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Editorial

by Sandra Liebenberg

We are pleased to present another edition of ESR Review featuring a number of key developments relating to socio-economic rights. Our guest contributor from Canada, Bruce Porter, describes how Canadian NGO's utilised international human rights mechanisms to challenge welfare cuts in Canada. The strategies used and lessons learnt in the process can benefit South African NGO's as they begin to engage with international human rights bodies following South Africa's ratification of a number of important human rights treaties. Gina Bekker reviews the initial reports submitted in terms of two of these treaties, both of which contain a number of provisions protecting socio-economic rights - the African Charter on Human and Peoples' Rights and the Convention on the Rights of the Child.

Three important pieces of legislation mandated by the Constitution are due to be tabled in Parliament during the latter half of this year. They are the Open Democracy Bill, the Administrative Justice Bill and the Equality Bill. These Bills seek to provide a legislative framework for access to information, reasonable and fair administrative action, and effective protection against unfair discrimination. All three are vital to the effective implementation of socio-economic rights in South Africa. The realisation of socio-economic rights depends on open, accountable and participatory institutions for delivering these rights as well as equal access to the rights for vulnerable and disadvantaged groups. It is also vital that this trilogy of legislation provides accessible, speedy and effective remedies for redressing violations of the rights they protect. In this way broadly framed constitutional promises can be claimed and defended by those they are intended to benefit. This edition examines the implications of two of these Bills - the Administrative Justice Bill and the Equality Bill - for the realisation of socio-economic rights in South Africa.

Danie Brand review the first report of the SA Human Rights Commission in fulfilment of its mandate in terms of s 184(3) of the Constitution. He identifies the weaknesses in the process and final report, and suggests ways for improving the process during the second monitoring cycle. This edition also contains a number of other articles and features which we hope will stimulate interest and active engagement in socio-economic rights advocacy by our readers.

ESR REVIEW

Socio-Economic Rights Advocacy - Using International Law

Notes From Canada

by Bruce Porter

Whether in litigation, public advocacy or academic discourse, those working in the area of social and economic rights have relied extensively on international human rights law, and particularly on the International Covenant on Economic, Social and Cultural Rights (ICESCR) to elucidate the content and meaning of rights. Even where social and economic rights achieve explicit protection in domestic law, as in South Africa's new constitutional democracy, the paucity of domestic jurisprudence and judicial unfamiliarity with social and economic rights means that courts, NGOs, academics and politicians will continue to turn to international human rights law for guidance.

Of particular importance are the views of the U.N. Committee on Economic, Social and Cultural Rights (UNCESCR) which is charged with overseeing the compliance of State parties with the Covenant. The U.N. Committee releases "Concluding Observations" after each periodic review of State parties to the Covenant (approximately every five years apart). It also adopts "General Comments", now numbering ten, on particular aspects of the Covenant such as the right to adequate housing, the rights of persons with disabilities, the role of human rights institutions or the domestic legal application of the Covenant. All of these provide important sources for social and economic rights advocates.

Those of us who work with people living in poverty often need to clarify that social and economic rights are not the sole preserve of a U.N. Committee meeting in the marble halls of the *Palais des Nations* in Geneva in one of the most affluent and expensive cities in the world. For the majority of those who struggle for social and economic rights, the proceedings of U.N. treaty monitoring bodies may seem entirely irrelevant, or to relegate social and economic rights to international "experts" rather than developing them as a field of domestic rights practice.

Establishing connections

It would be a mistake, though, for social and economic rights advocates to ignore the potential of using U.N. treaty monitoring bodies, and particularly the UNCESCR, to strengthen domestic social rights practice. Like all other human rights practitioners, and perhaps more than others, we need to work on a number of fronts simultaneously. Political advocacy will often be strengthened by judicial actions, and judicial actions assisted by public education and advocacy. Similarly, domestic social rights advocacy may be advanced by work at the international level, which in turn needs to be informed by domestic advocacy. To reject the international fora as being too remote or elitist would mean losing important opportunities for establishing meaningful connections between international monitoring processes and grassroots advocacy.

RELEVANT WEBSITES
www.web.net/cera
www.web.net/ngoun98
www.web.net/ccpi

A traditional conception of social and economic rights, which was thankfully rejected by the drafters of the South African Constitution, characterizes this category of rights as being in the nature of social objectives agreed upon by States but not enforceable by citizens. According to this approach, these rights may be made the subject of expert review and comment, assessing whether states are living up to their "aspirations", but not of rights claims adjudicated by courts or other bodies.

