

## Domestic Law and the *Core Obligations* under ICESCR: Specific Reference to India

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### I. Introduction

International human rights law is often referred to in domestic and regional jurisprudence, either as the country in question is party to a specific instrument or additionally to add weight to the obligations already undertaken in the respective Constitution.<sup>2</sup> This includes provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and guidelines and concepts issued by the Committee on Economic, Social and Cultural Rights (CESCR) elaborating on the import of provisions or obligations of states parties. One instance is the concept of ‘minimum core’ obligations, set out by the CESCR in its General Comment 3 in 1990, which implies that states are under an obligation to at the very least ensure the satisfaction of minimum essential levels of each right.

### II. Core Obligations under ICESCR

In India, for instance, while this concept has not been unequivocally adopted and followed, in *Mohd Ahmed (Minor) v. Union of India* [decided 17 April 2014, Delhi High Court], the Court did observe that **minimum core obligations** on the right to health were not derogable, even while recognising the difficulties in defining this concept. But largely, it has been noted that any references to

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<sup>2</sup> In fact, the Constitution of South Africa (1995) requires under section 39, international law to be considered in interpretation of the Bill of Rights.

a minimum core in Indian jurisprudence have been implicit rather than explicit.<sup>3</sup>

Similarly a decision of a Belgian Court is also noted to have **'acknowledged a right to water of a specific minimum quantity'**.<sup>4</sup> Another jurisdiction which appears to have adopted this approach is Colombia where the Constitutional Court, recognising the progressive nature of economic, social and cultural rights, also recognised the need to **'at the very least devise and adopt a plan of action for the implementation of the rights'**.<sup>5</sup> On the other hand, the South African Constitutional Court in *Republic of South Africa v. Irene Grootboom*,<sup>6</sup> declined to adopt this concept due to lack of adequate information to define such minimum essential levels, adopting instead a 'reasonableness test'.

In other matters too, concepts/principles as elaborated by the CESCR have been taken account of in domestic courts. For instance, in *Jaftha v. Schoeman*,<sup>7</sup> in the context of the right to adequate housing, recognized but not at that point considered in any detail by the Court, note was taken of General Comment 4 of the CESCR and the need to give the right to housing not a restricted interpretation but instead one that implies **'the right to live somewhere in security, peace, and dignity'**.

The CESCR's emphasis on the notion of adequacy, and its determination by economic, social, cultural, climatic, ecological and other

factors, as well as on the security of tenure was also taken note of by the Court.

On the issue of forced evictions, the Delhi High Court in *P.K Koul v. Estate Officer and another* [decided 30 November 2010] noted the importance of General Comment 7, specifically security of tenure, and the gravity of the issue of forced evictions. Procedural protections identified by the CESCR, **to be given effect to in case of forced evictions, including adequate notice and genuine consultation** were taken note of in *Ajay Maken v. Union of India and others* [decided 18 March 2019, Delhi High Court].

Another concept adopted by the CESCR in its general comments is the **respect-protect-fulfil typology**.<sup>8</sup> For instance, General Comment 14 on the right to the highest attainable standard of health recognises that the right imposes three types or levels of obligations on states parties, namely, the obligation to respect (to refrain from interfering directly or indirectly with the enjoyment of the right to health), to protect (to prevent third parties from interfering with article 12 rights), and to fulfil (to adopt specific legislative, administrative, budgetary, judicial, and promotional measures towards the full realisation of the right to health).<sup>9</sup>

This typology has for instance been adopted in the South African Constitution, where section 7 (2) (Bill of Rights), specifically requires the state to 'respect, protect, promote

<sup>3</sup> George S. McGraw, 'Defining and Defending the Right to Water and its Minimum Core' 8(2) *Loyola University Chicago International Law Review* 127 (2011).

<sup>4</sup> *Id.* at 168.

<sup>5</sup> Malcolm Langford, 'Domestic Adjudication and Economic, Social and Cultural Rights' 6 (11) *Sur Revista Internacional de Derechos Humanos* (2009).

<sup>6</sup> (2001) 1 SA 46 (CC).

<sup>7</sup> (2005) 2 SA 140 (CC)

<sup>8</sup> This typology was proposed by Henry Shue, and developed further by Asbjørn Eide, and adopted by the CESCR.

<sup>9</sup> E/C.12/2000/4 (11 August 2000), para 33.

and fulfil the rights in the Bill of Rights'. It is also seen reflected for instance, in the preamble and section 2 of the National Health Act, 2003 in South Africa. While not in its specific provisions, the Humans Rights Act, 2004 of the Australian Capital Territory is subtitled, '**an Act to respect, protect, and promote human rights**'. Respecting, promoting, and protecting human rights has been set out as being the duty of the National Human Rights Commission under the Nepalese Constitution of 2015.<sup>10</sup> A draft National Health Bill proposed in India in 2009 also incorporated this typology in clause 7 requiring the government to meet obligations to respect, protect and fulfil, incorporating the meanings of these obligations as set out in General Comment 14. This Bill also incorporated the standards of acceptability, availability, accessibility and quality, also elaborated upon in General Comment 14 as well as other general comments of the CESCR in the context of economic, social and cultural rights (for instance, General Comment 12 of the Right to Adequate Food<sup>11</sup>).

Thus, concepts and standards proposed or adopted by the CESCR are being referred to at the domestic level, either in the form of incorporation of specific standards in constitutions and legislation or by courts in their decisions concerning these rights where these standards are referred to in order to determine or add support to state obligations.

But it must be noted that such influence on jurisprudence and legislation is not confined to one direction (international to nation); rather it can be said to be mutual with international, regional, and domestic systems influencing

and drawing support from concepts and standards set out; for instance, the concept of reasonableness in South African jurisprudence is reflected in the provisions of the Optional Protocol to the ICESCR [article 8(4)], which incorporates the same.

