

JUSTICIABILITY OF SOCIAL RIGHTS

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INTRODUCTION

The discourse regarding the justiciability of economic, social and cultural rights is an ancient and never ending one. In today's era, several countries are coming to terms with incorporating social and economic rights in their constitutions, while their domestic courts and regional bodies have the duty of hearing and passing judgments in cases that involve economic and social rights. Because of the increasing number of regional bodies which have propagated the securing of these rights, such as the European Committee of Social Rights (ECSR)¹, European Court of Human Rights etc., it is now extremely difficult to uphold that the justiciability of these rights are unfound.

However, the United Nations' attempt at initiating an Optional Protocol for establishing a Complaints Mechanism to the International Covenant on Economic Social and Cultural Rights (ICESCR) is continuously receiving opposition from a number of states for the full and proper recognition of social and economic rights. A Working Group² was launched in pursuance to the Optional Protocol, wherein several experts have propounded the fact that justiciability of social and economic rights simply cannot be denied. States such as the United Kingdom, Unites States and Australia who are constant resistors to the Optional Protocol, not only maintain their notion that such rights are not justiciable, but also have raised disputes regarding the efficacy of a complaints and adjudication procedure for these rights, claiming that such rights are "vague" and the government's interference in socio-economic policies is uncalled for. Therefore, in order to procure the consent of these states at the Human Rights Council for enabling the passing of a resolution by the Working Group to draft an Optional Protocol, it was agreed that the resolution could be altered in such manner that the draft so prepared would comprise of ways to limit the "scope and application" of a complaints procedure³.

In July 2007, the Open Ended Working Group held a meeting wherein, despite the strong need for a complaints procedure, various state delegations kept debating its implementation, by suggesting the option of allowing states to choose which aspects of rights the complaints

¹ *Autisme-Europe v France, Complaint No 13/2002, 7 Nov 2003 (education rights of person with autism)*

² Report from First and Second Sessions of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR (2004 and 2005 respectively)

³ Human Rights Council, Resolution 2006/3.

procedure could adjudicate over. This form of ratification by states clearly varied from the comprehensive methods put forth by other UN Human Rights treaties complaints procedures, thereby signifying the divergent nature of economic, social and cultural rights. Therefore, it is evident that the issues regarding what kind of institutions can be implemented for the adjudication and application of economic and social rights, and how to determine the role of courts in judging claims based on such rights are still extremely paramount and crucial.

MAJOR ISSUES REGARDING THE JUSTICIABILITY OF SOCIAL AND ECONOMIC RIGHTS

There are primarily three mainstream presumptions with regard to the justiciability of social and economic rights, namely:

1. The contrast between Social and Economic rights on one hand, and Civil and Political Rights on the other.
2. It is not appropriate for the courts to interfere in the social and economic policy of the State.
3. Decision making bodies and Courts do not have the competency to preside over and pass orders in matters that involve Social and Economic rights.

These three presumptions are subject to heavy scrutiny.

1) Contrast between Social and Economic Rights and Civil and Political Rights

There have always been incorrect speculations about the nature of social and economic rights, in comparison to its parallel opponent, i.e. the Civil and Political Rights. Some of the main assertions made on the varying nature of both sets of rights are as follows:

a) Positive Obligations of the Civil and Political Rights juxtaposed with Negative Obligations of Social and Economic Rights

The notion of positive and negative obligations of the State is due to the gross misjudgement about the nature of both sets of rights. This can be comprehended through the use of examples. For example, if an individual wishes to take part in the politics of his State using his right to vote, it cannot be done unless State declares the holding of elections. This can be viewed as a form of positive obligation of the State. However, if a State sets aside any form of funding that was essential for local health clinic, thereby resulting in a violation to right of health of the public due to mere inaction on behalf of

the State, it creates a form of negative obligation on the State. Therefore, this distinction has given rise to different expression of rights in constitutional jurisprudence. While Civil and Political Rights have been redeemed in the eyes of international and domestic judicial bodies as means of enforcing positive obligations on the State, Social and Economic rights continue to represent the negative obligations it imposes on the State.

