

The Right to be Heard: What's at Stake?

Presentation by Bruce Porter

**High Level Experts' Seminar
on Economic, Social and Cultural Rights
Nantes, France
September 5 - 7, 2005**

Recently when I was preparing for a human rights tribunal hearing in Canada into an allegation of a violation of human rights in housing brought by a single mother on welfare, the claimant telephoned the night before the hearing to report tearfully that she was ill and could not attend the hearing the next day. When the lawyer for the Human Rights Commission was told of this, his response was: "Oh well, we don't need to hear from her." I couldn't imagine how the tribunal would get a full understanding of the issue without hearing from the claimant, and could not help but wonder if he would have made the same comment if the claimant had not been poor.

People living in poverty and homelessness or suffering other violations of ESC rights have been told by the UN for thirty years that they have rights but that no one needs to hear from them directly about alleged violations. Experts can work out state obligations, develop indicators, determine the minimum core content and hold states to account, they are told. Why do we need to hear and adjudicate claims from rights holders? This is really the issue at the heart of the ongoing debates about the optional protocol.

In considering what is at stake in this debate, we need to remind ourselves that the idea that you have a right but that you don't need to be heard really attacks the core value of human rights and the central place accorded to individual dignity and equality of citizenship and to rights holders as the "subjects" of rights. We cannot now decide to invent a new category of human right for which there is no need to hear from claimants,

no access to adjudication, and no remedy. This issue transcends the question of justiciability. The CESCR has made it clear in General Comment No. 9 that whether or not domestic courts are enforcing all, or only some aspects of ESC rights, all components of ESC rights must be subject to effective remedies. That is, there must be someplace to go to be heard if a right is being violated, there must be a process for consideration or adjudication of the claim, and there must be an effective remedy provided if a right has been violated. As the Committee makes clear, this is fundamental to the relationship between human rights and the rule of law.

It is in this sense that the optional protocol debate has evolved into a critical moment for the international community, in which it may either affirm ESC rights as real rights or, unfortunately, do irrevocable damage to international human rights by affirming in some sense that they are not, or that certain aspects of them are not, real rights. I can assure you that if an optional protocol is adopted which excludes any rights or any aspects of Covenant rights from adjudication, this exclusion will be used by governments and courts in Canada and elsewhere as a reason to refuse to grant hearings and effective remedies with respect to violations of those rights at the domestic level. There is a lot that is stake in this debate for those whose rights are being violated than an additional procedure at the international level. This is a debate about whether the international community will stand behind the equal status of ESC rights, which will reverberate at all levels of human rights protections.

As a practitioner working on the domestic level of social rights advocacy, therefore, I want to suggest that we need to turn the discussion about justiciability of ESC rights around, and instead of considering justiciability as an attribute of the rights in the Covenant, consider it as a necessary quality of the adjudicative procedure we design. In other words, it is incumbent on us to design an inclusive, comprehensive and effective institutional mechanism so as to ensure that ESC rights claimants can receive a hearing and an effective remedy for all rights and all components of the rights in the Covenant. Can we not ensure, at the international level, that we provide adequate

adjudicative space for ESC rights, so as to ensure the **better** promotion and protection of ESC rights and access to effective remedies within state parties, not worse?

I want to reflect for a moment on what it means to provide adequate adjudicative space for ESC rights, so that they are adequately heard, adjudicated and so that effective remedies are provided.

Obviously, an optional protocol does not mean that everyone gets a hearing. It does mean, though, that we will begin to reorient our understanding of social and economic rights around individual circumstances and struggles.

I think anyone who has participated in human rights hearings at the domestic or regional level will know what I mean when I say that in many cases there is a kind of pivotal moment in the adjudication of a human rights claims when, through the “voice” of the rights claimant, the subjective struggle for dignity and security, breaks through all the legal argument to bring home the real issues of human dignity that are at stake in a claim.

A number of speakers have spoken of the significance of the Grootboom case, the first right to housing case heard by the South African Constitutional Court under the new Constitution. I think that case defined this kind of pivotal moment for social rights both in South Africa and internationally. Many of you may recall the opening paragraphs of that judgment, when Justice Jacob describes the plight of Irene Grootboom and her family, living under plastic on the Sports Field of Wallacedene, with the winter rains arriving. He wrote: “The case brings home the harsh reality that the Constitution’s promise of dignity and equality for all remains for many a distant dream.”

Having participated in some of the debates about justiciability during the constitution drafting process in South Africa, which were not unlike many of those we have been engaged in around the Optional Protocol, I was struck in reading that judgment that this

is really what the debates about justiciability had really been about - whether Irene Grootboom and others like her would, through a new adjudicative space, be able to bring to life the link between social rights and the promise of dignity and equality for all that is at the heart of all human rights.

The issues of homeless families in South Africa could have been documented and presented in a periodic report, and recommendations made for improvement. By considering those issues through the lens of an individual rights claim allowed South Africa to come to a better understanding of the rights affirmed in its Constitution, and at the same time, give the world considerable guidance as to how policies and decisions can be reviewed for consistency with social rights, even in the context of scarce resources and vast competing needs.

