

A RESOURCE BOOK

SECOND EDITION

Socio- Economic Rights in South Africa



COMMUNITY
LAW CENTRE

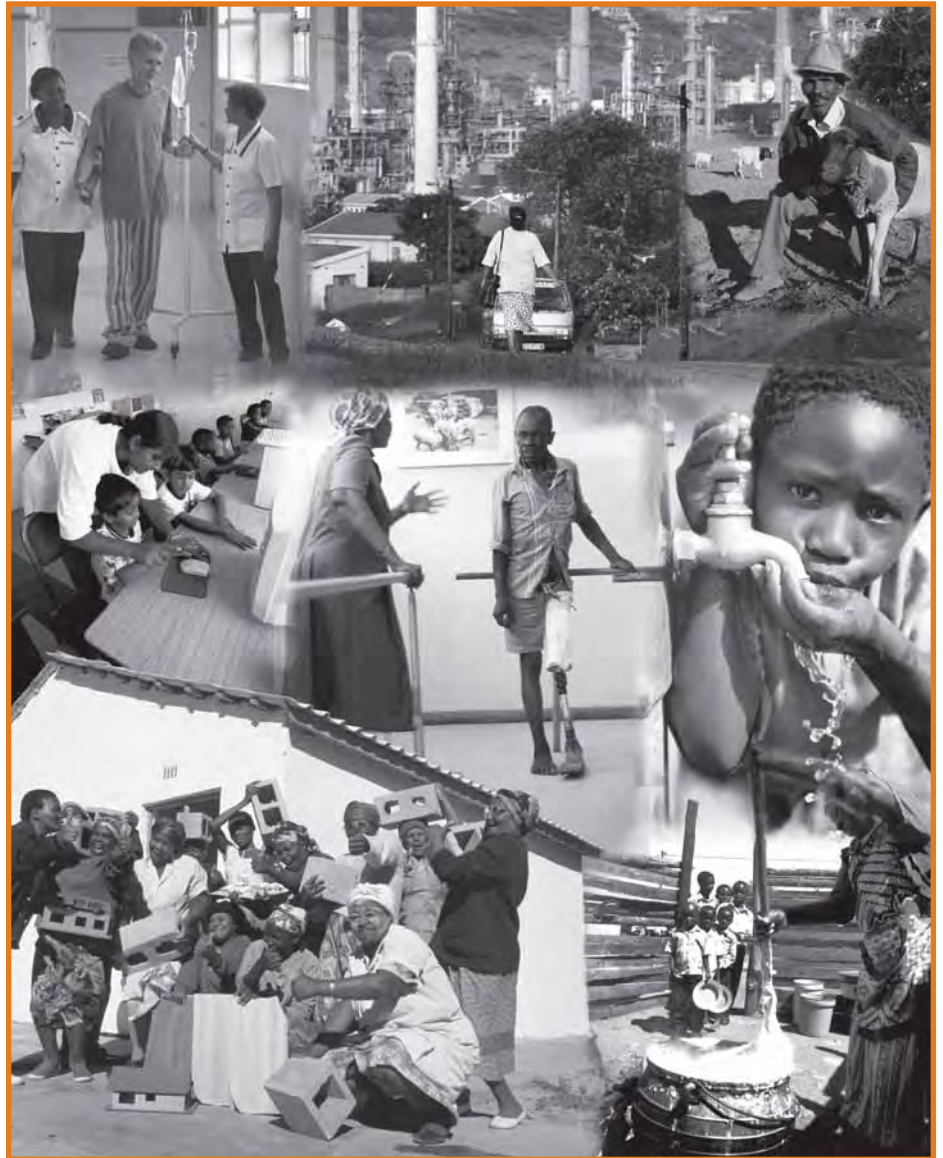
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Introducing socio-economic rights

CHAPTER 1



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KEY WORDS

Access	Able to get, have or use something, eg access to social grants.
Accountable	Being responsible for your actions and having to explain them to others, eg by reporting.
Adequate	Suitable and up to a good enough standard.
<i>Amicus curiae</i>	Friend of the court – when an organisation joins a court case to assist the court with its knowledge of an issue.
Arbitrarily/Arbitrary	Without good reason and not following the law.
Bill of Rights	The list of human rights in our Constitution.
Certification	The process that the Constitutional Court followed to officially declare that the final Constitution had correctly followed the 34 Constitutional Principles of the interim Constitution.
Compliance/Comply	Whether or not you are obeying laws, policies and court judgments.
Constitution	The highest law of the country that all other laws and policies must follow.
Constitutionality	Whether or not a policy, law or action is in line with the Constitution.
Constitutional Principles	The 34 principles listed in the interim Constitution that had to be respected in the drafting of the final Constitution, eg that there must be a Bill of Rights in the Constitution.
Directive principles of State policy	Guidelines in a Constitution that the Government is meant to respect in running the country.
Discrimination	Being treated differently, eg because you are a woman, black, lesbian, living with a disability, or living with HIV.
Enforce/Enforceable	Take action or able to take action to make your rights effective, eg get a remedy if your rights are violated.

Equality clause	Section 9 of the Bill of Rights in our final Constitution, including the right to equality and non-discrimination.
Equitable	Fair and reasonable.
Final Constitution	Our current Constitution (also known as the 1996 Constitution) that took over from the interim Constitution on 4 February 1997.
Horizontal application of the Bill of Rights	The enforcement of your rights against another private individual, body or company.
Interim Constitution	Our Constitution between 1993 and 4 February 1997 (also known as the 1993 Constitution) while the final Constitution was being written by the Constitutional Assembly.
Justiciable rights	Rights that can be enforced in the courts.
Justifiable	Something that can be defended or supported with good reasons.
Minimum core obligation	The duty to provide basic essential levels of each of the socio-economic rights (eg essential food, primary health care and basic shelter) for everyone.
Progressive realisation	Steps to improve access to socio-economic rights over a period of time.
Prohibited grounds of discrimination	Grounds or reasons that the Constitution or other laws say you are not allowed to use to unfairly discriminate against anyone, eg because of race, gender, disability, language or HIV.
Rehabilitation	Community-based services and activities aimed at promoting the healing and recovery of individuals and communities that have been affected by human rights violations.
Remedy	Order by a court or other body that prevents a human rights violation, or that compensates you when your rights have been violated; or finding solutions in other ways, eg through negotiation or mediation.
Reparation	Practical and symbolic steps to compensate the victims of gross violations of human rights, eg financial grants, building of memorials and monuments, and developing museums.
Separation of powers	A principle of constitutional law that says the three branches of government (the legislature, executive and judiciary) have separate powers and functions, and should not trespass on the role of another branch.

Socio-economic rights	Social and economic rights, eg the rights to land, housing, water and education.
Sphere of government	National, provincial or local government.
Submission	Setting out in writing or verbally the views and proposals of your organisation on laws, policies or other official documents.
Systemic	Linked to or part of a system, eg systemic human rights abuses under apartheid.
Undermine	Act in a way that weakens or shows no respect for something, eg undermine human dignity.
Unfair discrimination	A policy, law, conduct or situation that unfairly disadvantages you, eg because you are a woman, black, gay, living with a disability, or living with HIV.
Vertical application of the Bill of Rights	The enforcement of your rights against the State, eg national, provincial or local government.
Violate/Violation	Abuse or not respect, eg a violation of your right to equality.
Vulnerable groups	People that need special protection, eg children, elderly people.

1.1

What are socio-economic rights?

1.1.1 Socio-economic rights as human rights

Socio-economic rights are recognised as human rights in a number of international human rights documents. They are recognised mainly in the 1948 *Universal Declaration of Human Rights* (UDHR) and the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Today, they are also protected in many other documents, including national constitutions, for example, the South African *Constitution (Act 108 of 1996)*.

Human rights are sometimes divided into two groups of rights:

- *Civil and political rights* include the right to life, vote, a fair trial, freedom of speech, movement and assembly.
- *Socio-economic rights* include the right to adequate housing, food, health care, education, social security and water.

For decades, socio-economic rights have been treated differently from civil and political rights. They have often been regarded as ‘mere aspirations or second class rights’ not deserving of the status of human rights. Yet, civil and political rights have always been seen as ‘fundamental rights or first class rights’.

However, the United Nations has confirmed many times that economic, social and cultural rights, *and* civil and political rights, are equally important, indivisible and interdependent. The real life experiences of people show that

the two groups of rights cannot be separated. To lead a meaningful life and to fully develop, a person needs to enjoy civil and political rights *and* socio-economic rights. Each depends on the other to be real and meaningful.

Yet these two groups of rights continue to be treated differently in the legal systems of different countries. Civil and political rights are usually more strongly protected than social and economic rights. This often happens in two ways. Firstly, it is more usual for civil and political rights to

be included in the Bill of Rights as enforceable rights (eg United States Constitution).

Secondly, even if social and economic rights are included in a constitution, they are often included as ‘directive principles of State policy’. This means that they are included as mere guidelines for the government, but cannot be enforced in courts to the same extent as civil and political rights (eg Namibian, Indian and Irish Constitutions).

EXAMPLES



HUMAN RIGHTS DEPENDING ON EACH OTHER

- *Without the right to an education, it is difficult to effectively exercise your civil right to express an opinion and to make a submission.*
- *Without the right to food and basic health care, your right to life as a poor person is threatened.*
- *If you have the right to information and to participate in political decision-making, you have a much better chance of ensuring that the Government meets your socio-economic needs.*

Sometimes the courts are willing to use the directive principles of State policy to give a more meaningful and broad interpretation to civil and political rights. For example, the Indian Supreme Court has said that the right to life and liberty includes access to food (*People's Union for Civil Liberties case, 2001*).

1.1.2 The aim of socio-economic rights

Socio-economic rights are those rights that give people access to certain basic needs (resources, opportunities and services) necessary for human beings to lead a dignified life. Government and, in certain circumstances, private individuals and bodies, can be held accountable if they do not respect, protect, promote and fulfil these rights. This means that government must not do things that make it more difficult for people to gain access to these rights, must protect people against violations of their rights, and must assist people to meet their basic needs. The law should also provide effective remedies if these rights are violated.

Socio-economic rights are especially relevant for vulnerable and disadvantaged groups in society. They are important tools for these groups, who are often most affected by poverty and who experience a number of barriers that block their access to resources, opportunities and services in society. Vulnerable groups often experience social exclusion and unfair discrimination because of a number of overlapping grounds or reasons.



1.1.3 Implementing socio-economic rights

Through the struggles of human rights activists, the international community is now paying more attention to socio-economic rights. They are realising that it is not enough to simply say that social and economic rights are important and essential to human dignity.

To make socio-economic rights effective:

- Countries need to ratify international agreements and make them a part of a national legal system.
- Countries need to give them strong protection in their national legal systems, including recognising them in the Bill of Rights as enforceable rights.
- Countries need to develop and implement policies and laws to give effect to socio-economic rights at national level.
- People must have access to strong remedies at national and international level if their socio-economic rights are violated.

Although South Africa has not ratified the ICESCR, it has become an international role model by including socio-economic rights as enforceable rights in its Constitution, and having an increasing record of enforcing these rights in South African courts.

The courts have confirmed that socio-economic rights are enforceable under the Constitution. The poor, the vulnerable and disadvantaged have a right of access to courts. They have brought cases before courts challenging government policies and laws that deprived them of access to social services, resources and opportunities.

Apart from going to court, everyone has a right to take complaints to bodies like the South African Human Rights Commission (SAHRC) or the Commission for Gender Equality (CGE) to get a remedy if their socio-economic rights are violated. They can use these rights to advocate and lobby for better service delivery, effective policies and laws that will improve their lives.

Only through knowing our socio-economic rights, and organising to defend and advance these rights, will they become more than 'paper rights'.

1.2

History and socio-economic context in South Africa

1.2.1 The legacy of apartheid

Apartheid left a deep-rooted problem of poverty and inequality in South Africa. For the majority of people in South Africa, apartheid meant:

- The dispossession of people from their land and housing.
- The deliberate underdevelopment of black communities.
- Discrimination in the quantity and quality of education, housing, health care and social security.



For a discussion and statistics on poverty and HIV/AIDS, see Chapter 4 on page 133.

Some of the problems inherited in the apartheid era are still visible today. As a result, even the policies and laws developed since the beginning of democracy are struggling to address the size of these problems. Poverty and HIV/AIDS are serious challenges facing South Africa today.

1.2.2 Creating a new Constitution

Our current Constitution was adopted to be the foundation of our new, democratic society. It aimed to heal the divisions of the past, and establish a society based on democratic values and social justice. Some socio-economic rights were included in the *interim Constitution (Act 200 of 1993)*, but many internationally recognised rights were excluded, such as the rights to housing and health care.

While writing the final Constitution in 1995 and 1996, the Constitutional Assembly ran an extensive public participation programme aimed at giving ordinary people a voice in the drafting of the final Constitution. One of the major issues was whether socio-economic rights should be included in the Bill of Rights, along with civil and political rights, as rights that can be enforced by the courts.

Most political parties supported including socio-economic rights in some way in the Bill of Rights. A large number of civil society organisations, including human rights and non-governmental organisations (NGOs), church groups, civics and trade unions, campaigned for the full inclusion of socio-economic rights in the Bill of Rights. The arguments that they made are summed up in the extract on the next page from the petition presented to the Constitutional Assembly by 55 organisations in July 1995.

They argued that a Constitution that did not recognise socio-economic rights would not truly 'belong' to the millions of disadvantaged people in South Africa. They were also worried that, without socio-economic rights, the rich and powerful would use certain rights in the Bill of Rights, like the right

to property, to frustrate social transformation and a more fair distribution of resources in the country. Including these rights would give the new democratic government a constitutional mandate to achieve a more just distribution of resources and opportunities in society.

This campaign was successful. As we have seen, the current South African Constitution is one of the few national constitutions to include a full range of socio-economic rights in its Bill of Rights, and to give the courts the power to enforce these rights.

Petition to the Constitutional Assembly by the Ad Hoc Committee for the Campaign for Social and Economic Rights

“We, the undersigned individuals and organisations, believing that:

- All South Africans are entitled to full citizenship rights.
- The struggle against apartheid was as much about access to social and economic rights as it was about a right to vote and other civil liberties.
- Social and economic rights are essentially development rights.
- These development rights lie at the heart of the government’s Reconstruction and Development Programme (RDP).
- All our citizens have a right to a better quality of life and the right to human dignity in a new and democratic South Africa.
- The most disadvantaged sectors of our society should be granted every available means to protect and progressively realise these individual and collective human rights in South Africa.
- The interim Constitution does not adequately and equally reflect or entrench basic human rights which the majority of South Africans struggled for over many years.

Call on members of the Constitutional Assembly to:

- ***Recognise*** that social and economic rights are as fundamental, equal to, and essential as political and civil rights to the transformation, reconstruction and development of a democratic South Africa.
- ***Enshrine*** these development rights as equal and justiciable basic human rights in the Chapter on Fundamental Rights in the Constitution.
- ***Ensure*** that the most disadvantaged members of our society may progressively realise their basic human rights through the highest law of our land – the Constitution.”

1.2.3 Defending socio-economic rights in the final Constitution

Before the final Constitution could be adopted, the Constitutional Court had to certify that the Constitution followed the 34 Constitutional Principles listed in the interim Constitution.

During the certification process, some groups challenged including socio-economic rights. They argued that socio-economic rights would give judges the power to dictate to Parliament and the executive what its social policies and budget priorities should be. They said that this would go against the constitutional principle of 'separation of powers'. They felt that socio-economic rights were not universally accepted fundamental rights and were not justiciable. Other civil society organisations (eg the Legal Resources Centre, the Centre for Applied Legal Studies and the Community Law Centre of the University of the Western Cape) defended including socio-economic rights.

The Constitutional Court supported including socio-economic rights in the final Constitution that came into force on 4 February 1997.

The Constitutional Court has since reaffirmed this position in the Grootboom case (*Government of the Republic of South Africa and Others v Grootboom and Others*) and other cases.

For more on the Grootboom case and other leading cases, see page 31 onwards.

COURT CASE



SOCIO-ECONOMIC RIGHTS IN OUR FINAL CONSTITUTION

In accepting the inclusion of socio-economic rights in the Bill of Rights, the Constitutional Court decided:

- Many civil and political rights such as equality, freedom of speech and the right to a fair trial, may also result in courts making orders that affect budgets (*paragraph 78 of judgment*).
- Including socio-economic rights does not automatically mean breaking the principle of a separation of powers (*paragraph 77*).
- The fact that socio-economic rights affect the budget does not mean that they cannot be enforced by the courts (*paragraph 78*).
- At the very minimum the courts can protect socio-economic rights from "improper invasion" (*paragraph 78*).

First Certification judgment, 1996

1.2.4 Monitoring socio-economic rights

The Constitution is committed to making the guaranteed socio-economic rights a reality. It does not only establish the courts to enforce these rights. It also establishes and mandates the SAHRC to monitor, assess, investigate and report on the observance of human rights. It also gives specific powers to the SAHRC to monitor and report on implementing socio-economic rights. Section 184(3) of the Constitution says that:

"Each year, the Human Rights Commission must require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

The SAHRC has reported on and assessed the information provided by government departments and parastatals. It has produced six reports on socio-economic rights, covering the period 1997–2003. The August 2006 report covers the period 1 April 2003–31 March 2006.

These reports:

- Analyse government efforts to implement socio-economic rights.
- Assess whether the laws, policies and programmes are designed and implemented reasonably.
- Assess whether budgets are allocated reasonably to ultimately ensure realising these rights.
- Assess progress and identify shortcomings or failures in government measures to make socio-economic rights real.
- Recommend to government departments on how these rights could be better implemented to meet the Government's constitutional obligations in the future.

EXAMPLE



**SAHRC REPORT DECLARING
THE GOVERNMENT'S
PROGRAMMES
UNREASONABLE AND
UNCONSTITUTIONAL**

“That the Government has taken steps towards the progressive realisation of the right to have access to adequate housing is beyond dispute. What is apparent, however, is that as demonstrated in this critique section, the steps adopted by the government cannot be said to be reasonable, as they cannot pass a constitutional muster. It is regrettable to note that this is so despite the landmark decision of the Constitutional Court in Grootboom as millions of people are still living in peril and the programme adopted is not comprehensive as it neglects significant members of the society.”

SAHRC, 4th Economic and Social Rights 2000–2002 Report: Housing, 62

The SAHRC submits its reports to Parliament and the Office of the Presidency to consider them and make recommendations.

The increase in court judgments on socio-economic rights means that the SAHRC is expected to monitor State compliance with these judgments. The Constitutional Court has recognised this role. In the Grootboom case, it specifically mandated the SAHRC to monitor the State's compliance with the judgment, and if necessary, report back to it on the efforts made by the State to comply with it. The SAHRC carried out this instruction and reported to the Court.

At the international level, the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR) has the role of assessing progress reports received from State parties to the ICESCR. The CESCR may have another role of investigating and deciding on cases of violations of socio-economic rights brought by individuals or organisations if the proposed Optional Protocol to the ICESCR is adopted.

For more information on the Optional Protocol to the ICESCR, see Chapter 3 on page 101.

1.3

What socio-economic rights are included in the Constitution?

1.3.1 A chart of socio-economic rights

These are the socio-economic rights included in the Bill of Rights of the Constitution:

Section	What is the right?	Who benefits?
24	The right to a healthy environment.	Everyone.
25(5)–(9)	The right of access to land, to tenure security, and to land restitution.	Citizens and individuals or communities who had land rights violated as a result of past racially discriminatory laws or practices.
26	The right of access to adequate housing and protection against arbitrary evictions and demolitions.	Everyone.
27	The right to have access to – <ul style="list-style-type: none">• Health care services, including reproductive health care• Sufficient food and water• Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. No-one may be refused emergency medical treatment.	Everyone.
28(1)(c) and (d)	The right to basic nutrition, shelter, basic health care services and social services. The right to be protected from maltreatment, neglect, abuse or degradation.	Every child (a person under 18).
29	The right to education.	Everyone.
35(2)(e)	The right to conditions of detention that respect human dignity, including the provision at State expense, of adequate accommodation, nutrition, reading material and medical treatment.	Everyone who is detained, including every sentenced prisoner. This right would include, for example, someone detained in a psychiatric hospital.

For the full text of these sections, see the Bill of Rights on page 442.

1.3.2 Socio-economic rights and other rights

a) Equality and human dignity in socio-economic rights cases

We have seen how all rights are interrelated, indivisible and mutually reinforcing. The rights to equality and human dignity are foundational values of the Constitution. They are closely related to socio-economic rights. For example, the right to equality can be used to make sure that a person does not face discrimination in accessing and enjoying her socio-economic rights.

The Constitution defines *equality* to include “the full and equal enjoyment of all rights and freedoms” (section 9(2)). It says that the State may take steps to protect or advance individuals or groups that have been disadvantaged by unfair discrimination with the aim of promoting the achievement of equality. Therefore, advancing real equality can only be achieved if the State takes positive steps to ensure that vulnerable and disadvantaged groups enjoy meaningful access to socio-economic rights.

Human dignity emphasises that human beings must be treated with respect. Socio-economic rights are based on respect for human dignity. As Sandra Liebenberg points out:

COURT CASE



CONSTITUTIONAL VALUES IN SOCIO-ECONOMIC RIGHTS CASES

“Our Constitution entrenches both civil and political rights, and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society are denied those who have no food, clothing and shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.”

Grootboom case, paragraph 23 of judgment

“Respect for human dignity requires respect for equal worth of the poor by marshalling its resources to redress the conditions that perpetuate their marginalisation.”
Liebenberg, 2005, 1

The Constitutional Court stressed this point even further by saying that it is not only the dignity of the people affected by eviction that is violated when homeless people are driven from pillar to post in a desperate search for:

“...a place where they and their families can rest their heads. Our society as a whole is demeaned when government action intensifies rather than mitigates their marginalisation.” *Port Elizabeth Municipality v Various Occupiers, 2004, paragraph 18*

b) The right of access to information

The right of access to information is also important for socio-economic rights claims. Making information accessible to the public is an important part of government’s duty to ensure that it is transparent and accountable. However, it is common for government officials to withhold information that is necessary for poor people to have access to special assistance.

CASE STUDY



NOT KNOWING AN EXISTING POLICY

During a study conducted in Amahlati and Lukhanji locations in the Eastern Cape, members of these communities said that they did not know of the indigent policy. This was their municipality's policy to assist poor people who cannot afford to pay for basic services like water and electricity.

The study concluded that while the policy existed, officials at the municipalities did not inform the people of this policy.

Community Law Centre website, 2004

1.3.3 Socio-economic rights and promoting equality

a) Introducing the Equality Act

The main aim of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* (the Equality Act) is to promote real and meaningful equality. The Equality Act aims to do away with social and economic inequalities, especially those rooted in apartheid, colonialism and patriarchy. The Act thus contributes to realising socio-economic rights. It came into force partially on 1 September 2000 and fully on 16 June 2003.

Prohibited grounds of discrimination in the Equality Act

Race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.



b) Socio-economic status and other related grounds

Socio-economic status does not form part of the list of prohibited grounds of discrimination. However, it is prohibited by the fact that the Act also prohibits discrimination on any other grounds where this discrimination:

- Causes or continues systemic disadvantage, or
- Undermines human dignity, or
- Negatively affects the equal enjoyment of rights and freedoms in a serious way that is similar to discrimination on a listed ground.

The Act also recognises that these four grounds of discrimination are closely linked to systemic disadvantage and discrimination in our society:

- Socio-economic status
- HIV/AIDS
- Nationality
- Family responsibility and status.

c) When is discrimination fair or unfair?

The Equality Act lists a number of factors to help decide if discrimination is fair or unfair, including:

- The context (setting) where the discrimination takes place.
- When the discrimination harms or is likely to harm human dignity.
- The position of the complainant (the person complaining) in society.
- The nature and extent of the discrimination.
- Whether reasonable steps have been taken to accommodate diversity (eg a range of different languages or religions).

d) What is not unfair discrimination?

The Act says that it is not unfair discrimination to take steps to protect and advance individuals or groups of people disadvantaged by unfair discrimination – this is usually referred to as *affirmative action*.

EXAMPLES



UNFAIR DISCRIMINATION BASED ON SOCIO- ECONOMIC STATUS

- A school excludes a learner because his parents are too poor to afford school fees.
- Banks refuse to give home loans to people living in townships or informal settlements.
- A private hospital refuses to admit a critically injured person because she appears to be poor and unable to pay.

e) The Equality Courts

The Act establishes any Magistrate's Court or High Court as an Equality Court. Individuals or groups can bring cases of unfair discrimination against the Government, private bodies (eg companies, associations, political parties) or other individuals.

Although the Act does not include *socio-economic status* as one of the specifically listed grounds, socio-economic status can still be brought before the Equality Courts using the principle linking systemic disadvantage *and* discrimination. The Act lists widespread practices that may be unfair discrimination because they deny access to socio-economic rights and benefits.

For examples of these practices, see *What is not unfair discrimination?* on page 29.

1.3.4 The equal rights of men and women

The CESCR has issued *General Comment No. 16*. This General Comment explains the nature of State obligations under the equality clause in article 3 of the International Covenant on Economic, Social and Cultural Rights. Article 3 says that:

“States must ensure the equal rights of men and women to all economic, social and cultural rights in the Covenant”.

Much like South Africa's Equality Act, General Comment 16:

- Recognises that women have been historically disadvantaged.
- Directs States to take special measures to ensure that women have fair access to social and economic benefits.
- Spells out a number of examples of these measures.

General Comments are very important in interpreting socio-economic rights at domestic (country) level. They provide clarity on the nature and scope of the rights and also on the obligations. South Africa's courts, particularly the Constitutional Court, have relied on these General Comments to interpret socio-economic rights, such as the right of access to adequate housing in the Grootboom case.

For more on General Comments, see Chapter 3 on page 105.

1.4

What do socio-economic rights mean?

1.4.1 Guides to interpreting socio-economic rights

The meaning of socio-economic rights develops in various ways, including:

- Decisions of the courts.
- General Comments or recommendations of international bodies (eg the CESCR, the African Commission on Human and People's Rights, the African Committee of Experts on the Rights and Welfare of the Child).
- The adoption of legislation by parliaments.
- Academic writings.

- The advocacy work of civil society organisations, including NGOs, church groups and trade unions.
- The reports of human rights commissions.

The meaning of socio-economic rights is being developed through a combination of these methods. Their content is being made clearer by court judgments in major cases.

1.4.2 Major socio-economic rights cases in our courts

To date, our Constitutional Court has heard four major cases dealing with socio-economic rights. We now discuss each of these briefly.

a) Soobramoney case – access to health care

COURT CASE



SOOBARAMONEY

The 1997 case of *Soobramoney v Minister of Health, KwaZulu-Natal* (Soobramoney case) dealt with the right of access to health care. Mr Soobramoney was an unemployed man who had chronic kidney failure.

Mr Soobramoney asked the court to direct the provincial hospital to provide him with ongoing dialysis treatment and to prevent the provincial Minister of Health from refusing him admission to the renal (kidney) unit of the hospital. Without this treatment, he would die. He relied on the right to life (section 11) and the right to emergency medical treatment (section 27(3)) in the Constitution.

The Constitutional Court decided against his claim and said that:

- Mr Soobramoney's claim did not fall under "medical emergency treatment" because his situation was not a case of sudden catastrophe, but ongoing treatment to prolong his life.
- The hospital could not be expected to provide treatment to all patients like Mr Soobramoney.
- The hospital's guidelines for determining who gets the dialysis treatment had been applied in a fair and rational manner.
- The right to health care services is limited by the availability of resources:

"A court would be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters." *Paragraph 29*

b) Grootboom case – access to adequate housing

COURT CASE



GROOTBOOM

The 2000 Grootboom case focused on the right of access to adequate housing. A group of adults and children moved onto private land from an informal settlement because of the bad conditions in which they lived.

The group was evicted from the private land and their building materials were destroyed. They applied to the High Court for an order against all three spheres of government to be provided with temporary shelter or housing until they got permanent accommodation. They relied on the right of access to adequate housing in section 26(1) and the right of children to shelter in section 28(1)(c) of the Constitution.

The Cape High Court said that there was only a violation of the right of children to shelter and not the right to adequate housing. On appeal, the

Constitutional Court did not agree with the High Court's interpretation of children's right to shelter. However, it decided that the Government's housing programme did not comply with the obligation to take reasonable steps (section 26(2)).

The Constitutional Court developed a standard of *reasonableness* as a guide to decide if the Government's programme meets constitutional requirements. The Constitutional Court said:

- The programme must be comprehensive, coherent and coordinated (paragraph 40).
- It must be capable of "facilitating the realisation of the right" (paragraph 41).
- It must be balanced and flexible, and appropriately provide for short-, medium- and long-term needs (paragraph 43).
- It must clearly allocate responsibilities and tasks to the different spheres of government, and ensure that financial and human resources are available (paragraph 39).
- It must be reasonably formulated and implemented (paragraph 42).
- It must provide for the needs of those most desperate by providing relief for people who have no access to land, no roof over their heads, and who are living in intolerable or crisis situations (paragraph 44).

c) **Treatment Action Campaign case – access to health care**



The 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case) involved the right of access to health care.

The Treatment Action Campaign (TAC) challenged the limited nature of government measures introduced to prevent mother-to-child transmission (MTCT) of HIV on two grounds. They argued that:

- The Government unreasonably prohibited administering the antiretroviral drug, nevirapine, at public hospitals and clinics, except for a limited number of pilot sites.
- The Government had not produced and implemented a comprehensive national programme for the prevention of MTCT of HIV.

The High Court and the Constitutional Court applied the test of reasonableness developed in the Grootboom case and decided that:

- The Government's programme did not comply with the right of access to health care services and the duty to take reasonable measures under section 27(2) of the Constitution.

The Constitutional Court developed a new element of reasonableness:

- The Government must be transparent and allow for the participation of a number of stakeholders in the implementation of the programme.

d) **Khosa case – access to social assistance**

COURT CASE



KHOSA

The 2004 case of *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* (Khosa case), dealt with the right of access to social assistance.

A group of permanent residents challenged the constitutionality of some provisions of the *Social Assistance Act 59 of 1992* and the *Welfare Laws Amendment Act 106 of 1997*. These provisions:

- Restricted access to social assistance to South African citizens only.
- Excluded permanent residents, elderly people and children, who would otherwise have qualified for social grants if there was no requirement of citizenship.
- Excluded primary caregivers from accessing the Child Support Grant for children in their care, especially where these children are South African citizens.

Yet foster care parents did not have to comply with a requirement of citizenship. In other words, children of non-citizens would have to be removed from their families to join a foster family in order to benefit from the Child Support Grant.

The Constitutional Court decided that:

- Permanent residents are a vulnerable group.
- The laws that exclude them from access to the benefit of social assistance treat them as inferior to citizens.
- The costs of including permanent residents in the social security scheme would be small.
- Excluding permanent residents from access to a social security scheme was not consistent with section 27 of the Constitution.
- Excluding children from access to these grants was unfair discrimination on the basis of their parents' nationality and violates their right to social security under section 28(1)(c).

1.4.3 **Interpreting socio-economic rights**

a) **Approach to interpreting socio-economic rights**

In the Grootboom case, the Constitutional Court developed an approach to interpreting socio-economic rights:

- These rights must be understood and interpreted in our historical and social context.
- When looking at the historical and social context, the court may consider the current barriers to access to services and vulnerability of specific groups, such as children, women and the elderly.

b) What does the right “to have access to” socio-economic rights mean?

As we have seen, the Bill of Rights refers to a right of “access to” housing, health care services, food, water and social security.

The Constitutional Court has given guidance on the meaning of “access to”. In the Grootboom case, it said that the right “to have access to” adequate housing means more than bricks and mortar. It includes land, basic services (eg water, removal of sewage) and the financing of all these, including building a house itself.

In other words, “to have access to” means that the Government must facilitate access to or create an enabling environment for everyone to access a service. It does not mean though that the Government must provide shelter on demand. A range of different strategies, including finance, land and infrastructure, can contribute to realising the right.

EXAMPLES



FACILITATING ACCESS TO SOCIO-ECONOMIC RIGHTS

The Government facilitates access to:

- **Health care services** by ensuring that hospitals and clinics are built, nurses are employed, and medicines are available and affordable for all.
- **Sufficient food** by ensuring that land is available, cash in the form of social grants or food parcels is given to the poor, and the pricing and safety of food is regulated, so that people can buy food or have access to affordable food.
- **Basic education** by ensuring that schools are built within the reach of all learners, enough and good teachers are employed, classes are sufficiently furnished, books are provided, and poor learners do not have to pay school fees.

To have “access to” can also mean that socio-economic rights are not goods that must be handed out free of charge by the Government to the people. Instead, the Government’s role is to:

- Remove barriers in the way of people getting access to the rights.
- Empower people and community organisations to be able to provide the service themselves.
- Adopt special measures to assist vulnerable and disadvantaged groups to have access to the rights.

In other words, socio-economic rights do not mean that people have to get services for free. But paying for services should not be a barrier that prevents poor people from gaining access to education, water services, health care and other rights. Charges for basic services should be affordable to poor people. People who genuinely cannot afford service charges or fees should be able to talk to the relevant authority for a reduction or other concession. Most municipalities have an indigent policy that is meant to assist poor people who are unable to afford service fees.

The Government must fulfil its duties, but groups and communities are also responsible for participating actively in their own development. This is the approach of the *United Nations Declaration on the Right to Development* (1986). The Declaration says:

On the indigent policy, see Chapter 4 on page 140.

- People are active participants and beneficiaries of the right to development, not passive recipients.
- Communities must protect hospitals, clinics and schools, and pay for fees, where they can afford them.

1.4.4 What are the State's duties?

Section 7(2) of the Constitution says that:

“The State must respect, protect, promote and fulfil the rights in the Bill of Rights.”

These duties prevent the State from undermining people's enjoyment of human rights. They also force the State to take positive steps to protect and advance realising these rights.

a) The duty to respect

The duty to respect rights means that the State should not arbitrarily take away people's socio-economic rights, or make it difficult for them to gain access to the rights. The courts have on many occasions dealt with the duty to respect.

COURT CASES



DUTY TO RESPECT

Courts have said that a violation of the duty to respect happens in these circumstances:

- When a municipality disconnects the water supply, it limits the right of access to water. The limitation has to be justified (*Residents of Bon Vista Mansions v Southern Metropolitan Local Council, 2002*).
- The eviction of occupiers from private land took place earlier than the date ordered by the Magistrate and in circumstances that saw squatters' homes bulldozed (*Grootboom case, 2000*).
- The law allowing the sale of housing in order to settle small civil debts in situations that could make people homeless, violates the duty to respect in section 26(1) of the Constitution (*Jaftha v Schoeman and Others, 2005*).
- The Government deprives people of access to a socio-economic benefit. For example, it stops payment of disability grants to certain beneficiaries without justification and notice (*The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v Ngxuzza and Others, 2001*).
- The Government makes it difficult or impossible for people to gain access to socio-economic benefits. For example, it limits access to a social grant to citizens only, thus excluding a number of vulnerable groups such as permanent residents (*Khosa case, 2004*). Or, because of administrative inefficiencies, social grants are not paid to beneficiaries within a reasonable time (*Mashava v the President of the Republic of South Africa, 2004*).
- A small group of people is evicted from land they occupied for some time without anyone objecting, without anyone stating that they needed to use the land urgently, and without alternative accommodation being made available to the occupiers (*Port Elizabeth Municipality v Various Occupiers, 2004*).

b) The duty to protect

The duty to protect means that the State must pass laws that prevent powerful people or organisations (eg banks, insurance companies, employers, landlords) from violating your socio-economic rights. The State must also enforce these laws through establishing bodies that will investigate and give effective remedies if your rights are violated.

EXAMPLE



REGULATING CREDIT

The new *National Credit Act 34 of 2005* aims to protect consumers and promote responsible credit practices. The *National Credit Act* allows people to have access to a range of economic opportunities and resources that will especially help poorer people to improve the standard of their lives.

The *National Credit Act*:

- Imposes a responsibility on credit providers (eg banks) not to give you credit if you cannot afford it.
- Places a duty on creditors to fully inform consumers of their rights.
- Creates a *National Credit Regulator* to monitor market trends and educate consumers about their rights.
- Establishes a *National Credit Tribunal* to receive individual complaints or resolve disputes on credit agreements.

The *Department of Trade and Industry* emphasises how important the *National Credit Act* is:

“It is quite easy for credit to lead to financial hardship and destroy a household’s wealth. Taking on extra loans in order to pay back existing loans can lead people into a debt spiral out of which it may be difficult to escape. Over-indebtedness has a negative impact on families and has in some extreme cases even led to family suicides. It also has an impact on the workplace, can lead to de-motivation, absenteeism and a propensity to commit theft.”

Department of Trade and Industry website, 2004

GUIDELINE



NATIONAL CREDIT ACT

The new and improved consumer rights guaranteed in the *National Credit Act* will come into force on 1 June 2007.

c) The duty to promote

The duty to promote means that the State must actively aim to increase awareness and respect for socio-economic rights through methods such as:

- Educating people about policies and programmes that will help them have access to socio-economic benefits.
- Using the media to inform people about their rights and where to go to claim them.

- Making sure that the speeches and actions of government ministers support the constitutional commitment to socio-economic rights.
- Encouraging the work of NGOs and community organisations on socio-economic rights.

d) The duty to fulfil

The duty to fulfil means that the State must take positive steps to assist people without housing, health care, food, water and social security to gain access to these rights.

It is clear that the full realisation of these rights in South Africa cannot be achieved overnight because of the large backlogs inherited from apartheid and current poverty levels.

The Constitution recognises that fully realising socio-economic rights is a process. Sections 26 and 27 describe the duty of the State to fulfil socio-economic rights:

“The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” *Sections 26(2) and 27(2)*

This wording is very similar to the wording of article 2 of the ICESCR that sets out the duties of State parties to this agreement.

The Constitutional Court has developed guidelines that can assist in understanding what is meant by the duty to “take reasonable measures”.

For more discussion of guidelines on reasonableness, see page 32.



EXAMPLES



REASONABLE MEASURES

- Food relief programmes should reach children who are malnourished or vulnerable to malnutrition.
- Government should inform beneficiaries about a social policy that it is implementing (eg indigent policy).
- Government should involve the public in developing important social policies or legislation.

The principle established in the Grootboom case can also assist the State to defend its decision to come to the assistance of vulnerable groups when a decision on what is “reasonable” is challenged.

COURT CASE



DEFENDING VULNERABLE GROUPS

In the 2001 case of *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others*, the Government defended its decision to assist vulnerable groups.

The Government had established a transit camp on State-owned land to house approximately 300 flood victims. A neighbouring residents’ association challenged this conduct as unlawful, saying that there was no legislation permitting it and that it went against an existing town planning scheme, as well as land and environmental legislation. The Government relied on the principle that it has a duty to assist people in crisis situations.

The Constitutional Court decided:

- Providing relief to flood victims is an important role of government in a democratic state, and the Government would have failed in its duty if it had done nothing.
- The steps taken by the Government in this situation were reasonable and thus complied with its constitutional duty.

e) The duty to realise socio-economic rights progressively

Progressive realisation means that rights may not be realised immediately. This means that the State must take steps to achieve the full realisation of rights over a period of time. To achieve this goal, the State must take steps that:

- Are balanced and flexible, and provide appropriately for short-, medium- and long-term needs.
- Facilitate access over time by lowering legal, administrative, operational and financial hurdles to fulfilling the rights.
- Make a service accessible to a greater number of people over time *and* also ensure that a wide range of people benefit as time progresses.
- Include concrete targets and goals that are linked to timeframes.

In the Grootboom case, the Constitutional Court said that passing legislation is not enough. A legislative measure must be supported by appropriate, well-directed policies, programmes and implementation plans.

Targets and goals with specified timeframes allow the State to plan and monitor its own progress. They also help the SAHRC, the CGE, NGOs and the general public to monitor and hold the State accountable for realising socio-economic rights.

f) **The duty to take measures "within available resources"**

Taking measures within available resources recognises that resources are not limitless, and that the State must do the best it can within the resources it has.

The State can defend an allegation that it is not making sufficient progress in realising socio-economic rights on the grounds that it does not have sufficient resources and is doing all that is reasonably possible in the circumstances. What 'pie' of resources gets taken into account to assess whether government is doing all that is reasonably possible?

The Government cannot indefinitely delay taking clear measures that will advance the rights. It must also make sure that it correctly prioritises its budget and other resources to enable it to fulfil its constitutional commitments. It cannot claim that it lacks "available resources" when its budgetary and financial policies clearly favour privileged groups in society at the expense of disadvantaged groups.

The Government's first priority should be to ensure that vulnerable and disadvantaged groups have access to at least a basic level of socio-economic rights, eg shelter, primary health care, basic education and nutrition. This is what the UN's CESCR calls the State's "minimum core obligations". Even when it is clear that the State does not have sufficient resources to realise the rights fully, it must at least adopt strategies and low-cost programmes to protect vulnerable groups (*General Comment No. 3, paragraphs 10–12*).

For more on claiming resources for socio-economic rights, see Chapter 4.

g) **Are there 'minimum core obligations' on the State?**

The issue of whether socio-economic rights in sections 26 and 27 of the Constitution impose minimum core obligations on the State is a very controversial one in South Africa.

The CESCR developed the *minimum core obligation* in interpreting the positive obligations of the State to realise socio-economic rights under the ICESCR (*General Comment No. 3, paragraph 10*). It refers to the duty of the Government to provide the basic essential levels of each of the socio-economic rights (eg essential foodstuffs, primary health care, basic shelter and housing) for all its people.

The Constitutional Court has been asked in two cases to decide whether the socio-economic rights in the Bill of Rights impose minimum core obligations on the State. The issue was first brought to the Court by the Community Law Centre (CLC) at the University of the Western Cape and the SAHRC in the Grootboom case, and later by the CLC and the Institute for Democracy in South Africa (IDASA) in the TAC case. These institutions each approached the courts as an *amicus curiae* ('friend of the court').

For more on becoming an *amicus curiae*, see Chapter 2 on page 74.

Although they took different approaches to the minimum core argument, they mainly argued that sections 26 and 27 impose duties:

- To adopt measures that will give everyone a right to some ‘basic’ (minimum) core of services.
- To adopt measures that will ensure that the services are accessible and improved over time.

In the Grootboom case, they argued that the minimum core obligation for the right of access to adequate housing would mean that everyone is entitled to some basic shelter, including shelter for children. In the TAC case, they argued that the minimum core obligation for the right of access to health care would mean that everyone is entitled to receive nevirapine, including pregnant women living with HIV and their newborn babies.

The Constitutional Court rejected the minimum core argument in both cases. The Court said that:

- The drafting and language of the socio-economic rights provisions in the Bill of Rights do not support the idea that these rights impose a minimum core duty on the State.
- It would be difficult to determine a ‘core’, as rights varied a lot and needs were diverse.
- Deciding on a minimum core duty for a particular right requires a lot of information that courts often do not have access to.
- The minimum core idea was, however, relevant to assessing the reasonableness of the measures taken by the State.

h) Do unqualified socio-economic rights mean providing services immediately?

Other socio-economic rights in the Bill of Rights are not qualified in the same way as the rights in sections 26 and 27. Their wording does not refer to “progressive realisation” or the “availability of resources”. These are:

- The right to an environment that is not harmful to health or well being.
- The right against arbitrary evictions or demolitions.
- The right against the refusal of emergency medical treatment.
- Children’s socio-economic rights.
- The right to basic education.
- The socio-economic rights of people in prison or detention.

Children as a vulnerable group

Section 28(1)(c) provides that every child has a right to basic nutrition, shelter, basic health care services and social services. Human rights activists working in the children’s rights sector felt that the direct nature of the duty around children’s rights was justified by the fact that these rights require a ‘basic’ level of the various services. They argue that children are more vulnerable to poverty than any other group.

A number of factors may cause children to be in desperate need:

- There may be no programme or an existing programme may not cater for very vulnerable groups of children (eg children with disabilities).
- Programmes may exist that intend to benefit children, but they do not reach vulnerable children because of poorly formulated and implemented policies. For example, many children do not have access to the Child Support Grant because they do not have an Identity Document (ID) or Birth Certificate that is necessary to apply for a grant. *Liebenberg, 2004a, 5*

How have the courts interpreted children's socio-economic rights?

COURT CASES



DO CHILDREN'S SOCIO-ECONOMIC RIGHTS MEAN PROVIDING THE SERVICE IMMEDIATELY?

In the Grootboom case, the High Court ruled that, because there were children involved, the applicants were entitled to have access to shelter for the children and their families.

The Constitutional Court overruled this and said that this would mean that:

- People with children would then be able to claim housing on the basis of their children's right of shelter. But those people, who have no children or whose children are adult, can only claim under the right of access to adequate housing, no matter how old, disabled or deserving they may be. The Court warned that this would make children "stepping stones" to housing for their parents, instead of them being valued for who they are (*paragraph 71 of judgment*).
- A carefully designed constitutional scheme would make little sense if it could be overridden in every case by the rights of children to get shelter from the State on demand (*paragraph 71*).
- Children's socio-economic rights and rights to family care should be read together. Parents have the main duty to fulfil their children's socio-economic rights. Government has the main duty, though, towards children who are not cared for by their parents. It must also provide the legal and administrative resources necessary for children's rights to be fulfilled (*paragraphs 76–77*).

The Court also said that, by providing maintenance grants and other material assistance to families in need, the Government may be taking one of the steps to meet its obligations in sections 26 and 27. However, the Government had to take care of children that do not have family care, such as when they are orphaned or abandoned.

In the TAC case, the Constitutional Court further clarified its position. It said that the Government duty to provide for children's socio-economic rights did not only arise when children were physically separated from their families. Children born to mothers, who are poor and unable to afford the basic services, are dependent on the State to assist them and their parents.

The issue of whether children have a direct claim to basic services is debatable. What is clear though is that the Constitutional Court has said that these unqualified rights do not necessarily mean that the State has a direct duty to provide services to children without delay.

i) Can non-nationals claim socio-economic rights?

Some rights in the Bill of Rights clearly belong only to “citizens”. These include the right to vote, the right to enter and to live anywhere in the country, the right to a passport, the right to choose your trade, occupation or profession freely, and the right to equitable access to land.

Most of the other rights in the Bill of Rights, including the socio-economic rights, can be claimed by “everyone”. This means that non-nationals cannot automatically be excluded from access to rights such as education, housing, health care services and food.

COURT CASES



NON-NATIONALS AS A VULNERABLE GROUP

In the 1997 case of *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another*, the Constitutional Court said that non-nationals are a vulnerable group in society, as they are a minority and do not have the ‘political muscle’ to defend their interests. This means that excluding certain categories of non-citizens, such as permanent residents, from social benefits and opportunities could be unfair discrimination (*paragraphs 19–20 of judgment*).

In the 2004 Khosa case, the Constitutional Court decided that a group of permanent residents are a vulnerable group and that excluding them from social security was not consistent with section 27 (right of access to social assistance).

For more details on the Khosa case, see page 33.

If the Government wants to restrict access to some socio-economic rights only to citizens or some categories of non-nationals (eg permanent residents), it must prove that this restriction is reasonable and justifiable under the section of the Bill of Rights that allows for general limitations on rights.

International treaties, such as the *Convention relating to the Status of Refugees* (1951), protect the rights of refugees. This includes their socio-economic rights, such as the rights to housing, public education, labour and social security.

j) Can the State limit socio-economic rights?

All the rights in the Bill of Rights, including the socio-economic rights, can be limited or restricted by the State. Section 36 of the Constitution sets out the conditions for a valid limitation of a right:

- The limitation must be under “a law of general application” – in other words, the law must not target named or easily identifiable individuals or groups, and it must not be arbitrary.
- The limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

GUIDELINES



LIMITING RIGHTS

A court will look at a number of factors to decide if the limitation of a right is reasonable and justifiable, including:

1. The reason why the right is being limited – the purpose of the limitation.
2. The degree to which the right is limited – how much is the right being limited?
3. If there are other less restrictive ways to achieve the limitation – a right should be limited no more than is necessary to achieve the purpose of the limitation.
4. If the Government proved that the limitation of a right is reasonable and justifiable.

EXAMPLES



LIMITING RIGHTS

- *The Government may decide that, because it cannot meet the needs of the large number of school-going children from poor families who leave home without proper food, to provide school meals and snacks for schools in very poor areas first.*
- *“Everyone” (not just citizens) has the right to have access to adequate housing. The Government will have to show why restricting housing rights to citizens is reasonable and justifiable in the circumstances.*
- *The Government may claim that it has only enough resources to provide a limited number of shelters for homeless children. The resources may not be enough to accommodate all children in need. The Government will have to prove that there is a good reason for limiting the right of every child to shelter in this way, and that it has not limited the right more than is reasonable and justifiable.*

1.5

Challenges

These are some of the key challenges facing human rights activists focusing on socio-economic rights:

- To advocate for implementing court judgments and orders relating to socio-economic rights.
- To advance interpretations of these rights that will make a real contribution to improving the quality of life of poor people.
- To use strategies that will make a greater impact on understanding and implementing socio-economic rights.
- To advocate for policies, laws and financial steps to effectively and speedily realise these rights.
- To promote establishing a range of accessible bodies and remedies to deal with violations of these rights.
- To advocate for ratifying the ICESCR and the adoption of the proposed Optional Protocol to the ICESCR.

Chapter 2 focuses in more detail on the different bodies and procedures for advancing these rights. Chapter 3 examines socio-economic rights in international law, while Chapter 4 looks at the financial, human and institutional resources needed to implement socio-economic rights.

Chapters 5 to 12, dealing with specific socio-economic rights, will also highlight the laws, policies and bodies relevant to particular rights.

For a discussion on the Optional Protocol, see Chapter 3 on page 101.

Discussion ideas



TALKING POINT 1

Clareburg Primary School near Durban in KwaZulu-Natal, applied to the Department of Health to be included in the primary school feeding scheme. The application was turned down on the basis that it was an Indian school, was not regarded as a disadvantaged school, and fell outside the geographical location from which poor schools were targeted. For a school to stand a chance of qualifying, it must be situated in a very poor area and must be previously disadvantaged.

Clareburg challenges the decision on its application and the criteria used to implement the scheme. It argues that the decision and the criteria discriminate unfairly against poor learners that attend the school, and this leads to a violation of these poor learners' right to basic nutrition and access to sufficient food that would enable them to enjoy their right to education.

Discuss these questions in a small group:

1. *Do you think that the school has a valid case?*
2. *What rights in the Bill of Rights may be violated?*
3. *What arguments could the school raise?*
4. *What arguments could the Department of Health raise?*
5. *What would be the grounds for or against limiting the rights?*
6. *What organisations or institutions should the school approach for help?*
7. *What are the advantages or disadvantages of the different strategies that the community could take up?*

TALKING POINT 2

Take a look again at the elements of reasonableness in the Grootboom case on page 32 and the examples of reasonable measures on page 38. Using these to guide you, discuss these questions in a small group:

1. *Can you think of other examples of a situation, or of Government programmes or policies, that may be seen as unreasonable?*
2. *What socio-economic rights are violated in the examples?*
3. *Can you also identify the civil and political rights that are violated in these examples?*



TALKING POINT 3

Some commentators have criticised the Constitutional Court approach that says that the State has a duty to develop and implement reasonable socio-economic rights programmes or policies that will include and prioritise people in desperate need. They have argued that:

- This means that a person claiming a socio-economic right is only entitled to a reasonable programme, not a service (eg a house, food or water immediately).
- The Court could have ensured that people's rights were strongly protected by accepting that the State has a duty to provide an essential 'core' (minimum) service to everyone as a matter of priority.

Think about these questions, write down your ideas, and then compare your ideas with colleagues:

1. *Do you agree with these commentators?*
2. *What will be the implications of the Constitutional Court ordering the Government to provide a service (even an essential minimum service) to everyone in South Africa?*
3. *Can you think of circumstances where a court could order that the Government must provide a socio-economic right immediately? What right and groups of people would be involved in this kind of situation?*

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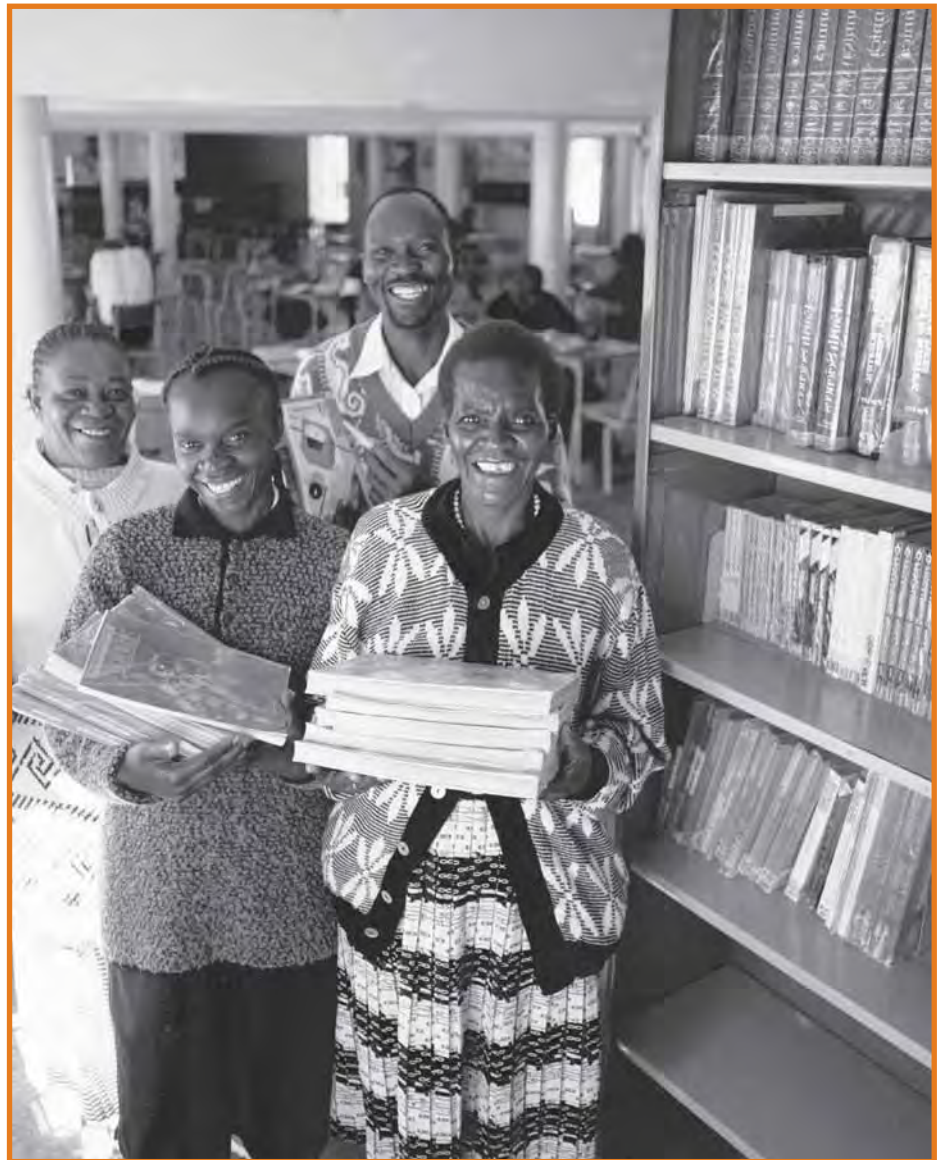
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Advancing socio-economic rights in South Africa

CHAPTER 2



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KEY WORDS

Accountable	Being responsible for your actions and having to explain them to others, eg by reporting.
Administrative action	Action taken or not taken by an organ of State or public body, eg administrative action by a government department.
Administrator	Someone who manages a government agency or department.
Advance	To take forward and implement, eg advance socio-economic rights.
Advocacy	Mobilising and working for change, eg to a law.
<i>Amicus curiae</i>	Friend of the court – when an organisation joins a court case to assist the court with its knowledge of an issue.
Complainant	The person who complains or starts a case.
Compliance/Comply	Whether or not you obey a law, policy or court order.
Constitutionality	Whether or not a policy or law is in line with the Constitution.
Disclose	When you make something known or bring it out in the open, eg disclose personal or commercial information.
Dispute	A disagreement or argument.
Enforce	To take action, eg to claim your socio-economic rights.
Equitable	Fair and reasonable.
Information officer	A person responsible for interacting with the public and media, or with other people or bodies needing information.
Liable	Legally responsible.

Litigate/Litigation	Starting a court case and, if necessary, going to court to claim or defend your rights.
Lobbying	Persuade or influence a person or body to do something, eg make changes to a law.
Mandamus	An order by a court demanding performance of a particular act, eg directing government to develop a plan to ensure access to a grant.
Mediate	Try to solve a dispute by getting the two sides to talk and to agree to a solution to the dispute.
Organ of State	Government departments and public bodies carrying out State duties, but not including the courts or judicial officers (eg magistrates).
Public interest	In the interests of the general public.
Remedy	Order by a court or another body that prevents a human rights violation, or that compensates you when your rights have been violated; or finding solutions in other ways, eg negotiation.
Respondent	The person a claim or case is made against.
Review	Formal process to check if a judgment or decision followed the correct procedure.
Shadow report	An independent report written and published by non-governmental organisations that is often compared to an official report by government.
Spheres of government	National, provincial and local levels of government.
Statutory body	Body established under a law of Parliament.
Submission	An oral or written presentation, eg on laws or policies.
Subpoena	Formal legal procedure to get a witness to appear and give evidence.
Third party	Outside person or body, in other words, besides the two sides involved in a complaint, dispute or request for information.
Transparency	Openness
Unconstitutional	Not in line with the Constitution.

Unfair discrimination	A policy, law, condition or situation that unfairly disadvantages you, eg because you are a woman or living with a disability.
Violate/Violation	Abuse or not respect, eg violating your right to dignity.
Vulnerable groups	People that need special protection, eg people living with HIV, who may face abuse or unfair discrimination.

Introduction

Our *Constitution (Act 108 of 1996)* provides a number of ways for claiming and defending basic needs, such as our socio-economic rights to housing, health care, food and water. It establishes a number of independent institutions to hold the Government accountable to its constitutional duty to respect, promote, protect and fulfil socio-economic rights recognised in the Bill of Rights. These institutions include courts to enforce these rights and bodies like the South African Human Rights Commission (SAHRC) to promote and monitor their implementation.

The various laws that have been passed to give effect to the socio-economic rights provisions in the Constitution provide guidelines and mechanisms for advancing and protecting these rights.

The spirit of the Constitution also allows for different groups, such as non-governmental organisations (NGOs) and community organisations, to play a role in realising socio-economic rights. These groups and communities can use different strategies to influence developing policies and laws that are responsive to the basic needs of the poor and of marginalised groups. This is how they can make the Government accountable to the public in its effort to assist people to meet their basic needs.

However, to be effective, these groups and communities need a favourable political environment. This can be achieved by ensuring that the State respects the courts and bodies like the Commission for Gender Equality (CGE). There also needs to be strong involvement by groups and communities in policy-making and law-making processes. Without groups and communities participating in these processes, very little will be achieved in improving the quality of life of the poor and of marginalised communities.

The courts have said that socio-economic rights often do not translate directly to material gains or immediate benefits. Rather, socio-economic rights impose a duty on the Government to create conditions for people to, for example, enjoy their rights to housing, food, education, water and health care services over time.

The fact that socio-economic rights have been included in the Constitution is a big change from the days of apartheid South Africa. But the real test lies in the manner that these rights are implemented and realised for ordinary people. Can ordinary people claim them and enforce them? These rights can only be meaningful if they actually improve the everyday lives of vulnerable people and people living in poverty.

In this chapter, we use the term *advancing* socio-economic rights to include *enforcing* socio-economic rights through the courts, together with other methods like campaigns.

2.2

How can you advance socio-economic rights?

You, your organisation, group or community can take a range of different steps to claim and enforce socio-economic rights.

There are a number of strategies to enforce socio-economic rights. South Africa has a long history of mass action, stayaways and strikes to demand the delivery of basic services. Section 17 of the Constitution confirms the principle that anyone has the right:

“Peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions regarding the implementation of human rights, including socio-economic rights.”

But there are some limits on actions like stayaways, protests and strikes. The *Regulation of Gatherings Act 205 of 1993* deals with the procedures for getting permission to hold demonstrations, marches and strikes.

GUIDELINES



GETTING PERMISSION TO HOLD A GATHERING OR MARCH

The procedures and guidelines for getting permission to hold a gathering or march may vary from province to province. The general steps under the Regulation of Gatherings Act are:

- You must apply to the local authority and send a copy of the application letter to your local traffic department.
- Your application must reach the local authority at least seven days before the date of the intended gathering or march.
- Depending on the size of the march, the application letter must include:
 - What the purpose of the march is.
 - What routes (roads or streets) it will take – where it will start and end.
 - What will be the duration and times of the demonstration or march.
 - Who will be the responsible or lead persons during the demonstration.
 - How it will be led (eg a car with a loudspeaker facility or a group of people leading it).
 - Who will receive you at your destination.
- The local authority may decide that it is necessary to discuss the content of the application letter with you before deciding to grant or refuse permission.
- The local authority must reply within 24 hours to inform you whether or not your march or gathering is allowed.

The local authority has a right to grant or refuse permission for gatherings or marches, but must give reasons for the refusal. Permission may be refused:

- If the time for the march would cause serious traffic problems in the city or town (eg it will coincide with peak traffic hours).
- If there is reasonable suspicion that the gathering will result in lawlessness and damage to property (eg looting).
- If it is suspected that the march would cause injury to the participants in it.

Various organisations and institutions use different strategies to promote and protect socio-economic rights. These include research, lobbying, advocacy, campaigns, social mobilisation, marches, media and litigation. The impact of these strategies, individually or collectively, can contribute to the improved delivery of basic services and goods to the poor and to vulnerable groups.

In this chapter, we explore six strategy options to help you advance your socio-economic rights:

- Getting information
- Getting reasons
- Getting help
- Going to policy-makers and law-makers
- Mass action and campaigns
- Going to the courts.

You or your organisation can use these strategy options on their own or together to claim and defend your rights.

2.3

Strategy option 1: Getting information

2.3.1 The right to information

Having access to information is important for claiming and enforcing all human rights, including socio-economic rights. Section 32 of our Constitution says that everyone has the right to get:

- Any information held by the State.
- Any information held by another person or body that you need to exercise or protect your rights.

This means that you can get information on what the Government plans to do to improve your needs such as housing, health care, food and education. You can also ask private bodies such as companies for information on things that can harm your rights, for example, information about the pollution of water.

This information helps individuals and communities to engage meaningfully with



processes that will lead to implementing their rights. If people have access to information, they may be able to monitor and claim effective service delivery from the Government. They may also be able to understand why these services are not being delivered to them immediately.

EXAMPLE



STEPS TO ENFORCE A COURT ORDER

Four days after the Constitutional Court's judgment in the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case), the Treatment Action Campaign (TAC) wrote a letter requesting information on what steps the different provinces will take to implement the court's orders. The Constitutional Court had ordered that steps must be taken to enforce the prevention of mother-to-child transmission of HIV by providing nevirapine to pregnant mothers living with HIV. Through using the law around access to information, the TAC succeeded in getting responses from some provinces.

Heywood, 2003

The Constitution says that laws can allow organs of State or private bodies to refuse to give you information in some situations. For example, information may be refused if it:

- Leads to the unreasonable disclosure of personal information.
- Could endanger someone's life.
- Could harm or obstruct a criminal prosecution.
- Has a negative effect on the security of the State.

Section 239 of the Constitution says that an *organ of State* is:

- A department in national, provincial and local government, or
- An official or body exercising a power or carrying out a function under the national Constitution or a provincial constitution, or
- An official or body exercising a public power or carrying out a public function under another law.

But an organ of State does not include a court or a judicial officer, for example, a magistrate or a judge.

2.3.2 The Promotion of Access to Information Act

The *Promotion of Access to Information Act 2 of 2000* (PAIA) was passed to give effect to the right of access to information. This Act describes in more detail the information you are allowed to receive and how you can go about getting it.

PAIA says public and private bodies must make certain information available without being requested. Public institutions such as the SAHRC have to publish a guide in each official language setting out information you can reasonably request when exercising any right in the Constitution's Bill of Rights (*section 10 of PAIA*).

Public and private bodies must appoint information officers to facilitate requests for information, including the duty to refer requests to other appropriate bodies. PAIA also makes it possible to take action on behalf of vulnerable groups. A person or anyone acting in the public interest may approach a State department or any other institution for the information that they may need to enforce constitutional rights.

GUIDELINES



REQUESTING INFORMATION

When requesting information, you should:

- Get a form from the government department you wish to get information from.
- Submit the completed form to the information officer at their fax, telephone number or email address.
- Give sufficient details to enable the official to identify the requested information or record.
- Specify the language you wish the information to be given in.
- If the request is made on behalf of a person, submit proof of the capacity in which you are making the request.
- If you are unable to make a request because of illiteracy or disability, make a request for assistance personally to the government department.
- Keep records of all the communication between you and the information officer that helped you, for example, notes of telephone conversations.

PAIA has a more detailed list of “circumstances” where information may be refused. These include:

- Where the privacy of a third party will be endangered.
- Commercial information relating to a third party.
- Certain confidential information about the safety of individuals and information on the protection of property.
- Protection of privileged documents from production in legal proceedings, for example, communication between an attorney and a client.
- Economic interests and financial welfare of the country, and commercial activities of public bodies.
- Protection of research information of a third party and protection of research information of a public body.
- Operations of public bodies.
- Petty requests, or requests that will result in a substantial and unreasonable wasting of resources to give the information.

Even if information fits into one of these “circumstances”, it can be given if the disclosure of the information would show, for example, an immediate and serious public safety or environmental risk. If you feel that information was unreasonably refused, you can appeal against the decision to the High Court after you have tried any other internal processes to get the information.

COURT CASE



CLAIMING ACCESS TO INFORMATION

In the 2005 case of *The Trustees for the Time Being of the Biowatch Trust v The Registrar: Genetic Resources and Others*, Biowatch Trust is an NGO that aims to ensure civil society involvement in determining policy and the regulation of the use, control and release of genetically modified organisms (GMOs) in South Africa. Biowatch Trust approached the Transvaal Provincial Division for an order forcing the Registrar of Genetic Resources to give them certain information relating to GMOs.

Biowatch Trust wanted information on the precise location where field trials of GMOs are being conducted so that Biowatch Trust could assess the environmental impact of each field trial. Biowatch Trust was acting in the public interest, as it was concerned with the issues of pollinating neighbouring farmers' crops, reducing biological diversity, invading wild species, and the potential impact on non-target species.

The Court noted that Biowatch Trust did not follow all the procedures for requesting information in PAIA. However, the Court ruled that this was not enough to justify the refusal of access to the records requested. If the Registrar of Genetic Resources had any doubts about the validity of the request, he could establish what Biowatch Trust was looking for and assist them in achieving that. If the Registrar still doubted the good faith of the request, then he could have refused it.

The Court then ruled in favour of Biowatch Trust on the grounds that:

- It established that it had a clear right of access to some of the information requested.
- It had no other remedy to enforce this right.

2.4

Strategy option 2: Getting reasons

2.4.1 The right to get reasons

You have a right to ask for written reasons why an authority took a particular decision that may have negatively affected your socio-economic rights.

Section 33 of the Constitution says that:

- All administrative action must be lawful, reasonable and follow fair procedures.
- Everyone whose rights have been negatively affected by administrative action, has the right to be given written reasons.



2.4.2 The Promotion of Administrative Justice Act

The *Promotion of Administrative Justice Act 2 of 2000* (PAJA) was passed to give effect to the right to get reasons. PAJA aims to promote and encourage the culture of accountability and transparency (openness) in exercising public power.

The Act creates procedures for people to follow when their rights are directly or indirectly affected by decisions taken by the State. PAJA thus allows any person whose rights have been significantly and negatively affected by *administrative action*, to ask for written reasons for the action. Reasons can be refused if it is reasonable and justifiable in the circumstances, but the official must then explain the refusal.

Meaning of administrative action in PAJA

The meaning of “administrative action” in PAJA helps us to understand the kinds of decisions we can challenge and get reasons for.

What is an administrative action?

An administrative action is when a department or body takes or does not take a decision that negatively affects your socio-economic rights. For example, they:

- Cut off your electricity.
- Cut your water supply.
- Stop providing a social grant.

Who can take an administrative action?

- An organ of State or any of its officials or employees, when they:
 - Exercise a power under the national Constitution or a provincial constitution, or
 - Exercise a public power or perform a public function under any law.
- A natural person or a juristic (legal) person, such as a company, when exercising a public power or performing a public function under any law – for example, a company contracted to deliver water services on behalf of the State.

What is not included in an administrative action?

- The law-making functions of a law-making body and some of the executive functions of the national and provincial executives.
- The judicial functions of a judicial officer of a court, tribunal or traditional leader under customary law or any other law.
- A decision to start or continue a prosecution.

For example, this means that you cannot ask for written reasons for a decision not to prosecute a criminal case (*section 1(i)(b) of PAJA*).

GUIDELINES



GETTING REASONS

- Find out about the structure of an authority you contact for information or reasons – for example, will you write to the Chairperson or to a sub-committee?
- If there is a local, a provincial and a national body in your area dealing with the particular socio-economic rights you are trying to enforce, you can send similar requests for information and reasons to each of them. Their different replies may help you to challenge their decisions at a later stage in court.
- Always keep good records of things like:
 - Copies of letters demanding information and reasons.
 - Copies of faxes and confirmation slips.
 - Notes of discussions with any officials or elected representatives, including their names and contact details.

2.5

Strategy option 3: Getting help

You or your organisation can get help to enforce your rights by making use of the State bodies that have been set up under the Constitution to help people protect their human rights. There are also many NGOs that can assist you in claiming your rights.



In this part, we look at getting help from:

- The South African Human Rights Commission.
- The Commission for Gender Equality.
- The Public Protector.
- Other commissions and institutions.
- NGOs and other bodies.

2.5.1 The South African Human Rights Commission

You can get help from the SAHRC, an independent institution set up to support constitutional democracy. The SAHRC works as a watchdog over the actions of government and private bodies that may affect human rights. Its main functions are to:

- Investigate and report on human rights violations.
- Assist people to get a remedy when their rights have been violated.
- Carry out research on human rights.
- Conduct human rights education.

The SAHRC does not only investigate complaints. It also assists in finding solutions to the issues raised in a complaint, for example, a complaint about unfair discrimination. Cases brought before the SAHRC must involve any of the rights in the Bill of Rights and rights violations must have happened after 1994.

The SAHRC does not usually deal with individual criminal cases, as these are handled by Justice Centres established under the *Legal Aid Board Act 20 of 1996*.

You can make a complaint to the SAHRC as an individual on your own behalf. You can also bring a complaint as:

- A group acting in the public interest.
- An individual or group representing someone who is unable to act independently.
- A group acting in the interests of its members.

By complaining to the SAHRC, your case may be resolved more quickly than if you went to court. The SAHRC uses various strategies to resolve disputes, such as mediation and negotiation.

GUIDELINES



COMPLAINING TO THE SAHRC

1. Send your complaint in a letter to an office of the SAHRC or complete a complaint form, available at any of the offices of the SAHRC, and return it to the office.
2. In the letter or on the form, you must:
 - Give your personal details (name, address, identity number and contact details) as the person complaining (the *complainant*).
 - Identify who has wronged you or violated your right (the *respondent*).
 - Set out a brief summary of the events leading to the violation of your rights.
3. Ask for help from the SAHRC's Registrar if you can't write the complaint on your own.
4. When receiving your complaint, the SAHRC will register it on their complaint register.
5. They will then check your complaint and accept it or reject it.
6. If they reject your complaint, you can request the reasons for this.
7. If the SAHRC rejects your complaint or refers you to another body, you can appeal to the Chairperson of the SAHRC within 45 days of the decision.
8. If they accept your complaint, the SAHRC may decide to use one or more of these methods:
 - Hold an investigation.
 - Negotiate or mediate to try and settle the dispute.
 - Hold a public hearing.
 - Deal with it as part of a group of similar complaints.
 - Litigate (go to court) on your behalf.
9. If the SAHRC takes the case to court, they may do this in their own name, or they can help you to take the case to court in your own name.

EXAMPLE



PUBLIC HEARING ON EDUCATION

After receiving many complaints, the SAHRC held a public hearing in October 2005 on the content and context of the right to basic education as part of their investigation mandate. Issues raised included:

- The accessibility and quality of education.
- The inability to afford quality education due to factors such as school fees, uniforms and transport costs.
- Challenges brought about by HIV/AIDS.
- The special needs of children living with disabilities.
- Lack of infrastructure in schools.
- Levels of violence and abuse in schools.

The SAHRC concluded that students in disadvantaged schools lack the necessary platform to claim their right to education as provided in laws and policies.

SAHRC Report on the Public Hearing on the Right to Basic Education, 2006

SAHRC monitoring procedure

Section 184(3) of the Constitution places a duty on the SAHRC every year to get information from relevant organs of State on the steps they have taken towards realising the rights in the Bill of Rights: land, housing, health care, food, water, social security, education and environmental rights. Relevant organs of State must provide this information to the SAHRC who will then compile a report from it.

The SAHRC produced five socio-economic rights reports between 1997 and 2004, focusing on information given by government departments at all levels. However, the 6th Report of August 2006 includes experiences of communities to assist in verifying the progress claimed by government departments.

The SAHRC has overhauled its monitoring system. They will be reporting every three years, instead of every two years.

Once completed, the SAHRC presents their reports to Parliament and then makes them public. The SAHRC have focused on finding out:

- If government departments understand their duties to realise socio-economic rights.
- If they have taken reasonable steps towards realising these rights.
- What their future plans and goals are.

The SAHRC has also made recommendations on how government departments can improve on their efforts to realise socio-economic rights.

EXAMPLE



A FINDING OF THE SAHRC ON HOUSING

“Although the National Department of Housing has realised its shortfalls and the effects on the lives of beneficiaries, in all the reported programmes, policies and projects, there is no express indication either by the various housing departments or other role players (such as banks) to rectify unsuccessful projects. Instead, the Department continues to introduce and implement new policies without any research as to why the current programmes and project are not successful. For example, the controversy associated with bonded house projects such as in Phumula Gardens in Johannesburg, which was developed in 1994, and the issues around habitability of RDP houses have not been mentioned. The fact is that beneficiaries – whose right to have adequate housing has allegedly been compromised – still live in those houses because they do not have any choice. Yet some of the houses do not come close to being permanent structures as contemplated in the Housing Act and the Housing Code.”

SAHRC, 5th Economic and Social Rights Report (2002–2003): The Right of Access to Adequate Housing, 51

For SAHRC office details, see the contact list in the back cover pocket.

2.5.2 The Commission for Gender Equality

The CGE is another institution that supports constitutional democracy. The CGE has a mandate to promote respect for gender equality, and to help protect, develop and achieve gender equality. Its main functions are to:

- Investigate gender-related issues on its own initiative or after receiving a complaint.
- Investigate any government structure, statutory body, public or private institution, or individual.
- Develop information and educational programmes.
- Monitor respect for international agreements.
- Make recommendations on government policies and laws affecting gender equality.

For CGE office details, see the contact list in the back cover pocket.

You can approach the CGE to investigate your circumstances when you cannot get access to human rights on grounds such as sex, gender, pregnancy, marital status or sexual orientation. For example, the CGE can investigate the issue of the expulsion of girls from school when they are pregnant, or barriers experienced by women and girls in accessing housing, property and inheritance rights.

The CGE works together with the SAHRC to monitor gender equality in relation to socio-economic rights. There have been suggestions that the two bodies should be combined because of the overlapping nature of their work – for example, they can both assess progress made in identifying gender-related human rights discrimination and violations.

