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Introduction
By Professor Sandra Fredman

Socio-economic rights are often regarded as an issue primarily for developing countries. As austerity policies bite deep into basic social provision for the poorest in society, the key role of socio-economic rights in developed economies is underscored. At the same time, their two central weaknesses are highlighted: the absence of effective implementation measures; and the continuing assumption that budgetary issues are matters of policy and not rights.

The focus of this year’s posts has been on the UK’s breaches of its international social rights commitments. Thus the Committee of the European Social Charter found that the UK was again in breach of its undertaking ‘to establish or maintain a system of social security’. The Committee found not only that the levels of social benefits were ‘manifestly inadequate’; but that this had worsened since the previous reporting round. As Daniel Cashman points out (‘Not Reaping the Benefits: the United Kingdom’s Continuing Violation of Article 12§1 of the European Social Charter’ p 322), this is particularly troubling as the report was before the swathing cuts, rights under the current Coalition government. The low regard the UK has for its socio-economic rights commitments is further demonstrated by Jonathan Butterworth’s exposure of the breaches of the legal requirement under the International Covenant on Economic, Social and Cultural Rights to secure the human right to adequate food (‘Going Hungry? The Human Right to Food in the UK Jonathan Butterworth’ p 324). Alarmingly high increases in the levels of malnutrition, hunger and food bank usage can be largely attributed to the fall in the real value of wages and budget cuts specifically targeted at the working poor and the unemployed. This damning verdict on the UK’s record is underscored by the UN’s Special Rapporteur on Housing who found a clear breach of the UK’s international commitment to the right to housing, with the current housing situation described in crisis terms. As Rachel Clement points out (‘No Compromise on the Right to Adequate Housing: UN Condemnation of UK Austerity Measures Rachel Clement’ p 308), these conclusions disturbingly suggest that progressive realisation of the right to adequate housing is under threat.

Although the spotlight in this chapter is on the UK, it is far from alone. In a separate post (‘The European Social Charter in Austerity Europe: Damning Conclusions on the Right of Access to Healthcare in Spain’ p 311), Rachel Clement notes that the report of the European Committee on social rights has delivered a ‘damning indictment of the impact of austerity measures on human rights across Europe’. Indeed, almost every state in Europe was found to be in breach of the right to social security under the European Social Charter.

Cuts in social welfare need not be characterised only as socio-economic rights. They can also affect an individual’s basic rights to dignity and private life. In McDonald v UK [2014] ECHR 492 (20 May 2014), the ECtHR found that the reduction in healthcare afforded to the claimant fell within the scope of Article 8 ECHR. However, because of the wide margin of appreciation afforded to states, rights violations might be justifiable in the context of the wider need to provide services for others. Nevertheless, as Stephen Cragg QC points out (‘McDonald v UK: The ECtHR on Social Care Provision’ p 317), the case establishes that the provision and withdrawal of social and health services is a matter which falls within the avowedly civil and political rights in the ECHR. Similarly, Sebastian Koh describes a watershed decision of the Hong Kong Court that a seven year residency requirement for social welfare rights was ‘manifestly without reasonable foundation’ and therefore in breach of the right to social welfare in Hong Kong basic law (‘Kong Yunming v The Director of Social Welfare: Constitutional protection of social welfare rights in Hong Kong’ p 316). This is not, however, a route the Ontarian court has yet felt able to follow. As Ravi Amarnath shows (‘Right to Housing Debate Stalled by Canadian Court Ravi Amarnath’ p 310), when faced with the case arguing that there is constitutional obligation on government to provide citizens with affordable and accessible housing, the Ontario Court of Appeal struck out the claim on the grounds that the right to “life, liberty and security of the person” in the Canadian Charter had not yet been held to confer a standing right to adequate housing.

Even when socio-economic rights are given equal constitutional status, as in South Africa, their enforcement remains challenging. Despite a robust constitutional right to education, conditions in the Eastern Cape remain dismal. Many schools were constructed by local communities out of mud, liable to be blown down in bad weather. Parents have to draw on their very meagre resources to pay teachers; and learners frequently sit on the ground, due to lack of desks and chairs. In the long-running litigation by the Legal Resources Centre, government recalcitrance to abide by court orders has led to increasingly imaginative remedies. Particularly important has been the development of the class action, which has been used to challenge the refusal by the government of the Eastern Cape to fulfill its obligations to appoint and pay teachers. As Shona Gadziz shows (‘Victory in first Certified Class Action Sees Teachers Appointed and Paid’ p 303), the Linkside v Department of Education Case No. 3844/2013 case was the first case in which the recently established criteria for a certified class action were satisfied. This was not in itself sufficient: the order to reimburse teachers’ salaries and appoint educators in 32 schools was only complied with when the court resorted to the unusual step of attaching the amount as a debt to the Education Minister’s assets. But further pre-emptive action was needed to prevent non-compliance in relation to the outstanding salaries of the 90 schools that had opted-in to the class action. Following the example of foreign courts, the South African court made the novel order that a “claims administrator” be appointed to oversee payment of the R81 million. Equally robust was the judgment in Madzodzo, analysed by Chris McConnachie (‘South African Judge Lays Down the Law on the Right to a Basic Education’ p 302), holding that the provision of school furniture is an essential aspect of the right to education. In this case, the High Court held that mere assertions of budgetary incapacity did not justify watering down remedies. Instead, a credible timetable must be established, for which governments must be held to account.
From across the Atlantic, in Brazil, courts are taking similar steps to ensure the right to education is properly implemented. Oscar Vilhena Viera describes the process by which the courts in Sao Paolo came to the view that they needed to supervise implementation of the right to education in the Brazilian constitution (‘Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil’ p 304). Having held that the principle of separation of powers could not serve as a shield for the executive which failed to fulfil its obligations, the court went on to provide a remedy which, in Viera’s words ‘could not have been more creative.’ The court ordered the municipality to draft a plan for the provision of an additional 150,000 school places, as well as requiring educational quality standards to be adhered to. Responsibility for monitoring implementation remained with the court itself with the assistance of other public officers. The possibility of penalties for failure to comply remained open. On the other hand, proper implementation of the UN Guiding Principles on Business and Human Rights remains elusive especially in the financial sector. Caio Borges nevertheless shows that Peru might have a far more effective model than its neighbour Brazil (‘Finance and Human Rights: Developments in Brazil and Peru’ p 325).

This raises the difficult question of what added value a human rights based approach has, especially in the field of health. Professor Paul Hunt describes his path-breaking study for the World Health Organization (‘Women’s and Children’s Health: Evidence of Impact of Human’ p 312). A team of leading researchers found that in practice applying human rights to women’s and children’s health policies and programmes not only helps governments comply with their binding national and international obligations, but also contributes to improving the health of women and children.

On the whole, the blog posts that comprise this chapter demonstrate that budgetary considerations continue to be regarded by governments as a reason to roll back on basic human rights. There remains a pressing need for both a stronger assertion of the indivisibility of all human rights, and a more creative approach to remedies.

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South African Judge Lays Down the Law on the Right to a Basic Education

By Chris McConnachie | 25th February 2014

One of the most visible manifestations of the ongoing crisis in South African education is the severe shortage of desks and chairs in schools. Children in the Eastern Cape, South Africa’s poorest province, are among the worst affected. A government audit in 2011 found that 1,300 of the province’s 5,700 state schools lack adequate furniture, affecting over 605,000 children. Many sit on the floor, stand, or squeeze into desks shared with others, making basic reading and writing tasks virtually impossible. In Madzodzo v Department of Basic Education [2014] ZAECMHC 5, handed down on Thursday last week, Judge Glenn Goosen of the South African High Court declared that the government’s failure to address this problem is a violation of the section 29(1)(a) constitutional right to a basic education. He further ordered the government to deliver sufficient desks and chairs to all Eastern Cape schools by 31 May 2014.

Madzodzo is arguably the most significant judgment yet on the right to a basic education. At this stage, any judgment on this right is significant given the paucity of case law. What makes Madzodzo so significant is that Goosen J has offered one of the clearest accounts of the nature and content of this right and the most convincing demonstration yet of how to translate this right into appropriate remedies.

This judgment marks the end of three rounds of litigation over school furniture in the Eastern Cape. The first round resulted in a detailed consent order, handed down in November 2012, recording the government’s undertaking to complete a full audit of Eastern Cape schools’ furniture needs, to develop a comprehensive plan to address the shortage, and to deliver furniture to all schools in need by June 2013. The audit was completed three months late, its coverage was patchy, and there was no sign of the comprehensive plan or province-wide delivery. This non-compliance resulted in a second round of litigation in August 2013 and another consent order recording further promises of an independent audit and a comprehensive plan. The sticking point was whether the government should be bound to deliver furniture by a fixed deadline. This led to the third round of litigation heard by Goosen J in mid-February 2014.

In this round, the government readily conceded that its failure to provide sufficient desks and chairs was a violation of the right to a basic education. However, it argued that budgetary and logistical constraints meant that it would take an indefinite time to provide adequate furniture, requiring an open-ended court order. A complication was that the Eastern Cape budgeted a mere R30 million (£1.6 million) for school furniture in the 2013/2014 financial year, a tiny portion of the estimated R360 million (£20 million) needed to address the shortage.

Goosen J rejected the government’s arguments for an open-ended order. This was motivated, in part, by the government’s
consistent non-compliance with the previous court orders, which necessitated more stringent judicial control. Furthermore, Goosen J emphasised that an open-ended order would fail to vindicate the right to a basic education. In setting out this argument, Goosen J provided one of the clearest accounts yet of the nature and content of this right. First, he emphasised that the right to a basic education is distinct from other socio-economic rights in the South African Constitution as it is ‘immediately realisable’ (Madzodzo [17] citing Juma Musjid [37]). Second, Goosen J stressed that right to a basic education ‘requires the provision of a range of educational resources,’ including desks and chairs, and is not merely a right to a place in a school (Madzodzo [20]). This makes explicit a point that has long been implicit in other judgments. Goosen J concluded that an open-ended order with no deadline for delivery would fail to provide effective relief [36].

Underpinning Goosen J’s judgment and order is the important point that the immediately realisable right to a basic education cannot always translate into immediate relief. Resource and capacity constraints are always important considerations in determining the appropriate remedy. Nevertheless, immediate realisability does require, at minimum, that remedies must offer a clear timetable for relief.

