

Socio-Economic Rights Project, CLC, UWC

**THE CONTEMPORARY PROTECTION OF ECONOMIC,
SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW**

A.G. Pillay

*Paper presented
at a colloquium 17 - 19 March 2002*

THE CONTEMPORARY PROTECTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN INTERNATIONAL LAW

A.G. Pillay

- Chief Justice of Mauritius and Member of the U.N. Committee on Economic, Social and Cultural Rights

People are beneficiaries of Covenant rights

The International Covenant on Economic, Social and Cultural Rights ("*the Covenant*") is a treaty or an agreement prepared by States and concluded among States which defines the concrete meaning of every economic, social and cultural right mentioned therein. The Covenant was adopted by the General Assembly of the United Nations in December 1966 and came into force in January 1976 after having been ratified by the prescribed number of States Parties.

It is, it must be stressed, the everyday people of States that have ratified the Covenant who benefit from it and derive enjoyment of those Covenant rights. Hence, the importance of ratifying the Covenant by all States.

The principal legal obligation of States Parties to the Covenant is to implement all its provisions at the national level and ensure the availability of effective remedies for victims of violations of their rights by all appropriate means i.e legislative, administrative, judicial, economic, social, educational and other measures.

Covenant rights which must be immediately implemented

Although there is an obligation on every State Party, individually or through international assistance and cooperation (article 2(1) of the Covenant), to take deliberate, concrete and targeted steps in order to move as expeditiously and effectively as possible towards the full realization of all Covenant rights, there are certain rights which, in the words of the Committee on Economic, Social and Cultural Rights ("*the Committee*"), "*would seem to be capable of immediate application by judicial and other organs in many national legal systems*" i.e. which are plainly and currently justiciable. These rights, which are non-limitative, include –

- (a) the guarantee that all the Covenant rights will be exercised, without discrimination of any kind, as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (e.g. age, physical or mental disability);
- (b) equal rights for men and women;
- (c) equal pay for equal work;
- (d) the right to form and join trade unions and the right to strike;
- (e) the right of children to special protection and assistance in respect of economic, social or other form of exploitation;
- (f) the right to free compulsory primary education;
- (g) the right to choose a private school for the education of one's children;

- (h) the right to establish schools of an appropriate minimum standard;
- (i) the freedom for scientific research and creative activity.

Duty to respect, protect and fulfil

Moreover, since the Covenant rights engender corresponding legal duties upon States Parties to protect against, prevent and remedy Covenant rights violations, States Parties in their capacity as duty-holders have the duty to respect, protect and fulfil their obligations under the Covenant. Thus, the obligation to respect requires that a State Party should refrain from taking measures that interfere with the enjoyment by its people of any of the Covenant rights. For example, the right to housing is violated if a government organization uses force to remove people from land or housing without following established legal procedures.

The obligation to protect requires a State Party to take all necessary measures that prevent third parties i.e private entities, including transnational corporations, or individuals from interfering with the enjoyment of the Covenant rights e.g. preventing mining companies from appropriating lands of indigenous people or failing to ensure that private employers comply with employment standards regarding safety at work.

The obligation to fulfil (facilitate) requires a State Party to take positive measures to enable a certain category of individuals and certain groups of people to enjoy the Covenant rights e.g. providing subsidies for housing, or low-cost housing to the low-income groups. Finally, the obligation to fulfil, i.e. provide a Covenant right by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of that right where an individual or group of people is unable, for reasons beyond his or its capacity, to realize that right, e.g. the disadvantaged and marginalized groups which include the poor, the homeless, people with disabilities, internally displaced people, refugees and indigenous people.

Core obligations

By the same token, according to the Committee, States Parties must implement minimum essential elements of each of the Covenant rights. *“Thus, for example, a State Party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter or housing or of the most basic forms of education is failing to discharge its obligations under the Covenant”*. In this regard, there is the particular duty imposed on States Parties to protect all the disadvantaged and marginalized groups.

In its subsequent Comments (Nos. 11,13 and 14), the Committee has elaborated on the core content of –

- (1) the right to adequate food (article 11 of the Covenant) which implies the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptance within a given culture and the accessibility of such food in ways that are sustainable and do not interfere with the enjoyment of other human rights;
- (2) the right to education (article 13 of the Covenant) which includes an obligation –
 - (a) to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis;
 - (b) to ensure that education conforms to the objectives set out in article 13(1) of the Cov-

enant;

- (c) to provide primary education for all in accordance with article 13(2) of the Covenant;
 - (d) to adopt and implement a national educational strategy which includes provisions for secondary, higher and fundamental education; and
 - (e) to ensure free choice of education without interference from the State or third parties, subject to compliance with minimum educational standards [Article 13(3) and (4) of the Covenant].
- (3) the right to health which includes an obligation –
- (a) to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for the disadvantaged and marginalized groups;
 - (b) to ensure access to the minimum essential food which is nutritionally adequate and safe and to ensure that no one suffers from hunger;
 - (c) to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water;
 - (d) to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
 - (e) to ensure equitable distribution of all health facilities, goods and services;
 - (f) to adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population; the strategy and plan of action shall be devised, and periodically reviewed, on the basis of a participatory and transparent process; they shall include methods, such as right to health indicators and benchmarks, by which progress can be closely monitored; the process which the strategy and plan of action are devised, as well as their content, shall give particular attention to all the disadvantaged and marginalized groups.

It is pertinent to note that a State Party cannot, under any circumstances whatsoever, justify its non-compliance with its core obligations under the Covenant, which are non-derogable, as opposed to its other general legal obligations. This means that those rights continue to exist, irrespective of the availability of resources of the State Party concerned, and even in situations of conflict, national emergency and national disaster.