GUIDELINES



COMPLAINING TO THE CGE

1. Make a complaint by visiting a CGE office, or by writing to the CGE or phoning their office.
2. Make sure the issue you are complaining about is gender-related, such as sex, gender, pregnancy, marital status, family responsibility (sole parent status), sexual harassment or violence based on your sex. You may approach CGE, for example, if you are blocked from getting access to housing because you are a woman.
3. When you make your complaint:
 - Give your name and contact details.
 - Identify who has wronged you.
 - Say clearly what your complaint is, for example, why you think you have been unfairly discriminated against (eg as a pregnant woman at work).
 - You must also include all the dates and any other relevant details.
 - Indicate whether you have tried to resolve the issue in another way.
4. If you need help to make your complaint in writing, ask the CGE office for help with this.
5. If the CGE cannot deal with your complaint, they should refer you to another body for help – they should give you the name of the person to contact.
6. If the CGE takes on your complaint, they will investigate the complaint, and try to resolve the issue through mediation or litigation.

The *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* mandates the SAHRC to “consult” the CGE when dealing with the equality plans received from government ministers in promoting equality in South Africa (*section 25(5)(b)*).

As with the SAHRC, you can complain to the CGE as an individual on your own behalf or on behalf of someone who needs help. You can also complain as a group acting in the public interest, representing people who need help, or on behalf of your organisation’s members.

2.5.3 The Public Protector

The Public Protector is another institution that supports constitutional democracy. It investigates wrongful conduct in State affairs or in the public administration of national, provincial and local government. This includes all government employees, such as police officers, pension payout clerks or electoral officers. It can also investigate corporations or bodies performing a public function, for example, Eskom and Telkom. The Public Protector has powers to report on any wrongful conduct of a public institution and to take action to correct it.

The Public Protector thus protects citizens from unfair treatment by the State and its officials, as well as from inefficient administration and dishonesty to do with public money. You can complain to the Public Protector if, for example, you think that public officials are:

- Corruptly using money meant for socio-economic rights delivery.
- Abusing their powers or not allowing you access to claim your socio-economic rights.

There are circumstances where the Public Protector is not allowed to investigate an abuse of power. These are:

- Judgments of judges and magistrates, including the sentences they give.
- When the alleged abuse concerns private acts by individuals.
- When the wrongdoer is a private company.
- When the action is by doctors or lawyers who are not working for the State.

CASE STUDY



INVESTIGATION OF ABUSE OF PUBLIC FUNDS

In 2004, the Office of the Public Protector investigated a complaint of misappropriation of public funds in the Department of Housing of Gauteng. The allegation challenged the expenditure by the Head of the Gauteng Department of Housing authorising an advert in the *City Press* and another newspaper on 31 October 2004 about the death of the KwaZulu-Natal MEC for Housing.

The Public Protector:

- Decided that the amount used (R45 144) was unauthorised, fruitless and wasteful.
- Ruled that the expenditure had not followed the requirements of the *Public Finance Management Act 1 of 1999*.
- Recommended that the Gauteng Provincial Treasury investigate further to determine whether the Head of the Gauteng Department of Housing should be charged with financial misconduct.

Report 29 of the Public Protector, 13 July 2005, 3

GUIDELINES



COMPLAINING TO THE PUBLIC PROTECTOR

For Public Protector office details, see the list in the back cover pocket

1. The Public Protector encourages people to try to solve their complaints before approaching the Public Protector's office. For example, try to speak to the official or write to the person in charge.
2. If you are not satisfied with the answers you get, you should contact an office of the Public Protector.
3. You must bring your complaint within two years after the event you are complaining about.
4. Make your complaint by letter, telephone or on a form available from an office of the Public Protector.
5. Include in your complaint the contact details of everyone you have contacted and copies of any correspondence between you and officials.
6. A legal officer from the Public Protector's office will record your complaint and will let you know that they have received the complaint.
7. The Public Protector's office will then check your complaint, including:
 - The type of complaint.
 - The steps taken to solve the issue.
 - The reasons why the Public Protector should investigate the complaint.
8. The Public Protector will then investigate and try to solve the complaint informally.
9. If the informal approach does not work, there will be an official hearing.
10. The Public Protector can refer the complaint to another body if it falls outside the Public Protector's powers.
11. After the Public Protector's office has conducted an investigation and a hearing, the Public Protector makes a decision and recommendations.
12. The Public Protector has to report to Parliament on cases dealt with and recommendations coming out of these cases.

2.5.4 Other commissions and institutions

There are a number of other commissions and bodies that can have an effect on realising your socio-economic rights, for example:

- The Judicial Service Commission
- The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities
- The Auditor General
- The Independent Communications Authority of South Africa
- The Public Service Commission
- The Magistrates Commission.

Legislation has given these institutions the power to investigate complaints you may have against any officer, institution or organ of State that falls within their area of focus.

Other institutions such as the Banking Ombudsman, the National Credit Regulator, the Pension Funds Adjudicator and various ombudspersons in the insurance industry, may be able to assist you in making powerful companies and other private bodies accountable for their actions, including violations of socio-economic rights.

2.5.5 NGOs and other bodies

NGOs and community-based organisations play a key role in advancing socio-economic rights in South Africa. You can get help from these organisations in taking up socio-economic rights campaigns and cases. These organisations use different strategies, for example, public exposure ('naming and shaming'), monitoring, advocacy, education, public awareness, social mobilisation, litigation, research and training to promote and advance socio-economic rights.

For example, there are a number of organisations that provide legal and paralegal assistance to communities and individuals whose socio-economic rights have been violated or threatened. Amongst these, the Legal Resources Centre, the Women's Legal Centre and the Centre for Child Law (University of Pretoria) take up legal action on socio-economic rights on behalf of groups and individuals.

The decision on which organisation you approach will depend on the nature of the problem you have.

2.6

Strategy option 4: Going to policy-makers and law-makers



The Constitution allows for laws to be made by the national, provincial and local spheres of government. Each of these spheres has a duty to fulfil the rights in the Bill of Rights, including socio-economic rights. While these spheres have their own exclusive powers, they are also interrelated and interdependent:

- The national Government is mainly responsible for setting policy and national standards affecting socio-economic rights – it also has a large influence on the availability of resources for socio-economic rights.
- Local and provincial government will be directly responsible for

the delivery of socio-economic rights – although a particular function may fall within the responsibility of local or provincial government, they may not be able to deliver the service, because not enough funds are available from national government.

The Constitution makes local government the delivery engine of basic services. For example, section 152 says that the aims of local government are to:

- Ensure the provision of services to communities in a sustainable (lasting) way.
- Promote social and economic development.
- Promote a safe and healthy environment.

The Constitution also places a specific developmental duty on local government to give priority to the basic needs of the community, and to promote the social and economic development of the community (*section 153*).

Submissions on policy development and law reforms can be made to the various structures and departments of government. For example, submissions can be made to:

- The various portfolio committees in Parliament.
- Government departments at all levels.
- Agencies delivering services on behalf of government.

How can you get involved in these processes?

Our Constitution encourages transparency and participation in policy-making and law-making processes. You can participate in these processes at different stages to ensure that your socio-economic rights are properly included and protected in policies and laws. You can do this by:

- Lobbying – persuading people or structures to change a policy or law.
- Advocacy – public campaigning and media pressure to bring about change.

GUIDELINES



GETTING INVOLVED IN LOBBYING AND ADVOCACY

1. Try to get involved at the policy stage – in other words, before the making of laws and regulations that will affect your daily life.
2. Look out for public hearings held by parliamentary portfolio committees.
3. Look out for calls from local and provincial government for public inputs and comments on policies and laws, including those affecting socio-economic rights.
4. Make contact with Members of Parliament, your local council, or other government officials to be aware of their programmes and agendas.
5. Read local newspapers and the Government Gazette (available at your local library) to know about public hearings on policies and laws.

For details of monitoring, lobbying and advocacy structures you can work with, see the list in the back cover pocket.

Many unions, NGOs and community organisations are involved in monitoring what is happening in Parliament and in government. You can link up with these organisations and ask them for help in approaching policy-makers and law-makers. You can also find out about how you can join or support campaigns run by organisations around socio-economic rights issues, like housing and health care.

2.7

Strategy option 5: Mass action and campaigns

Mobilising groups of people to join forces in drawing attention to an issue can be a useful way of advancing access to socio-economic rights. These campaigns can be organised around local, provincial or national issues.

EXAMPLES



CAMPAIGNS

- *Local mobilisation around a particular environmental issue affecting a community, such as pollution or lack of access to nearby water.*
- *A provincial campaign when the province is responsible for the delivery of a particular right, such as education.*
- *A national campaign targeting the delivery of specific rights, such as access to antiretrovirals, or events, such as the day on which the budget is presented to Parliament, to draw attention to the resources government is making available for improved delivery of socio-economic rights.*

For example, a wide range of civil society organisations founded the Basic Income Grant Coalition in June 2001 to coordinate efforts, to develop a common campaign and to build popular support for a basic income grant. Led by a National Steering Committee comprising the national leadership of the various sectors in the Coalition, high profile South African personalities were also approached to serve as patrons (Liebenberg, 2002 and Kallman, 2002).

Peaceful mobilisation or mass action can involve a range of strategies, such as:

- Developing a catchy slogan for your campaign.
- Printing T-shirts carrying the message you are trying to get across.
- Making posters to publicise your cause.
- Holding mass meetings with prominent speakers supporting your campaign.
- Organising a petition with a large number of signatories to be sent to the relevant authority.
- Writing letters to the newspapers drawing attention to the issue you want to highlight.
- Using other media, such as community radio or street theatre.

2.8

Strategy option 6: Going to the courts

After trying other ways to claim and defend your socio-economic rights, you may decide to go to the courts to enforce your rights. Section 34 of our Constitution says that you have the right to have all disputes about rights protected in the Bill of Rights decided in a fair public hearing before a court or another independent body.



2.8.1 Legal assistance

If you are considering the option of going to courts to enforce socio-economic rights, it is helpful to get the assistance and advice of a lawyer who has experience in public interest litigation and human rights cases.

While every person wishing to have a dispute resolved may have access to a court, this does not necessarily allow everybody to have a lawyer for free to assist in getting the dispute resolved. The Constitution says that people who face the risk of substantial injustice in criminal cases (eg a long prison sentence) and who cannot afford a lawyer, can get one at State expense.

Children have a broader right to legal assistance at State expense in civil cases affecting their interests if being without a lawyer will result in serious injustice, and thus may be able to get a lawyer through the State to enforce socio-economic rights.

In socio-economic rights cases, various legal institutions may be prepared to help you to pay for a lawyer in certain circumstances or to find you an affordable one. You can try legal NGOs such as:

- The Legal Resources Centre
- The Women's Legal Centre
- The Centre for Child Law (University of Pretoria)
- University law clinics
- Paralegal advice offices.

EXAMPLES



NGOs AND INSTITUTIONS HELPING IN THE PUBLIC INTEREST

- *The Legal Resources Centre (a non-profit organisation working for social justice and human rights in South Africa) provided legal assistance to the community of Wallacedene to take their case to the Cape High Court and the Constitutional Court in the 2000 cases of **Grootboom v Oostenberg Municipality and Others**, and **Government of the Republic of South Africa and Others v Grootboom and Others** (Grootboom case). This community was evicted and left homeless, and wanted an order forcing the State to provide them with access to adequate housing under section 26(1) and shelter for their children under section 28(1)(c) of the Constitution.*
- *The Women's Legal Centre (an advocacy and public interest group that works to promote women's rights) participated in the case involving young women who challenged the constitutionality of the rule of male primogeniture (that male heirs inherit) and other laws that supported this in the High Court and Constitutional Court in the 2004 and 2005 cases of **Bhe and Others v Magistrate Khayelitsha and Others**.*
- *The Legal Aid Board (a statutory body) paid for legal representatives of the litigant in the 2004 High Court case of **Daniel v Robin Grieve Campbell and Others** on protecting the inheritance rights of spouses in monogamous unions, who are married according to Muslim rites.*
- *The Centre for Child Law at the University of Pretoria (an advocacy and public interest body that works to promote the best interests of the child in South*

GUIDELINE



When going to see a lawyer or paralegal, take all documents and records of your communication with any other bodies, as these will help to build your case.

IMPORTANT DOCUMENTS

*Africa) was involved as an applicant in the 2006 Witwatersrand High Court case of **Centre for Child Law and Others v MEC for Education and Others** on children's access to proper bedding while in the care of the State.*

Other statutory bodies, such as the SAHRC and the CGE, also have the power to take cases to the courts on your behalf.

2.8.2 Who can go to court?

a) As a party

If your rights or your organisation's rights are violated or threatened, you can go to court to get a remedy. You then become a *party* or an *applicant* in the case.

In addition, you or your organisation can go to court in any one of these ways:

- On behalf of someone who cannot take up a case in her/his own name, eg a minor.
- On behalf of a group of people, eg people living in an informal settlement.
- On behalf of a class of people, eg a person brings a case on behalf of

herself and all the other people whose social grants were discontinued without notice or warning (in other words, people who are in a similar situation).

- In the public interest, eg to get a court order to set school fees at an affordable level for poor people.
- As an association acting in the interest of your members, eg trade unions, civic organisations, sports clubs.

Public interest actions are very important for enforcing socio-economic rights because most poor people do not have the capacity to go to court on their own to advance their rights. Our Constitution now allows you, your organisation, your street committee or your union to go to court on behalf of other citizens and residents.

GUIDELINES



ACTING IN THE PUBLIC INTEREST

Before an organisation or committee is allowed to act in the public interest, you must meet two requirements:

1. The organisation or committee must show that it is acting in the public interest. For example, it must show that:
 - There is no other reasonable and effective way to bring the case.
 - The remedy will benefit a wider group of people.
 - The affected group or people belong to vulnerable parts of society.
 - The consequences of the violation of the right are very serious for the affected groups or people.
2. The organisation or committee must show that the public has a sufficient interest in the remedy they want to get. For example, it must bring enough evidence and argument to enable the court to decide the issue.

b) **As an *amicus curiae***

You or your organisation may participate in a case that is already before the court on the grounds that you have an interest in the issues that will be raised. The rules of the High Court, Supreme Court of Appeal and

Constitutional Court allow a person or an organisation with an interest in a case before the courts to be admitted as an *amicus curiae*, meaning a 'friend of the court'.

An *amicus curiae* is not a party in the case. It only assists the court to arrive at its decision. It joins the case because of its special expertise or interest in the case before the court, and because it believes that the decision may affect its interests.

EXAMPLE



PARTICIPATING IN COURT CASES AS AN *AMICUS CURIAE*

An organisation with a lot of research and advocacy experience in housing rights can present a study they have conducted on evictions and homelessness in the City of Johannesburg.

GUIDELINES



ADMISSION AS AN AMICUS CURIAE

To be admitted as an *amicus curiae*, an organisation or person must show that the submission it wants to put before the court:

1. Is relevant to the case.
2. Will be useful to the court.
3. Is different from the submissions of other parties.

To be admitted as an *amicus curiae*, you also need:

- To get the written consent of all the parties in the case.
- To apply to the court for admission as an *amicus curiae* and provide supporting documents to show that all the parties have agreed to your participation.

Even if you have the consent of the parties, you still have to apply to the court because it has the final discretionary power to decide whether to admit or not to admit you or your organisation.

COURT CASE



BRINGING ISSUES COVERED BY ANOTHER PARTY

The Institute for Security Studies (ISS) had applied to be admitted as an *amicus curiae* in the 2005 case of *Institute for Security Studies In re State v Basson*. The Constitutional Court acknowledged ISS's interest in international criminal law, a subject matter in the case. However, it refused to admit ISS as an *amicus curiae* because the central issues it wanted to raise were already covered by the State.

The Constitutional Court also said that the fact that a person or organisation applying to become an *amicus curiae* has obtained consent from all the parties or was admitted as an *amicus curiae* in a lower court, does not automatically mean that the Constitutional Court has to admit them. The Court has a discretion to decide whether or not to admit a person as an *amicus curiae* (paragraphs 7 and 8 of judgment).

2.8.3 The different courts

These are the different courts that you can use to enforce your socio-economic rights:

- **The Constitutional Court** – the highest court for interpreting your constitutional rights.
- **The Supreme Court of Appeal** – the highest court for dealing with appeals, except in constitutional cases.
- **The High Courts** – the highest courts in each province.
- **The Magistrates' Courts** – the courts dealing with issues in your town or neighbourhood, and sometimes with socio-economic rights (eg complaints of unlawful eviction from land or housing).
- **Specialist courts and tribunals** – these, for example, deal with:
 - Labour cases in the Labour Courts.
 - Land issues in the Land Claims Court.
 - Water resources and services in the Water Tribunal.

For more on PAIA, see page 58, and on PAJA, see page 61.

- Equality cases in the new Equality Courts created by the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*, together with PAIA and PAJA. These laws give the Magistrates' Courts powers to hear equality cases, to review unreasonable administrative action, and to decide on disputes on access to information.

2.8.4 Remedies

In socio-economic rights cases, it is very unusual for a court to make an order that results in giving you as an individual direct material gain, for example, ordering that the Government must build a house for you.

The Bill of Rights in the Constitution gives the courts broad powers when deciding constitutional cases, including socio-economic rights:

- Section 38 says that a court may grant appropriate relief, including a declaration of rights if there is a violation of a right.
- Section 172(1) says that a court must declare the law or conduct that is inconsistent with the Constitution unconstitutional to the extent that it is inconsistent.
- Section 172(2)(b) says that a court may make any order that is just and equitable.

A court may declare that a law, part of a law or conduct that goes against the Constitution, is invalid. A court can also make any order that is "just and equitable", including deciding to delay declaring an action invalid in order to give the Government a chance to correct the problem.

There are different kinds of orders that the court can make, including:

- Declaratory orders
- Mandatory orders
- Damages
- Structural interdicts
- Reading in words
- Contempt of court orders.

a) Declaratory order

COURT CASE



GOVERNMENT NOT MEETING ITS HOUSING DUTIES

In the Grootboom case, the Constitutional Court declared that the State housing programme for the Cape Metropolitan Council did not meet constitutional requirements. This was because it did not make reasonable provision for people with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations (*paragraph 99 of judgment*).

This is an order where the courts declare something lawful or unlawful, or a law or policy constitutional or unconstitutional.

b) **Mandatory order**

This is a court order forcing the other side to do something, also called a *mandamus*.

COURT CASE



ORDERING THE STATE TO DO SOMETHING

In the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case), the Constitutional Court ordered the Government to:

- Remove the restrictions that prevent nevirapine from being made available for reducing mother-to-child-transmission (MTCT) of HIV at public hospitals and clinics that are not research and training sites.
- Provide, where necessary, for the training of counsellors that are based at public hospitals and clinics that are not research and training sites on the use of nevirapine.
- Extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and speed up the use of nevirapine for preventing MTCT of HIV (*paragraph 135 of judgment*).

c) **Damages**

This is an order where the court tells the authority that caused the harm or violated your right to pay you money to compensate you.

COURT CASE



GRANTING CONSTITUTIONAL DAMAGES

In the 2005 case of *President of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others*, the Constitutional Court granted an order stating that:

- Modderklip Boerdery Pty Ltd (a private land company) has a right to be paid compensation by the Department of Agriculture and Land Affairs for the loss of use of its land during the period in which it had been occupied by the Gabon community. This was because the occupation was a result of the failure of the State to provide alternative land for the occupiers.
- The compensation should be calculated under section 12(1) of the *Expropriation Act 63 of 1975*.
- If the parties are unable to agree on the compensation, they are granted leave to approach the High Court for direction (*paragraph 68 of judgment*).

d) **Structural interdict**

A structural interdict (also called a *supervisory order*) is an order where the court orders a party (the violator) to submit a report to it within a specified period of time setting out what steps it has taken or what future steps it will take to correct a wrong. The wronged party will be given an opportunity to respond to the report.

If you do not obey the obligations set out in the court order, you can be guilty of *contempt of court*. The High Courts have used the structural interdict as a form of relief in socio-economic rights cases.

For more on contempt of court, see page 79.

COURT CASE



REPORTING TO THE COURT

In the 2006 case of *EN and Others v The Government of South Africa and Others* (EN case), the Durban High Court ordered the respondents to:

- Remove the restrictions that prevent the 12 applicants (prisoners) from accessing antiretroviral (ARV) treatment they have a right to get under the National Department of Health's *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa*.
- Immediately provide ARV treatment to the applicants according to the Government's Operational Plan.
- Submit affidavits to the Court, within 15 days, setting out what it will do to obey the court order.

The Court also said that the applicants may also comment on the Government's affidavits within five days, and that the Government could reply again to the applicants' comments.

Debate: structural interdicts in socio-economic rights cases

The Constitutional Court has been reluctant to grant a structural interdict. This has led to heated public debate. In the TAC case, the Court said that this kind of order should only be made in appropriate cases where it would be necessary to secure compliance with the court order. For example, the Court may order a structural interdict where the Government has disobeyed declaratory orders or other orders granted by a court in a particular case.

The courts may be reluctant to order structural interdicts because of the burden these orders place on the courts to supervise them. By issuing these orders, the courts may feel they are becoming involved in political struggles around complex issues. The Constitutional Court has been criticised for its refusal to order structural interdicts, because there have been many cases of government officials disobeying court orders. These are some of the advantages of structural interdicts:

- They empower the court to monitor the implementation of its own orders.
- They make the Government account to the court on its failures to meet its obligations.
- They are potentially more effective in ensuring that litigants get services (such as shelter, social grants or medical drugs) as promised by court judgments.
- They offer an opportunity for successful litigants to participate in forming policies or other measures to carry out court orders.

e) Reading in words

A court may insert missing words (normally in legislation) in order to bring the law in line with the Constitution. This is done after the court has found that an Act or regulation is inconsistent with the Constitution.

COURT CASE



READING IN MISSING WORDS

In the 2004 case of *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* (Khosa case), the applicants (a group of permanent residents in South Africa) challenged certain provisions of the *Social Assistance Act 59 of 1992* and the *Welfare Laws Amendment Act 106 of 1997*. These laws restricted access to social grants to South African citizens only. This excluded permanent residents, aged people and children, who would otherwise have qualified for social assistance.

The Constitutional Court said that the words “or permanent residents” must be read in after the words “South African citizens”.

f) Contempt of court order

A court may hold an authority or person criminally liable for not obeying a court order (often a mandatory order or a structural interdict). In these cases, the court would normally call on the person charged with contempt of court to show why he/she should not be held ‘in contempt of court’. If the person is found guilty of contempt of court, they may be fined or imprisoned.

Debate: contempt of court

Some courts, for example in the Eastern Cape and KwaZulu-Natal, believe that making contempt of court orders against government officials is the only effective way of ensuring that the State complies with court orders to pay money.

However, the Supreme Court of Appeal disagrees with this approach. They argue that it will be unfair to hold a government official in contempt of court when a person in the same position cannot be held in contempt of court for not paying his/her own debts (*Jayiya v Member of Executive Council for Welfare, Eastern Cape Provincial Government and Another, 2004*).

In the 2006 EN case, the Durban High Court reopened this debate and stated that:

- The Government’s failure to comply with court orders seriously undermines the role of the courts and brings about a “grave constitutional crisis” (*paragraph 33 of judgement*).
- Unless section 3 of the *State Liability Act 20 of 1957* is declared unconstitutional, there will be no mechanism such as imprisonment to enforce court orders (*paragraph 32*).

To date, this issue has not been raised in the Constitutional Court in relation to socio-economic rights cases. Yet, contempt of court orders have the potential to ensure compliance with court orders. By trying to get contempt of court orders in socio-economic rights cases, you can help the courts develop this remedy into a powerful weapon for enforcing socio-economic rights.

2.8.5 Obeying court orders

Our Constitution values law and the orders of the courts very highly. If court orders are not obeyed, then anybody disobeying them should be called to account and face some punishment or consequences. This is one of the reasons why some courts are arguing for the State Liability Act to be declared unconstitutional to allow for the possibility of sending government officials to prison for contempt of court.

There are a number of cases involving socio-economic rights (especially on social grants in the Eastern Cape and KwaZulu-Natal) where national, provincial and local government officials have ignored court orders, or have delivered later than ordered by the court. The courts are struggling to develop effective and fair punishment responses in these cases.

A number of judges have expressed dissatisfaction with often having to deal with the same type of cases because of poor administration in some provinces.

COURT CASES



NON-PAYMENT OF SOCIAL GRANTS

In the 2000 case of *Vumazonke and Others v MEC for Social Development*, the Eastern Cape High Court dealt with a number of cases of people whose social grants had not been paid to them by the Eastern Cape administration. The Court ruled against the Department of Social Development, and then made the judgment available to the SAHRC and Public Service Commission so that they could play a monitoring role.

The 2004 case of *Q.T. Machi and Others v MEC for the Province of KwaZulu-Natal Responsible for Social Welfare and Population Development* involved poor handling of applications for social grants. The Durban High Court ordered the MEC for Social Development to pay costs from his own pocket for acting negligently and unreasonably in defending the case in court. However, the order was suspended to allow the MEC to satisfy the court by a specified date that the backlog in the applications had been properly dealt with.

2.9

Conclusion

Even with our Constitution's Bill of Rights, enforcing rights and getting a remedy when your rights have been violated is often not so simple. There is a range of possible strategies available to use to advance your socio-economic rights.

Choosing which strategy to follow will depend on a wide variety of factors, and can be influenced by:

- Whether there is a 'built-in' procedure for complaining, for example, legislation or a government department sets up a complaint hotline.
- Whether a statutory body such as the SAHRC or the CGE can possibly assist to resolve your complaint.
- Whether there is a group of people facing similar hurdles in realising their socio-economic rights, who can get together to form a joint strategy.
- Whether going to court is a viable option, and whether a court order is likely to produce the result that you aim to achieve.

- What resources are available to you to implement your chosen strategy.
- Whether an NGO or public interest legal centre is able to assist you.

The strategies suggested in this chapter should be read together with Chapters 5 to 12 that explain specific socio-economic rights. You may decide to use different strategies for advancing different rights. For example, an appropriate strategy for enforcing environmental rights (where big companies, local governments and provincial governments are often the targets of complaints) may differ from the strategy to follow in advancing education rights, where you may start with a complaint at school or governing board level.

Finally, we should remember that our constitutional democracy is a young one, just over a decade old. We have a strong foundation for increasing access to socio-economic rights and to prevent rights violations, but there is still a great deal of work to be done. We have to work together creatively and strategically, using democratic principles and the limits of the law, in efforts towards ensuring that everyone's access to their socio-economic rights is eventually fulfilled.

Discussion ideas



Discuss these practical situations in one group or in smaller groups in a workshop:

TALKING POINT 1

Mrs Calata, aged 72, was wrongly declared and registered dead by the Department of Home Affairs. For about 13 years, she has been struggling to get this corrected by the Department. As a result, she couldn't access her pension when she reached the minimum age required. She approached the Department and they promised her that her case would be attended to. After a long wait, she approaches you as an advice office worker in your community.

- *Which strategies can you use in helping Mrs Calata?*

TALKING POINT 2

You are the coordinator of a service organisation that deals with the protection of the rights of children. On 25 November 2003, three children were involved in a car accident. Their parents approach your organisation to assist them in making a claim against the Road Accident Fund. The children do not have Birth Certificates. You write letters and make telephone calls.

- *What can you and your organisation do to help the families?*

TALKING POINT 3

The Demarcation Board issued a statement that it was considering changing the existing structure of municipal demarcations (the way the city and surrounding areas are divided up into local councils). On radio and in the weekend newspapers, it calls for people to come forward and make submissions on the advantages and disadvantages of this proposal. You hear this on the radio and strongly oppose the proposal.

- *What steps can you take to bring your feelings on this issue to the attention of the Demarcation Board and to make your voice heard more widely?*



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Protecting socio-economic rights internationally

CHAPTER 3



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KEY WORDS

Adopt	Formally accept something, eg adopt a treaty through ratification.
Binding/Bound	What must be followed as the law – means the same as ‘legally binding’. After it ratifies a treaty, a State is bound by the treaty.
Civil society	Non-State role players, such as non-governmental organisations, community organisations and trade unions.
Compliance/Comply	Whether or not countries carry out their obligations under treaties.
Customary international law	Practices that States accept and follow over time, eg not discriminating on grounds of race or sex – also called ‘international custom’.
Domestic remedies	Relief or solutions for violations of human rights available within a State. For you to approach an international monitoring body for relief, you must ‘exhaust domestic remedies’ first, meaning that you must first try everything possible within your own legal system to find a solution, eg go to the highest court in the land.
International instruments	International documents like conventions, declarations, treaties and charters.
Jurisdiction	The power that a State has over an area or people – also often used to refer to the power of courts to decide a particular issue.
Marginalisation	Being sidelined and excluded.
Mechanisms	Methods, tools or procedures to help enforce treaties.
Non-binding	What you can use as a guide, but do not have to follow.
Obligations	Duties.
Petition	A formal written statement to claim a right or complain about something. Also called ‘complaint’ or ‘communication’.

Provisions	Sections and clauses in formal documents like laws, regulations, treaties and charters.
Ratify	Accept that a treaty is binding, and respect and carry out duties under the treaty.
Shadow report	Unofficial NGO report with information, statistics and analysis on whether a country is complying with its treaty obligations, alongside the official report of the Government – also called a ‘parallel’ or ‘alternate’ report.
Special procedures	When special rapporteurs, experts or working groups gather information and report on specific human rights violations or the situation in a particular country.
Special rapporteur	A person appointed by a committee or commission to act as the official monitor and reporter on a particular issue, eg on the right to education, or on human rights in a country.
State party	A State that has adopted and is bound by a particular treaty.
Submissions	Verbal or written views, eg to a reporting body.
Remedy	An order by a court or other body that prevents a human rights violation, or requires a body to take certain steps to correct a human rights violation, or compensates you when your rights have been violated. A remedy can also mean finding solutions in other ways, eg through negotiation or mediation.
Treaty	An international agreement between States creating rights and duties that are legally binding under international law. Also called a ‘convention’, ‘covenant’ or ‘charter’.

3.1

Introducing international law

Abbreviations for international documents

African Charter	African Charter on Human and Peoples' Rights, 1981
African Children's Charter	African Charter on the Rights and Welfare of the Child, 1990
African Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1966
CRC	Convention on the Rights of the Child, 1989
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICCPR	International Covenant on Civil and Political Rights, 1966
Refugee Convention	Convention Relating to the Status of Refugees, 1951
UDHR	Universal Declaration of Human Rights, 1948

Abbreviations for international supervisory bodies

African Commission	African Commission on Human and Peoples' Rights
African Committee	African Committee of Experts on the Rights and Welfare of the Child
African Court	African Court on Human and Peoples' Rights
CESCR	Committee on Economic, Social and Cultural Rights
CEDAW Committee	Committee on the Elimination of All Forms of Discrimination Against Women
CERD Committee	Committee on the Elimination of Racial Discrimination
CRC Committee	Committee on the Rights of the Child
ECOSOC	Economic and Social Council

3.1.1 What is international law?

International law is the law that mainly governs relations between States. However, it increasingly also regulates the conduct of other actors, including individuals, international organisations, insurgents and national liberation movements.

The two most important sources of international law are:

- International treaties.
- International custom.

a) International treaties

Treaties are international agreements entered into by States. A treaty can be:

- *Bilateral* if it is agreed to by two States, or
- *Multilateral* if it is agreed to by more than two States.

Some important concepts for understanding treaties

<i>Declarations</i>	Unlike a treaty, a declaration is not legally binding on the States that have adopted it. But declarations can lead to the formation of binding obligations through customary international law. They may also be considered when interpreting provisions of treaties. Declarations can be made by the United Nations (UN) General Assembly, such as the <i>Universal Declaration of Human Rights, 1948 (UDHR)</i> . Declarations can also be adopted by international conferences, for example, the <i>1974 Universal Declaration on the Eradication of Hunger and Malnutrition</i> that was adopted at the World Food Conference.
<i>Protocol</i>	An additional agreement to the main treaty. States can decide for themselves whether they also want to become a party to this additional agreement. For this reason, they are also sometimes called 'Optional Protocols'. An example is the <i>1989 Second Optional Protocol to the International Covenant on Civil and Political Rights</i> , aimed at the abolition of the death penalty.
<i>Ratification</i>	When a State ratifies a treaty after it has signed it, it means the State declares that it is now formally 'a State party' to the treaty. It is then bound under international law by the treaty, and must respect the rights and carry out the duties of the treaty. A treaty will normally say that a certain number of States must ratify it before it comes into force. Sometimes the word 'accession' is used instead of 'ratification'. Although there is a technical difference, the effect is the same. The word ratification will be used throughout this book.
<i>Reservations</i>	Statements made by a State at the time of becoming a party to the treaty, for example, that it wants to exclude or change the legal effect of certain parts of the treaty on that State.
<i>Signature</i>	When a State signs a treaty, it usually shows that the State intends to become party to the treaty. Once a State has signed a treaty, it must not act in a way that defeats the aim and purpose of the treaty.


Treaties address a wide range of inter-State issues including taxation, the environment, trade and cooperation between States on security and other issues. Human rights treaties are multilateral treaties.

The treaty system is based on the consent of States. The decision to adopt a particular treaty is made by each State out of its own free will. A State also has the right to renounce (formally withdraw from) the treaty it has ratified if it no longer wants to be bound by it.

Human rights treaties are either adopted by States under the control of the UN or at regional level under the control of a regional organisation such as the African Union (AU), for example:

- A UN treaty: the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).
- A regional treaty: the *African Charter on Human and Peoples' Rights* (African Charter).

b) Customary international law

EXAMPLE	<p><i>The principle of non-discrimination on the grounds of race and sex.</i></p>
	
INTERNATIONAL CUSTOM	

Customary international law is made up of rules of law flowing from the consistent conduct of States acting out of the belief that the law requires them to act in that way. In order for a practice to become a rule of customary international law, it must be accepted and followed by States over time out of a sense of legal obligation.

The practice must be followed by a significant number of States and not rejected by a significant number of States. In this way, States are bound by rules of customary international law without signing and ratifying them as a treaty.

3.1.2 The development of international human rights law

a) Forming the United Nations

The Second World War set the stage for the development of an international system for protecting and promoting human rights. It highlighted the need for some form of action by the international community to prevent another war and widespread violations of human rights. It also showed that domestic legal systems (the legal systems of particular countries) were not enough to protect the human rights of people living in those countries.

One of the leading advocates for recognising international human rights law was President Franklin D Roosevelt. In his famous 'Four Freedoms' speech, he argued for a new world order governed by four key freedoms – freedom of speech and expression, freedom of worship, freedom from want, and freedom from fear. This speech inspired the development of the current international system of human rights.

The basis for developing international human rights law was set out in the UN Charter that established the UN in 1945. While the UN Charter did not actually create a system for protecting human rights, it clearly recognised the promotion of and respect for human rights as an important goal to be achieved by the UN and its Member States.

South Africa played an important role in the creation of the UN and has been a party to the UN Charter since the beginning. However, South Africa was also one of the eight countries that abstained from adopting the UDHR. South Africa's apartheid policies of racial discrimination led to a number of steps being taken against it by the UN. In 1974, South Africa was excluded from participating in the General Assembly of the UN and from participating in the activities of a number of specialised agencies of the UN, such as the International Labour Organisation (ILO) and the Food and Agriculture Organisation (FAO).

b) Adopting the Universal Declaration of Human Rights

The rights and freedoms referred to in the UN Charter were first defined in the UDHR. This declaration was adopted by the General Assembly of the UN in 1948. As it is not a treaty, it is not a legally binding document.

However, today the UDHR is almost universally accepted as being the main guide to the meaning of the human rights commitments in the UN Charter, and most of its provisions have been included in treaties and national constitutions. Some of its provisions have also become part of customary international law. Significantly, the UDHR protects both civil and political rights *and* socio-economic rights.

c) Adopting the ICESCR and the ICCPR

Efforts to transform the UDHR into a legally binding treaty led in 1966 to the UN General Assembly adopting the ICESCR and the *International Covenant on Civil and Political Rights* (ICCPR). These covenants came into force in 1976 when enough States had ratified them.

The ICESCR protects economic, social and cultural rights, while the ICCPR protects civil and political rights. These treaties were adopted separately because of the disagreements between States that arose during the negotiations leading to their adoption. Western States argued for the recognition of civil and political rights only, but not socio-economic rights. The reasons for this centred on the possible differences between the two sets of rights. Socio-economic rights were considered to be positive rights requiring States to take action. They were therefore expensive rights that could not be easily realised.

Socio-economic rights were also considered to be unsuitable for judicial enforcement because they involved resource allocation – a function seen as part of the mandate for the legislative and executive branches of governments. Eastern States argued for recognising socio-economic rights because these rights were consistent with their political ideology at the time.

Adopting two separate treaties marked a victory for the Western States:

- Socio-economic rights in the ICESCR were defined with internal limitations. These rights were to be realised “progressively” and “within available resources”. No specific monitoring body was created for them and they did not have individual or State complaint mechanisms.
- Civil and political rights in the ICCPR were defined without internal limitations. The Human Rights Committee was created to monitor their implementation. It was given power to hear individual and inter-State complaints, and to consider State reports on realising these rights.

Since then, socio-economic rights have suffered from a lack of proper legal recognition and from inferior enforcement mechanisms.

At the time of writing, there are 151 State parties to the ICESCR, and 154 to the ICCPR. South Africa signed the ICESCR and the ICCPR on 3 October 1994. However, it ratified the ICCPR only on 10 December 1998 and has to date not ratified the ICESCR.

The fact that South Africa has a progressive *Constitution (Act 108 of 1996)* that recognises a wide range of socio-economic rights is not a justification for not ratifying the ICESCR. South Africa should have nothing to fear by ratifying the ICESCR since obligations under our ICESCR would be similar to its duties under our Constitution.

EXAMPLES



ADVANTAGES OF RATIFYING THE ICESCR

- *South Africa would be able to call for international assistance from other State parties to the ICESCR to implement its socio-economic rights obligations under the ICESCR. This is because this treaty recognises the significance of international cooperation and assistance in realising these rights.*
- *The ICESCR could be an important bargaining tool with international financial institutions to resist donor or trade conditions that may compromise realising socio-economic rights under the ICESCR.*

d) Other human rights treaties

The UDHR, the ICESCR, and the ICCPR and its two Optional Protocols, form what is known as the *International Bill of Rights*. These documents contain the core of the human rights standards recognised by the international community.

There are a number of other treaties within the UN system dealing with human rights. Most of these treaties are specialised, as they deal with a specific issue or subject.

EXAMPLES



UN HUMAN RIGHTS TREATIES

- *International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965.*
- *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1979.*
- *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), 1984.*
- *Convention on the Rights of the Child (CRC), 1989.*


3.1.3 Regional systems for protecting human rights

In addition to the UN system for human rights protection, three regions in the world (Europe, the Americas and Africa) have developed their own regional human rights mechanisms.

Regional systems add to the international system of human rights in many ways:

- Regional treaties can consider the specific circumstances affecting the region in defining the rights to be protected. At the international level, regional circumstances may not be fully reflected because of the compromises reached during negotiating treaties.
- Regional mechanisms for protecting human rights can also be more accessible than the UN ones, with less distance and fewer costs needed to monitor or enforce the rights.

The African regional system was established in 1981 when the African Charter was adopted by the Organisation of African Unity (OAU). The OAU has since been dissolved and replaced by the African Union (AU). Since 1981, two more human rights treaties have been adopted in Africa focusing on protecting children's rights and women's rights.


EXAMPLES	
	
TREATIES IN THE AFRICAN REGIONAL SYSTEM	<ul style="list-style-type: none"> • <i>African Charter on Human and Peoples' Rights, 1981.</i> • <i>African Charter on the Rights and Welfare of the Child, 1990.</i> • <i>Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.</i>

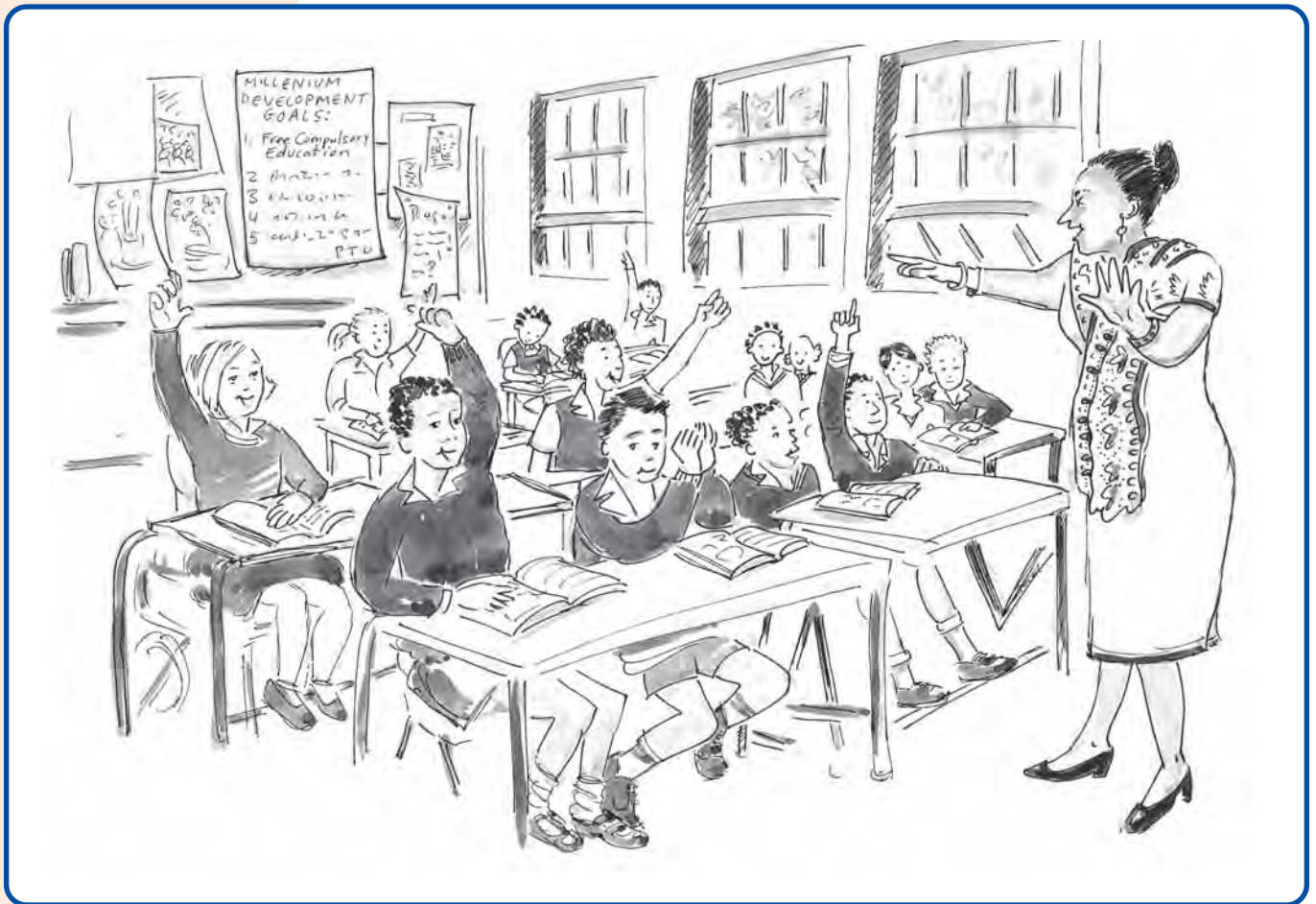
3.1.4 International and regional policies

a) Millennium Development Goals

On 8 September 2000, the UN General Assembly adopted the *UN Millennium Declaration* affirming the principles and purposes of the UN Charter.

Through this Declaration, world leaders agreed to set time-bound and measurable goals for combating poverty and environmental degradation, protecting the vulnerable, promoting and protecting human rights and democracy, meeting the special needs of Africa, and securing peace and security.

EXAMPLES	
	
DEVELOPMENT GOALS FOR 2015	<ul style="list-style-type: none"> • <i>Halve extreme poverty and hunger.</i> • <i>Achieve universal primary education.</i> • <i>Empower women and promote equality between women and men.</i> • <i>Reduce the mortality of children under the age of 5 by two-thirds.</i> • <i>Reduce maternal mortality by three-quarters.</i> • <i>Reduce the spread of diseases, especially HIV and malaria.</i> • <i>Ensure environmental sustainability.</i> • <i>Create global partnership for development, with targets for aid, trade and debt relief.</i>



These goals, now popularly known as the *Millennium Development Goals* (MDGs), provide a framework for the UN and all States to work towards achieving a common goal. With assistance from the UN and other international organisations, States have to integrate the MDGs in their programmes and policies. The UN Secretary General prepares a global report on the extent of achieving the MDGs. Countries have also begun to produce their own reports to complement the global report of the UN Secretary General.

Civil society has a role to play in ensuring that States make progress in achieving the MDGs. In order to effectively monitor your country's progress, you can join the Millennium Campaign, an initiative of the UN that supports efforts of people aimed at holding their governments accountable for the MDGs.

To link with the Millennium Campaign, see our useful websites on page 124.

b) NEPAD

What is NEPAD?

The New Partnership for Africa's Development (NEPAD) is an important economic and development programme adopted by African leaders in 2001 to eradicate poverty and to participate actively in the world economy. It aims to end Africa's underdevelopment and marginalisation from the globalisation process.

The long-term aims of NEPAD are:

- To eradicate poverty in Africa and to place African countries, both individually and collectively, on a path of sustainable growth and development, and thus halt the marginalisation of Africa in the globalising process.
- To promote the role of women in all activities.

The expected outcomes of NEPAD are:

- Economic growth and development, and increased employment.
- Reducing poverty and inequality.
- Diversifying productive activities.
- Enhancing international competitiveness and increased exports.
- Increasing African integration.

NEPAD has a Programme of Action that identifies three priority areas – securing conditions for sustainable development, undertaking policy reforms and increased investment in certain identified priority sectors, and mobilising resources.

The Implementation Committee

At the time of its adoption, the NEPAD document did not set out any mechanism for its implementation. This task was left to the Heads of State promoting the initiative, working under a Heads of State Implementation Committee, consisting of five Heads of States (the promoters of NEPAD) and 15 others to be appointed (three for each region). The AU Chairperson and the Head of the AU Commission are also part of the Committee.

The powers of this Committee are to identify strategic issues, set up mechanisms for reviewing progress on the mutually agreed targets, and review progress in the implementation of past decisions. The Committee reports to the AU Assembly of Heads of State and Government annually.

The African Peer Review Mechanism

The main monitoring body of NEPAD is now the African Peer Review Mechanism (APRM). States choose whether to participate in the review mechanism or not. The APRM has four parts:

- The Committee of Participating Heads of State and Government (called the *APR Forum*) acts as the highest decision-making authority in the APRM process.
- The Panel of Eminent Persons (called the *APR Panel*) oversees the review process, considers review reports and makes recommendations to the APR Forum. The APR Panel is made up of between five and seven eminent persons, who have distinguished themselves in careers relevant to the work of the APRM.
- The APRM Secretariat provides the secretarial, technical, coordinating and administrative support services for the APRM.

For details about countries accepting the APRM and the review of participating countries, see NEPAD's website address on page 124.

- A Country Review Team is appointed only for the period of a country review visit. Its composition has to be carefully designed to enable an integrated, balanced, technically competent and professional assessment of the reviewed country, and is approved by the APR Panel.

The APRM is designed to assess the quality of a participating country's draft Programme of Action and help it to strengthen its capacity to implement it. Once approved, follow-ups are made to check on the country's progress in implementing the Programme of Action. So far, 23 countries, including South Africa, have voluntarily agreed to the APRM.

Civil society has a role to play in the APRM process. Non-governmental organisations (NGOs) can bring important information, including information on human rights, to the attention of the APRM. This can help to assess the Programme of Action of a country under review. For example, civil society was allowed to participate in the review process conducted by members of the APRM in South Africa in November 2005.

NEPAD and realising socio-economic rights in Africa

NEPAD is an economic programme, rather than an international treaty. Its legal basis in international law is therefore weak. Its main focus is on eradicating poverty and facilitating the development of the continent.

Realising human rights does not form part of the priority areas of NEPAD, although reference to human rights is made in it. Its implementation mechanisms are also not linked to the regional human rights monitoring bodies on the continent such as the African Commission on Human and Peoples' Rights (African Commission).

EXAMPLES



OPPORTUNITIES TO USE NEPAD TO HELP REALISE SOCIO-ECONOMIC AND OTHER RIGHTS

- *In the review process, the APRM mechanism pays attention to the human rights record of a country. While the weight given to a country's commitment to human rights remains unclear, the review process offers an opportunity for bringing important human rights concerns in the country under review to international attention.*
- *Realising NEPAD's aims may also involve realising socio-economic rights, because poverty and socio-economic rights overlap in important ways. Ending poverty may mean better enjoyment of socio-economic rights, while realising socio-economic rights is also vital in efforts to do away with poverty.*

These opportunities show us that it is important for civil society to take the APRM process seriously and to participate in it to advance socio-economic rights.

3.2

Socio-economic rights in international human rights law

3.2.1 Strengthening the protection of socio-economic rights

Although the adoption of the ICCPR and the ICESCR as separate treaties weakened the protection of socio-economic rights, the international community has since stressed that all rights are 'indivisible and interdependent'. This was reinforced in the *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights in 1993.

In keeping with this belief, the international community has increasingly accepted that the enforcement mechanisms for economic, social and cultural rights need to be strengthened.

EXAMPLES



OPPORTUNITIES FOR MAKING COMPLAINTS

- *Economic, social and cultural rights under CERD, the African Charter, the African Children's Charter, and the African Women's Protocol are subject to individual and inter-State complaints.*
- *The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women was adopted on 12 March 1999, providing for both individual petitions and an enquiry procedure. It came into force on 22 December 2000.*
- *The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights was adopted in 1988 and came into force on 16 November 1999. It provides for individual petitions to the Inter-American Commission and Inter-American Court on Human Rights for alleged breaches of trade union rights and the right to education.*
- *The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints was adopted in 1995 and came into force on 7 January 1998. This Protocol allows NGOs, trade unions and employers' organisations to refer complaints alleging breaches of the Charter to the Committee of Independent Experts.*

In 2001, the UN Commission on Human Rights appointed an independent expert to examine the question of an Optional Protocol to the ICESCR. At its 59th session, the Commission established a working group to consider options for this Optional Protocol. The working group was mandated to report to the Commission at its 60th session and make specific recommendations. Once adopted, this Optional Protocol will give economic, social and cultural rights similar enforcement tools to the ones used for civil and political rights in the ICCPR.

NGOs with an interest in socio-economic rights and UN Economic and Social Council (ECOSOC) consultative status can attend meetings of the working group. Many NGOs are also working together to push for the adoption of the Optional Protocol. They include the Economic, Social and Cultural Rights Network and the International Commission of Jurists.

For details of the websites of these structures and information on the Optional Protocol, see the websites listed on page 124.

3.2.2 Key treaties protecting socio-economic rights

ICESCR

Rights protected:

The most important UN treaty dealing with socio-economic rights is the ICESCR. It protects the right to work and to just and favourable conditions of work, trade union rights, the right to social security, family rights, the right to an adequate standard of living (including adequate food, clothing and housing), the right to health, and educational and cultural rights.

Monitoring:

The supervisory body is the Committee on Economic, Social and Cultural Rights (CESCR), established under the ECOSOC Resolution 1985/17 of 28 May 1985. The CESCR has the power to receive State reports, but not to decide individual and inter-State petitions. The draft Optional Protocol to the ICESCR (to extend the powers of the CESCR to receive and determine individual and inter-State petitions) is still being considered.

CERD

Rights protected:

CERD prohibits discrimination based on race. It calls on States to eliminate racial discrimination in all its forms and to guarantee the right of everyone to enjoy human rights. The rights listed include the right to work, trade union rights, the right to housing, the right to public health, rights to medical care, social security and social services, the right to education and training, and the right to equal participation in cultural activities.

Monitoring:

The implementation of CERD is monitored by the Committee on the Elimination of Racial Discrimination (CERD Committee). This Committee has the power to receive State reports and inter-State complaints, and individual complaints (in cases where the State against which the complaint is made has accepted the right of the Committee to receive individual complaints).

CEDAW

Rights protected:

A number of articles of CEDAW deal with women's equal access to socio-economic rights. These include rights dealing with education, work, health, rural women and the family.

Monitoring:

The supervisory body is the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee). It has the power to receive State reports. Individual petitions may be brought against States that have ratified the Optional Protocol to CEDAW.

CRC

Rights protected:

Some parts of the CRC deal with children's socio-economic rights. These rights focus on the survival and development of the child, family responsibilities, children living with mental or physical disabilities, health, social security, an adequate standard of living and education.

Monitoring:

The supervisory body is the Committee on the Rights of the Child (CRC Committee). This body has the power to receive State reports.

Refugee Convention

Rights protected:

Parts of this Convention deal with socio-economic rights of refugees including employment, rationing of products in short supply, housing, education, public relief, labour legislation and social security.

Monitoring:

The Office of the High Commissioner for Refugees is the supervisory body. It can request information and statistics from States.

African Charter

Rights protected:

For South Africa, the most important regional treaty protecting socio-economic rights is the African Charter. It protects these socio-economic rights: work, health, education, development, environment, and special assistance to the family, children, the aged, and people living with disabilities.

Monitoring:

The supervisory body is the African Commission on Human and Peoples' Rights. This body has the power to receive State reports, inter-State and individual complaints, and undertake investigations. On 25 January 2004, the *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* came into force. The Court will have the protective mandate, while the African Commission will retain the mandate to promote these rights.

African Children's Charter

Rights protected:

The African Charter on the Rights and Welfare of the Child has various articles protecting children's socio-economic rights. These deal with the survival and development of the child, education, children living with disabilities, health, child labour, family responsibilities, and the right to development.

Monitoring:

The supervisory body is the African Committee of Experts on the Rights and Welfare of the Child (African Committee). It has the power to receive State reports, inter-State and individual complaints, and undertake investigations.

African Women's Protocol

Rights protected:

The AU adopted the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* on 11 July 2003. It is yet to become operational. The African Women's Protocol protects a wide range of the rights of women, including these socio-economic rights: education, work, health and reproductive rights, food security, adequate housing, positive cultural context, peace, development and environment.

Monitoring:

The African Commission and the African Court have the same powers to monitor the implementation of this Protocol as they have for the African Charter.

Other examples of regional treaties protecting economic and social rights:

- In Europe, the *European Social Charter* (1961).
- In the Inter-American System, the *American Convention on Human Rights* (1969) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (1988).

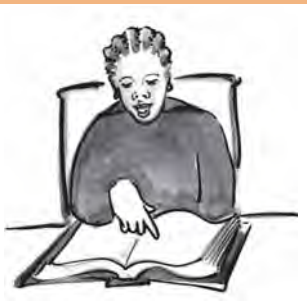
3.2.3 Interpreting socio-economic rights under international law

Socio-economic rights remain underdeveloped compared to civil and political rights due to the fact that they have received too little legal protection in international and domestic law. There is now an increasing body of materials that can help us to understand the content of these rights.

We have seen how some of the supervisory bodies have the power to receive petitions. The views of these bodies given in their decisions become authoritative interpretations of these rights. For example:

- The Human Rights Committee of the ICCPR has found violations of some civil and political rights in cases based on facts revealing violations of socio-economic rights.
- The African Commission has handed down a number of decisions interpreting socio-economic rights and finding States responsible for violating rights under the African Charter.

COURT CASE



NIGERIA

In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (Communication 155/96), the African Commission decided that:

- Nigeria had violated a range of rights, including the right not to be discriminated against, the right to life, the right to property, the right to health, the right to family protection, the right of peoples to freely dispose of their wealth and natural resources, and the right to a general satisfactory environment.
- Nigeria had violated the right to housing and the right to food, which are not expressly (directly) recognised by the African Charter.

According to the African Commission, the right to housing is implicitly (indirectly) recognised by a combined reading of the rights to property, family protection, and to enjoy the best attainable state of mental and physical health. Similarly, the right to food is implicitly recognised by a combined reading of the provisions guaranteeing the rights to life, and to enjoy the best attainable state of physical and mental health, and economic, social and cultural development. The Commission decided Nigeria had violated these rights because it:

- Allowed its military forces to be used by oil companies to perpetrate various human rights violations.
- Did not regulate and control the oil companies to prevent polluting the environment.

COURT CASE



THE GAMBIA

In *Purohit and Moore v The Gambia* (Communication 241/2001), the complainants argued that:

- The Lunatic Detention Act, the principal legislation governing mental health, was outdated and inadequate to protect the rights of mental patients.
- The Act did not provide safeguards to protect the rights of people undergoing diagnosis for mental illness, and during their certification and detention as mental patients.
- The Psychiatric Unit, where mental patients were detained, was overcrowded, the living conditions in the Unit were poor, and people were treated without giving consent.

The African Commission decided that The Gambia had violated the right to health and other rights.

a) General Comments

For information on interpreting our Bill of Rights, see page 111.

For a list of General Comments, see page 122.

Supervisory bodies established under UN treaties or human rights systems have established a practice of adopting General Comments that interpret specific provisions of treaties.

The CESCR has issued 16 General Comments on the ICESCR. The purpose of these General Comments is to help clarify the meaning of the rights and duties in the Covenant. General Comments have also been useful in interpreting the provisions of the South African Constitution's Bill of Rights.

EXAMPLE



GENERAL COMMENT 3

*The CESCR's General Comment No. 3 on the nature of State party obligations has been used by the Constitutional Court to interpret "progressive realisation" in section 27 of the South African Bill of Rights. In the **Government of the Republic of South Africa and Others v Grootboom and Others** (Grootboom case), the Court referred to paragraph 9 of General Comment 3 and said that:*

"Although the Committee's analysis is intended to explain the scope of State parties' obligations under the Covenant, it is also helpful in plumbing the meaning of 'progressive realisation' in the context of our Constitution" (paragraph 45 of judgment).

b) Concluding Observations

When considering State reports, some supervisory bodies adopt Concluding Observations. These are comments, concerns and recommendations made by supervisory bodies after considering a State report. Concluding Observations often also include interpretations of human rights provisions and the duties they impose.

For example, the CESCR may say that particular actions of a State party (eg cutbacks in social security) are a violation of the rights to social security and an adequate standard of living protected in the ICESCR. Concluding Observations are therefore also a valuable aid to interpreting socio-economic rights provisions in our Constitution.

**Concluding observations:
The right to social security in Zambia**

The CESCR:

- Noted its concern about the low amount of money spent on social security and that comprehensive social protection was not available to the vast majority of the population, especially low-income workers, workers older than 55 and those employed in the informal sector.
- Expressed concern that privatised social security schemes were not financially sustainable, leaving their beneficiaries without adequate protection.
- Urged Zambia to extend the protection of the National Pension Scheme Authority to cover low-income workers, workers older than 55 and workers employed in the informal sector, especially in rural areas.
- Recommended that Zambia more strongly monitor private social security schemes and funds so that these schemes are able to provide adequate social protection for their beneficiaries.

Concluding Observations of the Committee on Economic, Social and Cultural Rights: Zambia, 2005

c) Powers of UN agencies

UN agencies may also have powers to implement socio-economic rights. Examples are the United Nations Educational and Scientific Organisation

(UNESCO) and the Food and Agriculture Organisation (FAO).

When carrying out their mandate, these organisations also adopt documents interpreting socio-economic rights. These can also be used when interpreting the South African Constitution.

EXAMPLE



FOOD AND AGRICULTURE ORGANISATION

On 24 November 2004, the FAO adopted Voluntary Guidelines on the Right to Adequate Food.

These Guidelines provide some practical steps on how States can implement this right, and they help us understand the meaning of this right and its obligations.

3.3

Implementation mechanisms

3.3.1 Treaty mechanisms

Most human rights treaties create their own monitoring body. For example, each one of the six UN treaties listed on page 92, as well as the African Charter, have their own

supervisory body, whose main job is to see to it that States meet their obligations (duties) under the treaty.

The ICESCR is one of the few treaties that did not provide for a specific monitoring body. However, the ECOSOC created the CESCR to monitor the implementation of this treaty.

These supervisory bodies usually have between 10 and 23 members, who are meant to be independent human rights experts, elected by State parties. These bodies are usually called 'committees'.

The supervisory bodies use four main types of monitoring systems: reporting systems, individual complaint systems, inter-State complaint systems and investigatory systems.

EXAMPLES



BODIES SUPERVISING TREATIES

- *The supervisory body of the ICCPR is the HRC.*
- *The supervisory body of the ICESCR is the CESCR.*
- *The supervisory bodies of the African Charter are the African Commission and the African Court.*



a) Reporting systems

States that have ratified a treaty must submit regular reports to the supervisory body on progress made in implementing the treaty, for example, reporting every two years. This procedure is based on dialogue between the supervisory body and the State party.

Once an official country report is submitted, together with other information such as an NGO shadow report, members of the supervisory body prepare a list of questions. These questions form the basis of the dialogue with the State party's representatives. At the end of the discussion, the supervisory body adopts Concluding Observations on the extent to which the State has implemented the treaty.

The problem with the reporting process is that the Concluding Observations made at the end of the process are not legally binding on States. There is no way that the supervisory body can force a State to implement the observations.

However, a conclusion that a State has not met its human rights duties can embarrass the State greatly in the international community and provide a platform for public pressure on the State to deal with the situation. Also, perceptions about a country's human rights record can affect contact between countries around tourism, trade and cultural exchanges.

b) Individual complaint systems

The individual complaint system gives the supervisory body the power to receive written statements from individuals, who claim to be victims of violations of any of their rights protected in the particular treaty:

- After receiving the defending statement of the State that the allegation was made against, the supervisory body decides if rights have been violated (called its 'views').
- The supervisory body then recommends to the State that it gives the affected person a suitable remedy, eg pays compensation to that person.

Supervisory bodies usually do not automatically have the power to receive complaints. A State has to specifically accept the authority of the supervisory body to deal with individual complaints against it. At the moment, CERD, ICCPR and CAT have this additional form of supervision for those States that have accepted it.

All the three AU human rights treaties – the African Charter, the African Children's Charter and the African Women's Protocol – recognise an automatic right of individuals to bring complaints against State parties alleged to have violated their rights.

c) Inter-State complaint systems

A State party to a treaty can submit a claim alleging that another State party is not complying with the provisions of a particular treaty. This happens when both States have accepted the authority of the particular supervisory body to receive inter-State communications or petitions.

The ICCPR, CERD, CAT and the African Charter have an inter-State complaint system in addition to their reporting procedures.

For more on shadow reports, see page 114.

d) Investigatory systems

EXAMPLES



TREATIES WITH INVESTIGATING POWERS

- *The CAT (article 20).*
- *The Optional Protocol to CEDAW also allows the CEDAW Committee to enquire into serious violations of CEDAW. But State parties can choose to exclude the right of the Committee to hold an enquiry by making a declaration at the time the State becomes a party to the Optional Protocol. This Optional Protocol also gives individuals the right to complain under CEDAW.*

Some treaties give the supervisory body special powers to investigate if a particular State is violating the human rights protected by the treaty. So far, these powers have not been used to investigate violations of socio-economic rights.

3.3.2 Special procedures

a) UN Commission on Human Rights

Special procedures are special mechanisms for protecting human rights. Special procedures were created by the UN Commission on Human Rights, a body established by the ECOSOC.

The UN Commission on Human Rights developed special procedures to deal with:

- Specific human rights problems, called *thematic procedures*, or
- The human rights situation in a particular country, known as *country-specific procedures*.

Special procedures usually consist of an individual called a special rapporteur, representative or independent expert, or a group of individuals called a working group.

EXAMPLES



THEMATIC PROCEDURES

Special rapporteurs

- *Special Rapporteur on the Right to Education*
- *Special Rapporteur on the Right to Food*
- *Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living*
- *Special Rapporteur of the Commission on Human Rights on the Right of Everyone to the Enjoyment of the Right to the Highest Attainable Standard of Physical and Mental Health.*

Working groups

- *Open-ended Working Group to Consider Options Regarding the Elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.*

Independent experts

- *Independent Expert on the question of human rights and extreme poverty*
- *Independent Expert on the effects of economic reform policies and foreign debt.*

EXAMPLES



COUNTRY PROCEDURES

- *Special Rapporteur on the situation of human rights in the Sudan, 2005*
- *Independent Expert on the situation of human rights in the Democratic Republic of the Congo, 2004.*

Special procedures mainly report on serious human rights violations so that the UN Commission on Human Rights or General Assembly may take appropriate action. They also help to identify ways of improving the implementation of human rights. The main role of thematic procedures is to:

- Gather information on the implementation of a particular right.
- Identify patterns of violations of rights and perpetrators of violations.
- Propose methods of preventing violations or for improving the realisation of the right.

While thematic procedures deal with implementing a right internationally, country-specific procedures focus on implementing particular human rights within a given country. Country-specific procedures are established to provide the UN Commission on Human Rights and other relevant bodies with a solid analysis of the human rights situation in a particular country.

b) **New UN Human Rights Council**

The system of special procedures is currently under review. This follows the establishment of the UN Human Rights Council in April 2006 to replace the UN Commission on Human Rights. The Human Rights Council was formed as a response to growing concerns that the Commission on Human Rights:

- Had become too political.
- Had a membership open to known human rights violators.
- Could not act in time to address serious human rights concerns in emergency situations.
- Had procedures that blocked its effective operation.

The Human Rights Council was established to strengthen the protection of international human rights. It falls under the UN General Assembly and its 47 members are elected directly by the General Assembly – this reduces the chances of States with poor human rights records being members.

The functions of the Human Rights Council are to:

- Promote the full implementation of human rights.
- Follow up on the goals and commitments related to promoting and protecting human rights.
- Do a periodic review of the fulfilment by each State of its human rights duties.
- Contribute towards the prevention of human rights violations.

The Human Rights Council's founding resolution gives it a specific obligation to:

“Assume, review and, where necessary, improve and rationalise all mandates, mechanisms, functions and responsibilities of the Human Rights Commission in order to maintain a system of special procedures, expert advice and a complaint procedure.”

The review process should be completed in June 2007. The hope is that its new mandate gives the Human Rights Council a better chance of success in promoting and protecting human rights, compared to the Commission on Human Rights. The success of the new Council will depend on the political will of States. However, some concerns have been raised about:

- Lack of clarity on the role that NGOs should play in the procedures of the Human Rights Council.
- Lack of transparency during the drafting of the resolution creating the Human Rights Council.
- The fact that the first Human Rights Council includes some States with bad human rights records.

3.4

The relevance of international law for South Africa

3.4.1 Drafting the Bill of Rights

EXAMPLE



THE ICESCR AND OUR BILL OF RIGHTS

For more on progressive realisation, see Chapter 1 on page 38.

- *Article 2 of the ICESCR says that State parties must “take steps ... with a view to achieving progressively the full realisation of the rights recognised”.*
- *Section 27(2) of the South African Bill of Rights dealing with the right of access to health care, food, water and social security says that the State “must take reasonable measures to ... achieve the progressive realisation of each of these rights”.*

International law played a key role in the drafting of our *interim Constitution (Act 200 of 1993)* and final Constitution of 1996. There are a number of clauses in the Bill of Rights of the final Constitution that are similar to clauses in international treaties.

3.4.2 Interpreting the rights in the Bill of Rights

The Constitution gives international law a special role when South African courts and other bodies have to interpret the rights in the Bill of Rights. Section 39 of the Constitution says that when a court or other body interprets a right in the Bill of Rights, it “must consider international law”.

In the *Grootboom* case, the Constitutional Court said that international law, including non-binding international instruments, was an important guide to the interpretation of the Bill of Rights. The weight to be given to a rule of international law would vary. For example, the Court said that a principle of international law that is binding on South Africa may be directly applied in South African law.

The Constitutional Court has relied on General Comments of the CESCR when interpreting socio-economic rights provisions under the Bill of Rights. For example, in the *Grootboom* and *TAC* cases (*Minister of Health and Others v*

EXAMPLES



MINIMUM CORE OBLIGATIONS FOR THE RIGHT TO HEALTH

- *The duty to ensure the right to health facilities, goods and services on a non-discriminatory basis.*
- *The duty to provide essential drugs.*
- *The duty to ensure equitable distribution of all health facilities, foods and services.*

Treatment Action Campaign and Others), the Constitutional Court adopted the same meaning as the CESCR for the terms “progressive realisation” and “available resources”. However, it refused in both cases to adopt the ‘minimum core obligations’ concept of the Committee, arguing that South African conditions did not justify doing this.

Generally, therefore, the Constitutional Court has relied on

For more on ‘minimum core obligations’, see Chapter 1 on page 39.

international law to interpret provisions in the Bill of Rights that are similar to international law provisions. But it has not followed the interpretations of international law where the provisions of the Bill of Rights are not the same as international law provisions, or where specific circumstances in South Africa call for a different interpretation.

3.4.3 Applying international law in South Africa’s legal system

Under our Constitution (section 231):

- An international treaty is only binding on South Africa once it is approved by resolution of both Houses of Parliament – in other words, the National Assembly and the National Council of Provinces.
- A ratified treaty usually only becomes part of South African law when it is incorporated (included) in our law by national legislation.



- The exception to this general rule is when a treaty has a provision that can be implemented by our courts without the need for legislation (called *self-executing provisions*). Provisions like this form part of South African law, unless they go against the Constitution or an Act of Parliament. For example, treaty provisions protecting the right to non-discrimination are usually considered self-executing, and can thus be applied by our courts.

EXAMPLES



MAKING HUMAN RIGHTS TREATIES EFFECTIVE IN OUR LAW

- *None of the human rights treaties ratified by South Africa have been fully incorporated into South African law. These treaties are therefore not as a whole binding on South African courts. However, some of the provisions in these treaties have been included in various pieces of legislation. For example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 includes provisions of CERD and CEDAW.*
- *The Hague Convention on the Civil Aspects of International Child Abduction, 1980, was included in our national law by the Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.*

3.4.4 When a treaty is not made part of South African law

When a treaty is not made part of our law:

- It is not binding on South Africa, but is still binding under international law – thus South Africa can be held accountable through international mechanisms.
- The courts and other bodies like the South African Human Rights Commission can also use the treaty to interpret the meaning of the rights in the Bill of Rights.

At the moment, South Africa has strong mechanisms for the protection of human rights at national level. International law can help us strengthen the protection of human rights that we have in our Constitution.

UN treaties including socio-economic rights that South Africa has ratified

Treaty	Date of ratification
CRC	16/06/1995
CEDAW	15/12/1995
Refugee Convention	12/01/1996
CERD	10/12/1998

Regional treaties including socio-economic rights that South Africa has ratified

Treaty	Date of ratification
African Charter	09/07/1996
African Children's Charter	07/01/2000
African Women's Protocol	17/12/2004

At the date of writing:

- South Africa had signed the ICESCR on 3 October 1994, but not yet ratified it.
- South Africa ratified the ICCPR and CAT on 10 December 1998.

3.5

Using international human rights mechanisms

We have seen that there are four types of supervisory systems of treaties: the reporting, individual complaint, inter-State complaint and investigatory systems. In this part, we focus mainly on the reporting and individual complaint systems.

3.5.1 Using reporting systems

Once a State ratifies one of the UN human rights treaties, it has to prepare and send reports to the supervisory body on the progress that it has made in realising the rights in the treaty.

Under the ICESCR, State parties must submit:

- A first report within two years after ratifying the treaty.
- Further reports every five years, or whenever the CESCR requests a report.

Under the African Charter, State parties have to submit a report every two years from the date the Charter came into force, or from the date of ratification by the State.

South Africa submitted its first and only report to the African Commission on 14 October 1998.

NGOs can play an important role by participating in the reporting system. Depending on the supervisory body, NGOs can make verbal or written submissions to the Committee. These submissions can influence:

- The type of questions that the supervisory body asks the reporting State.
- The Concluding Observations after considering the State's report.

EXAMPLES



TYPES OF SUBMISSIONS

- *A list of suggested questions.*
- *A short report or letter to the Committee, including relevant information that is not included in the official State report.*
- *A **shadow report** (sometimes also called a 'parallel' or 'alternative' report). This is an independent report, usually submitted by national or international NGOs, commenting on the implementation of the treaty by the State.*

a) Shadow reports

A shadow report will need a lot of extra work by the staff of your organisation. It also costs a lot of money to send someone to attend the session in Geneva or The Gambia (for the African Commission), where South Africa's report is going to be considered.

Thus, it is a good idea for a broad coalition of NGOs to work together on a shadow report, and to raise funds especially for this project. Collaboration among NGOs also helps to eliminate problems of duplicating information or NGOs giving conflicting information.

CASE STUDY



CHILDREN'S RIGHTS IN SOUTH AFRICA

In 1998, the South African National Children's Rights Committee submitted a shadow report to the initial report of the South African Government under the CRC. Each of the country's nine provinces had a task team overseeing the shadow report process, and a national task team was established to consolidate the report.

The reasons for preparing this shadow report were to:

- Give relevant information where gaps in the country report were identified.
- Table civil society's additional recommendations on children's rights delivery and performance monitoring in South Africa.
- Produce a document that will guide reconstruction and development initiatives of the children's rights movement in South Africa.

b) CESCR: NGO participation

GUIDELINES



NGO PARTICIPATION IN CESCR REPORTING

The CESCR values the contribution of NGOs in its work. Thus, it allows NGOs to participate in its work in many ways. When considering State party reports, the CESCR allows for the participation of NGOs at various stages.

1. Participation when a State ratifies the ICESCR

- When a State party ratifies the ICESCR, NGOs working in the area of socio-economic and cultural rights are encouraged to make contact with the CESCR's secretariat. This early contact is important because it enables the CESCR to get information from national NGOs when a State party submits a report later on.
- NGOs can also assist the Government in the preparation of its report.

2. Participation following the submission of a State party's report

- NGOs may submit any type of information to the secretariat of the CESCR when a State has just submitted its report. These could include press clippings, NGO newsletters, videos, reports, academic publications, studies and joint statements.
- This information will help the CESCR to develop a country profile that provides an overview of the human rights situation of the reporting State.



3. Participation in the pre-sessional working group

- When a State report is received, the CESCR appoints a pre-sessional working group (made up of five of its members) to prepare the list of issues arising from State reports to be discussed at the CESCR's next session. Each of the five members acts as a country rapporteur for one of the State reports to be considered.
- NGOs can submit any relevant information to the country rapporteur or to the Secretariat before the meeting of the working group. They may also make oral statements during the pre-sessional working group meeting.
- This information will help the working group to draft the list of issues to be addressed by the State party before the session of the CESCR at which the report will be considered.

4. Participation at the CESCR's session

- NGOs that have a general or special consultative status with the ECOSOC may submit a written statement (2000 words long) to the CESCR at its reporting session. General consultative status is given to NGOs with a broad interest in ECOSOC activities. Special consultative status is given to NGOs with interest in specific aspects of ECOSOC activities.
- An NGO without a consultative status may submit a written statement (1500 words long) where it is sponsored by an NGO with consultative status.
- NGOs may also submit a shadow report providing an alternative or additional interpretation of the status of implementing the ICESCR in their country. They may also make an oral statement (15 minutes long) on the first day of the reporting session.

5. Participation in the follow-up procedure

- Once the CESCR makes Concluding Observations on the status of the implementation of the treaty in the reporting State, NGOs can help publicise these observations locally and internationally, and monitor the Government's implementation of them.
- NGOs can also keep the CESCR informed about the progress made by the State in following up on the observations.

6. Participation when a State does not report

- When a State party has taken too long to prepare a report, the CESCR can start its own review process. Then it will notify the country about its intentions and ask it to report as soon as possible. If the State still does not report, the CESCR can consider the status of implementing the ICESCR in the State without an official State report.
- NGOs can be called on to provide relevant information to the CESCR. NGOs should then submit information on each article of the treaty and make an oral presentation at the CESCR's NGO oral hearing.

