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SOCIO-ECONOMIC RIGHTS IN FOCUS

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Editor's Note ...

This Issue of the LST Review, with a focus on the socio-economic rights discourse incorporates several articles from a local, regional and global perspective.

Opening the Issue, is an article by *Rukshana Nanayakkara* that discuses the need for as well as the possibility of, recognising a right to environment as a fundamental right. The article which is rich with information drawn from a wide variety of disciplines ranging from philosophy and history to contemporary legal developments, contains and in depth discussion of the arguments for and against the recognition of a fundamental right to environment in the basic law of a country ie. the constitution. Drawing from experiences around the world, the author points out that whatever the model of the constitution may be, and wherever a right may be enshrined within such a constitution, the ultimate objective of a constitution is to benefit the people of that particular country. The nature of a right to environment not being self - executory which requires positive state intervention for its fulfilment, the writer acknowledges the fact that the enforcement of a right to environment would entail a lot of difficulties despite it being placed in the basic law of a country. However, the writer successfully drives home the point that, the incorporation of a right to environment in the Constitution of a country itself would significantly enhance its potential of being respected, fulfilled and protected by both the state as well as its citizenry.

Also in this Issue, we publish the ***General Comment No. 15 of the Committee on Economic, Social and Cultural Rights*** which was issued in their 29th session in Geneva, November 2002. General Comments carry the Committee's observations and recommendations on substantive issues that arise in the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This particular General Comment relates to the right to water, which is enshrined in articles 11 and 12 of the ICESCR.

While explaining at the very outset that the right to water is a *sine qua non* for an adequate standard of living, which in turn links it inextricably with the rights to a highest attainable standard of health, to adequate housing, to adequate food etc, and fundamentally to the right to life and human dignity, the Committee points out that the right to water consists of both freedoms as well as entitlements. The former

includes the right of access to existing water supplies and the freedom from arbitrary interference with the enjoyment of the right to water, while the latter includes the right to a system of water supply and management that provides equality of opportunity for people to enjoy their right to water.

Commenting on the elements of the right to water, the Committee observes that 'adequacy' of water does not refer only to the quantity but also to its quality as primarily an economic good and also as a social and cultural good. The Committee adds that, the realisation of the right to water should be done in a sustainable manner by adhering to the principle of 'inter - generational equity' in that the interests of both present and future generations should be taken into account. Consequently, the Committee identifies three (3) indispensable factors that apply generally across the board, in relation to the element of 'adequacy' of the right to water;

(a) *availability* - sufficient and continuous supply of water;
(b) *quality* - condition of water should be safe for consumption;
(c) *accessibility* - accessible to every one without discrimination.

Dealing with state obligations, the Committee sets out specific obligations imposed on states parties in relation to the right to water;

(a) the obligation to *respect* - non interference, directly or indirectly, with the enjoyment of the right;
(b) the obligation to *protect* - protect from third party interference with the right;
(c) the obligation to *fulfil* - adopt measures directed towards the full realisation of the right, which includes the adoption of necessary legislation, a national water strategy and plan of action etc.

This is particularly relevant in the Sri Lankan context where planning and management strategies in relation to natural resources like water, though a public necessity, continues to remain in the realm of political will.

The Committee also lays down a procedure in paragraph 54 of the Comment by which it would be able to monitor the formulation and implementation of workable national water strategies and/ or plans of action, parallel to the periodic reporting procedure of states parties under the ICESCR.

While recognising the provisions made in the ICESCR for the progressive realisation of economic, social and cultural rights, the Committee emphasises that there are certain immediate obligations which form the minimum core obligations, from which states cannot derogate. In this regard, the Committee considers the following acts and/or omissions as amounting to violations of state obligations:

a) the failure to act in good faith in the realisation of the right to water and 'unwillingness' of a state party as opposed to inability, to perform its obligations; and
b) acts of commission such as arbitrary and unjustified disconnection of water services.

The Committee further states that effective judicial or other remedies should be made available at both national and international level, for persons or groups who have been denied the right to water.

General Comments issued by the Committee have long been used within national jurisdictions, as both a tool to persuade states to comply with their international obligations eg. in courts and tribunals, policy debates etc, and as a statement of academic value for research and education. At a point in time when Sri Lanka is facing a transitional stage in her history, apart from meeting the interests of the average citizen, the country has also to deal with the task of rebuilding and reconstructing a war torn state, and with it the lives of different kinds of war victims ie. civilians, militants, children, internally displaced persons etc. Considering the depth of the matter and the scantity of the available resources, it seems both timely and practical under the circumstances to have the guidance of international monitoring mechanisms like that of the Committee, in an effort to realise the basic human rights of a once war torn nation. It is noted however that, much is left to the discretion and *bona fides* of state parties to utilise these mechanisms to the well being of its citizenry.

Continuing on the socio-economic rights theme, the Issue concludes with an article by *Danwood Mzikenge Chirwa* which discusses the nature of the obligations imposed on non-state actors in the realisation of socio-economic rights, by using South Africa as a case study. In an era where social dealings are increasingly privatised and being drawn away from state control, thereby making the vertical application of human rights an inadequate method of protecting the human rights of the people, the article explores the necessity of extending the application of human rights to private actors.

The writer refers to a large body of international human rights provisions that impose both positive as well as negative obligations on non-state actors in relation to socio-economic rights. In the light of the above, he discusses the parameters within which the horizontal application of human rights could take place in a social context which increasingly involves the participation of non-state actors at various levels, ranging from the provision of basic services to influencing private relations. It is the writer's contention that the responsibility of fulfilling the socio-economic rights of the citizens of a state is not the sole responsibility of the State, but a collective responsibility which also includes non-state actors, with both negative and positive obligations being imposed on them.

The author concludes by proposing the 'state action' paradigm as a basis for identifying the level of responsibility of non-state actors, in relation to their obligations towards the fulfilment of socio-economic rights. Accordingly, private actors exercising functions of state, or power akin to or greater than that of the state would be placed on the same level as the state, considering their potential to cause serious violations or denials of socio-economic rights.

The article which carries a detailed analysis of the role of non-state actors in the realisation of socio-economic rights makes a useful contribution to the socio-economic rights discourse, which in recent years has become the focus of increased global attention.

Recognition of a Right to Environment as a Fundamental Human Right

Rukshana Nanayakkara[*]

1. Introduction

The right to environment has developed as a third generation right in the main human rights discourse. The nature of this right has been the focus of extensive discussions ever since its emergence. Although this right has gained a new impetus in the 1970s with the emergence of group rights, it in fact has a longer history as the teachings of all major religions emphasized the protection and advancement of the environment.[1]

The Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) make no explicit reference to the right to a clean environment. Nevertheless it can be argued that some of the rights enumerated in these Covenants give effect to this right implicitely.[2]

This lacuna in the main human rights discourse and the increasing global attention on environmental protection and ecological preservation paved the way for the global community to strategise new methods on the realization of this right both domestically as well as internationally. This was initiated with the adoption of the United Nations Declaration on the Human Environment in 1972 commonly known as the Stockholm Declaration.[3] Principles 1 of this Declaration says:

> "*Man has the fundamental rights of freedom, equality and adequate condition of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*"

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[*] Lecturer, Faculty of Law, University of Colombo; Researcher, Law & Society Trust.

[1] At the primitive state of civilization man used to worship the moon, the sun and trees all of which are components of the environment, as they believed that they had supernatural powers. According to Buddhism the actions of an individual in protecting the environment adds more good karma to a persons life which in turn enables him to reap good results in his current or future life. Even Lord Buddha himself paid tribute to the Bo tree, which had given him protection when he was in the process of attaining enlightenment, by continuously observing the tree for seven consecutive days. In Islam the Qura'an is conspicuously silent on the right to a clean environment while a large body of Islamic environmental ethics stresses the responsibility of individuals towards protecting the natural environment. The underlying concept is that the earth is a creation of Allah and that it is the prime duty of all individuals and the state to protect what Allah has created. The same notion can be found in the teaching of Jesus who has referred to many examples from the environment in his parables.

[2] Eg: Article 6 of the ICCPR recognises the right to life and it can be argued that the right to a clean environment is part and parcel of this right. Article 12(2) of the ICESCR specifically states that it is an obligation of the state to take action for the improvement of all aspects of environmental and industrial hygiene.

[3] Declaration of the United Nations Conference on the Human Environment (1972) passed on 16th June 1972.

This principle establishes an environmental era at international level which proclaims a right to environment. It embraces the features of both civil and political rights (the rights of freedom, equality and dignity) as well as economic and social rights (the right to an adequate condition of life) in it.[4] Therefore, it amalgamates the rights that are recognised so far as economic, social and cultural rights and civil and political rights, in the main human rights discourse. Further, it stresses that the protection and improvement of the environment is a responsibility of each individual while highlighting the responsibility of the present generation in the protection of the environment. Finally it adds a temporal perspective into the context by speaking about the interests of future generations as well.[5]

The Principles in the Stockholm Declaration[6] have provided a new perspective through which state parties are to consider their policies on environment and to adopt more effective mechanisms within their national jurisdiction to protect and improve the environment. This concern which evolved in the mid seventies has culminated to the status of becoming a part of domestic law as one of the main strategies through which this right has been given effect to in the domestic sphere. This right has been included in most of the constitutions, which were adopted subsequent to its promulgation[7] while some countries have introduced this right to their constitutions through constitutional amendments.

2. Recognition of the Right to a Clean Environment

There can be a number of reasons and arguments for and against the constitutionalisation of this right. The nature of this right and the arguments which stand for and against this right have to be considered in striking a balance.

The main human rights discourse has significantly evolved since 1948 in a consistent and vibrant manner. The interesting question which emanates from this process is whether the categorization of human rights as first second and third generation rights is precise enough to establish a clear cut demarcation between the different rights. Specially for the purpose of this paper, it has to be considered whether the right to environment finds a place in other categories other than its allocated place in the third generation rights. An analysis of the scope of the right is therefore necessary.

