Courts and the Legal Enforcement of Economic, Social and Cultural Rights

Comparative experiences of justiciability

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INTERNATIONAL
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Abbreviations

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	United Nations Committee on the Elimination of All Forms of Racial Discrimination
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CRC	United Nations Committee on the Rights of the Child
ECHR	European Convention on Human Rights and Fundamental Freedoms
ESC rights	Economic, Social and Cultural Rights
GC	General Comment
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Commission of Jurists
ILO	International Labour Organisation
Optional Protocol to the ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
US	United States of America
WHO	World Health Organisation

Chapter 1 – ESC rights before courts: Introduction

The International Commission of Jurists (ICJ) has consistently recognized and advocated that economic, social and cultural rights (ESC rights)[1] should be taken as seriously as civil and political rights. ESC rights have been part of the language of international human rights since at least the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Yet, compared to civil and political rights, there has been considerably less attention placed on the need to develop the content of ESC rights and protection mechanisms to enforce them. These gaps in the international human rights system, this report will argue, came about for political and not for legal reasons. To a great extent, the cause of these gaps was the prominence accorded by Western countries to civil and political rights, in the context of the cold war divide. As a consequence, the notion of the justiciability of ESC rights has been neglected and largely ignored. The term "justiciability" means that people who claim to be victims of violations of these rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have any remedy enforced.

Bridging the gap between the justiciability of civil and political rights and that of ESC rights is key if both sets of rights are to be considered on an equal footing. This report will demonstrate that:

- ECS rights can be adjudicated
- adjudication is desirable, and
- adjudication is already put into practice, to varying degrees, in many courts throughout the world.

The report analyzes and counters some of the traditional objections to the justiciability of ESC rights. Some of these objections have been debated in the academic field.[2] They also inform the position of States in various fora, including the present

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1 We use the term 'economic, social and cultural rights' ('ESC rights') as this is how such rights are called in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other universal human rights instruments, and because this is the term generally accepted in the field of international human rights law. In some constitutional traditions, other terms are more frequently used, such as 'social rights', 'socio-economic rights', 'fundamental social rights', 'welfare rights' or 'welfare benefits'. While there is some reluctance by common law countries to recognize the existence of ESC rights as 'fundamental' or 'constitutional', the fact is that some of these rights are already enshrined in statutes and sometimes in national constitutions. As we will see in this report, adjudication of ESC rights is not infrequent in common law countries such as the United States, Canada or the United Kingdom, particularly in certain areas, such as the right to education and the rights of persons with disabilities.

2 See, from different points of view, A. Neier, "Social and Economic Rights: A Critique", *Human Rights Brief* 13-2 (2006), 1-3; G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?,* University of Chicago Press, Chicago,1991; C. Tomuschat, "An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?", in *Weltinnenrecht. Liber amicorum Jost Delbrück,* Duncker & Humblot, Berlin, 2005, pp. 815-834.

debate in the United Nations (UN) about the adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol to the ICESCR). This will establish a complaints procedure enabling these rights to be adjudicated by an international committee of experts.[3] These objections also have consequences at the domestic level, as they inhibit the use of litigation where ESC rights have been violated and thus leave the promotion and protection of these rights almost exclusively to political, rather than judicial, bodies.

This report refers to a wide variety of case law, showing how courts and judges around the world have adjudicated ESC rights, despite the alleged impediments to this. The case law highlighted in this report has been selected to:

- represent a wide variety of ESC rights, including labour-related rights, the right to health, the right to housing, the right to education, the right to food and cultural rights. By examining a broad range of rights this report aims to show that the blanket assumption that ESC rights in general are not justiciable is false, and that numerous examples can be shown to contradict that assumption, regardless of the particular right at stake; and

- represent different regions in the world: cases from different high level domestic courts, regional human rights courts, and international monitoring bodies competent to review individual, group or collective petitions.

The case law highlighted in this report includes both judicial decisions (i.e. decisions of domestic and international courts) and quasi-judicial decisions (such as UN treaty bodies[4]).

While judicial and quasi-judicial decisions are different, both procedurally and in terms of the legal value of their final outcome, in the context of this report they share an important common feature: they demonstrate that ESC rights can constitute the basis for judging whether a State has conformed with a legal duty.

The purpose of this report

In addressing some of the most common and pervasive objections to the justiciability of ESC rights, this report does not purport to be exhaustive. The three main topics covered here address a variety of objections raised by some States in the

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3 For an overview of this process, see http://ohchr.org/english/issues/escr/intro.htm. For an NGO perspective, see http://www.opicescr-coalition.org – website of the NGO Coalition for an Optional Protocol to the ICESCR, including the ICJ. See also www.icj.org.

4 Such as the Human Rights Committee, the Committee against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women. The recently adopted Convention on the Rights of Persons with Disabilities creates a new treaty body – the Committee on the Rights of Persons with Disabilities – which will also be an important source for cases on ESC rights. Treaty bodies can be described as groups of independent experts who examine how states that have ratified the relevant treaty have implemented their obligations under the treaty.

discussion about an optional protocol that would enable victims of violations of ESC rights to lodge complaints before a quasi-judicial international body and when States object to guaranteeing ESC rights within the domestic sphere.

These objections are threefold. They are:

- the alleged uncertainty of the content of ESC rights;
- concerns that the judiciary is ill-equipped in practice to adjudicate matters of social policy decided by the political branches of the State and that, under the 'separation of powers', courts should not encroach on the domain of these other branches;
- procedural difficulties and limitations in the judicial process, which are said to render the adjudication of ESC rights cases fraught with difficulty, useless or even meaningless.

The arguments in this report should not be interpreted as a call for employing litigation as the *only* means to ensure States comply with their duties relating to ESC rights. This would not only be naïve, but would also be grossly inadequate, as is the case with any other right. Courts alone cannot supervise the planning and implementation of public policies in areas such as health, access to food, housing or education. The creation and/or strengthening of such policies require debate and action by the executive and legislative branches of the State. As this is also true for the duties stemming from civil and political rights, which also require legislation and implementation of services, it is not a decisive argument against justiciability.

Litigation is a separate and independent means to enforce and implement ESC rights, as is it with civil and political rights. The belief that ESC rights should not be granted any kind of judicial or quasi-judicial protection, and should be left to the discretion of political branches of the State, is one of the main reasons why ESC rights have been devalued within the legal hierarchy. While courts and litigation should not be seen as the only means for realizing ESC rights, the absence of an effective method of recognizing justiciability for these rights:

- narrows the range of mechanisms available for victims of rights violations to receive remedies and reparations;
- weakens the accountability of States;
- undermines deterrence; and
- fosters impunity for violations.[5]

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5 See Bangalore Declaration and Plan of Action, para. 14:

"An independent Judiciary is indispensable to the effective implementation of economic, social and cultural rights. Whilst the judiciary is not the only means of securing the realization of such rights, the

It is also worth reminding ourselves that completely excluding courts and tribunals from considering violations of ESC rights is incompatible with the idea that, "an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments are essential to the full and non-discriminatory realization of human rights".[6]

This report also discusses how decisions relating to the justiciability of ESC rights in the domestic sphere could help at the international level and *vice versa*. ESC rights already have been recognized in a number of domestic constitutions and statutes worldwide.[7] Conversely, the development of the content of ESC rights by international bodies can assist to overcome prejudices against justiciability in some domestic jurisdictions.

Case law in the domestic sphere may also help to clarify, as well as unpick assumptions which were entrenched in international human rights law when the UN adopted the two separate covenants in 1966, on civil and political rights (the International Covenant on Civil and Political Rights, ICCPR) and on ESC rights (the International Covenant on Economic, Social and Cultural Rights, ICESCR).

Objections to the justiciability of ESC rights were reinforced at the international level not only by the adoption of two separate covenants, but also by the fact that the ICCPR enables States to accept an individual complaints mechanism by ratifying an optional protocol, while the ICESCR does not. Regional human rights systems such as the European and the American systems have also reflected the notion that it is principally civil and political rights that are justiciable, thus limiting the list of rights that are subject to complaint mechanisms.

This report therefore acts as a window onto the ongoing process of codification of international remedies for violations of ESC rights – a process that is closing the historical gap between the attention paid to ESC rights compared to civil and political rights. It shows that adjudication in the field of ESC rights is possible. It shows how States should guarantee such adjudication when they have recognized ESC rights

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existence of an independent judiciary is an essential requirement for the effective involvement of jurists in the enforcement, by law, of such rights, given that they are often sensitive, controversial and such as to require the balancing of competing and conflicting interests and values".

The Bangalore Declaration and Plan of Action was issued following a conference on economic, social and cultural rights and the role of lawyers, convened by the International Commission of Jurists in Bangalore, India, in October 23-25, 1995.

6 See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, June 25, 1993, para. 27.

7 Countries which have recognized ESC rights in their Constitutions include: Argentina, Belarus, Belgium, Bolivia, Brazil, Bulgaria, Cape Verde, Chile, Colombia, the Democratic Republic of Congo, Costa Rica, Croatia, the Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Ethiopia, Finland, France, Germany, Greece, Guatemala, Honduras, Hungary, India, Indonesia, Ireland, Italy, Japan, the Republic of Korea, Latvia, Lithuania, Macedonia, Mexico, Mongolia, Morocco, Mozambique, the Netherlands, Nicaragua, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russia, Senegal, Slovakia, Slovenia, South Africa, Spain, Syria, Switzerland, Thailand, Uruguay and Venezuela.

in their domestic constitution or legislation, whether through the ratification of international human rights treaties, or by recognizing customary international law.

The arguments raised can be used in favour of an Optional Protocol to the ICESCR and other initiatives aimed at increasing the potential options for victims to claim judicial remedies when their ESC rights are violated.[8]

Furthermore, the case law contained in this report, while not intended to be exhaustive, may be useful for legal practitioners, advocacy groups and non-governmental organizations. The report can therefore also be used as a comparative tool from which to draw ideas. The cases illustrate some strategies for litigation that have proved to be successful in different jurisdictions. Practitioners as well as judges may find this compilation of case law a useful source of comparative decisions in the field of ESC rights. Moreover, it will help governments to understand in a practical way what judicial scrutiny of their compliance with duties arising from ESC rights entails, both domestically and internationally. In turn, this understanding will help the ongoing process of drafting and adopting an Optional Protocol to the ICESCR.

The report can also be useful for training or teaching purposes, particularly given the scarcity of material bringing together precedents in this area of human rights law.[9] The examples from different courts and tribunals around the world, both domestic and international, demonstrate how the justiciability of ESC rights is conceivable and is already a reality in many jurisdictions.

The structure of the report

The following three chapters will examine the different ways in which the content and implications of ESC rights have been defined by courts and human rights treaty bodies throughout the world. The content of a right and of the duties that it imposes are a pre-condition for the adjudication of any right.

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8 These include new judicial interpretations extending justiciability to ESC rights, or statutory provisions granting victims the possibility of filing complaints before administrative, quasi-judicial or judicial bodies.

9 Among other useful sources employed for this Report, see V. Abramovich and C. Courtis, *Los derechos sociales como derechos exigibles* (Madrid: Trotta, 2nd ed., 2004); F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerp: Intersentia-Maastricht Centre for Human Rights, 2006); Centre on Housing Rights and Evictions (COHRE), *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: COHRE, 2003); COHRE, "Leading cases in Economic, Social and Cultural Rights: Summaries" (Geneva, COHRE. Working Papers Nº 4, 2006); Council of Europe, Steering Committee for Human Rights (CDDH), "Recent developments in the field of social rights", background paper prepared by the Special Rapporteur for the CDDH, Ms. Chantal Gallant, CDDH (2006)022, Strasbourg, October 17, 2006; ESCR-Net Case law Database, available at http://www.escr-net.org/caselaw/; Y. Ghai and J. Cottrell (eds.), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (London: Interights, 2004); M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in Comparative and International Law* (New York: Cambridge University Press, forthcoming 2008); and G. Pisarello, *Los derechos sociales y sus garantías; Elementos para una reconstrucción,* (Madrid: Trotta, 2007).

- Chapter 2 deals in detail with the challenges to the justiciability of ESC rights based on their alleged vagueness and uncertainty. Assumptions about the allegedly vague nature of ESC rights will be addressed, including an analysis of the historical development of ESC rights and their relationship to areas such as labour law. Various ways in which the content of ESC rights can be defined to counter these assumptions, will also be discussed.

- In many respects, chapter 3 forms the heart of this publication. It explores in detail how the content of ESC rights has been defined by courts, how the problems posed by the justiciability of ESC rights can be overcome, and how courts have been able to guarantee ESC rights to claimants.

- Chapter 4 goes on to identify how courts already have a long tradition of indirectly guaranteeing ESC rights, by interpreting civil and political rights as necessarily encompassing certain aspects of ESC rights.

- Chapter 5 examines why courts are capable of measuring social policies affecting ESC rights against the legal norms guaranteed by such rights.

- Chapter 6 addresses measures to overcome procedural and structural difficulties to the guarantee of ESC rights.

- The final chapter investigates specific issues at the international level and identifies the need for a United Nations system to enforce ESC rights.

What is 'justiciability'? The right to a remedy for a violation

The term 'justiciability' refers to the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. Justiciability implies access to mechanisms that guarantee recognized rights. Justiciable rights grant right-holders a legal course of action to enforce them, whenever the duty-bearer does not comply with his or her duties.[10] The existence of a legal remedy – understood both in the sense of providing a procedural remedy (effective access to an appropriate court or tribunal) when a violation has occurred or is imminent, and the process of awarding adequate reparation to the victim – are a defining features of a fully fledged right. [11]

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10 An extended judicial protection of rights may include other forms of adjudication – such as litigation brought by non-victims on behalf of victims, or on behalf of the public interest, but the absence of any role for victims seriously hampers the idea that they are true right-holders.

11 The post-World War I arbitral opinion in the Lusitania cases, for example, often considered a landmark in the defining of State responsibility, held that "[i]t is a general rule of both the civil and the common law that every invasion of a private right imports an injury and that for every injury the law gives a remedy". See Mixed Claims German-American Commission, *Decision in the Lusitania Cases*, November 1, 1923, *Recueil des sentences arbitrales*, Volume VII, p. 32, at 35. For a general panorama about the right to a remedy, see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations. Practitioners Guide N° 2* (Geneva: International Commission of Jurists, 2006: available in English, French and Spanish.)

Such legal remedies are particularly important when the matter at stake is the violation of human rights, which are, by definition, rights inherent to the human being's condition and identity. It is for this reason that a number of human rights instruments expressly provide for a right to a remedy in case of violations of human rights.[12] The right to a remedy has often been considered one of the most fundamental and essential rights for the effective protection of all other human rights.[13] Similar provisions regarding the protection of constitutional or fundamental rights can be found in many constitutions around the world.[14] The UN Committee on Economic, Social and Cultural Rights (CESCR) reflects this notion in its General Comment (GC) Nº 9:

> *"But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of*

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12 See, for example, International Covenant on Civil and Political Rights, Article 2(3); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 13; International Convention on the Elimination of All Forms of Racial Discrimination, Article 6; International Convention for the Protection of All Persons from Enforced Disappearance, Articles 12, 20 and 24; Universal Declaration of Human Rights, Article 8; United Nations Principles Relating to the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions, Principles 4 and 16; Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Principles 4-7; Vienna Declaration and Programme of Action, Article 27; Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Articles 13, 160-162 and 165; Declaration on Human Rights Defenders, Article 9; European Convention on Human Rights and Fundamental Freedoms (ECHR), Article 13; Charter of Fundamental Rights of the European Union, Article 47; American Convention on Human Rights, Article 25; American Declaration of the Rights and Duties of Man, Article XVIII; Inter-American Convention on Forced Disappearance of Persons, Article III(1); Inter-American Convention to Prevent and Punish Torture, Article 8(1); African Charter on Human and Peoples' Rights, Article 7(1)(a); and Arab Charter on Human Rights, Article 9.

13 See, for example, the Report of the UN Special Representative of the Secretary-General on Human Rights Defenders, A/56/341, September 10, 2001, para. 9; Report of the Special Rapporteur on violence against women, its causes and consequences, E/CN.4/2002/83, January 31, 2002, para. 116. The Human Rights Committee has underlined in its General Comment (GC) Nº 29 on derogations during a state of emergency that the right to a remedy constitutes "a treaty obligation inherent in the Covenant as a whole" and that even in times of emergency, "the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective". See HRC, General Comment Nº 29, *States of Emergency (Article 4),* U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 14.

14 The South African Constitution offers a clear example. Section 38 provides as follows:

> *"Enforcement of rights:*
>
> *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:*
>
> *(a) Anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group or class of persons;*
>
> *(d) anyone acting in the public interest; and*
>
> *(e) an association acting in the interest of its members".*

> *redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place".*[15]

As is well established, there are many different remedies that could be granted as a result of legal action. These include:

- preventive measures
- injunctions
- monetary compensation, or
- administrative penalties or criminal punishment.[16]

In all cases involving justiciable rights there are clear and common elements. Essentially, the right-holder (or somebody acting on his or her behalf) should be able to lodge a complaint before an impartial and independent body when he or she considers that the duties arising from the right have not been complied with.

What is an independent and impartial body?

A body is independent when it is not subject to the control or influence of the authorities whose actions or omissions that body has to review.[17] An impartial body is one that is capable of making decisions solely on the law and on the facts, without bias for one side or the other. An impartial and independent body should also have enough legal power to impose an order (the order could include a requirement to do something, not to do something, to pay something, etc) upon the duty-bearer if he or she is deemed not to have met his or her duties. In this sense, the power to make suggestions or recommendations, but not to enforce orders, would fall short of the definition of a mechanism establishing the justiciability of a right.[18] In the modern State, this task is most frequently performed by courts, although some other

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15 CESCR, General Comment N° 9, *The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 2. Emphasis added.

16 The list is only illustrative. For a complete overview, see International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations. Practitioners Guide N° 2* (Geneva: International Commission of Jurists, 2006).

17 For a complete overview, see International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide N° 1* (Geneva: International Commission of Jurists, 2007).

18 While this requirement may be employed to define the adequacy of remedies in the domestic sphere, the present state of international law does not reflect such a feature. Neither international courts, nor international quasi-judicial bodies, yet have the power in practice to impose their decisions or views on States. International case law is still relevant, however, because international courts and quasi-judicial bodies share with domestic courts the competence to determine that a certain factual situation amounts to a violation of rights and duties – despite the lesser degree of enforceability of their decisions.

mechanisms, such as administrative tribunals, arbitrators or quasi-judicial bodies, may also be adequate, should they comply with the criteria set out above.[19]

Justiciability of a right does not amount to an entitlement to have any given complaint upheld; rather justiciability indicates the *possibility* of having a case involving an alleged violation of a right heard by an independent and impartial body. In other words, it requires that such a complaint is not excluded *a priori*. The final outcome of a case depends on the merits of the arguments made and, when appropriate, on the evidence produced. Even if a complaint can be adjudicated, the independent and impartial body could still make decide that the compliant is wrong either in law or on the facts.

ESC rights compared to civil and political rights

Before discussing some of the arguments against the justiciability of ESC rights, it is worth commenting first on some general assumptions that underlie these arguments about the nature of these rights.

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19 These ideas were clearly summarized by the ICJ in 1965, in a declaration pronounced after an international conference held in Bangkok, where the basic requirements of a representative government under the Rule of Law were discussed:

> *"The guarantee of individual freedom and dignity within the framework of a representative government requires that:*
>
> - *In a State in which the Rule of Law prevails there should be effective machinery for the protection of fundamental rights and freedoms, whether or not these rights and freedoms are guaranteed in a written constitution.*
> - *In countries where the safeguards afforded by well-established constitutional conventions and traditions are inadequate, it is desirable that the right guaranteed and the judicial procedures to enforce them should be incorporated in a written constitution.*
> - *While governments should of their own volition refrain from action infringing fundamental rights and freedoms, the ultimate determination as to whether the law or an executive or administrative act infringes those rights and freedoms should be vested in the courts."*

The ultimate protection of the individual in a society governed by the Rule of Law depends upon the existence of an enlightened, independent and courageous judiciary, and upon adequate provision for the speedy and effective administration of justice. See International Commission of Jurists, "Basic requirements of representative government under the Rule of Law", para. 10, Bangkok Conference, 1965, Committee I, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966), p. 8.

Similar ideas occur in statements adopted in 1993 by the United Nations Vienna Declaration and Programme of Action, and by several resolutions of the United Nations General Assembly:

> *"The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the process of democracy and sustainable development."*

See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna, June 25, 1993, para. 27. See also UN General Assembly resolutions 50/181 of December 22, 1995 and 48/137 of December 20, 1993, entitled "Human rights in the administration of justice". For a detailed overview of the implications of these statements, see International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide N° 1* (Geneva: International Commission of Jurists, 2007), pp. 17-61. Available online at http://icj.org/news.php3?id_article=3649&lang=en

Those who argue that ESC rights are not justiciable tend to assume that the content of these rights and obligations they impose are all very similar. Yet, a review of any accepted list of ESC rights suggests the opposite; the obligations imposed by ESC rights work in a number of different ways. These include:

- providing freedoms
- imposing obligations on the State regarding third parties
- imposing obligations on the State to adopt measures or to achieve a particular result, among other examples.[20]

In many respects, therefore, these rights must be approached in exactly the same way as civil and political rights that are set out in instruments such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms (ECHR), or the American Convention on Human Rights. The civil and political rights set out in such conventions establish an equally wide variety of obligations, guaranteeing freedoms for individuals, prohibiting certain action by States, imposing obligations regarding third parties, as well as duties to adopt legislative and other kinds of measures, or duties to provide access to services or institutions.

Positive and negative obligations

Neither ESC rights nor civil and political rights as a whole offer a single model of obligations or enforcement. No particular right can be reduced only to a single duty on the State, such as a duty to refrain from acting, or a duty to do or provide something. The traditional distinction that civil and political rights impose only negative duties and ESC rights entail only positive duties, for States, is inaccurate. Every human right imposes an array of positive and negative obligations. It is incorrect to say that any particular right has only one kind of duty associated with it. This challenge to the justiciability of ESC rights as a whole is based on a false distinction that overestimates the differences between civil and political rights and ESC rights on this basis.

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20 For example, the list of rights provided by the ICESCR, or by regional instruments such as the Revised European Social Charter or the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador). This list of instruments is not exhaustive, and it is not intended to convey the idea that ESC rights are only enshrined in these sources. ESC rights could be found in a variety of human rights instruments: other specific ESC rights instruments (such as the International Labour Organisation (ILO) conventions); instruments mainly directed at recognizing civil and political rights (such as the ICCPR, the ECHR, and the American Convention on Human Rights); and instruments where no significant difference between ESC rights and civil and political rights is made (such as, for example, the Universal Declaration of Human Rights, the American Declaration of Rights and Duties of Man, the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, and the Convention on the Rights of Persons with Disabilities).

The CESCR has proposed a system for analyzing different levels of duties imposed by any right enshrined in the ICESCR (and potentially any other human right, regardless of whether it is considered 'civil', 'political', 'economic', 'social' or 'cultural'). As will be explained below, concepts such as 'duties to respect', 'duties to protect' and 'duties to fulfil' offer a framework for understanding the different types of duties of States and therefore the different ways in which justiciability can be applied in practice. They may also more clearly underscore exactly which kinds of duties are less likely to be justiciable (the same can also be said about some duties arising from civil and political rights), but it is not correct to infer from this that no duty related to ESC rights could be judicially enforced.

This point also sheds some light on a further objection to the justiciability of ESC rights: that ESC rights are frequently equated with the provision of services, money or in-kind benefits. Yet, civil and political rights may also encompass similar aspects, such as access to services or to payments, which have never been used to deny the justiciability of civil and political rights in general. That being said, the idea that duties to provide services, money or in-kind benefits are incompatible with adjudication is also misleading. Even if elements of certain ESC rights are less easy to adjudicate, this is not a reason to reject the justiciability of ESC rights as a whole.

The CESCR has summarized some of these ideas in its General Comment N° 9:

> *"In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment N° 3 (1990) it cited, by way of example, Articles 3 [equal right of men and women to enjoyment of all ESC rights]; 7, paragraph (a) (i) [fair wages and equal remuneration for work of equal value]; 8 [right to form and join trade unions]; 10, paragraph 3 [right of children to special measures of protection without discrimination]; 13, paragraph 2 (a) [right to free primary education]; 13, paragraph 3 [liberty of parents to choose for their children schools]; 13, paragraph 4 [liberty of individuals and bodies to establish educational institutions]; and 15, paragraph 3 [freedom for scientific research and creative activity]. (...) While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge 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."[21]

21 CESCR, General Comment Nº 9, *The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 10.

Chapter 2 – Defining the content of ESC rights I: ESC rights as a basis for adjudication

This chapter details the challenges to the justiciability of ESC rights based on their alleged vagueness and uncertainty. In addressing these assumptions the chapter will examine the development of ESC rights from a historical perspective and their relationship to areas such as labour law. The chapter will also discuss the various ways in which rights can be defined generally, and their application in order to specify the content of ESC rights.

The development of ESC rights – an historical perspective

The task of building a systematic body of jurisprudence in the area of ESC rights is no different from the task of building criteria for adjudicating any other area of law. Useful criteria and standards for judges and lawyers to apply have been and are being developed for environmental, consumer, labour and health law. These provide good examples of what is possible for ESC rights as a whole.

The absence of a sufficiently coherent body of legal regulations, case law or jurisprudence in the area of ESC rights is not because of any fundamental concern relating to their non-justiciable nature, but rather due to ideology. It is clear that during the eighteenth and nineteenth centuries, law, as we now understand it, developed principally to give a legal underpinning to the capitalist market structure. This remains the dominant foundation of legal education and academic discourse today. Torts and other "wrongs", contract and property law continue to be the basic courses in law schools. Only in a limited number of countries has priority been given to developing a legal basis for the functions of the welfare state. A consequence is that ESC rights are considered to be 'programmatic' rights[22] – as opposed to directly enforceable rights. The criteria, therefore, for designing and implementing social policies is left to the complete discretion of the political branches. Even in jurisdictions where a legal basis for the welfare state has been nurtured, there is still often no distinct legal discipline of ESC rights.

Labour law as a substitute for ESC rights?

There is another historical factor, which helps to explain why, although ESC rights are recognized in many constitutions, there has not been a coherent conceptual development of their content. Even those countries, both developed and developing, which were committed to establishing a welfare state during the twentieth century,

22 According to this doctrine, that is still dominant in many constitutional traditions, 'programmatic' rights are those which require the political branches of the State to take action, but do not offer right-holders an entitlement to claim them before courts. Even if enshrined in constitutions and human rights treaties, ESC rights were – and are still – often considered in this way, i.e. as incomplete or imperfect rights.

did so mainly through a redistributive model centred on labour relations. The strong and organised position of workers in the labour market ensured the distribution of entitlements, income transfers and access to other socially-oriented services such as housing, consumer credit, social insurance or health care services. Thus, great efforts were made to develop the content of labour-related rights, both individual and collective. Indeed, the definition of labour rights received considerable attention even in the international sphere, mainly through the adoption of conventions and recommendations by the International Labour Organisation (ILO). Constitutions, other laws and ILO conventions and instruments have clarified the content of rights such as the right to be protected against unfair dismissals, the right to occupational health and safety, the right to compensation in case of work injury, the right to create and join unions, the right to strike and the right to collective bargaining.

There was little space however, for the separate development, outside of the labour market, of rights such as the right to health, the right to food or the right to adequate housing, partly because they were just seen as supplementary workers' entitlements or ancillary to the workers' position.[23] ESC rights were therefore subsumed within the labour movement and did not form a distinct (and justiciable) set of rights in and of themselves.

Furthermore, a common assumption during the so-called 'golden years' of the welfare state was that ensuring access to decent salaries and working conditions was the main strategy for indirectly satisfying the basic needs of the population. Unfortunately, the situation of labour markets in the last twenty years, both in developed and developing countries, has shown some of the limits of this strategy. High and long-term rates of unemployment, the large proportion of unstable and temporary jobs, and the importance of the informal sector, cast doubt on the success of the strategy of pegging access to social goods, such as health or housing, to formal jobs. Under this strategy, social groups that are relatively well-off and in a position to secure permanent jobs, are better able to access social benefits. Meanwhile, the most vulnerable social groups, whose protection is one of the main justifications for the notion of social rights, are often not able to satisfy their basic needs. The situation, however, is gradually changing. There is growing acknowledgment that anyone, regardless of their employment situation should be able to satisfy their basic needs. This realization is guiding the elaboration of new social policies. Interestingly, this has also fostered growing and more detailed attention to the definition of some ESC rights, such as the rights to health, housing, food and water.

