



INTERNATIONAL  
COMMISSION  
OF JURISTS

**ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND  
THE NEW CONSTITUTION OF NEPAL**

**AUGUST 2009**

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## ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE NEW CONSTITUTION OF NEPAL

The present constitution drafting process offers a unique opportunity for Nepal to demonstrate commitment to realize all human rights, including by incorporating economic, social and cultural (ESC) rights in the highest law of the land. By ensuring that the economic and social rights of all Nepalis are guaranteed, and the interests of marginalized and disadvantaged groups are protected in the new Constitution, the government will fulfill the aspirations of Nepalese people for economic and social justice voiced during the *Jana Andolan II*. Constitutionalisation of ESC rights as fundamental rights provides a framework of social justice, which will not bankrupt the government, but will ensure consistency of governmental policies with fundamental human rights, thereby enhancing rule of law and redressing social injustice.

The ICJ supports the constitution-making process under way. Nevertheless, if ESC rights were not to be integrated in the constitution on an equal footing with civil and political (CP) rights, such negative signals would be highly detrimental to the full realization of all human rights. They would also be widely regarded as a retrogressive step and one which contravenes the existing obligations of Nepal under the International Covenant on Economic, Social and Cultural Rights.

This paper analyzes the critical importance of ESC rights for Nepalese society, and advantages of their constitutionalisation as fundamental rights. It summarizes and explains the basic legal framework of ESC rights with a view to addressing a part of the existing information gap, and answering the most common questions that have been raised in Nepal in the course of the drive to incorporate ESC rights in the new Nepalese Constitution. The objective is to demonstrate why ESC rights, which reflect the fundamental needs and aspirations of the majority of Nepal, should and can receive constitutional entrenchment, including protection through judicial review.

Part I discusses the importance of ESC rights for Nepal, and their inclusion as fundamental rights in the new Constitution; part II highlights the advantages of constitutionalisation of ESC rights as fundamental rights, as opposed to directive principles; part III summarizes and explains the basic legal framework of ESC rights; part IV scrutinizes the obligations of state emanating from ESC rights; part V discusses some of the landmark cases demonstrating the justiciability of ESC rights; and part VI outlines sample model constitutional text for ESC rights.

### I. BACKGROUND AND CONTEXT

Nepal is currently undergoing an historic transition from a monarchy to a democratic federal republic. The government, through an elected Constituent Assembly (CA), is tasked with drafting a permanent constitution. Despite numerous challenges and obstacles, this is a time of great hope and expectation for the country.

#### *Why are economic, social and cultural rights important for Nepalese society?*

Centuries of entrenched practices of discrimination and exclusion of disadvantaged groups in Nepal, including women, *Dalits*, indigenous and ethnic (*Janajatis*) peoples, and *Madhesis*, have led to a demand to bring about greater inclusion, and ensure greater justice through a human rights framework. Analysts argue that the conflict in Nepal was

partly rooted in socio-economic and cultural inequalities resulting from the state's failure to ensure and protect ESC rights. In this manner, denial of equal access to socio-economic opportunities and development directly contributed to the recent armed conflict.<sup>1</sup>

Social exclusion, discrimination, violence, structural inequalities, corruption, and lack of political will are among the major barriers to the realization of ESC rights in Nepal.<sup>2</sup> For many Nepalese communities the most important constitutional reforms needed pertain to basic quality of life concerns, including livelihood, food and water, health, housing and education. This is due to the extreme poverty and underdevelopment experienced by much of the population. Nepal ranks 145 out of 179 countries according to the UNDP Human Development Index. The adult literacy rate is 48.6 per cent; life expectancy is 61.3 years; the mortality rate for children under five years is 74 per 1000 live births (compared to 6 per 1000 in the UK); 48 per cent of children are underweight for their age: only 11 per cent of births are attended by skilled personnel.<sup>3</sup>

The aspirations of Nepalese people shown in the *Jana Andolan II* were not only for a change in government but also for the strengthening of a human rights culture, including economic and social justice.<sup>4</sup> This is reflected in human rights terms in the Comprehensive Peace Agreement of 12 November 2006 that ended the conflict between the Government of Nepal and the Communist Party of Nepal (CPN-Maoist), wherein the parties undertook "to create an environment where the Nepali people can utilize their civic, political, economical, social and cultural rights and are committed to create an environment in which these rights will not be violated in the future under any circumstances."<sup>5</sup>

One of the crucial factors that will determine the success of this endeavour is the need to address problems of disadvantaged, marginalised and minority groups by ensuring that their voices are heard and their interests protected in the new federal and legal structures. This can be achieved by incorporating legal provisions into the constitutional and legislative framework aimed at addressing social injustice and ending discrimination based on class, caste, language, gender, culture, religion or region.

The present constitution drafting process offers a unique opportunity for Nepal to demonstrate commitment to realize the rights of all Nepalis, including by addressing poverty and social exclusion by incorporating ESC rights in the highest law of the land. It also provides an opportunity to harmonize its domestic legal framework with international obligations. Nepal is a state party to a number of international treaties containing obligations aimed towards the realization of ESC rights. These treaties, include the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the rights of the Child, the Convention on the Elimination of Discrimination against Women and eleven International Labour Organisation (ILO)

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<sup>1</sup> *Status and Trends: Economic, Social and Cultural Rights in Nepal*, Review Period: January 2001 to March 2007, A Civil Society Report, 38<sup>th</sup> Session of the United Nations, Committee on Economic, Social and Cultural Rights, April 2007, prepared by Human Rights Treaty Monitoring Coordination Committee Nepal.

<sup>2</sup> *Ibid.*

<sup>3</sup> UNDP Human Development Report 2007/2008, at: <http://hdr.undp.org/en/reports/global/hdr2007-2008/>. Also see, IDEA, *Creating the New Constitution: A Guide for Nepali citizens*, 2008, Yash Gahi and Jill Cottrell (eds.), p.127.

<sup>4</sup> UNDP, *Human Rights, Diversity and Social Justice*, Report of the conference organized by the Constitution Advisory Support Unit, 29-30 April 2007, Nepal.

<sup>5</sup> The CPA article 7.1.2. Also see section 7.5 committing the parties to socio-economic rights, including freedom to practice any profession, right to food security, health, and education. Available at: <http://nepembseoul.gov.np/doc/nov21.doc>.

conventions.<sup>6</sup> It is therefore entrusted with obligations to adopt provisions and measures to realize ESC rights under these instruments.

### ***Why recognize economic, social and cultural rights as fundamental rights in Nepal's constitution?***

At the World Conference on Human Rights in Vienna in 1993, all states affirmed that all human rights are universal, indivisible and interdependent and interrelated. Since that time, many states and other international actors have made it a priority to place ESC rights on an equal footing with CP rights. An important means of achieving this parity is to ensure that all rights are recognized under the constitution or basic laws of the concerned state.

Economic, Social Cultural rights are elements of social justice. They establish a favorable legal and policy environment for achieving progress and enable citizens to petition their government. These rights were included in Nepal's 1990 Constitution as unenforceable directive principles of state policy, and later recognized as fundamental rights in the Interim Constitution of 2007.

