
Fact Sheet No. 9 Challenging misconceptions

MISCONCEPTION ONE: Economic, social and cultural rights are not capable of being applied by judicial bodies. They are not justiciable

One of the major arguments used against an OP to the ICESCR is that economic, social and cultural rights are not justiciable and, as a result, cannot be the object of an individual complaint procedure.

Developments at the domestic and regional levels show, on the contrary, that economic, social and cultural rights can be subjected to the scrutiny of a court of law or another judicial or quasi-judicial entity.

In recent years, a jurisprudence surrounding economic, social and cultural rights has gradually emerged. Domestic and regional courts have, in many instances, adjudicated issues related to the enjoyment of economic, social and cultural rights, offering an adequate remedy to the victims. As a result, a wide range of case law related, among others, to food, health, shelter and education, etc. has emerged. In dealing with economic, social and cultural rights courts have also developed innovations in procedures to deal with economic, social and cultural rights. As such, the existence of domestic and regional case law related to economic, social and cultural rights bear witness to the direct justiciability of these rights.

Indeed, today, an increasing number of countries, across all continents and legal systems, have incorporated judicial review of economic, social and cultural rights. These include South Africa, Finland, Argentina, Mauritius, Canada, Latvia, France, India, Bangladesh, Nigeria, and most countries in Central and Eastern Europe.

Moreover, governments have increasingly supported the justiciability of economic, social and cultural rights in numerous fora. Complaint procedures for violations of economic, social and cultural rights have been developed at the regional level (i.e. the African Charter of Human and Peoples' Rights and Duties, the Collective Complaints Procedure under the European Social Charter and the Inter-American San Salvador Protocol).

For further developments related to the issue of economic, social and cultural rights justiciability, please refer to Fact Sheets No. 7 and No. 8.

MISCONCEPTION TWO: Economic, social and cultural rights are too vague to be applicable to a case-based complaint procedure

It is often claimed that economic, social and cultural rights are not rights but political aims, alleging that they represent too vague provisions to be enforceable. This perception has been overcome by different developments related, notably, to the nature, content and scope of economic, social and cultural rights, as well as to related State obligations.

General Comments of the Committee on Economic, Social and Cultural Rights (“the Committee”), work of UN Special Rapporteurs, experts, academics and NGOs, as well as national and regional case-law have all significantly contributed to refute this assertion and clarify State obligations ensuing from the ICESCR.

The Committee’s General Comments, along with the doctrine and existing jurisprudence offer precise descriptions of economic, social and cultural rights’ content and scope, as well as of the respective State obligations to respect, protect and fulfil. In addition, that same sources also offer a clear description of how the concepts of “progressive realisation” and “available resources” apply to such obligations. As such, a certain degree of interpretative certainty and predictability can be expected.

In this respect, further clarification can only take place on a case-to-case basis, which is precisely why a complaint procedure is needed.

MISCONCEPTION THREE: Economic, social and cultural rights involve questions of resources allocation and public policy that should not be dealt with by courts

It is sometimes suggested that matters involving the allocation of resources and public policy questions should be left to the political authorities rather than the courts. These objections relate to the concern that the judiciary should not intervene in such fields, which are said to be the exclusive domain of governments. At the national level, these objections are related to the question of separation of powers, while at the international one they are raised in the context of intrusion into sovereignty.

First, it is important to remember that, as it is the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. In this respect, when national courts have intervened to order that specific programme or policy be implemented, the orders have, in most cases, given a wide degree of discretion to the government to devise the appropriate response. For instance, the Bangladesh High Court noted in 1999 that in order to fulfil the basic rights of equality, life and livelihood, the government had to complement its project to demolish slum-dwellings in Dhaka with a plan to rehabilitate the dwellers and that the project needed to be carried out in stages with reasonable notice given to evict.¹ With regard to the progressive realisation of economic, social and cultural rights, courts have shown the capacity to set boundaries for their intervention. For instance, the Swiss Federal Court has said it lacked the “competence to set priorities in allocating resources” but would intervene if the legislative framework failed to ensure constitutional entitlements.²

Secondly, while the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters with important resource implications. The adjudication of civil and political rights, as well as many other legal rules such as trade law, regularly impinges upon the political options of governments, notably with regard to the allocation of resources. Indeed, while judges should respect the division of competences between the various branches of government, it is important to