### III. ICESCR Committee and Indian Jurisprudence

India being a party to the ICESCR, its provisions as well as the work of the Committee on Economic, Social and Cultural Rights (CESCR) have been referred to by courts as well as other bodies in their decisions/reports.

The Indian Supreme Court has referred in various decisions to relevant provisions of the ICESCR among other international instruments in considering matters concerning economic and social rights; for instance, article 11 of the ICESCR was referred to in *Chameli Singh v. State of U.P.* [AIR 1996 SC 1051], in the context of the right to an adequate standard of living, also noting the obligation of states parties to take appropriate steps for the realisation of the right; this provision was also referenced in *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan* [(1997) 11 SCC 121]. Both these matters were concerned with the right to shelter.

As far as concerns the contributions of the CESCR, courts in India have referred to general comments issued by the committee for the purpose both of considering obligations of states thereunder, as well as in the context of elaborating on certain provisions. In *National Legal Services Authority v. Union of India and Others* [decided 15 April 2014, Supreme Court

<sup>10</sup> Article 249, Constitution of Nepal.

<sup>11</sup> E/C.12/1999/5 (12 May 1999).

of India], concerned with the rights of the transgender community, the 2009 report of the Committee on Economic, Social and Cultural Rights was referred to in the context of its observations on gender orientation and gender identity that these aspects should not be grounds for discrimination or barriers to the realisation of ICESCR rights.

Another instance, *Mohd Ahmed (Minor) v. Union of India* [decided 17 April 2014, Delhi High Court] was a matter concerned with the right to health wherein a minor suffering from Gaucher disease, a chronic and rare disease, and whose parents belonged to the economically weaker sections, sought medical treatment. His situation had a positive prognosis but the cost of treatment was around rupees 6 lakhs per month. In considering the matter, besides constitutional provisions, the court also referred to General Comment 14 of the CESCR, specifically the issue of the 'highest attainable standard of health' which in its view referred both to biological and socioeconomic preconditions of the individual as well as resources of the state, and the aspects of availability, affordability, accessibility, and quality. The Court also took note of General Comment 3 of the CESCR and the minimum obligation recognised thereunder to provide minimum essential levels of each right. While it did not make any specific observation as to the applicability of the general comments, it did observe that article 21 was to be interpreted in accordance with the ICCPR, India being a signatory to the same, and went on to reaffirm the right to health and access to healthcare as well as to quality healthcare. Another important aspect of this decision is as regards core obligations on the right to health, which the court held to be non-derogable. It acknowledged the difficulties in defining the minimum core but at the same time held it to

include 'the minimum decencies of life consistent with human dignity'. It was also of the view that the government cannot plead financial constraints to not fulfil its obligation to ensure access to medicines or to adopt a plan of action for treatment of rare diseases nor to 'wriggle out of its obligation' to ensure access to healthcare to the vulnerable and marginalized sections. It may be noted here that this position contrasts with the approach of the South African Constitutional Court which declined to use the concept of 'minimum core'. While in the Indian context too, the concept has not been frequently brought up or used, the observations of the Delhi High Court in this instance would indicate that this may be considered and applied in the future.

The concept of 'minimum core' was also taken note of in *Laxmi Mandal v. Deen Dayal Harinagar Hospital* [decided 2 June 2010, Delhi High Court], where the court was of the view that the Supreme Court in *PUCL v. Union of India* [CWP 196/2001] had spelled out the minimum core of the right to health and food in terms of the 'obligations of conduct' and 'obligations of result' of the centre, state and UT governments.

Another instance where general comments were referred to by the Delhi High Court was more recently in 2019 in *Ajay Maken v. Union of India and others* [decided 18 March 2019, Delhi High Court], a matter concerned with forced evictions of about 5000 persons living in a JJ basti in Delhi. Noting that the General Comments of the CESCR explain the substantive and procedural aspects of the ICESCR, the Delhi High Court, took note, in particular, of General Comment no 4 as to the various aspects of the right to housing including security of tenure; availability of services, materials, and facilities; affordability;

accessibility; habitability; location; and cultural accessibility. The indivisibility of all rights was also considered to observe that the right to housing cannot be viewed in isolation from other rights. Reference was also made to General Comment 7 on forced evictions to take note of the definition of the expression by the CESCR, which essentially covers situations of permanent or temporary removal of persons from the homes or land occupied by them without consent and without appropriate legal and other protections, when carried out otherwise than in accordance with law. The court also stressed on the procedural protections applicable in such situations such as adequate and reasonable notice, opportunity for genuine consultation, requirement of presence of government officials, and other conditions as to timing, etc., besides provision of legal remedies.

An earlier decision of the Delhi High Court also concerned with housing, *Sudama Singh v. Government of Delhi and Another* [decided 11 February 2010, Delhi High Court], the Court looked into the Concluding Observations of the CESCR on India which specifically raised the issue of the need for a National Housing Policy in the Country and the issue of acute shortage of housing in the country and recommended implementation of the laws and regulations concerned with forced evictions so as to ensure provision of either compensation or alternative accommodation to those displaced, and the requirement of open, participatory and meaningful consultations with those impacted prior to undertaking such evictions.

Besides the judiciary, the Law Commission of India in its 223<sup>rd</sup> report, 'Need for Ameliorating the Lot of the Have Nots' [2009] also considered the work of the

CESCR, particularly its definition of poverty, 'as human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.

**Thus the work of the ESSCR, be it in terms of definitions or concepts proposed, guidelines laid out, or observations specific to India have been taken into account by the judiciary as well as bodies such as the Law Commission of India, in the process at least of considering or interpreting constitutional provisions.**

#### IV. Readings

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