

Delineating the content of the right to social security

The right to social security is of crucial importance in protecting the most vulnerable and marginalised members of society, especially those living in dire poverty. Social assistance is essential in ensuring that persons living in poverty are able to access a minimum level of income that is sufficient to meet basic subsistence needs and prevent them from having to live below minimum acceptable standards.

The right to social security has been guaranteed at both the international and national levels. For instance, at the international level, the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), recognises the right to social security, including social assistance (article 9). Under the ICESCR states are also required to guarantee an adequate standard of living to everyone (article 11), which can be interpreted to mean that a state should provide social assistance and other needs-based forms of social benefits in

cash or in kind to anyone without adequate resources (Van Rensburg and Lamarche, 2005: 213-4). At the national level, the South African Constitution, for example, guarantees to everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance [section 27(1)(c)], and to every child the right to basic social services [section 28(1)(c)].

The United Nations Committee on Economic, Social and Cultural Rights (the Committee or CESCR)

General Comment No 19: The right to social security, adopted on 23 November 2007, UN doc. E/C.12/GC/19

has elaborated on a number of socio-economic rights and the related obligations in a series of general comments. Though some of the general comments touch on social security issues and the Committee has addressed this right in its consideration of state reports and in various statements, it did not adopt a general comment specifically on social security until recently.

In November 2007, the Committee adopted General Comment No 19 on the right to social security. In it, the Committee

expresses its concern about the extremely low levels of access to social security, with about 80% of the global population lacking access to formal social security, 20% of them living in dire poverty (para 7).

Accordingly, the Committee recognises the important role social security plays in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion (para 3). Social security must be seen as a means to respond to levels of vulnerability, risk and deprivation deemed socially unacceptable within a given society. Hence measures taken by states to provide social security benefits cannot be defined narrowly and must guarantee everyone a minimum enjoyment of this right (para 4). Such measures include contributory or insurance-based schemes such as social insurance, non-contributory schemes such as universal schemes, privately run schemes and self-help schemes such as community-based or mutual schemes. The Committee notes that non-contributory schemes will be required in almost all states parties, as it is unlikely that every person could be adequately covered through an insurance-based system.

In General Comment No 19, the Committee identifies, among other things, the essential elements of this right as well as the obligations of states and non-state actors. The following paragraphs highlight some of the key points.

Essential elements of the right to social security

First, it is important to note that the right to social security, as pointed out by the Committee,

“includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies” (para 9).

The Committee identifies five factors to be taken into account in determining whether the right to social security is being implemented effectively. These are availability, social risks and contingencies, adequacy, accessibility and relationship with other rights. The factors may vary based on the different conditions.

Availability

For the right to social security to be implemented effectively, a social security system must be available and in place to ensure the provision of benefits. The duty to ensure that the system is effectively administered and supervised is placed on public authorities. In addition to the requirement that the system must be established under domestic law, the schemes also have to be sustainable so as to ensure their long-term application (para 11).

Social risks and contingencies

There are nine principal branches of social security that any system of social security must provide coverage for. These are: health care; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; and survivors and orphans (paras 12-21). These categories are also recognised

by the International Labour Organization (ILO) Social Security (Minimum Standards) Convention, 1952 (No 102).

Adequacy

This relates to adequacy in amount and duration, irrespective of whether benefits are paid in cash or kind; and regular monitoring is required to ensure that beneficiaries are able to afford the goods and services they require to realise their rights. Of crucial importance to the adequacy criterion is the obligation on states to fully respect the principles of human dignity and non-discrimination in order to avoid any adverse effect on the levels of benefits and the form in which the benefits are provided. With regard to social security schemes that provide benefits to cover lack of income, there should be a reasonable relationship between earnings, paid contributions and the amount of the relevant benefit (para 22).

Accessibility

This includes issues of coverage, eligibility, affordability, participation and information, and physical access. The social security scheme should not discriminate in coverage, and non-contributory schemes are essential in ensuring universal coverage (para 23). Qualifying criteria have to be reasonable, proportionate and transparent and the withdrawal, reduction or suspension of benefits has to be limited, based on grounds that are reasonable, subject to due process and provided for in national law (para 24). The costs and charges associated with making contributions must

be affordable for all and not compromise the realisation of other rights (para 25). Beneficiaries must be able to participate in the administration of the scheme, and the rights of individuals and organisations to seek, receive and impart information on all social security entitlements must be ensured (para 26). Finally, accessibility also requires that benefits be provided in a timely manner, and that beneficiaries, especially those with disabilities, migrants and persons living in remote or disaster-prone areas and areas experiencing armed conflict, have access to social security services, including benefits and information (para 27).

