The Justiciability of Economic, Social and Cultural Rights via the Principle of Indivisibility of Human Rights – An Illustration: The Right to Food

Assist. Cristina SÂMBOAN PhD Student
„Artifex” University of Bucharest

Abstract

Phrased in idealistic terms and benefiting from positive and fastidious correlative obligations, the economic, social and cultural rights (ESCR) – or the so-called “claim-rights” – have long been regarded as a “poor relation” of their elder “brothers”, i.e. the civil and political rights (CPR) or “liberty-rights”, which are surrounded by an aura of historic authority and judicial force. These rights have often been pushed by doctrine towards the field of legal rhetoric. However, jurisprudence has proved that, despite such criticism, ESCR may well be subject to judicial control, either by the indivisibility principle of the human rights or by interpreting correlative obligations.

The article aims to illustrate the above mentioned reality through the analysis of the case-law generated by a right which, at the first glance, seems hardly enforceable before the courts: the right to food.

Key words: economic, social and cultural rights (ESCR), civil and political rights (CPR), right to food, indivisibility, justiciability, jurisprudence

Introduction

The disagreeable status of ESCR (“rights of the poor” or “poor rights”?) definitely comes from the way in which they have been expressed in the international treaties, in terms that remind especially of the electoral rhetoric than the legal terminology. The right to work, the right to food, the right to a minimum income, the right to social security, the right to housing... Can hunger be eradicated, poverty be fought against, unemployment be eliminated or can general welfare be assured through justice? What remedies can give the judge of some problems whose solution requires time, staging, programmatic approach, budget appropriation and so on? Or if it does it, is this not an interference with the powers of the Parliament - the one who decides budgetary distribution and allocation of resources (the democratic argument)? On the other hand, is the judge capable through his specific expertise and by the very nature of his prerogatives - application and interpretation of the law: juris dictio - to provide solutions for issues that require technical, economic, social expertise, bref, complex approach
and “polycentric” intervention (the technical argument)? In other words: are ESCR justiciable? Can they indeed be effective in front of the courts? Or are they rather part of the evasive register of the legal rhetoric? Who may take such rights seriously, as a matter of fact?

The key stone of discourse for challenging ESCR is, however, in the distinction based on the type of duties generated by this kind of rights: positive onerous obligations, contrary to the principle of separation of powers (hence the name, more or less pejorative of "rights-claim") versus the negative comfortable obligations of simple abstention from the state debtor, correlative to the “freedom-rights”, the civil and political rights. One thing is to require the state to ensure a "right to housing" to all its nationals and another thing is to pretend it to guarantee the citizens' right to free speech or the right to vote, or the right to life. The first aspect requires a program of action, resources, positive actions - easy to enforce, difficult to fulfil, even more difficult to monitor; the second involves simple abstention, non-intervention practices and the performance of obligations is easily accomplished judicially by simply removing the disturbing or injuring actions.

It is not the purpose of this paper to review the opinions expressed over time on the justiciability of ESCR. We confine ourselves to report that this type of discourse, focused on the distinction "positive obligations vs.negative obligations" dominated with authority for a long time not just the specific doctrine, but also the international meetings, works and debates, at concerning the ICESCR (International Covenant on Economic, Social and Cultural Rights).

While suspicions dominated the legal theory, beneficiaries were taking their rights seriously and the national and international courts were taking their duties seriously, while jurisprudence began to confront with the first raids of ESCR from the paper into reality. But "on site" confrontation, subjecting ESCR to tough test of reality, revealed a surprising observation: negative obligations are not the exclusive prerogative of CPR, just as those positive are not a single characteristic of ESCR; achievement progressivity may also cover a CPR, as immediate execution can be perfectly compatible with ESCR; in fact, both categories of rights create a varied set of obligations and, briefly, the theory of negative and positive obligations is simply a myth. In its turn, exegesis of works, reports (Final Observations and Conclusions) and General Observations of control international bodies has also contributed to mitigating of the cleavage between the two categories of rights, acknowledging the jurisprudential findings.

As expected, the doctrine retreated without delay to these findings, so that, currently, the focus of discourse upon ESCR shifted from the binomial "positive-negative" to the triad of the so-called “stratified obligations”: respect, protection and implementation. Reality is often presented in a various "mixed" way and is not easily subject to the rigors of doctrinal classification. CPR and ESCR are, more exactly, indivisible. All these findings obtained international consecration in the conclusions of the Vienna Conference in 1993.
I. Right to food – legal consecration

The right to food is laid down both in Article 25 of the Universal Declaration of Human Rights, and in Article 11 of the International Covenant on Economic, Social and Cultural Rights.

The right to food is also acknowledged in other international conventions protecting particular groups of population, such as the Convention on the Elimination of Discrimination against Women (1979), the Convention on the Rights of the Child (1989) and the Convention on the Rights of Persons with Disabilities (2006).

The right to food is also acknowledged in certain regional instruments, such as the additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, referred to as “Protocol of San Salvador” (1988), the African Charter on the Rights and Welfare of the Child (1990) and the Protocol to the African Charter of Human and People’s Rights on the Rights of Women in Africa (2003).

