

## NOTE ON HOW DENMARK CAN STRENGTHEN ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN MULTILATERAL FORA

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### 1 INTRODUCTION

This note is based on in-house expertise from the Danish Institute for Human Rights (DIHR) as well as meetings with international experts working in the area economic, social and cultural rights (ESCR) including:

- Ignacio Saiz, Executive Director, Center for Economic and Social Rights;
- Rebecca Brown, Deputy Director, ESCR-Net;
- Manfred Nowak, Professor, Ludwig Boltzmann Institute of Human Rights;
- N.J. Schrijver, Professor, Faculty of Law, Leiden University;
- Christian Courtis, Human Rights Officer, Human Rights and Economic and Social Issues Section, Office of the High Commissioner for Human Rights;
- Maria Green, Visiting Professor, Raoul Wallenberg Institute.

The facts and opinions expressed in this note are DIHR's and do not necessarily reflect the views of the experts consulted. The note provides a short overview of some of the issues on the current agenda in the area of ESCR and recommendations on possible target areas where Denmark may play a role.

The topics presented are:

- Justiciability of ESCR
- The Right to Development
- Human Rights and Business
- Natural Resources Management and ESCR
- ESCR and Environmental issues
- Post-2015 Development Agenda
- Working for the promotion of specific rights
  - Right to participation
  - Right to health
  - Right to education
  - Right to development

## 2 JUSTICIABILITY OF ESCR

Whether economic, social and cultural rights violations can be raised in front of a court of law has long been an intensely debated issue. Some national courts have already taken up the subject, as is the case of the *South Africa vs. Grootboom* case<sup>1</sup>, where the right to housing was contested. In Canada, in the case of *Eldridge v British Columbia*<sup>2</sup>, the Supreme Court ruled on the need to allocate resources for non-discrimination in health care. After considering cost and budgetary implications, the Supreme Court ruled that the right to equality requires that governments provide resources to ensure that deaf people have access to interpreters in the provision of health care. In Europe, the European Court of Human Rights has used “civil and political” provisions to decide on economic, social and cultural rights. The right to health, for example, has been contested under the right to family and private life (Art. 8 of the European Convention on Human Rights) and the prohibition of torture (Art. 3 of the European Convention on Human Rights). All together these rulings give evidence to that fact that economic, social and cultural rights have been brought into courts for quite some time.

When the Optional Protocol (OP) to the International Covenant on Economic, Social and Cultural Rights (ICESCR) enters into force on 5 May 2013, the principles and rights contained in the Covenant, as well as the question of justiciability, will be further explored.

Over the coming years, the Committee on Economic, Social and Cultural Rights (CESCR) will take on the important task to develop a body of jurisprudence on the rights contained in the Covenant by drawing on the valuable case-law that has already been produced by various domestic courts. The decisions of the CESCR will also influence future decisions by domestic courts and tribunals, especially in countries where there is no existing case law on the subject. Accordingly, the issue of justiciability could constitute an important area of support for Denmark.

The OP establishes an individual complaints mechanism leading to cases being brought before the Committee to handle. Therefore, it is a vital legal mechanism to hold governments accountable to their human rights obligations. As a consequence of the OP, the Committee will most likely need to increase their capacity to handle complaints.

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<sup>1</sup> Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000); full copy of the judgment available online at: <http://www.saflii.org/za/cases/ZACC/2000/19.html>

<sup>2</sup> *Eldridge v British Columbia (Attorney General)*, (1997) 3 SCR 624, 1997 CanLII 327 (SCC)

Lastly, the OP is critical both for its substance and symbolic value. It will therefore strengthen Denmark's strategic platform at the multilateral level, as well as strengthen coherence between bilateral and multilateral work, if Denmark ratifies the OP.

## **THE RIGHT TO DEVELOPMENT**

The right to development has changed considerably since the establishment of the 1986 Declaration. The obligations, which were unclear and criticised for augmenting the North-South disparities by only creating obligations for developed countries, have since been further clarified by the international community. However, there is still no single definition of the right to development in international human rights practice nor a clear set of indicators to monitor the right to development.

