Cintia Sousa de Freitas[1]

ABSTRACT

The purpose of this paper is to present an overview on the discussion around the justiciability of economic, social and cultural rights (ESCR), *i.e.*, whether they are able to be invoked before national or international courts. Thus, from the traditionally unfavorable allegations to the ESCR, a historical review on its origin, concept and legal nature is presented in order to dismantle those allegations, bringing up the pertinent arguments, presented as an outcome of this study, which prove, therefore, the ESCR justiciability. From a methodological perspective, this paper is developed through analysis regarding the different approaches in legal sources and official documents at the national, and in particular, the international sort, in order to demonstrate that the present discussion can take place in any level, whether national, regional or global, whenever DESC violation is detected. For this reason, the arguments intend to overcome the discussion on the justiciability of DESC as a way of guaranteeing a legal remedy to victims in case of violation, in order to increase levels of quality of life and contribute to the drastic reduction of poverty and social inequalities of any country. Therefore, if the justiciability of ESCR is not recognized as is the justiciability of civil and political rights (CPR), all the acknowledgments and efforts made to consider all human rights as one integrated body will be worthless.

Keywords: human rights; violation; justice.

RESUMO

O presente artigo tem por escopo apresentar um panorama geral sobre a discussão em torno da justiciabilidade dos direitos econômicos, sociais e culturais (DESC), ou seja, sobre a possibilidade de exigir seu cumprimento perante o Poder Judiciário, seja ele em âmbito nacional ou internacional. Para isso, partindo-se das alegações tradicionalmente desfavoráveis aos DESC, apresenta-se um levantamento histórico sobre sua origem, conceito e natureza jurídica com o intuito de desmontar aquelas alegações, trazendo os argumentos pertinentes, apresentados como resposta e resultado deste estudo, que comprovam, portanto, a justiciabilidade dos DESC. Do ponto de vista metodológico, este trabalho desenvolve-se por meio da análise jurídica a respeito das diferentes abordagens presentes em doutrinas e documentos oficiais, de cunho nacional e, especialmente internacional, de modo a demonstrar que a presente discussão pode se apresentar em qualquer esfera, nacional, regional ou global, sempre que verificada a violação a um dos DESC. Por esta razão, os argumentos expostos pretendem superar a discussão sobre a justiciabilidade dos DESC como forma de garantir um remédio legal às vítimas em caso de violação, a fim de colaborar com o aumento dos níveis de qualidade de vida e contribuir na redução drástica da pobreza e das desigualdades sociais de um país. Neste sentido, se a justiciabilidade dos DESC não for devidamente reconhecida, assim como é para os direitos civis e políticos (DCP), todos os esforços feitos para o reconhecimento dos direitos humanos, como um só corpo integrado, serão em vão.

Palavras-chave: direitos humanos; violação; justiça.

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1- INTRODUCTION

The examination and in-depth analysis of the historical evolution of human rights in general and economic, social and cultural rights (ESCR) in particular, require, undoubtedly, an extensive and elaborated work. Since the objective of this study is more modest, it will only raise the most relevant aspects of the origins, the concept and the legal nature of ESCR and will emphasise the controversies on their justiciability, which means the possibility of demanding their compliance before the Judiciary, whether national or international.

Thus, from a methodological point of view, this work is developed through legal analysis regarding the different approaches present in doctrines and official documents, being national (such as the Constitutions) and, especially international (such as UN documents), in order to demonstrate that the current discussion can be presented in any sphere, national, regional or global, whenever a violation of one of the DESC is verified.

As a starting point, there is the Universal Declaration of Human Rights (UDHR), adopted in 1948 by the United Nations General Assembly (UNGA), which proclaimed for the first time the protection of both categories of human rights, *i.e.*, civil and political rights (CPR) and psychological, social and cultural rights (ESCR) at the universal level. Later, in 1993, the Vienna Declaration and Programme of Action established, in its Art. 5, that all human rights are "universal, indivisible, interdependent and interrelated".

Despite the international recognition of ESCR, the ideal of having all these rights effectively protected has not yet been achieved. Beyond doubt, gross human rights violations, in relation to both categories of human rights, occur at a daily basis. Whereas CPR relate to the non-interference of the state in the rights of individuals, ESCR concern the ability of people to have an adequate standard of living fullfield.

Therefore, the arguments set out in this study intend to overcome the discussion on the justiciability of ESCR as a way of guaranteeing legal remedies to victims in case of their violation.