The preamble of the 1990 Constitution referred to 'social justice' and article 18 recognized certain cultural and educational rights. However, other ESC rights were excluded from the purview of fundamental rights and instead incorporated within the directive principles under Part IV. No legal remedy was available to implement these provisions as the constitution expressly stated that these 'principles and policies shall not be enforceable in any court.'<sup>7</sup>

The Interim Constitution of 2007 adopts a more progressive approach, proclaiming the 'right to dignified life' and guaranteeing as 'fundamental rights' rights to basic health services, education (including free education up to the secondary level), language and culture, employment and social security, food and property.<sup>8</sup> It also includes,

- the right to social justice for economically, socially, and educationally marginalized groups, including women, *Dalits*, indigenous and ethnic groups, *Madhesis*, poor farmers, and workers;
- free legal aid to the poor;
- the rights of women, including reproductive health; the right against physical and mental violence against women; equal rights of sons and daughters to property and inheritance;
- the rights of children, including rights to subsistence, basic health, and social security; protection against exploitation as well as special measures for children who are orphans, homeless, displaced, or victims of conflict.<sup>9</sup>

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<sup>6</sup> International Covenant on Economic, Social and Cultural Rights, UN Doc. A/RES/2200 A (XXI), (1966), and in force from 3 January 1976. Nepal is party to the following ILO Conventions: Weekly Rest (Industry) Convention, 1921, Forced Labour Convention, 1930, Right to Organise and Collective Bargaining Convention, 1949, Equal Remuneration Convention, 1951, Abolition of Forced Labour Convention, 1957, Discrimination (Employment and Occupation) Convention, 1958, Minimum Wage Fixing Convention, 1970, C138 Minimum Age Convention, 1973, Tripartite Consultation (International Labour Standards) Convention, 1976, Indigenous and Tribal Peoples Convention, 1989, Worst Forms of Child Labour Convention, 1999.

<sup>7</sup> See IDEA, *op. cit.* n.3.

<sup>8</sup> *Ibid.*

<sup>9</sup> Articles 16 to 22, 29 and 30 of the Interim Constitution of Nepal, 2007, available at: <http://www.undp.org.np/constitutionbuilding/constitutionnepal/interim.php>.

However, the Interim Constitution does not fully guarantee ESC rights, as these rights are subject to 'laws' that have not yet been adopted. For example, according to article 16(2) 'Every citizen shall have the right to get basic health service free of cost from the State as provided for in the law.'<sup>10</sup> In the absence of such provision in the law, implementation remains uncertain. Further, some ESC rights remain only as non-enforceable directive principles of state policy, such as the 'policy of establishing the rights of all citizens to ... housing', or the special provision for women for their education, health and employment.<sup>11</sup> The provision ensuring non-enforceability weakens protection for these rights. Rights constitute hard legal obligations, not mere policy prescriptions and it is a general principle of law that established rights must be accompanied by an effective remedy for violations.

It is important to note that constitutional recognition is only the first step in realizing ESC rights. Full realization of these rights requires action by the political and judicial branches of government, including the enactment of legislation addressing more specific elements correlative to the core obligation. It also requires incorporation into overall state law and policies of a 'rights-based approach', including special laws and policies to address the needs of socio-economically marginalized sections of the society. Appropriate laws, policies, and institutions must be in place to ensure that constitutional provisions are implemented.<sup>12</sup>

## II. CONSTITUTIONALISATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS – AN OVERVIEW

### *What are the advantages of constitutionalising economic, social and cultural rights as fundamental rights?*

ESC rights, like CP rights, are not merely political goals and aspirations. Rather, they flow from hard legal obligations, engaging the responsibility of the entities bound by those obligations, including states, intergovernmental organizations and global actors. There is a growing practice around the world that ESC rights should appropriately be incorporated as fundamental rights in states' constitutions.<sup>13</sup>

Constitutional recognition of ESC rights requires domestic law to respect and conform to the rights, and to provide for judicial remedies. It also provides a safeguard against the withdrawal of these fundamental rights for reasons of political expediency, a risk to which ordinary legislation may be prone.<sup>14</sup> Recognition of ESC rights as fundamental rights within the provisions of the constitution affords protection and the strongest possible basis for enforcement.<sup>15</sup>

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<sup>10</sup> Similarly see, the rights to education, and social security under articles 17 and 18 of the Interim Constitution, *ibid*.

<sup>11</sup> Articles 33(h) and 35(8) of the Interim Constitution, *ibid*. Also see, IDEA, *op. cit.* n.3.

<sup>12</sup> Jill Cottrell, UNDP, *op. cit.*, n.4, p.67.

<sup>13</sup> Economic, Social and Cultural Rights are widely recognized in numerous domestic legal systems, including for example, explicitly in the national constitutions of South Africa, India, Finland, Portugal, Kenya, Uganda, Cuba, Thailand, Indonesia, Brazil, Argentina, Cambodia, Sri Lanka, Bangladesh and South Korea.

<sup>14</sup> In most countries, in comparison to ordinary legislation, modifying the constitution requires special procedures, which ensures greater permanency. See Leibenberg, S., in Eide, A. et al (eds.), *Economic, social and cultural rights: a textbook*, second revised edition, (The Hague, Kluwer Law Journal, 2001).

<sup>15</sup> OHCHR report, Economic and Social Council, Substantive Session of 2006, E/2006/86, 21 June 2006, paras. 18-22, p. 7.

Inclusion of ESC rights in the constitution will also help reinforce a fundamental principle of international human rights law, the interdependence of human rights.<sup>16</sup> Such an approach will give clear expression to the premise that civil, cultural, economic, political and social rights are of equal status and importance. If Nepal were to constitutionalise only CP rights but treat ESC rights as non-justiciable, it could signal a devaluation of ESC rights by Nepal. The interests of marginalized groups lies in entrenching ESC rights in the legal framework and working to ensure that these rights are implemented in government policy and practice aimed at ending social exclusion and deprivation.

### ***What are the main concerns against constitutionalising economic, social and cultural rights?***

Many of the traditional arguments against recognizing the legal and policy status of ESC rights stem from ideological concerns rather than practical considerations and are rapidly becoming discredited. One common misperception is that ESC rights are strictly 'positive rights' requiring the states to undertake positive actions contingent upon available resources. They are contrasted to absolute CP rights, which are seen as nearly costless, requiring the state only to refrain from interfering in the lives of its citizens. In this view, ESC rights give rise to no obligations susceptible to enforceability and thus are not capable of adjudication in the same manner as CP rights.<sup>17</sup>

This conception profoundly misunderstands the nature of both sets of rights. A more accurate way to understand these obligations is to consider that both categories of rights create both positive and negative obligations. They also require realization on three levels: to respect, to protect and fulfill. (see page 10 below) In respect of civil right to a fair trial, for example, an effective justice system cannot be ensured without the state providing adequate resources to establish a functioning court system and to appoint judges and prosecutors. Similarly, it is clear that ESC rights will also impose negative obligations as part of the obligation "to respect", for example, prohibiting governments from depriving a particular community of access to health care or housing on a discriminatory basis or taking measures resulting in the destruction of health, education, housing infrastructure. The idea that CP rights are 'cheaper' and require less resources from the state is also misleading. Fulfilling the right to vote is expensive, as is respecting the right to a fair trial.

Another argument refers to the vague or unclear nature of ESC rights as compared to CP rights. While not all ESC rights are equally clearly defined in full scope and content in human rights treaties, the same condition applies to CP rights. Human rights treaties set out in express terms the core of the enumerated rights. The role of international treaty bodies, national courts is to elaborate on the legal standards through concrete cases and examples that help define the practical application of the right in question. In respect of ESC rights, there has emerged a significant body of national practice, cases and jurisprudence clarifying their content.<sup>18</sup> Further, legal developments over the last decade have also defined the nature and content of obligations arising from ESC rights, to the

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<sup>16</sup> Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, Vienna, 14-25 June 1993, para. 5, (United Nations General Assembly document A/CONF. 137/23).

