The approach of the African Charter was significant in that it extended the bare minimum approach (assuming the provision of primary school is the minimum) advanced by international law and puts African children in an advantaged position where they must compulsorily and freely acquire basic education beyond the primary school. The difference between the international law approach and the African Charter's approach is even more significant in a continent where the education of the girl child is often not prioritised even if it may be free. Some parents of African children particularly the girl child often see the provision of labour by children or their marriage to be more important than their education. Providing for compulsory and free basic education was a sure way to ensure that children are in school for the entire basic education years or even beyond schooling years.

Conclusion

The terms in international law regulating the provision of education for children are many and have evolved to the point where it is generally accepted that children must be provided with free primary or elementary education. The consensus for free primary education has also been extended to the provision of free fundamental or basic education by the Universal Declaration and the African Charter. The Universal Declaration, unlike the African Charter, does not, however, make basic education compulsory. This discussion aimed to provide a clear link between the terms used to regulate the provision of education for children in international law.

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1 Interview with Prof. Sandy Liebenberg

The ESR Review interviews Prof Sanda Liebenberg, who recently got appointed as a member of the UN Committee on Economic, Social and Cultural Rights.

First, we would like to congratulate you on your election as a member of the UN Committee on Economic Social Cultural and Rights. This is an honour well deserved.

Thank you.

You started the Socio-Economic Rights Project (SERP). What really motivated you to start the project, and what were you hoping to achieve?

I founded the SERP shortly after the end of my secondment to the Technical Committee of South African's Constitutional Assembly. During my service on the Technical Committee, I was deeply involved in the debates, research and drafting of the socio-economic rights provisions in the 1996 Constitution. The entrenchment of a holistic set of socio-economic rights as judicially enforceable rights in the Bill of Rights was a historic and internationally significant achievement.

I realised, however, that if these rights were to make a meaningful contribution to people's struggles against poverty and the socio-economic legacy of apartheid, there had to be organisations in South Africa which focused on breathing life into these rights. SERP was founded with the aims of deepening research, popular education, advocacy and support litigation in the area of socio-economic rights. In addition to advocacy on important policy and legislation such as the child support grant and new Housing Act, the SERP was involved as amicus curiae in the leading early decisions of the Constitutional Court on socio-economic rights – Grootboom, TAC and Modderklip.

There are now a number of NGOs and social movements doing important work on socio-economic rights in South Africa. It is almost 12 years since I moved from UWC to Stellenbosch University, and it is gratifying to see that the SERP is still going strong and making an important contribution to rights-based struggles against socio-economic deprivation.

It has been 20 years since the adoption of the Consititution, often described as one of the most progressive in the world. As one of the persons involved in the drafting of the Constitution, what is your assesment of the implementation of its socio-economic rights provisions?

Important legislation and policy has been adopted by the post-apartheid government, which has undoubtedly contributed to improving people's access to basic services and resources. In addition, the South African Constitutional Court has handed down internationally admired decisions around socio-economic rights.

In particular, it has developed what I consider to be one of the most protective legal frameworks in the world against evictions, which risk exposing poor people to homelessness.

However, there have also been disappointing cases in which the Court has not adequately interrogated the impact of certain programmes on the health, dignity and life chances of impoverished communities. Institutions like the South African Human Rights Commission also play an important role in monitoring the progressive realisation of socio-economic rights, and in highlighting systemic problems through research and public participation.

Despite these achievements, it is well known that deep patterns of poverty and inequality persist in South Africa. Particularly concerning is the high level of youth unemployment and the quality of education in township schools as well as the poorer provinces. There is much work to be done if the socio-economic rights in the Bill of Rights are not to have a hollow ring to those bearing the burden of poverty and social exclusion (to paraphrase the late Chief Justice Arthur Chaskalson in the Soobramoney case).

The Constitutional Court has developed the concept of reasonableness to measure government's commitments to realising socio-economic rights, now being adopted by international and regional human rights bodies. What's your view on this ? Do you really think this is the right way to go?