So if, as I am proposing, we transform the debate about justiciability into the challenge of creating an appropriate space for the adjudication of ESC claims at the international level, where do we come down on some of the critical questions before us?

The first point that becomes clear is that adjudicative space for ESC rights is not that different from the kind of adjudicative space we want to create or have already created for other rights. We are not, in seeking adjudicative space for ESC rights, looking for a body with a singular expertise in social policy. Many juridical skills will be needed here, such as the ability to consider dignity interests from the standpoint of the rights claimant, who may be separated by a wide gulf from the circumstances of the members of the adjudicating body. We will rely on some traditional legal principles, such as respect rules of evidence, the setting aside of personal prejudices and ideologies, and the ability to develop and apply coherent and consistent principles or interpretation that promote the values of human rights and ensure that both claimants and governments receive a full and fair hearing.

The adjudicating body should not, however, be made up only of lawyers, as it will need to be free of some of the traditional legal formalism that has led to the exclusion of social rights in the past. It will be important to ensure effective representation from women, people with disabilities and others who have an ability to understand the perspective of rights claiming groups.

In many cases, the adjudicating body will need to consider the “polycentric” nature of social rights, by inquiring beyond the particular circumstances presented by the claimant, to consider the other rights and needs at stake, particularly in resource allocation decisions. So it will need to be accessible to groups that may not have the means to participate, and it will need to be able to proactively seek out interventions from groups in order to hear additional perspectives and appreciate all dimensions of a claim.

An investigations procedure, as has been pointed out, would provide a critical means of ensuring access to information that is unavailable through the complaints process and in some instances could be used to supplement the information provided by the parties to a complaint.

Perhaps most important of all will be that the adjudicating body be free of limitations or arbitrary restrictions in considering ESC rights, so that it can interpret and apply rights consistently with the interests they are meant to protect. It is particularly important that the body be authorized to consider all aspects of positive obligations on states, particularly in the obligation to protect, through legislation and regulation, and to fulfill, through the allocation of resources where necessary.

Claims by the most disadvantaged groups often relate to positive measures and have resource implications. If the optional protocol were ever to limit the adjudication of positive rights claims of that sort, it would exclude the most disadvantaged groups from the process and undermine significant advances that have been made at the domestic

and regional level. If people with disabilities, because workplaces or housing has been designed as if they did not exist, require positive measures involving resource allocation, surely that is no reason to give their rights to work or to housing any less of a hearing, or to treat the need for an effective remedy in these cases with any lower level of concern. The typology of obligations was developed in General Comments to **enhance** the protection of Covenant rights by elucidating different dimensions of the right, not to provide a basis for denying effective remedies to particular groups or claims.

Similarly, a restriction to grave violations like massive forced evictions, discrimination or denial of the most basic necessities would represent and be interpreted at the domestic level as an indirect affirmation that ESC rights should not be heard. These kinds of violations can already be adjudicated under the ICCPR as violations of the right to life or the right to non-discrimination. To take the rights in the ICESCR and try to identify the components that are most like civil and political rights, rather than providing for the adjudication of all aspects of ESC rights, would represent a giant step backward for international human rights.

Some have suggested that we need to be more compromising, rather than insist on getting everything in an Optional Protocol. But the wide spectrum of NGOs and experts advocating a comprehensive approach are not doing so in order to try to get ‘more rather than less’ in some kind of adventurous ‘all or nothing’ gambit. On the contrary, we are seriously concerned that a compromised complaints procedure would be retrogressive, representing an assault on core values and principles of the international human rights movement. The adjudication that is established must be consistent with the principles of the Covenant and affirm that everyone’s rights, whatever their shape and whatever the nature of the obligation they place on governments, must be given full consideration and respect.

Some have suggested excluding the right to self-determination, but we need to consider this option in light of the constituencies we would exclude. Indigenous people in Canada place their ESC rights clearly within a framework of the right to self-determination under article 1. This is how the serious violations of Covenant rights of aboriginal people in Canada have been considered and addressed in the reporting process. I don't think we should, prior to the drafting process, exclude consideration of this critical dimension of Covenant rights in complaints.

Similarly, with respect to the possibility that future jurisprudence may find that some components of ESC rights may include a dimension of international cooperation, I cannot see why we would want to exclude that dimension. Those of us who, at the domestic level, have tried to ensure that trade and investment agreements are consistent with the protection of human rights have been told by our courts that this is a question that must be addressed through international rather than domestic law. These issues are coming to the fore because they are central to the challenges facing ESC rights. Again, I cannot imagine why, if we are looking to ensure a broad and effective adjudicative mechanism, we would want to exclude such a key emerging issue, particularly prior to even drafting the Optional Protocol.

After 30 years of discriminatory exclusion of ESC rights claimants from the right to be heard, it is critical that we proceed to draft an optional protocol that is consistent with the rights and the purposes of the Covenant, and which affirms that all aspects of the Covenant will benefit from hearing from those whose rights may have been violated.

Let us move quickly to put an end to the discriminatory exclusion of claimants of economic, social and cultural rights and to the refrain: "We don't need to hear from you."

