

International Covenant on Economic, Social and Cultural Rights: obligations and responsibilities

*Maria Virginia B.Gomes

The Covenant entered into force on 3rd January 1976 and has been ratified till now by 160 States parties from all over the world. The most recent ratifications were by the Bahamas and Papua New Guinea, in 2008. It contains some of the most significant international legal provisions establishing economic, social and cultural rights, including rights relating to self-determination, to work in just and favourable conditions, to social security, to an adequate standard of living, to the highest attainable standard of physical and mental health, to education, and to the enjoyment of the benefits of cultural freedom and scientific progress¹.

Two cross cutting principles apply to all Covenant rights -- the principle of non-discrimination and the principle of the equal right of men and women to the enjoyment of all economic, social and cultural rights. These 2 principles should be read in conjunction with each specific right guaranteed in part III of the Covenant.

1. Nature of economic, social and cultural rights

In spite of the general consensus on the universality, indivisibility, interdependence and interrelatedness of all human rights, the truth still is that economic, social and cultural rights are not given the same priority as civil and political rights. One of the arguments for this hierarchy of rights is that the principle of indivisibility and interdependence of all human rights does not imply equal implementation, thereby placing economic, social and cultural rights in a subsidiary position to civil and political rights. They are often viewed as effectively “second class rights” – relative, vague, unenforceable, non-justiciable, only to be fulfilled “progressively” over time.

However, economic, social and cultural rights entail full compliance with the obligations to respect, to protect and to fulfil.

The obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the right while the obligation to protect requires States parties to take measures to prevent third parties from interfering with the enjoyment of the right. The obligation to fulfil can be further broken down into the obligation to provide, for those who are unable to do so for reasons beyond their control; the obligation to facilitate, by putting into place positive measures; and the obligation to promote, through education and information campaigns in order to raise awareness.

2. Core obligations of States parties

Ratification of the Covenant implies immediate obligations for States parties:

¹ The Committee on Economic, Social and Cultural Rights, Fact Sheet 16 (Rev.1)

- to take immediate measures for the materialization of the core obligations, by bringing national legislation in conformity with the Covenant, by allocating the necessary resources for their implementation, and by providing the judicial or other effective remedies adequate to the nature and extension of the violation of a Covenant right;
- to enable those living under its jurisdiction to exercise Covenant rights without discrimination of any kind;
- to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.

Core obligations are those that ensure the satisfaction of, at the very least, minimum essential levels of each of the Covenant rights².

The Committee, in its General Comments³, has identified core obligations arising from minimum essential levels of the right to food, education, health, work and social security and these General Comments should provide guidance for States parties.

3. Progressive realization of Covenant rights

Ratification of the Covenant implies an obligation for States parties to take steps to ensure the progressive realization of economic, social and cultural rights by developing medium and long-term policies and programmes, to the maximum of their available resources, including through international assistance and cooperation. In order to achieve progressively the full realization of the Covenant, States parties must take deliberate, concrete and targeted steps within a reasonably short time after the Covenant's entry into force⁴.

Since it is within the margin of discretion of Governments to design and implement the economic, social and cultural development policies they consider as most appropriate, this issue of resource allocation for the progressive realization of Covenant rights is a difficult issue for the Committee and the States parties.

An across the board constraint invoked is lack of resources.

Lack of resources can certainly affect the full enjoyment of economic, social and cultural rights, given their amplitude. However, the principle of progressive realization foreseen in the Covenant takes into account the level of development as well as the current economic situation of each State party.

Article 2.1 of the Covenant obliges each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations,

² CESCR General Comment 3 (1990) on the nature of States parties' obligations

³ In www.ohchr.org

⁴ Committee Statement on "an evaluation of the obligation to take steps to the "maximum of available resources under an optional protocol to the Covenant", adopted in May 2007

because without core obligations the Covenant would be deprived of all meaningful content.

In fact, what comes out of our dialogue with State party delegations frequently is that the insufficient fulfilment of economic, social and cultural rights is not only due to the lack of resources, but also, and above all, to the development of domestic priorities that do not attribute sufficient relevance to these rights and, very often, to the fact that material and financial resources, in themselves scarce, are not targeted and used to the fullest extent possible for their implementation.

4. International Cooperation and Assistance

Notwithstanding that national capacity is a key factor in implementing economic, social and cultural rights, official development assistance and other modalities of international cooperation also have a very important role to play, since the Covenant entitles State parties to receive resources available from the international community through international cooperation and assistance.