Furthermore, Goosen J emphasised that mere assertions of budgetary incapacity cannot justify watering down remedies. Citing the Constitutional Court’s judgment in Blue Moonlight  [2011] ZACC 33 [74], he emphasised that ‘it is not good enough for [government] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its [constitutional] obligations.’ Goosen J held that the government had been fully aware of the furniture crisis at least since 2011 and its budgeting decisions ought to have responded to this crisis (Madzodzo [35]).

The resulting order demonstrates how to balance the need for effective relief with the need for some flexibility to accommodate legitimate budgetary and capacity constraints. The government was ordered to provide furniture to all schools by 31 May 2014, but it may apply for an extension by giving ‘full disclosure’ of the steps it has taken, a full set of reasons for the delay, and a clear timeline for delivery (Madzodzo [41]).

The significance of Goosen J’s judgment is not its finality. The government will undoubtedly request an extension, leading to further rounds of litigation. Instead, its significance is that it injects greater urgency, transparency and accountability into the delivery of adequate school furniture. All Eastern Cape children may not have a desk and a chair of their own by 31 May, but Goosen J’s order ensures that the government will not escape its constitutional obligations lightly.

 victory in First Certified Class Action Sees Teachers Appointed and Paid

By Shona Gazidis | 18th April 2014

A landmark settlement agreed on 20th March 2014 in Linkside v Department of Education Case No. 3844/2013 has consolidated the law regarding class action in South Africa, and is a significant victory in the fight to ensure children’s right to an education.

It is astounding to imagine that educators, who work so hard to ensure that children receive a decent education in accordance with the Constitution and their basic human rights, are not paid by the government for the work that they do. It is equally astounding to imagine that the government fails to fill vacant teaching posts. Yet this is the reality of the education system in the Eastern Cape, and it has taken lengthy court proceedings to effect change.

Linkside is a step toward that change, as the government was ordered to reimburse teachers’ salaries, appoint temporary educators to vacant posts and appoint existing temporary educators to permanent posts in respect of 32 applicant schools. Further, the court ordered that there be an ‘opt-in’ class of all schools in the Eastern Cape whose posts had not been filled or who had paid teachers out of school funds.

‘Post-provisioning,’ introduced in 1996, was designed to redeploy teachers from over-staffed to under-staffed schools in an attempt to establish a more equal education system. However, the Eastern Cape did not establish post-provisioning until 2004, and since then it has not been effectively implemented. Under the system, each public school is allocated a certain number of teaching posts based on the school’s resources, the number of learners etc. The Department of Education is then obliged to appoint teachers to each of these allocated posts and to pay them a salary. However, the Department has repeatedly failed to meet its obligations in this regard. Either the post is simply left vacant, or the parents of learners are forced to pay minimal salaries to temporary teachers through school fees. Inevitably, it is the poorer schools that suffer the most, as they cannot afford to use school fees to pay their own appointed temporary teachers.

Linkside makes clear that the problem is not a lack of educators, but their distribution. In 2014, it is anticipated that there will be
5,342 substantive vacant posts, yet up to 10,000 teachers in excess. The national Executive attempted to deal with the problem of the distribution of educators with an intervention in March 2011. A report was prepared, which identified post-provisioning as a major problem. However, although the intervention is still in place, the Minister has evidently failed to address the problem.

This is not the first time schools have had to resort to court action. The posts establishments for 2012 and 2013 were also challenged through the courts. An order was made in August 2012, resulting in an order that temporary educators be appointed to permanent posts, remunerated, and vacant posts be advertised and filled. However, once again, the order was not complied with.

Significantly, the case is the first certified class action in South Africa, an area of law that Oxford Pro Bono Publico played an important role in developing. Based on research carried out by Oxford Pro Bono Publico, the court set down that in order to bring a class action, there would need to be certification, i.e. that the matter involves definition of the class, identification of some common claim or issue, existence of a valid cause of action, suitable representative of the class, and that class action is the appropriate procedure. Linkside is the first case, which has implemented this guidance and satisfied the criteria to be a certified class action.

It remains to be seen whether the Department will comply with this order. One can only hope that we are a step closer to the day when every child in the Eastern Cape can sit on a chair, at a desk, with a textbook, in front of a teacher, in a concrete building, without having to make an application to court.

Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil

By Oscar Vilhena Viera | 31st July 2014

Should judges interfere with the enforcement of public policies implemented by the executive? If yes, what would be the best way to do so?

In December 2013, the Court of Appeal of the State of São Paulo, in an extraordinary decision, ruled that the city of São Paulo should provide at least 150,000 new spots in childcare facilities and elementary schools by 2016, for children aged five years old and under. This decision reversed the lower court’s ruling, which had accepted the municipality’s argument that the judiciary should remain silent in matters of public policy.

Yet, the main novelty of this case is not the decision of the court to interfere in public policy matters or even the forcefulness of the ‘obligation to fulfill’ imposed by the judiciary upon the executive. Rather, the most unique aspect of this case is the way in which the dispute, led by the NGO, Ação Educativa, was conducted and how the court ruled that its decision should be implemented.

After receiving the appeal, instead of issuing a final injunction order to put an ‘end’ to the proceedings without necessarily resolving the issue, the judges decided to convene a public hearing, with participation from public officials, experts, and representatives from civil society organizations. Therein, the court sought an agreement between the parties. As such an agreement was never achieved, the court then decided that the municipality, by failing to provide a sufficient number of school and childcare places for all children of elementary school age in the city, had violated the Constitution. If the executive does not fulfill its obligation to protect or promote a fundamental right, it is for the ‘Judiciary, when triggered, to act to protect it.’ The principle of separation of powers cannot serve as a shield for the executive administration to fail to perform its obligations, ‘violating rights.’

However, the dilemma in such cases is how to impose a complex obligation upon the executive without interfering with its role of designing and implementing a given public policy. After all, the mayor was elected to make these policy and financial choices, and the municipality has the technical staff necessary to implement them.

The solution in this case could not have been more creative. The court ordered the municipality itself to draft a plan, with a fixed deadline that has just expired, for the provision of 150,000 additional school places, while making it clear that the expansion of the school system must meet various educational quality standards established by law as well as by the National and the Municipal Councils for Education. Moreover, the judges ruled that the court’s section on children’s rights would be responsible for monitoring the implementation of the plan, along with civil society organizations, the Public Prosecutor’s Office, the Public Attorney’s Office,
among others, ‘in relation to the opening of new school vacancies, or in relation to the provision of quality education.’ The Court kept open the possibility of penalizing the failure of the executive to produce a consistent plan, or even adopting its own plan in the case of an unsatisfactory proposal from the executive.

Ultimately, the approach adopted by the Court of Appeal of the State of São Paulo strikes a balance between the judicial obligation to give meaning to substantive social rights, guaranteed by the Constitution itself, with the obligation to design consistent policy implementing those rights, which lies primarily on the shoulders of executive and legislative officials. In this way, the Court has addressed the increasingly complex challenges accompanying the implementation of social rights in Brazil. The success of this case will set a new standard of performance for the judiciary with respect to matters of public policy.

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very effective way of ensuring compliance.

Adel Kegye from the Chance for Children Foundation (CFCF) outlined the disturbing practice of segregation of Roma children, which takes place in Hungary’s education system. CFCF have been engaged in litigation against segregated schools, as well as against the Ministry of Education for the misdiagnosis of Roma children, wrongly placed in schools for children with special needs. Although the courts have declared that segregation is illegal, they have not been prepared to go as far as imposing a desegregation order.

Vanda Durbakova from the Centre for Civil and Human rights (Poradna) explained that Poradna litigated the first and only case regarding segregation in education in Slovakian Courts. The court declared that the segregation of children was a violation of anti-discrimination laws and ordered the school to rectify the situation. However, problems then ensued in implementing the order, with resistance from teachers and a lack of support from state institutions.

Daniela Mihaylova of the Equal Opportunities Initiative Association described the situation in Bulgaria, where cases have been more successful when brought before the Commission for Protection Against Discrimination. One particularly effective remedy the Commission can impose is to put inspection measures in place. Cases through the courts, though, have proven more difficult and so far been unsuccessful.

Delphine Dorsi of the Right to Education Project presented on remedies and enforcement under international law, which is much weaker than domestic law, consisting mainly of opinions and declarations. On an international level, the Human Rights Council and International Court of Justice provide avenues whereby complaints can be made, and UN treaty bodies can provide opinions on specific issues. UNESCO’s convention against discrimination in education provides a confidential procedure by which parties can hopefully reach agreement.

The workshop also included a presentation on regulatory theory by Professor Karen Yeung of King’s College London, which set out a different approach, whereby delegates were encouraged to consider regulation as an alternative to litigation.

Jaakko Kuosmanen and Meghan Campbell discussed the proposed Sustainable Development Goals (SDGs). In terms of education, it is clear that the Millennium Development Goals focussed too much on primary education and enrolment numbers. Within the SDGs it is, therefore, essential to establish indicators, which measure the quality of education at different levels, rather than focussing on enrolment figures.

It was evident during the workshop that parallels can be drawn between the education systems in South Africa and countries in Eastern Europe. The event provided an opportunity to share experiences in different jurisdictions, and, more generally, to consider the role of education in the global development agenda. It is hoped that this discussion will continue through the Oxford Human Rights blog.

Shona Gazidis is a Researcher in the Constitutional Litigation Unit of the Legal Resources Centre. Her father was imprisoned and forced into exile for his role in the anti-apartheid struggle, which inspired her to work with an organisation that tackles the inequalities and injustices still present in South Africa.

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Court Makes Unprecedented Step Appointing “Claims Administrator” to Ensure State Compliance with Court Order

By Shona Gazidis | 13th January 2015

A landmark judgment handed down on 12th December 2014 in the case of Linkside & Others v Minister of Education [2014] ZAECGH0 111 sees a ‘claims administrator’ appointed to oversee the payment of outstanding teachers’ salaries (amounting to R81 million) in the first certified opt-in class action in South Africa.

The South African government has a duty to ensure that every child’s right to education, as set out in the Constitution, is realised. However, all too frequently the state fails to meet its obligations. The Legal Resources Centre (LRC) has launched extensive litigation over the past six years to force the Department of Education to rectify these failures. A major hurdle is that once court orders are obtained (mostly by agreement), the Department does not comply with them. Foreign courts have often made use of ‘special masters’ and ‘claims administrators’ to oversee the implementation of court orders, but South African courts have been slow to utilise this mechanism prior to Linkside.