Welshman Ncube, Fennifer Momaned-Katerere and Munyaradzi Chenje have succinctly described seven components that constitute the right to environment.[8]

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[4] Welshman Ncube, Fennifer Momaned- Katerere and Munyaradzi Chenje: *"Towards The Constitutional Protection of Environmental Rights in Zimbabwe"*, The Zimbabwe Law Review, 1996 Volume 13 Page 97.
[5] *Ibid*
[6] The same kind of principles can be found in the instruments that preceded the Stockholm Declaration which are "The World Charter for Nature" and "The Rio Declaration on Environment and Development (1992)" which was promulgated by the United Nations General Assembly.
[7] This is evident as the world's early constitutions such as the American Constitution, French Constitution and German Constitution which were drafted prior to this time period do not address this issue.
[8] *Supra* note 4

(a) **The right to be safe from harmful exposure:** this means that citizens have a right not to be exposed to a harmful environment which can be a threat to their lives.

(b) **The right to know:** This provides the people's right to know the environmental threats to their lives and the origins of those threats. In other words this right creates a link with the right to information.

(c) **The right to clean up:** Persons have the right to know whether measures are in place to clean up dangerous products. For example, clean up petrol/ diesel in the event of a spill.

(d) **The right to participate:** This signifies the importance of obtaining public views on development projects which have considerable impact on the human and physical environment.[9]

(e) **The right to compensation:** Citizens should have the right to demand compensation if a specific environmental condition or disaster causes harm to them.

(f) **The right to prevention:** Citizens have the right to demand that all preventive measures be taken before the implementation of a development project which is likely to have a considerable impact on the environment.

(g) **The right to protection and enforcement:** This guarantees that citizens are adequately protected from harmful substances which emanate from an ongoing project and that adequate regulations are in force to safeguard the right to a clean environment.

While this clarification by the Zimbabwean writers tries to cover the scope of the right to environment, it has negated some of the important substantive and procedural aspects of the right. Procedural rights such as the freedom of association and assembly and access to justice including legal aid can be important though they cannot strictly be included in the substance of the right. The right to education on environmental issues too should be added into this analysis as it facilitates the raising of awareness among the citizens on the subject.

Nevertheless, this analysis highlights the fact that this right embraces the characteristics of many rights recognised in the first and the second generation rights of the rights discourse. The difficulty that arises from the conspicuous silence in the UDHR, the ICCPR and the ICESCR to the right to environment, can therefore be overcome by the contention that the

[9] Section 10 of the Rio Declaration and Article 6,7 and 8 of Aarhus Convention (The UN/ECE Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted on 25th June, 1998 in the Danish city of Aarhus at the Fourth Ministerial Conference in the "Environment for Europe" Process) stress the importance of public participation in environmental decision making processes.

rights that are recognised in these documents lead to an implied right to environment.[10] At one end it is the duty of the state to take steps to provide the conditions for a healthy environment. This has links with the right to education on the environment, the right to clean up, the right to compensation, the right to protection and enforcement where state intervention is required for the fulfillment of those rights. It is clear that these obligations are positive in character. On the other end, it is the duty of the state to refrain from activities which can be harmful to the environment. This links with people's rights to association and assembly which would give them an opportunity to form environmental organizations and freedom from torture and degrading treatment where environmental destruction caused by state intervention would lead to such treatment. These aspects of the right imposes negative obligations on the state. Therefore, it is the duty of the state to respond in both a positive and a negative manner in ensuring the protection of the environment.

3. A Constitutional Right to Environment

Every domestic legal system provides at least some legislation, which deals with issues relating to environment. This can be either the basic law of the state or an ordinary piece of legislation passed by a legislative body. Whatever the nature of those protections may be the constitutional guarantees on environment provides the highest level of protection as the constitution is considered the basic law of a country. Nevertheless there are a number of contentions which stand against the constitutionlisation of these rights. Therefore, the importance of recognising this right through the basic law of a country should be highlighted.

Though there can be a number of environmental legislation in a particular country, they may still be inadequate to address all the environmental problems within its territory. Even countries with advanced environmental protection systems sometimes find that their laws are incompetent to address the wide range of environmental problems encountered within their jurisdictions. This may be pronounced in the case of countries, which are in the process of developing environmental laws and regulations. In both these situations, including provisions relating to the environment in the constitution can provide a safety net for resolving environmental problems that existing environmental laws and regulation do not address.

Secondly, the identification of the right to a clean environment through the basic law of the state places the right at a higher priority level by guaranteeing a constitutional entrenchment to the right. This is significant as environmental concerns are often viewed as secondary to other concerns especially those relating to economic development. This entrenchment provides the opportunity of elevating environment related cases to the level of those cases which involve the adjudication upon constitutional matters such as the constitutionally

[10] *Supra* note 2

entrenched fundamental human rights.[11] This creates a steady level of protection to the right relating to environment where it stands less susceptible to the political and social changes of a country.[12]

The incorporation of procedural rights such as the freedom of information, freedom of association and assembly, public participation, judicial standing etc., into the basic law of a country, can also contribute to the protection and preservation of the environment. These procedural rights promote transparency, which are the participation and accountability, which are the cornerstones of good governance.

The provisions relating to environmental protection in a constitution can either be found in the fundamental rights chapter or elsewhere in the basic law. The exclusion of a right to environment in the fundamental rights chapter would not undermine its importance as a constitutionally entrenched provision, as it may still possess persuasive authority to influence government policies and regulations or to impose obligations on citizens on the protection of the environment, e.g. by being included in the Directive Principles of State Policy and Fundamental Duties of Citizens chapter.

While the points enumerated above stress the importance of the constitutionalisation of environmental rights, there are several arguments which stand against this process. Professor Andre Rabie has effectively summarized all the arguments against the constitutionlisation of environmental rights.[13]

According to Prof. Rabie:

1. The right cannot be formulated with sufficient clarity. This applies both to the concept of "environment" as well as to the adjectives that seek to qualify it.

    (a) While the meaning of "environment" is most often taken for granted, there is considerable certainty among those who seek clarification as to what is subsumed under the concept. It may be restrictive in meaning, relating only to natural environment or it may be used in a comprehensive sense as encompassing the human environment, thereby including the built, cultural, social, political and economic environment.

    (b) Among the adjectives which have been suggested to qualify "environment" are clean, best possible, reasonable, befitting a human being, humane, healthy,

[11] *Supra* note 4

[12] Special procedures will have to be followed in order to amend a constitution of a country unlike amending ordinary legislation, such as obtaining 2/3 majority of the parliament plus its approval by the people at a referendum.

[13] Rabie, A.: *"A Constitutional Right to Environmental Integrity: A German Perspective,"* South African Journal of Human Rights, 208, cited in *Supra* note 4 at page 106

unharmed, unimpaired, safe, decent, appropriate, balanced, suitable and favorable etc. A conspicuous characteristic of these adjectives is their vagueness and intangibility. Moreover, there is no indication as to the degree to which these adjectives oblige the state to effect the required conservation.

2. The natural environment which includes the air, water, land etc. unlike the objects of other constitutional rights, do not relate to individual interests. In fact, they accommodate interests that are shared in common by the entire public. An individual has a right to his/her health, his/her property etc, but not to his/her environment.

3. A fundamental objection towards a constitutional right to environmental integrity is the relativity of such a right. Environment conservation is only one of a number of assignments imposed on the state. It has to be weighed against other societal and individual interests with which it may be in conflict. Among those interests, a primary concern would be economic and technological development. For instance a claim by an individual from the state to clean air may not be able to be reconciled against other priorities of a political system which are decided by the legislature and the executive.

4. It is contended that whereas the state can secure most of the classical constitutional rights by lifting existing limitations or by simply refraining from encroaching upon them, a right to environmental integrity would require a considerable degree of active intervention; something which the state may not be in a position to accomplish realistically. This, in effect, amounts to an objection in principle against second and third generation human rights which instead of obliging the state to refrain from action, demands the state's intervention with a view to the rendering of certain services.

5. If a constitutional right to environmental integrity were to have "Drittwirkung"[14] it would enable any individual to stop any environmentally harmful activity, even though he/she may not have been personally affected. On the other hand, such a right without "Drittwirkung" would seem to have limited effectiveness since most environmentally harmful activities are undertaken not by the state but by other individuals. Nevertheless, since most individual actions which affect the environment require official approval, a constitutionally guaranteed right may be able to influence the state's discretion in granting such approval and thus indirectly serve to restrain such harmful individual actions.

6. It is foreseen that the introduction of a constitutional right to environmental integrity may lead to claims by other (often opposing) groups to have their interests

[14] This signifies the horizontal application of the right where it is enforceable.

constitutionally protected, e.g. claims by industrialists, economists etc, for the introduction of an equivalent constitutional right to development.

7. It is feared, finally, that on account of the above mentioned difficulties the practical effect of such a right will be limited and that this may lead to disillusionment among those who may have held high expectations regarding the introduction of such a right as guaranteeing a satisfactory environment. This may even have a further detrimental effect as regards reliance upon constitutional guarantees as a whole.[15]

The first point made by Prof. Rabie points out that the scope of the right to environment is uncertain and vague. But it should be noted that this theory is applicable to many of the other rights in the main human rights discourse. No clear demarcation can be found in many of the human rights recognised so far, as they have all evolved through a process of juristic writings and judicial interpretations. For example, no specific limit can be found in the right to information or the freedom of association.[16] All the adjectives identified by Prof. Rabie such as clean, best possible, reasonable etc. have to be considered within a particular context or a situation.

Prof. Rabie is not supporting the second argument that the right to environment is not an individual right such as the right to life or right to property, on a factual or a legal basis. Though the right to environment is associational in its character the ultimate vindication of that right is by individuals.[17] Though he has distinguished between the right to environment and the right to life, it has been considered in a number of judicial decision that the right to environment is part of the right to life.

The third argument that this right should be balanced with other rights and that it should be determined by the political sphere in the society and not by the judiciary, clearly lacks legitimacy. There are a number of examples where the "non representative judiciary" (according to Prof. Rabie) has intervened to secure the rights of the people from political tyranny. All human rights aim at providing an ultimate benefit to people. Leaving such rights in the hands of a politically partial executive or a legislature, would inevitably put such rights at a stake. Therefore, the recognition of this right through a constitution would be the best way of safeguarding the right as it would be less susceptible to political turbulence of a State.