<sup>17</sup> Aoife Nolan, Bruce Porter, and Malcolm Langford, *The justiciability of social and economic rights: an updated appraisal*, Centre for Human Rights and Global Justice, Working Paper No. 15, 2007.

<sup>18</sup> UN Committee on Economic, Social and Cultural Rights, General Comments, available at <http://www2.ohchr.org/english/bodies/cescr/index.htm>. Also see, Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative International Law*, Cambridge, 2009.

extent that vagueness is no longer a legitimate argument against the justiciability of ESC rights. It is the role and responsibility of the domestic courts to apply constitutional rights in a manner that upholds the legal principles and conforms to the national context.

#### **Examples of ESC rights violations already being tried in courts around the world**

- \* Forcible evictions
- \* Terminating an employee without cause
- \* Deliberate poisoning of a water supply
- \* Discrimination in access to medical care, work, housing, education etc.
- \* Banning unions
- \* Depriving children of adequate food and water
- \* Failing to provide any primary level education
- \* Failing to provide basic health care facilities
- \* Educational institutions in such poor condition that they are a risk to safety
- \* Housing in such poor condition that it is as risk to safety

Source: CESR, *Basic Primer on ESC Rights*, at: <http://www.cesr.org/article.php?id=275>

Vagueness has also not prevented international development agencies from producing immense volumes of research on global social and economic conditions. These include standardized methodologies for comparing conditions in different countries and regions – the UNDP's human development index and gender-related indices, and UNICEF's rate of progress measurements, to name a few.

Historical neglect of ESCR cannot be attributed to methodological obstacles. While there will always be a need for additional indicators to measure compliance in relation to specific rights, it must be emphasized that the definition of all rights, even freedom from torture, changes and gains clarification over time through concrete practice. The main obstacle to realizing ESC rights remains a lack of political will and commitment on the part of states, including international organizations, whose responsibility it is to respect, protect and promote these rights for the benefit of all human beings.

#### ***Are directive principles an effective way of protecting economic, social and cultural rights?***

ESC rights are sometimes recognized as constitutional principles or directives intended to guide the interpretation and application of other provisions. This is often the case for constitutions drafted several decades ago, before recent developments that emphasized the interdependence between ESC rights and CP rights and burgeoning state practice and jurisprudence in ESC. Despite the best intentions of this approach, pressing needs facing individuals and communities tend not to be brought into legal ambit and instead remain at the level of generalized political considerations, resulting in unenforceable constitutional duties on the government. Due to their non-enforceable nature, governments are not impelled to give effect to directive principles and may consequently ignore them. This has frequently been the experience in a number of countries with directive principles, for example, Ireland, Nigeria, and Namibia.<sup>19</sup>

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<sup>19</sup> Sandra Liebenberg, "Needs, rights and transformation: The adjudication of social rights in South Africa," in Terry Lovell (ed.), *(Mis)recognition, Social Inequality and Social Justice*, (Routledge, 2007), p. 177.

The Indian Constitution also follows such two-tier approach by placing CP rights in the section on fundamental rights, which are expressly justiciable, and placing ESC rights as non-justiciable directive principles of state policy. This was in keeping with the constitutional ethos of late 1940s. The Indian Supreme Court, however, has interpreted directive principles expansively, for example, reading the right to health into the right to life, and thereby given real legal effect to ESC rights. While not enforceable in themselves, the Court has used them as interpretative norms to monitor government compliance with a broadly interpreted right to life. This approach has, in effect, rendered some components of ESC rights in the directive principles justiciable in court.<sup>20</sup>

It is important to recognise that the model offered by the Indian Constitution is defined by its own historical and social context, and the international developments prevailing at the time of its drafting, which predated the general trend of decolonization. As Nepal revisits the debate, the international human rights and political context has changed dramatically. The deliberations should therefore be in line with the emerging trends in international human rights, which affirms that CP rights are interdependent and interrelated, and of equal status, to ESC rights, and one cannot be meaningfully enjoyed without full realisation of the other.

### III. ECONOMIC, SOCIAL AND CULTURAL RIGHTS – AN INTRODUCTION

#### *What are economic, social and cultural rights?*

ESC rights derive from the inherent dignity of human beings. They are based on the belief that freedom from fear and want can only be achieved if the conditions are created for everyone to enjoy ESC rights, as well as CP rights. They embody essential elements of life of dignity and freedom, including work, health, education, food, water, housing, social security, healthy environment, and culture.<sup>21</sup>

The Universal Declaration of Human Rights recognizes a comprehensive range of civil, political, economic, social, and cultural rights, without making any distinction between them. However, political circumstances related to the Cold War polarized human rights into two different categories - civil and political rights on the one hand, and economic, social, and cultural rights on the other.

The Vienna Declaration of 1993 affirmed that “all human rights are universal, indivisible and interdependent and interrelated.”<sup>22</sup> Since then, significant progress has been made under international law in clarifying the content of ESC rights, as well as developing mechanisms to implement them.<sup>23</sup> ESC rights have been elaborated through a number of universal and regional treaties, domestic laws, and principles.<sup>24</sup> Of primary importance is the ICESCR, which has been ratified by 160 states to date.<sup>25</sup>

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<sup>20</sup> In one case, the Supreme Court held that the passage of 44 years since the enactment of the Constitution had effectively converted the non-justiciable right to education of children under 14 into one enforceable under the law. See, *Unni Krishnan, J.P. v. State of A.P. & Ors*, Supreme Court of India, [1993] 4 *Law Reports of the Commonwealth* 234.

<sup>21</sup> Articles 6 to 15 of the ICESCR, 1966.

<sup>22</sup> Vienna Declaration, *op. cit.* n.16, para 5.

<sup>23</sup> CESCR General Comments, *op. cit.* n.18.

<sup>24</sup> See generally General Comments of the UN Committee on Economic, Social and Cultural Rights, at: <http://www2.ohchr.org/english/bodies/cescr/comments.htm>; Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, (Protocol of San Salvador), adopted at San Salvador, El Salvador on November 17, 1988, at the eighteenth regular session of

On 10 December 2008, on the 60th Anniversary of the Universal Declaration of Human Rights, the United Nations General Assembly adopted the Optional Protocol to the ICESCR bringing the possibility of international justice one step closer for millions of excluded people, groups, communities, and peoples worldwide. The Optional Protocol will be open for signature and ratification on 24 September 2009. The Optional Protocol will provide victims of ESC rights violations who are not able to get an effective remedy in their domestic legal system with an avenue to seek remedies at the international level.<sup>26</sup>

#### **Key international instruments explicitly referring to ESC rights**

- Universal Declaration of Human Rights, 1948;
- International Covenant on the Elimination of All Forms of Racial Discrimination, 1965;
- International Covenant on Economic, Social and Cultural Rights, 1966;
- Declaration on Social Progress and Development, 1969;
- Convention on the Elimination of All Forms of Discrimination against Women, 1979;
- Declaration on the Right to Development, 1986;
- Convention on the Rights of the Child, 1989;
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990.

#### **Regional human rights instruments addressing ESC rights**

- African Charter on Human and Peoples' Rights, 1981;
- Additional Protocol in the Area of Economic, Social and Cultural Rights to the American Convention on Human Rights (Protocol of San Salvador), 1988;
- European Social Charter (revised), 1996 and the Additional Protocol thereto.

