Chapter 8
Socio-Economic Rights and Labour Rights as Human Rights
# Socio-Economic Rights and Labour Rights as Human Rights

## Chapter eight

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The New Politics of Socio-Economic Rights
By Dennis Davis | 26 July 2012

The wave of constitutional democracy, which was generated during the latter part of the previous century, has ensured that the enforcement of socio-economic rights had become central to contemporary constitutional debates. At the most obvious level of justification for the inclusion of these rights within a constitution lies the argument that they enhance democracy by way of the guarantee that every member of a political community must enjoy a minimum standard of welfare in order to participate in the social and political life of the society of which he or she is a member.

By contrast, the traditional argument, not only articulated by those who view a constitution as primarily a preservative instrument but also by more progressive legal voices, contends that the involvement of courts in the allocation of public resources can either, at worst, impede economic growth, or, at best, may serve to disrupt social welfare provisioning.

The record of courts in Columbia, South Africa and India are employed to counter this criticism. Advocates on behalf of these courts have done an excellent ‘sales job’ in promoting the progressive credentials of these institutions. However, can it be said with any confidence that socio-economic litigation promotes the interests of the poorest of the poor as opposed to those better resourced and who are more often than not the litigants in these cases? To what extent do judgments in these cases materially affect the overall position of inequality, as is claimed?

This question often leads to the observation that a concession about equality implies that socio-economic rights do not mean that socio-economic rights should be viewed in a binary fashion that is: either litigation or politics. However, the greatest potential for the development and enforcement for socio-economic rights should lie in properly structured political engagement. This becomes even more imperative in the second decade of the twenty-first century, within a context of fiscal austerity or, to express it differently, when neo-liberal economics shows a surprising but continued hegemony, even though its core is at worst, the combination of social and economic rights contained in modern constitutions. The absence of sustained political engagement leads to present day Hungary or the current threats to the South African Constitution.

Dennis Davis is a Judge of the South African High Court, the President of the Competition Appeal Court, Professor of Law at the University of Cape Town, the host of popular current affairs television programmes, and a former technical advisor to the Constitutional Assembly.

Mind the Gap: The Joan Fitzpatrick Memorial Lecture on Poverty and Equality delivered by Professor Sandra Friedman
By Laura Hilly and Meghan Campbell | 6 August 2012

On 24 July 2012, Professor Sandra Friedman delivered the 9th annual Joan Fitzpatrick Memorial Lecture. In light of an austere economic climate, Professor Friedman delivered a timely call for a new understanding of substantive equality that can cast light on the experience of poverty and the ways law can address it.

She argued that the traditional separation of ‘status based equality rights’ on one hand, and redistributive policies on the other is no longer sustainable. Rather, poverty should be recognized as an equality issue and addressed through a multi-dimensional view of equality. Pragmatically, this is important for countries without entrenched protection for socio-economic rights.

With respect to poverty, substantive equality focuses on:
- Breaking the cycle of disadvantage associated with poverty: - Promoting dignity and worth, and redressing stereotyping, stigma, humiliation, and violence that are often experienced by those living in poverty;
- Accommodating difference and aiming to achieve structural change;
- Facilitating full participation of all members of the community, both politically and socially.

Professor Friedman highlighted that poverty is an equality issue that has an impact upon us all: research demonstrates that greater gaps in communities between the ‘haves’ and the ‘have-nots’ lessens the cumulative health of the community. This is further evidenced by the social disharmony resulting from the current banking crisis experienced in the United Kingdom where extreme wealth disparities have heightened tensions. She argued that poverty needs to be defined in terms of both the provision of minimum justice, and comparative wealth (where wealth is understood to include more than just income) if the recognition harms resulting from poverty discrimination are to be addressed.

She argued there are two ways for poverty to be brought into the rubric of an equality analysis: by including poverty as a ground for discrimination and through pro-active equality duties.

She examined the jurisprudence of different courts: Canada, US, South Africa and the UK and concluded that courts have not been receptive to these arguments. However, this judicial reluctance is not the end but the beginning. Equality illuminates important aspects of poverty that are not addressed by redistributive government policies alone.

This Memorial Lecture began in 2004 in order to honour the life work of Professor Joan Fitzpatrick, Jeffery & Susan Brotman Professor of Law, University of Washington Law School and Oxford Law Faculty Alumni.

In introducing the lecture, Dr Andrew Shacknove, Co-Director of the Oxford/George Washington University Summer Programme in International Human Rights Law described Professor Fitzpatrick as ‘one of the most principled people’ he had ever met and a person of both ‘passion and compassion’. Her work as both a scholar and an advocate covered a wide range of human rights areas and, as Dr Shacknove described, remains ‘well cited and standing the test of time’. She promoted human rights in terms of women’s rights, freedom from torture, rights in states of emergency, prisoners rights, and she played a pivotal role on the Board of Directors of Amnesty International in the 1980s and ’90s, broadening the direction of Amnesty’s work to include, in particular, the rights of gay men and lesbians.

This lecture given as part of the Oxford/George Washington University Summer Programme in International Human Rights Law

Meghan Campbell and Laura Hilly are D.Phil candidates in Law at Pembroke College and Magdalen College, Oxford University, with research interests in equality law.

Gendered Poverty: A Role for the Right to Social Security
By Beth Goldblatt | 27 August 2012

The welfare safety net has been eroded in many developed countries over recent decades. Since the global financial crisis, austerity measures involving welfare cutbacks have worsened poverty in a number of European nations. This crisis has also had a major impact on the economies of the developing world, leading to food insecurity, job losses and increased poverty. Poor women, already on the margins, have often been hardest hit. Social security is meant to provide a buffer against hardship and lack of income that arises when people lose jobs, become sick, grow old or face other circumstances of life. It is meant to assist families and provide support to those members of society that do not earn a sufficient income to meet their basic needs. It also can play an important role in addressing gender inequalities that cause the major burden of poverty to be placed on women. In 2007 the UN Committee on Economic, Social and Cultural Rights (CESCR) produced General Comment No. 19 on the right to social security. This statement of interpretation of the right recognises the gender dimensions of poverty and the role of social security, in every society, to directly assist women in need.

By recommending that State parties remove factors that create unequal wage outcomes or address the impact of family responsibilities, the General Comment hints at more structural changes that might be required to the workplace, economy and society. This substantive and more far-reaching approach is needed if gender inequalities in social security are to be addressed. By requiring States to take account of care responsibilities in calculating benefits, it goes considerably further than most countries are doing at present and renders visible care work that is so often naturalised and ignored. It recognises that women generally earn less than men and face greater financial hardship over the course of their working lives.

While women’s unequal care burden is acknowledged, the General Comment does not talk about increasing the role of men in care so as to begin change gender relations in society. It also does not expressly note that women are often involved in unpaid subsistence work, in family enterprises and in household and reproductive labour which means they have no opportunities to access contributory social insurance. Their labour is not seen as work. In addition, the fact that some members of society have access to higher paid social insurance benefits while others, often women, must settle for more modest social assistance benefits (where these exist at all) raises questions about the role of rights in undoing this more structural inequality. The General Comment makes no mention of violence against women. Violence and sexual harassment affect many women’s earning capacity, requiring them to leave or move jobs or remain unemployed. Addressing gender-based violence and other discriminatory practices along with labour market restructuring and the reconfiguration of care are essential if women are to have equal rights to social security. The right to social security should be seen as a vehicle for addressing women’s poverty and disadvantage and could also play a role in building more gender equal societies.

Beth Goldblatt is a Visiting Fellow of the Australian Human Rights Centre, University of New South Wales, and an Honorary Senior Research Fellow at the University of the Witwatersrand in South Africa. Beth is the co-organiser, with Professor Lucie Lamarche of the University of Ottawa, of the International Initiative to Promote Women’s Right to Social Security and Protection. The Initiative recently held a series of webinars. The papers and videos from the webinars can be accessed at http://www.cdp-hrc.uottawa.ca/?p=4575. A longer version of this post is published in the Human Rights Defender, a magazine of the Australian Human Rights Centre, Issue 21(2) August 2012.
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Engendering Social Welfare Rights

By Shanelle van der Berg | 14 March 2013

Recipients of social welfare must routinely face the fact that many in society regard them as "scroungers" who are undeserving of the support they receive. Welfare recipients are thus compelled to live with the stigma attached to the receipt of social support in addition to the severe problems and stigma that poverty holds in the first place. The problem is compounded for female welfare recipients when the granting of social welfare benefits, and especially cash grants, are made conditional upon women performing certain duties linked to the grants.

 Leaving the current system of incentive language coupled with punitive measures for social welfare unexamined may reinforce gender stereotypes and serve to further feminise socio-economic burdens.

In a recent seminar delivered at the Socio Economic Rights and Administrative Justice research group at Stellenbosch University, South Africa, Professor Sandra Fredman of Oxford University sought to develop an evaluative framework through which social welfare rights could be viewed from a gendered perspective. While not attempting to prescribe what precise social welfare system would be ideal or advocating the abrogation of the cash grant, Fredman acknowledged that leaving the current system of incentive language coupled with punitive measures unexamined may reinforce gender stereotypes and serve to further feminise socio-economic burdens.

A gendered evaluative framework would, firstly, entail a redistributive dimension which recognises that addressing poverty generally cannot be equated with addressing gender disadvantage specifically. There is a need to move beyond income poverty in order to acknowledge that uneven power distribution within families can result in "hidden poverty". Moreover, we should acknowledge that discrimination within property law, the law of succession and customary law – coupled with discrimination that hampers women's education – is impeding redistributive measures aimed at redressing gender disadvantage. Fredman highlighted the need for a recognition dimension within which awareness of the stigma attached to both poverty and welfare could be fostered. Intrusive mechanisms such as means-testing can serve to exacerbate the stigma attached to receiving welfare benefits while simultaneously strengthening male and female stereotypes. A shift from a perception of welfare as charity to welfare as a right is required. A transformational dimension could serve to address gendered structures and stereotypes rather than merely reflecting them. Finally, a participative dimension could promote the perception of women as agents rather than as passive recipients of benefits while acknowledging the impact that intersectionality of disadvantage can exercise on the complex myriad of issues at stake.

While not purporting to be the panacea for all the problems associated with poverty and social welfare, Fredman's four-dimensional framework could serve as a quintessential paradigm from which to re-think the way we approach the gendered nuances of social welfare rights.

Shanelle van der Berg is a doctoral candidate and member of the Socio Economic Rights and Administrative Justice research group at Faculty of Law, Stellenbosch University, South Africa.

The Rise of South Africa’s Education Adequacy Movement

By Chris McConnachie | 21 August 2012

This week we feature news on recent education rights litigation in South Africa and India. In this piece, Chris McConnachie discusses the emergence of the education adequacy movement in South Africa, which is increasingly using litigation in an attempt to improve conditions in schools.

South Africa is a pioneer in the recognition and enforcement of socio-economic rights. While there has been extensive litigation over housing, healthcare, social security and a range of other socio-economic rights, the right to a ‘basic education’ under section 29(1)(a) of the Constitution has been largely neglected. This is not for a lack of need.

South Africa’s education system is in a terrible state. The World Economic Forum’s recent global competitiveness report ranks South Africa 126th out of 139 countries in primary education. This reflects the poor conditions in South African schools. According to government statistics, thousands of schools lack basic amenities, eighty per cent of schools lack sufficient text books, only seven per cent have stocked and functioning libraries, and ten per cent have working computer facilities. Teaching standards also remain weak, compounded by the state’s failure to fill vacant teaching posts. These conditions are the product of apartheid policies which produced vast disparities in the education system. Since the end of apartheid little progress has been made in improving these conditions and, in many areas, conditions have worsened.

It is only in the last three years that civil society groups, school governing bodies and parents have begun to use the right to a basic education to compel the state to take action. This started with test litigation in 2010 over inadequate school facilities in the Eastern Cape Province. This focus on school facilities has since expanded into ongoing litigation to force the Minister for Basic Education to produce national norms and standards for school infrastructure. There has also been headline-grabbing litigation over the state’s failure to provide textbooks to schools in the Limpopo Province, resulting in a far-reaching court order requiring the government to take immediate action to provide textbooks and to implement a catch-up plan. Most recently, Eastern Cape schools have succeeded in obtaining a court order requiring the state to fill vacant teacher posts in the province after a decade of inaction.

This demonstrates the rise of an ‘education adequacy’ movement in South Africa, akin to the movement that emerged in the United States in the late 1980s and early 1990s. The South African movement is still in its infancy, but this early litigation has revealed two key trends.

The first is that litigants have sought to capitalise on the ‘unqualified’ nature of the right to a basic education. Unlike many of the other socio-economic rights in the South African Constitution, the right to a basic education is not qualified by the requirements that the state must take ‘reasonable’ steps to implement the right ‘progressively’ within its ‘available resources’. The Constitutional Court interprets these qualifications to mean that individuals do not have a positive right to socio-economic goods on demand but merely have a right to have the state implement reasonable programmes to provide access to these goods over time. This imposes an onerous burden on litigants, as they must establish that the state’s programmes are unreasonable. In Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others at [37] the Constitutional Court affirmed that the right to a basic education is different. It is a right to receive a basic education; anything less is a limitation of the right requiring the state to justify the limitation. The implications are yet to be fully worked out, but it is clear that the unqualified right eases the burden of proof on litigants and focuses attention on the poor conditions at their schools. The education adequacy movement has made good use of these advantages.

The second important trend is that litigation has not been treated as an end itself but as one element of a broader range of strategies to secure improvements in education. This is evident in the current litigation over norms and standards for school infrastructure which has been accompanied by protests marches, pickets, fasting and petitions. The litigation over textbooks in Limpopo has also been used as a tool to focus media and political attention on this issue. This is a clear example how litigation can be used to complement rather than to replace structured political engagement, as Dennis Davis emphasised in his recent post.

Many challenges lie ahead. Uncertainty remains over the proper interpretation of the right to a basic education, there have been real problems in enforcing court orders, and there are difficult questions over the appropriate role of the courts in addressing systemic problems in the education system. The movement will soon need to address these challenges.

