

February 14th 2020

Contributions to the draft general comment on article 15 of the International Covenant on Economic, Social and Cultural Rights.

The Center for Legal and Social Studies is an Argentine human rights organization founded in 1979 during the last military dictatorship, with ECOSOC consultative status. It promotes the protection of human rights and their effective exercise, justice and social inclusion – both nationally and internationally. CELS welcomes the efforts of this Committee in the preparation of the draft and presents some preliminary observations and recommendations.

We will focus on 1.- States' duty to replace harmful technology, 2.- the need for safeguards against restrictions based on political, cultural, religious or moral considerations, 3.- the need for stronger language in relation to intellectual property regimens and its impact, 4.- the countries' extraterritorial obligations not to interfere with the enjoyment of the Covenant rights by persons outside their territories and 5.- the need for safeguards to prevent the impairment of other rights as a prerequisite to enjoy the right to science.

1. Less dangerous technology, right to health and progressive fulfillment

Inequality in the fulfillment of the right to science affects living conditions, while technology can help to live in healthier environments.

For instance, in waste management procedures or in energy generation processes the lack of access to the benefits of scientific progress contributes to people living in more polluted and harmful environments for their health. On many occasions, citizens of developed countries can have healthier lives because they can enjoy the benefits of cleaner technologies for the satisfaction of their rights, while in less developed countries people has to live with old and harmful technologies. This is a matter of justice in the right to science. Inequalities in the fulfillment of the right to science condemn people in developing or less developed countries to have less healthy and shorter lives than people in developed states who can enjoy the benefits of scientific progress and its applications.

A worrying aspect in this regard is the use of highly dangerous pesticides (HHP) in different countries of the Global South, whose use is prohibited in countries of the Global North, even in those on which the producing companies are based, as has been the cases of Paraquat Atrazine or Endosulfan. The

right to enjoy the benefits of scientific progress implies the right to have old and harmful technology replace with new, better and less dangerous technology.

Notwithstanding that the States that produce and export potentially harmful technologies have an extraterritorial obligation not to interfere with the enjoyment of the rights of persons in third countries, the States that do not adopt measures to use available safe, clean and healthy technologies do not comply with their obligation of progressive fulfillment. This circumstance demands that States are held accountable for using or allowing companies to use harmful technology when there are safer technologies available.

We recommend including a reference in this regard, highlighting the obligation of States to replace old and harmful technologies, when new and less harmful ones are available, as part of their obligation of progressive realization.

Recommendation: A final sentence should be added in paragraph 31: "*This obligation includes the duty of States to replace potentially harmful technologies, when new and less harmful technologies are available*".

2. Political or cultural constrains in the enjoying of scientific progress

The lack of access to technology and science benefits as a consequence of political or cultural constraint is a reality that impacts disadvantaged group's rights, as it occurs with sexual and reproductive health goods and services.

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has recalled that "access to essential medicines for vulnerable and marginalized groups should not be impeded by political, legal and cultural considerations". In this regard, he highlighted that "access to medical abortion pills such as mifepristone with misoprostol, though included on the WHO EDL, are culturally and legally restricted in many States, limiting women's accessibility to sexual and reproductive health" (A/HRC/23/42, p. 45).

Although in Argentina there are cases in which the abortion is legal according to the law and the WHO declares that the safer way for an early abortion is through the combined use of mifepristone and misoprostol (both included in the WHO Model List of Essential Medicines), due to political disregard for women rights, in our country there is no mifepristone available.

This situation was noted by this Committee in 2016 and recommended Argentina to "ensure access to medications for safe abortion, including misoprostol and mifepristone" (E/C.12/ARG/CO/4, parr. 56.b).

However, currently Argentine women are prevented from enjoying their right to benefit from scientific progress and its applications since mifepristone is still not authorized for sale. The lack of availability of mifepristone makes it illegal to get the recommended medication for a safe abortion.

Recommendation: Paragraph 26 should include a final sentence stating that *“States parties shall guarantee that people’s right to benefit from scientific progress shall not be restricted by political, cultural, religious or moral considerations, particularly when there are risks to the right to health and physical integrity”*.

3. The right to science and intellectual property regimens

Intellectual property regulations have deep impact in the fulfillment and enjoyment of several human rights guaranteed under international law and, specifically, the International Covenant on Economic, Social and Cultural Rights. Intellectual property rights regimens as crystalized in the TRIPS Agreement and especially in the trade agreements negotiated in the last 25 years, reinforce the inequalities among countries, restricting the access to knowledge and creating higher and somewhat impenetrable barriers for developing countries.