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23 For a more extensive discussion of this point, see V. Abramovich and C. Courtis, *El umbral de la ciudadanía. El significado de los derechos sociales en el Estado social constitucional* (Buenos Aires: Editores del Puerto, 2006), Chapter 1.

Critiques of ESC rights on account of their 'vagueness'

One set of arguments against the justiciability of ESC rights asserts that they are so vague or uncertain in character that their content cannot be adequately defined. Consequently, it is said, such rights are impossible to adjudicate. According to this view, while civil and political rights provide clear guidance on what is required in order to implement them, ESC rights only set out aspirational and political goals. The content of ESC rights is supposedly variable and devoid of the certainty required for adjudication. It is frequently said, for example, that rights such as the 'right to health' or the 'right to housing' have no clear meaning, and that they offer no obvious standard by which one can determine whether an act or omission conforms to the right or diverges from it, i.e. whether an act or omission fulfils the right, or violates it.

The merits of this argument need careful examination. A lack of specificity regarding the exact content of ESC rights, and therefore of the legal obligations that stem from them, would certainly seriously impede their judicial enforcement. Without clear requirements for the content and scope of a right, combined with a failure to identify rights-holders and duty-bearers, judicial enforcement would be difficult. The process of judicial decision-making needs a relatively clear 'rule of judgment' which can be used to assess compliance or non-compliance with certain obligations. Without this 'rule of judgment', it seems impossible to differentiate between adjudication and law-making.

However, the question of content and scope of a right is not a problem exclusively related to ESC rights. The determination of the content of *every* right, regardless of whether it is classified as 'civil', 'political', 'social', 'economic' or 'cultural', is vulnerable to being labelled as insufficiently precise. This is because many legal rules are expressed in broad terms and, to a certain extent, unavoidably general wording.[24] Thus, 'classic' rights such as the right to property, freedom of expression, equal treatment or due process face this hurdle to the same extent as ESC rights. Yet, this has never led to the conclusion that these 'classic' rights are not rights, or that they are not judicially enforceable. On the contrary, it has resulted in ongoing efforts to specify the content and limits of these rights, through a series of mechanisms aimed at defining their meaning (for instance, the development of statutory law-making, administrative regulation, case law and jurisprudence).[25]

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24 See H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961; 2nd edition with postscript by J. Raz & P. Bulloch (eds.), Oxford: Oxford University Press, 1994, Chapter VII); G. Carrió, *Notas sobre derecho y lenguaje* (Buenos Aires: Abeledo-Perrot, 1964) 45-60; I. Trujillo Pérez, "La questione dei diritti sociali", in *Ragion Pratica* 14, 2000, at p. 50.

25 On the possibility of conceptually developing the content of ESC rights see, for example on the right to work, R. Sastre Ibarreche, *El derecho al trabajo* (Madrid: Trotta, Madrid, 1996). For the right to health, see, B. Pezzini, "Principi costituzionali e politica della sanità: il contributo della giurisprudenza costituzionale alla definizione del diritto sociale alla salute", and M. Andreis, "La tutela giurisdizionale del diritto alla salute", in: C.E. Gallo and B. Pezzini, (comps.), *Profili attuali del diritto alla salute* (Milano: Giuffrè, 1998).

In identifying the scope of ESC rights and their content, the ICJ set out the following principles in the ICJ Bangalore Declaration and Plan of Action:

> *"Specifying those aspects of economic, social and cultural rights which are more readily susceptible to legal enforcements requires legal skills and imagination. It is necessary to define legal obligations with precision, to define clearly what constitutes a violation, to specify the conditions to be taken as complaints, to develop strategies for dealing with abuses and failures, and to provide legal vehicles, in appropriate cases, for securing the attainment of the objectives deemed desirable."*[26]

Paradoxically, the consequence of this long-standing notion that ESC rights are non-enforceable has been an absence of any effort on the part of the judiciary in many countries to define principles for their construction. Due to the purely rhetorical value ascribed to these rights, and to the lack of attention paid to their interpretation by the judiciary and legal academics, fewer concepts have been developed that would help to understand rights such as the right to education, the right to an adequate standard of health, the right to adequate housing or the right to food. However, the lack of practical elaboration of many of these rights does not justify the claim that because of some essential or hidden trait, ESC rights, as a whole category, cannot be defined at all. Critics claim that the content of ESC rights cannot be defined, so little effort has been invested to define their content. The lack of practical elaboration is then used to argue that ESC rights are not justiciable.

If the past deficit of jurisprudence in this area has created difficulties, a growing body of more recent domestic case law is, however, offering better criteria to further specify the content of ESC rights. Supreme court and lower court precedents regarding health, housing, consumer and environmental rights in many countries have begun to foster further litigation in these fields, which was unknown decades ago. Some of these decisions will be examined in detail in later chapters.[27]

Statutory definitions of ESC rights

Under the rule of law and the separation of powers, defining the content and scope of a right is primarily the task of the legislative branch and, subsequently, further elaborated by administrative regulations. For example, in the nineteenth century, national parliaments of the continental (or civil) law tradition defined the content, scope and limits of property rights. Civil codes – and similarly, in common law countries, the common law of property, torts and contracts – define the way in which

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26 Bangalore Declaration and Plan of Action, para. 18(2), 1995.

27 See, in this sense, Bangalore Declaration and Plan of Action, para. 18(3):

> *"Amongst specific actions to be taken where appropriate, the following were endorsed: (...) Reform of the law of standing and encouragement of public interest litigation (such as has occurred in India) by test cases, to further and stimulate the political process into attention to economic, social and cultural rights and to afford priority to the hearing of such cases".*

property is acquired, transferred and lost, the prerogatives and the duties of owners of property, and when damage to property should be compensated for or the loss borne by the owner. There is no conceptual obstacle to applying a similar legislative and administrative process to defining ESC rights by developing the same kind of general, abstract and universal standards. Legislatures can and should explain the scope of ESC rights.[28]

Such an approach has been adopted in some countries where there has been an attempt to give meaning, for example, to the right to health, by defining in law the type and extent of treatment that any health service should provide[29]. Once the content of ESC rights has been statutorily defined, the notion that they offer no basis for judicial adjudication begins to look weaker. In many areas, judges decide whether or not the acts or omissions of the authorities break statutory duties. There is also some scope for judges to point out where legislation itself contains omissions, gaps or inconsistencies in relation to obligations arising from constitutional or other human rights norms governing ESC rights.

The role of international treaty bodies and international experts in defining the content of ESC rights

International expert bodies have also helped to define the content of ESC rights, and provide examples and guidance for local law-making. General Comments issued by treaty bodies such as the UN CESCR and the UN Committee on the Rights of the Child (CRC) offer examples of how the rights set forth in their respective treaties are interpreted by the body mandated to monitor their implementation. The task of drafting and issuing these General Comments is not conceptually different from

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28 See the Bangalore Declaration and Plan of Action, para. 18(3): "Amongst specific actions to be taken where appropriate, the following were endorsed: (...) 3.2 Revision of other municipal law to state in precise and justiciable terms, economic, social and cultural rights in a way susceptible to legal reform". At an earlier conference organized by the International Commission of Jurists in 1965 in Bangkok, the following statement was adopted:

> *"Some of the economic, social and cultural standards set forth above [i.e. those included in the Universal Declaration of Human Rights] have already been given legal force and sanction by constitutional and statutory provisions; however, there is a need progressively to enact the appropriate legislation and to develop the legal institutions and procedures whereby these standards may be maintained and enforced within the Rule of Law."*

See "Economic and social development within the Rule of Law", adopted in the Conference of Bangkok, 1965, Committee II, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966) p. 44.

29 See for example, Argentina, Laws (*leyes*) 23.660 and 23.661, Presidential Decrees (*Decretos presidenciales*) 492/95 and 1615, Ministerial Resolutions of the Ministry of Health and Social Action (*Resoluciones del Ministerio de Salud y Acción Social*), 247/96 and amendments (542/1999, 157/1998, 939/2000 and 1/2001); Canada, Canada Health Act (R.S., 1985, c. C-6); France, *Social Security Code* (*Code de la Securité Sociale*) and *Universal Health Coverage Act* (*Loi sur la Couverture Maladie Universelle*); Mexico, *General Health Law* (*Ley General de Salud*). These statutes and regulations purport to establish, amongst other things, the basis of the health system, defining its general goals and objectives, its financial aspects, the standards that should govern the provision of health care services and the identification of the type, content and coverage of these services.

the work of constitutional courts when they interpret constitutionally based ESC rights.[30] Similarly, some soft law instruments, such as the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (Limburg Principles) and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines), were developed to clarify the legal duties arising from ESC rights including when they are violated.[31]

Implementing international standards domestically to explain the content of ESC rights

The experience of different countries shows many ways in which international legal standards can play a role in the interpretation of domestic law, or could be directly applied by judges.[32]

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30 See CESCR, General Comment N° 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23; General Comment N° 4, *The right to adequate housing* (Sixth session, 1991), U.N. Doc. E/1992/23; General Comment N° 5, *Persons with disabilities* (Eleventh session, 1994), U.N. Doc E/1995/22 (1995); General Comment N° 6, *The economic, social and cultural rights of older persons* (Thirteenth session, 1995), U.N. Doc. E/1996/22 at 20 (1996); General Comment N° 7, *Forced evictions, and the right to adequate housing* (Sixteenth session, 1997), U.N. Doc. E/1998/22; General Comment N° 9, *The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998); General Comment N° 11, *Plans of action for primary education* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999); General Comment N° 12, *Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); General Comment N° 13, *The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); General Comment N° 14, *The right to the highest attainable standard of health* (Twenty-second session, 2000) U.N. Doc. E/C.12/2000/4 (2000); General Comment N° 15, *The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003); General Comment N° 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author* (Article 15, paragraph 1 (c), of the Covenant), (Thirty-fifth session, 2005) U.N. Doc. E/C.12/GC/17 (2006); General Comment N° 18, *The right to work,* (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006). For a panorama of the international efforts to define the content of socio-economic rights, see the different essays in V. Abramovich, M. J. Añón and C. Courtis, *Derechos sociales: instrucciones de uso* (Mexico: Fontamara, 2003).

31 The Limburg Principles were adopted in an expert conference held in Maastricht (the Netherlands), convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, United States of America), from 2 to 6 June 1986, and reproduced in UN doc. E/CN.4/1987/17.

The Maastricht Guidelines were adopted in an expert conference held in Maastricht, from 22-26 January 1997, at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute on Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands).

Both instruments have been extensively employed by the CESCR to interpret the ICESCR.

32 The Bangalore Declaration and Action Plan emphasizes this principle:

> *"Judges should apply domestically international human rights norms in the field of economic, social and cultural rights. Where there is an ambiguity in a local constitution or statute or an apparent gap in the law, or inconsistency with international standards, judges should resolve the ambiguity or inconsistency or fill the gap by reference to the jurisprudence of international human rights bodies".*

Bangalore Declaration and Plan of Action, para. 18(5)(4).

'Monist' systems

'Monist' legal systems, where international law is incorporated directly into the domestic legal system, allow for the immediate domestic application of international treaties. For instance, the Colombian Constitutional Court has made extensive use of both international treaties and non-binding instruments to interpret fundamental rights in the Colombian Constitution.[33] Other countries, such as Argentina and Costa Rica, have taken similar approaches. But even in countries with a monist tradition, there may be impediments to the direct application of international law. For instance, while the Dutch legal system is monistic in its approach to international law, judges have considered that treaty standards providing for ESC rights, including those of the ICESCR, are not self-executing.[34]

'Dualist' systems

In 'dualist' States – that is, in those legal systems where international law is not automatically part of domestic law and further steps are needed to incorporate it into national law – the record is also mixed. While in some countries international treaties do not apply until domestic legislation reproduces or refers to the content of a treaty, judges in other countries have developed more creative ways of making use of international standards. For example, even though South Africa is not yet a party to the ICESCR, the South African Constitutional Court has used CESCR's General Comments to interpret the ESC rights enshrined in the South African Constitution[35].

Defining the language of human rights in the context of constitutional provisions – an overview

While it is desirable to maintain generality in the language of a constitution or human rights treaty, this does not mean it is impossible to pin-point cases in which, even without a further specification of its content, a right has been breached. The tradition of judicial review shows that it is often possible to verify whether an act or omission, or laws or regulations below the constitution are compatible with a constitution or a human rights treaty. This already happens with civil and political rights, and there is no reason not to apply the same approach to ESC rights. Of course, the task is much easier when the content of the right is already further specified in laws or regulations. But in many cases, when the clause of a constitution or

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33 See, among many others, Colombian Constitutional Court (*Corte Constitucional de Colombia*) decisions *C-936/2003*, *T-1318/2005*, *T-403/2006* and *T-585/2006* (applying both the ICESCR and GCs adopted by the CESCR).

34 For a discussion of this issue, see Frank Vlemminx, "The Netherlands and the ICESCR: Why Didst Thou Promise Such a Beauteous Day?", in Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic System* (Antwerp: Intersentia-Maastricht Centre for Human Rights, 2006), pp. 43-65.

35 See, for example, Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000, paras. 29, 30, 31 and 45.

a human rights treaty is clear enough to set out the scope of the expected conduct, the objection based on lack of certainty is misguided.

These practical problems of defining the content and scope of a right are typical of constitutional and human rights treaty clauses. There are a number of reasons why rights are drafted in this way:

- Firstly, it allows for more flexibility and adaptability. This is particularly important when a constitution or similar entrenched legislation is more difficult to amend than ordinary legislation.
- Secondly, it offers those responsible for developing the content of these rights and of implementing them a margin of appreciation or discretion, necessary to choose the best means to address particular situations.
- Finally, it preserves the brevity and conciseness that allow these instruments to set out the most fundamental catalogue of legal principles underpinning the State and society.[36]

The existing international, quasi-judicial bodies, such as the European Committee of Social Rights and the relevant ILO bodies, are allowed, to some degree, to consider complaints regarding ESC rights. Their experience shows that they have had little difficulty in interpreting the general character of ESC rights. Those institutions and their developing jurisprudence are evidence that clauses contained in international treaties, such as the European Social Charter and ILO conventions, are capable of constituting the basis for legal judgments.

In reality, however, in many countries, constitutional judicial review exists only on paper. This may be due to a number of factors, including lack of judicial independence and impartiality, authoritarian regimes or extreme deference to the political branches. In such countries these powers of judicial review have never been developed, so there is no tradition of interpreting constitutional duties, whether relating to civil, political, economic, social or cultural rights. In other countries, there is no tradition of judicial oversight over administrative activity. It is difficult to develop any case law in these situations, though such difficulties affect both civil and political rights and ESC rights. Nevertheless many examples from both developed and developing countries already offer a wealth of experience of constitutional judicial review and judicial control of administrative activity.

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36 See C. Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Oxford University Press, 2000) at pp. 156-157.

The prohibition on arbitrariness as a means of giving content to the obligations arising from ESC rights

As has been seen above, statutory regulations, case law and jurisprudential concepts, all contribute to interpreting and clarifying the content and scope of rights. Nevertheless, in their absence, there are other ways to give a degree of substance to the content of ESC rights and guaranteeing that they are respected, protected and fulfilled.

For example, the right to enjoy the highest possible attainable standard of health, access to medical treatment, vaccination or provision of medicines, can provide a set of standards against which to judge whether the right has been implemented. Courts have taken into consideration the previous conduct of the State in order to decide whether there has been a breach of the right; for example, by preventing the State from arbitrarily stopping the production of a vaccine or failing to provide medicine to a seriously ill infant.[37]

Similarly, even where statutory rules allow the executive a margin of discretion in choosing how to comply with duties arising from ESC rights obligations, English courts have decided that the executive may be bound to follow through with specific steps it has taken, for example, when it conducts a particular assessment regarding needs of specific groups, or when it makes a specific promise to individuals, but then fails to act according to those previous commitments, it is possible to hold it accountable for a failure to comply.[38]

Finally, when judges examine an allegation that a right has been violated, they do not necessarily focus on the determination of a specific obligation to be imposed on the State or on an individual. Judges usually assess the course of action undertaken by the duty-bearer in terms of legal standards such as 'reasonableness', 'proportionality', 'adequacy', 'appropriateness' or 'progression'. Such standards are not unknown to courts when they carry out judicial reviews of other types of decisions taken by the political branches. In deciding whether an individual person's right has been satisfied judges do not need to supplant political branches in designing the most appropriate public policies to satisfy a right. Rather, they examine the effectiveness of the measures chosen to fulfil that right. Although the State's margin of

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37 See, for example, Argentine Supreme Court (*Corte Suprema de Justicia*), *Campodonico de Beviacqua, Ana Carina*, October 24, 2000, where the Supreme Court took the State's previous conduct of delivering medication to a child with disabilities as an indication of a self-assumed duty; Argentine Federal Administrative Court of Appeals, Chamber IV, *Viceconte, Mariela Cecilia c/Estado Nacional-Ministerio de Salud y Acción Social-s/Amparo Ley 16.986*, June 02, 1998, where a Federal appellate court considered that the previous conduct of funding research and purchasing doses of an experimental vaccine bound the State to continue its production.

38 See, for example, *R. v. Sefton Metropolitan Borough Council, ex parte Help the Aged* (1997) 4 All ER 532 (CA); *R. v. Birmingham City Council, ex parte Mohammed* (1998) 3 All ER 161 (CA); *R. (on the application of Batantu) v. Islington Local Borough Council* (2001) 4 CLR 445 (QB); *R v. North and East Devon Health Authority, ex parte Coughlan* (2001) QB 213 (CA).

discretion to select appropriate measures is broad, certain aspects of policy-making or implementation are likely to be reviewed by the courts through the application of a 'reasonableness' or similar standard. For example, as will be shown later, when reviewing the State's compliance with its obligations courts may consider issues such as the exclusion of groups to be granted special protection, the lack of coverage of minimum needs defined by the content of the right, or the adoption of deliberately retrogressive measures.

Chapter 3 – Defining the content of ESC rights II: Developments in domestic and international courts and tribunals

This chapter examines how the content of ESC rights has been defined by courts, how the problems posed by the justiciability of ESC rights can be overcome, and how courts have been able to guarantee ESC rights to claimants. It explains a number of mechanisms that have been applied by courts in order to deal with different aspects of ESC rights, providing examples for each approach.

Core content or minimum core duties

The first conceptual element that assists in determining the responsibilities of a State in relation to ESC rights is the idea of core content (also called minimum core content, minimum core obligations,[39] minimum threshold or 'essential content', as it is known in the German constitutional tradition and the traditions which flow from it). This concept entails a definition of the absolute minimum needed, without which the right would be unrecognizable or meaningless.

The idea of core content has also been employed in analyzing civil and political rights, and especially in the constitutional law tradition. Different constitutional constructions have justified this core requirement as a corollary of the concept of human dignity, or have conceived it as a vital minimum or 'survival kit'.

The definition of a vital minimum, by its nature, is evolving. The accepted mandatory minimum level may change over time, for example as science and technology advance. This is particularly true with some rights, such as the right to medical treatment and the right to food security, which are, respectively, components of the right to health and the right to food. This is, of course, also the case with civil and political rights: the impact of new technologies, such as surveillance equipment, on the right to privacy is a good example. In relation to some rights, such as the right to education, there is considerable consensus on the minimum core content of the service to be provided by the State – that is, universal, free and compulsory primary education.

The German Federal Constitutional Court and Federal Administrative Court have provided examples of the 'minimum core content' of rights, which are derived from the constitutional principles of the welfare (or social) state and the concept of human dignity. In Germany the courts have decided that these constitutional principles can be translated into positive State obligations to provide an 'existential minimum'

39 See, for example, Maastricht Guidelines, Guideline 9.

Box 1. The German Constitutional Court and protection of the 'vital minimum'

The German Federal Constitutional Court has developed the doctrine of the 'vital minimum' or 'minimum level of existence' (*Existenzminimum*). According to this doctrine, the State is obliged to provide assistance to enable persons in need to lead a dignified life. The Constitutional Court has stated that the legislature "is certainly committed by the Constitution to develop social action" [BVerfGE 1, 97 (104)] and that "assistance to the people in need is surely among the evident obligations of a Social or Welfare State (*Sozialstaat*)" [BVerfGE 40, 121 (133)], so "the State must ensure persons the minimum conditions for a dignified existence".

According to the Constitutional Court, "the State duty to secure the minimum existential conditions that make a dignified existence possible" is grounded in the principle of human dignity (Article 1(1) of the German Constitution or Basic Law) in conjunction with the Welfare State principle (Article 20 of the German Constitution) [BVerfGE 45, 187 (229)].

Grounded in this doctrine, the Constitutional Court has ruled that:

- the State must endeavour to provide decent conditions of life to persons who are in need as a result of Hitler's regime. However, "an enforceable constitutional claim might possibly arise [from the provision endorsing the Welfare State] … only when the legislature arbitrarily does not fulfil this obligation" [BVerfGE 1, 97 (105)].
- the State must provide social assistance to those who, as a result of physical or mental disabilities, face difficulties in their personal and social development and are not in a position to take care of themselves [BVerfGE 40, 121, (133)]. Beyond the safeguard of the minimum conditions which should enable these persons to live a dignified existence, the legislature has discretion to decide the extent of social assistance provided to them, considering the available resources and other State duties [BVerfGE 40, 121 (133)].
- the State must ensure that the income needed to satisfy the minimum conditions for a dignified existence is free from taxation [BVerfGE 82, 60 (85) and BVerfGE 99, 246 (259)].
- in order to ensure the vital minimum to persons in need, the State must provide access to social services or benefits [BVerfGE 82, 60, (85)].

or 'vital minimum', comprising access to food, housing and social assistance to persons in need.[40] (See Box 1.)

Similarly, the Swiss Federal Court has found that Swiss courts can enforce an implied constitutional right to a 'minimum level of subsistence' (*'conditions minimales d'existence'*), both for Swiss nationals and foreigners.[41]

Brazilian courts have followed a similar path when considering that, as part of the express provision in the Brazilian constitution establishing the right to education for children, the State is obliged to ensure access to day-care and kindergarten for children up to six years old. Compliance with this constitutional mandate – according to the Brazilian Federal Supreme Court – cannot be left to administrative discretion.[42]

Access to basic, essential medical care has also been considered to be a meaningful component of the right to health. The Argentine Supreme Court has held that, in light of the human right to health guaranteed by the Constitution and international human rights treaties, statutory regulations granting access to medical services should be read as requiring health care givers to fully provide essential medical services in case of need.[43]

Duties of immediate effect and duties linked with the progressive realization of ESC rights

Article 2(1) of the ICESCR refers to the progressive realization of the rights enshrined in the treaty.[44] The treaty acknowledges, in this sense, that the full realization of the rights recognized within it in many circumstances requires gradual implementation. However, the CESCR has made clear that not every duty arising from the obligations set out in the Covenant is qualified by this idea of progressive realization and that some duties have immediate effect.[45] So while some of the duties associated with ESC rights may be qualified by the concept of progressive realization, thus leaving the State some leeway to decide the proper timeframe and allocation of resources,

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40 See, for example, German Federal Constitutional Court (*BVerfG*) and German Federal Administrative Court (*BVerwG*), BVerfGE 1,97 (104f); BVerwGE 1,159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (133, 134); BVerfGE 45, 187 (229); BVerfGE. 82, 60 (85) and BverfGE 99, 246 (259).

41 See Swiss Federal Court, *V. v. Einwohrnergemeine X und Regierungsrat des Kanton Bern*, BGE/ATF 121I 367, October 27, 1995.

42 See Brazilian Federal Supreme Court (*Supremo Tribunal Federal*), RE 436996/SP (opinion written by Judge Celso de Mello), October 26, 2005.

43 See Argentine Supreme Court, *Reynoso, Nida Noemí c/ INSSJP s/amparo*, May 16, 2006 (majority vote agreeing with the Attorney General's brief).

44 ICESCR, Article 2(1): "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, *with a view to achieving progressively the full realization of the rights recognized in the present*" (emphasis added).

45 See, in the same sense, Limburg Principles, Principles 8, 16, 21-24.

according to their availability, other duties must be complied with immediately by the State and no delay is permissible.

This distinction is also relevant for justiciability, because it means that compliance with immediate obligations can directly be assessed by adjudicatory bodies, thereby refuting the idea that the whole content of ESC rights is left to the discretion of the political branches of the State. Duties linked with progressive realization are, in turn, subjected to a different, less stringent, and possibly less coercive, standard of scrutiny. The Colombian Constitutional Court has explicitly taken this approach, distinguishing, when it comes to the interpretation of ESC rights, between duties directly related to the protection of life, which are of immediate effect, and duties regarding the development of services in need of legislative and other actions, which are related to the progressive realization of ESC rights.[46] But the Court has also decided that aspects of the rights subjected to progressive realization can be justiciable, if the State has failed to take the adequate measures to progressively realize the right over a reasonable period of time.[47]

Duties of immediate effect

The CESCR has identified some duties as having immediate effect. These include:

- the duty to take steps or adopt measures directed towards the full realization of the rights contained in the ICESCR; and
- the prohibition of discrimination.

These are duties which a State party is immediately required to satisfy once it has ratified the ICESCR. It could also be said that such duties of immediate effect apply in relation to the recognition of ESC rights in a domestic constitution or legal order. The duty to take steps "by all appropriate means"[48] certainly includes legislative action, and may also include, but is not limited to, the provision of judicial remedies, and the adoption of administrative, financial, educational and social measures.[49] The Committee has also made it clear that the obligation to take steps includes the duty to draft and adopt a detailed plan of action for progressive implementation.[50]

The existence of duties of immediate effect offers a basis upon which to assess violations of State action and omission. It clearly demonstrates how ESC rights are not purely 'programmatic': rather they impose some directly operative obligations.

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46 See, for example, Colombian Constitutional Court, decision *T-484/1992*, August 11, 1992.

47 See, for example, Colombian Constitutional Court, decision *T-595/2002*, August 1, 2002, para. 5.3.

48 ICESCR, Article 2(1).

49 See CESCR General Comment N° 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, paras. 3, 4, 5 and 7.

50 See CESCR General Comment N° 1, *Reporting by States parties* (Third session, 1989), U.N. Doc. E/1989/22, para. 4; General Comment N° 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, para. 11.

Non-compliance with these duties can then be justiciable. For example, legislation or State action which discriminates against people on illegitimate grounds such as gender, race, national origin, disability or sexual orientation, or which establishes deliberate barriers to the enjoyment of ESC rights, constitute violations of immediately effective duties. Lack of action to realize rights, or to remove discriminatory legislation or practices within a reasonable time, also constitute violations of duties of immediate effect.

The right to housing and duties of immediate effect

A number of courts have felt able to give effect to the principle of duties of immediate effect. Judicial protection against forced eviction is a good example. The right to adequate housing includes positive duties to make housing accessible to people in need, which could require progressive implementation over a period of time. But the State also has an immediate negative duty to refrain from forcefully evicting persons from their housing without legal justification. Even where justified, eviction is prohibited without due compliance with procedural guarantees. The Supreme Courts of India and of Bangladesh have issued significant decisions in this regard, underscoring the importance of the State's procedural duties which must be complied with as a prerequisite to a lawful eviction.[51] For instance, the Supreme Court of Bangladesh held, in *ASK v. Bangladesh*,[52] that before carrying out a massive eviction from an informal settlement, the government should develop a plan for resettlement, allow evictions to occur gradually and take into consideration the ability of those being evicted to find alternative accommodation. The court also held that the authorities must give fair notice before eviction.