## **IV. ECONOMIC, SOCIAL AND CULTURAL RIGHTS OBLIGATIONS OF NEPAL**

### ***What is the nature of the obligations of the State?***

Under the prevailing understanding of State obligations with respect to ESC rights, rights may be realized through three levels of obligation: obligation to *respect*, to *protect*, and to *fulfil* economic, social and cultural rights. The Committee on Economic, Social and Cultural Rights, the supervisory body entrusted with monitoring the fulfillment of states obligations under the ESCR has adopted this conceptual framework.

The obligation to *respect* requires that states refrain from conduct resulting in direct violations of rights. For example, states must not deny access to health facilities on a discriminatory basis.

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the General Assembly; European Social Charter (revised), 1996 (CETS No. 163), and the Additional Protocol of 1995 providing for a system of collective complaints (CETS No. 158); African Charter on Human and Peoples' Rights, 1981, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>25</sup> *Op. cit.* n.6.

<sup>26</sup> For the OP to enter into force, 10 States need to ratify or accede to it.

The obligation to *protect* requires the state to prevent a right from being impaired by the conduct of third parties. For example, states must protect the accessibility of education by ensuring that parents and third parties do not stop girls from going to school.

The obligation to *fulfil* requires states to take steps to progressively ensure the realization of the right in question. For example, obligation to *fulfil* requires states to facilitate, provide, or otherwise ensure access to food, housing, health, and education (or a monetary entitlement thereto) to those in society who are without the means to provide for themselves. In some instances, states with limited resources will be required to meet this obligation progressively, rather than with immediate full effect. However, ESC rights include some core obligations of immediate effect that are not subject to progressive realization. These are obligations without which it is considered that the right would be deprived of its *raison d'être*.

Article 2(1) of the ICESCR provides for the general obligation of states under the ICESCR:

*“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures”.*

There are four key issues:

First, whereas it is open to states to implement the rights in a progressive manner, they must take immediate steps to that end.<sup>27</sup> It is not open to states to delay indefinitely the implementation of the rights on the pretext that the right is not immediately realizable, but must, for example, develop a national plan with a progressive approach to issues such as housing and literacy. States should not take any measures which are retrogressive towards the fulfillment of Covenant Rights.

Second, states are obliged to take steps to the maximum of their available resources. It is not open to states to use poverty or resource constraints as an excuse for doing nothing, but rather are required to constantly measure progress against defined criteria and benchmarks.

Third, states must take steps both individually and ‘through international assistance and co-operation’. This means that states should actively seek assistance from the international community for the realization of the rights, and that states with more substantial resources must provide measure of cooperation and assistance to other states..<sup>28</sup>

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<sup>27</sup> CESCR General Comment 3 on the nature of State Parties obligations adopted by the Committee on Economic, Social and Cultural Rights, Fifth Session 1990, E/1991/23, para. 2. Committee on Economic, Social and Cultural Rights, Report on the Fifth Session. Economic and Social Council, Official Records, 1991, Supplement No. 3 (UN Doc. E/1991/23), pp. 83–87.

<sup>28</sup> The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 6 June 1986, UN Doc. E/CN.4/1987/17, Annex, para. 26. Reproduced in *Human Rights Quarterly*, Vol. 9 (1987), pp. 122–135. See also, Plan of Action to Strengthen the Implementation of the International Covenant on Economic, Social and Cultural Rights of December 1996. [www.unhchr.ch/html/menu2/6/action.htm](http://www.unhchr.ch/html/menu2/6/action.htm).

Finally, measures to be undertaken by states in the implementation of the Covenant are not limited to legislative measures.<sup>29</sup> Other types of state measures, including the development of administrative policies or public education activities, may also be required, depending on the circumstances. For instance, non-discrimination in the context of access to health facilities cannot not be secured solely by the adoption of anti-discrimination legislation. Prejudices have to be combated by other means, such as targeted educational programmes.

### ***What kind of obligations towards economic, social and cultural rights must be implemented immediately?***

Although states may implement ESC rights progressively, there are some obligations that require immediate implementation. These include:

- the duty to take deliberate, concrete and targeted steps towards the full realization of ESC rights; and
- the prohibition against discrimination

According to international legal standards, the duty to take steps includes legislative action, including the provision of judicial remedies, and the adoption of administrative, financial, educational and social measures. The CESCR has explained that the obligation to take steps also includes the duty to elaborate and adopt a detailed plan of action for progressive implementation.<sup>30</sup>

There is a growing recognition that all the rights in the Covenant have a resource-free dimension and therefore are capable, in part at least, of being implemented immediately.<sup>31</sup> For instance, the right to equal pay for equal work (article 7(a)(i)), the right to form and join trade unions (article 8), and the obligation to respect the liberty of parents choose schools for their children other than those established by the public authorities, which conform to minimum educational standards (article 13(3) and (4)).<sup>32</sup> These are largely, negative rights and create obligations similar in substance to CP rights.

Similarly, it is evident that the obligation of non-discrimination contained in article 2(2) is immediate as regards all of the rights in the Covenant.<sup>33</sup> Therefore, for instance, the introduction or continued enforcement of discriminatory legislation with respect to health care services, housing provision, or employment is prohibited.

### ***What are minimum core obligations?***

The 'minimum core content' of a right is the baseline level that must be guaranteed for all persons in all contexts, and is not subject to progressive realisation. It entails the absolute minimum needed, without which the right would be unrecognizable or meaningless. This recognizes that people's very survival depends upon access to essential services and that no state is too poor to meet those basic needs. The UN Committee on Economic, Social and Cultural Rights in its General Comment on the nature of obligations under the CESCR affirms that there is "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the

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<sup>29</sup> See Report of the International Law Commission on the work of its twenty-ninth session, 9 May – 29 July 1977, Yearbook of the International Law Commission 1977, Vol. II, Part Two. UN Doc. A/CN.4/SER.A/1977/Add.1 (Part 2), p. 20, para. 8.

<sup>30</sup> *Ibid.*, para 43 (f).

<sup>31</sup> Paul Hunt, *Reclaiming social rights: international and comparative perspectives*, (Aldershot : Dartmouth, 1996).

<sup>32</sup> General Comment 3, *op. cit.* n. 27, para. 5.

<sup>33</sup> Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (Oxford: Clarendon Press, 1995), pp. 181–182.

rights is incumbent upon every State party. 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 and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>34</sup> As noted by Danilo Turk, the UN Special Rapporteur on ESC rights, “[s]tates are obliged, regardless of their level of economic development, to ensure respect for minimum subsistence rights for all.”<sup>35</sup> It therefore indicates a minimum below which no government should perform, even in unfavorable conditions.

### Examples of minimum core obligations in relation to economic, social and cultural rights

Minimum core obligations, highlighted by the CESCR in its general comments, require states to:

- Ensure the right of access to employment, especially for disadvantaged and marginalized individuals and groups, enabling them to live a life of dignity;
- Ensure access to the minimum essential food which is nutritionally adequate and safe, to ensure freedom from hunger to everyone;
- Ensure access to basic shelter, housing and sanitation, and an adequate supply of safe drinking water;
- Provide essential drugs as defined under the WHO Action Programme on Essential Drugs;
- Ensure free and compulsory primary education to all;
- Ensure access to a social security scheme that provides a minimum essential level of benefits that cover at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.