On its General Comment No. 24 this Committee warned that “States parties should ensure that intellectual property rights do not lead to denial or restriction of everyone’s access to essential medicines necessary for the enjoyment of the right to health, or to productive resources such as seeds, access to which is crucial to the right to food and to farmers’ rights. States parties should also recognize and protect the right of indigenous peoples to control the intellectual property over their cultural heritage, traditional knowledge and traditional cultural expression” (E/C.12/GC/24, par. 24). The Draft’s section on privatization of scientific research and IP (section V.C.) requires stronger language to protect the right to enjoy the benefits of scientific progress and its applications.

Data exclusivity

Also, it should be noted that paragraph 65 states that “IP can also block the necessary sharing of results of scientific research and its methods, which is crucial for the advancement of science. For instance, patents limit the possibility to access some data for a certain period of time”, but this is not the case in most patent regulations.

TRIPS Article 39.3 established that States shall protect data against “unfair commercial use”. This unfair commercial use cannot be equated with the use of the data for the deepening of scientific research, as the Draft suggest. The Draft should not imply that the restriction of access to the data when it is for research constitutes an inherent attribute of the patent regime.

The data exclusivity to which the Draft is referring, that gravely impair the right to science, is the protection included in TRIPS-Plus agreements promoted by developed countries.

Recommendation: This circumstance should be noted in the Draft stating paragraph 65 that “*For instance, some TRIPS-Plus patent regulations limit the possibility to access some data for a certain period of time, seriously affecting the exercise without discrimination of the right to science.*”

4. Developed countries’ extraterritorial obligations

State parties shall not persuade other State parties to adopt TRIPS-plus standards using their enhanced economic power and market access as leverage, since it only fosters the inequalities among states and restricts the right to science in developing countries.

In 2009 the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health issued a report on the impact of international intellectual property trade agreements on the protection and enjoyment of the right to health. The Special Rapporteur found that “TRIPS and FTAs have had an adverse impact on prices and availability of medicines, making it difficult for countries to comply with their obligations to respect, protect, and fulfil the right to health”.

In this regard, the report adds that the “lack of capacity coupled with external pressures from developed countries has made it difficult for developing countries and LDCs to use TRIPS flexibilities to promote access to medicines” (A/HRC/11/12, par. 95)

This is why the Special Rapporteur recommended that developing countries and LDCs “should review their laws and policies and consider whether they have made full use of TRIPS flexibilities” and “should not introduce TRIPS-plus standards in their national laws” (A/HRC/11/12, par. 97 and 108).

Accordingly, he stated that “developed countries should not encourage developing countries and LDCs to enter into TRIPS-plus FTAs and should be mindful of actions which may infringe upon the right to health”.

Currently, through external pressure, more often using economic power as leverage, developed countries induce other States to adopt maximalist intellectual property regimens way above TRIPS standards, in favor of their corporate's interests.

As noted previously by this Committee, this situation represents an infringement of developed countries’ extraterritorial obligation to respect the people’s rights in developing and less developed countries where they impose these maximalist intellectual property regulations.

Recently this Committee highlighted this situation. In its General Comment No. 24 this Committee explicit that “The extraterritorial obligation to respect requires States parties to refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories. As part of that obligation, States parties must ensure that they do not obstruct another State from complying with its obligations under the Covenant. This duty is particularly relevant to the negotiation and conclusion of trade and investment agreements or of financial and tax treaties, as well as to judicial cooperation” (E/C.12/GC/24, par. 29).

Recommendation: It should be added to paragraph 83 a sentence stating that “*States parties shall refrain from interfering directly or indirectly with the enjoyment of the Covenant rights by persons outside their territories, especially through the negotiation and conclusion of trade and investment agreements with TRIPS-plus or similar standards*”.

5. Safeguards to prevent impairment in the enjoyment of other rights to enjoy scientific progress

People should not have to give up their rights - such as their informational autonomy and privacy - in order to enjoy the benefits of scientific progress.

This is especially relevant in the current use of information technologies, in which the global corporations involved in the expansion of the technological frontier unilaterally establish the terms and conditions of use of their products, which very weakly protect the rights of their users.

Here the already known principles of “privacy for default” and “privacy from the design” are relevant. The application of these concepts and principles tells us about the need for an approach that aims to the protection of human rights from the design and development of these technologies. A human rights by design approach.

As part of their obligation to protect the right to science under article 15 of the Covenant, States must assure that private actors refrain from requiring people to give up their rights if they want to enjoy the scientific progress applications developed by them.

Recommendation: Paragraph 47 should include the following sentence: “*States shall ensure that people will not be required to renounce other rights to enjoy their right to enjoy the benefits of scientific progress and its applications, including by regulating the activities of national and transnational business enterprises*”. This obligation may also be included in Draft’s section G (Risks and promises of the so called 4th industrial revolution)