The right to work and duties of immediate effect

The right to work also provides some good examples of the justiciability of duties of immediate effect. The prohibition of discrimination, the prohibition of forced labour, the right to fair remuneration, and the right to enjoy conditions of work compatible with human dignity are duties of immediate effect. The African Commission on Human and Peoples' Rights has considered that even positive obligations to detect and eradicate practices that violate these rights represent immediate duties established by the African Charter on Human and Peoples' Rights, regardless of the wealth of the country involved. In an important decision involving a low-income country

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51 See Supreme Court of India, *Olga Tellis & Ors v. Bombay Municipal Council* [1985] w Supp SCR 51, July 10, 1985; Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government and Bangladesh & Ors* 19 BLD (1999) 488, July 29, 2001. For further comments on these cases see COHRE, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: COHRE, 2003), at 30-47; G. Pisarello, *Vivienda para todos: un derecho en (de)construcción. El derecho a una vivienda digna y adecuada como derecho exigible* (Barcelona: Icaria, 2003), at 204.

52 See Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government and Bangladesh & Ors* 19 BLD (1999) 488, July 29, 2001.

(Mauritania), where allegations where made regarding large scale slave labour, the African Commission stated that:

> *"Independently from the justification given, by the defendant State, the Commission considers, in line with the provisions of Article 23(3) of the Universal Declaration of Human Rights, that everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. These provisions are complemented by those of Article 7 of the International Covenant on Economic, Social and Cultural Rights. In view of the foregoing, the Commission deems that there was a violation of Article 5 of the Charter due to practices analogous to slavery, and emphasises that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man; both practices condemned by the African Charter."*[53]

The Inter-American Court of Human Rights has followed a similar path in the *Ituango Massacres* case,[54] which also involved, amongst other issues, violations related to the right to work. Following a massacre of the civilian population carried out by paramilitary groups in complicity with members of the Colombian army, the perpetrators stole cattle from the victims, and forced 17 peasants to carry the stolen cattle to territory under the control of the paramilitary groups, without pay and under threat of violence. The Inter-American Court considered that the prohibition of forced labour had immediate effect, and read Article 6.2 (prohibition of forced or compulsory labour) and Article 7 (right to personal liberty) of the American Convention on Human Rights in the light of Convention 29 of the International Labour Organization, finding that the State was liable for the breach of these rights.

Duties related to the progressive realization of ESC rights

The concept of progressive realization gives States considerable leeway and discretion in deciding what steps to take to address issues such as group or target prioritization or budget allocation. However, the CESCR has also made clear that even those duties, qualified by the concept of progressive realization, can generate appropriate review standards.

Some of the developments in this area concern the establishment of indicators and benchmarks to assess the improvement, stability or deterioration of the enjoyment of rights or the goals enshrined in the ICESCR. The employment of empirical or outcome indicators is an extremely useful tool for the continued supervision of

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53 African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000), May 11, 2000, para. 135.

54 See Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, July 1, 2006, paras. 145-168.

State performance in the implementation of ESC rights within a specific timeframe, such as the timeframe provided by the State reporting system. On the other hand, adjudication by the courts is probably not the best method for monitoring their evolution. A number of factors can create obstacles for filing solid claims based on allegations of regression measured against empirical indicators before courts. These include:

- difficulties regarding the reliability of both empirical indicators and data; and
- the difficulty of ascertaining causal links between State action or inaction and the alleged regression.

The prohibition of retrogressive measures

The CESCR has devoted some attention to the prohibition on States of deliberately introducing retrogressive measures:[55] this prohibition matches one of the tenets of law used by judges and lawyers in many areas. The underlying principle is that if the ICESCR requires the progressive realization of the rights enshrined in it, while acknowledging the necessary gradual character of their full enjoyment, States cannot take steps to retard or eliminate their realization. As a standard for normative comparison, the prohibition of retrogression means that any measure adopted by the State that suppresses, restricts or limits the content of the entitlements already guaranteed by law, constitutes a *prima facie* violation. It entails a comparison between the previously existing and the newly passed legislation, regulations or practices, in order to assess their retrogressive character.[56]

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55 See CESCR, General Comments N° 3, *The nature of States parties' obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, para. 9; N° 13, *The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), para. 45; N° 14, *The right to the highest attainable standard of health* (Twenty-second session, 2000), para. 32; N° 15, *The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003), para. 19; N° 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author* (Article 15, paragraph 1 (c), of the Covenant), U.N. Doc. E/C.12/GC/17 (2006), para. 27; N° 18, *The right to work,* (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006), para. 21. See, also, Maastricht Guidelines, Guideline 14(e).

56 Such comparisons are not foreign in a range of areas of law: a common criminal law principle is the retroactive character of the most benign criminal law; labour law requires comparison of statutory and collectively bargained clauses in order to assess the validity of the most favourable clause; international investment law includes clauses granting the most-favoured nation treatment; and international human rights law institutes the *pro homine* principle, which imposes a preference for the more protective human rights clause in case of overlap. The *pro homine* principle is an interpretive principle used to determine the rule to be applied in case of overlap between norms that grant human rights: it requires the adoption of the most extensive protection of the rights of the person. It can be applied either in situations where various human rights norms apply to the same situation (for example, a universal and a regional instrument), or in case of coexisting international and domestic norms (such as constitutional norms granting fundamental rights). See, generally, M. Pinto, "El principio *pro homine*. Criterios de hermenéutica y pautas para la regulación de los derechos humanos", in M. Abregú and C. Courtis (comps.), *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, (Buenos Aires: CELS-Editores del Puerto, 1997), pp. 163-171.

While the prohibition on retrogression is not absolute, under the jurisprudence of the CESCR, the State has the burden of proving that the measures were taken in pursuit of a pressing goal, that they were strictly necessary, and that there were no alternative or less restrictive measures available. In other words, retrogressive measures are deemed to be breaches of the duty of progressive realization, unless the State can prove, under heightened scrutiny, that they are justified.

Domestic courts in a number of jurisdictions have employed this prohibition of retrogression in a variety of settings. These include challenges to the disestablishment of a National Health Service, changes to income benefit laws and health and safety and work issues.

The Portuguese Constitutional Tribunal, for example, has considered a challenge to a statute regulating a guaranteed minimum income benefit.[57] The new statute changed the minimum age limit for those receiving benefits, raising it from 18 to 25 years, thus excluding people who had previously been covered. The Constitutional Tribunal considered, amongst other issues, that the statute defined the minimum content of the constitutional right to social security, and that new legislation narrowing the scope of beneficiaries amounted to a deprivation of that right for the excluded category of persons, and thus it was held to be unconstitutional.

The Argentine Supreme Court also employed this approach when reviewing a constitutional challenge to a statutory change in the area of employee occupational health and safety benefits.[58] The previous system provided employees who claimed to be victims of occupational health and safety violations with an option: the employee had to choose between a no-fault, tabulated compensation regime, with a lower standard of proof, and a full compensation tort regime, where the plaintiff had to prove negligence. In September 1995, the Argentine Congress approved legislation which overhauled the entire occupational health and safety compensation system. The court-based workers' compensation scheme was set aside, and a new insurance scheme managed by private entities was established. In the *Aquino* case, the plaintiff challenged the constitutionality of this legislation which removed the option to obtain full compensation through tort action.

The Supreme Court held that the new regime was unconstitutional. The Court considered that the new legislation violated the prohibition of retrogression, by adopting a measure that deliberately restricted the right to full compensation. The Court based its opinion not only on constitutional grounds (including the right of the worker to dignified and equitable working conditions), but also drew on international human rights standards. It mentioned the applicability of different provisions of the ICESCR, the Convention on the Elimination of All Forms of Discrimination against

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57 Portuguese Constitutional Tribunal, Decision (*Acórdão*) Nº 509/2002, December 19, 2002.

58 Argentine Supreme Court, *Aquino, Isacio c. Cargo Servicios Industriales S.A. s/accidentes ley 9.688*, September 21, 2004.

Women, the Convention on the Rights of the Child and the American Convention on Human Rights. The references to the ICESCR[59] underline the connection between full compensation for occupational health and safety, and the right to just and favourable conditions of work.

In a number of other cases retrogressive measures in this field have been subjected to heightened constitutional scrutiny by the courts. For example, the Colombian Constitutional Court struck down retrogressive legislation regarding pensions,[60] health coverage,[61] education[62] and protections for the family and workers,[63] and also retrogressive administrative regulations relating to housing.[64] In some cases, however, the Court considered that the State's justifications for the introduction of retrogressive legislation regarding workers' protections against dismissal were sufficient to overcome the usual presumption against such steps.[65]

In the same vein, the Belgian Court of Arbitration has read Article 23 of the Belgian Constitution, which enshrines economic, social, cultural and environmental rights, as imposing a 'standstill effect', forbidding a significant retrogression in the protection of those rights offered by legislation at the moment of the adoption of the Constitution. In a case concerning the alleged reduction of social assistance benefits, the Court said that:

> *"Even if it is true that Articles 10 and 11 of the Constitution impose, in principle, the comparison of the situation of two different categories of persons, and not the situation of a same category of persons under the older and new legislation, which would make impossible all modification of legislation, the case is not the same when a violation of the "standstill" effect of Article 23 of the Constitution is invoked jointly with them. In fact, this effect forbids, regarding the right to social assistance, significant retrogression in the protection offered by legislation, in this matter, at the moment of the entry in force of Article 23. It logically derives from this that, to decide on the potential violation, by a statutory norm, of the "standstill" effect enshrined in Article 23 of the Constitution in reference to the right to social assistance, the Court must proceed to compare the situation of the beneficiaries of this norm with their situation under the authority of the older legislation. A breach of Articles 10 and 11 of the Constitution would*

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59 The Court refers to Articles 7(a)(ii), 7(b), 12(2)(b) and 12(2)(c) of the ICESCR.

60 See Colombian Constitutional Court, decision *T-789/2002*, September 24, 2002.

61 See Colombian Constitutional Court, decision *T-671/2002*, August 20, 2002.

62 See Colombian Constitutional Court, decision *C-931-2004*, September 29, 2004.

63 See Colombian Constitutional Court, decision *C-991-2004*, October 12, 2004.

64 See Colombian Constitutional Court, decision *T-1318/2005*, December 14, 2005.

65 See, for example, Colombian Constitutional Court, decision *C-038/2004*, January 27, 2004. The Court found that the goal chosen by the State – reducing unemployment – was imperative, and that the new legislation met a number of conditions: (i) the careful consideration of the adopted measures by the Legislature; (ii) the consideration of alternatives and (iii) the proportionality of the measures adopted in relation with the intended goal. See paras. 32-48.

> *occur if the extant norm entails a significant decrease in the protection of the rights guaranteed in the field of social assistance by Article 23 regarding a particular category of persons, in relation to other categories of persons that have not suffered a similar breach of the "standstill" effect enshrined in Article 23."*[66]

While not using the same wording, the African Commission on Human and Peoples' Rights followed a similar reasoning when examining the closure of universities and secondary schools in the former Zaire for two years. The African Commission concluded that such closure amounted to a serious and massive violation of the right to education under the African Charter on Human and Peoples' Rights.[67]

Retrogressive measures relating to the provision of health services have also been scrutinized by the courts. The Constitutional Tribunal of Portugal held that the abrogation of a statute which established the National Health Service breached the prohibition of retrogression and was thus unconstitutional.[68] (See Box 2.)

Box 2. Portugal: The Prohibition of Retrogression and the Statutory Guarantees of the Right to Health

The Portuguese Constitutional Tribunal held, in a challenge to a statute that abrogated a previous statute establishing the National Health Service, that the constitutional right to health expressly imposed on the government a duty to establish a national health service, and that the abrogation of that statute was unconstitutional:

> *"If the State does not comply with the due realization of concrete and determinate constitutional tasks that it has in charge, it can be held responsible for a constitutional omission. However, when the State undoes what it had already done to comply with those tasks, and thus affects a constitutional guarantee, then it is the State action which amounts to a constitutional wrong. If the Constitution imposes upon the State a certain task – the creation of a certain institution, a certain modification of the legal order – then, when that task has already been complied with, its outcome becomes constitutionally protected. The*

66 See Belgian Court of Arbitration (*Cour d´Arbitrage*), case Nº 5/2004, January 14, 2004, para. B. 25.3. See also case Nº 169/2000, November 27, 2002, paras. B.6.1 to B.6.6 (unofficial translation).

67 African Commission on Human and People's Rights, *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah v. Zaire*, Comm. Nos. 25/89, 47/90, 56/91, 100/93 (Joined) (1995), October, 1995, para. 48 and holding.

68 Portuguese Constitutional Tribunal (*Tribunal Constitucional*), Decision (*Acórdão*) Nº 39/84, April 11, 1984.

State cannot move backwards – it cannot undo what it has already accomplished, it cannot go backwards and put itself again in the position of debtor (...).

"Generally, social rights translate themselves in a duty to act, especially a duty to create public institutions (such as the school system, the social security system, etcetera). If these institutions are not created, the Constitution can only give ground to claims for their creation. But, after they have been created, the Constitution protects their existence, as if they already existed when the Constitution was adopted. The constitutional tasks imposed on the State as a guarantee for fundamental rights, consisting in the creation of certain institutions or services, do not only oblige their creation, but also a duty not to abolish them once created. This means that, since the moment when the State complies (totally or partially) the constitutionally imposed tasks to realize a social right, the constitutional respect of this right ceases to be (or to be exclusively) a positive obligation, thereby also becoming a negative obligation. The State, which was obliged to act to satisfy a social right, also becomes obliged to abstain from threatening the realization of that social right."

'Reasonableness', 'adequateness' and 'proportionality' as judicial standards

As is well established, most constitutional and human rights norms are not absolute and are subject to limitation, balancing or regulation. To carry out these obligations, judges have developed tests to scrutinize the exercise of legislative or regulatory powers.[69] Some of the typical tests or standards that have been developed include those that ask whether the powers have been exercised in a way that is 'reasonable', 'adequate' or 'proportionate'. Indeed, there is a strong link between these standards and the notion of core content or minimum core duties. They actually provide a test for judges to assess whether legislation or regulations comply or fail to comply with that core content or minimum core duties.

This is not the place to conduct a comprehensive analysis of the content of, and differences between, these approaches, yet it is fair to say that their application is a common feature of constitutional review by courts, irrespective of the differences amongst diverse legal traditions. Similar formulae are also employed by international human rights courts and bodies to assess the compatibility of legislative measures undertaken by the State with the rights enshrined by human rights instruments.

69 In the same sense, see Limburg Principles, Principles 49, 51, 56 and 57.

Judicial review of goals and means

When applying these standards, judicial review of legislative or regulatory powers typically involves a legal analysis of the goals the State purports to be aiming to achieve when justifying a certain measure, and a comparison between those goals and the means chosen to fulfil them. When analysing the goals promoted by the State, courts usually assess whether the constitution (or a human rights instrument) permits, requires or prohibits the goal chosen by the government; and whether other constitutional goals were correctly considered by the legislative or regulatory body. For example, if the goal chosen by the legislative or regulatory body is constitutionally permitted, courts often consider whether the piece of legislation or regulation ignored another constitutionally mandated goal.

Courts typically consider whether there is a justifiable relationship between the declared goal and the means chosen, and whether the means chosen are excessively restrictive of protected rights. The formulae for scrutiny vary: some are strict; some more deferential towards the choices made by the political branches; while some constitutional goals, such as non-discrimination, may have a specially protected status over other permissible goals and may trigger different kinds of scrutiny. Notwithstanding, the differences of approach to this kind of analysis is undoubtedly a characteristic of judicial review.

Such analyses derive from the jurisprudence of civil and political rights. There is, however, no reason why they cannot also be applied to legislation or regulations concerning ESC rights. Indeed, the language of the ICESCR, both in general clauses, such as Articles 2(1) and 4[70], and in particular clauses recognizing different rights, establishes legal goals to be complied with, and requires States to use means that are appropriate or consistent with those goals. They further require that any limitations imposed on these rights are compatible with their nature and solely justified by the purpose of promoting the general welfare in a democratic society.[71] (See Box 3).

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70 Article 2(1), ICESCR: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." And Article 4, "The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

71 See Limburg Principles, Principles 46-57.

Box 3. Examples of means and goals in the ICESCR

Means	Prescribed or permitted goals
Article 2(1) – General obligations Take steps, by all appropriate means	Achieve progressively the full realization of rights recognized in the ICESCR
Article 4 – Limitations Limit rights recognized in the ICESCR by law in a manner compatible with the nature of those rights	Promote general welfare in a democratic society
Article 6(1) – Right to work Take appropriate steps	Safeguard the right to work
Article 8(1)(a) – Right to form and join trade unions Restricting the right to form trade unions or join trade unions	Protect national security, public order or the rights and freedom of others in a democratic society
Article 8(1)(c) – Rights of trade unions Limit the right of trade unions to function freely	Protect national security, public order or the rights of freedom of others in a democratic society
Article 11(1) – Right to an adequate standard of living Take appropriate steps	Ensure the realization of the right to an adequate standard of living
Article 11(2)(a) – Right to food Take measures needed, making full use of technical and scientific knowledge, disseminating knowledge of the principles of nutrition, developing or reforming agrarian systems	Improve methods of production, distribution of food, achieve the most efficient development of natural resources

Means	Prescribed or permitted goals
Article 11(2)(b) Right to food Take measures needed, taking into account problems of both food-importing and food-exporting countries	Ensure an equitable distribution of world food supplies in relation to needs
Article 12(2) Right to health Take steps necessary	Reduce stillbirth rate, and infant mortality and provide for the healthy development of the child; improve all aspects of environmental and industrial hygiene; prevent, treat and control epidemic, endemic and occupational diseases; create the conditions which would assure medical service and medical attention to everyone in the event of sickness
Article 13(2)(a) Right to education Take steps by appropriate means	Make primary education compulsory and available free to all
Article 13(2)(b) Right to education Take steps by appropriate means, in particular the progressive introduction of free education	Make secondary education generally available and accessible
Article 13(2)(c) Right to education Take steps by every appropriate means, in particular the progressive introduction of free education	Make higher education equally accessible to all, on the basis of capacity
Article 3(3) Right to education Take steps by appropriate means; lay down or approve minimum educational standards to which non-State schools should conform	Respect the liberty of parents to choose schools for their children, other than those established by the public authorities, and to ensure the religious and moral education of their children in conformity with their own convictions

Many jurisdictions have given substance to ESC rights enshrined in constitutional law, including healthcare and pension provision, by adopting the tests of 'reasonableness', 'adequateness' and 'proportionality'. For example, in the *Asociación de Esclerosis Múltiple de Salta* case,[72] the Argentine Supreme Court upheld an appellate court decision which overturned a regulation issued by the Ministry of Health excluding from the mandatory minimum health insurance plan some treatments related to multiple sclerosis. The Court followed the opinion of the Attorney General, who considered the regulation to be unreasonable as it affected the right to health as protected by international human rights treaties. The Attorney General found that the State offered no reasonable justification for excluding some previously protected beneficiaries from full medical coverage.

The Czech Constitutional Court has followed a similar approach.[73] The Court struck down mandatory, statutory eligibility requirements for pension benefits, holding they were unnecessary, disproportionate and contrary to the principle of equality. The statute required the potential beneficiary to file a claim within a two-year time frame in order to claim a pension to support a dependant child. The Court considered that, while the State could legitimately set itself the goal of properly administering public social security funding, and this could include limiting when the benefit could be claimed, the same goal could be achieved by different means that would not affect the fundamental right.

Similarly, the Supreme Court of the United States has decided that a statutory restriction on the eligibility conditions for a food stamp programme was unconstitutional,[74] confirming a lower court's decision to include the plaintiffs in the programme.

Yet another source of judgments on ESC rights have involved constitutional, human rights or statutory requirements for services to meet a certain substantive requirement – such as 'adequate housing', 'adequate treatment', 'sound basic education' or 'reasonable accommodation'. A number of judgments from US State Supreme Courts regarding the government's duty to ensure minimum quality in public education follow this pattern. For example, the Supreme Court of New York decided, in *Campaign For Fiscal Equity v. State of New York*,[75] that the State funding of public education did not meet the minimum constitutional requirements to comply with the

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72 See Argentine Supreme Court, *Asociación de Esclerosis Múltiple de Salta c. Ministerio de Salud – Estado Nacional s/acción de amparo-medida cautelar*, Attorney General´s brief of August 4, 2003, Court decision of December 18, 2003.

73 See Constitutional Court of the Czech Republic, *Pl. US 42/04*, June 6, 2006.

74 See US Supreme Court, *US Department of Agriculture v. Moreno*, 413 US 528, June 25, 1973. The challenged statute excluded from food stamp benefits any household containing an individual who was unrelated to any other household member. The Court found that the exclusion violated the due process clause of the US constitution, considering the distinction "wholly without any rational basis".

75 See State Supreme Court of New York, *Campaign For Fiscal Equity v. State of New York et al.*, 710 N.Y.S. 2d 475, January 9, 2001; see also New York Court of Appeals, *Campaign For Fiscal Equity v. State of New York et al.,* 100 N. Y. 2d 893, June 26, 2003; New York Appellate Division, First Department, *Campaign for Fiscal Equity, Inc. v. State of New York*, 2006 NYSlipOp 02284, March 23, 2006.

duty to provide a "sound basic education". The decision was substantially upheld on appeal.

Interestingly, while the European Court of Human Rights has a limited basis to adjudicate directly on ESC rights, it has in fact employed similar formulae to decide on acceptable restrictions on civil and political rights. Among the legitimate goals, aims, or interests to be considered by the State in order to establish certain limitations on civil and political rights, the Court has frequently upheld the protection of ESC rights – applying tests of necessity and proportionality.[76]

Grootboom: the right to adequate housing

The now famous *Grootboom* decision,[77] issued by the South African Constitutional Court in 2001, employed similar analysis when it assessed the constitutional compatibility of a housing policy implemented by the government.

A group of homeless people who had recently been evicted by a local authority from their informal settlements in Oostenberg, Western Cape, South Africa, sought an order from the High Court to oblige the State to provide them with temporary shelter until such time as they were able to find more permanent housing. The High Court granted the order, arguing that the children in the group were entitled to be provided with shelter at State cost under Section 28 (1)(c) of the South African Constitution. Furthermore, their parents had to be provided with shelter as well, since removing the children from their parents would not be in their best interest and contrary to the Section 28 requirement that the best interest of the child must be paramount in all decisions affecting children.[78]

Before the Constitutional Court heard the appeal, the plight of this particular group of claimants had been resolved, as the State had reached a settlement with them under which they were provided with temporary shelter of an acceptable standard. As a consequence, only the underlying constitutional question – whether or not, more generally, the State was obliged to provide homeless people with temporary shelter – was still before the Court. Relying on the constitutional right of everyone to have access to adequate housing (Section 26(1)), the Court held that the State

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76 See, for example, European Court of Human Rights, *James and others v. the United Kingdom*, February 21, 1986 (protection of security of housing tenure is a legitimate goal to restrict the right to property); *Mellacher and Others v. Austria,* December 19, 1989 (rent control follows legitimate goal of protecting the right to housing); *Spadea and Scalabrino v. Italy*, September 28, 1995 (protection from eviction for vulnerable groups is a legitimate goal to restrict property rights). In *Hutten-Czapska v. Poland,* June 19, 2006, the Court decided that, while rent-control schemes follow a legitimate goal and are thus permissible as a restriction to the right to property, they should be proportionate, and therefore prices cannot be fixed at such a level that would prevent the landlord from recovering maintenance costs.

77 Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.

78 *Grootboom v. Oostenberg Municipality* (2000) 3 BCLR 277 (C).

had to put in place a comprehensive and workable plan to meet its housing rights obligations.

The Court established that in deciding how to comply with these obligations, three elements must be considered by the authorities:

- the need to take reasonable legislative and other measures;
- the need to achieve the progressive realization of the right; and
- the requirement to use available resources.

Regarding the 'reasonableness' of the measures adopted, the Constitutional Court said that the State had a legal duty, at least, to have in place a plan of action to deal with the plight of "absolutely homeless" people such as the Grootboom community. An examination of the State's housing policy at the time revealed that it focused on providing long term, fully adequate low-cost housing and took no account of the basic need of homeless people for temporary shelter. The Court declared the State's housing policy unreasonable, and thus unconstitutional, to the extent that it failed to make adequate provision for homeless persons.

Treatment Action Campaign (TAC): the right to health

In a similar vein, the South African Constitutional Court decided another important case involving the right to health. In the *South African Minister of Health v. Treatment Action Campaign* case[79], the Court decided that the exclusion from public health care services of a drug that had been shown to reduce the transmission of HIV from mothers to children was unreasonable. (See Box 4).

Box 4. The South African Constitutional Court and the prevention of HIV: the test of reasonableness in action

In the *Treatment Action Campaign* case, the South African Constitutional Court dealt with the adequacy of the State's efforts to prevent the spread of HIV, in particular the transmission of HIV from mothers to their babies at birth. Studies by the World Health Organisation (WHO) and indeed by South Africa's own Medicines Control Council had shown that the administration of a single dose of the anti-retroviral drug Nevirapine to mother and child at birth safely prevents the mother-to-child transmission of HIV in the large

79 See Constitutional Court of South Africa, *South African Minister of Health v. Treatment Action Campaign,* 2002 (5) SA 721, July 5, 2002.

majority of cases. Nevertheless, the State generally refused to provide the drug for this purpose at public health facilities.

The Treatment Action Campaign, an umbrella body for a group of NGOs and social movements advocating better prevention and treatment options for HIV/AIDS, approached the High Court seeking an order directing the State to make Nevirapine available at all public health facilities where women give birth to prevent the mother-to-child transmission of HIV and to devise a comprehensive plan to prevent such transmission. The High Court granted the order.

On appeal to the Constitutional Court this order was in essence upheld. The Court held that the State's refusal to make Nevirapine available more broadly, and its failure to have a comprehensive plan to deal with the mother-to-child transmission of HIV, was unreasonable and breached the right of indigent mothers and their new-born babies to have access to health care services, provided by Section 27(1) of the South African Constitution. In light of the evidence produced, the Court rejected the State's concerns about the safety and efficacy of Nevirapine. The Court also accepted that there was significant latent capacity within the public health care service to administer the drug effectively and to monitor its use and effects. As a result, the Court directed the State to make Nevirapine available at all public health facilities where its use was indicated; and to devise and implement a comprehensive plan to prevent the mother-to-child transmission of HIV.

Justiciability and State omissions

A potentially controversial issue concerning judicial review of legislative and regulatory powers exercised by the political branches of in the State is whether courts should control not only the acts, but also the omissions, of both legislative and regulatory bodies.[80] This raises the question of the scope of judicial review – and eventually the scope of judicial remedies, as we will see later – when the implementation of a recognized right or goal requires the introduction of legislation or regulations, and the governmental bodies responsible simply avoid taking any such action. Three points are to be made here.

- Firstly, the issue is not only limited to ESC rights, but is relevant when considering any right (civil, political, economic, social, cultural) which requires legislation or regulation to be implemented. So the fact is that courts already have to develop methods of judicially reviewing legislative or regulatory

80 For examples of violation through omission, see Maastricht Guidelines, Guideline 15.

omissions. The fact that courts have to pronounce on omissions relating to civil and political rights, does not undermine their justiciability. For example, a number of duties arising from the prohibition on torture under international law require torture to be considered a criminal offence, and require that evidence obtained through torture shall not be employed as the basis for criminal convictions. The implementation of these requirements imply, in some legal systems, passing legislation to incorporate a new criminal offence in the penal code, and modifications to the rules of evidence in the criminal procedure statutes to exclude evidence obtained under torture. Failing to adopt such legislation does not make the right not to be subjected to torture a non-justiciable right. Rather, the State is obliged to comply with the positive duty of ensuring, through adequate means, the full content of its duties that arise from the right. This is no different to omissions relating to ESC rights.

- Secondly, it is not especially difficult to assess omissions by comparing action or lack of action with a legal standard. Problems may, however, arise when it comes to deciding the adequate remedy, once an omission has been verified.

- Thirdly, while legislative and regulatory bodies sometimes fail to adopt any necessary regulations, the frequency of such absolute omission should not be overstated. There are actually few cases where, given a constitutional duty, legislative or regulatory bodies do nothing at all.