b) Varying use of Resources among both sets of Rights

The claim in this case is that, Civil and Political rights are those “rights that certain things **not** be done”. Hence they are viewed as rights that bear no cost or have no use of resources for its maintenance, thereby making them easily realisable. However, Social and Economic Rights are considered to be dependent on resources and hence are found to be unsatisfied in scenarios where there is a dearth of resources. The reason why Civil and Political rights do not seem to attract much expenditure is because of its established forum in many countries. For example, the right to vote (in para (a)) does not necessitate expenditure, because its expenditure is not a prerequisite to enforce a fundamental right. Thus, while Social and Economic Rights may invariably appear the requirement of expenditure, more so than the Civil and Political Rights, this difference is one of degree than of nature.

c) Differing precision of both sets of Rights

Another prevailing misconception is the fact that Social and Economic Rights are perceived to be “vague” whereas Civil and Political Rights are considered “precise”. This leads to the question of whether judicial enforcement of the “vague” Social and Economic Rights can be held valid or not. *“It is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity. The fact that the content of many social and economic rights is less well-defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature.”*⁴

⁴ Sandra Liebenberg, ‘Social and Economic Rights’ in M. Chaskalson et al, Constitutional Law of South Africa (Cape Town; Juta, 1996) 41-11.

In fact, certain civil and political rights such as the right to life and liberty have found to be vague on multiple occasions, whereas some social and economic rights are attributed higher precision. Hence, the purview of the kind of precision each set of rights has varies enormously

2) Appropriate Authority of Courts to interfere in the Socio-economic policy of a State

a) Democratic Legitimacy

The legitimacy of the Court or similar decision making bodies in adjudication with respect to social and economic rights is often demurred on grounds of being “Anti-Democratic”. It is debated that the administration of State funding and the implementation of Socio-economic policy must be performed only by the *elected representatives of the people*. But then, why does this play a more prominent role in the execution of social and economic rights, and not so for civil and political rights? The assertion is that, in democratic states, human rights norms invariably *restrain, limit or direct the actions of democratically elected representatives*. Thus, the question of how far the judiciary has a role to play in strengthening democratic governance is raised. In modern day practice, it is very well noted that the judiciary indeed has a prominent role wherein it has to review the decisions made by the government so as to ensure its adherence to the human rights set out. This democratic governance is aimed at securing the minorities’ interests so that they do not get outweighed by the majority opinion.

b) Separation of Power

While para (a) dealt with the objection to the legitimacy of courts in adjudication on grounds of being “Anti-Democratic”, this paragraph enunciates the same on grounds of breaching the separation of powers among the three organs of Government, namely the Legislature, Executive and Judiciary. This was based on the notice that, while courts entertain cases of economic, social and cultural rights, they ultimately take into consideration the functions attributed to the other organs of the State. For example, when the court decides on matters pertaining to programs and policies or budgetary functions, it fails to consider that such duties are the agenda of the legislature⁵. Thus, it is believed that, if the courts adjudicate matters on social and economic rights, it invariably leads to

⁵ Bruno De Villiers, ‘Social and Economic Rights’ in Van Wyk, J. Dugard, B. de Villiers and D. Davis (eds.), *Rights and Constitutionalism – The new South African Legal Order*

the imbalance in the separation of powers between the judiciary and the other organs of the Government, thereby giving the Judiciary an unfair advantage in power.

3) Competency of Courts to adjudicate Social and Economic Rights

The claim that Courts are incompetent to adjudicate on matters pertaining to Social and Economic Rights can be classified into three parts, namely:

a) Courts do not have the requisite information to deal with such cases

Insufficiency of information arises due to a number of reasons. While judges and lawyers provide adequate information before the court that are subsequently subject to review, such information may not include the basis on which policy decisions are made by Governments. This kind of information cannot be put forth to the court by means of “evidence”. Thus, advocates who argue for economic and social rights often find themselves in a position, wherein, the amount of evidence put forth by them often brings up new information that was not properly taken into consideration by the governments.

b) Judiciary does not have proper qualification or experience to handle matters pertaining to social and economic rights