For more information on core obligations, see the general comments adopted by the CESCR.<sup>36</sup>

Source: OHCHR, *Frequently Asked Questions on Economic, Social and Cultural Rights*, at: <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>

### *What is ‘progressive realization’ of economic, social and cultural rights?*

International human rights law recognizes that ESC rights cannot be realized in their full scope overnight. At the core of the concept of ‘progressive realization’ under article 2(1) of the ICESCR is the obligation of states to take appropriate measures towards the full realization of ESC rights to the maximum of their available resources.<sup>37</sup> While states have a degree of flexibility in formulating and implementing policies towards this end, that

<sup>34</sup> General Comment 3, *op. cit.* n.27, para.10. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, “[s]uch minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties,” (Principle 9), SIM Special No. 20, Utrecht, 1998, 190-205.

<sup>35</sup> See, Turk, Second Progress Report of the UN Special Rapporteur on Economic, Social and Cultural Rights, UN Doc. E/CN.4/Sub.2/1991/17, p. 18, para. 10; General Comment 3, see note 24, UN Doc. E/C.12/1990/8, para. 10.

<sup>36</sup> CESCR General Comment 14, on the right to highest attainable standard of health, Twenty second session 2000, E/C.12/2000/4, para 43; General Comment 13 on the right to education, Twentieth session 1999, E/C.12/1999/5, para 57; and General Comment 12 on the right to adequate food, Twenty-first session 1999, E/C.12/1999/10, para 8.

<sup>37</sup> OHCHR Factsheet No. 33, *Frequently Asked Questions on Economic, Social and Cultural Rights*, p.7, available at: <http://www.ohchr.org/EN/PublicationsResources/Pages/FactSheets.aspx>; WHO, *25 Questions and Answers on Health and Human Rights*, available at: <http://www.who.int/hhr/activities/publications/en/>.

flexibility is circumscribed. The state and those monitoring its performance should apply indicators and benchmarks to assess the improvement, stability or deterioration of the enjoyment of rights guaranteed in the Covenant. The employment of benchmarks and indicators are an essential tool for the continued supervision of state performance in the implementation of ESC rights within specific timeframes.

Critically, as affirmed by the UN Committee on Economic, Social and Cultural Rights (CESCR) not every duty arising from the obligations set out in the Covenant is qualified by progressive realization; some duties have immediate effect, as discussed above.

#### *Prohibition of retrogressive measures*

Retrogressive measures, which effectively act to reduce the realization of ESC rights over time, are not allowed unless there is a compelling justification for those measures and the state is able to demonstrate that such measures have been adopted after full consideration of alternatives. One consequence of this principle is that any measure adopted by the state that suppresses, restricts, or limits the content of the entitlements already guaranteed by law, constitutes a *prima facie* violation. For example, introducing user fees for primary healthcare which were formerly provided free of charge would constitute a retrogressive measure absent compensatory measures.

While the prohibition of retrogression is not absolute, the state has the burden of proving that the retrograde measures had been taken in pursuit of a compelling objective, that they were strictly necessary, and that there were no alternative or less restrictive measures available.<sup>38</sup> Retrogressive measures are breaches of the obligation of progressive realization, unless states can prove that they are justified based on above mentioned requirements.

#### *What are 'reasonable measures'?*

Reasonable measures involve the establishment and implementation of a coherent, well-coordinated and comprehensive programme towards a progressive realisation of the guaranteed rights. Under the Optional Protocol to the ICESCR, whether a state has discharged its obligations or whether there is a violation is determined by "consider[ing] the reasonableness of the steps taken by the State Party ....[t]he State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant" (article 8(4)). The standard of "reasonableness", as developed in the South African courts, is useful in setting a threshold for acceptable state conduct:

*"A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met."<sup>39</sup>*

The requirement to undertake reasonable measures is not mutually exclusive to the concept of minimum core obligations. There is a strong link between these standards and the notion of minimum core obligations. The test of 'reasonableness' allows judges to assess whether legislation or regulations are adequate to meet the requirement of their minimum core obligations.<sup>40</sup> Therefore, this standard could be used to protect claimants

<sup>38</sup> CESCR General Comment 14, *op. cit.* n. 36, para 32.

<sup>39</sup> Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000, para 41

<sup>40</sup> ICJ, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Human Rights and Rule of Law Series, 2008, at p.32.

who lack access to even the basic social services.<sup>41</sup> Where, for example, in the state has failed to ensure that marginalised groups are able to access a basic social service, the duty would be on the state to show that the exclusion is reasonable.

***Will constitutionally protecting such rights deprive the state of the financial means to carry out essential state functions?***

No, constitutionally protecting these rights or making them justiciable will not bankrupt the state. Some rights obligations, including most involving the obligations of respect, require few or no resources. There are various obligations emanating from ESC rights which require more in the way of political will than financial resources. For example, ensuring non-discriminatory access to health care services, goods and facilities, requires the adoption of appropriate laws and practices, rather than financial resources.

In addition, adjudicatory bodies examining ESC claims have taken into consideration governments' resource constraints, and have intervened to ensure that governments take reasonable steps, without discrimination, and subject to available resources, to respect, protect and fulfill the rights. Adjudication of ESC rights claims by the courts and other adjudicatory bodies therefore ensures consistency of governmental policies with fundamental human rights. Holding governments accountable for violations of ESC rights enhances rule of law and redresses social injustice.

While in some cases it will be impossible to realize human rights without more funding, resources are necessary to safeguard and guarantee all human rights - civil, cultural economic, political or social. Ensuring an effective justice system or establishing the systems needed for free and fair elections<sup>42</sup> may be just as costly as realizing certain socio-economic rights such as access to primary education or safeguarding against forced evictions.

***How can a developing state undertake such constitutional obligations in good faith?***

As discussed above, the Covenant obligates the states to realise progressively ESC rights within their maximum available resources.<sup>43</sup> This obligation takes into account the limitation that poor states are not immediately capable of guaranteeing the same levels of fulfillment of esc rights, such rights to education, health and housing as developed states. However, the concept of progressive realization requires states to make constant efforts to improve the enjoyment of ESC rights. This means that, while their realization may be achieved progressively, steps towards that goal must be taken within a reasonably short time.<sup>44</sup> These steps must be deliberate, concrete, and targeted as clearly as possible towards meeting governments' human rights obligations.<sup>45</sup> States must demonstrate that every effort has been made in *good faith* to use all resources that are at its disposal for fulfillment of these rights. In this context, it is important to distinguish the *inability* from the *unwillingness* of a state to comply with its obligations.

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<sup>41</sup> Sandra Liebenberg, "Basic Rights Claims," *ESR Review*, (10) 2004, p.10.

<sup>42</sup> OHCHR, *Frequently asked questions on a human rights based approach to development cooperation*, 2006, available at: [http://www.hurilink.org/tools/FAQon\\_HRBA\\_to\\_Development--OHCHR.pdf](http://www.hurilink.org/tools/FAQon_HRBA_to_Development--OHCHR.pdf).

<sup>43</sup> ICESCR, article 2 (1).

<sup>44</sup> OHCHR, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, Professional Training Series No. 12, 2005.

<sup>45</sup> General Comment 3, *op. cit.*, n.27.

The concept of progressive realization does not permit the perpetuation of economic injustice and disparity.<sup>46</sup> These rights are therefore violated when a government does not allocate sufficient resources towards basic social services, or when these services are undermined through corruption, or when the institutional structures necessary to deliver these services are deliberately neglected.

