

Chapter 14

The role of the courts in protecting economic, social and cultural rights

Facilitator's Guide

Learning objectives I

- To familiarize the participants with the main international legal instruments protecting economic, social and cultural rights
- To explain to the participants the intrinsic relationship between economic, social and cultural rights, on the one hand, and civil and political rights, on the other
- To acquaint the participants with the nature of the legal obligations of State parties with regard to the enforcement of economic, social and cultural rights
- To inform the participants of the content of some economic, social and cultural rights

Learning objectives II

- To discuss with the participants the question of the justiciability of economic, social and cultural rights
- To familiarize the participants with the important role of the domestic courts in protecting economic, social and cultural rights
- To increase the participants' awareness of their own potential as judges and lawyers in contributing to the enforcement of economic, social and cultural rights at the domestic level

Questions I

- How are economic, social and cultural rights protected and enforced in the country where you work?
- What role do the courts play in the enforcement of these rights?
- What mechanisms other than courts exist in your country to promote and/or enforce economic, social and cultural rights?
- What aspects of economic, social and cultural rights are particularly relevant in the country where you work?

Questions II

- In your country, are there any vulnerable groups that are in particular need of legal protection in the field of economic, social and cultural rights?
- If so, what are they, and in what sense do they need special protection?
- How, if at all, is this protection provided? Is it effective?
- How would you envisage a remedy at the domestic level to efficiently protect a person's economic, social and cultural rights?

Key legal instruments

A. Universal instruments

- The International Covenant on Economic, Social and Cultural Rights, 1966
- The Universal Declaration of Human Rights, 1948

B. Regional instruments

- The African Charter on Human and Peoples' Rights, 1981
- The American Convention on Human Rights, 1969
- The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988
- The European Social Charter, 1961, and the European Social Charter (Revised), 1996

Why there are two international covenants on human rights I

All civil, cultural, economic, political and social human rights are of equal value and dependent on each other for their mutual realization.

The decision to have two international covenants on human rights reflects the more complex nature of economic, social and cultural rights and the particular issues relating to their implementation, although it was also based, in part, on political considerations linked to different views of Socialist countries and some Western States.

Why there are two international covenants on human rights II

In view of the different levels of development of States, the International Covenant on Economic, Social and Cultural Rights had to provide for the possibility of progressive implementation, although this was never meant to imply that there were no immediate obligations.

The suggestion that economic, social and cultural rights are not justiciable was never accepted in the course of the drawing-up of the Covenant.

The interdependence and indivisibility of human rights

The evolution of the international law of human rights, including its interpretation by international monitoring organs, has confirmed the essential links that exist between civil and political rights and economic, social and cultural rights.

Governments have a fundamental legal duty simultaneously to proceed with the implementation of all these rights, which are aimed at protecting the most essential dimensions of the human person.

The rights guaranteed I: The International Covenant on Economic, Social and Cultural Rights (1)

The Covenant guarantees:

- The right to equality and non-discrimination in the enjoyment of rights – article 2 (2) (non-discrimination in general) and article 3 (between men and women)
- The right to work, including the right to gain one's living by work freely chosen or accepted – article 6
- The right to enjoy just and favourable conditions of work, including fair and equal remuneration for work of equal value without distinction of any kind; a decent living for workers and their families; safe and healthy working conditions; equal opportunity of promotion, as well as rest, leisure and reasonable limitation of working hours and periodic holidays with pay – article 7

The rights guaranteed II: The International Covenant on Economic, Social and Cultural Rights (2)

- The right to form trade unions and join the trade union of one's choice, including the right to establish national federations or confederations – article 8 (1) (a)–(b)
- The right to strike – article 8 (1) (d)
- The right to social security, including social insurance – article 9
- The right to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions – article 11 (1)

The rights guaranteed III: The International Covenant on Economic, Social and Cultural Rights (3)

- Protection and assistance to the family; marriage must be freely entered into; maternity protection; protection and assistance to children and young persons – article 10 (1)–(3)
- The right to the highest attainable standard of physical and mental health – article 12
- The right to education – article 13
- The right to take part in cultural life, to enjoy the benefits of scientific progress and to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author – article 15 (1)