Another alleged claim made was that judges are incompetent to deal with socio-economic policies which may comprise of information and details unknown to their knowledge. Their incapability of addressing and deciding upon matters in such regard is highly scrutinized and is another form of challenge pertaining to the expertise of the judiciary. However, it is to be noted that, when such decision making bodies are provided with ample and adequate information to consider certain cases involving economic and social rights, no assumption can be made on the contrary regarding their incompetency, when they have all the means and resources to do their functions.

c) Courts do not have the requisite remedies for handling economic and social rights issues

It is often found that the kinds of orders passed by the Courts are not satisfactory for the true realization of the economic and social rights. Courts pass orders in the form of damages, reparations, declaratory orders, mandatory orders etc. However sometimes, despite the call for immediate action put forth by the judiciary, its

implementation takes a much longer time than anticipated. Hence, individuals whose economic and social rights have been infringed have to wait for a prolonged period of time in order to receive compensation for their sufferings. Nevertheless, in certain countries, “supervisory jurisdiction” has been implemented in order to keep a check on the vindication of economic and social rights. The courts of US⁶, Canada⁷, India⁸ and South Africa are well known for their complex and intricate orders. Hence, the supervisory jurisdiction acts as a check upon such orders passed, for better enforcement of judgements.

DOMESTIC IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS

The domestic implementation of economic and social rights vary from State to State. While the ICESCR (International Convention on Economic, Social and Cultural Rights) governs the enforcement of these rights, it does not lay down the exact methods for such enforcement and it is for each State to decide the explicit procedure as to how the Covenant⁹ rights shall be effected into National law. This section is primarily divided into three sub parts, namely:

- a) Tri-Partite Obligations on States
- b) Implementation of Economic and Social Rights in other countries
- c) Significant Cases in Justiciability of Economic and Social Rights

(a) Tri-Partite Obligations on States

Social and Economic Rights impose three paramount obligations on the States:

i. The Obligation to Respect¹⁰

Every government (of all States) have the utmost duty to respect the economic, social and cultural rights. No government cannot violate or interfere with the realization of these fundamental rights, thereby causing detrimental value to its enforcement. For example, a government cannot simply evict people out of their settlements without providing compensation of some sort.

⁶ Brown et al v. Board of Education of Topeka et al 347 US 483 (1954)

⁷ Doucet-Boudreau v. Nova Scotia (2003) 3 S.C.R. 3. 3.

⁸ M.C. Mehta v. State of Tamil Nadu and Others (1996) 6 SCC 756

⁹ United Nations Committee on Economic, Social and Cultural Rights, General Comment No 9: The Domestic Application of the Covenant, 3 December 1998, E/C. 12/1998/24

¹⁰ ASK v Bangladesh

ii. The Obligation to Protect¹¹

While governments have the duty of respecting the economic, social and cultural rights, they should take absolute care in prohibiting external forces from violating such rights. Human Rights Legislation and Human Rights Commission play a vital role in achieving the obligation to protect. The Human Rights Legislation has the power to disallow private parties as well as the government from violating the aforesaid rights, whereas the Human Rights Commission is vested with the duty of discharging the legislation.

iii. The Obligation to Fulfil¹²

The government is conferred the most important task of fulfilling the needs of the people, in the attainment of economic, social and cultural rights. Right to food, shelter, health, education and other requisites come within the ambit of the State's Obligation to Fulfil.

(b) Implementation of Economic, Social and Cultural Rights in other countries

With the passage of time, a steady progression in the full and true realization of economic and social rights through ameliorated standards of enforcement and adjudication has been witnessed. Some of its examples in the different countries are as follows:

i. Europe

In Europe, the Council of Europe embraced the revised *European Social Charter (ESC)* which came into effect on July 1, 1999.¹³ This Charter aims at furnishing procedures for preserving the economic and social rights by means of right to decent housing, and protection from poverty etc. The ESC is different from that of the *European Convention on Human Rights (ECHR)* which upholds the guarantee of civil and political rights. An example can be noted, wherein, the *European Court of Justice (ECJ)* has declared the ESC to be “an important source of the fundamental principles of European Community Law to support its finding of sexual discrimination arising from the unequal retirement ages of women and men in the Belgian Aviation Industry”¹⁴.

