

Socio-Economic Rights Project, CLC, UWC

Summary of key themes of the Colloquium

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What are the key challenges for government in the realisation of socio-economic rights?

The primary responsibility to realise socio-economic rights lies with government. The first challenge is the *definition of responsibilities* and the division of those responsibilities among the various tiers of government. In some cases there appears to be confusion about who should do what.

The second challenge is to *work in an integrated fashion*, since many socio-economic rights are interrelated. There are limitations if the realisation of socio-economic rights is looked at only on an inter-sectoral level.

A third challenge relates to the fact that *South Africa has not yet ratified the International Covenant on Economic, Social and Cultural Rights*. Although one of the participants did emphasise that SA should be cautious about ratifying the covenant, there was a strong call for government to consider ratifying the covenant. Justice Pillay pointed out that if SA ratifies the covenant, there are not only core minimum obligations, but also benefits attached to ratification. The covenant can be used as a bargaining chip with international financial institutions. Ratification would imply a number of core responsibilities. In order to fulfill these responsibilities, SA may need to look to other State parties who could provide assistance.

With regard to the *interpretation of the Grootboom case*, the way government interprets the case has an impact in terms of its own responsibilities. It is not advisable for government to take a legalistic approach. A limited interpretation of the Grootboom case tends to see government as having limited responsibilities. Government will do better if it sees Grootboom as the minimum they should do, while still exploring their range of responsibilities. Grootboom was a cautiously crafted judgement, the first of its kind in SA.

On the issue of *implementation of socio-economic rights*, the debates showed that a wide range of legislation and policy is in place, with the exceptions of food security, social assistance and health care. The point was made that we can have the laws, but if we don't have committed officials willing and able to carry out the ethos of the Constitution, we will not realise socio-economic rights. It is not just a court judgement that can deliver on these rights. So much depends on budgets and the allocation of money. The challenge is to build the capacity or capability of government to deliver.

With regard to the *monitoring of socio-economic rights*, the role of the Human Rights Commission was discussed. The Commission has a very limited budget. Government should consider this in its efforts to monitor the implementation of socio-economic rights. Monitoring and feedback will help government reflect on the process of implementation. Furthermore, monitoring cannot only be done by the Human Rights Commission and Non-Governmental Organisations. Government should devise the means to evaluate implementation at all spheres of Government. Significant also is the capability of public officials to understand the Constitution and the Constitutional Court judgement in the Grootboom case. The challenge is to introduce Constitutional education. This needs to be considered seriously since the objectives of government are based on the Constitution. Important to note is that the Fiscal Com-

mission has stated that there is enough money to be spent on the realisation of socio-economic rights, but there is a lack of effective capacity to spend the money.

What is the purpose of socio-economic rights?

Its purpose is to transform our society into one that is based on human dignity. The aim is to bring about change, not to maintain the status quo. Socio-economic rights help us achieve this. We have overlooked this, sometimes holding these rights against government, and seeing it as something that is resisted by government. But these rights are there to help government to transform. Socio-economic rights are not only about fighting government, but also about government fighting for people.

What lessons can be drawn from discussions at the colloquium?

- 1) *It is high time SA ratifies the Covenant on Economic, Social and Cultural Rights.* The content of the rights entrenched in the Covenant has been unpacked, and this could be very helpful to us.
- 2) *The Constitution creates the opportunity for parliament and the courts to engage in dialogue.* The idea that the courts need to decide on how socio-economic rights are implemented is nonsense. Decisions about macro-economic policy are not a matter for the courts. But whether the duty to fulfil these rights is adhered to *is* a matter for the courts. Courts test the kind of policies introduced by government. However, there is a role for institutional modesty. We don't want the courts to run the country. There are limits to the role of the courts, in terms of its legitimacy and particularly its accountability. Judges in the court are not elected, and that limits their role. Significant also is how cases come to the courts. They don't invent cases, but wait for cases to come to them. They are limited to the facts of the case. Some decisions not suited to courts, but require broader knowledge. We need to clarify the role of courts in institutional dialogue. What form of separation of powers do we want?
- 3) We need to examine *how legal strategies can form part of broader social mobilisation.* How do we integrate legal strategies into community strategies? Legal cases cannot stand on their own.
- 4) An important question is also *the appropriateness of legal remedies.* The debate is not about justiciability, but about how to enforce socio-economic rights. A party can be ordered to do something specific to remedy the matter. The problem with direct enforcement is that, in some cases, there are different ways of giving effect to these rights. The executive branch of government has to decide what means to use. The point is that it is not for the courts to decide this. It is up to parliament and the executive. The courts are reluctant to get involved in this enforcement. Courts should be encouraged to adopt a halfway approach, where it proposes a remedy, and requires government to work out how they will enforce the remedy. The courts then assess whether the means by which the remedy is carried out is adequate.
- 5) *The Grootboom case dealt with people who were in a desperate situation.* The court was not asked about the rights of people who have a lack of housing but about people who have no housing at all. However, we should not assume that socio-economic rights are only for people in desperate situations. Everyone has the right to adequate housing, but how this is achieved is a different story. This has been dealt with on a case by case basis. The court has spoken the first word, not the last word, on housing.

Concluding Remarks

It is surprising to see the doom and gloom with which the Grootboom case has been regarded in SA. People in other countries are envious of the Grootboom judgement. In SA, we complain that it is not good enough. Yet, it is an extraordinary judgement. Much has been said about Afro-pessimism, but this seems to be a case of South African pessimism. This does not mean that we shouldn't be critical, but we should celebrate our victories. We should bear in mind that the law is not static. The Grootboom case was the reverse of the outcome of the Soobramoney case. The TAC case will be the next attempt to move things forward. Grootboom will be helpful for litigation in the TAC case. It is a powerful tool to help people assert their socio-economic rights. Civil society can achieve a great deal through socio-economic rights. It can be a powerful tool in the struggle for social justice.