A state faced with severe resource constraints can begin to meet its minimum obligations by developing a plan for the accomplishment of the goal over time. For example, article 14 of the Covenant requires states to adopt a “detailed plan of action” by realizing the right to free primary education within two years of ratifying the Covenant.<sup>47</sup>

State must also not adopt any retrogressive measures that harm ESC rights, for example through “a general decline in living and housing conditions directly attributable to policy and legislative decisions by states parties,”<sup>48</sup> unless there are strong justifications for those measures and state is able to demonstrate that such measures have been adopted after full consideration of alternatives.

It is also important to note that according to international legal standards resources are both, those existing within a state and those available from the international community through international cooperation and assistance.<sup>49</sup> States must therefore actively seek assistance from international community for the realization of the rights, and that international community should bear in mind this obligation in international relations. In addition to financial assistance, the states and the international financial institutions, such as the World Bank and the International Monetary Fund, must also ensure that their international policies, including in trade and development, do not obstruct, but support, the realization of ESC right in other countries.

## V. ECONOMIC, SOCIAL AND CULTURAL RIGHTS - IN PRACTICE

Many states around the world have enshrined ESC rights in their constitutions, and in recent years, several courts and regional bodies have routinely adjudicated upon ESC rights claims, proving these rights justiciable.

### *Landmark cases*

In *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, members of the Ogoni community in Nigeria alleged that the military Government had violated a number of rights, including rights to health and a clean environment, by facilitating the operations of oil companies in Ogoniland. The applicants alleged that the operations of an oil consortium, comprising the Nigerian National Petroleum Company and Shell Petroleum Development Corporation, had contaminated the environment, leading to serious and widespread health problems among the Ogoni people. The African Commission on Human and Peoples’ Rights held that the Ogoni had suffered violations of a number of their human rights, including their rights to health and a clean environment, as a result of the Government’s failure to

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<sup>46</sup> General Comment 3, *op. cit.*, n.27, paras 8-11.

<sup>47</sup> Audrey R. Chapman, and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002.

<sup>48</sup> General Comment 4 on the right to adequate housing, Sixth session, 1991, U.N. Doc.E/C.12/1991/23, para. 11.

<sup>49</sup> Grootboom judgement, *op. cit.*, n.39, para 13.

prevent pollution and ecological degradation. It found that the Government had failed to adequately regulate and monitor the oil consortium. The Commission issued a number of orders, for example, environmental and social impact assessments should be prepared in the future and health and environmental information should be made available.<sup>50</sup>

In the *Grootboom* decision, issued by the South African Constitutional Court in 2001, a group of homeless people who had recently been evicted by a local authority from their informal settlements in Oostenberg, Western Cape, South Africa, sought an order from the High Court to oblige the State to provide them with temporary shelter until such time as they were able to find more permanent housing. The High Court granted the order, arguing that the children in the group were entitled to be provided with shelter at State cost under Section 28 (1)(c) of the South African Constitution. Furthermore, their parents had to be provided with shelter as well, since removing the children from their parents would not be in their best interest and contrary to the Section 28 requirement that the best interest of the child must be paramount in all decisions affecting children.<sup>51</sup>

Before the Constitutional Court heard the appeal, the plight of this particular group of claimants had been resolved, as the State had reached a settlement with them under which they were provided with temporary shelter of an acceptable standard. As a consequence, only the underlying constitutional question – whether or not, more generally, the State was obliged to provide homeless people with temporary shelter – was still before the Court. Relying on the constitutional right of everyone to have access to adequate housing (Section 26(1)), the Court held that the State had to put in place a comprehensive and workable plan to meet its housing rights obligations.

The Court established that in deciding how to comply with these obligations, three elements must be considered by the authorities:

- the need to take reasonable legislative and other measures;
- the need to achieve the progressive realization of the right; and
- the requirement to use available resources.

Regarding the ‘reasonableness’ of the measures adopted, the Constitutional Court held that the State had a legal duty, at least, to have in place a plan of action to deal with the plight of “absolutely homeless” people such as the *Grootboom* community. An examination of the State’s housing policy at the time revealed that it focused on providing long term, fully adequate low-cost housing and took no account of the basic need of homeless people for temporary shelter. The Court declared the State’s housing policy unreasonable, and thus unconstitutional, to the extent that it failed to make adequate provision for homeless persons.

In *People’s Union For Civil Liberties v. Union of India and others*, the Supreme Court of India identified duties on the State to fulfil ESC rights.<sup>52</sup> During a famine in the State of Rajasthan many people died of starvation, even though the government kept grain reserves for emergencies. Through a number of interim measures, the Supreme Court found that the government had failed to implement schemes to prevent and combat famines, and ordered detailed urgent measures to resolve the situation.

Among them, it required the Government to:

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<sup>50</sup> African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001).

<sup>51</sup> Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.

<sup>52</sup> Supreme Court of India, *People’s Union For Civil Liberties v. Union of India and others*, 2003(001) SCW 2353 SC, judgement of 2 May 2003.

- implement the Famine Code for three months;
- double the grain allocation for the food for work scheme and to increase financial support for other food schemes;
- ensure that food ration providers stay open and provide grain to families below the poverty line at the set price;
- to give publicity to the rights of poor families to grain; and grant all individuals without means of support a ration card for free grain; and
- to progressively implement meal schemes in schools.

In the case of *Mariela Viceconte v. Ministry of Health and Social Welfare*, Mariela Viceconte, and the National Ombudsman, asked the court to order the Government of Argentina to take protective measures against haemorrhagic fever which threatened 3.5 million people. More specifically, they asked the court to order the Government to produce a WHO certified vaccine (Candid-1) for Argentine haemorrhagic fever. According to the court, it was the Government's responsibility to make health care available in a situation where the existing health-care system, including the private sector, was not protecting individuals' health. In light of the Constitution's incorporation of international treaties that recognize the right to health, the court found that the Government had not "fulfilled its obligations to make available the Candid-1 vaccine". Because the private sector saw the production of the vaccine as unprofitable, the court ordered the State to produce Candid-1.<sup>53</sup>

## VI. SAMPLE PROVISIONS OF CONSTITUTIONAL TEXTS

Many modern national constitutions include legally enforceable ESC rights within their lists of fundamental rights, notably South Africa, Thailand, Indonesia, Afghanistan, Brazil, Argentina, Bolivia, Ecuador, South Korea, Cuba, Uganda, and Ethiopia. Provisions from some of these constitutions are discussed below to highlight the approach taken by these countries towards recognising ESC rights as fundamental and justiciable rights.

### Equality Rights

#### Equality before and under law and equal protection and benefit of law

1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

#### Affirmative action programs

Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (*source: Canada*)

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<sup>53</sup> Case No. 31.777/96 (1998).