¹¹ ICJ v Portugal , SERAC v Nigeria

¹² This approach was first defined by American Scholar, Henry Shue

¹³ European Social Charter (Revised), 3 May 1996, ETS No. 163 (entered into force 1 July 1999)

¹⁴ Defrenne v Sabena European Court of Justice, Case 149/77 (1978) ECR 1365

ii. India

The Supreme Court of India has attempted to implement social and economic rights by incorporating them with the protections awarded for civil and political rights. The Constitution of India has not expressly enforced social and economic rights, but has set them out in one part known as “*Directive Principles of State Policy*”. These policies cannot be enforced in the Courts of India. While elucidating the civil and political rights enshrined in the Indian Constitution, such as the Right to Life, the right to adequate quality of life, including proper nutrition, clothing and shelter automatically comes within its ambit.¹⁵ In one case, a Bombay municipality tried to forcibly evict street dwellers from their shacks. The Court held this to be an infringement of the dwellers’ right to life, as it was entailed to the achievement of a necessary state objective¹⁶

iii. South Africa

The situation in South Africa is worth taking a look at, as its Constitution has only recently taken steps to implement full and proper realization of economic and social rights¹⁷. The Constitution of South Africa as it is today, has expressly stated a wide range of economic and social rights such as right to adequate housing, health care services, sufficient food and water, and social security including appropriate social assistance. A recent decision of the Court of South Africa has affirmed the obligation of the State to take effective steps with regard to social and economic rights, in accordance with the provisions of the South African Constitution. The decision also stated that the Court must carry out its duty of enforcing the aforesaid rights and the Human Rights Commission has played a vital role in this aspect as *amicus curiae*.¹⁸ The current case was with respect to adequate housing.

iv. Canada

In Canada, any obligations imposed by international conventions or treaties will not be binding unless the same has been ratified domestically by way of Statute. Domestic Courts of Canada shall be bound by treaty obligations if:

¹⁵ 1991 study, The Protection of Social and Economic Rights: A Comparative Study.

¹⁶ *Olga Tellis v Bombay Municipal Corporation* AIR (1987) LRC 351

¹⁷ Discussion of the South African experience is from Jackman & Porter

¹⁸ *Government of RSA and others v Grootboom and others* (4 October 2000) Constitutional Court – CCT 11/00.

1. International Law is particularly incorporated in domestic legislation or by necessary implication.
2. Such legislation is itself enacted by the legislature with jurisdiction over the subject matter of the treaty.¹⁹

Also, the Supreme Court has the power to make such international instruments (mentioned aforesaid) to be binding even if it has not taken the form of a domestic statute. Such power has been exercised with relevance to the interpretation of the Charter and of administrative law. Various cases have witnessed the applicability of the Charter over the years, from *Slaight Communications Inc²⁰ v Davidson* to *Baker v Canada (Minister of Citizenship and Immigration)²¹*. While the former dealt with the right to work, the latter dealt with the Convention on the Rights of the child.

(c) Significant Cases in Justiciability of Economic and Social Rights

There are a number of fields in which the justiciability of economic and social rights have been raised. Some of the prominent ones are as follows:

i. Social Assistance

In an Ontario Case, *Mohammed v Metropolitan Toronto (Department of Social Services)²²*, discriminatory practices were found in the social assistance scheme on the ground of age. No “direct welfare payments” or “equivalent benefits” were accrued to persons who were below the age of 16. However the Court held that it was indeed a justiciable limit on such right as it was in accordance with *Section 1* of the *Charter*. In another case to the contrary, *Silano v. British Columbia²³*, social assistance rules that provided \$25 less to those individuals below the age of 26 was held to be discriminatory. The Court held that the justification for the distinction based on age was not reasonable as it would not come within the ambit of Section 1.