¹ *Ain O Salish Kendro (ASK) & Ors v Government of Bangladesh & Ors*

² Judgment of the Second Public-Law Division of 27 October 1995 *in re V. v Resident Municipality X. and Bern Canton Government Council (Constitutional Complaint)*.

recognise that their decisions frequently have budgetary consequences.³ For instance, the right to a fair trial necessitates significant financial investments in court systems, and frequently legal aid.⁴ Similarly, the protection against torture and other forms of cruel, inhuman or degrading treatments also requires financial prioritization in term of police training, construction of prison facilities, protection of the victims, etc. While it is obvious that the realisation of civil and political rights involve allocation of resources, the related costs are often not considered because the institutions are already in place.

Thirdly, in many cases, the realisation of economic, social and cultural rights will only require a government to refrain from certain behaviour or to regulate the actions of third parties. For instance, State Parties to the ICESCR have to ensure that there are not arbitrary restrictions on the right to work or that no forcible evictions are carried out in the absence of adequate compensation and resettlement. In such cases, the realisation of economic, social and cultural rights does not involve questions of resource allocation and does not requires the adoption and implementation of policies, programme or measures.

Fourthly, while issues of social and economic policy involve complex questions that are difficult to resolve on a case-by-case basis, courts frequently deal with many questions concerning the public interest. For instance, judgments on the right to freedom of expression will involve certain contested interests. As a result, the judges will have to balance the notion of public or national interest with the restrictions put to the enjoyment of the right to freedom of expression. Such balancing act between contested interests can be easily applied within the realm of economic, social and cultural rights.

Finally, concerns expressed about the democratic legitimacy of courts are often raised in relation to the suggestion that they should not get involved in matters related to the allocation of resources and public policy issues. In this regard, while judicial officers are not elected by popular vote, governments appoint many courts members. In addition, judicial bodies have shown a capacity to uphold the rights of individuals and groups in the face of hostile or negligent State.

MISONCEPTION FOUR: Judicial remedies are not effective in realising economic, social and cultural rights

It is sometimes argued that judicial remedies alone cannot bring about the systemic changes necessary for the complete realisation of economic, social and cultural rights.

The first object of judicial remedies, at the national or international levels, is to provide adequate redress and compensation to victims of human rights violations, as well as to guarantee the cessation and non-repetition of the violation. Such objectives remain the same across the whole human rights spectrum and apply in cases of civil and political rights, as well as economic, social and cultural rights.

³ See UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, The domestic application of the Covenant, E/C.12/1998/24, at para. 10.

⁴ See for example *Airey v Ireland* [1979] 2 E.H.R.R. 305. The European Court of Human Rights held that the lack of legal assistance for complex divorce proceedings violated the right to a fair trial and right to respect for family life. Ireland subsequently enacted a civil legal aid system.

As judicial or quasi-judicial entities look at specific cases of human rights violations, judicial remedies will always be limited in term of their ability to address or change a whole country situation. In this regard, such limitations apply irrespective of whether the case addresses civil and political rights, or economic, social and cultural rights. For instance, it is unlikely that a decision of the Human Rights Committee on a torture case in a given country will be effective in putting a stop to an institutionalised practice that is taking place throughout the country in question. Indeed, it is more the conjunction of different actions and factors that can trigger change in a given situation and can prove effective in realising economic, social and cultural rights as well as civil and political rights. Judicial remedies play, in this respect, a crucial role.

Indeed, litigation can spur legislative changes, attend to individuals or group complaints and provide a constant and watchful accountability mechanism over legislative and administrative spheres. Litigation can also play a useful educative and transformative role in the dissemination and understanding of human rights principles.

MISCONCEPTION FIVE: A complaint procedure for economic, social and cultural rights would imply a huge financial burden for States

An argument that is sometimes put forward against an OP to the ICESCR is that a complaint procedure for economic, social and cultural rights at the international level would have huge financial implications for States. This argument relates to the assumption that economic, social and cultural rights only require action by governments with important financial implications.