The rights guaranteed IV: The African Charter on Human and Peoples' Rights (1)

The African Charter guarantees the following individual economic, social and cultural rights, in particular:

- The right to non-discrimination in the enjoyment of the rights protected by the Charter – article 2
- The right to freedom of association – article 10
- The right to work under equitable and satisfactory conditions; the right to receive equal pay for equal work – article 15

The rights guaranteed V: The African Charter on Human and Peoples' Rights (2)

- The right to enjoy the best attainable state of physical and mental health – article 16
- The right to education – article 17 (1)
- The right freely to take part in the cultural life of one's community – article 17 (2)
- The right of the aged and disabled to special measures of protection in keeping with their physical or moral needs – article 18 (4)

The rights guaranteed VI: The American Convention on Human Rights

Article 26 reads:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The rights guaranteed VII: The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (1)

The Additional Protocol to the American Convention protects the following rights, in particular:

- The right to non-discrimination in the exercise of the rights guaranteed – article 3
- The right to work, including the opportunity to secure the means for living a dignified and decent existence – article 6

The rights guaranteed VIII: The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (2)

- Just, equitable and satisfactory conditions of work, including, inter alia, remuneration which guarantees, as a minimum, to all workers and their families, dignified and decent living conditions; fair and equal wages for equal work; the right to promotion; safety and hygiene at work; the prohibition of night work and unhealthy or dangerous working conditions for persons below the age of 18 years; a reasonable limitation of working hours and rest, leisure and paid vacations – article 7

The rights guaranteed IX: The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (3)

- Trade union rights, such as the right of workers to organize trade unions and to join the union of their choice for the purpose of promoting and protecting their interests, as well as the right to strike – article 8 (1)
- The right to social security – article 9
- The right to health, “understood to mean the enjoyment of the highest level of physical, mental and social well-being” – article 10

The rights guaranteed X: The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (4)

- The right to a healthy environment – article 11
- The right to food, meaning “the right to adequate nutrition which guarantees the possibility of enjoying the highest level of physical, emotional and intellectual development” – article 12 (1)
- The right to education – article 13
- The right to take part in the benefits of cultural life, and to enjoy the benefits of scientific progress and its application – article 14 (1)

The rights guaranteed XI: The Additional Protocol to the American Convention in the Area of Economic, Social and Cultural Rights (5)

- The right to the formation and protection of families – article 15
- The rights of children – article 16
- The right of the elderly to special protection – article 17
- The right of “everyone affected by a diminution of his physical or mental capacities” to receive special attention “designed to help him achieve the greatest possible development of his personality” – article 18

The rights guaranteed XII: The European Social Charter, 1961 (1)

The 1961 European Social Charter protects the following rights:

- The right to work – article 1
- The right to just conditions of work – article 2
- The right to safe and healthy working conditions – article 3
- The right to a fair remuneration – article 4
- The right to organize – article 5
- The right to bargain collectively – article 6
- The right of children and young persons to protection – article 7

The rights guaranteed XIII: The European Social Charter, 1961 (2)

- The right of employed women to protection (maternity rights) – article 8
- The right to vocational guidance and training – articles 9 and 10
- The right to protection of health – article 11
- The right to social security – article 12
- The right to social and medical assistance – article 13
- The right to benefit from social welfare services – article 14

The rights guaranteed XIV: The European Social Charter, 1961 (3)

- The right of persons with disabilities to independence, social integration and participation in the life of the community – article 15
- The right of the family to social, legal and economic protection – article 16
- The right of mothers and children to social and economic protection – article 17
- The right to engage in a gainful occupation in the territory of other State parties – article 18
- The right of migrant workers and their families to protection and assistance – article 19

The rights guaranteed XV: The European Social Charter, 1961 (4)

By virtue of the 1988 Additional Protocol, the State parties also undertake to consider themselves bound by one or more of the articles:

- The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex – article 1
- The right to information and consultation for workers – article 2
- The right of workers to take part in the determination and improvement of the working conditions and working environment – article 3
- The right of elderly persons to social protection – article 4