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[15] *Supra* note 14 at pp 209-212

[16] In the case of ***V. C. Karunathilaka & W. M. Sunanda Deshapriya*** v. ***Dayananda Dissanayake, Commissioner of Elections.*** (SC Application No. 509/98) the Sri Lankan Supreme Court decided that the right to vote is part of the freedom of expression.

[17] Dr. Fernand de Varennes in his paper *"Language, Non – Discrimination and the Rights of Minorities"* strongly advocates that all the minority rights are linked to the first generation civil and political rights though they are considered as group rights. (This paper was discussed by the writer in the LLM (Human Rights) Course at the University of Hong Kong on 20 March 2001.)

The fourth argument by Prof. Rabie highlights the need for positive actions from the state. But it should be noted that all human rights require both positive and negative responses from the state for their existence. The right to life, which is being considered as a negative right needs positive measures to protect persons form being unlawfully killed by others. The right to environment requires the state to respond in a negative manner by refraining from taking actions, which can be harmful to the environment. Therefore all human rights need both positive and negative actions from states though the degree of that requirement may vary form one right to another.

While in the fifth argument he proposes a solution in itself as it suggests the recognition of vertical and horizontal application of human rights, the problem explained in the sixth point can be overcome with relative ease, as the right to clean environment does not stand alone. There can be no valid argument for the exclusion of the right to development from the bill of rights chapter of a country's constitution as it is also a fundamental human right that needs to be respected. A problem has to be resolved by taking all relevant interests into consideration by adopting a holistic approach. The right to development too, should not stand in isolation as it should also consider the concept of sustainable development in which context environmental rights play a key role.

Prof. Rabie's final argument that practical effect of such a right will be limited and that people may thereby be disillusioned, is one that could be leveled against any human right. No right can be achieved to its fullest capacity as every right evolves with time adding new dimensions to their contexts. No country in the world has fully realized the right to life or the freedom of information or the freedom of association and assembly. But it does not justify the conclusion that the right to life or the freedom of information or the freedom of association and assembly should not be recognised as fundament rights or should be excluded from a constitution.

It should be noted that the presence or absence of a particular right in the basic law of a country does not determine the extent of protection guaranteed by that right in every sphere of its application. This is evident, as most of the rights have been honoured more in their breach than in their observance. Countries which lack constitutional provisions on environment may provide sufficient safeguards to protect the environment through their general laws and regulations. An example of this kind is the United States which has no constitutional provision to protect the environment but yet has developed an advanced system of protecting the environment through ordinary law. Nonetheless, the constitutional protection of a particular right becomes a powerful tool for the advancement and

enhancement of that right. Therefore, the constitutional provisions on environment necessarily stand as one of the most effective tools of protecting the environment.[18]

4. The Constitutional Guarantee and its Objectives

All constitutional provisions which recognise the right to environment are based on a few fundamental principles which have as their ultimate objective the guaranteeing of security for and advancement of, the environment. These fundamental principles have gathered special momentum through international deliberations towards the protection and advancement of environment such as the Brundtland Commission's report commonly known as *"Our Common Future"*[19], the *Agenda 21* and the *Rio Declaration.* Five basic principles of immense importance can be identified in this regard.[20]

4.1 Sustainability of the Environment

This concept signifies the importance of consuming current resources equitably by the present generation without jeopardising the interests of future generations. This idea which was given significance in the Brundtland Commission report is central to the concept of sustainable development. According to this concept intra-generational equity should be a consideration where economic development is concerned without jeopardising the rights of the future generations. This concept has been encapsulated in the two binding documents adopted at Rio, ie. Article 6(a) of the Convention on Biological Diversity and Article 3(1) of the United Nations Framework Convention on Climate Change.[21] Generally, this fundamental principle should form the basic foundation of all actions taken towards the protection and advancement of the environment.

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[18] *Supra* note 4

[19] ***Our Common Future,*** World Commission on Environment and Development (1987).

[20] These principles were discussed at length by C. O. Okidi in his paper 'Review of the Policy Framework and Legal and Institutional Arrangements for the Management of the Environment and Natural Resources in Kenya', presented at a National Seminar in Kenya (27-29 May1994), p 156-170. Also reported in the South African Journal of Environmental Law and Policy, Volume 3 Number 1, March 1996. Special Edition: *Report of the Proceedings of the workshop on the Constitution and the Environment*, Pietermaritzburg 2 and 3 February 1996.

[21] Article 6(a) of the Convention of Biological Diversity states:

> *Each Contacting Party shall, in accordance with its particular conditions and capabilities: (a) Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, inter alia, the measures set out in this Convention relevant to the Contracting Party concerned;*

The Article 3(1) of the United Nations Framework Convention on Climate Change states:

> *The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.*

Accordingly, the developed countries should take the lead in minimising or eradicating the causes and adverse effects of climate change.

4.2 Preventive Principle

This principle has replaced the idea of imposing liability and penalties for damages caused to the environment. The principle requires the adoption of precautionary measures specially in employing development projects which has the potential of making irreversible negative impacts on the environment. It intends to ascertain the probable impacts on the environment of a particular development programme before the stage of implementation, with the idea of determining the necessary precautions that need to be undertaken to prevent negative impacts on the environment. The common method of implementing this principle is the preparation of an Environmental Impact Assessment (EIA). An EIA requires a proponent of any project to make an exhaustive analysis of the proposed project in order to ascertain the positive as well as the negative impacts on the environment and to propose measures that need to be undertaken to mitigate such negative impacts. The underlying idea of such processes is the utilization of environmental resources in a sustainable manner.

This goal has been recognised by Principle 15 of the Rio Declaration[22] and Article 3(3) of the United Nations Framework Convention on Climate Change.[23]

4.3 Integration of Environmental Considerations into Development Planning

This principle which is closely connected to the sustainability of the environment aims at the formulation of a network which integrates environmental concerns into development programmes. It expects each sector or department of the government which implements development programmes to specify precautionary methods in their development plans. In other words, it is the responsibility of each department to determine the precautionary measures that would be undertaken to protect the environment in implementing their development projects. Therefore, they bear the responsibility of evaluating the EIA process as a precautionary measure which ensures intra as well as inter generational equity.

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[22] Principle 15 of the Rio Declaration states:

> *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

[23] Article 3(3) of the United Nations Framework Convention on the Climate Change states:

> *The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors. Efforts to address climate change may be carried out cooperatively by interested Parties.*

This idea has been emphasised in Chapter 8 of *Agenda 21* adopted in Rio (1992). Further it is included in Chapter 10, which deals with planning and management of land resources. Principle 4 of the Rio Declaration provides that,

> *"In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation form it."*

This is called the principle of integration, a component of the principle of sustainable development.

4.4 Public Participation

Vigilant public participation is an essential element in securing intra as well as inter generational equity. Two dimensions can be identified in this regard.

(i) Participation of the public in relation to precautionary measures

Public participation in development projects has been highlighted as an essential component in the current development process. The EIA process requires the full disclosure of the project including the possible impact on the environment, alternatives to the project and measures to mitigate the possible negative impact on the environment. The public should be aware of such information if they are to influence the final decision on the proposed project. Being the targeted beneficiaries, the public should have the ability to decide the utility and necessity of any development project.

(ii) Expansion of Locus Standi

This provides an opportunity to the public to draw the attention of the judiciarty to environmental problems. The traditional notion of locus standi only permits the Attorney General to invoke the jurisdiction of the judiciary. Individual appearance had been restricted only to the cases of private nuisance where a particular damage to the environment has any effect on private individuals. Therefore it is essential to expand the locus standi of the public in order for them to be able to invoke the jurisdiction of courts in the interest of the general public. This can be realised either through an express recognition to this effect or through innovative interpretation of existing provisions of the basic law of a state.

4.5 The Institutional Structure

An organized institutional structure is required to implement the above mentioned principles in a particular state. This should be the central authority that monitors and implements all policies which relate to the environment. The Central Environmental Authority in Sri Lanka is an example of this kind which monitors the EIA process and the issuance of the Environmental Protection Licenses (EPL) in the country with the primary objective of managing the environment.

5. Right to Environment: Where to be Placed in a Constitution

Different countries have adopted various methods of recognizing the right to environment, depending on their preference on different constitutional models. These methods can be placed mainly in two categories.

(i) Environmental safeguards incorporated in the fundamental rights chapter; and
(ii) Environmental concerns recognized in state policy and fundamental duties of citizens

The recognition of environmental rights through a fundamental rights chapter of a constitution authorizes citizens of a country to enforce such rights through judicial intervention. Some countries have recognized the right to environment in their constitutions by giving a subjective definition to the right. For example, Article 18 of the Hungarian Constitution recognizes this right as follows:

> *"The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment."*

The second category is the inclusion of such a right in the Directive Principles of State Policy and Fundamental Duties of Citizens chapter - a pattern followed by most constitutions in the South Asian region. The nature of this categorisation is objective as it requires governmental intervention for their realisation, since the very nature of directive principles is their unenforceability through judicial intervention. For example Article 37 of the Indian Constitution, which relates to the application of Directive Principles of State Policy states:

> *"The provisions contained in this Part shall not be enforced by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."*

Therefore, the second approach only makes a reference to the 'welfare state' thereby adding a socialistic perspective to the state. The report of the Committee of Experts on Proposals for a Draft Constitution in Ghana[24] observed that, traditionally such provisions are not justifiable but they are a "*barometer by which people can measure the performance of a government.*"[25] Further they proposed that such principles were "*for the guidance of the President, Council of Ministers, Political Parties and other bodies, making and applying policy for establishing a just and a free society.*"[26]

W.Neube, J.Mohamed-Katerere and M.Chenje[27] have pointed out a number approaches which could be followed in order to recognise a constitutional right to environment. These approaches can be summarized into four basic categories.