Based on research carried out by Oxford Pro Bono Publico, Linkside was the first certified class action in South Africa. In brief, the case concerns the failure of the Department to appoint permanent teachers to vacant posts, and to pay their salaries, leaving schools having to raise funds to pay them. The initial case comprised of 32 applicant schools, salaries amounting to R28 million
were finally paid, only after the court attached the amount as a debt to the Education Minister’s assets. This case did not, however, address the outstanding salaries of 90 applicant schools that had opted-in to the class action, and it was clear that a solution that pre-empted the State’s non-compliance was needed.

The LRC argued on behalf of the applicant schools that the appointment of a ‘claims administrator,’ i.e. a firm of accountants to verify and pay out each applicant school’s claim would be the appropriate remedy in this case. The LRC drew the court’s attention to foreign jurisdictions, including the USA, Australia and Canada, which have already been using such mechanisms. In the US, for example, a ‘master’ (defined by Federal Rule 53 as ‘including a referee, an auditor, an examiner, a commissioner, and an assessor’), is often employed to oversee a claim. In addition, in the Canadian case of Peppiatt v Nicol (SCJ, 27 Nov 1991), the Defendant was ordered to pay sum into court to be transferred into a trust held by the representative plaintiff’s lawyer for distribution to class members.

In South Africa, the recent Supreme Court of Appeal Judgment Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another (767/2013) [2014] ZASCA 209 (at para 35), confirmed that courts need to be creative in forming remedies in socio-economic cases and should secure on-going oversight to ensure implementation of the orders. The court referred to the example of the supervisory measures used in US courts.

The Department of Education’s arguments were scrutinised and dismantled by the LRC. The Department’s claim that progress had been made in appointing teachers in accordance with a previous collective agreement signed, held little weight as, in reality, very little had changed. Their argument of budgetary constraints could not be accepted, given that previous judgements have confirmed that the right to education is not subject to budgetary constraints, and that failure to budget properly was not a valid defence. The Respondent’s final arguments that the Applicants should have referred to the Education Labour Relations Council (ELRC) and that trade union movements were opposed to the order were simply without merit. Not only were their defence arguments untenable, but the Department failed to support their arguments with sufficient evidence.

The court agreed with the LRC, and Judge Roberson made the novel and unusual order that a ‘claims administrator’ be appointed to oversee payment of the R81 million. The outcome of this case has extremely significant implications for future strategic litigation, where the South African government has so often failed to comply with court orders, secure in the knowledge that they were unlikely to be enforced. This judgment signifies that South African courts are willing to certify class actions, and to implement new and inventive mechanisms to monitor the compliance of the State. It will be possible to litigate future socio-economic cases based on a class of applicants and to obtain stringent measures to implement long-term solutions.

Shona Gazidis is a Researcher in the Constitutional Litigation Unit of the Legal Resources Centre. Her father was imprisoned and forced into exile for his role in the anti-apartheid struggle, which inspired her to work with an organisation that tackles the inequalities and injustices still present in South Africa.


No Compromise on the Right to Adequate Housing: UN Condemnation of UK Austerity Measures
By Rachel Clement | 21st February 2014

Statements made by the United Nations Special Rapporteur on adequate housing, following her visit to the UK in September, clearly indicated that her ultimate report on the housing situation would lay significant criticism at the feet of the Coalition Government. The formal report, published this month, does not disappoint. It castigates the Government for its regressive housing and welfare policies, which threaten the principles of dignity and equality underlying, and secured by, the right of access to adequate housing.

Raquel Rolnik, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, made an official visit to the UK in September last year. The purpose of the visit was to examine the UK’s realisation of the right to adequate housing in light of relevant international human rights standards. Her report was published earlier this month. For those unfamiliar with housing related austerity policies, the report makes for a shocking read. But for those who have been following the housing situation, Rolnik’s observations are hardly surprising. Nevertheless, they provide formal UN condemnation of the UK’s current housing policy, and its disproportionate impact on certain minority groups.

Legal Background

In light of its international human rights obligations as detailed in the report, the UK has an obligation to ensure the progressive realisation of the right to adequate housing, even in times of economic crisis, which extends to guarantees of ‘security of tenure, affordability, accessibility, location and cultural adequacy’ and ‘should be ensured to all persons irrespective of income or access to economic resources.’

The current housing situation was described in crisis terms, broadly characterised by soaring house prices, dramatic increases in private sector rents, inadequate housing standards, insecurity of tenure, discrimination and poor management practices, a massive shortage of social housing, overcrowding and increasing homelessness.

UK Reforms and their Impact

The report charges the Government with effectively forcing people to choose between paying for food and heating or staying in their homes. The Bedroom Tax and the changes to the calculation of the maximum rates of Local Housing Allowance (paid to those in private rental accommodation) faced particular scrutiny. The implementation of the former was condemned for failing to account for the gap between supply and demand for smaller social housing, which prevents people from downsizing, even when they want to. Rolnik described families as having few choices, and the policy as having caused ‘tremendous despair.’ The accuracy of the projected financial benefits of the policy was also doubted.

The relationship between the housing crisis and deteriorating living conditions for those living in low-income households was observed. Evidence has suggested a link between housing policy and increased rent arrears, fuel poverty and food bank usage, homelessness and the use of B&Bs as emergency accommodation. The Special Rapporteur was particularly critical of the impact of the policies on disabled individuals and considers the Government’s response – an increase in funding for Discretionary Housing Payments – as inadequate to guard against the discriminatory impact of the policy on this vulnerable group.

Conclusions

The Special Rapporteur’s conclusions clearly indicate that progressive realisation of the right to adequate housing is under threat by the regressive, and likely discriminatory, austerity policies. Specific recommendations include significantly reassessing housing related austerity policies, the immediate suspension of the bedroom tax with a view to its removal, and broader recommendations in relation to land, planning and housing policy.

The Government’s immediate response, however, is less than satisfactory. The report has been dismissed as ‘partisan’ and unimaginatively labelled a ‘misleading Marxist diatribe.’ The tone of this dismissal echoes the response to the recent conclusions of the European Committee on Social Rights in relation to the impact of austerity policies on the UK’s obligation to maintain a system of social security under the European Social Charter. Against this background, the political will is clear. It is unlikely that this report will force a climb-down in the austerity politics that weigh heavily on the effective exercise of key social rights, particularly by vulnerable members of society. However, the report adds to the momentum building behind international criticism of austerity policies both in the UK and beyond.

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The Zulu Case: Threats to Squatters’ Rights in South Africa
By Andrew Wheelhouse | 4th July 2014

It is trite to say that land is a contentious issue in South Africa. The issue of land encompasses not only the legacy of the unjust expropriations and arbitrary evictions of the apartheid era, but also contemporary concerns as to when landowners, including state organs, are permitted to evict squatters.

Section 26(3) of the Constitution, given effect by The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), prohibits evictions without a court order. However, the balance struck between landowners and squatters is questionable. The spectre of orchestrated ‘land invasions’ is often invoked by those applying for eviction orders in court. Many argue that this marginalises the interests of squatters, who are usually desperately poor with nowhere else to go.

These concerns form the backdrop to the case of Jabulani Zulu and 389 Others v eThekwini Municipality and Others [2014] ZACC 17 in which the Constitutional Court of South Africa handed down judgment on 6 June.

The appellants are residents of Madlala Village, an informal settlement in Durban, which occupies land allocated by eThekwini Municipality to the construction of low-cost social housing. The KwaZulu-Natal High Court (Koen J) had granted an interim order authorising the Municipality and the South African Police Service to prevent persons from occupying or building on the land and permitting them to demolish any structures constructed after the granting of the order.

As the residents were not original parties, they brought an application for leave to intervene in the proceedings on the basis that the interim order authorised their eviction without compliance with PIE. The state parties argued that the order did not affect the appellants because it was aimed at prospectively preventing land invasions. Kruger J held that PIE was not applicable and dismissed the application.

The difficult issue was whether the Constitutional Court could tackle the constitutionality of Koen J’s order, given that the appeal concerned the narrow question of leave to intervene in proceedings before the High Court. All of the parties addressed this question at the hearing. In the event the majority thought not, with the Court producing three judgments and a confusing web of partial or full concurrences.

The Court unanimously held that Koen J’s order was an eviction order and that the Madlala Village residents should be granted leave to intervene. Zondo J, writing the main judgment, observed that the order was drafted sufficiently widely that it would include ‘continuing occupation that had commenced prior to the grant of the order.’ However, he concluded that the constitutionality of the interim order was not properly before the Court and so could not be ruled upon.

Another concern was that records before the court demonstrated that Koen J’s order had been used as an eviction order both before and after the hearing before the Constitutional Court, despite the state parties’ insistence that this was not the case. While
critical of this, the majority took the view that the rights of the appellants were safeguarded by an order of the High Court (per Jeffrey AJ) preventing further demolitions or evictions. It is telling that at that hearing the Municipality relied on Koen J’s order as authorising its actions.

Mosebenze ACJ considered that the protection offered by Jeffrey AJ’s order meant that there were no special considerations that justified dealing with the constitutionality of Koen J’s order.

In a powerful judgment, Van der Westhuizen J disagreed. He argued that to essentially remit the matter would render the High Court proceedings ‘an empty and futile formality’; the main judgment had found Koen J’s order to be an eviction order, which he held to be ‘inevitably unlawful’ as being issued in disregard of the provisions of PIE. It was necessary to establish legal certainty, as the matter before the Court ‘was not an isolated or unique incident,’ and indeed, other courts have issued similar orders. The lengthy consideration given to the question of constitutionality meant that ‘it has effectively become the subject of the appeal.’ However, only Froneman J joined him out of a bench of eleven.

Some will regard this case as a missed opportunity to rule conclusively on interim orders that appear to circumvent constitutional protections on the right to housing. Nevertheless, Van der Westhuizen J’s comments in particular may well persuade future parties to tackle the question of constitutionality head-on in order to establish a binding precedent that will help ensure the lower courts do not produce orders that may be open to abuse.

Andrew Wheelhouse was called to the Bar Of England & Wales at Middle Temple in 2013. Between January and July 2014 he served as a Foreign Law Clerk to Justices Skweyiya and Madlanga at the Constitutional Court of South Africa. He writes here solely in a personal capacity.

