Taking Dignity Seriously – Judicial Reflections on the Optional Protocol to the ICESCR

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Abstract: *There is a growing appreciation of the need for mechanisms to ensure greater protection for human rights, and the Optional Protocol to the International Covenant on Economic, Social and cultrual Rights provides some hope if it can translated into a utility that is real and accessible to those that need it the most. This article considers the merit in adopting the Optional Protocol, the contribution of the South African judicial experience of enforcing and understanding social, economic and cultural rights and raises a few practical points which will hopefully strengthen, by some small measure, the supervisory capacity of the Committee tasked with handling the complaints.*

Keywords: *Optional Protocol, ICESCR, UN Committee on Economic, Social and Cultural Rights, South Africa, justiciability, human dignity.*

A. Introduction

There is a growing appreciation of the need for mechanisms to ensure greater protection for human rights. In considering the application and content of the optional protocol, I am mindful that the protection and advancement of human rights must not exist only in rhetoric but must ultimately translate into a utility that is real and accessible to those that need it the most. This historic instrument should be the subject of discussion and engagement and I hope. I hope also that the South African experience of grappling with the enforcement of social, economic and cultural rights will be of interest to jurists from the developed and developing nations alike and that it will enrich the on-going debates.

Economic, social and cultural rights "imply a commitment to social integration, solidarity and equality and…are indispensible for an individual's dignity and the free development of their personality."[1] Nearly forty years after the commencement of the International Covenant on Economic, Social and Cultural Rights (the ICESCR), we find ourselves on the threshold of

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[1] Jackbeth K . Mapulanga-Hulston: "Examining the Justiciability of Economic, Social and Cultural Rights" (2002) 6 *The International Journal of Human Rights,* pp. 29,34.

the coming into force of an optional protocol.[2] This mechanism will provide individuals or groups with a right to complain about violations of the ICESCR, to the Committee on Economic, Social and Cultural Rights (CESCR), once they have exhausted domestic remedies. It is a protocol that has not gone unchallenged or without complexity and controversy. As a testament to the protracted debate and complexities that have surrounded this issue, one need look no further than the elaborate and extensive contributions from scholars, jurists, academics, non-government organizations and government officials themselves that have analysed its merits and demerits, its practical constraints and practical necessities; its criticisms and praise; obstacles that still lie ahead and those that it has overcome.

My paper will encompass three issues: first, I will consider briefly the merit in adopting the draft Optional Protocol. I shall then proceed to consider the South African judicial experience of enforcing and understanding social, economic and cultural rights, as an example of how these rights can be interpreted to advance democratic and constitutional values. Finally, I raise a few practical points which will hopefully strengthen, by some small measure, the supervisory capacity of the Committee tasked with handling the complaints.

B. A Need for an Optional Protocol?

In theory, the international community has affirmed that the protection of social, economic and cultural rights has equal status to the protection of civil and political rights. The enforcement mechanisms to address violations of the former have, however, not been as effective as those under the International Covenant on Civil and Political Rights (the ICCPR).[3] The lack of a parallel development, particularly in the context of an individual complaints based system, has largely been due to the perception that socio-economic rights impose on state sovereignty; that they are not justiciable; and that there are practical obstacles to enforcement given the budgetary constraints of different States. On the other hand, we must be cognizant that we are increasingly finding ourselves in a globalised village characterized by a growing interconnectedness. Gross human rights violations are met with resistance from the international community. The civil, political, economic, social or cultural realities of one country can have a ripple effect on the realities of another country and pose a real threat to international peace and stability. The Optional Protocol is a culmination of the accumulated efforts by the international community to adopt a mechanism to realise the rights of all people and afford greater protection to the rights recognized in the ICESCR.

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[2] International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976; Optional Protocol to the International Covenant on Economic, Social and Cultural Rights GA Res. 832, UN GAOR, 63rd Session, UN Doc A/RES/63/117 (2008)

[3] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. On this point see Philip Alston: "The Committee on Economic, Social and Cultural Rights", in Philip Alston (ed.): *The United Nations and Human Rights – A Critical Appraisal* (Oxford: Oxford University Press 1992), 473.