Relationship with other rights

Though the right to social security plays an important role in facilitating the realisation of other rights, the adoption of other measures to realise these rights cannot per se be used as a substitute for the creation of social security schemes (para 28).

Obligations of states parties

Though the obligation of states to realise economic, social and cultural rights is subject to progressive realisation and the availability of resources, some are of immediate effect.

As observed by the Committee, states have immediate obligations in relation to the right to social security, such as the guarantee that the right will be exercised without discrimination of any kind (para 40). The prohibited grounds of discrimination include

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.

States are also required to give the right to social security appropriate priority in law and policy due to its fundamental importance for human dignity. They are therefore obliged to develop a national strategy for the full implementation of the right to social security and to allocate adequate fiscal and other resources at the national level towards its implementation, including international cooperation and technical assistance (para 41).

In addition to the general obligations stated above, the Committee further outlines the specific legal, international and core obligations of states.

Legal obligations

Just like other human rights, three types of obligations apply to states parties in relation to the right to social security:

- The *obligation to respect* requires states to refrain from interfering directly or indirectly with the enjoyment of the right to social security. This includes refraining from engaging in any practice or activity that denies or limits equal access to adequate social security, or arbitrarily or unreasonably interferes with self-help or other social security arrangements or institutions that have been established by individuals or

corporate bodies to provide social security (para 44).

- The *obligation to protect* requires states to prevent third parties from interfering with the enjoyment of the right to social security. This includes adopting the necessary and effective legislative and other measures to restrain third parties from denying equal access to social security schemes operated by them or by others, arbitrarily or unreasonably interfering with self-help and other social security arrangements or failing to pay required contributions for employees or other beneficiaries into the social security scheme (para 45). In addition, states have an obligation to prevent abuses by establishing an effective regulatory system that includes framework legislation, independent monitoring, genuine public participation and the imposition of penalties for non-compliance (para 46).
- The *obligation to fulfil* requires states to adopt necessary measures, including the implementation of social security schemes, directed towards the full realisation of the right to social security (para 47).
The Committee further divides the obligation to fulfil into the obligations to *facilitate*, *promote* and *provide*.
 - The *obligation to facilitate* requires states to take positive measures to assist individuals and communities to enjoy the right to social security.

This includes recognising the right, adopting a national social security strategy and plan of action to realise the right, and ensuring that the system is adequate, accessible for everyone and covers social risks and contingencies (para 48).

- *The obligation to promote* requires states to take steps to ensure that there is appropriate education and public awareness on access to social security schemes, especially in rural and deprived urban areas or among minorities (para 49).
- *The obligation to provide* obliges states to make available social security where people are not able to realise the right themselves. States have to establish non-contributory schemes or other social assistance measures to provide support to people who are unable to make sufficient contributions for their own protection. Of particular importance is the duty to ensure that the social security system can respond in times of emergency (para 50).

International obligations

The international obligations of states in relation to the right to social security include the duty to:

- refrain from actions that directly or indirectly interfere with the enjoyment of this right in other countries (para 53);
- prevent their own citizens and nationals from violating

this right in other countries (para 54);

- facilitate the realisation of this right in other countries - subject to the availability of resources - through, for instance, the provision of economic and technical assistance (para 55);
- ensure that the right to social security is given due attention in international agreements and consider the development of further legal instruments, with persons working temporarily in other countries covered by the social security schemes of their home country (para 56);
- take steps to ensure that international and regional agreements do not impact negatively on the right to social security (para 57); and
- ensure that their actions as members of international organisations take due account of the right to social security (para 58).

Core obligations

In General Comment No 3 on the nature of states parties' obligations (UN doc. E/1991/23), the Committee states that "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party" (General Comment No 3, para 10). In General Comment No 19, the Committee notes states' obligation to satisfy the minimum essential levels of the right to social security. In this regard, states are obliged to:

- ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and

families, enabling them to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs and the most basic forms of education (and if a state cannot provide this minimum level for all risks and contingencies within its maximum available resources, it should, after a wide process of consultation, select a core group of social risks and contingencies);

- ensure the right of access to social security systems or schemes on a non-discriminatory basis, especially for disadvantaged and marginalised individuals and groups;
- respect existing social security schemes and protect them from unreasonable interference;
- adopt and implement a national social security strategy and plan of action;
- take targeted steps to implement social security schemes, particularly those that protect disadvantaged and marginalised individuals and groups; and
- monitor the extent of the realisation of the right to social security (para 59).