Right to Housing Debate stalled by Canadian Court
By Ravi Amarnath | 6th January 2015

By a 2-1 majority, a provincial appellate court has halted proceedings in Tanudjaja v Canada (Attorney-General) 2014 ONCA 852, which sought to recognise a constitutional obligation on provincial and federal governments to provide citizens with affordable and accessible levels of housing. Consequently, 10,000 pages of proposed evidence on this novel claim will remain idle pending appeal.

The original application was brought by four individuals and a public interest group (the ‘applicants’) in the Canadian province of Ontario. The applicants alleged that various decisions of the Ontario government and the federal government have resulted in homelessness and inadequate provision of housing.

Specifically, the applicants claimed that the actions of both governments violated their right under section 7 of the Canadian Charter of Rights and Freedoms (“Charter”) to ‘life, liberty and security of the person’ and their right under section 15 of the Charter to the ‘equal protection and equal benefit of the law without discrimination.’ They sought a number of remedies, including mandatory orders that strategies be developed in consultation with affected groups to provide adequate housing and that monitoring regimes be established.

Two aspects of the applicants’ claim made it unique in Canadian jurisprudence. First, the applicants did not challenge the constitutionality of a particular legislative program or scheme by either level of government; instead, the applicants made a more holistic claim that overall changes to legislative policies, programs and services have resulted in greater levels of homelessness and inadequate provision of housing.

Secondly, to date, the Supreme Court of Canada has interpreted section 7 of the Charter as ‘restricting the state’s ability to deprive people’ (Gosselin v. Québec (Attorney General) [2002] 4 SCR 429) of life, liberty and security of person, as opposed to imposing an obligation on the state to ensure these rights are fulfilled.

Prior to proceeding to trial, counsel for the Attorney General of Canada and the Attorney General of Ontario successfully had the applicants’ claim struck on the basis that it was ‘plain and obvious’ that their claim could not succeed.

Justice Lederer of the Ontario Superior Court stated: ‘The Application seeks the subsequent implementation of programs designed to ensure that housing which satisfies these requirements is made available, by Canada and Ontario, to the poor, disadvantaged and vulnerable members of our society. This is a desirable end. … The question is whether the court room is the proper place to resolve the issues involved. It is not; at least as it is being attempted on the Application.’

A majority of the Ontario Court of Appeal upheld the decision, preventing the case from being heard on its merits. Justice Pardu, for the majority, held that the applicants’ claim that section 7 of the Charter confers a free standing right to adequate housing is
doubtful in light of the fact that Court has previously declared the Charter does not confer a freestanding right to health care. For similar reasons, she concluded it was not necessary to decide whether homelessness can be viewed as a ground of discrimination under section 15 of the Charter.

In dissent, Justice Feldman noted that while the Charter does not provide any freestanding right to housing, Canada’s constitution, which includes the Charter, has always been interpreted as a ‘living tree,’ (Edwards v. A.G. of Canada [1930] A.C. 124) which is capable of growth and expansion.

Accordingly, she concluded the application ought to be heard on its merits, stating: ‘It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice … the [applicants] put together a significant record to support their application. That record should be put before the court.’

While Canada’s national statistics agency does not track homelessness on an annual basis, a recent report estimates that 235,000 Canadians, or just under seven percent of Canada’s population, experience some form of homelessness every year.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

HEALTHCARE

The European Social Charter in Austerity Europe: Damning Conclusions on the Right of Access to Healthcare in Spain
By Rachel Clement | 11th February 2014
Recent conclusions published by the European Committee on Social Rights (ECSR) present yet another damning indictment of the impact of austerity measures on human rights across Europe. In particular, the Committee’s condemnation of discriminatory healthcare policy in Spain points to the increased burden of austerity measures placed on vulnerable minorities.

The Contracting Parties in the Council of Europe submit annual reports to the ECSR, detailing the implementation of the rights contained in either the European Social Charter (ESC) or the Revised European Social Charter (rESC). In a recent post on this blog, Daniel Cashman has discussed the Committee’s finding that the UK was in violation of Article 12§1 ESC. However, the UK is not alone in failing to meet its Charter obligations. Almost every state was found to have breached at least one obligation under either Art. 12 ESC or Art. 12 ESC (both of which contain a right to social security expressed in almost identical terms), indicating pervasive inadequacies in levels of social security across Europe and signalling a widespread failure to implement austerity-based economic policies in a way which ensures compliance with the ESC.

The Council of Europe has already expressed concern over the impact of austerity measures. Only last December, the Council of Europe Commissioner for Human Rights published an issue paper, ‘Safeguarding human rights in times of economic crisis,’ in which human rights were described as providing ‘a universal normative framework and operational red lines within which governments’ economic and social policies must function’ and which included recommendations for bringing economic policy in line with human rights obligations.

However, the conclusions with respect to Spain’s implementation of the ESC detail a particularly egregious policy, which warrants further scrutiny. The recently enacted Royal Legislative Decree 16/2012 and Royal Decree 1192/2012 exclude foreign nationals, present in Spain unlawfully, from receiving access to healthcare, save in ‘special situations’ (i.e., emergent treatment needs, and care for pregnant women and minors). The ECSR’s reporting procedure is used to assess compliance within a specified reference period, and as the legislation was enacted after that period, a formal declaration of non-conformity was not possible. Nevertheless, the Committee expressed in strong terms the view that the legislation is contrary to Article 11 ESC and that the maintenance of the legislation would lead to a formal conclusion of non-conformity in the next reporting cycle addressing Art. 11.

The Committee stated that ‘the States Parties to the Charter… have guaranteed to foreigners not covered by the Charter rights identical to or inseparable’ from those contained within it, and that states have positive obligations to ensure access to healthcare for migrants ‘whatever their residence status.’ The Committee invoked Art. 12 of the ICESCR and General Comment No. 14 on the right to the highest attainable standard of health when stating that healthcare must be accessible universally, without any form of discrimination.

The measure was enacted in response to the economic crisis and the preamble of the Spanish legislation attempts to justify the policy as necessary against this background. The Committee took a dim view of this justification. It reiterated its existing position that ‘the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter.’ The Committee also highlighted the importance of impact assessment and consultation, particularly with regard to the impact of austerity measures on the most vulnerable groups in society.

Though the strength of the enforcement mechanism provided by the reporting obligations is much maligned, the Spanish legislation has already attracted the concern of the United Nations Committee on Economic, Social and Cultural Rights, and the condemnation of the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, and it is likely that international pressure will continue to build. In a broader context, this measure provides a shocking example of what the Council of Europe has already acknowledged, and what many activists, lawyers and individuals affected by austerity policies experience on the front lines: vulnerable minorities are bearing a disproportionate burden when it comes to the implementation of austerity measures across Europe.

Rachel Clement is a DPhil Candidate at the University of Oxford.

Women's and Children's Health: Evidence of Impact of Human Rights
By Paul Hunt | 22nd February 2014

During 2011-13, I had the fortune to serve as a part-time Senior Human Rights Advisor to WHO Assistant Director-General Flavia Bustreo. The records show that the first Director-General of WHO – Brock Chisholm – recognised that WHO had a vital role to play in the promotion and protection of health-rights.

Regrettably, since Director-General Chisholm stepped down in 1953, WHO has struggled to establish an appropriate health-rights role consistent with its Constitution, which explicitly recognises the right to the highest attainable standard of health. However, Assistant Director-General Bustreo understands the complementarity between health and human rights, as demonstrated by her speeches and scholarship.
On beginning my secondment, I asked colleagues how I could most usefully help them advance the health-rights agenda both within WHO and beyond. The answer was clear: they recognised the legal and political reasons for adopting a human rights-based approach, but wanted to know what evidence there was that human rights contribute to health gains. In other words, they wanted to see evidence that human rights could help them reduce suffering and save lives.

Some warned against looking for evidence that human rights contribute to improvements in health. Their argument was that human rights have intrinsic value and must be respected whether or not there is evidence demonstrating that they contribute to health gains. I was relatively untroubled by this argument. Today’s greatest health-rights challenge is operationalisation: how to make human rights real in hospitals, clinics, and communities. Without health professionals, it will be impossible to operationalise health-rights, and so, if possible, it is vital to marshal arguments that health professionals find compelling. Crucially, it is not either-or: evidence of health gains can supplement normative and political arguments in favour of human rights and health.

Other, methodological, objections to the project were more challenging. What do you mean by ‘evidence’ and ‘health gains’? How do you show that human rights shaped a health intervention? How do you demonstrate that a human rights-shaped intervention contributed to health gains?

Dr. Bustreo asked me to lead an 18-month project on the evidence of impact of human rights on aspects of women’s and children’s health. A multi-disciplinary Steering Group was established, including Dr Francisco Songane, former Minister of Health (Mozambique), and Dr Sujatha Roa, former Secretary of Health and Family Welfare (India). Researchers were commissioned and some 30 authors contributed to the publication. The monograph – *Women’s and Children’s Health: Evidence of Impact of Human Rights* – was launched at an event co-organised by WHO and the German Government and co-hosted by the Norwegian Government.

It addresses the methodological challenges and examines the evidence of impact of a human rights-based approach on aspects of women’s and children’s health in four countries: Nepal, Brazil, Malawi and Italy. One chapter illustrates the impact of one principle of a human rights-based approach – participation – on women’s and children’s health. The publication concludes that applying human rights to women’s and children’s health policies, programmes and other interventions not only helps governments comply with their binding national and international obligations, but also contributes to improving the health of women and children.

One theme emerging from the research is that a human rights-based approach to health is supported by an enabling environment, with features such as high-level political leadership and advocacy for a human rights-based approach. Another theme is the striking scarcity of research on and evaluation of the impact of a human rights-based approach on women’s and children’s health and the vital importance of multidisciplinary and multi-method approaches to these issues.

The publication emphasises the need to establish a platform for policy-makers seeking to implement a human rights-based approach to women’s and children’s health, and the importance of establishing a multi-disciplinary network of policy-makers.
practitioners and scholars interested in research on and evaluation of the impact of a human rights-based approach on women’s and children’s health.

WHO has recently embarked on other human rights initiatives, in close collaboration with a range of partners. For example, it has recently published *Ensuring Human Rights in the Provision of Contraceptive Information and Services: Guidance and Recommendations*. Of course, the road ahead is littered with obstacles. But there are signs that senior management in WHO has re-discovered the vision that inspired its predecessors some 60 years ago.