Documents of the UN Committee on Economic, Social and Cultural Rights can be located at the following address:
www.unhchr.ch/tbs/doc.nsf

Until recent years, it was the traditional paradigm of social and economic rights which prevailed within the U.N. treaty monitoring system. The process was conceived as a dialogue between governments and a committee of appointed experts without any formal recognition of a role for NGO's or constituencies whose rights were at stake. This usually made the process somewhat stultified. Governments like Canada submitted lengthy documentation of all of their accomplishments and the Committee was extremely limited in its ability to challenge governments' self-congratulatory approach.

Out of the shadows

In 1993, with Canada's second periodic report coming up for review, Canadian NGOs decided to challenge the traditional paradigm. We petitioned the Committee for a new procedure through which it would hear oral submissions from domestic NGOs as part of the periodic review process. The Committee decided to break new ground at the U.N., setting aside time at the beginning of each session for NGO presentations relating to the periodic reviews of State parties. The new procedure had a dramatic effect, allowing NGOs to play a central role and fundamentally transforming the nature of the review process.

NGO submissions at treaty monitoring bodies are often referred to as "shadow reports" but the CESCR really brought the NGO role out of the shadows in 1993. Rather than pretending that it has the resources or expertise to assess complex social and economic issues in country, the Committee has recognised that it functions best in a more adjudicative role, facilitating and then drawing conclusions from a rights-based dialogue between domestic NGO's and governments. Admittedly, this is not always possible. It depends on the ability of domestic NGO's to participate freely and effectively in the review process. Where such participation is possible, however, the Committee relies on the NGO's to identify the most critical issues regarding the implementation of the Covenant and to provide the necessary background for members to put these issues to government delegates for a response. The Committee does not necessarily agree with the NGO's any more than it would necessarily agree with an individual petitioner, but it is placed in a stronger position to assess governments' submissions in the light of NGO submissions and evidence.

The prominent role of NGO's in the review of Canada's compliance with the Covenant in 1993 made the process highly visible and the subject of extensive public debate. The Committee's concerns and recommendations made headlines across Canada, were the subject of raucous debate in parliament, and were enthusiastically disseminated by anti-poverty and human rights groups across Canada. They have since been cited in the pleadings in a number of cases under the *Canadian Charter of Rights and Freedoms* and human rights legislation.

Poverty amidst affluence

In 1993, the oral submissions by NGO's focused on two major themes which have continued to dominate social and economic rights advocacy in Canada: (1) increasing poverty, homelessness and hunger in the midst of affluence; and (2) the failure by both courts and governments in Canada to provide effective domestic remedies for violations of social and economic rights. We provided concise information on the extent and depth of poverty among vulnerable groups in Canada - usually drawn from government data - as well as demonstrating comparative measures of Canada's wealth and "available resources." We accompanied our presentation with slides showing what homelessness and poverty looked like in Canada. In addition, we provided summaries of cases in which social and economic rights claims had been brought before Canadian courts and human rights tribunals.

The Committee's concluding observations addressed most of the issues we brought to the Committee and which have been directly relevant to our domestic struggles. For the first time, the Committee issued a stern rebuke to an affluent country for violations of social and economic rights. It made it clear that the doctrine of "progressive realisation" is as much a sword as a shield. The doctrine can be used to hold countries responsible for failing to apply "the maximum of available resources" to fulfilling social and economic rights:

12. In view of the obligation arising out of article 2 of the Covenant to apply the maximum of available resources to the progressive realisation of the rights recognised in the treaty, and considering Canada's enviable situation with regard to such resources, the Committee expresses concern about the persistence of poverty in Canada. There seems to have been no measurable progress in alleviating poverty over the last decade, nor in alleviating the severity of poverty among a number of particularly vulnerable groups.

Equally important was the Committee's unequivocal statement that there is an obligation to provide effective remedies for all rights in the Covenant, including, in particular, the right to an adequate standard of living in article 11 of the Covenant:

21. The Committee is concerned that in some court decisions and in recent constitutional discussions, social and economic rights have been described as mere "policy objectives" of governments rather than as fundamental human rights. The Committee was also concerned to receive evidence that some provincial governments in Canada appear to take the position in courts that the rights in article 11 of the Covenant are not protected, or only minimally protected, by the Charter of Rights and Freedoms. The Committee would like to have heard of some measures being undertaken by provincial governments in Canada to provide for more effective legal remedies against violations of each of the rights contained in the Covenant.