The work of clarifying the content of this right has been carried out by, among others, the UN Working Group on the Right to Development (1998) and a High Level Task Force (2004), which were mandated to define the content and the obligations contained in the right to development. Since 2005, these two bodies have defined a set of criteria for determining whether or not the right to development is in fact being implemented.

The right to development focuses on collective obligations of states and the rights of individuals. This means that states, when acting collectively, must take into account the impact of their collective policies on the development prospects of other states, especially those states with few resources per capita. It also entails that multilateral institutions must act in accordance with the right to development.

The rights-holders of the right to development: as a right of peoples and individuals, states can be assumed to be the representatives of the collective rights of the individuals within their jurisdiction.

The duty-bearers of the right to development: are States acting collectively (in the UN and its agencies and programmes, in the WTO, the World Bank, etc.), States acting individually with regard to those under its jurisdiction (for example, Denmark acting with regard to persons in Denmark), and States acting individually with regard to peoples and individuals in other countries (for example, Denmark's votes in international organizations, decisions regarding trade or aid policies and Denmark's role with regard to the extraterritorial activities of Danish businesses).

To make it easier to understand the obligations of states in relation to the right to development, the High Level Task Force has developed a set of attributes, criteria, sub-criteria and indicators. These are yet to be approved by the Working Group. (For a complete list of these please follow the link: <http://www2.ohchr.org/english/issues/development/right/docs/A-HRC-15-WG2-TF-2-Add2.doc>).

The right to development goes beyond the notions of non-discrimination, which exists in human rights conventions, to demand that international and national decisions are consistent with global social justice. The right to development is thereby directly and explicitly connected to notion of equity. It obligates states to make more explicit account of equity, removing the obstacles to development and sharing the benefits of development across the globe.

Furthermore, the right to development affirms that human rights goals and processes are to be integrated into the entire development endeavour – in this way it lends normative weight to a HRBA.

The right to development demands a more direct focus on how the *process* of development affects people's lives. Thus, the promotion of per capita income growth, although remaining critical, becomes subservient to improving human well-being. The right to development stipulates sustainable poverty reduction for all rather than mere growth. This is in line with the understanding of HRBA and poverty orientation provided in the recent "HRBA Guidance Note" developed by Danida.

### **3 HUMAN RIGHTS AND BUSINESS**

Business activities can impact on virtually all internationally recognised human rights, including civil and political rights, economic, social and cultural rights, labour rights recognised by the International Labour Organisation (ILO), and rights enjoyed by specific categories of rights-holders under specialised human rights instruments, such as the UN Convention on the Rights of the Child (CRC).

Positive impacts can include employment, production and delivery of essential goods and services, and contributing to economic development locally and nationally, e.g. through payment of taxes.

Adverse impacts result e.g. from pollution, land grabbing and forced resettlements of indigenous and rural populations, local inflation and pressure on scarce resources such as housing and water.

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs). Under the Guiding Principles and its “Protect, Respect and Remedy framework”, states are required to prevent, investigate, punish and redress business-related human rights abuse through effective policies, legislation, regulation and adjudication. Businesses in turn must respect all human rights and undertake due diligence measures, including human rights impact assessments. Victims must also have access to effective remedies for business-related human rights abuses.

Since 2011, the Guiding Principles have been absorbed into a number of other multilateral frameworks outside the UN, such as the OECD Guidelines for Multinational Enterprises, and the International Finance Corporation Performance Standards. Financial institutions, such as the World Bank and European Investment Bank, are also aligning to the UNGPs, as well as institutions at national level such as Export Credit Guarantee Agencies, and individual companies and industry associations<sup>3</sup>. In addition, the CRC has in 2013 issued a General Comment on human rights and business as a following a statement issued by CESCR in 2011.

