
Fact Sheet No. 7

The question of justiciability

Can courts enforce economic, social and cultural (ESC) rights? Should UN treaty committees be able to give an opinion that a State has violated such rights and recommend appropriate action to remedy the violation? These questions are frequently raised during discussions on establishing a complaints mechanism through an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR). A number of common myths reflect misunderstandings of both the nature of economic, social and cultural rights and of the role of courts and other bodies in adjudicating them.

Myth: Adjudicating economic, social and cultural rights is not an appropriate or legitimate role for courts or other bodies since it involves making policy decisions that are properly the function of democratically elected parliaments.

Reality: Adjudicating economic, social and cultural rights claims does not require courts to take over policy making from governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases, courts and other bodies adjudicating economic, social and cultural rights review government decision-making, to ensure consistency with fundamental human rights. Holding governments accountable to human rights enhances democracy. It does not undermine it.

Myth. Economic, social and cultural rights require governments to ‘give everyone houses’ to comply with the right to housing or ‘buy everyone expensive medicines’ to comply with the right to health. Making these rights justiciable will bankrupt governments.

Reality: Under the ICESCR, governments have accepted obligations to progressively realise these rights within their maximum available resources (Article 2.1). This requires that States only demonstrate in good faith the fulfillment of the rights over time within their capacities. Where courts and other bodies have adjudicated ESCR claims, they have shown considerable deference to governments’ decisions about resource allocation, and intervened only to ensure that governments take reasonable steps, without discrimination, and subject to available resources, to respect, protect and fulfill the rights (See examples below).

When these rights are infringed, by action or inaction, the court must take action. But it only protects the fundamental rights. It may appear to be a policy decision but the Court is not taking one.

Justice Iyer,
formerly of Supreme Court of India

Myth: Courts or similar bodies are incapable of adjudicating ESCR because these rights are too vague or complex and involve many different economic and social policies.

Reality: Courts and UN human rights bodies adjudicating civil and political rights are used to considering rights claims in the context of complex policies and problems such as crime or systemic discrimination. They can play just as important a role in helping States make themselves accountable to economic, social and cultural rights. Courts regularly order remedies for the unjustified interference with economic, social and cultural rights (for example, dismissal from employment or forced evictions) and have increasingly demonstrated their capacity to monitor the progressive realization of the rights through the implementation of appropriate programs and policies. They play a critical role in protecting the rights of minorities who may be overlooked or treated unfairly in ways which deny them equal enjoyment of economic, social and cultural rights.

To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.¹

Justice Beverly McLachlin, now Chief Justice of the Supreme Court of Canada.

¹*RJR-MacDonald Inc. v Canada (A.G.)*, [1995] 3 S.C.R. 199 at paragraph 136.