Several international instruments on human rights, which do not have a legally binding character, particularly recommendations, guiding principles, resolutions or statements, focus also on the right to food. Such instruments aim at positioning the implementation of the right to food. Among these instruments, it is worth quoting the General Observation no. 12 of May 12th 1999, adopted by the Committee on economic and social rights. The Committee mentioned thus that « the right to adequate food is realised when every man, woman and child, alone or in community with others, has physical and economical access at all times to adequate food or means for its procurement ». Particularly, the Committee clarified the obligations imposed to the States, distinguishing between obligation to respect, to protect and to realize the right.

The works of the successive Reporters have contributed greatly to promote the guarantee of this right, as well as to determine its content. In parallel, FAO continues to work towards the effective achievement of this right. Within this framework, the States adopted in 2004 voluntary Directives to support the progressive fulfilment of the right to adequate food in the context of the national food security, which have the objective to guide their action for the purpose of an effective implementation of the right to food.

At national level, the right to food is acknowledged under various forms:

a) explicit acknowledgment;

b) explicit acknowledgment of the right to food belonging to specific groups (such as children, elderly, retired persons, prisoners);

c) implicit acknowledgment of the right to food through the explicit acknowledgment of a broader right, such as the right to an adequate standard of living, right to health or to decent means of subsistence;

d) acknowledgment of a right to social security for non-workers (implicit acknowledgment);

e) acknowledgment of the right to a minimum wage for workers, adequate to satisfy the primary needs of the worker and of his family, including food needs.
II. Interactions with other fundamental rights

Human rights are interdependent, interrelated and indivisible. Under the indivisibility of human rights, perfectly similar situations lend themselves to separate qualifications in terms of violated rights, inasmuch as - as a result of such indivisibility - a CPR breach also involves the prejudice to an ESCR and they all enjoy the judicial remedies, even if the remedies aim to protect only one of the rights. This means that the breach of the right to food may compromise the exercise of other fundamental rights, such as the right to health, education or life and vice versa. A few examples may be found in the frame hereunder:

(A) Intimate and indissoluble correlations – right to life, right to health, right to dignity, right to water.

Water and food support the life of any human being whose health depends on the manner of feeding himself. Moreover, any person deprived of food may not live in dignity. So, the right to food is an essential condition, sine qua non for the right to life, health and dignity.

This deep connection allowed the implicit guarantee of the right to food through the right to life or to health, in these national or regional legal systems where the right to food was not subject to a formal consecration.

Thus, the Indian Supreme Court interpreted the right to life, justiciable fundamental right within the meaning of Constitution, as integrating the right to enjoy primary needs such as the right to food, the right to clothing and the right to live in a decent housing. The Indian judge manages thus to control the observance of the principle on food improvement through a socializing interpretation of the right to life. Similarly, the German Federal Constitutional Court generated from the conjunction of the constitutional principles of the social State and of human dignity, a right to minimum means of subsistence, such as food, clothing and housing..

According to the interpretation of the African Committee of Human and People’s Rights, the right to food is implicitly protected under the African Charter of Human and People’s Rights (1981) through the right to life, the right to health and the right to economic, social and cultural development. According to the Committee of human rights, which monitors the application of the International Covenant on civil and political rights (1966), the protection of the right to life requires the states to adopt effective measures, especially measures for the purpose of removing malnutrition.

(B) Situations placing the right to food under pressure – Humanitarian Law, population movements, state of emergency

In the context of an armed conflict, the constant practice of the States and the opinio juris forbid the use of famine as weapon of war, and there is also an obligation to refrain from hindering the distribution of food intended for individuals threatened by famine. Famine is forbidden to be used against civilians as method of fight in both international and non-international armed conflicts. The interdiction to
appeal to famine is developed in the provisions banning to attack or destruct objects required for the civilian population to survive, including foodstuffs and potable water. The United Nations Security Council reiterated that any individuals preventing food distribution during armed conflicts might be considered as individually liable in Somalia and the former Republic of Yugoslavia.

As for the state of emergency, Article 4 paragraph 2 of the Covenant provides so as “this provision authorises no derogation from Articles 6, 7, 8 (par. 1 and 2), 11, 15, 16 and 18” which report, inter alia, to the right to life and to the right to prohibition of torture and inhuman and degrading treatments. The food deprivation or the impossibility to feed in prisons or any other detention structures may constitute a torture or an inhuman and degrading treatment.

The Swiss Federal Court, in the case Brothers V. c. Berne Canton Government, admitted that the minimum living conditions were a non-written constitutional right. This case was filed by three Czech stateless refugees living in Switzerland and deprived of any means of earning money for feeding. The applicants were not able to work, being impossible for them to obtain a work permit. Or, as they did not have official identity documents, they could not leave the country. Therefore, they asked authorities for support which was denied. The Court decided that these persons should have the right, at least, to minimum living conditions in Switzerland, in order to avoid them to become beggars.

(C) Vulnerable persons – women, children, indigenous populations etc.

