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AN INTRODUCTION TO ECONOMIC, SOCIAL AND CULTURAL RIGHTS' IMPLEMENTATION AS A POSITIVE OBLIGATION

Açar sözlər: iqtisadi hüquqlar, sosial hüquqlar, mədəni hüquqlar, implementasiya, məcburet mə

Key words: economic rights, social rights, cultural rights, implementation, enforcement

Ключевые слова: экономические права, социальные права, культурные права, реализация, правоприменение

Introduction

During the Cold War when the international normative framework for the protection of human rights was in the process of negotiation by the United Nations, ideological perceptions about differences between the two sets of rights were allowed to undermine the persuasive logic of their unitary moral and existential foundations. Nevertheless, it must also be accepted that the constructs of civil and political and social, economic and cultural rights are products of different political philosophies, with correspondingly different ideas of the relationship between individual and state and the role of the individual as a citizen in society. It is also clear that, despite the polarization of ideological constructs since the end of World War II, a more holistic conception of social democracy has prevailed in Western Europe, whereby governments have accepted international and domestic obligations to safeguard traditional democratic freedoms while at the same time ensuring varying levels of economic and social provision. Now, the United Nations General Assembly has adopted by consensus, on 10 December 2008, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights which paves the way for individual complaints of economic, social and cultural rights against States Parties, it seems to be an appropriate time to reflect on why it has taken so long for these developments to occur. The Protocol opens for ratification by States Parties on 24 September 2009. Before any high expectations are placed on the Optional Protocol to deliver better implementation of economic, social and cultural rights, there is a need to issue temper that expectation with some realities of the past. At the same time there is tremendous optimism that economic, social and cultural rights obligations can no longer be ignored or wished away by many States. So, I focused the historical development; the needs and the ways of the implementation of social, economic, cultural rights.

1.2. Historical Development

The polarization of the world over the Cold War had a major influence. It resulted in the drafting of the Covenant being difficult as the United Nations Commission on Human Rights prepared a text that paralleled the Universal Declaration on Human Rights. UDHR was adopted in 1948 and it was not mandatory. That is why it didn't create any obligation for states. In 1952 the General Assembly instructed the Commission on Human Rights to prepare two covenants as they gave in to the pressure of the western liberal Member States of the United Nations. The result was that the human rights provisions were bifurcated into the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, even though the original intention was to have a single one. These two Covenants and the UDHR are often referred to as the International Bill of Rights. The whole process of establishing the International Bill of Rights lasted nearly 30 years in total before completion. And the result was that the Covenants come into force in 1976. In addition, it took another 33 years to afford State Parties the opportunity to ratify an optional protocol which permits individual complaints to be submitted for adjudication at the international level.

The three 'generations' language was latched onto by the States looking for neat classifications which justified their lack of protection of all human rights for all persons, thereby continuing a phoney battle over a war that has since long ceased. In 1993 the Vienna Declaration and Programme of Action sought to correct this misperception by restating the original intent that "all human rights are universal, indivisible and interdependent and interrelated." Any discussion of human rights, of necessity, draws us into comparisons between the ICCPR and ICESCR to illustrate the rightful location of economic, social and cultural rights.

1.3. The Norms and Enforcement

A schematic summary of the International Bill of Rights that protect economic, social and cultural rights appears as below, where the article is listed after the abbreviation for the international instrument: *Economic*

Rights: right to property; right to work; right to social security. *Social Rights*: adequate standard of living; rights of families to assistance. *Cultural Rights*: right to education; right to preserve cultural identity of minority groups; right to take part in cultural life; right to benefit from scientific progress; right to benefit from moral and material interest and etc. The oversight function of both the ICCPR and ICESCR are left to committees. States Parties to the ICESCR submit reports to a monitoring body every five years. While originally States Parties under the ICESCR did not report to such a committee, but to the United Nation Economic and Social Council, this was changed. In the understanding of many of the Soviet states, who drove the drafting process of the ICESCR, implementation of the rights would take place with minimal international interference. In the State reports both committees, on the ICESCR and ICCPR, rely on “naming and shaming” as a device to correct deficiencies in state practice. The Committee on Economic, Social and Cultural Rights issued reporting guidelines to assist States, conducted on-site visits, engaged in constructive dialogue with States Parties and issued concluding observations. The articulations of the monitoring body of ICESCR on broader issues relating to all States parties are seen as authoritative interpretations of the Covenant as States Parties account for their progress before them. For example, the nature of State Parties obligations have been addressed in General Comment 3 which dealt with the implementation of the rights under Article 2 of ICESCR. There is the obligation of conduct by the State Party which means that the State Party guarantees that the rights will be exercised without discrimination. Also there is an obligation of result in which the State Party is committed to take action within a reasonably short time in which the steps are deliberate, concrete and targeted towards meeting the obligation. To satisfy the obligation to take steps all appropriate measures are expected to be taken including legislative action. The Committee drew the attention of States Parties to the fact that the obligation under the Covenant is not confined to the respect of human rights, but that States Parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction.

