



# INTERNATIONAL COMMISSION OF JURISTS

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## THE JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: NATIONAL, REGIONAL AND INTERNATIONAL EXPERIENCES

### Introduction

In both affluent and developing nations, massive violations of economic, social and cultural rights occur on a routine basis. Examples of current economic, social and cultural rights violations include housing demolitions and forced evictions of large numbers of citizens in Nigeria and social assistance reductions in Canada and the United States which deprive millions of human beings of their most basic economic, social and cultural rights. In light of this, it is imperative that such violations are addressed more effectively than they have been in the past. On the national, regional and international levels, those responsible for violations of economic, social and cultural rights must be held fully accountable.

Under international law, civil, political, economic, social and cultural rights are said to be indivisible, inter-related and interdependent. Despite this affirmation, the division of rights included in the Universal Declaration of Human Rights into the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* and the *International Covenant of Civil and Political Rights (ICCPR)* has generated confusion and divisiveness that has damaged their indivisibility, inter-relatedness and interdependence.

It has taken the international community several decades to reach its current level of understanding with regard to the nature and content of internationally-recognized civil and political rights. In comparison to these rights, the precise legal meaning and content of economic, social and cultural rights is less well developed, not because these rights are inherently more complex or difficult to understand and define, but because the human rights movement and national governments have, until now, neglected economic, social and cultural rights, devoting little time and attention to both understanding and protecting them. In this, there has been a widespread tendency to deem economic, social and cultural rights as something "other" than civil and political rights as only civil and political rights are perceived as justiciable. Here, it is sometimes mentioned that economic and social rights are not suitable for judicial consideration because of the wide range of issues that have to be taken into account and the uncertainty surrounding effective means of achieving the ends in question. Positioned as national and or international policy aspirations, economic, social and cultural rights have thus been said to fall below the justiciable threshold for individual legal enforcement.

Counter-arguments to this view assert that, Courts make law and do not merely declare it, they are thus directly and routinely involved in policy decisions and there is consequently no reason why Courts should refrain from dealing with the kinds of issues raised in arguments over the implementation of economic, social and rights.

### National Experiences With Regard to the Justiciability of Economic, Social and Cultural Rights

The experiences of Argentina, Bangladesh, Canada, Colombia, Costa Rica, Finland, France, Germany, Guyana, Hungary, India, Japan, Latvia, Mauritius, Mexico, New Zealand, Nigeria, the Philippines, Poland, Portugal, Spain, South Africa, Switzerland, Venezuela and numerous other nations in adjudicating economic, social and cultural rights demonstrates the leading role adjudicative procedures may play towards the further realisation of economic, social and cultural rights. A leading example of this comes from South Africa whose 1996 Constitution encompassed a wide range of economic, social and cultural rights on an equal footing with civil and political rights. With such recognition, South African Courts have increasingly created a foundation of

jurisprudence moving towards the improved protection of economic, social and cultural rights. One notable example of this may be found in the case of *Government of the Republic of South Africa v. Grootboom*.

The facts of this case are as follows: Irene Grootboom was one of a group of 390 adults and 510 children living under appalling conditions in a South African shanty-town settlement. Illegally occupying land reserved for low-cost housing, the State forcibly evicted the "Grootboom group" and bulldozed their primitive domiciles. Prior to this, many of the inhabitants had applied for State subsidised low-cost housing and had been on a waiting list for up to seven years. Petitioning the High Court, Irene Grootboom sought State supplied basic shelter on behalf of her 800 member squatter society basing her argument on her South African constitutional right to housing.