Chris is a MPhil Candidate at Lincoln College, Oxford and is the administrator of the Oxford Human Rights Hub. He is the co-author of ‘Concrete the Right to a Basic Education’ (2012) 129 South African Law Journal 554, an article documenting recent litigation over school facilities in South Africa.
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Ready to Learn? A Resource for Realising the Right to Education—on 25 October at the Open Society Foundations in New York City. Chris McConnachie explains the significance of this publication (available at http://osfrhr.ox.ac.uk/?p=3125)

Followers of South Africa’s socio-economic rights case law will be familiar with the hard-fought legal campaigns over the rights to housing, healthcare, social assistance, water, and other goods. The Constitutional Court’s judgments on these rights are studied around the world and the underlying legal strategies have been carefully dissected for lessons on how to litigate socio-economic rights effectively.

In contrast, the recent wave of education rights litigation has reached limited audience outside of South Africa. Most of these cases have settled before going to court. Others have resulted in High Court judgments that have not been widely circulated. Some cases have reached the Constitutional Court, but none has resulted in an authoritative judgment on the right to a basic education. Education in South Africa still awaits its Grootboom—the path-breaking judgment on housing rights that cleared the way for further litigation.

The Legal Resources Centre (LRC), South Africa’s oldest and largest public interest law organisation, has been at the forefront of these efforts to secure the right to a basic education. In a series of cases, the LRC has achieved settlement agreements and court orders requiring the national and provincial governments to:

- Commit R8.2 billion to the eradication of ‘mud schools’ and the improvement of school infrastructure across South Africa;
- Fill 7,000 vacant teaching posts in the Eastern Cape Province;
- Complete a comprehensive audit of Eastern Cape schools’ furniture needs and explain how each student will be provided with a desk and a chair;
- Publish binding norms and standards on school infrastructure— including adequate classrooms, electricity, water, sanitation, libraries, laboratories, sports and recreational facilities, and perimeter security— for all South African schools by November 2013.

Until now, information on these cases has not been easily accessible. In Ready to Learn? A Resource for Realising the Right to Education, a new book available for free download, the LRC offers the first consolidated account of its work, including summaries of the key cases; extracts from court documents, judgments, and orders; and candid discussions of the strategies informing past and future cases.

This is an important resource for understanding the development of education rights litigation in South Africa. It also offers lessons for lawyers and campaigners around the world in how to use courts to secure education rights.

The LRC’s work shows that litigation can achieve a great deal when it is properly planned and executed. It is also a reminder of courts’ limitations in the face of government incapacity and intransigence. As this book details, South Africa’s national and provincial governments have routinely failed to comply with court orders and settlement agreements, requiring the LRC and its partners to engage in patient negotiations, media campaigns, and further litigation to secure compliance.

In his foreword to the book, Dr Kishore Singh, UN Special Rapporteur on the Right to Education, emphasises the need for lawyers and academics around the world to share their ideas and experiences in enforcing education rights. The LRC has benefited greatly from this shared knowledge in formulating its legal arguments and strategies. Ready to Learn more than returns the favour.

Chris is a South African DPhil candidate at Lincoln College, Oxford.
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Public Duties and Private Schools: the Indian Supreme Court’s Landmark Ruling

By Gautam Bhatia | 23 August 2012

Problems of affordability and access have perennially plagued the Indian educational system. State-run schools, while affordable, have suffered from a severe absence of quality in every respect; and private schools have been beyond the financial reach of a vast majority of Indians. Over the years, the government and the judiciary undertook many efforts to rectify the situation, culminating in the passage of the Right of Children to Free and Compulsory Education Act (‘RtEA’) in 2009. On 12th April 2012, a three-judge bench of the Indian Supreme Court, by a 2:1 majority, rejected a constitutional challenge to the RtEA 12th April, in a judgment that is bound to have far-reaching consequences for basic education in India.

A brief legal background is apposite at this point. The Indian Constitution, originally, did not guarantee the right to education as a justiciable, legally enforceable right. It placed the right to education as a part of the ‘right to life’ as recognized under Article 41, the provision of free and compulsory education for children until the age of fourteen (Article 45), and special provisions for educating the economically and socially weaker sections of society (Article 46) among the ‘directive principles of State policy’ (‘DPSPs’) – i.e., aspirational, non-enforceable legislative goals that the Constitution exhorts the government to try and achieve.

Over the years, however, the distinction between the Bill of Rights (Part III), and the DPSPs has been eroded by the judiciary in many ways, and particularly as far as education is concerned. In Mohini Jain v State of Karnataka, for instance, the Supreme Court held that a ‘right’ to education flows from the enforceable right to life and personal liberty guaranteed by Article 21 of the Constitution, since there could be no ‘dignified enjoyment of life’, or the realization of other rights, without adequate education. Unnikrishnan v State of Andhra Pradesh gave specificity to the Mohini Jain holding by imposing an obligation upon the State, again flowing from Article 21, to provide free education to all children until the age of fourteen. The State responded to Unnikrishnan by amending the Constitution in 2002, and crystalizing the dictum of the Court in a new Article 21A. The RtEA 2009, then, enacts by the government to fulfill its obligations under Article 21A and Unnikrishnan.

Of particular interest to us is s. 12(1)(c) of the RtEA, which requires privately-run schools, receiving no aid from the State, to admit, ‘in Class I, to the extent of at least 25% of the strength of that class, children belonging to weaker section and disadvantaged group in the neighbourhood and provide free and compulsory elementary education till its completion.’ In other words, part of the burden of fulfilling Article 21A obligations is placed upon what, in strict technical terms, is a non-State entity (the private school).

In Society for Un-Aided Private Schools of Rajasthan v Union of India (the ‘RIEA case’) an association of private, un-aided schools challenged this provision, complaining that it violated their freedom to practice any profession, or carry on any trade or business, guaranteed by Article 19(1)(g) of the Constitution. This argument formed the core of the case, and the Court rejected it on two grounds. First, Article 19(6) of the Constitution allows the government to impose ‘reasonable restrictions’ ... in the interests of the public’ upon the 19(1)(g) right. The Court held that what was enjoined by a DPSP automatically counted as a ‘reasonable restriction’ under Article 19(6). Secondly, the Court held, in line with previous cases, that running a private educational institution could only qualify for protection under Article 19(1)(g) if education was to be treated as a charitable enterprise. That being the case, the Court implied that an arrangement requiring these charitable enterprises to help weaker sections of society was a reasonable restriction on their freedom. The Court went on to uphold the manner of classification provided by the RIEA, rejected the idea of merit playing any role at the level of access to basic education, and exempted minority institutions from the purview of the RIEA.

Apart from an account of what the Court decided, it is also worthwhile to examine, briefly, what it did not decide. It did not decide the question of whether private schools were themselves subject to the obligations imposed by Article 21A. In Unnikrishnan, certain remarks made by Justice Mohan in his concurring judgment appear to imply that, since they perform a public function, private educational institutions may be subjected to providing equal treatment to all, as guaranteed by Article 14 of the Constitution. In the RIEA case, a slightly different argument was raised, asking the Court to apply the bill of rights horizontally in order to bring private schools under the ambit of Article 21A. It was rejected by Justice Radhakrishnan in his dissenting opinion, and not addressed by the majority. The question, for the moment, remains open.

Gautam is a recent BCL graduate at Balliol College, Oxford. He will be progressing to the MPPI in Law at Oxford later this year.

Cultivating a Common Bond: The Right to Adequate Education in South Africa and the United States

By Scott Wadding | 11 September 2013

As the newest wave of education adequacy litigation crashes upon the shores of South Africa, courts face the enormous task of breathing life into a socio-economic right that is at once amorphous and rapidly evolving. But South African courts are not alone. In the United States, several state high courts recognize the right to an adequate education under their respective state constitutions. US decisions wrestling with the right to an adequate education offer a wealth of knowledge that can be cultivated by South African courts as they refine the nature of a basic education under the South African Constitution.

As South African courts continue to draw upon the collective experience of humanity in the education context, they may find a common bond with their American counterparts. Scott Wadding is an attorney practicing constitutional law in Cedar Rapids, Iowa.
Horizontal Application of the Right to Education in India
By Jayna Kothari | 13 September 2012

A Full Bench of the Supreme Court of India delivered the long awaited judgment on the constitutionality of the Right of Children to Free and Compulsory Education Act 2009 (RTE Act). The case arose out of a series of petitions filed by several private aided and unaided schools, challenging the RTE Act and specifically Section 12(1)(c) of the law that mandated private unaided schools all across the country to admit 25% of their Class I strength with children from weaker and disadvantaged sections and provide them with free education.

One of the important questions that came up before the Supreme Court was the horizontal application of fundamental rights. This issue is really the core of the RTE Act, which mandates all private unaided schools to take in 25% of children from disadvantaged groups free of charge and to be re-imbursed only nominally by the State and requires them to follow the basic norms and standards set by the State for all schools. Although in India there has never been a direct application of fundamental rights being applied to non-State actors, the debate of horizontality of rights is not new. There are several articles in Part III of the Indian Constitution (containing the fundamental rights), which directly apply to non-State actors as well.

What is fascinating about the RTE Act and the recent judgment is that not only does it affirm the horizontality of rights argument as the Court recognises that private schools are also required to comply with the obligation to provide the right to education, but that it has used this argument for the horizontal application of social rights and not merely civil and political rights. The Indian Constitution has taken this argument to a step further ahead of other jurisdictions, which have anti-discrimination laws covering the private sector to hold that private actors are not merely required to perform negative duties of restraint from infringing on fundamental rights, but also to positively provide socio-economic rights guarantees such as the right to education.

The argument of horizontality of rights that was quoted in the dissenting judgment of J. Radhakrishnan was conceptualized by the Centre for Law and Policy Research through the Azim Premji Foundation as an Interlocutor.

Jayna Kothari is a partner at Ashira Law, a law firm in Bangalore and is practicing in the High Court of Karnataka. She is one of the founding members of the Centre for Law & Policy Research, an organisation which aims to maintain and promote legal education and public policy research and litigation.

Education Suspended, Rights Infringed
By Jadine Johnson | 9 April 2013

On Monday, March 25th, ninety-seven students at Leflore High School in Mobile, Alabama were suspended. These students were not suspended for drugs or weapons. They were not fighting or being disruptive. These students were suspended for violating Leflore’s uniform policy — some had simply worn the wrong colour jackets or socks to school.

In Mobile County, students are suspended so often for minor infractions that it has become the norm. The recent suspension of nearly 100 students at Leflore High School is the most recent example of what happens all across the South, and the United States.

Suspended students miss valuable class time, and endure major setbacks in their educational and emotional development.
Socio-Economic Rights and Labour Rights as Human Rights

Chapter eight

Yordanova and others v Bulgaria: an Illustration of the Absence of Watertight Divisions Between the Social Right to Adequate Housing and the Civil Right to Respect for One’s Home

By Adelaide Remiche | 28 February 2013

On 24 April 2012, the European Court of Human Rights (ECHR) handed down a unanimous judgment in the case of Yordanova and others v Bulgaria, in which it ruled against Bulgaria for its attempt to remove Bulgarian nationals of Roma origin from their homes which had been unlawfully built on a municipal land in the neighbourhood of Sofia.

Yordanova v Bulgaria shows that the Article 8 right to respect for one’s home is not interpreted in isolation from the social right to adequate housing.

In short, the Court found that the enforcement of the removal order would amount to a violation of the applicants’ right to respect for their home guaranteed by Article 8 of the European Convention on Human Rights (ECHR). Even though the eviction order was in accordance with domestic law and pursued legitimate aims, it was not “necessary in a democratic society” as the decision-making procedure did not offer safeguards against disproportionate interference [with the right to respect for one’s home] but also involved a failure to consider the question of “necessity in a democratic society” (§ 114).

The judgment shows that the Article 8 right to respect for one’s home is not interpreted in isolation from the social right to adequate housing, protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter (ESC). Rather, when the ECtHR assesses the compatibility of an eviction with the right to respect for one’s home, it tends to mobilise similar principles as the ones developed by the Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee of Social Rights (ECOSR).

First, even though both the ECtHR and the Committees accept that evictions may be justifiable, in particular when a land or a dwelling is unlawfully occupied, neither considers this to be a sufficient condition.

As a matter of fact, both the Committees and the ECtHR consider that a balance ought to be struck between the right to property and other rights and interests. Moreover, independent of whether the issue of forced evictions is dealt with under the right to property or the right to adequate housing, the Court and the Committees highlight that the two same questions need to be asked: are the procedural safeguards sufficient to protect the interests at stake against disproportionate interference?; and is the forced eviction proportionate to the legitimate aims pursued?

Second, both the ECtHR and the Committees insist on the need to consider, and take seriously, the risk of homelessness that may result from forced evictions. Even though the right to respect for one’s home cannot (yet?) be interpreted as the ones developed by the Committee on Economic, Social and Cultural Rights (CESCR) and the European Social Charter (ESC), the Committees imposes an unqualified duty on national authorities to provide evicted people with alternative housing.

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The Bedroom Tax: The First Six Months

By Justin Bates | 13 October 2013

The UK ‘bedroom tax’ (Reg B13, Housing Benefit Regulations 2006 (as amended)) came into force on April 1, 2013. It reduces housing benefit payments to those renting in the social sector by 14% if they claim two or more rooms, or by 25% if there are two or more unnecessary bedrooms. The policy has been highly controversial and has attracted widespread comment.

A protest against the Bedroom Tax in Ipswich

A recent judicial review of the bedroom tax failed, although permission to appeal was granted. It is also still open to parties to appeal individual housing benefit decisions to the First-Tier Tribunal. Several recent cases have clarified the application of the bedroom tax, and have indicated how reasonable use, current use, minimum size should be interpreted. In addition, the bedroom tax has been examined in the Tribunal for discriminatory impact.

Reasonable Use

Recent cases before the Tribunal have sought to clarify the definition of a “bedroom”, in terms of reasonable use. In Harrower-Gray v Fife Council SC108/13/01318 Ms Harrower-Gray was the tenant of an old property that had been subject to “unsympathetic subdivision and clumsy internal rearrangement.” The association informed Fife Council that there were three “additional” bedrooms at the property, and as Ms Harrower-Gray was only entitled to one bedroom under regulation B13, her housing benefit would be reduced.