(a) The environmental rights recognized in the Bill of Rights Chapter

(b) Environmental provisions relating to the duties of citizens

(c) Environmental provisions relating to the obligations of state

(d) Constitutional provisions which authorizes international environmental law to be operative in the domestic sphere

While the degree of enforceability of these provisions may vary, it should be noted that the effect of the last approach is somewhat different from the others as it directly empowers international law to be operative in domestic jurisdictions. This kind of approach can be identified in the Constitution of Burundi where Article 10 of the Constitution states that:

> "*The rights and duties proclaimed and guaranteed by the Universal Declaration of Human Rights, the international pacts relative to human rights, the African Charter on Human and People's Rights and the Charter of National Unity shall be an integral part of this Constitution*"

As a consequence this Constitutional provision incorporates Article 24 of the African Charter on Human and People's Right as a part of the domestic law of Burundi. Article 24 of the African Charter on Peoples and Human Rights provides:

> "*All people have the right to a generally satisfactory environment favourable to their development.*"

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[24] Chapter 4, p 49 of the Directive Principles of Sate Policy, Constitution of Ghana, 1991.
[25] *Supra* note 4
[26] See Albie Sachs, ***'Towards a Bill of Rights in a Democratic South Africa'*** (1990) 6 South African Journal of Human Rights, page 1 at page 5.
[27] *Supra* note 4

Some countries have adopted a comprehensive approach to the protection of the environment in their Constitutions recognising a constitutionally protected citizens' right to environment while placing an obligation on the state as well as the citizens to protect the environment. Article 15 of the Constitution of Mali has recognized such a right as well as an obligation, making them a part of the enforceable and binding Declaration of Human Rights of the Malian Constitution. Article 15 of the Constitution states as follows:

> "*Every person has a right to a healthy environment. The protection and defense of the environment and the promotion of the quality of life is a duty of everyone and of the State.*"

Another interesting example can be found in the South African Constitution. Article 29 of the Fundamental Rights Chapter of the South African Constitution grants an enforceable environmental right to citizens while simultaneously placing an enforceable duty on the state to take measures for the protection and advancement of the environment. Article 29 of the South African Constitution states that:

(a) Everyone has the right to environment that is not harmful to their well-being: and

(b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

(i) prevent pollution and ecological degradation

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

This approach towards the protection of the environment is comprehensive as it embraces the interests of both present and future generations. Further it identifies the main issues to be focused on in the process, such as the prevention of ecological degradation and the promotion of environmental conservation. It balances environmental protection with economic development stressing the importance of sustainable development. This is a recognition of all the aspects relating to the protection of the environment discussed in this paper, such as sustainability of environment, precautionary measures, integration of environmental considerations into development planning etc.

It is thus, evident that various countries have adopted different approaches towards the protection of the environment. Granting environmental rights to citizens while placing a

simultaneous obligation on citizens and the state to protect the environment seems to be the most comprehensive and pragmatic approach in this regard, as it provides a wider opportunity for the protection and improvement of the environment.

6. Right to a Clean Environment and Constitutional Patterns

A full realisation of a right to environment requires a collaborated effort of all the actors on the social scene: the individuals, the state, public and private bodies and the international community.[28] The short-term objective of such efforts can vary according to the circumstances. But the common goal and the ultimate objective has been phrased as achieving "a healthy environment or sustainable environment". Therefore a constitution, can be a pragmatic approach towards the realisation of such a goal. Nevertheless, this pragmatic approach has been the focus of criticism by a large number of American jurists.

Constitutional patterns can be divided into two main divisions: the traditional "institutionalized constitutions" and "radical–democratic constitutions."[29] The institutionalized constitutions propose programmatic approaches for the realization of rights adding a socialistic nature to its constitutional structure. It aims at fulfilling duties towards the welfare state by utilising the constitution as a tool. The radical democratic constitutions for which the best example can be found in the United States, accommodate the notion of separation of power where the functions of each institution has been distinguished from the other.

A Constitution, which is considered the supreme law of a country is expected to guarantee equality within all tiers of society. The nature of a constitution whether pragmatic or programmatic or radical-democratic is immaterial in this regard. In Germany, the concept of the *Rechtsstaat* in the nineteenth century, meant the adherence to legality; in the twentieth century it has been referred to denote a "social law-based state" (soziale Rechtsstaat), a development described as moving "from formal to material *Rechtsstaat*."[30]

Therefore, the core objective of any constitution regardless of its nature should be, the utilisation of its provisions for the ultimate benefit of the people of a country. Undoubtedly, environmental rights are not self executing and they need positive state interventions for their fulfillment. This characteristic of the right to environment may cause some difficulties in its full realisation and enforcement as there is no identified, specific formula to carry out this process. A holistic approach to the subject through an innovative method based on tradition

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[28] *Supra* note 9

[29] See Cottrell, Jill. *Environmental Protection by Constitution,* a paper presented at a seminar in University of Hong Kong, 1997.

[30] *Ibid*

legal system would ease such difficulties in the process of executing environmental rights. Particularly relevant in this regard is the observation made by Jill Cottrell:

> *"An enforcement procedure must therefore be capable of taking into consideration the implications of the decision made; it must be effective in giving remedies to those who have suffered and more important, must be capable of changing the behaviour of those who infringe such rights; and it must be capable of resisting capture by those sections of society that it is designated to control."*[31]

[31] Cottrell, Jill. ***'The Generation Right and Social Action Litigation'*** **in Law and Crisis in the Third World** by Adelman, A. and Paliwala, A. (eds).

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SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

General Comment No. 15 (2002)

The right to water
(Art. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)

I. Introduction

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights. The Committee has been confronted continually with the widespread denial of the right to water in developing as well as developed countries. Over one billion persons lack access to a basic water supply, while several billion do not have access to adequate sanitation, which is the primary cause of water contamination and diseases linked to water.[1] The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty. States parties have to adopt effective measures to realise, without discrimination, the right to water, as set out in this general comment.

[1] In 2000, the World Health Organization estimated that 1.1 billion persons did not have access to an improved water supply (80 per cent of them rural dwellers) able to provide at least 20 litres of safe water per person a day; 2.4 billion persons were estimated to be without sanitation. (See WHO, *The Global Water Supply and Sanitation Assessment 2000*, Geneva, 2000, p.1.) Further, 2.3 billion persons each year suffer from diseases linked to water: see United Nations, Commission on Sustainable Development, *Comprehensive Assessment of the Freshwater Resources of the World*, New York, 1997, p. 39.

The legal bases of the right to water

2. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

3. Article 11, paragraph 1, of the Covenant specifies a number of rights emanating from, and indispensable for, the realisation of the right to an adequate standard of living "including adequate food, clothing and housing." The use of the word "including" indicates that this catalogue of rights was not intended to be exhaustive. The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival. Moreover, the Committee has previously recognised that water is a human right contained in article 11, paragraph 1, (see General Comment No. 6 (1995)).[2] The right to water is also inextricably related to the right to the highest attainable standard of health (art. 12, para. 1)[3] and the rights to adequate housing and adequate food (art. 11, para. 1).[4] The right should also be seen in conjunction with other rights enshrined in the International Bill of Human Rights, foremost amongst them the right to life and human dignity.

4. The right to water has been recognised in a wide range of international documents, including treaties, declarations and other standards.[5] For instance, Article 14, paragraph 2,

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[2] See paras. 5 and 32 of the Committee's General Comment No. 6 (1995) on the economic, social and cultural rights of older persons.

[3] See General Comment No. 14 (2000) on the right to the highest attainable standard of health, paragraphs 11, 12 (*a*), (*b*) and (*d*), 15, 34, 36, 40, 43 and 51.

[4] See para. 8 (*b*) of General Comment No. 4 (1991). See also the report by Commission on Human Rights' Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari (E.CN.4/2002/59), submitted in accordance with Commission resolution 2001/28 of 20 April 2001. In relation to the right to adequate food, see the report by the Special Rapporteur of the Commission on the right to food, Mr. Jean Ziegler (E/CN.4/2002/58), submitted in accordance with Commission resolution 2001/25 of 20 April 2001.

[5] See art. 14, para. 2 (*h*), Convention on the Elimination of All Forms of Discrimination Against Women; art. 24, para. 2 (*c*), Convention on the Rights of the Child; arts. 20, 26, 29 and 46 of the Geneva Convention relative to the Treatment of Prisoners of War, of 1949; arts. 85, 89 and 127 of the Geneva Convention relative to the Treatment of Civilian Persons in Time of War, of 1949; arts. 54 and 55 of Additional Protocol I thereto of 1977; arts. 5 and 14 Additional Protocol II of 1977; preamble, Mar Del Plata Action Plan of the United Nations Water Conference; see para. 18.47 of Agenda 21, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (A/CONF.151/26/Rev.1 (Vol. I and Vol. I/Corr.1, Vol. II, Vol. III and Vol. III/Corr.1) (United Nations publication, Sales No. E.93.I.8), vol I: *Resolutions adopted by the Conference*, resolution 1, annex II; Principle No. 3, The Dublin Statement on Water and Sustainable Development, International Conference on Water and the Environment (A/CONF.151/PC/112); Principle No. 2, Programme of Action, *Report of the United Nations International Conference on Population and Development, Cairo, 5-13 September 1994* (United Nations publication, Sales No. E.95.XIII.18), chap. I, resolution 1, annex; paras. 5 and 19, Recommendation (2001) 14 of the Committee of Ministers to Member States on the European Charter on Water Resources; resolution 2002/6 of the United Nations Sub-Commission on the Promotion and Protection of Human Rights on the promotion of the realisation of the right to drinking water. See also the report on the relationship between the enjoyment of economic, social and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation (E/CN.4/Sub.2/2002/10) submitted by the Special Rapporteur of the Sub-Commission on the right to drinking water supply and sanitation, Mr. El Hadji Guissé.

of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates that States parties shall ensure to women the right to "enjoy adequate living conditions, particularly in relation to [...] water supply." Article 24, paragraph 2, of the Convention on the Rights of the Child requires States parties to combat disease and malnutrition "through the provision of adequate nutritious foods and clean drinking-water."

5. The right to water has been consistently addressed by the Committee during its consideration of States parties' reports, in accordance with its revised general guidelines regarding the form and content of reports to be submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, and its general comments.

6. Water is required for a range of different purposes, besides personal and domestic uses, to realise many of the Covenant rights. For instance, water is necessary to produce food (right to adequate food) and ensure environmental hygiene (right to health). Water is essential for securing livelihoods (right to gain a living by work) and enjoying certain cultural practices (right to take part in cultural life). Nevertheless, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease, as well as water required to meet the core obligations of each of the Covenant rights. [6]

Water and Covenant rights

7. The Committee notes the importance of ensuring sustainable access to water resources for agriculture to realise the right to adequate food (see General Comment No.12 (1999)).[7] Attention should be given to ensuring that disadvantaged and marginalised farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.[8]

8. Environmental hygiene, as an aspect of the right to health under article 12, paragraph 2 (*b*), of the Covenant, encompasses taking steps on a non-discriminatory basis to prevent

[6] See also World Summit on Sustainable Development, Plan of Implementation 2002, paragraph 25 (*c*).

