Inaccessibility in International Human Rights: The Requirement to Exhaust All Domestic Remedies

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The UN individual communication procedures under various treaty bodies provide a relatively affordable and straightforward mode of redress for individuals whose rights have been violated by their state. However, for an adjudication on the merits, each communication must meet certain admissibility requirements, one of which is the exhaustion of domestic remedies. While it is reasonable for the Committees to have some gatekeeping admissibility criteria, this requirement creates an access to justice issue for those who cannot afford to pursue their claim domestically before accessing international mechanisms.

The February 14, 2022 decision of the Committee on the Elimination of Discrimination Against Women ("CEDAW") in *Matson v Canada* could have been an opportunity for the CEDAW to address the affordability of domestic remedies as part of its admissibility analysis, as both parties made submissions on this basis. Instead, it is the latest of a line of admissibility decisions that fail to meaningfully engage with the issue of affordability of domestic remedies. This article argues that a new exception is needed to make treaty body communication procedures truly accessible to victims of human rights violations: an exception for inability to afford to pursue domestic remedies.

The Treaty Body Communications Procedures

The use of individual complaints is fairly new in international human rights law. There are currently eight committees that allow individuals to bring complaints alleging their state violated an international human right and provide an adjudication on the merits: the Human Rights Committee ("HRC") for the *International Covenant on Civil and Political Rights* ("ICCPR"); the Committee for Economic, Social and Cultural Rights; the CEDAW; the Committee Against Torture ("CAT"); the Committee on the Elimination of Racial Discrimination; the Committee on the Rights of Persons with Disabilities; the Committee on Enforced Disappearances; and the Committee on the Rights of the Child.

Common to each Committee are the gatekeeping steps to screen out inadmissible complaints. Articles 1 and 5 of the First Optional Protocol to the ICCPR outline these requirements for complaints to the HRC: the State complained of must be a party to the Committee's enabling treaty, the complaint must not be anonymous, the individual must have exhausted all domestic remedies, and the complaint cannot undergo concurrent examination by another international investigative body. The admissibility requirements of other Committees are substantially similar.

The requirement to exhaust all domestic remedies is broadly stated in each of the Committees' admissibility requirement provisions. Its purpose is to recognize the principle of subsidiarity, wherein states are typically in the best position to deal with their own internal human rights issues.

Exceptions to the Requirement to Exhaust Domestic Remedies

The Committees have read in only two exceptions to the requirement to exhaust domestic remedies: where there is no reasonable chance of success, or where the state would take an unreasonable amount of time to provide a remedy. If either of these exceptions is satisfied, a complainant will not have to exhaust domestic remedies, and their complaint will be admissible for an adjudication on the merits by the relevant Committee.

However, the requirement to exhaust all domestic remedies and its two narrow exceptions do not sufficiently take into consideration an individual's financial ability or the cost of pursuing litigation domestically. While there has been discussion in the decisions of the Committees of a limited exception for financial difficulty where a state fails to provide legal aid in criminal matters, an access to justice issue remains for all others who cannot afford to seek legal redress.

Inaccessibility in Domestic Law

To literally exhaust all domestic remedies, an individual would be required to pursue all levels of appeal, potentially in addition to administrative remedies, should they provide a reasonable likelihood of success. In Canada, this could lead to costs in the millions of dollars.

A comprehensive study examined the "everyday legal costs" that Canadians face in a year, and found that the average expenditure annually for claims such as harassment at work, divorces, evictions, terminations, disputing wills or cell phone contracts, credit rating challenges, and social assistance benefits, amounted to $6,100. Twelve participants listed annual expenditures at over $100,000. The primary expenses were legal fees, followed by indirect costs such as transportation to hearings, then court and printing fees. While $6,100 may not seem significant, the cut-off income for legal aid across the provinces is around $20,000 per year. For someone making $30,000 per year, with regular financial obligations such as rent or mortgages, gas and car insurance, food, and childcare, this is a very significant sum. Canadian courts do have the ability to award costs, but this also comes with the risk of having to pay for the opposition's legal fees if the case is lost.

Despite the influential scholarship suggesting that legal aid is a human right, it is not universally provided. According to the *Global Study on Legal Aid* by the United Nations Development Programme ("UNDP"), legal aid is on average ten percent less available in civil matters than in criminal matters at various stages. While all reporting member states provided a guarantee of legal aid in criminal matters, on average it was only provided 84 percent of the time in civil matters. This varied significantly by location, with 94 percent of European states providing civil legal aid, but only 50 percent of Middle Eastern and North African states providing the same.