Reasonableness is a widely used judicial tool in international and comparative law for reviewing government obligations in various areas of law, including human rights law. It plays a role in assessing the positive duties of states in relation to civil and political rights, such as the right to vote, and in evaluating whether government agencies have exercised "due diligence" to prevent, investigate and remedy human rights violations by private bodies. It also plays a central role in assessing whether limitations to fundamental rights are justifiable.

Reasonableness is also playing a prominent role in the socio-economic rights jurisprudence of regional and international treaty-bodies.

It is explicitly adopted as the standard of review which the UN Committee must apply under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. This Protocol provides for an individual-complaints mechanism and represents a historic development in the international protection of economic, social and cultural rights.

The problem is not with a reasonableness model of review as such, but rather with its application. It can be applied in a way which is highly deferential of government's acts or omissions, and simply takes the state's justifications for its conduct at face-value. As a human rights tool, reasonableness review must be integrally linked to the purposes and values which socio-economic rights aim to foster. These include ensuring that people are able to live in security, dignity, and to participate as equals in all spheres of society.

It is very important that courts and treaty bodies engage in a rigorous analysis of the impact of government acts or omissions on the lives of those affected by them. This includes also ensuring that there are adequate participatory channels in place for hearing the voices of those whose rights are at stake. The South African jurisprudence of "meaningful engagement" has much untapped potential in this regard.

South Africa recently ratified the ICESCR almost 20 years after signing the instrument. What possible changes do you forsee in terms of realisation of socio-economic rights at the national level?

The ratification of this Covenant – an integral part of the "International Bill of Rights" – is very welcome. I also hope that government decides soon to ratify the abovementioned Optional Protocol to the Covenant. Having ratified the Covenant, government is obliged under international law to ensure that all its laws and policies are consistent with the obligations imposed by the Covenant. It will have to report to the UN Committee on Economic, Social and Cultural Rights on a periodic basis on the measures it has taken to ensure the realisation of the rights in the Covenant.

Whilst there are many similarities between the Covenant and the economic, social and cultural rights in the South African Constitution, there are also rights in the Covenant which are not explicitly protected in the South African Bill of Rights, such as the right to work, in article 6 of the Covenant. In addition, all spheres of government will have to take into account the Committee's specific interpretation of the various Covenant rights in their General Comments and Concluding Observations on State Reports.

Particularly important in this regard is that government departments define and implement social protection floors for all socio-economic rights to give effect to the Committee's concept of minimum core obligations. The South African Constitution requires the courts to consider international law and to interpret legislation in ways that are consistent with international law. Accordingly, it is also to be expected that the South African courts will pay close attention to the obligations in the Covenant and their interpretation by the Committee on Economic, Social and Cultural Rights, in the development of South African socio-economic rights jurisprudence. This will further ensure alignment between South African domestic law and international human rights law.

As one of the newly elected members of the CESCR, what are your views about the committee and what changes do you hope to see?

The Committee has made tremendous strides and has truly come of age. Since its establishment in 1985, it has made a substantial contribution to developing the normative content of socio-economic rights in many areas through its concluding observations, general comments, statements and letters as well as recently its jurisprudence under the Optional Protocol.

Its two most recent general comments concern the rights to sexual and reproductive health and to just and favourable conditions of work (General Comments No. 22 and 23). Most recently, at its 58th session in June, it adopted an important statement on the obligations of states and multilateral lending institutions under the Covenant in the context of public debt and austerity measures.

Given global cut-backs in social programmes under the yoke of austerity measures, this statement provides important normative guidance on the obligations of borrowing states, international lending organisations as well as member states of international financial organisations. When my term on the Committee officially starts in 2017, I would like to investigate ways in which both the concluding observations of the Committee on state reports as well as its views under the Optional Protocol can be rendered more effective and meaningful for the beneficiaries of the Covenant rights.

Furthermore, a substantial priority for the Committee is to build up a coherent jurisprudence on economic, social and cultural rights under the Optional Protocol, which entered into force on 5 May 2013. This is essential to the credibility of the Optional Protocol as well as to global efforts to provide effective remedies for violations of economic, social and cultural rights.