[7] This relates to both *availability* and to *accessibility* of the right to adequate food (see General Comment No. 12 (1999), paras. 12 and 13).

[8] See also the Statement of Understanding accompanying the United Nations Convention on the Law of Non-Navigational Uses of Watercourses (A/51/869 of 11 April 1997), which declared that, in determining vital human needs in the event of conflicts over the use of watercourses "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation"..

threats to health from unsafe and toxic water conditions.[9] For example, States parties should ensure that natural water resources are protected from contamination by harmful substances and pathogenic microbes. Likewise, States parties should monitor and combat situations where aquatic eco-systems serve as a habitat for vectors of diseases wherever they pose a risk to human living environments.[10]

9. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses in Part II on the normative content of the right to water in articles 11, paragraph 1, and 12, on States parties' obligations (Part III), on violations (Part IV) and on implementation at the national level (Part V), while the obligations of actors other than States parties are addressed in Part VI.

II. Normative Content of the Right to Water

10. The right to water contains both freedoms and entitlements. The freedoms include the right to maintain access to existing water supplies necessary for the right to water, and the right to be free from interference, such as the right to be free from arbitrary disconnections or contamination of water supplies. By contrast, the entitlements include the right to a system of water supply and management that provides equality of opportunity for people to enjoy the right to water.

11. The elements of the right to water must be *adequate* for human dignity, life and health, in accordance with articles 11, paragraph 1, and 12. The adequacy of water should not be interpreted narrowly, by mere reference to volumetric quantities and technologies. Water should be treated as a social and cultural good, and not primarily as an economic good. The manner of the realisation of the right to water must also be sustainable, ensuring that the right can be realised for present and future generations.[11]

12. While the adequacy of water required for the right to water may vary according to different conditions, the following factors apply in all circumstances:

    (a) Availability. The water supply for each person must be sufficient and continuous for personal and domestic uses.[12] These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal and household

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[9] See also para. 15, General Comment No. 14.

[10] According to the WHO definition, vector-borne diseases include diseases transmitted by insects (malaria, filariasis, dengue, Japanese encephalitis and yellow fever), diseases for which aquatic snails serve as intermediate hosts (schistosomiasis) and zoonoses with vertebrates as reservoir hosts.

[11] For a definition of sustainability, see the *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 1992*, Declaration on Environment and Development, principles 1, 8, 9, 10, 12 and 15; and Agenda 21, in particular principles 5.3, 7.27, 7.28, 7.35, 7.39, 7.41, 18.3, 18.8, 18.35, 18.40, 18.48, 18.50, 18.59 and 18.68.

[12] "Continuous" means that the regularity of the water supply is sufficient for personal and domestic uses.

hygiene.[13] The quantity of water available for each person should correspond to World Health Organization (WHO) guidelines.[14] Some individuals and groups may also require additional water due to health, climate, and work conditions;

(b) Quality. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological *hazards* that constitute a threat to a person's health.[15] Furthermore, water should be of an acceptable colour, odour and taste for each personal or domestic use.

(c) Accessibility. Water and water facilities and services have to be accessible to *everyone* without discrimination, within the jurisdiction of the State party. Accessibility has four overlapping dimensions:

(i) *Physical accessibility*: water, and adequate water facilities and services, must be within safe physical reach for all sections of the population. Sufficient, safe and acceptable water must be accessible within, or in the immediate vicinity, of each household, educational institution and workplace.[16] All water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements. Physical security should not be threatened during access to water facilities and services;

(ii) *Economic accessibility*: Water, and water facilities and services, must be affordable for all. The direct and indirect costs and charges associated with securing water must be affordable, and must not compromise or threaten the realization of other Covenant rights;

(iii) *Non-discrimination*: Water and water facilities and services must be accessible to all, including the most vulnerable or marginalized sections of the population, in law and in fact, without discrimination on any of the prohibited grounds; and

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[13] In this context, "drinking" means water for consumption through beverages and foodstuffs. "Personal sanitation" means disposal of human excreta. Water is necessary for personal sanitation where water-based means are adopted. "Food preparation" includes food hygiene and preparation of food stuffs, whether water is incorporated into, or comes into contact with, food. "Personal and household hygiene" means personal cleanliness and hygiene of the household environment.

[14] See J. Bartram and G. Howard, "Domestic water quantity, service level and health: what should be the goal for water and health sectors", WHO, 2002. See also P.H. Gleick, (1996) "Basic water requirements for human activities: meeting basic needs", *Water International*, 21, pp. 83-92.

[15] The Committee refers States parties to WHO, *Guidelines for drinking-water quality*, 2nd edition, vols. 1-3 (Geneva, 1993) that are "intended to be used as a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking water supplies through the elimination of, or reduction to a minimum concentration, of constituents of water that are known to be hazardous to health."

[16] See also General Comment No. 4 (1991), para. 8 (*b*), General Comment No. 13 (1999) para. 6 (*a*) and General Comment No. 14 (2000) paras. 8 (*a*) and (b). Household includes a permanent or semi-permanent dwelling, or a temporary halting site.

(iv) *Information accessibility*: accessibility includes the right to seek, receive and impart information concerning water issues.[17]

Special topics of broad application

Non-discrimination and equality

13. The obligation of States parties to guarantee that the right to water is enjoyed without discrimination (art. 2, para. 2), and equally between men and women (art. 3), pervades all of the Covenant obligations. The Covenant thus proscribes any discrimination on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to water. The Committee recalls paragraph 12 of General Comment No. 3 (1990), which states that even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes.

14. States parties should take steps to remove de facto discrimination on prohibited grounds, where individuals and groups are deprived of the means or entitlements necessary for achieving the right to water. States parties should ensure that the allocation of water resources, and investments in water, facilitate access to water for all members of society. Inappropriate resource allocation can lead to discrimination that may not be overt. For example, investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population.

15. With respect to the right to water, States parties have a special obligation to provide those who do not have sufficient means with the necessary water and water facilities and to prevent any discrimination on internationally prohibited grounds in the provision of water and water services.

16. Whereas the right to water applies to everyone, States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States parties should take steps to ensure that:

[17] See para. 48 of this General Comment.

(a) Women are not excluded from decision-making processes concerning water resources and entitlements. The disproportionate burden women bear in the collection of water should be alleviated;

(b) Children are not prevented from enjoying their human rights due to the lack of adequate water in educational institutions and households or through the burden of collecting water. Provision of adequate water to educational institutions currently without adequate drinking water should be addressed as a matter of urgency;

(c) Rural and deprived urban areas have access to properly maintained water facilities. Access to traditional water sources in rural areas should be protected from unlawful encroachment and pollution. Deprived urban areas, including informal human settlements, and homeless persons, should have access to properly maintained water facilities. No household should be denied the right to water on the grounds of their housing or land status;

(d) Indigenous peoples' access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water;

(e) Nomadic and traveller communities have access to adequate water at traditional and designated halting sites;

(f) Refugees, asylum-seekers, internally displaced persons and returnees have access to adequate water whether they stay in camps or in urban and rural areas. Refugees and asylum-seekers should be granted the right to water on the same conditions as granted to nationals;

(g) Prisoners and detainees are provided with sufficient and safe water for their daily individual requirements, taking note of the requirements of international humanitarian law and the United Nations Standard Minimum Rules for the Treatment of Prisoners;[18]

(h) Groups facing difficulties with physical access to water, such as older persons, persons with disabilities, victims of natural disasters, persons living in disaster-prone areas, and those living in arid and semi-arid areas, or on small islands are provided with safe and sufficient water.

[18] See arts. 20, 26, 29 and 46 of the third Geneva Convention of 12 August 1949; arts. 85, 89 and 127 of the fourth Geneva Convention of 12 August 1949; arts. 15 and 20, para. 2, United Nations Standard Minimum Rules for the Treatment of Prisoners, in *Human Rights: A Compilation of International Instruments* (United Nations publication, Sales No. E.88.XIV.1).

III. States Parties' Obligations

General legal obligations

17. While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to water, such as the guarantee that the right will be exercised without discrimination of any kind (art. 2, para. 2) and the obligation to take steps (art. 2, para.1) towards the full realization of articles 11, paragraph 1, and 12. Such steps must be deliberate, concrete and targeted towards the full realization of the right to water.

18. States parties have a constant and continuing duty under the Covenant to move as expeditiously and effectively as possible towards the full realization of the right to water. Realization of the right should be feasible and practicable, since all States parties exercise control over a broad range of resources, including water, technology, financial resources and international assistance, as with all other rights in the Covenant.

19. There is a strong presumption that retrogressive measures taken in relation to the right to water are prohibited under the Covenant.[19] If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party's maximum available resources.

Specific legal obligations

20. The right to water, like any human right, imposes three types of obligations on States parties: obligations to *respect*, obligations to *protect* and obligations to *fulfil*.

(a) Obligations to respect

21. The obligation to *respect* requires that States parties refrain from interfering directly or indirectly with the enjoyment of the right to water. The obligation includes, *inter alia*, refraining from engaging in any practice or activity that denies or limits equal access to adequate water; arbitrarily interfering with customary or traditional arrangements for water allocation; unlawfully diminishing or polluting water, for example through waste from State-owned facilities or through use and testing of weapons; and limiting access to

[19] See General Comment No. 3 (1990), para. 9.

or destroying, water services and infrastructure as a punitive measure, for example, during armed conflicts in violation of international humanitarian law.

22. The Committee notes that during armed conflicts, emergency situations and natural disasters, the right to water embraces those obligations by which States parties are bound under international humanitarian law.[20] This includes protection of objects indispensable for survival of the civilian population, including drinking water installations and supplies and irrigation works, protection of the natural environment against widespread, long-term and severe damage and ensuring that civilians, internees and prisoners have access to adequate water.[21]

(*b*) *Obligations to protect*

23. The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.

24. Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

(*c*) *Obligations to fulfil*

25. The obligation to *fulfil* can be disaggregated into the obligations to facilitate, promote and provide. The obligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or a

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[20] For the interrelationship of human rights law and humanitarian law, the Committee notes the conclusions of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons (Request by the General Assembly), ICJ Reports (1996)* p. 226, para. 25.