The First-Tier Tribunal allowed an appeal. In this case, none of the “spare” rooms could be considered “bedrooms”. One was too small (at 10 feet by 13 feet); it had been designed for use as a bedroom but not used as such. It was not enough that the room could, in theory, be used as a bedroom. The second room was also very small (at 9 feet by 11 feet) and was in need of renovation. Again, there was no evidence that the room had been designed as a bedroom. Whilst it was “possible” to “squeeze” a single bed into the third room, it had a low ceiling and minimal natural light. It was not “reasonable fit” for use as a bedroom.

Current use

The Tribunal has also examined whether current use is taken into account when classifying rooms as bedrooms. In McLeary v Fife Council SC108/13/01435 the appellant was blind and had been designed as a bedroom. Whilst it was “possible” to “squeeze” a single bed into the third room, it had a low ceiling and minimal natural light. It was not “reasonable fit” for use as a bedroom.

Minimum size

In addition, recent Tribunal cases have clarified the minimum size of a bedroom. In Nelson v Fife Council SC108/13/01362 the FTT found that the disputed room was too small to be used as an adult bedroom having regard to the statutory overcrowding provisions in the Housing (Scotland) Act 1987. Further, Circular 4/2012 indicated that the room was only to be considered a “bedroom” for bedroom tax purposes if it could be used by a disabled person. This approach was followed in Re Fife Council SC108/13/01445.

Discriminatory impact

Perhaps the most far-reaching decision on the bedroom tax is Re: Glasgow City Council SC108/13/11351, in which the FTT held that the bedroom tax was incompatible with Art.14 and Art.1, Protocol No.1, ECHR and re-interpreted Reg B13. The appellant in that case was permitted to receive housing benefit for an otherwise disqualified bedroom.

In Glasgow City Council, the appellant’s housing benefit was reduced by 14%. She appealed to the First-Tier Tribunal. She suffered from multiple sclerosis and needed an electric wheelchair for mobility. There were two bedrooms in the flat. The second bedroom was used by her husband, as her disabilities made it impractical for them to share a bed.

The FTT found that the failure of the housing authorities to make provision for this situation amounted to a violation of Art.14. The Tribunal was required by s.3, Human Rights Act 1998, to “so far as is possible” read the regulations so as to be compatible with the Convention rights of the parties. It was possible to read in an exemption for overnight care provided by family members.

It is not entirely clear how this decision squares with the failed judicial review, where apparently similar factual scenarios were found not to amount to unlawful discrimination.

Nonetheless, the decision in Re: Glasgow City Council provides a glimmer of hope.

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To politicians and lawyers, the ‘bedroom tax’ is just media shorthand for statutory rules relating to housing benefit reductions for under-occupancy of housing association property, ushered in by the Welfare Reform Act 2012. To the many individuals affected by the policy, however, it represents a loss of security which is much more personal and tangible than the letters on paper.

For three months, I have been volunteering in a Citizens Advice Bureau in North West England, where reportedly more people are affected by the recent welfare reforms than anywhere else. Even in that short time, the inequitable impact of the bedroom tax on the livelihoods of many people has become vividly, uncomfortably apparent.

Two ‘types’ of client are particularly memorable. Firstly, there are the clients who are forced to leave their family home, often after decades of quiet residence, and despite their wish to remain, for smaller lodgings because they cannot afford to bear the reduction in their housing benefit, especially when other expenses (e.g. utilities, food and prior debts) are already stretching any disposable income. Secondly, there are clients who similarly cannot afford to bear the reduction, but who are happy to move and have requested a transfer to a smaller property, only to be told by their housing authority that none is available.

It is difficult to convey on paper the real sense of powerlessness and despondency which these clients so clearly experience. For the former, the feeling of helplessness results from the loss of security due to their coerced displacement, whereas the latter develop a deep distrust of government policy and doubt the efficacy of local councils. The frequency with which such clients are coming through bureau doors is increasingly concerning.

Thankfully, the unfair impact of the bedroom tax on some of the most vulnerable in society has not gone entirely unnoticed. In a recent case, blind barrister Suinderei Lall succeeded in arguing that a room in his flat used to store equipment essential to him to lead a normal life should not be classified as a second bedroom for the purpose of the under-occupancy rules. A further case has been granted permission to go to the Court of Appeal, to examine whether the current rules unlawfully discriminate against disabled persons. Commenting on this issue in a public statement, the Chief Executive of Citizens Advice, Gillian Guy, notes that for some a little extra storage space is a real necessity, but it is those people who continue to be penalised by the present policy.

So controversial has the bedroom tax become, that it is now a divisive issue in electoral campaign politics in the UK, with current Leader of the Opposition Ed Miliband pledging to scrap the policy. For those on the wrong side of the current rules, repeal cannot come soon enough. Because of its inequitably overbroad scope, and potential for unfair and discriminatory application, the bedroom tax must go.

Natalia Holcroft-Emmess is a volunteer gateway assessor for Citizens Advice. She has recently completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

By Natasha Holcroft-Emmess | 7 October 2013
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Spatial Justice in South African Evictions Jurisprudence
By Margot Strauss and Sandra Liebenberg | 7 September 2013

Apartheid’s legacy has entrenched patterns of spatial injustice in South Africa. Poor, overwhelmingly black residents are geographically concentrated in poorly serviced townships or informal settlements on the periphery of towns and cities. Redressing the spatial disparities created by apartheid’s land and housing laws is a major policy challenge identified in the National Development Plan 2030 and an important theme in recent jurisprudence on evictions and relocations.

The Spatial Planning and Land Use Management Act (‘SPLUMA’, signed into law on 5 August 2013), establishes a clear link between the need for an inclusive spatial planning and land use management system and the imperative to realise the housing rights of disadvantaged communities in South Africa. A key feature of the Act is the inclusion of the principle of spatial justice, which aims to redress past development imbalances by improving access to well-located land and promoting integrated human settlements. This principle of spatial justice is consistent with the Constitution’s broader commitment to social justice and should constitute a central guiding principle in judicial, legislative and policy interpretations of the right of access to adequate housing in section 26 of the Constitution.

However, attention to spatial justice has been elusive in the burgeoning evictions jurisprudence on section 26. This is despite the fact that the eviction and relocation of impoverished communities, from densely occupied informal settlements or inner-city properties to ill-located peripheral locations, deepens vulnerability by disrupting fragile community networks, removing people far from livelihood opportunities and interfering with existing arrangements for child care and education. Temporary accommodation provided in the aftermath of evictions also tends to acquire a permanent character, which undermines the objective of creating integrated human settlements.

The issue of spatial justice, as a key element in relation to housing rights, was pertinently raised in the case of Residents of Joe Slovo Community, Western Cape v Thubelishia Homes (‘Joe Slovo’). The provincial government and a housing development agency applied for the eviction and relocation of approximately 20,000 residents from a large informal settlement to a temporary resettlement unit (‘TRU’), some 15 kilometres away on the urban periphery, in order to facilitate the upgrading of the settlement. The residents and amicus curiae advanced extensive arguments regarding the impact of the relocation of the community to the TRU, when expert evidence indicated that an in situ upgrade of the settlement was feasible. Although the Court commented on the state’s duty to assess and ameliorate the disruptive spatial consequences of relocating vulnerable people in need of housing, these consequences were largely viewed as operational matters in which the state should be afforded a generous discretion. In Joe Slovo, an order requiring the parties to engage meaningfully about the feasibility of an in situ upgrade of the settlement would have been less disruptive and arguably more in line with the tenets of spatial justice. Ultimately, the eviction order was discharged in Joe Slovo II, as the authorities eventually decided to proceed with an in situ upgrade of the settlement.

In contrast to Joe Slovo, the recent Constitutional Court judgment in City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties (‘Blue Moonlight’) is more spatially sensitive to the circumstances of the occupiers. The case dealt with an application for the eviction of 86 people who were unlawfully occupying dilapidated, privately owned buildings in the Johannesburg inner city that were earmarked for commercial development. The occupiers opposed their eviction on the grounds that it would render them homeless, as they could not afford alternative accommodation in the city, and that the location of their building was crucial to their ability to access socio-economic opportunities. The Court granted the eviction order in Blue Moonlight, but ordered the City to provide the occupiers with temporary accommodation in a location as near as possible to the area where they were residing.

Blue Moonlight illustrates that courts can play an important dual role in promoting the objectives of spatial justice in relation to housing. The first role is to carefully consider the needs and circumstances of the particular occupiers before finding that an eviction meets the constitutional and legislative requirements of justice and equity. Secondly, in instances where relocation is unavoidable, courts can mitigate the consequences of the relocation by ensuring that proximal alternative accommodation is provided. Blue Moonlight provides a valuable platform from which the principle of spatial justice can be developed in jurisprudence on section 26.

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Class Actions for South Africa: Children’s Resource Centre Trust v Pioneer Food
By Ingrid Cloete | 10 December 2012

Although the South African Constitution makes provision for class actions, the requirements for instituting a class action and the relevant procedures had not been authoritatively determined, until a landmark judgment delivered two weeks ago. Ingrid Cloete explains Oxford Pro Bono Publico’s role in bringing about this important development of the law.

On 29 November 2012, the South African Supreme Court of Appeal handed down judgment in Children’s Resource Centre Trust v Pioneer Food.

This case concerned consumers of bread who had suffered damages as a result of anti-competitive behaviour by bread manufacturers. The issue before the court was whether or not the plaintiffs could bring a class action, and if so, what procedures should be followed.

Section 38(c) of the South African Constitution provides that “anyone acting as a member of, or in the interest of, a group or class of persons” has the right to approach a court claiming that a right in the Bill of Rights has been infringed or threatened. However, until this decision, neither the courts nor Parliament had laid down clear rules regulating class action litigation.

As a result, the court’s task in this case was firstly, to set out when class actions may be pursued, and secondly, to lay down procedural requirements.

The judgment of the Supreme Court of Appeal provides clear guidance on the approach to be adopted in class actions. Firstly, the court lays down a certification requirement for class actions (para 23). Secondly, it lays down rules that must be followed before a class is certified. The class must be “defined with sufficient precision that a particular individual’s membership can be objectively determined by examining their situation in the light of the class definition” (para 29). In addition, there must be a cause of action raising a triable issue (para 35), and issues of fact, law, or both, that are common to all members of the class (para 44).

In formulating clear rules for instituting class actions, the court paid considerable attention to the position in other jurisdictions. Much of the information regarding comparative law came to the court’s attention through the arguments of the Legal Resources Centre – a South African public interest law firm that acted as amicus curiae in the matter. The Legal Resources Centre, in turn, relied heavily on a report compiled by Oxford Pro Bono Publico, in crafting its heads of argument. OPBP’s report was a comparative analysis of class action law in Europe and the United States, compiled specifically for the LRC for use in the litigation. Jurisdictions covered included the USA, Finland, Norway, the United Kingdom, Italy, Sweden and Denmark.

The court ultimately decided in favour of the legal developments proposed by the Legal Resources Centre. By providing the information that assisted the LRC in crafting persuasive arguments based on comparative approaches, OPBP’s research contributed directly to the development of South African law.

Ingrid Cloete is a MPhil Candidate at Wolfson College, University of Oxford and is deputy-chairperson of Oxford Pro Bono Publico.
Fight Hunger and Discrimination by Empowering Women

By Olivier De Schutter | 7 March 2013

In rural areas around the world it is often men who migrate first to cities in search of waged labour. When they do so, it falls to women to sustain small-scale farms – and with them the food security of families and entire communities. Yet all too often women are denied the tools to improve their situation on and off the farm.

The burden of cooking, cleaning and caring for the young and elderly – not to mention fetching water and firewood – is disproportionately a woman’s concern. Women and girls, which makes it impossible for them to attend school or training sessions. Lower levels of education mean that women have less access to economic opportunities, and in turn hold weak bargaining power within the household. As such they are often saddled with a disproportionate burden of household responsibilities, and the cycle of discrimination closes.

Women are thus held back from prospering on and off the farm, despite ample evidence now showing that women’s empowerment – as well as being necessary in order to fulfil their rights – is the single most important factor in reducing hunger, and that global hunger could be reduced by up to 17% if women had access to the same productive resources as men.

What must States do to break the cycle of discrimination and fight hunger by empowering women?

They must go beyond piecemeal actions, and start to think systematically and holistically about challenging gender roles. Measures such as quotas for women in Indian public works schemes are a positive step, but women will not benefit if no provision is made for childcare services and they remain bound by domestic chores. Efforts to expand female school attendance are also welcome and several Asian countries have introduced stipends to keep girls in school – but many schools lack adequate sanitation facilities, and there is often a shortage of female teachers, thus discouraging socially conservative families who do not want their daughters taught by men. Credit is another area where development strategies have tried to target women. Countries like Indonesia have introduced microfinance programs earmarked for female-headed households, but credit-worthy women can be used as midwives to channel funding to businesses run by their male relatives.

Individual measures such as these are susceptible to fail unless more is done to tackle the underlying norms and cultural practices. States must therefore pursue transformative food security strategies that address cultural constraints and redistribute roles between women and men.

Pioneering schemes in several countries are already showing how this might be achieved. In Bangladesh, the Building Resources Across Communities initiative has provided women with poultry – a less labour-intensive asset than livestock – alongside subsidized legal and health services, clean water and sanitation. The scheme has thus freed women up in order to prosper as farmers and in other economic activities. Meanwhile, a conditional cash-transfer program in the Philippines, now covering 3 million households, not only looks to alleviate rural poverty, but also includes a gender action plan that requires that bank accounts be set up in women’s names, trains women on their rights with respect to domestic violence, child care, nutrition and other areas; and trains fathers to share responsibility as caregivers. These schemes have proved themselves gender-sensitive, and taken action to challenge the underlying gender roles.

Steps like these are the most effective way to empower women, and are a shortcut to tackling hunger and malnutrition.

Olivier De Schutter is the UN Special Rapporteur on the right to food.

Children of a Lesser God: Food Politics in India

By Ashish Goel | 25 August 2013

The tragic loss of 23 children who ate contaminated food at a government-run primary school in the East-Indian state of Bihar, near Patna, speaks volumes about the continued policy paralysis afflicting governance in the health and education sectors in India.

The Bihar incident, together with several equally fatal incidents in Rajasthan, West Bengal and Odisha, has brought India’s famous Mid Day Meal Scheme (MDMS) – which feeds over 120 million children every day and costs $2 billion an year – under the scanner. The Bihar CM, Nitish Kumar, in his defence, alleged conspiracy against his government; while primary teachers boycotted the MDMS, fearing charges of mismanagement. The responsibility for the children’s deaths, however, is yet to be owned – individually or collectively.