*Professor Paul Hunt, Human Rights Centre, University of Essex.*

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**Aboriginal Right to Pursue Traditional Medicine Recognised by Canadian Judge**

By Ravi Amarnath | 3rd December 2014

A Canadian judge has ruled that a constitutional right exists for certain aboriginals in Canada to choose traditional medicines over physician-recommended procedures.

In August 2014, J.J. (whose identity cannot be released) was diagnosed with acute lymphoblastic leukemia (A.L.L.), a form of cancer in the bone marrow. J.J. is a member of The Six Nations of the Grand River (‘Six Nations’) in the Canadian province of Ontario.

Doctors at a local hospital believed J.J. had a 90-95% chance of recovery with chemotherapy. They deferred decisions regarding her course of treatment to her mother, as J.J. was deemed not to have the required capacity to consent. J.J.’s mother initially allowed the hospital to perform chemotherapy on J.J. but withdrew consent 12 days after treatment had begun. She informed doctors of the family’s plan to treat J.J. with traditional medicines and has since taken J.J. to Florida to pursue these treatments.

Hospital staff asked a local children’s aid society to intervene. After an investigation, the agency declined as it felt J.J.’s mother was devoted to J.J. and was doing what she felt was best for her daughter.

The hospital subsequently sought a court order against the children’s aid society requiring it to bring J.J. to a ‘place of safety.’ The hospital argued the decision of J.J.’s mother to discontinue chemotherapy for her daughter made J.J. a child ‘in need of protection’ under subsection 40(4)(a) of Ontario’s Child and Family Services Act.

Representatives of the Six Nations provided submissions in the case, arguing the family had a constitutionally protected right to provide their daughter with traditional medicines. Specifically, section 35(1) of the Constitution Act, 1982 (the ‘Constitution’) states: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby reorganized and affirmed.’

In order to qualify as a constitutionally protected aboriginal right, the Supreme Court of Canada has held that ‘an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.’ Furthermore, the activity must have existed prior to contact with European settlers and must not have been extinguished at the time Canada’s Constitution was entrenched in 1982.

From the evidence in J.J.’s case, the application judge determined that the Six Nations had a practice of using traditional medicines prior to European settlement and that this practice remains an integral part of its activities today. He therefore recognized an
aboriginal right under section 35(1) of the Constitution to pursue traditional medicine.

The judge concluded: ‘I cannot find that J.J. is a child in need of protection when her substitute decision-maker has chosen to exercise her constitutionally protected right to pursue their traditional medicine over [the hospital’s] stated course of treatment of chemotherapy.’

To date, the hospital has not decided whether to appeal. If the decision is not appealed, it will not bind courts in other Canadian provinces as the case was decided at a court of first instance.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

When Policing Meets Health: International Experts call for Improved Alliance between Law Enforcement and Public Health

By Janine Ewen | 10th November 2014

The 2nd International Law Enforcement and Public Health Conference, organised by the Centre of Law Enforcement and Public Health (CLEPH) and the Law Enforcement and HIV Network took place between the 5th and 8th of October at the Vrije Universiteit in Amsterdam.

The conference was greeted by public health practitioners, intelligence institutions, local police and non-governmental organisations, all uniting around a common theme: public health depends on the police and other arms of law enforcement to achieve our global health agenda, and the police need public health systems to deal with complex social issues.

Despite the intersection of these two sectors, there is a continued struggle to identify our global police in a health role. The police are seen to criminalise activities (e.g. drug use or sex work). It is also likely that many of us will have visual representations of the police locking up menaces in our communities.

Unfortunately, neither arrests nor criminalisation invoke an image of a body with a role to play in public health. Twenty-first century health challenges ask us to consider partnerships, expand our knowledge outside the medical field and encourage those at the frontline to consider their practices through the lens of prevention and harm reduction. Law enforcement officials are witnessing health and welfare cases, just as much as healthcare professionals. The key element that unites both disciplines in the middle is the most predominant function of all: to protect the public.

The Chief Constable of the Dutch Police Service, Pieter-Jaap Aalbersberg opened the gathering and asked participants to integrate, rather than go deeper for solutions, stating:

‘Major advancements in public health tell us that our health is not just about healthy bodies, but healthy lives. This requires more recognition, as well as adjustments to practice. Our Red Light District has existed since 1400. Our approach in Amsterdam is care and empowerment for sex workers, but human trafficking and healthcare combine to deal with victims trafficked against their will.’

EUROPOL’S Director, Rob Wainwright, gave his perspective through a talk entitled ‘When “International” meets interdisciplinary: fighting crime and reducing harm at a European level.’ Wainwright repeated the stance on health’s relationship with crime prevention, recommending that the police should be engaging in discussions with health organisations. He noted an example:

‘We supported a research project on access to services for women who experience domestic violence. In Europe 42,000 women cannot reach out to health services because of intimidation and violence from male partners; a daily crime that requires actions from health and law enforcement.’

Wainwright also discussed the problems of policing that hinder a flourishing relationship between public health and the law:

‘The police nature and mind-set across Europe is conservative. This must change. For example officers are very reluctant to work with non-governmental organisations because of their lack of structure, but they often have the best relationships with people… Public health and policing have become inseparable now.’

NGOs in attendance included the Open Society Foundation (OSF), a world-leading organisation aiming to shape public policy, human rights, and economic, social and legal reform. Representing OSF’s International Harm Reduction programme, Sanjay Patil drew attention to the lack of funding directed towards health care:

‘Billions of dollars is spent on hardware upgrading for law enforcement, rather than building up improved systems for health and
Aldo Lale-Demoz, Deputy Executive Director of the UNODC, elaborated on a further component absent in policing and health: a human rights person-centred approach.

‘My colleague and Director of the UNODC, Yury Fedotov highlights continuously that many national drug control systems rely on sanctions and imprisonment, rather than evidence-based health care in full compliance with human rights standards.’

The gathering was a unique opportunity to put into perspective that having healthy lives depends on our perception that we are safe. The flow of high crime and rates of poor health cannot be resolved by ‘top-down’ jurisdiction, but it can improve when we recognise those who are involved in aspects of health and crime. Harm reduction is an evolved idea that has become attractive, practical and a commitment. Its values are based upon the person and ensuring that an environment with treatment and options can help to minimise risks.

Janine Ewen specialises in Public Health and Human Rights. Recently she presented her research paper on sex workers and the World Cup 2014: ‘We will use the Venom of a Snake for a Useful Antidote’ in Brazil at the International Mega Events and Cities conference.

**SOCIAL SECURITY**

**Kong Yunming v The Director of Social Welfare: Constitutional Protection of Social Welfare Rights in Hong Kong**

By Sebastian Ko | 4th February 2014

On 17 December 2013, the Court of Final Appeal of Hong Kong unanimously allowed the appeal of Madam Kong in Kong Yunming v The Director of Social Welfare (Kong) (17/12/2013, FACV2/2013). Kong, an applicant for Comprehensive Social Security Assistance (CSSA), was married to a Hong Kong permanent resident who died one day after she arrived in Hong Kong on a One-Way Permit (OWP) in 2005. She became homeless after her late husband’s public housing unit was repossessed. In 2006, the Director of Social Welfare (the Director) rejected her application for CSSA, as she did not meet the seven-year residence requirement (the Requirement). She sought judicial review on the basis that the Requirement contravened inter alia arts 25, 36 and 145 of the Basic Law.

The CSSA scheme was a means-tested social security scheme. The scheme originally had a one-year residence requirement, which remained until 2004 when the Requirement was introduced. This Requirement, however, did not apply to minors or where the Director’s discretion applied. The OWP scheme was devised to help reunite Mainland and Hong Kong family members, especially children of permanent residents. The Court declared the Requirement unconstitutional, restoring the former one-year requirement.

**Right to social welfare**

Ribeiro PJ examined the nature of the constitutional right to social welfare in Hong Kong. Art 36 provides that ‘Hong Kong residents shall have the right to social welfare in accordance with law,’ and protects the right to social welfare effected through administrative social security schemes. Art 145 requires the government to ‘formulate policies on the development and improvement’ of the social welfare system. Subject to constitutional review, the government could modify rights under art 36 by adopting policies developed in accordance with art 145, even if certain benefits were reduced or eliminated. The court would refrain from adjudicating the merits of socio-economic policies, unless the measure (i.e. the Requirement) was ‘manifestly without reasonable foundation’ (MWRF).

The Director claimed that the Requirement was imposed to: defend the financial sustainability of the system against the growth of welfare applicants generated by the OWP scheme and a rapidly ageing population; and to curb increasing expenditure on CSSA. However, the Director failed to establish a rational connection between the Requirement and the sustainability rationale.

The Director also argued that the Requirement promoted uniformity in qualifying periods for heavily state-subsidised benefits, and that benefits should be withheld until an applicant has contributed to the Hong Kong economy. It was held that these objectives were insubstantial in terms of societal interests, and besides, the Requirement was a disproportionate means to achieve them. The Requirement also unreasonably excluded indigent mothers, who were overwhelmingly represented amongst new arrival CSSA recipients, but who were insufficiently recognised for their contribution as caretakers of the children of permanent residents.

The Director sought to advance three proportionality arguments based on the following:

a) the Requirement was widely publicised on the Mainland to deter potential indigent new arrivals;

b) new arrivals, if denied CSSA, could rely on charities for help; and
c) the Director’s discretion would be exercised in exceptional cases.

Ribeiro PJ found that none of the arguments qualified as reasonable mitigation of the hardship caused by the Requirement. It was therefore MWRF, given its contradictory policy consequences and insignificant benefits and supporting government statistics.

**Equality analysis**

Bokhary NPJ held that the Requirement excluded non-permanent residents from the right to social welfare. Art 24 of the Basic Law guarantees equal constitutional protection for all residents, and art 36 applies to residents generally. The Requirement’s discrimination of different classes of residents was unjustifiable by ‘any standard of review.’ The Requirement was also illegitimate as it contravened arts 2 and 9 of the ICESCR, which the Basic Law aims to implement. The increased residence requirement was an unwarranted retrogression in addressing basic needs.

Director of Social Welfare: Constitutional Protection of Social Welfare Rights in Hong Kong

Kong attracted much public controversy in Hong Kong. Whilst some people saw the decision as judicial permission for new immigrants to exploit welfare resources, others viewed it as an affirmation of the rule of law. How the Hong Kong courts will address new immigrants’ rights to other aspects of social welfare (e.g. public housing) remains to be seen. Kong represents a watershed in Hong Kong’s jurisprudence on socio-economic rights.

