Monitoring states’ obligation to fulfill economic, social and cultural rights: methodologies for national institutions

Side event held during the 10th International Conference of National Human Rights Institutions, Edinburgh, Scotland, 7 - 10 October, 2010

WORKSHOP REPORT

Introduction

On 9 October 2010 at the 10th International Conference of National Human Rights Institutions, the Center for Economic and Social Rights (CESR), co-hosted a lunchtime workshop with the Scottish Human Rights Commission (SHRC). The workshop, moderated by Mr. Duncan Wilson, Head of Strategy and Legal at the SHRC, highlighted the need to strengthen methodologies for monitoring economic, social and cultural rights (ESC rights), focusing on how national human rights institutions (NHRIs) can assess public policies against the state’s obligation to fulfil ESC rights.

CESR is currently undertaking a project on this issue in partnership with the Kenyan National Commission on Human Rights (KNCHR)1, with the aim of learning from NHRIs’ experiences in monitoring ESC rights to identify if the monitoring framework developed by CESR would be useful in the NHRI context and, if so, to produce a guide on the framework for use by NHRIs around the world. The goal of the workshop was to provide a space to exchange views amongst NHRIs about the methodologies being used to monitor ESC rights, to share information on new methodologies for ESCR monitoring developed by CESR, and inform NHRIs of the CESR-KNCHR project.

Report of Proceedings

Presentation of the Project and Monitoring Methodology

Ms. Allison Corkery, research fellow from Columbia University (currently working with CESR), presented an overview of the project in order to inform NHRIs about its overall framework and rationale. In particular, she highlighted that public policy in the socio-economic sphere (in health, education, labour, social security) is key to fulfilling ESC rights. These public policies therefore need to be monitored as part of efforts to hold states accountable to their ESC rights obligations. Monitoring can help to ensure accountability and can provide feedback on how such policies should be revised if they are failing to comply with ESC rights obligations. Ms. Corkery pointed out that

NHRIs are in a very unique position to carry out this monitoring of public policy because their very different functions (from advising governments to holding public enquiries) can feed all stages of a government’s policy cycle (formulation, implementation, assessment).

However, she also highlighted how deprivations of ESC rights such as malnutrition, illiteracy, disease etc. can be challenging to monitor from a human rights perspective. As Ms. Corkery explained, we cannot measure these principles by only looking at the outcomes government policies, it is necessary to also make a judgment on the adequacy of those policies. However, showing the causal link between weak policies and poor results—in human rights terms—is difficult. This is because there are a large number of multi-dimensional standards and principles relevant, which are complex to assess (e.g. progressive realization, maximum available resources). New methodologies can help to overcome this complexity.

Ms. Sally-Anne Way, Research Director at the Center for Economic and Social Rights, explained how the methodological framework developed by CESR provides a structure to holistically assess public policy against the relevant international standards and principles. Adopting the acronym OPERA, the approach offers a step-by-step framework for making a full assessment of compliance. It focuses on four levels of assessment: Outcomes; Policy Efforts; Resources; and Assessment. Eight steps are used to address these four levels:

1. measure the current level of enjoyment of the right;
2. identify legal and policy commitments;
3. examine policy content and implementation;
4. analyse policy processes;
5. evaluate the allocation of resources;
6. identify other determinants;
7. understand states’ constraints;
8. carry out an overall assessment to determine state compliance.

Different tools and techniques are relevant for each step (e.g. using quantitative indicators or conducting budget analysis). Importantly, each step is connected to one or more of the relevant human rights standards and principles (e.g policy content is assessed against the AAHA criteria, policy process are assessed against the principles of participation, transparency etc.). As an example of this methodology in practice, Ms. Way described how CESR worked with the Instituto Centroamericano de Estudios Fiscales, to produce the report Rights or privileges? Fiscal commitments and the rights to food, health and education in Guatemala.2 In that case, the methodology enabled a more rigorous analysis that led to detailed recommendations; generated wide public support; and shifted the onus onto the government to fully account for its policy decisions.

Regional Perspectives on Monitoring Economic, Social and Cultural Rights

Mr. Maina Mutuaruhiu, Principal Human Rights Officer at the Kenya National Commission on Human Rights, presented the Commission’s report Living Large: Counting the Cost of Official Extravagance in Kenya.3 The report, produced in

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2 Available at: http://www.cesr.org/article.php?list=type&type=33
3 Available at: http://www.knchr.org/dmdocuments/LivingLarge.pdf
partnership with Transparency International, measured the “opportunity cost” of personal expenditure by government officials. Specifically, the report considered what difference the amount spent by government departments on luxury cars would have made to the realization of ESC rights. This issue was chosen, Mr. Mutuaruhi explained, because of its tangibility and visibility (the Kshs 878 million spent on cars could have seen 25,000 children through eight years of school or provided antiretroviral treatment to 147,000 people for a whole year).

In terms of preparing the report, Mr. Mutuaruhui explained that access to information was one of the most challenging aspects of the process. Only four government departments responded to the commission’s request for information and some sought advice from the Attorney General on whether they were bound to comply with the Commission’s request. Nevertheless, the KNCHR has the power to summons information from non-state actors and so could obtain financial records from the dealers that had sold the cars. He also noted that by obtaining information from embassies in the country, the KNCHR was able to compare the level of spending with other countries in the region.