2 - HUMAN RIGHTS ARISING: ORIGINS AND HISTORICAL EVOLUTION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The origins of the acknowledgment of ESCR are very diffuse. Firstly, ESCR derive from and reflect principles expressed in diverse religious traditions to care for those in need and those who cannot look after themselves (STEINER; ALSTON; GOODMAN, 2008). This religious charity-based approach reflects however "the obligation of one individual to another, rather than the obligation of the state as to an individual" (STARK, 2009, p. 91). Still, "the recognition that the poor, the sick, the very old and the very young have a moral claim against the larger community is a powerful and enduring norm" (STARK, 2009, p. 91).

The ESCR can further be traced to the XVIII century liberal philosophers promoting that humans can create a better and fairer world through reason and science. In this period of the Enlightenment, various philosophers discussed the connection between individuals and their rights. On the one side, English philosophers, such as John Locke pointed out the importance of negative rights, such as freedom of speech and of religious from state restrictions. On the other side, French philosophers like Jean-Jacques Rousseau discussed the obligation of the state to take positive actions in order to assure a decent standard of living for its people (STARK, 2009, p. 91).

In the 1791 French Constitution certain social concerns with regard to the protection of vulnerable people found entrance and in the 1793 French Declaration of the Rights of Man and of the Citizen, the notion that the vulnerable have a claim against the state was included (FERREIRA FILHO, 2010, p. 64-65).

During the XIX and XX centuries, out of the necessity to address social problems resulting from the Industrial Revolution inducing economic and political developments in particular in the US and Western Europe, ESCR increasingly became recognised (FERREIRA FILHO, 2010, p. 59). Due to the development of economic liberalism, the wealth of the bourgeois class suddenly increased. The lack of social policies in western states left the working class in a miserable situation without corporative or state protection. Due to the technical progress machines increasingly replaced manual causing high unemployment rates and working

conditions were extremely poor and inhuman. The growing disparities between the working and the bourgeoisie class finally let to protests by the former against the prevalent system aimed to acquire more rights (FERREIRA FILHO, 2010, p. 61).

The starting social unrests led to the inclusion of ESCR in the legal frameworks, *i.e.* constitutions of several countries. In particular, the Mexican Constitution of 1917 was the first to establish labour rights as fundamental rights, in its Art. 123. Another extremely important document for the recognition of ESCR was the 1919 Weimar Constitution dealing in particular with the right to property and its limitation "for the purpose of public welfare", according to its Art. 153. This document inspired several other Constitutions in the world, such as the 1934 Brazilian Constitution establishing for the first time an entire title (SILVA, 2008, p. 285) about the "Economic and Social Order" (Title IV).

Nonetheless, it was only with the creation of the United Nations (UN) in 1945 that ESCR were internationally recognised as human rights. The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the UN General Assembly (UNGA), for the first time incorporated at the universal level both ESCR and civil and political rights (CPR).

The UDHR, as a GA resolution, does not have the same legal character as a treaty or a convention, even though it is argued that at least parts of it have the status of customary law. Thus, in order to transform the Declaration's provisions into legally binding obligations, the UNGA promoted two new documents, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) in 1966 (STEINER; ALSTON; GOODMAN, 2008, p. 137). Both Covenants entered into force in 1976, after receiving each 35 ratifications[2]. Together with the UDHR, the two Covenants built the "International Bill of Human Rights", "the bedrock of the international normative regime for human rights" (STEINER; ALSTON; GOODMAN, 2008, p. 263). It is important to mention that until 1st May 2023, out of 193 UN member states, 171 ratified the ICESCR, whereas 173 states have ratified the ICCPR (UN, 2023).

At the international level, the adoption of the ICESCR and in particular the work of the Committee on Economic, Social and Cultural Rights (CESCR), the body in charge to monitor

[2] According to Art. 27(1) of ICESCR and Art. 49(1) of ICCPR.

the implementation of the treaty obligations by states, have been most relevant for the strengthening and the recognition of ESCR as human rights (COOMANS, 2009, p. 293).

Still, even though ESCR were recognised as human rights, they continued to be considered a different category of rights compared to CPR. However, both categories are completely interrelated (ISA, 2009, p. 39). In 1968, at the First International Conference on Human Rights in Teheran, it was firstly recognised that "all human rights and fundamental freedoms are indivisible and interdependent" (UN, 1968). This approach was restated and extended in the Second World Conference on Human Rights, through the 1993 Vienna Declaration and Programme of Action (VDPA), establishing in its Art. 5 that all human rights, *i.e.* CPR and ESCR, are "universal, indivisible, interdependent and interrelated".