The Committee pointed out that, even without explicit protection of social and economic rights in the Canadian Charter, many social and economic rights could be protected through expansive interpretations of rights such as "equality" and "security of the person".

30. The Committee encourages the Canadian courts to continue to adopt a broad and purposive approach to the interpretation of the Charter of Rights and

Freedoms and of human rights legislation so as to provide appropriate remedies against violations of social and economic rights in Canada.

These important themes have recently been reaffirmed in the Committee's General Comment on the Domestic Application of the Covenant (General Comment No. 9, E/C.12/1998/24). We have raised them before courts in Canada at every possible opportunity.

Removing the pillar of social rights protection

While the U.N. Committee's observations were widely publicised in Canada, the response by the government was extremely disappointing. Rather than implementing any of the recommendations or addressing the concerns of the Committee, Canada has moved decisively backward with respect to the implementation of the Covenant rights.

The most dramatic of recent developments was the federal government's decision in 1995 to revoke the provisions of the Canada Assistance Plan (CAP). For a generation of Canadians this had been the pillar of social rights protections. CAP was federal legislation governing cost-sharing in respect of provincial social assistance programmes. In exchange for a 50% contribution to such programmes from the federal government, provinces were required to ensure that every person in need was provided with financial assistance at a level that covered basic requirements, that there was an appeal mechanism, and that no one would be forced to work against their will in order to receive social assistance.

There is little jurisprudence in international law on the right to social security and the right to an adequate standard of living, but it is clear that CAP embodied some of the most important features of these rights - universal entitlement regardless of the cause of need, adequacy of benefits, procedural and administrative fairness, and freedom from coerced labour in exchange for benefits. CAP, in fact, provided a justiciable right to social security and an adequate standard of living after the Supreme Court of Canada determined that the standards or conditions in CAP, including the principle of adequacy, were legally enforceable by individual social assistance recipients.(*Finlay v Canada (Minister of Finance)* [1986] S.C.R. 607).

Under the new "block funding" arrangement which came into effect in 1996, however, called the Canada Health and Social Transfer, all of these basic features of the right to social security and an adequate standard of living in Canada were eliminated - both the entitlements and the mechanism for providing legal remedies.

When the government of Canada announced its intention to revoke the provisions of CAP, NGO's and international legal experts made submissions to the parliamentary committee reviewing the proposed legislation. They argued that such a step would be in breach of Canada's obligations under the Covenant not to take "deliberately retrogressive measures" with respect to the protection of Covenant rights. When the government appeared to pay little heed, we petitioned the U.N. Committee directly which granted permission to make oral submissions on the issue. In May 1995 a delegation of Canadian NGO's appeared before the Committee, outside of the regular periodic review process, and presented an urgent request that the Committee address this issue. The Committee responded by sending a letter to Canada relating the NGO concerns and asking for a report on the legislation later that year in the context of Canada's third periodic report.

Nothing was submitted until two and a half years later when Canada finally submitted its overdue report and was scheduled for review in November 1998.

During the intervening time, provincial social assistance schemes had been seriously eroded. In Ontario, social assistance rates were slashed by 22%, forcing over 100,000 households out of their housing and doubling the demand on foodbanks. American-style "workfare" schemes were introduced in a number of provinces. When poor people went to courts to challenge the cuts to social assistance, citing the U.N. Committee's 1993 concluding observations, governments argued that there is no constitutional right to a particular level of adequacy of benefits in Canada. The court agreed, making no reference at all to the U.N. Committee's recommendations with respect to the interpretation of the *Charter of Rights and Freedoms* or the provision of legal remedies.

Turning to the U.N. Committee

In this climate, NGO's in Canada again turned again to the UNCESCR's review process as a forum that at least offered some neutral distance from the political and ideological developments at home. A diverse group of Canadian NGO's began preparing for Canada's review, scheduled for November 1998. Consultations were held with poor people and other constituencies across the country to identify primary concerns and charitable funding was secured to pay for NGO's transportation and accommodation costs in Geneva.