A state is *prima facie* failing to discharge its obligations under the ICESCR if a significant number of individuals in that state are deprived of the essential levels of a right (General Comment No 3, para 10). Reiterating that view here, the Committee adds that for a state to be able to attribute its failure to meet the minimum obligations to a lack of available resources, "it must demonstrate that every effort has been made to use all resources that are at

its disposal in an effort to satisfy, as a matter of priority, these minimum obligations” (para 60).

Assessing states parties' compliance with their obligations

States are required to use “all appropriate means” to realise the rights in the ICESCR [article 2(1) of the ICESCR]. However, as observed by the Committee, states have a margin of discretion in choosing the measures that are most suitable for their specific circumstances (para 66).

Hence, in assessing whether states have complied with their obligation to take action, the Committee looks at whether implementation of the right is reasonable and proportionate, whether it complies with human rights and democratic principles, and whether it is subject to an adequate framework of monitoring and accountability (para 36).

It should be noted that deliberate retrogressive measures are prohibited under the ICESCR. However, where such measures have been taken, the state has the burden of proving that they were introduced after careful consideration of all alternatives and are duly justified by reference to the rights in the ICESCR. In assessing this, the Committee will look at the following:

- whether there was reasonable justification for the action;
- whether alternatives were comprehensively examined;
- whether there was genuine participation by affected groups in examining the proposed measures and alternatives;
- whether the measures

were directly or indirectly discriminatory;

- whether the measures will have a sustained impact on the realisation of the right to social security or an unreasonable impact on acquired social security rights, or whether an individual or group is deprived of access to the minimum essential level of social security; and
- whether there was an independent review of the measures at the national level (para 42).

Violation of the right to social security by states

Generally, a state can violate the right to social security by not acting in good faith when taking steps to realise the right. Article 26 of the Vienna Convention on the Law of Treaties provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

In addition, the Committee notes in General Comment No 19 that violations of the right to social security can occur through acts of commission or through acts of omission (para 64).

“Acts of commission” relate to direct actions of states or other entities insufficiently regulated by states. Examples include the adoption of deliberate retrogressive measures incompatible with the core obligations stated above or active support for measures adopted by third parties that are inconsistent with the right to social security.

“Acts of omission”, on the other hand, relate to the failure to take sufficient and appropriate action to realise the right to social

security. Examples include the failure to enforce relevant laws, to take appropriate steps towards realising the right or to ensure financial sustainability for state pension schemes.

Obligations of non-state actors

Non-state actors referred to in General Comment No 19 include UN specialised agencies and other international organisations working on social security and trade issues. These non-state actors are obliged to cooperate effectively with states in relation to the implementation of the right to social security (para 82). To promote and facilitate the implementation of this right, especially among vulnerable and marginalised individuals and groups, international financial institutions are specifically required to incorporate the right to social security in their programmes and policies (paras 83-4).

Conclusion

General comments are important mechanisms for developing the jurisprudence of the Committee. Though not legally binding, they have considerable weight and are important and useful interpretative guides for the courts and other human rights bodies in states that have ratified or signed the ICESCR. In fact, the South African Constitutional Court has relied directly on, for example, General Comment No 3 when interpreting the right to have access to adequate housing [*Government of the Republic of South Africa and Others v Grootboom* 2001 (1) SA 46 (CC) at para 45]. General Comment No 19 will no doubt

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be very useful in facilitating the realisation of the right to social security, especially in developing countries, as it addresses not only social risks but also endemic vulnerabilities like those associated with poverty. In addition, non-governmental organisations have an important role to play in the implementation of this right, through highlighting violations and participating in the identification of appropriate solutions.

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Reference

Van Rensburg, L and Lamarche, L 2005. The right to social security and assistance. In D Brand and C Heyns (eds), *Socio-economic rights in South Africa*. Pretoria University Law Press.

General Comment No 19 is available at <http://www2.ohchr.org/english/bodies/cescr/comments.htm> or <http://daccessdds.un.org/doc/UNDOC/GEN/G08/403/97/PDF/G0840397.pdf?OpenElement>.

The International Labour Organization (ILO) Social Security (Minimum Standards) Convention is available at www.ilo.org/ilolex/cgi-lex/convde.pl?C102.