The rights guaranteed XVI: The European Social Charter (Revised), 1996 (1)

The revised European Social Charter adds the following rights to those contained in the 1961 Charter and the 1988 Additional Protocol:

- The right to protection in cases of termination of employment – article 24
- The right of workers to protection of their claims in the event of the insolvency of their employer – article 25
- The right to dignity at work – article 26
- The right of workers with family responsibilities to equal opportunities and equal treatment – article 27

The rights guaranteed XVII: The European Social Charter (Revised), 1996 (2)

- The right of workers' representatives to protection against acts prejudicial to them and to be afforded facilities – article 28
- The right to information and consultation in collective redundancy procedures – article 29
- The right to protection against poverty and social exclusion – article 30
- The right to housing – article 31

The rights guaranteed XVIII: Summing up

The economic, social and cultural rights guaranteed by international human rights law cover wide areas of essential aspects of human life, such as the right to work and conditions of and at work, the right to an adequate standard of living, including the right to adequate physical and mental health, the right to education and the right to special assistance for families and children.

The enjoyment of these rights is conditioned by the principle of equality before the law and in the application of the law.

States' legal obligations under the International Covenant on Economic, Social and Cultural Rights I

The State parties to the International Covenant on Economic, Social and Cultural Rights cannot rely on their internal legislation to justify failure to implement the Covenant.

The State parties to the Covenant have an obligation of *conduct* and must in particular take all legislative, administrative, financial, educational and social measures that are appropriate to give effect to the terms of the Covenant.

States' legal obligations under the International Covenant on Economic, Social and Cultural Rights II

The State parties also have an obligation of *result* in that they must move as expeditiously and effectively as possible towards the realization of the rights contained in the Covenant using the maximum of their available resources.

Every State party has a legal duty immediately to ensure the minimum core obligations of each of the rights contained in the Covenant.

States' legal obligations under the International Covenant on Economic, Social and Cultural Rights III

Even in situations of demonstrably inadequate resources, the State parties have to prove that they are striving to ensure the widest possible enjoyment of the rights contained in the Covenant.

The State parties have a legal duty to give effect to the Covenant by using all means at their disposal. This duty comprises the provision of means of *redress* or *remedies* enabling individuals effectively to vindicate their economic, social and cultural rights at the domestic level.

States' legal obligations under the European Social Charters

The European Social Charters provide a hybrid of international legal duties in that they impose on the States a certain number of immediately enforceable rights at the same time as they allow them to engage in a progressive implementation of other rights.

The justiciability of economic, social and cultural rights I

Neither the nature of economic, social and cultural rights, as such, nor the terms of the International Covenant on Economic, Social and Cultural Rights, or the preparatory works thereto, can be relied on to deny the justiciability of these rights.

On the contrary, many aspects of these rights lend themselves to judicial determination. In its general comment No. 3 (1990), the Committee on Economic, Social and Cultural Rights stated that “the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies.”

The justiciability of economic, social and cultural rights II

Whenever necessary for their effective enforcement, the State parties to the Covenant must provide judicial remedies for proven violations of economic, social and cultural rights. Such remedies must exist alongside adequate administrative remedies.

To classify economic, social and cultural rights as non-justiciable implies a denial of justice and of their indivisible and interdependent link with civil and political rights.

The right to adequate housing I

What it means (1)

The right to adequate housing is an essential component of the right to an adequate standard of living, which must be interpreted not only in the light of other economic, social and cultural rights, but also by considering civil and political rights.

The right to adequate housing II

What it means (2)

The principle of *adequacy* means that:

- There must be legal security of tenure
- There must be availability of basic services, materials, facilities and infrastructure
- The housing must be affordable, habitable and accessible, and located close to employment and other facilities
- The housing must be built so as not to jeopardize the health of its occupants
- The housing must be culturally adequate

The right to adequate housing III

The legal obligations (1)

The International Covenant on Economic, Social and Cultural rights imposes in particular the following immediate obligations on the State parties:

- They must give particular consideration to social groups living in unfavourable conditions
- They must almost invariably adopt a national housing plan to define the objectives, resources, responsibilities and time frame of the measures required
- They must effectively monitor the housing situation

The right to adequate housing IV

The legal obligations (2)

The State parties to the International Covenant on Economic, Social and Cultural Rights must also provide domestic legal remedies with regard in particular to the questions of eviction and the demolition of houses, discrimination, illegal actions taken by landlords, and unhealthy and inadequate housing conditions.