However, in many instances, the realisation of economic, social and cultural rights does require restraint by governments, i.e. refraining from certain behaviour or regulating the actions of third parties. As mentioned in General Comment Nr. 12 of the Committee, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect protect and fulfil.⁵ Under the obligations to respect and protect States have to refrain from interfering with the enjoyment of economic, social and cultural rights and to prevent violations of these rights by third parties.⁶ In both cases, the realisation of economic, social and cultural rights does not impose huge financial burden upon States, as it does not imply the adoption and implementation of expensive programme or measures.

MISCONCEPTION SIX: A complaint procedure for economic, social and cultural rights would create new obligations for States

It is sometimes suggested that an OP to the ICESCR would create new obligations for State parties to the ICESCR.

First of all, as indicated by its name, the OP to the ICESCR will remain an option for States. In other words, States will not be obliged to ratify such instrument. Secondly, the OP to the ICESCR will not create new obligations for States but a new supervision procedure for obligations that already exist under the ICESCR. In this regard, the procedure created by an OP to the ICESCR will not be different that the ones existing under the First Optional Protocol to the International Covenant on Civil and Political

⁵ See also the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para 6,

⁶ *Ibid.*

Rights (ICCPR), the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of Racial Discrimination or the Optional Protocol to the Convention on the Elimination of Discrimination against Women.

MISCONCEPTION SEVEN: A complaint procedure for economic, social and cultural rights would compete or conflict with other complaint procedures

Complementarity in the human rights framework is not a new issue. Indeed, complementarity between different human rights mechanisms can be found at the regional and international levels and with respect to conventional and non-conventional mechanisms. It results from the development of human rights law, along with the identified need to bring special protection to vulnerable groups, address particular subjects of concern or respond to regional specificities. Within the human rights framework and with respect to individual complaint mechanisms, complementarity can be understood from two different perspectives: one specific right may be covered by several instruments or mechanisms and one particular individual may have access to several mechanisms.

With respect to the OP to the ICESCR, concerns have been raised that such a mechanism would duplicate, to a certain extent, the work carried out by other bodies such as the Human Rights Committee, the Committee on the Elimination of Discrimination against Women, as well as the International Labour Organisation (ILO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO).

Complementarity, or overlap between the rights covered by different individual complaint mechanisms is common in the realm of civil and political rights and does not seem to create problems or to raise concerns. For instance, the Committee Against Torture is authorised, under Article 22 of the Convention against Torture (CAT), to receive complaints from individuals who claim to be victims of a violation of the provisions of this Convention by a State party that has made a declaration under this Article. This provision does not prevent the Human Rights Committee from receiving individual complaints regarding alleged violations of Article 7 of the International Covenant on Civil and Political Rights (hereinafter *ICCPR*), under the Optional Protocol to this Covenant. Nor does it prevent the Inter-American Commission, the Inter-American Court or the European Court on Human Rights to look at individual complaints related to torture and other cruel, inhuman or degrading treatment. Moreover, the right to freedom of association, covered by the Optional

Protocol to the ICCPR, has not been excluded from the individual complaint procedure on the grounds of overlap with the ILO Committee on Freedom of Association. Similar examples could be given with respect to other individual complaints mechanisms, including the Convention on the Elimination of Discrimination against Women (*CEDAW*) and the Convention on the Elimination of all Forms of Racial Discrimination (*CERD*).

Potential duplication of work between these different mechanisms has not created problems or raised potential concerns because all these procedures contain clauses preventing the examination of a case that would be, at the same time, under

consideration by another procedure of international or regional settlement or investigation.

The interdependence, indivisibility and interrelatedness of all human rights, reiterated in the Vienna Declaration and Programme of Action adopted by the Second World Conference on Human Rights in 1993, requires that the same standards be applied equally to economic, social and cultural rights and civil and political rights.⁷ In this respect, the Draft OP to the ICESCR follows the same approach as its civil and political rights predecessors concerning the ‘examination clause’, stipulating that an individual complaint cannot be examined concurrently by more than one mechanism. The interdependence, indivisibility and interrelatedness of all human rights also highlights the need that a complaint procedure for economic, social and cultural rights be able to look at the full range of economic, social and cultural rights.

⁷ UN. Doc. A/CONF.157/23, para. 5. Paragraph 5 adds: “The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”