In fact, there was no consensus between Western states ("Universalists") and those states supporting cultural relativism ("Relativists") regarding these aspects inherent to all human rights. For Universalists, human rights stem from "specifies minimum conditions for a dignified life, a life worthy of a human being" (DONNELLY, 2013, p. 16). For Relativists, the notion of human rights is connected to politic, economic, cultural, social and moral systems present in a determined society. Moreover, the Relativists affirm that Universalists only invoke a hegemonic view of the Western culture regardless the cultural aspects of other societies, whereas the Universalists declare that Relativists, on behalf of culture, intend to cover serious violations of human rights (PIOVESAN, 2013, p. 49).

Nonetheless, the compromise formula established in the VDPA, at that time, was the best solution in order to overcome the distinction construed between the two categories of rights (ISA, 2009, p. 47).

3 - THE LEGAL NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The brief introduction above showed that through the ICESCR and the subsequent work of its Committee, ESCR step by step became a "full member of the human rights family" (COOMANS, 2009, p. 293).

According to the ICESCR, which structure was basically copied by other regional and

domestic legal instruments, ESCR encompass:

a) Economic rights: the right to work, the right to fair and favourable working conditions, the freedom to form and join trade unions, the right to strike;
b) Social rights: the protection of the family and maternity as well as of children and juveniles, the right to social security, the right to an adequate standard of living, including food, clothing, and housing, the right to health
c) Cultural rights: the right to education and participation in cultural life and the protection of intellectual property. Moreover, this category of rights is also constituted of right of all peoples to self-determination, prohibition of discrimination and gender equality.

Art. 2 (1) of the ICESCR establishes that states parties in order to fulfil their obligations have to take steps, individually and through international co-operation, to the "maximum of [their] available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures".

According to Coomans, in order to understand the differences between both categories of rights, the central provisions of the ICCPR and ICESCR and the scope of state obligations they enshrine have to be analysed. Whereas CPR can be generically considered as immediate and enforceable since obligations of states mainly concern the non-interference in the rights of the individual, ESCR have been basically perceived as non-immediate and non-enforceable (COOMANS, 2009, p. 295) due to the requirement of progressive realisation as enshrined in the ICESCR. However, over the years and in particular because of the interpretative work by the CESCR in its General Comments, the legal nature of ESCR has been defined and specified (EIDE, 2001, p. 9).

For instance, in General Comment No. 3, paragraph 1, the CESCR pointed out that the emphasis placed on the different wordings of both Arts. 2 of the two Covenants fails to recognise that "there are also significant similarities" between both categories of rights. While

Art. 2, ICESCR, states that "[e]ach State Party […] undertakes to take steps […], to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights", Art. 2, ICCPR, establishes that "[e]ach State Party […] undertakes to respect and to ensure to all individuals […]the rights recognised".

The argument that ESCR are neither enforceable nor immediate in their application has to be analysed case by case as same as CPR. Due to the conceptual misunderstandings about the precise nature of ESCR, the justiciability of the latter (MELISH, 2009, p. 33) has also been questioned as will be discussed in the subsequent section.

4 - THE MATTER OF JUSTICIABILITY OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Even though ESCR have over the years been recognised as human rights, another question and subject of heavy debates has been their justiciability, *i.e.* whether they are "able to be invoked before the courts" (UN, 1990, paragraph 6) in case of their violation.

The discussion on the justiciability of ESCR is not a new one, since the main reasons of objection have been basically based on the same arguments used for denying ESCR the status as human rights, *i.e.* their legal nature connected to the nature of state's obligations.

The aim of the next section is to develop on the traditional arguments used to contest the justiciability of ESCR. In fact, most common arguments against their justiciability relate to the comparison between ESCR and CPR opposing and classifying them as "vague/precise, positive/negative, progressive/immediate and expensive/cost-free" (YESHANEW, 2013, p. 49), respectively.

The subsequent discussion will dismantle the commonly used arguments related to the justiciability of ESCR and analyse them in three categories, *i.e.* the positive and negative dichotomy between ESCR and CPR; the vagueness of ESCR and their judicial enforcement; and the progressive realisation and available resources to implement ESCR.

4.1 The positive and negative dichotomy between economic, social and cultural rights and civil

and political rights

One of the main arguments against the justiciability of ESCR concerns the nature of states' obligations with regard to their implementation. It has been argued that while CPR relate to states' abstentions, protecting the individual against interference into its personal autonomy, the main objective of ESCR is a positive state conduct in order to protect and implement them. Thus, while the primary function of CPR is to limit states' power (negative obligation), ESCR require positive actions from the states (positive obligation) (SARLET, 2009, p. 66).