[21] See arts. 54 and 56, Additional Protocol I to the Geneva Conventions (1977), art. 54, Additional Protocol II (1977), arts. 20 and 46 of the third Geneva Convention of 12 August 1949, and common article 3 of the Geneva Conventions of 12 August 1949.

group are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.

26. The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, *inter alia*, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national water strategy and plan of action to realize this right; ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.

27. To ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*:

(a) use of a range of appropriate low-cost techniques and technologies;
(b) appropriate pricing policies such as free or low-cost water; and
(c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

28. States parties should adopt comprehensive and integrated strategies and programmes to ensure that there is sufficient and safe water for present and future generations.[22] Such strategies and programmes may include:

(a) reducing depletion of water resources through unsustainable extraction, diversion and damming;
(b) reducing and eliminating contamination of watersheds and water-related eco-systems by substances such as radiation, harmful chemicals and human excreta;
(c) monitoring water reserves;
(d) ensuring that proposed developments do not interfere with access to adequate water;
(e) assessing the impacts of actions that may impinge upon water availability and natural-ecosystems watersheds, such as climate changes, desertification and increased soil salinity, deforestation and loss of biodiversity;[23]
(f) increasing the efficient use of water by end-users;
(g) reducing water wastage in its distribution;
(h) response mechanisms for emergency situations;

[22] See footnote 5 above, Agenda 21, chaps. 5 ,7 and 18; and the World Summit on Sustainable Development, Plan of Implementation (2002), paras. 6 (*a*), (*l*) and (*m*), 7, 36 and 38.
[23] See the Convention on Biological Diversity, the Convention to Combat Desertification, the United Nations Framework Convention on Climate Change, and subsequent protocols.

(i) and establishing competent institutions and appropriate institutional arrangements to carry out the strategies and programmes.

29. Ensuring that everyone has access to adequate sanitation is not only fundamental for human dignity and privacy, but is one of the principal mechanisms for protecting the quality of drinking water supplies and resources.[24] In accordance with the rights to health and adequate housing (see General Comments No. 4 (1991) and 14 (2000)) States parties have an obligation to progressively extend safe sanitation services, particularly to rural and deprived urban areas, taking into account the needs of women and children.

International obligations

30. Article 2, paragraph 1, and articles 11, paragraph 1, and 23 of the Covenant require that States parties recognize the essential role of international cooperation and assistance and take joint and separate action to achieve the full realization of the right to water.

31. To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party's jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction.[25]

32. States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water.[26] Water should never be used as an instrument of political and economic pressure. In this regard, the Committee recalls its position, stated in its General Comment No. 8 (1997), on the relationship between economic sanctions and respect for economic, social and cultural rights.

33. Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where

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[24] Article 14, para. 2, of the Convention on the Elimination of All Forms of Discrimination Against Women stipulates States parties shall ensure to women the right to "adequate living conditions, particularly in relation to [...] sanitation". Article 24, para. 2, of the Convention on the Rights of the Child requires States parties to "To ensure that all segments of society [...] have access to education and are supported in the use of basic knowledge of [...] the advantages of [...] hygiene and environmental sanitation."

[25] The Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires that social and human needs be taken into account in determining the equitable utilization of watercourses, that States parties take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given to the requirements of vital human needs: see arts. 5, 7 and 10 of the Convention.

[26] In General Comment No. 8 (1997), the Committee noted the disruptive effect of sanctions upon sanitation supplies and clean drinking water, and that sanctions regimes should provide for repairs to infrastructure essential to provide clean water.

States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations and applicable international law.

34. Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.

35. States parties should ensure that the right to water is given due attention in international agreements and, to that end, should consider the development of further legal instruments. With regard to the conclusion and implementation of other international and regional agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to water. Agreements concerning trade liberalization should not curtail or inhibit a country's capacity to ensure the full realization of the right to water.

36. States parties should ensure that their actions as members of international organizations take due account of the right to water. Accordingly, States parties that are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should take steps to ensure that the right to water is taken into account in their lending policies, credit agreements and other international measures.

Core obligations

37. In General Comment No. 3 (1990), the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant. In the Committee's view, at least a number of core obligations in relation to the right to water can be identified, which are of immediate effect:

(a) To ensure access to the minimum essential amount of water, that is sufficient and safe for personal and domestic uses to prevent disease;

(b) To ensure the right of access to water and water facilities and services on a non-discriminatory basis, especially for disadvantaged or marginalized groups;

(c) To ensure physical access to water facilities or services that provide sufficient, safe and regular water; that have a sufficient number of water outlets to avoid prohibitive waiting times; and that are at a reasonable distance from the household;

(d) To ensure personal security is not threatened when having to physically access to water;

(e) To ensure equitable distribution of all available water facilities and services;

(f) To adopt and implement a national water strategy and plan of action addressing the whole population; the strategy and plan of action should be devised, and periodically reviewed, on the basis of a participatory and transparent process; it should include methods, such as right to water indicators and benchmarks, by which progress can be closely monitored; the process by which the strategy and plan of action are devised, as well as their content, shall give particular attention to all disadvantaged or marginalized groups;

(g) To monitor the extent of the realization, or the non-realization, of the right to water;

(h) To adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups;

(i) To take measures to prevent, treat and control diseases linked to water, in particular ensuring access to adequate sanitation;

38. For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on States parties, and other actors in a position to assist, to provide international assistance and cooperation, especially economic and technical which enables developing countries to fulfil their core obligations indicated in paragraph 37 above.

IV. Violations

39. When the normative content of the right to water (see Part II) is applied to the obligations of States parties (Part III), a process is set in motion, which facilitates identification of violations of the right to water. The following paragraphs provide illustrations of violations of the right to water.

40. To demonstrate compliance with their general and specific obligations, States parties must establish that they have taken the necessary and feasible steps towards the

realization of the right to water. In accordance with international law, a failure to act in good faith to take such steps amounts to a violation of the right. It should be stressed that a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable.

41. In determining which actions or omissions amount to a violation of the right to water, it is important to distinguish the inability from the unwillingness of a State party to comply with its obligations in relation to the right to water. This follows from articles 11, paragraph 1, and 12, which speak of the right to an adequate standard of living and the right to health, as well as from article 2, paragraph 1, of the Covenant, which obliges each State party to take the necessary steps to the maximum of its available resources. A State which is unwilling to use the maximum of its available resources for the realization of the right to water is in violation of its obligations under the Covenant. If resource constraints render it impossible for a State party to comply fully with its Covenant obligations, it has the burden of justifying that every effort has nevertheless been made to use all available resources at its disposal in order to satisfy, as a matter of priority, the obligations outlined above.

42. Violations of the right to water can occur through *acts of commission*, the direct actions of States parties or other entities insufficiently regulated by States. Violations include, for example, the adoption of retrogressive measures incompatible with the core obligations (outlined in para. 37 above), the formal repeal or suspension of legislation necessary for the continued enjoyment of the right to water, or the adoption of legislation or policies which are manifestly incompatible with pre-existing domestic or international legal obligations in relation to the right to water.

43. Violations through *acts of omission* include the failure to take appropriate steps towards the full realization of everyone's right to water, the failure to have a national policy on water, and the failure to enforce relevant laws.

44. While it is not possible to specify a complete list of violations in advance, a number of typical examples relating to the levels of obligations, emanating from the Committee's work, may be identified:

(a) Violations of the obligation to respect follow from the State party's interference with the right to water. This includes, *inter alia*:

(i) arbitrary or unjustified disconnection or exclusion from water services or facilities;
(ii) discriminatory or unaffordable increases in the price of water; and
(iii) pollution and diminution of water resources affecting human health;

(b) Violations of the obligation to protect follow from the failure of a State to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to water by third parties.[27] This includes, *inter alia*:

(i) failure to enact or enforce laws to prevent the contamination and inequitable extraction of water;
(ii) failure to effectively regulate and control water services providers; (iii) failure to protect water distribution systems (e.g., piped networks and wells) from interference, damage and destruction; and

(c) Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realisation of the right to water. Examples includes, *inter alia*:

(i) failure to adopt or implement a national water policy designed to ensure the right to water for everyone;
(ii) insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to water by individuals or groups, particularly the vulnerable or marginalized;
(iii) failure to monitor the realisation of the right to water at the national level, for example by identifying right-to-water indicators and benchmarks;
(iv) failure to take measures to reduce the inequitable distribution of water facilities and services;
(v) failure to adopt mechanisms for emergency relief;
(vi) failure to ensure that the minimum essential level of the right is enjoyed by everyone
(vii) failure of a State to take into account its international legal obligations regarding the right to water when entering into agreements with other States or with international organizations.

V. Implementation at the National Level

45. In accordance with article 2, paragraph 1, of the Covenant, States parties are required to utilize "all appropriate means, including particularly the adoption of legislative measures" in the implementation of their Covenant obligations. Every State party has a margin of discretion in assessing which measures are most suitable to meet its specific circumstances. The Covenant, however, clearly imposes a duty on each State party to take whatever steps are necessary to ensure that everyone enjoys the right to water, as soon as possible. Any national measures designed to realise the right to water should not interfere with the enjoyment of other human rights.

[27] See para. 23 for a definition of "third parties."

Legislation, strategies and policies

46. Existing legislation, strategies and policies should be reviewed to ensure that they are compatible with obligations arising from the right to water, and should be repealed, amended or changed if inconsistent with Covenant requirements.

47. The duty to take steps clearly imposes on States parties an obligation to adopt a national strategy or plan of action to realise the right to water. The strategy must:

(a) be based upon human rights law and principles;
(b) cover all aspects of the right to water and the corresponding obligations of States parties;
(c) define clear objectives;
(d) set targets or goals to be achieved and the time-frame for their achievement;
(e) formulate adequate policies and corresponding benchmarks and indicators.
(f) establish institutional responsibility for the process;
(g) identify resources available to attain the objectives, targets and goals;
(h) allocate resources appropriately according to institutional responsibility;
(i) establish accountability mechanisms to ensure the implementation of the strategy.