The right to adequate housing V

Forced evictions (1)

Forced evictions are prima facie incompatible not only with the International Covenant on Economic, Social and Cultural Rights but also with the International Covenant on Civil and Political Rights.

Domestic legislation should provide effective protection against forced evictions, including evictions carried out by private persons. The law should provide the following guarantees, among others:

- Whenever evictions do occur, they must conform to international human rights law and must not involve any form of discrimination

The right to adequate housing VI

Forced evictions (2)

- Forced evictions and the demolition of houses as punitive measures are forbidden
- Evictions must be carried out only after due notice and consultation with the persons affected and with the availability of adequate domestic legal remedies and compensation for any property affected by the eviction
- Evictions should not result in people being made homeless

The right to adequate housing VII

Lessons learned (1)

Both international and national jurisprudence on the right to adequate housing confirm, in particular, that:

- It is indispensable to consider the effective implementation of economic, social and cultural rights also in the light of the effective implementation of civil and political rights
- Economic, social and cultural rights or, as a minimum, some aspects thereof, are justiciable and consequently lend themselves to judicial adjudication

The right to adequate housing VIII

Lessons learned (2)

International and national jurisprudence on the right to adequate housing further confirm that:

- Legal terms are meant to have an effect. Consequently, terms such as taking “steps” to achieve “progressively” the full realization of rights impose immediate positive duties on States in terms of conduct, result and effect

The right to adequate housing IX

Lessons learned (3)

International and national jurisprudence on the right to adequate housing finally confirm, inter alia, that:

- The reference to “all appropriate means” implies that there is a built-in flexibility that makes it possible in any given case to strike a fair balance between the legal duties of a given State and the means at its disposal

The right to health I

What it means (1)

The right to health as guaranteed by the International Covenant on Economic, Social and Cultural Rights means the right to enjoy the facilities, goods and services, and conditions necessary for the realization of the highest attainable standard of health. The right includes the freedom to control one's own health and body, as well as the right of access to a system of health protection in a non-discriminatory manner.

The right to health II

What it means (2)

The International Covenant on Economic, Social and Cultural Rights requires that health facilities must be *available, accessible, acceptable* and of *good quality*.

Vulnerable groups such as persons with disabilities, women and elderly persons, as well as indigenous peoples, have the right to have specific measures designed for their particular needs.

The right to health III

The legal obligations (1)

The State parties to the International Covenant on Economic, Social and Cultural Rights have a legal duty to take deliberate, concrete and targeted steps towards the full realization of the right to health. While some obligations can be implemented progressively, others have an immediate effect.

The State parties have to *respect*, *protect* and *fulfil* their legal undertakings. The obligation to fulfil also implies that the State parties have a legal duty to *facilitate*, *provide* and *promote* the right to health.

The right to health IV

The legal obligations (2)

The State parties to the International Covenant have, at the very least, 11 *core obligations* which must be complied with at all times.

All alleged victims of violations of the right to health should have access to effective judicial or other appropriate remedies inter alia at the national level, as well as the right to adequate reparation for violations of this right.

Judges and members of the legal professions in general should be encouraged to pay greater attention to violations of the right to health in the exercise of their responsibilities.

The right to health V

Lessons learned from national case law

Case law from Canada and India shows that, although the right to health may not, as such, be included in domestic law, the domestic judge is not necessarily deprived of legal tools to protect the right to health of vulnerable groups:

- In Canada this was done by reference to the right to equal access to medical services, giving the right to equality a dynamic, purposeful interpretation
- In India it was done by an extensive interpretation of the right to life as understood in the light of other constitutional provisions concerning inter alia social justice