According to this argumentation, CPR are justiciable since they only require states to refrain from abusive actions, such as "don't kill, don't torture" (MELISH, 2009, p. 36). On the other hand, ESCR are not justiciable because they impose general positive obligations on the state, requiring, for instance, more expenditures on social facilities and infrastructure. Courts, are neither equipped nor in the right position to take such complex decisions belonging to the policy rather than the judicial sphere (MELISH, 2009, p. 36).

Still, the focusing exclusively on this negative and positive dichotomy of CPR and ESCR is not suitable as argument against their justiciability, since both categories of rights "include negative and positive elements and impose on states a spectrum of obligations that range from refraining from direct violations of rights to providing goods and services" (CAVALLARO; SCHAFFER, 2007, p. 345).

The state, according to Melish (2009, p. 36-37, author's emphasis), has just

> as strong a *negative duty* to refrain from destroying a family's food supply as it does from torturing detainees in custody. At the same time, the state's *positive duty* to create an electoral system in which fair voting by secret ballot can be achieved for all citizens is just as binding as its obligations to create health care system.

Therefore the attempt to divide both categories of rights based on the character of their inherent obligations is not practical, since the realisation of CPR require positive actions as the fulfilment of ESCR requires the realisation of CPR. According to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, both ESCR and CPR impose three different types of obligations on states: the obligations to respect, protect and fulfil. The failure to comply

with one of the three obligations already constitutes a rights' violation. The obligation to respect requires states to refrain from interfering with the enjoyment of ESCR; the obligation to protect demands states to prevent violations of ESCR by third parties; and the obligation to fulfil requires states to take appropriate legislative, administrative, budgetary, judicial and other measures in order to fully realise ESCR.

4.2 The vagueness of economic, social and cultural rights and their judicial enforcement

The general argument regarding the justiciability of rights, which is automatically applicable to ESCR, is related and dependent on the "positivisation", *i.e.* the adoption of laws or other legal normative acts at the national level (EIDE; ROSAS, 2001, p. 30).

However, it has been argued that ESCR are just too imprecise with respect to the nature and scope of their obligations, binding states under international law, resulting in a lack of legal implications: “when a right is established in the law without explicit or clearly implicit elaboration as to its scope, content, and counterpart obligations, such a right is legally inoperative and cannot be claimed in the courtroom (MELISH, 2002, p. 34).

Further traditional points of critique concern that the judicial enforcement of ESCR would constitute a violation of the democratic principle of the separation of powers since their realisation depends on budgetary decisions. Judges would be in charge of decisions actually belonging to the competences of the legislative or the executive powers (MICHELMAN, 2003, p. 13).

Nonetheless, according to Melish (2002, p. 34), ESCR are not vaguer than CPR requiring for instance “due process” or “equal protection” without specifying. However, CPR have benefited significantly from more authoritative interpretation over the past decades, while the normative content of ESCR has still been discussed by experts, international human rights bodies and some domestic trying to provide some authoritative guidance.

Invoking the theory of separation of powers is the result of a conservative approach to traditional constitutional doctrine. However, the modern welfare state and its various conceptions require overcoming these old dogmas (KRELL, 2022, p. 70). According to

Schutter, "judges and other branches of government should be seen less as opposing one another – the power attributed to the ones meaning less power left to the others – than as complementing each other. Courts therefore should not have to choose between substituting themselves for the other authorities, or abdicating their responsibility to monitor compliance with economic and social rights" (DE SCHUTTER, 2010, p. 743).

The CESCR, in General Comment No. 9, paragraph 9, explains that "the right to an effective remedy need not be interpreted as always requiring a judicial remedy", however, there are some obligations to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the ICESCR. "In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary".

Another important issue discussed in this General Comment is related to the argument that the principle of separation of powers "prohibits courts from encroaching upon the legislative function of deciding how to allocate scarce public resources" (MELISH, 2002, p. 37).

In response, the CESCR, in its General Comment No. 9, Part C, paragraph 10, stated that

> courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Confirming the idea that ESCR are justiciable, the UNGA adopted an Optional Protocol to the ICESCR that enables victims of violations of rights covered by the Covenant to address individual complaints to the CESCR (UN, 2008). Although the Committee, a quasi-judicial body, only can make non-binding recommendations to states, they still hesitate to ratify this new Protocol, which was adopted in 2008 and entered into force in 2013. Until 1st May 2023, out of 171 states parties to the ICESCR, only 27 have ratified it, such as Argentina, Bolivia,

Bosnia & Herzegovina, Ecuador, El Salvador, Finland, Mongolia, Montenegro, Portugal, Slovakia, Spain and Uruguay (UN, 2023).[3]

The adoption of the Protocol however proves that the debate on the justiciability of ESCR is becoming more and more obsolete. It can be said that "perhaps social rights are vague because they are not adjudicated" (KRATOCHVÍL, 2009, p. 34).