A great many of the cases regarding judicial interpretation of ESC rights involve either a claim that the administration is not complying with a statutory duty, or a challenge to the existing legislation or regulations because of the way in which they do not satisfy duties or breach a prohibition. Thus, courts less often judicially review an absolute omission, and more often review legislation or regulations that allegedly inadequately implements constitutional or statutory duties or prohibitions. The previously mentioned cases – *Grootboom*, *TAC*, *Asociación de Esclerosis Múltiple*, and *Campaign For Fiscal Equity* – are examples of partial omissions, not of absolute omissions. In these cases, courts considered that the existing public policy deployed to comply with a certain ESC right fell short of the required legal standard – that is, the means chosen were insufficient in relation to the legal obligation, because they excluded a certain group, lacked adequate funding, or failed to include a necessary substantive component.

Duties to respect, protect and fulfil

The CESCR has classified the different levels of State obligations by stating that every ESC right, as with every human right, includes duties to respect, duties to protect and duties to fulfil. This interpretation of State obligations has been reflected in the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.[81]

This tripartite classification is based on different assumptions about the relationship between the right-holder, his or her access to the protection afforded by a right, potential threats to that access, and the role of the State.

The CESCR has explored the application of this classification in several General Comments regarding different rights protected by the ICESCR. In these General Comments the Committee has identified both duties arising from those rights and the types of violations of those duties. Exploring how this classification applies helps to illustrate the problems created by rejecting the justiciability of ESC rights *per se*.

Duties to respect

Duties to respect focus on preventing the State from unduly intervening in the enjoyment a particular freedom or entitlement. The State is required to abstain from interfering. Nevertheless, to prevent the interference, the State may still have to take proactive measures, for example, to prevent State agents from acting in certain ways, or to provide reparation if a duty has been breached.

Judicial intervention to ensure compliance with duties to respect ESC rights – both preventive and restorative or compensatory – is not substantially different from traditional notions of civil and political rights litigation, i.e protecting against State action that threatens the *status quo*. This is particularly the case when potential victims already have access to essential provisions, such as food, housing, work, income and health care. The duty to respect is justiciable, therefore, in the following circumstances:

- protection against State-organized or sanctioned forced evictions;
- protection from direct threats to health by State actors;
- protection from the interruption of existing levels of medical treatment provided by the State;
- protection against arbitrary termination of employment in the public sphere;

81 See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Guideline 6.

- protection from retrogressive and retroactive downgrading measures in social security schemes; and
- protection from State interference in the use of a minority language or anything deemed to have an important symbolic value for a particular culture or religion.

The duty to respect ESC rights: case law examples

Several examples drawn from case law in various jurisdictions around the world illustrate the importance of the duty to respect ESC rights. In the case of the *Islamic Community in Bosnia and Herzegovina*[82] the Human Rights Chamber for Bosnia and Herzegovina found that the State authorities, in destroying and removing the remains of mosques and desecrated graveyards, and denying the Muslim community the ability to rebuild the destroyed mosques, breached the community's religious and property rights.

Other examples come from the South African Constitutional Court. In *Jaftha v. Schoeman* and *Van Rooyen v. Stoltz*,[83] the Constitutional Court decided that provisions of the *Magistrates' Courts Act* that allowed, without adequate judicial oversight, the sale of a person's home to make good a judgment debt, breached the duty to respect the right of everyone to have access to adequate housing. Similarly, an Argentine State Supreme Court decided that provisions of the local Administrative Code that granted the State the authority to automatically evict tenants of State-owned housing were unconstitutional, breaching the right to due process and the right to housing.[84] The court explicitly linked the right to due process, the right to legally challenge eviction orders and the right to adequate housing. The judgment referred specifically to CESCR's General Comment 4 (on the right to adequate housing) and General Comment 7 (on forced evictions).

In a case regarding the right to be free from forced labour,[85] the European Committee of Social Rights reviewed the Greek Government's legislation which required

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82 See Human Rights Chamber for Bosnia and Herzegovina, CH/96/29, *The Islamic Community in Bosnia and Herzegovina v. the Republika Srpska*, June 11, 1999.

The Human Rights Chamber for Bosnia and Herzegovina is a judicial body established under the General Framework Agreement for Peace in Bosnia and Herzegovina (known as the Dayton Peace Agreement). The Chamber has the mandate to consider violations of human rights as provided in the ECHR and its Protocols, and discrimination arising in the enjoyment of the rights and freedoms provided for in the Convention and 15 other international instruments, including the ICESCR.

83 Constitutional Court of South Africa, *Jaftha v. Schoeman; Van Rooyen v. Stoltz,* (2005) 1 BCLR 78 (CC) October 8, 2004. The summary of the case is due to Danie Brand.

84 See Buenos Aires Supreme Court (*Tribunal Superior de Justicia de la Ciudad Autónoma de Buenos Aires*), *Comisión Municipal de la Vivienda c. Saavedra, Felisa Alicia y Otros s/Desalojo s/Recurso de Inconstitucionalidad Concedido*, October 7, 2002, and *Comisión Municipal de la Vivienda c. Tambo Ricardo s/desalojo*, October 16, 2002.

85 See European Committee of Social Rights, *Quaker Council for European Affairs (QCEA) v. Greece*, Complaint Nº 8/2000, April 27, 2001.

conscientious objectors to perform civil service in lieu of compulsory military service. The Committee found that the civil service requirements prescribed an excessive duration of service, compared to the duration of military service.

The German Federal Constitutional Court provides further examples: it has held in several cases that the State's powers of taxation cannot infringe on the material means people need to cover the "existential minimum".[86] Thus, the legislature has a duty to respect the means necessary for a basic livelihood, and cannot impose taxes beyond these limits.

SERAC and CESR v. Nigeria

In the *Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria* (*SERAC and CESR*) case, the African Commission on Human and Peoples' Rights endorsed the notion of duties to respect the enjoyment of ESC rights.[87] The Commission stated:

> *"The obligation to respect entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs."*[88]

The Commission found that the Government of Nigeria breached its duties to respect the rights to health and to a healthy environment, by directly "attacking, burning and destroying several Ogoni villages and homes".[89] The Commission also considered that there had been violations of the right to housing:

> *"At a very minimum, the right to shelter obliges the Nigerian Government not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. The State's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing*

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86 See, for example, German Federal Constitutional Court, *BVerfGE 82, 60(85), BVerfGE 87, 153(169)*.

87 See African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication Nº 155/96, October 13-27, 2001.

88 *Ibid.*, para. 45 (footnote omitted).

89 *Ibid.*, para. 54.

> *needs. [...] The government has destroyed Ogoni houses and villages and then, through its security forces, obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes. These actions constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter."*[90]

Similarly, the Commission found that the State had also breached its duties to respect the right to food.[91]

Duties to protect

Under the duty to protect, the State is required to prevent third parties from unduly interfering in the right-holder's enjoyment of a particular freedom or entitlement. Emphasis is therefore placed on State action that is necessary to prevent, stop, or obtain redress or punishment for third party interference. This is normally achieved through one or all of the following

- State regulation of private party conduct;
- inspection and monitoring of compliance; and
- administrative and judicial sanctions enforced against non-compliant third parties, such as employers, landlords, providers of health care or educational services, potentially pollutant industries or private food and water suppliers.[92]

Judicial intervention to ensure compliance with duties to protect ESC rights – again, preventive, restorative or compensatory – is similar to litigation that seeks to require the State to protect against the acts or failure to act of private (third) parties in the sphere of civil and political rights. When private individuals and parties threaten the provision of what would be considered essentials for a decent life, judicial intervention is one means to protect the rights involved. This approach should work alongside and compliment other State activity, such as regulation and law-enforcement. Access to some basic ESC rights – such as the rights to work, health or education services, housing or food – is often left to a great extent to market forces or provision by third parties. This creates its own tensions for the State, in how it carries out its duties to protect. However, this duty to regulate conduct between private parties becomes greater where there is a power imbalance between those parties.

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90 *Ibid.*, paras. 61-62.

91 *Ibid.*, para. 66.

92 See Maastricht Guidelines, Guideline 15(d).

Judicial intervention as a means of controlling the actions, or failure to act of private parties in the context of duties to protect ESC rights have arisen in the following examples:

- protection against privately conducted forced evictions;
- protection of labour conditions in the private labour market;
- protection from failure to comply with health or education requirements in the private sphere;
- protection from discrimination in contracts directed at providing basic services, such as health, water, housing or education; and
- protection from abusive termination or modification of these contracts.

The duty to protect ESC rights: case law examples

Some examples from domestic and international courts and quasi-judicial bodies illustrate the potential for determining non-compliance with a State's duty to protect the enjoyment of an ESC right from the conduct of third parties.

In two cases in particular, the Inter-American Court of Human Rights considered massacres perpetrated by paramilitary groups in Colombia as a violation of the duty to protect ESC rights.[93] The massacres caused the forced eviction and displacement of the civilian population, and the loss of their homes and means of livelihood. In both cases, the State was found responsible, amongst other things, for its failure to protect the civilian population against attacks from paramilitary groups, which the Court held was the responsibility of the Colombian army, which was in overall control of the area.

In the aforementioned *SERAC and CESR v. Nigeria* case,[94] the African Commission on Human and Peoples' Rights also found violations of the State's failure to regulate and prevent the conduct of a private oil company which polluted natural resources and destroyed the traditional means of livelihood of the Ogoni people. The Commission held that the State had failed in its duties to protect the rights to health, to a clean environment, and to protect against the degradation of the people's wealth and natural resources.

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93 See Inter-American Court of Human Rights, *Mapiripán Massacre v. Colombia*, September 15, 2005, paras. 167-189 (violation of the right to freedom of movement and residence); *Ituango Massacres v. Colombia*, July 1, 2006, paras. 172-200 (violation of the right to property and the right to privacy, family life and home) and 204-235 (violation of the right to freedom of movement and residence).

94 African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication Nº 155/96, October 13-27, 2001. On the duties to protect, see paras. 46, 61 and 65. On the findings of violations to these duties, see paras. 55, 57-58 and 66. For a comment, see F. Coomans, "The Ogoni Case Before The African Commission on Human and Peoples' Rights", *International and Comparative Law Quarterly*, Vol. 52 (2003), p. 749-760.

Where the police failed to intervene to protect the Roma community, whose homes were burned down by a mob causing them to flee and lose their homes, jobs and means of livelihood, the UN Committee against Torture has considered that the State's inaction amounted to cruel, inhuman and degrading treatment by failing to protect ESC rights.[95]

The first case ever decided by the European Committee of Social Rights, *International Commission of Jurists (ICJ) v. Portugal* under the collective complaints procedure,[96] provides another example of a (quasi-) judicial body's consideration of duties to protect. In that case, the Committee maintained that the prohibition on child labour (prohibiting the employment of children under 15 years old), as established by Article 7(1) of the European Social Charter, applied to all economic sectors and all types of enterprises. The Committee held these encompassed family businesses, as well as all forms of work, whether paid or not, including agricultural and domestic work, domestic labour and sub-contracting, and even work within the family.[97] The Committee also held that the State's failure to conduct proper supervision of working conditions for children, coupled with the limitations in the work of the labour inspectorates, amounted to a violation of Article 7(1) of the European Social Charter.

In a number of cases dealing with private education, the Colombian Constitutional Court has decided that, because of the fundamental character of the right to education, private schools are bound by specific obligations. These concern their disciplinary powers and their capacity to terminate contractual relations with students or students' parents. For example:

- the act of expelling a pregnant student in the middle of the school year amounted to a violation of her right to education. In this case the Court ordered the private school to re-admit the student.[98]

- a private school's threats to expel two students on the basis of their physical appearance also amounted to a violation of both their right to education, and their right to personal autonomy and free development of their personality.[99]

Statutory-based claims in US disability law also show the potential for courts to enforce ESC rights. The *American with Disabilities Act* requires businesses and services directed at the general public to be accessible to people with disabilities.

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95 See UN Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication N° 161/2000, December 2, 2002. (check Yugoslavia). Two partially dissenting members of the Committee considered that the deeds amounted to torture.

96 See European Committee of Social Rights, *International Commission of Jurists (ICJ) v. Portugal*, Complaint N° 1/1998, September 10, 1999.

97 *Ibid.*, paras. 27-28.

98 See, for example Colombian Constitutional Court, *Case T-211/95*, May 12, 1995. See also *T-377/95, T-145/96, T-180/96, T-290/96, T-667/97* and *T-580/98*.

99 See Colombian Constitutional Court, *Case T-065/93*, February 26, 1993.

In two class actions, courts imposed on private cinema and gas station chains duties to make accessible a large number of previously inaccessible premises.[100]

Etcheverry v. Omint

A number of Argentinian cases have addressed the duty to protect, in the context of the right to health. In *Etcheverry v. Omint*,[101] the Supreme Court decided that a refusal by a private health insurance fund to maintain the membership of an HIV-positive client amounted to a breach of the right to health. The plaintiff had been a member of the health plan as part of his employment benefits. When he became unemployed, he sought to continue the policy privately. After the plaintiff had tested HIV-positive, the health insurance company refused to maintain his membership in the health plan.

The Supreme Court, following the Attorney General's opinion, stated that private health insurance companies had special duties towards their customers that extended beyond a mere commercial deal. They stressed that health insurance companies carry duties to protect the right to health, as provided for by international human rights treaties. Thus, they bear "a social pledge to their users".[102] The Court ordered the health insurance company to maintain the plaintiff as its client.

Duties to fulfil

Duties to fulfil impose on a State obligations to facilitate, provide and promote access to rights. This is particularly the case when such access is limited or non-existent. In these circumstances, the State is expected to be a proactive agent, capable of bringing about an increase in access to a range of ESC rights. Therefore, emphasis is placed on State action directed at:

- identifying problematic situations;
- providing relief; and
- creating the conditions that would allow right-holders to manage their own access to the provisions protected by rights.

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100 See US Federal Court of Appeals, Ninth Circuit (Southern California) *Molski v. Gleich*, 307 F.3d 1155, 2 Cal. Daily Op. Serv. 10,310, 2002 Daily Journal D.A.R. 11,901 (2003) (where a judicial settlement imposed on the respondent the duty to make approximately 1,200 gas stations and mini-markets which it operated more accessible to disabled persons); Federal Circuit Court (Northern California), *Arnold v. United Artists Theatre Circuit, Inc.*, 158 FRD 439, 452 (ND Cal.), modified, 158 FRD 439, 460 (1994) (where a judicial settlement ordered the respondent to make approximately 400 of the cinemas it operated, containing around 2,300 screens, more accessible to disabled persons).

101 See Argentine Supreme Court, *Etcheverry, Roberto E. v. Omint Sociedad Anónima y Servicios*, Attorney General's brief of December 17, 1999, and Judgment of the Court of March 13, 2001.

102 Unofficial translation.

The duty to fulfil ESC rights includes an obligation to remove obstacles to the full enjoyment of ESC rights. It also requires the implementation of measures to modify discriminatory social and cultural patterns which result in the disadvantage of vulnerable groups.

The duty to fulfil ESC rights: case law examples

Cases concerning the obligations to fulfil the provisions of ESC rights have involved access to the provision of services and assessing whether legislation and regulations that are necessary to provide services exist. Even if they do exist, they must satisfy standards of reasonableness, adequacy, equality and non-discrimination. Cases may involve:

- total or partial omissions;
- failure to meet substantive standards regarding the quality of services;
- failure to meet procedural standards for planning, implementing or monitoring services;
- insufficient allocation of resources;
- failure to implement statutory obligations;
- failure to regulate and monitor private parties when public services are outsourced; or
- failure to provide services to eligible individuals.

Since duties to fulfil require positive action by the State, it is not surprising that most of the cases involving alleged breaches of these duties to fulfil concern State omissions. If an omission is identified, this tends to translate into a requirement to act (for example, requirements to legislate, to provide treatment or to put into place a policy).

The *Grootboom* case again provides a good example of judicial scrutiny of compliance with duties to fulfil.[103] As discussed above, the South African Constitutional Court considered that the housing policy adopted by the government failed to take into account the situation of some of the most vulnerable groups of society, such as the group of squatters who were evicted in this case.

In *Autism-Europe v. France*,[104] decided by the European Committee of Social Rights, the Committee found that measures undertaken by the Government of France to

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103 Constitutional Court of South Africa, *The Government of the Republic of South Africa and others v. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.

104 See European Committee of Social Rights, *International Association Autism-Europe v. France*, Complaint N° 1/2002, November 7, 2003.

provide guidance, education and vocational training for persons, and especially children, with autism, were insufficient and failed to meet its duties under the Revised European Social Charter.

In a number of US cases based on statutory claims arising from the *Individuals with Disabilities Education Act* (IDEA), the courts found educational authorities to be in breach of duties to fulfil required by the statute. The authorities had not complied with the provision of an individualized educational plan, tailored to satisfy the specific needs of children with disabilities, which would then have allowed them to be included in the regular educational system.[105] Similarly, the Supreme Court of Israel decided that the right to education for children with disabilities includes the right to free education not only in respect of special education, but also in integrated educative settings. In this case the government was ordered to arrange its budgetary previsions to cover these services.[106]

In *People's Union For Civil Liberties v. Union of India and others*, the Supreme Court of India identified duties on the State to fulfil ESC rights.[107] During a famine in the State of Rajasthan many people died of starvation, even though the government kept grain reserves for emergencies. Through a number of interim measures, the Supreme Court found that the government had failed to implement schemes to prevent and combat famines, and ordered detailed urgent measures to resolve the situation.[108]

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105 See, for example, US Federal 3rd Circuit Court, *Oberti v. Board of Education of the Borough of Clementon School District*, 995 F.2d 1204 (3d Cir. 1993), May 28, 1993, and US Federal 9th Circuit Court, *Sacramento City Unified School District v. Rachel H.,* 14 F.3d 1398 (9th Cir. 1994), January 24, 1994 (which decided that school districts have an obligation to include children with disabilities in regular schools, and that placement in special education would only be justified when all efforts have been made and the child still could not satisfactorily progress in a regular classroom). The US Supreme Court decided similar cases on the basis of a previous act, the *Education of the Handicapped Act*. See US Supreme Court, *Irving Independent School District v. Henri Tatro*, 468 US 883, 104 S.Ct. 3371, 82 L.Ed.2d 664, 18 Ed. Law Rep. 138, 1 A.D.D. 154, July 5, 1984 (which held that the law required the school to provide an eight-year-old child born with spina bifida with clean intermittent catheterization so that she could attend special education classes); *Honig v. John Doe and Jack Smith*, 108 S.Ct. 592, 484 US 305, 98 L.Ed.2d 686, 56 USLW 4091, 43 Ed. Law Rep. 857, 1 A.D.D. 333, January 20, 1988 (found that the law prohibits state or local school authorities from unilaterally excluding disabled children from classroom for dangerous or disruptive conduct growing out of their disabilities pending review proceedings).

106 See Supreme Court of Israel, *Yated and others v. the Ministry of Education*, HCJ 2599/00, August 14, 2002.

107 See Supreme Court of India, *People's Union For Civil Liberties v. Union of India and others*, May 2, 2003.

108 Among them, it required the Government to:

- implement the Famine Code for three months;
- double the grain allocation for the food for work scheme and to increase financial support for other food schemes;
- ensure that food ration providers stay open and provide the grain to families below the poverty line at the set price; to give publicity to the rights of poor families to grain; and
- grant all individuals without means of support a ration card for free grain; to progressively implement meal schemes in schools.

Judicial orders requiring public authorities to act in relation to health care are a common feature of many jurisdictions, both through collective and individual complaints. Courts in Latin America have been particularly active in this field. The Argentine Supreme Court, for example, ruled favourably in a case brought by a number of NGOs defending the rights of HIV-positive people. The Court ordered the Ministry of Health to provide full HIV-related medication to public hospitals.[109] A number of other cases in the same jurisdiction have involved individual claims to access medical treatment and health care services. The Court made clear in two important cases that international human rights treaties imposed on the State positive duties to provide access to medical treatment, and ordered the administration to do so.[110] The Court has also ordered the delivery of medication through preliminary injunctions.[111]

The Colombian Constitutional Court has followed a similar path, with literally hundreds of decisions granting injunctive relief and ordering the social security agency to provide the required medicines and/or treatment.[112] Judicially ordered provision of medicines and treatment is also common in Brazil.[113] The Constitutional

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109 See Argentine Supreme Court, *Asociación Benghalensis y otros c. Ministerio de Salud y Acción Social – Estado Nacional s/amparo ley 16.688*, June 1, 2000.

110 See Argentine Supreme Court, *Campodónico de Beviacqua, Ana Carina c. Ministerio de Salud y Banco de Drogas Neoplásicas*, October 24, 2000; *Monteserin, Marcelino c. Estado Nacional - Ministerio de Salud y Acción Social - Comisión Nacional Asesora para la Integración de Personas Discapacitadas - Servicio Nacional de Rehabilitación y Promoción de la Persona con Discapacidad*, October 16, 2001.

111 See Argentine Supreme Court, *Alvarez, Oscar Juan c. Buenos Aires, Provincia de y otro s/acción de amparo*, July 12, 2001; *Orlando, Susana Beatriz c. Buenos Aires, Provincia de y otros s/amparo*, April 04, 2002; *Díaz, Brígida c. Buenos Aires, Provincia de y otro (Estado Nacional - Ministerio de Salud y Acción Social de la Nación) s/amparo*, March 25, 2003; *Benítez, Victoria Lidia y otro c. Buenos Aires, Provincia de y otros s/ acción de amparo*, April 24, 2003; *Mendoza, Aníbal c. Estado Nacional s/amparo*, September 8, 2003; *Rogers, Silvia Elena c. Buenos Aires, Provincia de y otros (Estado Nacional) s/acción de amparo*, September 8, 2003; *Sánchez, Enzo Gabriel c. Buenos Aires, Provincia de y otro (Estado Nacional) s/acción de amparo*, December 18, 2003; *Laudicina, Angela Francisca c. Buenos Aires, Provincia de y otro s/acción de amparo*, March 9, 2004; *Sánchez, Norma Rosa c/Estado Nacional y otro s/acción de amparo*, May 11, 2004, among many others. The Court declared itself not competent but notwithstanding ordered preliminary injunctive relief in *Diéguez, Verónica Sandra y otro c. Buenos Aires, Provincia de s/acción de amparo*, December 27, 2002; *Kastrup Phillips, Marta Nélida c. Buenos Aires, Provincia de y otros s/acción de amparo*, November 11, 2003; *Podestá, Leila Grisel c. Buenos Aires, Provincia de y otro s/acción de amparo*, December 18, 2003, among others.

112 The number of cases decided by the Colombian Constitutional Court is impressive. See, for example, decisions *T-067/94, T-068/94, T-204/94, T-571/94, T-020/95, T-049/95, T-179/00, T-1034/01* and *T-1101/03* (provision of treatment and medication in cases where the health of children with disabilities as at risk); *T-533/1992* (access to free treatment by indigent persons); T*-179/1993* (right to health of pregnant women); *T-153/1998, T-535/1998, T-606/1998, T-607/1998, T-530/1999, T-575/1999* and *T-233/2001* (access to timely treatment by prison inmates); *T-098/2002, SU-1150/2000, T-1635/2000* and *T-327/2001* (access to health care and treatment by persons suffering forced displacement); *889/2001* (right to timely treatment); *T-376/2000* (access to rehabilitation services); *SU-480/1997, T-283/1998; T-328/1998 and T-329/1998* (access to treatment and medication not provided by health plan and arbitrary exclusion from coverage); *T-366/1999, T-367/1999* and *T-849/2001* (right to a diagnosis as part of the right to health), among many others.

113 See, for example, Sao Paulo Justice Tribunal (*Tribunal de Justiça de São Paulo*), cases (*acordãos*) *068.167-5/9-01, 126.471-5/6-00, 068.167-5/9-01, 134.507-5/5-00, 165.207-5/8-00, 169.790-5/6-00, 178.687-5/7-00, 178.224-5/5-00, 178.250-5/3-00, 187.912-5/6-00, 182.452-5/0-00, 177.207-5/0-00, 204.526-5/6-00, 171.946-5/9-00, 202.837-5/0-00, 208.353-5/5-00, 203.576-5/6-00, 209.451-5/0-00,*

Chamber of the Supreme Court of Costa Rica has, in many cases, prompted public authorities to provide timely medical treatment.[114] Further, the Venezuelan Supreme Court ruled in a collective claim that the State should provide anti-retrovirals to 170 HIV-positive persons.[115]

Soobramoney

Soobramoney v. Minister of Health, KwaZulu-Natal,[116] a case decided by the South African Constitutional Court, is sometimes presented as a case demonstrating the limits of the justiciability of ESC rights. In this case, an elderly person with kidney failure needed dialysis treatment, normally provided by the State. In an attempt to rationalize the use of scarce resources, the medical authorities had declared him ineligible for the treatment. The Court upheld the decision; the patient did not receive the treatment and subsequently died. However, the Court did not argue that the right to health is not justiciable: rather it maintained that the case was not covered by the duty to provide emergency treatment enshrined in the South African Constitution. The case revolved, therefore, around the right to health, also guaranteed in the Constitution. The Court had no hesitation in finding the case justiciable. Their approach was to apply a 'reasonableness' test to the regulations that governed the provision of the dialysis service (and who had access to it) and found that the criteria advanced by the government were acceptable in that they fell within the scope of what was reasonable. The Court felt at ease in scrutinizing how the medical authorities justified their distribution of scarce medical resources in beyond emergency cases.

197.264-5/6-00, 209.431-5/9-00, 208.398-5/0-00, 209.366-5/1-00, 211.215-5/3-00, 209.935-5/9-00, 211.907-5/1-00, 215.465-5/2-00, 214.029-5/6-00 and *206.934-5/2-00*. These are just some examples, among many others. All of these related only to HIV-AIDS treatment cases in the Sao Paulo city district in 2000 and 2001.

114 See, for example, Constitutional Chamber of the Supreme Court of Costa Rica (*Sala Constitucional de la Suprema Corte de Justicia*), decisions *04684-2005, 13436-2005, 13216-2005* and *02980-2006*.

115 See Supreme Court of Venezuela (Suprema Corte de Justicia), *Cruz Bermúdez y otros v. Ministerio de Sanidad y Asistencia Social*, Case N° 15.789, Decision N° 916, July 15, 1999.

116 See Constitutional Court of South Africa, *Soobramoney v. Minister of Health, KwaZulu-Natal,* 1998 (1) SA 765 (CC), November 27, 1997.

Box 5. Courts, the duty to fulfill and the situation of internally displaced people

Courts in different jurisdictions around the world have ordered governments to take steps to safeguard the rights of internally displaced people as a result of armed conflicts and natural catastrophes. The courts have considered duties regarding both civil and political and ESC rights.

In a number of cases the Constitutional Court of Colombia has required the government to comply with its duties to fulfill, among others, the rights to food, health, work and housing. In a collective case involving the situation of 1150 families [*Sentencia T-025/04*, January 22, 2004], the Court declared that the general failure of the government to comply with its duty to fulfil those rights amounted to an "unconstitutional state of affairs",[1] and required them to adopt administrative and financial measures to:

a) Comply immediately with the core obligations regarding the rights to life, dignity, physical, psychological and moral integrity, to family union, to basic health care, to protection from discrimination and with the right to education of children under 15 years old.

b) Identify the specific circumstances of each individual and family situation and to plan for their support and re-integration.

c) Implement the negative obligations to:

- refrain from applying coercive measures to return or resettle people;
- refrain from preventing displaced people from returning or resettling elsewhere;
- provide the necessary information on the security situation in their place of return, and provide guarantees to ensure a safe return;
- refrain from promoting return or resettlement when it may entail risk to life and personal integrity and provide the necessary support to ensure that a return can be carried out in safety; and
- to ensure that those who return can earn a living.

1 Unofficial translation.

In a case involving people internally displaced as a result of armed conflict in Nepal, including women, children, the elderly and people with disabilities, the Supreme Court of Nepal relied on international human rights standards, including the International Covenant on Economic, Social and Cultural Rights and held that the State had the duty to provide relief in a transparent, equal and non-discriminatory manner. Specifically, it required the government to adopt a legal framework, ensuring the appropriate management and delivery of the services and facilities to be provided to the internally displaced [*Bhim Prakash Oli et. al. v. Government of Nepal et. al.*, February 8, 2006].

Non-discrimination and equal protection of the law

An important number of issues relating to the justiciability of ESC rights either involve discrimination claims, or challenges based on unlawful or unreasonable distinctions made by law. The CESCR has made clear that, within the provisions of the ICESCR, the prohibition on discrimination is an obligation of immediate effect.[117] Other international human rights instruments also stress this feature, notably Article 26 of the ICCPR, which makes the equal protection principle applicable to any piece of legislation passed by the State, regardless of its substantive content, including legislation regulating ESC rights.