CESCR Report, 7 July 2000

3.5.2 Using individual complaint systems

You can only use individual complaint systems under international law at the UN and regional levels:

- If there is no solution to a legal or human rights problem at the national level – in other words, within the national law of countries (called a *domestic remedy*), or
- If you have gone to the highest court of law or other forum in your country and cannot take the case any further – in other words, you have exhausted your domestic remedies.

The only exception to this rule is if the domestic remedies are unavailable, ineffective or take a very long time.

We have seen that communications or individual complaints can be submitted under each of:

- CERD.
- CEDAW.
- The African Charter.
- The African Children's Charter.
- The African Women's Protocol.

South Africa is a party to the African Charter and the African Children's Charter, and therefore must receive communications under these treaties. It has also accepted the complaint procedure under CERD.

3.5.3 Using non-treaty mechanisms

We have also referred to non-treaty mechanisms for protecting human rights. These mechanisms are increasingly being used to address violations of socio-economic rights.

NGOs can send relevant information on realising socio-economic rights to individuals acting as special rapporteurs, independent experts or members of a working group.

3.6

NGO guidelines on using international law

GUIDELINES



USING INTERNATIONAL LAW TO PROMOTE AND PROTECT SOCIO-ECONOMIC RIGHTS

1. Use the socio-economic rights in international law to argue and campaign for a progressive interpretation of the socio-economic rights in the South African Bill of Rights. This can be done through submissions to Parliament and government, campaigns on human rights issues, and in court cases.
2. Educate and share information with communities, government officials and judges about the socio-economic rights protected in international law and their relevance for South Africa.
3. Lobby the Government to ratify international treaties protecting socio-economic rights like the ICESCR, and to ratify the Optional Protocol allowing for individual complaints under treaties, eg to the ICCPR and CEDAW (when it comes into force).
4. Lobby the Government to pass legislation that makes international treaties effective in our national law.
5. Organise together with other NGOs, community organisations, trade unions and civics to prepare a shadow report under treaties such as the African Charter, the CRC, CEDAW, and CERD.
6. After you have tried unsuccessfully to get a remedy in South Africa, assist individuals or groups who have experienced violations of socio-economic rights to submit a complaint to a supervisory body under a treaty, eg the African Charter.
7. Link up with NGOs in other countries that are interested in using international law to advance socio-economic rights. Share experiences and learn from each other's successes and failures.
8. Link up with NGOs from other countries, especially in Africa, to form pressure groups to help to strengthen the implementation mechanisms for socio-economic rights.

Discussion ideas



TALKING POINT 1

Let's say that the Constitutional Court decided that the Government did not violate the right to health of mothers, who were denied access to antiretroviral treatment for purposes of reducing mother-to-child transmission of HIV. Which international human rights bodies would you approach to resolve the case? What arguments would you use?

TALKING POINT 2

What arguments can you think of to support the need to adopt an Optional Protocol to the ICESCR providing for a system of complaints to address violations of economic, social and cultural rights?

TALKING POINT 3

How can NGOs advocate for the more effective implementation of socio-economic rights at the African regional level?

TALKING POINT 4

Imagine your NGO has to draft a shadow report on South Africa for the African Commission on Human and Peoples' Rights. What key areas of concern in implementing socio-economic rights in South Africa would you highlight?



References and resource materials

Constitution, legislation and policy documents

Constitution of the Republic of South Africa, Act 108 of 1996.

Hague Convention on the Civil Aspects of International Child Abduction Act 72 of 1996.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Cases

Government of the Republic of South Africa and Others v Grootboom and Others 2000 (11) BCLR 1169 (CC).

Minister of Health and Others v Treatment Action Campaign and Others 2002 (10) BCLR 1075 (CC).

Individual complaints under international human rights treaties

Purohit and Moore v The Gambia, Communication 241/2001.

The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication 155/96.

International documents

Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988.

Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, 1995.

African Charter on Human and Peoples' Rights, 1981.

African Charter on the Rights and Welfare of the Child, 1990.

American Convention on Human Rights, 1969.

Charter of the United Nations, 1945.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984.

Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

Convention on the Rights of the Child, 1989.

Convention Relating to the Status of Refugees, 1951.

European Social Charter, 1961.

Hague Convention on the Civil Aspects of International Child Abduction, 1980.

International Covenant on Civil and Political Rights, 1966.

International Covenant on Economic, Social and Cultural Rights, 1966.

International Convention on the Elimination of All Forms of Racial Discrimination, 1966.

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, 1999.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 2004.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003.

Second Optional Protocol to the International Covenant on Civil and Political Rights, 1989.

The New Partnership for Africa's Development, 2001

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Claiming resources for socio-economic rights

CHAPTER 4



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KEY WORDS

Advocate	Mobilise and work for change, eg in budget allocations.
Budget allocation	This is money set aside for a particular purpose in the Budget. For example, the allocation to the Gauteng Social Development Department by the Gauteng Provincial Treasury in 2005–6 for developmental social welfare services has to be spent on delivering these services during 2005–6.
Consumer Price Index	The Consumer Price Index (CPIX) reflects the price of a representative basket of consumer goods and services less mortgage costs. The indexes are used to develop a number, called a 'deflator', used to adjust the value of budget allocations for the decrease in purchasing power caused by inflation.
Compliance	Whether or not you obey laws, policies or court judgments.
Conditional grants	These are allocations of money from one sphere of government to another, conditional on certain services being delivered or on compliance with specific requirements. An example is the conditional grant that was allocated by National Treasury through the National Department of Social Development to provincial social development departments to use for delivery of home- and community-based care in HIV/AIDS-affected communities.
Contingency Reserve	This is the amount in the Budget allocated to accommodate emergency expenditure needs, caused by changes in the economic environment.
Deflator	This is a number, calculated from an index measuring inflation, such as the CPIX that can be used to adjust forward estimates of budget allocations for expected sustained increases in prices (inflation).
Division of Revenue	The allocation of funds between the spheres of government under the Constitution.
Efficiency and effectiveness in use of resources	These two concepts measure how well resources allocated for spending by the State are used: <ul style="list-style-type: none">• There are <i>efficiency</i> gains when more services (outputs) are produced with the same amount of resources (inputs).• There are <i>effectiveness</i> gains when improvements in quality of services result in a more favourable impact on the beneficiary of services (in other words, the outcome of the budget allocation improves).

Equitable share	This is the share of revenue received by the spheres of government under the Constitution. The allocation, made annually through the Division of Revenue Act, comes from the National Revenue Fund – the fund for receiving all money raised by national government through taxes and other means.
Fiscal policy	Government’s decisions and plans on collecting revenue through taxes, spending on goods and services, and financing the budget deficit.
Fiscal year	The fiscal year is government’s 12-month accounting period that runs from 1 April to 31 March in South Africa.
Government budget deficit	A ‘balanced budget’ is when the Government’s total revenues equal its total expenditures for a given financial year. When the Budget is not in balance, it is either in deficit or surplus. A ‘budget deficit’ is a negative balance between budget expenditure and budget revenue in a particular financial year.
Government budget deficit reduction	This is a reduction in the negative balance between budget expenditure and budget revenue. Budget deficit reduction was one of the main targets of the Growth, Employment and Redistribution (GEAR) strategy, adopted by the Government in 1996.
Gross Domestic Product (GDP) and economic growth	<i>GDP</i> is a measure of the total national output, income or expenditure in the economy. <i>Economic growth</i> reflects the change in the value of GDP from calendar year to calendar year (1 January to 31 December). GDP growth is the most common measure of the performance of an economy. It has its limits because it does not tell us about how the benefits of growth are distributed across the population. Economic growth is essential for sustainable poverty reduction, but it is possible to have economic growth without reducing poverty.
Inflation	<p>Inflation is a sustained increase in the level of prices in an economy. There are three main measures of inflation:</p> <ul style="list-style-type: none"> • The <i>consumer price index</i>, measuring price increases for a representative basket of consumer goods. • The <i>producer price index</i>, measuring price increases for a representative basket of producer goods • <i>Gross domestic product inflation</i>, measuring price increases for a broad category of goods in an economy. <p>To adjust budget allocations for the impact of inflation, we usually use the CPIX measure of inflation.</p>
Justiciable rights	Rights that can be enforced in the courts.
Medium Term Expenditure Framework (MTEF)	The MTEF is the three-year spending plan of national and provincial governments, published at the time the Budget is tabled.

Real budget values

These are budget allocations that have been adjusted for inflation. They reflect the purchasing power of money at a particular time. For example, the real value of the budget allocation for the Child Support Grant programme in the Eastern Cape, expressed in 1998 prices, adjusts the *nominal* value of the budget allocation for the programme each year downwards to take into account the devaluing impact of inflation since 1998. The real value of a future budget allocation is usually smaller than the nominal amount (unless of course there is deflation).

Spheres of government

National, provincial and local levels of government.

Vulnerable groups

People that need special protection, eg prisoners, children, and people living with HIV.

4.1

Introduction

Motivating for inclusion of justiciable socio-economic rights in our *Constitution (Act 108 of 1996)*, Judge Albie Sachs said:

“The danger exists in our country, as in any other, that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain poor and oppressed. The only difference will be that the poor and the powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of racial oppression we will have non-racial oppression.”

In Ajam and Murray, 2004

The words of Judge Albie Sachs remind us why a comprehensive package of socio-economic rights for everyone, as well as a special set for children and detainees, were included in the Constitution. The rights are there to protect the most vulnerable in society and ensure that resources are generated and used in South Africa to fight poverty.

To facilitate this becoming a reality, the Constitution linked State obligations to socio-economic rights. These obligations include respecting, promoting and protecting the rights. In addition, there is the positive duty to fulfil the rights. This means having to plan, finance and implement programmes that provide basic social goods such as health care, education, housing and food, together with necessary income support (social assistance).

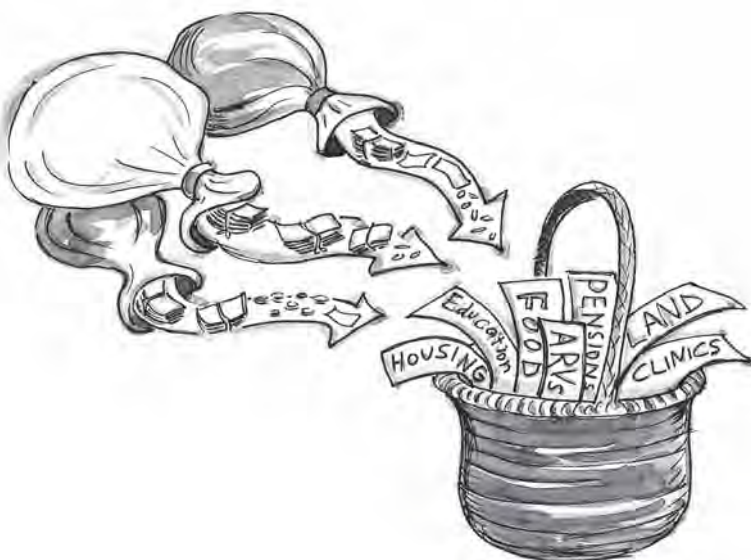
In exploring the link between socio-economic rights and resources in this chapter, our focus is on *the duty to fulfil*.

4.1.1 Resources to fulfil socio-economic rights

The resources needed to fulfil socio-economic rights are broad – they include financial and human resources, as well as institutional capacity. They are also large. Concern about the size of resources needed to fulfil socio-economic

rights is one reason why some people argued against including socio-economic rights as justiciable rights in the Constitution. It is also why, when they were included, everyone’s socio-economic rights were qualified by ‘reasonableness’, ‘available resources’ and ‘progressive realisation’.

For example, section 27(1) gives everyone the right to have access to health services, sufficient food and water and social security, including appropriate social assistance if people are unable to support themselves. But it is qualified by section 27(2):



For more information on these qualified and unqualified rights, see Chapter 1 from page 30 onwards.

“The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”

The special set of rights for children, namely the right to basic nutrition, shelter, basic health care services and social services (section 28), as well as the rights of people who have been arrested and detained, were not qualified. This reflects a special commitment in the Constitution to planning and managing budgets in a way that takes care of these vulnerable groups.

Some people are pessimistic about socio-economic rights and what they mean for people experiencing poverty. They argue that the promise of socio-economic rights is meaningless, as the State does not have the resource strength to provide services at the scale needed to fulfil the rights. They say that the State will use insufficient administrative and financial capacity as excuses for non-delivery.

Adopting this kind of ‘defeatist’ view could allow the State to be complacent about taking innovative budgetary and other actions to fulfil socio-economic rights. It could also make it easier for government to explain away non-delivery by using the resource constraint limitation, when really the problems are lack of creativity in planning and implementation, insufficient prioritisation and lack of political will.

4.1.2 A positive approach

A more positive and constructive view is that socio-economic rights can serve as powerful tools in the struggle to reduce and eliminate poverty. This is as long as people become active in designing and implementing strategies to ensure that the State works through law, policy, budgeting and service delivery to fulfil its obligations.

This chapter explores this positive perspective. Its main aim is to show that there are socio-economic rights-based strategies focusing on budgets that can be used by individuals and communities to advance the interests of those experiencing poverty. These strategies challenge the Government’s resource decisions on two levels:

- The quantity of resources made available for spending.
- How efficiently and effectively resources allocated for socio-economic rights programmes and other programmes are used.

The chapter starts off by providing contextual information to facilitate effective engagement with the State over mobilising resources to fulfil constitutional socio-economic rights. Part 2 is about the nature of the poverty crisis and the Government’s policy approach to addressing it. Part 3 covers how the Constitution directs the State to fulfil socio-economic rights, with the focus on resource obligations. Part 4 presents strategy options.

4.2

Poverty and policy context

4.2.1 Trends, level and nature of poverty

While there is general agreement that it is important to know what has happened to poverty levels since the end of apartheid, there is surprisingly little information currently available (*Leibbrandt and others, 2004, 12*).

The Census (1996 and 2000) can be used to measure how poverty has been changing over time in democratic South Africa. A group of poverty measurement experts have used it to show that:

- Poverty, measured by an income poverty line of R250 a month for each person, has increased from 50% to 55% of the population.
- Income inequality has increased.
- Poverty, measured by access to services indicators, has decreased.
- There have been different rates of progress across provinces – the rural/urban divide and poverty levels remain much higher in some provinces (Eastern Cape and Limpopo) than others (such as Gauteng and Western Cape).
- Income poverty remains higher in rural than urban areas. However, due to rural/urban migration, the share of the rural poor decreased between 1996 and 2001 – based on the poverty line of R250 a person each month, from 62% to 57% (*Leibbrandt and others, 2004*).

The figures in the next box are based on different indicators of poverty and the *General Household Survey of 2004* to illustrate the current level of poverty. From this, we can see how much still needs to be done to fulfil socio-economic rights.

Poverty indicators from 2004 General Household Survey

Education	2.8% of children aged 7–15 do not attend school. 3 815 000 people aged 7–24 do not attend an educational institution because they cannot afford to. 6 083 040 people older than 20 have no matric (grade 12).
Health	21% of those who said they were injured or ill in June 2004 did not consult a health worker, as it was too expensive.
Hunger	21% of children aged 0–18 experience hunger.
Housing	11.3% of households live in informal dwellings.
Assets	35.4% of households do not own books.

a) The role of HIV/AIDS

One reason for the lingering and deep poverty crisis is HIV/AIDS. South Africa is one of the countries in the world that has been most affected by the HIV/AIDS pandemic. According to the Department of Health in 2005, between 6.29 and 6.57 million people were living with HIV in 2004.

People already affected by poverty in South Africa are those that have also been the most affected by the HIV/AIDS crisis. HIV/AIDS has also had the effect of increasing the number of households affected by poverty. The gender imbalance in HIV infections is striking, with many more women living with HIV than men.

There is no sign as yet that the pandemic is lessening and HIV/AIDS will thus deepen the difficulties experienced by people living in poverty for some time to come (*Streak, 2005, 1*). It is mainly women and children who shoulder the burden of caring for people who are ill and traumatised by HIV/AIDS.

b) The role of unemployment

There is also a link between poverty and unemployment. Most people experience poverty due to unemployment at the household level (*Bhorat and others, 2001, 9*). Economic growth since 1994 has created jobs and some income gains for poor people. However, the pace of job creation (especially for semi-skilled and unskilled workers) has been insufficient to translate into the level of income creation needed. The rate of growth of jobs is too slow, relative to the growth in work seekers. The unemployment rate has thus risen over time.

There are two measures of unemployment:

- The official, conservative measure that does not count people that have become discouraged and given up actively seeking work as part of the unemployed.
- The unofficial measure that includes the discouraged part of the labour force.

The most recent estimate of the unemployment rate using the first definition is 26.5% (*Statistics South Africa, 2005a*). Early in 2005, the Government decided that Statistics South Africa would no longer calculate and release information on the official unemployment rate. According to Statistics South Africa's March 2003 *Labour Force Survey*, the expanded unemployment rate was 42,1%, which translates into about 8.4 million people (*Van der Westhuizen and Streak, 2004, 1*).

The unemployment crisis in South Africa is *structural*. This means that it is due to a mismatch between the type of skills that unemployed people have and those demanded by the growing economy. The structural nature of unemployment means that most of the people that are

CASE STUDY



SIZWE IS NOT ENJOYING HIS RIGHTS

Sizwe looks after his dying mother and two sisters in a mud-block house north of Durban. He left school last year when his mother was sent home from hospital to die from an AIDS-related illness because her bed was needed by someone who might recover. He can't go back to school because there is no money to buy food or to pay for school fees.

Sizwe sends his sisters off to beg for mealie meal from a neighbour who sometimes helps out. He leaves his mother sleeping while he makes his third trip of the day to fetch water from the standpipe. When he returns, his sisters are waiting with a packet containing a cupful of mealie meal. Sizwe makes a fire while the older girl rocks the toddler to stop her crying. The mother sleeps between bouts of coughing. It is nearly time.

Tomorrow Sizwe will visit the woman from the burial society to see if he can get help preparing for the funeral. Sizwe is a 10-year old boy living in one of the richest countries in Africa, under one of the finest constitutions in the world. Our Constitution guarantees children's rights, but Sizwe is not enjoying his rights.

Adapted from Ewing, 2000, in Streak, 2005

currently unemployed will never, in their lifetime, find stable formal employment.

Yet, South Africa is not a poor country. We are a relatively well off middle-income country, with tremendous wealth among poverty and high income inequality. The resources are available in South Africa to provide everyone with at least a basic level of the socio-economic rights we are entitled to. As Liebenberg has remarked:

“In a country such as South Africa, with its highly unequal distribution of income and resources, the State would be hard pressed to demonstrate that it is unable to afford ensuring that each person has essential survival levels of socio-economic rights.”

Liebenberg 2005, 3

4.2.2 Government policy to address poverty

a) The RDP

After 1994, the *Reconstruction and Development Programme* (RDP) was the democratic Government's first policy to fight poverty. It proposed extensive State spending on programmes to provide basic goods and services. Poor children and women featured as a particularly vulnerable group, deserving of special attention in the RDP vision. The RDP did not address the question of how to finance the socio-economic rights spending it proposed.

Over the past 12 years, the Government has managed to expand service delivery to give effect to socio-economic rights. It has done this by implementing and financing some new programmes, such as the Child Support Grant programme, Home- and Community-Based care programme, and Primary School Feeding Scheme. It has also expanded existing programmes, such as the Older Persons and Disability Grant programmes.

However, as Davis (2004) points out, the level of spending on service delivery proposed in the RDP never became a reality. This can partly be explained by the adoption, in June 1996, of a more conservative economic policy, namely the *Growth, Employment and Redistribution* (GEAR) Strategy.

b) GEAR

GEAR strongly advocated that private sector-driven economic growth is the most powerful vehicle for reducing poverty, and that this should be the foundation of the Government's strategy to attack poverty (*Michie and Padayachee 1998, 628*). It emphasised job creation led by private sector investment growth as a more powerful tool than public spending on social and basic services as a way to fight poverty. This was partly due to concern about the need to reduce the high level of government debt, reflected in a high government budget deficit, built up during the last years of apartheid (*Streak, 2004, 4*).

The *government budget deficit* that the Government has to borrow funds to finance is the difference between:

- The amount of revenue it gathers through tax collection, and
- The amount it plans to spend on service delivery.

One of the characteristics of developing countries like South Africa, where the tax base is small and basic needs (such as for spending on infrastructure, health, education and other social services) are great, is that revenue is less than planned spending and government runs a budget deficit. The problem about government budget deficits is that they need to be paid off, with interest in the future. There is a lot of debate about how large developing country governments, such as South Africa, should allow their budget deficits to climb to, and thus how much they should borrow now (and pay later) to support service delivery to people affected by poverty.

While GEAR emphasised job creation linked to private investment expansion as the main way of reducing poverty, it did recognise and advocate for expanding delivery of basic and social services, such as social assistance, health, welfare, public works and micro-economic finance. To provide the resources needed to expand these services, GEAR advocated for improving the *efficiency* of spending (producing more services with less resources) and improving the *effectiveness* of resource use (producing a better quality by having a greater impact on the beneficiary).

GEAR drew a lot of criticism from civil society organisations and activists concerned about lack of resource availability to bring immediate relief to people affected by poverty. This is because:

- GEAR put a lid on expanding basic and social spending, while the Constitution called for prioritising spending on basic and social services.
- The GEAR strategy to fight poverty is based on the false assumption that private sector investment would necessarily create a lot of job opportunities for poor people (*Streak, 2004, 281*).

However, there are some positive aspects in the GEAR legacy:

- GEAR did help produce a big reduction in the level of government debt. As a result, the Government was in a much better financial position to expand socio-economic rights programmes. The Finance Minister, Trevor Manuel, commented on this aspect of the GEAR legacy:

“In order to reverse the rising debt trend, we have been prudent about overall spending, putting the emphasis firmly on reprioritisation and better quality of expenditure. Now we can reinforce public service delivery without threatening fiscal sustainability, and our children and grandchildren can look forward to a future unencumbered by debt... so that the tree bears not the bitter but the sweet fruit of liberty.”

February 2001 Budget Speech

- GEAR helped create a favourable environment for private investment and economic growth necessary to finance socio-economic rights spending. This has led to lower interest rates, lower unit labour costs, and reduced and more predictable inflation rates.
- Budgetary and legal reform started under GEAR has improved the capacity of government to spend on socio-economic rights – although vast administrative challenges remain (*Streak, 2004, 279*).

c) **Government's current strategy**

To understand how the Government is approaching the task of fighting poverty and delivering socio-economic rights after 2000 (the end of the GEAR implementation period), we can consult the Budget Reviews and annual State of the Nation Addresses. We can also examine the *Accelerated and Shared Growth Initiative for South Africa* policy document, developed under the leadership of the Deputy President in 2005.

The Government's strategy after 2000 includes many of the GEAR elements, for example, the Government's approach still involves commitment to fiscal discipline and a low government budget deficit to Gross Domestic Product (GDP) ratio. However, there are also new, positive elements, including:

- Less faith in the potential for economic growth led by private sector investment to reduce poverty through job-creation in the short- to medium-term.
- A greater role being given to spending on government programmes to create jobs, for example, through the Expanded Public Works Programme. This programme, introduced in 2003, involves government spending on infrastructure and services (such as early child care and home-based care) to build skills, and create jobs and income-earning capacity.
- An increased emphasis on government capital spending – economic spending (eg roads and ports) and social spending (eg schools and hospitals).
- An increased emphasis on building locally, and obtaining from abroad, critical skills needed to stimulate economic growth.
- A greater emphasis on building public administration capacity.
- A higher level of priority being given to improving regulations governing small- and medium-business development.

4.3

Socio-economic rights as a guide for resource action by the State

"Constitutional socio-economic rights are blueprints for the State's manifold activities that proactively guide and shape legislative action, policy formulation and executive and administrative decision-making."

Brand, 2005, 2

As Brand says, constitutional socio-economic rights need to guide the State in its law-making, policy, budgeting and service delivery. The responsibility for mobilising resources for socio-economic rights falls mainly on government. This involves spending more and better on widening access to basic goods, such as housing, health care, water, food and education and, if necessary, social assistance (as a minimum income). However, the other two main branches of the State – the judiciary and legislature – have vital support roles to play.

This part of the chapter gives information to help you successfully engage with the State over how resources are allocated and used to fulfil socio-economic rights.

4.3.1 Government and resources for socio-economic rights

a) Service delivery areas of spheres of government

The Constitution divides government into national, provincial and local spheres, which are distinctive, interdependent and interrelated (*section 40(1)*).

The allocation of tasks to the different levels of government in schedules 4 and 5 of the Constitution means that all three spheres have significant service delivery responsibilities in relation to socio-economic rights. For example:

- National and provincial governments are given concurrent (joint) responsibility for programme delivery in health services, housing and welfare services, and in education (except for higher education, the sole responsibility of the national sphere).
- Local government has responsibility for basic services (water, electricity, sanitation), as well as child care facilities and municipal health services.

Where the function is shared between national and provincial government, national government is mostly responsible for policy and monitoring. Provincial government is responsible for financing and implementing most programmes.

EXAMPLES



NATIONAL AND PROVINCIAL POWERS

- *With health, the national Government has responsibility for initiating laws, developing policy (including setting national norms and standards), as well as monitoring programme implementation. Provinces have most of the responsibility for financing and delivering programmes and services, such as the programme to provide pregnant mothers and children under the age of 6 with free health care services, delivered through clinics and public hospitals.*
- *With social welfare and social development (including social assistance and developmental social welfare services), the split of responsibilities mirrored health. However, with the creation of the South African Social Security Agency (SASSA), established in April 2005, the responsibilities of the national and provincial departments are changing:*
 - *The financing responsibility for social assistance programmes (such as the Child Support Grant) has been taken away from provinces.*
 - *National Treasury is now allocating money to the national Department of Social Development in a direct transfer known as a **conditional grant**, for provinces to use to implement social assistance programmes.*
 - *In the near future, SASSA will finance and implement social assistance programmes.*



b) Division of total revenue between spheres

Section 213(1) of the Constitution allows the Government to create a National Revenue Fund (NRF) into which all money received by national government must be paid, except money reasonably excluded by an Act of Parliament. The money in the NRF is collected through payment of taxes (such as personal Income Tax, Company Tax and Value Added Tax).

Section 214(1) of the Constitution says that an Act of Parliament must provide for:

- The equitable (fair) division of revenue raised nationally among the national, provincial and local spheres.
- Determining each province's equitable share of the provincial share of national revenue.
- Any other allocations to provinces, local government or municipalities from the national Government's share of that revenue, and any conditions on which those allocations may be made.

It is National Treasury's task, after consulting with all levels of government and the Financial and Fiscal Commission (FFC), to work out:

- The division of the NRF between the three spheres of government.
- How the provincial and local share should be split between provinces and municipalities.

Section 214(2) of the Constitution says that a proposed division of revenue law can only be enacted once the provincial governments, organised local government and the FFC have been consulted. The FFC is an independent institution set up by the Constitution to advise national and provincial parliaments on financial issues.

GUIDELINES



DIVISION OF REVENUE

Section 214(2) of the Constitution sets out these standards to guide the Government in dividing revenue:

- The national interest.
- The need to ensure that the provinces and municipalities are able to provide basic services and perform the functions allocated to them.
- The fiscal capacity and efficiency of the provinces and municipalities.
- Developmental and other needs of provinces, local government and municipalities.
- Obligations of provinces and municipalities under national legislation.
- The need for stable and predictable allocations of revenue and shares.

Annexure E of the Budget Review explains how the NRF is shared between the spheres of government, including the formula used to share the NRF between provinces and municipalities. Annexure E is released when the Finance Minister presents the annual budget speech.

Based on the 2005 Budget:

- Debt service costs are first taken off the NRF, together with the contingency reserve before it is split between the three spheres.
- Then about 62% of national revenue is allocated to the nine provinces and 284 municipalities.

National Treasury, 2005 Budget Review, 143

Revenue-raising capacity

While provinces have large expenditure obligations, including duties around socio-economic rights programmes, they have very small revenue-raising capacity. This is because national government has been given the power to levy the taxes that gather most revenue, such as personal Income Tax, Value Added Tax and Company Tax. Compared to equitable share revenue, the proportion of provincially earned revenue (gathered through provincial taxes) is less than 10% for each province, with an average of 4%.

Municipalities vary substantially in their revenue-raising capacity. The amount they raise relative to the equitable share varies from 97% in some metropolitan municipalities to 3% in the most rural municipalities. On average, 86% of local government revenue is own revenue, collected from property taxes, regional service council levies, user chargers and borrowing (*National Treasury, 2005 Budget Review*).

Indigent policy

In 2004, the Department of Provincial and Local Government developed a framework for a municipal indigent policy. This calls on all municipalities to manage their budgets in a way that provides, free of charge, a package of essential basic services to indigent households. The package includes water, sanitation, refuse removal, energy and access to housing. The precise level of service provision to be financed by the municipality is left up to each municipality to decide on (*Flusk, 2005*).

However, the *Department of Provincial and Local Government Framework for a Municipal Indigent Policy* gives benchmarks to help target subsidies and levels of service delivery. You can get a better understanding of what government must offer indigent households in a particular municipality by contacting the Department of Provincial and Local Government.

Real challenges confronting the implementation of the indigent policy are:

- Who to define as *indigent* (as there is no national poverty line).
- How to accurately target indigent people.
- How to finance the free services offered, for example using money raised from people who pay for services in the municipality.

At 31 July 2005, it was estimated that 176 municipalities have formal indigent policies in operation.

c) **Fiscal policy**

Fiscal policy refers to the Government's decisions and plans about:

- How much revenue to collect from taxpayers through various taxes.
- How much will be made available for spending on goods and services after allocating money for debt repayment and contingencies (unexpected events), and setting a target for the *government budget deficit* (difference between expected revenue and planned spending).
- How the budget deficit will be financed.

The National Treasury, under the leadership of the Minister of Finance, and informed by the President and his Cabinet, is responsible for developing the fiscal policy for the whole country. Fiscal policy for the national level is presented when the Finance Minister presents the annual budget speech to Parliament (usually in the third week of February).

Fiscal policy at the national level is critical because it determines the size of the NRF. The NRF is distributed between the three spheres of government and supplies most of the funds that are spent on socio-economic rights programmes.

In deciding on the government budget deficit, the Finance Minister considers:

- How fast the economy is expected to grow.
- The spending capacity of the Government.
- The expected trend in future debt repayment costs.

The provincial treasuries, led by provincial finance ministers, are responsible for deciding fiscal policy in their province. They present fiscal policy, with all their resource decisions and spending information, when they present the provincial Budget. This is about a week after the national Finance Minister presents the national fiscal policy and budget information in the third week of February. The financial year begins on 1 April and runs until 31 March of the next calendar year.

d) **Budget information**

As part of the budget reform process started in 1997, the Medium Term Expenditure Framework (MTEF) approach to budgeting was adopted. Under

this framework, the Government makes and presents its fiscal policy and budget information within a three-year (financial year) time period.

Sections 215 and 216 of the Constitution describe what information budgets should at minimum contain, and prescribes “uniform treasury norms and standards”. Government has to respect the principles of accountability and transparency in budget processes and reporting. The *Public Finance Management Act 1 of 1999* and the *Local Government: Municipal Finance Management Act 56 of 2003* were developed to help build a legal environment to promote accountability and transparency in resource use, thereby improving service delivery.

GUIDELINES



NATIONAL BUDGET DOCUMENTS

The key budget information documents of national government that are easily available from National Treasury are:

- The *Budget Review*, released in the third week of February, providing:
 - An overview of revenue gathered through taxes.
 - The target for the budget deficit.
 - Total spending planned across all three spheres of government.
 - How spending will be split across major areas, such as defence, health, trade and industry, social development and health.
- The *Budget Speech*, a summary of the Budget Review, and also released in the third week of February.
- The *Estimates of National Expenditure*, released in the third week of February, giving a detailed breakdown (by programme) of national spending plans and outcomes for the previous year for each department.
- The *Medium Term Budget Policy Statement*, released in the third week of October, providing a preview of what will be announced in the upcoming national Budget.

GUIDELINES



PROVINCIAL DOCUMENTS

The key documents for provinces, available from provincial treasuries (budget offices) are:

- The *Provincial Budget Speech*, released in the first week of March.
- The *Provincial Estimates of Expenditure*, also released in the first week of March.
- The *Intergovernmental Fiscal Review*, an overview of provincial revenue and expenditure trends released by the National Treasury in September of each financial year.

The local government resource allocation and spending patterns are recorded in local government budget documents. These should be accessible from each council.

Currently, the budgets classify:

- *Past expenditure* – estimated expenditure for the most recent financial year and actual expenditure for a couple of previous years.
- *Planned expenditure* for the upcoming MTEF period.

GUIDELINES



CLASSIFYING PAST AND PRESENT EXPENDITURE

1. By **function** – following the budget votes of government departments.
2. By **programmes** within each function.
3. By **economic classification** – linked to capital and current expenditure: in other words, defined as the difference between ‘once-off spending’ (on things like equipment, buildings and training) and repeated spending (salaries of officials and transfers to the not-for-profit sector).

The kind of information that the Government makes available through budget documents on resource allocation and use matches up well internationally and is a big improvement on what used to be available in South Africa.

However, for monitoring the extent to which the Government is meeting its obligation to fulfil socio-economic rights, there are inadequacies that weaken monitoring and effective planning of resource use for socio-economic rights.

EXAMPLES



SHORTCOMINGS IN MONITORING RESOURCES

- *The budget documents do not break down estimated expenditure for the previous financial year and the estimated allocations for the up-coming three-year budget cycle for vulnerable groups, such as women, children and people living with disabilities.*
- *The classification system is often too broad. We may want to identify allocations on some sub-programmes, but this is not possible, for example, for early childhood development for children aged 0–5 and the Expanded Public Works Programme in the social development part of the budget.*

e) Budget process for allocations to programmes

Once total revenue has been shared across the three spheres, each sphere divides its slice of the revenue across the programmes for which it has responsibility. Each sphere’s ‘slice’ is:

- The sum of its own revenue collection, and
- Its equitable share from the NRF.

At national and provincial levels, officials from each department advocate for funds for their programmes to treasury officials. In most cases, department representatives request increases over their baselines (what they had been allocated the year before), using arguments about the need for various expenditures to expand coverage and improve quality of services.

The decisions by national and provincial treasury representatives about how much extra to allocate for each programme are influenced by:

- Views on the ability of departments and programmes to spend additional funds.
- Priorities fed down from the national and provincial executives.

In the end, the President and Cabinet decide on the laws, policies and priorities that govern budgetary decisions. The President signs all policies before they

are implemented. In addition, at the start of every budget cycle, Cabinet, under the leadership of the President, sets the priorities that guide treasury officials, at the national, provincial and local levels, when they take decisions about how to allocate resources.

Allocations based on need?

At the moment, budget allocations to socio-economic rights programmes (except for social assistance) are not informed by costing service delivery requirements based on need.

Civil society budget organisations (eg IDASA's Budget Information Service and the FFC) have for a long time called for the budget process to change. They say that determining provincial equitable shares and allocations to key socio-economic rights programmes at provincial level, should be based on costing actual needs, guided by generally accepted minimum service levels and standards.

Public participation

Allocating funds across programmes and services at local government level is linked to and informed by a municipal council-led Integrated Development Planning (IDP) process. This process, engaged in annually, but within a three-year time frame, should involve all stakeholders in the community. It is aimed at identifying needs and setting out spending priorities. The Constitution calls on local government to involve communities and community organisations in planning (*IDASA, 2004, 14*).

In their IDP and budget processes, municipalities have to comply with the developmental duties of municipalities set out in section 153 of the Constitution, which says that a municipality must:

- a) structure and manage its administration and budgeting and planning process to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- b) participate in national and provincial development programmes."

4.3.2 The courts and resources for socio-economic rights

a) The role of the courts

The Constitution gives the courts their judicial authority. The courts are not directly responsible for directing resources to fulfil socio-economic rights. As Liebenberg notes, and the Constitutional Court has pointed out, their role is indirect, carried out through their law enforcement duty. For example, the Constitutional Court said in *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case) that, although its orders enforcing socio-economic rights claims may have budgetary implications, they are "not in themselves directed at rearranging budgets" (*Paragraph 38 of judgment, in Liebenberg, 2004a, 9*).

The courts do not have direct influence over policy and budgeting for socio-economic rights fulfilment. However, they influence how resources are used for realising socio-economic rights because the Government has to take into account case law developments in policy and budgeting. In Creamer's words:

"Given the entrenchment of socio-economic rights in South Africa's Constitution, jurisprudential development and discussion on government's obligations with regard to the realisation of socio-economic rights should provide guidance to the development of social policy. In particular the budget process, as a key instrument of government planning and implementation, should involve the active application of evolving interpretations of government's socio-economic rights obligations." *Creamer, 2004, 231*

Through their decisions, the courts have to achieve a critical balance between effectively protecting the socio-economic rights of the poor, while also respecting the roles of the legislature and executive as the main branches of government responsible for realising socio-economic rights and managing the country's finances (*Liebenberg, 2004a, 7*).

b) **Assessing the Constitutional Court's approach**

The Constitutional Court's approach to reviewing the Government's policy and budgeting for socio-economic rights has been driven by *the reasonable measures test*. This test says:

- The Government must act to give effect to a socio-economic right by developing a plan and a related programme to realise it.
- The programme measure should meet specific standards.

There is still lack of clarity around how the Constitutional Court would judge State programmes and budgeting for the unqualified socio-economic rights for children in the Constitution. However, most experts suggest that the Court would probably use a stricter test to judge compliance with these rights. As Liebenberg asks, the really important question is: how should the unqualified socio-economic rights given to children guide government policy and budgeting? (*Liebenberg, 2004b*)

For more on the reasonable measures test, see Chapter 1 on page 32.

GUIDELINES



CHILDREN'S SOCIO-ECONOMIC RIGHTS, GOVERNMENT POLICY AND BUDGETING

The Constitutional Court's approach suggests a four-level response from government:

1. Fulfil the direct obligation to children living without adult parents (the most vulnerable of all children) through direct service provision.
2. Fulfil the obligation to all vulnerable children by prioritising and fast-tracking programmes offering services to meet needs.
3. Mainstream children's rights by integrating vulnerable children's needs into all poverty-related programmes (eg the Expanded Public Works Programme).
4. Engage (informed by those working directly on service delivery for children in the not-for-profit sector) with the challenge of defining standards in relation to all section 28 rights (*Liebenberg, 2004b*).

The general opinion is that the Constitutional Court has not been as bold as it could be in its review of government's policy and budgeting for socio-economic rights (*Ajam and others, 2002; Brand, 2005; Liebenberg 2004a, 2004b and 2005*). The cautious stance is shown by:

- The Court's decision to leave the choice of what programme measures to use to give effect to socio-economic rights up to the Government. And, related to this, the Court's refusal to examine whether the programme measure chosen by the Government to give effect to a right is the most cost-effective.
- The courts' failure to date to examine and assess the pre-existing budgetary allocations of the spheres of government. For example, in *Soooramoney v Minister of Health, KwaZulu-Natal*, the Constitutional Court simply accepted the State's argument that the total resources available in KwaZulu-Natal were insufficient to support kidney dialysis treatment being offered to the applicant and others in need of the treatment. They did not consider whether the fiscal policy and the size of the resources given to the province through the division of the NRF could be changed to make the treatment affordable.
- The rejection by the Constitutional Court of the idea that socio-economic rights provisions in the Constitution impose a direct, unqualified duty on the State to provide social goods and services on demand. This was in spite of arguments raised by organisations as 'friends of the court' in the *Grootboom (Government of the Republic of South Africa and Others v Grootboom and Others)* and TAC cases.

The cautious approach of the courts can be explained by these factors:

- Concern about taking policy and budgetary decisions because they are traditionally seen as the responsibility of other branches of the State.
- Concern about the complex and unpredictable impact of decisions in socio-economic rights cases on the State's finances, and on economic variables in the economy, such as interest rates and inflation.
- Information limits, especially the reality that there is no information available to weigh up the value of spending more money on one programme compared to another programme.
- A sense among judges that, with subjective resource-related decisions, it is more democratic to leave these kinds of decisions up to politicians who are elected, rather than judges, who are not.

Ajam and Murray, 2002; Brand, 2005; and Liebenberg, 2005

4.3.3 Parliament and resources for socio-economic rights

A number of experts argue that, out of the three main branches of the State, Parliament has so far been the weakest in carrying out responsibilities to fulfil socio-economic rights. Parliament affects how many and in which way resources are used for socio-economic rights through its responsibility to:

- Monitor resource decisions.
- Pass the annual budget.
- Pass laws.

a) **Monitoring function and resource mobilisation**

Portfolio committees in Parliament and provincial legislatures are responsible throughout the year for monitoring government's policy, programming and budgetary actions – this is also called their *oversight* function.

In addition, there are two particular occasions in the year when Parliament and provincial legislatures must focus on the Government's resource allocation and spending decisions. This is when:

- The FFC makes its recommendations on the division of revenue.
- The national Minister of Finance and the provincial ministers present national and provincial Budgets. After the presentations, special committees are set up to hear submissions on the budget plans. They encourage submissions by all individuals and organisations.

In examining resource decisions, parliamentarians should be informed by the standards set by the courts.

b) **Parliament's rubber-stamping of resource decisions**

The National Assembly has the responsibility to pass the national Budget and the nine provincial parliaments have the responsibility for passing the provincial Budgets.

A particular issue needing attention is the failure by the national and provincial parliaments so far to fulfil the requirement under sections 77(2) and 120(2) of the Constitution to enact a procedure to enable the national and provincial legislatures to amend money Bills (annual Budgets) tabled by the executive. Parliament is currently empowered to either accept or reject, but not change, money Bills. In Creamer's words:

"This limits the role of parliamentary oversight and weakens the institution's ability to apply jurisprudential standards to budgets for socio-economic rights related programmes. The drastic implications for effective governance of the rejection of a tabled budget means that legislators cannot credibly be expected to reject a tabled budget and, in the absence of amendment powers, are left with no effective options other than to accept money bills as tabled by executive organs."

Creamer, 2004, 223

c) **Parliament, law-making and resources for rights**

Parliament's greatest potential to affect resource mobilisation for socio-economic rights is through its law-making activities. Parliament directs resources to rights by developing laws that require programmes and services that advance rights. For example, the *Social Assistance Act 13 of 2004* says the State must pay social grants that give effect to the right to social assistance.

CASE STUDY



HOW THE CHILDREN'S ACT WILL RELEASE RESOURCES FOR CHILDREN'S RIGHTS

A great deal of work has been done recently by the Social Development Portfolio Committee in Parliament (with input from civil society) to finalise the first part of the Children's Act (the section 75 section of the Act). It was eventually passed in the National Assembly in December 2005 and is now an Act (*Children's Act 38 of 2005*), although it has not yet been put into operation.

A new Children's Act has been urgently needed. Without a rights-informed legal framework, there has been inadequate planning for, and financing of, the full package of services required for realising children's rights, including the unqualified right to social services in section 28 of the Constitution.

Parliament will have a positive impact on budgeting for fulfilling children's socio-economic rights if it speedily refines the second part of the Bill (the section 76 part) and passes it. Then a complete new legal framework, informed by the socio-economic rights set out in the Constitution, can begin to guide policy, programming and service delivery for vulnerable children. The section 76 Bill (*Bill 19 of 2006*) was due to be debated in Parliament in the second half of 2006.

4.4

Strategies for contesting budget decisions

"If the socio-economic rights in the Constitution are to amount to more than paper promises, they must serve as useful tools in enabling people to gain access to the basic social services and resources needed to live a life consistent with human dignity."

Liebenberg, 2002, 159

When we consider the factors undermining resource mobilisation for socio-economic rights, there is a range of strategies that communities, organisations and individuals can use to generate either more resources for socio-economic rights, or better use of resources already allocated.

We discuss some strategy options in these four categories:

- Budget process changing strategies.
- Strategies directed at increasing the total revenue made available for spending on all programmes and specifically on socio-economic rights programmes.
- Strategies directed at improving efficiency and effectiveness of socio-economic rights spending (especially key programmes for realising socio-economic rights).
- Using the courts.

4.4.1 Strategies to change the budget process

a) Adjusting the budget classification system

The first budget process strategy that can be used is to call on the Government to adjust the budget recording and reporting system to make it possible to easily track socio-economic rights spending for different vulnerable groups, such as children, people with disabilities, and people living with HIV.



Adopting this kind of budget classification will do a lot for resource mobilisation to give effect to rights. This is because it will:

- Force the Government to identify, list and group the different programmes it has developed and financed to give effect to the socio-economic rights of vulnerable groups.
- Increase transparency and accountability for spending on these programmes.
- Highlight where the Government has no programme in place or is spending very little or poorly on programmes.
- Promote intergovernmental and interdepartmental cooperation in allocating for and spending on socio-economic rights.
- Generate better information for watchdog organisations such as the South African Human Rights Commission and the United Nations Committee on the Rights of the Child to use in their interactions with the Government on its measures to fulfil socio-economic rights.

To advocate for a new classification system, concerned groups should lobby National Treasury officials and Members of Parliament. For example, you could use the hearings set up after the presentation of the national Budget. Or you could link up with other activists and use mass mobilising strategies.

b) **Public participation**

Affected individuals and communities can participate to claim their rights and promote their interests in the budget process by:

- Feeding though information to government officials and parliamentarians involved in planning and budgeting on their experiences and difficulties.
- Making suggestions to government officials and parliamentarians about how the Government should change revenue collection and spending.

For more on watchdog structures, see Chapter 2 on page 62 and Chapter 3 on page 107.

GUIDELINES



USING BUDGET HEARINGS

You can use the budget hearings held by provincial and national legislatures as a platform for participation and for sharing information. Remember:

- These two spheres of government are responsible for financing and implementing programmes in the social service part of the socio-economic rights package of services (health, housing, developmental social welfare services, education and nutrition).
- You should thus concentrate on the need for budget and service delivery action in these areas rather than those that are mainly the responsibility of local government.

How can participation in the budget process activate more and better use of resources for socio-economic rights? We have seen that one reason for insufficient linking of society's resources and socio-economic rights is lack of political will and insufficient prioritising of vulnerable groups. Information on the levels of difficulty being experienced by vulnerable groups due to poor planning and inadequate budgeting can result in vulnerable people getting more attention in policy priority-setting and budgeting.

GUIDELINES



LOCAL DEVELOPMENT PLANNING

You can also participate to generate more resources for socio-economic rights in the Integrated Development Planning process at local government level. Here you can be constructive by, for example:

- Giving information about challenges around access to basic services.
- Coming up with ideas about community development projects that should be financed to improve the quality of life in the community.

c) **Parliamentary amendment power**

The lack of parliamentary amendment power over budgets waters down the potential effect of parliamentary hearings, in which individuals, communities and NGOs have the opportunity to give input on resource allocation and use. As a result, advocacy, lobbying and mobilising is needed to get the Government to fulfil its constitutional duty by granting Parliament this power.

4.4.2 **Strategies to increase size of revenue and allocations**

a) **Making more revenue available through fiscal policy**

Another possible strategy is to advocate, mobilise and lobby around the total fiscal amount made available for spending through the national Government's setting of fiscal policy. The aim of this strategy is to release more total resources for dividing revenue between spheres and allocating to socio-economic rights programmes within spheres. This can be done by:

- Identifying room to increase the size of debt without undermining spending in the medium- to long-term.
- Identifying possibilities for more revenue to be collected through tax.

Currently, the climate is good for success in any call for more revenue to be released through increasing government borrowing. This is because the current fiscal policy approach is very conservative. There is thus room for expanding spending relative to revenue and increasing the budget deficit.

The room for increasing the total size of the amount available for spending was illustrated when the Minister of Finance presented the *Medium Term Budget Policy Statement* in Parliament on 25 October 2005. He announced that the Budget Deficit as a proportion of South Africa's Gross Domestic Product (the total output produced by the economy) is expected to be only 1% for 2005–6 (*Medium Term Budget Policy Statement, 2005, 9*). This is very low compared to other countries, including developed countries. The plan is for the deficit to rise as a percentage of GDP to 2.2% in 2006–7.

The call for increased revenue to become available through changing revenue collection (tax) policy can be made by calling on the Government to increase certain types of taxation. Options here include:

- 'Sin taxes' (taxes on cigarettes and alcohol).
- Higher income taxes paid by wealthier people.

Additional strategies will be needed to ensure that any extra money made available at national level is actually allocated to socio-economic rights programmes at national, provincial and local level.

b) **Stepping up allocations to specific programmes**

To increase the size of allocations to a particular socio-economic rights programme, you can use budget information supplied by government to highlight negative growth in budget allocations to a programme you are concerned about.

GUIDELINES



PUSHING FOR AN INCREASED PROGRAMME ALLOCATION

1. Gather budget information for the last year and the upcoming three years of the MTEF for the programme you are concerned about. For example, if the programme is financed at the provincial level, you will need to use the provincial budget statements.
2. Once you have the budget information for four years, adjust these for inflation. You can do this by dividing the total allocations by CPIX deflators – you phone the South African Reserve Bank or National Treasury to get the deflators (or get help from IDASA). The *CPIX deflator* is a measure used to adjust budget allocation data to allow for the impact of inflation on our purchasing power. It is based on the CPIX measure of inflation that measures the rate of increase in a range of consumer goods, excluding mortgage costs.
3. Then, use the *real values* (the budget values adjusted for inflation) for each year to calculate the real growth trend over time. To calculate the real budget growth for each year, use this formula:
 - Real budget growth (%) = real budget value for that year less the real budget value for the previous year divided by the real value for the previous year multiplied by 100.

In the next box, we give an example of how to calculate the real growth rate in a programme budget. It is based on allocations for the Child Support Grant programme over the Medium Term Expenditure Framework Period 2005–6 to 2007–8 in the Eastern Cape.

EXAMPLES



CALCULATING REAL GROWTH RATES IN BUDGET ALLOCATIONS FOR KEY SOCIO-ECONOMIC RIGHTS PROGRAMMES

Preliminary outcome for Child Support Grant (CSG) budget in 2004–5 and estimates for CSG programme budget over 2005–6 to 2007–8 in Eastern Cape:

	2004–5	2005–6	2006–7	2007–8
R million	2 053	2 546	3 079	3 335

CPIX deflators for years (from National Treasury using 2004–05 as base year):

	2004–5	2005–6	2006–7	2007–8
	1	1.042	1.097226	1.155379

Calculating real budget values / adjusting for inflation:

2004–5: R2 053 million / 1 = R2 053 million

2005–6: R2 546 million / 1.042 = R 2 443.37 million

2006–7: R3 079 million / 1.097226 = R2 806.16 million

2007–8 R3 335 million / 1.155379 = R2 886.49 million

Calculating real growth rates:

2005–6 = $(2\,443.37\text{ million} - 2\,053\text{ million}) / 2\,053\text{ million} \times 100 = 19\%$

2006–7 = $(2\,806.16\text{ million} - 2\,443.37\text{ million}) / 2\,443.37\text{ million} \times 100 = 14.9\%$

2007–8 = (you can now calculate this yourself)

Source of budget data: National Treasury: 2005 Provincial Budgets and Expenditure Review, Table 4.15, page 61

Once you have calculated the real growth rates, you need to look out for any negative real growth rates. A *negative growth rate* indicates that the size of the increase in the budget for that year is insufficient to keep up with inflation and that the purchasing power of the programme has decreased. Increases in efficiency and effectiveness will be needed for the programme to continue with its current level of service provision.

To get government to respond by raising budgets, the evidence you generate on negative growth in key socio-economic rights programme budgets needs to be sent to the right people. For example, give parliamentarians information on the desperate need for sufficient financing of the services.

In the box on the next page, we illustrate how evidence of a real decline in the budgets of social welfare service programmes in Gauteng for 2005–6 was used to activate much needed increases.

CASE STUDY



HOW EVIDENCE OF REAL DECLINES IN SOCIAL WELFARE SERVICE BUDGETS IN GAUTENG WAS USED TO INCREASE BUDGETS

When the Gauteng provincial budget statement was released early in March 2005, it showed a large reduction in the budget for all developmental social welfare service programmes in Gauteng for 2005–6. This caused much concern, as there was a financial crisis affecting service delivery in the province, particularly in the not-for-profit sector.

There was a shortage of social workers in the province in both the public and not-for-profit sector. As a result, the level of service delivery was far too little to meet needs. Examples of needs were:

- Child protection services.
- Early childhood development and care services for children aged 0–5.
- Counselling for families in need of psychological support.
- Services for children living on the street.
- Interventions to build income-earning capacity and livelihoods in families struggling due to poverty.
- Services to assist people affected by substance abuse.

In response to the proposed budget cuts, a group of service organisations involved in service delivery in the not-for-profit sector, most of which depend on funding from the Gauteng budget, joined together to challenge the size of the allocation to developmental social welfare service programmes:

- They employed an economist to develop a document to provide an overview of the budget proposal (that amounted to 25% for all programmes together).
- They used this budget analysis together with data on the shortage of services and by referring to constitutional rights to social services, to lobby the Gauteng legislature and government to adjust the budget allocation.

The budget advocacy and research strategy included:

- A presentation to the Gauteng Parliamentary Committee on Social Development.
- A visit to the Premier.
- Various articles in the press.

This strategy has been a success, as additional allocations have been made.

J Loffel (consultant to Johannesburg Child Welfare), and C Barberton (economist involved in children's budget issues) in personal conversation

Focusing on the size of the current allocation

Another way to raise allocations for a particular socio-economic rights programme is to use budget information to illustrate how small the allocation of the underfinanced programme is compared to either:

- The total available in the budget for spending, or
- How much would be required to finance delivery of the service to all those in need.

GUIDELINES



CURRENT ALLOCATION AS A SMALL PART OF THE TOTAL AVAILABLE

1. Look in the relevant budget documents (national, provincial or local) to access information on the total amount allocated to the programme for the year in question. Most of the relevant programmes are financed and delivered by provinces, so the data source you will most commonly use is the provincial budget statements or the National Treasury annual publication that provides an overview of provincial budgets.
2. Gather information on the total amount of revenue available in the NRF from the Budget Review or Budget Speech for that year.
3. Divide the amount allocated for the programme in that year, by the amount available in the NRF and multiply by 100.

EXAMPLES



CHILD SUPPORT GRANT

- *The 2005 National Treasury Provincial Budgets and Expenditure Review (the Treasury's overview of provincial budgets) shows a budget estimate to pay for the Child Support Grant programme in all nine provinces of R11 431 billion.*
- *According to the 2005 Budget Review, the NRF for 2005–6 is R369,9 billion.*
- *This means that the Child Support Grant allocation is R11 431 billion / R369,9 billion x100 = 3% of the NRF for 2005–6.*

GUIDELINES



CURRENT ALLOCATION AS A SMALL PART OF ALLOCATION BASED ON NEED

1. Form links with academics and others with the necessary technical skills to get this kind of information for use in advocacy and lobbying to advance socio-economic rights in budgets.
2. Get them to help you calculate the costs of expanding programmes to bring them more in line with need, as well as a commitment to assisting in the struggle to advance socio-economic rights.

CASE STUDY



ANTIRETROVIRAL TREATMENT

- The Treatment Action Campaign (TAC) used the powerful strategy of working out the cost of extending antiretroviral treatment to all pregnant mothers and their children, as well as the costs of not extending the programme.
- The cost benefit analysis was done by Professor Nicoli Nattrass from the School of Economics at the University of Cape Town.
- This was used in TAC's 2002 campaign and Constitutional Court case aimed at increasing budget allocations to this programme.

4.4.3 Strategies to improve efficiency and effectiveness

Advocacy, lobbying and mobilisation to improve the efficiency and effectiveness of resource use in socio-economic rights programmes is also very important.

- *Improving the efficiency of resource use* means changing resource use so that more services (outputs) are produced with the same resources (inputs).
- *Improving the effectiveness of resource use* refers to changing resource use so that the quality of services (outputs) is better and there is a more favourable impact on the beneficiary – in other words, the outcome improves.

a) Highlighting shortfalls in spending

One strategy to engage in as a way of improving efficiency and effectiveness of spending is to look for and highlight any shortfall of actual spending, compared to allocated funds (planned spending) in key socio-economic rights programmes. In the next box, we show how this can be done, using the case of the developmental social welfare service programme targeted at delivering services (such as social workers conducting counselling and providing early child support) to children, youth and families in the Free State.

The Free State example shows government wasting scarce resources allocated for the delivery of socio-economic rights. This information should be used to advocate for building the administrative and other capacity needed to deliver services to poor people more effectively.

EXAMPLES



CALCULATING % OF ALLOCATED BUDGETS SPENT IN A PROGRAMME CRITICAL TO SOCIO-ECONOMIC RIGHTS FULFILMENT

Budget data for the child and youth care and protection developmental social welfare service programme for Free State province in 2004–5:

<i>R'000 Initial allocation</i>	<i>Adjusted allocation</i>	<i>Estimated expenditure</i>
111 885	57 942	50 920

$$\% \text{ of initial allocation spent} = (R50\,920 / R111\,885) \times 100 = 45.5\%$$

Source of budget data: National Treasury, 2005 Provincial Budgets and Expenditure Review, Annexure A

GUIDELINES



TAKING ACTION

1. You can investigate underspending using the budget books yourself.
2. You can contact an NGO doing budget analysis, such as IDASA.
3. You can ask government itself (Treasury or department responsible for the programme) for the most recent government data on the difference between actual *and* planned spending for programmes that are most important for realising socio-economic rights. Government monitors the difference between budget allocations and spending in programmes quarterly (four times a year).

Again, for this strategy to have impact, the administration must be put under pressure to improve managerial and other capacity so that the rate of spending picks up. Therefore, the information on underspending needs to be distributed to the media or parliamentarians, who are committed to making a noise about non-delivery of socio-economic rights obligations.

b) **Highlighting access and quality shortcomings**

A second strategy that can be used to improve efficiency and effectiveness of spending in a socio-economic rights programme involves:

- Highlighting access and quality shortcomings.
- Suggesting reasons for these failures.
- Offering solutions to deal with the problems.

Programme areas where there is currently a lot of need for this strategy are:

- The developmental social welfare service programmes being financed and delivered (with assistance from the not-for-profit sector) to vulnerable children and their families. These include child protection services, early childhood development services to children aged 0–5, and the social development part of home- and community-based care.
- Poverty alleviation services and projects being financed and delivered by local government.

4.4.4 **Using the courts**

Community organisations and individuals can also turn to the courts to mobilise resources for fulfilling socio-economic rights. As a general rule:

- Focus on using the kinds of advocacy, mobilising and lobbying strategies we have suggested in this chapter to affect resources for socio-economic rights by directly influencing government policy, budgeting and service delivery.
- Turn to the courts only when the community or an individual needs a specific remedy to a problem.

We will summarise two particularly good court case examples of how litigation can work to bring relief to those in need, as well as to release more resources for realising socio-economic rights.

COURT CASE



EXTENDING SOCIAL ASSISTANCE TO NON-CITIZENS

In the 2004 case of *Khosa and Others v Minister of Social Development and Another, Mahlaule and Others v Minister of Social Development and Another* (Khosa case), the Constitutional Court was asked to question the legality of the State not offering social assistance to a community of indigent non-citizen residents.

The Constitutional Court decided in favour of the indigent non-citizen residents that brought the claim, and decided that the law should be read so that both South African citizens and residents have a right to social assistance, as long as they qualify, for example, through the means test. The decision brought real relief to the claimants because they then qualified for social assistance.

However, it had a wider impact in releasing resources for realising socio-economic rights. As a result, more resources were allocated by national government from the NRF to the equitable shares of provinces to finance the increased demand for social grants caused by all non-citizen residents qualifying for social assistance.

For more on the Khosa case, see page 33.

COURT CASE



EXTENDING ANTIRETROVIRAL TREATMENT TO PREGNANT MOTHERS AND THEIR CHILDREN

In the 2002 TAC case, the Constitutional Court considered the Government's decision to limit the programme to provide antiretroviral (ARV) treatment to pregnant mothers and their children to pilot sites.

The Constitutional Court decided in favour of the TAC and said that:

- This limitation could not be justified.
- Government had to roll out the programme to all public hospitals and clinics.

This order brought relief for many mothers and their babies in need of ARV treatment, and government resources had to be adjusted to provide ARV treatment nationally.

While litigation can be a powerful tool to use, it can be costly and take a long time. Also, the Constitutional Court's cautious approach in using the 'reasonable measures' test to review government action makes litigation a difficult tool to use because the burden of proving the case rests with litigants who are challenging government. It is difficult to prove in court that a programme is unreasonable (*Liebenberg, 2003 and 2004a, 10*).

The benefits of litigation can be limited because the courts may decide not to ask government to provide a service immediately to meet needs.

For more on the TAC case, see Chapter 1 on page 32.

GUIDELINES



ARGUMENTS TO USE IN THE COURTS TO RELEASE RESOURCES AND REALISE RIGHTS

1. The resources available for a socio-economic rights programme potentially include all the resources in the country, not just those already allocated to the programme. Sufficient resources may be available from other budget items.
2. South Africa is rich and has a conservative fiscal policy. When a country has the resources to provide for basic levels of socio-economic rights, it is a serious denial of human dignity to neglect to do this. It also undermines efforts to build a peaceful, caring and inclusive society.
3. Without a detailed costing of the programme, government is not in a position to make a rational decision on budget allocations.
4. Concern about inability to spend funds in socio-economic rights programmes signals the need to spend more on building managerial and other skills, rather than to hold back funds and socio-economic rights.

For more on the 'minimum core' argument, see Chapter 1 on page 39.

4.5

The limitations imposed by the 'reasonable measures' test to claimants using the courts as a vehicle to release socio-economic rights resources and to realise their rights, raises a final important strategy. This is advocating and lobbying for the courts to change their 'reasonable measures' test so that:

- The burden of proof is on the State to justify that the budget is not enough.
- Financing and delivering a 'minimum core' of each right given to everyone in the Constitution begins to be seen as part of the 'reasonable measures' test.

Conclusion

The task the Constitution sets for the State – of generating and using resources to fulfil socio-economic rights – is a difficult one. At the same time, it is not easy for communities and individuals to hold the State, and most importantly government, responsible for fulfilling this obligation.

However, this chapter has tried to show that it is very important to challenge the State to connect socio-economic rights and budgets more closely. This must happen for constitutional rights to serve their purpose of improving the quality of life of all vulnerable groups. In addition, we have seen how a wide range of strategies can be used to generate more and better use of resources for fulfilling socio-economic rights.

In rising to the challenge, and engaging with government budgets, it is encouraging to remember the words of John Samuels, from the National Centre for Advocacy Studies in India, that:

"Budgets are not financial documents, they are political documents, an expression of the power relations in the society" (in Shultz, 2002, 22).

While it is true that South Africa's resources are limited and we need to be careful to grow them to finance future needs, affordability is not the only – or most important – factor working against enough resources being allocated to fulfil socio-economic rights. The other, more important factors are:

- Lack of agreement about the types and levels of goods and services that the State should finance to give effect to socio-economic rights.
- Not enough political will to support the constitutional value and promise of organising resource allocation and use in the country in a way that prioritises the basic needs and rights of the most vulnerable groups.
- Insufficient planning, budgeting and implementation capacity – particularly at local government level – to manage larger socio-economic rights programme budgets.
- Underspensing of funds allocated for social services.
- Inadequate pressure on government by other role players with duties to promote resource use for socio-economic rights, including Parliament and civil society organisations.

Discussion ideas



TALKING POINTS

1. *What do the socio-economic rights in the Constitution promise everyone and specifically children affected by poverty?*
2. *Why do constitutional socio-economic rights require budget action by government? Is it only financial resources that government needs to provide?*
3. *Who represents the interests of people affected by poverty when policy, planning and budget decisions are taken in government?*
4. *Do you think it should be left to government to decide on what services should be financed to give effect to socio-economic rights? And at what level they should be financed? If not, who should decide this, and how should it be done?*
5. *What is the Integrated Development Planning process at local government level? How does it relate to government spending on socio-economic rights?*
6. *Think of a socio-economic rights service that is poorly delivered in your community. Do you think the problem is insufficient government funds or something else?*
7. *When would you turn to the courts to try to secure more resources to realise a right in your community? Try to use a local example.*

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Environmental rights

CHAPTER 5



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KEY WORDS

Access	Able to get, have or use something, eg access to health care.
Administrative action	Decisions taken or not taken that negatively affect your legal rights, eg administrative action by government departments, local authorities and other organs of State.
Arbitration	When both sides in a dispute agree that a neutral person can make a final decision on how to solve the dispute, after listening to both sides, and without the need for litigation.
Biodiversity	Our many different plants, animals, the variability among living organisms and the ecological environments of which they are part.
Conciliation	When a neutral person tries to assist two sides in a dispute to reach an agreement to solve the dispute. The neutral person helps the people involved by clarifying the issues and assessing the strengths and weaknesses of each side of the case, and if the case is not settled, exploring the steps that remain to prepare the case for trial.
Discretionary action	Actions where government officials have to think about all relevant factors and then decide on what to do.
Discrimination	Being treated differently, eg because you are a woman, black, gay, living with a disability, or living with HIV.
Ecological	To do with the relationship between living things (animals, plants and humans) and their environment.
Ecosystem	The relationship and interaction between plants, animals and the non-living environment.
Emission/Emitting	Sending out or discharging, eg emitting substances or fluids.
Environmental degradation	Lowering the quality of the environment through human activities.
Environmental impact	The effect of proposed activities or developments on the environment, society and economy.

Environmental Impact Assessment (EIA)	An EIA is an important planning tool that focuses on the likely impacts of a specific proposed development or activity on the environment – in other words, all the things that can happen when you disturb the environment through a development or other activity that may significantly change the environment.
Exploitation	Using or taking advantage of something or someone.
Hazardous waste	Waste that is a threat to people, plants and animals, eg hazardous waste from factories, hospitals, use of detergents, pesticides and vehicles.
International instruments	International documents like conventions, declarations, treaties and charters – can also include structures and procedures.
Just administrative action	The duty of authorities to listen to the concerns of the public before giving permission for an activity that may significantly affect the environment.
Legislation	Laws made by national and provincial parliaments, and by a Municipal Council of a municipality.
Litigation	Bringing or defending a court case against another person.
Mediation	When you agree to bring in a neutral person to help two people in a dispute to find a solution. The neutral person assists people involved in the dispute by managing the negotiation process, helping them to listen to each other and keeping them on track.
NEMA	The National Environmental Management Act 107 of 1998.
Regulate	Make laws, rules, procedures and standards to control an activity or otherwise regulate society.
Sanitation	Toilets and sewerage systems, including the disposal of their contents.
Significant	Key word used in NEMA – something important or something that has a serious effect, eg significant pollution.
Strategic Environmental Assessment (SEA)	A process of examining environmental policies, plans and programmes before implementation. Unlike an EIA that reacts to a proposed activity or development, the aim of an SEA is to proactively provide information on and an analysis of the consequences of different actions and their environmental impacts in the short-, medium- and long-terms.
Sustainable development	Development that is planned to meet the needs of present and future generations. Sustainable development includes using and conserving resources responsibly.

Unfair discrimination A policy, law, conduct or situation that unfairly disadvantages you, eg because you are a woman, black, lesbian, living with a disability, or living with HIV.

.....
Violate/Violation Abuse or not respect, eg violate your environmental rights.
.....

5.1

Why is it important to understand your environmental rights?

CASE STUDY



TAKING UP ENVIRONMENTAL STRUGGLES

Disadvantaged communities in the South Durban area live near two oil refineries and many industries that cause a lot of pollution. The refineries in the past used to produce up to 60 times more pollution than a clean oil refinery in Europe or North America. A 2002 medical study, carried out by the University of KwaZulu-Natal's Nelson Mandela School of Medicine and a United States University, found that an abnormally high number of students and teachers (52%) at a primary school bordering one of the refineries suffered from asthma.

But these communities have taken action against industry in the area, and are slowly getting the pollution levels decreased. They have done this through protest action and by challenging industry and local and national government in many ways, including protest action and court action. From 1997 to 1999 these communities participated in the Durban South Basin Strategic Environmental Assessment. Their participation was instrumental in stopping further development of the area that may have introduced more pollution problems.

Today things are improving, as the polluters and government are taking steps to minimise pollution. The plight of the South Durban communities for a healthy environment is, however, a continuous struggle for justice, as there does not seem to be a permanent solution in sight.

Durban South Basin Strategic Environmental Assessment (undated), eThekweni Municipality website

If you know what your environmental rights are and how you can protect and advance them, you and your community can also take up similar struggles.

5.2

History and current context

South Africa's economic development since colonial times has been based on the extraction of its mineral wealth and many other natural resources, and the exploitation of its indigenous population. The interests of industry have come first and the effect of these economic policies and activities on the environment and people has been a low priority.

Our environment today experiences problems such as industrial pollution, unsustainable agricultural practices, soil erosion and the contamination of ground water. Exploitative mining and industrial practices have often left a legacy of disease and poverty. Apartheid city planning has ensured that most of the negative impacts on the environment today are felt by historically disadvantaged communities.

Conditions contributing to stress and poor health in these communities include:



- Poor living conditions.
- Poor provision of services (eg refuse removal and sanitation).
- Dangerous and unhealthy workplaces.
- Air pollution.
- Proximity of residential areas to disposal facilities and polluting industries.
- Lack of access to quick and safe transport.

Demands for an improved environment are essentially a call for an improved quality of life that will cost a lot in the short-term. The costs involved would include those required for improved industrial safety, new (alternative) energy sources, better town planning and public transport infrastructure, and improved municipal services and amenities. These costs are possible obstacles to getting access to these rights.

However, by responding to the calls of communities for a better quality of life for all, and investing time, energy, effort and costs in the short-term, the real possibility exists of improving the future quality of life and looking after our resources in a sustainable manner.

5.3

What are your environmental rights in the Constitution?

5.3.1 What are environmental rights?

Section 24 of the *Constitution (Act 108 of 1996)* says:

- Everyone has the right to an environment that is not harmful to health or well being.
- The Government must act reasonably to protect the environment by preventing pollution, promoting conservation, and securing sustainable development, while building the economy and society.

5.3.2

What other constitutional rights support environmental rights?

One way of making sure that the Government takes responsible decisions to protect the environment is to make sure that it follows transparent and reasonable administrative procedures, and to ensure that its decisions are made in a manner that is substantively fair.

There are two fundamental rights in the Constitution to make sure that these things happen:

- The right of access to information (*section 32*).
- The right to just administrative action (*section 33*).

Section 36 of the Constitution says that these rights are not absolute – they may be limited if the limitation is reasonable and justifiable in a democratic society based on human dignity, equality and freedom.

The Constitution also promises us the right to:

- *Civil and political rights*, including the right to human dignity, life and privacy.
- *Socio-economic rights*, including the right to:
 - Access to health care services.
 - Access to sufficient food and water.
 - For children: basic nutrition, shelter, basic health care services and social services, and to be protected from neglect or abuse.

a) Poverty and socio-economic rights

Imagine circumstances where some or all of these rights could be under threat because of poor economic circumstances. For example, circumstances where people are living without adequate sanitation, refuse removal or water, as are often found in informal settlements, poorly serviced townships and rural areas.

Residents who demand that a local authority must provide them with toilets, water, sanitation and refuse removal can argue that if the Government does not provide these, it could be violating a number of constitutional rights. Improved socio-economic conditions could result from an effective campaign around these rights.

b) Equality and non-discrimination

The Constitution also recognises equality as a fundamental right. The right to equality says that everyone must have equal protection and benefit of the law. This means that a safe and healthy environment should not only be for those who can afford it, but for everyone. The State and private bodies may not unfairly discriminate directly or indirectly against anyone.

Indirect discrimination happens when there is no obvious discrimination, but in fact the law or an activity has a greater negative impact on a particular group.

One of the indirect forms of discrimination that has been recognised, for example in the United States, is the placing of the majority of hazardous or polluting industries in poor or black neighbourhoods. These neighbourhoods then carry an unequal share of the environmental burdens of these industries, including their effects on the health and safety of the residents. This practice is called 'environmental discrimination' or 'environmental racism'. Planning and environmental decisions taken in South Africa also need to be examined for this kind of discrimination.

EXAMPLES



DIFFERENT RIGHTS BEING VIOLATED

An informal settlement without water or sanitation could be a threat to public health. If the local authority does not provide toilets, sewerage, water and refuse removal, this could be:

- *A violation of the environmental right (a threat to the health or well being of residents).*
- *A violation of the right to life (if the unhealthy conditions threaten life itself, eg through the outbreak of diseases like tuberculosis and cholera).*
- *A violation of the right of access to water (if no water is supplied to residents).*
- *A violation of the right of children to basic nutrition.*
- *A violation of the right to privacy and dignity (if there are no toilets and the local authority refuses to supply them).*

5.4

Guides to interpreting your environmental rights

5.4.1 Case law

There have not been many cases in South Africa's courts that directly interpret the right to a healthy environment, as described in the Bill of Rights in the Constitution or in international instruments. Most of the cases so far have looked at whether there has been just administrative action when a decision was taken that affects the environment.

COURT CASE



THE DUTY TO LISTEN TO THE CONCERNS OF PEOPLE

In the 1999 case of *The Director, Mineral Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others*, the Supreme Court of Appeal considered the right to participate in an environmental decision-making process. The people concerned were mainly property owners whose environment was the subject of an environmental decision-making process.

The Court decided:

- Before a permit is given authorising mining activities, government must be prepared to listen to the views of people who might be affected by potential environmental impacts.
- Interested and affected parties must be told about the application for a new mining activity and given a chance to raise their objections in writing. If it is necessary, after the submission of written objections, a more formal hearing can take place.
- The kinds of environmental concerns that can be raised include destruction of plants and animals, pollution, loss of jobs and small businesses, and the depreciation of property values as a result of mining.
- Government must make sure that development meets present needs, but does not compromise the needs of future generations.

COURT CASE



COURT CHALLENGES TO ENVIRONMENTAL DECISION-MAKING MUST BE REASONABLE

In the 2005 case of *Wildlife and Environment Society of South Africa v MEC for Economic Affairs, Environment and Tourism, Eastern Cape Provincial Government and Others*, the Eastern Cape High Court considered whether a non-governmental organisation (NGO) had acted in an unreasonable manner in challenging an environmental decision.

The NGO had been involved in an Environmental Impact Assessment (EIA), but misunderstood one of the processes that were the subject of the EIA, as it did not realise that its concerns had been addressed. When a decision was taken by government to authorise the construction of an incinerator (a waste-burning facility), the NGO appealed to the MEC against that decision.

On appeal, the MEC dismissed the NGO's challenge on the basis that its concerns had been addressed. The NGO then approached the court to challenge the MEC's decision on appeal. The Court decided:

- The NGO misunderstood the waste disposal process. Because of this misunderstanding, the appeal against the decision that authorised construction of an incinerator had no prospects of success.
- The appeal had been correctly decided by the MEC.
- The NGO, in launching a court application against an unfavourable decision, had acted in an unreasonable manner.
- If the NGO had exercised due care, it should have been aware that its concerns had already been addressed, and that the application was therefore unnecessary.
- The NGO should pay the costs of the parties who opposed this application, because the NGO's application was not well prepared when brought before the court.

5.4.2 What are South Africa's international environmental duties?

In addition to its constitutional duties, the Government also has a number of international duties to protect the environment. These are set out in international instruments, including:

- The *African Peer Review Mechanism*.
- The *United Nations Millennium Development Goals*.
- The *World Summit on Sustainable Development Plan of Implementation*.
- The *Rio Declaration*.
- The *African Charter on Human and Peoples' Rights*.

a) The African Peer Review Mechanism

The African Peer Review Mechanism (APRM) is a self-monitoring mechanism voluntarily adopted by African states, including South Africa. As part of the APRM, South Africa must prepare periodic reports on its performance in adopting and implementing policies, standards and practices that will lead to political stability, high economic growth, sustainable development, and regional and economic integration.