1.4. Example for Domestic Enforcement

When the normative principles of the international protection of all human rights, including economic, social, and cultural rights, are included in the constitution of a country then the proponents of justiciability of economic social and cultural rights have an effective mechanism. For example, since South Africa became a constitutional state it protects economic, social and cultural rights together with civil and political rights. The International Covenant on Economic, Social and Cultural Rights has been signed but South Africa is not yet one of the 160 State Parties. The approach of the Constitutional Court to the economic, social and cultural rights has been classified into three main categories by one commentator: The first would be ‘basic’ rights unqualified by references to resource constraints or notions of progressive realization and would include children’s socio-economic rights, the right to basic education and the rights of the detained and prisoners’ socio-economic rights. The second category includes ‘access rights’ or the right of everyone to have access to adequate housing, health care, food, water and social security. The duty of the State is limited to taking “reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.” The third category imposes a prohibition on the State with regard to the right to shelter in that no eviction may be made without an order of court and the right not to be refused emergency health care. The jurisprudence of the South African Constitutional Court with regard to social and economic rights has been set out initially in the well-known “reasonableness review” cases of *Soobramoney v. Minister of Health, KwaZulu-Natal*. The central issue that appears to preoccupy the Constitutional Court in these types of cases is whether the policy chosen by the organs of state can reasonably be expected to deliver the rights in question. From a cautious start, with some deference paid to the executive and legislature, in *Soobramoney* the Constitutional Court became quickly aware of the framework of its inquiry into the reasonableness of state policy. As a result of limited funds being available for dialysis treatment, which the Constitutional Court found did not fall within the ambit of the “right to emergency treatment”, it denied Mr. *Soobramoney* the right to that treatment. It said: a court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters. In the *Grootboom* case, Mrs *Grootboom*, her children and number of similarly affected neighbors, moved from their home which had flooded during the winter rains onto land earmarked for low-cost housing. They were evicted from this land when the matter went before the High Court who found in their favor. The State appealed to the Constitutional Court which explained the ambit of the Court’s inquiry within the standard of reasonableness of the state policy in the context of the separation of powers doctrine: the precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether

public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met. As the highest court in the land, it reiterated that it had the power to adjudicate on socio-economic rights because the Constitution gave them that power. It also said that, within the debate around the separation of powers, it was entitled to examine this issue even if it had a 99financial implication. It repeated that if it ordered legal aid to an accused individual, as civil right, that too would have a financial implication. That would appear to be an adequate answer to those who maintain that the enforcement of civil and political rights, as a negative duty on the State, do not have high cost implications, as discussed earlier. One commentator sees the political dimension of this debate clearly as privileging negative liberty and the existing economic status quo. In Grootboom, the Constitutional Court stated that reasonableness can be evaluated at the level of legislative programming and its implementation: Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies and programmes implemented by the executive. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations. The Constitutional Court also explained the meaning of reasonableness by linking it to the three democratic values of human dignity, equality and freedom in the South African constitution. The development of the domestic jurisprudence in South Africa based on the review of the reasonableness of state policy has resonance in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights where under the provisions for the Examinations of Communications it is stated: when examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party... In doing so the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

1.5. Conclusion

It is time that economic, social and cultural rights shed the yoke of history and claimed its legitimate place as a human right in the legal systems of the world. Our law-makers need to be educated in the better ways to introduce these rights through law reform. The ways of getting best protection of human rights are promotion, respect and implementation. And every state party should follow Committee's recommendations. After that, state party should change its domestic legislation. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well directed policies and programmes implemented by the executive. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations

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Pozitiv öhdəlik kimi iqtisadi, sosial və mədəni hüquqların implementasiyasına giriş

Xülasə

Tarixi inkişaf artıq sosial, iqtisadi və mədəni hüquqların da ayrılmaz, bölünməz insan hüquqları kimi tanınmasını zəruri edirdi. Bunun nəticəsində bu gün həmin hüquqlar beynəlxalq paktlara əsaslanaraq, müxtəlif mexanizmlərlə təmin olunur. Təkcə beynəlxalq sənədləri imzalamaq yox, həm də əks olunanları implementasiya etmək lazımdır. Bu sahədə ən səmərəli üsul dövlətlərin daxili qanunvericilik aktlarını

beynəlxalq insan hüquqları standartlarına uyğun təkmilləşdirməsidir. Bir nümunə olaraq, bu məqalə Cənubi Afrika sistemini əks etdirir.

**Введение в реализацию экономических, социальных
и культурных прав как позитивное обязательство**

Резюме

Историческое развитие уже заставило признать социальные, экономические и культурные права неотъемлемыми и неделимыми правами человека. В результате сегодня эти права гарантируются различными механизмами, основанными на международных соглашениях. Необходимо не только подписывать международные документы, но и осуществлять их. Наиболее эффективный путь в этой области - для государств улучшить свое внутреннее законодательство в соответствии с международными стандартами в области прав человека. В качестве примера, эта статья отражает систему Южной Африки.

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