Sebastian Ko completed the BCL at the University of Oxford, and is a practising lawyer in Hong Kong.

**McDonald v UK: The ECtHR on Social Care Provision**

By Stephen Cragg QC | 4th June 2014

So did Ms McDonald OBE, former ballerina, win her case in the European Court of Human Rights (McDonald v UK [2014] ECHR 492 (20 May 2014)) or not? The Guardian on 20 May 2014 said: ‘European court awards payout to disabled woman over loss of night care.’ But the article then explained ‘[t]he ruling grants government wide discretion in balancing needs of vulnerable individuals with “economic wellbeing of the state.”’ The case clearly needs some explanation.

First, a short recap.
Ms McDonald is disabled and needs to visit the lavatory several times at night but needs assistance to get out of bed to do so. Her local authority assessed her as needing help to use the commode at night and provided a night-time carer.

However, in November 2008 the council decided that Ms McDonald only needed general assistance with toileting and stopped the night-time service. Her needs could be met if she wore incontinence pads at night, even though she is not incontinent. But the council failed to follow the statutory rules for re-assessing a person’s needs in making this decision.

Having lost a challenge in the High Court, she appealed to the Court of Appeal, by which time the council had carried out a proper assessment in November 2009. The Court found that the council had acted unlawfully in the year between the decision to remove services and the new assessment but that withdrawal of services after November 2009 was a legally defensible decision. In 2011 the Supreme Court agreed.

In Strasbourg there were a number of questions. First, did her situation come within the Article 8 right to respect for private life? Second, if she were within the scope of Article 8, then were those rights breached during the period between November 2008 and November 2009? Third, again if she were within the scope of Article 8, could the otherwise lawful decision-making process be justified, or was the attack on Ms McDonald’s rights and dignity simply too great to be justified?

Of most interest on the first point, the Court said the case involved providing a low level of care which ‘conflicted with her strongly held ideas of self and personal identity,’ and emphasised that ‘the very essence of the Convention was respect for human dignity and human freedom.’ These principles have been expressed in ‘right to die’ cases, but have not been expressed before in relation to social care provision. But the Court decided that ‘the contested measure reducing the level of her healthcare falls within the scope of Article 8.’

Having got over that hurdle, the period between November 2008 and November 2009 was easy for the Court to consider. Any breach of Article 8 must be ‘in accordance with the law.’ The Supreme Court had decided that statutory procedures had not been followed. Therefore, the November 2008 assessment was ‘not in accordance with the law’ and the breach of Article 8 could not be justified. Ms McDonald was awarded 1,000 Euros.

But after November 2009, the assessment resulting in service withdrawal was lawful. The Court had ‘regard to the wide margin of appreciation afforded to States in issues of … health-care policies’ and especially where ‘State resources’ were in issue. Set against this standard, there had been a proportionate consideration of the Article 8 breach, which was justifiable in the context of the wider need to make provision of services for others.

Therefore, local authorities are unlikely to be criticised for rights violations from devising policies to provide the most efficient way of sharing resources amongst care users, even if important services are withdrawn from some people, with the consequent adverse effect on their dignity and independence.

But the case represents a win for Ms McDonald in establishing that the withdrawal of care services could have such an effect on a person’s dignity and independence as to amount to a breach of rights. It also represents a win in establishing that if the proper assessment procedures are not carried out, then any breach of those human rights cannot be justified (and damages may be payable).

And, for the first time, the case puts the provision and withdrawal of social and health care services firmly on the human rights radar.

Stephen Cragg QC is a barrister at Doughty Street Chambers and was the lead counsel for Ms McDonald before the European Court of Human Rights.

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Property Rights, Pension Claims, and the Problematic Features of the ECHR’s Proportionality Review
By Ingrid Leijten | 7th August 2014

Although less mind-blowing than other recent Strasbourg judgments, the case of Stefanetti and Others v. Italy [2014] ECHR 394 is an interesting one, especially when viewed against the backdrop of the European Court of Human Rights’ (ECHR) earlier pension rights rulings. Importantly, the judgment demonstrates the problematic features of this line of case law. For what determines when pension reductions, understood as interferences with property rights, are (dis)proportional?

In Stefanetti, the ECHR had to review the fact that the applicants’ pensions had amounted to approximately a third of what they had expected. The reduction resulted from Law 296/2006, which established a method of calculating the pensions of Italians who
had been working in Switzerland, interfering with the interpretation given by the highest courts thus far. The Court had previously dealt with this issue in the 2005 case of Maggio and Others v. Italy [2014] ECHR 769. In contrast with this earlier case, however, the Court has now concluded that there was a breach of the right to property in Stefanetti.

Unlike in Maggio, the applicants in Stefanetti received less than half of what they had expected from their pensions. This is reason enough to 'reassess the matter and scrutinise the reduction more closely.' Eventually, the Court relied upon information about minimum and average pensions in Italy. It then considered that seven out of the nine applicants received somewhat less than €1,000 a month, which is less than the average pension. Because Italy's minimum pension of €461 can be regarded as inadequate, these sums ‘must be considered as providing only basic commodities.’ The reductions had therefore ‘undoubtedly affected the applicants’ way of life and hindered its enjoyment substantially.’

When exactly is a pension reduction ‘disproportional’? It is the Court’s task to provide individual rights protection and it hence seems unproblematic that it reaches different conclusions in two similar cases. Interestingly in this regard, however, is that the Court did not distinguish between the nine individuals whose applications were reviewed together in the Stefanetti case. But was the reduction as disproportional for one applicant – who still received €1,820 – as for another applicant – who only received €714? This question can be answered in the affirmative if the Court only looks at the percentage of the reduction as such, since it was the same for these two applicants. However, the Court also explicitly examined the effects thereof, considering what the applicants received in light of the minimum pension.

This, moreover, begs the question of whether the effects in Maggio were truly less severe. That the Court did not distinguish amongst the Stefanetti applicants can be justified by the fact that it eventually attached weight to the circumstances surrounding the pension reductions. Yet, as the circumstances in Maggio were comparable, this also fails to explain why in that case, no violation of property rights was found.

Framed as a human rights concern, property review must account for all relevant circumstances. When social benefits or pensions are considered to be ‘possessions,’ however, this triggers review of social circumstances and the appropriateness of welfare policies. The similarity of the facts in Maggio and Stefanetti make painfully clear that it is then difficult, if not impossible, to draw the line.

The dissenters in Stefanetti also questioned the Court’s capacities in this regard. They highlighted the ‘huge and unjustified disparity there would have been, to the advantage of the applicants, had the system not been amended’ as well as the wide margin of appreciation. Moreover, they observed that none of the applicants fell into the lowest pension bracket and that it cannot be said that ‘the old-age pensions actually received by the applicants … are at such a level as to deprive the applicants of the basic means of existence.’

This is an interesting point. Would its case law improve if the Court examined whether ‘core’ social security guarantees are interfered with, in the sense that basic means of subsistence are at stake? Only then, it can be argued, can the Court reach the solid conclusion that a legislative interference in the sensitive and politically-laden social security sphere is ‘disproportional’ in terms of its impact upon fundamental rights.

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Women’s Rights to Social Security and Social Protection
By Beth Goldblatt and Lucie Lamarche | 11th November 2014

There is a growing international focus on social protection in the developing world, while at the same time, countries in the
developed world are cutting back on social security in pursuit of ‘austerity.’ The breaking down and building up of welfare systems
in different parts of the world provide a fascinating context in which to examine the impacts of such programmes on women. Many
of the austerity cuts have targeted single mothers and other poor women, adding to the burdens facing these vulnerable groups.
At the same time, some of the social protection measures being introduced into developing countries are specifically directed at
mothers who are seen as reliable vehicles for tackling child poverty. Such measures often place additional responsibilities on poor
women. A human rights framework that is fully cognisant of women’s interests and entitlements is crucial in interrogating these
developments and in helping to shape new responses that advance the rights of women.

We are pleased to introduce a new book on the right to social security examined from a women’s rights perspective that contributes
to the articulation of such a framework (Beth Goldblatt and Lucie Lamarche (eds), Women’s Rights to Social Security and Social
Protection, Ofati International Series in Law and Society, Hart, 2014). The collection emerges from an international initiative to
focus on women in the interpretation and development of this central social and economic right. This initiative involved a webinar
and workshop that encouraged human rights practitioners and scholars to deepen our understanding of the gender dimensions of
social security and protection in the context of increasing poverty and inequality in the world.

The book contains chapters that explore conceptual questions on the relationship between the right to social security and rights
to equality and participation for women. It also considers the meaning of the right to social security in an age where the language
of ‘crisis’ and the focus on ‘human capital’ shape dominant discourse. There are chapters evaluating the place of women within
international law, including within the International Labour Organisation’s Social Protection Floor Recommendation and the work
of other UN bodies dealing with social security and protection. There are also a number of chapters on specific countries’ social
security programmes, analysed from a women’s rights standpoint, including China, Canada, Australia, Bolivia, Ireland, Spain, Chile
and the USA.

The book explores a range of ways of ‘engendering’ the right to social security. The first approach integrates the right to social
security with the right to equality to ensure that social security is guaranteed equally for men and women. The second approach
requires a systematic gender-based reformulation of the social security right by critiquing and reframing it in light of feminist
theory. The third approach proposes a human rights approach to social protection that mainstreams gender and includes a set of
guidelines that tests compliance of social protection programmes with human rights obligations informed by a gender perspective
(this is the approach taken by Magdalena Sepúlveda Carmona, former Special Rapporteur on extreme poverty and human rights).

These approaches are closely interrelated and lead towards the same goal of a gendered social security right that is socially,
economically and politically transformative. The right to social security is also closely related to many other rights such as rights
to work, health and livelihood. The authors of the chapters in the collection are mindful of the many intersecting categories of
disadvantage that shape women’s rights to social security including age, race, disability, migrant status and many others. The
chapters note the need for the restructuring of labour markets and the reallocation of care responsibilities in society if women are
to fully participate as equals in all societies. These issues are intimately linked to the rights to social security and protection and
require both national and transnational responses.

The book brings together research and writing across the disciplines of social policy, human rights and feminist theory. While it
engages with scholarly debates within these fields, it is also directed, in a practical way, at contributing to the development of the
right to social security from a women’s rights perspective.

Beth Goldblatt is an Associate Professor in the Faculty of Law at the University of Technology, Sydney.