Civil society plays an important role in the development of these reports as it is involved in responding to the questionnaire that initiates the process. Environmental sustainability is one of the key issues and is systematically built into all sections of the questionnaire.

For more on the APRM, see Chapter 3 on page 99.

b) The United Nations Millennium Development Goals

The United Nations Millennium Development Goals (MDGs) must be met by 2015. Among these is Goal 7, directing countries to ensure environmental sustainability by:

- Integrating the principles of sustainable development into country policies and programmes.
- Reversing loss of environmental resources.
- Reducing by half the percentage of people without sustainable access to safe drinking water.
- Achieving significant improvement in the lives of at least 100 million slum dwellers by 2020.

For more on the MDGs, see Chapter 3 on page 97.

c) The World Summit on Sustainable Development Plan of Implementation

The World Summit on Sustainable Development Plan of Implementation (2002) directs States to prevent and minimise waste and maximise re-use, recycling and use of environmentally friendly alternative materials, with the participation

of all stakeholders. This must be done to minimise adverse effects on the environment and improve resource efficiency.

The Plan of Implementation also says that, in order to reverse the current trend in natural resource degradation as soon as possible, States must implement strategies, including targets to protect ecosystems and to achieve integrated management of natural resources. To achieve this:

- States must launch a programme of action to achieve the MDG on safe drinking water with a view to halve, by 2015, the proportion of people who are unable to reach or to afford safe drinking water and the proportion of people without access to basic sanitation.
- States must facilitate access to public information and participation, including women, at all levels, in support of policy and decision-making related to water resource management and project implementation.

d) The Rio Declaration

The Rio Declaration says that, in order to protect the environment, States must first fulfil the basic needs of their people and improve living standards.

e) The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights says that all people have a right to a generally satisfactory environment favourable to their development.



5.5

Policies, legislation and programmes to implement your environmental rights

The Government has produced a number of policy documents and laws to give meaning to the environmental rights in our Constitution. These include laws about water, waste management, air quality and protecting our biodiversity.

South Africa has also signed the *Basel Convention* that, from January 1998, banned imports of toxic waste by developing countries from industrial countries. At home, the Government regulates the establishment, operation and closure of waste disposal sites to make them safer.

5.5.1 The National Environmental Management Act

COURT CASE



INTERPRETING ENVIRONMENTAL LAWS

In the 2005 case of *The MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Limited and Another*, the Supreme Court of Appeal settled a dispute on the meaning of provisions of the *Environment Conservation Act 73 of 1989*. What was in dispute was whether the Act prohibited the construction of a filling station without written authorisation. The Gauteng Department of Agriculture, Conservation, Environment and Land Affairs (the Department) had developed policy guidelines based on the understanding that the construction of a filling station is a prohibited activity that may only be undertaken after a written authorisation has been issued.

The Department applied these guidelines and refused Sasol Oil (Pty) Ltd authorisation to build a filling station in Randpark Ridge on the grounds that the construction would be potentially harmful to the environment. Sasol argued that the construction of a filling station is not a prohibited activity and the guidelines are unlawful, as they were based on wrongly thinking that the Department had powers to decide whether the construction of a filling station should be authorised or refused.

The Court decided:

- The Department had these powers and the guidelines were lawful.
- The proposed development was planned opposite a church (a culturally and socially sensitive location) and next to properties zoned for residential development. The development would also be a source for pollution and have a negative visual impact on the surrounding areas.
- The interpretation of an environmental law must be consistent with the purpose of the law, the environmental right set out in the Constitution, and other relevant statutory provisions that are part of environmental laws.
- The *National Environmental Management Act 107 of 1998* (NEMA) says that the interpretation of any law concerned with protecting and managing the environment must be guided by its principles.
- At the heart of the NEMA principles is the principle of sustainable development – this means organs of State must evaluate the social, economic and environmental impacts of activities that may significantly affect the environment.

International experiences show that environmental rights cannot be effectively protected unless other rights are also protected, including the right of access to information, public participation in decision-making and access to justice. The Government passed NEMA to help you to claim these other rights in the context of protecting the environment.

NEMA helps protect the environment by:

- Creating a set of environmental principles that show the Government how it should act. For example, it tells the Government what “sustainable development” means and says that the public must be actively involved when decisions that affect the environment are made.
- Making the Government consider all the effects that a development can have (“environmental impacts”) before it is allowed to go ahead.

5.5.2 Access to information

Getting the right information is very important because it helps you make the right decision about what you are going to do before you take action. This can save you delays, costs and damage. The Constitution gives us the right to information held by government, and information held by private individuals and bodies that is needed by you to protect any of your rights.

The Government passed the *Promotion of Access to Information Act 2 of 2000* (PAIA). This Act tells you what information you can get and how to go about asking for it from government and private individuals or bodies. A request for commercial information about a company can only be refused if the information is genuinely confidential. This means that, if made available to the public, it would unfairly affect the commercial interests of the company.

NEMA and PAIA work together in opening up access to information. NEMA also says what information you are allowed to get about the environment and public health.

NEMA, for example, says that information about pollution and waste products from industry can never be private information. Under PAIA, a person cannot refuse to give this information unless it would harm the polluter’s commercial interests.

For more on PAIA, see Chapter 2 on page 58.

COURT CASE



MAKING REPRESENTATIONS WHEN NEW INFORMATION IS INTRODUCED IN AN EIA

In the 2005 case of *Earthlife Africa (Cape Town) v Director General: Department of Environmental Affairs and Tourism and Another*, the Cape High Court considered the question of what is a reasonable opportunity to make representations in an EIA before a decision is taken on whether or not to authorise the generation of energy by using nuclear power.

A decision to authorise was taken based on an Environmental Impact Report that was fundamentally different from a draft Environmental Impact Report on which the public had commented. Earthlife Africa launched court proceedings challenging this decision.

The Court decided:

- The fact that a decision is but the first step in a multi-stage process does not mean that interested and affected parties must not be given an opportunity to make representations before it is made.
- It also does not mean that an aggrieved person must await the final step before taking legal action to review the decision.
- Where a draft Environmental Impact Report is substantially different to a final Environmental Impact Report, interested and affected parties have a right to a reasonable opportunity to make representations to the decision-maker on the new aspects not previously addressed in the draft Environmental Impact Report.

COURT CASE



ACCESS TO INFORMATION MAY BE COSTLY

In the 2005 case of *The Trustees for the Time Being of the Biowatch Trust v The Registrar: Genetic Resources and Others*, the Transvaal Provincial Division of the High Court considered an application that related to a constitutional right of access to information.

In this case, the Court granted an NGO access to information, but ordered it to pay the legal costs of an international company that had opposed the court proceedings.

The High Court decided:

- Where a person has established a clear right of access to information, a failure to grant access is a continued infringement of the constitutional right.
- Even where a person has been successful in court proceedings instituted to advance, protect or enforce a right to access to information, the court may still grant a costs order against that person. The court may grant this order if it finds that the way that the requests for information were formulated was vague.

5.5.3 Public participation in environmental decision-making

Governments all over the world have recognised that when the public is involved in environmental decision-making, it is possible to make better decisions that protect the environment and your health. Remember, the Constitution says that you have the right to just administrative action.

In making decisions about the environment, just administrative action means that the concerns of the public must be listened to before giving permission for an activity that may significantly affect the environment. This principle is set out in NEMA.

For more on PAJA, see Chapter 2 on page 61.

The *Promotion of Administrative Justice Act 3 of 2000* (PAJA) helped to explain what the constitutional right to just administrative action means. It says:

- Administrative action that may negatively affect your rights must follow fair procedures.
- Government has the discretion to decide if a public enquiry should be held in cases where administrative action negatively affects your rights. It can also give you a chance to make written comments if it decides that this is appropriate.

One of the ways that the public can participate in environmental decision-making is when an Environmental Impact Assessment is done before a new development. The EIA must look at all the different ways in which the development can be done and choose the one that does the least harm to the environment. It must also evaluate the impact of new developments on the socio-economic conditions of people and their cultural interests.

5.5.4 Access to justice in protecting environmental rights

One of the important ways of protecting the environment and your health and well being is to approach a court for an order. In the past, people were not keen to do this because if they lost, they had to pay their opponent's legal costs. Even if they won the case, it could still cost a lot.

NEMA helps to use the law to protect the environment by:

- Making it easy to complain to government about damage to the environment.
- Allowing for conciliation, facilitation and arbitration where there is a dispute about an environmental issue.
- Making it less financially risky for you to go to court to defend the environment.
- Saying that you can charge someone through a private prosecution if government is not willing to prosecute environmental crimes.

Access to information, public participation and access to justice are important tools for exercising your environmental rights. But how do you know when to use them? There are so many different laws governing the environment that can make a difference to your quality of life. As a result, you may need a lawyer to explain which of the many environmental laws may have been broken on the way to your environment or health being harmed. This can create difficulties.

NEMA helps you fight for your constitutional right to the environment without having to know all the environmental laws. It has a set of environmental principles that must be followed whenever government takes any action significantly affecting the environment. It also says that, whenever anybody "significantly pollutes or degrades the environment", you can go to government to ask it to investigate and force the polluter to clean up the pollution.

GUIDELINES



SOME OF NEMA'S KEY ENVIRONMENTAL PRINCIPLES

- You have a right to be consulted before your environment can be harmed.
- All important aspects of the environment that may be affected by a development must be studied before it happens.
- Women and other vulnerable and disadvantaged groups should be helped to participate in decisions about their environment.
- The polluter must pay for harm done to the environment.
- There must be fair access to environmental resources.

5.5.5 Evaluation of new environmental laws and their implementation

The environmental rights in the Constitution and other laws have many positive aspects, but these laws also have shortcomings (see the table on the next page).

Tighter regulation of the environment will take many years and a lot of political controversy because pollution control is expensive in the short-term. Continuously, environmental groups and other NGOs have to lobby government, Parliament and polluters to improve standards and to protect health. They need the help of environmental scientists and lawyers to make submissions and to take part in enquiries about technical issues (eg chemical processes, toxic chemicals and causes of disease).

If you think that someone is causing damage to the environment and government does not agree with you, you can ask government to pay for a mediator or arbitrator to help solve the problem. Government does not have to do this – if they refuse, you will have to go to court for a decision about this issue.

Our new environmental management system has improved the position for women and other vulnerable and disadvantaged groups. This is because the environmental principles say that environmental management must put people and their needs first. They also say that there must be environmental justice. This means that there must not be unfair discrimination in the way that negative environmental impacts are distributed.

Evaluation of our environmental laws

Positive aspects

- The laws help to coordinate government activity by setting standards for different government departments to protect the environment in a consistent way.
- Before new developments can happen that may significantly affect the environment, there must be public participation and information-sharing.
- Polluters who damage the environment must clean up their pollution.
- There is improved access to justice for members of civil society with complaints about damage to the environment.

Shortcomings

- The laws set out general principles for environmental management and public participation, but do not spell out exactly how people, businesses and government should behave. They leave issues poorly regulated or unregulated. For example, they do not say how much pollution is allowed by any particular factory, or how different kinds of waste should be managed and disposed of.
- Government officials still have a lot of discretion about how much pollution and degradation of the environment they are prepared to allow.
- NEMA has been amended to exclude a duty to undertake an EIA where an activity is not identified as requiring one, even though the activity may significantly affect the environment.
- The meaning of “reasonable measures” is still vague and has not been decided by courts, or spelt out in regulations in enough detail.
- Some new laws have not been implemented even though they have been drafted, eg the *Coastal Zone Management Bill of 2003*.

5.6

Protecting and advancing your environmental rights

In this part, we deal with two environmental problems:

- When a new development is about to start or an activity is about to be continued that may harm your health or your environment, and where you want to protect your environmental rights.
- Where the harm to your environment or your health is already happening, and you want to do something to stop it.



5.6.1 Problem 1: New developments or continuing activities

GUIDELINES



WHAT HAPPENS WHEN NEMA REGULATIONS DO NOT COVER A DEVELOPMENT?

- If you think it will have a significant impact on the environment, you can try to persuade government that an impact assessment should be done beforehand. This impact assessment would be part of the developer's duty of care under NEMA.
- If you are ignored, you can go to court and see whether the court agrees with you.
- If the court agrees with you, it can order the development to be stopped until the impact assessment is completed.

Section 24 of the Constitution says that the State must protect the environment through reasonable steps that “prevent pollution and ecological degradation”, “promote conservation” and “secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”. This means that, when the State allows new developments or continuation of existing activities, it must act reasonably to protect your health or well being, and to protect the environment.

NEMA also says how impacts must be assessed before the Government can give permission for a development which may “significantly” affect the environment.

a) **Using an Environmental Impact Assessment**

An EIA is a process of finding out what harm a development might do to the environment:

- Each different form of harm is called an *impact*.
- Ways of making the harm less (*mitigation*) are explored.
- If there are different ways of doing the development (*alternatives*), these are also researched.
- An expert not involved in any other way in the project (called an *environmental assessment practitioner*) usually does the research.

The public is told about the project and allowed to make comments. They can suggest different ways of doing the project. After all the impacts have been identified, government looks at what everyone has said and decides whether to let the development go ahead or not. Conditions that aim to protect the environment can be placed on the development.

NEMA says that there must be an EIA before any activity or development that is identified or specified by the Minister of Environmental Affairs and Tourism, or the MEC for a provincial environmental affairs portfolio, as needing an environmental authorisation before it can start or continue. This means that the developer must ask government for permission and must do an impact assessment before starting with or continuing the development. The impact assessment helps government to decide whether to let the development go ahead.

Under NEMA, there are regulations saying that certain activities must definitely have EIAs before they may begin or continue.

NEMA says that when we do these assessments, we must not only look at the way the environment may be affected. We must also look at the way our society and our cultural heritage may be affected. For example, we should assess the impact that a proposed development is likely to have on unemployment in the surrounding community, and on areas of cultural significance such as graves and battlefields.

Government is not allowed to ignore what is recommended in an EIA. It is also not allowed to ignore the NEMA environmental principles when it decides what to do. If it does, you can take legal action, and ask a court to stop the development until government has issued a new decision taking into account the NEMA environmental principles and the recommendations of an EIA.

b) **Preparing to take action**

On the next page, we suggest some steps you can take to get organised to advance, protect and defend your environmental rights when new developments are being planned.

If you are not satisfied at the end of an EIA that it has been done following these guidelines, you can go to court and try to stop the development from going ahead until an EIA is done that is in line with legal requirements. You can also ask for government to appoint a conciliator or arbitrator to try to solve the dispute.

GUIDELINES



STEPS TO TAKE WITH NEW DEVELOPMENTS

1. Find out from the developer which government department it has approached for permission.
2. Ask for a list of interested and affected parties in your area.
3. Organise other interested and affected parties in your area to be included on the list.
4. Ask who the environmental assessment practitioners are and what their qualifications are.
5. Find out from your local university or technikon, or the Internet, if there have been any similar developments elsewhere in the country or in the world, and what kind of harm they caused to the environment and to human health. For example, there are many support groups in the United States of America dealing with industrial and other developments. The United States Environmental Protection Agency also has a website and provides information.
6. Find out what important issues need to be raised in the impact assessment.
7. Ask to see all scientific studies done on the impacts.
8. Ask for 'mitigation measures' to be studied in each impact – in other words, what can be done to make the impact less harmful.
9. Find out all the impacts that the activity may have on the socio-economic environment or cultural heritage.
10. Ask the independent consultants to say when they do not have scientific answers to questions, or where they are not qualified enough to answer scientific questions.
11. Ask for an independent review of the reports by another consultant to be paid for by the developer.
12. Make sure all your comments are included and recorded in the review.
13. If you are unhappy at any stage, ask for conciliation, mediation or arbitration.
14. Make sure that at all stages of the process you get all the information you need from the developer about possible harm to the environment, or your health and well being.
15. Ask if arrangements have been made for the monitoring and managing of the harm that the development may cause to the environment or to your health.
16. Make sure that government considers all recommendations from reports that were done during the impact assessment, and other provisions of NEMA and its environmental principles.



5.6.2 Problem 2: Stopping actions that harm the environment and your health

Under South Africa's environmental management laws, you can get organised to protect your environmental rights in these situations:

- When a law that protects the environment has been broken, for example, a person is dumping used motor oil in a river.
- When government has not followed a principle of NEMA, for example, government has made no attempt to get a mining company to cover a dusty mine-dump next to a community. It says it is too expensive for the mine. This goes against the principle that environmental management must put people and their needs first, and must be fair.
- When there is serious pollution of the environment, for example, a local authority is pumping sewage into a river used by a community for drinking water.
- If you are punished for refusing to do work that could harm the environment or for giving information about risks to the environment.

Your different options for action will depend on what kind of harm is being caused to the environment or to your health and well being. Your options include:

- Complaining to local or provincial authorities.
- Complaining to the Director General of the relevant government department.
- Asking for conciliation or arbitration.
- Going to court.

a) Preparing to take action

GUIDELINES



WHAT TO DO BEFORE TAKING ACTION

1. Prepare as much evidence as you can, for example, take photographs, soil or water samples, and record complaints by people affected.
2. If you write letters, include as much detail as possible and keep copies of what you have sent.
3. Try to approach local universities and technikons (many have environmental units) and ask them to help you with scientific information and support.
4. Get legal advice about whether a law has been broken, for example, from university law faculties, law clinics, advice offices, Legal Resources Centres, or human rights lawyers in private practice.
5. Contact other environmental groups locally for support and advice.

b) Complaining to local or provincial authorities

GUIDELINES



COMPLAINING TO AUTHORITIES

For example, if someone is illegally dumping builders' rubble or medical waste in your community:

- Phone your local government health or environmental department and make a complaint.
- Complain to the provincial department responsible for Environmental Affairs or, if the waste is being dumped in a water resource, the Department of Water Affairs.
- Ask whether the action you are complaining about is a crime, and if it is, lay a charge at the police station.

c) Complaining to the Director General

If your complaint is about serious pollution, you can make a complaint to the Director General of the government department that is responsible, for example:

- Water Affairs and Forestry, if water or soil is being polluted.
- Environmental Affairs and Tourism, if any part of the environment is being polluted.

If they do not answer, you can go to court to order them to respond. You should put your complaint in writing, especially if later you want to go to court for help and you need to prove that all other efforts have failed.

d) Asking for conciliation or arbitration

Conflict management happens when a neutral person helps to solve a dispute between two or more persons by conciliation or arbitration. You can ask government to pay a conciliator or arbitrator to solve the problem. This is a much cheaper way to solve problems than going to court.

e) Going to court

You can go to court to:

- Stop government or a person from breaking the law, or
- Force someone to do their duty if there is a duty on them to do something, such as clean up pollution.

The next three case studies show how you can protect your environmental rights.

CASE STUDY



RIVER POLLUTION IN PIETERMARITZBURG

Bayne's Spruit River is situated next to Sobantu Township in Pietermaritzburg. This river is a valuable resource to the Sobantu community, as its water is used for irrigation purposes, swimming and washing of clothes. For years, oil companies upstream of the township were illegally polluting this river by discharging oily, smelly fluids ('industrial effluent') into it. These fluids clogged up the irrigation pipes, and made the water unsuitable for swimming and washing.

Action taken:

- Community members formed an organisation to deal with the pollution problem, among other issues.
- This organisation was instrumental in establishing a multi-stakeholder forum, including representatives of oil companies, the Department of Water Affairs and Forestry, the Department of Agriculture and Environmental Affairs, and the Msunduzi Municipality.
- The aim of the forum was to stop the pollution through investigating pollution incidents, identifying the polluters and collecting samples to assist in the prosecution of individual companies.
- The forum's activities helped to decrease the companies' pollution of the river because the threat of prosecution became real.

Environmental Justice Project Report, 2002, Legal Resources Centre, 8

CASE STUDY



AIR POLLUTION IN TABLE VIEW

An oil refinery is situated and operating in the residential area of Table View in Cape Town, less than three kilometres from poor community areas of De Noon and Joe Slovo. In these areas, residents complain that they have a high prevalence of respiratory problems, chest-related illness, coughs, sore throats, weak immune systems, sinus complication, headaches, eye infections, ear infection and allergies. It is suspected that all these problems are linked to toxic air pollution, allegedly caused by the refinery.

Action taken:

- The residents in Table View started to take air samples that showed the presence of 31 chemicals, 12 of which are categorised as dangerous ('toxic') air pollutants by the United States Environmental Protection Agency.
- Using these air samples, the Table View Residents Association approached the South African Human Rights Commission alleging that the residents are experiencing human rights abuses as a result of the operations of the oil refinery.

National Report on Community-based Air Pollution Monitoring in South Africa – Air Pollution in Selected Industrial Areas in South Africa, 2003, groundWork, 34

CASE STUDY



RECYCLING CHEMICALS

A company that recycled hazardous chemicals in Europe was having trouble proving to government officials that its industrial process was not making workers ill. The company decided to go to South Africa, as it thought our environmental laws were less strict than in Europe. It set up a factory to recycle the chemicals. After a while, two workers died and many others became sick. They discovered that one of the hazardous chemicals they were recycling was making them ill.

Action taken:

- The workers took the case to court in Britain. An out-of-court settlement was reached and the workers were paid damages for their injuries.
- The company later improved its safety processes and workers are no longer getting sick.

groundWork press release, 'Thor chemicals to be held accountable for poisoning workers, community and environment', 12 March 2003; Greg Dropkin, UK Judges Block Thor Manoeuvre, LabourNet UK website.

Discussion ideas



TALKING POINT 1

Organise the community that lives near an industry that causes harm to the environment. Choose a local example that you are aware of.

Workshop these steps to take up the issue:

1. Find out and highlight the issues:

- Discuss the nature of the operations involved.
- Discuss the environmental impacts that are likely to result from those operations – in other words, are they likely to pollute the air, soil or water?
- Discuss the likely impact on the community – with air pollution, for example, are chest problems common among the members of the community?
- Highlight these issues to other members of the community with the aim of forming a community organisation or using an existing community organisation to take up these issues.

2. Get more information and help:

- Find out where other operations of the industry are located in other parts of South Africa or in other countries.
- Link up with communities in those places to find out how they have challenged the industry.
- Find out about NGOs that assist communities with environmental pollution.

3. *Take up the issue:*

- *Discuss ways of taking up the issue, such as petitioning the industry concerned or taking legal steps against the industry for specific incidents of environmental pollution.*
- *Discuss the possibility of establishing a multi-stakeholder forum, involving community, industry and government representatives with the aim of tackling environmental pollution.*
- *Find out about forums in other parts of the country and learn from their experiences.*

TALKING POINT 2

Challenge a new development that may significantly affect the environment.

An aluminium smelter (a known large-scale polluter) is planned for construction near a low-income community. Workshop these steps to take up the issue:

1. *Find out what the issues are:*

- *Discuss the environmental rights in the Constitution.*
- *Discuss the NEMA environmental principles.*
- *Discuss whether an EIA must be undertaken.*
- *Brainstorm possible impacts, eg water pollution, air pollution, noise, traffic changes.*

2. *Find out more about the process:*

- *Identify possible interested and affected parties.*
- *Work out what kind of information should be asked from the developer.*
- *List what kinds of advice (eg scientific, legal) are needed to take part in the assessment, and where you can get this advice.*

3. *Take part in the process:*

- *Discuss how to get the most out of meetings and discussions that the developer will hold.*
- *Discuss how to ask for an independent review of the process.*
- *Discuss how to ask for mediation or arbitration if there is a dispute in the process.*
- *Write a submission setting out the community's concerns.*

4. *Think about what to do after government takes a decision:*

- *Discuss what you need advice on, and how to get advice about what to do.*
- *Discuss how to prepare to appeal against the decision.*
- *Discuss how to prepare to take the case to court.*

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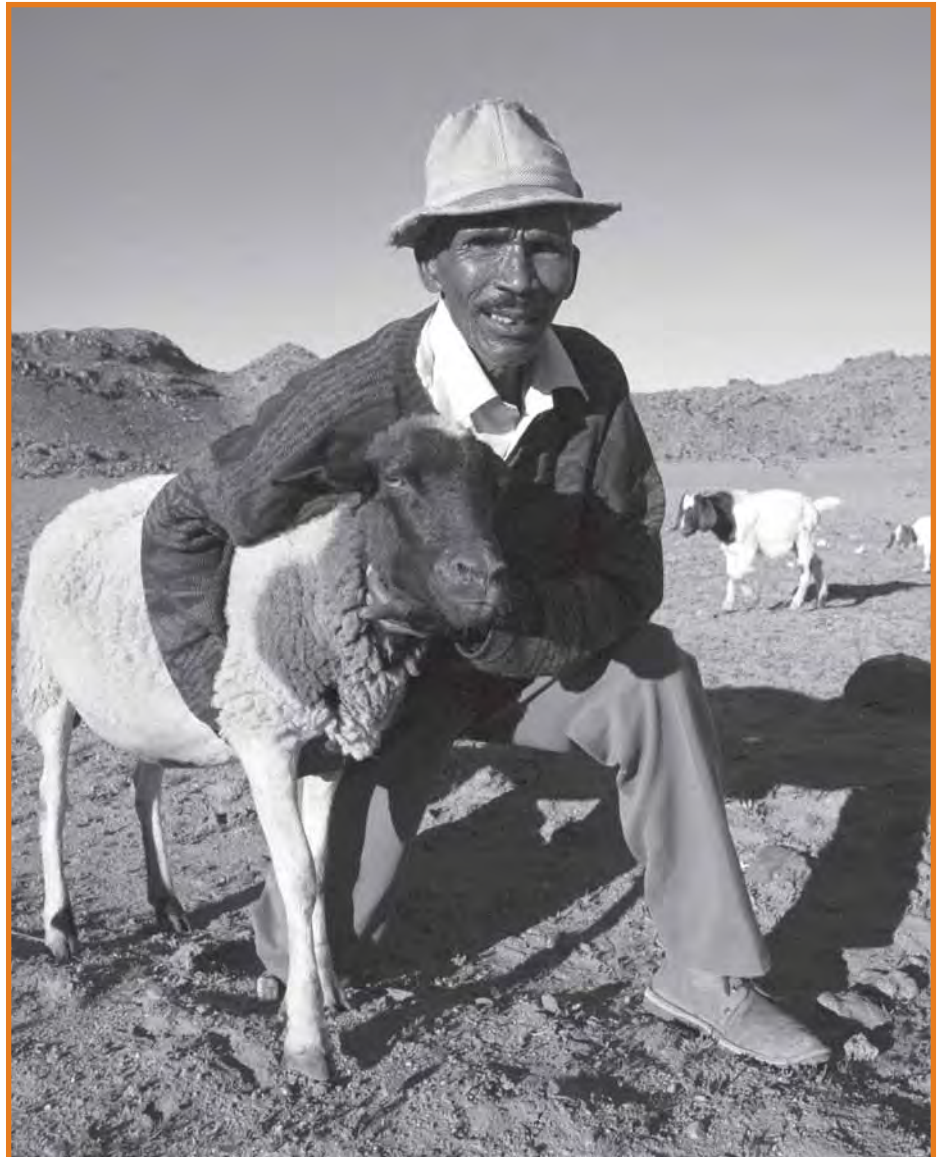
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CHAPTER 6

Land rights



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KEY WORDS

Access	Able to have, get or use something, eg access to land and housing.
Acquire/Acquisition	To get or gain something with the possibility of keeping it permanently, eg buy land.
Arbitrary deprivation	Taking away someone's property rights in an unfair and unlawful way.
Arbitrate	Decide on a case where the two sides (eg land claimant and land owner) cannot agree.
Breach	Break or not respect, eg breach your rights, breach an agreement.
Declaratory order	A court order stating the correct legal position on an issue.
Deprivation	Taking away, eg deprivation of property.
Equitable	Fair and reasonable.
Equity	Fairness.
Expropriate/ Expropriation	When the State takes away property from an owner for a public purpose (eg to achieve land reform), usually with compensation being paid to the owner.
Indicators	Signs or measures used for understanding and evaluating progress.
Interim order	A temporary court order that needs to be made a final court order at a later date.
Labour tenants	People allowed to live on and develop land in return for their labour.
Occupiers	People living on land belonging to someone else.
Peri-urban	Bordering on or surrounding an urban area.
Precedent	A case decision that other courts have to follow.

Public interest	In the interests of the general public.
Redress	Money or another kind of compensation, eg for past discrimination.
Repeal	Withdraw a law or part of the law.
Restitution	Returning what you had or compensating you for what you lost, eg restitution of land to communities dispossessed under apartheid laws.
Security of tenure/ Tenure security	Giving people legally secure rights in land or housing.
Violate/ Violation	Going against or not respecting your rights.

6.1

Why is it important to understand your land rights?

CASE STUDY



ILLEGALLY EVICTED WOMAN RESTORED TO HER HOME

Salome is 23 and lived with her one-year-old baby on a farm near Bela-Bela in Limpopo. Salome was born on the farm, as her father worked for the land owner for over 20 years. After her father's death in 2001, the farm owner gave Salome 12 months' notice under the Extension of Security of Tenure Act (ESTA) to vacate the farm.

However, she did not leave the farm, as she had nowhere to go. On 26 November 2004, the owner broke down the doors to her house and took all her belongings and dumped them on the road outside the farm. Salome contacted a lawyer attached to the Nkuzi Development Association, who visited the site on 2 December and found Salome with her belongings and her baby staying by the side of the road, with nowhere else to go.

Nkuzi brought an urgent application for restoration of tenure rights in the Bela-Bela Magistrate's Court, arguing that the owner had no court order for the eviction and the eviction was therefore illegal. An interim order was granted restoring Salome to the house and ordering the owner to repair the damage to the house and other property. The order was later confirmed by the Court as a final court order.

*Report from Nandu Malumbete, Attorney,
Nkuzi Development Association, 2005*

Knowing and understanding your land rights will allow you and your community to take steps to advance and protect these rights.

6.2

History and current context

6.2.1 The impact of apartheid

During apartheid, laws such as the *Natives Land Act 27 of 1913* and the *Native Trust and Land Act 18 of 1936* restricted the African population to 13% of the total land area of South Africa. Overcrowded reserves were the only area where Africans could lawfully own land. The dispossession of land forced successful black farmers to seek employment as farm labourers, thus converting them into insecure land occupiers and tenants.

For many black South Africans, forced removals meant that people were driven from their homes, loaded onto trucks and transported to relocation sites. Their properties were expropriated without compensation and bulldozers demolished their houses. Influx control laws also prevented Africans from getting permanent land rights in urban areas.

The *Group Areas Act 36 of 1950* allocated certain areas to specific race groups. For example, this meant that a black person could not own land in

Camps Bay because this land was in a 'white area'. Under this law, many black people were forcibly removed from their homes, and resettled in underdeveloped and underserved areas.

The legacy of decades of dispossession and legal discrimination lives on into the democratic era with very limited access to land by black people, lack of livelihood opportunities and the concentration of poverty in rural areas, as the statistics below illustrate.

CASE STUDY



DISTRICT SIX

District Six was home to many people of colour in Cape Town. Many years of living there had made it a cultural symbol for people. It was proclaimed a group area for white people in 1966. When this happened, people's homes were bulldozed, and the community's livelihood and culture destroyed. Thousands of residents were forcibly removed to barren areas of the Cape Flats.

EXAMPLES



LAND AND POVERTY IN SOUTH AFRICA

- *In 1994, approximately 86.2 million hectares of commercial farm land was owned by less than 60 000 white owners.*
- *By 2005, about 3.5% of this had been transferred to black people through the various official land reform programmes.*
- *Around 57% of South Africans were living below the income poverty line in 2001, a figure unchanged since 1994.*
- *Poverty is heavily concentrated in the rural areas – the poorest provinces are Limpopo and Eastern Cape, with 77% and 72% of their populations living below the income poverty line.*
- *Approximately 16 million people live in the communal areas of the old 'homelands', and between 3 and 5 million live as tenants on commercial farms.*

Human Sciences Research Council, 2004, and R. Hall, 2004

For information on changes to the law through the Customary Marriages Act of 1998, see page 221.

Most rural women in South Africa are agricultural producers, cultivating mainly subsistence crops. Apartheid policies forced many women to take over the running of rural property when their husbands and sons were forced into wage labour on the mines and in the cities. Women worked on agricultural production in addition to being heads of households, caring for children and maintaining the household. Customary laws also prevented women from owning land. For many years, a woman was not able to get effective land rights without the permission of her husband or guardian.

6.2.2 Current barriers to land rights

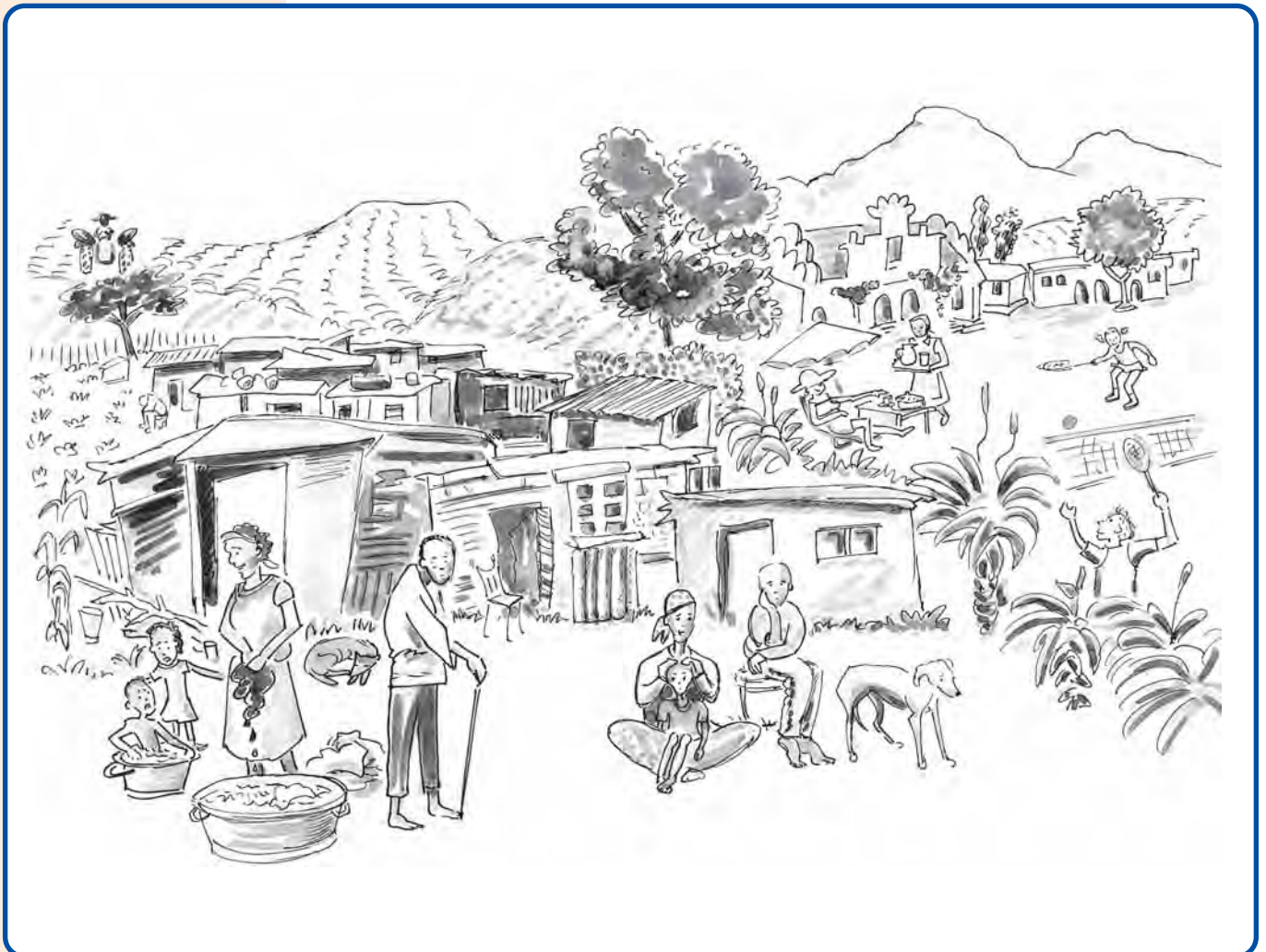
Access to land is not enough

Since 1994, there has been a growing awareness, both within government and among landless people, that access to land alone cannot provide a way out of poverty. For access and control over land to be productive and sustainable, it must be linked to a range of other services and infrastructure, such as affordable credit, training and access to markets.

Apartheid policies

During the apartheid years, the main approach to land tenure was that the land rights of black people were administered on their behalf by various 'trusts' and State arrangements. There was a range of statutory land tenure systems allowing black people to hold, occupy and use, but not own land.

These rights were not registered under the central deeds registration system. This has created a huge problem, since most long-term occupiers of rural land in the old 'homelands' are not able to establish a clear legal right to the land they occupy. This has left millions of people, particularly the rural poor and women, in a vulnerable position.



Problems with restitution

To date, the restitution process has not lived up to its promise of returning land and restoring dignity and livelihoods to the millions of people dispossessed under colonialism and apartheid. Of approximately 79 000 claims brought under the *Restitution of Land Rights Act 22 of 1994*, the great majority has been settled by cash compensation, without any return of land. Approximately 920 000 hectares of land had been restored to around 180 000 beneficiaries by the end of 2005, but many of these people have struggled to make productive use of the land after many decades of displacement.

Of the remaining claims, a large number are community claims in rural areas, mainly in Limpopo, Mpumalanga and KwaZulu-Natal, involving large areas of high potential agricultural land. It remains to be seen whether this can make a real difference to the lives of claimants.

Limited benefits from redistribution

The redistribution programme has been dominated by the transfer of farms to groups of beneficiaries, usually registered as a Trust or Communal Property Association (CPA). Throughout the country, these groups have suffered from a lack of cohesion. Poorly designed and inappropriate business plans, together with lack of access to support services, have meant that most redistribution projects struggle to deliver benefits to their members, and some projects have collapsed.

Lack of security for farm housing

Disputes between farm dwellers and owners often lead to eviction, loss of livelihoods and even violence:

“The Mazibukos were thrown out of their kraal in mid-winter after their son, who tended livestock for the farmer who owned the land, was accused of stealing a cow. Their son claimed that, despite his protests that the animal had strayed, he was assaulted by one of the farmer’s security guards as punishment. When he refused to return to work, the family was told to go, because the money for their rent and grazing came from his payment.” *Schadeberg, 2005, 91*

Challenges for women

Women as producers and owners of small-scale enterprises face a number of barriers in gaining ownership or use of land and other natural resources. Most rural women do not have access to land in their own names – they usually get access through a male relative. Many women also experience problems in accessing credit, appropriate technology and skills training.

Challenges for people living with disabilities

People living with disabilities also experience many difficulties in accessing land, as they are often considered to be unable to use the land effectively:

“When trying to access land as a disabled adult, we are usually told that our father, or a child who has reached the age of 21, or other senior member needs to sign for it – in other words, the land will belong to them.”

Liebenberg and Pillay, 1998, 9.

6.3

Your land rights in the Constitution

Section 25 of the *Constitution (Act 108 of 1996)* protects the right to property, including land rights, and also makes the State implement a variety of land reforms. This section has been the subject of much controversy. Some have argued that it protects existing property rights and entrenches the current extreme racial imbalance of property rights in South Africa.

The right to property was one of the most hotly contested issues in the period before the adoption of the Constitution:

- Trade unions, non-governmental organisations (NGOs) and progressive research institutions all raised serious objections to including the right to property in the Constitution. They were concerned that a property clause in the Constitution would frustrate land and related reforms.
- The National Party, the Democratic Party, white commercial farmers' organisations, and big business strongly favoured including the right to property because property rights were fundamental to a market economy.

Eventually, a property clause was included in the Constitution, but it was worded to try and lessen its impact on land and related reforms. Today, many organisations believe that the property clause places serious limits on the Government's capacity to deliver on the land reform programme. Others view it as a potentially powerful basis for land reform that has not been adequately reflected in government policies to date.

We will now go through the different elements of section 25, the property rights clause.

6.3.1 Deprivation of property

Section 25(1) of the Constitution says that property rights may not be interfered with unless it is done under a "law of general application" – in other words, the law does not target named or easily identifiable individuals or groups.

Section 25(1) also prohibits the arbitrary deprivation of property.

EXAMPLE



A LAW THAT IS NOT OF GENERAL APPLICATION

Imagine a law that says that State officials may enter and inspect the land of Leslie Davids and Pumi Kumalo at any time to see if there are any fire hazards on the land. As this law specifically names Leslie and Pumi, it is not a law of general application and therefore cannot legally be used to interfere with the enjoyment of their property rights.

EXAMPLE



ARBITRARY DEPRIVATION

A long-standing industrial area is suddenly zoned for residential use for no good reason. This results in a number of people losing their means of livelihood. We can argue that this is an arbitrary deprivation of property.

6.3.2 Expropriation of property

Expropriation means taking away a person's ownership of property. Under section 25(2) of the Constitution:

- Expropriation also needs a "law of general application".
- Expropriation can only be done for a public purpose or in the public interest.
- The *public interest* "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources" (section 25(4)).
- When your land is expropriated, you must be compensated. The amount (how much), the time (when) and manner (how) of compensation can either be agreed to by those affected, or decided and confirmed by a court order.

6.3.3 Just and equitable compensation

Section 25(3) of the Constitution gives some guidance in working out how much compensation someone, whose land has been expropriated, should be paid. Most importantly, compensation must be "just and equitable, reflecting a fair balance between the public interest and the interests of those affected".

In deciding on the amount of compensation, a court must consider all relevant circumstances, including:

- The current use of the property.
- The history of ownership and use of the property.
- The market value of the property.
- The amount of State investment in the land.
- The purpose of the expropriation.

Some of these factors are new and different from many other legal systems, and from past practice in South Africa, where compensation is calculated using the market value of the property. Using only the market value makes land reform expensive for the Government, and may be a barrier to effective land redistribution.

6.3.4 Equitable access to land

Section 25(5) of the Constitution places a duty on the State to:

“Take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

This does not mean that the State must provide everyone with free land, and is not a ‘right to land’. But it does mean that the State must take steps and create conditions that make it possible for disadvantaged individuals and groups to gain access to land. Thus the State must remove apartheid laws that did not allow black people to have access to land.

The State must also take positive steps to assist disadvantaged people to get land, for example, the various grants provided by the Department of Land Affairs under its redistribution and tenure reform programmes.

For more details on land redistribution grants, see page 209.

6.3.5 Security of tenure

Under sections 25(6) and 25(9) of the Constitution, Parliament must make laws that promote security of tenure, or provide some form of redress for people or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices.

These laws have been widely ignored and many farm dwellers continue to face eviction. A recent study by Nkuzi Development Association and Social Surveys found that 2.3 million people were displaced from farms since 1994. Of these, 942 000 had been the victims of evictions (*Wegerif, Russell and Grundling, 2005*).

CASE STUDY



HOW LAND OWNERS REMOVE RIGHTFUL OCCUPIERS

Between 2001 and 2003, the South African Human Rights Commission (SAHRC) compiled a report on conditions facing farm dwellers in South Africa. In spite of the *Extension of Security of Tenure Act 62 of 1997* (ESTA), the SAHRC found widespread avoidance of the law by land owners, a lack of enforcement by police and intimidation of farm dwellers:

“Typical examples provided to the Inquiry of how land owners attempt to circumvent the provisions of ESTA are to:

- Intimidate and victimise occupiers in order to force them to leave the land.
- Cut the electricity supply in order to make the conditions of residence intolerable.
- Make workers sign agreements at the Commission for Conciliation, Mediation and Arbitration (CCMA) stating that they will leave the farm.”

SAHRC, 2003, 60



6.3.6 Restitution of property or equitable redress

For information on the Restitution of Land Rights Act, see page 211.

Section 25(7) of the Constitution says that a person or community who lost their property after 19 June 1913 as a result of past racially discriminatory laws or practices, has a right to restitution of that property or to equitable redress (fair and reasonable compensation).

6.3.7 Taking steps to redress the results of past discrimination

Section 25(8) was put into the property rights clause of the Constitution to try and ensure that private property rights did not frustrate land reform. It says that steps taken by the State to achieve land, water and similar reforms to redress the results of past racial discrimination do not violate the property clause if they are:

“Reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

6.4

Guides to interpreting your land rights

6.4.1 Decisions of the courts

For more cases interpreting land rights, see page 217 onwards.

In South Africa, decisions of the courts, especially the Constitutional Court and the Land Claims Court, are important sources for interpreting your land rights. They tell us what the content and limits of these rights are.

COURT CASE



PROPERTY RIGHTS AND LAND RESTITUTION

In the 1996 case of *Transvaal Agricultural Union v The Minister of Land Affairs*, the Constitutional Court dealt with a constitutional challenge under the *interim Constitution (Act 200 of 1993)* to the Restitution of Land Rights Act of 1994. The agricultural union challenged some sections of the Act that they argued went against its members' right to property and free economic activity protected in the Constitution.

The Constitutional Court decided:

- The effect of these provisions was that the existing rights of ownership did not have priority over claims for restitution.
- Instead, these interests had to be balanced against each other, and resolved in a way that is just and equitable.

Apart from saying that interests have to be balanced, the decision in this case doesn't resolve the issue of the opposing nature of the relationship between commercial agricultural farmers and land claimants.

6.4.2 International law

The right to property in international human rights law has been a very controversial issue. While many Western countries argued for a strong protection of property, socialist and developing countries emphasised the social function of property. This allows for interference with property rights in the name of the public interest, for example, for land reform and environmental reasons.

The next table shows the different aspects of land rights that are protected by a selection of international documents and bodies protecting land, property and development rights.

For more detail on international law, see Chapter 3.

International instrument	Protection given to land and property rights
United Nations (UN) Declaration of Human Rights, 1948	<ul style="list-style-type: none"> • Provides for a right to own property. • Prohibits arbitrary deprivation of property, but does not provide a compensation standard.
Convention on the Elimination of All Forms of Discrimination Against Women CEDAW (1979)	<ul style="list-style-type: none"> • Protects rural women's right to participate in and benefit from rural development and implementing development planning. • Protects rural women's right to have access to agricultural credit, loans and marketing facilities. • Protects equal treatment in land and agrarian reform and in land settlement schemes.
The Social Policy Convention (International Labour Organisation – ILO), 1962	<ul style="list-style-type: none"> • Aims to improve the standard of living for agricultural producers. • Supervises land tenancy arrangements.
Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO), 1989	<ul style="list-style-type: none"> • Recognises the special relationship between indigenous people and their land. • Calls for adopting special measures on their behalf. • Safeguards against arbitrary removal of indigenous people from their traditional land with procedural guarantees. • Calls for respect for customary procedures.
Declaration on the Right to Development, 1986	<ul style="list-style-type: none"> • Emphasises equity and equality of opportunity in the development process.
UN Declaration on Social Progress and Development, 1969	<ul style="list-style-type: none"> • Recognises the social function of property, including land. • Calls for forms of land ownership that ensure equal rights to property for all.
The Peasants' Charter (UN Food and Agricultural Organisation)	<ul style="list-style-type: none"> • Advocates land tenure reform and land redistribution for the benefit of those who are landless and small farmers. • Notes the importance of development strategies as a means to redistribute power. • Regulates changes in customary tenure. • Calls for community participation in and control over natural resources.
African Charter on Human and Peoples' Rights, 1981	<ul style="list-style-type: none"> • Guarantees the right to property. • Says that public need and general community interests may justify the State interfering with people's property rights. • Protects the rights of dispossessed people to lawful recovery of their property and adequate compensation.
American Convention on Human Rights, 1969	<ul style="list-style-type: none"> • Protects the right to use and enjoy property. • Prohibits arbitrary deprivation of property, unless there is payment of just compensation.

6.5

Policies, legislation and programmes to implement your land rights

6.5.1 Policies and programmes

a) National land policy

Details of the Government's land reform programme are set out in the *White Paper on South African Land Policy, 1997*.

The land reform programme has three sub-programmes:

- *Land restitution* – returning land or compensating victims for land rights lost since 19 June 1913 because of racially discriminatory laws or practices.
- *Land redistribution* – achieving a fairer distribution of land in South Africa, for example, through making it possible for poor and disadvantaged people to buy land with the help of a Settlement/Land Acquisition Grant.
- *Land tenure reform* – bringing all people occupying land under a legally secure system of landholding. The programme provides for secure forms of land tenure, helps to resolve tenure disputes, and makes grants and subsidies accessible to provide people with secure tenure.



b) Land redistribution grants

Up to 2000, previously disadvantaged people with a household income of less than R1 500 a month could apply for a Settlement/Land Acquisition Grant of R16 000. This could be used towards buying land, usually as part of a group.

Since 2001, the Land Redistribution for Agricultural Development (LRAD) Grant has largely replaced the Settlement/Land Acquisition Grant. The new grant has no income limit and provides grants of between R20 000 and R100 000 to individuals, based on their ability to make a contribution of their own.

According to the Department of Land Affairs, the objectives of the LRAD are to:

- Increase access to agricultural land by black people (Africans, Coloureds, and Indians) and to contribute to the redistribution of approximately 30% of the country's commercial agricultural land (previously 'white commercial farm land') over the duration of the programme.
- Contribute to relieving the congestion in overcrowded old 'homeland' areas.
- Improve nutrition and incomes of the rural poor who want to farm on any scale.
- Overcome the legacy of past racial and gender discrimination in ownership of farm land.
- Facilitate structural change over the long-term by assisting black people who want to establish small and medium-sized farms.
- Stimulate growth from agriculture.
- Create stronger linkages between farm and off-farm income-generating activities.
- Expand opportunities for young people who stay in rural areas.
- Empower beneficiaries to improve their economic and social well being, and to enable people currently accessing agricultural land in communal areas to make better productive use of their land.
- Promote environmental sustainability of land and other natural resources.

A separate Grant for Municipal Commonage is available to municipalities wishing to acquire land that can be allocated for use as grazing or garden allotments to local people unable to acquire land of their own.

GUIDELINES



HOW TO APPLY FOR THE GRANTS

- Groups or individuals wishing to access grants to acquire land or upgrade their land tenure can apply for grants at the provincial offices of the Department of Land Affairs, now known as Provincial Land Reform Offices (PLROs). You can also apply at district offices in most District Municipalities.
- Local Municipalities may also apply to the Department of Land Affairs for the Grant for Municipal Commonage, either to acquire new commonage or to 'buy back' commonage that has been leased out on long leases to commercial farmers or for non-agricultural uses. This grant is not available for individuals.

Farm Equity Schemes allow farm workers to buy a share in a farming enterprise, without necessarily becoming land owners. Farm Equity Schemes are largely implemented by using the LRAD.

6.5.2 Key land legislation

a) The Interim Protection of Informal Land Rights Act

EXAMPLE



PROTECTING INFORMAL LAND RIGHTS

Communities have been powerless to stop development projects taking place on communal grazing land that threatens to deprive them of their 'informal' rights because they have no clear legal right to the land. The Interim Protection of Informal Land Rights Act now ensures that the process of deprivation happens only with the consent of the holder of the informal land rights.

The *Interim Protection of Informal Land Rights Act 31 of 1996* includes an interim (temporary) method to protect people with insecure tenure from losing their rights to and interests in land, while waiting for long-term tenure reform. The Act gives basic protection when "informal rights to land" are threatened.

The main point of this Act is to ensure that there is legal recognition and protection of the various kinds of land rights existing in South Africa. However, inequality remains because the constitutional protection of existing property rights is stronger than this law protecting informal rights.

The Act is likely to remain in force for some years while the *Communal Land Rights Act 11 of 2004* is being implemented.

b) The Communal Land Rights Act

The Communal Land Rights Act was signed into law in July 2004, but by August 2006 the implementation of the Act had not yet begun. The Act aims to give

secure land tenure rights to communities and people who occupy and use land previously reserved for occupation by African people. Most of this land is registered in the name of the State or is held in trust by the Minister of Land Affairs or the Ingonyama Trust on behalf of particular communities.

The Act allows the setting up of these structures:

- Communities may

COURT CASE



CHALLENGING THE COMMUNITY LAND RIGHTS ACT

In April 2006, four rural communities – two in Mpumalanga and one each in Limpopo and North West – were assisted by Webber Wentzel Bowers Attorneys and the Legal Resources Centre (LRC) to launch a constitutional challenge to stop implementation of the Communal Land Rights Act. The case is expected to be heard first in the High Court (Transvaal Provincial Division) late in 2006.

The communities argued that the Act:

- Gives wide new powers to traditional leaders and the Minister of Land Affairs.
- Will undermine women's rights.
- Will threaten the security of tenure in all communal land.
- Imposes a 'fourth tier of government' on previously marginalised 'homeland' citizens (in addition to the national, provincial and local levels of government).

establish a land administration committee to manage and administer communal land on behalf of a community as the owner of the land. Where a community has a recognised traditional council, the powers and duties of a land administration committee of the community may be exercised and performed by this council.

- The Minister may set up land rights boards to advise on land issues and to supervise the workings of the land administration committees. These Boards will be made up of appointees of the Minister, nominees of the Provincial Houses of Traditional Leaders and representatives of communities.

Land and gender activists, and many affected communities, have strongly criticised the Act. They say that it strengthens undemocratic and patriarchal practices in the name of 'tradition', and grants very wide powers to unelected traditional leaders.

c) The Restitution of Land Rights Act

The Restitution of Land Rights Act of 1994 deals with the restitution of land rights to those people who lost their land after 19 June 1913 under racially-based policies. You could get restitution for:

- Loss of possession leading to landlessness, or
- No or poor compensation for the value of the lost land.

This Act also established the legal framework and structures for restitution. These include the Commission for Restitution of Land Rights and the Land Claims Court. The deadline for submitting restitution claims to the Commission was 31 December 1998, and the current deadline set by government for settling all claims is 31 March 2008.

In 2003, the Restitution of Land Rights Act was amended to enable the Minister of Land Affairs to expropriate property without a court order for restitution or other land reform purposes.

d) The Extension of Security of Tenure Act

ESTA aims to give security of tenure for vulnerable occupiers of rural and peri-urban land, and to allow for the acquisition of land by vulnerable occupiers. This Act:

- Protects occupiers against unfair evictions by the land owner.
- Provides for legal evictions under certain circumstances.
- Sets out the rights and duties of owners and occupiers.
- Protects people living on land belonging to someone else by giving them a basic level of *tenure security*. This means that the occupiers have the right to continue living on and using this land, including the right to graze cattle and draw water. The land owner cannot cancel or change the occupiers' rights without their consent, unless there is good reason, and the occupiers have had a chance to answer complaints against them.
- Gives special protection to occupiers who have lived on the land for 10 years, and who are 60 or older, or who are living with a disability.



For more on ESTA and housing, see Chapter 7 on page 245.

In 2001, ESTA was amended to specifically allow occupiers to bury family members on the land where they lived, a right that was previously much contested by land owners. Under the new section 6(2)(dA), an ESTA occupier was given the right:

“To bury a deceased member of his or her family who, at the time of that person’s death, was residing on the land in which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists.”

GUIDELINES



EVICCTIONS

ESTA sets out the process a landowner must follow before evicting an occupier:

1. Termination (ending) of the right of residence of an occupier can arise from the employment agreement when an occupier resigns or is dismissed in a fair way under the *Labour Relations Act 66 of 1995*.
2. Two months’ notice must be given to the occupier, the municipality and the Department of Land Affairs.
3. The court may order an eviction to be stopped, occupiers to be allowed back in their homes, and the payment of damages.
4. The court’s decision must be based on justice and equity, and take all relevant circumstances into account, for example:
 - The period of residence of the occupier, or
 - The availability of suitable alternative accommodation for people being evicted.

COURT CASE



WOMEN AS INDEPENDENT OCCUPIERS

In the 1999 case of *Conradie v Hanekom* (Conradie case), a woman who worked on a farm in the Western Cape was granted the right to stay on the farm as an independent occupier after her husband was dismissed from the farm's employment. According to the Land Claims Court, even though her husband was dismissed from his employment, it goes against the Constitution to tie a wife's rights to her husband's actions. The Court also allowed the husband to stay in the house to fulfil his wife's right to family life.

For many years, women's housing rights have been tied to their male partner's contract. The Conradie case challenges the discriminatory housing practice on farms where, if the man is evicted, the woman is automatically evicted. This is an important case for securing housing rights for women on farms.

COURT CASE



RIGHTS OF PROPERTY OWNERS, RIGHTS OF OCCUPIERS AND DUTIES OF THE STATE

In the 2004 case of *President of the Republic of South Africa, Minister of Agriculture and Land Affairs v Modderklip Boerdery (Pty) Ltd* (Modderklip case), the Constitutional Court dealt with a case involving a land owner trying to evict a group of 40 000 people occupying its property at Benoni.

Modderklip Boerdery got an eviction order from the Pretoria High Court in 1999 but, when they found this impossible to implement, they once again went to the High Court. The High Court ordered the State to present a comprehensive plan to the Court indicating the steps it would take to implement the eviction order. The State then appealed to the Supreme Court of Appeal (SCA).

The SCA largely agreed with the judgment of the Pretoria High Court, and also decided:

- The State had to pay compensation to Modderklip for the loss caused by the unlawful occupation.
- The occupiers had a right to remain on the land until alternative accommodation was made available to them by the State.

The State appealed against the SCA judgment to the Constitutional Court. Unlike the SCA, the Constitutional Court did not engage with arguments on whether the section 25(1) rights of Modderklip had been violated. Rather, the Court focused on the right of the property owner to access the courts in section 34 of the Constitution, read with the constitutional principle of the 'rule of law'.

The Constitutional Court decided:

- The State should compensate Modderklip for the unlawful occupation of its property – this would ensure that the occupiers would continue to have accommodation until suitable alternatives were found.
- The State has the constitutional duty of progressively realising the rights of access to adequate housing or land for the homeless.

In deciding what should happen to the occupiers, the Court considered:

- The aims of legislation covering evictions.
- The principle that a court should be reluctant to grant an eviction order against relatively settled occupiers unless it is satisfied that a reasonable alternative is available.

For more on the Grootboom case, see Chapter 1 on page 31.

The Constitutional Court did not define the minimum rights for landless people in getting access to adequate housing. But the Court made it clear that the State cannot use broad excuses about housing backlogs, resource constraints or the threat of land invasions to justify not fulfilling its socio-economic rights duties to vulnerable people. The Court thus confirmed the protection extended to occupiers and the duty to treat all people humanely in its judgment in the Grootboom case (*Government of the Republic of South Africa and Others v Grootboom and Others*).

e) **The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**

The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* (PIE):

- Prohibits unlawful evictions and sets out fair procedures for the eviction of “unlawful occupiers”.
- Recognises that special consideration needs to be given to the rights of the elderly, children, people living with disabilities and households headed by women.

For more on PIE and housing, see Chapter 7 on page 247.

f) **The Communal Property Associations Act**

The *Communal Property Associations Act 28 of 1996*:

- Recognises that many African people hold land through communal systems.
- Establishes a new kind of legal body, a communal property association (CPA), for members of disadvantaged and poor communities to jointly acquire, hold and manage property under a written constitution.

The community has to develop a constitution that includes:

- Democratic processes.
- Equal representation of men and women.
- Ways of ensuring transparency, accountability and consultation.
- How the resources will be managed.

Community education and training is needed to make the rules and process for developing a CPA more accessible, especially when there is a high level of illiteracy in the community.

g) **The Land Reform (Labour Tenants) Act**

The *Land Reform (Labour Tenants) Act 3 of 1996* protects labour tenants and their families from eviction, and promotes their acquisition of land rights.

The Act defines a “labour tenant” as:

- A person who is residing on or has the right to reside on a farm.
- A person who has or had the right to use cropping and grazing land on this farm (or another farm of the owner), and in return works or has worked for the owner or lessee.

EXAMPLES



POSSIBLE EVICTIONS

- When the labour tenant has broken the employment contract.
- When the labour tenant is guilty of misconduct.
- When the owner has specific needs for the land.

- A person whose parent or grandparent resided or resides on a farm, and had the use of cropping or grazing land on this farm (or another farm of the owner or lessee), and in return works or worked for the owner or lessee of the other farm.
- A person appointed as successor to a labour tenant under this Act.

According to the Act, a farm worker is not a labour tenant.

What the Act says:

- Labour tenants can only be evicted in limited circumstances, and the eviction must be “just and equitable”.
- If the court orders an eviction, it can order the owner to pay just and equitable compensation, or allow the labour tenant to tend a crop until it is ripe to reap and remove.
- Only the Land Claims Court can order an eviction of a labour tenant.
- Labour tenants can buy land (either land that they are living on or alternative land).
- Labour tenants can get subsidies to buy land.

COURT CASE



PROTECTING THE RIGHTS OF LABOUR TENANTS

In the 1996 case of *Zulu and Others v Van Rensburg and Others*, the Land Claims Court decided that the impounding of the labour tenants’ livestock was the same as an eviction, even though the tenants were not physically evicted. This was based on the definition of “labour tenant” in the Act – this made it clear that the right to use the land for grazing or cropping was part of the labour tenant’s right to occupy the land.

h) The Development Facilitation Act

The *Development Facilitation Act 67 of 1995* introduced steps to facilitate and speed up the implementation of land projects, especially serviced land for low-income housing.

i) The Transformation of Certain Rural Areas Act

The *Transformation of Certain Rural Areas Act 94 of 1998* has the aim of reforming land tenure in the 23 ‘Act 9’ areas (previously ‘Coloured Rural Areas’). These are in the Northern, Western and Eastern Cape provinces, and in the Free State.

The Act provides for the transfer of land that is currently held in trust by the Minister of Agriculture and Land Affairs to a municipality, a CPA or other institution, and for the survey and registration of individual holdings.

The implementation of the Act was at an advanced stage in the six Act 9 areas of Namaqualand by the end of 2005, and was set to proceed in the remaining areas during 2006. This is the first large-scale reform of communal

tenure in South Africa since 1994, and is likely to provide many important lessons for implementing the Communal Land Rights Act.

6.5.3 Land institutions

a) **The Commission on Restitution of Land Rights**

The Commission on Restitution of Land Rights (Restitution Commission) was established in 1995 under the Restitution of Land Rights Act, with a national office under a Chief Land Claims Commissioner and seven regional offices under Regional Land Claims Commissioners. The Restitution Commission was originally an independent body, but now forms part of the Department of Land Affairs.

The Restitution Commission is responsible for receiving and investigating claims for restitution of the land rights of individuals or communities who lost their land as a result of apartheid policies, and for settling these claims through:

- Restoring the land, or
- Providing alternative land, or
- Paying compensation.

In 1999, the Restitution of Land Rights Act was amended:

- Where agreement could be reached between the claimants, the Restitution Commission and other affected parties (eg land owners), claims no longer had to be referred to the Land Claims Court.
- The claim could be settled by an “administrative route”, leading to a section 42(d) notice by the Minister of Land Affairs.

The introduction of the administrative route was an important step in accelerating the settlement of land claims.

b) **The Land Claims Court**

The Land Claims Court has the task of confirming agreements that are referred to it by the Restitution Commission and arbitrating in cases where no agreement has been reached. The Court’s main powers are to decide on restitution, compensation and rightful ownership.

The Land Claims Court can also hear eviction cases under ESTA and the Land Reform (Labour Tenants) Act, and review land-related cases referred to it from the Magistrates’ Courts.

c) **The Land and Agricultural Bank**

The Land and Agricultural Bank (better known as ‘the Land Bank’) is a parastatal body that provides mortgage finance to acquire land and finance for agriculture-related activities. The bank is being transformed to serve the needs of people targeted in the land reform programme, through providing grants on behalf of the Department of Land Affairs and small loans to new farmers.

For contact details of the Commission on Restitution of Land Rights, the Land Claims Court and the Department of Land Affairs, see the back cover pocket.

6.6

Protecting and advancing your land rights

6.6.1 The right to restitution

Since 1999, most land claims have been settled by negotiation, rather than by the courts. Nevertheless, the restitution process continues to be shaped by key judgments of the Land Claims Court. An important judgment was handed down in the case of the Kranspoort Community, where the Court ruled on:

- The concept of ‘beneficial occupation’.
- The definition of “community”.
- Providing for the upgrading of rights to freehold title.

COURT CASE



COMMUNITY LAND RIGHTS

In the 1999 Land Claims Court case of *Kranspoort Community: in re Farm Kranspoort 48 LS* (Kranspoort case), the Kranspoort community made a claim that it was dispossessed of land under a racially discriminatory law or practice. The community lived on a Dutch Reformed Church mission station at the foot of the Soutpansberg in Limpopo from 1890 until they were removed between 1955 and 1964. The community applied for the restitution of their rights under the Restitution of Land Rights Act.

The Dutch Reformed Church of Transvaal opposed the claim. The Church claimed:

- There was no “community” either at the time of the removals or at the time the claim was lodged.
- Even if a community existed, it did not have any rights in the land.
- Even if the community proved its claim, they should not receive restoration of the farm, but rather some other award such as compensation.
- It was not feasible to restore the land because the community could not viably re-establish themselves there.
- The area was environmentally sensitive and a restoration order would be bad for the environment.

The Land Claims Court decided:

- The evidence proved that there was a “community” at the time of the removals and at the time the claim was lodged.
- The community had beneficial occupation of the farm for at least 10 years before the removals.
- The removals were as a result of a racially discriminatory law or practice, as the Group Areas Act was used to remove the people and the removals were carried out in a racist manner.

More...

Kranspoort case continued

- The group had not received “compensation”, because any compensation given was not “just and equitable”, as directed by the Act.
- Restoring the land to the community would be just and equitable, and allowed upgrading of the beneficial occupation to full ownership.

The Court imposed conditions that the community had to fulfil before there could be restoration of the land. These were:

- The formation by the community of a CPA to hold the property.
- The approval by the Court of a draft constitution for the CPA.
- Confirmation by the CPA that it wants restoration of the land and not some other form of compensation.
- The formulation of plans for the development and use of the property.

The community had to meet these conditions within a fixed time limit, or the court order would fall away. Then the community would be able to get a different type of compensation.

6.6.2 The right to security of tenure – challenging unfair evictions

Even with the introduction of ESTA and the land reform programme, farm dwellers continue to face the threat of eviction. Farm dwellers throughout the country, along with the NGOs and legal advice centres that support them, have reported enormous difficulties facing farm dwellers attempting to exercise their rights. Common complaints include:

- Intimidation and disregard for the law by land owners.
- Lack of assistance from police and prosecutors.
- Lack of responsiveness by officials of the Department of Land Affairs.

COURT CASE



RIGHT TO LEGAL REPRESENTATION

In the 2001 case of *Nkuzi Development Association v the Government of the Republic of South Africa and the Legal Aid Board* (Nkuzi case), the Land Claims Court made a declaratory order saying that:

- People who have a right to security of tenure under ESTA and the Land Reform (Labour Tenants) Act, and whose security of tenure is threatened or has been breached, have a right to legal representation or legal aid at State expense.
- They have this right to legal representation:
 - If substantial injustice would otherwise result, and
 - If they cannot reasonably afford the cost of legal representation from their own resources.
- The State is under a duty to provide this legal representation or legal aid through mechanisms selected by it.

CASE STUDY



RURAL LEGAL TRUST

After the judgment in the Nkuzi case, it was widely recognised that access to legal representation was critical to exercise people's land rights, and that State legal services in many parts of the country were greatly inadequate. To meet this challenge, a new NGO, the Rural Legal Trust (RLT) was established in 2001 to provide legal services to rural dwellers throughout the country.

The RLT aimed to fill the gap in the services provided by the Legal Aid Board (LAB) by identifying organisations that were dealing with land issues in provinces and entering into cooperation agreements with them to establish and support legal teams on the LAB's behalf. The idea is that capacity is placed within provinces in a cost-effective and speedy manner. This approach also enhanced the services that these organisations were giving to help enforce and protect community land rights.

The RLT has entered into a cooperation partnership with these organisations:

- Nkuzi Development Association in Limpopo.
- KwaZulu-Natal Land Legal Cluster in KwaZulu-Natal.
- North West University in the North West.
- Association for Community and Rural Advancement in the Northern Cape.
- Southern Cape Land Committee in the Western Cape.
- Wits Law Clinic, Nkuzi and Noko Incorporated in Gauteng.
- Mpumalanga Land Legal Cluster in Mpumalanga.
- University of Free State Legal Aid Clinic and Free State Rural Development Association in the Free State.
- Rhodes Legal Aid Clinic and the Legal Resources Centre in the Eastern Cape.

The RLT and its cooperation partners also work closely with a network of paralegal associations and advice offices throughout the country.

6.6.3 Mobilising for the right of equitable access to land

Land reform cannot operate in isolation from a broader programme of rural economic development and transformation that targets job creation, service provision, housing and other services. Water services and alternative labour-saving systems will reduce the heavy burden of domestic labour on women.

Over the past decades, a variety of initiatives have been taken by civil society to mobilise around access to land, but with limited success. The collapse of the National Land Committee, the leading NGO network in the land sector for many years, in 2004–5, and the failure of the Landless People's Movement to form an effective organisation, has left the sector without a strong voice at the national level.

The *Rural People's Charter* was adopted and the Rural Development Initiative was launched at the Bloemfontein Rural People's Convention held on 23–25 April 1999. This followed more than a year of consultations between the land and rural development sector, NGOs and rural communities. The Rural

People's Charter and the Rural Development Initiative were a response to the declining political weight given to rural issues, as reflected in government budget allocations.

In December 2003, the Trust for Community Outreach and Education convened a People's Tribunal on Landlessness in Port Elizabeth. This Tribunal provided an opportunity for landless people and the dispossessed to provide testimony on their personal experiences, and senior government officials were questioned on the progress of land reform in the country. The Tribunal was highly critical of the slow pace of reform and the ongoing exclusion of landless people in policy-making and policy implementation.

National Land Summit

In July 2005, the Government and civil society convened a National Land Summit to review the progress of land reform. Broad consensus was reached on the weaknesses of the land reform programme, and the need to replace the 'willing seller, willing buyer' policy with a more aggressive approach that would accelerate the redistribution of land to the historically oppressed.

Key resolutions from the National Land Summit included a call to:

- Accelerate the restoration of land to claimants.
- Re-open the lodgement process for eligible claimants who missed the 1998 land claim deadline.
- Replace the 'willing buyer, willing seller' policy with a stronger State-led approach, with greater use of expropriation.
- Include a 'social obligation' clause to protect landless people who occupy unused land.
- Limit the amount of land that can be held by any one person.
- Stop all evictions from farms, while reviewing tenure legislation.
- Improve after-settlement support for all land reform beneficiaries.

It remains to be seen how the Government and civil society will take the resolutions of the National Land Summit forward.

6.6.4 Gender equality and land rights

A study by gender activists on the gender impact of the land reform programme over a five-year period clearly shows a lack of vision within the Department of Land Affairs on why gender equity is crucial to the land reform process (*Hargreaves and Meer, 1999, 9*).

The study concluded:

- Policies are not guided by gender equity principles.
- There are no mechanisms in place to implement gender equity.
- There is a lack of understanding of the highly unequal power relations of gender that affect access to and control over land and resources.

- The Department of Land Affairs has not developed any clear indicators to measure whether or not its gender policy or commitments under international treaties, such as CEDAW, are being followed.

In 1999, the Centre for Rural Legal Studies completed a research report: *Promoting Equity and Sustainable Development for Women Farmworkers in the Western Cape*. The report develops gender indicators for ESTA and CEDAW.

Customary Marriages Act

The *Customary Marriages Act 120 of 1998* allows women to enter into contracts and to acquire land and property rights. While the Act is a step forward for women married under customary law, there are still many issues that need to be addressed before rural women can enjoy effective equality in relation to land and property.

The Customary Marriages Act:

- Repeals the minority status of women under the *Black Administration Act 38 of 1927*.
- Allows women in customary marriages to enter into contracts, to access credit, to become home owners, and to acquire other rights in land and property.
- Says all customary marriages must be registered.
- Says all customary marriages entered into after the Act comes into force, are taken as being *in community of property* – this means that the woman is joint owner of the marital property.

There are now real opportunities for women to improve and protect their land rights, but not enough organisations to assist them in the process. To achieve gender equality in the land reform process, women must participate fully at all levels. Gender equality will be achieved only with the removal of all legal, social and economic restrictions on the participation of women.

The land reform agenda therefore needs to include:

- Further reform of the rules governing customary marriages.
- Natural resource management policies.
- Agricultural policy support.
- Changing inheritance laws, when they are obstacles to women receiving and holding rights in land.

There is a clear need for a strong lobby to campaign for women's land rights in rural areas. Women's capacity to benefit from land reform is limited by their lack of knowledge of the structures and legal opportunities they can use. NGOs and community organisations can play an important role to:

- Educate rural women around jointly registering leases and other rights to land and property in the names of both male and female partners.
- Lobby for equal representation in decision-making structures.
- Change attitudes on women's land rights.

6.6.5 Indigenous land rights

The *United Nations Human Development Report* (1999) confirmed that there is an urgent need for understanding the spiritual, social, cultural, economic and political significance of lands, territories and resources to indigenous societies for their continued survival and vitality.

COURT CASE



RICHTERSVELD LAND CLAIM FOR INDIGENOUS LAND RIGHTS

The 2003 case of *Alexkor Ltd and Another v The Richtersveld Community and Others* (Richtersveld case) has set an important precedent for other communities. The community of 3 000 people used to be nomadic and pastoralist people, who traditionally occupied the Richtersveld area. Over many decades, the people of the Richtersveld were removed from the diamond-rich lands along the Gariiep (Orange) River and denied access to natural resources.

The land claimed is currently held by the State-owned diamond mine, Alexkor Limited, that is in the process of being privatised. The Legal Resources Centre (LRC) is negotiating for a community equity share in the mine and to secure the land rights of the community. The case represents a unique opportunity for the South African legal system to bring its approach in line with international legal practices.

In the Land Claims Court in 1999, the State and Alexkor Limited argued that there are no grounds to claim the right to aboriginal title or ownership based on indigenous rights in South Africa. These arguments were rejected by the Land Claims Court, but in 2003 the Supreme Court of Appeal granted leave to appeal against this judgment.

The Supreme Court of Appeal confirmed that the Richtersveld community had been in exclusive possession of the whole of the Richtersveld, including the subject land, prior to and after its annexation by the British Crown in 1847.

In October 2003, after another appeal by Alexkor and the State, the Constitutional Court decided that the Richtersveld community had a right under section 2(1) of the Restitution of Land Rights Act to:

- Restitution of the right to ownership of the subject land (including its minerals and precious stones), and
- The exclusive beneficial use and occupation of the land.

By June 2005, the Richtersveld case was once again before the Land Claims Court for arguments on the restitution award (*The Richtersveld Community v The Government of the Republic of South Africa and Others*). The demands of the community include the return of the 85 000 hectares of land currently owned by Alexkor, compensation of R1.5 billion for loss the diamonds mined by Alexkor, R1.3 billion for rehabilitation of the environment and further compensation of R10 million.

Initial discussions with the State around a negotiated settlement were unsuccessful, and the State and Alexkor are vigorously contesting the claims for compensation. An important milestone was achieved in November 2005 when the Land Claims Court ordered the State to pay R5 million towards the community's legal costs.



6.7

Challenges

Although a range of land reform steps have been taken in South Africa, much more is needed before the existing distribution pattern and inequalities in access to land are resolved. For example:

- Redistribution of land under the redistribution and restitution programmes has been extremely slow – this is due to the ‘market-based’ approach taken by government and the lack of capacity within key agencies such as the Department of Land Affairs, provincial Departments of Agriculture and local municipalities.
- Farm dwellers, including labour tenants, remain vulnerable to eviction and other abuses of their rights, and more effective means need to be found to provide them with tenure security.
- In the communal areas of the old ‘homelands’, debate continues around the direction that tenure reform should take, and the future role of traditional leaders.
- Where people have obtained land under the land reform programme, they have often struggled to make effective use of it, due to poor settlement planning and a lack of appropriate support from State and private agencies.