The MDMS was first conceptualised during the British rule in 1950s for the disadvantaged children of Madras, now Chennai, and later replicated in Pondicherry by the French. After India gained independence, MDMS ran in few southern states but was mostly dormant across the country. In 2001, the Indian Supreme Court, sitting on public interest litigation directed all government-run primary schools to provide midday meals to children. However, India continues, even today, to fight for the legal right to subsidised food. For example, the recent Food Security Bill guarantees eligible citizens subsidised food grains but, stands little chance of reaching its targeted groups. The fear of food contamination incidents in Rajasthan, West Bengal and Odisha, has brought India’s famous Mid Day Meal Scheme (MDMS) – which feeds over 120 million children every day and costs $2 billion an year – under the scanner. The Bihar CM, Nitish Kumar, in his defence, alleged conspiracy against his government; while primary teachers boycotted the MDMS, fearing charges of mismanagement. The responsibility for the children’s deaths, however, is yet to be owned – individually or collectively.

The MDMS fiasco in Bihar cannot be understood in isolation from the politics influencing health and nutrition in India. Bihar is arguably India’s most backward state – economically and socially. Widespread poverty and mass illiteracy make the state prone to corruption as the population can get easily tricked by local politicians’ grand talks about growth and development. CM Kumar’s model of ‘good governance’ may have reaped more benefits than that of his predecessor; but, the fact of the matter is that, centrally funded development schemes, such as MDMS and others, rarely reach their targeted groups. The fear of food contamination due to improper storage and distribution facilities is only a facet of a bigger problem.

India’s food security story is paradoxical: India is one of the world’s largest producers of wheat, rice, fruits and vegetables, but, still, four children die every minute from hunger, malnutrition and hunger-related, treatable diseases. The MDMS went a long way in encouraging parents in rural India to send children to school; employing women as cooks; and, of course, ensuring primary education. But the government’s apathy has reduced an otherwise generous scheme to mere vote bank politics, and for the children who died, a tragedy.

For the Indian poor, life remains a hard reality with which they have long grappled and, of late, have had to come to terms with.

Ashish Goel is a young lawyer educated in Calcutta and London and has travelled widely in rural Bihar.

Equal Inheritance Rights for Women in Botswana

By Vanja Karth | 19 October 2012

The latest decision of the Botswana High Court on inheritance rights in Edith Mmusi v Ramantele is a pivotal step for women in Botswana and Africa as a whole.

A number of African countries still have discriminatory customary law practices that effectively leave women with nothing on the death of a male family member. In this case, the Ngwaketse customary law of inheritance was challenged on the grounds that it violated the right to equal protection of the law under section 3(a) of the Constitution of Botswana. This law confirmed the right to inherit the family home on the last born male, thus excluding women, irrespective of their position in the birth order.

Judge Dingake rose to the occasion by affirming the Constitution of Botswana as the supreme law of the country and authoritatively declared that gender cannot be subsumed by cultural practice. It is to be hoped that other African legal systems will follow this example to ensure that women are not forced into inheritance-based discrimination that is so entrenched in some African societies.

The judgment considered the nature of the relationship between section 3(a) of the Constitution (which confers upon all persons the equal protection of law) and section 15 (an anti-discrimination provision which contains a savings clause for customary law).

The court held that the customary law is biased against women, with the result that women have limited inheritance rights as compared to men, and that daughters living in their parents’ homes are liable to eviction by the heir when the parents die.

Judge Dingake argued that ‘this gross and unjustifiable discrimination cannot be justified on the basis of culture.’ Section 3 requires that all laws must treat all people equally save as may legitimately be excepted by the Constitution. Thus, to the extent that the customary law denies the right of women to inherit intestate solely on the basis of their sex, it violates their constitutional right to equality under section 3, notwithstanding the savings clause under section 15.

The court also held that the Government of Botswana’s ratification of a number of international legal instruments implied that it was committed to modifying social and cultural patterns of conduct that adversely affected women through appropriate legislative, institutional and other measures. In particular, these ought to aim at achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes, or on stigma-based stereotypes for women and men. Therefore, the court also declared that there was an urgent need for Parliament to abolish all laws inconsistent with section 3(a).

Vanja Karth is Programme Manager of the Democratic Governance and Rights Unit, University of Cape Town. Researchers at Oxford Pro Bono Publico provided research assistance to Judge Dingake on comparative law.
Mmusi Ruling a Watershed Moment for Gender and Customary Law in Botswana and Beyond
By Tara Weinberg  | 23 September 2013

On September 3rd, the Court of Appeal in Botswana decided that Edith Mmusi’s parents’ home belonged to her and her sisters. In doing so, Botswana’s highest court struck a blow to rigid versions of customary law and breathed new meaning into the Botswana Constitution’s provisions to prevent unfair discrimination.

Edith Mmusi’s story
Edith Mmusi, 80, was born in the village of Kanye in southern Botswana. When Mmusi’s father died, she and her sisters contributed to the upkeep of the homestead and looked after their mother until her death in 1988. Mmusi moved from her parents’ home when she married but returned in 1991 after her husband’s death. Owing to a dispute with her in-laws, Mmusi was unable to inherit anything from her late husband’s estate.

Mmusi has lived in her parents’ home until the present day. However, recently her nephew, the namibian, Namatho, claimed the family home belonged to him. The basis of his claim was that under Ngwaketse customary law, the family home always passes to the youngest son.

Since elders and family members could not agree, the issue passed through several courts before reaching the Court of Appeal, Botswana’s highest court.

Implications of the case
The Mmusi case has far reaching implications for women’s ability to inherit but there remain some challenges.

There are three striking features of the Mmusi ruling, which have wide-reaching implications for customary law and gender equality in Botswana.

First, the Court strengthened the legal protection from unfair discrimination in Botswana. The Court clarified the relationship between the rights and freedoms enshrined in section 3 of the Constitution and the limits placed on these rights and freedoms. This was important because section 15 specifically excludes matters of inheritance and marriage from its prohibition on discrimination. Ramantele’s team said that discrimination against women in inheritance under customary law was permitted.

The Court disagreed with this interpretation. Building on a landmark 1992 case Attorney General of Botswana vs. Unity Dow, it found that the umbrella guarantee of equality before the law is contained in section 3. That guarantee can only be limited where the limitation prevents prejudice to the rights of others, or promotes the public interest. Discrimination against women in inheritance matters fails on both grounds.

A second striking feature of the Court’s ruling relates to its interpretation of Botswana’s Customary Law Act. According to the Court, where the content of customary law is in doubt, it should be determined in line with underlying values of “humanity” that should guide all law in Botswana.

The Court concluded that the underlying value of Ngwaketse inheritance laws was that those responsible for looking after the family, or who had invested in the property or who were in need of the home as a result of their circumstances should be prioritized. Edith Mmusi fitted all these categories and the court decided it would be counter to the sense of “humanity” underlying customary law – and all Botswana law – for her to be deprived of her inheritance rights.

A third important element of Mmusi’s victory relates to the Court’s articulation of living customary law. Until this case, Botswana’s jurisprudence spoke little of the notion of “living law”. The Court referred to evidence in the historical and anthropological literature, the testimonies of the litigants, and the actions of the lower customary courts, to show that customary law is “living” – that is, constantly in flux and subject to changing social dynamics. The judgment noted this means “there is no reliable and justifiable basis for us to narrow the norms of days gone by when such norms go against current value systems” (paragraph 80).

The Mmusi ruling has recognised and elevated the social reality of women’s inheritance over customary law stereotypes of exclusively male heirs. The historical literature shows that women have almost always inherited their mothers’ personal property and agricultural fields. In addition, encouraged by Kgosi Linchwe Il’s pronouncements, women inherited cattle on a more widespread basis in the latter 20th century. Evidence from the 1980s onwards shows that it has become increasingly common for unmarried daughters to inherit the family plot and that women have become the guardians of family plots even when men were around.

The Mmusi case has far reaching implications for women’s ability to inherit but there remain some challenges. Although the decision of the Court of Appeal applies to all women in Botswana regardless of their marital status, in practice married women might find it difficult to inherit as often women are barred from inheritance not just because of their sex but because they are married.

The ruling also provides the courts with the discretion to read their own interpretations of social practice into customary law. This could be exploited in contexts where the court is conservative or runs too far out of step with public sentiment.

For now, though, Edith Mmusi and her sisters can live out their last years in a house that they have won the right to inherit, on the basis of Constitution as well as customary law in Botswana.

Tara Weinberg is a researcher with the Rural Women’s Action Research Programme at the Centre for Law and Society, University of Cape Town.

Developing the Customary Law to Give Effect to the Constitutional Commitment to Substantive Equality: Mayelane v Ngwenyama
By Taryn Bannister | 20 August 2013

The South African Constitution expressly provides for the horizontal application of the Bill of Rights, stating that these rights apply to all law. Section 39(2) also states that when interpreting legislation or developing the common law or customary law the courts must: “promote the spirit, purport and objects of the Bills of Rights.” In spite of these provisions, a coherent jurisprudence on the interaction between the Bill of Rights and the private law has yet to develop. In addition, certain private law rules continue to undermine the constitutional commitment to social justice and substantive equality. For example, within South Africa it is disproportionately women and children who bear the socio-economic burden of divorce and family dissolution. The law’s failure to recognise domestic partnerships and Muslim marriages has also had severe implications for the socio-economic security of vulnerable family members.

In the recent Constitutional Court case of Mayelane v Ngwenyama and Another, the Court considered the development of the customary law relating to Tsonga marriages, relying primarily on section 39(2). In this case the applicant had been married to the deceased in terms of customary law since 1984. The deceased then entered into a second marriage with the respondent in 2008 and then passed away in 2009. The issue was the customary law relating to Tsonga marriages required that the first wife had to consent to the second marriage in order for it to be valid. Ultimately the Court developed the customary law to require the first wife’s consent.

While this goes a long way in effectively protecting the constitutional rights of the first wife, the Court has been criticised for ruling that the second marriage is automatically void. This is due to the fact that automatic invalidity could have serious economic and social consequences for the second wife and any children from the relationship. While the first wife’s consent should be required, the appropriate remedy should depend on all the circumstances of the case, including the constitutional rights of the ‘discarded’ second wife. This is necessary as she may have been in a vulnerable position when she entered into the relationship, where marriage provided an irresistible economic and social pull. She may have also been unaware of her partner’s previous marriage. If she and her children depended on the economic assistance of her husband for their survival, automatic invalidity would then place them in a vulnerable position, effectively exacerbating the feminisation of poverty.
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dhrough the equal pay claim in the Employment Tribunal (‘ET’) may issue a claim in the civil court as of right if the claim is in time.

Gender pay inequality claims remain unique in the discrimination field, in that the mechanism for enforcement is contractual rather than tortuous: the statutory equality clause modifies the terms of the woman’s contract to be no less favourable than the terms of her male comparator’s contract. Accordingly, the ET and the civil courts have always enjoyed a concurrent jurisdiction over equal pay claims, albeit that in practice, claims are brought in the ET for reasons of expertise and the lack of costs penalty for bringing an unsuccessful claim.

The time limits for bringing a claim also differ as between the jurisdictions. In the ET, a claim must be presented within six months of the end of the employment relationship to which the claim relates, usually (but not invariably) the end of the discriminatory employment contract. The ET has no discretion to extend time in the woman’s favour to consider an out of time claim. By contrast, a claim in the civil court can be issued within six years of the breach, which can be later. This gives rise to the prospect of out of time ET claims nevertheless being in time in the civil courts.

In Abdulwa, the Council sought to rely on section 2(9) Equal Pay Act (‘EqPA’) 1970 (now section 122 Equality Act (‘EqA’) 2010), which gives a civil court the power to strike out an equal pay claim if it dismisses employer and that provided a reasonable employer could have dismissed, the decision to do so is lawful. It is hard to envisage many circumstances in which a dismissal would be sufficiently unreasonable to fall outside the BORR available to the employer, but not extreme enough to be characterised as perverse.

The majority disagreed. The ability to strike out a claim because it could be dealt with more conveniently before the ET (for reasons of expertise and costs) did not mean that the civil claim should be struck out, leaving the woman without any potential remedy. Lord Wilson, giving the majority judgment, considered the absolute nature of the ET time limit an important consideration: no discretion to extend time in the ET is consistent with the prospect of a right to bring a claim at a later date (see paragraph 41). Importantly, he held that it would never be reasonable to conduct a factual inquiry into why the claim had not been submitted earlier in the ET. This is a welcome rejection of yet another procedural hurdle being placed in the way of determination of equal pay claims, an area of law that is bedevilled by such arguments.

Will this decision lead to a rash of equal pay claims being issued in the civil courts? The answer is almost certainly no. Equal pay claims remain rare outside the public sector where mass claims concerned with structural pay inequalities between male and female occupational groups have dominated in recent years. Where claims are issued, they tend to arise together with other claims at the end of the employment relationship. That fact, together with the practical benefits of ET proceedings in terms of expertise and costs is likely to keep equal pay claims within that sphere.

Further, although Lord Sumption in the minority raised the possibility that a dismissal law provides what Strasbourg would regard as an ‘effective remedy’ given that heads of compensation are restricted by statute and for example, no award may be made for injury to feelings. Heathen Williams QC is a senior barrister at Doughtey Street Chambers in London.

Pay Equality: When Is There a Right to Claim?
By Betsan Criddle | 30 October 2012

The important decision of the Supreme Court in Birmingham City Council v Abdulla establishes that a claimant who is out of time to pursue an equal pay claim in the Employment Tribunal (‘ET’) may issue a claim in the civil court as of right if that claim is in time.

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Dismissal and the Band of Reasonable Responses: An Unconventional Approach to Convention Rights?
By Heather Williams | 4 December 2012

The Court of Appeal recently decided in Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470 that the band of reasonable responses test (“BORR”), applied by Employment Tribunals to determine whether a dismissal is fair or unfair for the purposes of section 98 of the Employment Rights Act 1996, meets the standards of justification required by Article 8(2) of the European Convention on Human Rights when engaged by the consequences of a dismissal.

