

The right to health and the nature of socio-economic rights obligations under the African Charter

The *Purohit* case

Purohit and Moore v The Gambia [Communication 241/2001] [*Purohit* case]

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The African Charter on Human and Peoples' Rights (the African Charter) guarantees a broad range of economic, social and cultural rights (socio-economic rights) as well as civil and political rights.

Although some of the Charter's provisions mirror the International Covenant on Economic, Social and Cultural Rights (the ICESCR), there are significant differences between these instruments. While the ICESCR defines socio-economic rights with such qualifications as 'progressive realisation' and 'available resources', the African Charter does not.

Article 1 of the African Charter simply enjoins all States parties to adopt legislative and other measures to give effect to the rights protected under it. The socio-economic rights provisions themselves are defined in the same way as civil and political rights. For example, the provision on the right to health reads:

- (1) Every individual shall have the right to enjoy the best attainable state of physical and mental health.
- (2) State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

This formulation has led some commentators, such as Chidi Odinkalu, to contend that the obligations to realise the socio-

economic rights in the Charter are immediate rather than progressive.

Although the African Commission on Human and Peoples' Rights (the African Commission) has handed down a number of decisions on socio-economic rights, it interpreted these rights substantially for the first time in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (SERAC case). In this case, the African Commission found that Nigeria was in violation of a range of rights, including socio-economic rights, in connection with oil activities in Ogoniland. It also read into the African Charter and interpreted the rights to food and housing, which are not expressly recognised by it (see *ESR Review*; (3) 2002 and 5(1) 2004). The African Commission stated that all rights under the African Charter generate the duties to respect, protect, promote and fulfil on States parties.

However, what is missing in this

case is a consideration of the standard for measuring compliance by States with their positive obligations in relation to socio-economic rights. In some passages, the African Commission made references to the obligation of the State to take 'reasonable steps' and to 'minimum core obligations'.

However, reading the case as a whole, it is unclear whether the Commission was endorsing the reasonableness test adopted by the South African Constitution, or the minimum core obligations concept adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR).

The *Purohit* case is significant not only because it interprets the right to health under the African Charter but also because it sheds more light on the nature of positive obligations of State parties in relation to

socio-economic rights under the African Charter. While it does not

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establish a standard for measuring state compliance with these obligations, it makes the vital point that we cannot turn a blind eye to the scarcity of resources in Africa when defining the socio-economic rights in the African Charter.

Facts of the case

This communication was brought by two mental health advocates, Ms H. Purohit and Mr P. Moore, on behalf of mental patients at a psychiatric unit in The Gambia, and existing and future mental patients detained under the Mental Health Acts of the Republic of The Gambia.

The complainants alleged that the provisions of the Lunatic Detention Act of The Gambia and the manner in which mental patients were being treated amounted to a violation of various provisions of the Charter, including the right to health. It was alleged that the Act failed to provide safeguards for patients who were (suspected of being) insane during their diagnosis, certification and detention. Among other things, it did not make provision for the review of, or appeal against, orders of detention, nor any remedy for erroneous detentions. No provision existed, it was argued, for the independent examination of the administration, management and living conditions within the unit itself.

The decision

The Commission found The Gambia to be in violation of a range of Charter rights. It was held that the Lunatic Detention Act was discriminatory because the categories of people who would be detained

under it were likely to be people picked up from the streets and people from poor backgrounds.

Secondly, it was held that the legislative scheme of the Lunatic Detention Act, its implementation and the conditions under which persons detained under it were held amounted to a violation of respect for human dignity. Among other things, the Act used such terms as “idiots” and “lunatics” to describe persons with mental illness. Such terminology, according to the African Commission, dehumanised them. The respondent State was also found to have violated the right to liberty and security of the person and the right to have one’s cause heard for a number of reasons, including the lack of procedural provisions allowing for the review or appeal against detention under the Act. The exclusion of mentally ill persons from political

participation was held to be a violation of the right to freely participate in one’s own government.

The right to health

A finding of particular interest to this article relates to the right to health. The African Commission found The Gambia to be in violation of this right. It stated that the right to health includes “the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind”. According to the African Commission, mental health patients deserve special treatment because of their condition and by virtue of their disability. Thus, it held that the Lunatic Detention Act was deficient in terms of therapeutic

objectives and provision of matching resources and programmes for the treatment of persons with mental disabilities.

The Commission relies heavily on the United Nations Principles for the Protection of Persons with Mental Illness and Improvement of Mental Care as adopted by GA res. 46/119, December 1991 (the Principles). The Principles accord special treatment to mental health patients and stress that such patients are entitled to the highest standards of medical care at three levels: analysis and diagnosis, treatment and rehabilitation. The Commission takes note of the difference in standards between the Principles and the Charter. While article 16 uses “best attainable state of...mental health”, the Principles use “highest attainable standards”.

Resource scarcity and socio-economic rights

In interpreting the right to health, the Commission took note of the relevance of resources and the realities facing African countries in their efforts to realise this right. According to the Commission:

...millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with problems of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full realisation of this right. Therefore, having regard to this depressing but real state of affairs, the African Commission would like to read into Article 16 the obligation on the part of States party to the African Charter to *take concrete and targeted steps, while taking full advantage of its available resources*, to ensure that the right to health is fully realised in all its aspects without discrimination [para 84, emphasis added].