In spite of debt relief, development assistance still falls short of the internationally agreed targets and for many poor countries debt service burdens are still too high. The Committee has therefore been encouraging developed countries to step up their contributions by way of official development assistance, to reach the target of 0.7 per cent of its GDP, as reaffirmed at the Follow-up International Conference on Financing for Development to Review the Implementation of the Monterrey Consensus, held in Doha, at the end of 2008.

We have also been reminding international financial institutions, bilateral donors and recipient countries of the need to take into full account the enjoyment of economic, social and cultural rights by all sectors of the population, particularly the most vulnerable, when signing up to structural adjustment and other development cooperation programmes.

5. Role of National Human Rights Institutions

Among the other “appropriate means” referred to in Article 2.1. of the Covenant, through which States parties should guarantee the human rights approach is the provision of judicial or other effective remedies, as well as administrative, financial, educational and social measures. All such appropriate means are necessary for the enjoyment of Covenant rights without discrimination⁵.

The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate, and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective.

⁵ Articles 2.2., 3, 7(a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) all contain an universal or non-discrimination element of immediate application by judicial or other competent organs

One of the appropriate means through which important steps can be taken to ensure appropriate remedies for the violation of Covenant rights is through the decisions of national institutions for the promotion and protection of human rights, including National Human Rights Commissions, Ombudsman Offices and Human Rights Advocates. Such institutions have been established in States with widely differing legal cultures and regardless of their economic situation.

Independent National Human Rights Institutions, based on the Paris Principles, have a potentially crucial role to play in promoting and ensuring the indivisibility and interdependence of all human rights⁶. Unfortunately, this role has too often either not been accorded to the institution or has been neglected or given a low priority by it. For a variety of reasons, many of them have dealt very scarcely with economic, social and cultural rights, particularly in relation to the scrutiny of existing laws and regulations to ensure consistency with Covenant requirements, and the examination of violations.

6. Involvement of civil society

Civil society is constituted by citizens who organize themselves formally and informally around common interests.

The participation of non-governmental organizations in economic, social and cultural development is two fold.

On one hand, it implies their involvement right from the start so as to enable them to participate in the different stages of policy formulation, implementation and evaluation. This entails more than providing them with a voice or asking for an opinion in the later stages as if what is expected is a validation of the decisions already taken by the public authorities.

On the other hand, due to their proximity to local communities, especially to the most disadvantaged and marginalized individuals and groups, information provided by NGO's on implementation or, in most cases, non-implementation of the Covenant, is of great relevance to the Committee that has for long recognized the fundamental contribution of civil society⁷.

7. On-going assessment, indicators and benchmarks

In relation to target groups most in need of protection, the core obligations of States are immediate and cannot be subject to the notion of progressive realisation without time bound measurable benchmarks that set the targets to be achieved and the economic and social measures to achieve them. Compliance with such obligations must also enable an on-going assessment that allows for corrections if the impact of the measures is not as expected. Of course, this can only be achieved through the meaningful participation of the affected groups themselves in the process.

⁶ CESC General Comment 10 (1998) on the role of national human rights institutions in the protection of economic, social and cultural rights

⁷ The Committee adopted a formal procedure for the participation of NGO's in its activities, during its 8th session, in 1993

The Indicators' Unit of the Office of the High Commissioner for Human Rights is developing lists of illustrative indicators (including MDG indicators) on some civil and political rights, as well as economic, social and cultural rights.

The contribution of the Committee to this issue is an on-going project to develop a set of indicators, for the time being, on the right to food, and then to engage in a scoping exercise in which both, the State party and the Committee, establish measurable benchmarks for 5 years. When the State party presents its report after the 5 year period, it has either achieved its benchmarks or it has failed to do so (and there could be acceptable reasons for that, or not).

8. Optional Protocol

The Optional Protocol to the ICESCR was adopted on 10th December 2008 by the General Assembly and it was indeed an important element of the celebration of the 60th anniversary of the Universal Declaration of Human Rights. So far it has been signed by around 30 States parties and we now need ratification by 10 for the OP to enter into force, providing for an individual complaints procedure that will really be a major step towards making the justiciability of economic, social and cultural rights a reality.

A final message...

Let me end with part of a quotation by Mary Robinson, former High Commissioner for Human Rights:

"I am not suggesting that human rights will provide the solution to massive and complex challenges. But human rights can, and must, be the compass that provides the moral, ethical and legal guidance to effective responses at every level"⁸.

While the common theme underlying experiences of deprivation is one of powerlessness, human rights can empower individuals and communities. The challenge is to connect the powerless with the empowering potential of human rights.

Virginia Bras Gomes / Instituto de Derechos Humanos "Bartolomé de las Casas"
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⁸ WDA (World Demographic Association) Newsletter. August 2008