In support of this conclusion, both Elias LJ and Sir Stephen Sedley stressed that the BORR entailed a higher standard of review than a public law Wednesbury type test, as it involved an objective assessment of the decision to dismiss by the Tribunal, who should expect a more rigorous investigation from an employer where the consequences were particularly serious in terms of reputational damage and/or future employment prospects.

However, it seems doubtful that the BORR in fact operates very differently to a Wednesbury test in practice.

Countless Court of Appeal authorities have stressed that the Tribunal cannot substitute its own judgment for that of the employer, whether the employee should have been dismissed, tempted by the particular challenge of exploring the reasons for the dismissal. The Council argued 2010), which gives a civil court the power to strike out an equal pay claim if it dismisses employer and that provided a reasonable employer could have dismissed, the decision to do so is lawful. It is hard to envisage many circumstances in which a dismissal would be sufficiently unreasonable to fall outside the BORR available to the employer, but not extreme enough to be characterised as perverse.

Furthermore, where Article 8 is engaged, Article 8(2) requires the Court/Tribunal to make its own assessment of the proportionality of the measure, including, where there is a relevant dispute, by conducting its own assessment of the facts and its own evaluation of the competing interests involved; see for example, the Supreme Court’s decision in the housing context in Manchester City Council v Pinnock [2010] 3 WLR 1441. By contrast a BORR test presupposes just that; a range of permissible responses, so that a dismissal may be lawful even though some reasonable employers would not have decided to dismiss. It is hard to see how this equates with a proportionality test under which the Tribunal makes its own assessment of the proportionality of the dismissal and may conclude that dismissal in the particular circumstances was disproportionate. Indeed, those repeated injunctions against Tribunals forming their own views of the facts and / or substituting their own view as to whether the employee should have been dismissed, seem to directly conflict with the conventional Strasbourg approach to proportionality under Article 8(2) in the employment context, see for example Kyriakides v Cyprus (2009) App. No. 39058/05 and Schuth v Germany (2011) 52 EHRR 32.

Further, both the European Court of Human Rights and the House of Lords has rejected the proposition that a “super Wednesbury” test entails heightened scrutiny is analogous to a Convention compliant proportionality assessment, for example see Smith & Grady v United Kingdom (1999) 29 EHRR 493 and R (Daily) v Secretary of State for the Home Department (2001) 2 AC 532.

Despite having considered employment discrimination cases on countless occasions, neither the House of Lords or the Supreme Court has ever examined the legitimacy or application of the BORR, even though it entails a restrictive test that is nowhere to be found in the apparently wide words of section 88 of the Employment Rights Act (which, in turn, makes it rather ironic) that Elias LJ noted in his judgments that proportionality was not a word that was to be found in Article 8(2).

Perhaps the Supreme Court could now be persuaded to do so, tempted by the particular challenge of exploring the interface between domestic unfair dismissal law and Convention rights.

More encouragingly from a claimants’ perspective, Elias LJ’s judgment contains a detailed analysis of recent European Court of Human Rights authorities indicating when Article 8 will be engaged by the consequences of a dismissal, including by virtue of the damage to reputation involved or, less commonly, by the adverse effect upon future employment opportunities and/or the disruption to relationships with, for example, work colleagues. Domestic law has previously contained little guidance on this issue. If, as seems likely from this assessment, Article 8 is potentially engaged when, for example, dismissal occasions reputational damage, this may in turn call into question whether current unfair dismissal law provides what Strasbourg would regard as an “effective remedy” given that heads of compensation are restricted by statute and for example, no award may be made for injury to feelings.

Heather Williams QC is a senior barrister at Doughtey Street Chambers in London.
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### Chapter Eight

**From Slavery to Strasbourg: The ECtHR Makes the First Article 4 Finding Against the UK**

By Gwendolen Morgan | 5 December 2012

In November 2012, the European Court of Human Rights handed down judgment in the case of CN v. UK. The court unanimously held that there had been a violation of Article 4 (prohibition of slavery, servitude and forced labour) of the European Convention on Human Rights.

This is the first finding against the UK in relation to Article 4. The Court found that the criminal law in force in the UK had been inadequate to afford practical and effective protection to CN (see §66-77). Due to this absence of specific legislation criminalising domestic servitude and forced labour, the investigation into CN’s case had been rendered ineffective.

In her recent OHCHR post, the Special Representative and Co-ordinator for Combating Trafficking in Human Beings at the OSCE highlighted the extent of the current forced labour phenomenon in the modern, globalised labour market. She cited the International Labour Organization’s 2012 estimates that 27 million people are victims of forced labour globally, though the organisation stresses that this is a conservative estimate.

The UK signed the International Labour Organisation Forced Labour Convention in 1930, and has been under a positive obligation to effectively penalise forced labour since then.

The court’s ruling underlines why it matters to have a ‘bespoke’ criminal offence which goes to the heart of the modern slavery phenomenon: blackmail, theft, and kidnapping do not suffice alone. In practical domestic terms, in the absence of a specific offence targeting the core of the credible allegations, most police officers (that she was forced to work without pay and under threat), the police’s investigative powers were necessarily limited. There was, for example, noPACE power to arrest or interview suspects under caution for the relevant conduct. Further, the penalties for ancillary offences such as ‘obtaining pecuniary advantage by deception’ under the Theft Act 1968 would have been grossly inadequate given her extra-four-year ordeal.

Following a campaign spearheaded by Anti-Slavery International and Liberty, with an influential opinion from Helen Mountfield QC and the former DPP, the last Government introduced a new offence of slavery, servitude and forced labour in 2010. It remains to be seen if that new legislation will provide a robust remedy for a range of victims of forced labour in the UK.

The ways in which modern slavery is obscured within the UK continue to exist in the twenty-first century. Although, officially, slavery was abolished over 150 years ago, thousands of people are still held as slaves in Europe, treated as objects, humiliated and abused. Modern slaves, like their counterparts of old, are forced to work (through mental or physical threat) with or without financial reward. They are physically constrained or have other limits placed on their freedom of movement and are treated in a degrading and inhumane manner.

Today’s slaves are predominantly female and usually work in private households, starting out as migrant domestic workers, au pairs or ‘maid-on-wine’ workers. Most have come voluntarily, seeking to improve their situation or escaping poverty and hardship, but some have been deceived by their employers, agencies or other intermediaries, have been debt-bonded and even trafficked. Once working, (or married to a ‘consumer husband’), they become vulnerable and isolated. This creates ample opportunity for abusive employers or husbands to force them into domestic slavery.

Anti-Slavery International estimates that there are thousands of victims of forced labour and servitude in the UK and at least 360,000 in western industrialised countries. There is exploitation across a range of sectors but it is particularly common in domestic work, the care sector, contract cleaning, agriculture, cannabis cultivation and food processing.

The ways in which modern slavery is obscured within the UK are summarised by Adel Abadeer (2004: cited in Craig et al. 2007):

> “Modern-day slavery victims are typically very poor, vulnerable and marginalised ... they are unaware of the imperfect nature of contract or of transactional terms, the process of enslavement, and they lack visible identities. The perpetrators, in contrast, exploit the incompleteness of contracts or transactions in terms of the significant information gap between them and the victims ... and the desperate state of the enslavement that results from their ignorance, vulnerability and the absence of viable alternatives.”

The 2011 Joseph Rowntree report on forced labour explored the conceptual and practical difficulties in clearly defining forced labour so as to criminalise and prevent its occurrence:

> “It is important to understand forced labour as a process that may start with deception and move into more direct forms of coercion (Anderson and Rogaly). This idea is developed by Skivnakova, who suggests that ‘the reality of forced labour is not a static one, but a continuum of experiences ranging from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour’.”

In CN v. UK, discussed in detail in a previous post, the court helpfully analysed CN’s situation through the prism of the International Labour Organisation’s forced labour indicators, which were all present in her case at various points, although the police had failed to recognise that pattern given the lacuna in the criminal law at that time:

1. Threats or actual physical harm to the worker.
2. Restriction of movement and confinement to the work place or to a limited area.
3. Debt bondage: where the worker works to pay off a debt or loan, and is not paid for his or her services. The employer may provide food and accommodation at such inflated prices that the worker cannot escape the debt.
4. Withholding of wages or excessive wage reductions, that violate previous or current employment agreements. The wages or deduction of wages are not sufficient to meet day-to-day needs, and are used by employers to control the work and freedom of the worker.
5. Retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status.
6. Threat of denunciation to the authorities, where the worker is in an irregular immigration status.”

This approach echoes the statement of Lord Tunnocklie, the Government spokesman who moved the amendment which was to become section 71 Cororners and Justice Act 2009. He emphasised that the new offence of forced labour, slavery or servitude should not be interpreted restrictively. He explained the Government’s approach as follows:

> “The behaviour that the new offence prohibits is holding another person in slavery or servitude or requiring another person to perform forced or compulsory labour where the offender either knew or ought to have known that the person was being held or required to perform labour in such circumstances. Broadly speaking, the offence will require proof of a relationship of coercion between the defendant and the worker, and the circumstances will need to be such that the defendant knew that the arrangement was oppressive and not truly voluntary or had deliberately turned a blind eye to that fact. Precisely what constitutes slavery, servitude and forced or compulsory labour will be determined by the courts using existing case law on Article 4 of the European Convention on Human Rights and Section 4 of the Asylum and Immigration (Treatment of Claims, etc.) Act 2004 as it develops. In the vast majority of cases, we do not anticipate any difficulty for the courts in deciding whether the behaviour that they are asked to consider amounts to prohibitive behaviour under the new offence. In addition, we anticipate that sentencing guidelines will include a range of factors which will provide an indication of the relative seriousness of the prohibited behaviour. We would expect these to draw on the types of indicators in the International Labour Organisation’s conventions.”

Following section 2 Human Rights Act 1998, the police, CPS and courts here will have to take into account Strasbourg jurisprudence which often interprets civil and political rights through a progressive social and labour rights lens, as seen in CN v. UK. One hopes that despite severe funding cuts to specialist NGOs, police taskforces and legal aid representatives, the new section 71 offence will lead to convictions and send a message that modern-day serfs have enforceable rights.

Gwendolen Morgan is an Associate at Bindmans LLP. She was CN’s solicitor, instructing Helen Law and Helen Mountfield QC from Matrix Chambers.

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*By Gwendolen Morgan | 5 December 2012*
At the relevant time the BNP was a ‘whites only’ political party that was incompletely committed to the ideal of non-white immigration

Redfearn v United Kingdom: Hard Case Makes Good Law-Part 1
By Alan Bogg | 17 December 2012

On 6 November 2012, the European Court of Human Rights (ECHR) handed down judgment in Redfearn v United Kingdom (judgment of 6 November 2012, no. 44471/08). In the first part post, Alan Bogg argues that the ECHR reached the correct decision and considers the implications of this judgment.

Mr Redfearn stood as councillor for the British National Party (BNP).

Mr Redfearn worked as a driver for Serco, a company which provided transport services to Bradford City Council for vulnerable children and adults with physical and mental disabilities. Many of the service users and employees of Serco were of Asian origin. Following complaints from trade unions about Mr Redfearn’s political orientation and his subsequent election as a BNP councillor, Mr Redfearn was summarily dismissed by Serco. It was not disputed that he had been an exempted employee in his employment. Nevertheless, Serco took the view that his continued employment posed serious reputational risks to the company, despite Mr Redfearn’s ability to continue in its contractual arrangements with Bradford City Council.

Mr Redfearn was not able to bring an unfair dismissal claim because the Civil Service Code of Conduct at that time ran only for 1 year, now 2 years, as an employee. Furthermore, dismissal by reason of political belief was not included as an ‘automatically unfair’ reason for dismissal that operated as a ‘day 1’ statutory right. Nor was there any free-standing anti-discrimination provision in respect of political opinion or affiliation. His claim for race discrimination – predicated somewhat unusually upon the race of some of his fellow employees and not his own race – was dismissed by the Court of Appeal.

In a brave decision, the Fourth Chamber of the ECHR concluded by a majority that domestic law breached Mr Redfearn’s Article 11 right to freedom of association. A number of important propositions were reiterated by the Court. First, Article 11 is capable of generating positive obligations to intervene in private relations and to ensure the enjoyment of the right to freedom of association. This would necessitate positive interventions that were ‘reasonable and appropriate’ to secure the right to freedom of association as, for example, a trade union would be required to cease from BNP members whose political orientations were anathema to the trade union’s autonomy as guaranteed by Articles 11 and 1. The Court is bound to entertain any application for a withdrawal of a dismissal situation as a ‘day 1’ protection. Following cases like Palomo Sanchez v Spain and Vellutini and Michel v France, it is arguable if an individual meets the statutory qualifying periods (an automatically unfair reason for dismissal attracting ‘day 1’ protection). Following cases like Palomo Sanchez v Spain and Vellutini and Michel v France, it might be a dismissal situation engaging Art 10 and Art 11 freedoms. So, if there is no reason at all the following the trade union’s right to exclude individuals from membership would be breached if rules were unreasonable or arbitrary or if the consequences of exclusion resulted in exclusion of a whole section of the population, the trade union’s autonomy as guaranteed by Article 11 is not extinguished. There are situations where trade unions are required to not exclude individuals from membership who would be excluded if the rules were unreasonable or arbitrary.

(b) What about the future of continuity thresholds in respect of unfair dismissal protection? First, the ramifications of Redfearn might be far reaching in this respect. Redfearn’s situation. This would enable a tribunal to scrutinise the fairness of Mr Redfearn’s dismissal, given the competing interests of job creation, and indeed was legitimate in domestic workers and service users rather than his own race – was summarily dismissed by Serco. It was not disputed that he had been an exempted employee in his employment. Nevertheless, Serco took the view that his continued employment posed serious reputational risks to the company, despite Mr Redfearn’s ability to continue in its contractual arrangements with Bradford City Council.

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Redfern v United Kingdom and an Integrated Approach to Labour Rights

By Anjoli Maheswaran Foster | 23 December 2012

In recent years, the Strasbourg Court has made use of an ‘integrated approach’ to the protection of social labour rights.