Solutions to the challenges of land redistribution, tenure security and effective land use clearly require coordinated efforts by landless people themselves, government agencies and non-governmental organisations. In recent years, land-sector NGOs and movements of the landless have, with a few exceptions, remained poorly organised and under-resourced. There is an urgent need to build capacity and increase participation in the sector.

Discussion ideas



TALKING POINT 1

Share experiences and ideas in a discussion group:

1. *In your community, were groups of people forcibly removed or relocated?*
2. *Were they able to use the law to defend their rights? If not, why?*
3. *Is restitution all about the return of land? Are other forms of compensation appropriate in some cases?*
4. *What additional support is required for people who regain their land, and who should provide this support?*

TALKING POINT 2

Read this case study and discuss the questions in small groups:

Mrs Mvusa is 78. She was employed as a domestic worker for Mrs Wattle on the farm Riversend since 1965. In 1966, the owner of the farm, Mr Wattle, died and left Mrs Wattle the farm. Mrs Mvusa remained on the farm where she built a house and lived with her children. She also grazed her livestock on the farm. The new owner of the farm gave Mrs Mvusa an eviction summons on 9 July 1998. The notice said that she was occupying the land unlawfully.

1. *What legislation protects Mrs Mvusa from being evicted from the farm?*
2. *Are the correct procedures being followed in this eviction?*

3. *What are Mrs Mvusa's rights under land laws and the Constitution?*
4. *What international documents could further support and protect Mrs Mvusa?*

TALKING POINT 3

Discuss these questions in small groups:

1. *How can women's participation in the land reform process be ensured?*
2. *How many women in the group are affected by the Customary Marriages Act of 1998? For example, has your home been registered in your name or only in your partner's name?*
3. *How can we be sensitive to and respect the traditions of customary law, and at the same time push for the equal participation of women?*
4. *What support can your organisation provide on land issues to people in rural areas?*
5. *What are the most urgent needs and demands in your urban area?*



TALKING POINT 4

Discuss these questions in small groups:

1. *What are the factors that continue to limit people's land rights?*
2. *Do you think the State is doing enough to advance people's land rights? What more can be done?*
3. *What can poor and landless people themselves do to advance their land rights?*

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Housing rights



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KEY WORDS

Access	Able to get, have or use something, eg the right of access to adequate housing.
Adequate	Suitable and up to a good enough standard.
Administrative action	Decisions taken or not taken that negatively and directly affect your legal rights, eg administrative action by local authorities.
Arbitrary	Without good reason and not following the law.
Beneficiary	Person that benefits from something.
Compliance	Whether or not you obey a policy, law or court judgment.
Disproportionately	Affected much more than others by something, eg farm workers disproportionately experiencing evictions.
Equitable	Fair and reasonable.
Grossly	To a large extent, seriously, eg grossly unfair.
Onus	Legal responsibility to prove something.
Organ of State	Government departments or public bodies carrying out legal functions (but excluding courts).
Peri-urban	Bordering on or surrounding an urban area.
Prejudiced	Seriously affected or put at a disadvantage.
Public interest	In the interests of the general public.
Repeal	Withdraw a law or part of a law.
Sanitation	Toilets and sewerage facilities.

Security of tenure	Giving people legally secure rights in land or housing.
Sustainability	Something that will last and stay in good condition or function for a long time.
Unfair discrimination	A policy, law, condition or situation that unfairly disadvantages you, eg because you are a woman, black, lesbian, living with a disability, or living with HIV.
Violate/Violation	Abuse or not respect, eg violate your housing rights.
Vulnerable groups	People that need special protection, eg people living with disabilities, refugees.
Warranty	A guarantee of protection for a fixed time period, eg a warranty against structural defects in your new home.

7.1

Why is it important to understand your housing rights?

CASE STUDY



ALEXANDRA TOWNSHIP

In 2002, the Gauteng provincial government started an Urban Renewal Project aimed at improving the living conditions in Alexandra Township in Johannesburg, through building houses and upgrading the area with better roads, bridges, sanitation and shopping centres. At present, residents say their lives are no better than they were four years ago and fear they are going to live in a dump forever. Also, some of the new houses cannot be said to be permanent structures, as they are already falling down.

Residents of Alexandra continue to experience overcrowding, high rates of unemployment, lack of basic services, such as water and electricity, and very bad environmental conditions. In some cases, five to seven people live in a one-room shack. Due to overcrowding, water pressures are low and sewers frequently block and overflow.

Anna Mlangeni has lived in Alexandra for 16 years in front of an open sewer that smells all the time. She does not have access to toilets, water or electricity. Anna now has tuberculosis (TB) because of these conditions.

People still live along the banks of the Jukskei River that is in danger from flooding. Mabore Mamabolo has been living in Stjwetla, a settlement on the banks of the Jukskei River, for the past 11 years. She and her kids stay in a one-room shack, with no access to water, electricity and toilets, or a nearby clinic or schools.

Special Assignment, SABC 3, 4 October 2005

Housing rights are important for people in Alexandra and Stjwetla. They need to know what their right to have access to adequate housing means. Understanding your right to have access to adequate housing will help you and your community to take the necessary steps to protect and advance your housing rights.

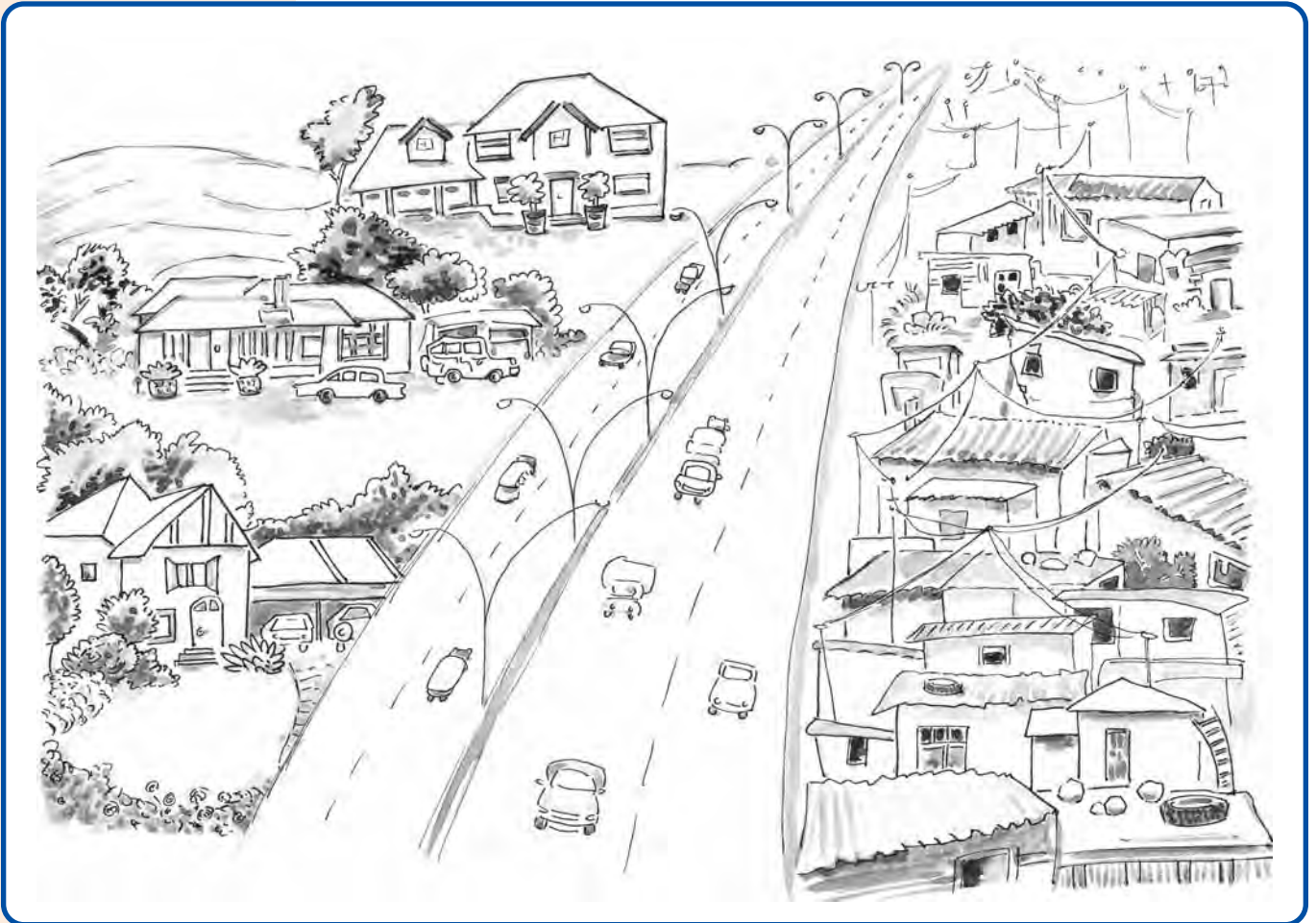
7.2

History and current context

7.2.1 The impact of apartheid

Apartheid laws and policies are largely responsible for the housing crisis South Africa is facing today. The *Group Areas Act 41 of 1950*, and its succeeding Acts, resulted in people being evicted from their homes without any compensation and being relocated to remote, racially-defined areas that deprived them of work and educational opportunities. More homes were demolished than were built.

The apartheid Government had grossly unequal approaches to housing for each race group. There was a large amount of overlap, duplication and confusion because access to housing was run by the three previous 'own affairs' administrations and the Department of Housing. Subsidy schemes



were racially divided, poorly targeted and inadequately funded. Black residential areas were exposed to growing housing shortages, lack of resources, poor infrastructure and poor service delivery, resulting in substandard and very inadequate housing for black people in South Africa.

Apartheid laws and policies have, therefore, shaped the current housing crisis, despite the introduction of new policies and approaches on housing in post-apartheid South Africa. Many people have confirmed this point, including the Minister of Housing. She stated that “despite the huge public investment into housing over the last 10 years of R29,5 billion, apartheid’s legacy remains strongly tenacious” (*Minister Lindiwe Sisulu, 2005a*).

7.2.2 Statistics on the current housing crisis

- Millions of people lack proper housing, while thousands of others have no access to housing or shelter of any kind (*De Vos, 2005, 85*). For example, in the Western Cape alone, an estimated 350 000 families are waiting for housing, and the city needs 260 000 housing units (*Pretoria News, 26 September 2005*).
- About 2.4 million households live in informal housing structures (*Minister Sisulu, 2005a*).
- The estimated growth rate of informal settlements is 4% up to 2010 and thereafter, 3% a year (*Van der Walt, 2004*).

- The rate of delivery of housing is below the rate of low-income household formation, estimated at 200 000 households a year (*Charlton, 2004*).
- There is a backlog of over 3 million houses that increases each year. An increase in housing delivery of 12% a year is needed to overcome the current backlog and prevent new slum formation (*Minister Sisulu, 2005a*).
- Between 2004 and 2005 alone, thousands of people have been affected by evictions (*COHRE, 2005*).

7.2.3 Current barriers to adequate housing

Despite the introduction of new policies and approaches on housing in post-apartheid South Africa, and the fact that our *Constitution (Act 108 of 1996)* guarantees the right to have access to adequate housing, people are still faced with barriers to gaining access to adequate housing.

EXAMPLES



HOUSING BARRIERS

- *Some people are not aware of the meaning of housing rights (“access to adequate housing”) and the programmes in place to give effect to these rights, and are thus unable to access housing.*
- *The cost of housing is high and, very often, subsidies do not fully cover the cost.*
- *People do not have access to adequate services necessary for the enjoyment of the right to housing, such as the lack of space for key amenities (eg laundry, parking, refuse), widespread decay in old buildings, and the lack of community and social space.*
- *Housing subsidy beneficiaries lack the necessary education to empower them to identify quality shortcomings in their housing units and make use of the complaints procedures of the National Home Builders Registration Council (SAHRC, 2004).*
- *The lack of, or inadequate, communication between government and affected communities contributes to the slow pace of housing delivery.*
- *Underspending by provincial departments on housing delivery results in slow housing delivery.*
- *People have difficulties in accessing land. Some land identified for housing forms part of land restitution claims, resulting in the slow release of land at a scale that does not meet the demand. As a result, there is a delay in housing delivery (SAHRC, 2004).*
- *The lack of a mechanism for everyone to have a degree of security of tenure that guarantees legal protection against forced eviction. Security of tenure is a crucial pillar of the right to adequate housing.*
- *Corruption and maladministration result in tampering with housing waiting lists.*
- *Women, people living with disabilities, refugees, people living in informal settlements and other disadvantaged groups have special housing needs that still need to be taken into account in housing programmes.*

These barriers affect the rural poor most severely because the government has deliberately shifted its policies from the rural poor to the urban poor, due to the difficulties of accessing land in the rural areas.

7.3

Your housing rights in the Constitution

The Constitution clearly guarantees the right to have access to adequate housing:

Section	What is the right?	Who benefits?
Section 26(1)	The right of access to adequate housing.	Everyone.
Section 26(3)	The right not to be evicted from your home, or have your home demolished, without an order of court, made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.	Everyone.
Section 28(1)(c)	The right to shelter.	Every child.
Section 35(2)(e)	The right to adequate accommodation at State expense.	Everyone who is detained, including every sentenced prisoner.

Other constitutional rights that can be used to protect housing:

- The right to equality (*section 9*)
- The right to just administrative action (*section 33*)
- The right to dignity (*section 10*)
- The right of the child to family care or parental care (*section 28(1)(b)*).

Also, land rights (discussed in Chapter 6) and the right to have access to adequate housing are closely linked – “the stronger the right to land, the greater the prospect of a secure home” (*Port Elizabeth Municipality v Various Occupiers, 2004, paragraph 19*). Therefore, section 25(5) dealing with access to land is important, as realising the right of access to adequate housing also requires available land.

Note that section 25(5) does not use the clear language of a ‘right to land’ or a ‘right to have access to land’. It only directs the State to:

“Take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.”

Also, section 25(6) protects vulnerable groups by reinforcing security of tenure.

7.4

Guides to interpreting your housing rights

Section 26(1) of the Constitution does not give you a right to housing or shelter, but a right of “access” to adequate housing. This means that there are no obligations on the State to provide free housing on demand for all people in need of housing.

7.4.1 The meaning of “adequate housing”

In understanding what the term “adequate housing” really means in our Constitution, we can be guided by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 11(1) of the ICESCR says State parties must recognise the right of everyone to adequate housing.

However, it says that this right can be “progressively” realised, “within the available resources” of the State. This means that the State should try and give effect to this right through legislation and other steps, but this does not have to be achieved overnight. South Africa has signed the ICESCR, meaning it agrees with what the ICESCR says.

The Committee on Economic, Social and Cultural Rights (CESCR) monitors the duties of State parties under the ICESCR. The CESCR has given some attention to the meaning of “adequate housing” in paragraph 8 of its *General Comment No. 4*.

The CESCR has identified these key elements of the right to adequate housing:

- Legal security of tenure
- Availability of services, materials, facilities and infrastructure
- Affordable housing
- Habitable housing
- Accessible housing
- Location
- Culturally adequate housing.

a) **Legal security of tenure**

All people should have some form of security of tenure that guarantees legal protection against forced evictions, harassment and other threats. The different types of tenure include rental accommodation (private or public), owner-occupation, cooperative housing, lease, emergency housing and informal settlements, including occupation of land or property.

Governments must take steps aimed at ensuring security of tenure to people and households that do not have security of tenure.

b) Availability of services, materials, facilities and infrastructure

Housing must have facilities essential for health, security, comfort and nutrition. People who benefit from housing must therefore have access to drinkable water, sanitation, washing facilities, energy for cooking, heating and lighting, food storage, refuse disposal, drainage and emergency services.

c) Affordable housing

People must be able to afford housing. They must not be deprived of other basic needs to pay for their housing. Further, governments must make housing subsidies and finance available, and protect people from unreasonably high or sudden rent increases.

d) Habitable housing

For housing to be adequate, it must provide adequate space, be physically safe, offer protection from cold, damp, rain, heat, wind or other threats to health for all occupants, and guarantee the physical safety of occupants.

e) Accessible housing

Housing must also be accessible to all. Legislation and policy must especially cover the housing needs of the homeless, the poor, the elderly, single mothers, people living with disabilities, people who are mentally ill, people living with HIV/AIDS (including children orphaned by HIV/AIDS), and other vulnerable groups.

f) Location

Housing must be in areas that allow easy access to places of work and potential economic opportunities, schooling, child care centres, health care services and recreational facilities. Housing should also be in a safe and healthy environment, for example, it should not be built on polluted sites.

g) Culturally adequate housing

The way housing is built and the type of materials used must enable people living there to express their cultural identity. Activities geared towards development or modernisation in the housing sphere should ensure that they do not sacrifice cultural aspects of housing, and yet that they provide modern technological facilities.

The Habitat Agenda

We can also be guided by the *Habitat Agenda* that has also given some attention to the meaning of “adequate housing”. It was adopted by the participating States

at the Second United Nations Conference on Human Settlements, held in Istanbul in 1996. South Africa has signed the Habitat Agenda.

Section 60 of the Habitat Agenda says that:

“Adequate shelter means more than a roof over one’s head. It also means adequate privacy; adequate space; physical accessibility; adequate security; security of tenure; structural stability and durability; adequate lighting, heating and ventilation; adequate basic infrastructure, such as water-supply, sanitation and waste-management facilities; suitable environmental quality and health-related factors; and adequate and accessible location with regard to work and basic facilities: all of which should be available at an affordable cost.”

It also says that people should be involved in determining the adequacy of their houses, and that adequacy may vary from country to country, depending on specific circumstances.

People in States that have signed the Habitat Agenda can use what it says to motivate that their housing is inadequate. However, it does not have the same legal status as the ICESCR, because States committing themselves to the Habitat Agenda do not have the legal duties they have under the ICESCR.

CASE STUDY



HOUSING FOR PEOPLE LIVING WITH DISABILITIES

To uplift the living standards of people with disabilities, who do not have a roof over their heads, the People with Special Needs Task Team started a project in 2002 to provide homes for people who have special housing needs.

By the end of 2002, 100 units were completed. The houses provided to community members in Lakeside Proper were one-room units with a toilet, but no bathroom or special toilets for people in wheelchairs. The walls of some of the units are shaky, roofs leak, door handles and electricity boxes are too high for people in wheelchairs, inside walls are not plastered, floors and walls are badly cracked, toilet water supply systems leak, and there is no storm water drainage and no vegetation.

Although this is an improvement on the previous housing condition of people with disabilities, these units cannot be considered as “adequate”.

SAHRC, 2004, 44

7.4.2 Protection against arbitrary evictions

The right to be protected against arbitrary evictions is a part of the right to have access to adequate housing. Section 26(3) of the Constitution prohibits evictions from and demolitions of your home without an order of court made after considering all the relevant circumstances.

The CESCR has covered legal protection against forced evictions. This can provide some guidance to interpreting section 26(3) of our Constitution. The CESCR defines forced evictions as:

For court cases on evictions, see pages 242 and 249–251.

“The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy without providing access to appropriate forms of legal or other protection.” *General Comment No. 7, 1997, paragraph 4*

GUIDELINES



CESCR PROTECTION AGAINST EVICTIONS

- Evictions should not result in people being left homeless or open to having other human rights violated.
- Where people affected are unable to provide for themselves, the State must take all necessary steps, using the best available resources, to ensure that there is adequate alternative housing, resettlement or access to productive land.
- Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable groups disproportionately experience forced evictions. Therefore, when evictions take place, the State must ensure that proper steps are taken to ensure that no form of unfair discrimination is involved.



7.4.3

Children's rights to shelter and the general right of access to adequate housing

COURT CASE



INTERPRETING HOUSING AND SHELTER RIGHTS

In the 2001 case of *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom case), the Constitutional Court interpreted the right of access to adequate housing in section 26 and the right of children to shelter in section 28(1)(c) of our Constitution.

The Grootboom case involved a group of people, including a number of children, who had been evicted from private land they had moved onto, because of the bad conditions in which they lived in the informal settlement they moved from.

The Constitutional Court decided that:

- The State's housing programme must include measures that are reasonable in the way they are set up and implemented. The programme must not exclude a significant segment of society, and must respond to the urgent needs of those in desperate situations.
- The State's housing programme was unreasonable because it made no provision for access to housing for people in desperate need.
- The State had violated section 26(2) of the Constitution and had to act to meet its duties under section 26(2). The State thus had to devise, fund, implement and supervise measures aimed at providing assistance to those people in desperate need.
- The State has an immediate duty to provide shelter only for those children who are removed from their families. As the children in this case were under the care of their parents or families, the State must provide the legal and administrative infrastructure necessary to ensure that children are given the protection intended by section 28.

For more information on the Grootboom case, see Chapter 1 on page 31.

The decision in the Grootboom case has been praised internationally as a great victory for the homeless and landless people of South Africa, and for developing case law on the nature of the State's duty to progressively realise a specific socio-economic right (*Pillay, 2002a and 2002b*). However, close to six years after the judgment, the State has not yet adequately enforced the Court's orders.

Challenges to enforcing the Court's orders in the Grootboom case include:

- The community's lack of understanding of legal and technical issues relating to housing.
- Lack of skills, as most members of the community are illiterate.
- Inadequate communication and consultation between government and the community leading to non-consultative decision-making and a lack of understanding by the community of government plans.
- No maintenance of services provided, leading to their deterioration.

GUIDELINES



ISSUES ARISING FROM THE GROOTBOOM CASE

1. Housing means a lot more than a roof over your head. For a person to have access to adequate housing, there must be land, the house itself, services such as the provision of water, and the removal of sewage. In addition, these must be properly financed.
2. It is not only the State that is responsible for providing housing. Other people and structures within our society must be permitted by legislative and other measures to provide housing. This is because the State's duty is to create the conditions for access to adequate housing for people at all economic levels of our society.
3. Shelter cannot be provided on demand. Access to housing has to be realised progressively within available resources.
4. Parents or family have the primary duty to fulfil their children's socio-economic rights under section 28(1)(c) of the Constitution. When they are unable to do this, then the duty shifts to the State.
5. Priority has to be given to the needs of the most vulnerable people.
6. The State has a duty to ensure that an eviction is carried out humanely. If the eviction results in possessions and building materials being destroyed and burnt, it could be a violation of the State's duty under section 26(1) of the Constitution.

7.5

Policies, legislation and programmes to implement your housing rights

7.5.1 The White Paper on Housing

In 1995, the Government adopted a *White Paper on a New Housing Policy and Strategy for South Africa*. The White Paper recognises:

- Housing as a basic human right and the role of the Government to take steps and create conditions that will lead to an effective right to housing for all.
- The duty of the Government to stop taking any steps that encourage or cause homelessness.
- The responsibility of the Government to ensure conditions suitable for the delivery of housing.
- The importance of involving communities in the housing development process.
- The right of individuals to freedom of choice in satisfying their housing needs.
- The principle of non-discrimination in the delivery of housing.

7.5.2 Legislation

a) The Housing Act

The Housing Act 107 of 1997 sets out the framework for housing delivery in South Africa. The Act:

- Repeals all discriminatory laws on housing, dissolves all apartheid housing structures and creates a new non-racial system for implementing housing rights in South Africa.
- Defines the roles of national, provincial and local government on housing.
- Commits local government to take reasonable steps to ensure that all people in its area have access to adequate housing progressively – in other words, over a period of time.
- Places a duty on municipalities to set housing delivery goals and identify land for housing development.
- Deals with the basic principles that must guide housing development.
- Limits the sale of State-subsidised housing:
 - *Voluntary sale* of a State-subsidised house cannot be done within a period of eight years from the date on which it was acquired, without first offering it to the provincial government involved.
 - With *involuntary sale*, a person's creditors cannot sell the house unless it has first been offered to the provincial government involved at a price not greater than the subsidy received for the property. This restriction was introduced into the Act by the *Housing Amendment Act 4 of 2001*. It came into operation on 1 February 2002.

Section 1 of the Housing Act defines “housing development” as the establishment and maintenance of habitable, stable and sustainable public and private residential environments to ensure that households and communities have convenient access to economic opportunities, and to

GUIDELINES



HOUSING ACT PRINCIPLES ON HOUSING DEVELOPMENT

1. Giving priority to the housing needs of the poor, people living with disabilities, marginalised women and other disadvantaged groups.
2. Encouraging and supporting individuals and communities to fulfil their own housing needs by assisting them in accessing land, services and technical assistance.
3. Promoting education and consumer protection in housing development.
4. Promoting steps to prohibit unfair discrimination based on gender and other grounds of unfair discrimination in housing development.



health, educational and social amenities, and that all citizens and permanent residents have progressive access to:

- Permanent residential structures with secure tenure, internal and external privacy, and adequate protection against the weather.
- Drinkable water, adequate sanitation and a home energy supply.

b) **The Extension of Security of Tenure Act**

The *Extension of Security of Tenure Act 62 of 1997* (ESTA) provides security of tenure and protection from arbitrary evictions for people in rural areas and peri-urban land.

Who does ESTA affect?

ESTA is aimed at “occupiers”. Under ESTA, an *occupier* is a person living on land belonging to someone else and who has on or since 4 February 1997 had the permission of the owner, or another legal right to live there. The Act says a land owner must get a court order before evicting occupiers.

These people are not occupiers under ESTA:

- A labour tenant under the *Land Reform (Labour Tenants) Act 3 of 1996*.
- A person using or intending to use the land mainly for industrial, mining, commercial or commercial farming purposes.
- A person who has an income of more than R5 000 a month.

There are two different procedures for evictions under ESTA:

- A procedure for people occupying land before or on 4 February 1997.
- A procedure for people who started occupying land after 4 February 1997.

Evictions of people who were occupiers on or before 4 February 1997

ESTA sets out the circumstances for granting an eviction order for this group of occupiers – these are mainly situations where an occupier has done something wrong. It says that, even if there are none of these circumstances, a court may grant an eviction order if it is satisfied that suitable alternative accommodation is available for occupiers. This means that they can remain on the land until suitable alternative accommodation is found.

GUIDELINES



POSSIBLE EVICTION

ESTA also says that an occupier, who has not done anything seriously wrong and even if no alternative accommodation is available immediately, can be evicted if these steps are covered:

1. Suitable alternative accommodation is available to the occupier within a period of nine months after the date of termination of his/her right of residence.
2. The owner or person in charge provided the house where the occupier lives.
3. The business of the owner or person in charge will be seriously prejudiced unless the housing is available for occupation by another person, who will be employed.
4. The court is convinced that it will be just and equitable to evict the occupier, considering:
 - The efforts which the owner or person in charge and the occupier have made to secure suitable alternative accommodation for the occupier, and
 - The interests of each side, including whether refusing to grant an eviction will cause the owner or person in charge more hardship than the occupier will experience if the eviction order is granted.

Evictions of people who became occupiers after 4 February 1997

GUIDELINES



POSSIBLE EVICTION

Occupiers after 4 February 1997 can be evicted if these steps are covered:

1. If it is a clear and fair part of the agreement between the occupier and owner or person in charge that the occupier would live on the land for a specific period, that period has come to an end, and the court thinks that an eviction order is just and equitable.
2. The court for any other reason believes that an eviction order is just and equitable.
3. In deciding whether it is just and equitable to grant an order for eviction, the court must consider:
 - How long the occupier has lived on the land.
 - Whether the agreement between the parties is fair.
 - Whether the occupier can get suitable alternative accommodation.
 - The reason for the eviction.
 - The interests of the owner or person in charge, the occupier and the remaining occupiers on the land.

GUIDELINES



EVICION DATE

In deciding on the date for an eviction, ESTA says:

1. A court that orders the eviction of an occupier must:
 - Decide on a just and equitable date when the occupier must leave the land.
 - Decide on the date for the eviction order if the occupier has not left the land on the date in the eviction order.
2. In deciding on a just and equitable date, a court must consider all relevant factors, including:
 - The fairness of the agreement.
 - The interests of the owner or person in charge, the occupier and the remaining occupiers on the land.
 - The period that the occupier has lived on the land.

c) **The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act**

The *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998* (PIE) provides a framework to prevent unlawful occupation and at the same time ensure that unlawful occupiers are treated with dignity, giving special consideration for the most vulnerable occupiers.

PIE emphasises the court order requirement under section 26(3) of the Constitution. PIE is for occupants in urban and rural areas.

Who does PIE affect?

PIE is aimed at “unlawful occupiers” – occupiers who did not have the consent of the owner or person in charge, or any legal right to occupy the land.

PIE does not cover:

- “Lawful occupiers” – people who occupy land with the consent of the owner or person in charge, or have the right to occupy the land.
- Occupiers of rural land, who are protected by ESTA.
- Rural occupiers, who have informal rights to land.

Evictions by an owner or person in charge of land

Section 4 of PIE says that an owner or person in charge of land may evict unlawful occupiers.

If an unlawful occupier has occupied the land for *less than six months* at the time when the eviction procedures are started, a court may grant an order for eviction if it thinks that this is just and equitable. The court must consider all the relevant circumstances, including the rights and needs of the elderly, children, people living with disabilities, and households headed by women.

If an unlawful occupier has occupied the land for *more than six months* at the time when the eviction procedures are started, a court may grant an order for eviction if it thinks this is just and equitable. Again, the court must consider all the relevant circumstances, including:

- Whether land has been made available or can reasonably be made available by a municipality, another organ of State, or another landowner for the relocation of the unlawful occupier.

- The rights and needs of the elderly, children, people living with disabilities, and households headed by women.

Evictions by an organ of State

Section 6 of PIE says that an organ of State can in some circumstances start procedures to evict an unlawful occupier.

A court may grant an eviction order if this is just and equitable, after considering all the relevant circumstances. The unlawful occupier must occupy the land without the consent of an organ of State where this consent is needed, and it must be in the public interest to grant the eviction order.

In deciding whether it is just and equitable to grant an eviction order, a court must consider:

- The circumstances under which the unlawful occupier occupied the land and erected the building or structure.
- The period that the unlawful occupier and his/her family have lived on the land.
- The availability to the unlawful occupier of suitable alternative accommodation or land.

PIE is currently under revision. The proposed amendments (*Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2005*) are problematic, as they expose ex-tenants and ex-mortgagors to evictions.

GUIDELINES



WHEN THREATENED WITH EVICTION

1. Landlords often do not know the law or try to avoid applying to the court.
2. The landlord cannot use threats or force to get you to leave the land you are living on.
3. Only a court can force you out by issuing you with an order to leave.
4. You should be given adequate and reasonable written notice before the scheduled date of eviction.
5. Get advice and find out what your rights are by going to an advice office or another relevant community-based organisation.
6. Show the advice worker or community worker all correspondence you received from the landlord or the court.
7. The court should inform you of the date, time and place of the hearing to decide on your case.
8. You may need an attorney to represent you in court.
9. Your case may be strengthened or you may have a right to alternative accommodation if:
 - The affected household includes a child, someone with a disability, an elderly person or a single mother.
 - You have lived on the land for six months or more.
10. If the court grants an eviction order, you could be asked to pay the landlord's legal costs needed to evict you.
11. Only the sheriff of the court can carry out an eviction order.

"Relevant circumstances" and "alternative accommodation"

The courts have said that the circumstances listed in PIE are not the only circumstances that should be taken into account.

COURT CASE



CITY OF CAPE TOWN

In the 2004 case of *City of Cape Town v Rudolph and Others*, the Cape High Court addressed the relevant circumstances to be taken into account in an eviction case.

The Metropolitan Municipality of the City of Cape Town brought an application for the eviction of residents of Valhalla Park from accommodation owned by the City. Some of the residents had been placed on the housing waiting list of the City for more than 10 years. As a result of the overcrowded, intolerable conditions under which they were living under at the time, they decided to move onto vacant land that was owned by the City.

The City claimed that:

- PIE does not apply to the residents, as they occupied their land without the City's consent.
- If PIE is applicable, an urgent eviction order should be granted.

The residents opposed the application and also brought a counter-application. They argued that the City's housing policies and programmes had failed to give effect to their right of access to adequate housing under section 26 of the Constitution. The Court decided that:

- The provisions of PIE apply to the eviction, and the circumstances did not warrant the granting of an urgent eviction order.
- The housing policy must make temporary provision for the people in Valhalla Park in a crisis or desperate situation.

The Court also said that, in allocating housing, all relevant circumstances must be considered, including the rights of the elderly, children, people living with disabilities and households headed by women. If the period of occupation is more than six months, factors to consider are whether land has been made available, or can reasonably be made available by a municipality, another organ of State or another landowner for the relocation of the unlawful occupier.

COURT CASE



PORT ELIZABETH MUNICIPALITY

In the 2004 case of *Port Elizabeth Municipality v Various Occupiers* (PE Municipality case), PIE had to be interpreted to give meaning to section 26(3) of the Constitution.

The case involved an eviction application by the Port Elizabeth Municipality against 68 people (“occupiers”), who had occupied private, undeveloped land within the Municipality area. They had been living on the land for periods ranging from two to eight years. Most of them had moved onto the land after being evicted from previously occupied land.

The occupiers indicated that they were willing to leave the property, provided that they were given suitable alternative land to which they could move. However, they refused to move to a place called Walmer Township, saying that no form of security of tenure had been provided and they might be vulnerable to further eviction if they move to the land.

The Municipality argued that giving them alternative land would be preferential treatment. They said that this would disrupt the existing housing programme and would be ‘queue-jumping’ by the occupiers.

The Constitutional Court decided not to order the eviction. It said that:

- Section 26(3) recognises that the eviction of people living in informal settlements may take place, even if it results in loss of a home. This included situations where people deliberately occupy land with the purpose of disrupting an organised housing programme and placing themselves at the front of the queue.
- A court should be reluctant to grant an eviction against relatively settled occupiers, unless it is satisfied that a reasonable alternative is available, even if only as an interim measure while waiting for eventual access to housing in the formal housing programme.
- The circumstances listed in section 6 of PIE are not the only ones that should be considered. The Court must consider all circumstances that may be important, including:
 - The vulnerability of the elderly, children, people living with disabilities and households headed by women.
 - The extent to which proper discussions and, where possible, mediation has taken place.
 - The reasonableness of offers made regarding alternative accommodation or land.
 - The amount of disruption involved.
 - The willingness of the occupiers to respond to reasonable alternatives presented.

COURT CASE



MODDERKLIP BOERDERY

In the 2005 case of *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others* (Modderklip case), about 40 000 people moved onto private land owned by Modderklip Boerdery (Pty) Ltd. This was as a result of overcrowding and shortage of land in the nearby Daveyton and Chris Hani informal settlements. The land owner failed to get various organs of State to assist him in enforcing the eviction order granted by the Pretoria High Court.

The Constitutional Court decided that:

- It was unreasonable to force the land owner to carry the State's burden of providing the occupiers with accommodation.
- The unlawful occupiers were entitled to occupy the land until alternative land is made available to them by the State, or by the provincial or local authority.
- Land owners also deserved protection and could be awarded damages.

Balancing the housing rights of unlawful occupiers and the property rights of land owners

Land owners also have rights that must be protected. PIE tries to strike a balance between a land owner's right to evict unlawful occupiers *and* the occupiers' right to have access to adequate housing and be protected from arbitrary eviction. According to the Grootboom case, the State has a duty to try to satisfy both rights (*paragraph 74 of judgment*).

The courts have attempted to establish an appropriate relationship between sections 25 and 26 of the Constitution. The courts consider the interest of both the unlawful occupiers and the land owner – they try to ensure that there is a balance between the housing rights (section 26) of unlawful occupiers and the property rights (section 25) of the owner of land:

- In the PE Municipality case, the Constitutional Court said that its role is to balance both rights. This means that the State must show equal accountability to occupiers and land owners. If the State does not provide alternative land in an eviction case when it should have, it breaks its constitutional duty to both the land owner and unlawful occupiers.
- In the Modderklip case, the Supreme Court of Appeal said that the State's failure to provide alternative accommodation to the unlawful occupiers was a violation of the right to property of the land owner *and* the right of the occupiers to housing.

d) The Housing Consumers Protection Measures Act

The *Housing Consumers Protection Measures Act 95 of 1998* (HCPMA) protects housing consumers by establishing the National Home Builders Registration Council (NHBRC).

This Council aims to:

- Represent the interests of housing consumers by providing warranty protection against defects in new homes.
- Improve the structural quality of houses built.
- Promote housing consumer rights and give housing consumer information.

e) The Rental Housing Act

The *Rental Housing Act 50 of 1999*:

- Defines the role of the Government in rental housing.
- Creates structures to ensure the proper functioning of the rental housing market.
- Allows the Minister to introduce a rental subsidy housing programme or other steps to make rental housing property accessible and available for people with low income.
- Sets out the relationship between tenant and landlord, including their rights and duties.
- Allows a local authority to establish a Rental Housing Information Office to advise tenants and landlords on their housing rights and duties.
- Allows the MEC for Housing to set up tribunals, called 'Rental Housing Tribunals' in provinces, to deal with problems or disputes between landlords and tenants.

Therefore, a tenant or landlord can make a complaint to the Rental Housing Tribunal about an unfair rental housing practice. The tribunal has the power to investigate an issue, appoint a mediator or conduct a hearing, and make a ruling that is just and fair in the circumstances.

Rental tribunals have been set up in Gauteng, the Western Cape and the North West. Other provinces are busy establishing these tribunals.

f) The Home Loan and Mortgage Disclosure Act

The *Home Loan and Mortgage Disclosure Act 63 of 2000* aims to promote fair lending practices among financial institutions that provide home loans.

To achieve this aim, the Act calls for the disclosure of certain information by financial institutions that provide home loans. For example, they must disclose:

- The total number of applications for home loans.
- The number and amount in Rand of applications granted.
- The number and amount in Rand of unsuccessful applications.
- The reasons for rejections.

The Act establishes an Office of Disclosure to:

- Monitor if the required information is being given.
- Make information available to the public that shows whether or not financial institutions are serving the housing credit needs of their communities.
- Rate financial institutions in accordance with their service record.
- Assist in identifying possible discriminatory lending patterns and in enforcing compliance with anti-discrimination laws.

The Act was approved at the end of 2000, and came into operation during 2003.

7.5.3 Programmes

a) The Housing Subsidy Scheme

The Housing Subsidy Scheme, introduced in 1995, is one of the Government's most important ways of implementing the constitutional right of access to adequate housing.

People who qualify for a housing subsidy receive a once-off grant from the Government for housing purposes. The Government does not give cash to beneficiaries. The grant is only used for the purchase of housing goods and services (building materials and basic municipal services such as water and sanitary services) to provide complete houses that comply with the minimum technical and environmental norms and standards.



Housing subsidies	The types of subsidies currently available include:
1. A consolidation subsidy	<p>This gives people who have already received serviced stands from the State the opportunity to acquire houses:</p> <ul style="list-style-type: none"> • Beneficiaries (those who qualify) with a household income of not more than R1 500 a month get a top-up subsidy of R21 499 to construct a house. • Beneficiaries with a household income of between R1 501 to R3 500 a month get a top-up subsidy of R19 020.
2. An individual subsidy	<p>This allows beneficiaries to buy a serviced stand and build their own home, or to purchase existing improved residential properties that are not part of approved housing subsidy projects. There are two types of individual subsidies:</p> <ul style="list-style-type: none"> • <i>A credit-linked individual subsidy</i> – given to beneficiaries who can afford loan finance. The beneficiary acquires property, using both the subsidy and additional loan applied for. • <i>A non-credit-linked individual subsidy</i> – given to beneficiaries who wish to acquire property entirely out of the subsidy amount.
3. A project-linked subsidy	<p>This enables individuals to own houses in projects approved by Provincial Housing Departments. The subsidy is allocated to a developer, who initiates and manages the building of houses under an approved project. The houses are then sold to qualifying beneficiaries. The developer can be a municipality, an organisation in the private sector, or a non-governmental or community-based organisation.</p>
4. An institutional subsidy	<p>This is available to institutions that create affordable housing for individuals, who qualify for subsidies. The institution provides houses on a rental or rent-to-buy basis. After four years, the house may be sold or transferred to the beneficiary.</p>
5. A relocation subsidy	<p>This provides defaulting borrowers, who were three months in arrears on 31 August 1997 and cannot afford to rehabilitate the mortgage loans, with the option of getting affordable housing under the Housing Subsidy Scheme. The person enters into a relocation agreement that allows them to relocate to affordable housing.</p>
6. A rural subsidy	<p>This is available to beneficiaries who only enjoy tenure rights to the State land they occupy. The subsidies are available on a project basis and beneficiaries are supported by implementing agents approved by the Provincial Housing Departments. The subsidies can be used either for service provision, building of houses, or for a combination of both.</p>

GUIDELINES



WHO QUALIFIES?

To qualify for the Housing Subsidy Scheme, you must:

1. Have a combined household income of less than R3 500.
2. Be a South African citizen or permanent resident.
3. Be 21 or older.
4. Be married, live with a partner, or be a single person with one or more dependants. *Unmarried couples* must produce an affidavit to prove they are living together as a couple. *Dependants* usually include children, elderly people and people with severe disabilities.
5. Not have received a housing subsidy previously. However, a person who received only a vacant serviced site under the previous dispensation on the basis of ownership, leasehold or deed of grant, qualifies for a consolidation subsidy. This does not apply to people who qualify for relocation assistance or people with disabilities. With divorce, the terms of the divorce order will determine if a person qualifies.
6. Not own or have owned property in South Africa, except under a consolidation subsidy or relocation assistance. This does not apply to people living with disabilities.

To apply for a housing subsidy, you need to contact the provincial Housing Department in the province where you stay, or the local or district municipality. The provincial Housing Department checks and approves or rejects people applying for the subsidy scheme. All information provided on the application form is recorded on a National Database.

GUIDELINES



IMPORTANT POINTS ON THE SUBSIDY SCHEME

For more on the PHP,
see page 259.

- Some beneficiaries will have to pay a financial contribution, or they will have to participate in the building of their houses through an approved People's Housing Process (PHP).
- Beneficiaries living with disabilities, who have special housing needs, can be given additional funds for the provision of facilities such as a handrail, visual doorbell indicators, kick plates to doors, slip resistant flooring or a vinyl folding door. Beneficiaries have to submit a medical certificate from a registered medical doctor explaining their disability. The additional amount depends on the seriousness of the disability.
- Beneficiaries with health problems, who are permanently or temporarily unable to build their own homes, can get an increased subsidy amount. Beneficiaries have to submit a medical certificate from a registered medical doctor setting out their health situation.
- Housing subsidies are now available to people living in rural areas where there is communal tenure and people have informal land rights. Subsidies are only available on a project basis and the land owner has to consent in consultation with communities.

SUBSIDY QUANTUM FOR 30M² HOUSES IN THE 2006–7 FINANCIAL YEAR

Income category	Previous subsidy	New subsidy	Contribution	Product price
Individual, project-linked and relocation subsidies				
R0 to R1 500	R31 929	R36 528	None	R36 528
R1 501 to R3 500	R29 450	R34 049	R2 479	R36 528
Elderly, living with disability, or in poor health: R1 501 to R3 500	R31 929	R36 528	None	R36 528
Institutional subsidies				
R0 to R3 500	R29 450	R34 049	Institution must add capital	At least R36 528
Consolidation subsidies				
R0 to R1 500	R18 792	R21 499	None	R21 499
R1 501 to R3 500	R16 313	R19 020	R2 479	R21 499
Elderly, living with disability, or in poor health: R1 501 to R3 500	R18 792	R21 499	None	R21 499
Rural subsidies				
R0 to R3 500	R29 450	R34 049	None	R34 049
People's Housing Process				
R0 to R3 500	R31 929	R36 528	None	R36 528

Department of Housing website

b) The National Housing Programme for Housing Assistance in Emergency Circumstances

The Emergency Housing Programme was created in 2004 as a result of the Grootboom judgment. It aims to assist people in urban and rural areas, who have urgent housing problems due to circumstances that they had no control over, such as disasters, evictions or threatened evictions, demolitions or imminent displacement, or immediate threats to life, health and safety.

The assistance is through grants to municipalities to enable them to help people in emergencies by providing land, municipal services infrastructure and shelter. The people may also be relocated and resettled if they agree to it, and are involved in the process. People who get assistance under this programme can later apply for subsidies for permanent housing under the Housing Subsidy Scheme if they qualify.

GUIDELINES



IMPORTANT POINTS ON THE EMERGENCY PROGRAMME

1. The housing problem must be urgent, should not have been caused by you, and you are not able to address the problem from your own resources or other sources (eg money from insurance policies).
2. The provincial housing department or the municipality identifies people who need emergency housing and applies to the MEC for assistance.
3. The assistance is temporary, except for assistance with repair or rebuilding of damaged, permanent formal housing.
4. The aid provided is the first step towards a permanent housing solution.
5. Beneficiaries can also include people who do not qualify for subsidies under the Housing Subsidy Scheme:
 - Households with monthly income over R3 500
 - Non-lawful residents (in other words, people who are not citizens or permanent residents)
 - People below 21, who head households
 - People without dependants
 - People who own or have owned a house before
 - People who have previously received housing assistance.

EXAMPLES



EMERGENCY CIRCUMSTANCES

- *The houses of people are destroyed or damaged by fire, wind or earthquakes to the extent that they can no longer live there. Assistance can be provided by repairing or building the permanent formal housing on the land or on new land where the land becomes unsafe for further occupation.*
- *People are forced to vacate land because of severe frequent flooding, failure of a dam wall, eviction, unsafe buildings or civil unrest. They can no longer live on the land or buildings either temporarily or permanently. However, it is possible for them to return to the land in the future. In this kind of situation, assistance can be provided by relocating them to a temporary settlement area, to be relocated again, once a permanent housing solution is possible*

Department of Housing, National Housing Programme: Housing Assistance in Emergency Circumstances, 2004, Table 1

c) **Social housing policy**

Social housing is a housing option for people with low- to medium-incomes provided by housing institutions. Social housing excludes immediate individual ownership.

The social housing policy aims at creating an environment that enables the social housing sector to develop and deliver housing opportunities on a large scale in South Africa. It also aims to provide housing under different tenure options, such as cooperative housing and instalment sale. The policy was launched on 15 August 2004.

GUIDELINES



SOCIAL HOUSING

For more on the PHP, see the next page.

- Social housing is not an option for the very poor.
- People accessing accommodation from housing institutions will have to earn a secure income – formally or informally.
- People have to be able to afford the rental or other periodic payment for the accommodation.
- Social housing cannot be used by beneficiaries wanting immediate individual ownership. The conversion of rental schemes into ownership options may be considered after 10 to 15 years.
- Social housing projects can include initiatives where beneficiaries participate in the solution of their housing needs through the People's Housing Process (PHP).

d) Other national housing initiatives

The National Housing Finance Corporation

The National Housing Finance Corporation (NHFC) was set up in 1996 to assist people with a regular monthly income between R1 500 and R7 500 to access finance, and to acquire and improve a home of their own. Banks are reluctant to provide loans to people in this range.

The NHFC does not finance possible house buyers directly. It acts as an intermediary between possible house buyers and the non-traditional lenders who are prepared to offer loans. The NHFC provides funds to these lenders.

In 2003–4, 55 loans to the value of more than R632 million were paid out to finance 220 602 houses (*GCIS, 2004–5, 376*).

The National Urban Reconstruction and Housing Agency

The National Urban Reconstruction and Housing Agency (NURCHA) was established in 1995 to assist households earning less than R1 500 a month to access bridging (temporary) housing finance. It provides guarantees to banks prepared to issue housing credit to low-income borrowers.

Since 1995, NURCHA supported the building of 135 421 houses, of which 13 827 were built during 2003–4 (*GCIS, 2004–5, 377*).

Servcon Housing Solutions

Servcon Housing Solutions (Servcon) was set up to address the problem of non-payment of housing loans. They offer a number of options to defaulters, including:

- The rescheduling of loans.
- The conversion of loan repayments into a rental scheme.
- The relocation of defaulters to properties they can afford.

Where individuals refuse to join the programme and they are seriously in arrears, their property can be taken back.

7.6

Protecting and advancing your housing rights

7.6.1 The People's Housing Process

The PHP aims to assist the very poor, who have access to housing subsidies and wish to enhance their subsidies by building or organising the building of their homes themselves.

The Government provides these people with housing subsidies, and technical, financial, logistical and administrative support to build their homes on a basis that is sustainable and affordable. Government also gives an additional grant for the training of communities in PHP development. The programme is useful for the upgrading of informal settlements.

The advantages of the PHP include:

- Increased community participation and community development.
- An outcome better suited to the needs of people, as the community has more control over the design of the housing project.
- Capacity-building of participants.
- Easier access to housing for women.

The Homeless People's Federation was established as an independent civil society organisation to promote this approach to housing.

7.6.2 Getting organised

Organised communities can better express their needs and have a more powerful voice in housing projects. Strong community leadership and organisation also means more effective involvement in the longer-term development of your area.

GUIDELINES



GETTING INVOLVED IN PROTECTING HOUSING RIGHTS

1. Get organised in communities at a local level in civic or community organisations.
2. If you form a committee, make sure that it is recognised by the local council.
3. Hold meetings on the housing needs of residents to highlight their housing problems.
4. Discuss the housing plans of the municipality and challenge decisions that do not favour the housing interests of local people.
5. Involve people in gathering reliable information on the housing and other socio-economic needs of people in the area.
6. Hold workshops and training sessions on housing rights.
7. Run campaigns around key housing developments.

CASE STUDY



WALLACEDENE

Wallacedene is on the eastern side of Kraaifontein about 30 kilometres from the City of Cape Town. The judgment in the Grootboom case aimed at ensuring the realisation of access to adequate housing for the Wallacedene community. But almost six years after the judgment, the community still faces housing problems. The settlement is still very dense, some of the houses are built in waterlogged areas, and there are limited sanitation and water services, with no proper drainage system.

The community is dissatisfied with the delay in fully implementing the court judgment and other agreements with the Government on realising their right to have access to housing. They have elected a Committee with the task of ensuring that the judgment and agreements are implemented. The Committee forms part of the Greater Wallacedene Project Steering Committee that aims to facilitate housing development in the area.

The Committee, on behalf of the community, approached the Legal Resources Centre (LRC), a non-profit public interest law centre that provides legal services for vulnerable and marginalised communities in South Africa. They asked the LRC about possible legal steps to respond to the delay in fully implementing the court judgment and agreements. Subsequently, a number of meetings have been held between the community and the LRC to see how the community can be assisted. The aim was to put effective pressure on the Government to fully implement the court judgment.

7.6.3 Community participation

EXAMPLES



ISSUES WHERE CONSULTATION IS IMPORTANT

- *The location of the land allocated for housing needs to be suitable for housing and close to places of work, health care facilities, schools, shops, transport and other facilities. The community can check if the area, the plot and the 'starter' house meet the guidelines for adequate housing.*
- *The layout of the project site should consider the need for open spaces, and architectural, environmental, public health, and safety and anti-crime factors.*
- *If people are to be relocated, the time (including day and month of the year) of relocation is relevant, so that children's education, for example, is not disrupted.*

The lack of community participation in housing projects results in beneficiaries not getting what they need. The active involvement of people who lack adequate housing in all stages of the processes of getting housing is therefore very important.

Participation and consultation should be meaningful, not 'token' involvement for the sake of saying: "We have consulted the people". Communities should also be directly involved in monitoring the municipality and other participants in the process.

Communities can often have more influence over an elected council and a public body like a municipality. To be effectively involved, communities need:

- Relevant information to make informed decisions.
- Information on the meaning of 'home ownership' – for example, taking on

responsibility for your own repairs and maintenance, and having to pay rates and other service charges.

- Open communication with government on all practical, legal or technical issues relating to housing.

7.6.4 Access to information

For more on access to information, see Chapter 2 on page 57.

Lack of access to information has contributed to unethical behaviour, corrupt practices and irregularities in housing development in South Africa, undermining the livelihoods of millions of poor people (SAHRC, 2004, *Housing*, 54). Therefore, access to accurate and adequate information is important in advancing housing rights.

Section 32(1) of the Constitution says:

“Everyone has the right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights.”

The *Promotion of Access to Information Act 2 of 2002* and the Home Loan and Mortgage Disclosure Act promote access to information.

EXAMPLES



INFORMATION NEEDED ON HOUSING RIGHTS

- *All resource and planning issues that can have an impact, positively or negatively, on your struggle for housing.*
- *The available housing schemes and how to access them.*
- *Where and what land is available.*
- *Your rights to water, sanitation and other services.*

7.6.5 Lobbying for making and implementing policy and legislative change

For example, civil society organisations can use opportunities for discussion on the PIE Amendment Bill to examine their meaning for poor people trying to access housing.

You can then:

- Influence the legislation and policy through submissions to the Housing Portfolio Committee in Parliament.
- Write to the Department of Housing identifying communities that can benefit from the Emergency Housing Programme.

7.6.6 Making complaints about poor housing

There is widespread dissatisfaction with the quality of housing that has been provided so far. The complaints include cracked walls, weak doors and roofs, and insecure buildings (*Minister Sisulu, 2005b*).

New housing consumers can make complaints to the NHBRC about structural defects in their houses. An example of a *structural defect* is a leaking roof. You have a one-year warranty against roof leak after occupying your new home.

Complaints are dealt with under the HCPMA. Before making a complaint to the NHBRC, you should:

- Notify the home builder in writing of all the complaints requiring attention within the time periods stated in the HCPMA (*section 13(2)(b)*).
- Keep a copy of your letter of complaint and proof of the date that it was sent to the builder.
- Allow the builder reasonable access to the house to rectify the defect.
- Make sure that you meet all financial obligations to the builder.



GUIDELINES



HANDING IN YOUR COMPLAINT

You need:

- Proof of the occupation date of the home.
- Proof of notification to the home builder within the necessary time periods.
- A complete list of the items of dispute given to the home builder.

You approach the NHBRC with your complaint after the home builder has failed to respond to the complaint within the necessary time frames, or there is an unresolved dispute between you and the home builder about the extent of the home builder's liability.

7.6.7 Addressing rental housing problems

Houses that are in a poor condition and badly in need of maintenance cannot be regarded as 'adequate'. Examples of complaints about rental housing are:

- "The rent you are being charged is very high."
- "Your property is in a very bad condition and is not being maintained by your landlord."

GUIDELINES



TAKING ACTION

You or your community organisation can organise to:

1. Check the municipality's legal duties, and its repairs and maintenance policy.
2. Monitor the municipality's performance and gather information on the typical repair and maintenance problems residents have.
3. Pressurise municipalities to meet their duties to repair and maintain council flats and houses.
4. Make a formal complaint to the Rental Housing Tribunal about an 'unfair practice' you have experienced as a tenant or landlord.

Getting more information about rental housing can enable you to protect and advance your rental housing rights. A local authority can set up a Rental Housing Information Office to advise tenants and landlords on housing rights and duties in the area. You can ask your local authority if a Rental Housing Information Office has been set up in your area.

7.6.8

Improving the position of women and other disadvantaged groups

GUIDELINES



STEPS TO TAKE

1. Form special committees to discuss the special housing needs of women, people living with disabilities and other disadvantaged groups.
2. Develop strategies and take action against discrimination facing these groups in housing.
3. Monitor the development and implementation of policies and laws to ensure equality for women and other disadvantaged groups in housing.
4. Lobby the Government to properly address these special needs in developing housing policies, laws and programmes.

Discussion ideas



TALKING POINT 1

1. Do existing housing conditions in your area or in other areas fall short of the meaning of “adequate housing”? Consider the type and size of house, the cost, quality of building materials, its location and the impact of the environment on the people, and access to basic services such as water, sanitation, electricity, roads and drainage. If some of the houses are inadequate, think of steps your community can take to advance your right to adequate housing.
2. Based upon your personal experience or the experience of other people you know, what barriers can you identify to accessing housing?
3. What do you understand by ‘equitable access’ to housing? Discuss the issue of equitable access to housing for vulnerable groups.

TALKING POINT 2

1. What are the duties of the State on the right to have access to adequate housing?
2. What do you understand by “reasonable legislative and other measures”, “within available resources” and “progressive realisation”?

TALKING POINT 3

1. *What are the types of housing subsidies available?*
2. *How can you access a housing subsidy?*
3. *Do you think the housing subsidy schemes provided by government are adequate to meet the needs of the people?*

TALKING POINT 4

What will you do if a landlord tries to force occupants off the land without a court order? Some of them are people with disabilities, children and people over 60.

Divide into small groups to discuss in more detail. Examples of groups:

- *The occupants*
- *A housing rights organisation*
- *The landlord.*

TALKING POINT 5

1. *Can a mother claim housing based on her child's right to shelter?*
2. *Who has the responsibility of providing shelter to children?*

TALKING POINT 6

How can the Emergency Housing Programme be used to reduce the housing crisis in South Africa?

TALKING POINT 7

1. *How can you address your housing problems to do with structural defects or rental problems?*
2. *Are there any institutions that you can approach?*
3. *What are the procedures you have to follow?*
4. *Discuss the rights and duties of a landlord and a tenant in a rental agreement.*

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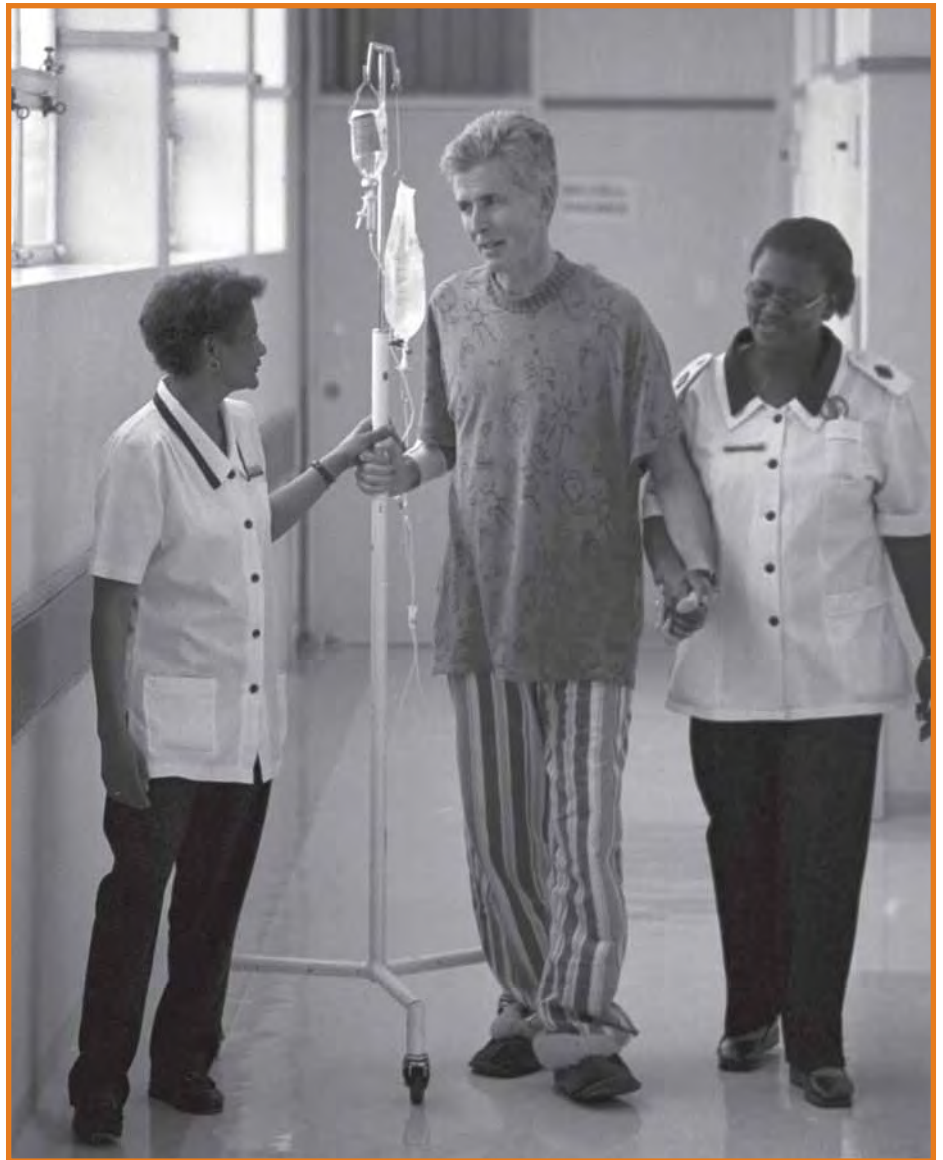
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Health care rights

CHAPTER 8



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KEY WORDS

Access	Ability to get, have or use something, eg access to health care.
Adequate	Suitable, sufficient, up to a good enough standard.
Antiretroviral treatment	Drug treatment that fights against HIV by slowing down and controlling the spread of HIV in your body.
Breach	Break or not respect, eg breach your right to give informed consent to have an HIV test.
CD4 count	A measure of the strength of your immune system – CD4 cells are white blood cells that organise the body's response to viruses like HIV.
Comply	Whether or not you obey policy, law and procedure.
Confidentiality	Keeping information about a patient private.
Consent	Permission or agreement.
Constitutionality	Whether or not laws and regulations are in line with the Constitution.
Diagnose	Explain to someone what his/her medical condition is.
Diagnostic	To do with a medical diagnosis or a decision on what illness you have.
Endemic	Found in a local area, or associated with people in this area.
Equitable/Equitably	Handle fairly and reasonably.
Informed consent	Giving permission for a medical procedure or test after receiving full information, including understanding the benefits, possible harm and the choices you have.
Lactating	The period when women produce milk after childbirth.
Legally binding	Law or rule that you must follow.

Living positively	Living healthily with HIV and with a positive state of mind.
Lobbying	Persuading or influencing people in authority, eg to introduce or revise laws.
Marginalised	When some groups are excluded or sidelined.
Negative duty	A duty not to do something or to stop doing something that will affect a person's rights.
Positive duty	A duty to do something that will help realise a person's right to health.
Primary health care	Basic medical care, such as check-ups for children and pregnant woman, and HIV counselling and testing at clinics by doctors and nurses.
Reproductive health	Physical, mental and social well being to do with your reproductive system and all its functions.
Stigma	Negative attitudes, beliefs and feelings about a person, eg because you are living with HIV.
Transmission	To pass on a virus or an illness to another person.
Treatment literacy	Helping people understand how HIV can progress to AIDS, what they can do to protect their health, and why, how and when to take antiretrovirals and other treatments.
Unconstitutional	Not in line with the Constitution.
Unfair discrimination	A policy, law, condition or situation that unfairly disadvantages you, eg because you are a woman, black, lesbian, living with a disability, or living with HIV.
Validly	Whether or not new or existing policies or regulations are allowed under the law.
Violate/Violation	Abusing or not respecting, eg violate your right of access to health.
Voluntarily	By choice and without force.
Vulnerable groups	People that need special protection, eg children, people in detention.

8.1

Why is it important to understand your health rights?

CASE STUDY



SUPPORT AND TREATMENT WHILE LIVING WITH HIV

Francis Tsengwa lives in Site C, Khayelitsha, near Cape Town with her four daughters, Neliswa (19), Zisanda (17), Ntombizodwa (7) and Sandisiwe (3). At the beginning of 2002 her husband, Fani, told her that he was HIV positive and left her for another woman. Francis and her two younger children tested HIV positive soon afterwards and they were all put on antiretroviral (ARV) treatment, as they were living near a day hospital set up by the organisation called *Medécins Sans Frontières*.

In August 2004, Francis visited a *sangoma*, who told her to stop taking ARVs and to stop giving the drugs to her daughters. Around this time, the social grant (Disability Grant) she received from government was also cancelled. This is because only people living with HIV with a CD4 count lower than 200 qualify for a Disability Grant and Francis's CD4 count had risen to 600 after taking ARVs.

Soon afterwards the children became very ill with diarrhoea. Francis was also kicked out of her house and she had to go and live in a shack in Lwandle. For several months she did not return to the clinic because she was depressed and had no money to travel to the clinic where she would have to wait in a long queue to see the doctor. She had also contracted tuberculosis (TB) and became very ill herself. She could not walk anymore and was so weak that her eldest daughters had to carry her from the bed to the chair.

Meanwhile Zisanda fell pregnant and in 2004 she gave birth to a baby girl at the State hospital. She had to stay in hospital for three days because it was a difficult birth, but she was very happy when her daughter tested negative for HIV. Zisanda takes her daughter to the clinic every six months for a check-up where she has to wait with other mothers in a long queue, often for the whole day.

In the middle of 2005, a friend took Francis and the two youngest daughters back to the clinic. Francis was first put on TB medicine and later on ARVs. The daughters were also put back on ARVs. They have all recovered and are now living positively with HIV. Her doctor informed Francis that she and her youngest children had made a good recovery, and that they have a good chance of staying healthy, as long as they keep on taking ARVs every day.

The doctor, who works at the clinic three times a week, is overworked and complains that she does not have the necessary support staff and medicine to provide the same care that patients would get in town. Some days she works from 8 in the morning until 8 at night.

Information taken and translated from 'Daar is tog 'n môre', by Willemien Brümmer, Die Burger, 30 November 2005

Understanding your health rights will allow you to take steps to advance and protect your rights, and to make the best decisions about your health and the health of your family.

8.2

History and current context

8.2.1 The impact of apartheid

Apartheid laws and policies had a very negative effect on the health of millions of black people in South Africa. Black people were denied adequate housing, water, sanitation and access to schools, hospitals and other medical care. These living conditions caused a poor state of health amongst many black people.

Health services in South Africa were divided according to race, geographic location, and whether they were public or private services. The best services were provided in big cities to white people, who could afford medical aid and could go to private doctors and hospitals. As most black people could not afford private health care services, they had to make use of racist and inaccessible public health services. These apartheid health structures offered very little help to poor, black South Africans when they were ill.

The health system also failed to adequately address the health problems of the poor majority. Most of the money, doctors and equipment were used to address the complicated and expensive health needs of white patients, for example for open-heart transplants (*Baldwin-Ragaven, De Gruchy and London, 1999, 30*).

EXAMPLES



HEALTH PROFESSIONALS UNDER APARTHEID

- In 1990, there were about 22 000 doctors registered in South Africa – of these, only about 1 000 were black doctors.
- In 1990 there were 3 581 dentists – only about 25 were black dentists.
- In 1990 there was one general practitioner for a population of 900 people in an urban area.
- In 1990, there was one general practitioner for a population of 4 100 people in the rural areas.

Chapman and Rubenstein, 1998, 21

8.2.2 Current barriers to health care services

Despite the fact that our *Constitution (Act 108 of 1996)* guarantees freedom and equality for all, there are still many barriers that people face in getting access to health care services. Health care services are often expensive and most people do not have access to private medical aid to pay for expensive treatment. There is a general shortage of doctors. Many doctors and nurses are overworked. Some leave the country for better salaries overseas.

People living in poor, rural communities are most affected by these barriers:

- Many people do not know about certain diseases and how to prevent or treat them to ensure good health.
- There is a lot of prejudice and ignorance in some communities about HIV and AIDS. Some people living with HIV/AIDS fear that the community will reject them if they get tested and people find out that they are HIV positive and are taking ARVs.

- Health care facilities are often far away from where people live, and transport to these facilities is expensive.
- Health care facilities often do not have enough staff or medicines to provide proper health care services.
- Many people do not have access to clean water, sanitation, nutrition and electricity, and this also causes poor health. Many women travel long distances to fetch water, and this negatively affects their bones and muscles. A 1994 household health survey by CASE found that about two-thirds of the African population is affected by poor public health conditions – overcrowding, lack of electricity, clean water and sanitation (*Chapman and Rubenstein, 1998, 19*).
- Poor people face the high costs of transport, buying medicines, and follow-up visits to a doctor.
- Language barriers between patients and health care workers mean that many people may not be able to fully understand their treatment because the health care worker does not speak the patient's language.
- Many women experience domestic violence, sexual offences and other forms of violence against women.
- There are discriminatory attitudes amongst health care workers against people because of their race or gender.
- Because of the HIV/AIDS crisis, many hospitals and clinics face a huge increase in patients, but there has not been an increase in the doctors and nurses available to care for all the new patients.
- The health care system is also better equipped and provides a better service in some provinces like Gauteng and the Western Cape, than in others such as the Eastern Cape and Limpopo.



CASE STUDY



LACK OF INFRASTRUCTURE AND HEALTH FACILITIES AS BARRIERS TO HAVING ACCESS TO HEALTH CARE SERVICES

De Hope is a disadvantaged area in Limpopo. The town clinic covers six villages – Nhangani, Njhakanjhaka, Doli, Matsele, Nkuzana and De Hope. Some patients have to travel by foot more than 10 kilometres to the clinic. On some parts of the road, they have to take off their shoes to cross the river.

The clinic does not have a telephone and there is a shortage of staff. Staff use their mobile phones for emergencies to communicate with the doctors at Elim Hospital. There is only one nurse for Voluntary Counselling and Testing (VCT). When she is upset, she does not come to work and no VCT is done until she comes back. Patients in a critical condition have to wait for the ambulance that takes time to come because it travels more than 70 kilometres to the clinic.

From 'A river, too few staff and a lack of ambulances hamper patient care', Joel Ntimbani, Treatment Action Campaign website

8.3

Your health rights in the Constitution

There are many constitutional rights that protect your health rights or are related to your health. Some of these rights are shown in the next table:

Section	What is the right?	Who benefits?
12(2)	The right to bodily and psychological integrity, including the right – <ul style="list-style-type: none">• To make decisions on reproduction• To security in and control over your body• Not to be subjected to medical or scientific experiments without your informed consent	Everyone
24(a)	The right to an environment that is not harmful to your health or well being	Everyone
27(1)(a)	The right of access to health care services, including reproductive health care services	Everyone
27(3)	The right to emergency medical treatment	Everyone
28(1)(c)	The right to basic health care services	Every child
35(2)(e)	The right to adequate medical treatment at State expense	Everyone who is detained, including every sentenced prisoner

GUIDELINES



CONSTITUTIONAL HUMAN RIGHTS

- The Constitution gives special attention to the health rights of children and detained people. It recognises that these groups are particularly vulnerable and need stronger protection than everyone else.
- The health right of “everyone” in section 27(1)(a), to have “access to” health care services is qualified by “available resources”. This means that the State has a duty to provide more and more people with better access to health care, but that it need not do more than it can with the amount of money available to it.
- The Constitution does not allow unfair discrimination on any grounds, including the grounds of race, sex, religion, age, marital status, disability and sexual orientation (for example, being gay or lesbian). In the 2000 case of *Hoffman v South African Airways*, the Constitutional Court ruled that unfair discrimination on the basis of HIV status was not allowed. This means that you cannot be denied access to a hospital, doctor or medical treatment, or to employment, just because you are living with HIV.

For the full Bill of Rights (Chapter 2 of the Constitution), see page 442.

There are also other important constitutional rights that affect health rights, including:

- The right to equality.
- The right to human dignity.
- The right to life.
- The right to privacy.
- The right to education.
- The right of access to adequate housing.
- The right of access to sufficient food and water.

8.4

Guides to interpreting your health rights

8.4.1 The right of access to health care services and the right to emergency medical treatment

a) **Duty not to interfere and to respect health care rights**

The Constitution places a duty on the State and on private health care providers not to interfere with a person’s access to health care services. This is also called *the duty to respect* the right. This means that any action or conduct by the State or a private company that interferes with existing access to health care services, or would make it more difficult for an individual to gain access to existing health care services, could be a violation of the right to health.

EXAMPLES



INTERFERING WITH HEALTH CARE ACCESS

- Where the State closes down a clinic in a rural area, and thus forces poor women and children to travel much further and pay more for transport to go to another clinic.
- Where the Minister of Health orders all doctors in public hospitals to stop treating patients with cheap and available drugs for any known illness.

Section 27(3) of the Constitution supports the duty to respect health rights, saying that no-one may be refused emergency medical treatment.

COURT CASE



DIALYSIS TREATMENT NOT AN EMERGENCY MEDICAL TREATMENT

In the 1997 case of *Soobramoney v Minister of Health, KwaZulu-Natal* (Soobramoney case), the Constitutional Court said that “emergency medical treatment” refers to the treatment that is available in emergency situations, and is necessary to stabilise the patient and to avoid harm. An *emergency medical situation* is defined as a situation where a sudden disaster immediately endangers the life of a patient.

The Court decided that Mr Soobramoney, who was suffering from chronic kidney failure and wanted free access to a dialysis machine, was not requiring “emergency medical treatment” because his kidney failure was an ongoing condition.

b) Duty to take reasonable steps

For more on the duty to take reasonable steps, see Chapter 1 on page 32.

The Constitutional Court has on a few occasions described what ‘the duty to take reasonable steps’ means.

COURT CASE



MOTHER-TO-CHILD TRANSMISSION OF HIV

In the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case), the TAC took the Government to court to challenge the State’s policy on mother-to-child transmission of HIV. The Court decided:

- Children are especially vulnerable and their needs are “most urgent” because, if they do not get access to nevirapine, they will die. In cases like these, poor children depend on the State to save their lives, and the Government’s policy to not provide these life-saving drugs, was therefore unreasonable and unconstitutional.
- The Government’s programme to progressively provide women living with HIV and their newborn babies access to nevirapine was unreasonable and unconstitutional. By restricting the provision of nevirapine to 20 pilot sites and by failing to provide for training for counsellors in the use of nevirapine, the State was rigid and unreasonable in its approach.
- The Government must take all reasonable measures to extend the testing and counselling facilities at State hospitals and clinics throughout the public health sector, and to facilitate and speed up the use of nevirapine for the purpose of reducing mother-to-child transmission of HIV.

CASE STUDY



REASONABLE ACTION

Imagine that the State plans and implements a programme to rid our society of TB, and targets only mine workers and their families. The programme does not target poor women and children in rural areas, who are also seriously affected by TB.

A court may find that the programme is not reasonable because it does not address the needs of some of the most vulnerable groups in society.

The Court's decision in the TAC case shows that the State has a constitutional duty to do as much as it possibly can, with available money, to protect the most vulnerable groups in our society from serious illness and death. Where it is possible for the State to save the lives of people who are poor and vulnerable (such as mothers and newborn babies who cannot afford private health care) and the State does not take reasonable steps to do this, a court will be able to declare that the State has not carried out its constitutional duty to provide access to health care.

CASE STUDY



AVAILABLE RESOURCES

Imagine that the State plans and implements a programme to rid our society of TB, and the programme targets mine workers and all other vulnerable groups, such as poor women and children in rural areas. The programme allows for education and treatment, and has a phased implementation. The Government budgets R500 million to implement the programme over three years.

But after six months, before the programme has actually been rolled out, the Minister of Health decides to use the money to build a monument to honour the work done by Cuban doctors in South Africa. The TB programme is then scrapped because of "a lack of resources".

A court may find that the excuse of a lack of resources is not constitutionally acceptable, because the money was already budgeted. The decision to build a monument, instead of fighting TB, can therefore not be reasonable.

c) International law

General Comment on right to health

While the South African Constitution provides for a right of access to health care services, article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) recognises the right of everyone to the highest attainable standard of physical and mental health.

The Committee on Economic, Social and Cultural Rights (CESCR) adopted *General Comment No. 14* on the right to health. Although the wording of the ICESCR is slightly different to the South African Constitution, the essential elements of the right to health in paragraph 12 of General Comment 14 are:

- Availability
- Accessibility
- Appropriateness
- Acceptability.

For more on General Comments, see Chapter 3 on page 105.

For more on these elements, also known as 'the 4-A scheme', see Chapter 12 on page 418.

Availability

Functioning public health and health care facilities, goods, services and programmes must be available in sufficient quantity within the State.