Several clauses enshrined both in the Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the International Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) make explicit reference to their application to ESC rights in the implementation of social policies and the provision of social services. Constitutions in every region of the world contain similar provisions for non-discriminatory and equal treatment.

'Suspect categories'

An important aspect of the current development of anti-discrimination law is the heightened scrutiny applied to those cases where legislation or administrative practices subject certain groups of people to a disparate treatment, which results in a denial or restriction of rights. The use of specific criteria such as race or gender, to make distinctions to the detriment of groups that have been disadvantaged in the past or continue to be disadvantaged, is considered highly suspect, and therefore such treatment cannot be easily justified. There is thus a presumption that, when these 'suspect categories' are used to make legal differentiations it is unacceptable, unless the State shows there is a pressing need to do so.

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117 See also Limburg Principles, Principles 13, 22 and 35-41; Maastricht Guidelines, Guidelines 11, 12 and 14(a).

There is potential to develop new criteria in order to identify other social groups whose different treatment requires a heightened scrutiny - for example, socio-economic status. This could also expand the protection offered by the prohibition of discrimination and the principle of equal protection of the law in the enjoyment of ESC rights.

Non-discrimination and equal protection of the law: case law examples

One of the most famous cases in US constitutional law, *Brown v. Board of Education of Topeka*,[118] concerns the application of the equal protection clause to the right to education. In that case, the US Supreme Court decided that the existence of schools segregated according to racial criteria amounted to a breach of the equal protection clause, and ordered that the school system be overhauled in accordance with the ruling.

Discrimination in the field of housing and social security benefits

In the case of *Ms. L. R. et al v. Slovakia*,[119] CERD found that a municipal decision revoking a housing policy directed towards fulfilling the needs of the Roma population amounted to a discriminatory interference with the right to housing based on grounds of ethnic origin.

The United Nations Human Rights Committee (HRC) has also decided cases where the right to equal protection under the law and the prohibition on discrimination were applied to ESC rights. In *Zwaan de Vries v. the Netherlands*[120], the HRC held that the Dutch social security legislation which provided unemployment benefits discriminated against married women, requiring them to satisfy additional eligibility conditions that did not apply to married men. This differential treatment on the basis of gender was found to be in breach of Article 26 of the ICCPR. Similar cases have been decided by the European Court of Human Rights, whereby social benefits were protected by the right to property enshrined in Protocol 1 to the European Convention.[121]

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118 See US Supreme Court of Justice, *Brown v. Board of Education of Topeka*, 347 US 483 (1954). The Supreme Court considered together four cases of racial segregation in schools, involving the states of Kansas (*Brown v. Board of Education of Topeka*), South Carolina (*Briggs et al. v. Elliott et al.)*, Delaware (*Gebhart et al. v. Belton et al.)* and Virginia (*Davis et al. v. County School Board of Prince Edward County, Virginia, et al.*). Remedies were ordered in a follow-up case decided a year later, *Brown v. Board of Education II*, 349 US 294 (1955). For a historical account, see M. V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court 1936-1961*, (Oxford University Press: New York, 1994), chapter 11; R. Kluger, *Simple Justice: The History Of Brown v. Board Of Education And Black America's Struggle For Equality* (Knopf: New York, 1975).

119 See UN Committee on the Elimination of Racial Discrimination, *Ms. L. R. et al v. Slovakia*, Communication N° 31/2003, March 10, 2005.

120 See UN Human Rights Committee, *Zwaan de Vries v. the Netherlands*, Communication 182/1984, April 9, 1987. See also *Broeks v. the Netherlands*, Communication 172/1984, April 9, 1987.

121 See European Court of Human Rights, *Wessels-Bergervoet v. the Netherlands*, June 4, 2002 (gender based

The European Court of Human Rights has also scrutinized the application of the principle of non-discrimination on the basis of national origin in relation to social security and social assistance benefits. In the *Gaygusuz* case,[122] the Court considered that the difference in treatment between nationals and non-nationals in their eligibility for a contributory emergency assistance scheme was not based on any objective and reasonable justification, and was therefore discriminatory. In the *Koua Poirrez* case,[123] the Court ruled that the refusal of a non-contributory allowance to an adult with a disability on the basis of their national origin was unjustifiable and amounted to discriminatory treatment as well as a violation of their right to property.

The South African Constitutional Court has also considered a constitutional challenge to the *Social Assistance Act*, which restricted access to social assistance benefits to South African citizens only.[124] The plaintiffs, a group of indigent Mozambican nationals with permanent resident status in South Africa, alleged that the *Social Assistance Act* discriminated against them on the basis of their national origin. The government argued that the exclusion of non-citizen permanent residents was justified because to include them in the social assistance system would attract a flood of immigrants to South Africa. This, it continued, would place an unsustainable additional financial burden on the social assistance budget.

The Court rejected these arguments and found that the exclusion of permanent residents both discriminated against them unfairly in breach of Section 9(3) of the Constitution and breached their Section 27(1) right to have access to social assistance. As a consequence, it declared the offending provisions of the *Social Assistance Act* unconstitutional and proceeded to read words into the provisions so that permanent residents would also be eligible for access.

Discrimination and the right to work

The Committee on the Elimination of Racial Discrimination has also heard cases concerning discrimination on the basis of national origin related to ESC rights. In *Ylimaz Dogman v. the Netherlands*,[125] the applicant, a Turkish citizen living in the Netherlands, was dismissed from her job following a statement by her employer making general assumptions about a foreign worker's proclivity to abuse sickness leave. The Committee held that the State party had not provided the applicant effective protection against discrimination in her enjoyment of her right to work.

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discrimination regarding the period of coverage of welfare benefits: paras. 46-55); *Willis v. the United Kingdom*, June 11, 2002 (gender-based discrimination regarding widows' payment and widower mother's allowance: paras. 39-43).

122 See European Court of Human Rights, *Gaygusuz v. Austria,* September, 16, 1996, paras. 46-52.

123 See European Court of Human Rights, *Koua Poirrez v. France*, September 30, 2003, paras. 46-50.

124 See Constitutional Court of South Africa, *Khosa and others v. Minister of Social Development and others,* 2004 (6) SA 505 (CC), March 4, 2004. The summary of the case was prepared by Danie Brand.

125 See UN Committee for the Elimination of Racial Discrimination, *Ylimaz Dogman v. the Netherlands,* Communication N° 1/1984, September 29, 1988.

The Human Rights Chamber for Bosnia and Herzegovina has also applied the prohibition of discrimination on the basis of national origin to several economic and social rights provided by the ICESCR. In the *M.M.* case,[126] and in a number of similar cases,[127] the Chamber found that the applicant was discriminated against in the workplace on the basis of her national origin, and ordered remedies to be implemented.

Discrimination on the basis of sexual orientation and ESC rights

US State Courts provide some examples of upholding the prohibition of discrimination on the basis of sexual orientation in the area of housing protection. For instance, in *Braschi v. Stahl Associates Co.*,[128] the New York Court of Appeals held that the same-sex partner of the tenant of a controlled-rent housing scheme should be considered as a member of his family and therefore protected from forced eviction and granted the extension of the controlled-rent benefit. In applying a broad interpretation to the term 'family' the court read the legislative intent of the controlled-rent housing scheme to bring security of tenure to long-term inhabitants with bonds of mutual commitment.

The United Kingdom's (UK) highest court, the House of Lords, has decided a similar case. They found that differential treatment of same-sex partners, compared to different-sex partners, with respect to their protection of security of tenure amounted to unlawful discrimination and a violation of Article 14 (the prohibition of discrimination) in relation to Article 8 (the right to respect of family and private life) of the ECHR, applicable under the *Human Rights Act*.[129] In the same way, the HRC has held that distinctions based on sexual orientation in the provision of pension benefits for *de facto* marital unions were unreasonable, not objective and therefore discriminatory.[130]

Inequality in the provision of services: new interpretations

Some courts have dealt with violations of ESC rights based on less traditional grounds of discrimination. In many cases, various factors combine to produce discriminatory circumstances, or apparent grounds for legal distinctions indirectly affecting particular social groups in a disproportionate manner. Various examples drawn from different jurisdictions illustrate this point.

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126 See Human Rights Chamber for Bosnia and Herzegovina, CH/00/3476, *M.M. v. the Federation of Bosnia and Herzegovina,* March 7, 2003.

127 See also Human Rights Chamber for Bosnia and Herzegovina, CH/97/67, *Sakib Zahirovic v. Bosnia and Herzegovina and the Federation of Bosnia and Herzegovina*, July 8, 1999; CH/99/1714, *Mladen Vanovac v. the Federation of Bosnia and Herzegovina*, November 8, 2002; CH/01/7351, *Ana Kraljevic v. the Federation of Bosnia and Herzegovina*, April 12, 2002.

128 See New York Court of Appeals, *Braschi v. Stahl Associates Co.*, 1989 (544 N.Y.S.2d 784).

129 See U.K. House of Lords, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.

130 See UN Human Rights Committee, *X v. Colombia*, Communication 1361/2005, May 14, 2007.

US State Courts have dealt extensively with challenges to government funding of public education. Relying on local constitutional provisions recognizing the right to education, the applicants in a series of cases have requested courts to declare State budgetary allocations to be discriminatory by failing either to provide equal funding to different educational districts (equity claims), or to provide sufficient funding to ensure minimum quality standards in education (adequacy claims). The root of the problems have been the funding of basic public education: the bulk of that funding coming from municipal or district taxes, resulting in a disparity of resources between poor and rich counties or districts.[131] The basis for the unequal distribution of resources was a combination of socio-economic and geographical factors, making the poorest population of the poorest district bear either a higher cost for the same quality of education, or suffer a worse quality of education. Litigation addressing this imbalance was launched in 36 US States, with favourable results for the applicants in around 20 States.[132] In these cases, the Courts ordered the State legislatures to redesign budgetary allocations and to fund public education by redistributing State resources, rather than relying on municipal or district funding, in order to meet equality standards in education.[133]

The Supreme Court of Israel has also heard a number of cases concerning the unequal allocation of health, housing and social services. In these cases, three factors coincided to contribute to the unequal distribution and delivery of services: geographical, ethnic and socio-economic. Geographical inequality in the distribution of services in Israel follows ethnic lines, disproportionately affecting Arab communities, which are in turn poorer. These factors have a negative impact on the quality

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131 The argument is not dissimilar to that provided by the CESCR in General Comment N° 13, *The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999): "Sharp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant" (para. 35).

132 The strategy obtained positive results in the following states California (*Serrano v. Priest*, 1976), New Jersey (*Robinson v. Cahill*, 1973 and *Abbot v. Burke*, 1990), Montana (*Helena Elementary School District N° One v. State*, 1989), Kansas (*Knowles v. State Board of Education*, 1976), Connecticut (*Horton v. Meskill*, 1977 and *Horton v. Meskill*, 1985), Washington (*Seattle School District N° 1 v. State*, 1978), West Virginia (*Pauley v. Kelly*, 1979), Wyoming (*Washakie County School District N° One v. Herschel*, 1980), Arkansas (*Dupree v. Alma School District N° 30*, 1983), Kentucky (*Rose v. Council for Better Education*, 1989), Texas (*Edgewood Independent School District v. Kirby*, 1989), Tennessee (*Tennessee Small School Systems v. McWherter*, 1993), Massachussetts (*McDuffy v. Secretary of the Executive Office of Education*, 1993), New Hampshire (*Claremont School District v. Governor*, 1993), Arizona (*Roosevelt Elementary School District N° 66 v. Bishop*, 1994), Idaho (*Idaho School for Equal Educational Opportunity v. Idaho State Board of Education*, 1996), Alabama (*Ex parte School*, 1997), Vermont (*Brigham v. State*, 1997), Ohio (*De Rolph v. State*, 1997), North Carolina (*Leandro v. State*, 1997) and New York (*Campaign For Fiscal Equity v. State of New York et al.*, 2001; *Campaign For Fiscal Equity v. State of New York et al.*, 2003 and *Campaign for Fiscal Equity, Inc. v. State of New York*, 2006).

133 For further analysis on the results of this kind of litigation, see D. S. Reed, "Twenty-Five Years after Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism", 32 *Law and Society Review* 17 (1998); J. Banks, "State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?", 45 *Vanderbilt Law Review* 129 (1992); W. E. Thro, "Judicial Analysis during the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model", 35 *Boston College Law Review* 597 (1994); R. F. William, "Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond", 24 *Connecticut Law Review* 675 (1992).

of ESC rights enjoyed by these communities, particularly in comparison with those enjoyed by other, more affluent and predominantly Jewish communities. Some of the cases relating to these issues were settled.[134] In other cases the Supreme Court has ruled that the State should adopt measures to address the inequalities,[135] or it approved of the measures shown to be adopted by the Government in order to remedy the situation.[136]

The Human Rights Chamber for Bosnia and Herzegovina has also applied the prohibition of discrimination in a new way when addressing alleged violations of the economic and social rights established by the ICESCR. For example, in the *Klickovic, Pasalic and Karanovic* case,[137] the Chamber decided that the disparity in pension payments given to pensioners returning to Bosnia and Herzegovina, compared with those pensioners who remained in Bosnia and Herzegovina during the armed conflict, amounted to discrimination in the right to social security on the basis of the applicants' status as internally displaced persons.

Affirmative, positive or 'special' measures

Protection against discrimination is particularly relevant to the judicial enforcement of ESC rights. Besides actively prohibiting discriminatory practices, either by State agents or private parties, anti-discrimination legislation should also encompass special measures granting protection to disadvantaged, vulnerable or minority groups. Children, for example, have been specifically targeted for special protection measures. There is also a growing consensus that people with disabilities require pro-active measures to make environments more accessible in order to allow their full social inclusion. Respect for the cultural traditions of indigenous people is a further example of the need to consider relevant differences for some social groups.

A case decided by the Canadian Supreme Court illustrates this point. In *Eldridge v. British Colombia (Attorney General)*,[138] the Court found that the failure to provide

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134 See, for example, Supreme Court of Israel, H.C. 7115/97, *Adalah, et. al. v. Ministry of Health, et. al*. This case settled, with the government agreeing to provide maternal and health care centres for unrecognized Bedouin villages in the Negev.

135 See Supreme Court of Israel, HCJ 727/00, *Committee of the Heads of Arab Municipalities in Israel v. Minister of Construction and Housing*, 56(2) P.D.79. The Court required the Government to expand a municipal renovation program to more Arab municipalities. The summary of this case was facilitated by Yuval Shany.

136 See Supreme Court of Israel, HCJ 2814/94, *Supreme Monitoring Committee for Arab Education in Israel v. Minister of Education, Culture and Sport*, 54(3) P.D. 233. In this case the Court noted the Government's undertaking to expand an education-support program for weak schools to more Arab schools. The summary of this case was facilitated by Yuval Shany.

137 See Human Rights Chamber for Bosnia and Herzegovina, CH/02/8923, CH/02/8924, CH/02/9364, *Doko Klickovic, Anka Pasalic and Dusko Karanovic v. Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska*, January 10, 2003.

138 See Supreme Court of Canada, *Eldridge v. British Columbia (Attorney General)*, 151 D.L.R. (4th) 577, 616 (1997).

sign language interpreters for deaf people in medical centres amounted to discrimination in their enjoyment of the equal benefit of the law (as required by Section 15(1) of the Canadian Charter of Rights and Freedoms). It was considered that the applicants were afforded a worse quality of service compared with people without disabilities. The Court ordered the government to undertake special measures in order to ensure that the disadvantaged group could benefit equally from public health services.

Courts have also addressed the consideration of cultural rights and differences, as a way to prevent discrimination and preserve the equal dignity of cultural minorities. A number of cases decided by the Inter-American Court of Human Rights offer good examples of this approach. In the leading case, *Awas Tingni v. Nicaragua*,[139] and in subsequent cases,[140] the Court has interpreted the right to property (Article 21 of the American Convention on Human Rights), in terms of its enjoyment by indigenous people, as a collective right. This interpretation accords with the arguments presented by many indigenous groups and is supported by ILO Convention N° 169 concerning Indigenous and Tribal Peoples in Independent Countries. In the *Awas Tingni* case, the Court ordered the State to cease granting permission for wood exploitation on the ancestral land of the indigenous group. Additionally, the State was ordered to demarcate and provide the community with a legal title to the land.[141]

Box 6. ESC rights, non-discrimination and equal protection

Grounds for judicial scrutiny of discrimination and violation of equal protection:

- Race (*Brown v. Board of Education of Topeka*, *Ms. L. and others v. Slovakia*)
- Gender (*Zwaan de Vries v. the Netherlands*, *Wessels-Bergervoet v. the Netherlands)*
- National origin (*Khosa and others*, *Gaygasuz v. Austria*, *Ylimaz Dogman v. the Netherlands*)

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139 Inter-American Court of Human Rights, *Mayagna (Sumo) Community Awas Tingni v. Nicaragua*, August 31, 2001.

140 In the same sense, see *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, paras. 123-156, especially paras. 131, 135, 137, 146, 147 and 154; *Sawhoyamaxa Indigenous Community v. Paraguay*, March 29, 2006, paras. 117-143.

141 See Inter-American Court of Human Rights, *Mayagna (Sumo) Community Awas Tingni v. Nicaragua*, August 31, 2001, paras. 148-154.

- Sexual orientation (*Braschi v. Stahl Associates Co.*, *Ghaidan v. Godin-Mendoza*)
- Wealth, socio-economic status and residence (US education equity and adequacy cases, *Adalah et al. v. Ministry of Health*, *Klickovic, Pasalic and Karanovic*)

Positive action or 'special' measures as a requirement for material equality, non-discrimination and respect for cultural differences

- Persons with disabilities (*Eldridge*)
- Indigenous people (*Awas Tingni v. Nicaragua*)

Procedural guarantees built into ESC rights

While ESC rights are often identified with substantive provisions such as healthcare, education and housing, they also include certain procedural dimensions, which constitute a solid basis for their justiciability. Principles of access to courts and fair trial and administrative procedures, for example, are particularly relevant in the area of access to and the guarantee of effective ESC rights. These principles include:

- equality of arms;
- equal opportunities to present and produce evidence;
- the opportunity to challenge evidence brought by the opponent;
- proceedings of reasonable length to be held within a reasonable time;
- fair review of administrative decisions;
- access to legal counsel;
- access to the file and all relevant information;
- impartiality and independence of the adjudicative body; and
- compliance with judicial orders.

Fair trial rights and ESC rights

Both the European and the Inter-American Courts of Human Rights have employed procedural guarantees in relation to ESC rights. The European Court of Human Rights has extensive jurisprudence concerning the application of Article 6(1) of the ECHR (the right to a fair trial) to social security and social assistance payments, and

to labour rights.[142] In this regard, the Court has considered a number of aspects, including the principle of equality of arms, access to courts in order to review decisions by administrative bodies, the due compliance of judicial decisions, and the length of the proceedings.[143]

In turn, the Inter-American Court of Human Rights has applied Article 8 (the right to a fair trial) and Article 25 (on the right to judicial protection) in cases concerning labour rights, social security rights, recognition of the legal personality of indigenous groups, and access to communal lands by indigenous groups.[144] The Court

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142 See numerous cases brought before the European Court of Human Rights on the basis of an alleged violation of Article 6 of the ECHR, including: *Feldbrugge v. the Netherlands*, May 29, 1986 (concerning the right to compensation for a work related accident); *Deumeland v. Germany*, May 29, 1986 (concerning the right to a widow's supplementary pension as part of accident insurance), *Obermeier v. Austria*, June 28, 1990 (dismissal of private employee); *Salerno v. Italy*, October 12, 1992 (right to old age pension); *Salesi v. Italy*, February 26, 1993 (social assistance benefits); *Schuler-Zgraggen v. Switzerland*, June 24, 1993 (right to an invalid pension); *Schouten and Meldrum v. the Netherlands,* December 9, 1994 (social security contributions); *Mennitto v. Italy*, October 5, 2000 (family disability allowances).

143 See, for example, cases of the European Court of Human Rights brought on the basis of violations of Article 6(1) of the ECHR, *Feldbrugge v. the Netherlands*, May 29, 1986 (lack of a fair hearing to challenge administrative decision); *Deumeland v. Germany*, May 29, 1986 (length of the proceedings exceeded reasonable time); *Obermeier v. Austria*, June 28, 1990 (lack of access to court to challenge administrative decision and length of the proceedings exceeding reasonable time); *Vocaturo v. Italy*, May 24, 1991 (length of proceedings for determination of labour rights exceeds reasonable time; Court stresses that "Employment disputes by their nature call generally for expeditious decisions", para. 17); *Lestini v. Italy*, February 26, 1992 (length of proceedings for determination of labour rights exceeds reasonable time; Court stressed "that special diligence is necessary in employment disputes, which include pensions disputes", para. 18); *Ruotolo v. Italy*, February 27, 1992, (length of proceedings for determination of labour rights exceeds reasonable time; Court stresses "that special diligence is necessary in employment disputes", para. 17); *X v. France*, March 31, 1992 (length of proceedings for determination of a health related tort claim exceeds reasonable time); *Salesi v. Italy*, February 26, 1993 (length of the proceedings exceeded reasonable time); *Schouten and Meldrum v. the Netherlands,* December 9, 1994 (length of the proceedings exceeded reasonable time); *Mosca v. Italy,* February 2, 2000, (length of proceedings for determination of labour rights exceeds reasonable time); *Mennitto v. Italy*, October 5, 2000 (length of the proceedings exceeded reasonable time); *Delgado v. France*, November 14, 2000 (length of proceedings for determination of labour rights exceeds reasonable time; Courts states that "labour disputes, which are of capital importance for the professional situation of a person, should be solved with a particular celerity", para. 50); *Pramov v. Bulgaria*, September 30, 2004 (lack of access to court to establish lawfulness of dismissal from work).

The Court found, in another set of cases, violations to Article 6(1) for failure of the Government to comply with social security and labour-related payments determined by judicial decisions. See, for example, *Burdov v. Russia*, May 7, 2002; *Makarova and others v. Russia*, February 24, 2005; *Plotnikovy and Poznakhirina v. Russia*, February 24, 2005; *Sharenok v. Ukraine*, February 22, 2005.

144 See, for example, Inter-American Court of Human Rights, *Baena Ricardo et. Al. (270 workers v. Panama),* February 2, 2001, paras. 122-143 (violation of Articles 8 and 25 for lack of due process and effective remedy in the administrative and judicial stages regarding arbitrary dismissal of 270 workers); *Mayagna (Sumo) Community Awas Tingni v. Nicaragua*, August 31, 2001, paras. 115-139 (violation of Article 25 for lack of adequate procedures for demarcation and titling indigenous community's land); *"5 pensioners" v. Peru*, February 28, 2003, paras. 127-141 (violation of Article 25 for lack of compliance with judicially ordered pension payments), *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, paras. 63-119 (violations of Articles 8 and 25 for lack of adequate procedures for recognizing the legal personality of an indigenous community and for demarcating and titling community's land); *Acevedo Jaramillo and others v. Peru*, February 7, 2006, paras. 215-278 (violations of Articles 8 and 25 for lack of compliance with judicial decisions protecting arbitrarily dismissed of workers); *Sawhoyamaxa Indigenous Community v. Paraguay*, March 29, 2006, paras. 81-112 (violations of Articles 8 and 25 for lack of adequate procedures for recognizing the legal personality of an indigenous community and for demarcating and titling the community's land); *Dismissed*

has considered aspects such as the length of procedures, the possibility of judicial review of administrative decisions, and compliance with judicial decisions by the government.

The extent to which the State or private parties comply with procedural guarantees before adopting decisions that may impair ESC rights has also been a regular subject of judicial review. Issues where respect for procedural guarantees is of particular importance include:

- protection against forced evictions;[145]
- lawfulness of the termination of social benefits;[146]
- lawfulness of the adoption of measures that could affect indigenous communities,[147] users and consumers,[148] the environment[149] and other stakeholders.[150]

Procedural guarantees may also involve:

- compliance with procedural prerequisites such as the requirement for rights to be regulated by parliamentary statute;[151] and

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workers of Congress (Aguado Alfaro and others) v. Peru, November 24, 2006, paras. 107-132 (violation of Articles 8 and 25 for lack of judicial protection against arbitrary dismissal of workers).

145 See the aforementioned Supreme Court of India, *Olga Tellis & Ors v. Bombay Municipal Council* [1985] 2 Supp SCR 51, July 10, 1985; Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government and Bangladesh & Ors* 19 BLD (1999) 488, July 29, 2001.

146 See, for example, US Supreme Court, *Goldberg v. Kelly*, March 23, 1970, 397 US 254 (where the Court found that due process, including the right to a hearing and the right to defense, should be respected before termination of social benefits).

147 See, for example, Colombian Constitutional Court, decisions *SU-39/1997*, February 3, 1997, in which the Court struck down the Government's decision to allow an oil company to start exploration on indigenous people's land. The Court found the Government had failed to conduct proper consultation with the indigenous community in terms of ILO Convention 169. See also decision *T-652/1998*, November 10, 1998, which declared an environmental license to build a dam to be illegal as the Government had failed to conduct consultation with the local indigenous community in compliance with ILO Convention 169.

148 See, for example, Argentine Federal Administrative Court of Appeals, Buenos Aires District, Chamber IV (*Cámara Federal en lo Contenciosoadministrativo de la Capital Federal, Sala IV*), *Defensora del Pueblo de la Ciudad de Buenos Aires y otro c. Instituto Nacional de Servicios Sociales para Jubilados y Pensionados,* February 10, 1999. In this case the Court of Appeals suspended a bid to privatize the social security agency and found there had been a failure to provide adequate information to users.

149 See, for example, Australia, Environmental Court of New South Wales, *Leatch v. Director-General of National Parks & Wildlife Service and Shoalhave City Council*, November 23, 1993, NSWLEC 191. The Court in this case applied the precautionary principle to revoke a licence to take or kill endangered fauna.

150 See, for example, Supreme Court of Pakistan, *Shehla Zia and others v. WAPDA, February 12, 1994,* PLD 1994 Supreme Court 693. This case applied the 'precautionary principle' to suspend construction of a power plant in a residential area, until health risks were assessed by experts and consultation was carried out. See also, Supreme Court of Venezuela, Political-Administrative Chamber, *Iván José Sánchez Blanco y otros c. Universidad Experimental Simón Bolívar*, June 10, 1999 (striking down the introduction of a university fee for failure to comply with formal requirements).

151 See, for example, Constitutional Court of the Czech Republic, *Pl. US 33/95* (1996) in which it was held that the regulation of the right to health as a fundamental right required a formal statute by the Parliament.

- requirements for fair notice, access to information, public hearings or group consultation prior to decision-making.

Summary: different ways in which courts have given meaning to the content of ESC rights

This chapter has identified that ESC rights are not by nature vague or indeterminate; ESC rights have content, which can be further developed, and thus are suitable for adjudication. A series of standards have been developed by different courts worldwide, which enable cases involving ESC rights to be adjudicated.

Some of the most important aspects of the justiciability of ESC rights that have been examined in this chapter include:

- definition of a core content or minimum core duties;
- distinction between duties of immediate effect and duties related to the progressive realization of ESC rights (which in turn offers grounds for the prohibition of retrogressive measures);
- assessment of the 'reasonableness', 'adequateness' and 'proportionality' of the measures adopted by the State as a means to fully realize ESC rights, or when limiting ESC rights;
- distinction between duties to respect, duties to protect and duties to fulfil, which allow for a deeper understanding of the implications of ESC rights with regard to State and third-party action (or inaction);
- application of the principle of equality and of the prohibition of discrimination in upholding ESC rights; and
- obligation to guarantee procedural aspects of ESC rights.

The content of ESC rights can be defined through statutes and regulations. At the same time, the task of assessing compliance with duties emanating from ESC rights can be performed by the judiciary.

Chapter 4 – Defining the content of ESC rights III: The indivisibility of human rights in practice: indirect protection of ESC rights through civil and political rights

This chapter will explain how courts have a long tradition of indirectly guaranteeing ESC rights, by interpreting civil and political rights as encompassing certain aspects of ESC rights.