Collectively, the rights protected in the Universal Declaration of Human Rights, together with the ICCPR and the ICESCR, can only be realised if the enforcement mechanisms are put in place to protect the basic rights of all people. These rights derive from the inherent dignity of every human being regardless of geographical location, sex, race, religion or creed and because every person is a "joint inheritor of all natural resources, powers, inventions and possibilities … [and] is entitled, within the measure of these resources … to the nourishment, covering and medical care needed to realize his full possibilities and mental development from birth to death."[4]

There are still frequent occurrences of illiteracy, torture, discrimination, malnutrition, detention without trial, inequality and conditions of exacerbating poverty which merit action in the form of enforcement mechanisms to alleviate the plight of those that are suffering. The primary objective of human rights law has always been to protect weaker individuals from oppression by powerful groups, by giving those individuals 'inalienable' rights which 'inhere' in them as individuals.[5] Through this mechanism, the Committee receiving the complaints will receive information on the nature of the complaint and ultimately gain insight into the challenges faced by the complainant and the extent of the limitations or perpetrations committed by the member State. This would enable the Committee to develop a jurisprudence that is sensitive to the global realities, which could provide a useful framework through which further complaints, concerning other member States, may be analysed and understood.[6] I am optimistic that member State will take seriously their obligations to protect and properly enforce social, economic and cultural rights, knowing that their actions and decisions on the implementation of these rights, will be reviewed by a monitoring mechanism. Different courts across the world adopt diverse approaches to understanding the nature of the obligation to enforce social, economic and cultural rights. It is therefore useful to have progressive international instruments leading the development towards an increased protection of fundamental human rights. International instruments can assist the courts in understanding human rights and influence governments to legislate effectively to protect human rights.

C. The South African Experience

In formulating the socio-economic rights provisions to be inserted in the South African Bill of Rights, the relevant stakeholders were mindful of not placing obligations on governments which could not be fulfilled. Incidentally, the wording of some of the constitutional rights mirrors the wording of article 2 of the ICESCR and qualifies the positive obligation on the State

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[4] Stephen James: *Universal Human Rights, Origins and Development (for a discussion of the Sankey Bill)* (New York: LFB Scholarly Publishing LLC, 2007) 145.

[5] Paul Sieghart: "International human rights law: some current problems," in Robert Blackburn and John Taylor (eds): *Human Rights for the 1990s: Legal, Political and Ethical Issues* (Great Britain: Mansell Publishing Limited, 1991) 38.

[6] See also the discussion Erika De Wet: "Recent developments concerning the draft optional protocol" (1997) 13 *SAJHR* pp 514, 516.

to take "reasonable legislative and other measures within its available resources" and thereby introduces the concept of "progressive realisation." The South African Constitution recognizes that human rights should be addressed holistically in order to effectively "promote substantive human welfare and self-realisation",[7] and indeed demonstrates an appreciation for the inter-connectedness between the social, economic and cultural cluster of rights and the civil and political cluster of rights and acknowledges that these two clusters must co-exist to maximize the commitment to upholding human rights. I agree that the principle of interdependency finds application at a normative and institutional level – our Constitution recognizes the equal value of both sets of rights and requires that the institutional arrangements should be perceived and experienced as equally effective. [8]

1. The Justiciability of Socio-Economic Rights

There has been traditionally a widespread reluctance to afford courts any role in formulating judicial remedies to address socio-economic or cultural rights' violations. The South African Constitution recognizes a range of rights which impose positive, negative and qualified duties on the State, and the courts are expressly mandated to adjudicate on these duties. The inclusion of economic, social and cultural rights in the Constitution marks a commitment to addressing the inequalities within society. The doctrine of separation of powers and the question of the institutional competence of judges to adjudicate on and review government economic policies have taken up much of the debate around the justiciability of these rights.

The concept of justiciability has two components: the practical or procedural component and the substantive component. The latter leads to the question whether the courts are competent to rule on a particular issue and what the effect of the ruling will be. The primary concern in the adjudication process should always be whether the court order will be effective in its remedy. In the context of social, economic and cultural rights adjudication, the remedial effect does not always create a tangible and immediate benefit, but often does create guidelines to assist governments in realizing their mandate. The jurisprudence of the Constitutional Court in this regard demonstrates how the Court has used the concept of reasonableness to align government action with the mandates of the Constitution. And it is notable that this principle is now included in the Optional Protocol itself as a guide to the Committee in how to assess complaints.