## **Right to Housing**

1. Each person has the right to housing. No one may be arbitrarily deprived of housing.
2. Bodies of state power and bodies of local self-government encourage housing construction and create conditions for the exercise of the right to housing.
3. Housing is provided free or at affordable cost to low-income and other citizens indicated in the law who require housing from the state, municipal and other housing stocks in accordance with the norms prescribed by law. (*source: Russian Federation*)

## **Right to Education**

1. Everyone has the right -
  - a. to a basic education, including adult basic education; and
  - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account -
  - a. equity;
  - b. practicability; and
  - c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that -
  - a. do not discriminate on the basis of race;
  - b. are registered with the state; and
  - c. maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions. (*source: South Africa*)

## **Right to health**

The State recognises the right of every citizen to protection of health and to the enjoyment of the highest attainable standard of physical and mental health and with a view to ensuring the effective exercise of this right the State undertakes—

- (a) to take steps to provide for free primary health care in State institutions for all its citizens;
- (b) to take appropriate measures to prevent, treat and control epidemic, endemic and other diseases;
- (c) to take steps to reduce infant mortality and promote the healthy development of the child;
- (d) to promote individual responsibility in health matters;
- (e) to allow, subject to such supervision and conditions as are necessary in a democratic society, for the establishment of private medical services. (*source: Seychelles*)

## **Right to food**

Everyone has right to unrestricted and permanent access to sufficient and nutritious food corresponding to the cultural traditions of the people to which the consumer belongs, for a healthy and dignified life. (*source: Ecuador*)

## **Right to water and sanitation**

1. Everyone has the right to universal and equitable access to the basic services of drinking water, sanitation, electricity, gas for household uses, postal services and telecommunication.
2. The provision of basic services by means of public, mixed, cooperative or collective bodies is the responsibility of the State, with all its levels of government. In the cases of electricity, gas for household uses and telecommunications the service can be provided through contracts with private companies. The provision of services must correspond with the criteria of universality, responsibility, accessibility, continuity, quality, efficiency, equitable tariffs and necessary coverage; with participation and social control.
3. Access to water and sanitation constitute human rights; they can not be the object of concessions or privatisation and are subject to a regime of licenses and registers, in accordance with the law. (*source: Bolivia*)

## **Right to work**

1. The republic recognizes the right of all citizens to work and promotes conditions to fulfill this right.
2. According to capability and choice, every citizen has the duty to undertake an activity or a function that will contribute to the material and moral progress of society. (*source: Italy*)

## **Right to social security**

1. Everyone is entitled to social security.
2. It is the duty of the State to organize, coordinate, and subsidize a unified and decentralized social security system, with the participation of the trade union associations, other organizations representing the workers, and associations representing the other beneficiaries.
3. The right to set up private and non-profit-making institutions of social solidarity that pursue the social security objectives laid out in this Article and in Articles 67 (2)(b), 69, 70 (1)(d), 71 and 72, is recognized;\* they are regulated in the law and subject to State supervision.
4. The social security system protects citizens in sickness, old age, disability, widowhood, orphanhood, unemployment, and all other situations in which the means of subsistence or capacity to work are lost or reduced.
5. All the periods of time spent working regardless of the sectors of activity where the work was performed, are taken into account for the purposes of calculating the amount of old age and disability pensions, in accordance with the law. (*source: Portugal*)

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\* Also see, Article 67 Family, Article 69 Childhood, Article 70 Young People, Article 71 Disabled Persons, Article 72 Old Age, at: <http://www.servat.unibe.ch/icl/po00000.html#A067>

## **Right to culture**

Everyone has a right as applicable to belong to, enjoy, practice, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others. (*source: Uganda*)

## **VII. CONCLUDING REMARKS**

Nepal has longstanding obligations to realize economic, social and cultural rights, including as a party to the Covenant on Economic, Social and Cultural rights. Yet Nepal remains a long way from realization of ESC rights.

Nationally and internationally, ESC rights are now being addressed in a substantial manner. At the domestic level, this is reflected in strengthened legal protections in jurisdictions such as South Africa, India, Brazil and Ecuador. Courts are increasingly enhancing protection and holding states to account with respect to ESC rights. Legal protections are complemented by increasing integration of ESC rights into policies and programmes.

Yet in Nepal, commitments made by the politicians to guarantee these rights have yet to be implemented. Social exclusion, discrimination, violence, and structural inequalities hinder the realisation of ESC rights in Nepal. Today new opportunities are unfolding. The work of CA provides an opportune environment to resolve some of the longstanding socio-economic issues. While, including ESC rights in constitution alone would not achieve the entire goal, excluding ESC rights from the Nepalese Constitution would certainly be an opportunity missed.

The ICJ supports the constitution-making process under way. Nevertheless, if ESC rights were not to be integrated in the constitution on an equal footing with CP rights, such negative signals would be highly detrimental to the full realization of all human rights. They would also be widely regarded as a retrogressive step and one which contravenes the existing obligations of Nepal under the International Covenant on Economic, Social and Cultural Rights.

The ICJ expresses its appreciation of the important work presently being undertaken by the CA. Efforts to integrate all human rights and to ensure full justiciability for them, at the national level, hopefully will be a major milestone towards the full realization of all human rights.

## ANNEX I

# Economic and Social Rights Provisions International instruments

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### Universal Declaration of Human Rights, 1948

#### **Article 22**

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

#### **Article 23**

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

#### **Article 24**

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

#### **Article 25**

(1) Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

#### **Article 26**

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious

groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

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## **International Covenant on Economic, Social and Cultural Rights, 1966**

### **Article 2**

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant 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.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

### **Article 3**

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

## **PART III**

### **Article 6**

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

### **Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### **Article 8**

1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

#### **Article 9**

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

#### **Article 10**

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.

2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

#### **Article 11**

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

#### **Article 12**

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

#### **Article 13**

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the

human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

(a) Primary education shall be compulsory and available free to all;

(b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;

(c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;

(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

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## ANNEX II

# Constitutional provisions

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### Constitution of South Africa, 1996

#### 26. Housing

1. Everyone has the right to have access to adequate housing.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

#### 27. Health care, food, water and social security

1. Everyone has the right to have access to
  - a. health care services, including reproductive health care;
  - b. sufficient food and water; and
  - c. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.

#### 28. Children

1. Every child has the right –
  - a. to a name and a nationality from birth;
  - b. to family care or parental care, or to appropriate alternative care when removed from the family environment;
  - c. to basic nutrition, shelter, basic health care services and social services;
  - d. to be protected from maltreatment, neglect, abuse or degradation;
  - e. to be protected from exploitative labour practices;
  - f. not to be required or permitted to perform work or provide services that–
    - i. are inappropriate for a person of that child's age; or
    - ii. place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
  - g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
    - i. kept separately from detained persons over the age of 18 years; and
    - ii. treated in a manner, and kept in conditions, that take account of the child's age;
  - h. to have a legal practitioner assigned to the child by the state, and at state

- expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.
2. A child's best interests are of paramount importance in every matter concerning the child.
  3. In this section 'child' means a person under the age of 18 years.

## **29. Education**

1. Everyone has the right –
  - a. to a basic education, including adult basic education; and
  - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.
2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account –
  - a. equity;
  - b. practicability; and
  - c. the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
  - a. do not discriminate on the basis of race;
  - b. are registered with the state; and
  - c. maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions.

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## **Constitution of the Republic of Uganda, 1995**

### **Article XIV. General Social and Economic Objectives.**

The State shall endeavour to fulfill the fundamental rights of all Ugandans to social justice and economic development and shall, in particular, ensure that –

...

- (ii) all Ugandans enjoy rights and opportunities and access to education, health services, clean and safe water, decent shelter, adequate clothing, food, security and pension and retirement benefits.

### **Chapter Four - Protection and promotion of fundamental and other human rights and freedoms**

#### **26. Protection from deprivation of property.**

- (1) Every person has a right to own property either individually or in association

with others.

- (2) No person shall be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied—
  - (a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public order, public morality or public health; and
  - (b) the compulsory taking of possession or acquisition of property is made under a law which makes provision for—
    - (i) prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition of the property; and
    - (ii) a right of access to a court of law by any person who has an interest or right over the property.

