

Report on the Seminar “Litigating Socio-Economic Rights at the International Level: Introducing the Optional Protocol to the ICESCR”

Hosted by the Socio-Economic Rights Project of the Community Law Centre,
University of the Western Cape

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1 Introduction

The seminar on ‘Litigating Socio-Economic Rights at the International level: Introducing the Optional Protocol to the ICESCR’ was organised by the Socio-Economic Rights project of the Community Law Centre (University of the Western Cape). It was held on 26 May 2009 at the Centre for the Book, 62 Queen Victoria Street, Cape Town.

The seminar was organised around the newly adopted Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) that establishes individual and interstate complaint procedures and an inquiry procedure. Through submitting a communication to the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR), victims of socio-economic rights violations, who could not obtain justice in their countries for one reason or another, after exhausting all the available domestic remedies, may now under the Optional Protocol to the ICESCR obtain help at the international level. This was an issue of concern before. The Optional Protocol remedies this; hence it is an important tool in advancing socio-economic rights.

It is against this brief background that the Socio-Economic Rights Project hosted this one-day seminar to raise awareness of the Optional Protocol to the ICESCR and the various procedures it establishes.

The seminar brought together 40 participants from across South Africa including community and non-governmental organisations, South African Human Rights Commission and the academia.

The objectives of the seminar were:

- (i) To raise awareness of the Optional Protocol to the ICESCR and various procedures it establishes;
- (ii) To provide a forum where institutions and organisations working on socio-economic rights can discuss, reflect and share experiences on enhancing the implementation of socio-economic rights and effective litigation strategies;
- (iii) To provide a forum for networking and initiate future collaboration amongst the participating institutions and organisation.

The seminar was divided into four main parts. Part one captured presentations on socio-economic rights at the international level and the

Optional Protocol to the ICESCR. Part two focused on the complaints procedures at the African regional level. Part three focused on litigation strategies. Part four looked at opportunities for future collaboration and the way forward.

Session one aimed at discussing socio-economic rights at international level and the OP-ICESCR. The presentation during this session highlighted the historical process leading to the Optional Protocol to the ICESCR, the benefits of the Optional Protocol, the contents of the Optional Protocol, possible challenges to the implementation of the Optional Protocol to the ICESCR and the role that South Africa had played during the process of negotiating it.

Session two sought to provide insight into litigating at the African regional level. One presentation looked at the complaints procedure at the African regional level. Another presentation highlighted the relevant instruments that are applicable to the African Court on Human and People's Rights (African Court), the jurisdiction of the Court, the individual complaints procedure, access to court, and submission of cases to the Court.

Session three focussed on litigation strategies. In the presentations, the importance of looking at the overall litigation strategy, pre-litigation research as well as the important role that the international standards on socio-economic rights play in court decisions was highlighted. The presentations also noted the importance of coordination amongst various partners to avoid duplication of court cases, the important role that the media can play in litigating socio-economic rights and also the importance of follow-up after obtaining judgment in court.

Session four considered the way forward, and in view of the seminar deliberations, the Socio-economic Rights Project committed to do the following:

- (a) compile a report of the seminar proceedings and circulate it to all the delegates;
- (b) send a register of all participants present at the seminar;
- (c) inform participants of the developments that are taking place so that they can see areas of collaboration;
- (d) coordinate efforts around ratification, by South Africa, of the ICESCR and its Optional Protocol..

This report provides a summary of the presentations, discussions and recommendations that were made during the seminar.

2 Welcome remarks

The seminar commenced with a note of welcome from Dr. Lilian Chenwi, Project Coordinator of the Socio-Economic Rights Project, Community Law Centre (University of the Western Cape). Dr Chenwi stated that the objective of the seminar was to raise awareness of the Optional Protocol to the ICESCR (OP-ICESCR) and various procedures it establishes.