When formulating and implementing their right to water national strategies, States parties should avail themselves of technical assistance and cooperation of the United Nations specialised agencies (see Part VI below).

48. The formulation and implementation of national water strategies and plans of action should respect, *inter alia*, the principles of non-discrimination and people's participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water. Individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.

49. The national water strategy and plan of action should also be based on the principles of accountability, transparency and independence of the judiciary, since good governance is essential to the effective implementation of all human rights, including the realization of the right to water. In order to create a favourable climate for the realization of the right, States parties should take appropriate steps to ensure that the private business sector and civil society are aware of, and consider the importance of, the right to water in pursuing their activities.

50. States parties may find it advantageous to adopt framework legislation to operationalise their right to water strategy. Such legislation should include:

(a) targets or goals to be attained and the time-frame for their achievement;
(b) the means by which the purpose could be achieved;

(c) the intended collaboration with civil society, private sector and international organisations;
(d) institutional responsibility for the process;
(e) national mechanisms for its monitoring; and
(f) remedies and recourse procedures.

51. Steps should be taken to ensure there is sufficient coordination between the national ministries, regional and local authorities in order to reconcile water-related policies. Where implementation of the right to water has been delegated to regional or local authorities, the State party still retains the responsibility to comply with its Covenant obligations, and therefore should ensure that these authorities have at their disposal sufficient resources to maintain and extend the necessary water services and facilities. The States parties must further ensure that such authorities do not deny access to services on a discriminatory basis.

52. States parties are obliged to monitor effectively the realisation of the right to water. In monitoring progress towards the realisation of the right to water, States parties should identify the factors and difficulties affecting implementation of their obligations.

Indicators and benchmarks

53. To assist the monitoring process, right to water indicators should be identified in the national water strategies or plans of action. The indicators should be designed to monitor, at the national and international levels, the State party's obligations under articles 11, paragraph 1, and 12. Indicators should address the different components of adequate water (such as sufficiency, safety and acceptability, affordability and physical accessibility), be disaggregated by the prohibited grounds of discrimination, and cover all persons residing in the State party's territorial jurisdiction or under their control. States parties may obtain guidance on appropriate indicators from the ongoing work of WHO, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Centre for Human Settlements (Habitat), the International Labour Organization (ILO), the United Nations Children's Fund (UNICEF), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP) and the United Nations Commission on Human Rights.

54. Having identified appropriate right to water indicators, States parties are invited to set appropriate national benchmarks in relation to each indicator.[28] During the periodic

[28] See E. Riedel, "New bearings to the State reporting procedure: practical ways to operationalize economic, social and cultural rights – The example of the right to health", in S. von Schorlemer (ed.), *Praxishandbuch UNO*, 2002, pp. 345-358. The Committee notes, for example, the commitment in the 2002 World Summit on Sustainable Development Plan of Implementation to have, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water (as outlined in the Millennium Declaration) and the proportion of people who do not have access to basic sanitation.

reporting procedure, the Committee will engage in a process of "scoping" with the State party. Scoping involves the joint consideration by the State party and the Committee of the indicators and national benchmarks which will then provide the targets to be achieved during the next reporting period. In the following five years, the State party will use these national benchmarks to help monitor its implementation of the right to water. Thereafter, in the subsequent reporting process, the State party and the Committee will consider whether or not the benchmarks have been achieved, and the reasons for any difficulties that may have been encountered (see General Comment No.14 (2000), para. 58). Further, when setting benchmarks and preparing their reports, States parties should utilise the extensive information and advisory services of specialised agencies with regard to data collection and disaggregation.

Remedies and accountability

55. Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels (see General Comment No. 9 (1998), para. 4, and Principle 10 of the Rio Declaration on Environment and Development).[29] The Committee notes that the right has been constitutionally entrenched by a number of States and has been subject to litigation before national courts. All victims of violations of the right to water should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudsmen, human rights commissions, and similar institutions should be permitted to address violations of the right.

56. Before any action that interferes with an individual's right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises:

(a) opportunity for genuine consultation with those affected;
(b) timely and full disclosure of information on the proposed measures;
(c) reasonable notice of proposed actions;
(d) legal recourse and remedies for those affected; and
(e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person's failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.

[29] Principle 10 of the Rio Declaration on Environment and Development (*Report of the United Nations Conference on Environment and Development*, see footnote 5 above), states with respect to environmental issues that "effective access to judicial and administrative proceedings, including remedy and redress, shall be provided."

57. The incorporation in the domestic legal order of international instruments recognizing the right to water can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Incorporation enables courts to adjudicate violations of the right to water, or at least the core obligations, by direct reference to the Covenant.

58. Judges, adjudicators and members of the legal profession should be encouraged by States parties to pay greater attention to violations of the right to water in the exercise of their functions.

59. States parties should respect, protect, facilitate and promote the work of human rights advocates and other members of civil society with a view to assisting vulnerable or marginalized groups in the realisation of their right to water.

VI. Obligations of Actors other than States

60. United Nations agencies and other international organisations concerned with water, such as WHO, FAO, UNICEF, UNEP, UN-Habitat, ILO, UNDP, the International Fund for Agricultural Development (IFAD), as well as international organisations concerned with trade such as the World Trade Organisation (WTO), should cooperate effectively with States parties, building on their respective expertise, in relation to the implementation of the right to water at the national level. The international financial institutions, notably the International Monetary Fund and the World Bank, should take into account the right to water in their lending policies, credit agreements, structural adjustment programmes and other development projects (see General Comment No. 2 (1990)), so that the enjoyment of the right to water is promoted. When examining the reports of States parties and their ability to meet the obligations to realise the right to water, the Committee will consider the effects of the assistance provided by all other actors. The incorporation of human rights law and principles in the programmes and policies by international organisations will greatly facilitate implementation of the right to water. The role of the International Federation of the Red Cross and Red Crescent Societies, International Committee of the Red Cross, the Office of the United Nations High Commissioner for Refugees (UNHCR), WHO and UNICEF, as well as non-governmental organisations and other associations, is of particular importance in relation to disaster relief and humanitarian assistance in times of emergencies. Priority in the provision of aid, distribution and management of water and water facilities should be given to the most vulnerable or marginalised groups of the population.

Non-state actors' responsibility for socio-economic rights

The nature of their obligations under the South African Constitution[1]

Danwood Mzikenge Chirwa[*]

The concept of human rights has traditionally been applied to relations in the public sphere. The dominant view has been that the state/individual relationship involves unequal power dynamics between parties. A state's potential to abuse its position of authority to the detriment of an individual's interests was the basis for human rights to insulate the latter against state interference.

By contrast, relationships in the private sphere have been regarded as being based on a degree of parity between free and autonomous parties. This reasoning has been largely responsible for the failure to apply human rights in relationships between private parties.

However, it is being increasingly acknowledged that limiting the application of human rights to vertical relationships is no longer sufficient to ensure their protection. Non-state actors such as multinational corporations and insurgents have committed, and continue to commit, massive violations of human rights. The rights of women and children have also suffered serious infringements within the context of private relations. More recently, the increasing privatization of basic services is also concerning.

These developments, among others, provide a basis for the extension of the application of human rights to private actors.

The concept of human rights is a tool of emancipation. It has evolved over time through the struggles of people against certain forms of domination in specific geopolitical, social and economic circumstances. It is a concept that is not static but dynamic and responsive to changing circumstances. In modern times, to inoculate private actors against human rights responsibility would only serve to ridicule the human rights idea itself.

The 1996 Constitution of South Africa has been at the forefront of recognising the human rights obligations of private actors. Other African constitutions that have done similarly include those of Malawi (1994), the Gambia (1996), Cape Verde (1990), Ghana (1992) and Mali (1992). In addition to explicit constitutional provisions, obligations may also be imposed on non-state actors indirectly through legislation.

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[*] Research Fellow in the Socio-Economic Rights Project, Community Law Centre, University of the Western Cape.

However, a serious constraint to the effective horizontal application of human rights has been the failure to establish the precise nature of the obligations of non-state actors, particularly in the realm of socio-economic rights. This brief contribution seeks to use the South African Constitution as a case study to investigate the nature of obligations that non-state actors have in relation to socio-economic rights.

The international framework

Although international law is chiefly aimed at regulating inter-state relations, emerging trends point to an increasing recognition of the socio-economic rights obligations of non-state actors. The preamble to the Universal Declaration of Human Rights establishes the basis of such responsibilities by providing that 'every individual and every organ of state... shall strive ... to secure' the universal and effective recognition and observance of all human rights. This statement excludes neither judicial persons, nor natural persons. Significantly, it implies that private actors may shoulder more than the negative obligation engendered by human rights.

Several human rights instruments, including the Convention on the Rights of the Child, the African Charter on Human and Peoples' Rights, and the African Convention on the Rights and Welfare of the Child, impose duties directly on private actors such as individuals, children, parents and communities. Some of these duties relate to socio-economic rights and entail both positive and negative aspects.

The International Covenant on Economic, Social and Cultural Rights expressly declares that the individual is 'under responsibility to strive for the promotion and observance of the rights' recognised under it. The Committee on Economic, Social and Cultural Rights (CESCR), which is entrusted with the supervision of this Covenant, has stated unambiguously in General Comment No. 12 (the right to food) that 'all members of society-individuals, families, local communities, non-governmental organizations, civil society organizations, as well as the business sector have responsibilities in the realisation of the right to adequate food.' The CESCR has made similar comments on the right to health.

The International Labour Organization (ILO) has perhaps broken more ground than any other international human rights body in imposing direct obligations on non-state actors, especially in relation to labour rights. Some of the instruments adopted under the auspices of the ILO call upon multinational companies to:

- create employment opportunities;
- promote equality;
- ensure security of employment;
- provide favourable conditions and work place safety; and
- protect freedom of association and the right to organize in host countries.

Although not always wholly explicit, these instruments and many others not specifically mentioned here recognise that private actors have both negative and positive obligations in relation to socio-economic rights.

The international framework has significant implications for the horizontal application of socio-economic rights in the South African Constitution. Section 39 (1) (b) of the Constitution obliges the courts to consider international law in interpreting the Bill of Rights.