International assistance and cooperation in fulfilling core obligations

In its General Comment No. 14, the Committee stresses that it is particularly incumbent on all those in a position to assist, to provide “*international assistance and cooperation, especially economic and technical*” to enable developing countries to fulfil their core obligations. Core obligations, therefore, give rise to national responsibilities for all States Parties and international responsibilities for developed States as well as those “*in a position to assist*”. Thus, it is imperative, for instance, for international financial institutions to adjust their structural adjustment policies and practices by taking into consideration issues of economic, social and cultural rights.

Legal obligation to submit periodic reports

There is also the legal obligation of States Parties to the Covenant to submit periodic reports to the Committee, according to specific reporting guidelines set out by the Committee, on measures adopted and on progress achieved in the enjoyment of Covenant rights by their

people and on any factors and difficulties affecting the degree of fulfillment of their obligations under the Covenant.

Monitoring implementation of all the Covenant rights

Who has the task of monitoring the implementation of all the Covenant rights? First of all, there is the Committee comprising of eighteen international experts nominated and elected by the States Parties themselves, according to the principle of geographic distribution, which meets in sessions twice a year to examine the reports submitted by States Parties and is serviced by the UN Secretariat.

Second, there are members of civil society, including non-governmental organizations, which help the Committee in its task by providing in-depth and up-to-date information about the Covenant rights situation on the ground in their country.

Third, the various organs of the State Party, namely the various Ministries and departments, the Courts and tribunals, members of the legal profession, the police, the prison officers and the statistical agencies continuously self-monitor the Covenant rights situation obtaining in the country and establish national systems for the protection of Covenant rights and for the provision of remedies to victims of Covenant rights abuses.

Reporting by State Party creates various opportunities

The legal obligation of State Parties to the Covenant to report to the Committee creates an opportunity for -

- (a) the State Party to undertake a comprehensive review of its national laws, regulations, domestic policies, standards and practices affecting all Covenant rights;
- (b) the State Party to target specific laws, regulations, domestic policies, standards and practices to the most disadvantaged and marginalized groups;
- (c) the State Party to publicise its efforts to protect, promote and fulfill Covenant rights by empowering people to know about and claim their rights;
- (d) the State Party to allow public scrutiny and supervision, at both national and international levels, of the respect for, and enjoyment of, Covenant rights in the country;
- (e) the regular monitoring by the Committee of the situation (i) on the ground in the State Party of Covenant rights and (ii) of the disadvantaged and marginalized groups, and for a review by the Committee of the strengths and weaknesses of the State Party in realizing all the Covenant rights;
- (f) establishing a basis for the assessment of any future progress made by the State Party;
- (g) facilitating –
 - (i) exchange of information among States Parties; and
 - (ii) international cooperation and assistance.

Main functions of the Committee

The main function of the Committee is to assist States Parties to understand the actual level of enjoyment of the Covenant rights in their countries and to improve their Covenant rights situation by –

- (a) reviewing their reports and answers to the list of specific issues, prepared by the Committee and addressing specific areas of concern, in a face-to-face constructive dialogue with their representatives;
- (b) issuing concluding observations and recommendations at the outcome of the State reporting process which focus public attention on shortfalls in compliance with Covenant obligations and identifying specific measures needed to improve implementation of Covenant rights;
- (c) contributing to the development and understanding of Covenant rights standards or benchmarks through the process of writing General Comments. These are commentaries on the nature of the obligations associated with each and every Covenant right; and
- (d) insisting on the State Party to take follow-up action with regard to its recommendations made in its concluding observations.

Cycle of review, planning and monitoring

As Professor A. Bayefsky has succinctly noted, the Covenant standards, the submission of reports by States Parties and the periodic dialogue are intended to progress at the national level from understanding and awareness of those standards to –

- (a) reviewing of enactments, policies and practices set against those standards;
- (b) planning concrete actions to improve the shortfalls revealed;
- (c) monitoring the implementation of those plans;
- (d) reporting and feedback from a dialogue with the Committee.

The reporting process thus provides the State Party, according to the Professor, with enhanced understanding of the Covenant standards and the cycle of review, planning and monitoring begins again with the follow-up action taken by the State Party.

Functions of the reporting process

Consequently, the reporting process –

- (a) enables a State Party to know its national situation insofar as the Covenant rights are concerned through review of its enactments, policies and practices and its effective data collection;
- (b) raises awareness of Covenant rights among all levels of society and enlists their assistance in the field of Covenant rights;
- (c) creates an opportunity for national dialogue among all sectors of civil society;
- (d) enables the State Party to benefit from the views and guidance of the Committee and from international cooperation and technical assistance.

The Draft Optional Protocol and the justiciability of Covenant rights

With regard to the draft Optional Protocol providing for individual and group complaints in relation to any alleged violations of Covenant rights, there is a Special Rapporteur who has been appointed to look into the matter. As indicated already, many elements of various Covenant rights are described with sufficient precision and clarity as to be amenable to judicial or quasi-judicial determination such as a Court, tribunal or other such adjudicating body. They correspond, or are correlated, to the core obligations undertaken by States Parties.

Consequently, it will be easy for the Committee, once a newly revised Optional Protocol is adopted, to adjudicate on any alleged violation of a Covenant right by an individual or group of people by expressing its views on the complaint.

Indeed if an Optional Protocol is adopted, it will go a long way not only to demonstrate, assuming there is such a need for this, that at least core obligations undertaken by States Parties to the Covenant are justiciable but also to enhance the justiciability of those obligations.