

Challenges in the Implementation of Economic, Social & Cultural Rights:
CESCR Jurisprudence, May/2020
Dr. Mallika Ramachandran

Challenges in the Implementation of Economic, Social & Cultural Rights: CESCR Jurisprudence

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I. *Introduction*

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force in 1976, and for the first few decades of its operation, the system of periodic reports by states parties envisaged in article 16 of the ICESCR was the only mechanism for monitoring compliance by states parties. This mechanism too

was seen as weak, but underwent improvements after the establishment of the Committee on Economic, Social and Cultural Rights (CESCR) in 1986 which has issued general comments elaborating the content of the rights and obligations of parties, and also played a role in monitoring reports in an in depth manner. Only in 2008, when the Optional Protocol to the ICESCR was adopted, **overcoming various objections to the enforceability of these rights including on issues of vagueness, non-justiciability, and resource issues, were other forms of monitoring compliance including individual communications introduced to this system.** The Protocol came into force in 2013 and consideration of complaints commenced.

One of the issues that can be identified in the context of the effective implementation of the complaints procedure under the ICESCR is the number of parties to the protocol. **While the ICESCR has 170 parties, the Optional Protocol to the ICESCR which contains among others, the individual communications procedure has only 24 parties as of April 2020 [In**

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contrast, the International Covenant on Civil and Political Rights (ICCPR) has 173 parties and its Optional Protocol containing an Individual complaints mechanism has 116 parties]. Therefore, individual communications can be received only in respect of a limited number of states parties.

A study by Claire Callejon, Kamelia Kamileva, and Felix Kerschmeir² highlights some of the challenges faced in the context of individual communications procedures under treaty bodies. **One major issue is the lack of awareness and access to information about the very existence of the forum, and procedures to be followed by people even in countries that are parties, which is worsened by the lack of transparency in available information regarding communications received and registered.** Furthermore, access to the jurisprudence of treaty bodies has been seen as a challenge not only for people in general, but all stakeholders from

² Callejon, Kamelia Kamileva, and Felix Kerschmeir, 'Treaty Bodies' Individual Communication Procedures: Providing Redress to Victims of Human Rights Violations', The Geneva Academy of International Humanitarian Law and Human Rights Law (May 2019), <https://www.geneva-academy.ch/joomlatools-files/docman->

victims to states to human rights mechanisms and researchers.

Unlike decisions of national courts, upon conclusion of proceedings before treaty bodies, even if a violation or breach is found, the body in question, including the CESCR can make recommendations on which the state party is to submit a written response, while the CESCR may call for further follow-up information to be included in state reports.³ However, these recommendations not being binding in nature, the implementation comes under question, and may pose a challenge in the success of the entire process.

In this regard, the study by Callejon, Kamileva, and Kerschmeir⁴ suggests highlighting of the positive impacts of the communications process such as remedying of the situation by the party in question, in some instances even before the recommendations of the treaty body in question.

The role of indirect stakeholders such as non-governmental

[files/UN%20Treaty%20Bodies%20Individual%20Communications.pdf](https://www.unhcr.org/refugees/files/UN%20Treaty%20Bodies%20Individual%20Communications.pdf) (accessed 7 May 2020)

³ Article 9, Optional Protocol the International Covenant on Economic, Social and Cultural Rights, 2008.

⁴ *Supra* note 11 at 24.

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organisations (NGOs) and national human rights institutions is also seen as important in raising awareness and providing legal advice besides also disseminating decisions.⁵ Moreover, they also play an important role in the provision of information. As compared to other treaty bodies, the CESCR is in fact one of the first to formally receive documentation and verbal submissions from NGOs.⁶

Structural issues such as a limited support capacity are also seen as an impediment to the effective implementation of the communications process as well as the fact that treaty bodies are part-time bodies meeting only for limited periods in a year.⁷ With consideration of country reports, issuance of general comments and individual communications besides other mechanisms incorporated in the Optional Protocol such as suo motu investigations and inter-state communications, the workload of the CESCR is also an aspect that needs to be given attention.

Thus various issues from the limited number of signatories to possibilities of enhanced workload with enhancement of the CESCR's functions and number of signatories besides issues of adequate awareness and dissemination of information as well as issues of implementation can hinder the effective functioning of the communications process.

II. CESCR Jurisprudence on Climate change, Corruption, and Resource Scarcity

Issues such as climate change, corruption, and scarcity of resources can all be seen as challenges or impediments to the realisation of human rights, including economic, social and cultural rights, and addressing these issues becomes crucial in order to ensure effective realisation of these rights. And in fact, in the course of its work, **the issues have been addressed by the CESCR as part of its statements, general comments, as**

⁵ *Id.* at 27–28.

⁶ Audrey R. Chapman, 'A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural

Rights", 18 *Human Rights Quarterly* 23, 41 (1996).