The South African constitutional framework

The 1993 South African Constitution, the forerunner to the 1996 Constitution, did not contain clear provisions on the application of the Bill of Rights to horizontal relationships. Section 7(1) provided that the Bill of Rights binds 'all legislative and executive organs of the state at all levels of government.' The omission of the judiciary from this section generated mixed judicial pronouncements on whether the Bill of Rights had horizontal effect.

This scuffle was laid to rest by the Constitutional Court in ***Du Plessis*** v. ***De Klerk.***[2] The majority view of the Court in this case was that the interim Bill of Rights did not lend itself to direct horizontal application. Rather, it was relevant only indirectly as regards private parties. The implication of the judgment was that the interim Bill of Rights was only relevant in the development and application of the common law.

Section 8 of the 1996 Constitution is markedly different from its predecessor. Section 8(1) expressly states that the Bill of Rights binds 'the legislature, the executive, the judiciary and all organs of state.' More explicitly, subsection 2 provides that a provision in the Bill of Rights binds both 'natural and juristic' persons if, and to the extent that, it is applicable. Interestingly, subsection 4 gives express recognition to the possibility of juristic persons having rights if the nature of the juristic person and the nature of the right are such that the juristic person can claim the right.

In terms of section 8(3), when a right has horizontal effect courts are enjoined to apply or, if necessary, to develop common law to the extent that legislation does not give effect to the right in question. Courts are further obliged by section 39(2) to promote the spirit, purport and objects of the Bill of Rights when developing common law or customary law or when interpreting the Constitution.

In addition to sections 8 and 39(2), several other specific provisions favour a horizontal application. For example, section 9(4) expressly provides that, 'No person may unfairly discriminate directly or indirectly against anyone' on any ground listed in subsection 2. The horizontal application of the equality provision was given further credence in the Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000. Section 24(2) of the Act provides that 'All persons have a duty and responsibility to promote equality.' Thus, both the Constitution and the Act prohibit private actors from discriminating unfairly and specifically oblige them to promote equality. It is clear that the horizontal application of these provisions is a useful tool in protecting and advancing access to socio-economic rights.

Section 32(1) (b) explicitly applies to private relations only. It provides that everyone has the right of access to any information that is held by another person and that is required for the

[2] 1996 (3) SA 850 (CC)

exercise or protection of any rights. This right is critical to the advancement of socio-economic rights. For example, individuals are entitled to ask a manufacturing company to provide relevant information in respect of pollution in the local community within the vicinity of the company's operations.

Last, but not least, section 29 (3) specifically places an obligation on any person who establishes an independent educational institution to maintain standards of education that are not inferior to those of comparable public education institutions.

Horizontal application of socio-economic rights in the Constitution

According to section 8(2), the determination as to whether a given provision is applicable to a non-state actor, turns on the nature of the right and the nature of the duty imposed by the right.

Suggestions that this section permits the application of socio-economic rights to private actors have elicited spirited resistance from leading South African scholars such as Dennis Davis, Halton Cheadle, Stuart Woolman and Alfred Cockrell. The basis of their objection lies in the broad characterisation of socio-economic rights as entitlements that flow from a social democratic vision of the role of the state. This vision, they argue, views the state as the sole provider of basic services and goods necessary to facilitate basic equality of the citizenry, which in turn is essential to achieving equal and fair participation in democratic processes. This duty is generally considered extremely onerous. Thus, they argue the state is better placed to realise these rights on a progressive basis.

However, the fact that socio-economic rights generally serve as a vehicle for facilitating social equality and that the state is the key player in securing that goal cannot be used to downplay the responsibility of other actors in the attainment of this vision.

Various socio-economic rights embodying different kinds of duties contribute to this ultimate objective in different ways. Thus, each right must be examined on its own in the light of the obligations it generates. This conclusion is consistent with section 8(2) which intimates that 'a provision in the Bill of Rights' may apply to private actors.

Furthermore, the full enjoyment of certain rights requires that actors discharge various levels of duty. For example, children's socio-economic rights can be realised better by the concerted efforts of parents/ caregivers and the state. The combination of efforts of various duty holders in the realisation of socio-economic rights does not diminish the state's overall responsibility to ensure that there is respect for the inherent dignity of all and that society becomes more egalitarian. On this basis, the argument that socio-economic rights are generally incapable of horizontal application is wrong in principle. Each right must be assessed on its own in the light of the duties it embodies to determine whether it has horizontal reach.

Implications of the socio-economic rights jurisprudence

Section 26(1) of the Constitution entrenches the right of access to adequate housing while section 27(1) guarantees the right of access to health care services, sufficient food and water and social security. Subsection 2 of both these sections enjoins the state to take reasonable legislative and other measures, within it available resources, to achieve the progressive realisation of these rights.

In both *Government of the Republic of South Africa and Others* v. *Grootboom and Others,*[3] *(Grootboom)* and *Minister of Health and Others* v. *Treatment Action Campaign and Others,*[4] (TAC) the Constitutional Court refused to hold that subsection 1 of either section 26 or section 27 created self-standing rights. The Court reasoned, on both occasions, that the qualifications contained in subsection 2 – 'progressive realisation', and 'within available resources' - could not be separated from the rights provided for in the first subsection.

This interpretation could be broadly construed to imply that it is the state alone that has obligations in respect of these rights since subsection 2 of both sections singles out the state as the sole duty holder. This construction does not sit well with the emerging trend in international human rights law discussed above, nor with other specific pronouncements in the judgment.

A restrictive construction of both judgments would lead to the opposite conclusion. As shown above, international law has cogently established that the negative duty to respect socio-economic rights is sacrosanct. This obligation exists independently from the internal qualifiers of socio-economic rights. In South Africa, this negative obligation was explicitly recognized by the Constitutional Court in *Re Certification of the Republic of South African Constitution, 1996.*[5]

Significantly, it was held in *Grootboom* that, in the context of the right of access to adequate housing, there exists 'at the very least, a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right to access to adequate housing.' In the same case, the Constitutional Court surmised that the right of access to housing suggested that 'it is not only the state that is responsible for the provision of houses.'

These dicta confirm the position that private actors have both negative and positive obligations relating to socio-economic rights. However, these duties do not emanate from subsection 2. On this basis, it is arguable that subsections 1 of both section 26 and section 27 are self-standing, at least as regards private actors. This interpretation is distinguishable from state obligations in respect of which, as the Constitutional Court recognised, subsection 1 and 2 must be read together.

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[3] 2000 (11) BCLR 1169 (CC)
[4] 2002 (10) BCLR 1033 (CC)
[5] 1996 (4) SA 744 (CC)

The interpretation proposed would also accord with a horizontal application of trade union rights and labour rights, entrenched in section 23, and environmental rights, recognised under section 25 of the Constitution.

The socio-economic rights obligations of the state

It is settled that human rights generate four levels of duties: to respect, protect, promote and fulfill. The South African Constitution has expressly acknowledged these duties in section 7(2). For the most part, these duties have been defined in relation to the state.

Thus, the duty to respect obliges the state to refrain from interfering in the enjoyment of all fundamental rights. The duty to protect requires the state to protect right holders against other subjects through measures such as the adoption of legislation and the provision of effective remedies. Furthermore, this obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic, social interferences.

The duty to promote enjoins the state to ensure that individuals are able to exercise their rights and freedoms through promoting tolerance, raising awareness and building an appropriate infrastructure. The duty to fulfill is intricately connected with the duty to promote, although the former requires more positive action by the state to ensure the actual realisation of a right.

Thus, the duty to respect is negative in nature while the other three duties require positive action (though varying in degree). These duties apply to civil and political rights as they do to socio-economic rights. It is submitted that these obligations, with certain modifications, are capable of application to private actors as well.

Duties of non-state actors

Section 8 (2) states that a provision in the Bill of Rights might apply to natural and juristic persons 'to the extent' that it is applicable, depending on, among other things, the nature of any duty embodied in the right. This provision does not mean that a private actor is responsible for all the layers of duty in order for a right to apply to it. Instead, it recognises that rights might need concerted action by several actors for them to be fully realised. It also implies that some actors should bear greater obligations than others.

It is submitted that the 'state action' paradigm could serve as a useful basis for distinguishing the level of responsibility of non-state actors for socio-economic rights. Strictly speaking, this standard has conventionally been used to determine whether a given private actor should be held liable for human rights violations. Thus, a plaintiff would not succeed in suing a non-state actor unless he or she has established that the conduct of the non-state actor amounted to sate action or was linked to the state.

Thus, private actors exercising the functions of the state would be held liable for human rights violations. Non-state actors wielding particularly oppressive power, although not linked to the state, would likewise be liable for human rights violations under this paradigm. This benchmark could be used to differentiate the positive obligations of various private actors, depending on the right and the nature of the obligations involved. Thus, a private actor carrying out the functions of the state would bear the latter's responsibilities. Similarly, a private actor not linked to the state but exercising power akin to or greater than that of the state should be bound by the same standard as the state would. The 'state action' test could be extended to bind private actors who, however small, hold positions that can result in serious denials or violations of socio-economic rights.

Conclusion

Times have changed. We certainly live in the world that was lived in some two centuries ago, but the circumstances are different. People now face different challenges in their day-to-day lives. As with time, the concept of human rights is not static. It has historically played the role of liberator from oppression. It certainly cannot resist emancipating the masses from the new forms of domination and oppression that have emerged in the globalised world.

Private actors have obligations to discharge in order to ensure meaningful enjoyment of socio-economic rights. International law is moving in the direction of imposing enforceable obligations in this regard. The South African Constitution offers a useful opportunity for holding private actors accountable for socio-economic rights.

Although still rudimentary, international law and the South African Constitution suggest that the obligations of non-state actors for socio-economic rights have both negative and positive aspects. In principle, there is no socio-economic right that can be said to bind the state only. All private actors are enjoined, at the very minimum, to respect socio-economic rights.

The difficulty, however, lies in distinguishing the levels of positive obligations among private actors given that these duty holders are different in character and nature. This contribution has suggested the adoption of the 'state action' benchmark in this regard.

With litigation and further research on the subject, it is hoped that the precise obligations of non-state actors relating to socio-economic rights will emerge.