She briefly noted the developments that took place during the negotiation of the OP-ICESCR. More significantly, it was noted that South Africa participated during the negotiation process of adopting the OP-ICESCR. However, in spite of its participation, South Africa has not ratified the ICESCR, the mother body to the OP-ICESCR. It was, therefore, necessary to find ways of getting South Africa to ratify the ICESCR as a way forward.

In conclusion, Dr Chenwi thanked all the delegates for coming to the seminar and wished them a fruitful discussion.

3 Opening remarks

In his opening remarks, Prof. Kader Asmal, Professor Extraordinary in the Faculty of Law, University of the Western Cape, expressed appreciation and thanks to all delegates and the Socio-Economic Rights Project for providing the context for what the seminar discussion aims to achieve. He was hopeful that the outcome of the workshop would bear fruitful recommendations that would lead towards the “gradual” enforcement of economic, social and cultural (ESC) rights in South Africa.

In his address, Prof. Asmal emphasised that international covenants provide a good authoritative interpretation tool and help in developing the constitutional jurisprudence. In this regard, he gave an example of the right to life case that had first landed in the Constitutional Court of South Africa.¹

He also emphasised the significant role that the international forum has on the enforcement of socio-economic rights as it provides an external collective force. He, however, pointed out that if there are good national systems, the best way of enforcing ESC rights is at that level.

Prof. Asmal further commented on the importance of the findings of the CDESCR, whose significance can have enormous influence on court judgments. He, however, also commented on the unfortunate position of most countries, including South Africa that ratify international covenants but do not comply with the requirement of submitting periodic reports to the monitoring body on the implementation measures in place. He stressed that, often, the findings of these bodies are important and are sometimes the politics behind court judgments. Hence there is need to submit periodic reports as required.

3.1 Discussion

The opening remark was followed by an open discussion in which a number of issues were raised. It was noted that there is, generally, a lack of follow-up on issues that have been discussed at seminars. Once an issue has been discussed at a seminar, it then becomes nobody’s business. It was therefore agreed that follow-up of issues was crucial.

¹ S v Makwanyane 1995 (3) SA 391.

On the issue of ratification of the ICESCR by South Africa, a possible reason that was discussed for non-ratification was the fact that rights are based on the needs of a particular society. This may become a problem if national standards are sometimes higher than international standard articulations.

The next issue raised was why there is lack of political will or non-compliance with the periodic reporting requirement. South Africa is among the few countries that have not been keen on submitting periodic reports. The open discussion agreed that there is non-compliance simply because of incompetence. Change of Ministerial positions was also identified as a factor that could have an impact on the submissions of reports. In some cases, ministers are in a particular ministerial position for only few months before they are moved to another ministerial post.

Another issue raised was on possibilities of extra-territorial jurisdiction to enforce socio-economic rights. It was generally noted that it is not in the interest of the international community to mingle in other country's affairs. As a solution, it was suggested that what is required is to develop and articulate social values into non-corrupt social structures.

4 Socio-economic rights at the international level and the OP-ICESCR

This session discussed socio-economic rights at the international level and the OP-ICESCR. Two presentations on 'South Africa's role in advancing socio-economic rights at international level' and 'Introducing the Optional Protocol to the ICECSR were to be discussed. Unfortunately, the other presenter did not come² and hence only one paper was presented. The session, therefore, focussed on the OP-ICESCR, the mechanisms it creates, its benefits and future challenges.

4.1 Introducing the Optional Protocol to the ICESCR³

The ICESCR is one of the most important instruments on ESC rights. South Africa has signed the ICESCR but has not yet ratified it. Despite this position, the South African Constitution enshrines most of the socio-economic rights protected in the ICESCR. More importantly, the South African courts have referred to the ICESCR and its general comments when interpreting the constitution. The *Grootboom case* is an example.

² Department of International Relations and Cooperation.

³ Dr Lilian Chenwi

During the presentation, it was also pointed out that the ICCPR, which is a covenant for the protection of civil and political rights, was adopted together with an Optional Protocol in 1966 but the ICESCR, which was also adopted in 1966, did not have an Optional Protocol.