### **30. Right to education.**

All persons have a right to education.

### **31. Rights of the family.**

- (1) Men and women of the age of eighteen years and above have the right to marry and to found a family and are entitled to equal rights in marriage, during marriage and at its dissolution.
- (2) Parliament shall make appropriate laws for the protection of the rights of widows and widowers to inherit the property of their deceased spouses and to enjoy parental rights over their children.
- (3) Marriage shall be entered into with the free consent of the man and woman intending to marry.
- (4) It is the right and duty of parents to care for and bring up their children.
- (5) Children may not be separated from their families or the persons entitled to bring them up against the will of their families or of those persons, except in accordance with the law.

### **37. Right to culture and similar rights.**

Every person has a right as applicable to belong to, enjoy, practise, profess, maintain and promote any culture, cultural institution, language, tradition, creed or religion in community with others.

### **39. Right to a clean and healthy environment.**

Every Ugandan has a right to a clean and healthy environment.

### **40. Economic rights.**

- (1) Parliament shall enact laws—
  - (a) to provide for the right of persons to work under satisfactory, safe and healthy conditions;
  - (b) to ensure equal payment for equal work without discrimination; and
  - (c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays.

- (2) Every person in Uganda has the right to practise his or her profession and to carry on any lawful occupation, trade or business.
- (3) Every worker has a right—
  - (a) to form or join a trade union of his or her choice for the promotion and protection of his or her economic and social interests;
  - (b) to collective bargaining and representation; and
  - (c) to withdraw his or her labour according to law.
- (4) The employer of every woman worker shall accord her protection during pregnancy and after birth, in accordance with the law.

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## Constitution of Cuba, 1992

### FUNDAMENTAL RIGHTS, DUTIES AND GUARANTEES

**Article 45.** Work in a socialist society is a right and duty and a source of pride for every citizen.

Work is remunerated according to its quality and quantity; when it is provided, the needs of the economy and of society, the choice of worker and his skills and ability are taken into account; this is guaranteed by the socialist economic system, that facilitates social and economic development, without crises, and has thus eliminated unemployment and the "dead season."

Nonpaid, voluntary work carried out for the benefit of all society in industrial, agricultural, technical, artistic and service activities is recognized as playing an important role in the formation of our people's communist awareness.

Every worker has the duty to faithfully carry tasks corresponding to him at his job.

**Article 46.** All those who work have the right to rest, which is guaranteed by the eight-hour workday, a weekly rest period and annual paid vacations.

The state contributes to the development of vacation plans and facilities.

**Article 47.** By means of the Social Security System the state assures adequate protection to every worker who is unable to work because of age, illness or disability.

If the worker dies this protection will be extended to his family.

**Article 48.** The state protects, by means of social assistance, senior citizens lacking financial resources or anyone to take them in or care for them, and anyone who is unable to work and has no relatives who can help them.

**Article 49.** The state guarantees the right to protection, safety and hygiene on the job by means of the adoption of adequate measures for the prevention of accidents at work and occupational diseases.

Anyone who suffers an accident on the job or is affected by an occupational disease has the right to medical care and to compensation or retirement in those cases in which temporary or permanent work disability ensues.

**Article 50.** Everyone has the right to health protection and care. The state guarantees this right;

- by providing free medical and hospital care by means of the installations of the rural medical service network, polyclinics, hospitals, preventative and specialized treatment centers;
- by providing free dental care;
- by promoting the health publicity campaigns, health education, regular medical examinations, general vaccinations and other measures to prevent the outbreak of disease. All the population cooperates in these activities and plans through the social and mass organizations.

**Article 51.** Everyone has the right to education. This right is guaranteed by the free and widespread system of schools, semi-boarding and boarding schools and scholarships of all kinds and at all levels of education and because of the fact that all educational material is provided free of charge, which gives all children and young people, regardless of their family's economic position, the opportunity to study in keeping with their ability, social demands and the needs of socioeconomic development.

Adults are also guaranteed this right; education for them is free of charge and with the specific facilities regulated by law, by means of the adult education program, technical and vocational education, training courses in state agencies and enterprises and the advanced courses for workers.

**Article 52.** Everyone has the right to physical education, sports and recreation.

Enjoyment of this right is assured by including the teaching and practice of physical education and sports in the curricula of the national educational system; and by the broad nature of the instruction and means placed at the service of the people, which makes possible the practice of sports and recreation on a mass basis.

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## **Constitution of South Korea, 1987**

### **Chapter II. Rights and Duties of the Citizens**

#### **Article 22. [Learning, Intellectual Rights]**

- (1) All citizens enjoy the freedom of learning and the arts.
- (2) The rights of authors, inventors, scientists, engineers, and artists are protected by law.

[...]

#### **Article 31. [Education]**

- (1) All citizens have an equal right to receive an education corresponding to their abilities.
- (2) All citizens who have children to support are responsible at least for their elementary education and other education as provided by law.
- (3) Compulsory education is free of charge.
- (4) Independence, professionalism, and political impartiality of education and the

autonomy of institutions of higher learning are guaranteed under the conditions as prescribed by law.

- (5) The State promotes lifelong education.
- (6) Fundamental matters pertaining to the educational system, including schools and lifelong education, administration, finance, and the status of teachers are determined by law.

#### **Article 32. [Work]**

- (1) All citizens have the right to work. The State endeavors to promote the employment of workers and to guarantee optimum wages through social and economic means and enforces a minimum wage system under the conditions as prescribed by law.
- (2) All citizens have the duty to work. The State prescribes by law the extent and conditions of the duty to work in conformity with democratic principles.
- (3) Standards of working conditions are determined by law in such a way as to guarantee human dignity.
- (4) Special protection has to be accorded to working women, and they may not be subjected to unjust discrimination in terms of employment, wages, and working conditions.
- (5) Special protection has to be accorded to working children.
- (6) The opportunity to work shall be accorded preferentially, under the conditions as prescribed by law, to those who have given distinguished service to the State, wounded veterans and policemen, and members of the bereaved families of military servicemen and policemen killed in action.

#### **Article 33. [Unions]**

- (1) To enhance working conditions, workers have the right to independent association, collective bargaining, and collective action.
- (2) Only those public officials who are designated by law, have the right to association, collective bargaining, and collective action.
- (3) The right to collective action of workers employed by important defense industries may be either restricted or denied under the conditions as prescribed by law.

#### **Article 34. [Welfare]**

- (1) All citizens are entitled to a life worthy of human beings.
- (2) The State has the duty to endeavor to promote social security and welfare.
- (3) The State endeavors to promote the welfare and rights of women.
- (4) The State has the duty to implement policies for enhancing the welfare of senior citizen and the young.
- (5) Citizens who are incapable of earning a livelihood due to a physical disability, disease, old age, or other reasons are protected by the State under the conditions as prescribed by law.
- (6) The State endeavors to prevent disasters and to protect citizens from harm therefrom.

**Article 35. [Environment, Housing]**

- (1) All citizens have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.
- (2) The substance of the environmental right is determined by law.
- (3) The State endeavors to ensure comfortable housing for all citizens through housing development policies and the like.

**Article 36. [Marriage, Family, Mothers, Health]**

- (1) Marriage and family life are entered into and sustained on the basis of individual dignity and equality of the sexes, and the State must do everything in its power to achieve that goal.
- (2) The State endeavors to protect mothers.
- (3) The health of all citizens is protected by the State.

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