Undoubtedly, there is a growing awareness by the judiciary for the justiciability of ESCR which, in the last instance, can ensure the enforcement of ESCR. By including ESCR in their judicial practice either granting a subjective right or declaring a restrictive or retrocessive measure unconstitutional, judicial bodies have to be aware of their responsibility to act in accordance with the principle of separation of powers (SARLET, 2009, p. 355).

4.3 The progressive realisation and available resources to implement economic, social and cultural rights

Another argument used against the justiciability of ESCR concerns their progressive realisation and their dependence of their realisation on the spending of states' financial resources. In other words, it has been argued that the nature of ESCR requires positive actions often involving public spending by states in order to be realised, while the obligations of states to ensure the enjoyment of CPR do not require so (EIDE, 2001, p. 32). According to Eide, this is a gross oversimplification. As has been explained above there are three different obligations with regard to the realisation of human rights (respect, protect and fulfil). In the argumentation on the justiciability, the progressive realisation and the need for financial resources the obligation to fulfil ESCR is always compared to the obligation to respect CPR.

The Limburg Principles on the Implementation of the ICESCR, in its paragraph 21, states that:

> [t]he obligation 'to achieve progressively the full realisation of the rights' requires states parties to move as expeditiously as possible towards the realisation of the rights. Under no circumstances shall this be interpreted as implying for states the right to

[3] In the other hand, until 1st May 2023, out of 173 states parties to the ICCPR, 116 have ratified the Optional Protocol to ICCPR.

> deter indefinitely efforts to ensure full realisation. On the contrary all states parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.

In General Comment No. 3, paragraph 9, the CESCR also states that "any deliberately retrogressive measures" with regard to the obligation to achieve progressively the full realisation of the rights, established in Art. 2 (1) ICESCR, "would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources".

The discussion on the progressive realisation is closely connected to the aforementioned fact that the realisation of ESCR may depend on the availability of adequate financial and material resources of states. However, this argumentation could also be related to the implementation of CPR, since their fulfilment as well will require the spending of public funds. Even though the non-fulfilment of certain rights is to be refused might be a natural consequence of the scarcity of resource (HOLMES; SUSTEIN, 1999, p. 95-97). Still, according to the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, in paragraph 10, this argument does not absolve states "of certain minimum obligations in respect of the implementation" of ESCR. states are "obligated regardless of the level of economic development, to ensure respect for minimum subsistence rights for all" and "must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations", according to General Comment No. 3 of ICESCR, in its paragraph 10.

In addition, the CESCR, in General Comment No. 9, paragraph 10, explained that judicial remedies for violations of ESCR are essential and many provisions in the ICESCR are capable of immediate implementation. It also clarified the difference between "justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration)".

Finally, the Committee, despite admitting that each legal system needs to be taken into consideration and that the allocation of resources should be left to the political authorities rather than to the courts, it confirms that the adoption of a rigid classification of ESCR, in defining

them beyond the reach of the courts, would be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent (UN, 1998, paragraph 10).

5 - CONCLUSION

As discussed in this paper, ESCR have been often considered as being fundamentally different from CPR. Nonetheless, this distinction is artificially constructed and even counterproductive, since it has widely been recognised that all human rights are universal, indivisible, interdependent and interrelated.

However, the historical approach to interpreting the character and legal nature of human rights and the constant comparison of ESCR with CPR has hindered the latters' justiciability. Still, most of the arguments against their justiciability, *i.e.* that they require only positive obligations from states, or are too vague to be enforced, or depend on financial resources to be progressive realised etc., have become than obsolete as has been discussed above.

Undoubtedly, the discussion about the justiciability of ESCR is crucial since the judicial enforcement of human rights is fundamental. As reported by the UN Office of the High Commissioner for Human Rights (OHCHR) “a right without remedy raises questions of whether it is in fact a right at all. This is not to say that judicial enforcement is the only, or indeed the best, way of protecting economic, social and cultural rights. However, judicial enforcement has a clear role in developing our understanding of these rights, in affording remedies in cases of clear violations and in providing decisions on test cases which can lead to systematic institutional change to prevent violations of rights in the future.

Ultimately, this study accomplished its main purpose of presenting the arguments that supports the wide recognition of justiciability of all ESCR, so that they can be effectively protected, thus collaborating with the increase in quality of life levels and contributing to reduce drastically poverty and social inequalities in a country. This is because states must be held accountable for non-compliance with the human rights obligations to which they are committed, either because they are states parties to international treaties, or because they are complying with the mandate of their own Constitutions.

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