A brief overview of the OP-ICESCR was provided. The UN General Assembly adopted the Optional Protocol to the ICESCR on 10 December 2008. The Optional Protocol offers an opportunity to those whose ESC rights have been violated to get justice at the international level. It also empowers the CESCR to receive complaints about violations of the rights protected under the ICESCR. It also sets up a procedure for interstate complaints. Additionally, it establishes an inquiry procedure. The following points were noted about the OP-ICESCR:

- that the OP-ICESCR does not create new substantive rights;
- people bringing complaints have a choice between the three procedures (individual complaints, inter-state complaints and the inquiry procedure);
- only states parties to the ICESCR can be parties to the OP-ICESCR; and
- the OP-ICESCR is optional. Therefore parties to the ICESCR are not automatically bound by the OP-ICESCR; among others.

Emphasising its important role in defining and strengthening ESC rights and addressing systematic violations, the benefits of OP-ICESCR are as follows:

- It reinforces the universality and indivisibility of all human rights, placing ESC rights on equal footing with civil and political rights;
- It provides individuals and groups with the opportunity to get justice for violations of these rights at an international level;
- It will contribute to the development of international jurisprudence which invariably promote the development of domestic jurisprudence on ECS rights;
- It will encourage states to implement ESC rights; and
- In addition, the OP-ICESCR will help in the struggle against poverty.

The presentation included the historical milestones of the OP-ICESCR and its contents. The detailed contents of the OP-ICESCR can be accessed at <http://2.ohchr.org/english/bodies/cescr/docs/A-RES-63-117.pdf>. In this report, we highlight only a few. Article 1 makes provision for competence of the CESCR to receive and consider communication. Article 3 provides for admissibility of a communication. More important to note under Article 3 is that the CESCR shall not consider a communication unless exhaustion of all available domestic remedies were made. The exception to the rule is where the application of the remedies under domestic system was unreasonably prolonged. Article 4 provides that the CESCR may decline to consider a communication where it does not reveal a clear disadvantage suffered by a person submitting it. Article 9 provides that after examining a communication,

the CESCR shall transmit its views on the communication together with its recommendations to the parties concerned. Article 10 provides for the procedure on inter-state communications. It is important to note that in inter-state communication, exhaustion of domestic remedy is also a prerequisite for the communication to be admissible. Article 11 and 12 deal with inquiry procedure and follow-up to the procedure.

The following were highlighted as possible challenges to the implementation of the OP-ICESCR:

- General implementation of OP-ICESCR would be a challenge because it is optional in nature;
- Accessibility to the CESCR in relation to lack of/limited human and/or financial resources;
- Strategic litigation – choosing the right cases
- Effective implementation of the views and recommendations of the CESCR

It was further pointed out that the OP-ICESCR is not yet in force. It will come into force three months after the deposit of the 10th instrument of ratification. Three months after a state ratifies the OP-ICESCR after it has come into force, the treaty will bind the state. In relation to the next steps, following adoption, the following were noted:

- The Human Rights Council has invited all states parties to the ICESCR to participate in the signature ceremony in New York on 24 September 2009;
- Advocacy initiatives are underway to encourage states to sign and ratify the Op-ICESCR; and
- Increasing public awareness of the mechanisms is crucial.

South Africa's participation in discussions and its support for the OP-ICESCR was also noted. More importantly, South Africa firmly supported the justiciability of all ESC rights and the view that all rights in the ICESCR should be subjected to the complaints procedure.⁴ In conclusion, the presentation ended by emphasising the role of the OP-ICESCR in addressing poverty.

4.1 Discussion

During the open discussion that followed the presentation, the main concern raised was how South Africa, who has not ratified the ICESCR, would ensure that big companies comply with ESC rights. This concern was brought to the fore because of the fact that only a state party to the ICESCR has an obligation to ensure that non-state actors, such as big companies, comply with International human rights standards.

⁴ Further information on how South Africa participated is available on <http://2.ohchr.org/english/issues/escr/intro.htm>.