Women have special food needs, particularly related to their procreative health. Any damage to the right to adequate food on women of childbearing potential is likely to determine complications threatening the prognosis during pregnancy or childbirth. The malnutrition of pregnant or breast-feeding women may ultimately result in malnutrition as well as in physical and mental deficiency of their child. Article 12 of the Convention on the Elimination of Discrimination against Women provides that women should be provided with an appropriate nutrition during their pregnancy and breast-feeding. However, it should be noted that the right to food applies to all women and not only to women in their capacity of mothers or procreator persons.

Children are particularly vulnerable to nutritional deficiencies because they need nutritious and safe food for their physical and mental development.

Most indigenous populations are among the most exposed to hunger and to malnutrition, which are mostly due to a long history of social, political and economic exclusion, of which centuries of their land expropriation and despoliation.

For the purpose of protecting particularly vulnerable groups, such as women, children, indigenous and tribal populations, refugees and stateless persons, other treaties have been internationally accepted by the States. The right to food has been thus acknowledged for women in the Convention on the Elimination of Discrimination against Women (in Articles 12 and 14), against children in the...
Convention on the rights of the child (in Articles 24 and 27), against refugees in the Convention related to the status of refugees (in Articles 20 and 23), against stateless people in the Convention related to the status of stateless persons (in Articles 20 and 23) and against indigenous and tribal populations in the Convention related to indigenous and tribal populations(mainly in Articles 14 to 19).

(D) Rights providing directly the premises of the right to food – the right to employment and social security, the right to environment, the right to propriety, the right to housing, the right to development

Employment and social security are often essential means to obtain food. The minimum wage and the social security benefits are often defined according to the cost of basic food products on the market.

The right to food is related to the environmental policies implemented in order to fight famine, which may generate major pressures on the most fragile soils. In 1986, at the time of presenting its national report, Tunisia was subject to discussions based on measures to be adopted in order to fight against the damage of natural resources, erosion and contamination of food. The Committee admitted the need to adopt preventive measures in order to prevent any contaminations and stated that houses should not be built on polluted soils or in the proximity of pollution sources which may endanger human health.

In «Ogonis» case, the African Committee estimated that by destroying the food sources of the population and by expelling them arbitrarily from their domiciles, the authorities had infringed their obligation of not preventing the populations’ access to food.

In the Grootboom and al. c. Government of the Republic of South Africa case, the constitutional Council of South Africa concluded that the housing programme of South Africa was not reasonable as it failed to provide an immediate support to “persons in particularly precarious situation”, such as those “deprived of access to land, homeless and living in inexpressible conditions or facing crisis situations”.

(E) Derived rights with which the right to food has indirect, necessary and mutually interdependent relations – the right to education, the right to information, the civil and political rights

Hunger and malnutrition hinder the full exercise of civil and political rights and, in its turn, the exercise of such rights may influence the public policies on food so as the right to food of all social categories is protected.

Hunger and malnutrition harm children learning skills and may force them to abandon school and start working, which affects the exercise of their right to education. In addition, in order to be protected from hunger and malnutrition, individuals should be familiar with a nutritious diet and acquire intentional skills and capacities to produce or obtain food as income sources.

The dissemination of information allows individuals to obtain details on food products and nutrition, on markets and on allocation of resources. The
protection and promotion of the right to search, obtain and disseminate information favour thus the exercise of the right to food.

**Conclusion**

Through the inevitable interactions – more or less profound – with other human rights, even an apparently unjusticiable right, such as the right to food seems to be, may be brought under the scrutiny of the courts. Moreover, this happens not only in the systems which provide its legal protection, but also where such explicitly protection is missing. The principle of the indivisibility of human rights proves to be an important source of efficiency for the human rights.

**Bibliography**

Barac, Lidia - *Convenția Europeană a Drepturilor Omului, drepturile sociale și economice* în ”Supliment legal”, disponibil online la adresa: [http://www.just.ro/LinkClick.aspx?fileticket=m7clInR29A%3D&tabid=1571](http://www.just.ro/LinkClick.aspx?fileticket=m7clInR29A%3D&tabid=1571)


Petre, Ileana - *Drepturi bănești în jurisprudența CEDO* în ”Supliment legal”, disponibil online la adresa: [http://www.just.ro/LinkClick.aspx?fileticket=m7clInR29A%3D&tabid=1571](http://www.just.ro/LinkClick.aspx?fileticket=m7clInR29A%3D&tabid=1571);

Nivard, Carole - *“The right to food”*, Magazine of the Human Right, [http://revdh.files.wordpress.com/2012/06/le-droit-c3a0-lalimentation.pdf](http://revdh.files.wordpress.com/2012/06/le-droit-c3a0-lalimentation.pdf)

Roman, Diane ș.a., *”Droits des pauvres, pauvres droits?” Recherches sur la justiciabilite des droits sociaux*, disponibil la: [http://revdh.files.wordpress.com/2012/06/droits-des-pauvres-pauvres-droits.pdf](http://revdh.files.wordpress.com/2012/06/droits-des-pauvres-pauvres-droits.pdf);

“The right to adequate food”, Informative note no. 34 [http://www.ohchr.org/Documents/Publications/FactSheet34fr.pdf](http://www.ohchr.org/Documents/Publications/FactSheet34fr.pdf);