Through this approach, the Court has used the civil and political rights under the European Convention on Human Rights (the Convention) to protect social labour rights, for example the right to work, the right to join trade unions, the right to safe and healthy working conditions. This is based on the idea that civil and political rights have inherent social and economic consequences. Several cases illustrate this approach. In Sidabras v Lithuania (2004) the applicants were dismissed from their jobs under Lithuanian law, because they had previously worked for the KGB. The Court held that this fell within the ambit of Article 8, and was discriminatory under Article 14. Thus, the Court used Convention rights to private life and equality to protect what would have been traditionally classed as a social-right the-right to work. Also, in Enerji Yapi-Yol Sen v Turkey (2009) the Article 11 right of association was used to protect the social right of workers to join trade unions and have them represent their interests.

In the recent case of CN v UK (2012), the Court used the Article 4 prohibition on slavery, servitude and forced labour to protect people from being forced into work by their employers. The use of workers’ rights in the workplace to protect human rights has also been seen in the Redfern case, where the Court used an integrated approach.

This ‘integrated approach’ assumes special importance in the context of labour rights because social labour rights themselves are very strongly protected. Labour rights are protected by the European Social Charter, but in the Charter cannot be enforced through the Strasbourg Court. Rather, the Charter uses a ‘soft method of enforcement’ through reporting procedures and a collective complaints procedure. Social labour rights are also protected through various international declaration (ILO) conventions - once again, however, these conventions in general contain only ‘soft methods of enforcement. Therefore, the Strasbourg Court use of civil and political rights in the Convention to protect social labour rights places the latter on a much stronger footing.

Anjoli Maheswaran Foster read for the BA in Jurisprudence at Keble College, Oxford and is currently reading for the Bachelor of Civil Law.

A Price Tag for Employment Rights? The New Employee Shareholder Status in the UK

By Jeremias Prassl | 7 May 2013

Section 31 of the recently enacted Growth and Infrastructure Act 2013 has added a third employment status to the existing categories of ‘employees’ and ‘workers’ in English law: the notion of the ‘Employee Shareholder’. The introduction of this new category, based on Adrian Beecroft’s controversial report on Employment Law reforms, has been the most high-profile change in employment law since the Coalition Government came to power.

During consultation on the proposals in the autumn of 2012, responses from employee and business representatives as well as the legal community were near-unanimously hostile, even a protracted battle between the House of Parliament and the House of Lords. The consultation process in the spring of 2013, however, did not deter the government from pressing ahead with its plans.

Under the new status, employees who receive capital gains tax-exempt shares in their employer (or a controlling enterprise) valued at £2,000 or more in return for becoming ‘employee shareholders’ are no longer entitled to the following employment rights:

- The right to not be unfairly dismissed (with the exception of automatically unfair dismissals, and those in contravention of the Equality Act 2010)
- The right to statutory redundancy pay
- The right to request flexible working
- The right to request to undertake study or training
- Employee shareholders’ are furthermore subject to longer notice periods before returning from maternity, paternity or adoption leave (up from six or eight weeks’ notice to sixteen weeks).

In the face of significant opposition in the House of Lords, the Government has made a series of procedural concessions in creating the ‘employee shareholder’ category. Prospective ‘Employee Shareholders’ need to be issued with a detailed statement of particulars, including the terms at which shares will be issued, as well as list of rights denied. Following receipt of this statement, the worker is entitled to have their employment transferred to another company, they can only validly be accepted following such advice and after a seven-day cooling-off period. Provisions have furthermore been made to protect existing employees from suffering a detriment in employment and/or unfair dismissal as a result of a refusal to become an employee shareholder. Finally, the government has given an undertaking that jobseekers could not be forced to accept employment as ‘employee shareholders’ at pains of losing their entitlement to receive jobseekers’ allowance.

As these safeguards are primarily procedural, however, it is unlikely that they will bestow significant protection on employees – most importantly in so far as there is no protection for prospective employees, who may be offered employee shareholder’ jobs on a ‘take-it-or-leave-it’ basis.

The exchange of employment rights for shares is deeply problematic: first, because it suggests that such rights can be clearly valued in monetary terms. Given the inherent inequity of bargaining power in the vast majority of employment contexts, it is highly improbable that employees will be able to bargain for more than the prescribed minimum amount of shares. The fact that employers may stipulate for a compulsory repurchase upon the termination of employment, second, exposes employees to additional risks, such as equity market fluctuations: during periods of underperformance (which will frequently be linked with other areas of statutory regulation? What would happen in the case of a TUPE transfer? or company law (In which entity should the shares be issued? What rights, if any, should be attached to the shares? Drakén has convincingly argued, it is furthermore ‘completely unnecessary and counterproductive […] to link [employee ownership] to the loss of employment’.

The reforms are supposedly motivated by a desire to ‘maximise flexibility’ and provide ‘the competitive environment required for enterprise to thrive’. Yet it is unlikely that these goals will be achieved: the new status is marred in complexity, whether as a matter of employment law (How will it relate to other areas of statutory regulation? What would happen in the case of a TUPE transfer? or company law (In which entity should the shares be issued? What rights, if any, should be attached to the shares? Drakén has convincingly argued, it is furthermore ‘completely unnecessary and counterproductive […] to link [employee ownership] to the loss of employment’.

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A growing body of work has recently developed which suggests otherwise. For example, Rainier’s seminal four-pronged theory on ‘corporate complicity’ for human rights violations on a primarily ‘do no harm’ basis is already more than a decade old. More recent developments have taken theory to practice and include the so-called ‘Ruggie Principles’, a voluntary framework endorsed by the UN Human Rights Council which provides extensive human rights guidance to companies. The Ruggie Principles require inter alia companies who subscribe thereto to comply with the International Bill of Rights and the ILO’s fundamental principles and rights at work and to conduct ongoing human rights due diligence. In response the OECD and IFC have updated their guidelines to include aspects of the Ruggie Principles. The USA now requires certain companies with new investment in Burma to file human rights reports effective 1 July 2013.

South Africa is in an ideal position to develop the corporate human rights accountability debate as its Constitution requires the ‘horizontal application’ of the Bill of Rights and expressly extends such application to juristic persons. Despite select case law on juristic persons’ ‘human rights’ which include the constitutional right to privacy and the right to dignity and freedom of expression, the extent to which human rights and obligations apply to juristic persons has been underexplored by South African courts and legislatures.

The Marikana disaster is testimony that, despite some degree of progress has been made, there remains an unsustainable and volatile imbalance between migrant workers’ rights to dignity and socio-economic justice and corporate profit margins remains in post-apartheid South Africa. If companies find the developing legal framework around corporate human rights accountability unconvincing, then the link between social and business risk and its resultant threat to the bottom line should compel both local and global companies to re-assess their human rights agendas with urgency.

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The Anniversary of the Marikana Massacre in South Africa and Corporate Accountability for Human Rights Breaches

By Hannine Drake | 21 July 2013

It is almost a year since more than 40 striking mineworkers were killed in a clash with local police at the Marikana mine on the South African platinum belt. Many argue that the Marikana massacre was not simply the result of an illegal wage strike that got out of hand. Rather, its causes are complex and are borne from a socio-economic desperation cultivated by decades of inequality, and employee and community alienation from unions, government and mining houses.

Human rights disasters in the workplace require the scrutiny of not only the role of government but also the role and responsibility of corporate stakeholders which include the corporate employer, the supply chain, institutional investors, and lenders. It is time that juristic persons, which require bespoke law as their form and influence, vary greatly from both individuals and states, are both holders of rights and therefore have the ability to infringe rights. And yet, the traditional view holds that international law does not regulate juristic persons and therefore corporations have the right to be a ‘moral’ or voluntary responsibility to respect human rights.
We Should All Participate in Articulating the Post-2015 Development Agenda

By Daniel Bradlow | 16 October 2012

The projected end date for the Millennium Development Goals is 2015. The UN Secretary General recently appointed a High Level Panel to advise him on creating a vision for a post-2015 development agenda that incorporates economic growth, social equality, and environmental sustainability.

The Panel has a choice. It could be cautious and merely propose a revised version of the MDGs. Alternatively, it could set out a vision of sustainable and equitable development that is applicable to all individuals and states, and that makes development a shared project of the whole international community. Such a vision could help us resolve complex problems like poverty, inequality, unemployment, climate change, and poor national and global governance.

Consequently, we need the Panel to choose the latter option even though we know that it cannot be merely imposed by a UN decree.

The last time the UN articulated a grand vision for how societies should be structured was in the Universal Declaration of Human Rights. At the time, it was considered so ambitious and idealistic that most states that voted for it did not think that it would have any practical significance. Over time, however, and thanks to the hard work of many states and non-state actors, the UDHR has reshaped the relationship between governments and their own citizens and has influenced international relations and international law.

The UN’s effort to articulate a post-2015 development agenda could have a comparably radical effect over time.

Daniel Bradlow is SARCHI Professor of International Development Law and African Economic Relations, University of Pretoria, Professor of Law, American University Washington College of Law, and Co-Coordinator of the Global Economic Governance Africa project. He is also a participant in a transnational civil society post-2015 Development Agenda initiative.

CSW57, MDGs and Gendered Poverty

By Meghan Campbell | 8 March 2013

One of the themes the delegates at CSW57 will be confronting over the next two weeks are the challenge of the de facto achievement of the Millennium Development Goals (MDGs) for women and girls. As the first post in the OxHRH CSW57 themed post series, Meghan Campbell looks at the issue of gendered poverty and the MDGs.

The Convention on the Elimination of Discrimination Against Women (CEDAW), complements the CSW, as it approaches women’s issues from a legal and human rights perspective. CEDAW has been described as the Magna Carta for women. It addresses women’s civil, political, economic, social and cultural rights. Therefore, it is somewhat surprising that CEDAW does not make any substantive reference to poverty. This is doubly so when the in 2012 the World Development Report on Gender Equality and Development emphasized on the urgency of addressing poverty significantly limited women’s gains in education, health and the paid labour force.

Currently, the CEDAW Committee’s treatment of gendered poverty has been rather patchwork. The latest General Recommendation released in 2013, on the economic consequences of marriage, family relations and their dissolution touches upon poverty. The Committee recommends that States “eliminate ‘property disposal/grabbing’ and protect the inheritance rights of the surviving spouse. This will help to overcome the gendered poverty that makes development a shared project of the whole international community. Such a vision could help us resolve complex problems like poverty, inequality, unemployment, climate change, and poor national and global governance.

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The 2011 protests that precipitated the fall of long-time dictator Hosni Mubarak were comprised of nearly 50% women. Even the 2013 Freedom House Report documents discrimination throughout the Egyptian civil service, and notes the presence of merely 10 women out of 508 seats in the parliament.

The story of Egypt’s revolution has not yet ended. There is still time to meet the demands at the heart of the Arab Spring – but such an effort must include freedom and justice for everyone. To discard the voices of women – a hard-fought battle would be a denial of the very movement that made democracy a possibility in Egypt.

Rhea Fernandes is a graduate student reading for her Master of Public Policy at the Blavatnik School of Government.

The 57th session of the United Nations Commission on the Status of Women, Egypt’s Muslim Brotherhood reinforced its conservative position on women’s rights by condemning aspects of the declaration as antithetical to Islam.

The 57th session of the United Nations Commission on the Status of Women ended on March 15th with the passage of a new declaration primarily aimed at eliminating and preventing all forms of violence against women and girls. The two-week session was heralded as a victory by many, including the head of the Egyptian delegation, Mervat El-Tayawly, who deemed the declaration a gift to Egyptian women. El-Tayawly’s voice on women’s rights in Egypt is a sharp contrast to the statement released by the Muslim Brotherhood, which called the declaration “the final step in the intellectual and cultural invasion of Muslim countries.” They argued that some provisions such as replacing guardianship with partnership among married couples, granting wives the right to file legal complaints in the case of spousal rape, and providing equality in marriage legislation, do more than just undermine the institution of the family but “subvert the entire society” as a whole.

The sentiments expressed by the Brotherhood reflect the reservations held by countries such as Iran and the Holy See, and point to a longstanding tension between tradition, tradiation, and women’s rights. However, the response by the Brotherhood reveals less about the content of the declaration than the declining of Egypt itself. With strong links to President Morsi’s Freedom and Justice Party, the increasing power and presence of the Brotherhood and the consequent crackdown on women’s participation in political and social spheres reflects the regressive state of Egypt’s revolutionary ambitions.

The 2011 protests that precipitated the fall of long-time dictator Hosni Mubarak were comprised of nearly 50% women. Even as the chants from Tahrir Square calling for “Asha, Homeya, Adala Egtema’eya” (Bread, Freedom, Social Justice) echoed throughout the city, female protestors were being subjected to virginity checks, beatings, and strip-searches by soldiers. Last August, General Abdul Fattah al-Sisi, a defender of the virginity checks, was appointed commander of Egypt’s armed forces. Yet the blatant disregard for women’s rights is more pervasive than the appointment of al-Sisi. Egypt’s highly-critiqued constitution, drafted by an unrepresentative, overwhelmingly male and Islamist-dominated constituent assembly, limited women’s rights to those compatible with Islamic law. It makes use of vague language in addressing protections for women and minorities, leaving them vulnerable to the caprices of the conservative and Islamist leaders who currently dominate Egyptian politics. The law has no recourse for women who have been raped by their husbands, and allows for leniency in “honor killings.”

In Egypt today, tradition and law work in tandem to reinforce discrimination against women. The 2013 Freedom House Report documents discrimination throughout the Egyptian civil service, and notes the presence of merely 10 women out of 508 seats in the parliament.
Entry into Force of the New Optional Protocol to the ICESCR
By Siobhan McInerney-Lankford | 28 June 2013

The new Optional Protocol (OP) to the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on 5 May 2013. The OP recognizes the competence of the Committee to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, who claim to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant (Article 2). The OP also requires all available domestic remedies to be exhausted before a communication to the Committee can be considered (Article 3). In exceptional circumstances, it allows the Committee to request that the State Party take interim measures, before a determination on the merits has been reached, to avoid possible irreparable damage to victims of alleged violations (Article 5). It also allows a State Party to recognize the competence of the Committee to receive and consider interstate communications relating to the rights protected in the ICESCR (Article 10).

ICESCR Optional Protocol: Reconciling Standards of Review
By Adélaïde Remiche | 16 July 2013

Until very recently, there was no individual complaint procedure for a violation of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR); for almost forty years, the only way to monitor the Covenant was through the reporting mechanism.