It was unanimously agreed that there is an urgent need for South Africa to ratify the ICESCR as well as sign and ratify the OP-ICESCR.

5 Complaints procedures at the African regional level

This session sought to provide information on the complaints procedure at the African regional level. The session focussed on litigating at the African Commission level and bringing cases to the African Court were made.

During the first presentation,⁵ delegates were briefed on the background to Amnesty International and its work as well as its involvement in the OP-ICESCR process. The presentation also included an introduction of the African Commission

In the second presentation⁶ Mr Mujuzi, outlined the relevant instruments that are applicable to the African Court. These include:

- African Charter on Human and Peoples Rights;
- Protocol to the African Charter on Human and Peoples Rights on the Establishment of the African Court on Human and Peoples Rights;
- Protocol to the Statute of African Charter
- Draft Interim Rules of Procedure of the African Court on Human and Peoples Rights
- Protocol of the Court of Justice of the African Union;
- Constitutive Act of the African Union; and
- Decision on the Merger of the African Court of Human Rights and the Court of Justice of the African Union.

The African Court was established by the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples Rights (African Court Protocol), 1998. The African Court is mandated to consider cases and disputes about the interpretation and application of the African Charter on Human and Peoples Rights, 1981, the African Court Protocol and any other relevant human rights instrument ratified by the states concerned.

The jurisdiction of the African Court is provided for in Article 3 of the African Court of Protocol. Among others, it provides that the court may provide advisory opinion on any legal matter relating to the African Charter at the request of a member state of the African Union.

⁵ Nokuthula Magudulela, Director, Amnesty International South Africa.

⁶ Jamil Mujuzi, Doctoral Researcher, Community Law Centre.

Access to the African Court is provided under Article 5 of the African Court Protocol. More significant to note is Article 5 (3) which allows NGOs and individuals to institute cases before the African Court. Mr Mujuzi, however, noted that most cases have been submitted by NGOs.

The guidelines on how to submit communication to the African Commission are provided under Article 48 and 49 of the African Charter (communication from the state). A complaining state must disclose the identity of the applicant, among other requirements. The conditions that must be met before a communication can be considered by the Commission are provided in Article 56 of the African Charter which among others, includes: the communication must not be written in insulting language; the communication must be compatible with the Charter; and the complainant must have exhausted all the domestic remedies.

Rule 87 (2) of the Draft Interim Rules of the African Court provides for two reasons for submission to the African Court:

- Massive and severe human rights violations; and that
- The State party does not comply with the Charter.

In conclusion, Mr Mujuzi, observed that the findings of the African Court are binding and a state has a duty to comply.

5.1 Discussion

In the European context there is a European Council that makes sure that decisions of the court are carried out. It was also pointed out that doing things in good faith has not been a strong point in Africa. So, the concern raised was whether the African Court is ready to see that there is compliance with its decisions. In debating about this issue, it was noted that in the early days, the European Court decisions were also not followed. Members were optimistic that in future, Africa will comply with decisions of the African Court.

6 Litigation strategies

This session sought to provide insight on litigation strategies. Three presentations on 'Public interest litigation: Learning from WLC experience' 'Prisoners and the right to health: Learning from the ALP experience at Westville Correctional Centre' and 'Use of international law in socio-economic rights litigation at the national level' were made.

In the presentation on public interest litigation in South Africa⁷ it was emphasised that when discussing litigation, we are looking at a society with differences between the rich and the poor on the one hand, and gender on the other, with women subjected to discrimination. It is therefore important that

⁷ Jennifer Williams, Director, Women's Legal Centre.

there has to be strategic litigation on various levels of social rights. The presentation was drawn from the experiences of Women's Legal Centre.