The South African jurisprudence in this context showcases a constitutional dialogue between the different branches of government, which furthers the democratic values of openness, responsiveness and accountability, and moves towards a re-conceptualisation of the doctrine of separation of powers. In the *Re Certification*[9] judgment, the Constitutional Court addressed the objections to the inclusion of socio-economic rights in the Bill of Rights and held as follows: "[t]he fact that socio-economic rights will almost inevitably give rise to [bud-

[7] See Sandra Liebenberg: "Socio-Economic Rights", in Chaskelson et al (ed.): Constitutional Law of South Africa (1st ed., Juta, Loose-leaf binder, Revision Service 5, 1999) at 41-1.

[8] Ibid.

[9] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

getary] implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion."[10] While no mention was made of the court's role in respect of positive duties, the court has developed a jurisprudence which has stressed the inter-connectedness between positive and negative duties and developed the concept of reasonableness to incorporate accountability, equality and a high level of justification for government actions.

In assessing reasonableness, the Court has emphasised that it will not prescribe particular policy choices to government: "A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable."[11] In making this evaluation, the Court looks to a number of factors, in particular whether the relevant measure is comprehensive, coherent, coordinated, appropriate financial and human resources have been made available, the measure is balanced and flexible and makes appropriate provision for short, medium and long-term needs, is reasonably conceived and implemented, is transparent and made known effectively to the public, and most crucially, those whose needs are most urgent must not be ignored by the measures aimed at achieving realization of the right.[12] The principle of reasonableness has also been applied in forced eviction cases which raise a range of negative and positive obligations. In *Port Elizabeth,* after noting the provision of the constitution that prohibits evictions without a court order, we went on to say that "a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme."[13]

2. Giving Content to 'Vagueness'

Socio-economic rights are often formulated in vague and open-ended terms which can hinder the ability of judges to say in express terms what the right requires or prohibits in a particular circumstance. In the case of *S v Makwanyane*[14], O'Regan J recognized that "it is the responsibility of courts … to develop the rights entrenched in the Constitution … any minimum content which is attributable to a right may in subsequent cases be expanded and developed."[15] I agree with the view that the content of these rights is less clearly defined more because of

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[10] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) at para 78.

[11] *Grootboom and Others v Government of the Republic of South Africa and Others* [2000] ZACC 14; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC), para. 41.

[12] See generally Sandra Liebenberg: "South Africa: Adjudicating social rights under a transformative constitution", in Malcolm Langford (ed.): *Social Rights Jurisprudence: Emerging Trends in International and Comparative* Law (New York: Cambridge University Press, 2008), 75, 85.

[13] *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC), para. 28.

[14] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC).

[15] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR (CC) at para 325.

their exclusion from the realm of adjudication, than due to an inherent vagueness.[16] Standard tools of interpretation are implemented to give content to the normative make-up of these rights. In interpreting the Bill of Rights, our courts are obliged to promote the underlying values of our constitutional democracy based on human dignity, equality and freedom. The Constitutional Court has adopted the approach that where the benefit in question is provided in a discriminatory manner, this results in an infringement of socio economic rights. For example, in the *TAC*[17] case, where the government provided antiretroviral drugs only at certain points and not at all public hospitals, the Court ordered the government to remove such restrictions. This judgment was a vindication of the right to health care and equality.[18]

In the *Grootboom*[19] case, Yacoob J recognized that the right of "access to adequate housing" means more than "bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these."[20] The Preamble to our Constitution records our commitment to attaining social justice and a better quality of life for everyone. Courts must strive to achieve substantive equality, dignity and freedom. These concepts have infused the court's approach in the application of these rights and in giving meaning to their content. It is clear that the courts have adopted reasonableness as a standard of review in rights adjudication – courts require state officials to justify its policies and initiatives. The reasons advanced are tested against the demands of the Constitution. The standard of reasonableness may still allow a court to recognize a minimum core in assessing the reasonableness of government action: it allows courts to recognize which services are urgent for the survival of vulnerable groups and places a strong duty of justification on state officials for a failure to act accordingly.

3. The fallacy of the Distinction

The disparity in protection between civil and political rights, on the one hand, and economic, social and cultural rights, on the other, perhaps has its foundation in the manner in which these rights are enforced. The traditional understanding is that civil and political rights are more easily protected and enforceable by the courts because they involve a negative obliga-

[16] Liebenberg, note 7 above, at 41-11.