⁷ *Id.* at 38.

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well as concluding observations on state reports, whereby these issues are not only taken into account but recommendations made toward ensuring that their negative impacts can be mitigated.

a. Climate Change

Climate Change has been seen as the ‘defining issue of our time’⁸ and is one of the most significant challenges facing us in the current context. While not expressly covered in the provisions of the ICESCR, **climate change is an issue that has been addressed by the CESCR in its functioning.** On 16 September 2019, a joint statement was issued by five treaty bodies, among them the Committee on Economic, Social and Cultural Rights (CESCR) on ‘Human Rights and Climate Change’. This statement, inter alia, referred to the earlier statement of the CESCR on Climate Change and the International Covenant on Economic, Social and Cultural Rights of 2018 which **stressed on the importance of the role of human rights mechanisms in ensuring that states avoid taking measures that**

accelerate climate change as well as dedicate maximum available resources towards combating climate change.

The 2019 Statement also emphasized the role of women, children and other vulnerable groups as agents of change rather than merely as victims, as well as state obligations to take steps to reduce emissions, phase out fossil fuels, address effects of climate change, environmental degradation etc., as well as the need to address discrimination and phenomena such as migration which can be a consequence of climate change.

On the issue of climate change in the work of the CESCR, Marcos A Orellana, Miloon Kothari, and Shivani Choudhary⁹ highlight various general comments, including General Comment 15 on the Right to Water which talks inter alia, of strategies to be adopted by states parties to assess impacts of actions that may impact upon water availability and natural ecosystems watersheds such as climate change, desertification, etc.; General Comment 14 on the right to health which refers to the promotion of conditions enabling people to lead a

⁸ <https://www.un.org/en/sections/issues-depth/climate-change/>.

⁹ Marcos A Orellana, Miloon Kothari, and Shivani Choudhary, ‘Climate Change and the

Work of the Committee on Economic, Social and Cultural Rights’, Friedrick Ehburt Stiftung, Housing and Land Rights Network, and CIEL (May 2010).

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healthy life including a 'healthy environment'; the issue of food availability in General Comment 12 which stresses the link between sustainability and food security wherein adequacy of food is determined by various conditions including social, economic, cultural, climatic, ecological and other conditions; and General Comment 4 on the right to housing wherein once again adequacy of housing requires consideration of social, economic, cultural, climatic, ecological and other conditions.

Such reference to climate change and environmental issues is not confined only to its General Comments but also its concluding observations on state reports such as its 2008 observations on Ukraine welcoming its adoption of legislation implementing the Kyoto Protocol and UNFCCC, 2009 observations on Australia raising concerns on the negative impact of climate change on the adequate standard of living, among others and recommending that the party intensify efforts to address climate change; and its 2009 observations on Cambodia

welcoming their adoption of a carbon credits project.¹⁰ Again in its 2019 observations on Mauritius, the CESCR took note of the country being prone to natural calamities and recommended better disaster preparedness.¹¹

Climate change has also been addressed or taken account of in statements issued by the CESCR, for example on the World Food Crisis in 2008 [E/C.12//2008/1, 20 may 2008] wherein it urged states parties to implement strategies to combat climate change that promote sustainable agriculture and do not negatively impact the right to adequate food and freedom from hunger. Its statements issued prior to the World Summit on Sustainable Development [2002], and to the Third Ministerial Conference of the WTO [1999] also speak of environmental concerns.

In 2018, as mentioned a statement was released by the CESCR on '**Climate Change and the International Covenant on Economic, Social and Cultural Rights**' [8 October 2018]¹² wherein welcoming the report of the IPCC on the impacts of global warming, it discussed the human rights impacts of climate change, particularly

¹⁰ *Id.*

¹¹ E/C.12/MUS/CO/5 (5 April 2019).

¹²

<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E>

[es/DisplayNews.aspx?NewsID=23691&LangID=E](https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E)

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on ICESCR rights including on **possible losses of life as a consequence, and impacts on nutrition, access to livelihood, poverty, and basic rights of food, water and sanitation.** It reiterated that any failure to prevent foreseeable human rights harms caused due to climate change or to mobilise maximum available resources to do so would constitute a breach of obligations. It was further observed that states parties should adopt measures to adapt to the negative consequences of climate change and integrate the same in existing social, economic, and budgetary policies, besides other steps such as facilitating transfer of green technologies and contributions to the green fund. The role of human rights mechanisms in ensuring that states avoid measures that accelerate climate change was also emphasized. It also stated that in its future work, it would keep under review the impacts of climate change on economic, social and cultural rights and provide guidance to states parties on discharging their duties under the ICESCR as concerns the mitigation of climate change.