¹⁹ M Cohen & A Bayefsky, *The Canadian Charter of Rights and Freedoms and Public International Law (Canadian Bar Review: 1983-6)* 265 at 288

²⁰ (1989) 1 S. C. R. 1038

²¹ (1999) 2 S. C. R. 817

²² (1996), 133 D. L. R. (4th) 108 (Ont. Div. Ct.)

²³ (1987), 42 D. L. R. (4th) 407 (B. C. S. C.)

ii. Health Care

Sections 7 and 15 of the *Charter* have attempted to challenge the provincial health care funding decisions, despite its unsuccessfulness. In *Brown v British Columbia Minister of Health*²⁴, the *Charter* disputed the government's resolution to fully fund the costs of AIDS treatment. However this was subsequently rejected. The plaintiffs put forth their plea, stating that the non-payment of the drug invariably led to the deprivation of life, liberty and security of the person. It was noted that Section 7 did not protect against economic deprivations or guarantee benefits that may enhance the life, liberty or security of the person. Furthermore, Section 15(1) was also not infringed as the Pharmacare Plan was administered for all residents of the said province, and those receiving the treatment was bound to contribute to the cost of the drugs.

iii. Housing

In a landmark decision, the Nova Scotia Court of Appeal held that public housing tenants came within the ambit of a protected class, similar to those listed in Section 15 of the *Charter*. In *Dartmouth/Halifax County Regional Housing Authority v Sparks*²⁵, the Court struck down two sections of the Residential Tenancies Act that tackled public housing tenants differently from other tenants. This decision was upheld owing to the fact that it amounted to unjustifiable violations of Section 15 of the *Charter*. In this case, a black sole support mother (plaintiff) faced discrimination based on the aforesaid differential treatment. The plaintiff put forth empirical evidence about the characteristics of the public housing tenants, which included sex and racial composition. Hence, these tenants faced major disadvantages owing to the effect of several personal characteristics listed in Section 15(1).

²⁴ (1990), 66 D. L. R. (4th) 444 (B. C. S. C.)

²⁵ (1993) 101 D.L.R. (4th) 224 (N. S. C. A.)

iv. Employment

In *Fenton v British Columbia (Forensic Psychiatric Services Commission)*²⁶, a patient of a psychiatric institution challenged a provincial employment standards regulation that sought to prevent employers from paying minimum wage to those employees who were disabled and receiving occupational rehabilitation, education or therapy. Hence, the B.C. Superior Court held it to be a violation of Section 15. However, the Court of Appeal reversed the decision so made on the grounds that patients do not come within the ambit of employees under the legislation, with complete disregard to the constitutional issue.

Conclusion

On an appraisal of familiar arguments made against social and economic rights, as well as its practicality at the domestic level in the backdrop of various countries and their respective cases, one can safely say that social and economic rights are gravely misinterpreted and ill-conceived. It is crystal clear that the comprehension of how Civil and Political Rights and Social and Economic Rights are intertwined makes it unfeasible for contending that the latter is non-justiciable. Such declaration cannot be done without underestimating the protections for both sets of rights. The root causes for the economic and social rights violations are primarily poverty and social exclusion. Determining the justiciability debate will not help solve these persisting problems. However, with the uprising framework for adjudicating fundamental rights at the domestic, regional and international levels, one can see the manifestation of provisions for the purpose of hearing cases pertaining to *all* human rights issues, and not confined to particular rights. These stepping stones to the full realization of economic and social rights help secure the dignity, security and equality, thereby quashing out poverty, homelessness, hunger or any other infringements of such rights.

In conclusion, it is imperative to comprehend the interlaced relationship between human rights and good governance. If human rights law is considered binding on the State, then they invariably form a part of good governance. “Rule of law is also rule of human rights law”²⁷ and “good governance is essential to the realisation of all human rights”²⁸.

²⁶ (1991), 82 D.L.R. (4th) 27 (B. C. C. A.), reversing (1989), 29 C.C.E.L. 168 (B.C.S.C.); leave to appeal to S.C.C. refused (1992) 1 S.C.R. vii.

²⁷ General Comment No. 9, CESCR UN Doc E/C.12/1998/24

²⁸ General Comment No. 12, CESCR UN Doc. E/C.12/1999/5