[17] *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR) 1033 (CC).

[18] In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*, the Constitutional Court's (CC) directly addressed the constitutional prohibition on unfair discrimination and the right of everyone to have access to social assistance. Justice Mokgoro, examining the arguments from both parties, concluded for the Court that: "In my view the importance of providing access to social assistance to all who live permanently in South Africa and the impact upon life and dignity that a denial of such access has, far outweighs the financial and immigration considerations on which the state relies. For the same reasons, I am satisfied that the denial of access to social grants to permanent residents who, but for their citizenship, would qualify for such assistance does not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution." 2004 (6) BCLR 569 (CC), para. 82.

[19] *Grootboom* (note 11 above).

[20] Ibid., at para 35.

tion on the State whereas socio-economic rights are largely dependent on the ability of the State to provide certain basic amenities through welfare systems and subject to resource and budgetary considerations. This traditional categorization of human rights is a fallacy more than it is real and underlies the reluctance to recognizing binding human rights law commitments and must be abandoned. I agree that such an approach "draws a bright line around a cluster of concepts: duties of restraint are attached to freedom protecting civil and political rights while positive duties attach to equality-promoting socio-economic rights. The former are justiciable and the latter aspirational."[21]

To this may be added the idea that civil and political rights are more easily secured by legislation whereas economic, social and cultural rights need legislation, government commitment and the means to translate into fruition.[22] However, the difficulty that comes with implementation does not justify relegating these rights to Utopian ideals – the impediments to implementation should not lead us to accept that there is clear distinction between the two groups of rights, but rather that there is a clear interrelationship between the two. This traditional understanding is perhaps misunderstood or simply exaggerated: there is an interaction between civil and political rights and economic, social and cultural rights and both clusters of rights need to be recognized for one to fully feel and appreciate that inherent worth and dignity of being a human being. For instance, freedom of expression or association is of little consequence if one is starving and malnourished.[23]

Furthermore, these two sets of rights cannot be distinguished by the duties that arise from them. Both sets can give rise to negative duties to refrain from interfering with their exercise and positive duties to protect and promote their exercise. Thus, the civil and political right to life may be interpreted to give rise to a positive duty on the State to take steps to promote and protect life by providing emergency healthcare. The civil and political right to a fair trial may be interpreted to give rise to a positive duty to provide legal representation to indigent persons. Concomitantly, the socio-economic right of access to housing can be interpreted to oblige the State to refrain from arbitrary evictions. This overlap exposes as a fallacy the standard refrain that socio economic rights have budgetary implications because they place positive duties on governments or state officials.

This issue has been the subject of debate for many years and will continue to be so. I make these observations simply to decry the misplaced protestation to the optional protocol on grounds that we should stay away from placing positive obligations on the State. The application and enforcement of these rights has been a challenging task for the courts. The courts are not directly elected by society and neither have they the expertise to set government budgets to determine how much money will be allocated to the fulfilment of particular rights, but the courts do have a mandate to hold governments accountable to the Constitution. The courts are

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[21] Sandra Fredman: *Human Rights Transformed: positive rights and positive duties* (Oxford: Oxford University Press, 2008), 66.

[22] See for example the discussion by Jack Donnelly: *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press 1989), 32-8.

[23] The point was also made by Yacoob J in the *Grootboom* case as follows: "There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter." See note 15, at para 23.

cognizant of the fact that these rights must be realised progressively and within the States' available resources.

D. The Way Forward

I have tried to offer the South African experience as evidence of the feasibility and practicality of enforcing economic, social and cultural rights in domestic courts. Let us now examine some of the possible implications for the Committee under the optional protocol.

1. The Role of Reasonableness, Dignity and Equality

The principles of dignity and equality may be useful tools at the disposal of the Committee and they should permeate their recommendations to State parties to uphold and enforce socio, economic and cultural rights. If the State is going to provide a socio-economic benefit or impose a socio-economic burden, it must do so in a non-discriminatory manner. In considering the appropriate means of enforcing these rights, it seems that there is a balance that needs to be struck between the goal and the means to achieve that goal. The measures set in place by government must work towards the expeditious realisation of these rights but the availability of resources is an important factor in assessing the reasonableness of government action.[24] The action of States Parties must be reasonable – it must treat the vulnerable with care and respect and it must be aimed at ensuring a benefit to those that are most needy.