Further, the UNDP elaborates that "[t]he demand for legal aid for civil cases is largely unmet in most countries. The need for increased access to legal aid services for civil and administrative cases, including family disputes and property matters, is particularly pronounced in Least Developed Countries". Frequently, a significant portion of a state's legal aid is provided by NGOs and the private sector, rather than the government.

The availability of legal aid also varies significantly across types of litigation, with only 14 percent of Least Developed Countries providing access for public interest litigation, as opposed to 67 percent of high-income countries (see here at page 154). In the majority of Canada, state-funded legal aid is only provided for criminal, family, refugee and immigration, and mental health law issues (see here). It may also be revoked if the solicitor-client relationship breaks down, and it may be difficult or impossible for the individual to find a replacement lawyer.

This last scenario was well-illustrated in the case of Amir, a refugee attempting to seek asylum in Canada. He was ultimately detained for alleged criminal behaviour and the government initiated proceedings to have him deported. Amir found a legal aid lawyer to make a danger opinion, stating he was not a danger to Canadian society and should remain in the country. This application was denied,

and Amir's legal aid lawyer refused to appeal on the basis that it was without merit. Amir was not able to find another legal aid lawyer to take his case, and could not afford a private lawyer. He was ultimately deported to Kenya, refused entry, returned to Canada, and remained in jail (see here at page 114).

Additionally, while legal aid lawyers provide services to the best of their abilities, their services are often stretched thin, having to represent more clients than their capacity allows, which may result in inadequate services in practice. In *Henry v Jamaica*, for example, Henry brought a claim before the HRC challenging his death sentence on the basis that his legal aid lawyer attended his trial completely unprepared.

Where legal aid is not available for these individuals, seeking justice domestically is often inaccessible, which results in abandoned claims with no consequences for rights violators or redress for victims. The number of people affected by this scenario is significant. The Action Committee on Access to Justice in Civil and Family Matters stated it best: "*Most people* earn too much money to qualify for legal aid, but too little to afford the legal services necessary to meaningfully address any significant legal problem. The system is essentially inaccessible for all of these people" (see here at page 4). Further, individuals in poverty are more likely to face legal issues than their wealthier counterparts. The Special Rapporteur for Extreme Poverty aptly labelled this as discrimination against the poor.

It is arguable that legal aid should be universally available and adequate for all types of legal cases in order for individuals to have equal access and protection of the law, but the major gaps in civil matters illustrate that justice remains a privilege, rather than an equal right. This underscores the need for accessible legal aid, or, until that time, accessible procedures internationally where domestic remedies are unavailable.

Case law of the UN Committees

The existing UN Committee Views that do discuss financial ability can be broken into two categories: those that take note of the author's arguments on financial means and find the communication inadmissible anyway; and those that instead use the existing exceptions to the requirement to exhaust domestic remedies to find the communication admissible.

The first set of decisions discuss the claimant's financial inability to pursue domestic remedies directly, but nevertheless result in the communication being declared inadmissible. In *PS and TS v Denmark*, the HRC delineated its position on this issue: that "all domestic remedies" includes judicial remedies, and the failure to pursue them on the basis of "financial considerations and doubts about the effectiveness of domestic remedies do not absolve the author from exhausting them". The HRC has maintained this position in its recent Views in *Kadiri? v Bosnia and Herzegovina*. In *Sankhé v Spain*, the CEDAW also noted that the threshold cut-off for legal aid is a hard limit, and those who earn over the limit can likely "obtain a lawyer's services" without it being a "prohibitive financial burden", despite

the claimant's arguments that doing so would have bankrupted her.

In the second type of decisions, the Committees use existing exceptions to the requirement to exhaust domestic remedies – either undue delay or no reasonable chance of success – in order to find the claim admissible. For instance, in *Henry v Jamaica* and *Quelch v Jamaica*, the HRC admitted both claims on the basis that pursuing domestic remedies would unduly prolong a conclusion to the matter. In order to do so, it reframed the authors' admissibility arguments as concerning a failure of the State to provide legal aid in a quasi-criminal matter.