Despite doubts cast on whether ESC rights are justiciable governments have repeatedly recognized and accepted that all human rights are interdependent and indivisible and therefore should be judicially protected. This is particularly well-developed where violations of ESC rights are linked to violations of civil and political rights. Duties stemming both from civil and political rights and ESC rights often overlap and thus the traditional acceptance of the justiciability of civil and political rights can also be an indirect channel for the protection of ESC rights.

Where, in some jurisdictions, effective adjudication of ESC rights is limited or non-existent, the indirect protection of ESC rights has been made possible through the judicial application of duties deriving from civil and political rights where those duties are closely interrelated to ESC rights obligations.

This strategy may have limitations – not all aspects of ESC rights can be framed in terms of civil and political rights. The point is, however, that duties arising out of ESC rights can be justiciable, even if procedural limitations require violations to be 'translated' in terms of civil and political rights. The following examples will help to clarify this point.

The right to health and civil and political rights protection

Judicial protection of the right to health has been achieved in different legal systems through:

- the right to life;
- the right to be free from torture or cruel, inhuman and degrading treatment; and
- the right to the respect of private and family life.

The Indian Supreme Court, ruling on the basis of the constitutional right to life, decided that it encompasses access to primary health care, at least in cases of

emergency.[152] The Colombian Constitutional Court furthered its trend of judicial activism in matters regarding ESC rights by deciding that ESC rights were justiciable when connected with a fundamental right enshrined by the Constitution. That Court has asserted in numerous cases, for example, that failure to provide access to health care services may entail a violation of the right to life.[153] The Inter-American Court of Human Rights has followed a similar path. Within its broad interpretation of the right to life, which includes not only negative obligations, but also positive obligations, the Inter-American Court has found, in a number of cases, that failure to provide severely marginalised populations with access to basic health care services amounts to a violation of the right to life under the American Convention on Human Rights.[154]

In the case of *D v. the United Kingdom*,[155] the European Court of Human Rights stressed the connection between the maintenance of health care services and the prohibition on cruel, inhuman and degrading treatment. The Court held that deportation of a prison inmate who was benefiting from an HIV treatment to a country where such treatment was not available amounted to a violation of the right to be free from inhuman or degrading treatment or punishment under the ECHR.[156]

In some cases, the European Court has also held that a failure on the part of the State to prevent environmental conditions that can be hazardous to health may amount to a violation of the right to privacy and family life.[157]

The right to housing and civil and political rights protection

The right to housing has also been protected by drawing analogies with certain civil and political rights. The European Court of Human Rights has held that forced evictions,[158] forced displacements and destruction of homes,[159] and the exposure of

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152 See Supreme Court of India, *Paschim Banga Khet Majoor Samity and others v. State of West Bengal and another* (1996) 4 SCC 37, AIR 1996 Supreme Court 2426, June 5, 1996.

153 See Colombian Constitutional Court, cases *T-484/1992*, August 11, 1992; *T-328/1993*, August 12, 1993; *T-494/93*, October 28, 1993; *T-597/93*, December 15, 1993; *T-217/95*, June 23, 1995; among many others.

154 See Inter-American Court of Human Rights, *Instituto de Reeducación del Menor v. Paraguay*, September 2, 2004, paras. 147-148, 156, 159-161, 166, 172-173 and 176; *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, paras. 161-169, 172 and 175; *Sawhoyamaxa Indigenous Community v. Paraguay*, March 29, 2006, paras. 152-155, and 167-178.

155 European Court of Human Rights, *D. v. the United Kingdom*, May 2, 1997.

156 See European Court of Human Rights, *D. v. the United Kingdom*, May 2, 1997, paras. 51-53.

157 See, for example, European Court of Human Rights, *López Ostra v. Spain*, December 9, 1994, paras. 51, 56-58; *Guerra and others v. Italy*, February 19, 1998, para. 60; *Fadeyeva v. Russia,* June 9, 2005, paras. 94-105, 116-134.

158 See, for example, European Court of Human Rights, *Connors v. the United Kingdom*, May 27, 2004, paras. 85-95; *Prokopovich v. Russia*, November 18, 2004, paras. 35-45.

159 See, for example, *Aakdivar and others v. Turkey*, September 16, 1996, para. 88; *Cyprus v. Turkey*, May 10, 2001 (rights of displaced persons, paras. 174-175); *Yöyler v. Turkey*, May 10, 2001, paras. 79-80; *Demades v. Turkey*, October 31, 2003, paras. 31-37 (Article 8); *Selçuk and Asker v. Turkey*, April 24, 1998, paras. 86-87; *Bilgin v. Turkey*, November 16, 2000, paras. 108-109; *Ayder v. Turkey*, January 8, 2004, paras. 119-121;

housing to unhealthy environmental conditions[160] may amount to a violation of the right to privacy, family life and home, and to a violation of the right to property,[161] and even to inhuman and degrading treatment.[162]

Similarly, the Human Rights Chamber for Bosnia and Herzegovina has protected the right to housing in cases of forced evictions and failure to obtain compensation for house confiscations. This was achieved by finding violations of Article 8 of the ECHR (the right to respect for private and family life, home and correspondence)[163] and Article 1 of Protocol 1 to the ECHR (the right to peaceful enjoyment of possessions).[164]

In the same vein, the Inter-American Court of Human Rights has decided that forced evictions and displacements, and the destruction of homes constitute a violation of the right to property,[165] the right to freedom from interference with private life, family, home and correspondence,[166] and the freedom of residence and movement.[167]

Moldovan and others (2) v. Romania, July 12, 2005, paras. 105, 108-110.

160 See, for example, European Court of Human Rights, *López Ostra v. Spain*, December 9, 1994, paras. 51, 56-58; *Guerra and others v. Italy*, February 19, 1998, para. 60; *Hatton and others v. the United Kingdom*, October 2, 2001, paras. 99-107; *Taskin and others v. Turkey*, November 10, 2004, paras. 115-126; *Moreno v. Spain*, November 16, 2004, paras. 60-63; *Fadeyeva v. Russia,* June 9, 2005, paras. 94-105, 116-134.

161 See, for example, European Court of Human Rights, *Aakdivar and others v. Turkey*, September 16, 1996, para. 88; *Cyprus v. Turkey*, May 10, 2001 (rights of forcefully displaced persons, paras. 187-189); *Yöyler v. Turkey*, May 10, 2001, paras. 79-80; *Demades v. Turkey*, October 31, 2003, para. 46; *Xenides-Arestis v. Turkey*, December 22, 2005, paras. 27-32; *Selçuk and Asker v. Turkey*, April 24, 1998, paras. 86-87; *Bilgin v. Turkey*, November 16, 2000, paras. 108-109; *Ayder v. Turkey*, January 8, 2004, paras. 119-121. In *Oneryildiz v. Turkey*, November 30, 2004, the Court decided that the applicant's proprietary interest in a precarious hut built irregularly in State-owned land was of a sufficient nature to be considered a 'possession' in the sense of Article 1 of Protocol Nº 1.

162 European Court of Human Rights, *Yöyler v. Turkey*, May 10, 2001, paras. 74-76; *Selçuk and Asker v. Turkey*, April 24, 1998, paras. 77-80; *Bilgin v. Turkey*, November 16, 2000, paras. 100-104; *Moldovan and others (2) v. Romania*, July 12, 2005, paras. 111, 113-114.

163 See, for example, the Human Rights Chamber for Bosnia and Herzegovina, CH/00/5408, *Mina Salihagic v. The Federation of Bosnia and Herzegovina*, May 11, 2001 (violation of Article 8 of the European Convention for threatened eviction); CH/02/9040, *Nedeljko Latinovic v. Republika Srpska*, January 10, 2003 (violation of Article 8 of the European Convention for continuation of eviction threats); CH/02/9130, *Stana Samardzic v. Republika Srpska*, January 10, 2003 (violation of Article 8 of the European Convention for continuation of eviction threats).

164 See, for example, Human Rights Chamber for Bosnia and Herzegovina, CH/00/5408, *Mina Salihagic v. The Federation of Bosnia and Herzegovina, May* 11, 2001 (violation of Article 1 of Protocol 1 to the European Convention for threatened eviction); CH/98/166, *Omer Bjelonja v. the Federation of Bosnia and Herzegovina*, February 7, 2003 (violation of Article 1 of Protocol 1 to the European Convention for failure to obtain compensation for confiscation of house); CH/01/7224, *Milenko Vuckovac v. the Republika Srpska*, February 7, 2003 (violation of Article 1 of Protocol 1 to the European Convention, for threats of eviction).

165 See Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, July 15, 2005, paras. 127-135; *Ituango Massacres v. Colombia*, July 1, 2006, paras. 175-188.

166 See Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, July 1, 2006, paras. 189-199.

167 See Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, July 15, 2005, paras. 107-121; *Mapiripán Massacre v. Colombia*, September 15, 2005, paras. 168-189; *Ituango Massacres v. Colombia*, July 1, 2006, paras. 206-253.

Box 7. The Supreme Court of India, the right to livelihood and the protection against forced eviction

Declaring the right to livelihood an equally important facet of the right to life, the Supreme Court of India has extensively interpreted the right to life. In *Olga Tellis* the Court declared that the right to life includes a right to livelihood *(Olga Tellis et. al. v. Bombay Municipal Corporation et. al.,* July 10, 1985*)*. According to the Court, "the sweep of the right to life conferred by Article 21 [of the Constitution of India] is wide and far reaching. (...) An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live."

The case concerned the eviction of pavement dwellers. The Court pointed out: "Evidently, they [*pavement dwellers*] choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life.... Two conclusions emerge... one, that the right to life which is conferred by Article 21 includes the right to livelihood and two, that it is established that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood."

The right to education and civil and political rights protection

The Inter-American Court of Human Rights has held in a number of cases that the special measures of protection afforded to children by the State (Article 19 of the American Convention on Human Rights) includes the provision of education.[168] In one particular case, *Yean and Bosico*,[169] the Court held that, by failing to provide a child with a name and a nationality, as a result of discriminatory obstacles imposed

168 See Inter-American Court of Human Rights, *Instituto de Reeducación del Menor v. Paraguay*, September 2, 2004, paras. 149, 161 and 174; *Yakye Axa Indigenous Community v. Paraguay*, June 17, 2005, paras. 163, 165, 167 and 169; *Sawhoyamaxa Indigenous Community v. Paraguay*, March 29, 2006, paras. 167, 168, 170, 177 and 178.

169 See Inter-American Court of Human Rights, *Case of the girls Yean and Bosico v. Dominican Republic*, September 8, 2005, para. 185,

on her registration, the State breached her right to education, and thus also failed to comply with its duties of special protection of children.

The right to social security and civil and political rights protection

In a number of jurisdictions the right to social security and to social assistance have been linked to the right to property. The European Court of Human Rights, for instance, has established that social security and social assistance payments (both 'contributory' and 'non-contributory') are protected by the right to peaceful enjoyment of one's possessions, enshrined by Article 1 of Protocol 1 to the ECHR.[170] Similarly, the Inter-American Court of Human Rights considered that social security payments were protected by the right to property enshrined in Article 21 of the American Convention on Human Rights.[171]

Trade union rights and the right to work and civil and political rights protection

In all the main civil and political rights texts, the right to form and to join trade unions is explicitly part of the right to freedom of association. On a number of occasions the European Court of Human Rights has protected the right to form and join trade unions by applying Article 11(1) of the ECHR.[172] Similarly, the Inter-American Court

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170 See, for example, European Commission of Human Rights, *Müller v. Austria*, Commission's admissibility decision, December 16, 1974, which decided that the duty to contribute to social security may be covered by Article 1 of Protocol 1); *G. v. Austria*, Commission's admissibility decision, May 14, 1984 (old age pension may be covered by Article 1 of Protocol 1); European Court of Human Rights, *Gaygusuz v. Austria*, September 16, 1996 (right to emergency assistance covered by Article 1 of Protocol 1, para. 41); *Skorkiewicz v. Poland*, admissibility decision, June 1, 1999, (rights stemming from paying contributions to social insurance systems covered by Article 1 of Protocol N° 1, para. 1); *Domalewski v. Poland*, June 15, 1999, admissibility decision (rights stemming from the payment of contributions to the social insurance system, in particular the right to derive benefits from such a system –for instance in the form of a pension– covered by Article 1 of Protocol N° 1, para. 1); *Koua Poirrez v. France*, September 30, 2003 (right to emergency assistance covered by Article 1 of Protocol 1, para. 37); *Willis v. the United Kingdom*, June 11, 2002, (right to a widow's payment and a widowed mother's allowance covered by Article 1 of Protocol 1, paras. 32-36); *Azinas v. Cyprus*, June 20, 2002 (right to a pension covered by Article 1. of Protocol 1, paras. 32-34); *Wessels-Bergervoet v. the Netherlands*, June 4, 2002 (right to old-age pension covered by Article 1 of Protocol 1, para. 43); *Buchen v. the Czech Republic*, November 26, 2002 (retirement pension rights covered by Article 1 of Protocol 1, para. 46); *Van den Bouwhuijsen and Schuring v. the Netherlands*, December 16, 2003 (benefit pursuant to a national insurance scheme covered by Article 1 of Protocol 1); *Kjartan Asmundsson v. Iceland*, October 12, 2004 (right to a contributory pension is covered by Article 1 of Protocol 1, para. 39); *Pravednaya v. Russia*, November 18, 2004 (a claim concerning a pension covered by Article 1 of Protocol 1, if it is sufficiently established to be enforceable, para. 38); *Stec and others v. the United Kingdom*, admissibility decision by Grand Chamber, July 6, 2005 (solving controversy about the application of Article 1 of Protocol 1 to non-contributory benefits: non-contributory benefits covered by Article 1 of Protocol 1, paras. 49-56); *Macovei and Others v. Moldova*, April 25, 2006 (annuity pensions obtained by virtue of final judgments covered by Article 1 of Protocol 1, para. 49); *Pearson v. the United Kingdom*, August 22, 2006 (pension covered by Article 1 of Protocol 1, para. 21).

171 See Inter-American Court of Human Rights, *"Five Pensioners" v. Peru*, February 28, 2003, paras. 93-121.

172 Article 11(1) of the ECHR states that "Everyone has the right to freedom of peaceful assembly and to freedom

of Human Rights has protected this right through the application of Article 17 of the American Convention of Human Rights, which enshrines freedom of association.[173]

In turn, the rights to work and to fair conditions of work have been protected through the prohibition of slavery, servitude and forced labour. The European Court of Human Rights, for instance, considered that Article 4 of the European Convention, which forbids both slavery and servitude, and forced or compulsory labour, requires positive obligations from the State. It found France to have breached these duties by failing to provide adequate protection for a foreign minor living in conditions of exploitation.[174] Similarly, the Inter-American Court of Human Rights interpreted Article 6(2) of the American Convention on Human Rights, which also forbids forced or compulsory labour, in the light of ILO Convention 29, and found the respondent State in violation of its duties. It held that it had acted in complicity with paramilitary forces who had forced 17 peasants to drive stolen cattle for them.[175] The African Commission on Human and Peoples' Rights has also considered cases in a similar way.[176]

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of association with others, *including the right to form and to join trade unions for the protection of his interests*" (emphasis added). See, for example, European Court of Human Rights, *National Union of Belgian Police v. Belgium*, October 27, 1975, paras. 38-40; *Swedish Engine Drivers' Union v. Sweden*, February 6, 1976, paras. 37, 39-41; *Schmidt and Dahlström v. Sweden*, February 6, 1976, paras. 33-34; *Wilson & the National Union of Journalists and others v. the United Kingdom*, July 2, 2002, paras. 41-48*; Tüm Haber Sen and Çinar v. Turkey,* February 21, 2006, paras. 28-40; *Demir & Bakyara v. Turkey*, November 21, 2006, paras. 28-46 (where the Court makes clear that collective bargaining may constitute an inseparable part of freedom of association in the labour context – see paras. 34, 35 and 36).

173 See Inter-American Court of Human Rights, *Baena Ricardo et. Al. (270 workers v. Panama),* February 2, 2001, paras. 154-173. The Court read Article 16 of the American Convention in the light of the ILO Constitution, and took into consideration the jurisprudence of the ILO Labour Freedom Committee and Committee of Experts on the Application of Agreements and Recommendations.

174 See European Court of Human Rights, *Siliadin v. France*, July 26, 2005, paras. 82-149. The Court found the situation in which the minor lived – which included 15 hours of unpaid work with no leave or holidays, passport retained, unfulfilled promises of regularization of her migratory situation by the family who 'employed' her – to constitute "forced labour" (paras. 113-120, resorting to ILO Convention 29 in order to define the term) and "servitude" (paras. 121-129). The case can also be seen as a case of protection against child labour. It may be recalled that the elimination of forced and compulsory labour and the abolition of child labour are two of the four rights and principles included in the list of so-called "fundamental principles and rights at work" by the International Labour Organization. See International Labour Organization Declaration on Fundamental Principles and Rights at Work (1998).

175 See Inter-American Court of Human Rights, *Ituango massacres v. Colombia*, July 1, 2006, paras. 154-168.

176 See African Commission on Human and Peoples' Rights, *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98 (2000), May 11, 2000, paras. 132-135.

The relationship between basic welfare services and civil and political rights

Standards for the provision of basic welfare services have also been derived from civil and political rights. For example, courts have held that minimum standards in relation to the adequacy of educational services include:

- the right to be free from cruel, inhuman or degrading punishment;[177]
- the prohibition of discrimination;[178] and
- the right to the free development of personality.[179]

The provision of mental health services has also prompted a number of cases regarding:

- the right to personal liberty;[180]
- the right to respect for private life and correspondence;[181]
- the right to life;
- the right to personal integrity;
- the right to be free from torture and degrading treatment;[182] and
- the prohibition on discrimination

In another area, access to sexual and reproductive health care services has been the subject of jurisprudence under civil and political rights standards. For example, in *Llantoy Huaman v. Peru*,[183] the UN Human Rights Committee ruled that State failure

177 See European Court of Human Rights, *Campbell and Cosans v. the United Kingdom*, February 25 1982, where the Court found that the existence of corporal punishment as a disciplinary measure in a school violates the parent's right to ensure education and teaching according to their religious and philosophical convictions (paras. 33-38), and that the suspension of a student for his refusal to accept that he receive or be liable to corporal chastisement amounts to a denial of the right to education (para. 41).

178 For instance, see the aforementioned US Supreme Court case of *Brown v. Board of Education*, and the Inter-American Court of Human Rights case of *Yean and Bosico v. Dominican Republic*, para. 185.

179 See, for instance, the aforementioned Colombian Constitutional Court cases *T-065/93*, *T-211/95, T-377/95, T-145/96, T-180/96, T-290/96, T-667/97* and *T-580/98*.

180 See European Court of Human Rights, *Winterwerp v. the Netherlands*, October 24, 1979, paras. 60-67; *X v. the United Kingdom*, November 5, 1981, paras. 49-62; *Luberti v. Italy*, February 23, 1984, paras. 31-37; *Megyeri v. Germany*, May 12, 1992, paras. 22-27; *Johnson v. the United Kingdom*, October 24, 1997, paras. 58-68 and *Storck v. Germany*, June 16, 2005, paras. 89-113.

181 See European Court of Human Rights, *Herczegfalvy v. Austria*, September 24, 1992, paras. 85-92, 94.

182 See Inter-American Court of Human Rights, *Ximenes Lopes v. Brazil*, July 4, 2006, paras. 119-150.

183 See Human Rights Committee, *Karen Noelia Llantoy Huamán v. Peru*, Communication No 1153/2003, October 24, 2005, paras. 6.3, 6.4 and 6.5. For a comment on this case, see Pardiss Kebriaei, "UN Human Rights

to provide an abortion when it is legal, thus forcing a minor to carry a pregnancy to term, even if the foetus would not survive, amounted to a violation of the rights to privacy, to be free from cruel and degrading treatment, and to the special measures to protect children. The European Court of Human Rights has come to similar conclusions, in a case concerning the failure to secure access to legal abortion services in Poland.[184]

Box 8. Indirect Protection of ESC rights through Civil and Political Rights

Invoked Civil and Political Rights	Protected ESC rights
Right to Life	Rights to Health, Food, Water, Education
Freedom from Torture/Degrading Treatment	Rights to Health, Housing
Right to Private/Family Life and Home	Rights to Health, Housing
Right to Property	Right to Social Security, Housing, Collective Right to Ancestral Land of Indigenous People
Protection of the Child	Rights to Health, Food, Education
Freedom of Movement/Residence	Right to Housing, Collective Right to Ancestral Land of Indigenous People
Freedom of Association	Right to Form and Join Trade Unions, Rights to Collective Bargaining
Freedom from Forced/Compulsory Labour	Right to Work/ to Fair Conditions of Work

Committee Decision in [K.L.] v. Peru", 15 *Interights Bulletin*, N° 3 (2006), at p. 151.

184 See European Court of Human Rights, *Tysiac v. Poland*, March 20, 2007.

Chapter 5 – The proper role of courts in determining how social policies comply with legal norms

Another important set of objections to the judicial enforceability of ESC rights relates to the 'separation of powers' doctrine. The argument is that, while ESC rights establish legitimate goals to be complied with by a State, the fulfilment of these should be left to the discretion of the political authorities, (the executive and legislative branches of the State) and not be subject to review by or interference of judges. Some criticisms stress that judges lack practical legitimacy to implement ESC rights, while others question the ability of judges to adjudicate violations of ESC rights and the suitability of the judicial hearing as a forum for discussing such matters. These two sets of arguments sometimes overlap. This chapter will focus on questions of legitimacy, and the following chapter will discuss the institutional capacity of the judiciary to cope with ESC rights adjudication.

The 'Separation of Powers' Argument

Arguments against judicial enforceability of ESC rights based on the concept of the 'separation of powers', rely upon a certain concept of the proper distribution of functions between the judiciary and the political branches of the State. In essence, these arguments assert that decisions concerning ESC rights – such as decisions to prioritize assistance to certain groups or to further certain goals, to allocate budgetary resources or to design adequate measures to implement these rights – should be left to the executive and legislature, and not be subject to judicial review. According to these arguments, it is important to distinguish between the 'political' and 'legal' spheres, ESC rights are said to belong more in the `political` sphere, while civil and political rights offer a better 'legal' foundation as a basis for judicial adjudication.

As has already been considered, responsibility for the design and implementation of measures to comply with ESC rights ought to lie with the political branches of the State, as they should, to a great extent, in relation to civil and political rights. For example, responsibility for the design and implementation of a public policy that aims to eradicate torture or brutality in police investigations and create prison conditions respecting human dignity, also lie with the political branches of the State. Similarly, the establishment of a professional prosecution service, vital to the guarantee of a fair trial, is a matter for the executive and legislative branches of the State.

The issue is not whether the judiciary should have the leading role in the implementation of public policies intended to comply with constitutional or international ESC rights obligations. Such a proposition would be difficult to support. Rather, the fundamental question is what role the courts should have to supervise the implementation of these policies, according to constitutional, international human rights or legal standards.

In this regard, at least two related issues need to be explored. The first is how the boundaries between the 'legal' and the 'political' spheres have been constructed in different legal systems. There is no single approach to, or single definition of, what characterizes an issue as purely political, to the total exclusion of legal or judicial perspectives. The second has to do with the way in which the definition of the role of the judiciary (*vis-à-vis* the role of the political branches of the State) has been constructed in different legal systems – in particular at the constitutional level.

The 'legal' and the 'political' in rights-based jurisdictions

The implication of a distinction between the 'political' and the 'legal' spheres ignores the fact that these spheres are not mutually exclusive. The laws we have are the outcome of political choices and reflect a choice of certain political values such as the rule of law, democracy and respect for human rights. These are political choices aimed at preventing the practices of an autocratic regime or the unfettered exercise of power by political authorities.

Conversely, politics employs law as one of the means for its realization, so political decisions often take the form of legal rules or norms. In this broad sense, law is often a means through which political values are conveyed, and political ideas are often expressed through legislation. Thus, when judges apply law in judgments, they issue decisions that implement and execute the policies – and, as broadly understood, the political choices – enshrined in law.

Yet another feature of judicial decision-making which requires judges to make policy choices is the complexity of legal interpretation. The language of law is often uncertain:

- the terms it uses could be interpreted in a number of different ways;
- the nature and the structure of legal norms may be different (some scholars point, for example, to the differences between 'rules' and 'principles');
- the legal application of certain norms depends on their comparison and compatibility with other norms (this is the case in constitutional judicial review, but is also the case with other kinds of legal analysis); and
- gaps and contradictions in the legal order are not uncommon and need to be detected and resolved.

In this sense, judicial decisions are both 'legal' and 'political': they seek to apply an existing rule or principle, but judges also exercise discretion in choosing one possible interpretation and excluding others.

'Political questions'

Another and, to a certain extent overlapping, common use of the distinction between the 'political' and the 'legal' spheres is reflected in the constitutional doctrine, developed by the US Supreme Court and adopted in a number of legal systems, of judicial deference towards 'political questions'. Under this doctrine certain political decisions are reserved to the discretion of the political branches and exempted from judicial review. These are often referred to as 'technical decisions' or areas 'reserved to the discretion' of each branch of the State.

The continental administrative law tradition also distinguishes between 'legal' review, and review of 'opportunity, merits or convenience'. However, there are no 'essential' or 'absolute' features that make a particular issue 'political' or 'technical' or a 'matter of opportunity, merits or convenience', so the borderline between those kinds of questions and 'merely legal' questions is constantly shifting. In fact, an analysis of the application of the doctrine of 'political questions' offers a good example of the changeable character of the distinction. The list of 'political matters' exempted from judicial review in US constitutional law, and in many Latin American countries influenced by that tradition, has varied dramatically over the course of the last century: matters once considered to be 'political questions' are now dealt with by the courts and the judiciary has broadened its review powers over acts or omissions of the political branches.[185]

While the impact of the doctrine of 'political questions' on judicial review has been a deterrent in the past, courts in different jurisdictions are gradually overcoming its expansive effect. Constitutional and statutory rules offer standards which facilitate the evaluation, from a legal viewpoint, of public policy choices enshrined in regulations. Comparative examples are a good means to find adequate formulae by which courts can undertake such scrutiny, although it may take some time to develop criteria to properly apply these formulae. Interestingly, in a number of jurisdictions, the courts have rejected attempts by the executive branch to exempt itself from judicial control on the basis of the 'separation of powers' argument.[186]

The definition of the role of the judiciary

The boundaries between the 'legal' and the 'political' are not clear-cut, and judges undeniably make policy choices. Therefore, discussions about the role of the

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185 Matters previously considered 'political' which became 'judicially enforceable' form a large list, including: design of electoral districts, control of the exercise of powers exclusively attributed to a political branch, due process in case of impeachment and a number of foreign policy issues. In Argentina, the Supreme Court declared unconstitutional a constitutional amendment, because it breached the limits imposed by the statute which declared the need for an amendment. See Argentine Supreme Court, *Fayt, Carlos S.*, August 19, 1999. Similarly, Constitutional Court of South Africa, *Certification of the Constitution of the Republic of South Africa*, Case CCT 23/96, September 6, 1996.

186 A typical example is the argument of judicial interference in the administration's 'reserve zone', and on its alleged exclusive powers in the implementation of social policies.

judiciary in the enforcement of ESC rights will depend on the extent and nature of that role within the understanding of the division of powers, in light of the theory of democracy and the notion of the rule of law under a representative government.

There is a broad acceptance that, under a representative government, the legislature has the role of creating the law, the executive implements it, and the judiciary adjudicates cases on the basis of the existing law (i.e. interprets it).[187] This basic approach, however, does not logically exclude the possibility that judges can, and should, play a role in the enforcement of ESC rights that are enshrined in existing law. However, a number of additional issues should also be brought into consideration in order to fully understand the implications of arguing in favour of or against assigning judges any role in the enforcement of ESC rights.

Superior and inferior law: the hierarchical structure of legal systems

Legal systems are complex and multi-layered. The validity of laws and regulations depend on their conformity with superior layers of the legal system. Typically, statutes should be in line with the constitution, and administrative regulations in line both with legislative statutes and the constitution. Legal systems which provide for the direct incorporation of international law may even add higher legal layers with which to comply.