The following were highlighted as important things to be considered in litigation, whether at international, regional or national courts:

- A client must always be the centre of focus. This factor requires that one always works in the best interest of the client. Look at what they need and stick to their needs until the end of the case;
- Look at the overall litigation strategy and see what social change the case is going to bring about. The importance of this factor is that it informs you on what court to go to, ie High Court or Constitutional Court;
- Coordination between non-governmental organizations is important because gender issues cannot be dealt with in isolation. Coordination is also important in order for NGO's avoid duplication of cases to court;
- Timing. This factor needs to be considered not only in relation to the length of the time the case will take but, also the political situation in the country, the judges as well as the jurisprudence;
- Research is also crucial;
- Branding of your case in the media so that you get across your issues as competing rights can sometimes be also be important;
- Follow-up on a case after judgment is also important. For example in *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC), judgment was delivered in 2005. It took three years for the order to be implemented.

Sharing her experience of litigating in South Africa, Ms Williams noted the following:

- In South Africa, most cases are not litigated on new issues;
- Communication of the judgment and the consequences of the judgment is in most cases lacking, leaving the client not knowing what the judgment means;
- An observation was also made that there is generally not enough NGO's doing litigation;
- There is also lack of experienced staff in NGO's that are doing litigation;
- Loosing a case for one individual is different from loosing a case for a group of people;
- It is important to consider what you can or want to get from a judgment;

In conclusion, Ms Williams pointed out the important role of the judiciary and cited the *Jordan and Others v S and Others*, [2002 \(11\) BCLR 1117](#) (CC) in which the majority judgment had ruled that there was no discrimination.

The second presentation in this session focussed on prisoners and the right to health, based on AIDS Law Project (ALP)'s experience at Westville Correctional Centre⁸ Introducing his presentation, Mr Berger noted that ALP uses law as a social tool and its work is informed by the political situation in the country.

The EN and Others v Government of the RSA and Others, SA 575) (D) case was used to illustrate problems encountered in litigating socio-economic rights at the national level. ALP in its legal battle on access to treatment on behalf of some Westville Correctional Centre prisoners, noted that part of the challenge in litigating on behalf of prisoners was first to encounter the question why people should care about prisoners. In analysing the whole scenario, however, it was discovered that the problems that the prisoners were facing in prison are the same problems that ordinary members of a society are facing outside prison. These problems were identity document requirement, application fee; and rigid application of National ARV and treatment guidelines. The relief sought by ALP from the High Court included the removal of obstacles in the way of access to treatment, ensure access to treatment in accordance with Operational plan, and develop plan for ensuring access to treatment.

The High Court handed down two judgments. The first one ruled in favour of the applicants and granted them the relief sought. The second one granted leave to appeal against a recusal decision to full bench. This decision had been made because the judge's daughter acted as applicants' correspondent attorney in Durban.

The opportunities the case presented were:

- Task team process helped to build trust with and develop capacity of middle management at the Department of Correctional Services (DCS)
- Supervisory interdict helped identify elements of a reasonable plan

The mistakes made were:

- Inadequate focus on roles of other departments, including Department of Health (DoH);
- Allowed negotiations to run for too long;
- Failure to record minutes of meetings with DCS leadership;
- Placed trust in Deputy Minister and Deputy Commissioner.

In conclusion, Mr Berger emphasised the need to have decisions made during negotiation recorded.

⁸ Jonathan Berger, Senior Researcher, AIDS Law Project.

The third presentation focussed on the use of international law in socio-economic rights litigation at the national level.⁹ Before making his presentation, Advocate Kubukeli noted the following as important points in litigation:

- Legal Resource Centre is a client driven organization. As such, if a client gives instructions to take the case to court and eventually the government reaches a settlement with the client, Legal Resources Centre cannot move forward.
- Pre-litigation research is very crucial since there are costs involved and bureaucratic barriers on the way;
- When preparing for litigation, it is important to have the affidavit from each and every person if the claim involves a group; and
- Litigation specialist should construct their arguments in a manner that would predict the end result.