With the entry into force of the Optional Protocol to the ICESCR (OP-ICESCR) on the 5th of May, three months after its 10th ratification by Uruguay, the Committee on Economic, Social and Cultural Rights (CESCR) now has the capacity to receive and consider ‘communications … submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party’ (Article 2). To date, the CESCR has not rendered any decision based on the OP-ICESCR; nor has it registered any communication.

Amongst the many interesting questions raised by the entry into force of the OP-ICESCR, this post will address just one: what standard of review will the Committee use when assessing the level of respect afforded by State Parties to their conventional duties? At first glance, the Committee may be torn between two different standards: the minimum core and the reasonableness approaches.

On the one hand, the Committee has developed in its General Comments a ‘minimum core’ doctrine according to which each of the rights give rise to a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of [them]’ (General Comment n° 3, § 10). Under this standard of review, a State ‘in which any significant number of individuals are deprived of essential [necessities of life] is prima facie failing to discharge its obligations’ in relation to socio-economic rights (ibid.).

On the other hand, Article 8(4) of the OP-ICESCR states that ‘when examining communications… the Committee shall consider the reasonableness of the steps taken by the State Party’. Reasonableness has been borrowed to the South African Constitutional Court, which adopted it in an explicit rejection of the minimum core standard. Under this standard, it is expected that the government ‘devise a comprehensive and workable plan in order to progressively realise socio-economic rights’ (Grootboom, § 38). Not only must the programme be ‘comprehensive’ in the sense that it must be determined and implemented by the different spheres of government, but it must also be ‘coherent’, ‘balanced’ and ‘flexible’ (Grootboom, § 43). This last requirement refers to the need to take into account those in most desperate need.

How will the Committee reconcile these two standards of review?
Unpaid Interns in the New York Courts: Time to Start Spreading the News?
By Darryl Hutcheson | 16 July 2013

In June 2013 in Glatt v Fox Searchlight Pictures No. 11 Civ. 6784 (WHF), a US District Court found that interns on two film production crews were “employees” under the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL), entitling them to be paid a minimum wage. The key question was whether the claimant interns fell within the “trainee” exception to “employee” status previously established by the U.S. Supreme Court in Walling v Vermont Terminal Co.

In deciding that they did not, Judge Pauley refused the idea – favoured by the US Court of Appeals (6th Circuit) in Soils v Laurelbrook Sanitarium (2011) – that the ultimate inquiry in this context was which party derived the “primary benefit” from the arrangement. The judge stated that an assessment of all the circumstances was needed, but he in fact placed great (if not exclusive) emphasis on six factors identified in a progressive US Department of Labor “Fact Sheet” in concluding that the claimant interns were employees. He emphasised in particular that the internship program was not constructed for “fringe benefit” (though they may have acquired useful knowledge incidentally); that they had completed tasks which would otherwise have fallen to regular employees; and that the employer obtained an immediate advantage from their work.

The Glatt decision undoubtedly marked a breakthrough for interns and their advocates, and sparked a flurry of inter-claimant lawsuits in summer 2013 leading one commentator to suggest that unpaid internships “may no longer be a viable option by the time summer 2014 rolls around”. This heady forecast seems a little premature since other District Court judges have taken a markedly different approach to Judge Pauley in Glatt. Most notably, in Wang v Hearst (2013), the judge dismissed an application for summary judgment in favour of interns seeking retrospective payment of the minimum wage. While also declaring that Walling required a focus on the “the totality of circumstances of the training program”, the judge paid far less attention to the USDOL Fact Sheet factors. The clearest break from the Glatt approach was the judge’s insistence that interns could be trainees even where employers derived clear benefits from their work.

Both the Glatt and Wang courts certified their decisions for immediate appeal to the US Court of Appeals (2nd Circuit), which is currently considering whether to hear an appeal. While this would mark uncharted territory for the 2nd Circuit, there is considerable and conflicting jurisprudence on the interpretation of Walling from other Circuits. Any decision by the 2nd Circuit is highly unpredictable given the multi-factorial and open-ended tests for “employee” status. Using these tests, judges who are inclined to rock or not to rock the boat of unpaid internships have a myriad of ways to justify their preference. Thus the brave battle of New York’s intern claimants could ultimately demonstrate the usefulness of legal action as a tool for class advocacy: or, just as easily, generate an unwelcome appeal court authority to complicate their pursuit of a laudable political goal.

Finally, as the October 2013 decision in Wang v Phoenix Satellite Television illustrates, the inclination of a given judge is not the only arbitrary factor which can determine whether interns enjoy fundamental employment rights: another is the particular statutory source of the right(s). The claimant intern, alleging sexual harassment against her employer, was rebuffed on the basis that under the NYC Human Rights Law, it was an essential condition of “employee” status that the individual had received remuneration. The judge emphasised that this was already “axiomatic” under the State Human Rights Law and Title VII of the Civil Rights Act 1964.

Unpaid interns are thus deprived of such important employment rights as those against discrimination and harassment on the remarkable basis that their users have decided to deprive them of benefits, namely pay. While it is bizarre to see different rules applied to interpret the same concept of “employee” status, this highlights the true significance of the fact that unpaid interns are co-citizens.

If the 2nd Circuit rules in their favour, then interns will be encouraged to demand not only pay but various other rights which, following Phoenix Satellite, can only exist in a paid work relationship.

Darryl Hutcheson graduated in the BCL with Distinction in 2012 and is currently studying the BPTC in London. He participated in the formation of the International Coalition for Fair Internships, a multinational network of advocacy groups which seeks to challenge unpaid internships and improve rights for interns.

For Love and Money? Unpaid Legal Internships in the Third-Sector
By Laura Hilly | 30 November 2013

Recent litigation in the United States has successfully challenged the use of unpaid interns by large corporations. However, recent UK research indicates that “third-sector” organisations – not-for-profits and charities – are amongst the highest users of unpaid interns. This is also true in the legal profession, where many social-justice-oriented not-for-profit organisations rely on unpaid labour source in order to provide much-needed social services.

Can a balance be struck between underfunded third-sector organisations and interns who cannot afford to work for free?

The current state of play concerning the legal position of unpaid interns working for third-sector organisations in the United Kingdom remains, as a 2013 joint report by Intern Aware and Unite the Union highlights, a gray area. Only ‘workers’, not ‘volunteers’, are entitled to remuneration according to National Minimum Wage legislation. However, deciding whether an unpaid intern is in fact a true volunteer or a worker, due associated worker entitlements, is a difficult and fact-specific assessment. Often the role of an unpaid intern will mimic that of a paid worker in all but name. However, any challenge by those who are in fact ‘workers’ but engaged under the label of an ‘intern’ will often require legal mobilisation beyond the reach of many engaged in such positions.

The joint report also acknowledges the organisational reality of third-sector organisations that engage unpaid interns. In times of austerity, and particularly in the face of swinging legal aid cuts, these organisations rely upon the energy and skills of interns in order to maintain the services they provide. Not all, but many, of these organisation would not be able to maintain many of the socially critical services they provide without the assistance of this valuable and enthusiastic resource.

Correspondingly, for the intern, a well-structured internship can be part of the way to addressing the dilemmas created by unpaid internships. What is needed is a more well-considered and stopgap response to a greater problem. However, they demonstrate how with greater support from all parts of society – from universities which have an interest in promoting their talented graduates and from funding from private organisation which may later reap the benefits of the skills developed by these graduates during their internships – these dilemmas are not necessarily insurmountable.

Laura Hilly is a DPhil Candidate in Law at the University of Oxford, the Managing Editor of the Oxford Human Rights Hub Blog and the former Chair of OPBP.

OPBP mobilises graduate students and Faculty members dedicated to the practice of public interest law on a pro bono basis. As well as running its internship programme, OPBP provides free, high-quality comparative law research for lawyers acting pro bono around the world. OPBP’s work was recently recognised in 2013 by the American Bar Association’s Best Contribution by a Team of Students’ award in the LawWorks and Attorney-General Awards. OPBP welcomes expressions of interest from any individuals or organisations who might wish to support its continued growth: opbp@law.ox.ac.uk.

One initiative set up by Oxford Pro Bono Publico (OPBP) in 2010 seeks to address the current imbalance by providing financial support to students who undertake unpaid or poorly paid public interest law internships. With the support of the University of Oxford Faculty of Law and a small number of private sector donations, OPBP has so far been able to provide modest financial support to around twenty graduate students, and the organisations in which they are placed, who would otherwise not have been able to take advantage of a mutually beneficial internship opportunity.

Recently, OPBP announced that it received a major grant to support its activities, including the expansion of its internship fund. This will allow OPBP to provide further support both to third sector organisations that rely upon unpaid interns in order to provide essential public interest legal services; and to aspiring public interest lawyers eager to support these organisations and to acquire skills and experience which will help them achieve their goals.

Initiatives such as the OPBP internship programme only go part of the way to addressing the dilemmas created by unpaid internships in third-sector organisations. They are a patchwork and stopgap response to a greater problem. However, they demonstrate how with greater support from all parts of society – from universities which have an interest in promoting their talented graduates and from funding from private organisation which may later reap the benefits of the skills developed by these graduates during their internships – these dilemmas are not necessarily insurmountable.

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What Can we Learn from the Novartis Case?  
By Swaraj Barooah | 12 April 2013

Last week’s decision by the Indian Supreme Court to reject Novartis’ patent application over a leading leukemia drug, Glivec, has resonated globally. Many hail it as a victory for patients, while others denounce it as a regressive step for pharmaceutical innovation. With money on one end of the scale and lives on the other, perspectives are easily polarised. However, innovation and access are supplementary when it comes to improving health and to chip away at either of these requires a clear understanding of the tradeoffs.

Until 2005, India had only allowed ‘process patents’ which meant processes in drug making could be patented, but not the products. From 2005, in compliance with the WTO TRIPS Agreement, India started granting product patents, although it started accepting applications from 1995. These ‘patent mailbox provisions’ meant that any applications from that period would be considered against the knowledge present until the point of application. As amended in 2005, section 3(d) of the Indian Patent Act, 1970 prevents the patenting of new forms of known substances unless they show enhanced efficacy. Although this provision is a relatively stringent requirement for ‘non-obviousness’, it is compliant with India’s international obligations and remains unchallenged at the international level.

In 1998, Novartis applied to the Indian Patent Office for the ‘beta crystalline’ form of imatinib mesylate. One year earlier, its US patent application for the same was granted on appeal. Imatinib mesylate, which received FDA approval in 2001, is the salt form of imatinib, patented in the US in 1992.

The Supreme Court held that (i) with this history, imatinib mesylate was in fact a ‘known’ substance (ii) ‘efficacy’ referred to ‘therapeutic efficacy’ and (iii) although it presented evidence of increased bioavailability and better storage ability, Novartis did not present any evidence that the ‘beta crystalline’ form presented any ‘enhanced efficacy’ over the known substance imatinib mesylate. In its decision, the Court was not required to define the therapeutic efficacy threshold required by section 3(d), so the case can only be viewed as limited precedence.

What about the concerns regarding drug innovation though? Doesn’t Novartis deserve a patent?

This is a misleading question. As Jamie Love has pointed out, Novartis has likely invested about $38–96 million dollars in Glivec. A majority of the product development and discovery costs have been paid for by public funds and non-profits. In 2012, Novartis made almost $4.7 billion on Glivec sales. So the question becomes: Considering the enormous profit margin, does Novartis deserve to exclude hundreds of thousands of patients from accessing the drug, so as to receive a small increase in revenues from the few patients in India able to afford the branded product?

Glivec is just one drug, though. What does this provision do for other drugs?

First, India is not prohibiting patents on new forms of known substances. Rather to receive patent protection, products must show enhanced efficacy. As there is little transparency regarding the costs involved in bringing drugs to the market, it is difficult to tailor laws which allow the recoupment of these costs. Given that the pharmaceutical lobby has had considerable impact in loosening patent standards in several parts of the world, it is unlikely to not push back on these often rhetoric based claims.

Secondly, pharmaceutical companies make most of their revenues from US, EU and Japanese markets. As such, they direct their business models around these countries. It is very unlikely that sales in developing countries like India would cause net losses on the same drugs being sold as generics in poorer countries. At the same time, India’s buzzing generic industry has ensured that patients across the developing world are able to access otherwise expensive medicines.

Finally, rich countries can pay more for ‘frivolous’ medicines than poor countries can afford for life saving medicines. Stronger patent rights can increase this inequality. Given that by nature of the industry, pharmaceutical market signals are poor indicators of where limited inventive resources are to be directed, it becomes necessary to ensure that legal and policy concerns redirect it in more socially beneficial directions.

Innovation today leads to access tomorrow; the two are not necessarily in conflict. While access today is of course important, innovation today certainly does require substantial investment. What is required is for all stakeholders—big Pharma, generics, patients, academics, governments—to come together and work on providing solutions that work towards optimizing, or at least balancing, both access and innovation.

Swaraj Barooah is a doctoral candidate at UC Berkeley and the Editor-in-Chief of SpicyIP.

Proposed Bahamian Constitutional Reform: No Room for Socio-Economic Rights  
By Kamille Adair Morgan | 25 July 2013

On July 8, 2013, the Constitutional Commission of the Bahamas presented its report on proposed Constitutional reform in time for the nation’s 40th Anniversary of Independence. Although several useful and necessary recommendations are made, the recommendation for the deliberate exclusion of socio-economic rights is striking.

The declared intent of the process of reform is ‘to tread new ground in constitutional development’ (Report, ¶1.18). Against that backdrop, coupled with the country’s recent ratification of the International Covenant on Economic Social and Cultural Rights (ICESCR) in 2009, it would be expected that any reform proposal would, as a matter of priority, call for the express recognition of socio-economic rights.

With a population of just over 300,000 and a GDP per capita unmatched by any other Caribbean nation, it is arguable that budgetary allowances can be made, given the right priorities, for inclusion of economic, social and cultural Rights.

The report highlights two reasons for the recommended exclusion of socio-economic rights. First, it is argued that the rights enshrined in the ICESCR are made contingent on the availability of resources and are therefore progressively realisable (Report, ¶15.85). In the view of the Commissioners, this raises issues of implementation and enforcement, attempting to ‘make justiciable rights which might be unattainable, even if legally recognized’. Secondly, it is feared that the inclusion of socio-economic rights will ‘complicate and delay the litigation over enforceability, as has been the experience for its Caribbean counterparts Guyana and Belize in relation to the right to work recognized by those States (Report, ¶15.86).’