Six months prior to the scheduled review by the Committee of a government's periodic report, a pre-sessional Working Group meets to prepare a list of issues to send to the State party for a response. NGO's have the opportunity to make oral and written submissions to the Working Group. This is an important opportunity to ensure that the list of issues includes the most critical concerns of NGO's, as the list will be used to frame the oral review at the subsequent session. Two of us were sent to Geneva in May of 1998, representing a broad spectrum of Canadian NGO's to brief the pre-sessional Working Group. They in turn sent to Canada an extensive list of questions, addressing the revoking of CAP and a number of other concerns.

The opening day of the Committee's meeting of November - December 1998, at which both Canada and Israel were to be reviewed, was literally crammed with NGOs. - a dozen or so from Canada, at least as many Palestinian NGOs, and a few from other countries being reviewed. It seemed appropriate that it was the Chairperson, Philip Alston, chairing his last session of the Committee, who had to deal with the confusion. He had always been an advocate for recognising the role of NGO's and played a major role in the transformation of the Committee into a more activist body during the past decade.

The oral presentations and the submission of written briefs at the outset of the Committee's session is the most visible role for NGO's in the process. However, as with all other treaty monitoring bodies, submissions to individual Committee members on issues of particular interest or concern to them is all important. As members are generally overwhelmed with information, providing concise summaries of issues is the key. Canadian NGOs prepared a collective summary of our most critical issues, which was invaluable in assisting the Committee to focus its review. As NGO's have no ability to reply to government submissions, it is important to anticipate how one's government will respond to questions, and to provide relevant information to Committee members demonstrating why the anticipated response is inadequate. We anticipated correctly, on the basis of the

government's written responses, that the government delegation would deny the importance of CAP entitlements, describing CAP as merely an "administrative arrangement" between the federal government and the provinces which was in need of "updating". We therefore highlighted in our materials Canada's submissions to the Committee in previous periodic reviews and other official statements in which CAP was described as fundamental to the protection of social and economic rights and national standards in social assistance programmes. As a result, Committee members rigorously challenged the Canadian delegation to reconcile past submissions with their present denials. One member, on putting the previous statements to a Canadian delegate, asked: "Were you lying then or are you lying now?"

NGO's had done considerable advance work with the Canadian media. Reporters from the national newspaper chains and from national radio attended the two day exchange between the Committee and the delegates for the Canadian Government. NGO's from all sectors issued ongoing press releases and we established websites containing the government's report, the list of issues and the NGO submissions. The review process received extensive media coverage and commentary in Canada - even a spoof of the Governments' denials by a national television comedy show!

The Committee's conclusions

Substantively, the 1998 concluding observations on Canada reiterated and strengthened concerns and recommendations expressed at the previous review and contained a strong denunciation of the revoking of CAP:

19. The replacement of the Canada Assistance Plan (CAP) by the Canada Health and Social Transfer (CHST) entails a range of adverse consequences for the enjoyment of Covenant rights by disadvantaged groups in Canada.... The Committee regrets that, by according virtually unfettered discretion to provincial governments in relation to social rights, the Government of Canada has created a situation in which Covenant standards can be undermined and effective accountability has been radically reduced.(E/C.12.1.Add.31, 4 December 1998)

The Committee recommended the reinstatement of "a legally enforceable right to adequate assistance for all persons in need" and all other CAP standards.

The Committee also issued strong concerns and recommendations with respect to many other issues in Canada, including: cuts to provincial social assistance rates, the failure to address rising homelessness, increased reliance on foodbanks, cuts to unemployment insurance, failure to fairly address Aboriginal land claims and poverty among Aboriginal People, workfare programmes, the prevention of unionization among workers in these programmes, and the adverse consequences for women of social programme cuts.

Provincial governments were again criticised for arguing in court that Canada's *Charter of Rights and Freedoms* should be interpreted so as to deny legal remedies to those whose social and economic rights were violated. The Committee reiterated that "economic and social rights should not be downgraded to "principles and objectives". It urged that the Covenant rights be made enforceable within the provinces and territories "through legislation or policy measures and the establishment of independent and appropriate monitoring and adjudication mechanisms."(para. 52).