2. The Role of the Committee

It is important for members of the Committee to recognize that they do not constitute a court of law and that their findings will not have the effect of a legal order as such. It is crucial to first understand the nature and scope of the authority vested in them. Members of the Committee must be mindful that although they are an independently elected international body and therefore not directly accountable to a particular electorate, they still have a crucial role to play in bringing government action in line with the rights which they undertook to uphold and protect and developing their own 'jurisprudence'. It would be crucial to have members of the Committee that are qualified with the necessary skills that have the capacity to come up with creative solutions to secure compliance. Economic, social and cultural rights are notoriously understood to be more vague than civil and political rights (although the later can be equally vague) and it will therefore be necessary to give content to these concepts. At the same time, the Committee must be aware of the extent of the States parties' obligations – to respect, protect and promote – the progressive realization of rights within the States' available resources so that they know which standards to apply in reviewing state conduct.

[24] Ibid., at para 46.

3. A Minimum Core Obligation?

It is clear from general comments by the CESCR on the interpretation and application of the ICESCR that it considers that States parties are bound to fulfil a minimum core obligation, in the context of socio-economic rights, to ensure at the very least, minimal essential levels.[25] For the Committee then, the qualification that States must take steps to progressively realise economic, social and cultural rights within their available resources does not seem to mean that a State can escape liability simply by saying that it had no resources to act but that it is nevertheless committed to the progressive realisation of such rights. The State party must show that it has taken every effort and used the available resources to provide a basic level of services. The Optional Protocol is silent on a minimum core obligation. There are difficulties with identifying the minimum core obligation – it is context specific and depends on the information that is placed before the Committee. The minimum core obligation should be determined by considering the needs of the most vulnerable group in a particular society that are entitled to the protection of the rights in issue[26] and the threshold of human dignity and equality should further inform the need for minimum levels of services.

4. Providing Reasons for an Inadmissible Complaint?

One thing to consider is how the Committee will respond to complaints that are inadmissible or fall outside of the jurisdiction of the Committee's powers or fail to disclose at least a prima facie case that should be considered. I agree that the Committee should not adopt too formalistic and technical an approach in analyzing a complaint, but it must also decide whether it will disclose its reasoning in dismissing certain complaints off-hand. It may be useful to offer complainants a brief explanation.

5. Transparency in Dealing with Complaints

The legitimacy of the Committee will largely depend on the manner in which it deals with complaints. Whilst it does not have the status of a court of law, it is may be useful to apply the principles of openness and accountability to the process of assessing complaints. The process must be transparent and the Committee must clearly state its reasons for adopting a particular conclusion. Particularly where the process is on-going and there is a series of recommendations and communication between the Committee and the relevant State party on its actions, this dialogue must be transparent and involve all parties to the complaint.

E. Conclusion

There is a link between the enforcement and protections of economic, social and cultural

[25] Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991).

[26] Grootboom (note 11 above) at para. 31

rights and the development of a State. The development of a State is dependent on the development of the people within its borders which in turn is dependent on the effective enforcement of economic, social and cultural rights.[27] The development and progress of a country is measured by its provision of housing, its education system, the standard of living which individuals experience, its health care programmes etc – so the advancement of economic, social and cultural rights has a direct bearing on the development progress.

The law is often the only instrument that victims of human rights abuses have at their disposal and the quality of such an instrument will largely depend on the effectiveness and proficiency of monitoring bodies who have to enforce and protect those rights. Indeed States parties have an international responsibility and commitment to the promotion of human rights. There have been intensified efforts in some parts of the world towards cultivating a human rights discourse. We must subscribe to the understanding that human rights must be defended against abuse and the international community must stand as a collective in recognizing the basic human rights of all people and continue to create the mechanisms that will result in an unprecedented recognition and protection of these rights. At times these rights are taken for granted and we fail to appreciate the practical impact of the right to vote, the right to education, the right to freedom of assembly – to those that have been deprived and denied these rights, their application and protection are indeed a matter of crucial importance and their significance should not be underestimated.

[27] See Mashood A. Baderin and Robert McCorquodale: "The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development" in Baderin, M.A. and McCorquodale, R. (eds): *Economic, Social and Cultural Rights in Action* (Oxford: Oxford University Press, New York 1997)17.