Another challenge highlighted was the difficulty managing the commission’s relationship with the government. While it was necessary to antagonize the government in this context, the Commission also recognised the need to maintain the government’s cooperation in other contexts. Mr. Mutuaruhui noted that the media was a powerful ally in this respect. By building public support for the report, a spotlight was shone on the government’s response to the report and its recommendations. A few months after the report was released, a transport policy was developed, which among other things reduced the engine size permissible for government cars.

Dr. Gisella Vignolo Huamani, Head of the Human Rights Office of the Peruvian Ombudsman (Defensoría del Pueblo), presented two reports her department had produced: one the rights of Peruvian emigrants, and the other on the rights and social situation of Peruvians of Afro-descent. In both cases, the goal of the report was to assess relevant laws and policies affecting these groups. The reports are one example of the efforts being undertaken by each department of the Peruvian Ombudsman; assessing the working order of the state in a comprehensive fashion, restoring individuals’ and minority groups’ rights.

In her comments, Dr. Vignolo highlighted the importance of building alliances both within and outside the government. She noted that ministerial officials are themselves usually interested in knowing how their resources are being used and can, therefore, be important collaborators. Transparency laws in the country—which require government ministries to publish their budget information online—were another important tool for accessing information. She also stressed the significance of actually going out to the field and described how the Peruvian Ombudsman had engaged with NGOs and victims’ groups to discuss their main difficulties, as well as to consult academics and specialists. Health and education were identified as key priorities for the reports. Dr. Vignolo also described how the Peruvian Ombudsman established a working group for the reports to keep all partners up to date on their process. She saw this as one of the crucial aspects of the process, in terms of

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4 Available at: [http://www.defensoria.gob.pe/inform-defensoriales.php](http://www.defensoria.gob.pe/inform-defensoriales.php)
generating stakeholders' support that would increase media’s impact when the reports were published.

In regard to the challenges faced in producing the reports, Dr. Vignolo identified the lack of official statistics as most difficult, noting that it is almost impossible to make policy without statistics. To overcome this challenge, the Peruvian Ombudsman used data collected by NGOs, in particular household surveys. Another challenge was the limited understanding and interest in human rights from the State Ministries. National laws remain vague and general, while the state administration does not understand how to incorporate the more substantive international standards into it. The short-, medium- and long-term recommendations contained in the reports sought to guide the government on the minimum content required to give effect to international standards nationwide. The Peruvian Ombudsman has established a database to collect information in order to follow up on the implementation of the reports' recommendations.

Mr. Ahmed Shahid, Secretary General of the Human Rights Commission of the Maldives, described the constitutional protection of ESC rights in the country, which like the international Covenant, is subject to the availability of resources. Despite this conditionality, he reported that the Commission has had significant success in influencing the direction of government in relation to ESC rights; an area where it is increasingly turning its attention. For example, the Commission is producing a series of ‘rapid assessment’ reports on thematic issues such as housing, employment, and the rights of people with disability, as well as periodic reports every 2-3 yrs titled Rights Side of Life. The Commission also has plans to begin this year to conduct budget analyses of socio-economic policy.

Mr. Shahid attributed the commission's success in this area to its “constructive engagement” with the parliament and the executive. As he explained, all government departments have a human rights focal point, for whom the commission provides an orientation program on human rights. As a result, civil servants are used to seeing the Commission as source of expertise and consult with it in the development of public policy in its very early stages. Mr. Shahid also highlighted the importance of civil society in the Commission’s work on ESC rights. He noted that as democracy had begun to stabilise in the country, people were becoming more concerned with their quality of life. Civil society groups—which are convened through the Commission’s NGO network—are increasingly taking up work in this area. By reporting to the Commission on the human rights situation on the ground, members of the NGO network act as an important “eyes and ears” for the Commission, particularly in communities on remote islands.

Discussion

In the discussion that followed the presentation, workshop participants agreed that it was important for NHRIs to monitor public policies as part of their work on ESC rights. They expressed much interest in the project and inquired how the methodological framework might apply in a range of different contexts. For example, the representative from the Ministry of Human Rights of the Government of Pakistan mentioned work they had done on ensuring dignity during flood relief efforts or security operations. He also raised the issue of the World Bank/IMF approach to conditionality and stressed the need to help government to positively engage with
these bodies. The representative of the Swiss Federal Commission Against Racism suggested that the framework could usefully incorporate the ILO conventions to open door to the business world. The representative from the Korean Human Rights Foundation asked how the framework might apply in developed countries, to address poverty and inequality. Similarly, the representative from the UK Equality and Human Rights Commission asked about how the framework could address regressive public spending in the context of the financial crisis. Finally the representative from Ghana Commission on Human Rights and Administrative Justice described the similar efforts the commission had undertaken to develop tools, questionnaires etc. on health and education.

**Conclusion**

The presentations and discussion drew out a number of key themes that highlighted the unique role of NHRI s in ESC rights monitoring. In particular, each of the speakers stressed the importance of working cooperatively with government and described how their legal powers and/or official status enabled them to do this. At the same time, civil society engagement was considered to be a crucial factor influencing the government to take up the recommendations made in monitoring reports and each of the speakers described how they were able to play a coordinating role to achieve this. As was drawn out in the discussion, the OPERA framework may enable NHRI s to expand their expertise into a broader range of policy areas that have the greatest impact on the enjoyment of ESC rights in the long run. This suggested that it will be useful for CESR to share further information on the OPERA framework and for CESR and KNHRC to share the lessons learned from their project with other NHRI s.