Reference was made to section 39 of the Constitution, which says that courts must consider international law. In interpreting this section, the Constitutional Court in the *Makwanyane* case, in which the capital punishment was abolished, held that this rule applies to binding as well as non-binding international law in South Africa. In the *Grootboom* case,¹⁰ the ICESCR was relied upon by the CC. Commentary of the CESCR was also relied on. Thus, international law, including non-binding international law is important in interpreting the constitution. Advocate Kubukeli, quoting authors who had commented on the *Grootboom* judgment, reiterated that the use of international law is not only meant to be a tool but has the effect of legitimizing the decisions of the judges. Further, he pointed out that international law is not only a tool of interpretation, but in South Africa, it is also important in negotiating words like progressive realization in article 26(2) of the Constitution.

Emphasising the importance of international law as a tool in interpreting the rights in the constitution, Advocate Kubukeli concluded his presentation by asking this question: imagine if there was no international law where would the court have been referring to in interpreting the ESC rights?

6.1 Discussion

During the discussion, an issue was raised with regard to the Westville Correctional Prisoners case. Whether the Judge should have given more minimum guidelines in interpreting what the right to health entails whilst

⁹ Lwazi Kubukeli, Advocate of the High Court and Member of the Bar, Legal Resources Centre.

¹⁰ The landmark case of *Grootboom*, created a possibility of challenging action by the state and other non-state entities that hinder the realisation of socio-economic rights in South Africa.

leaving details to the negotiating table? It was agreed that the barriers that are faced in litigating ESC rights are mostly based on political decisions and not law or court judgment as was the case with the prisoners case. It is therefore unnecessary, sometimes, to insist on how a particular judgment should have been interpreted.

This discussion also highlighted a need for South Africa to ratify the ICESCR. It was generally agreed that application of international law was limited by non-binding international law and yet international law opens debates on so many issues and can be used as powerful tool in advancing ESC rights.

An issue that was also discussed was the implementation procedures of court orders. This issue came as a concern seeing that in the *Grootboom* case, for example, judgment was delivered and yet she still has no house. What came out of the discussion was that generally, there is lack of implementation procedures in place. It was, therefore, agreed that there is need for litigating specialists to make follow-up of cases after the judgment has been handed down to see to it that the orders that have been made are implemented.

Negotiation was noted to be important in the implementation of ESC rights and gives room for state institutions to negotiate. In light of the OP-ICESCR, a concern was raised as to the level of engagement at that level seeing that societies have different needs. In responding to this question, it was discussed that understanding the history of the country is such an important issue because ultimately governments have to implement and accept the legitimacy of the decision.

The issue of number of staff and the cost attached to these cases when they are being litigated was also raised. On costs, use of volunteers was identified as a way that is used by other NGOs in reducing costs. It was also noted that in some cases the issue of cost is not important, the focus, when they are litigating on behalf of the client is about getting the case done and getting the relief sought. On the number of staff, WLC responded that their work is divided into five focus areas and each personnel can go to court and argue a matter.

7 Opportunities for future collaboration and way forward

- SA Human Rights Commission indicated that they will be conducting hearings on ESC rights and those forums could be used to raise awareness of the OP-ICESCR and the need for ICESCR to be ratified.
- It was agreed that, as a way forward, there was need to identify important/influential individuals who are able to convince others to get the ICESCR ratified by South Africa.
- Members requested that they be kept informed on all the developments so that they can see areas of collaboration.
- Black Sash committed to providing contacts of people who had at some point sought an audience with the Minister with regard to ratification of the ICESCR.

- Socio-Economic Rights Project (Community Law Centre) committed to keeping delegates informed and coordinating efforts on ratification of ICESCR and signing/ratification of OP-ICESCR.

8 Conclusion

In the closing remarks, Dr Chenwi thanked all delegates for coming to the seminar and for having contributed to the discussion. She also thanked all the presenters. She remarked that the seminar was a call to make everyone join in the campaign of raising awareness of the OP-ICESCR and a call on South Africa to ratify the ICESCR. She also informed the delegates about the Dullah Omar memorial lecturer that will be held at the University of the Western Cape. Advocate Kubukeli, on behalf of all delegates, also expressed gratitude to the Socio-Economic Project for organising the workshop.