Denmark has already supported the UNGPs at international level by:

- Hosting a conference on the UNGPs under its 2012 EU Presidency;
- Participating actively in the 2011 review of the OECD Guidelines to support integration of the UNGPs;
- Supporting a DIHR staff as member of the UN Working Group on Business and Human Rights 2012-14;
- Supporting DIHR to lead advocacy and capacity building efforts amongst NHRIs on business and human rights since 2010.

Denmark is viewed as a leader in corporate social responsibility (CSR) in Europe and beyond, based on its early adoption of legal requirements for companies to report on CSR and now human rights; its newly reformed National Contact Point under the OECD Guidelines; the explicit provision for DIHR to work on business issues under its 2012 law; measures taken to promote awareness of CSR/human rights and business to Danish companies

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<sup>3</sup> (e.g. IPIECA - The global oil and gas industry association for environmental and social issues, ICMM – The International Council on Mining and Metals, GNI – Global Network Initiative).

operating abroad through Danish embassies; and generally strong historical and current protection of labour rights.

#### 4 NATURAL RESOURCES MANAGEMENT AND ESCR

In recent years, important new standards and tools have gained strength in three areas relevant for natural resource management:

1. **Natural resource governance**, such as the EITI (Extractive Industries Transparency Initiative), Natural Resource Charter (NRC), and EU country-by-country reporting for certain commodities;
2. **Business responsibilities for human rights** e.g. UN Guiding Principles on Human Rights, revised OECD Guidelines for Multinational Enterprises, revised OECD Common Approaches for Export Credit Guarantee
3. **Monitoring and assessment tools** for measuring economic, social and cultural rights and enhancing accountability such as the development of economic and social rights indicators by OHCHR and CESR, human rights budgeting, participatory budgeting and human rights impact assessment.

However, until now, these three agendas and their approaches have developed in silos:

- Human rights actors, instruments and processes are rarely mentioned by natural resource governance initiatives (e.g. NRC).
- Human rights mechanisms (e.g. UPR, treaty bodies, NHRIs' complaint mechanisms) – though generally concerned with the risks that corruption around natural resource management pose to the realization of ESCR – lack knowledge of standards and tools to evaluate the impacts of companies to ESCR, which means that such issues like corruption cases between companies and states are not addressed within human rights accountability frameworks;
- UN Guiding Principles on Business and Human Rights are focused on the state's duty to protect against *corporate* human rights abuses, and on businesses' *own* responsibility to respect human rights, which means that human rights violations resulting from inadequate state governance of natural resources are invisible.

If connected, the new standards and tools in these three areas provide the crucial means by which civil society and NHRIs can hold governments and private actors accountable for the approach taken in state law and policy to

manage natural resources, its implementation in practice, as well as the approach taken to apply revenues to deliver public services and achieve key development commitments such as the Millennium Development Goals (MDGs) and ESC-rights.

## **5 ESCR AND ENVIRONMENTAL ISSUES**

The protection of the environment is crucial for enjoyment of human rights in general, and a precondition for many specific rights such as the right to life and the right to health. Damage to the environment can jeopardize all human rights – as is the case in relation to climate change and especially for groups dependent on subsistence on land, forestry or fisheries, such as indigenous peoples or rural populations. Not all human rights violations are necessarily linked to environmental degradation, and environmental issues cannot necessarily be addressed comprehensively within the human rights framework. Nonetheless, human rights and environmental protection represent overlapping human values and are clearly connected.

A human rights-based approach to environmental protection entails both a deep knowledge of environmental issues, conditions and norms, and a strong focus on the principles of participation, accountability, non-discrimination and equality, as well as empowerment. These principles are vital to enable potentially affected people to access and participate effectively in decision-making processes concerning potentially harmful activities. Such human rights-based processes can in turn prevent environmental degradation and lead to better development and human rights outcomes.