Alternately, the CAT has relied on financial considerations to show that domestic remedies have no reasonable chance of success. In the similar decisions of *Bakay v Morocco* and *Erdogan v Morocco*, where two complainants were convicted of terrorism and faced removal, the CAT admitted the complaints because there was no evidence that the authors would be successful in pursuing domestic remedies, irrespective of the fact they could not afford them. In *MG v Switzerland*, the CAT deemed admissible the application of an incarcerated refugee claimant because he could not pay the mandatory fee to appeal the domestic decision. Had the author been able to initiate the appeal, legal aid would have become available. The CAT held that, since only an initial assessment of success was available, rather than a full adjudication on the merits, the remedy was not "available" and the claim could proceed.

A recent decision from the CEDAW presented the Committee with an opportunity to address financial status under a more recent landscape. *Matson v Canada* is the latest in a series of complaints to UN committees alleging the *Indian Act* discriminates against women. Matson argued discrimination on the basis that he could not pass his status to his children because it passed through a matrilineal line (i.e. grandmother) and would cut off after a second generation, whereas status passed through a patrilineal line would continue. Though Matson had attempted to pursue his discrimination complaint before the Canadian Human Rights Tribunal, he did not pursue a Charter challenge, arguing before the CEDAW that it would not be financially feasible based on his low income and receipt of a disability pension. In response, Canada argued that pro bono legal services, legal aid, the Court Challenges Program, or independent donations could have been available to fund his defence.

Despite having received submissions from both parties on the cost of domestic human rights litigation, the CEDAW spent only one paragraph of its 19-page decision discussing financial ability, and ultimately did not make its decision on admissibility on this basis. While the application passed the admissibility stage, the Committee continued the trend of its previous case law, relying instead on existing exemptions to the exhaustion requirement, rather than engaging meaningfully with the issue of cost.

From the foregoing cases, it is clear that the Committees at best deflect from the question of financial inability, and, at worst, have stated outright that financial status alone is no reason not to pursue domestic remedies. The result is a confusing and narrow space for financial inability to be raised as part of the existing exceptions. Most cases in which financial means is raised still result in findings of

inadmissibility, especially those that relate to civil matters. Of the foregoing cases, *Matson* was the only civil matter that was ultimately admitted, and represents an expansion of the Committees' trend of relying on existing exceptions, rather than engaging with the issue itself, into the civil sphere. By following that trend, *Matson* does not go far enough to address the underlying accessibility issues for those who cannot afford to pursue domestic remedies.

The Committees frequently point to other sources of funding that individuals can acquire in order to pursue domestic remedies, but do not recognize that pursuing domestic remedies is a privilege, due to the cost. It is not always possible to crowd-source a legal battle, especially through multiple trial and appellate levels of judicial, administrative, or constitutional forums. While states may have an obligation to provide legal aid in certain contexts, it is generally only available to a small sub-set of individuals. If the Committees continue to refuse a financial exception, individual communications, just like domestic remedies, will also remain a privilege.

Recommendations

Until there is more accessible legal aid, there should be an additional, separate exception to the exhaustion of domestic remedies requirement for financial inability. To be eligible for the exception, the complainant could furnish evidence as to their inability to pay for legal and other fees, such as evidence of the State's earnings cut-offs for legal aid, evidence of good faith efforts to obtain legal aid (state-funded or otherwise), income statements, and forecasted legal costs based on similar cases.

Recognizing such an exception is also consistent with both the goals of international law, and the principles of subsidiarity and State sovereignty. International Law has been a driving force in human rights protection, setting minimum standards for states to follow. The Conventions and Optional Protocols that enable individual communications make clear that their purpose is to further access to human rights – and by extension access to justice – for everyone, without discrimination. While admissibility criteria attempts to best allocate scarce resources, cost should not be the motivating factor where there are no other avenues for justice to be achieved.

The requirement to exhaust all domestic remedies recognizes that domestic courts are generally best situated to deal with human rights allegations against the State, as they are more familiar with the State's context, and may look at much more extensive evidence. However, if domestic courts are not accessible, the idea that the issue is better adjudicated domestically is purely theoretical. Similar to the existing exceptions of unreasonable delay and no chance of success, it is ultimately the State's failure to provide *effective* domestic remedies that necessitates this exception. Without such an exception, precluding the poor from justice is not merely an access issue, but a discrimination issue.

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