Lucie Lamarche is a Professor in the Faculty of Political Science and Law at the University of Quebec in Montreal.

First Nations Child Welfare Funding Before National Tribunal
By Ravi Amarnath | 12th November 2014

The fate of thousands of First Nations children is in the hands of an administrative tribunal in a decision that could alter the course
of child welfare funding in Canada.

Canada currently has two parallel systems in place to fund child welfare services, which aim to protect children from abuse
and neglect. Ordinarily, individual Canadian provinces are responsible for funding child welfare services within their jurisdiction.
However, Canada’s federal government is responsible for funding child welfare services for Canada’s indigenous population –
notably its First Nations population – who live in allocated areas of land throughout the country, known as reserves.
Aboriginal Affairs and Northern Development Canada (‘AANDC’) is the Canadian agency responsible for overseeing the implementation of on-reserve child welfare services. One of AANDC’s objectives while funding child welfare programs is to ensure that services are provided ‘in a manner that is reasonably comparable to those available to other provincial residents in similar circumstances.’

In 2007, two organizations, First Nations Child and Family Society of Canada, and the Assembly of First Nations (the ‘complainants’) filed a complaint to the Canadian Human Rights Commission (‘CHRC’) in which they asserted that AANDC underfunds child welfare services for on-reserve First Nations children.

The complainants’ alleged that this underfunding, as of 2007, resulted in 27,000 First Nations children, or one out of ten children, being placed in care as opposed to one out of 200 non-First Nations children – a figure that AANDC disputes.

Based on these figures, the complainants asserted that AANDC’s underfunding of welfare services was a form of adverse differential treatment, a prohibited ground of discrimination under subsection 5(b) of the Canadian Human Rights Act (‘CHRA’).

The CHRA was enacted in 1977 with the purpose of protecting individuals from discrimination when employed by, or receiving services from, the federal government, a First Nations government or private companies regulated by the federal government. Complaints are originally investigated by the CHRC, and subsequently adjudicated upon by the Canadian Human Rights Tribunal (‘CHRT’) if they are deemed to have merit.

While the complainants’ claim was initiated over seven years ago and has had a protracted legal history, the majority of proceedings have centred on whether the CHRT should adjudicate the matter on its merits.

In 2011, the former CHRT Chairperson determined that the CHRT could not hear the merits of the case. She stated that the complainants were required, but had failed, to identify a valid ‘comparator’ group to the federal government to establish their claim in discrimination. The decision drew rebuke, as the Supreme Court of Canada had stated days earlier, in the context of equality rights under the Canadian Charter of Rights and Freedoms, that it is ‘not necessary to pinpoint a mirror comparator group.’

On subsequent reviews – both at the Federal Court and Federal Court of Appeal – the Chairperson’s decision was found to be unreasonable and the decision was sent back to the CHRT to be heard on its merits by a newly comprised tribunal.

The substantive hearing on the merits of the case began last year and concluded this past October. The complainants are seeking a number of remedies in the case, including a declaration by the CHRT that AANDC funding is discriminatory and the formation of a national advisory committee to develop a new funding formula and oversee this new program.

If the tribunal rules in the complainants’ favour, the decision could have widespread ramifications for AANDC, which provides funding for a number of services for First Nations, and other indigenous peoples, in Canada.
Two outside interest groups, the Chiefs of Ontario and Amnesty International, provided submissions in the case.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

OTHER TOPICS IN SOCIO-ECONOMIC RIGHTS

Not Reaping the Benefits: the United Kingdom’s Continuing Violation of Article 12§1 of the European Social Charter
By Daniel Cashman | 6th February 2014

On 29 January 2014, the European Committee of Social Rights found, yet again, that the United Kingdom is in violation of Article 12§1 of the European Social Charter (‘the Charter’). This finding sets off alarm bells regarding the legality of the Coalition Government’s ‘welfare reforms’ implemented by the Welfare Reform Act 2012.

The UK’s compliance with the Charter is assessed by reference to periodic reports submitted by the Government, which are considered by the European Committee of Social Rights (‘the Committee’) in accordance with Article 24 of the Charter. The most recent report to have been considered by the Committee concerned provisions relating to ‘health, social security and social protection.’ The Committee concluded that the UK was primarily in conformity with the relevant provisions (although it requires further information regarding Article 13§4); however, with regard to Article 12§1, it found that the United Kingdom was in breach of its undertaking ‘to establish or maintain a system of social security.’

The jurisprudence of the Committee with regard to Article 12§1 was set out in Report XVIII-2. The Committee requires social security benefits to be ‘effective.’ For income-replacement benefits, this means that their level should never fall below ‘the poverty threshold defined as 50% of median equivalised income and as calculated on the basis of the Eurostat at-risk-of-poverty threshold value.’ In its most recent report, the Committee noted that the poverty threshold in 2011 stood at €714 per month.

The relevant level of benefits provided by the UK were:

• Short-term incapacity benefit: €85 per week;
• Long-term incapacity benefit: €112 per week;
• Employment and Support Allowance and Jobseekers’ Allowance: €321 per month;
• State pension: €490 per month;
• As these amounts do not even reach 40% of the Eurostat median equivalised income, the Committee concluded that they were ‘manifestly inadequate.’

This conclusion should not have been a surprise for the Government. The Committee found the UK to be in breach of Article 12§1 of the Charter in its reports for both the period 2001-2004 and 2005-2007. However, in its previous two findings, the Committee found fewer breaches; it concluded that (only) the levels of Statutory Sick Pay, short-term incapacity benefit and contributory jobseekers’ allowance for single persons were manifestly inadequate.

So, having found that the UK has been in breach of Article 12§1 of the Charter for (at least) the period from the beginning of 2001 until the end of 2011, what does the future hold for the UK’s compliance with the Charter? Unfortunately, the picture is bleak. The Committee’s most recent report only considered the situation up to the end of 2011. This means that the Coalition Government’s sweeping welfare reforms in the Welfare Reform Act 2012, mostly brought into effect from April 2013, are not included. Rather than seeking to raise benefits to the poverty threshold, the Government has introduced stringent reforms and caps. For example, by virtue of an overall benefit cap, 40,000 households are expected to lose an average of £93 per week; and, as a result of benefits only being up-rated by 1%, rather than in accordance with CPI inflation, 9.6 million people are expected to see an average weekly loss of £3.

The repeated findings of the UK’s violation of Art 12§1 might raise questions about whether the reporting procedure really has sufficient teeth in enforcing the Charter, especially in the light of a near-certain finding of a continued violation in the Committee’s next report on the UK’s social security provision. However, one would hope that the Government would sit up and take notice of the Committee’s persistent analysis. Unfortunately, members of the Coalition Government have reportedly responded to the Committee’s findings as ‘lunacy’ and ‘meddling.’ In so doing, the Government is dismissing the Committee’s concern for the most vulnerable in society.

Daniel Cashman is a barrister, who completed the BA and BCL at the University of Oxford. He was a founding co-chair of Oxford Legal Assistance and currently sits on the Executive Committee of Oxford Pro Bono Publico.
Is There a Hierarchy of Human Rights and Human Rights Reporting?
By Katharine Quarmby | 24th March 2014

I believe that just as there is a hierarchy of rights, as discussed by human rights scholars, there is also a hierarchy of human rights reporting.

War reporting and the human rights violations that occur in conflict zones are seen as ‘classic’ human rights journalism. It’s dangerous work. Last year, the International Federation of Journalists estimated that over 100 journalists and media workers were directly killed because of their work. Around half were engaged in human rights reporting.

I was one of the many journalists who travelled to Rwanda after the genocide that killed at least 800,000 Tutsis and moderate Hutus in 1994. I was there in 1997 to record the aftermath with BBC Panorama, and the film we made, Valentina’s Story, produced by Mike Robinson and reported by Fergal Keane, is a classic piece of human rights reporting. In 1999, as a BBC Newsnight producer, I went back with Fergal, to make two more classic human rights films, gathering evidence on rights violations during the genocide that could be used by the Arusha War Crimes Tribunal. Reporting on violations is crucial stuff and continues today, all over the world.

I have moved on to smaller scale human rights journalism that I also consider important, but which is less well-funded and more controversial. This is because the very rights of those under fire are seen as inconvenient, not mainstream or unpopular.

Disabled peoples’ rights, for instance, are seen as segregated from other rights, and are not central to the work of most human rights groups. Similarly, during the Leveson Inquiry, despite a campaign by disabled people and their organisations, none were called to give oral evidence on how they were treated in the media. Leveson took oral evidence from women’s rights organizations, transgender organizations and refugee organisations. This was disappointing, when the stereotyping of disabled people by certain sections of the media, especially around benefit cuts, is evidenced to have caused a worsening of public attitudes towards them.

The failure to understand the discrimination faced by disabled people meant that it took many years to get the pressing issue of disability hate crime recognized. The key intervention of Lord Ken Macdonald, then the Director of Public Prosecutions, who called disability hate crime a ‘scar on the conscience’ of the criminal justice system, was one of the reasons why that change happened. But there is still a long way to go, as disability rights are often seen as inconvenient to the general public, and this is mirrored in journalism itself.

Lastly, we come to unpopular human rights journalism – and this is where I would place the rights of Britain’s nomads, which come
into conflict with other another set of rights – those relating to property. The rights of Britain’s nomads to family life, to education, to a decent standard of housing, and to enjoy a life free from discrimination often come into conflict with British planning law.

This played out in Court 76 of the High Court on October 12, 2011, as I reported for the Economist, when the Dale Farm Irish Traveller residents lost a crucial legal battle against their eviction. I wrote: ‘Dale Farm has become a symbol of an increasingly bitter dispute about the rights of Gypsies and Travellers, around a fifth of whom have nowhere legal to live. Basildon council argues that it is simply enforcing planning law...This was echoed by Mr Justice Ouseley. He said that there must be “public respect for and confidence in” planning law, and that although Basildon council had not identified alternative pitches where the travellers could live, those deemed homeless had been offered “bricks and mortar” accommodation. The decision by Dale Farm residents to decline such housing, due to their “cultural aversion” to it, he said, was their own responsibility.’

Basildon was right in legal terms, but who won, when those evicted have ended up homeless and in poor health? There has to be a better way of honouring property rights than by ignoring human rights concerns. Reporting on such travails is unpopular human rights journalism – but important, all the same.