Denmark could champion the links between environmental protection and economic, social and cultural rights by, among other things, supporting the CESCR. The Committee is right now considering writing a comment on the connection between ESCR and environmental issues, but it lacks financial resources and in-house knowledge to do so and consequently needs support. Denmark could also provide financial and political support to the Special Rapporteur on the Adverse Effects of the Illicit Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights.

Denmark could also raise environmental issues systematically in the context of the Universal Periodic Review. To support such an initiative in practice, Denmark could generate a benchmark standard that draws together relevant information on minimum international standards on water and atmospheric pollutants. This would enable civil society to evaluate environmental

standards and performance in place in their own countries against internationally validated standards, and to present concise information on environmental issues before international and regional human rights fora. At EU level, Denmark can also press for environment and human rights to be raised systematically in political dialogue.

Furthermore, the discussion on climate change and its consequences opens a space for an integrated approach to ESCR and environmental issues. Floods, hurricanes, landslides and other climate related catastrophes will affect people's right to housing, health, water, education, etc. Yet legal accountability for climate change related impacts on human rights is gravely lacking.<sup>4</sup>

Indeed, climate change is perhaps the most profound danger to human rights at global level at the present time, but there is currently almost no way to scrutinise governments' climate change policies in a human rights forum. Denmark could therefore support work to scope out the avenues for securing greater legal accountability at the international level for climate change derived impacts on human rights.

Denmark is well known in the world for its "green profile" and its proactive role in climate change discussions and is therefore in a good position to lobby for a more integrated approach to ESCR and climate change. Considering that UNEP's (United Nations Environment Programme) regional office for Europe is located in Copenhagen, Denmark could focus on strengthening ties among these institutions (UNEP, CESCR, and OHCHR).

## **6 THE POST-2015 DEVELOPMENT AGENDA**

The Post-2015 Development Agenda provides a great opportunity for Denmark to strengthen ESCR. Denmark can use the new strategy "The right to a Better Life" and its strong human rights-based approach to push for the incorporation of human rights in the Post-2015 process.

Even though human rights play a central role in the UN Millennium Declaration, they were not integrated into the actual Millennium Development Goals (MDGs). The MDGs do not establish a strong link to human rights standards and principles and have been widely criticised for this limitation.

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<sup>4</sup> See ICHRP study on climate change and human rights.

The MDGs are also criticised for having primarily focused on improving average outcomes and not adequately tackled inequalities and structural causes of deprivation. Actions taken to tackle these inequalities could be guided by human rights (a HRBA). This will ensure that the focus of the Post-2015 Agenda is turned towards the most poor and vulnerable people, who have the most difficulties in realizing their human rights.

The goals and indicators of the Post-2015 Agenda have to take human rights into account. Human rights do not necessarily have to be directly written into the goals, but the goals have to help the implementation of human rights for all.

Denmark has recently supported the “Global Thematic Consultation on the Post-2015 Development Agenda” co-led by UNICEF and UN Women, which shows the Danish commitment to influence this agenda. It is clear that incorporating human rights in the Post-2015 agenda will include all human rights, but emphasising ESCR is an important opportunity to strengthen this particular set of rights. Right now there is a crucial need for a strong government voice to make this point heard in the Post-2015 process, and Denmark could take up this task to lift HRBA into the Post-2015 agenda.

## **7 WORKING FOR THE PROMOTION OF SPECIFIC RIGHTS**

Many European countries promote a particular rights-area with regard to international development cooperation. Germany and Switzerland for instance promote the right to water; Spain promotes the right to health; and Portugal promotes the right to education. Denmark could choose a similar approach – however always keeping in mind the indivisibility of human rights.

### **THE RIGHT TO PARTICIPATION**

Increasingly in the human rights community, there is a request to strengthen the “the right to be heard” or “the right to participation”, not least as reactions to the recent Arab Spring where the lack of participation was seen to lie at the core of the uprisings. While there may be considerable support for the right to participation and the idea that people should be involved in shaping issues that affect their lives, there is a substantial lack of clarity on what the right implies, what obligation it bestows on governments, and the extent to which governments have a responsibility to consult citizens or groups on issues of public importance or special relevance.