CASE STUDY



ESSENTIAL DRUGS

The South African Government's health policy says that all essential drugs should be available in public clinics and hospitals for common conditions like arthritis, TB, paediatric illnesses, high blood pressure and cardiac cases. However, patients complain that this does not happen. In Mdantsane, East London, patients at NU13 clinic complained that each time they visit their clinic, all they get is Panado.

This means that government in the Eastern Cape is not fulfilling its obligation to provide functioning public health care and to make it available in sufficient quantity.

'Managing medicine supply in the Eastern Cape', Health-e website, 27 February 2004

Accessibility

CASE STUDY



ACCESS FOR PEOPLE LIVING WITH DISABILITIES

Imagine there is an extensive government programme to build new clinics in rural areas. Unfortunately, the new buildings are not wheelchair accessible, and thus people with physical disabilities cannot get up the stairs into the clinics. This would mean that the Government had not fulfilled its obligation to make health facilities physically accessible.

Health facilities, goods and services have to be accessible to everyone without unfair discrimination. This includes physical accessibility, economic accessibility (affordability) and information accessibility.

Appropriateness

CASE STUDY



TESTING OF DRUGS

If the Department of Health allowed doctors or anyone else to prescribe herbal mixtures like *ubhejane* to people living with HIV without this product being scientifically tested to see if it works, it will be a breach of its international law duties.

Health facilities, goods and services must be scientifically and medically appropriate and of good quality.

Acceptability

EXAMPLE



INFORMED CONSENT

Medical ethics say that no person may be subjected to medical treatment or tests without their informed consent. Testing somebody for HIV without their approval will therefore also be a breach of international law duties.

All health facilities, goods and services must be respectful of medical ethics and culturally appropriate.

General Comment 14 also stresses that each State has the duty to realise at least the 'minimum core obligations' of the right to health, including the duty:

- To ensure the right of access to health facilities, goods and services in a non-discriminatory way, especially for vulnerable or marginalised groups.
- To ensure access to the minimum essential food that is nutritionally adequate and safe, to ensure freedom from hunger for everyone.
- To ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and drinkable water.
- To provide essential drugs, as defined under the World Health Organisation (WHO) Action Programme on Essential Drugs.
- To ensure equitable distribution of all health facilities, goods and services.
- To adopt and implement a national public health strategy and plan of action to address the health concerns of the whole population.
- To plan and review the strategy and plan of action in a participatory way, including giving special attention to all vulnerable or marginalised groups.

For more on the idea of a 'minimum core obligation', see Chapter 1 on page 39.

For more details on the Model List of Essential Drugs, go to the WHO website address on page 310.



EXAMPLE



WHO ESSENTIAL DRUGS

Every two years, the WHO issues a Model List of Essential Drugs. The 14th revised list was issued in March 2005 and includes a list of antiretroviral (ARV) drugs. This means that, under international law, the State has a duty to at least provide all people needing ARVs with these drugs.

General Comment on women and health

The Committee on the Elimination of Discrimination against Women adopted *General Comment No. 24* on women and health in 1999. Article 12 of the *International Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) places a duty on States to eliminate discrimination against women in the field of health care, meaning that:

- It would be unacceptable for a State to refuse to provide all women with access to reproductive health services.
- States cannot stop women from accessing health care services on the grounds that they do not have permission of husbands, partners or parents, or because they are not married.
- States have a duty to pass laws that ban female genital mutilation.

General Comments on HIV/AIDS and the rights of the child

In 2003, the Committee on the Rights of the Child (CRC Committee) adopted two General Comments that are important for our understanding of children's right to health care. In *General Comment No. 3*, the CRC Committee addressed HIV/AIDS and the rights of the child:

- HIV and AIDS have a devastating effect on the lives of children, affecting not only the right to health but all the rights of children.
- Children are especially vulnerable to the effects of HIV/AIDS because they may be orphaned by HIV/AIDS, or may be the victims of sexual and economic exploitation or other violent abuse.

The CRC Committee also adopted *General Comment No. 4*, dealing with adolescent health and development:

- Adolescents have a right of access to information that is essential for their health, including information about sexual and reproductive health, and HIV prevention.
- States have a duty to create safe and supportive environments for adolescents within the family, in schools and in all other kinds of institutions.
- States have a duty to protect adolescents from harmful traditional practices, such as early marriage and female genital mutilation.

8.4.2 The right to make decisions on reproduction

COURT CASE



INTERPRETING THE RIGHT TO MAKE DECISIONS ON REPRODUCTION

This right was discussed in the 1998 case of *Christian Lawyers Association of SA v Minister of Health* (first Christian Lawyers Association case). The Christian Lawyers Association challenged the *Choice on Termination of Pregnancy Act 92 of 1996*, allowing women access to abortion. They argued that the law violated the right to life of the fetus and was therefore unconstitutional.

In deciding whether the legislation went against the Constitution, the Court considered the right to life in section 11, and the right to bodily and psychological integrity in section 12(2) of the Constitution. The Court decided:

- The term “everyone” in section 11 of the Constitution did not include a fetus.
- Section 12(2) gave everyone the right to make decisions on reproduction.
- This section also gave everyone the right to security in and control over their bodies.
- The Constitution did not limit this right by saying that a woman had this right only to the extent that it did not harm her fetus.

The Christian Lawyers Association case showed that, as part of the right to make decisions on reproduction, women can choose to have an abortion under the circumstances allowed by the Choice on Termination of Pregnancy Act.

8.4.3 The right of access to reproductive health care services

While there has been no case law in South Africa dealing specifically with the meaning of reproductive health care services, we can be guided by international law.

CEDAW prohibits discrimination against women in all its forms, including access to health care services and those related to family planning. It says States must ensure appropriate services in connection with pregnancy, confinement and the post-natal period, including granting free services where necessary, as well as adequate nutrition during pregnancy and breastfeeding.

The *Beijing Declaration and Platform for Action*, adopted by the Fourth World Conference on Women in 1995, has this definition of *reproductive health*:

“Reproductive health is a state of complete physical, mental and social well being and not merely the absence of disease or infirmity, in all matters related to the reproductive system and to its functions and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and they have the capability to reproduce and the freedom to decide if, when and how often to do so.

Men and women have the right to be informed and to have access to safe, effective, affordable and acceptable methods of their choice for the regulation of their fertility which are not against the law, and the right of access to appropriate health care services that will enable women to go safely through pregnancy and childbirth and provide couples with the best chance of having a healthy infant.

Reproductive health care is defined as the constellation of methods, techniques and services that contribute to reproductive health and well being by preventing and solving reproductive health problems. It also includes sexual health, the purpose of which is the enhancement of life and personal relations, and not merely counselling and care related to reproduction and sexually transmitted diseases.” *Paragraph 94*

The WHO says that a minimum level of reproductive health services should include:

- Family planning.
- Sexually transmitted disease prevention and management.
- Interventions for safe motherhood (*WHO, 1995, 1*).

8.4.4 The right of detained people to adequate medical treatment

Section 35(2)(e) of the Constitution protects the right of detained people to adequate medical treatment. This includes everyone who is deprived of their liberty, for example, sentenced prisoners and people committed to psychiatric institutions. This section says:

- Medical treatment must be adequate.
- The treatment must be provided at State expense.

On pages 288–289, we see how our courts have interpreted the right to “adequate medical treatment at State expense” in the Van Biljon and EN cases.

COURT CASE



THE RIGHT OF PRISONERS TO ADEQUATE MEDICAL TREATMENT

The meaning of section 35(2)(e) was tested in the 1997 case of *Van Biljon and Others v Minister of Correctional Services* (Van Biljon case) in the Cape High Court. The Court ordered the Department of Correctional Services to provide combination ARV therapy to two prisoners. The Department of Correctional Services had said that prisoners did not have greater rights than patients at State hospitals, who were at that stage not receiving this treatment, and that the drugs were far too expensive.

The Court decided:

- The Constitution did not give prisoners the right to the best medical treatment, but only to “adequate” treatment.
- A prisoner’s right to medical treatment depends on an examination of circumstances, such as prison conditions, to decide what is adequate.
- The meaning of adequate medical treatment has to be linked to what the State can afford.
- As the two prisoners had been prescribed ARV treatment by a doctor, this was considered “adequate medical treatment” for their condition and circumstances.
- This decision did not mean that all prisoners with HIV should receive expensive drugs.

The Court summarised its approach:

“Even if it is accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the State for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the State is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve their immune systems than that which the State provides for HIV patients outside.”

Paragraph 54

COURT CASE



RIGHT OF PRISONERS TO ANTI-RETROVIRALS

For more on contempt of court, see Chapter 2 on page 79.

In the 2006 case of *EN and Others v The Government of South Africa and Others* (EN case), prisoners living with HIV in the Westville Correctional Centre challenged the slow implementation of the Government's plan to provide ARVs to prisoners needing them. The Durban High Court agreed that this was a matter of life and death, and said that the prison officials showed a lack of commitment to appreciate the seriousness and urgency of the situation.

Relying on the judgment in the Grootboom case, the Court decided that the Westville Correctional Centre's implementation of the relevant laws and policies in this case was unreasonable because it was inflexible, and characterised by unexplained and unjustified delays and irrationality. The court also hinted that the Government's *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa* itself is faulty itself because it did not properly consider the special vulnerability of prisoners to HIV/AIDS.

The Court ordered the Westville Correctional Centre:

- To immediately remove all restrictions that prevented prisoners needing ARVs from accessing them.
- To immediately provide all the applicants in the court case with access to ARVs.
- To submit a plan to the Court to explain how they plan to comply with the orders made by the Court (*paragraph 35 of judgment*).

The State appealed against this judgment to a full bench of the KwaZulu-Natal High Court. On 28 August 2006, the full bench dismissed the State's case and found it to be in contempt of the court order. The Court:

- Raised serious concerns about the fact that, when the State is in contempt of court orders, the Court cannot enforce these orders by imprisoning the responsible government officials. This is because section 3 of the *State Liability Act 20 of 1957* protects them against imprisonment for their actions while in office.
- Said that, unless the State Liability Act is declared unconstitutional, there is no mechanism for enforcing contempt of court orders against government officials.

The Court then ordered the State to implement without delay the original court orders unless and until another court sets aside these orders on further appeal.

Muntingh and Mbazira, 2006, 14–16

8.5

Policies, legislation and programmes to implement your health rights

The policies and laws passed by the Government describe in more detail the meaning of these constitutional rights, who must implement them and how they must be implemented. They help us to assess whether or not the Government is taking reasonable steps to realise our health care rights.

There are many laws dealing with different aspects of health care. In this part, we will discuss only some of the key policies and laws.

8.5.1 The White Paper on Health

The *White Paper on the Transformation of the Health System* (1997) sets out key health policy issues. It aimed to:

- Unify the national health system to address the effects of apartheid on health.
- Re-organise the health service to give priority to primary health care through the district health system, where certain aspects of health service delivery take place at district (instead of national or provincial) level. A clear advantage of the district health model is that it is another step to bringing health care services closer to the people on the ground.
- Recognise the need to increase access to services by making primary health care services available to all people.
- Ensure that there are safe, good quality essential drugs available in all health facilities.
- Strengthen disease prevention.
- Promote health.
- Give special attention to health services reaching people most in need of these services – the poor, the underserved, the elderly, women and children.
- Promote the participation of community structures in health care delivery.

8.5.2 Legislation

a) The National Health Act

The *National Health Act 61 of 2003* came into force in May 2005 and is the most important piece of legislation that helps to implement the constitutional rights on health. Although other laws deal with specific aspects of health rights, the National Health Act is the main law that gives clear overall direction on health rights in South Africa.

Some of the aims of the National Health Act are to:

- Make effective health services available to the population equitably and efficiently.
- Protect, respect and fulfil the rights of the people of South Africa to progressively realise the constitutional right to health.
- Establish a national health system that will provide people with the best possible health services that available resources can afford.

GUIDELINES



**PEOPLE WHO CAN
GET FREE PUBLIC
HEALTH CARE**

State and State-funded clinics and community health centres must give:

- Free medical services to pregnant and lactating women, and children younger than the age of 6, who are not on medical aid schemes.
- Free primary health care to all people, except those on medical aid schemes or those receiving compensation for occupational diseases.
- Free termination of pregnancy services under the Choice on Termination of Pregnancy Act 92 of 1996.

Free health care

The National Health Act allows for some people to get free health care in public health services.

Emergency treatment

The National Health Act also gives special protection to people needing emergency medical treatment. The Act says that a public or private health care provider (eg a hospital), health worker (eg a doctor or nurse) or health establishment (eg a chemist) may not refuse anyone emergency medical treatment.

Privacy and confidentiality

A health care professional, such as a doctor or nurse, may not give any information to any other person about a patient's health status, treatment or stay in a public or private hospital. The National Health Act provides for situations when information must be given to other health care professionals to help with the treatment of a patient, or where the patient has consented.

COURT CASE



CONFIDENTIALITY

In the 1993 case of *Jansen van Vuuren and Another v Kruger*, the Appeal Court had to rule on the duty of a doctor to keep information about a patient private and confidential. The applicant, Mr McGeary, had tested HIV positive. His doctor then revealed this information to two colleagues during a game of golf. Mr McGeary then brought an action against his doctor for damages for the breach of his privacy. In other words, he was claiming money from his doctor for not respecting his right to privacy and confidentiality.

The Appeal Court said:

- People living with HIV/AIDS have a right to privacy, especially when this right is based on a doctor-patient relationship.
- The doctor had no duty to give this information to his colleagues, who also did not have a right to receive the information.

GUIDELINES



SOUTH AFRICAN MEDICAL AND DENTAL COUNCIL ETHICAL GUIDELINES ON HIV/AIDS (1995)

A doctor is only allowed to disclose HIV-related information when:

1. The patient consents, or
2. A court order or any other law says there must be disclosure, or
3. If the spouse or partner of the person with HIV is at risk and where, even after repeated counselling, the person with HIV refuses permission – then and only to protect the spouse or partner, the doctor may disclose the HIV information.

CASE STUDY



USING THE SAMDC ETHICAL GUIDELINES

Dr Reed tests and diagnoses Peter with HIV. After advising Peter to tell his sexual partner, Mandla, that he has HIV, Peter still refuses and continues having unprotected sex with Mandla. Dr Reed may tell Mandla that Peter has tested HIV positive because of the dangers Peter's actions are causing to him. Dr Reed may only tell Mandla, who is an identifiable sexual partner, once he has told Peter that he will be doing this.

Full knowledge and consent

The National Health Act says that no person may be tested, treated or have any other medical procedure done on them without their informed consent. This consent must be given freely and voluntarily. As a patient, you can only give informed consent to medical treatment after you have been given all the information needed to make your decision.

This means that the health care worker must explain to you as the patient:

- Your current health status.
- The range of procedures and treatment options available.
- The benefits, risks, costs and consequences usually linked to each option.
- Whether or not you have a right to refuse to have medical treatment.

The *Children's Act 38 of 2005* says that a child of 12 may consent independently to medical treatment only if the child is mature enough to understand the implications of the treatment. The Act also states that a child may only be tested for HIV when:

- It is "in the best interests of the child", or
- If the test is necessary to establish whether a health care worker may be at risk of HIV infection due to coming into contact with any substance from the child's body that may transmit HIV.

COURT CASE



CONSENT TO MEDICAL PROCEDURES

In the 1923 case of *Stoffberg v Elliot*, the Cape Supreme Court stressed the importance of a patient's consent to medical procedures. The Court decided that:

- Entering a hospital does not mean that a patient agrees to any surgical treatment doctors may consider necessary without the patient's consent.
- Even after entering a hospital, a person still maintains control over his/her body, and has the right to say what operation he/she will submit to.
- Any operation performed without the patient's consent is unlawful because it does not respect the patient's right to personal security and control of their body.

CASE STUDY



NO CONSENT

Leila is not feeling well, so she goes to visit Dr Shabalala. Leila consents to Dr Shabalala doing a pregnancy test. However, in addition to doing a pregnancy test, Dr Shabalala does an HIV test on Leila's blood sample, but Leila has not consented to an HIV test.

GUIDELINES



NATIONAL POLICY ON HIV TESTING

The National Policy on Testing for HIV sets out the circumstances when HIV testing can take place, and how HIV testing should be done:

1. Testing for HIV may only be done with informed consent (except in a few cases, set out in the Policy).
2. Pre-test counselling must be given to each person before the test.
3. Post-test counselling must be given after the person gets the test result:
 - If the result is HIV negative, then the person should be told how to stay negative, and to test regularly.
 - If the result is HIV positive, the person should be given emotional support, and guidance on who to inform and how to reduce the risk of HIV infection to sexual partners.
4. If a hospital or clinic is not able to do counselling, it must refer the person to another place for counselling. *AIDS Law Project website*

Laying of complaints

The National Health Act also says that every person has the right to lay a complaint about the way he/she was treated at any health establishment by any of the staff. Any hospital, clinic or other State or private health facility has a duty to display the procedure for making a complaint at the entrance to the facility where anyone will easily be able to see it.

b) The Mental Health Care Act

The *Mental Health Care Act 17 of 2002* recognises that health is a state of physical, mental and social well being, and that mental health care services should be provided at all levels of the health system.

The Act aims to:

- Regulate the mental health care environment in a way that allows the best possible mental health care, treatment and rehabilitation that available resources can afford.
- Set out the rights and duties of the mental health care user, and the duties of mental health care providers.
- Respect the human dignity and privacy of every mental health care user – this means that, as a user, you must receive the care, treatment and rehabilitation services that improve your mental capacity to develop to your full potential and to facilitate your integration into community life.

c) The Sterilisation Act

The *Sterilisation Act 12 of 1998* allows for a right to sterilisation and sets out the circumstances when a sterilisation can be performed. *Sterilisation* is a surgical operation to make a woman incapable of falling pregnant.

The Sterilisation Act also deals with the sterilisation of people with a severe mental disability. It explains what “severe mental disability” means and who needs to consent when a person has a severe mental disability, and wants or needs to be sterilised.

CASE STUDY



CONSENT TO STERILISATION

- For Yasmin, who is older than 18, to be sterilised under this law, she needs to be given a clear explanation and description of exactly what will be done. She must give free and voluntary consent to it. Yasmin may also withdraw her consent at any time before the treatment begins. Yasmin does not need her husband's consent to be sterilised. She just needs to give her consent, and be 18 or older, to be sterilised.
- Yasmin's younger sister, Fatima, who is under 18, may only be sterilised if her life or physical health will be seriously harmed if she is not sterilised. However if this happens, Fatima's parent or guardian would need to give consent.

d) The Choice on Termination of Pregnancy Act

The Choice of Termination of Pregnancy Act gives every woman the freedom to choose whether to have an early, safe and legal termination (ending) of pregnancy, according to her beliefs. The Act allows you to have your pregnancy terminated on request during your first 12 weeks of pregnancy. All that is needed is your informed consent.

GUIDELINES



TERMINATION OF PREGNANCY

1. The Act makes it easier to get an abortion in your first 12 weeks of pregnancy, so it is important that people wanting an abortion approach their doctor as early as possible.
2. Although the Act allows for a person to have an abortion from the 13th week to the 20th week, this can only be done:
 - After consultation between the doctor and pregnant woman, and
 - If, for example, the doctor thinks the pregnancy would pose a risk to the woman's health, or there is a substantial risk of abnormality of the fetus, or the pregnancy resulted from rape or incest, or the continued pregnancy would significantly affect the social and economic circumstances of the woman.
3. The law allows for a termination of pregnancy after the 20th week in very limited circumstances.
4. The law says the State should try and provide optional counselling before and after the abortion, so you should ask if this counselling is available.
5. Only the consent of the woman wanting the abortion is needed. That means the consent of the woman's husband or the father of the fetus is not needed.
6. Young women under 18 should consult with their parents, guardian, family members or friends before the termination, but cannot be denied the right to terminate their pregnancy if they choose not to consult.

COURT CASE



A PREGNANT MINOR DOES NOT HAVE TO GET PERMISSION FOR A TERMINATION OF HER PREGNANCY

In the 2004 case of *Christian Lawyers Association of SA v Minister of Health* (Second Christian Lawyers Association case), the applicants argued that sections of the Choice on Termination of Pregnancy Act were unconstitutional. They claimed that the Act allowed a woman younger than 18 to choose to have her pregnancy terminated without consent from her parents or guardians, without consulting the parents or guardians, without first undergoing counselling, or having to reflect on the decision for a period of time.

The High Court rejected these arguments. The Court pointed out the Act said that, as long as a woman is capable of giving informed consent to the termination of pregnancy, no other person's consent is required:

- This was in line with the Constitution that protected the right of “every woman” to make decisions about their bodies and about reproduction.
- As long as a woman – no matter how young – was mature enough to give informed consent, the Constitution guaranteed her right to have her pregnancy terminated.

e) The Tobacco Products Control Amendment Act

The *Tobacco Products Control Amendment Act 12 of 1999* was introduced to deal with the harmful effects of tobacco on the health of people. It prohibits:

- The advertising and promotion of tobacco.
- The free distribution of tobacco products.
- The smoking of tobacco products in any public place or workplace.

f) The Medical Schemes Act

One of the aims of the *Medical Schemes Act 131 of 1998* is to protect the interests of members of medical schemes by setting out guidelines on the terms and conditions for membership of schemes. The Act prohibits:

- Unfair discrimination on a number of grounds.
- *Risk rating* – in other words, making people pay more because they are seen as being part of a ‘higher risk’ group.

The Act says the premiums that people have to pay must be based on income and number of dependants. The premium may *not* be based on any other grounds, including:

- Sex.
- Past or present state of health of the applicant or the applicant's dependants.
- The frequency of providing relevant health services to the applicant or dependants of the applicant.

EXAMPLES



PREMIUMS UNDER MEDICAL SCHEMES

If you are living with HIV and use health services very often, you cannot be denied access to a medical scheme or charged higher rates because of these factors. Your premium can only be based on your income and number of dependants, although there may be a penalty if you join the medical scheme late.

However, the Act does impose certain penalties for late joiners to medical schemes. A *late joiner* means an applicant or the dependant of an applicant who, at the date of application for membership, is 40 or older and has not been a member of another medical scheme during a period of two years before applying for membership. Regulations under the Act set out the maximum penalties in these circumstances.

g) The Medicines and Related Substances Control Amendment Act

The *Medicines and Related Substances Control Amendment Act 90 of 1997* controls the manufacture, sale and distribution of medicines. One of its important functions is to set out steps to ensure the supply of affordable medicines. The Act allows the Minister to lay down conditions for the supply of more affordable medicines in some circumstances to protect the health of the public. This includes provisions that can lower the cost of prescription drugs bought at chemists.

COURT CASE



A SINGLE ADMINISTRATION FEE NOT VALID

In the 2005 case of *Minister of Health and Another v New Clicks and Others*, the Constitutional Court had to decide on the validity of regulations made under the Medicines and Related Substances Control Amendment Act. These were aimed at lowering the price of medicines sold by pharmacies. The regulations set a single price for each medicine and allowed all pharmacies only to charge an administration fee set at R26.

A majority of the judges decided:

- The regulations as a whole were valid and were aimed at lowering the price of medicines and improving access to health care for all.
- The setting of a single administration fee was not valid – they said that the single administration fee did not take into account that rural pharmacies differ from city pharmacies, and that rural pharmacies may need a higher administration fee to enable them to survive.

Chief Justice Chaskalson sums up the approach of the majority of the Constitutional Court:

“An allegation has been made by professional organisations representing pharmacists that the dispensing fee will destroy the viability of pharmacies, and impair access to health care. That allegation is supported by a sufficient body of evidence to show that this is a real possibility. In the circumstances, the applicants were under an obligation to explain how they satisfied themselves that this would not be the result of the dispensing fee prescribed in the regulations. They were the only persons who could provide this information. They did not, however, do so. In the absence of such explanation, there is sufficient evidence on record to show that the dispensing fee is not appropriate.” Paragraph 404

h) **The Correctional Services Act**

The *Correctional Services Act 111 of 1998* places a duty on the Department of Correctional Services to provide all prisoners with adequate health care services. Adequate health care is based on the principles of primary health care in order to allow every prisoner to lead a healthy life. The Act says that every prisoner has the right to adequate medical treatment, but that no prisoner has a right to cosmetic medical treatment, such as the removal of tattoos or implants of breasts at State expense.

The Act also says that every prisoner has the right to be visited and examined by a medical practitioner of his/her choice and may be treated by this practitioner as long as the Head of Prison has given permission. In this kind of case, the prisoner will have to pay for the medical treatment.

The Act prohibits anyone from forcing a prisoner to undergo medical examination, intervention or treatment without informed consent, unless this will be a threat to the health of other people in prison. But consent to surgery is not needed if a medical doctor decides that it is in the interests of the prisoner's health, and the prisoner is unable to give consent because he/she is unconscious.

For more on the health care rights of prisoners, see the cases on pages 288–289.

i) **The Children's Act**

The Children's Act aims to protect children living with disabilities and with chronic illness. In section 11(3), it says that a child with a disability or chronic illness has the right not to be subjected to medical, social, cultural or religious practices that are detrimental to his/her health, well being or dignity.

The Act also restricts virginity testing and outlaws female genital mutilation or circumcision. Male circumcision is also restricted. Section 12(8) of the Act prohibits circumcision of male children under the age of 16, except when:

- Circumcision is performed for religious purposes in accordance with the practices of a specific religion, or
- Circumcision is performed for medical reasons on the recommendation of a medical practitioner.

The Act further restricts the circumcision of male children older than 16:

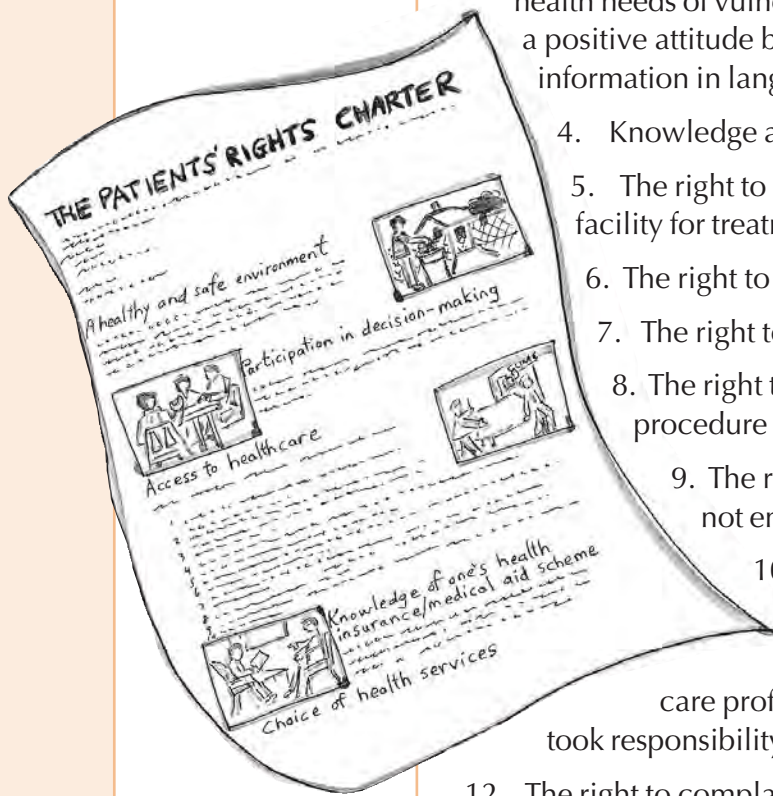
- The child must give consent after proper counselling, as set out in regulations.
- Any male child has the right to refuse circumcision, taking into account the child's age, maturity and stage of development.

8.5.3 The Patients' Rights Charter

In 1999, the Department of Health adopted the *Patients' Rights Charter* to help ensure realising the constitutional right of access to health care services. Although not a legally binding document, the Charter is meant to be the common standard for achieving the realisation of the right of access to health care services. The Charter covers the rights and responsibilities of patients.

A patient's rights under the Charter include:

1. The right to a healthy and safe environment.
2. The right to participate in decision-making on health policies and issues affecting your health.
3. The right of access to health care services, including receiving timely emergency care, treatment and rehabilitation, provision for the special health needs of vulnerable groups, counselling without discrimination, a positive attitude by health care workers, and necessary health information in language that the patient can understand.
4. Knowledge about health insurance or medical aid schemes.
5. The right to choose a particular hospital, clinic or other health facility for treatment.
6. The right to be treated by a named health care provider.
7. The right to privacy and confidentiality.
8. The right to only have an operation or another medical procedure after giving informed consent.
9. The right to refuse treatment as long as this refusal does not endanger the health of others.
10. The right to be referred on to another health care worker for a second opinion.
11. The right not to be abandoned by a health care professional worker or a health facility that initially took responsibility for your health.
12. The right to complain about health care and have these complaints investigated, and to receive a full report of the investigation.



A patient's responsibilities under the Charter include:

1. To take care of your own health.
2. To care for and protect the environment.
3. To respect the rights of other patients, health care workers and health care providers.
4. To use the health care system fully and not to abuse it.
5. To know your local health services and what they offer.
6. To provide health workers with relevant and accurate information to help health care workers to diagnose, treat, rehabilitate or counsel you.
7. To advise health providers of your wishes for when you die.
8. To follow the prescribed treatment or rehabilitation, and to arrange to pay for these.
9. To enquire about any related costs of treatment or rehabilitation, and to arrange to pay for these.
10. To take care of health records in your possession.

8.5.4 The draft Health Charter

The Government has produced a draft Health Charter aimed at regulating the health sector in South Africa. The draft Health Charter says that all stakeholders have an important and meaningful role to play in conducting their business in a manner that it is ethical, honest and fair, and that satisfies the needs of patients.

All stakeholders agree *not* to:

- Overservice or overcharge consumers of health services.
- Interfere with the independence of practitioners in practising their professions in the best interests of their patients.
- Exploit or influence health care professionals to act in a way that may go against the ethical codes of their professions.

Stakeholders also agreed to ensure that the rights of patients reflected in the National Patients' Rights Charter are respected and that the Health Charter is implemented in a way that is consistent with the National Patients' Rights Charter. By June 2006, the Health Charter had not been finalised and implemented.

8.6

Protecting and advancing health rights

Health rights offer great potential for civil society organisations to lobby for legislative reform, to engage in advocacy and campaigns, to monitor and make complaints, and to litigate to advance these rights. In this part, we will discuss each of these strategies to advance, protect and defend health rights.

8.6.1 Lobbying for legislative reform

Lobbying for legislative reform can be used to further advance, protect or defend health rights. For example, extensive lobbying by NGOs working in the area of gender equality and women's health played a vital role in the passing of the Choice on Termination of Pregnancy Act. These NGOs made submissions to the Health Portfolio Committee and attended public hearings on the Choice on Termination of Pregnancy Bill.

The Reproductive Rights Alliance spearheaded these efforts. Joint initiatives between different organisations working in a sector always give lobbying activities greater strength and impact.

The Constitutional Court has said that the State's implementation of the right of access to health care services would only be reasonable if it also targets the most vulnerable groups in our society. This means that there is scope for groups who champion the rights of vulnerable groups such as women, farm workers, domestic workers or people living with HIV to lobby for legislation to protect the health of these people and to increase their access to health care services.

8.6.2 Campaigning to further health rights

Human rights campaigns can mobilise civil society organisations to debate, discuss and make demands that take forward the health rights of specific groups or everyone in society.

CASE STUDY



THE TREATMENT ACTION CAMPAIGN

For more on the TAC case, see Chapter 1 on page 32.

Launched in 1995, the Treatment Action Campaign (TAC) is a civil society organisation aiming to:

- Campaign against stigma and the idea that developing AIDS is automatically a death sentence.
- Raise public awareness and understanding that HIV/AIDS treatments are available and that people should be able to afford these treatments.
- Promote access to treatment as an incentive for people to volunteer for HIV testing, and to improve openness around HIV and AIDS.
- Increase treatment literacy, including detailed knowledge on ARV treatment.

Between 2000 and 2002, the TAC launched a campaign to get the Government to provide the drug nevirapine to mothers living with HIV and their new-born babies to prevent the mother-to-child transmission of HIV. The campaign of the TAC succeeded in getting the Government to change its policy while the Constitutional Court was still deciding the case in 2002.

The TAC has continued with other campaigns, in partnership with other organisations, to advance its aims. Campaigns in 2005 included:

- Monitoring the State's rollout of ARV treatment and calling for speeding up the rollout.
- Marching to specific hospitals to demand ARV treatment.
- Pressurising for lowering the prices of some ARVs.
- Organising protests against Dr Mathias Rath, who sells vitamins and claims that they are more effective in stopping HIV than ARVs. This led to a court case in July 2005 to attempt to stop the activities of the Rath Foundation.

The TAC has also formed sectoral committees in the labour movement and the health, religious, youth and women's sectors. These specialised sectors work to mobilise their constituencies to achieve the aims of the TAC such as wider access to ARV treatment.

Lessons we can learn from the TAC

The TAC uses the right of access to health care in the Constitution to claim their rights, but they do not go to court at the start of a campaign. They first engage with the Government or a drug company. They often start a campaign through mass action, media activities and personal meetings.

Then, if this is not successful, they threaten legal action while continuing to put pressure on the Government or the drug company. As a last resort, they may need to go to court to claim their rights, usually when there is already strong public opinion in their favour.

GUIDELINES



RUNNING A HEALTH CAMPAIGN

1. Choose a specific health issue (eg access to ARVs), or a specific project aimed at furthering health rights (eg the draft Health Charter). This will help to keep the campaign more focused and easier to manage.
2. Have a clear list of exactly what is being demanded (eg interpreters within the health sector, nevirapine for pregnant women).
3. Be clear on who the demands are being addressed to (eg TAC aiming a campaign at both the Government and drug companies).
4. Mobilise relevant sectors through public education, using creative methods, such as billboards and radio slots.
5. Let your campaign aims and target groups guide the specific details of the campaign approach and strategies. For example, if you wish to reach schools, adapt your messages to appeal to younger people.

For more on campaigns for advancing health rights, see Chapter 2 on page 71.

8.6.3 Monitoring the provision of health care services

The problem of national laws and policies not being properly implemented is one of the greatest challenges facing the health sector. It is very important that civil society organisations carefully monitor the implementation of laws.



GUIDELINES



MONITORING HEALTH SERVICES

1. When monitoring health services, you can do this for a specific area or institution, or for the health service as a whole. Be clear on the purpose of the monitoring. For example, the results could be used:
 - To influence policy and legislation, or
 - To make a complaint to the South African Human Rights Commission (SAHRC) or a health structure, such as the Health Professions Council of South Africa.
2. Establish the area or place that will be monitored. For example, monitoring may take place within a particular health care facility (eg a hospital), a particular area (eg Soweto), a particular province (eg the Western Cape) or nationally.
3. Establish what particular health service is being monitored (eg the implementation of the Choice on Termination of Pregnancy Act).
4. Establish how you will monitor. For example, is it going to be through interviews with patients, or examining the records of a health care facility, or a combination of both methods?
5. Establish the standards you will use to assess the health care service. This can include standards that the Department of Health has set for itself or standards set by the WHO.
6. Identify key reports and other documents that can give you vital information. For example, if you are monitoring the health service as a whole, note that:
 - The Constitution directs the SAHRC to monitor realising the right of access to health care and to compile a report each year to show what steps the Government has taken.
 - The annual SAHRC report has lots of useful information to help you monitor the overall performance of the health sector.
 - You can compare the latest report with reports from previous years to check if any progress has been made.

CASE STUDY



QUALITY HEALTH CARE NOT DELIVERED EQUITABLY

The Government has developed legislative and other measures to comply with its constitutional duties under section 7(2) of the Constitution. However, despite national policies and programmes that mostly follow international standards and targets, the health care system has not been able to successfully deliver quality health care on an equitable basis in all the provinces.

For example:

- Provinces do not spend the same amount for each person on health care delivery, with rich provinces like Gauteng and the Western Cape far exceeding the amount spent by poor provinces such as Limpopo, Mpumalanga and the Eastern Cape.
- There is a serious lack of managerial capacity in the health system – the biggest challenge facing the efficient running of the health system is training managers to implement efficient systems in running clinics and hospitals where many problems have been identified. Problems include insufficient cleaning staff, nurses, doctors, dentists, pharmacists, psychologists and specialists.
- These problems place an enormous pressure on existing staff. New staff members are often unhappy with their working conditions, leading to some of them resigning. Many opt for better remuneration and working conditions in the private health care sector or go abroad.

'The Right to Health Care: 5th Economic and Social Rights Report Series, 2002–2003 Financial Year', SAHRC, SAHRC website, 21 June 2004

8.6.4

Making complaints against health authorities

The National Health Act says that there must be guidelines on procedures to be followed by users making complaints, claims or suggestions on the provision of health care services. Every health care establishment (for example, a hospital or a clinic) must display the procedure for laying a complaint at its entrance so that it is visible to everyone. Every complaint received must be acknowledged.

Complaints can also be made to the Councils that license doctors, nurses and other health professionals about the way a particular health professional treated you, for example:

- The Health Professionals Council of South Africa (HPCSA) controls the training and conduct of doctors.
- The South African Nursing Council (SANC) oversees the training and conduct of nurses.

In 2002, the Minister of Health issued new regulations on the suspension of health care practitioners. They could be suspended after a complaint about:

- Actual physical or mental abuse of a patient by a practitioner, or a substantial risk of physical or mental abuse.
- Harm or injury to a patient as a result of unsafe professional practices or a substantial risk of harm or injury.

- Evidence of drug abuse by a practitioner that harms the practitioner's ability to give a professional service.
- Any act by a practitioner that, in the opinion of the professional board, substantially lowers the dignity or damages the reputation of people practising the profession.

a) The HPCSA

GUIDELINES



HOW TO MAKE A COMPLAINT TO THE HPCSA

The complaint must be in writing and must give these details:

- The history of the complaint.
- The name of the person complaining (the *complainant*) and the name of the person the complaint is against (the *respondent*).
- The date and place of the incident.
- How the incident happened.

GUIDELINES



HPCSA PROCEDURES AFTER RECEIVING A COMPLAINT

1. Within three days after a complaint is lodged with the registrar of the HPCSA, it must request the complainant to confirm the content under oath. The registrar can then ask for more information from the complainant.
2. The registrar must gather as much information as possible, and forward it to the chairperson of the professional board.
3. If there is enough evidence, an 'ad hoc committee' will consider the complaint.
4. The registrar will arrange for the hearing to take place, and will issue a summons to the complainant and provide him/her with all the relevant information.
5. At the hearing the committee may ask anyone to give oral evidence. The respondent will also be allowed to ask questions of anyone giving evidence.
6. The committee will then make a decision about the suspension of the health care practitioner.
7. If you are not happy with the outcome of your complaint, you can appeal to the Special Appeal Committee and then to the High Court.

b) The SANC

The South African Nursing Council sets and maintains standards of nursing education and practice in South Africa. The SANC is committed to quality in health care by safeguarding standards of education and practice of nurses, midwives and support staff so that the South African public receives a competent, safe, compassionate and ethical health service within the framework of comprehensive health care.

The SANC aims to:

- Promote the health standards of all in South Africa.
- Control the education and training of registered nurses, midwives and enrolled nurses.
- Advise the Minister of Health on any issues in the *Nursing Act 50 of 1978*, and on amendments to the Nursing Act.
- Communicate important information to the Minister of Health arising out of the work of the SANC.

8.6.5 Litigating to claim health rights

See the examples of court cases on pages 281, 286, 288, 289, 291, 292, 295 and 296.

For more on advancing rights through the courts, see Chapter 2 from page 71 onwards.

There are a number of examples in this chapter of how the courts can protect people's health rights.

Although court cases are expensive, there are organisations such as the Legal Resources Centre (LRC) and the Women's Legal Centre that are funded to assist you in taking public interest health cases to court.

If you want to complain about unfair discrimination in health services, you can contact the SAHRC for assistance.

Discussion ideas



TALKING POINT 1

Gracie, a 32-year old working woman, is not feeling well and decides to visit Dr Laskin, her general practitioner, for a medical check-up. Dr Laskin starts fondling Gracie and later rapes her. Gracie is devastated and traumatised. She decides that the best way to do something is to have Dr Laskin reported, but she has no idea how to go about doing this.

Discuss what options Gracie has to make a complaint against Dr Laskin, and then advise Gracie on:

1. Who can the complaint be made to?
2. How must she make the complaint?
3. What details must she include in the complaint?
4. Which organisation can help her?
5. How can she appeal if her complaint is not successful?

TALKING POINT 2

Ms Khumalo has recently been diagnosed with breast cancer. Dr Naidoo at the Tygerberg Hospital (a State hospital) tells her that she needs chemotherapy to make sure that the cancer does not spread. Ms Khumalo is a domestic worker and earns a salary of R500 a month, does not have medical aid and cannot afford to pay for chemotherapy. She asks Dr Naidoo if she can provide her

with the treatment at Tygerberg Hospital free of charge. Dr Naidoo says that the hospital does not have the money for this – so, unless Ms Khumalo can afford to pay for the treatment, they will not be able to provide her with treatment.

Discuss these questions:

1. Who should be asked to explain and account for the hospital's decision? Is there anyone besides Dr Naidoo?
2. What questions should the relevant doctors be asked to make sure they are making a fair decision that respects Ms Khumalo's rights?
3. What other alternatives can the hospital consider to meet Ms Khumalo's needs?

Now divide into two groups to discuss these tasks:

Group 1: Advise Ms Khumalo on the possible constitutional rights and arguments she can use to challenge the hospital's refusal to provide her with the necessary treatment.

Group 2: Advise the hospital on whether chemotherapy can be considered "emergency medical treatment". If not, can Ms Khumalo's claim be made under section 27(1)(a) of the Constitution?

TALKING POINT 3

Donovan Solomons is a student at a local university. Feeling ill, he goes to the local clinic where the doctor told him that he "was probably infected with HIV". The doctor then took his blood and told him to come back in a week. At the next appointment, the doctor told him that his blood was tested for HIV and that he was indeed HIV positive. Donovan is very upset and storms out of the clinic. At home his girlfriend, Theresa, is concerned, but because he is scared he does not tell her. He regularly has sex with Theresa without a condom.

To deal with the trauma of finding out his HIV status, Donovan goes for student counselling about HIV, and his health and lifestyle choices. He is also counselled about the need to wear a condom when he has sex with Theresa. However, Donovan tells the counsellor that he does not like having sex with a condom and that he "cannot wear a condom now in any case because Theresa will be suspicious". He thinks she will know that he is living with HIV and will leave him.

The counsellor now contacts Theresa to tell her that Donovan is HIV positive. Theresa leaves Donovan. Donovan now wants to know to what extent his rights have been violated.

Discuss these questions:

1. Did the doctor at the clinic act in an appropriate manner? Is there anything Donovan can do about the way the doctor behaved?
2. Did the counsellor at the university act in an appropriate manner? Is there anything Donovan can do about the way the counsellor behaved?

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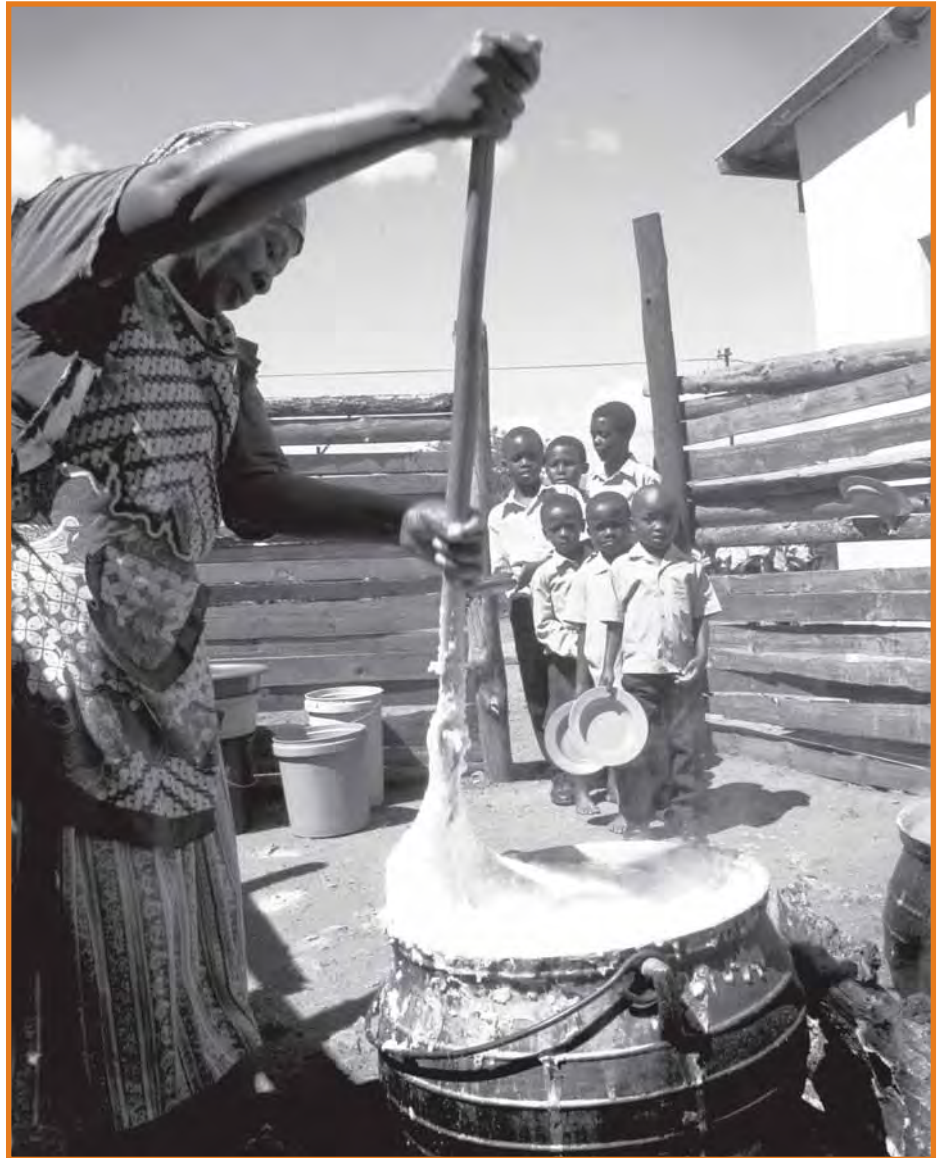
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CHAPTER 9

Food rights



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KEY WORDS

Access/Accessible	Ability to get, have or use something, eg access to food.
Adequate	Suitable and up to a good enough standard.
Discretion/ Discretionary	When a responsible person has the power to decide whether or not to do something, eg to give a grant.
Eligible	People who qualify for a grant.
Equitable	Fair and reasonable.
Famine	Widespread starvation, resulting in large numbers of deaths.
Food insecure	When you do not regularly get enough food of the right kind and quality.
Food secure/ Food security	Access to enough of the right kind and quality of food to live a healthy life.
Indicators	Signs or measures used for understanding and evaluating progress.
Labour tenancy/ Labour tenants	When people are allowed to live on and develop land in return for their labour.
Lobby	Influence or persuade policy-makers and law-makers, eg to prioritise the right to food in policies and planning.
Malnutrition	Undernourishment – not getting enough or the right kind of nutrition.
Nutrition	The value of food for health and well being, including taking in the right amount and quality of nutrients such as proteins, fats and vitamins.
Preservation	Keeping and maintaining in good condition.
Security of tenure	Giving people legally secure rights in land or housing.

Sharecropper Person allowed by a landowner to cultivate part of land for his/her own profit, in exchange for a share in the resulting crop.

.....
Subsistence farming Farming aimed at survival, not profit.

.....
Violate/Violation Abuse or not respect, eg violate your right to food.
.....

9.1

Why are food rights important?

Everyone knows that if you do not eat for a long time, you will slowly waste away and die. Food is in the first place important for survival – we need it simply to live.

But food is important in other ways also. Hungry people do not only worry about surviving. Their ability to work, interact with people, perform physical tasks, educate themselves, and participate in their community is affected. Hungry children struggle to pay attention in school, they do not have the energy to study at home and sometimes their intellectual development is harmed by malnutrition.

Adults who do not get enough food spend their time, attention and energies on trying to find the next meal, so that they find it hard to look for a job. When they do find a job, they often cannot perform efficiently. Hungry people do not easily participate in social or political life, as their attention is devoted to finding food to eat. We do not only need food to live – we also need food to live properly as healthy human beings.

In South Africa, hunger and malnutrition threaten the capacity of a large number of people to live and to live properly. Roughly 14 million South Africans (37% of our population) are *food insecure*, meaning that they regularly do not get enough food of the right kind and quality.

For this reason, we must understand the different rights related to food in our Constitution. If we understand what these rights mean and how they work, we can use them to ensure that the Government does everything possible to lessen our country's food crisis, and to ensure that the Government and our society in general does nothing to worsen this crisis.



9.2

History and current context

9.2.1 The impact of apartheid

South Africa's history gives an example of the close relationship between food rights and other rights. During the apartheid years, it was illegal for black South Africans to own and cultivate land in most parts of the country. This destroyed black agriculture and many black South African farmers were unable to produce food for themselves and others as they did before, resulting in hunger and malnutrition. Violations of the land rights of black South Africans led to violations of their rights to food.

Black South Africans were also prevented from participating in economic activities that enabled them to produce or buy food. Many black South Africans were, early in the 20th century, successful farmers through a practice called *sharecropping*. This happened when a white farmer allowed a black farmer to farm on part of the land in return for a share in the harvest. This practice was soon prohibited by law.

This meant that black farmers were legally prevented from continuing with sharecropping. It also meant that, where a white farmer made a sharecropping arrangement with a black farmer in spite of the prohibition, the black farmer could not use the law if the white farmer later broke his promises and took the whole harvest for himself.

CASE STUDY



BAN ON SHARECROPPING

In his book, *The Seed is Mine*, Charles van Onselen describes what happened to Cas Maine, once a self-sufficient and successful commercial farmer who in one particularly good season "... reaped a thousand bags of sorghum and five hundred and seventy bags of maize...". Through the prohibition on sharecropping and a series of dispossessions and forced removals, and thus the slow erosion of his rights to land, Cas was reduced to a pauper, who was unable to produce enough food even for subsistence and relied on the State for handouts.

Maine's own words describe perfectly how, even with all his personal resources, his ability to produce food depended on his rights to land:

"The seed is mine. The ploughshares are mine. The span of oxen is mine. Everything is mine. Only the land is theirs."

Van Onselen, 1996, introductory quote

9.2.2 The current situation

In South Africa today, 43% of households earn so little that they are in 'food poverty' – in other words, unable to afford enough food for basic subsistence. *De Klerk and others, 2004*

This food crisis affects physical development – of our children under the age of 9:

- 21,6% are stunted – they do not grow as quickly as they are supposed to.
- 10,3% are underweight – they do not weigh what they are supposed to.
- 3,7% experience wasting – while they are supposed to be growing, they actually lose weight. *Labadarios, 1999*

Certain groups of people are in a weaker position when it comes to food:

- 30% of black children under the age of 5 experience stunted growth caused by malnutrition, while the rate is only 5% among white children (*South African Human Rights Commission, 1999, 25*).
- More children have stunted growth in rural provinces such as the Northern Province (34,2%), compared to urban provinces such as the Western Cape (11,6%)

Black people, rural people, women and children experience hunger and malnutrition more than white people, city people, men and adults because special problems block their access to food. For example, in our society, women are most often the primary caregivers of children, meaning that they cannot work and earn an income as easily as men do. Many poor women do not have money to buy food and have to produce food for themselves through subsistence farming. Subsistence farming is also not easy for most women, as they do not have the money to pay for land, seed and water.

CASE STUDY



THE EXPERIENCE OF RURAL WOMEN

Joyce lives in a small rural community. She takes care of both her own and her daughter's children. She has no job and receives no income from relatives. Instead, she gets a very small income from building other people's houses. Her granddaughters also contribute financially by collecting wood that they sell for R10 a bundle. The girls are usually gone from 06h00 to midday, as the wood is heavy and they can't carry much at a time. Fetching for their own use and for selling means that they usually go three to four times a week.

Unlike some others, Joyce has no land to plough and no livestock:

"I am nothing – I am just a person of God. My biggest problem is to have enough food for my children." NGO Matters, 1998

9.3

Your food rights in the Constitution

9.3.1 Specific food rights

South Africa's *Constitution (Act 108 of 1996)* protects these food rights:

Section	What is the right?	Who benefits?
27(1)(b)	The right to have access to sufficient food	Everyone
28(1)(c)	The right to basic nutrition	Every child
35(2)(e)	The right to adequate nutrition at State expense	Everyone who is detained, including every sentenced prisoner



Each of these rights is a right for a specific group of people (everyone, children and detained people). Although they seem to provide different levels of protection, we will discuss them together as one right: the right to food.

9.3.2 Linking food rights to other rights

As our discussion of the impact of apartheid on food rights shows, the right to food is closely interlinked with other rights:

- People need the right to food to enjoy other rights.
- How much they can enjoy the right to food depends on other rights.

EXAMPLES



LINK BETWEEN FOOD RIGHTS AND HEALTH CARE RIGHTS

The right to food and the right to health care are closely linked:

- *Undernourishment and malnutrition affect people's physical development negatively, causing them to become ill much more easily than others and to find it much more difficult to heal than others once they are ill.*
- *A person who is ill sometimes needs special kinds of food to eat, or is unable to get the same benefit from food as a healthy person.*

9.4

International law and your food rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) is the most important international document dealing with the right to food.

Article 11 of the ICESCR places a duty on States to recognise the right of everyone to adequate food and requires States to avoid people going hungry. *General Comment No. 12* (1999) of the Committee on Economic, Social and Cultural Rights (CESCR) interprets the meaning of this right. The General Comment gives us important information about:

- The minimum duties under the right to adequate food.
- What would be possible violations of the right to food.
- Strategies for implementing the right to food.

At regional level, the right to food is usually not clearly guaranteed. Only article 12(1) of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* of 1988 (Protocol of San Salvador) provides for a right to adequate nutrition. However, when there is no clear guarantee of a right to food, regional courts and tribunals have interpreted other clearly guaranteed rights to include the right to food.

CASE STUDY



INCLUDING THE RIGHT TO FOOD

In the 1996 case of *SERAC v Nigeria*, the complaint was that the Nigerian government had, with international oil companies, destroyed the farming land, crops and livestock of the Ogoni people in retaliation for opposing the development of oil fields in their tribal lands.

The African Commission on Human and Peoples' Rights (African Commission) interpreted the rights to life, to health and to development in the *African Charter on Human and Peoples' Rights* (African Charter). The African Commission directed State parties:

- Not to interfere with access to food.
- To protect access to food from interference by powerful third parties.

The right to food is also found in documents that deal with the rights of vulnerable groups or with human rights in specific circumstances. For example, the *Convention on the Rights of the Child* (CRC, 1989) says States must, in caring for children:

- "Combat disease and malnutrition ... through, *inter alia*, ... the provision of adequate nutritious foods...", and
- "Provide material assistance and support programmes, particularly with regard to nutrition..." in cases of need.

A number of documents also protect the right to food during armed conflict and natural disasters, and when dealing with refugees.

Other documents that are not treaties describe policies and practices on the right to food, or provide standards to test realising the right to food.

For more on using international law, see Chapter 3.

EXAMPLES



USEFUL INTERNATIONAL DOCUMENTS

The World Food Summit Plan of Action, adopted at the 1996 World Food Summit in Rome, translates commitments of world leaders on ending hunger and malnutrition into practice. The Plan of Action lists actions that must be taken by the international community, international civil society and individual States.

The Plan of Action says that steps must be taken to clarify the content of the right to food and freedom from hunger. This led to:

- *Drafting of the CESCR's General Comment 12 on the right to food.*
- *Voluntary Guidelines on the Progressive Realisation of the Right to Food*, adopted by member States of the UN Food and Agriculture Organisation in November 2004.

9.5

Guides to interpreting the right to food

9.5.1 What does the right to food mean?

The right to food is realised if *food security* exists – this is when all people, at all times, can get enough of the right kind and quality of food to live an active and healthy life.

We will use the concept of ‘food security’ to explain what the right to food means.

a) Availability and accessibility

When people go hungry on a large scale or serious malnutrition exists, it is easy to say that food security has failed because there is not enough food. The solution is then to produce more food or get more food through trade.

However, people do not usually go hungry because there is not enough food available. Rather, they go hungry because they cannot get their hands on the food that is available.

CASE STUDY



BANGLADESH FAMINE

After the Bangladesh famine of 1974, economic analyses showed that there was more food available in Bangladesh in 1974 than in the five years before or after 1974. In the words of Dreze and Sen:

“And yet the famine hit Bangladesh exactly in that peak year of food availability. Those ... who died because of their inability to command food were affected by a variety of influences (including loss of employment, the rise of food prices, etc), and this occurred despite the fact that the actual availability of food in the economy of Bangladesh was at a peak.”

Dreze and Sen, 1989, 28

Achieving food security – and realising the right to food – therefore depends, on two things:

“The *availability* of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture;

The *accessibility* of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.”

CESCR, UNHCHR website

The *availability* of food means that there must be enough food available in the country to meet the dietary needs of everyone.

The *accessibility* of food means that people must be able to get the food that is available for them. People can get access to available food if they are ‘entitled’ to that food, for example:

- They earn income by selling labour or other commodities that they use to buy food.
- They can receive monetary or in-kind social assistance from the State to get food.
- They exercise some form of legal control over land, tools and water so that they can produce food for their own use.

CASE STUDY



LINKING THE BAN ON SHARECROPPING WITH ACCESS TO FOOD

The life of Cas Maine illustrates how, without an entitlement to food, people are unable to get food even when food is available. In Cas's time there was, for a knowledgeable and hard-working farmer like Cas, arable land available to produce food.

When Cas could still exercise a legal entitlement to the arable land – when he could still legally enter into sharecropping agreements with white farmers – he was able to get food by producing it himself. But when that entitlement was taken away from him when sharecropping was prohibited, Cas's ability to get access to food was seriously limited (*Van Onselen, 1996*).

See the background to the story of Cas Maine on page 317.

Economic and physical accessibility

People can also only get access to food if the food is both:

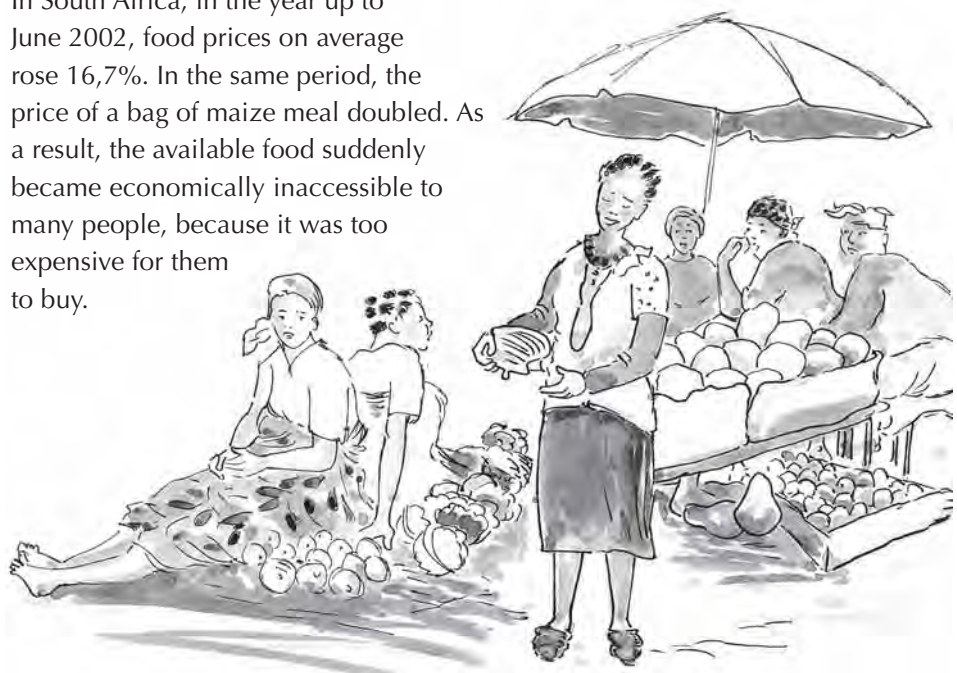
- Economically accessible – it is not too expensive for people to buy, and
- Physically accessible – it is distributed geographically so that there is food everywhere.

CASE STUDY



ECONOMIC ACCESSIBILITY

In South Africa, in the year up to June 2002, food prices on average rose 16,7%. In the same period, the price of a bag of maize meal doubled. As a result, the available food suddenly became economically inaccessible to many people, because it was too expensive for them to buy.



CASE STUDY



PHYSICAL ACCESSIBILITY

In the early 1990s, Somalia experienced widespread famine. The international community sent large amounts of food to Somalia. This food was never distributed across the country to the places where it was most needed, but rather remained in warehouses at the main airport, where it rotted. The available food was therefore not physically accessible to those who needed it.

b) Sufficient food

Our Constitution speaks about “sufficient food”, “basic nutrition” and “adequate nutrition”. These terms all mean that a certain standard and quantity of food – what we will call *sufficient food* – must be available and accessible for us to say there is food security.

Food will meet this standard if:

- There is enough food, and
- The available and accessible food is nutritious, safe and acceptable.

Enough food

Enough food refers to a basic amount of food – there must simply be enough food available and accessible so that people do not go hungry.

Nutritious food

Nutritious food refers to the nutritional quality of food – there must be enough food available and accessible with the correct amount and balance of calories, proteins, fats, minerals and vitamins to enable a person to live a healthy and dignified life.

EXAMPLE



NUTRITIONAL QUALITY

In South Africa, maize porridge (mieliepap) is a staple diet. Although mieliepap is a good source of carbohydrates, it does not contain enough vitamins, minerals or protein. People often eat more than enough mieliepap, but this is not sufficient to keep them healthy – it often leads to obesity, with its related health problems, while people are in fact malnourished. People have to be able to supplement their diet with vegetables and other foods in order for them to have sufficiently nutritious food.

Safe food

Safe food also refers to the quality of food – everyone must have access to food that is not only enough and nutritionally adequate, but that is also fresh enough and without any harmful substances, so that it does not endanger people’s lives or health.

EXAMPLE



UNSAFE FOOD

Every school day, the Government provides a nutritious meal to needy primary school children through the Primary School Feeding Scheme. In the past, the most popular meal to provide was a peanut butter sandwich, because peanut butter is particularly nutritious. However, in some cases the peanut butter that was provided contained poisonous substances due to incorrect production methods. The food that was provided to these children was perhaps enough and nutritious, but it was still not sufficient, because it was unsafe.

EXAMPLE



SPECIAL NEEDS OF PEOPLE LIVING WITH HIV

People who live with HIV often need antiretroviral (ARV) drugs to survive. These ARVs, although lifesaving, can cause a variety of diet-related problems. Some people gain weight around their stomachs and backs, while other people may lose a lot of fat. Their diets may need to be adjusted to counter these side effects.

Whether or not food is enough, nutritious and safe depends to a large degree on who is eating the food. Certain groups of people, because of special circumstances, have special food needs to make sure that all their nutritional needs are met.

EXAMPLE



CULTURALLY ACCEPTABLE FOOD

- People from the Hindu faith are not allowed to eat meat.
- Orthodox Jews are not allowed to eat pork or other foods that are not kosher.
- Muslims may only eat food that is halaal.

Acceptable food

Acceptable food refers to the cultural aspect. Often people's culture or religion prescribes that they may not eat particular kinds of food. For food to be sufficient, it must also be culturally acceptable to the people eating it.

9.5.2 Duties linked to the right to food

The State's basic duty on the right to food, in section 27(2) of the Constitution, says that it must take reasonable steps, within its available resources, to realise the right to food over time.

When people go hungry or are exposed to malnutrition, there are many possible reasons why they are *food insecure* and many ways in which to ensure that they again become *food secure*. This is why it is not possible to say that the State must do specific things to meet its duties relating to the right to food. To meet these duties, the State must simply use whichever measures it sees fit that will lead to food security.

However, although it is not possible to say specifically which steps the State must take, it is possible to say *which kinds of things* it must do. In broad terms, the State must take steps to ensure that all of the aspects of food security are in place.

a) Available food

The State must take steps to ensure that enough food for everyone is available:

- It must manage food production by farmers so that enough food is produced for the country.
- It must manage the importing of food where we do not produce enough food for our own use.
- It must ensure that natural resources to produce food, like land and water, are used in a way that they are not exhausted.
- It must monitor the food supply in the country so that it can know when it is necessary to act to avoid a crisis.

b) Accessible food

The State must take steps to ensure that available food is accessible:

- It must ensure that food is not too expensive for ordinary people to buy – for example, exempt basic foodstuffs such as maize flour and bread from Value Added Tax, or subsidise the production of these foodstuffs, or introduce price-control.
- It should take steps to enable people to produce food for themselves – for example, sponsor community food gardens and support small farmers through subsidies and through providing access to land.
- Where people are unable to buy food for themselves, the State should step in directly. This can be because of a natural disaster such as a flood, or because people are too old or too young to work and earn money, or they are too poor to buy food and are unable to find employment. The State could provide food directly to people (eg during a natural disaster) or provide money so that people can buy food (eg through food stamps or through social assistance grants).

c) Sufficient, safe and acceptable food

The State must take steps to ensure that available food is sufficient, safe and acceptable:

- It must ensure that producers of basic foodstuffs, such as maize flour and bread, supplement their products with vitamins and minerals.
- It must introduce basic standards for producing, preparing and storing food.
- It must put in place systems to monitor the safety and nutritional value of food.

It is true that the State's basic duty is limited. Although the State must take steps to realise the right to food, it can only be expected to do what is reasonable within the limits of resources and time.

This does not mean that the State can get away with doing nothing. The State must have a plan in place to realise the right to food – a plan that addresses all the different aspects of food security. The State must also actually carry out the plan and be able to show progress in implementing the plan.

The UN's CESCR suggests that States must adopt "national strategies", described in national "framework laws" in which they set out their plans for realising the right to food.

9.6

Violations of the right to food

EXAMPLES



STARVATION AND FAMINE

- *If a large number of people in a country starve, it is possible that the State is violating the right to food, but only if the State can in fact be held responsible for the existence of the famine or for not responding properly to it.*
- *If a famine is caused by natural factors (eg drought) or by other factors out of the control of the State (eg a sudden and unfair trade blockage), you cannot say that the existence of a famine means that the State has violated the right to food.*

Generally speaking, the State violates the right to food if it does not maintain food security for everyone. However, there are many different reasons why food security might fail, not all of them in the control of the State. We can only say that the State is violating the right to food if the State in fact caused the failure in food security.

9.6.1 Not respecting the right to food

The State violates the right to food if it interferes with people's existing access to food, without providing them with some alternative access to food – in other words, if it does not respect the right to food.

CASE STUDY



ZIMBABWE EVICTIONS

For more detail, see the UN website on page 342.

In 2005, the United Nations found that Zimbabwe had violated the right to food of many Zimbabweans through large-scale evictions.

The Zimbabwe Government said that the programme of evictions, called Operation Murambatsvina (Restore Order), was meant to stop illegal land use – illegal structures, small businesses run from residential plots, and small food gardens on residential plots. 700 000 people lost their homes and livelihood, and in many cases their access to food. The people evicted were moved to rural areas where the Zimbabwe Government's plan was to provide them each with a new serviced plot on which to build a home.

However, a UN investigation found that this process was not properly planned and that local authorities in the areas earmarked for these placements would not be able to cope with the renewed demand for infrastructure and services (*Anna Kajumulo Tibaijuka, 'Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina'; UN website*).

9.6.2 Not protecting access to food

The State violates the right to food if it does not take appropriate steps to protect people's access to food against other people.

CASE STUDY



LABOUR TENANCY DURING APARTHEID

During the apartheid years in South Africa, many black farmers managed to produce food for themselves and their families through labour tenancy agreements with white farmers. The white farmers would allow them to farm on parts of their land in return for their labour.

However, the law allowed the white farmers to evict these labour tenants if they could simply show in court that they were the owners of the land and that the labour tenants had no legal right to occupy it. As labour tenancy agreements were not legally recognised, the law did not protect these farmers and their ability to produce food against white farmers wishing to evict them.

9.6.3 Not taking action to restore food security

The State would also violate the right to food security if it does not take steps that have a reasonable chance of realising the right to food. This would happen if it does not take steps to ensure that a sufficient supply of nutritious, safe and acceptable food is maintained, and that people have access to that food.

The State would then violate the right to food because it has not fulfilled the right to food. For example, the State, when faced with a food crisis of some kind, does not respond adequately to restore food security.



COURT CASE



RAISING LEVELS OF NUTRITION IN INDIA

In the 1985 case of *Kishnan Pattnayak and Others v State of Orissa*, the Indian Supreme Court decided that the State government had failed in its duty to raise the level of nutrition because it did not prevent people dying from starvation in Orissa State. The Court ordered:

- The State government to appoint qualified people from civil society on its committee dealing with the problem of starvation to make the committee more effective.
- The committee to try to solve the problems of poverty that caused the famine in the first place, rather than just focusing on immediate disaster relief.

9.6.4 Not properly providing for food security

The State would not fulfil the right to food if its programme for realising the right to food in some way falls short because it does not provide for an aspect of food security.

CASE STUDY



SOUTH AFRICANS IN FOOD CRISIS

Many South Africans live in food crisis, as their access to food is so insufficient that they experience serious health risks. The State assists some of these people with targeted social assistance grants, such as the Child Support Grant for children under 14, the Old Age Pension for men older than 65 and women older than 60, and the Disability Grant for people living with a disability.

However, for those able-bodied people older than 14 and younger than 60 (for women) and 65 (for men) in food crisis, the State provides no regular support. As the State is under a duty to provide access to food to people who, for reasons outside of their control, are unable to provide for themselves, the complete lack of any form of regular assistance to these people may violate the right to food.

9.6.5 Not implementing the right to food

The State would not fulfil and thus violate the right to food even when its plan to achieve food security is complete on paper, but is not implemented adequately.

In the past, the Social Relief of Distress Grant could be given to people, often through a food parcel. Before the *Social Assistance Act 13 of 2004* and *Draft Regulations* published in the Government Gazette in February 2005, the Social Relief of Distress Grant was a discretionary grant. Applications for the grant were made to the Director General of the Department of Social Development, who exercised a discretion to award the grant. However, according to the Social Assistance Act and Draft Regulations, this discretion is now given to the Minister of Social Development, who may now make monies available for payment by the new South African Social Security Agency (SASSA) to assist the many people who experience temporary crises of food insecurity, hunger and malnutrition.

For more on developments with the Social Relief of Distress Grant, see Chapter 11 on page 392.

COURT CASE



SOCIAL RELIEF OF DISTRESS GRANT

In the 2003 case of *Kutumela v Member of the Executive Committee for Social Services, Culture, Arts and Sport in the North West Province*, people had applied for the Social Relief of Distress Grant, but in spite of clearly qualifying, did not receive it. Their complaint was that:

- Under the Social Assistance Act and its regulations, provincial governments had to provide the grant to eligible individuals applying for the grant.
- Although money had been allocated from the national Government for this purpose, the North West province had not allocated the necessary human, institutional and financial resources for the grant to be provided. As a result, the grant was available on paper but not in practice.

The case resulted in a settlement order directing the North West provincial government to:

- Plan a programme to ensure the effective implementation of the Social Relief of Distress Grant.
- Put in place the necessary infrastructure for the administration and payment of the grant.

9.6.6 Reversing progress towards food security

The State also does not fulfil the right to food if it acts in a way that reverses progress achieved in realising food security.

CASE STUDY



EXCLUDING POOR PEOPLE FROM AGRICULTURAL LAND SUBSIDIES

The national Department of Agriculture distributes agricultural land to black farmers through a system of State subsidy. Before 2001, qualifying households received a Settlement/Land Acquisition Grant (SLAG) of R16 000 to help them buy land. Municipalities were also empowered to make communal land available to poor people for grazing and cultivation. At this stage, the aim was clearly to enable poor people to produce food for their own subsistence needs and additional income.

The programme was reconsidered in 2000 and replaced with a new programme – Land Redistribution for Agricultural Development (LRAD) – in 2001. LRAD aims more to enable access to the commercial agriculture sector for black full-time, medium- to large-scale farmers. To qualify for a SLAG subsidy, a recipient household had to fall under a maximum monthly income of R1 500. To qualify for a grant under the LRAD, a recipient has to put up at least R5 000 before qualifying for a subsidy.

This requirement means that the poorest of the poor, who previously could benefit from the SLAG-programme and start producing food for themselves, are effectively excluded from the LRAD Grant. In this sense, the Government has taken a step backwards in facilitating access to food.

9.7

Policies, legislation and programmes to implement your food rights

South Africa has a national food policy framework in place – the *Integrated Food Security Strategy for South Africa* (IFSS). Efforts have also been made to draft a food framework law to further address the coordination and management of a national nutritional strategy, although it is not clear what progress has been made on this.

Within this framework, the State runs a variety of programmes. Although various initiatives are in place to ensure that South Africa maintains an adequate food supply, we focus here on the steps the State has taken to ensure that people have access to food.

9.7.1 Steps to respect and protect the right to food

The State has taken a number of steps to ensure that there will not be a repeat of the large-scale interference during the apartheid years in people's access to the resources to produce food. The laws enabling apartheid dispossessions, such as forced removals, have been repealed. New laws have been put in place to prevent these practices from happening again.

EXAMPLE



NEW LAWS ON EVICTIONS

*In the past, it was easy for a property owner to obtain an eviction order from the Magistrates' Court – the owner only had to prove ownership of the land and that the occupier had no legal right to occupy it. New laws now regulate eviction, most notably the **Land Reform (Labour Tenants) Act 3 of 1996**, the **Extension of Security of Tenure Act 62 of 1997 (ESTA)**, and the **Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)**.*

These new laws direct the courts to:

- *Look at all the relevant circumstances before deciding whether or not to grant an eviction order, including the hardship that the occupiers would experience if the order was granted. Where the land is used to produce food, this is relevant to the court's decision whether or not it should grant an eviction order.*
- *Consider whether or not alternative accommodation is available to farm workers or labour tenants before granting an eviction order.*

For more on evictions, see Chapter 6 on page 214 and Chapter 7 on page 247.

EXAMPLE



NEW LAWS ON TAKING LAND

Section 25 of the Constitution says that the State may now only take land only if it is to be used for a public purpose, and if just and equitable compensation is paid. The specific circumstances will determine things like what amount of compensation must be paid, and the time and manner in which it must be paid to people losing their land.

Where the State takes land from people that they use to produce food for themselves, the fact that this land was used for people to exercise their constitutional right to food will be very relevant to the question of what fair compensation would be.

These new steps prevent the State from interfering unfairly in people's access to food and also protect people's access to food against interference from other private parties.

9.7.2 Steps to fulfil the right to food

a) Facilitating access to food

The State has taken a number of steps to make it possible for self-sufficient people to gain access to food for themselves. These steps help to facilitate access to food, either by people producing food for themselves or earning an income to enable them to buy food.

EXAMPLES



PROGRAMMES ENCOURAGING ACCESS TO FOOD

- *The Department of Agriculture's Food Security and Rural Development Programme provides agricultural starter packs and food production information packs to food insecure rural households.*
- *The Department of Agriculture's Land Redistribution and Development Programme provides financial assistance for small farmers.*
- *The Department of Public Works' Community-Based Public Works Programme creates jobs through community involvement in public works programmes, so that people can earn money to buy food*
- *The Department of Social Development's Poverty Relief Programme provides:*
 - *Support for rural community food gardens.*
 - *Skill development to create employment opportunities for youth.*
 - *Local economic development projects for poor rural women to generate income.*
- *In 2001, in reaction to very sharp rises in the prices of basic foodstuffs, the State made agreements with food retailers to provide food to the poor at special low prices, thus making it easier for poor people to buy food.*

b) Providing access to food

There are also a variety of programmes that more directly provide access to food to people who cannot access food for themselves. The State is under a duty to provide food or the means with which to buy it to people who cannot look after their own needs, such as children, the elderly, people living with disabilities, people hit by natural disasters, and people who are indigent and unable to find work.