In fact, Caribbean nations have tended to shy away from a fulsome embrace of socio-economic rights. Jamaica, for example, in its 2011 amendment to the Constitution to introduce a new Charter of Fundamental Rights and Freedoms, recognises only the right of every child, who is a citizen of Jamaica, to publicly funded education at the pre-primary and primary levels (Jamaica Constitution, section 130(3)(k)). These approaches are perhaps reflective of an oft-held belief that socio-economic rights entail only positive, resource-intensive obligations and require the State to immediately provide maximal levels of each right to all within its jurisdiction—a standard that cash-strapped, developing nations are unable to meet. It appears Caribbean legislatures prefer to await the day when the State is financially able to fully realise these rights before legally recognising them. That day, however, may never come.

The Committee on Economic, Social and Cultural Rights has noted that the notion of progressive realisation does not allow for a State to completely avoid its obligations under the ICESCR on the basis of insufficient resources. Rather, States are obliged to take the necessary steps ‘to the maximum of its available resources’ towards the full realisation of the enshrined rights (General Comment 3, ¶10). This recognises that a State may take steps that fail short of full realisation in meeting its obligations in relation to such rights, particularly the development of a sound and reasonable plan directed towards full realisation of the rights in question. The Bahamian Commission notes its openness to a reference to such rights in the Constitution, provided that they are explicitly made legally unenforceable and recognised as imposing only a moral and political obligation on the State to use its resources for the welfare of citizens (Report, ¶15.84 and 15.88). This approach is insufficient. Particularly where resource insufficiency is a reality, constitutional rights adjudication can serve a crucial role in elucidating priorities, assessing the reasonableness of government action through judicial accountability and ultimately securing the socio-economic rights of citizens as the South African experience vividly demonstrates. With a population of just over 300,000 and a GDP per capita unmatched by any other Caribbean nation, it is arguable that budgetary allowances can be made, given the right priorities, for a start in this regard. Despite the perceived difficulties associated with a rights-based approach, the first step must be taken before the ultimate aim can be achieved. Room must be made for socio-economic rights on the reform agenda.

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By Kamille Adair Morgan | 25 July 2013

What about the concerns regarding drug innovation though? Doesn’t Novartis deserve a patent?

This is a misleading question. As Jamie Love has pointed out, Novartis has likely invested about $38–96 million dollars in Glivec. A majority of the product discovery and development costs have been paid for by public funds and non-profits. In 2012, Novartis made almost $4.7 billion on Glivec sales. So the question becomes: Considering the enormous profit margin, does Novartis deserve to exclude hundreds of thousands of patients from accessing the drug, so as to receive a small increase in revenues from the few patients in India able to afford the branded product?

Glivec is just one drug, though. What does this provision do for other drugs?

First, India is not prohibiting patents on new forms of known substances. Rather to receive patent protection, products must show enhanced efficacy. As there is little transparency regarding the costs involved in bringing drugs to the market, it is difficult to tailor laws which allow the recoupment of these costs. Given that the pharmaceutical lobby has had considerable impact in loosening patent standards in several parts of the world, it is unlikely to not push back on these often rhetoric based claims.

Secondly, pharmaceutical companies make most of their revenues from US, EU and Japanese markets. As such, they direct their business models around these countries. It is very unlikely that sales in developing countries like India would cause net losses on the same drugs being sold as generics in poorer countries. At the same time, India’s buzzing generic industry has ensured that patients across the developing world are able to access otherwise expensive medicines.

Finally, rich countries can pay more for ‘frivolous’ medicines than poor countries can afford for life saving medicines. Stronger patent rights can increase this inequality. Given that by nature of the industry, pharmaceutical market signals are poor indicators of where limited inventive resources are to be
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Children’s Rights and the Inter-American Court of Human Rights
By James Beeton | 18 December 2013

On 4 December 2013, Dr. Nicolas Espejo-Yaksic, Visiting Fellow at Kellogg College, UNICEF consultant in Latin America and Director of Research and Postgraduate Studies at Universidad Central de Chile, addressed an audience at Kellogg College in Oxford on the approach of the Inter-American Court of Human Rights to children’s rights.

Although children’s rights form the subject matter of international treaties, they are not always treated as subject to separate protection on a domestic and regional level. The European Convention on Human Rights, for example, does not make specific provision for children’s rights as a distinct category. By contrast, Article 19 of the American Convention on Human Rights specifically deals with the rights of the child: it provides that ‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.’ Dr. Espejo-Yaksic’s aim was therefore to examine approaches to the Art. 19 right in a range of cases decided by the Inter-American Court of Human Rights and to establish how the Court’s decisions can fit into a larger picture of rights protection.

Dr Espejo-Yaksic began by putting forward a typology of children’s rights cases coming before the Court.

The first category is cases involving gross and systematic violations of human rights; these are primarily concerned with the legacy of dictatorial regimes in Latin America during the 1970s and 80s and arise out of cases of forced disappearances and the legacy of dictatorial regimes in Latin America during the 70s and 80s. The third part and fourth parts of the book considers public finance, in terms of both standards and governance structures. The third category is reflected in recent decisions where the Court has emphasised the state’s obligations both to ‘respect’ and ‘protect’ in the context of children’s rights. In addition to a negative obligation not to interfere with such rights (the obligation to respect), there is a positive duty on the state to ensure that the right is protected.

The focus then moved on to the second category – structural violence. This group of cases arose primarily out of a lack of specific criminal policy towards young offenders – a group who have become increasingly marginalised by a lack of social protection and exposure to poor conditions of detention. Such concerns also had to be played out against a backdrop of institutionalised attitudes of violence prevalent in the police forces of certain states towards young offenders. The Court emphasised that development of policies and rules relating specifically to young offenders was crucial in this respect.

The final category – recent cases involving children and the right to family life – has allowed the Court to take a more activist stance. An example is Atlala Rífta and Daughters v Chile, which raised the issue of whether removal of children from the custody of their lesbian mother would be in their best interests. The Court decided that there was no specific conception of family life in the Convention and that in any case there must be concrete and specific reasons to restrict the right. The Court was able to consider a range of research about the effect of being raised by same-sex couples before judgment was given for the mother.

The link between human rights and states’ resource policies is currently a hot topic politically as well as academically. In the aftermath of the recent global economic and financial crises the implementation of economic and social rights in particular has faced a push-back from politicians advocating austerity budgets. Appeals to resource scarcity are commonly invoked as part of efforts to cut or limit increases in the funding of social and other rights related programs.

Most of the recent scholarly work done on the topic has focused on the role of courts in adjudicating cases where resource scarcity is appealed to as a justification by the state. ‘Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights’ approaches the topic from a new angle. The book, which is edited by a team of leading scholars in the field (Azize Nolan (University of Nottingham), Rory O’Connell (University of Ulster) and Colin Harvey (Queen’s University Belfast)), focuses on the linkage between public finance and the realisation of economic and social rights. It expands the inquiry to the role of governmental bodies with the primary responsibility to give effect to social and economic rights: the elected and democratically accountable branches of government.

The book takes Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) – which requires states to deploy maximum available resources towards the realisation of the Covenant rights – as its starting point. The contributions in the book offer theoretical and practical accounts on what exactly is covered by the Article. The authors draw on experiences across the globe, and they tackle questions of macroeconomic policy, conceptual difficulties in international law, and issues of resource constraint. The book features work from a range of academics and practitioners carrying out work on human rights and budgets from different disciplinary perspectives. The first two sections of the book, on ‘Concepts’ and ‘Governance’, address key conceptual issues relating to human rights and public finance, in terms of both standards and governance structures. The third part and fourth parts of the book considers the use of human rights budget work both in shaping and evaluating budgetary decisions. In particular, there is a focus on budgeting from the perspective of equality, children’s welfare, and the right to housing.

States signatories to ICESCR have legal obligations of implementation that cannot be overlooked in policy drafting. Social and economic rights are essential for human survival and flourishing, and identifying and clarifying what the obligations to work towards the full realisation of the Covenant rights entail vis-à-vis public finance is an urgent task that deserves close attention from scholars as well as practitioners. Given the fundamental importance of social and economic rights and the political rhetoric of ‘permanent austerity’ in many countries the collection is timely, and it provides an important contribution to the ongoing debates.

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A New Frontier? Human Rights and Public Finance
By Jaakko Kuusmanen | 1 December 2013

The link between human rights and states’ resource policies is currently a hot topic politically as well as academically. In the aftermath of the recent global economic and financial crises the implementation of economic and social rights in particular has faced a push-back from politicians advocating austerity budgets. Appeals to resource scarcity are commonly invoked as part of efforts to cut or limit increases in the funding of social and other rights related programs.

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The Role of Public Private Partnerships in Labour Rights Advancement

By Fabiana Di Lorenzo | 24 November 2013

Public private partnerships (PPPs) are a new form of institutional organisation by which public organisations, civil society and major companies pursue collaborative and voluntary strategies to achieve a common goal. When in partnerships, organisations decide to undertake specific tasks, share responsibilities, resources, competencies and benefits.

The cocoa partnerships in Ghana provide a clear example of some of the limitations of Public Private Partnerships (PPPs) in ensuring enhanced labour rights.

PPPs have become popular in projects aiming at advancing labour rights along business supply chains, particularly in countries where law enforcement remains weak. While many PPPs claim to value the government and its regulatory framework, it may be argued that corporations are preferring to partner with NGOs and relegating government to a minimalist role.

PPPs in the cocoa sector of Ghana provide a good example of this trend. Following Antislavery International reports of the dangerous conditions in which children worked in Western African cocoa farms, the cocoa and chocolate industries signed the Harkin-Engel Protocol, agreeing to take responsibility for addressing the worst forms of child labour in their supply chains. As result, the International Cocoa Initiative and small partnerships were created in order to bring together and partner trade unions, NGOs and businesses with the goal of sustaining ‘efforts to eliminate child labour and forced labour’ from cocoa supply chains.

In late 2000 research done by Tulane University and the 10 Campaign found that despite these efforts, the majority of children at risk of the worst forms of child labour remained untouched by the remediation initiatives of cocoa partnerships. They concluded that businesses should invest more money to tackle the problem of child labour in Ghana.

However what this conclusion overlooked was that the failure to reduce exploitative child labour was also linked to two major factors which arguably have greater impact than simply the amount of money that companies spend to address the issue. First, the weak role of the Ghanaian government in coordinating project activities on the ground led to overlapping and fragmentation of remedial projects, without any overarching and centrally located pressure upon the government to oversee and ensure the application human rights standards. Second, the majority of funding was diverted towards one specific supply chain (namely cocoa), ignoring the fact that child labour in Ghana exists across business sectors.

For ten years, cocoa partnerships were characterised by a strong relationship between NGOs and companies, while the government of Ghana struggled to coordinate the multitude of projects funded by business-NGOs partnerships. Partnership members involve the central Ghanaian Government by working with local districts and seeking their approval. However, if information is not correctly communicated to the relevant central coordination unit (in this case National Plan for the Elimination of the Worst Forms of Child Labour in Cocoa – NPECLC), consulting local district government will not necessarily help to coordinate all the activities taking place in the district. This may result in important information remaining at the district level and never reaching central government.

Through PPPs attention is diverted away from the role that governments should play in developing effective public policy, defending human rights and using tax revenues effectively. NGOs and businesses run the risk of rushing to find reactive solutions to fix problems such as child labour without taking the time to also look at the governance-related causes of this phenomenon.

When it comes to African countries in particular, campaigns tend to downplay the role that government can play in developing public policy to ensure effective law enforcement. Also, the role played by the loss in public revenues caused by excessive tax incentives for corporations, tax evasion and long-term tax exemptions is often not sufficiently analysed.

The creation of the Child Labor Cocoa Coordinating Group in 2010 marked a turning point by bringing the government of Ghana back to the decision-making table by giving it responsibility to oversee projects addressing child labour. It is yet to be seen how this new strategy will bring about in terms of long term child rights advancement.

Problem 2: Preference for particular supply chains

In addition, PPPs’ attention tends to be drawn toward one specific business sector because of the large economic potential at stake. Thus, issues which need addressing are identified on the basis of either campaign waves or business goals, diverting money away from projects based upon general public welfare needs. For example, in Ghana child labour is not an issue specific to the cocoa industry but rather plagued a variety sectors. However, the greatest amount of financial resources goes to cocoa.

NGOs and businesses need to overcome their distrust in governments which is fueled by neoliberal theories. Fear of government failure cannot justify the massive number of business-NGOs partnerships which today neglect the role of government in dispensing public policy through effective taxation and protecting human rights.

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The Mandela I Knew

By Bob Hepple | 14 December 2013

I hesitated when asked to say something on the sad occasion of the death of Nelson Mandela, because so many carpetbagging celebrities who had only a slight connection with him in the last 23 years of his long life have done so.

My connection with him, as one of his support team when he went underground in 1961 to prepare for the armed struggle, as his legal adviser in his 1962 trial for incitement to strike against the declaration of an all-white republic, and finally as one of his co-accused in the early stages of the 1963 Rivonia trial, are all covered in my book Young Man with a Red Tie: a memoir of Mandela and the Failed Revolution 1960-63 Johannesburg: Jacana Media, 2013."

The point I want to make now is to contest the view of some people that Mandela ‘sold out’ the liberation movement to white interests. I recall a meeting in London in 1996 with Mandela in the office of South Africa’s deputy prime minister including myself. Mandela said to us: ‘Whenever I meet black South Africans they say to me: ‘We have had a great victory’. Whenever I meet white South Africans they say: “Nothing much has changed.” They are both wrong. We have made a great historical compromise. No one has won. We agreed to live together in a democratic state in which the rights of all our people, white and black are protected.’

The ideas of democracy and human rights, for which so many thousands had suffered, died, been imprisoned, or exiled, triumphed.

His legacy to South Africa and the world is a democratic constitution, an independent judiciary and a free press. As long as those institutions and Mandela’s values are cherished, it will be possible for people to mobilise peacefully in order to fulfil the social and economic rights embodied in the constitution. Another long walk to freedom is only just beginning.

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