PAPER PRESENTED AT THE SEMINAR:

Litigating socio-economic rights at the international level: Introducing the Optional Protocol to the ICESCR

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USE OF INTERNATIONAL LAW IN SOCIO-ECONOMIC RIGHTS LITIGATION AT THE NATIONAL LEVEL

INTRODUCTION

In this short paper I shall start by highlighting one of the single-most difficult challenges faced by practitioners in enforcing socio-economic rights through the courts: the challenge of legitimacy. The challenge is due in large part to the weariness with which the other branches of government and some sectors of the public view such an exercise. That introduction will be followed by a short exposition on the place of international law within the South African Constitutional dispensation, specifically the interpretation of section 39(1) (b), which is that section which enjoins courts, tribunals or forums to consider international law when interpreting the Bill of Rights. The presentation concludes with a consideration of how international law was employed in the landmark case of *Grootboom*[i]. In view of the nature of the challenge, the theme of my presentation is that: the use of international law in litigating socio-economic rights has a purpose beyond the obvious one of strengthening one's argument with international authorities; it also serves the purpose of 'legitimating' the end result.

THE LEGITIMACY CRISIS

Using the South African experience as a point of reference, I can state that the pursuit of socio-economic rights through the courts is, by any standards, a very contentious matter. In my view, it is only second to judicial review in raising the ire of many in its perceived breach of the sacred divide, the so-called 'separation of powers'. Judicial review, which is that power of courts to set aside legislation that is in conflict with a Constitution, has been at times labeled

"counter-majoritarian" and "democratically illegitimate"[ii] because, so the reasoning goes, it sets aside through an appointed judiciary that which is enacted by democratically elected representatives.

A similar argument is raised about the enforcement of socio-economic rights through t he judiciary. Justice Kate O'Regan of the Constitutional Court, in October 1998, when delivering a paper on distinguishing socio-economic rights from civil and political rights, alluded to this argument. In her address, the Honourable Justice spoke about how it is argued that, because socio-economic rights often require expenditure by government in order to meet obligations, they should exclusively be a matter for parliament and not be subject to enforcement by the Courts, and that, in enforcing socio-economic rights, the judiciary crosses the divide that separates the branches of government.

Having highlighted the challenge and its nature, I want to suggest that the use of international law has a purpose beyond the obvious one of strengthening one's argument with international authorities, that it also serves a 'legitimating purpose'. It is not hard to imagine how compounded the difficulties facing litigators and judges would be if socio-economic rights were to be litigated in a vacuum of international instruments. It is to international instruments like the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) that we turn for legitimacy in order to push the judiciary and vicariously the State to enforce these rights. The legitimacy of these instruments lies in the fact that they are an expression of the collective will of nations. A roadmap of what the future should hold.

INTERNATIONAL LAW AS FOUNDATIONAL AND AS A TOOL OF INTERPRETATION

Our finely crafted Constitution would not be able to stand alone in vindicating and realizing the socio-economic rights of our communities. In fact, as revealed by Professor Sandra Liebenberg in her chapter: 'The Interpretation of Socio-Economic Rights' in Woolman et al, Constitutional Law of South Africa[iii] where she writes:

> *"a perusal of the relevant minutes and memoranda prepared during the (constitutional) drafting process reveals the strong influence of international law on the drafting of the relevant sections protecting socio-economic rights. ... The concepts of progressive realization and resource availability in section 26 (housing) and 27 (health care, food, water and social security) were based on article 2 of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)."*

In litigating socio-economic rights, one ignores international law at their clients' peril, because, as Prof. Liebenberg reveals, international law was foundational to the socio-economic rights provisions enshrined in our Constitution.

The use of international law in litigating socio-economic rights is not only for the enterprising litigator, it is a tool to be utilized by all. The Constitution in section 39 (1) (b) provides that: When interpreting the Bill of Rights, a court, tribunal or forum **must** consider international law. The rule is peremptory, authoritative, and absolute. It covers not just the higher courts; it covers lower courts, tribunals and forums.

This section was deliberated in the context of the Interim Constitution, wherein it appeared as section s35(1) in the case of *S v Makwanyane and Another*[iv]. The then President of the Constitutional Court, Justice Arthur Chaskalson interpreted it as follows:

> *"In the context of s35(1), public international law would include non-binding as well as binding law. They both may be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chapter 3* **(Bill of Rights)** *can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights and the European Court of Human Rights and, in appropriate cases, reports of specialized agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of chapter 3."*

This interpretation was invoked in *Grootboom,* by Justice Yacoob when the Constitutional Court was deliberating international law submissions made in support of a relief seeking to enforce socio-economic rights. Justice Yacoob, citing Justice Chaskalson, affirmed that international law, including non-binding law was an important guide to interpreting the sections under consideration.

USE OF INTERNATIONAL LAW IN GROOTBOOM

Turning my focus to the use of international law in the specific case of G*rootboom;* this is one of three cases designated by the Constitutional Court on their website as *'landmark cases in socio-economic rights litigation'*[v].