EXAMPLES



ASSISTING VULNERABLE GROUPS

- *The State provides cash social assistance grants to children, the elderly, people living with disabilities, foster children and war veterans. These grants are meant to enable the recipients to buy food.*
- *The State provides food directly to children through:*
 - *The Primary School Feeding Scheme – a nutritious meal is given to needy primary school children once every school day.*
 - *The Programme targeting children with acute Protein Energy Malnutrition (the PEM Programme) – seriously malnourished children are admitted to hospital where they are treated and provided with an intensive diet until they recover.*
- *In 2002, in response to sharp rises in food prices that made food economically inaccessible to poor people, government introduced a programme to provide food parcels and agricultural starter packs to destitute families for three months at a time.*

c) Ensuring nutritious and safe food

EXAMPLE



IODISATION OF TABLE SALT

In response to studies that showed that unacceptably high numbers of children in South Africa suffered from iodine deficiency, the State passed legislation requiring the iodisation of table salt. For example, this means regulating food production and sale to include:

- *Adding micronutrient supplements.*
- *Providing nutritional information on packaging.*

The State also runs programmes to ensure that food is nutritious and safe. The most important is the Department of Health's Integrated Nutrition Programme, providing nutritional education and addressing the lack of micronutrients in some foods.

d) Monitoring food security

There are also programmes to monitor national and household food security in South Africa. An important recent addition to these programmes is the appointment of the Department of Agriculture's National Food Pricing Monitoring Committee (for a period of one year) to investigate and advise government on food prices in South Africa.

9.8

Evaluation of steps taken

Our description of the State's strategy to realise the right to food shows that the State has done many things to meet its duties to do with the right to food. As required by international law, it has created a national strategy to realise the right. This strategy contains at least some programmes to meet all the duties related to the right to food. However, there are important areas in which the State still fails to give effect to its duties around the right to food.

9.8.1 Problems with scope and implementation

Many of the State's programmes aimed at realising the right to food are much too small to deal with the problem of food insecurity.

EXAMPLE



LIMITED IMPACT

The State runs a number of programmes to make it possible for people to produce food for themselves or to earn an income to use to buy food for themselves. By 2001 these programmes reached a total of only 120 000 people. More than 14 million people in South Africa are food insecure and 11 million of these people receive no social assistance grants from the State.

Many of the State's programmes that look good on paper fail in practice because they are not implemented properly. This is often due to a lack of money or of people skilled in implementing these programmes.

EXAMPLE



FARM WORKERS AND LABOUR TENANTS

The protection provided to farm workers and labour tenants against eviction through ESTA and the Land Reform (Labour Tenants) Act is important to help ensure food security, as many of them rely on small farming on the land on which they live as a source of food. However, both these laws are not implemented properly:

- *In most areas, there is no legal assistance for farm workers and labour tenants to help them rely on the protection of these laws.*
- *Magistrates often do not know about these laws and do not apply them.*
- *Most farm workers and labour tenants do not know about protections under these laws.*
- *As a result, many people are evicted from farms without the protection of these laws.*

9.8.2 Gaps in the State's strategy

We have seen that so many people in South Africa do not enjoy food security and are in a desperate situation. They are unable to afford even a basic subsistence diet for themselves and their families. These people do not go hungry through any fault of their own – South Africa's high unemployment rate means that, for most of them, it is simply impossible to find a job.

The State has a duty, under both international and South African law, to take steps to give these people access to food. This means that the State must provide food or the means with which to buy food directly to people in need. If we think about this duty, the State's current food security strategy simply has a very big gap.

Most of the State's food security programmes facilitate access to food through capacity-building and income-generation. State programmes that do provide food or money to buy food directly to people benefit only specific groups:

- The Primary School Feeding Scheme – primary school children.
- The PEM Programme – severely malnourished children treated at public health facilities.
- The Child Support Grant – children under 14.
- The State Old Age Pension – men older than 65 and women older than 60.
- The Disability Grant – people living with a disability.

The State's existing programme thus does not make any provision for the basic food needs of a large number of South Africans who find themselves in long-term food crisis.

9.9

Protecting and advancing your food rights

The responsibility to advance, protect and defend the right to food rests both on the Government and on people who have the right. People who benefit from the right to food must make use of existing programmes to exercise their right to food. To do this, they must know about these programmes and their rights under these programmes.

Organised civil society and individuals can lobby government to ensure that the right to food is properly prioritised in policy and planning, and can assist people to make use of their food rights.

9.9.1 Making use of existing opportunities

There are many existing programmes that people can use to realise their own access to food. These programmes provide training in food use and production, access to food production opportunities and, in some cases, direct provision of food. Some of these measures also protect people against interference with their access to food.

Programme	What it does	Who is responsible	How to make use of it
Primary School Feeding Scheme	Provides a nutritious snack to primary school children	Department of Education	Operates at about 80% of primary schools – contact Department of Education
PEM Programme	Inpatient treatment of severely malnourished small children	Department of Health	Contact local hospital or provincial Department of Health
Community Based Nutrition Project	Provides education on food use and small-scale food production	Department of Health	Contact provincial Department of Health
LRAD Grant	Provides financial and other assistance to set up small farmers	Department of Agriculture	Contact Department of Agriculture or local agricultural extension officer
ESTA and Land Reform (Labour Tenants) Act	Says that a court may only grant an eviction order against farm workers or labour tenants if it is just and equitable in all relevant circumstances	Department of Land Affairs	Contact local police station, Magistrates' Court, local authority, or local office of the Department of Land Affairs



9.9.2 Influencing laws and policies

Civil society should lobby the Government to prioritise implementing the right to food in its budgeting, planning and policy.

GUIDELINES



TAKING ACTION

For more on a basic income grant, see Chapter 11 on page 388.

1. Persuade the Government to introduce some kind of general social assistance, such as a basic income grant, so that people currently not receiving social assistance from the State will be covered and will be able to buy food.
2. Pressurise the Government to improve implementing programmes aimed at realising the right to food, such as providing the Social Relief of Distress Grant and properly applying the security of tenure laws, like ESTA.
3. Lobby the Government to introduce regulation of the food industry that will address dangerous rises in the price of basic foodstuffs.

A lesson can be learnt about this from the experience of Brazil, a country similar in many of its problems to South Africa.

CASE STUDY



CIVIL SOCIETY LOBBYING IN BRAZIL

In Brazil, political pressure from civil society organisations resulted in creating a special government body to coordinate government policy on issues relating to the right to food. It works in partnership with Brazilian and international non-governmental organisations (NGOs). The result has been that Brazil has developed a coordinated policy dealing with all aspects of the right to food, and has been successful in reducing its levels of hunger and malnutrition.

9.9.3 Information, training and assistance

People and organisations working on advancing the right to food should also focus on educating people on the right to food and assisting them to exercise their right to food.

GUIDELINES



INFORMATION AND AWARENESS WORK

Training workshops and programmes can:

1. Inform people about the different training and financing programmes provided by government to help you to provide for your own food needs.
2. Advise people about the best ways to use and prepare food to get the best nutrition out of the food.
3. Train people in land use and conservation, including agricultural training and environmental awareness programmes, to enable them to make best use of opportunities to produce their own food.
4. Inform farm workers and labour tenants of their rights under security of tenure laws, and of ways of claiming and enforcing these rights.
5. Give legal assistance to farm workers and labour tenants when they are threatened with eviction.

9.9.4 Monitoring by NGOs

Problems in realising the right to food and cases where the State violates the right to food can only come to light if information is available about the nutritional status of people in South Africa and about progress with implementing government food security programmes.

GUIDELINES



MONITORING

NGOs monitor different issues relating to food security. This monitoring can:

1. Focus on progress with implementing existing government programmes, such as the Primary School Feeding Scheme, the PEM programme, LRAD and the security of tenure laws.
2. Point out areas where existing programmes do not address the problems of people who are food insecure.
3. Identify groups of people who are particularly vulnerable to food insecurity and the reasons for their specific vulnerability.

Discussion ideas



TALKING POINT 1

Divide into two groups to discuss and share experiences on:

- *How to use existing programmes that open access to food production. Are there problems with these programmes?*
- *How to provide and produce food for own use (eg food gardens).*
- *How to conduct small-scale commercial farming for profit.*
- *How to obtain access to agricultural land (eg credit facilities, land redistribution programmes, security of tenure programmes).*
- *How to use and conserve land to enhance food production.*

TALKING POINT 2

Divide into two groups to discuss and share experiences on:

- *Which foods that are available to you are the most nutritious?*
- *What are the special food requirements of different groups, such as children, the elderly, pregnant and breastfeeding mothers, or people living with HIV?*
- *What are the safest, most nutritional ways to prepare the food that is available to you?*
- *How can you store food so that it lasts longer?*

TALKING POINT 3

In a big group, read and comment on this point of view:

“People must be made aware that realising food rights depends on realising other rights, such as land rights and rights to education. They must also be made aware that realising all these rights very often depends on the socio-economic position of people. This will help people understand the causes of hunger and malnutrition.”

- *Do you agree with this point of view?*
- *What problems in your area, besides the simple availability of food, affect the access of people around you to food?*
- *Whose responsibility is it to try and change these factors?*
- *How can these factors be changed?*



TALKING POINT 4

You notice that the price of the basic food that you buy every week, such as maize flour, bread and potatoes, is suddenly much higher than before.

Discuss these questions in pairs and then in a big group:

1. *Is this a violation of the right to food?*
2. *If this is a violation of the right to food, why, and who is responsible for it?*
3. *What can you do about this problem and who will you ask for help?*

TALKING POINT 5

You and your family have lived on a farm your whole lives, working for the farmer. You have always planted some maize, potatoes and pumpkins, and raised some chickens and sheep for extra food. The farmer sells his land to a big company that wants to establish a game farm on the property. As a result, they notify you that you and your family must leave the farm.

Break up into two groups and discuss these questions:

1. *If the company evicts you from the farm, does this violate your right to food?*
2. *If it is a violation of your right to food, why, and who is responsible for it?*
3. *What can you do and who can you approach to try to prevent the company from evicting you from the farm?*



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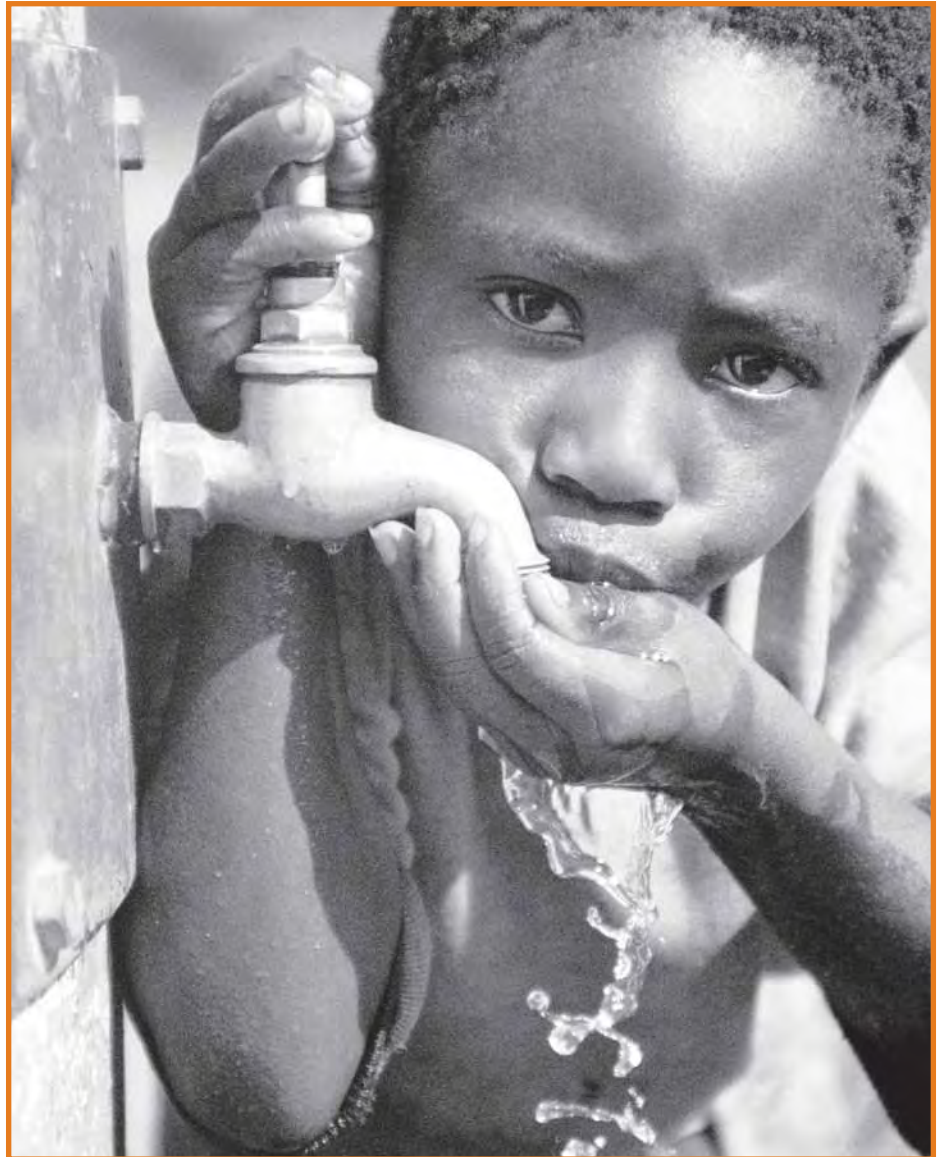
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Water rights

CHAPTER 10



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KEY WORDS

Access/Accessible	Ability to get, have or use something, eg access to sufficient water.
Accountability	Being answerable for your actions, eg by reporting.
Arbitrarily	In an unfair and unlawful way.
Breach	Break the law or not respect your rights, eg disconnect your water supply without good reason.
Catchment	Area of land that collects and transfers rainwater into a waterway, river, lake or ocean.
Compliance/Comply	Whether or not you obey duties and procedures set out in law and policy.
Constitutionality	Whether a policy, law or procedure is in line with the Constitution.
Cooperative	The principle that national, provincial and local government government should assist each other, and respect each other's powers and functions.
Corporatisation	When a government department is turned into a public company – the State keeps ownership, control and management, but the new body runs on business principles.
Delegate	Transfer powers and duties to another body.
Ecosystem	The relationship and interaction between plants, animals and the non-living environment.
Equitable/Equity	Fair and reasonable.
Labour tenants	People allowed to live on and develop land in return for their labour.
Lobby	Persuade or influence a person or authority, eg lobbying the Minister of Water Affairs and Forestry on the quantity and quality of water supply services.

Malnutrition	A medical condition caused by not eating enough or proper food, or not having a balanced diet.
Mediation	A process where a neutral person is given the power to help two sides find a solution to a dispute.
Organ of State	Government departments and public bodies carrying out State duties.
Potable water	Drinkable water.
Precedent	A case that sets an example for future cases to follow.
Prescribed	As set out in the law, usually by regulations made under an Act.
Privatisation	A process where private companies are involved in owning and managing State assets to provide a service or to operate a service.
Public trustee	A person who holds, manages and controls something for the benefit and in the interests of the public.
Riparian principle	When access to and use of water is linked to owning land next to rivers and other large water sources.
Sanitation	Maintaining clean and hygienic living conditions, including services for collecting sewerage and garbage.
Spheres of government	National, provincial and local levels of government.
Sustainable	Lasting and staying in a good condition for a long time.
Unfair discrimination	When a policy, law, condition or situation unfairly disadvantages you, eg because you are a woman, black, gay, living with a disability, or living with HIV.
Violate/Violation	Abuse or not respect your rights, eg violate your human dignity.
Water resource	Any source that water comes from, eg a borehole, a river, a lake.

10.1

Why is it important to understand your water rights?

CASE STUDY



THE VALUE OF WATER

Nomonde Mnika, a resident of Masakala community near Matatiele, in the Eastern Cape, knows the value of water. Her daily efforts to get potable water for her family until April 1998 were a time-consuming affair.

She would walk a few kilometres to a dry riverbed and begin digging by hand. Eventually, depending on the weather conditions over the past few weeks, she would strike paydirt – brown, unusable mud. Further digging and withdrawal of the water from the donga, as the holes were known locally, allowed clearer water to filter through and she would fill a few buckets and carry them home. She was one of hundreds of people who relied on the dongas for her water.

John Soderlund, 'Masakala community takes the initiative to replace water dongas', Sunday Independent, 14 February, 1999

The Constitution gives people like Nomonde Mnika a right of access to sufficient water. However, in order to be able to access this right, it is important that communities and individuals know what the right is, and how to protect and advance it.

10.2

History and current context

South Africa faces an increasing demand for water. It is a semi-arid country receiving insufficient and unpredictable amounts of rain every year. Initially, water was needed mainly for domestic agriculture and use. However, the growth of the industrial sector since the last half of the 20th century has increased the demand for water as an important natural resource.

Before 1994, the provision of water supply to the people was not regarded as the duty of the State in South Africa. Rather, access to water was closely linked with land. The old water laws tied access to and use of water to ownership of land along rivers and other large water bodies – this is called the 'riparian principle'. Land owners also had the sole right to use water sources like rain water that fell on their land, a stream that arose on their land and groundwater (eg from a borehole).

The fact that the majority of South Africans were stripped of their land rights and restricted to 13% of the land meant the majority of the people were also deprived of effective control of and access to water. The principles of South African water law helped to ensure that white land owners enjoyed privileged access to and use of the country's water resources.

There is also widespread waste of water, a scarce resource. Large-scale irrigation on commercial farms uses vast quantities of the country's water resources. The previous water laws granted the relevant Minister wide powers to regulate the storage, distribution and use of water.



10.2.1 The impact of lack of access to water

The Government estimates:

- About 7 million people in South Africa do not have access to adequate water services.
- About 18 million people or 3 million households do not have adequate sanitation facilities (*Draft White Paper on Water Services, 2002, 2; White Paper on Basic Household Sanitation, 2001, paragraph A1*).

Water is essential to live a healthy life. A human body cannot function properly without taking sufficient amounts of clean water. Water is also important for preparing our food, washing our clothes and maintaining a clean environment. Lack of access to water causes serious illnesses such as diarrhoea and cholera.

Water also serves many other important functions. For example, it can be used for farming, leisure and cultural purposes.

The *Draft White Paper on Water Services* of 2002 acknowledges:

“Water services are intimately linked with *poverty*. Lack of access to water supply and sanitation constrains opportunities to escape poverty.”

Paragraph 1.1

EXAMPLES



EFFECTS OF LACK OF ACCESS TO WATER

- *Lack of access to water has particularly negative impacts on women and the girl child. Rural women, for example, walk long distances to rivers or community taps to collect water. This task is time-consuming and exhausting. As a result, many rural women cannot take full advantage of economic and development opportunities, and do not participate equally in private and public life.*
- *Children in rural areas, who often accompany their mothers to assist in the collection of water for the household, experience similar hardships. They have little time for recreation and their heavy domestic responsibilities often affect their education.*

10.2.2 Current barriers to accessing water

Many people do not have access to water because of poor implementation of policies (such as the indigent policy and the free basic water policy) and legislation by municipalities. Many poor people are also not informed about their rights, and laws and programmes aimed at enabling them to have access to water. As a result, they have no way of claiming their water rights.

Most rural-based farm workers rely on the permission of farm owners to gain access to water supplies, and this contributes to a relationship of dependence.

Some barriers identified by poor people in gaining access to safe water include:

- Inadequate and unreliable infrastructure and services.
- Affordability of the services.
- Pollution and poor quality of water supplies.
- The special problems experienced by rural women and children.
- The attitudes of some local governments and traditional leaders.
- Privatisation of providing water services.

10.3

Your water rights in the Constitution

10.3.1 The right of access to sufficient water

Section 27(1)(b) of our *Constitution (Act 108 of 1996)* recognises the right of everyone to have “access to sufficient water”.

The State must take reasonable legislative and other steps, within its available resources, to achieve the “progressive realisation” of this right.

Section 28(1)(c) of the Constitution also gives children the right to basic nutrition.

For more on progressive realisation, see Chapter 1 on page 38.

10.3.2 Duties of the State

Section 7(2) of the Constitution sets out the specific duties of the State to “respect, protect, promote and fulfil” the right of access to water.

- *The duty to respect* means that the State must stop companies and people from preventing or impairing a right. For example, disconnecting water supply without a justifiable reason is a breach of this duty.
- *The duty to protect* means that the State must take positive action to protect people from violations of their rights by private actors. For example, the State must regulate a private water service provider.
- *The duty to promote* means that the State must ensure that individuals are informed and aware of how to exercise their rights.
- *The duty to fulfil* means that the State must deliver water services to the people by facilitating or providing it directly, including a duty to provide water to individuals or groups who cannot afford it. The free basic water policy is an example of the duty to fulfil the right to water.

The State also has the duty to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of this right. For example, if the Municipality of Cape Town developed a policy to privatise water services, this policy could be declared ‘unreasonable’ if poor people cannot afford it. This kind of policy could be set aside because it does not provide for people who are desperate and poor.

For more on the reasonableness test, see page 32.

10.3.3 Duties of different spheres of government

Providing water services falls within the shared mandate of all three spheres of government – national, provincial and local governments. All these have different and overlapping powers and duties around water resources and services.

For example, national government must manage and conserve South Africa’s water resources. The *National Water Act 36 of 1998* is the main law that directs the Government to ensure that the country’s water resources are managed, used, protected and developed in a sustainable way.

Water management is closely related to environmental issues and pollution control that fall within the joint powers of national and provincial government. These issues have to be dealt with in the spirit of cooperative government under the Constitution.

Some of the important functions of local government under the Constitution include the delivery of water supply and sanitation services. Water delivery and sanitation services by local government include domestic wastewater and sewage disposal systems. National and provincial governments must monitor, support and build the capacity of local government to fulfil this important function of providing access to water services. It is also the responsibility of the national Government to set national standards for the delivery of water services. This is mainly done through the *Water Services Act 108 of 1997*.

For more on the National Water Act, see page 363.

For more on the Water Services Act, see page 365.

The Department of Water Affairs and Forestry is the main organ of State responsible for water services. However, water management is also closely related to the activities of other government departments dealing with areas such as housing, land use, industrial development and mines.

10.3.4 Linking water rights to other rights

As water is very central to our lives, access to water can be claimed as a right linked to a broad range of other rights. For example, the rights to food and water are very closely linked. While water is essential for nutrition and to avoid malnutrition, access to water is also essential for food production.

We have seen how water and health are also closely linked. The *White Paper on Water Policy for South Africa* (1997) highlights this link:

“Access to sufficient, affordable, clean water for hygiene purposes should be seen as part of the primary health care service.”

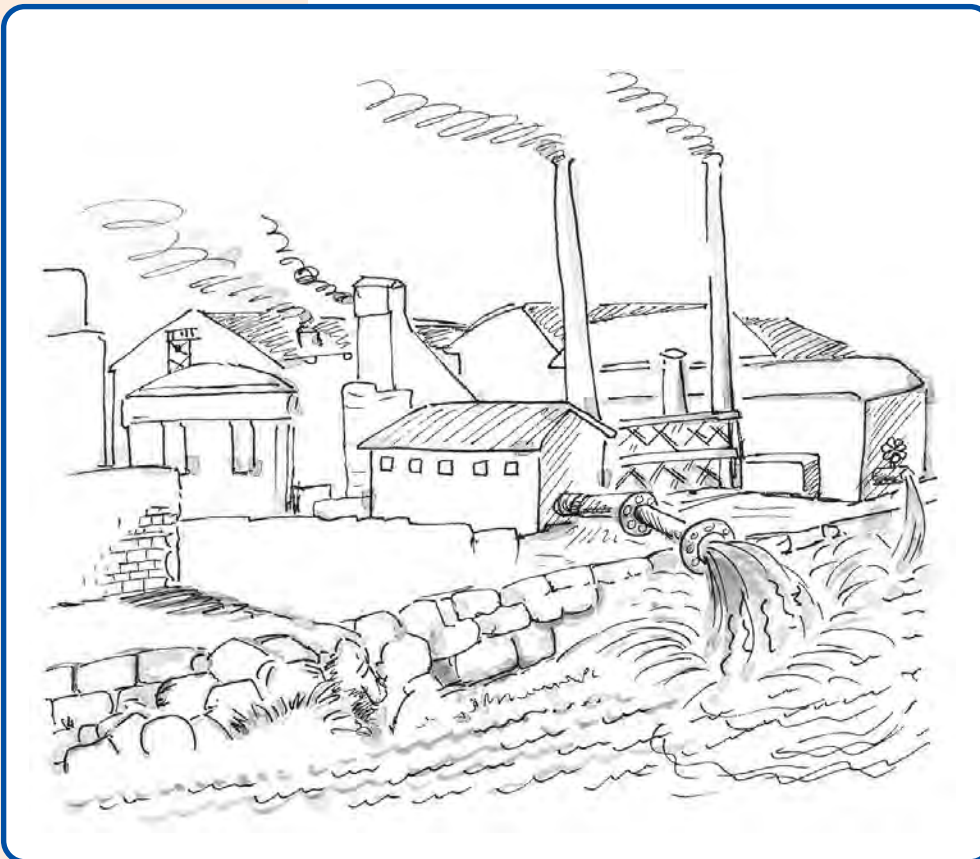
Paragraph 2.1.8

Water is also important for enjoying the right to housing. The Constitutional Court highlighted the close connection between water and housing in the 2000 case of *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom case). The Court decided that housing:

“...requires available land, appropriate services such as the provision of water and the removal of sewerage” *Paragraph 35 of judgment*

The environmental rights protected in the Constitution are closely related to the

right of access to sufficient water. The environmental rights place duties on the State to prevent pollution and ensure conservation of South Africa’s scarce water resources.



Land rights

As we have seen, access to our water resources has historically depended on having access to land. The right of equitable access to land is thus also important for accessing water rights.

COURT CASE



A WIDE INTERPRETATION OF EVICTION

In the 1998 case of *Ndhladhla and Others v Erasmus* and the 1999 case of *Van der Walt and Others v Lang and Others*, the Land Claims Court decided:

- Restricting occupation of or use of land may be an “eviction” under section 1 of both the *Land Reform (Labour Tenants) Act 3 of 1996* and the *Extension of Security of Tenure Act 62 of 1997* (ESTA).
- Restricting access to water for domestic use or for cultivating crops and watering livestock may be considered as an eviction that will have to be justified under these Acts.

Equality and human dignity

Other related rights are the rights to equality and human dignity protected as central values in our Constitution. Some of the main goals of the Government’s water policy are to:

- Ensure equitable access by all South Africans to the nation’s water resources.
- End discrimination in access to water on the basis of race, class or gender (*White Paper on National Water Policy for South Africa, 1997, paragraph 2.1.4*).

South Africans in poor communities often suffer a number of indignities arising out of poverty. Wilson Mhana told the National Speak Out on Poverty Hearings in the North West Province:

“People are starving. There is no work and no water. The gardens fail, and people eat rotten vegetables. I teach cooking and nutrition in adult schools. But people are too poor to buy fresh food.”

Poverty and Human Rights, Report, 1998, 12

COURT CASE



UNFAIR DISCRIMINATION AND CHARGES FOR WATER SERVICES

In the 1998 case of *City Council of Pretoria v Walker*, the Constitutional Court permitted a ‘flat rate’ system of levying service charges for water and electricity by a local authority in disadvantaged areas (previously ‘black’ group areas). The Court said that using this system instead of the consumption-based system used in previously ‘white’ areas was not unfair discrimination in the particular circumstances of the case (*Paragraphs 57–68 of judgment*).

10.4

Guides to interpreting your water rights

South African case law and legislation, and guidelines from international law, help us interpret our constitutional water rights.

10.4.1 South African law

a) Case law

COURT CASE



ACCESS TO RIGHTS AND SERVICES

In the Grootboom case, the Constitutional Court decided that the right of access to housing means something more than simply providing shelter. Rather, this right guarantees access to shelter and all services connected to the enjoyment of shelter, such as electricity, sanitation, water and land. Thus, the right of access to water guarantees not only access to water as a physical good, but also access to all services linked to providing water, such as sanitation.

Although there has been an increasing amount of case law on socio-economic rights in South Africa, little of this has focused on the right of access to sufficient water. Thus, in order to understand this right, we must be guided by the existing South African case law relating to other socio-economic rights.

The Grootboom case and the 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case) also help explain the meaning of the terms “progressive realisation” and “availability of resources”.

They also define the ‘reasonableness test’ for measuring the State’s compliance with its duties in relation to socio-economic rights. The meaning of these concepts applies directly to the right to water.

For more on progressive realisation and the availability of resources, see Chapter 1 on pages 38–39.

b) Legislation

Statutory law also provides specific protection of the right to water.

EXAMPLE



WATER SERVICES ACT

The Water Services Act protects the right to basic water supply and basic sanitation. Section 1(iii) of the Act defines “basic water supply” as:

“The prescribed minimum standard of water supply services necessary for the reliable supply of a sufficient quantity and quality of water to households, including informal households, to support life and personal hygiene.”

The Act says that water service institutions must give preference to providing a basic water supply and basic sanitation to its existing consumers if they are unable to meet the requirements of all those consumers. It also sets out the procedure and conditions for disconnections of water supply.

We can also find out the meaning of the right of access to water through key definitions given in various Acts:

- “Eviction” has been defined in ESTA to include depriving people against their will of residence on land, or the use of land, or access to water that is linked to a right of residence in the Act.
- The Land Reform (Labour Tenants) Act defines “eviction” as including deprivation of a right to occupy or use land. “Use of land” includes access to water for domestic use or for cultivating crops and watering livestock.

Based on this broad definition of eviction, it may be possible for farm workers or tenants to say that they have been unlawfully evicted from land when they are not allowed to water their cattle from a nearby stream, or to draw water from their employer’s borehole.

10.4.2 International law

a) The ICESCR

Although the main international treaty on socio-economic rights, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), does not directly recognise the right to water, this right is closely linked to other rights.

The UN Committee on Economic, Social and Cultural Rights (CESCR) monitors implementing the ICESCR. The CESCR has stated in *General Comment No. 15 on the Right to Water* that this right is indirectly protected in article 11 of the ICESCR. This is because article 11 recognises the right to an adequate standard of living, including adequate food, clothing and housing, and other rights such as the right to equality, health and human dignity.

General Comment 15 gives a comprehensive definition of the right to water, its meaning and content, and the duties arising from the right to water. It is a very important guide to interpreting our Constitution.

GUIDELINES



GENERAL COMMENT 15

The right of access to water has four elements:

1. *Physical access* – water, water facilities and water services must be within physical reach for all people.
2. *Economic access* – water, water facilities and water services must be affordable for all.
3. *Non-discrimination* – water, water facilities and water services must be accessible to all without discrimination.
4. *Information access* – information on water must be accessible to all.

Water, water facilities and water services must be adequate for human dignity, life and health. *Adequacy* means:

- The water supply for each person must be sufficient and continuous for personal and domestic uses, including drinking, personal sanitation, washing of clothes, food preparation, and personal and household hygiene.
- The quantity of water available for each person must be in line with the World Health Organisation (WHO) guidelines.
- Water for personal and domestic use must be safe and free from impurities, micro-organisms and other kinds of contamination.

b) Other international documents and bodies

International treaties directly recognise the right to water:

- The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW, 1979) places a duty on States to ensure that women in rural areas have the right “to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications” (*article 14(2)(h)*).
- The *Convention on the Rights of the Child* (CRC, 1989) says States have a duty to implement children’s right to health through “the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution” (*article 24(2)(c)*).
- The *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (2003) says that women have a right to nutritious and adequate food. States must therefore take steps to “provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious foods” (*article 15*).

A range of declarations and other standards also recognise access to water as a right, including:

- The *Mar del Plata Declaration* of the 1977 United Nations Water Conference.
- The *UN Principles for Older Persons*, 1991.
- The *Dublin Statement on Water and Sustainable Development*, 1992.
- The *Programme of Action of the 1994 International Conference on Population and Development*.

Specialised bodies of the United Nations, particularly the WHO and the United Nations Children’s Fund (UNICEF), have established important standards and guidelines that can assist in giving meaning to the right of access to sufficient water.

EXAMPLES



WATER STANDARDS

- The WHO estimates 20 litres a person each day is a minimum to maintain life. This amount can cover consumption, hand washing and food hygiene, but not laundry and bathing.
- To assure all personal and food hygiene, the minimum amount of water needed for domestic use is 50 litres a person each day.
- The water supply must be located “within a reasonable distance from the household”, meaning not more than 200 metres from the household.

WHO: *Domestic Water Quantity, Service Level and Health*, 2003, 25

For more on international law in interpreting our Constitution, see Chapter 3 on page 111.

10.5

Policies, legislation and programmes to implement your water rights

10.5.1 Policies

a) **White Paper on Water Supply and Sanitation**

In 1994, the Government adopted a *White Paper on Water Supply and Sanitation*, focusing on broadening access to water supply and sanitation services.

In November 1996, after a process of wide consultation with interested role players by the Department of Water Affairs and Forestry, the Cabinet approved a set of Fundamental Principles and Objectives for a New Water Law in South Africa. These principles are very different from the approach to water rights in apartheid South Africa.

EXAMPLES



PRINCIPLES FOR A NEW WATER LAW

- *Private ownership of water resources and the 'riparian principle' are done away with.*
- *The national Government will be the 'public trustee' of the nation's water resources. It must thus ensure that water resources are managed in a sustainable and equitable way for the benefit of all people.*
- *The development and supply of water resources must be managed in a way that respects environmental rights.*
- *Apart from the right to use a water resource to meet basic human needs, all other uses of water will have to be authorised by the Government through a system of licensing.*
- *To create greater local participation in water management, the Minister of Water Affairs and Forestry will give this responsibility to a local catchment or regional level where this is possible and suitable.*

b) **White Paper on Water Policy**

In its *White Paper on a National Water Policy* (1997), the Government committed itself to a policy and law-making agenda that would implement these principles.

The goals of the Department of Water Affairs and Forestry are captured in its slogan:

"Some, for all, for ever:
access to a limited resource (some)
on an equitable basis (for all)
in a sustainable manner, now and in the future (for ever)."

This White Paper formed the basis for drafting the Water Services Act.

c) **White Paper on Basic Household Sanitation**

In 2001, the Government adopted the *White Paper on Basic Household Sanitation*. This policy highlights the link between sanitation and water, and clearly shows that water is very critical to maintaining a clean environment and healthy living conditions. Its particular focus is on “the provision of a basic level of household sanitation to mainly rural communities and informal settlements”.

The White Paper defines the principles of providing sanitation:

- Sanitation is a basic human right and all South Africans must have access to sanitation services.
- Water has an economic value, and sanitation improvement is thus a primary responsibility of households.

The sanitation policy identifies strategies for improving sanitation such as:

- Facilitating the participation of communities.
- Promoting health and hygiene awareness and practices.
- Developing and using local resources.

The policy defines the duties of different role players in improving sanitation, such as householders, communities, national, provincial and local governments, the private sector and non-governmental organisations (NGOs).

Under this policy, municipalities must provide access to a free basic level of sanitation to poor households. The amount of the free service must be based on the minimum technical standards, and health and hygiene promotion standards, that will satisfy the elements of the definition of a basic level of service.



d) **National Water Resource Strategy**

In September 2004, the Government adopted the first edition of the *National Water Resource Strategy* (NWRS). This development is in keeping with CESCR's General Comment 15 that requires States to "adopt and implement a national water strategy and plan of action addressing the whole population", and to review it periodically (*paragraph 37(f)*).

The NWRS describes how water in South Africa will be used, managed, conserved and developed. The strategy is reviewed every five years.

Key features of the NWRS are:

- To ensure that "water is used to support equitable and sustainable social and economic transformation and development".
- To ensure that potable water and safe sanitation are accessible by all people, including the poor and previously disadvantaged people.
- To highlight the need for water conservation and protecting the environment.
- To provide for subsidising previously disadvantaged water users.
- To delegate powers and responsibilities of the Department of Water Affairs and Forestry to catchment management agencies and water user associations.

For more on new structures under the National Water Act, see pages 364–365.

e) **Draft White Paper on Water Services**

The Government is currently developing a new policy on water services. In 2002, it issued the Draft White Paper on Water Services for public comment. The new White Paper is being formulated because many changes have taken place since publishing the White Paper on Water Supply and Sanitation in 1994.

The new Draft White Paper covers both water services and sanitation. Thus, it is also meant to support the White Paper on Basic Household Sanitation. It will provide a basis for reviewing the Water Services Act and other legislation relating to water services. At the time of writing, the Draft White Paper had not been finalised.

Key features of the Draft White Paper on Water Services are to:

- Provide for a basic water supply – a minimum of 25 litres of potable water a person each day, or 6 000 litres a household each day, within 200 metres of a household.
- Provide basic sanitation services – appropriate health and hygiene education, and an acceptable, safe and reliable toilet.
- Set out goals and targets for water services, such as:
 - Water and sanitation services should be provided equitably, affordably, effectively, efficiently and sustainably.
 - Water services authorities are accountable, have adequate capacity to make wise choices on water service providers, and are able to effectively regulate water service provision.
 - The price of water and sanitation should reflect the fact that they are social and economic goods.
 - Water and sanitation services are effectively regulated.

- Set out social, economic and institutional principles to govern water services.
- Define the role of all three spheres of government in providing water and sanitation services.
- Set out a framework for monitoring and regulating the provision of water and sanitation services.

f) **Draft Position Paper for Water Allocation Reform**

The Department of Water Affairs and Forestry is currently developing a policy on water allocation. According to the *Draft Position Paper for Water Allocation Reform in South Africa* released in January 2005 (*Towards a Framework for Water Allocation Planning*), the main aim of this policy is to promote beneficial use of water in the best interests of all South Africans. Its aims are to promote equity in accessing water, address poverty, generate economic growth and create jobs.

GUIDELINES



WATER ALLOCATION REFORM

The policy establishes seven guidelines for allocating water:

1. The water allocation process must address past imbalances in water allocation to historically disadvantaged individuals.
2. The water allocation process must be supported by capacity development programmes to improve livelihoods and productive and responsible use of water.
3. The water allocation process must contribute to black empowerment and gender equality.
4. The water allocation process must respond to domestic national planning initiatives (local, provincial and national), and to regional and international initiatives.
5. The water allocation process must be undertaken in a fair, consistent and reasonable manner, and existing users must not be limited arbitrarily.
6. The water allocation process must promote water resources by promoting developmental and environmental objectives.
7. Innovative mechanisms will be developed that reduce the administrative burden of authorising water use, but support productive and responsible use, and effective management.

There is a new process of compulsory licensing. A compulsory licence will give government the power to take control of a water resource where there is more demand for water than is available for allocation. This will ensure that water is distributed fairly and equitably. It will also enable government to redress past imbalances in access to water.

g) Privatisation and corporatisation

Water services in South Africa are provided by State departments, private companies, or jointly by State departments and private companies. Policies and law governing this process are:

- The *White Paper on the Transformation of the Public Service*, 1995.
- The *White Paper on Municipal Partnerships*, 2000.
- The *Strategic Framework for Delivering Public Services through Public-Private Partnerships*, 2000.
- The *Local Government: Municipal Systems Act 32 of 2000* (Municipal Systems Act), as amended in 2003.

The process where private bodies are allowed to play a part in providing water services is called *privatisation*. The Government prefers to use the term 'restructuring', but there is no real difference between the two. Although water services in most municipalities have continued to be provided by State departments, privatisation has taken place in a number of municipalities.

EXAMPLES



PRIVATISATION

- *The delivery of water and sanitation services in three municipalities of the Eastern Cape – Queenstown, Stutterheim and Fort Beaufort – were the first basic municipal services to be privatised between 1992–4. Lyonnaise Water Southern Africa (restructured in 1996 as Water and Sanitation Services of South Africa) was the private company that won the relevant management contracts.*
- *In 1999, the provision of water services in Nelspruit was contracted out to Bewater, a British-based multinational company, for 30 years.*
- *Also in 1999, the provision of water and sanitation services in Dolphin Coast and Durban was contracted out to the multinational companies SAUR International and Bewater.*
- *In 2001, Water and Sanitation Services of South Africa won management contracts to provide similar services in Johannesburg.*

A new form of privatisation: corporatisation

Another kind of privatisation currently in use in South Africa is *corporatisation*. The cities of Cape Town, Pretoria, Johannesburg and Durban, for example, have adopted this form of providing water. Corporatisation is a process when a government department is turned into a public company with the aim of letting it function as a commercial body. The State keeps ownership, control and management of the assets, but the new body operates according to business principles.

Responses to privatisation

Many civil society organisations and labour groups, including COSATU, the Alternative Information and Development Centre and the Anti-Privatisation Forum, have criticised the privatisation policy. They argue that:

- Privatisation has led to higher prices for water and thus more disconnections, job losses and the creation of private monopolies.
- Privatisation does not lead to more access by poor people to the privatised service, but that the real beneficiaries are the big companies.

Does privatisation violate human rights?

The Constitutional Court in the Grootboom case said that the State has the duty to empower other actors to provide services to realise socio-economic rights. This statement means that privatisation, in itself, does not violate the Constitution, and can be seen as a way of giving effect to socio-economic rights.

However, privatisation does not do away with the human rights duties of the State. The State still has the duty to respect, protect, promote and fulfil the right to water and all other rights involved when it decides to privatise providing water. These duties must be complied with before, during and after the privatisation process.

The role of local communities in the privatisation process

While undertaking privatisation, the State must observe the Constitution and other laws, including the Municipal Systems Act. The Municipal Systems Act sets out the procedure to be followed when privatising municipal services. An amendment to this Act, *Act 44 of 2003*, introduced a detailed procedure for privatisation, including recognising the role of local communities in the privatisation process.

Local communities now have the right to record their views on whether a municipality must privatise a service or not. They also have the right to register their views on the content of the contract between the State and the private service provider, and to demand accountability from the relevant authorities.

Community participation in the privatisation process is important because it can highlight important concerns that need to be addressed before the decision to privatise can be made.

However, the Municipal Systems Act does not create a monitoring procedure, including local communities, once the privatisation process has been completed.

GUIDELINES



COMMUNITY PARTICIPATION IN THE MUNICIPAL SYSTEMS ACT

1. Before a municipality begins to explore whether to provide a service through an external body, it must give notice to the local community of its intention to do this.
2. Once the municipality decides to assess different service delivery options, it must consider the views of the local community and organised labour.
3. Before a municipality enters into a service agreement for a basic municipal service, it must establish a mechanism and programme for community involvement and distributing information on the service delivery agreement.
4. Municipalities have the duty to communicate the contents of the service agreement to the local community through the media.
5. Once the agreement is reached and signed, the municipality must make copies of the agreement available at its offices for public inspection during office hours. It must give notice to the media of:
 - The details of the service that will be provided under the agreement.
 - The name of the service provider.
 - The place where and the period for which the copies will be available for public inspection.

h) **Free basic water policy**

The Government adopted the free basic water policy in June 2001, based on regulations under the Water Services Act. It started implementing this policy in July 2001.

The plan was that, by June 2005, the policy would be implemented in all municipalities in the country. The amount of free basic water is 25 litres a person each day, or 6 000 litres a household each month.

Many writers have criticised this policy arguing that:

- The amount of free water provided is too little.
- The current pricing system means that consumers are charged at a high rate after the free block of water. As a result, the impact of the free water policy is insignificant.

However, this policy can be seen as one significant step towards realising the right to water. The duties of the State on the right to water are continuous, as the State must realise this right progressively. This means that the amount of free basic water should not remain static. The State should increase it over time so that poor people have access to sufficient water as required by the Constitution.

10.5.2 **Legislation**

a) **The National Water Act**

Together with the Water Services Act, the National Water Act implements the new water policies and principles.

The main aims of the National Water Act are to:

- Meet basic human needs of present and future generations.
- Promote equitable access to water.
- Facilitate social and economic development.
- Reduce and prevent pollution of water resources.

The National Water Act establishes the national government as the *public trustee* of the nation's water resources. This means that the Government must ensure that water resources are conserved and used so that the public's water needs will be met now and in the future. The Act says that most water use must be authorised through a system of licensing by the Minister of Water Affairs and Forestry.

Licensing for water use

The National Water Act provides for rules on licensing. A person must apply for a licence to use water. However, some uses of water do not need a licence, for examples, the taking of water for:

- Reasonable domestic use.
- Gardening that is not for commercial purposes.
- The watering of animals that graze on a person's land.

Water for personal or community use may be taken from any water resource that is situated on or forms the boundary of the land owned or occupied by a person if the use is not too much. This right is very important for facilitating access to water by disadvantaged communities, especially in rural areas.

Water pricing

The Minister has power under the National Water Act to establish, after public consultation, a pricing strategy for water use charges:

- These charges are to fund the costs of water resource management, and can also be used to achieve the equitable and efficient allocation of water.
- This pricing policy may vary according to geographic area and water use, depending on socio-economic conditions and circumstances. This will assist in making water more affordable for disadvantaged areas and for groups such as emerging black farmers.

New structures

The National Water Act establishes a number of new structures. These are important to promote community participation in decisions on managing and using water.

Catchment Management Agencies

Catchment Management Agencies (CMAs) are responsible for water resource management. The purpose of establishing these agencies is to delegate water resource management to the regional or catchment level, as well as ensuring that local communities are involved in water management. The Minister, local communities and other interested role players may establish a CMA.

Water User Associations

The Minister may also establish Water User Associations (WUAs). WUAs operate at local level and are cooperative associations of individual water users, who wish to undertake water-related activities for mutual benefit. Thus unlike CMAs, the main function of WUAs is not water management. The WUAs can be a useful vehicle for community members to join together for joint benefit in using or conserving water.

Water Tribunal

The Water Tribunal is an independent body that hears appeals against certain decisions taken by a responsible authority, catchment management agency or water management institution. Tribunals encourage solving disputes by mediation and by negotiation. Thus, you may appeal against decisions of a Water Tribunal to the High Court only on points of law.

b) The Water Services Act

The Water Services Act is the other main law for implementing the constitutional right of everyone to have access to sufficient water. One of the main aims of the Act is to give effect to:

“The right of access to basic water supply and the right to basic sanitation necessary to secure sufficient water and an environment not harmful to human health or well being.” *Preamble to Act*

Regulation 3 of the *June 2001 Regulations* under this Act provide that the minimum standard for basic water supply is:

“The minimum of potable water of 25 litres per person per day or six kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.”

The Government has adopted this minimum amount as the basis for its free water policy. It has also been criticised for being too little.

Development plans

The Act also provides for water service development plans. It imposes a duty on water service authorities to take reasonable measures to realise the right of access to basic water supply and basic sanitation. A *water service authority* is a municipality, including a district or rural council, responsible for ensuring access to water services.

Every water service authority must prepare and report on the implementation of a water service development plan. The plan must set out a five-year implementation programme to improve access to water supply and sanitation. The public must be allowed to comment on this plan.

Disconnections

Many people experience disconnections of water for non-payment of bills. Does the law permit disconnections of water for personal and domestic use because of non-payment? The answer is yes.

See the Mazibuko case challenging the constitutionality of this restriction on page 367.

See similar comments on the free water policy on page 363.



However, the Water Services Act places some restrictions on the right of a service provider to discontinue water services on grounds of non-payment. Section 4(1) of this Act says a service provider must set conditions for providing water services, including the circumstances under which water services may be limited or discontinued, and procedures for limiting or discontinuing water services.

GUIDELINES



LIMITING OR DISCONTINUING WATER

Section 4(3) of this Act says that procedures for limiting or discontinuing a water service must:

- Be fair and equitable.
- Provide for reasonable notice of intention to limit or discontinue water services and for an opportunity to make representations, unless:
 - Other consumers would be prejudiced, or
 - There is an emergency situation, or
 - The consumer has interfered with a limited or discontinued service.
- Not result in a person being denied access to basic water services for non-payment, where that person proves (to the satisfaction of the relevant water service authority) that he/she is unable to pay for basic services.

Section 4(3) thus directs that a water service may not be disconnected without reasonable notice. It may also not be discontinued where a person satisfies the local authority that he/she is unable to pay.

These provisions are important safeguards for people who cannot afford water services. It is therefore important to always check whether you have an unpaid bill or not. If you do, you are supposed to go to the relevant authority to explain that you cannot afford to pay for the bill. The relevant authority should then not discontinue your access to water.

COURT CASE



RESPECTING EXISTING ACCESS TO WATER

In the 2002 case of *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, the High Court examined the Water Services Act, together with the right to water under the Constitution. The Court decided that, when a local authority disconnects an existing water supply to consumers, this is a breach of its constitutional duty to respect the right of existing access to water.

Prepaid meters

Prepaid meters are used more and more these days by municipalities as a credit control method. These meters have the effect of discontinuing a water supply automatically after the credit for a given quantity of water expires. South African courts have not ruled on the constitutionality of using these meters, especially against poor people.

However, it is clear that prepaid meters effectively get around the procedures for discontinuing a service set out in the Water Services Act. In other words, these meters discontinue water supply without giving notice and without allowing the consumer a chance to show that he/she cannot pay.

COURT CASES



CUTTING WATER SUPPLY

In the 2006 case of *Lindiwe Mazibuko and Others v The City of Johannesburg and Others* (Mazibuko case), the applicants are challenging the decision of the City of Johannesburg to:

- Limit free basic water supply to six kilolitres for each household a month.
- Discontinue in Phiri, Soweto, a full-pressure, unmetered, uncontrolled volume water supply and to install a controlled volume water supply system operated by means of a prepaid water meter.

The applicants are all unemployed and living in poor conditions. They are acting for themselves and on behalf of all residents of Phiri who are similarly affected by the decision. The case was started by the Coalition Against Water Privatisation and is supported by the Centre for Applied Legal Studies.

The Mazibuko case will set a precedent on the legality of prepaid meters against the backdrop of the Water Services Act that sets out procedures to be followed before a disconnection of water supply can take place. Crucially, it will revive the debate about the role of the 'minimum core obligations' concept in implementing socio-economic rights in South Africa.

In a 1999 case in the United Kingdom, *R v Director General of Water Services Ex parte Lancashire CC*, the Water Industry Act of 1991 had similar provisions to South Africa's Water Services Act. A challenge was made in court to make the relevant water supplier remove and not install any further prepaid water devices in domestic premises in each of the applicants' areas.

The Court decided:

- The automatic operation of closing the valve disconnects water supply to the premises within the meaning of the legislation.
- The use of these prepaid devices went against the Act, because they cut water supply without observing the notice requirements or procedural provisions in the Act protecting individuals, who could not afford or who disputed their bills.

For more on 'minimum core obligations', see Chapter 1 on page 39.

National standards

Under the Water Services Act, the Minister of Water Affairs and Forestry may set national standards for the delivery of water services. Everyone must follow these standards.

In setting these standards, the Minister must consider a range of factors, including:

- The need for everyone to have a reasonable quality of life.
- Equitable access to water services.
- Social equity.
- The needs and economic circumstances of different users of water services and different geographical areas.

Water Services Committees

The Minister has power to establish a Water Services Committee (WSC) only when a relevant local authority is unable to supply water services effectively to consumers and potential consumers in a particular area. The WSC must have community representatives as members. Also, the WSC must consult the community before setting conditions for supplying water services.

Water Boards

The main function of Water Boards is to supply water services to other water service institutions within the Water Board's water services area. Some of the Water Board's powers include setting and enforcing general conditions, including tariffs, for providing water services.

Monitoring and information

The Act sets out steps for monitoring water services and intervention by the Minister or the provincial government where there are problems with providing water services. The Act also establishes a national water services information-gathering and information-distribution system.

10.6

Protecting and advancing your water rights

We have focused on the National Water Act and the Water Services Act. These laws create a number of opportunities for groups working in the area of water rights to protect and advance access to sufficient water for all.

10.6.1 Guidelines: Using the National Water Act

GUIDELINES



USING THE NATIONAL WATER ACT

For more on access to information, see Chapter 2 on page 57.

1. Write to the Minister of Water Affairs and Forestry or the relevant CMA when a land owner or industry is polluting a water resource and request them to take action under the Act. For example, they are polluting by discharging harmful waste products into a river.
2. If you are a member of a disadvantaged group (eg a small farmer, a rural woman), you can request that you are given special consideration in the issuing of licences for water use. You can also request financial assistance from the Minister for making a licence application.
3. If you are unhappy with a licensing decision or other water resource decisions under the Act, you can appeal to the Water Tribunal. You can also request mediation for any dispute under the Act.
4. You can make comments on any proposed water use charges that the Minister plans to set. This will ensure that these charges are equitable by considering the economic circumstances of disadvantaged water users.
5. If your organisation wants to monitor the protection of water resources and access to water, you can request access to the information collected by the Government in the national monitoring and information systems that it must set up under this Act.

10.6.2 Guidelines: Using the Water Services Act

GUIDELINES



USING THE WATER SERVICES ACT

1. You can make representations (eg letters, petitions) and lobby the Minister of Water Affairs and Forestry to ensure that the Minister prescribes an adequate quantity and quality of water supply services.
2. When people are too poor to pay for water services, you can assist them to make representations to the relevant local authority, proving that they are unable to pay for water services.
3. If a local authority unreasonably refuses to consider these representations and cuts off or limits their water supplies, you may be able to challenge this decision in court. You can also request the South African Human Rights Commission (SAHRC) to assist the affected people.
4. You can lobby and carry out campaigns for setting national standards on affordable tariffs for water services.
5. Your NGO or community organisation can monitor and make sure that water service providers follow national standards for the delivery of water services and the setting of tariffs.
6. You can comment on the draft water service development plan prepared by your local authority to ensure that it includes effective steps and reasonable timetables for improving access to water services in your area. Your community can monitor the implementation of this plan.
7. You can inform the Minister of Water Affairs and Forestry or the Provincial MEC that a local authority has not performed its duties under the Water Services Act. This may lead to the provincial or national government taking over the functions of the local authority.
8. You or your organisation can request information on the delivery of water services from the monitoring and national information systems.
9. Remember there can also be community participation in some of the bodies set up under the National Water Act and the Water Services Act, eg CMAs and WSCs.

Discussion ideas



TALKING POINTS

Break into small groups to discuss different ways for your NGO or community to deal with these situations:

- 1. A local authority cuts off all water supplies to a community. Many community members cannot afford water tariffs charged by the municipality.*
- 2. A farmer refuses to let his farm workers draw water from a local dam or borehole for domestic use and watering livestock.*
- 3. A person living in a wealthier residential area challenges the reduced water tariffs paid by people in poorer residential areas, arguing that the setting of different tariffs is unfair discrimination.*
- 4. You discover that your local authority plans to enter into a contract with a private company to provide water services. You are concerned that this will make water services too expensive.*
- 5. How can your organisation go about trying to improve the quality and quantity of water services in your area? Who can you approach for assistance?*

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Social security rights

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KEY WORDS

Access/Accessible	Able to get, have or use, eg access to social security.
Administrative action	When government officials have to make a decision that affects your rights, or have to take an action that will affect your rights. This includes making a decision to grant or reject your application for a social grant. All these actions or decisions must be done within a reasonable time period.
Advocacy	Mobilising and working for change, eg in policy.
Applicant	Person applying for a grant.
Appropriate	Suitable, fitting in with needs and conditions.
Assets	The things you own, eg property.
Beneficiary	A person who benefits from something, eg a grant.
CD4 count	A measure of the strength of your immune system – CD4 cells are white blood cells that organise the body's response to viruses like HIV.
Compliance/Comply	Whether or not you obey legislation, procedures or court judgments.
Contributory	When you have to pay in to a social security fund for when you need help, eg Unemployment Insurance Fund (UIF).
Delegate	When you ask someone else to do something for you.
Discretion/ Discretionary	Having the power to do something, eg to give a Social Relief of Distress Grant.
Eligibility criteria	What you need to qualify for a social grant.
Income	The money that you earn or receive.
Means test	How government decides if you have a right to receive a grant – this depends on how much money or property you have.

Non-contributory	When you can get a social assistance grant without having to pay anything towards a fund for it, eg Disability Grant.
Progressive realisation	Steps to improve people's access to socio-economic rights over a period of time.
Regulations	More detailed legal rules made under Acts.
Sliding-scale	Method used in means tests – the amount of money you get depends on what you earn. The more you earn, the smaller your grant can be.
Social assistance	State social grants that you do not have to contribute to, such as the Old Age Pension or the Child Support Grant.
Social grants	The different kinds of social assistance in South Africa, eg Disability Grants and Child Support Grants.
Social insurance	When you give money to a fund that helps you when you are in need, eg UIF or Compensation for Occupational Injuries and Diseases (COIDA).
Social security	State support system for when you cannot afford to look after yourself, including social assistance and social insurance.
Social security rights	The socio-economic rights in the South African Constitution to social security, and for children, the constitutional right to basic social services.
Social services	The welfare services that the State makes available to assist people in especially difficult circumstances, eg children experiencing abuse.
Socio-economic rights	Rights to goods and services that improve the lives of people, such as the right to a house, to health care and to social security.
Unfair discrimination	A policy, law, condition or situation that unfairly disadvantages you, eg because you are a woman, black, gay, living with a disability, or living with HIV.
Violate	Abuse or not respect, eg violating your right to dignity.
Vulnerable groups	People who need special protection, as they may be open to violence, abuse or discrimination, eg women, children, elderly people, or people living with HIV.

11.1

Why is it important to understand your social security rights?

CASE STUDY



GETTING ACCESS TO SOCIAL GRANTS

Sam is 12 years old. He lives in the North West Province with his mother, grandmother and two younger sisters. His grandmother has some land that she used to farm vegetables on. At that time, his grandfather worked in Johannesburg and would send money home for seeds. In good seasons, Sam's grandmother would produce more vegetables than the family needed, and would sell some to other people in the village.

Then Sam's grandfather died. The family became very hungry, and often would go to sleep not knowing what they would eat the next day. One day when Sam was at school, a visitor from the Department of Social Development came to talk to the school. The visitor told them about social grants that the Government paid to people who did not have much money, and who were old or children. She said that Sam's grandmother could get a pension every month, and that Sam's mother could receive a Child Support Grant for Sam and his sisters every month until they were 14.

When the family began to receive the grants, it made such a difference! Now they knew that they would always have food. Best of all, Sam's grandmother was able to buy new tools for farming, and his mother began to grow vegetables again like his grandmother had done.

When our elected representatives were drafting the Constitution of South Africa after the 1994 democratic elections, they agreed that everybody in South Africa should have access to social security to ensure that their needs were provided for. Social security was seen not as charity, but as a right.



Understanding your social security rights can assist you to claim what you are entitled to receive, or help you to receive other social assistance.

11.1.1 What is social security?

Social security is made up of two parts:

- Social assistance (grants)
- Social insurance.

Social assistance	Social insurance
<i>Examples:</i> Old Age Pension, Disability Grant, Child Support Grant	<i>Examples:</i> Unemployment Insurance Fund (UIF), Compensation for Occupational Injuries and Diseases (COIDA – the old Workmen’s Compensation)
<i>Non-contributory</i> – paid by the State from money collected through taxes, such as Value Added Tax (VAT) and Income Tax	<i>Contributory</i> – the worker, the employer and the State contribute to a national fund that pays out when workers who have contributed are unemployed or injured
Can be targeted or universal: <ul style="list-style-type: none"> • <i>Targeted grants</i> go to specific groups of people, like children living in poverty • <i>Universal grants</i> go to everyone, or to all in a certain category, eg all elderly people, no matter how much they earn 	If you are not employed, or doing casual jobs, you will not be able to pay into the fund – so you will not be able to claim money when you are unemployed or injured
Implemented by the Department of Social Development	Implemented by the Department of Labour

Some people also have private pensions that they pay for through their jobs or to an insurance broker. These include pensions, provident funds and retirement annuities.

People can also have private disability insurance and private burial schemes that they buy directly from an insurance broker or the bank. They pay premiums (regular payments) towards the scheme every month.

There is a link between social assistance and the tax system. In our country, some people are rich, while others are not so rich or just poor. Those who earn a lot of money have to pay Income Tax – a part of their wages that they pay back to the State. The employer deducts this automatically and pays it to the State. How much you pay depends on how much money you earn – the more you earn, the more you pay. This is called a *progressive* tax.

In South Africa, we also have Value Added Tax (VAT). This is a flat rate tax of 14% on everything that is not exempt from VAT. This is called a *regressive* tax because everyone has to pay the same amount of VAT on things they buy, however rich or poor they are.

The Government pays for social assistance from these taxes that we pay back to the State. This is known as *redistribution*, because it is mostly paid by rich people to people with less money to make things more equal in our country.

11.1.2 History and current context

During the last 100 years, almost every country in the world has introduced some type of social security to help look after the people living in it. Some countries give more benefits. The countries with the most generous benefits are known as 'welfare states', like Sweden and Norway.

The idea was that everybody would have jobs. Thus social security would only need to be available for people who were not working, either because they had retired (and needed a pension), or they were sick, or temporarily unemployed, but would find a new job within about six months.

The development of social security and social welfare services in South Africa was originally mostly for white people. White people were already advantaged by apartheid. They were more likely to have jobs and did not need pensions from the Government, because they received pensions from their employers.

In 1993, social grants were finally equalised across all race groups, but still not everybody received them. Black African mothers and children in general did not receive grants for children (the old State Maintenance Grant), even though they were often very poor. The Child Support Grant (that paid less money a month) replaced the State Maintenance Grant from 1 April 1998.

While the State Maintenance Grant was available to children up to 18, the Child Support Grant is only paid to children under 14. The Child Support Grant is now received by far more children than the previous State Maintenance Grant. The Child Support Grant was initially only payable for children up to the age of 7, but this has been progressively increased so that children now qualify until they are 14.

Under apartheid, there were many different welfare offices – for each province and old 'homeland', and for each different race group. Not all offices gave the same level of service. Under our new *Constitution (Act 108 of 1996)*, this changed and everybody fell under one national department, although the different provinces administered the grants and other welfare services. The administration of grants in some provinces (eg the Eastern

Cape) has been poor, and this has led to numerous court applications being brought to improve grant administration.

However, from 2006 onwards, all grants will be gradually administered under one national agency called the South African Social Security Agency that will be part of the Ministry of Social Development. Hopefully this will help to resolve some of the problems in the administration of grants at provincial level.

COURT CASE



LEGISLATIVE AND ADMINISTRATIVE MEASURES NOT ENOUGH

In the 2006 case of *Member of the Executive Council: Welfare v Kate* (Kate case), the Supreme Court of Appeal said:

"The establishment by the State of a legislative and administrative structure for the making of social grants and the appropriation of moneys for that purpose together go a long way to fulfilling the State's constitutional obligation but by themselves they are not enough. What is required in addition are reasonable measures to make the system effective. On that score there has been conspicuous and endemic failure in the Eastern Cape for a considerable time ... What is particularly distressing is that there seems to be no end in sight."

Paragraphs 2 and 4 of judgment

The *Chronic Poverty Report* sums up the role of social protection in this way:

“There is now significant evidence that social protection – in combination with other policies and interventions – can enable persistently poor people to escape poverty. It can shore up consumption so potentially irreversible welfare effects (reducing nutrition, avoiding essential medical expenditures or withdrawing children from school) do not occur. It can prevent the erosion of savings and other assets, and help poor people avoid becoming trapped in debt. It also provides the security that permits very poor households to invest in economic activities and human capital... There is emerging evidence that social protection measures can also achieve a more gender neutral distribution of benefits than other development initiatives.” *Chronic Poverty Report 2004–5*, 51

This chapter highlights important aspects of the right of everyone to have access to social security and the right of children to basic social services. Having these rights in the Constitution means that they can be used as a tool to improve the quality of people’s lives. Understanding these rights is the first step in the journey to make them real in people’s lives.

11.2

Your social security rights in the Constitution

Section 27(1)(c) of the Constitution covers the right to social security:

“Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.”

Section 27(2) says “The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right.

Sections 28(1)(b) and (c) of the Constitution say:

“Every child has the right...
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services.”

11.3

Guides to interpreting your social security rights

11.3.1

Reasonable measures and progressive realisation within available resources

To understand what our constitutional social security rights mean, we need to see how the Constitutional Court has interpreted these rights in exploring the meaning of socio-economic rights. Although they do not refer directly to the rights under section 27(1)(c), because other rights (such as housing and health care rights) are worded in the same way, we can use the Court’s judgments on these other rights to understand the right to social security too.

For more information on these cases and the meaning of the State's obligations, see Chapter 1 on pages 31–32.

The cases also set out how children's rights under Section 28 of the Constitution can be interpreted.

The main cases are:

- The 2000 case of *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom case).
- The 2002 case of *Minister of Health and Others v Treatment Action Campaign and Others* (TAC case).

In the Grootboom case, the Constitutional Court said that the State has an obligation to develop a comprehensive and workable plan to meet its constitutional duties. However, the Constitution has three qualifications:

1. The State has to take *reasonable* legislative and other *measures*
2. To achieve the *progressive realisation* of the right
3. *Within* the State's available resources.

11.3.2 Children's rights

The rights of children in Section 28 of our Constitution are different from the other socio-economic rights in two ways:

- The right is phrased more directly – it does not say that “children have the right of access to”, but that they have “the right to”.
- It does not mention “progressive realisation” of the right “within available resources” – originally people thought this meant that children could claim all of the rights at once.

In the Grootboom case, the Constitutional Court decided that the Constitution should be interpreted in this way:

- The main people who should provide for the needs of any child are that child's parents and family.
- Only if the child is removed from the family setting, must the State then provide for the child's needs.

However, the Court in the Grootboom case did mention that this does not mean that the State has no obligations towards children who are being cared for by their families. This point was confirmed in the TAC case, where the Constitutional Court decided that, while parents are the main providers for children in a family setting, if the parents are unable to provide for implementing their children's rights, the State must ensure that the right is protected. This is slightly confusing, especially in South Africa where so many children live in poor households.

Children's rights in general were supposed to be strengthened through a new *Children's Act 38 of 2005*, partly passed by Parliament in December 2005. The original

COURT CASE



THE RIGHT TO WARM BEDDING AND SOCIAL WORK SUPPORT

In the 2006 case of *Centre for Child Law and Others v The MEC for Education and Others*, the Witwatersrand High Court decided that, for children who had been removed from their families and sent to a school of industries, social services included the right to be provided with warm bedding and with social work support.

idea was that the new law would pull together a number of rights, including the legal status of children, their rights to social security and their rights to social services. But the Parliamentary Portfolio Committee insisted on splitting the financial aspects of the law from other aspects of children's law. The final version does not refer to social grants at all.

The precise meaning of *children's rights to social services* in the Constitution has to date not been explained in detail by any court.

11.3.3 International human rights law

We can also use international human rights agreements to guide our understanding of the right to have access to social security. Subsection (2) of sections 26 and 27 of our Constitution is based on Article 2 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* of 1966. South Africa signed the ICESCR in October 1994, but has not yet ratified it.

Article 2 says:

“Each State party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

There is a difference between this wording and the wording of our Constitution. The Constitution says that the State must take “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of this right, instead of saying that the State must use “the maximum of its available resources” as the ICESCR says.

This means that, under the ICESCR, a State would have to prove that it does not have any more resources to devote towards the progressive realisation of the right. In South Africa, the Government just needs to say that it is doing as much as it can, and does not have to prove that it does not have any more resources.

This is a tricky area for the Constitutional Court, since they do not want to be seen dictating to government how it should use its money by commenting on the economic and tax policies of the State. Many civil society groups argue that, instead of cutting the amount of Income Tax that people have to pay on their salaries, the State should keep taxes higher to give it more money for social spending. This will speed up realising socio-economic rights and improve the lives of people who are poor.

11.4

Policies and programmes to implement your social security rights

This part deals with key social security policies and programmes, while the next part (11.5) will cover social security legislation in a practical way when discussing the detail of *How can you receive social security?*

For more on the meaning of signing and ratifying agreements, see Chapter 3 on page 93.

11.4.1 Policy guiding social security

The policy framework of the Department of Social Development is set out in the 1997 *White Paper for Social Welfare*. This policy document was used to draft the *10-Point Plan* of the Department, adopted in 2000 for its work until 2005.

<p>1. Rebuilding of family, community and social relations</p>	<p>“ We will restore the ethics of care and human development in all welfare programmes. This requires an urgent rebuilding of family, community and social relations in order to promote social integration.</p>
<p>2. Integrated poverty eradication strategy</p>	<p>We will design an integrated poverty eradication strategy that provides direct benefits to those in greatest need, especially women, youth and children in rural areas and informal settlements.</p>
<p>3. Comprehensive social security system</p>	<p>We will develop a comprehensive social security system that builds on existing contributory and non-contributory schemes and prioritises the most vulnerable households.</p>
<p>4. Violence against women and children, older persons and other vulnerable groups</p>	<p>We must respond to brutal effects of all forms of violence against women, children, older persons and other vulnerable groups, as well as design effective strategies to deal with perpetrators.</p>
<p>5. HIV/AIDS</p>	<p>Our programmes will include a range of services to support the community-based care and assistance for people living with HIV/AIDS. Particular attention will be given to orphans and children living with and affected by HIV/AIDS.</p>
<p>6. Youth development</p>	<p>We will develop a national strategy to reduce the number of youth in conflict with the law and promote youth development within the framework of the National Crime Prevention Strategy and in partnership with the National Youth Commission.</p>
<p>7. Accessibility of social security services</p>	<p>We will make social welfare services accessible and available to people in rural, peri-urban and informal settlements, and ensure equity in service provision.</p>
<p>8. Services to people with disabilities</p>	<p>We will redesign services to people with disabilities in ways that promote their human rights and economic development. We will work with people with disabilities to ensure that their needs are met without further marginalising them.</p>
<p>9. Commitment to cooperative governance</p>	<p>All our work must be based on a commitment to cooperative governance that includes working with different spheres of government and civil society.</p>
<p>10. Train, educate, re-deploy and employ a new category of workers in social development</p>	<p>We must train, educate, re-deploy and employ a new category of workers in social development. This includes the re-orientation of social service workers to meet the challenges of South Africa and link these to regional and global demands.”</p>

11.4.2 Current priorities

Each year, the Department of Social Development adopts a set of priorities, flowing from its constitutional mandate and guided by Cabinet. Based on the 10-Point Plan, these are the priorities and strategic goals for the period 2004–5 to 2006–7:

- *Social security*: Develop a comprehensive system of social security through finalising social security policies and improving service delivery by establishing a national agency for social security grant administration and payments.
- *Transformation*: Transform other welfare services.
- *HIV and AIDS*: Expand the Home-Based Care/Community-Based Care and Support Programme.
- *Poverty reduction and integrated development*: Implement and roll out the Expanded Public Works Programme.
- *Social integration*: Rebuild families and communities through policies and programmes empowering the young, the old, women and people with disabilities.

For an update on new three-year priority areas, visit the website of the Department of Social Development.

11.4.3 Towards a comprehensive social security system

In March 2002, the Department published the *Transforming the Present – Protecting the Future* Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa, a committee appointed by the Minister of Social Development.

This report has many suggestions for policy changes to ensure that more people receive social security. It refers to the idea of *social protection* as a broader concept than *social security*. The Committee suggested that, in order to ensure people's well being, especially vulnerable people, the State needs to adopt programmes that address these social protection needs of people:

- *Income needs* – for example, through social grants.
- *Asset needs* – there is a need to ensure poor people have access to property to ensure their well being, such as houses, and that can also be used to generate an income, such as a business.
- *Capabilities* – the need for people to have access to basic services that enable them to improve their lives, such as education, health, water and transport.
- *Special needs* – some people need additional special care, such as people living with disabilities.

A Basic Income Grant?

The Committee also recommended that the Government consider introducing a general income grant. This would not have a means test and would ensure that everybody can afford at least the basics, such as food and transport money. This recommendation is known today in South Africa as a *Basic Income Grant (BIG)*.

A broad civil society campaign has been built around a call by the BIG Coalition, including COSATU, for the Government to introduce a BIG to help end poverty in South Africa. The Coalition is calling for an amount of R100 to be paid to everyone, whatever their income or age. A family of four would thus be able to receive R400 a month.

CASE STUDY



LOBBYING AND ADVOCACY AROUND THE BASIC INCOME GRANT

The Basic Income Grant Coalition mobilises people to understand what the BIG is, and to get their support. The Coalition has persuaded Members of Parliament about the benefits of a BIG, and held marches to various government offices.

The Government has said that it will not introduce a BIG because it is not affordable and it would undermine the dignity of people to receive a 'handout' that they have not worked for.

The Coalition argues that:

- Government has reduced the amount of money it could use for social spending by cutting Income Tax. A BIG would be affordable for the country if some of the tax cuts of the last few years were reversed.
- There are no jobs for about 41% of South Africans. If everyone had a BIG, then they could eat. They could buy food, and this could create jobs for the people who grow and produce food.

Changes in social security policy take time, because you have to persuade decision-makers about the real needs of people living in poor and rural communities. Poor people often struggle to make their needs heard. This is how the *Chronic Poverty Report* sees the role of social assistance:

"Both the coverage and value of social assistance programmes are affected by how social protection is perceived by the non-poor. There is a need to point out to national and international policy-makers, the middle classes and the general public, how transfers are often used not only for current consumption, but also for saving, investment and further redistribution within the household. Social assistance is not about 'doles' (handouts). Pensioners support grandchildren's schooling; public works schemes provide the savings for small scale business start-ups."

Chronic Poverty Report, 2004–5, 57

11.5

How can you receive social security?

11.5.1 Social assistance

There are about 45 million people living in South Africa today. About half of them – 22 million – live in poverty. Of these people, just over 10 million received one of the State social assistance grants in August 2005.

The Government does not give grants to all people, and not even to all poor people. It has decided that certain groups, seen as the most vulnerable, should receive the grants. There are two main conditions for qualifying for grants – age and a means test (the amount of money and property that you have).

The main laws providing for social grants are the *Social Assistance Act 13 of 2004* and the *South African Social Security Agency Act 9 of 2004*.

The table running over pages 390–391 gives details about qualifying for and receiving these seven social assistance grants:

- a) Old Age Pension
- b) War Veteran's Grant
- c) Disability Grant
- d) Child Support Grant
- e) Foster Child Grant
- f) Care Dependency Grant
- g) Grant-in-Aid

After the table, in part h), we discuss the Social Relief of Distress Grant separately, as it is not a compulsory grant.