*Katharine Quarmby is an award-winning non-fiction writer and journalist.*

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**Going Hungry? The Human Right to Food in the UK**

*By Jonathan Butterworth | 6th May 2014*

The Government is legally required under the International Covenant on Economic, Social and Cultural Rights (Article 11) to secure the human right to adequate food for everyone in the UK. But in recent years we have seen large increases in the levels of malnutrition, hunger and food bank usage, all of which are indicative of the UK being in breach of its international legal obligations in respect of the right to food.

In the 2014 Just Fair Consortium monitoring report ‘Going Hungry? The Human Right to Food in the UK,’ we learn how and why this is so.

*How do we know there is a problem?*

The numbers of people given three days’ emergency food by Trussell Trust food banks has risen exponentially from 26,000 in 2008-09 to 913,138 in 2013-14, as growing numbers of people can’t afford to provide the basics for their families and are forced to choose between heating, eating or paying for housing costs.

The effects of this state of food insecurity are widespread and dramatic. Public health experts have warned that the rise of malnutrition in the UK ‘has all the signs of a public health emergency,’ with a 74 per cent increase in the number of malnutrition-related hospital admissions since 2008-09.
Women, children and people with disabilities have been particularly adversely affected. Single mothers report having missed meals so that their children can eat. At times, they cannot even ensure their children are adequately fed. And this is whilst experts warn that child poverty is expected to increase in the near future.

What are the causes of the problem?

In the Just Fair Consortium monitoring report, ‘Going Hungry? The Human Right to Food in the UK,’ we have learnt that nutritious food is becoming too expensive for many people on low wages or benefits. The fall in the real value of wages has meant that the number of working poor who are hungry or unable to afford nutritious food has increased.

Evidence also shows that hunger has been fuelled by the inadequacy of social security provision and the processes by which it is delivered. People already on low incomes have been made even poorer by the under-occupancy penalty, the abolition of crisis loans and community care grants and the decision to cap increases in benefits to one per cent rather than indexing them to inflation. The squeeze on social security has been compounded by payment delays and sanctions, which leave some people with no income at all – 31 per cent of those visiting Trussell Trust food banks do so because their benefits have been delayed, and 17 per cent do so because of changes to benefits.

Even though they are spending more, people have been forced to cut the amount they eat and eat more poor quality, unhealthy food. From 2007 to 2012, expenditure on food rose by 20 per cent, but the actual volume of food consumed declined by seven per cent, as household incomes for poorer families have been put under greater stress whilst prices have increased.

What is required to address the problem?

We cannot allow the gap between wages, benefits and food costs to continue to grow. We cannot permit food banks to become a substitute for a comprehensive social security system. We cannot allow malnutrition rates to continue to rise. Securing the human right to food must become a national priority.

We call on the Government to draw up a national right to food strategy and action plan, including an assessment of the state of enjoyment of this right. Any further deterioration in income levels, which undermine people’s ability to access food, shelter and basic services, must be avoided. We urge the Government to close the gap between income and food costs.

We call on the Government to take urgent action to reduce benefit delays, review how benefit sanctions and welfare reforms are being implemented and reduce unnecessary hardship, hunger and distress. We call on the Government to mobilise all available resources and make full use of its tax and spending powers to deal with the national food emergency.

Jonathan Butterworth is co-founder and Director of Just Fair. He previously acted as an ESCR consultant for Democratic Audit, an adviser to the British Institute of Human Rights, and was a teaching fellow at UCL.

Finance and Human Rights: Developments in Brazil and Peru

By Caio Borges | 20th January 2015

In December 2014, governments, businesses and civil society gathered at the Palais des Nations, the UN's headquarters in Geneva, for the Third Annual Forum on Business and Human Rights. The event was organised by the UN Human Rights Council to serve as a prominent global venue to discuss the trends and challenges in the implementation of the UN Guiding Principles on Business and Human Rights (the GPs). The GPs can be understood as a ‘heterodox’ normative construction that puts together pre-existing hard law – binding obligations upon States to protect human rights – with ‘soft law’ – non-binding practical guidelines for companies on how to incorporate human rights standards into their day-to-day operations.

One session of the Forum discussed recent trends in the regulation of the financial sector in Latin America. The presentations by the Brazilian Central Bank (BCB) and the Peruvian Financial Authority made it clear that the two countries are following different paths towards the improvement of the respect of human rights by the financial sector, with the initiatives of Peru being strikingly more sophisticated than that of its giant neighbour.

In April 2014, the Brazilian authority adopted a regulation requiring every financial institution operating in the country to establish a social and environmental policy or, if such a policy was already in place, to review it in accordance to the provisions of the new rule. It commands that institutions should establish internal procedures, controls, systems and governance structures to ensure compliance with their policies. It also requires financial institutions to present an action plan describing how they intend to make it operational.
Despite being lauded by the financial market and the regulator itself as a landmark rule, the resolution is void of substantive criteria to allow external stakeholders, and even the BCB, to assess the robustness of the policies, especially their adherence to universal human rights standards, such as the GPs.

Unlike the Peruvian rule (not available to the public at the time of writing), the Brazilian norm ignores the remedial aspect of the ‘corporate responsibility to respect,’ one of the pillars of the GPs, and requires neither the financial institutions nor the borrowers to establish a grievance mechanism to solve human rights-related conflicts.

Regarding the engagement of stakeholders by financial institutions in the process of building or reviewing the policies, the wording of the norm is weak. According to the rule, financial institutions should only ‘stimulate’ the participation of interested parties in the process. It says nothing about the importance of banks requiring their corporate clients to demonstrate that they have meaningfully consulted affected communities throughout the life of the project cycle.

These loopholes in the Brazilian regulation mark a contrast with the Peruvian initiative, which has incorporated the core elements of the GPs and therefore, once enacted, will set a benchmark in the region, perhaps in the world.

The justification of the BCB is that the rule is aimed at ‘leveling the playing field,’ given that many financial institutions in the country, especially regional development banks, still lack an internal framework on social and environmental responsibility.

However, the light-touch regulation by the BCB is already showing its deleterious effects. In November 2014, the Brazilian Development Bank (BNDES) issued its new Social and Environmental Policy. Regrettably, the updated policy barely changed the wording of the old one. This is a problem because the BNDES, a bank that now lends two to three times more than well-known international financial institutions, such as the World Bank and the Inter-American Development Bank, has fragile social and environmental standards.

According to a study by Conectas Human Rights, in the past ten years the BNDES has grown in size and importance, but this has been accompanied by an increase in the number of denouncements that the Bank is providing financial support to companies allegedly involved in human rights abuses, such as the use of slave-like labor and displacement of communities without proper compensation, depriving them of their right to water, food, land and other basic rights.

The hope is that the BCB be more ambitious in its next steps. To ensure that the policies are not just words of good intention, the authority should conduct a thorough analysis of the first wave of policies, which are due to February this year, and exercise rigorous oversight over their execution. If best practices are needed, one is right next door.

Caio Borges is an attorney in the Business and Human Rights project at Conectas Human Rights, an international not-for-profit, non-governmental organization based in São Paulo, Brazil. Mr. Borges holds a Master degree in law and development from the Getulio Vargas Foundation Law School in São Paulo and is a researcher in the same institution.

The Benefits of Using Equality and Non-Discrimination Strategies in Litigating Economic and Social Rights – New Guide Published
By Joanna Whiteman | 14th January 2015

Socio-economic inequality is the biggest human rights and development challenge today. At the Equal Rights Trust we believe that using the rights to equality and non-discrimination in cases relating to the social and economic rights of the vulnerable is one, until now under-explored, way to address the challenge. On 10 December 2014, we published a Guide (with accompanying Online Case Compendium), which both makes our case and illustrates how such litigation may be brought.

Economic and social rights are clearly enshrined in international human rights law. The International Covenant on Economic, Social and Cultural Rights of 1966 sets out critical rights, such as those to education, an adequate standard of living, health and social security, and it requires that states guarantee that these rights will be exercised without discrimination (Article 2(2)). And yet there remains a serious problem of their realisation. What is this problem? Why does socio-economic inequality persist and indeed grow?

From a legal perspective, for a start, in contrast to the rights contained within the sister Covenant, the International Covenant on Civil and Political Rights 1966, the rights were imbued with weaker effect with states only required to ensure the rights’ ‘progressive realisation.’ Further, economic and social rights are not justiciable in many jurisdictions. Even where they are, courts remain reticent to interfere in what they still consider to be a matter with huge resource implications, which remains to be determined by legislatures.

The reticence to treat socio-economic rights on an equal footing with civil and political rights is misplaced. As Octavio Ferraz has
rightly pointed out, the issue is not that there aren’t the resources to secure everyone’s social and economic rights but rather that the resources are unequally distributed. Oxfam’s now well-cited finding that the 85 richest individuals in the world have, collectively, the same wealth as the poorest 3.5 billion demonstrates the inequality in stark terms. Inequality and discrimination, not limited resources, are at the heart of the problem of non-realisation of social and economic rights. Advancing equality and non-discrimination is key to solving the problem.

Unlike economic and social rights, the rights to equality and particularly to non-discrimination have received more traction both in terms of adoption as justiciable rights and in terms of being upheld in progressive judgments by courts. The Equal Rights Trust has long believed that these rights can provide an important basis upon which the socio-economic rights of the most disadvantaged can be realised.

In 2011, we commenced research into the extent to which courts at the international, regional and national levels (in selected jurisdictions) have made findings of discrimination or inequality in relation to socio-economic rights realisation. We found that there while there is some useful jurisprudence, it remains too limited and there is a need for equality and non-discrimination strategies to be employed more often and more effectively before courts.

The outcome of our research was ‘Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-discrimination Strategies to Advance Economic and Social Rights,’ which was published on 10 December. The Guide, taken together with its accompanying Online Case Compendium:

- Elucidates the conceptual links between equality and non-discrimination on the one hand and economic and social rights on the other and explains why the former could be used to advance the latter;
- Brings together for easy reference almost 100 cases from the key international and regional courts and treaty bodies and courts in nine national jurisdictions, which may provide useful precedents for lawyers;
- Provides practical guidance to litigators on assembling a case strategy which makes the most of the equality and non-discrimination framework to advance socio-economic rights.

It is our hope that greater involvement of equality and non-discrimination strategies in cases relating to socio-economic rights, will result in greater realisation of the rights. And we hope that our Guide will provide a useful resource for litigators in working towards this goal.

Joanna Whiteman is Head of Litigation at the Equal Rights Trust and drafted the Trust’s ‘Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights.’