I also perceive a need to elaborate on the relationship between the rights in the Covenant and environmental sustainability, particularly the multiple challenges of climate change, which have a disproportionate impact on poor and marginalised communities.

Since the entry into force of the Optional Protocol to the ICESCR, how would you assess the jurisprudence of the CESCR so far?

Thus far the Committee has decided four communications under the Optional Protocol – two in which it adopted views on the merits, and two which it ruled inadmissible. In I.D.G. v Spain, the Committee found a violation of the right to adequate housing in article 11 of the Covenant in that the Spanish judicial authorities have not taken sufficient steps to bring mortgage-enforcement legal proceedings to the personal notice of the author.

This meant that she was unable to adequately defend her right to housing in the courts. The Committee also found that there were insufficient legislative safeguards in place to protect the housing rights of those facing loss of their homes in mortgage enforcement proceedings. It is gratifying to see the Committee referencing a number of important South African jurisprudence pertaining to mortgage bonds and housing rights.

The second merits decision was made in Rodríguez v Spain and concerned a complaint by a prisoner that his non-contributory disability benefit had been reduced by the cost of his upkeep in prison. He alleged a violation of the right to social security (article 9 of the Covenant) as well as the prohibition on discrimination in the enjoyment of this right (article 2). The Committee found no violation of the right to social security on the basis that the reduction was reasonable and proportionate and did not leave the complainant without minimum essential social security benefits. It also rejected the discrimination claim.

Both cases indicate that the Committee is drawing on the concepts it has developed in its general comments in "adjudicating" individual complaints regarding economic, social and cultural rights. One of the challenges that the Committee faces as an international body is to gain a sufficiently detailed understanding of the domestic facts and context of particular communications. This is important both for assessing the impact of the particular measures on the complaints as well as the credibility of the State Parties' justifications for its position.
In this regard, third party submissions (similar to amici curiae submissions) can play an important role in enriching the Committee's deliberations under the Protocol. This point is well illustrated by the third-party submissions by ESCR-Net, an international network of NGOs and social movements focusing on economic, social and cultural rights, in the I.D.G. v Spain communication.

Socio-economic rights are now accorded more recognition worldwide, especially in national constitutions, but concerns remain. What would you consider to be the major challenges regarding the implementation of these rights?

The recognition of socio-economic rights as fundamental rights in a country's highest law is important as it creates channels for legal and political accountability for the realisation of these rights. However, to be effectively implemented [it] means that these rights and their underlying values must be consciously integrated in all decision-making which affects people's socio-economic well-being.

This includes budgetary processes, legislation and policy-making as well as decisions relating to trade, investment and the regulation of multinational corporations. In addition, without being claimed, rights mean very little on the ground. It is important that strong organisations are built and sustained which can support impoverished communities in their struggles to claim their socio-economic rights and demand accountability for their realisation.

Any suggestions for the way forward?

In South Africa black people still bear the burden of poverty and unequal access to socio-economic resources and services. In addition, poverty, inequality and environmental degradation are massive global challenges. We must use all the opportunities and channels which socio-economic rights create to redress these injustices and help build a more just and sustainable country and world.

UPDATES

General Comments by the United Nations Committee on Economic, Social and Cultural Rights

The United Nations Committee on Economic, Social and Cultural Rights (the Committee) has published two General Comments on its interpretation of the provisions of articles 12 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Comments codify the Committee's views on these issues in order to give states which have ratified the Covenant a clear understanding of their obligations and to indicate to government officials, legal practitioners and civil society where policy, laws and programmes may be failing and how they can be improved. The two General Comments are as follows:

General Comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the ICESCR)

In its General Comment No. 14 (2000) on the right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), the Committee addressed in part the issue of sexual and reproductive health. Considering the continuing grave violations of this right, however, the Committee is of the view that the issue deserves a separate General Comment. The present General Comment is aimed at assisting States Parties in their implementation of the Covenant and fulfilling their relevant reporting obligations. It primarily concerns the obligation of States Parties to ensure every individual's enjoyment of the right to sexual and reproductive health, as required under article 12, but is also related to the various barries that impede enjoyment of this right.
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f22&Lang=en