The case concerned a group of adults and children who had moved onto private land from an informal settlement owing to the 'appalling conditions' in which they lived. They were evicted from the private land. Following the eviction, they camped on a sports field in the area.

However, they could not erect adequate shelters as most of their building materials had been destroyed during the eviction. Accordingly, they found themselves in a precarious position where they had neither security of tenure nor adequate shelter from the elements. They applied to the Cape High Court on an urgent basis for an order against all three spheres of government to be provided with temporary shelter or housing until they obtained permanent accommodation. Justice Dennis Davis in the High Court held that there was no violation of section 26, but found a violation of section 28(1)(c) (the right of children to shelter). On appeal, the Constitutional Court declared that the State's housing programme fell short of compliance with section 26(2), but found no violation of section 28 (1)(c).[vi]

The judgment in *Grootboom* is described by Havard Law School Professor, Cass Sunstein, thus:

> *"The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met."* (my emphasis)

The point is that, in deliberating matters of socio-economic rights, the judges are inherently involved in a balancing act of seeking to force the state to fulfill the obligations imposed by the Constitution and at the same time trying to do it in a way which is respectful of democratic prerogatives, which include refraining from intruding into the legislative and executive sphere of social and economic policy-making.

A litigator, when involved in arguing matters of socio-economic rights should be aware of the fine line the judges have to walk. Guided by this awareness, one can utilize international law in his/her arguments in a way that will bring a level of comfort to a judge to walk as close as possible to the edges. That in my view is the role of international law in socio-economic rights litigation; to show the judge that regional and international instruments support a cutting-edge approach.

At the Constitutional Court hearing of the *Grootboom* matter, the Law Review Project submitted an *amicus curiae* (friends of the court) brief on relevant international law and its impact. In the brief, *amici* submitted that International Covenant on Economic, Social and Cultural Rights is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. The *amici* also relied on the interpretation of the rights by the United Nations Committee on Economic, Social and Cultural Rights. This is the committee which is charged with monitoring the obligations undertaken by states which are parties to the Covenant. Specifically, the committee had described the minimum core expected of a State in order to comply with its obligation under the Covenant. The *amici* argued that the minimum core should constitute a significant guide to the interpretation of section 26 of our Constitution.

It is important to note that South Africa has not yet ratified the Covenant but it is a signatory State having signed in October 1994. The Covenant is therefore not binding on South Africa, but because of having signed on to it, South Africa has incurred an international obligation to refrain from 'acts which would defeat the objects and purpose of the treaty'. This is according to the Vienna Convention on the Law of Treaties[vii].

In dealing with the argument of the *amici,* Justice Yacoob addressed himself to the two differences in the provisions of the Constitution dealing with housing and that of the covenant, specifically:

- the ICESCR provides for ***a right to adequate housing*** whereas our Constitution provides for ***a right of access to adequate housing***.
- *The ICESCR* ***obliges States to take appropriate steps which must include legislation*** *while the* ***Constitution imposes an obligation on the South African state to take reasonable legislative and other measures.***

The Court rejected the argument that the minimum core obligations as set out by the committee in interpreting the convention were binding on South Africa. Among other things, the Court distinguished the deliberations of the Committee from that of the Court by highlighting that the concept of minimum core was developed by the committee over many years of examining reports by reporting States whereas the Court did not have comparable information.

For purposes of my thesis, it is not the rejection or adoption of the argument that is significant. The point which is worth noting is that the use of international law in this matter led to the following welcome results among others:

- It forced the Court to deliberate extensively on the arguments of the *amici,* and in so doing, enriched our jurisprudence with an exposition of an area of law sorely in need of authorities; and
- The Court's deliberations have the effect of lending legitimacy to the end result by showing that, before the order enforcing socio-economic rights was granted, serious consideration was given to international standards, which, more significantly in this instance, were found to be higher than our own. The judgment, as a result, does not come across as a power-trip by Judges intent on usurping the powers of the other branches. It evidences a well-reasoned approach, which is respectful of democratic prerogatives, in vindicating socio-economic rights.

CONCLUSION

My preceding thoughts do not suggest that there is a simplistic cure to the crisis of legitimacy facing us in socio-economic rights litigation. There are many other variables which I could not factor without straying from my given topic. With these thoughts, I am only suggesting that the employment of international law is an indispensible tool for any litigator who is determined to sway the Court in his or her client's favour in socio-economic rights litigation.

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[i] *Government Of The Republic of South Africa & Others v Grootboom and Others* 2001(1) SA 46 (CC)
[ii] Jeremy Waldron, *Law and Disagreement* 165-187 (1999) and Yale Law Journal 115:1346 (2006)
[iii] 2nd ed (2008)
[iv] 1995 (3) SA 391 at [35]
[v] As visited on 27 May 2009
[vi] Case summary by Sandra Liebenberg in Woolman et al.
[vii] (1969) 8 ILM 679, art 18