b. Corruption

Corruption is another important issue as far as concerns human rights as it is an impediment to the enjoyment of rights. Peters¹³ points out that in practice, social rights are most impacted by corruption, especially petty corruption, for instance the impact on the right to health of corruption in the health sector. As is the case with climate change, corruption is thus an issue that the Committee on Economic, Social and Cultural Rights (CESCR) considers in its work. In fact, among the UN treaty bodies, it has been noted that the CESCR appears to be the one that addresses corruption the most, with 63 out of 139 state report reviews (45.3%) broaching the subject.¹⁴ For instance, in its 2020 CONCLUDING OBSERVATIONS ON UKRAINE, the CESCR commended the party on its establishment of a National Anti-Corruption Bureau and High Anti-Corruption Court, but expressed concern over the persistently high levels

¹³ Anne Peters, 'Corruption as a violation of International Human Rights' 29(4) *European Journal of Human Rights* 1251–87 (2018).

¹⁴ <https://www.universal-rights.org/blog/how-un-treaty-bodies-can-better-address-corruption-and-its-negative-impact-on-human-rights/>

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of corruption in the country and recommended inter alia, that the state party ensure implementation of anti-corruption laws, enhance the independence of the judiciary, and ensure effective implementation of whistleblower protection.¹⁵

Similarly, it welcomed the establishment of the Anti-Fraud and Corruption Office by *Senegal*.¹⁶ Recommendations were also made in its Concluding Observations on *Kazakhstan* to the state to intensify its efforts in combatting corruption and submit information concerning a complaint regarding the impact of corruption on the enjoyment of economic, social and cultural rights.¹⁷

Besides these observations, in its General Comment 24 on **'State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities'**,¹⁸ it specifically recognised that 'Corruption causes one of the most important obstacles to the

effective protection and promotion of human rights, particularly as regards the activities of businesses'.¹⁹ In the CESCR's view, **its impacts include undermining the state's ability to mobilise resources, and discriminatory access to public services.** It recommended thus that specialised mechanisms to address corruption be established and whistleblowers be protected.

c. Resource Scarcity

The ICESCR in article 2 requires states parties to 'take steps' to the 'maximum of [their] available resources' towards progressively achieving the full realisation of the rights in the Covenant. Thus resources considerations are essential when assessing a state party's fulfilment of obligations under the covenant. The expression 'maximum available resources' has been said to incorporate both idealistic and realistic aspects in the use of the terms 'maximum' and 'available', respectively.²⁰ In a

¹⁵ See E/C.12/UKR/CO/7 (2 April 2020).

¹⁶ See E/C.12/SEN/CO/3 (13 November 2019).

¹⁷ See E/C.12/KAZ/CO/2 (29 March 2019).

¹⁸ See E/C.12/GC/24 (10 August 2017).

¹⁹ See E/C.12/GC/24 (10 August 2017), para 20.

²⁰ Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing

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statement issued in 2007 on an 'Evaluation of the Obligation to Take Steps to the Maximum of Available Resources' issued for clarity in view of the optional protocol (at that point in the process of drafting), the CESCR clarified both the evaluation of adequacy of steps taken and the plea of financial constraints. As to the latter, it was clarified that criteria taken into account would include the level of development of the country, the severity of the breach, the economic situation in the country, whether other serious claims exist on the state's resources, whether low cost options were sought to be identified by the state, and its conduct in terms of seeking cooperation or response to offers of assistance from the international community.²¹

In its *Concluding Observations* on Cameroon in 2019, it expressed concern on the country's dependence on **international assistance to the detriment of the mobilisation of domestic resources and made recommendations in this regard.** It

also expressed concern over the lack of adequate personnel, infrastructure and medical supplies towards realisation of the right to health.²² Similarly in its observations on Mali, despite recognising issues of security, climate change, and poverty, it expressed concern on limited mobilisation of domestic resources towards realisation of economic, social and cultural rights.²³ In the case of Cyprus, where an economic crisis had led to austerity measures, the CESCR still expressed concern over decrease in public spending on areas such as social protection, housing, health and education, which disproportionately impacted marginalised groups and recommended both gradual phasing out of austerity and restoration of pre-crisis levels of public services and social benefits.²⁴

From its statement and concluding observations, it is seen that while resource constraints, claims on a state's resources, and the economic status of a country are considerations

Economic, Social, and Cultural Rights", 16 *Human Rights Quarterly* 693, 701 (1994)

²¹ E/C.12/2007/1 (10 May 2017).

²² E/C.12/CMR/CO/4 (25 March 2019).

²³ E/C.12/MLI/CO/1 (6 November 2018).

²⁴ E/C.12/CYP/CO/6 (28 October 2016).

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taken into account when assessing a state's fulfilment of its obligations, and international assistance and cooperation is also encouraged by the CESCR, it emphasizes more on mobilisation of domestic resources, and on maximum spending within existing constraints so as to ensure availability of economic, social and political rights.

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