The key question appealed to the Constitutional Court was whether the constitutionally enshrined housing and shelter rights placed a positive obligation on the South African State to provide housing for the petitioners. The facts of this case presented the Constitutional Court with a very difficult choice: to approve the illegal occupation of land by homeless people or to ratify the inaction of the Government to deal with the issue of homelessness. On October 4, 2000 the Court held that the South African government was positively obliged to remedy the conditions faced by the Grootboom group through the provision of basic housing. This result was arrived at through the finding that the State housing policies were unreasonable. In determining the 'reasonableness' of said policies, the Court decided that while limited State resources were an important factor, in the instant case the State had a duty to address the needs of the most vulnerable members of society. Thus, in the context of the right of access to housing, the Court held that South African State policy, in order to be reasonable, had to take account of the different socio-economic levels of the South African population and could not ignore those whose needs were most urgent. In conclusion, the Constitutional Court declared that the State housing programme had to include measures "to provide relief for people who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations."

This landmark *Grootboom* decision stands for a number of important economic, social and cultural rights principles:

- (i) The justiciability of economic, social and cultural rights cannot be determined in the abstract;
- (ii) Civil, political, economic, social and cultural rights are indivisible, interrelated and interdependent; and
- (iii) The "reasonableness" standard with regard to socio-economic rights mandates Courts, in determining whether the State is complying with its obligations of progressive implementation, to evaluate whether measures were adopted to address problem areas and whether such measures were reasonable, both in their conception and implementation. In assessing the reasonableness of South African housing programs under *Grootboom*, State measures were considered in light of the social, economic and historical context and the capacity of institutions responsible for implementing housing programmes. The Court found that South African housing programs failed to address the needs of the most desperate and thus failed against the reasonableness standard.

It must be noted that most, if not all nations throughout the world have recognized that certain aspects of economic, social and cultural rights are justiciable before national Courts and Tribunals. While the entitlements adjudicated over may not necessarily be labelled rights, they nonetheless deal with economic, social and cultural rights subject matter formulated in a way that renders their justiciability unproblematic.

## **Regional Experiences With Regard to the Justiciability of Economic, Social and Cultural Rights**

### **(v) The European System for the Protection of Human Rights**

Under the European Convention on Human Rights that, by in large, concerns civil and political rights, economic, social and cultural rights or some aspects of them have, in practice, been the subject of complaints before the European Court of Human Rights and the European Commission. Indeed, an examination of relevant jurisprudence reveals that these bodies have not upheld a strict separation between economic and social rights and the civil and political rights listed in the *European Convention*. Instead, the European Commission and the European Court of Human Rights have adopted a dynamic approach that has, where possible, taken account of economic and social rights concerns. For example, in interpreting *European Convention* Article 6, which concerns the right to fair trial, the European Court of Human Rights extended procedural protections to matters concerning public social insurance benefits. Further, the European Commission indicated its willingness to extend Article 2, right to life protections to an issue area directly linked with the right to health. Here, through a review of State health institutions that failed to meet certain minimum standards, the European Commission found that sub-standard health facility conditions could constitute a State failure "to take appropriate steps to safeguard life" as required by the European Convention. A final illustration of how economic and social rights have been extended European States through the judicial interpretation of the *European Convention* may be found through a European Commission decision that extended Article 8, (protection of private and family life), guarantees to a claimant that contracted health problems caused by serious environmental damage.

With the adoption of the 1995 Additional Protocol to the European Social Charter, an instrument that provides for a system of collective complaints on a selection of economic and social rights, the European system confirmed the international justiciability of these rights as unproblematic. Here, the European Committee of Social Rights has proceeded so far as to derive a justiciable right to medical and social assistance despite the fact that the wording of the European Social Charter does not provide for this individual right, but is addressed to the states parties that are to commit themselves to ensuring the enjoyment of a certain right.

### **(vi) The African Charter on Human and Peoples' Rights**

The African Commission on Human and Peoples' Rights has accepted cases under the *African Charter on Human and Peoples' Rights* that concern economic, social and cultural rights. For example, in a landmark 2002 decision, the African Commission held that the former military regime of Nigeria violated the economic and social rights of the Ogoni people by failing to protect their property, lands, and health from destruction caused by foreign oil companies and the Nigerian security forces.