Using the Civil and Political Covenant

In March of this year, Canadian NGO's focusing on poverty and homelessness decided to participate in the five year review of Canada's compliance with the International Covenant on Civil and Political Rights by the U.N. Human Rights Committee. Significantly, this Committee raised similar concerns to those expressed by the Committee on Economic, Social and Cultural Rights. In particular, the Human Rights Committee expressed concern about the extent of homelessness in Canada, recommending that the government "take positive measures required by article 6 (the right to life) to address this serious problem." The Human Rights Committee joined the Committee on Economic, Social and Cultural Rights in expressing concern about discrimination against social assistance recipients and the invasion of their privacy rights, failure to address Aboriginal land claims and self-determination rights, discrimination against Aboriginal women, the denial of the right to an effective remedy before human rights tribunals, denial of social benefits to refugees and the adverse effect of major cuts to social programmes on women and other disadvantaged groups.

Through advocacy at the international level we have begun to fashion a consensus among U.N. treaty monitoring bodies about violations of human rights occurring in Canada. In so doing, we have also encouraged these bodies to deal with important social and economic rights issues which might otherwise have been ignored. While we have not, at this point, succeeded in reversing any of the erosion of social rights in Canada, we have at least found one forum which allows us to articulate the most important rights claims and have them fairly considered in the light of international human rights law.

Social and economic rights violations are increasingly linked with global economic developments and trends. Increasingly, we find that we must advance our claims within the international as well as the domestic legal orders and, in so doing, enhance the capacity of both domestic and international human rights institutions to address global developments. Courts are less likely to hold their governments to a purely internal standard of the right to social security or to an adequate standard of living, for example, than to enforce standards and entitlements linked to internationally recognised social and economic rights. Our domestic claims are more likely to be successful if international human rights bodies have identified certain areas in which domestic protections fail against international standards.

Dialogue between international and national institutions

We are in the midst of what the Chief Justice of Canada's Supreme Court has called the "institutional moment" of international human rights law, the growth of institutional dialogue between international human rights bodies and national courts." (Rt. Hon. Antonio Lamer, *Enforcing International Human Rights law: The Treaty System in the 21st Century*, address at York University, June 22, 1997 at 6.) Social rights advocates in particular must encourage that institutional dialogue. We will be increasingly reluctant to advance novel domestic social rights claims without positive reinforcement in international human rights law. This being the case, it is important that we advance our claims internationally as well as domestically and ensure that U.N. treaty monitoring bodies give clear directions to our courts and governments.

Advocates in all countries need to work collaboratively to ensure that the pressing issues of domestic social and economic rights struggles are addressed at the international level. Presumably, we will benefit from each other's work. The

consideration by the UNCESCR of the right to social security and to an adequate standard of living in Canada may be useful, for example, in convincing the South African courts and parliamentarians of the importance of effective legal remedies for these rights and justiciable standards of universality and adequacy.

The treaty monitoring system at the United Nations is full of weaknesses and problems. The fact that Canada has been able to largely ignore the concerns raised by U.N. Committees without significantly compromising its international reputation as a defender and promoter of international human rights is evidence of how powerless the system can be. But the first step in reforming the system is to bring to it the struggles in various countries for social and economic rights. As in our domestic advocacy, I think we will find that the institutions will generally be built around the rights claims rather than *vice versa.*

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Paper Tigers?

Resources For Socio-Economic Rights

by Conrad Barbeton

The South African Constitution is widely regarded as one of the most progressive constitutions in the world. The principle reason for it being accorded this status is the inclusion of socio-economic rights in the Bill of Rights. This emphasis has raised peoples' expectations and placed tremendous pressure both on politicians and on departments to show real progress in the delivery of a wide range of goods and services.

Of particular interest to the vast majority of South Africans, and more particularly those people living in poverty, are:

- the right to gain access to land (section 25(5));
- the right to have access to adequate housing (section 26);
- the right to have access to health care services, sufficient food and water and social security (section 27); and
- the right to further education (section 29(1)(b)).

Also of paramount importance are the rights of children contained in section 28, as well as the right to a basic education in section 29(1)(a). However, these latter rights are accorded special status relative to the other rights mentioned above. Whereas the other rights are limited in certain significant respects, the rights of children and the right to a basic education are not qualified in the same way or to the same extent. What this means in practice will need to be discussed on another occasion.

Do these rights mean that the homeless can expect the government to provide them with housing? Will the landless be provided with land? And is the State obliged to ensure 'everyone' has access to health services, food, water and social security? Can people take the government to the Constitutional Court to get these rights enforced? If this happens, how much power does the Constitutional Court have to force the government to provide people with houses, land, etc.?