Much work has been done under the Convention on the Rights of the Child (CRC) focusing on Articles 12 to 17 – the participation rights. Furthermore, the Convention on the Rights of Persons with Disabilities (CRPD) establishes an obligation on governments to actively involve and consult with representative organizations on issues affecting people with disabilities (Art. 4.3). These conventions point towards the need to strengthen the right to participation.

Denmark has a strong culture of broad participation and consultation in public affairs and is uniquely placed to act as a proponent for the “right to participation” and potentially push for a greater recognition of the obligation of governments to consult groups and citizens in matters of general public or concerned interest. Guaranteeing the right to participation can also support the most vulnerable groups to participate in the decision-making processes that affect their own lives.

## **ON THE RIGHT TO HEALTH AND THE RIGHT TO EDUCATION**

As it can be seen for the Danish strategy “The right to a better life”, Denmark is already working in the areas of health and education under the social progress agenda. Lifting these rights in the international agenda would help creating a synergy in the work Denmark is already doing.

### **THE RIGHT TO HEALTH – SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS**

The right to health can be found in several international human rights conventions. The right to health includes several other rights, including the right to sexual and reproductive health, which is paramount to the advancement of women’s rights. Denmark has been an important player in the protection of women’s rights internationally, and there is therefore a need to continue the work with reproductive health and rights.

According to CESCR, General Comment No. 14, the right to health includes both freedoms and entitlements. This General Comment also contains special reference to the 3AQ:

- *Availability*: The existence of relevant facilities, services and programs, including drugs.
- *Accessibility*: Non-discrimination, within physical reach, affordable and include health information.
- *Acceptability*: Including sensitivity to gender and life-cycle.

- *Quality*: Health services should be of quality – according to WHO standards.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) urges a stronger focus on the promotion of women and girls' right to sexual and reproductive health. The UN Special Rapporteur's Report of 2006 recognizes that the right to health should not be limited to a right to specific health-related goods, services and facilities. The right to health should rather be understood more broadly as an entitlement to an effective and integrated health system. To fulfil the right to health, States need to adopt a national health policy with a detailed plan for realizing the right to health and this policy should include reproductive and sexual health.

Denmark has good track record in the area of sexual and reproductive rights both at home and internationally. Firstly, Denmark has a high quality national health care system based on the principle of equal access for all citizens. Secondly, a long experience with development cooperation has given Denmark a strong position in the area of women's rights generally and in the area of sexual and reproductive health in particular. Consequently, Denmark is in a unique position to put the right to health and the right to sexual and reproductive health more specifically on the international agenda.

## **THE RIGHT TO EDUCATION**

The right to education is guaranteed in several human rights instruments including the ICESCR, the CRC, CEDAW and the CRPD. All of these Conventions present variations to the right to education; however all can be said to support the contents of the UDHR (Art. 26), which states:

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

The CESCR General Comment No.13 outlines that education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially excluded groups can obtain the means to participate fully in their communities.

The same General Comment addresses the “4As” framework (similar to the 3AQ-concept mentioned above), whereby education must be:

- *Available* in sufficient quantity within the jurisdiction of the State party;
- *Accessible* educational institutions and programs to everyone without discrimination, within the jurisdiction of the State party;
- *Acceptable* forms and substance of education, including curricula and teaching methods;
- *Adaptable* to the needs of changing societies and communities, and respond to the needs of students within their diverse social and cultural settings.

Denmark is recognized for its national educational system. Moreover, support to the education sector has been a part of Danish development cooperation for many years and brought about both strong partnerships and a vast knowledge and experiences. This provides Denmark with a strong and strategic position to take on the right to education as a particular right in its development cooperation. By enforcing the right to education in international forums, Denmark can be a champion for gender justice and gender equality emphasising the importance of the right to education for boys and men as well as women and girls.

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