### **(vii) The Inter-American Commission of Human Rights and the San Salvador Protocol**

Within the Inter-American System, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", provides for the submission of individual complaints to the Inter-American Commission and the Inter-American Court with regard to trade union/association rights and the right to education. There are also a number of examples of cases where the Inter-American Commission of Human Rights has declared violations of economic, social and cultural rights, in particular violations of rights such as the protection of the family, education, health, wellbeing, and labour rights.<sup>1</sup>

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<sup>1</sup> See for example: The Inter-American Human Rights Commission Decision in Case 7898 (Cuba), Decision in Case 7602 (Cuba), Decision in Case 7615, Indigenas Yanomami (Brasil), and Decision in Case 2137, Testigos de Jehova (Argentina).

## **International Experiences With Regard to the Justiciability of Economic, Social and Cultural Rights**

Turning to the justiciability of economic, social and cultural rights on the international level, as the *ICESCR* and the *ICCPR* are both legally binding human rights treaties of equal force, economic, social and cultural rights should be equal to civil and political rights in terms of their justiciability. Currently, while an international adjudicative mechanism exists under the United Nations to monitor violations of civil and political rights, not such adjudicative mechanism exists with regard to economic, social and cultural rights. As has been stressed time and again through numerous United Nations resolutions and pronouncements, if human rights are indeed indivisible, interrelated and interdependent, there is no substantive reason why the adjudicative monitoring procedures under the *ICESCR* and the *ICCPR* should be different. Indeed, national and international precedents support the contention that it would neither be new nor innovative for the introduction of a United Nations mechanism to provide for the submission of complaints addressing the violation of economic, social and cultural rights. Towards this end, momentum has been building towards the drafting of a United Nations adjudicative mechanism that would consider violations of the economic, social and cultural rights enumerated under the *ICESCR*.

Aside from discussions concerning the justiciability of economic, social and cultural rights under the existence of the following regional and international remedial mechanisms demonstrate that economic, social and cultural rights are justiciable on the international level.

### **(i) The International Labour Organisation Committee on the Freedom of Association**

The International Labour Organisation, Committee on the Freedom of Association is a tripartite body that examines complaints from governments, workers' and employers' organizations concerning allegations that member States are not respecting basic freedom of association principles. The longstanding existence, functioning and jurisprudence of this body with regard to labour rights has proven that labour and related economic, social and cultural rights are justiciable on the international level.

### **(ii) The United Nations Human Rights Committee**

Although this adjudicative mechanism focuses on civil and political rights, the practice of the Human Rights Committee has been to interpret civil and political rights in a way that has allowed for adjudication on some elements of economic, social and cultural rights. In this, Human Rights Committee precedents and rules of operation may prove useful to a complaints mechanism under the *ICESCR*. For example, the Human Rights Committee has advised that the *ICCPR* non-discrimination clause is also applicable in relation to the enjoyment of economic, social and cultural rights.

### **(iii) The Optional Protocol to the *Covenant on the Elimination of Discrimination Against Women***

The Optional Protocol to the *Covenant on the Elimination of Discrimination Against Women*, (hereinafter CEDAW), entered into force on 22 December 2000. The structure of this instrument provides for an individual complaints procedure with respect to numerous economic, social and cultural rights. In the beginning of discussions concerning this Optional Protocol, in draft form, States parties debated the issue of justiciability and found it to be a non-issue.

### **(iv) The United Nations Educational, Scientific and Cultural Organization Complaints Procedure**

The United Nations Educational, Scientific and Cultural Organization established a confidential procedure for the examination of complaints concerning alleged violations of human rights in the fields of education, science, culture and information.

## **Conclusion**

In conclusion, if we look to the collective experiences of many nations and the practice of numerous international and regional bodies adjudicating over economic, social and cultural rights, the issue of the justiciability of economic, social and cultural rights is, in fact, a non-issue and demonstrates the leading role adjudicative procedures may play towards the further realisation of economic, social and cultural rights.