Regular metaphors used to describe the hierarchical structure of the legal system include the 'pyramid' and the 'staircase'. Such a hierarchical structure makes applying the law more complex. For example, the traditional role assigned to the judiciary, that of applying the law, may include making judgments about the validity and applicability of a particular law within the context of several superior layers of the legal system. Where there is a contradiction between superior and inferior laws or norms, the superior norm displaces the inferior. This role of the judiciary in making such decisions is typical of those legal systems which allow judges the function of constitutional review, and which also allow judicial control of the activity of the executive and the administration under statutory norms. It is meant to preserve the integrity and coherence of the legal system, and has traditionally been accepted in the area of civil and political rights. The same reasoning could be extended to the area of ESC rights.

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187 See, in general, the statements adopted at the International Commission of Jurists congresses and conferences on this matter: "Minimum conditions of a juridical system in which fundamental rights and human dignity are respected" (adopted in the Congress of Athens, 1955); "Basic requirements of representative government under the Rule of Law" (adopted in the Conference of Bangkok, 1965), "The legislature and the rule of law" (adopted in the Congress of Delhi, 1959), "Need for limitations on effective governmental powers" (adopted in the Congress of Delhi, 1959), "Human rights and government security" (adopted in the Conference of Lagos, 1961), "Control by the courts and the legislature over executive action" (adopted in the Congress of Rio, 1962), "Human rights and aspects of administrative law" (adopted in the Congress of Rio, 1962) and "Procedures utilized by administrative agencies and executive officials" (adopted in the Congress of Rio, 1962), all of them in International Commission of Jurists, *Human Rights and the Rule of Law: Principles and Definitions* (Geneva: International Commission of Jurists, 1966).

Judges also assess whether the 'political' branches act in conformity with the superior legal norms that govern their activity, and in particular, their power to create new rules. When political branches do what they are not allowed to do, or do not do what they are mandated to do, the legal system suffers from a 'defective construction', and judges have traditionally played (and should play) a role in re-establishing the rule of law, detecting legal 'inconsistencies' and 'gaps' and providing remedies for these 'defects'.

The judge's role in the implementation of ESC rights

In cases where different legal interpretations are possible, if duties or prohibitions regarding ESC rights are part of the legal system, and especially of the superior layers of the legal system, assigning judges a role in the enforcement of these norms is absolutely compatible with the traditional functions performed by the judiciary.

Even when the 'rule of judgment' is not fixed in detail by a legal rule, there are plenty of examples of legal standards – such as the aforementioned 'reasonableness', 'proportionality' or 'adequacy' principles – which are regularly applied by the judiciary in many areas. Finally, while political branches are often given a large margin of discretion, judges have also developed ways to assess State compliance with a legal standard or rule. These include taking into consideration the State's previous conduct in a given scenario, as was illustrated in chapter 3.

Different situations for adjudication in the field of ESC rights

The judicial enforcement of ESC rights may involve several situations; arguments of democratic legitimacy play different roles in each of them.

Application of and compliance with statutory provisions

Judges can and should certainly play a role in the executive's application of and compliance with statutory provisions.[188] As early as 1959, the following statement adopted by a rule of law conference organized by the International Commission of Jurists (ICJ) in New Delhi, on the subordination of the executive branch and the administration to the rule of law emphasized this point:

> *"In modern conditions and in particular in societies which have undertaken the positive task of providing welfare services for the community it is recognized that legislatures may find it necessary to delegate power to the executive or other agencies to make rules having a legislative character. The grant of such powers should be within the narrowest possible limits and should carefully*

188 The principle of judicial review of administrative activity is essential, especially in those cases where:

- the basis for administrative activity is provided by statutory provisions; and
- administrative action affects human rights.

define the extent and purpose of delegated legislation and should provide for the procedure by which it can be brought into effect. (...) To ensure that the extent, purpose and procedure appropriate to delegated legislation are observed, it is essential that it should be subject to ultimate review by a judicial body independent of the executive. (...) In general, the acts of the executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the courts (...) The judicial review of acts of the executive may be adequately secured either by a specialized system of administrative courts or by the ordinary courts. Where specialized courts do not exist it is essential that the decisions of ad hoc administrative tribunals and agencies, if created (which include all administrative agencies making determinations of a judicial character), should be subject to ultimate review by ordinary courts. (...) A citizen who suffers injury as a result of illegal acts of the executive should have an adequate remedy either in the form of a proceeding against the State or against the individual wrongdoer, with the assurance of satisfaction of the judgment in the latter case, or both. (...)."[189]

Later, in 1962, another rule of law conference convened by the ICJ in Rio de Janeiro adopted the following statement regarding control by the courts over executive and administrative action:

"1. Judicial control must be effective, speedy, simple and inexpensive.

2. The exercise of judicial control demands full independence of the judiciary and complete professional freedom of lawyers.

3. Judicial control over the acts of the executive should ensure that:

(a) the executive acts within the powers conferred by the constitution and such laws as are not unconstitutional;

(b) whenever the rights, interests or status of any person are infringed or threatened by executive action, such person shall have an inviolable right of access to the courts and unless the court be satisfied that such action was legal, free from bias and not unreasonable, be entitled to appropriate protection;

(c) where executive action is taken under a discretionary power, the court shall be entitled to examine the basis on which the discretion has been exercised and if it has been exercised in a proper an reasonable way and in accordance with the principles of natural justice;

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189 See International Commission of Jurists, "Need for and limitations of effective governmental powers", adopted at the Congress of Delhi, 1959, Committee II, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966), pp. 11-12.

(d) the powers validly granted to the executive are not used for a collateral or improper purpose.

4. *In establishing the purpose for which a power has been used it should be for a court to decide on evidence whether any claim not to disclose State documents is reasonable and justified.*

5. *When the infringement complained of is one affecting human rights, the courts should be entitled to take into consideration at least as an element of interpretation and as a standard of conduct in civilized communities the provisions of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations"*[190].

While judicial review is primarily concerned with executive and administrative abuse as a result of action, there is no reason not to extend the same rationale to violations of statutory duties which occur through inaction or failure to perform a required activity or provide a required service.[191]

In fact, a significant part of the comparative experience of judicial enforcement of ESC rights consists of cases where individuals or groups of individuals claim both protection from illegal administrative abuse as well as provision of benefits and services granted by statutory law, but which have been ignored, delayed or inadequately organized by the State. The logic of dealing with ESC issues in the language of rights, and not just of desirable goals, means translating policies into enforceable entitlements. Once this is done through the law, the duty-holder (which is usually, but not always, the executive power) should be held responsible for failing to comply with the relevant prohibitions and duties, that is, to deliver the services requested by statutory law.

Questions of democratic legitimacy do not seem to play a major role here: judicial review of the administrative application of statutory law stemming from the legislature could be seen as reinforcing, rather than conflicting with, democratic legitimacy. The adoption of a social/welfare agenda by a number of nation-states in the second half of the twentieth century was reflected in the expansion of the functions assigned to the executive, including social services such as health, housing, education, social security and social assistance services, which are necessary to individually satisfy ESC rights. Part of the role of courts – or of other independent bodies with judicial or quasi-judicial review powers – is, in this context, to ensure that the administration

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190 See International Commission of Jurists, "Control by the courts and the legislature over executive action. Judicial control", adopted in the Congress of Rio, 1962, Committee II A, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966), p. 15.

191 It has certainly been the position of the ICJ since the early 1960s that judicial review of administrative action should include all aspects of the Universal Declaration of Human Rights. The commitment to the Universal Declaration of Human Rights (UDHR) encompasses administrative infringements of both civil and political *and* ESC rights.

abides by the law that should govern its activities. If the law provides for rights or benefits, and the administration fails to deliver them, judicial enforcement of rights could be seen as a means to reinforce the democratic decision of the legislature, rather than as an invasion in the political sphere.[192]

Are courts equipped to enforce non-compliance with positive duties to guarantee ESC rights?

Constitutions and/or international human rights instruments (particularly where international law is directly applicable in the domestic sphere) impose positive duties on the legislative branch of the State. Where these duties are not complied with, such legislative omissions have frequently raised issues about the extent to which judicial review can be applied. In legal systems which allow for constitutional review and thus subject the powers of the democratically elected legislature to judicial control in terms of the duties and limits imposed by them, the rationale for judicial review of ESC rights would be exactly the same as for those cases concerning civil and political rights – that is, to guarantee constitutional supremacy.

There are also a number of arguments concerning the 'standard of judgment' to assess omissions and, most importantly, the kind of remedies the judiciary could put forward in cases of omission. The underlying suggestion here is that any judgment leading to concrete policy decisions when an omission has been asserted would amount to an attack by the judiciary on the competence of the legislature. But these issues should be treated distinctly. If the duties are stated in a relatively clear manner, or their content could be determined through means of interpretation such as the ones discussed in previous chapters, verifying legislative omissions should not be an insurmountable problem – judges are regularly in charge of verifying omissions on the basis of a number of different legal instruments, such as contract, statutes and administrative regulations.

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192 Limitations and duties imposed by human rights on the legislative power and proper judicial control of legislative action have been early concerns of the International Commission of Jurists. The following statement was adopted by the ICJ Congress of Delhi, in 1959: "Every legislature in a free society under the Rule of Law should endeavour to give full effect to the principles enunciated in the Universal Declaration of Human Rights"; "The legislature must (...) not impair the exercise of fundamental rights and freedoms of the individual [and] provide procedural machinery ("procedural due process") and safeguards whereby the abovementioned freedoms are given effect to and protected"; "[I]t is essential that the powers of the legislature be fixed and determined by fundamental constitutional provisions or conventions which (...) organise judicial sanctions enforcing the principles set out in this Clause [i.e. representative character of the legislature, monopoly of the legislature to enact general principles and rules as distinct from detailed regulation there-under, legislative control of the executive] and to protect the individual from encroachments on his rights under Clause III [i.e. non-discrimination, freedom of religion, freedom of elections, freedom of speech, assembly and association, prohibition of retroactive legislation, respect of fundamental rights and freedoms, procedural due process]. The safeguards contained in the constitution should not be indirectly undermined by devices which leave only the semblance of judicial control". See "The Legislature and the Rule of Law", adopted in the Congress of Delhi, 1959, Committee I, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966), pp. 9-10.

It is also accepted that political authorities have a 'margin of discretion'. This may result (as will be shown later) in greater judicial prudence and deference to decisions taken by the legislature, but should not imply a complete denial of the possibility of judicial review on the subject.[193]

Once the existence of a legislative omission has been verified, the question of an adequate remedy becomes an issue. It is often the case that in many complex matters regarding the provision of services that are needed to satisfy ESC rights, there is no single way of complying with a duty. Therefore, the role of judges in devising adequate remedies underscores a certain tension between the function of control assigned to the judiciary, and the primacy of the political branches in the adoption of public policies.

Different traditions and legal systems have attempted to resolve this tension in different ways. The responses range from the extensive judicial activism, where judges assume the functions regularly assigned to the legislative branch in cases of serious disregard of constitutional mandates, to a more deferential attitude, sometimes termed 'constructive' or 'constitutional dialogue', where the legislature is asked to act, but retains broad powers to discuss and adopt a solution it considers adequate to address the omission.

Partial omission or irregular compliance

As discussed above, governments tend to commit partial omissions, or may only partially comply with constitutional or human rights obligations or prohibitions. Judges ordinarily assess governments' compliance by measuring this against constitutional or statutory standards, such as reasonableness, adequateness, proportionality, equality/non-discrimination or non-retrogression.

Legislation regarding ESC rights may be – and in fact, in a number of jurisdictions, is – subjected to similar standards of scrutiny. Judicial challenges may assert the breach of a prohibition – such as is the case when addressing the prohibition of retrogression, or differentiation on a discriminatory basis[194] – or the failure to comply with a mandate – such as the insufficient or defective provision of a right or benefit.[195]

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193 See, for example, Constitutional Court of Hungary, decision 42/2000 (XI. 8.) AB, November 7, 2000 which held that while constitutional clauses impose on the State a duty to establish, maintain and operate a social security system and social security institutions in order to ensure that citizens may exercise their rights to benefits which they require to sustain themselves, it leaves the legislature relatively great liberty in determining the methods and degrees by which it enforces constitutionally-mandated State goals and social rights, and therefore does not entail a specific right "to have a place of residence".

194 The text of the ICESCR enshrines a number of prohibitions regarding particular rights. Article 13, for example, forbids the state from infringing upon the freedom parents have to chose their child's school, and forbids the state monopoly of educational services.

195 See, for example, the Constitutional Court of Latvia, case Nº 2000-08-0109, March 13, 2001, in which the Court considered the possibility that employers who avoid making contributions to social security funds violate the principle of solidarity. The Court found that the law allowing this was unconstitutional as it violated the right to social security of employees. See further, the Constitutional Court of Lithuania, case

Again, as in the previous case, one can differentiate between a judgment holding that legislation does not comply with a certain standard and the remedy adopted to overcome that situation. A number of remedies for incomplete or inadequate compliance with superior legal norms and standards by legislation can be found in different legal traditions and jurisdiction. These include:

- striking out clauses deemed to be illegal;
- extending rights or benefits to an illegally excluded class of beneficiaries;
- referring the question to the legislature for reconsideration under certain guidelines; and
- adopting a particular mandate when the identification of the concrete conduct to follow is possible.

'Checks and balances'

It is generally accepted that judges are vital for the guarantee of civil and political rights. Commonly, arguments justifying judicial review and judicial control of the administrative branches of the State, include:

- the mutual control of powers (often described as 'checks and balances');
- deference to the supremacy either of the constitution or of the law; and
- the protection of individuals and minorities whose rights could be overridden by majoritarian decisions.

Why should these arguments not also apply to ESC rights?

The supervision of State power has always been integral to the theory of democracy, and is deeply enshrined in the idea of the rule of law. The graphic metaphor of 'checks and balances' illustrates how and where branches of government supervise each other by different means. Amongst these, the judiciary clearly has a salient role, directed at monitoring the activity of the political branches in terms of their compliance with the limits and mandates that the law imposes on them. If a constitution or a statute imposes on the State duties regarding the effective delivery of ESC rights, it is hard to see why there should not be some kind of judicial oversight of these activities. The justification for a role for the judiciary in the enforcement of

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Nº 5/96, March 12, 1997, on the issue of the association of length of a person's period of social pension insurance with the actual payment of employer's contributions, and in which the Court found this violated the right to social assistance and was unconstitutional.

ESC rights could follow exactly the same criteria for judicial intervention in matters relating to the exercise of political power:

- control of the lawful application of that power by the political branches; and
- the protection of the rights of individuals and minorities granted by the constitution or the law.

In fact, there may be even stronger reasons to grant the judiciary a primary role, at least in the enforcement of a basic level of economic and social rights. The primary function of economic and social rights is to ensure the basic conditions of livelihood for the most vulnerable sections of the population. If part of the justification for an active role for the judiciary is the protection of the rights of vulnerable minority groups in society against abuse from the majority, it should be particularly important to promote – and not to deny – the participation of judges in the adjudication of ESC rights. Denying or limiting access to ESC rights affects democratic participation. Consequently, judicial supervision of their application could promote more effective access to democratic values.

Budget allocations and the degree of detail in judicial remedies

There are other objections to the involvement of the judiciary in the implementation of ESC rights. Judicial interference with decision-making and budgetary allocations in the field of social policies could be seen as raising issues of concern from a democratic standpoint. Such objections are sometimes taken as proof that ESC rights are distinct in nature, in constrast to civil and political rights. According to this line of reasoning, while civil and political rights are 'cheap' or costless rights, adjudication on the basis of ESC rights would result in wholesale policy-making and significant expenditure, essentially substituting the judiciary for democratically elected authorities.

A number of points in this argument need clarification. First, civil and political rights are neither particularly 'cheap' nor costless.[196] Decisions regarding civil and political rights also have costs – sometimes hefty costs. Political rights are translated into costly entitlements: the recognition and inscription of political parties and candidates, the granting of media space, the organisation of elections and voting scrutiny are all examples of expensive measures that need to be taken to ensure compliance with civil and political rights.

Breaches of civil and political rights lead to financial compensation, which by definition involves budgetary resources. A whole area of torts and administrative law

196 See our discussion on negative/positive rights in Chapter 1.

focuses on State liability, which is regularly assessed and adjudicated by courts and tribunals.

Civil and political rights may also require the adoption of legislation or regulations, which is not free of charge – it involves legal advice, time-consuming consultations, working time by advisors, legislators, regulators, etcetera. Such legislation and regulations need further implementation, which again requires budgetary allocations.

All decisions with budgetary outcomes imply, in a world of scarce resources, prioritization – so this argument not only applies to ESC rights, but to any right. Thus, the fact that adjudication has budgetary impacts has never been seen as a reason to deny the enforceability of civil and political rights, and the same argument should be made about ESC rights.

Degrees and details in judicial remedies

As in any form of litigation, it is possible to differentiate between the assessment of a breach of a duty, under the basis of a legal rule or principle, and the determination of the remedy to be adopted. A number of points require examination here. First, these issues are not directly related to the distinction between civil and political and ESC rights – they are rather linked to the degree of leeway that is granted to the political branches of the State.

Clearly defined acts or omissions that are required by a duty allow for clear judicial remedies without the need to consider a variety of policy choices: in matters of ESC rights, for example, when the benefit, or the kind of service, or the prohibition on the State is well defined, devising the remedy is not particularly difficult. Conversely, when the rule or judgment is clear – because the legal goal or standards are mentioned by the law – but the means through which the duties could be complied with are numerous, the determination of remedies may need some interaction between the judiciary and the political branches, and probably some deference by the judiciary.

It is also worth reflecting upon the determination of remedies in international human rights mechanisms. These are mainly devoted to hearing claims of violations of civil and political rights, such as the European human rights system, and the various UN treaty body mechanisms that allow victims to lodge complaints. While the determination of breaches of legal duties seems clear in both systems, the development and implementation of remedies is far less developed. This is especially true when it comes to those remedies aimed not at compensating the victim, but avoiding future repetition of a violation or putting State legislation or practice in line with its duties under the respective treaty. As a rule, Article 46 of the ECHR makes the State principally responsible for choosing the means through which it will implement the

Court's decision, under the supervision of the Council of Ministers.[197] The situation is similar in the UN treaty body complaint mechanisms. But that has never led to the conclusion that civil and political rights lack justiciability, or that international judicial or quasi-judicial complaint mechanisms for the adjudication of civil and political rights are unnecessary.

Judicial deference and the implementation of ESC rights

There are no absolute answers to these issues. However, judicial deference usually requires collaboration between the political branches and the judiciary, and good faith compliance with decisions of international courts or bodies. In the absence of this collaboration, or in the face of outright obstruction by the political branches, this would suggest a stronger justification for a more activist judicial approach.

At issue is not just the distinction between civil and political and ESC rights, but the degree of complexity of the cases before the judiciary. Individual cases where a breach of a relatively well-established duty is claimed are less complex, both in the context of civil and political *and* ESC rights. On the other hand, cases involving collective or massive impact, structural reform, absolute omissions, general policies not in line with a legal duty, defective organisation of a service, and other complex issues, may require a more careful approach by the judiciary. Some sort of interaction with the political branches will also be necessary in order to devise a clear mandate which could in turn be flexible enough for political authorities to take into account the number of different factors involved.

There are also empirical reasons to doubt the prospect of an outright takeover of legislative or regulatory functions by the judiciary if it is granted judicial review powers in matters of ESC rights. While these arguments are not definitive, they may indicate a certain trend in the way in which judges react when they are vested with power to review the activity of the political branches of the State.

Traditionally, the judiciary has been reluctant to review matters considered to be the domain of 'political' decision-making. Although the extent of this reluctance varies, judges tend to be reticent about adopting decisions that imply reviewing budgetary allocations, or which imply the design or implementation of public policies, group or goal priorities, in the absence of a firm legal basis to do so. Conversely, the margin of discretion granted to the political branches has tended to be broader – and thus, the space for judicial control narrower – when a decision corresponds to a field of

197 See the ECHR, Article 46: "Binding force and execution of judgments: The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution". The judgments of the European Court of Human Rights restrict themselves to declaring the existence of a violation, and to awarding monetary damages or to declaring that the judgment constitutes just satisfaction. Thus, Article 46(1) practically means that measures to ensure non-repetition of the violation are left to the State's discretion.

technical expertise which is considered to be part of their sphere of knowledge and alien to the judiciary.

As will be discussed in the next chapter, procedural safeguards, the insufficiency of information produced in the context of a trial, or the potential failure of over-demanding remedies, may also create disincentives for over-zealous judicial activism. Thus, the risk of the judiciary actively replacing the political branches in their functions without any firm legal foundation seems – at least from a historical perspective – to be largely overstated. If the judiciary has tended to favour self-restraint and deference to the political branches when there is no firm legal basis to intervene, it is not clear why this trend would not also apply to adjudication in the field of ESC rights.

Box 9. Courts, separation of powers and ESC rights

Courts from different jurisdictions have been confronted with arguments regarding the separation of powers, challenging their ability to adjudicate on ESC rights. Here are some examples of how courts have articulated their role in this field:

- The Constitutional Court of South Africa confronted a challenge to the inclusion of ESC rights in the South African constitution, allegedly breaching the principle of the separation of powers. The Court said:

> *"The second objection was that the inclusion of these rights in the [Constitution] is inconsistent with the separation of powers [...] because the judiciary would have to encroach upon the proper terrain of the legislature and executive. In particular the objectors argued it would result in the courts dictating to the government how the budget should be allocated. It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters.*
>
> *"However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the*

separation of powers." [Constitutional Court of South Africa, *Case CCT 23/96, Certification of the Constitution of the Republic of South Africa*, September 6, 1996, para. 77]

- The Constitutional Court of Colombia heard a case where the general failure of State authorities to provide for the vaccination of children was discussed. The Court concluded:

  "The State's obligations in the case of rights protecting negative liberty are generally defined in terms of abstention or non-interference with the individual. Restrictions are only permissible when provided by the law, are proportionate and reasonable, and do not affect the core of these rights. On the other hand, the promotion of substantive equality, including protection of those who suffer discrimination and marginalization, requires positive action, not simply abstention, from the State. In this case, from a constitutional viewpoint, the State's abstention is illegal.

  "The negligent abstention by the State, its passivity regarding the marginalized and discriminated groups of society, does not meet its duty to put in place an equitable social order –which constitutes the basis for the legitimacy of the Welfare State under the rule of law. It also fails to comply with the constitutional provision proscribing marginalization and discrimination. In these circumstances, the role of the judiciary is not to replace public authorities which are liable for this abstention. It is rather to order the State to fulfill its duties, where it is clear that failure to act violates a fundamental constitutional right." [Constitutional Court of Colombia, *Decision (Sentencia) SU-225/98*, May 20, 1998, para. 29][1]

- The Supreme Court of India concluded a case where it found that the State failed to provide emergency medical treatment as required by the Constitution. After detailing the standards that medical services should comply with in order to cope with emergency cases, the Court held that:

  "It is no doubt true that financial resources are needed for providing these facilities. But at the same time it cannot be ignored that it is the constitutional obligation of the State to

1 Unofficial translation.

> *provide adequate medical services to the people. Whatever is necessary for this purpose has to be done. In the context of the constitutional obligation to provide free legal aid to a poor accused this Court has held that the State cannot avoid its constitutional obligation in that regard on account of financial constraints."* (See *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627 at p. 631 (AIR 1981 SC 928 at p. 931). "*The said observations would apply with equal, if not greater, force in the matter of discharge of constitutional obligation of the State to provide medical aid to preserve human life. In the matter of allocation of funds for medical services the said constitutional obligation of the State has to be kept in view. It is necessary that a time bound plan for providing these services should be chalked out keeping in view the recommendations of the Committee as well as the requirements for ensuring availability of proper medical services in this regard as indicated by us and steps should be taken to implement the same."* [Supreme Court of India, *Paschim Banga Khet Samity v. State of West Bengal*, Case No. 169, May 6, 1996, para. 16]

Chapter 6 – Procedural challenges and solutions

Many of the objections to the judicial enforceability of ESC rights have already been examined by this report. This chapter will specifically address the arguments that the nature of judicial review renders courts ill-suited to identify and enforce breaches of ESC rights. In particular, this chapter will tackle issues including:

- the professional capacity of judges to confront and solve conflicts around social, economic and cultural issues;
- doubts about the institutional capacity of the judiciary to enforce decisions regarding ESC rights within the political branches of government; and
- the inadequacy of the judicial hearing as a forum for deciding conflicts that involve policy-making in ESC rights issues.

Arguments that claim that the courts are inappropriate venues for determining ESC rights issues are based on a common misapprehension. They presuppose that every ESC rights case is complex, involving large numbers of actors, intricate or expensive evidentiary issues, important financial impacts or potential conflicts between different branches of the State or government departments.

These assumptions are incorrect, many ESC rights cases are not so complex. Comparative judicial experience in this field shows that, in many jurisdictions, an important percentage of ESC rights cases decided by the judiciary are individual claims, involving both positive and negative obligations. In these cases, most of the arguments about the alleged institutional incapacity of the judiciary to deal with ESC rights are not applicable – decisions in fields such as health, labour, housing, education and social security do not differ greatly from decisions concerning any other State activity which may affect individuals.

It is true, however, that complex cases can pose problems when it comes to enforcing certain rights through litigation. The potentially massive numbers of plaintiffs, the claim for structural reforms as a remedy, the demands for new budgetary allocations or extended remedial phases which require constant monitoring. All these may be problematic in comparison to simple, individual, traditional litigation.

Then again, complex litigation is neither a necessary feature of ESC rights, nor exclusively linked to ESC rights. There are plenty of examples in international and domestic case law of complex litigation regarding civil and political rights – such as institutionally enforced racial discrimination, violation of prisoners' rights, violation of the rights of people committed to mental health facilities, and many others. There are also examples of complex, massive litigation in the fields of property and commercial law – such as consumer law, antitrust law, bankruptcy law, tax law – or in relatively new fields of law, such as environmental law. What determines the complexity of a case are factors such as the number of actors involved, the scope

of the violation, the extent of the required remedies. It is not the 'nature' of the rights involved that determine its complexity. Complex fraud and criminal trials are examples of how courts have to deal with intricate and difficult cases, often multi-jurisdictional as well as involving numerous defendants and witnesses.

Furthermore, even in situations which may require complex litigation to enforce rights, and even acknowledging the difficulties of complex litigation, it must be the case that judicial enforcement, as a guarantee for rights, is preferable to the absence of any kind of enforcement.

Lastly, arguments against the judiciary's ability to review cases concerning ESC rights may indicate inadequacies or limitations of judicial activity in some jurisdictions. But this is not an argument against judicial enforceability of ESC rights – or of any other rights – in complex cases, but a call for the reform of current judicial powers and available remedies.

The alleged professional incapacity of judges to confront and solve conflicts regarding social, economic and cultural issues

A common criticism of the justiciability of ESC rights focuses on the lack of knowledge of or expertise in social policy issues of judges, including complex technical understanding of health, education, food or housing. Consequently, it is said, that judges cannot be entrusted with the power to decide on these issues, which would be better left to the discretion of the political branches of the State.

In adjudicating cases relating to ESC rights, however, judges are not designing policies in these fields on the basis of their own initiative, but, as in any other field, they decide cases on the basis of existing rules – rules which are enshrined in constitutions, human rights treaties, statutes or regulations. If it is possible to determine the content of the duties that stem from ESC rights obligations, then the role of judges when adjudicating ESC rights cases would not differ from their role in any other case: that is determining whether a duty has been complied with by a duty-bearer. Judges are able to do this in many other fields that are often technically complex – such as telecommunications law, antitrust law, or environmental law. There seems to be no reason to grant judges the power to adjudicate in these fields, but not in fields such as health, education, housing or food.

Moreover, judges hear cases in a regulated framework that limits their discretion. Within this framework of trials or hearings, judges cannot just assess public policy at their will. Initially someone with *locus standi* (standing) needs to bring a claim. Judgments on complex technical issues could of course take into account the help of adequate expert testimony, as in any other field. Procedural rules, such as the imposition of the burden of proof, are safeguards against allegations of unsound or frivolous claims. When added to the deference given to State-created norms, these procedural rules call for judicial prudence before intervening in matters primarily

assigned to the political branches of the State, and are frequently a source for judicial self-restraint. The risk of unbound policy-making by judges in fields that go beyond their knowledge is far from the framework within which judges usually operate.