Grant	Who qualifies?
a) OLD AGE PENSION	<p>Women – 60 or older. Men – 65 or older. South African citizen or permanent resident with a 13-digit bar-coded Identity Document (ID). Not receiving another grant. Not permanently cared for in a State institution. Must be resident in South Africa at time of application.</p>
b) WAR VETERAN'S GRANT	<p>A person, who is 60 or older, or who is unable to provide for his/her maintenance because of any physical or mental disability, and served in the First or Second World War or the Korean War. South African citizen or permanent resident. Not receiving another grant. Not permanently cared for in a State institution. Must be resident in South Africa at time of application.</p>
c) DISABILITY GRANT	<p>A person, who is between 18 and 59 (woman), or 18 and 65 (man). Must submit a medical assessment report confirming disability. Payable for permanent or temporary disability. Must meet the means test. South African citizen or permanent resident with a 13-digit bar-coded ID. Not receiving another grant for him/herself. Not permanently cared for in a State institution. Must be resident in South Africa at time of application.</p>
d) CHILD SUPPORT GRANT	<p>Primary (main) caregiver must be South African citizen or permanent resident. Applicant must be primary caregiver of child. Child must be under 14. Applicant and spouse must meet the means test. Child must have 13-digit Birth Certificate. Applicant must have a 13-digit ID. Cannot apply for more than 6 biological children. Must be resident in South Africa at time of application.</p>
e) FOSTER CHILD GRANT	<p>Applicant must have a 13-digit bar-coded ID. Court order indicating foster care status. Valid South African or non-South African 13-digit Identity Number for each child. Foster child must pass the means test. Applicant and child must be resident in South Africa at time of application.</p>
f) CARE DEPENDENCY GRANT	<p>Applicant must be a South African Citizen, except for foster parents. Child must be a South African citizen or a permanent resident. Child must be between 1 and 18. Must submit a medical assessment report confirming disability. Applicant, spouse and child must meet the means test (income of foster parents not taken into account for means test). Care dependent child must not be permanently cared for in a State institution. Applicant must have a 13-digit bar-coded ID. Child must have a 13-digit Birth Certificate. Applicant and child must be resident in South Africa at time of application.</p>
g) GRANT-IN-AID	<p>Must need full-time help by someone else due to physical or mental disabilities. Must receive a social grant. Must not be cared for in an institution that receives a subsidy from the State for the care/housing of the beneficiary.</p>

What is the means test?	How much?	How long can you get it for?
Single person – net income (income after tax) less than R20 232 a year. Married persons – combined income less than R37 512 a year.	R820 a month.	For the rest of the aged person's life, unless they get more income than the means test.
Single person – net income (income after tax) less than R20 232 a year. Married persons – combined income less than R37 512 a year.	Maximum monthly amount: R820 Old Age Pension plus R18 = R838.	For the rest of the person's life, unless they get more income than the means test.
Single person – net income (income after tax) less than R20 232 a year. Married persons – combined income less than R37 512 a year.	R820 a month.	A temporary Disability Grant is usually for 6 months or 12 months – then it ends and people have to apply again. A permanent Disability Grant ends when a man or woman is old enough to get an Old Age Pension. It is the same amount of money every month, but it is then called a Pension not a Disability Grant.
The household income of the primary caregiver is: – R9 600 a year, or – R13 200 a year, and the child and the primary caregiver either: – live in a rural area, or – live in an informal dwelling (no brick, concrete or asbestos walls).	R190 a month for each child.	Until: – Child's 14th birthday, or – Death of child or primary caregiver, or – Child no longer in custody of primary caregiver.
Income of child cannot be more than R14 160 a year.	R590 a month.	Until: – Foster child turns 18 (can be extended to 21 if at school) or – Child no longer in custody of foster parent.
Income of parent not more than R48 000 a year, and income of child must not be more than R19 680 a year.	Maximum monthly amount: R820 for each child.	Until: – Child is 18 (can then apply for a Disability Grant), or – Parent or child dies, or – Child admitted to a State institution for care, or – Death of beneficiary.
No means test, but grant not given when applicant is cared for in an institution that receives a subsidy from the State for his/her care/housing.	R180 a month.	Until death of beneficiary.

h) **Social Relief of Distress Grant**

In the past, some provinces paid the discretionary Social Relief of Distress Grant to people in desperate circumstances for a limited period of time. It was not implemented in all provinces.

However, section 13 of the Social Assistance Act of 2004 (effective from 1 April 2006) provides that the Minister may make monies available to cover social relief of distress.

Draft Regulations under the Social Assistance Act, published in the Government Gazette in February 2005, also refer to social relief of distress. They provide that a person in need of temporary material assistance may qualify for a Social Relief of Distress Grant, if:

- The person is waiting for permanent aid, or
- A breadwinner has died or been admitted to prison, and there are insufficient means available, or
- The person has been affected by a disaster.

The Draft Regulations say that the Social Relief of Distress Grant can only be paid for a maximum period of three months. They also set out how to apply for the grant, and the amount of money that can be paid:

- For an adult, the amount may not be more than the amount payable for an Old Age Pension, War Veteran's Grant or a Disability Grant.
- For a child, the amount may not be more than the amount payable as a Child Support Grant.

GUIDELINES



EFFECT OF THE DRAFT REGULATIONS

While the Social Assistance Act of 2004 was effective from 1 April 2006, at the time of writing its Draft Regulations have not been finalised by Parliament. This grant will now be payable only if the Minister chooses to make money available to the South African Social Security Agency (SASSA) and subject to the provisions of the Act. The Act itself gives the Minister a discretion (choice) whether to give SASSA money for this grant. If Social Relief of Distress Grants become available, they should be available to people in all provinces.

Unlike other compulsory grants, it seems that there will be no right to a Social Relief of Distress Grant. It is also possible that the amount and the period of time for which the grant is paid may be less than the maximum set out in the Draft Regulations.

Until these new Regulations are finalised, the old Regulations under the 1992 Social Assistance Act will continue to be applied.



11.5.2 Barriers to receiving social grants.

There are a number of reasons why people struggle to enjoy their rights to social assistance. These include:

- Grants only being available for specific groups of people.
- Accessing Birth Certificates and Identity Documents.
- The means test.
- Administrative delays.
- Barriers experienced by refugees.
- Barriers experienced by people living with HIV or AIDS.
- Lack of knowledge about grants.

a) Grants for specific groups of people

Although the Constitution says that everyone has the right of access to social security, the Government feels that it cannot afford to give grants to everyone. They say that grants are only for people who cannot work, such as children, elderly people and people living with disabilities.

In some countries, everyone has the right to social assistance, whether they are rich or poor. This is known as a *universal grant*. Sometimes richer people effectively pay it back because they have to pay more Income Tax once they get the social assistance grants.

The problem with having limited rights to social security in South Africa is that we have a very high level of unemployment. So if you cannot get a job and you are between 15 and 60 (for women) or between 15 and 65 (men), even if you can show that you have tried to get a job, you cannot get a grant and so have no income.

For an example of challenging this approach, see the case study of the campaign for a Basic Income Grant (BIG) on page 388.

b) Accessing Birth Certificates and Identity Documents

According to the Regulations under the old Social Assistance Act (still in force at the time of writing), everyone who applies for a social grant has to have an ID. Sometimes people struggle to get their IDs. This is usually because people were not registered at birth and have no Birth Certificate. They then have problems proving their age and that they are South African citizens. Other people have difficulty getting enough money to go to the office of the Department of Home Affairs (Home Affairs) to apply for an ID.

The Department of Social Development has met with civil society organisations to try to see how this barrier to accessing grants could be solved in another way. The Department said that, without the requirement of an ID and Birth Certificate, they are faced with people getting grants fraudulently. So this remains a major barrier for many people.

GUIDELINES



NO BIRTH CERTIFICATE

Go to Home Affairs with a document to prove what your name is and the year that you were born. This can be:

- An affidavit (sworn statement) from your mother or father, or
- A letter from your grade 1 teacher at school to Home Affairs.

c) The means test

We have seen that only certain groups have access to a grant. The means test further limits access to grants by age, property and money:

- You cannot get a grant if you have a monthly income of more than the amounts set out in the table on pages 390 and 391.
- You also cannot get a grant if your assets (for example, your house and savings) are more than:
 - For a single person: R266 400
 - For a married person, jointly: R532 800.

Sometimes people struggle to prove that their assets are worth less than these amounts or that they do not earn enough income, and so they cannot get the grant. The best way to prove it is to go to a police station and make an affidavit in which you write down all this information and sign it.

The problem with means testing is that if you earn R1 over the limit, you lose your right to the grant. This can stop people from trying to earn a little more money for themselves and their families, if they believe that they will lose the monthly income from the grant. This is called an 'employment trap' or 'poverty trap'.

CASE STUDY



MEANS TESTING

Martha does piece work. She cleans for some people for a few days a month. She earns about R9 500 a year, sometimes earning R800 a month, sometimes less. One of the employers that she cleans for offers her another day's cleaning every second week – this would give her another R80 a month and would mean an extra R960 a year. But Martha is currently receiving Child Support Grants for her two children, aged 6 and 8. This comes to R380 a month for both children, and R4 560 a year.

If Martha takes this extra job, she would lose the two Child Support Grants, and the household would have R 3 600 less every year.

CASE STUDY



A CHALLENGE TO THE DIFFERENT AGE ELIGIBILITY CRITERIA BETWEEN OLDER MEN AND WOMEN

In the 2005 case of *Christian Roberts and Others v The Minister of Social Development and Others*, four male applicants are challenging several parts of laws and regulations that discriminate against men on the grounds of their age and gender in the Pretoria High Court. They argue that the eligibility criteria for a social grant for aged persons at 60 years of age for women and 65 years of age for men fundamentally violates their constitutional right to equality, social security and dignity.

In response, the Department of Social Development argues that it is reasonable to have different ages because:

- It serves the purpose of progressively realising the rights of everyone in South Africa to social assistance and it is within what the Government can afford.
- It aims at redressing the socio-economic inequalities that arose from previous unfair discrimination based on sex and gender – it is designed to advance and protect women as a class of people disadvantaged by unfair discrimination in the past.
- It is based on the relative needs of elderly men and women for social assistance – that men and women are not similarly situated in society.

Department of Social Development's answering affidavit, paragraphs 1–173

At the time of writing, the case had not been heard by the Pretoria High Court.

d) Administrative delays

Sometimes you wait for many months before you get the grant that you applied for. The average length of time for the processing of a grant from date of application is three months. Remember that you have a right to back pay from the date that you applied, however long the Department takes to process your application.

COURT CASE



BACKPAY WITH INTEREST

In the 2006 Kate case, Kate applied for a disability grant on 16 April 1996. It took 40 months for her grant application to be processed, and it was only approved in August 1999. By that date, she was entitled to backpay from the date of her application.

However, this backpay was eventually only partly paid, and she had to go to court to claim the remainder of her backpay with interest owing from the date that each monthly payment had been due. The Supreme Court of Appeal confirmed judgment in her favour in March 2006.

For more on getting reasons for decisions or delays, see Chapter 2 on page 60.

The type of administrative delay experienced by Kate violates the right to “just administrative action” under section 32 of the Constitution. Parliament passed the *Promotion of Administrative Justice Act 3 of 2000*. This Act sets out all the details about how to enforce this right, and the duties that rest on government officials.

GUIDELINES



TAKING ACTION ON DELAYS WITH GRANTS

- If the delay is unreasonable, you can go to an advice office and ask them to demand from government that your application is processed without any further delay.
- If government still does not process your application, the advice office will help you go to court so that a magistrate can order government to process your application with no further delays.
- You must be given proper reasons if your grant application is not successful.

COURT CASE



PROPER REASONS IN AN UNSUCCESSFUL GRANT APPLICATION

In the 2005 case of *Vumazonke and Others v MEC for Social Development and Welfare for Eastern Cape* (Vumazonke case), Vumazonke applied for a Disability Grant on 29 July 2003. She was informed that her grant would take approximately three months to process. She was supplied with a receipt containing an official stamp and record of the type of grant she had applied for.

However, after three months no answer from the provincial department had been received, so she made enquiries on the outcome of her application. Eventually she consulted a lawyer who wrote letters on her behalf. No answer was received and she had to go to court to force the department to take a decision.

On 13 February 2004 she was made aware of the fact that a letter existed, dated September 2003, saying that the medical officer had not recommended that she get a Disability Grant. She claims she did not receive this letter. All that the letter said was that the doctor had recommended refusal of her application, but it did not tell her what the basis for this recommendation was – in other words, no proper explanation for coming to that decision was given.

The High Court decided:

- This letter did not provide her with sufficient reasons for her grant being refused.
- The delay in dealing with her application was unreasonable.

The South African Social Security Agency

The Government has recently introduced SASSA as a single national agency to administer grant applications. SASSA will have provincial offices to administer the grants. These offices are still being set up, and were expected to be ready during 2006.

Once SASSA is effectively running, everyone should be able to get the same high standard of service, wherever you may be in South Africa. This is because the Department of Social Development is planning a *National Norms and Standards Policy*. One of the most important standards for beneficiaries is that all social grants should be processed within 21 days as part of SASSA's Operation Isidima (Operation Dignity).

e) Refugees

Although the Constitution says that "everyone" has a right to social security, including social assistance, the Social Assistance Act limits the right to people who are South African citizens.

In March 2004, the Constitutional Court decided that people who are permanent residents in South Africa also have a right to social assistance. This was in the 2003 case of *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* (Khosa case).

But in reality, refugees are still not able to claim social assistance. This is inconsistent with the Constitution, as well as section 27(b) of the *Refugees Act 130 of 1998* that says:

"A refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act."

Not providing assistance to refugees also goes against international agreements that South Africa has signed, such as Article 24(1)(b) of the United Nations 1951 *Convention Relating to the Status of Refugees*. South Africa ratified this Convention in January 1996, meaning it has a duty to give refugees the same social security rights as citizens.

f) People living with HIV/AIDS

More than 6 million people in South Africa are living with HIV/AIDS. There is thus a great concern that there is no special grant for people living with HIV/AIDS. All people with weaker immune systems need to eat healthily. When on antiretroviral (ARV) treatment, you should continue to eat enough to strengthen your body. If you do not have enough money, you may not be able to buy enough food.

Currently some doctors recommend to the Department of Social Development that people with a CD4 count of less than 200 should get a temporary Disability Grant. This is normally valid for six months or a year. Other doctors, however, do not do this.

There is also a related problem that when people are able to afford to eat better and have access to ARVs, their CD4 count increases because they are healthier. They then cannot get another temporary Disability Grant, and so risk getting ill again or having to stop treatment because they do not have the

For more on the Khosa case, see Chapter 1 on page 33.

right food. In the interests of ensuring ongoing access to ARV treatment, the Government should urgently address this situation.

g) **Lack of knowledge about grants**

Some people may have a right to receive a grant, but do not know this. The Department of Social Development has tried to ensure that everyone knows about grants, and has put up posters in clinics and schools. Churches and non-governmental organisations (NGOs) also try to raise people's awareness about the different grants and who may receive them. We should all learn this so that we can tell people who do not know.

GUIDELINES



INFORMATION ON GETTING GRANTS

1. If you have any enquiries about social grants, and other available assistance, you can call the National Help Line on 0800 6010111.
2. If you have a complaint about getting grants, you can submit it in writing to the Minister or the Director General of Social Development, who will investigate your complaint. You can write to: The Minister or The Director General for Social Development, Private Bag X901, Pretoria 0001.



11.5.3 Assessing access to social security

What do the rulings in the Grootboom and TAC cases on the right to shelter and to basic health care mean for the right to social security?

Based on the existing system of social grants and the barriers experienced in accessing them, we have reached these conclusions:

- There is no clear and accessible national plan for the progressive realisation of social security for everyone in South Africa. The State could argue that extending the age of qualifying for the Child Support Grant from children below the age of 7 to children under 14 indicates progressive realisation. Instead, we call for an immediate and long-term reasonable plan setting out how everyone will eventually have access to social security.
- Before extending the Child Support Grant, 11.8 million of the 23.8 poor people living in South Africa lived in households that had no access to social assistance – a significant number of vulnerable people for whom there was no access to the right to social security. This appears to violate the Constitutional Court's ruling that any plan or policy adopted by the State towards realising a constitutional socio-economic right must provide for the immediate needs of a significant number of desperate people.
- The Constitutional Court ruled that programmes and policies have to be reasonable in their aims as well as in their implementation. Activists on social security issues should consider whether providing short-term

assistance (eg for 6–12 months) to poor people is a reasonable policy if the life conditions of these people have not changed since they applied for assistance.

- Problems in the administration of the grant system need to be systematically addressed by the new SASSA to avoid the many court cases that have had to be launched to get provincial departments to fulfil their administrative duties and to ensure effective implementation of the right to social assistance. As pointed out in the Kate case, these problems have included:
 - Failure to give prompt consideration to applications for social grants.
 - Not paying money that is due to beneficiaries.
 - Ignoring court orders against the Department.

For more on the Kate case, see pages 382 and 396.

COURT CASE



COMPLYING WITH COURT ORDERS

In the 2006 case of *Magidimisi N.O. v The Premier of the Eastern Cape* (Magidimisi case), the applicant had to return to court to force the provincial authorities to obey a 2002 court order that had awarded his mother money owed for a Disability Grant. While his mother had subsequently died, the money was due to her estate.

The Court noted that it was very clear that only full compliance with the original court order was a proper fulfilment of the province's constitutional and legal obligations.

11.5.4 Social insurance

a) Compensation for Occupational Injuries and Diseases

Compensation for Occupational Injuries and Diseases (COIDA) used to be called 'Workmen's Compensation'. The *Compensation for Occupational Injuries and Diseases Act 130 of 1993* covers all casual and full-time workers, who as a result of a workplace accident or work-related disease are injured, disabled or killed, or they become ill.

COIDA does not include any of these workers:

- Workers who are totally or partially disabled for less than three days.
- Domestic workers.
- Anyone receiving military training.
- Members of the South African National Defence Force or the South African Police Service.
- Any worker guilty of wilful misconduct, unless they are seriously disabled or killed.
- Anyone employed outside the country for 12 or more continuous months.

GUIDELINES



DELAYS WITH COIDA APPLICATIONS

If you experience a delay in applying for a benefit:

- Phone the Compensation Commissioner on 012 3199111, or
- Go to your local advice office for help.

Benefits include payment for medical costs, as well as replacement of wages, depending on the seriousness of the injury or illness.

However, there is a serious administrative backlog in processing applications. In 2003–4, 217 680 accidents were reported, but only 53 781 payments were made, and 2 453 claims were rejected.

COIDA gives workers the right to claim compensation if they were injured or became ill as a result of an accident at work or dangerous working conditions that harmed them, for example, through exposing workers to harmful substances.

GUIDELINES



HOW TO CLAIM FROM THE COMPENSATION FUND IF YOU ARE A WORKER

1. Fill in the form

Report your injury or disease to your supervisor or employer immediately. Your employer must report it to the Compensation Fund and send in the necessary forms.

2. Get forms from the doctor

Get the W.Cl.2 or W.Cl.1 form from your employer and take it to the doctor when you go for a visit. After the doctor has filled in the form, take it back to your employer. Take any other forms the doctor gives you to your employer.

3. Keep in touch with the employer

Let your employer know when your address changes and keep in touch with your employer. Your money will be sent to your employer's address, so it is important that your employer can find you.

4. Get help if you have problems

If your employer does not send in the forms or the claim takes too long, contact the nearest labour centre and report it.

Information from Department of Labour website

b) Unemployment Insurance Fund

The Unemployment Insurance Fund (UIF) falls under the *Unemployment Insurance Act 63 of 2001*. The Act covers all workers except:

- Workers working less than 24 hours a month for an employer.
- Learners.
- Public servants.
- Foreigners working on contract.
- Workers who get a monthly State/Old Age Pension.
- Workers who only earn commission.

The Act has included domestic employers and workers since 1 April 2003.

Unemployed workers must apply for benefits at their nearest labour centre in person. They must be registered as work-seekers and take the necessary documents with them.

GUIDELINES



HOW TO CLAIM UNEMPLOYMENT BENEFITS

1. *Get the documents ready*

Before you can claim, you must get all these documents ready:

- 13-digit bar-coded ID or passport
- Form UI-2.8 for banking details
- Form UI-19 to show that you are no longer working for your employer
- Proof of registration as a work-seeker.

2. *Go to the nearest labour centre*

Unemployed workers must go to the nearest labour centre themselves and hand in the documents. Staff at the labour centre will assist you with all the processes and give you more information.

3. *Follow all the instructions of the staff at the labour centre*

Staff at the labour centre may ask unemployed workers to go for training or advice, or to visit the labour centre at certain times. You should do what they ask, or you may not be able to claim.

4. *Get help if you have problems*

If you experience a delay in applying for a benefit:

- Contact your local labour centre, or
- Phone the National UIF office on 012 3371680, or
- Go to your local advice office for help.

Information from Department of Labour website

11.6

Protecting and advancing your social security rights

11.6.1 Contact your government office

You can ensure that you receive social security if you:

- Go to your local Social Development office, or
- Go to your nearest labour centre, or
- Phone the Department of Social Development (social assistance) or the Department of Labour (social insurance), or
- When it is operational, contact the offices of SASSA.

11.6.2 Use advice offices and constituency offices

Sometimes you may need help to take up your social security rights – you can then:

- Go to your local advice office, or
- Go to the constituency offices of political parties in or near your community.

11.6.3 Advocate and campaign

You can join existing campaigns or organisations, or develop your own campaign or organisation to take up social security issues and to help claim your social security rights.

GUIDELINES



TAKING ACTION

1. Find out about your social security rights and try to claim them.
2. Pass this information on and help other people to claim their social security rights.
3. Collect information about why people need to have access to these rights.
4. Collect stories in your community about hardships people are experiencing and suggest ways to do something about these.
5. Write to the Minister of Social Development with your suggestions.

CASE STUDY



INCREASING THE AGE FOR QUALIFYING FOR CHILD SUPPORT GRANTS

One of the most successful social security campaigns has been about the age limitation of the Child Support Grant. When the grant was introduced, it was only available to children under the age of 7. People said that this was not fair, as older children also had to eat. A number of NGOs and community-based organisations began a campaign to increase the age limit.

Because of this campaign, the Government increased the age first to children under 12, and then to children under 14. This is an example of how we can persuade the Government to progressively realise the rights in the Constitution.

See also the case study of advocacy around the Basic Income Grant on page 388.

To find more detail on strategies for advancing social security rights, see Chapter 2.

Discussion ideas



Discuss these issues in one discussion group or in small groups in a workshop:

TALKING POINT 1

The Department of Social Development has now agreed in its policy review to consider extending the age of the Child Support Grant to 18. This is a campaign that everyone can get involved in.

1. *How can you build up a convincing case to lobby the Minister of Social Development?*
2. *How can you use the Constitution to support your case?*
3. *How can you collect stories about why older children need the grant?*
4. *What other activities do you think would help to persuade the Government?*

TALKING POINT 2

Paypoints often have poor conditions such as no chairs, shade, toilets and running water.

1. *How do these conditions violate people's access to social assistance in the Constitution?*

TALKING POINT 3

Government says that if it pays everyone R100 as a Basic Income Grant every month, this would encourage people to become lazy and stop working. Split into two smaller groups:

- *One group must work out five points that support this view.*
- *The other group must come up with five points disagreeing with this point.*

Then get back together and try to persuade each other.

TALKING POINT 4

1. *What provisions do you think that the Department of Social Development can put in place to make it easier for people to get IDs and Birth Certificates?*
2. *Do you think that the concern about fraud in getting grants is serious?*

TALKING POINT 5

There are many refugees coming into South Africa from other countries. Many of them are poor, and some of them are ill. The Constitution says that “everybody”, not just citizens, should be able to access social security, but the Social Assistance Act does not provide for this.

1. *Do you think that refugees should be allowed access to social assistance?*
2. *Are there any other documents or agreements that you can use to support your view, besides the Constitution and the Social Assistance Act?*

TALKING POINT 6

Imagine you are a paralegal in an advice office. A number of clients living with HIV have reported that they no longer get temporary Disability Grants because their CD4 counts are now higher than 200 after they have been on ARVs. Losing the grant is making it hard for them to buy enough food.

1. *How can you help these clients individually?*
2. *How can your advice office help start a campaign to lobby the Department of Social Development to stop discontinuing temporary Disability Grants in these circumstances?*

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Department of Labour: www.labour.gov.za.

Department of Social Development: www.socdev.gov.za.

International Labour Organisation: www.ilo.org.

South African Government (copies of laws and bills): www.info.gov.

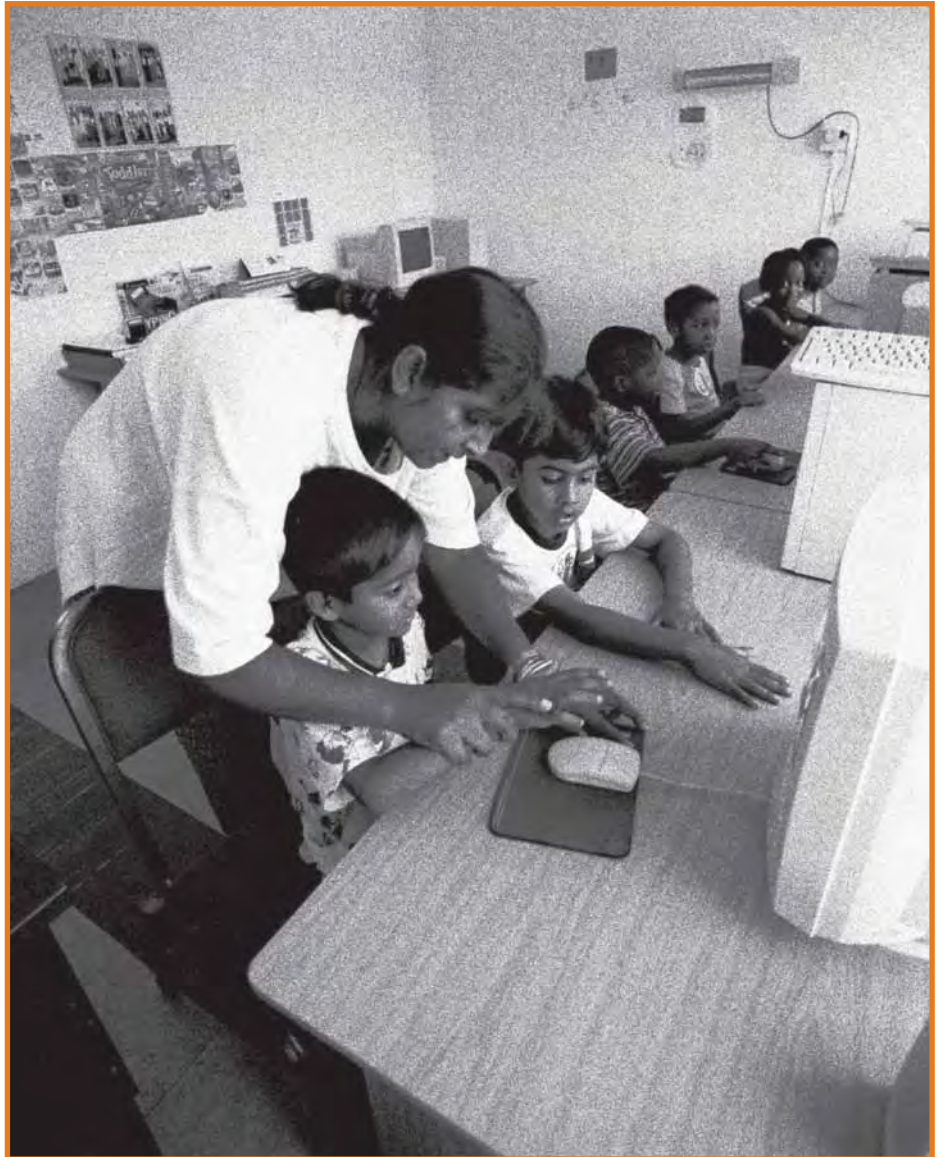
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South African Law Reform Commission: www.law.wits.ac.za/salc/salc.html.

Southern African Regional Poverty Network (policy discussions on poverty and social security): www.sarpn.org.za.

Education rights

CHAPTER 12



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KEY WORDS


Access/Accessible	Able to get, have or use something, eg access to further education.
Advocacy/Advocate	Working for change, eg through media, campaigns and law reform.
Appropriate	Suitable, made to fit in with needs and conditions.
Arrears	When you are behind with payments, eg school fee arrears.
Binding	A law, agreement or treaty that must be followed.
Class action	A court case brought by one person in the interests of a group of people all having the same complaint.
Compliance/Comply	Whether or not you obey a law, policy or court judgment.
Compulsory education	When you have a duty to attend school, and parents must send their children to school.
Criteria	Factors used to decide something, eg criteria, such as the salary of parents, for deciding on exemptions from paying school fees.
Dual-medium	Teaching in two languages.
Enforceable	When you can make something happen by law.
Equitable/Equity	Fair and reasonable.
Exemption	When you are excused from doing something, eg exempted from paying school fees.
Functionally illiterate	Not able to do basic reading and writing needed to carry out day-to-day activities.
Gross income	Total amount of money earned or received before tax.

Justifiable/Justifiably	With good reason.
Literacy	The ability to read and write.
Lobby	Influence or persuade authorities to change law or policies.
Multilingualism	The ability to use many languages.
Non-discrimination	Not allowing discrimination against learners, eg not treating learners differently because their parents cannot afford to pay school fees.
Numeracy	The ability to work with numbers, eg to add, subtract, divide and multiply.
Outcomes-based education	Education policy that says that, as a result of education, you should develop literacy, numeracy and other measurable skills.
Perpetrator	Person who carries out unlawful or immoral actions, eg a perpetrator of sexual abuse against learners.
Progressive realisation	Steps to improve people's access to socio-economic rights over a period of time.
Ratify	Formally accept a document, and agree to carry out international duties under it.
Single-medium	Teaching in only one language.
State party	When a country signs and agrees to obey an international agreement, it becomes a State party to the agreement.
Unconstitutional	Not in line with the Constitution.
Unfair discrimination	A policy, law, conduct or a situation that unfairly disadvantages you, eg because you are a woman, black, bisexual, living with a disability, or living with HIV.
Violate/Violation	Abuse or not respect your rights, eg violation of your right to basic education.
Vulnerable groups	People who need special protection, eg children orphaned by AIDS.

12.1

Why are education rights important?


Education rights have been described as “empowerment rights” (Coomans, 2002, 160). This is because education rights are necessary for exercising and enjoying other rights. In other words, education rights enable you to control the course of your life. This relationship between education rights and other rights also highlights the interdependency between all human rights.

EXAMPLES	<ul style="list-style-type: none">• An education is necessary to enjoy civil and political rights. For example, the extent of your participation in political life depends on your level of education, or using your right to vote. Without a basic level of literacy, you cannot read a ballot paper, newspapers and other materials that will assist you in making an informed choice.• Education is also necessary for the enjoyment of economic, social and cultural rights. For example, your freedom to choose a trade, occupation or profession is largely dependent on the level of education that you receive.
	
LINKS TO OTHER RIGHTS	

For more on the links between education rights and other human rights, see page 434.

This interdependency between the right to education and other rights is also significant for a nation’s development. For example, lack of basic education for individuals affects their knowledge of health and hygiene, and this has serious consequences for communities and their quality of life (Sen, 1999, 3).

Education also serves a positive social function in helping to build values such as tolerance and respect for human rights. Education therefore aims at strengthening a culture of human rights within and between nations.

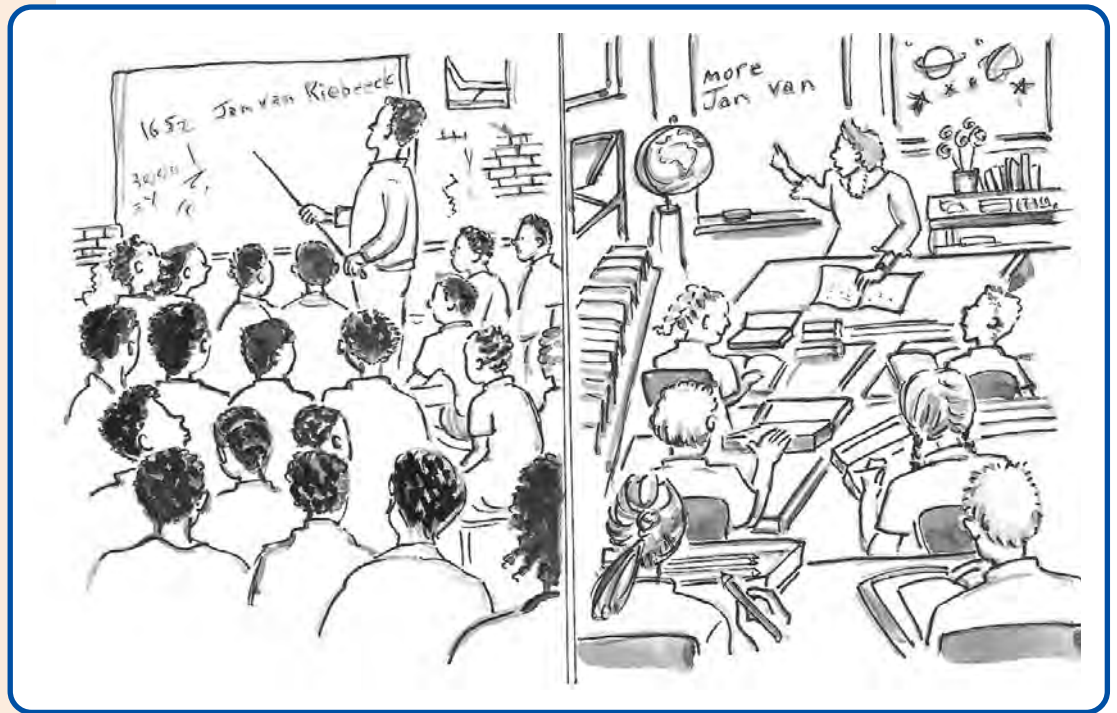
EXAMPLE	<p><i>In South Africa, the teaching of values such as social justice, respect for the environment and human rights (as defined in our Constitution) has become one of the basic principles of the outcomes-based curriculum. Our new curriculum includes these values in the content of each of the eight different learning areas on which the curriculum is based.</i></p>
	
INCLUDING CONSTITUTIONAL VALUES	

12.2

History and current context

12.2.1 Apartheid education

Under apartheid, education was structured along racial lines to prepare learners of different race groups for the roles they were expected to serve in a divided South Africa. The main features of the apartheid education system were huge inequality in the financing of education, different curricula for



different race groups and restricted access of black learners to higher education.

EXAMPLE



APARTHEID SPENDING

In 1994, at the end of apartheid, the differences in annual expenditure for each child were:

- R5 403 for White children.
- R4 687 for Indian children.
- R3 691 for Coloured children.
- Between R2 184 and R1 053 for African children.

Department of Education, 1995, 15

The differences in education for the different races were vast. White schools had many facilities, such as swimming pools, textbooks, laboratories, and soccer and rugby fields. In contrast, African learners, especially rural learners, walked long distances to schools and operated with few facilities, including lack of proper sanitation, running water or electricity.

12.2.2 Current status of South African schools

Today, while schools may not discriminate on racial grounds and must admit learners of all race groups, huge inequalities still exist between schools that were historically 'white' and schools that were historically 'black'.

This is mainly because of the way schools are currently funded. The Government contributes funds to all public schools, but these funds are not enough to improve and maintain schools at a high standard, or to employ sufficient numbers of educators at all schools. Schools are therefore allowed to charge school fees to add to the government funding (*South African Schools Act 84 of 1996*).

The effect of this system of funding is that schools in wealthier communities, mainly the historically white schools, charge higher school fees and maintain a high standard of education with sufficient numbers of educators and good teaching

facilities. Many schools in poor areas, predominantly African schools, cannot generate high school fees and therefore continue to deteriorate.

EXAMPLES



SCHOOL FEES

- A good suburban school can charge up to R15 000 a year for school fees.
- A good township school can charge up to R6 000 a year in school fees.
- A poor township school will charge about R100 a year for school fees.
- Some farm schools will charge about R50 a year.

EXAMPLES



CONDITIONS IN SOUTH AFRICAN SCHOOLS

These are some South African Human Rights Commission (SAHRC) statistics on conditions in 27 148 schools in 2002:

- 2 280 (8.4%) schools have buildings in a very poor condition.
- 10 723 (39%) schools have a shortage of classrooms.
- 13 204 (49%) schools have inadequate textbooks.
- 8 142 195 learners live beyond a 5-kilometre radius from the school.
- 10 859 (40%) schools are without electricity.
- 9 638 (36%) schools are without telephones.
- 2 496 (9%) schools are without adequate toilets.
- 19 085 (70%) schools do not have access to computer facilities.
- 21 773 (80%) lack access to library facilities.
- 17 762 (65%) lack access to recreational and sporting facilities.

SAHRC: 3rd Socio-Economic Rights Report, 2000–2, 258

CASE STUDY



A FARM SCHOOL IN KWAZULU-NATAL

The Fairleigh Farm School in Kwazulu-Natal has operated in conditions of extreme poverty. This school teaches learners in grades 1–7.

The school building used to consist of two church halls. The first hall catered for grades 1–2 and the second hall for grades 3–7. These church halls did not provide clean running water or toilets. The learners used the sugar cane fields as toilets. As there were no taps, each morning two small buckets of water filled at nearby houses were kept inside each classroom for drinking and washing. The roof of the classrooms had several holes. When it rained, it was impossible to teach because of water leaking into the classrooms.

Most of the learners who attend the school are children of farm workers and cannot afford to pay the school fees at better-resourced schools and walk the long distances to these other schools. The conditions at the school were severely affecting learning and teaching at the school.

After several years of trying to get the Department of Education to upgrade the school, the school principal and parents of the learners at the school approached the Legal Resources Centre (LRC) to assist them in taking the Department to court. The LRC sued the Department for failing to provide classrooms, water, electricity and toilets for the school. The case did not go to court, but was eventually settled as a result of the Department of Education agreeing to upgrade the school. Some of the improvements included:

- Providing piped water to the school.
- Installing a septic tank on the school grounds.
- Making application to Eskom for the connection of power to the school.
- Erecting gates and fences around the school.
- Installing water and sewer connections for the school.
- Installing pre-fabricated units as classrooms for the school.

Fairleigh Primary School and Others v The KwaZulu-Natal Minister of Education and Others, 2002

This case study shows the benefit of understanding your education rights and how taking up conditions in a school led to positive results.

12.3

Your education rights in the Constitution

Section 29 of the *Constitution (Act 108 of 1996)* sets out your education rights:

Section	What is the right?	Who benefits?
29(1)(a)	The right to a basic education, including adult basic education	Everyone (children and adults)
29(1)(b)	The right to further education that the State must make progressively available and accessible through reasonable measures	Everyone
29(2)	The right to receive education in the official languages of your choice in public educational institutions where it is reasonably practicable	Everyone
29(3)	The right to maintain independent educational institutions at your own expense	Everyone

For information on other constitutional rights linked to education rights, see page 434.

12.4

Guides to interpreting your education rights

12.4.1 Overview of the right to education

Section 29 of the Constitution can be described as a ‘hybrid right’. This is because section 29 is a socio-economic right that says the Government must make education accessible and available to everyone. But, it is also a civil and political right, as it contains freedom of choice guarantees, such as language choice in schools and the freedom to establish and maintain independent educational institutions. Individuals thus have the freedom to choose between State-organised and private education (*Veriava and Coomans, 2005, 59*).

The socio-economic rights under section 29 are also different from each other:

- Section 29(1)(a) is an unqualified socio-economic right – it has been described as a “strong positive right”.
- Section 29(1)(b) is qualified – it has been called a “weak positive right” (*Kriel, 1996, 38–2*).

12.4.2 The right to basic education

In the 1996 case of *In re: The Schools Education Bill of 1995 (Gauteng)* (Schools Education Bill case), the Constitutional Court commented on the constitutional right to basic education:

“This provision creates a positive duty that basic education be provided for every person and not merely a negative right that such a person should not be obstructed in pursuing his or her basic education.” *Paragraph 9*

In the Schools Education Bill case, the Constitutional Court thus recognised that there is a positive obligation to provide basic education, but it has yet to comment in detail on the scope and the content of this right.

a) An unqualified socio-economic right

An important feature of the right to basic education is that it is an unqualified socio-economic right. It is therefore different to the qualified socio-economic rights, such as the rights to health, housing, food, water and social security. These other rights are qualified to the extent that they are made subject to “reasonable legislative and other measures” and “progressive realisation”, and are within the State’s “available resources”.

The 2000 case of *Government of the Republic of South Africa and Others v Grootboom and Others* (Grootboom case) established a standard of review for qualified rights – to determine whether or not State measures were reasonable in progressively facilitating access to the right. The Constitutional Court then listed certain specific criteria which a State policy or programme would have to meet for that policy or programme to be reasonable.

The unqualified nature of the right to basic education seems to suggest that the standard of review for this right should be higher than other socio-economic rights. In other words, the ‘reasonableness test’ would not be appropriate for this right. Instead, the right to basic education should be an immediately enforceable right.

One possible way for the courts to assess whether or not the State has met its duties under the right is to:

- Define the content of the right to basic education, and
- Then to measure the actual level of achievement against the standard set by the right.

To determine the content of the right to basic education, we must look at international law and at our particular South African context.

b) International guidelines

The ICESCR

General Comment No. 13 of the Committee on Economic, Social and Cultural Rights (CESCR) defines article 13(2) of the *International Convention on Economic, Social and Cultural Rights* (ICESCR) as the right to receive an education.

For more on the Grootboom case and these definitions, see Chapter 1 on pages 31 and 38.

The General Comment says that, while the exact standard of the right to basic education may vary according to conditions within a particular country, education must have these four features:

- Availability
- Accessibility
- Acceptability
- Adaptability.

These four features are often together called *the 4-A scheme*. This is a useful tool to analyse the content of the right to basic education under section 29(1)(a) of our Constitution and the duties that flow from this unqualified right.

GUIDELINES



THE 4-A SCHEME

1. Availability

Functioning educational institutions and programmes have to be available in sufficient quantity. Their proper functioning depends on many factors, including the developmental context within which they operate. Examples are:

- Buildings or other protection from the elements
- Sanitation facilities for both sexes
- Safe drinking water
- Trained teachers on competitive salaries
- Teaching materials
- Facilities, such as a library, computer laboratory and information technology in some institutions and programmes.

2. Accessibility

Accessibility should include:

- The principle of non-discrimination – being accessible to all, especially vulnerable groups like children living with or affected by HIV/AIDS.
- Physical accessibility – education has to be within safe physical reach, for example, having neighbourhood schools.
- Economic accessibility – education has to be affordable to all.

3. Acceptability

Acceptability measures how much the curricula and teaching methods meet the aims of education.

4. Adaptability

Education has to be flexible so it can adapt to the needs of changing societies and communities, and respond to the needs of learners within their diverse social and cultural settings.

The *World Declaration on Education for All* (1990), while not a binding international treaty, is helpful in setting out the purpose of a basic education. The Declaration was adopted by the World Conference on Education for All

in Thailand, with the aim of making basic education for all a developmental goal for nations against a background of alarming rates of denial of access to education, and of adult illiteracy.

Article 1 of the World Declaration says:

“Every person – child, youth and adult – shall benefit from educational opportunities designed to meet their basic learning needs.

These needs comprise both essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.

The scope of basic learning needs and how they should be met varies with individual countries and cultures, and inevitably, changes with the passage of time.”

c) **Our South African context**

How can we begin to interpret the right to basic education?

Interpreting the right to basic education in our home context means, firstly, looking at the right in relation to other rights. Since education is a precondition for the exercise of other rights, the denial of access to education is also the denial of the full enjoyment of other rights that enable us all to develop to our full potential and to participate meaningfully in society.

Secondly, a right should also be interpreted in its social and historical context. In South Africa, this means creating a system of education that reverses the legacy of apartheid education. This refers to a system of education that is equally accessible to all and of an adequate educational standard to enable access to institutions of higher learning, or to enable learners to compete on equal terms with one another for employment in the labour market.

To give effect to the right to basic education, the State should ideally fulfil these duties immediately:

- Provide schools in sufficient numbers to accommodate all learners.
- Provide a basic education of an equally adequate standard for all learners.
- Ensure that all learners are able to access schools.

Where does 'basic education' fit in?

In South Africa, the *White Paper on Education and Training* (1996) seems to define *basic education* as the phase of education falling within the General Education and Training Phase (GET phase). This includes one year of pre-school up to grade 9. In the *South African Schools Act 84 of 1996* (SASA), this is also the compulsory phase of education.

Under SASA, it is compulsory for all children between 7 and 15, or in grades 1–9 to attend school. In other words, there is a duty:

- On all parents to ensure that children falling within this category attend school, and
- On the State to ensure that all children within this category are placed in schools.

The State has tried to meet its duties to provide basic education by making this phase of education the *compulsory* phase of education, and by prioritising this phase in policy, planning and spending.

EXAMPLES



FOCUS ON GET PHASE

- In the *Norms and Standards for School Funding*, money for the building and extension of schools must be directed towards the GET phase of education before the Further Education and Training phase (1998, paragraph 95).
- The current amendments to school fee laws will make some schools ‘fee-free’. However those schools may continue to charge school fees in grades 9–12 (*Education Laws Amendment Act 1 of 2004*, paragraph 18).

This definition of basic education is very narrow. This is because learners who have completed grade 9 are not yet sufficiently equipped with knowledge and skills that will enable them to develop to their full potential, to live and work with dignity, and to improve the quality of their lives.

With the particularly high employment rate in South Africa, learners who have completed grade 12, or who have degrees and diplomas from higher education institutions, are more likely to be successful in securing job opportunities than learners who have completed grade 9.

‘Basic education’ should therefore include a learner’s entire schooling career. This approach will also be consistent with international trends.

GUIDELINES



WORLD DECLARATION ON EDUCATION FOR ALL

- The World Declaration on Education for All has placed less emphasis on completing specific formal programmes or certification requirements.
- Instead, it emphasises getting basic learning needs, such as literacy, oral expression, numeracy, problem-solving and other skills necessary for an individual to realise full potential and participate in society.
- This connects the meaning of basic education with the aims to be achieved by guaranteeing this right.



12.4.3 The right to adult basic education

Included in the right to basic education is the right to adult basic education. This right gives people, who have not received an education in the past and who are now beyond the school-going age, the right to receive an education.

The *Policy Document on Adult Basic Education and Training* defines adult basic education and training (ABET) as education that:

“Subsumes both literacy and post-literacy as it seeks to connect literacy with basic (general) adult education on the one hand and with training for income generation on the other hand.”

Policy Document on Adult Basic Education and Training, 1997

This right is very important to help deal with the shortcomings of apartheid education where the majority of South Africans received no education or an education of a very low standard.

As section 29(1)(a) of the Constitution gives an unqualified right, the right to adult basic education must be capable of being enforced immediately. This means the State must ensure that:

- There are sufficient and affordable ABET Centres.
- All ABET learners are able to access these institutions.

EXAMPLES



WHAT THE STATE MAY HAVE TO DO

- Set up facilities for you to exercise your right to receive adult basic education.
- Give you financial assistance if you cannot afford to pay for the education.
- Provide financial assistance to non-governmental literacy organisations that provide adult basic education.

12.4.4 The right to further education

This right, unlike the right to basic education, is a qualified socio-economic right. The standard of review is therefore likely to be whether the measures taken to realise this right are 'reasonable'.

However, section 29(1)(b) of the Constitution is different from the other qualified socio-economic rights because the limitation of "within available resources" is not part of this section. This could mean that, where a State policy or programme is challenged, assessing the reasonableness of the programme could include an evaluation of the amount of funding made available for implementing the programme.

GUIDELINES



THE MEANING OF 'FURTHER EDUCATION'

- *Further education and training* is defined in the *Further Education and Training Act 98 of 1998* as levels above 'general education', but below 'higher education'.
- *Higher education* is defined under the *Higher Education Act 101 of 1997* as "all learning programmes leading to qualifications higher than grade 12 or its equivalent in terms of the National Qualifications Framework". This includes universities, technikons and colleges.
- In spite of these definitions, *further education* under the constitutional right should be seen as referring to all education of a higher level than basic education, including higher education.
- This approach would be consistent with the international interpretation given to the meaning of the right, and would be the only way to make sense of the different meaning the Constitution gives to basic *and* further education.

12.4.5 The right to education in the language of your choice

The approach taken to this right has been to balance the need to give effect to this right against the need to ensure broader access to education for all. Thus, this right is qualified by including an internal balancing test when deciding on the possible alternatives for implementing the right. This means the State must give effect to this right where it is 'reasonably practicable'.

In deciding what is *reasonably practicable*, the State must consider factors like:

- Equity.
- How practical it is to implement.
- The need to reverse the results of past racially discriminatory laws and practices.

CASE STUDY



A SINGLE-MEDIUM PUBLIC SCHOOL

A school tries to set up an Afrikaans single-medium institution. This may have the effect of denying other learners in that area, in particular black children who are not Afrikaans speaking, access to a school. Government can justifiably decide not to allow a single-medium institution, based on the right of all children to education in a language of their choice.

When you do not receive the right to education in your chosen language, the State will have to show that all possible alternatives were considered and that the failure to accommodate a learner was justifiable on the basis of one or more of the listed factors.

12.4.6 The right to set up an independent educational institution

This right enables people to set up and maintain their own schools. In other words, this right allows for the establishment of private schools.

This right is important in countries all over the world to ensure the protection of minority rights. This is because when specific language, religious or cultural groups set up their own schools, they are able to transfer knowledge of that particular language, religion or culture. They can then ensure that the language, religion or culture is passed on to the next generation.

Under the *interim Constitution* until 1996 (*Act 200 of 1993*), the protection of this right was only available to schools established by a specific cultural or religious identity. The right under our final Constitution of 1996 applies to all private schools.

In exercising this right, independent schools must follow these rules:

- They must not discriminate on the basis of race.
- They must be registered with the State.
- They must maintain standards that are not lower than the standards in public educational institutions.

EXAMPLE



A GERMAN SCHOOL

For example, an African learner wishing to attend a school teaching in German cannot be denied access to the school on the basis that she is an African. However, she must be willing to learn the language taught by the school.

This right does not place a duty on the State to fund independent schools. So this right must be exercised by people or communities at their own expense. However, the State can give subsidies to independent schools.

COURT CASE



NO OBLIGATION ON THE STATE

In the 1996 Schools Education Bill case, the Constitutional Court had to deal with a similar provision in the interim Constitution. The Court had to decide if the State had a positive obligation to establish educational institutions based on a common culture, language or religion, as long as there was no discrimination on the ground of race. In other words, was there a duty on the State to establish and fund this kind of school?

The Court decided that there was no positive duty on the State. Instead, there was a 'defensive' right, meaning that it protects the right of people to establish independent schools without fear of invasion or interference by the State.

12.5

Policies, legislation and programmes to implement your education rights

12.5.1 Basic education: introduction

Since 1994, the new democratic Government has developed and passed many laws and policies that have as their main aim taking steps to deal with the negative effects of apartheid education. The main principles and laws that govern basic education are set out in the South African Schools Act (SASA) of 1996 and the *Education Policy Act 27 of 1996*. There are also provincial policies, laws and regulations that give further details and help to implement national laws.

EXAMPLE



EXEMPTIONS FROM SCHOOL FEES

*Section 39 of SASA sets out the procedure that schools must follow when adopting its school fee and exemption policy. Section 39 says that the Minister of Education must make regulations setting out the criteria and procedure for getting exemption from school fees. The **Exemption of Parents from the Payment of School Fees Regulations, 1998 (School Fees Regulations)**, cover the criteria and procedure in detail.*

These education laws together transform apartheid education and regulate all issues relating to basic education. This includes issues such as:

- The funding of education and the charging of school fees.
- Governance for schools.
- The discipline of learners.
- Language policies for schools.
- Admission policies for schools.

12.5.2 Basic education: the principle of non-discrimination

SASA has a general prohibition on unfair discrimination in the admission of learners. This ensures the end of racial segregation in schools. SASA, together with other laws, also identifies and prohibits other practices that have the potential to discriminate against learners of different races, cultures or socio-economic backgrounds.

EXAMPLES



NON-DISCRIMINATION

- *SASA and the Admission Policy for Ordinary Schools Act 27 of 1996, (the Admissions Policy), prohibit excluding a learner from any of the school's activities where parents have not paid school fees.*
- *The Admissions Policy states that non-nationals, whose parents are temporary or permanent residents, must be treated in the same way as South Africans.*
- *The Admissions Policy states that learners with special needs must be accommodated in ordinary schools where 'reasonably practical'.*
- *The National Policy on HIV/AIDS for Learners and Educators in Public Schools of 1999 sets out guidelines for non-discrimination against learners living with or affected by HIV/AIDS.*

Education laws cannot always provide protection from all forms of discrimination, particularly hidden discrimination, likely to be experienced by learners. In these cases, litigation or advocating for law reform is useful.

COURT CASE



HIDDEN DISCRIMINATION

An example of a case of hidden racism is the 1996 case of *Matukane and Others v Laerskool Potgietersrus*. In this case, the school argued that their exclusively Afrikaans culture and ethos would be negatively affected by admitting learners from a different cultural background. The school attempted to rely on arguments about the protection of minority rights to exclude black learners.

The High Court rejected these arguments mainly because the school was a dual-medium school providing learning and teaching in both Afrikaans and English. The Court then decided that black learners had been unfairly discriminated against by having their application to the school rejected.

The Court ordered the school:

- Not to refuse entry to any child on grounds related to race, ethnic or social origin, culture, colour or language.
- To admit all the black children whose applications had originally been rejected.

12.5.3 Basic education: school fees

Under the current law, schools are allowed to charge school fees. However, parents who cannot afford to pay the fees charged by a school, can apply for exemption from paying school fees. This system has not been working well and many schools and school governing bodies (SGBs) do not obey and implement the laws.



EXAMPLES



HOW SCHOOL FEE LAWS HAVE BEEN ABUSED

- Although there should be no discrimination for non-payment of school fees, there have been many cases where learners are treated differently if their parents have not paid school fees. Schools have withheld report cards or textbooks, or sent learners home until their parents have paid school fees.
- Parents, who qualify for exemptions from school fees, are sued for arrear school fees. They receive letters of demand from lawyers, are served with a summons, or already have judgments against them for unpaid school fees.
- Learners cannot register at the school if they cannot afford the registration fees charged by a school.


It is very important for parents and learners to understand school fee laws to ensure that schools and SGBs properly implement these laws.


a) **Determining fees and exemptions**

The procedure for determining the fees charged at a school must be lawful:

1. Every year, the school must call a general meeting.
2. At this meeting, parents must vote whether or not to charge school fees.
3. They must also decide on the amount of school fees for the year and they must develop the school's exemption policy to assist poor parents, who cannot afford the fees charged by a particular school.
4. The exemption policy must follow the basic principles set out in the School Fees Regulations.



GUIDELINES	Category	Criteria	Example (for R1000 a year school fees)
	Full exemption	If the combined gross annual income of both parents (or just one if there is only one) is less than 10 times the annual school fees for each learner, the parent can get a full exemption.	A parent will be fully exempted if earning less than R10 000 for the year.
EXEMPTIONS FROM SCHOOL FEES	Partial exemption	If the combined gross annual income of the parents is less than 30 times, but more than 10 times, the annual school fees for each learner, the parent can get a partial exemption.	A parent will be partially exempted if earning more than R10 000, but less than R30 000, for the year. The total of a partial exemption should be calculated according to a sliding-scale. For example, if the parents' income is R20 000 for the year, they should receive a 50% exemption and will pay R500 school fees for the year.

GUIDELINES	
	<ol style="list-style-type: none"> 1. The person must apply to the SGB for an exemption. 2. The SGB must consider the application. For the application to be fair, it must follow the guidelines set out in the School Fees Regulations. 3. If the SGB does not grant an exemption or a person is unsatisfied with the exemption, they can appeal against the decision of the SGB to the head of the Department of Education in the province.
STEPS FOR GETTING AN EXEMPTION	

A school can only sue parents for school fee arrears if:

- The school fees were lawfully determined at the general meeting of parents.
- The SGB has notified all parents in writing of the annual school fees, and also the criteria and procedure for exemption from school fees.
- The parents would not qualify for an exemption.

Where these steps are not followed, parents can defend an action for school fee arrears.

COURT CASE



SCHOOL FEE ARREARS

In the 2003 case of *Sorsa and Sorsa v Simonstown School*, the Centre for Applied Legal Studies (CALs) successfully assisted parents in rescinding (setting aside) a default judgment for R24 000 for school fee arrears. The basis for the court's decision was that the parents had a valid defence to the school's demand for school fee arrears:

- The parents had qualified for an exemption from the payment of school fees under SASA and the School Fees Regulations.
- The parents were denied the right to apply for the exemption by the school.
- The school had also not complied with several of their duties under SASA and the School Fees Regulations, such as notifying the parents of their right to an exemption.
- The parents therefore correctly claimed that these unlawful actions by the school cancelled out their claim for school fee arrears.

Caregivers

GUIDELINES



WHO ARE CAREGIVERS?

- Caregivers can be grandparents, aunts, uncles, older brothers or sisters, or even family friends.
- Caregivers are people in whose care children live if their parents are deceased or no longer care for them.
- Caregivers provide for the children's daily needs out of their own means.

Caregivers have a right to apply for an exemption in the same way as parents. Including caregivers is very important in our South African context where so many children have been orphaned by HIV/AIDS.

b) New developments on fees

These are some of the main changes in the Education Laws Amendment Act 1 of 2004:

- National funding norms and minimum standards will be established:
 - The national department will set the amount that provinces should allocate to each category of school – schools are ranked into five categories from the poorest to the least poor.
 - The national department will also set an 'adequacy benchmark' that it considers the minimum adequate amount for a learner's right to a basic education to be realised. Thus, for example, in 2006 the poorest category of schools should receive an allocation of R703 for each learner and the wealthiest category R117, while the adequacy benchmark is set at R527.
- There will be 'no fee' or 'fee-free' schools in the poorest category of schools, but only if these schools receive an 'adequate' allocation from their provincial department. This means that there will be some schools that must

be completely free and cannot charge school fees. Also, schools must first be given an 'adequate allocation' from the provincial department.

- Where school fees continue to be charged, the new laws improve the exemption policy and strengthen non-discrimination provisions protecting poor learners.

There are some positive developments about the new laws that will improve access to schools for poor learners, but there are also concerns that this system will not do enough to improve access to schools.

<p>Improvements to school fee system</p>	<ul style="list-style-type: none"> • The poorest schools will be free. • Extra fees such as registration fees are prohibited. • There is a duty on schools to investigate whether or not a parent qualifies for an exemption before suing that parent. • A school cannot attach (hold as security for a legal debt) a parent's residence for a school fees debt without making arrangements for alternative accommodation.
<p>Concerns with new school fee system</p>	<ul style="list-style-type: none"> • The new system is very complex and administratively difficult to implement. • Which schools are fee-free is not set out in the Act – rather, this will be determined every year by the Minister depending on how that school is ranked. This may create a lot of uncertainty for parents and learners. • The new formula for exemptions is very difficult and parents will need assistance in working it out. • Even where schools are free, fees will still be charged in grades 9–12.

The new system should be closely monitored to ensure that no learner is denied access to school because they cannot afford school fees. If the new system does not improve access for poor learners, parents, learners and communities should mobilise to have the system changed again. The Department of Education wants to meet a 40% target of schools that would no longer charge fees.

c) **Meeting our international duties?**

This new system continues to fall short of meeting South Africa's duties under international law. International law says that education must be free and compulsory, at least at primary school level.

South Africa has ratified the *Convention on the Rights of the Child* (CRC) and the *African Charter on the Rights and Welfare of the Child* (African Charter). This means that South Africa has committed itself to fulfilling the duties arising from these international agreements. Yet it has not done this in practice. In Africa, countries such as Kenya and Tanzania have moved towards providing free education by abolishing school fees.

GUIDELINES



WHAT DO INTERNATIONAL AGREEMENTS GUARANTEE

- Article 26(1) of the *Universal Declaration of Human Rights* guarantees that education shall be free, at least in the elementary stages. Elementary education is also compulsory.
- Article 13(2)(a) of the CDESCR guarantees free and compulsory primary education, and article 13(2)(b) provides for the progressive introduction of free secondary education.
- Article 28(1)(a) of the CRC also guarantees free and compulsory primary education, while article 28(1)(b) directs State parties to make secondary education “available and accessible to every child, and take appropriate steps such as the introduction of free education and offering financial assistance in the case of need”.
- Article 11(3)(a) of the African Charter says State parties must take all appropriate measures to “provide free and compulsory basic education”.

d) **School fees and other access costs**

Not only do many parents struggle to pay school fees. They also struggle to pay other costs involved in sending a child to a school, such as transport, uniforms, books and stationery. These costs can make schooling inaccessible to poor learners.

According to the 2006 SAHRC *Report of the Public Hearing on the Right to Basic Education*, transport and uniform costs are often more of a burden on parents than school fees. The Report therefore makes recommendations to improve accessibility for learners, for example:

- Abolish school fees at primary level.
- The government must move rapidly to increase the number of fee-free schools available for poor learners.
- Poor learners who live far from their nearest school should receive State transport assistance to access education (*SAHRC 2006, 39–40*).

12.5.4 **Education of the girl child**

In many countries around the world, the education of boys is seen as more important than the education of girls. The effect of this is that girls are formally excluded from receiving an education. For example, until recently in Afghanistan girls were not allowed to attend school. Many countries have a huge gap between the enrolment of boys and the enrolment of girls.

The reason for this is that some people see the role of women as staying at home and raising children, and they view the education of girls as being of little value. Yet, women that are educated are more likely to participate in the education of their children, and to have a better understanding of issues relating to the nutrition and health care of their children.

CASE STUDY



UGANDA

In Uganda, a district official describes education as an obstacle to a girl's marital prospects:

"Educated girls do not fetch the 100–120 head of cattle for bride-price. Myth has it that education turns them into prostitutes, and they lose virginity, which is culturally treasured."

Tomasevski, 2003, 160

In South Africa, there are no formal barriers to girl learners receiving an education. But there are sometimes informal barriers to a girl learner receiving an education. These can result in a girl learner being forced to drop out of school or her performance at school being affected.

EXAMPLES



INFORMAL BARRIERS FOR GIRL LEARNERS

- *Where there are limited financial resources to pay school fees, transport, books and uniforms, a family may choose to send their male children to school and keep their female children at home.*
- *Girl learners are sometimes made to do more household chores, such as cooking, cleaning and caring of other siblings than boys. This may mean that girls have to stay out of school often or have little time to study or do homework.*
- *Where a girl learner becomes pregnant, she may be forced to leave school. According to the SAHRC Report of the Public Hearing on the Right to Basic Education (2006), teenage pregnancy and motherhood have been identified by the Department of Education as a challenge to the enrolment of girls in school.*
- *A Human Rights Watch Report (2001) found that one out of four girl learners in South Africa experience sexual harassment in school. These acts are perpetrated by other learners and by educators. Girl learners who have experienced sexual abuse complain that they find it difficult to continue to concentrate in school after the abuse or the harassment, or they drop out from school completely.*

The principle of non-discrimination in SASA should protect girl learners where they are not getting access to school when pregnant. A girl learner, who is asked to leave school because of pregnancy, can therefore assert her right not to be excluded from school. She can take her case to the courts or to the Commission for Gender Equality.

The Department of Education has started a process to develop regulations to protect girl learners who have been sexually harassed or sexually abused. Once these regulations are in force, they will set out procedures for assisting girl learners and for punishing perpetrators. Where the perpetrator is a teacher, he can also be dismissed for serious misconduct under the *Employment of Educators Act 76 of 1998*.

12.5.5 Adult basic education

CASE STUDY



LIMPOPO

The Limpopo Department of Education's termination of adult educator services, and the insufficient allocation of payment in the financial year 2001–2, resulted in the suspension of services of 795 Adult Learning Centres in the province. This led to 34 685 students not having the right to adult basic education (SAHRC, 2000–2, 277–278).

The Policy Document on Adult Basic Education and Training states that there are approximately 9,4 million potential ABET students. Yet spending on ABET shows that it is considered a low priority, with ABET spending not matching the great need for adult basic education.

12.5.6 Further education

The *Higher Education Act 101 of 1997* creates the “legal basis of a single, national higher education system on the basis of the rights and freedoms in our Constitution”. At the same time, institutions can regulate themselves around “student admissions, curriculum, methods of teaching and assessment, research, establishment of academic regulations and the internal management of resources” (*Higher Education White Paper, 1997*).

Against the background of an apartheid past where the majority of African students were denied opportunities for higher education, the Act directs institutions to develop and implement policies and programmes that deal with this legacy. For example, selection tests have been developed at certain universities to assess the potential of students, whose schooling results may not qualify them for university entrance. But through these tests, they may demonstrate an ability to succeed at university.

COURT CASE



CHALLENGING A
UNIVERSITY
ADMISSION POLICY

In the 1995 case of *Motala and Another v University of Natal*, the university's admission policy was the subject of an equality challenge. In this case, the parents of an Indian student brought an application against the university after her application to medical school had been rejected, in spite of her good academic results. The parents claimed that the university admission policy discriminated against their daughter and favoured African applicants.

The High Court decided:

- The discrimination was not unfair and the policy was within the meaning of section 8(3)(a) of the interim Constitution.
- Although the Indian community had been disadvantaged under apartheid, the disadvantage experienced by African learners under apartheid was significantly greater – thus, an admission policy that acknowledged this was not unfair.

The State also has a responsibility to fund higher education institutions. Funding for institutions should be fair and transparent, and should also consider racial inequalities of the past.

Higher education institutions can charge fees. A national student aid scheme has been established under the *National Student Aid Scheme Act 56 of 1999* to enable poor students to gain access to a higher education. The Act provides for the establishment of a board to allocate funds for loans and bursaries to qualifying students, and to develop the criteria and conditions for granting and withdrawing loans and bursaries.

Funding under this Act is provided from various sources, such as State allocations, private funding and the repayment of loans. The scheme has to consider the difficult circumstances under which students from historically disadvantaged communities learn.

GUIDELINES



ONGOING SUPPORT FOR DISADVANTAGED STUDENTS

One of the current problems being experienced is that students initially receive assistance under the National Student Aid Scheme Act, but then have this assistance withdrawn because of poor academic performance. Factors that need to be considered when setting conditions for granting and withdrawing loans should include:

- An assessment of the impact of economic hardship on an individual student's academic performance (such as the long distances a student may have to travel).
- Whether or not processes are in place to bridge the gap between the schooling received and the demands of the particular institution.

12.5.7 Instruction in the language of your choice

The *Norms and Standards for Language Policy in Public Schools* (1997) sets out how schools and education departments should implement their duties under section 29(2) of the Constitution. It sets out the process for:

- Choosing a learner's language of education at a school.
- The Department of Education to assist in accommodating a learner at another school in that area, if the school of choice is unable to accommodate the learner's language of choice.

The policy also defines "reasonably practicable":

"It is reasonably practicable to provide education in a particular language of learning and teaching if at least 40 in grades 1 to 6, or 35 in grades 7 to 12, learners in a particular grade request it in a particular school." *Paragraph V(D)(3)*

However in a recent court case, the Supreme Court of Appeal appears to have rejected this interpretation of "reasonably practicable".

COURT CASE



LANGUAGE POLICY IN SCHOOLS

In the 2005 case of *The Governing Body of Mikro Primary School and Another v The Western Cape Minister of Education and Others*, Mikro Primary School, an Afrikaans single-medium school, challenged the approach of the Western Cape Department of Education.

At the end of 2004, the Department instructed the school to admit 40 learners to grade 1 and to provide teaching to them in English. In effect, this would change the school to a dual-medium school. The school did not want to follow this instruction and turned to the courts. This eventually led to the Cape High Court setting aside the Department's decision.

The Department:

- Argued that section 29(2) meant that everyone had the right to be educated in an official language of their choice at each and every public educational institution, where this was reasonably practicable.
- Relied on the definition of “reasonably practicable” in the language policy, and argued that, as there were 40 names on the list, it was reasonably practicable for the school to provide teaching in English to the grade 1 learners.

However, the High Court rejected this interpretation and decided that:

- While the learners had a right to receive an education in English, and the State had the duty to fulfil that right, the learners did not have a constitutional right to receive an education at that particular school (Mikro Primary School).

The Department appealed against the High Court's decision to the Supreme Court of Appeal (SCA), but the SCA dismissed the appeal.

12.6

Other human rights linked to education rights

In addition to the specific protection guaranteed by section 29 of the Constitution, other parts of the Bill of Rights also affect the rights and freedoms of learners and students while at educational institutions.

Where potential violations of these rights are easily recognised, the State has taken steps to protect these rights in SASA. For example, the Act deals with protecting a learner's rights to dignity in section 10 and freedom from degrading or inhuman punishment in section 12. It sets out clear rules for how learners should be disciplined, including:

- Directing that the discipline of learners takes place in accordance with a code of conduct that is adopted by a particular school's SGB after consultation with learners, parents and educators.
- Directing that disciplinary proceedings follow the rules of due process to protect a learner's interest. The *rules of due process* include notifying a learner of the charges, giving an opportunity to present his/her side of the story, and giving a right to appeal.
- Prohibiting corporal punishment in schools.



COURT CASE



CORPORAL PUNISHMENT

In the 2000 case of *Christian Education South Africa v Minister of Education*, the ban on corporal punishment was challenged. The case was brought by a group of independent Christian schools. They argued that ‘corporal correction’ was a part of the Christian ethos in these schools, and thus that the banning of corporal punishment by section 10 of SASA should be declared invalid, as it limited the individual, parental and community rights of parents to practise their religion.

The Court decided that:

- To the extent that the ban on corporal punishment was a restriction on the ability of parents to practise their religion and culture, this was justifiable, as the practice of corporal punishment was inconsistent with the values guiding the Bill of Rights of the Constitution.

SASA also protect rights such as the right to the freedom of religion in section 15 of SASA, but this protection may not cover every case of a violation of that right.

EXAMPLE



RELIGIOUS OBSERVANCE AT SCHOOL

SASA allows religious observances, such as school prayers, to be conducted at schools, provided that these observances are conducted on an equitable basis, and attendance is voluntary. There is no provision to protect learners from exercising their religious beliefs in other contexts. So there is no specific provision that protects a Muslim girl learner’s right to wear a headscarf where an individual school governing body bans the wearing of the scarf (The Star, ‘Wrangle over headscarf at Joburg school’, 23 January 2004).

Parents and learners should be vigilant of rights violations and take steps where rights have been violated, for example, related to:

- The freedom of expression (section 1 of SASA).
- The freedom of assembly (section 17 of SASA).

COURT CASE



A RASTAFARIAN LEARNER

In the 2002 case of *Antonie v Governing Body, Settlers High School, and Others*, a Rastafarian learner challenged the school governing body's decision that found her guilty of serious misconduct and suspended her for five days for wearing a dreadlock hairstyle and covering her head with a cap. The school decided that she had violated the school's code of conduct that had a rule about the appearance of learners.

The Cape High Court set aside the decision of the SGB on the basis that it should have given 'adequate recognition' to the values and principles in the Constitution, including the learner's need to have freedom of expression.

COURT CASE



STUDENT ASSEMBLY AND PROTEST

In the 1996 case of *Acting Superintendent-General of Education KwaZulu-Natal v Ngubo and Others*, the Department of Education succeeded in limiting student action at a university. The High Court:

- Acknowledged the rights of students to assemble and protest under section 17 of SASA.
- Stated that this right was limited by two conditions – the demonstration had to be peaceful and the demonstrators had to be unarmed.
- Decided that the behaviour of students in this case had gone beyond the core content of a right with 'express limitations', because the demonstrations on campus involved trespassing, intentional and negligent damage to property, and intimidation of students and staff.

12.7

Protecting and advancing your education rights

12.7.1 Taking up education rights

To ensure that a learner's education rights are protected, it is important that parents, learners and communities are aware of and understand education laws. They may then make use of procedures set out in legislation to express their rights.

EXAMPLE



KNOWING ABOUT SCHOOL FEE EXEMPTIONS

Parents should know about their right to an exemption from paying school fees and the procedures to apply for an exemption:

- Parents must apply to the SGB in writing for an exemption from paying school fees.
- If the SGB does not give them an exemption, they may appeal to the Head of the Department of Education within 30 days of receiving the decision of the SGB.

There may be situations where legislation is inadequate in protecting the rights of learners, such as when:

- A law is unconstitutional.
- A law is not comprehensive enough in protecting a particular right.
- Educational institutions are not implementing the law.

Under these circumstances, parents and learners, or even SGBs, may approach different bodies to assist them in addressing their complaints. Public interest organisations and national institutions provide cheaper ways for taking up complaints, because they cover the financial costs of whatever action is taken to protect learners' rights.

Public interest organisations such as the Legal Resources Centre (LRC) or the Centre for Applied Legal Studies (CALs) assist parents and learners in dealing with education complaints.

For contact details of organisations and institutions to help with complaints, see the back cover pocket.

COURT CASE



CALS ASSISTING A COMMUNITY SCHOOL

The 2005 case of *The Governing Body of Bopasetjhaba and Others v The Premier of the Free State Province and Others* was heard in the Free State High Court. Bopasetjhaba Primary School is a school that was being *platooned*. This meant that it had to share facilities during different periods of the day with another school. To overcome this situation, the Department of Education promised that a new school with at least 20 classrooms and other facilities would be built. This promise was later withdrawn by the MEC for Education.

The SGB then approached CALs to assist them with legal representation. The SGB argued that they had a 'legitimate expectation' that a new school would be built, and therefore the provincial government should have consulted with them before the promise was withdrawn.

The Court decided in favour of the SGB and ordered that:

- The decision not to build the new school must be withdrawn.
- The SGB must be given a hearing before any decision relating to the building of a new school is taken.

CASE STUDY



GETTING HELP FROM THE SAHRC

The SAHRC received a complaint from a Muslim girl, who wrote an essay on the conflict in the Middle East between Israel and the Palestinians. The school, Crawford College, suspended her because they said she was an anti-Semite (anti-Jewish). The SAHRC decided that there had been a violation of the learner's right to freedom of expression (SAHRC, 1999, 8).

National institutions set up under our Constitution, such as the SAHRC and the Commission for Gender Equality (CGE), also assist individuals and organisations in addressing individual complaints. For example, a girl learner, who is pregnant and who has been excluded from school because of her pregnancy, may take her complaint to the CGE.

12.7.2 Advocating for change

Where education rights are threatened because of a specific law or because there is not a law to protect a right, it may be necessary to advocate for change.

GUIDELINES



ADVOCACY STRATEGIES

1. *Develop a social mobilisation strategy*

You can work with organisations and communities in developing awareness on specific education issues. Organisations and communities may then voice their concerns on public platforms, such as demonstrations, gatherings and other kinds of advocacy campaigns.

2. *Lobby for legislative reform*

When the Department of Education drafts laws, it makes these documents available to the public and calls for comments before revising the draft laws. The draft laws are then sent to Parliament, where public hearings are held to debate these draft laws before finalising them. Individuals and organisations can use these processes to comment on the laws.

3. *Getting media attention on a specific issue*

You can alert the media about an issue by writing a press release. You can also write newspaper opinion pieces, for example, analysing a new law and highlighting problems with it.

CASE STUDY



MOBILISING AROUND SCHOOL FEES

In recent years, there has been social mobilisation on the issue of school fees. Organisations such as the Global Campaign for Education have been calling for free education. The Alliance for Children's Entitlement to Social Security has highlighted cases of fee discrimination experienced by learners. CALS has publicised their cases of defending parents, who were being sued for school fee arrears.

These combined civil society efforts have created an awareness of the challenges faced by poor learners. This has pressurised the Department of Education into making school fee reforms. However, there are still many concerns with the effectiveness of the amendments in facilitating access to poor learners.

Renewed civil society efforts are therefore mobilising to:

- Publicise problems with the new school fee system.
- Build a case challenging the reasonableness of the new system.
- Jointly research and advocate for alternative models of school fees and school funding.

Advocacy strategies are most useful when they are all used together. Where advocacy fails and no reform takes place, you can then decide to go to court to protect education rights and other related rights.

Discussion ideas



TALKING POINTS:

1. Can you think of examples not mentioned in this chapter where learners' rights are violated? What rights are being violated? Do you know if these rights are protected in the education laws?
2. What is the impact on the right to education if schools do not have basic amenities such as classrooms, toilets and electricity? What steps can a school or the parents of learners at the school take to improve the school?
3. What do you think of the new laws relating to school fees? Will they facilitate access for poor learners? Why do we have school fees? Should schools continue to charge school fees?
4. What do you think of the law abolishing corporal punishment? Can you think of alternatives to corporal punishment for ensuring discipline in schools, while respecting the rights of learners?
5. You think that the Department of Education should develop a law protecting specific religious rights. For example, Muslim girl learners should be allowed to wear headscarves in schools. Rastafarian learners should be allowed to grow dreadlocks. Develop an advocacy strategy to push for a law that protects these rights.

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