Mental health patients deserve special treatment by virtue of their disability.

This statement establishes that the availability of resources is a relevant factor when determining whether a State is in violation of the right to health, contrary to what has been suggested by some scholars. While this statement was made specifically in relation to the right to health, it has wider implications for other socio-economic rights. Based on this case, States can allege scarcity of resources as a defence to non-compliance with socio-economic rights. However, the case does not establish who shoulders the burden of proving availability or lack of resources.

The *Purohit* case suggests that the African Commission is leaning towards adopting an understanding of socio-economic rights that the CESCR has developed in its General Comments on the ICESCR, especially General Comment No. 3 on State parties' obligations. As noted earlier, socio-economic rights under the ICESCR are realisable progressively within available resources. The CESCR has interpreted this to mean that States parties must not take retrogressive measures that have a negative impact on existing access to socio-economic rights. It has also stated that States must comply with minimum essential levels of socio-economic rights.

The approach adopted by the African Commission is justifiable, given that the formulation of the rights in the African Charter is not substantially different from that of the ICESCR. In addition, the ICESCR has been interpreted by the CESCR in a manner that considers the position of poor countries. For example, it has held that States that are seeking exemption from liability for not meeting their socio-economic rights obligations on the ground of lack of

resources must demonstrate that they have used the resources available to satisfy minimum essential levels of socio-economic rights as a matter of priority.

Since most African countries, including The Gambia, have ratified the ICESCR, it may not be wise to develop different standards under the African Charter as this would lead to confusion. What needs to be done is to marry the Charter with the international instruments that African countries have ratified. This requires that regional instruments be interpreted in a manner that realises consistency with the international instruments.

Marrying the Charter and the ICESCR

The question that still lingers is how international instruments should be applied at the regional level. This question becomes pertinent when considered from the perspective of the problem of permeability at the international level. International treaties have their monitoring bodies which have rendered interpretations to them. Inconsistent interpretations of such instruments from other treaty bodies would be fatal. This point is made more lucid by looking at the right to health as enshrined in article 16 of the Charter and article 12 of the ICESCR.

While article 16(1) of the Charter is at par with article 12(1) of the ICESCR, articles 16(2) of the Charter and 12(2) of the ICESCR are dissimilar. The latter is more elaborate. It lists the steps that the States parties are expected to take to preserve the right including reducing the stillbirth and infant mortality rates; improving all aspects of environmental and industrial hygiene; preventing, treating and controlling

epidemic, endemic, occupational and other diseases; and creating conditions that would assure medical service and medical attention to all in the event of sickness.

The Charter restricts itself, parochially, to curative medical care at the expense of preventive medical care. As a result, some authors, such as Fatsha Ouguerouz, have argued that the right in the Charter is 'indicative' rather than 'binding' - meaning that it does not proclaim any binding standards but is rather instructive as a guide.

However, this is a very restrictive, literal and non-contextual interpretation of the Charter. This is especially so in light of article 60, which compels the Commission to seek inspiration from international human rights law. The importance of this requirement has been made even stronger in respect of the African Court on Human and Peoples' Rights (the African Court). The Protocol establishing the African Court empowers the Court to apply not only the Charter but also "any other relevant human rights instrument ratified by the State concerned". The use of the word 'apply' could be interpreted to mean that the African Court would have to apply such an international instrument as if it were a primary source of law. However, this would deepen the problem of permeability. Marrying the instruments would instead make it possible to apply the norms of the international instrument without making it a primary source of law.

It is this course that the Commission appears to have embarked on in this case, though not expressly. The Commission should have expressly made reference to article 2(1) of the ICESCR and General Comment No.

3 of the Committee in finding that resource constraints of countries must be considered. Though the Commission should be commended for having sought guidance from the principles, it could have still sought guidance from article 12(2) and General Comment No. 14 of the Committee to expand on the right to health in article 16 of the Charter.

Conclusion

Although the African Commission did not expressly rely on the ICESCR when deciding the *Purohit Case*, it can still be argued that it was greatly influenced by it. African countries are severely constrained economically. They can therefore not be expected to implement socio-economic rights fully and immediately. Even the most economically and techno-

logically advanced States may not fully realise socio-economic rights in a short period of time. It would be turning a blind eye to the realities facing African countries if one were to insist that all socio-economic rights obligations must be complied with by States immediately.

At the same time, the 'mourning' should not be prolonged indefinitely. Countries should be required to take concrete and targeted steps and to take full advantage of the available resources as stated by the African Commission to realise these rights.

The question is, however, by what standard does the African Commission measure the concreteness of the steps undertaken and whether they are well targeted? The same standards developed by the CDESCR in relation to the ICESCR should be

applied. While I am not advocating a wholesale and uncritical adoption of the jurisprudence of the CDESCR, consistency could be achieved if the instruments are married. This is especially important where the State has ratified both the Charter and the international instrument.

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The decision is contained in the 16th Annual Activity Report of the African Commission on Human and Peoples' Rights 2002-2003, available at www.achpr.org