Finally, of course, the judgement is always subject to appeal. Thus ensuring, when matters reach the final court of appeal, all the issues have been fully aired and can be appropriately framed.

The alleged institutional incapacity of the judiciary to enforce ESC rights decisions on the political branches of the State

There are some serious arguments concerning the possible negative effects on the legitimacy of the judiciary if they adjudicate ESC rights but are unable to ensure that orders directed at the political branches are enforced. An extension of judicial powers in this area, even when well-intentioned, could actually undermine the legitimacy of the judiciary, if decisions taken are weak or impossible to enforce. This could then create false expectations for right-holders, diverting them from exerting pressure through political channels in order to have their claims heard. In fact, what these arguments highlight are weaknesses in the position of the judiciary vis-à-vis the political branches. These include:

- the lack of adequate guarantees regarding the enforcement of judicial orders directed at the political branches;
- the lack of judicial power to enforce the design and implementation of measures which require budgetary allocations; and
- the need for cooperation by the political branches of the State when it comes to turning judicial orders into concrete guarantees, benefits or entitlements.

These are legitimate concerns, and any serious strategy fostering litigation on ESC rights should be mindful of the existence and significance of these obstacles. But the same argument would apply to any decision regarding State obligations in any other field of law. The independence of the judiciary and compliance by political branches of the State with judicial orders are general preconditions for the adequate functioning of the judicial guarantee of rights – of any right, be it civil, political, economic, social or cultural – when State action or inaction is at issue.

In fact, compliance with unfavourable judicial decisions by the political branches is a component of the guarantee of a fair trial by an independent and impartial tribunal. Cases of non-compliance with judicial orders in any other field – especially in the instance of property rights of private contractors who engage in business with the State – has never led to doubt about the justiciability of rights, or that judicial protection of those rights in cases of violations is undesirable. The same idea of

the 'rule of law' requires good faith compliance with the law when an independent authority determines that legal duties have been breached.

Moreover, if compliance with judicial decisions by political authorities is desirable, and even a mandatory legal goal, serious commitment to it requires proper procedural mechanisms and guarantees – including, amongst others, sanctions against disobedience and contempt by public servants who fail to comply with judicial orders. The absence of these coercive powers represents a lacuna in the law, not a demonstration of the inability of the judiciary to enforce judicial decisions against the political branches of the State.

It should also be stressed that judicial enforcement of rights does not preclude right-holders from pursuing other forms of action in order to claim their rights. Political and judicial strategies are not necessarily in contradiction, and can actually reinforce each other. Where the need to establish a certain rule, or specify the content of a very general legal principle or obligation, is the priority, political strategies may be more advantageous than a judicial action without a firm legal basis on which to draw. But when the rule is already established, what right-holders need is legal tools that will force compliance, and not the re-negotiation of the rule. So the quest for well-suited judicial mechanisms is not necessarily a misguided one, and can actually reinforce previous political struggles or legal commitments that arose from them.

Procedural limitations and the inadequacy of some traditional procedural mechanisms for protecting social rights

Further objections to the justiciability of ESC rights relate to the inadequacy of the judicial hearing as a forum for discussing and devising public policy remedies in the areas of health, housing, social security or education. According to this line of argument, the narrow window offered by a court or tribunal hearing is ill-equipped to cope with complex public policy problems: procedural limitations regarding the object of judicial controversy, the limited number of participants and, generally, the limited amount of information that can be dealt with in a trial or hearing cannot grasp the complexity of planning and implementing public policies. Thus, litigation in the field of ESC rights would run the risk of distorting legitimate public policy and producing undesired outcomes – such as overturning prioritization decisions adopted on the basis of full information, interfering with the delivery of services, or altering the allocation of scarce resources previously decided by responsible political authorities.

The limits of traditional procedural mechanisms

While not every violation of ESC rights is collective or complex in nature, there is truth in these arguments when it comes to complex or structural reform litigation. This is not to say that protecting ESC rights through litigation is undesirable. In fact, one of the obstacles to the justiciability of ESC rights is the inadequacy of traditional

procedural mechanisms for protecting them when it comes to massive or collective violations.

Traditional rights-enforcement mechanisms were devised by the legal order within the paradigm of nineteenth-century property rights. The pre-eminent allocation of legal resources to property rights, referred to in chapter 2, not only affected the content of the legal curriculum, but also the design of apparently 'neutral' legal institutions, such as procedural mechanisms to guarantee rights. Thus, traditional judicial procedures have privileged individual lawsuits and narrow rules of standing related to individual grievances, and have been mainly developed to adjudicate conflicts between private individuals.

Despite this potential restriction inherent in the current structure of legal procedures, it must be stressed that the limitations of traditional individual lawsuits represent a problem relevant to any kind of massive or collective rights violation, and not only to those involving ESC rights. For example, violations of the civil rights of prisoners and of political rights are often collective violations, and require collective – not individual – remedies. Similarly, class actions in negligence claims can raise challenges for the traditional framework and how it guarantees the delivery of justice. It would be an odd position to arrive at whereby, because the nineteen-century model of justice cannot, as it is structured, easily adjudicate twentieth and twenty-first century rights, access to those rights is to be shelved, rather than re-examining the methods and mechanisms for the delivery of justice.

Administrative discretion

A further challenge, which needs to be addressed, is the absence of an adequate procedural framework for the judicial enforcement of ESC rights. This additional weak spot relates to the broad discretion granted to the political branches – and especially to the administration – in the implementation of social services. One of the features of this discretion has been the absence of causes of action or grounds of review in statutes regulating the provision of social services such as health care, education and housing. In many jurisdictions around the world; instead of giving content to the rights they are intended to regulate, these statutes mostly provide the administrative framework necessary for these services.

The inadequacies of court procedure mechanisms to deal with complex issues in the area of ESC rights

Some examples of the problems encountered in complex litigation on ESC rights might assist in illustrating the difficulties posed by the inadequacies inherent in a number of established procedures:

- Procedures designed for hearing individual grievances are not well suited to the resolution of collective claims, such as those involving group rights, massive rights violations or situations that require a collective remedy.

Certain requirements make it impossible to challenge measures that affect a whole group. These include the need to show a sufficient or exclusive individual interest in the case for the purposes of establishing standing (*locus standi*) or the limitation of remedies to those that address the concerns of the individual plaintiff, and the lack of collective representation mechanisms, which is characteristic of civil procedures in many countries. This is precisely the situation in many cases involving the enforcement of ESC rights.

- The adjudication of violations of ESC rights often requires, simultaneously, urgent satisfaction and ample proof. But these requirements can be mutually exclusive using traditional procedures. Constitutional actions injunctions and preliminary measures often impose a burden of proof on the complainant at the admissibility stage to produce evidence of a clear violation or probability of a violation, but thereafter keep the discussion of factual issues to a minimum. However, cases involving the violation of social rights often involve complex factual or legal problems, which require more extensive argument on factual issues and proof.

- Devising and implementing remedies in complex litigation may shift the weight of the procedure from the hearing to the remedial phase. But traditional procedures assume that the trial phase is the most important – and thus, devote most of the procedural regulations to this phase. The remedial phase is only ancillary, so little guidance is offered on adequate procedures to devise remedies and to monitor their implementation.

- The State in civil law systems can often have procedural advantages over private individuals. For example, the State has more time to respond to pleadings, it can bring its own administrative dossier as proof, and it has privileges that individuals do not have. Judgments against the State ordering the fulfilment of its positive obligations are often merely declaratory, do not come with sufficient procedural safeguards, and are regularly difficult to enforce, especially if they require structural reforms or long-term implementation. This may also raise problems of compliance and implementation: judgments that impose duties on the State may be postponed or subjected to merely cosmetic compliance.

Clearly all this can impose limitations on the judicial enforcement of ESC rights – and any other rights – when the violations are massive. However, it is not impossible to overcome the framework of lawsuits mainly designed for individual property conflicts by devising new procedures better suited to deal with the above-mentioned difficulties. The arguments about procedural mechanisms merely highlight a certain state of affairs.[198] Another way of looking at this could be that the current situation

198 A 'legal gap' which derives from the lack of plenitude in the legal order. See L. Ferrajoli, "El Derecho como Sistema de Garantías", in L. Ferrajoli, *Derechos y Garantías. La ley del más Débil* (Madrid: Trotta, 1999), p. 24.

violates *prima facie* the State's obligation to provide procedural remedies when enshrining fundamental rights, including ESC rights.[199] Indeed, these arguments actually call for imaginative and creative thinking on how to provide procedural mechanisms to enforce these rights.

Procedural reform and the lessons from the development of comparative law

To a certain extent, the contemporary evolution of procedural law has taken into account some of these difficulties, highlighting the need to adapt the old model of individual actions to new challenges, such as the collective incidence of some violations, or the need for urgent protection of fundamental legal rights before a violation takes place. Environmental, consumer and mass tort procedures have opened up new paths in this direction. Comparative law also offers many helpful examples, such as:

- class actions;
- collective *amparo*;
- new standards regarding preliminary measures (for example, the precautionary principle);
- the Brazilian *ação civil pública*, *mandado de segurança* and *mandado de injunção*; and
- *locus standi* for public prosecutors, the office of the Attorney General or Ombudsperson to represent collective complainants; *qui tam* actions.

New procedural arrangements which take into account the needs of collective or complex litigation can also help to overcome the limitations of individual lawsuits. They might tackle, for example, the complexities of involving multiple parties (such as representatives of different groups, or different branches of government), allowing all relevant information to be considered by the tribunal, providing an adequate framework to devise the required remedy, and ensuring continual monitoring of its implementation, especially when it involves a prolonged time-frame.

Different legal traditions have reflected, in one way or another, these trends. Class actions are part of the procedural heritage of common law countries, and public interest litigation has benefited from it. 'Abstract' constitutional review, detached from the need to prove an individual grievance, has been in place for more than fifty years in continental Europe, and has expanded, with variations, throughout the world. The relaxation of formalistic procedural requirements in order to consider

199 See, for example, CESCR, General Comment Nº 9, T*he domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), paras. 9-10.

serious violations of rights has also been a feature in countries like India, Colombia and Costa Rica. The broad constitutional review powers of the South African Constitutional Court are a good example of the development of that tradition.

Constitutional, legislative and judicial evolution in this field has been dramatic in some Latin American countries, such as Argentina, Brazil, Colombia and Costa Rica. In Argentina, the judicial development of a new constitutional action enshrined in the 1994 amendments to the Constitution, providing for a collective *amparo* through a direct interpretation of the constitutional provision, has been particularly creative. In Brazil, the use of a novel procedural mechanism called 'public civil action' (*ação civil pública*) to trigger judicial protection in environmental, consumer and occupational safety and health cases has become widespread since its regulation in 1985.[200] In Colombia, a number of new procedural mechanisms – namely, *acción de tutela* before the Constitutional Court, *acción popular* before ordinary courts, and *acción de cumplimiento* – have radically altered the possibilities for challenging State activities or omissions before the judiciary. In Costa Rica, a centralised and rather simplified *amparo* jurisdiction before the Constitutional Section of the Supreme Court has led to noteworthy results, including cases brought by children challenging educational decisions by school directors.

In India, one of the factors that led to the development of public interest litigation has been judicial insistence on the need to overcome formalistic procedural obstacles when a rights violation is massive and affects persons in a disadvantaged situation. This pre-eminence of material justice over procedural barriers has justified a flexible interpretation of procedural requirements such as standing (*locus standi*) or the formal requirements for the presentation of a judicial claim.[201] Indian courts have also devised a number of procedural mechanisms in order to overcome possible shortcomings: among them, appointing expert committees before taking a decision that may involve technical complexities, and securing the effectiveness of judicial orders by guaranteeing the court remains seized of a case when there is evidence of failure to comply with any remedies ordered.

Despite acknowledging the difficulties that each innovation brings with it, the doctrinal and institutional assessment of these new procedural mechanisms has

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200 See, for example, R. de C. Mancuso, *Açao Civil Pública* (São Paulo: Ed. Revista dos Tribunais, 1999), pp. 46–55; M.F.M. Leal, *Açoes Coletivas: História, Teoria e Prática*, (Porto Alegre: Sergio Fabris, 1998), pp. 187–200.

201 See, for example, Supreme Court of India, *The Mumbai Kamgar Sabha, Bombay v. M/S. Abdulbhai Faizullabhai and others*, AIR 1976 SCC 1455 (1976); *S. P. Gupta*, 1981 (Supp) SCC 87 (1981); *Upenda Baxi v. State of U. P. & ors.*, 1982 (1) SCC 84 [502], (1983), 2 SCC 308 (1986) 4 SCC 106, AIR 1987 191; *Sheela Barse v. Union of India and another* (1993) 4 SCC 204; High Court of Kerala (India), *In the Matter of: Prison Reform Enhancements of Wages of Prisoners etc.*, AIR Ker 261. See, generally, Sangueeta Ahuja, *People, Law and Justice. Casebook on Public Interest Litigation* (New Delhi: Orient Longman, 1997), T. I, *Introduction*, pp. 4-8; Siddarth Bawa, *Public Interest Litigation* (Delhi: New Era Law Publications, 2006), pp. 72-141 ; D.J. De, *New Dimensions of Constitutional Law* (Calcutta: Eastern Law House, 1991) pp. 8-21; Mamta Rao, *Public Interest Litigation. Legal Aid and Lok Adalats* (Lucknow: Eastern Book Company, 2nd edition, 2004), pp. 64-111 and 265-285.

been positive, and countries where they still have not been adopted are pushing for change. Many of the developments in this field today are promising. The fact that, both in the field of ESC *and* civil and political rights, the effect of purely *individual* cases may also lead political authorities to take general measures that can benefit *groups* of persons, beyond the individual interest of the plaintiff or petitioner, should not be underestimated.[202]

The standing of the State before domestic courts

The last issue to be addressed is the difficulty of executing orders against the State and, generally, the particular position of the State before domestic courts. In the continental administrative tradition there are certain procedural advantages for the State, which would be considered unjust or unfair in private suits. While some of these advantages can be justified, in many other cases complete discretion, lack of impartiality, breach of the 'equality of arms' principle and other features could be considered violations of due process, and may also require legislative reform and jurisprudential development.[203] Cases involving judicial review of the legal

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202 An important component of human rights (and constitutional) adjudication is that it does not only look backwards – thus providing relief for past violations – but also purports to avoid the continuation and repetition of the violations. Guarantees of non-repetition are an important component of the notion of reparation in the human rights field. The *Airey* case, decided by the European Court of Human Rights, offers a good example of this idea: the Court held that the existence of socio-economic barriers to access to justice – in the case, the need to pay a lawyer in order to obtain a judicially declared divorce – amounted to a violation of Article 6 (1) of the ECHR. The appropriate remedies to the violation found in the case did not only compensate the individual damage suffered by the victim, but required State action in order to modify the *status quo* and prevent future violations, thus benefiting a broader group of potential users of the Judiciary. See European Court of Human Rights, *Airey v. Ireland*, October 9, 1979, especially para. 26.

203 The subjugation of administrative action to the rule of law and to the requirements of due process – which, in turn, offers a basis for judicial review – has also been an early concern of the International Commission of Jurists. Some of the following statements are revealing:

> *"(…) Since [judicial] supervision [of administrative action] cannot always amount to a full re-examination of the facts, it is essential that the procedure of such ad hoc [administrative] tribunals and agencies should ensure the fundamentals of fair hearing including the right to be heard, if possible, in public, to have advance knowledge of the rules governing the hearing, to adequate representation, to know the opposing case, and to receive a reasoned judgments. Save for sufficient reason to the contrary, adequate representation should include the right to legal counsel. (…) Irrespective of the availability of judicial review to correct illegal action by the executive after it has occurred, it is generally desirable to institute appropriate antecedent procedures of hearing, enquiry or consultation through which parties whose rights or interests will be affected may have an adequate opportunity to make presentations so as to minimize the likelihood of unlawful or unreasonable executive action. (…) It will further the Rule of Law if the executive is required to formulate its reasons when reaching its decisions of a judicial or administrative character and effecting the rights of individuals and the request of a party concerned to communicate to him".*

See International Commission of Jurists, "Need for and limitations of effective governmental powers", adopted at the Congress of Delhi, 1959, Committee II, in International Commission of Jurists, *The Rule of Law and Human Rights: Principles and Definitions* (Geneva: International Commission of Jurists, 1966), pp. 12-13. See also "Human rights and aspects of administrative law", and "Procedures utilized by administrative agencies and executive officials", adopted in the Congress of Rio, in 1962, *Ibid.,* at pp. 19-22.

procedures established to grant, adjust or terminate labour rights, pensions, social security benefits and other ESC rights are not uncommon and have been the subject of litigation before international human rights bodies.[204]

204 See, for example, Inter-American Court of Human Rights, *Baena v. Panama*, February 2, 2001, paras. 124, 126 and 127, where the Court considered the right to a fair trial to be applicable to an administrative procedure for dismissal of trade union workers; *"5 Pensioners v. Peru"*, February 28, 2003, paras. 116 and 135, where the Court granted judicial review in a case dealing with administrative measures reducing pensions; Inter-American Commission on Human Rights, Report 03/01; case of *Amílcar Menéndez, Juan Manuel Caride, et al. (Social Security System) v. Argentina*, Admissibility Report, case 11.670, January 19, 2001, where the Commission considered that a complaint based on the alleged violation of procedural rights in the area of social security pensions was admissible. The case ended with an amicable settlement.

Chapter 7 – Justiciability of ESC rights in the domestic sphere and international human rights law

This chapter will briefly explore some of the implications of the points discussed in previous chapters in the context of international human rights law.

It is important to recall that, even though they have their own separate theoretical and practical fields of application, domestic and international law are of course interconnected in a number of ways. It would not be appropriate to address here the subject of the domestic incorporation of international human rights law – a topic which has deserved much academic attention in the last decades.[205] Rather, the chapter will sketch some of the ways in which the conclusions drawn about the justiciability of ESC rights can influence international human rights law; and, *vice versa*. This chapter will also reflect on the way international human rights law could be used to overcome past impediments to the justiciability of ESC rights.

Justiciability in the domestic sphere and international human rights law: some appraisals

As has been mentioned, objections to the justiciability of ESC rights sustained in the domestic sphere were reinforced at the international level with the adoption, in 1966, of two separate covenants, only one of which, that on civil and political rights, provided for an individual complaints mechanism through an optional protocol. Regional human rights systems – such as the European and the American systems – have also reflected the notion that only civil and political rights are effectively justiciable, limiting the list of rights that allow for complaint mechanisms to these. Reservations against justiciability in the international sphere mirror a similar reluctance in the domestic sphere – as international standards tend to reflect domestic practices of the States that participate in their adoption.

Evidence shows that, since the adoption of both international covenants, the adjudication of ESC rights across the world has, in fact, been widespread. Nevertheless, ESC rights have, for all intents and purposes, been side-stepped by the failure to adopt international complaint mechanisms for their enforcement. Yet the substantive arguments about the interdependence and indivisibility of human rights, be they civil and political or economic, social and cultural, and the fact that ESC rights have

205 See, for example, V. Abramovich, A. Bovino and C. Courtis (comps.), *La aplicación de los tratados de derechos humanos en el ámbito local. La experiencia de una década (1994-2005)* (Buenos Aires: Editores del Puerto, in press), M. Abregú and C. Courtis (comps.), *La aplicación de los tratados sobre derechos humanos por los tribunales locales* (Buenos Aires: CELS-Editores del Puerto, 1997); C. Haynes and F. Viljoen, *The Impact of the United Nations Human Rights Treaties in the Domestic Level* (The Hague: Kluwer Law International, 2002); Y. Shany, "How Supreme is the Supreme Law of the Land? A Comparative Analysis of the Influence of International Human Rights Conventions upon the Interpretation of Constitutional Texts by Domestic Courts", *Brooklyn Journal of International Law*, Vol. 31, pp. 341-404, 2006.

benefited from judicial protection in a number of domestic jurisdictions, support calls for the creation of complaint mechanisms in the international sphere, as a subsidiary to domestic judicial remedies.

If the principles behind the structure and purpose of judicial review are essentially the same in all jurisdictions where it is available, then case law which identifies the potential for judges to adjudicate on the basis of ESC rights in the domestic sphere will also indicate that such adjudication is possible at the international level.

Many of the (limited and indirect) means at the UN and regional level that allow for the justiciability of ESC rights through the prohibition on discrimination, or through their interconnection with other justiciable rights have been explored in a number of domestic jurisdictions.

The most comprehensive system which allows for the justiciability of ESC rights in the regional sphere – the collective complaints system provided for by the Additional Protocol to the European Social Charter – closely mirrors both the European tradition of 'abstract' constitutional review (when it undertakes a comparison between domestic norms and international standards[206]) and domestic class or collective actions (when it undertakes a comparison of the generalized practice and factual situation with international standards[207]).

Not all the objections to justiciability in the domestic sphere are relevant in the international sphere. Typically, arguments related to the 'separation of powers' doctrine are less relevant internationally, where there is no equivalent of a 'world government'. There is a loose confederacy between this and the notion of the 'margin of appreciation' granted to every member State of the international community, which can thereby be excluded to varying degrees from the scrutiny of international bodies. One view is that in matters concerning ESC rights, the 'margin of appreciation' granted to States should be much broader than in matters concerning civil and political rights. That said, the fact that States have voluntarily recognized that their human rights obligations do include ESC rights, effective international mechanisms are necessary to consider cases where there is a failure to comply.

Other arguments both for and against the justiciability of ESC rights are broadly similar in the domestic and international spheres. For example, the arguments that ESC rights lack concrete content relate both to domestic interpretation of that

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206 See, for example, the European Committee of Social Rights, *World Organisation against Torture (OMCT) v. Greece*, Complaint N° 17/2003, January 25, 2005. In this case Greece was found to be in violation of Article 17 of the European Social Charter as its legislation did not ensure that violence against children was prohibited. 'Abstract' constitutional review allows constitutional courts to review the constitutionality of legislative statutes without the need to single out particular victims.

207 See, for example, European Committee of Social Rights, *International Commission of Jurists (ICJ) v. Portugal*, Complaint N° 1/1998, September 10, 1999. This case involved allegations of violations of Article 7(1), as child labour was alleged to be widespread, despite the existence of protective legislation, thus demonstrating that the State had failed to properly supervise the implementation and application of the legislation.

content as much as they do to the definitions adopted by international bodies. Similarly, these objections can be answered by showing that, both domestically and internationally, it is possible – indeed, it is a common practice – to specify the content of those rights through substantive and procedural means. While the content of international and domestic standards may be different – for example, violations of domestic statutory law may not amount to violations of international human rights standards in the area of ESC rights – once the content of the rights has been determined in the respective sphere, the supposed lack of a firm basis for adjudication becomes less relevant.

The domestic judiciary's alleged inability to deal with issues involving ESC rights would be equally relevant to international courts or quasi-judicial bodies. Some of these arguments may not fully apply internationally, however: for example, the debate about the limited enforceability of domestic judicial decisions is considerably less relevant in the international sphere, where most decisions by courts or by quasi-judicial bodies lack coercive force, and depend on the good faith of States and on political pressure by international organizations for their implementation.

Additionally, arguments about the difficulties encountered in devising remedies are less relevant to quasi-judicial complaint mechanisms, such as those adopted by human rights treaties in the UN system, because when a violation is found, it is left to the States to tailor adequate compensation or reparations.

Developments in international human rights and justiciability in the domestic sphere

The development of both international human rights standards and adjudication in the field of ESC rights could be a useful tool in developing justiciability in the domestic sphere. This report has aimed to show that ESC rights are justiciable, and that many examples demonstrate this. Despite this, the belief in the 'programmatic character' of ESC rights and the idea that ESC rights cannot be enforced by judges continue to dominate in many jurisdictions.

The value of international human rights law for ESC rights

The development of international human rights law can play a number of important roles in reinforcing the consideration of ESC rights as fully meaningful rights, with clearly established duties and with enforcement mechanisms similar to those available for civil and political rights. It can do this in a number of ways:

- Firstly, the development of substantive standards (general interpretative principles, general duties, and specific content of each right) can be of help through the domestication of these standards, in those jurisdictions where local case law or jurisprudence are scarce or non-existent

- Secondly, international developments provide evidence that the content of ESC rights can and should be established. These are standards from which domestic courts can draw. For example, when domestic constitutional law gives effect to ESC rights, but without providing an indication of content to those provisions, resorting to international standards offers a relevant starting point, and may also have the effect of bringing a country's domestic interpretation of constitutional clauses in line with its duties under international law. This, in turn, may offer a better basis for filing claims based on ESC rights before domestic courts.

- Thirdly, the establishment of international mechanisms allowing petitioners to file complaints of violations of ESC rights before an international body could also have an important 'mirror effect'. Cases decided by international courts and quasi-judicial mechanisms are clear examples of the possibility of adjudicating on ESC rights, and provide a means via which domestic courts could overcome prejudices against their justiciability.

Creating an enforcement mechanism for the ICESCR

Notwithstanding the scarcity of international mechanisms allowing petitioners to bring claims alleging violations of ESC rights, the existence of a growing body of international case law, wherein ESC rights are indirectly protected through interconnection with other human rights and principles, has already highlighted the possibility of protecting those rights through the courts, even if this kind of protection can be seen as oblique, fragmentary and by no means complete.

An international mechanism, such as an Optional Protocol to the ICESCR, covering the full range of ESC rights enshrined in international instruments, and the expansion of the justiciability of those rights in regional systems, would fulfil this function in a more visible way. Further, in those countries where doubts about the justiciability of ESC rights still exist, domestic courts and domestic legal actors could draw on international precedents.

While the adoption of an Optional Protocol to the ICESCR is not the only means for making ESC rights justiciable in the international sphere,[208] the symbolic value of granting an equal footing to the rights enshrined both by the ICCPR and the ICESCR, in terms of the protection they offer internationally, will indeed constitute a fundamental step forward in making the interdependence and indivisibility of all human rights a meaningful reality.

The Optional Protocol should at least offer the same standards of protection granted by the Optional Protocol to the ICCPR. However, as this is a rather old instrument (it

208 Future developments may include a complaint mechanism for the Convention on the Rights of the Child, and further development of complaint mechanisms regarding ESC rights in regional human rights systems.

was adopted in 1966), ideally an Optional Protocol to the ICESCR should incorporate other innovations developed by the international community in terms of procedural protections, as set out in more recently adopted instruments, such as the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Some differences in the text of the ICESCR may allow for additional innovations – for example, the reference to international cooperation and assistance. However, these differences are not an argument for lowering the standards of existing protection granted to individuals under other complaints mechanisms, in terms of standing, admissibility, interim measures, and the nature and effects of the views of the examining body.

Justiciability in the international sphere can play an important role in the process of overcoming domestic obstacles to the justiciability of ESC rights. As the access to international protection mechanisms is subsidiary to domestic protection, and usually requires the exhaustion of domestic remedies, the existence of international complaints procedures may encourage States, where no remedies against violations of ESC rights exist, to create these remedies. This would have the merits of preventing cases from being taken before international bodies in the first place, and providing an opportunity to solve the case internally, before a claim is made against the State in the international sphere.

Summary conclusions: strategies for strengthening justiciability of ESC rights

- The idea that ESC rights, as a whole category, are not fit for judicial adjudication is seriously misguided.
- ESC rights do not follow a single pattern and cannot be identified through a single trait or characteristic. Differences between ESC rights, and civil and political rights, are gradual and more nuanced than the traditional divide has suggested. Apparent obstacles to and difficulties with justiciability may equally affect civil and political rights, but this has never led to the conclusion that those rights are not generally justiciable.
- Justiciability is not the only means of enforcing ESC rights. A great number of the tasks required for the full realization of ESC rights depend primarily on action by the executive and legislative branches of the State. However, denying judicial intervention in this field seriously reduces the remedies victims of ESC rights violations can claim. It also weakens the accountability of the State and erodes deterrence; consequently fostering impunity for violations.
- A number of conceptual and practical developments originating from the international, regional and domestic spheres show how ESC rights offer

a range of possibilities for justiciability. Examples of these developments include:

  - the distinction between negative and positive obligations;
  - the concept of minimum core content;
  - the difference between duties of immediate effect and duties subjected to progressive realization;
  - the different levels of State duties (duties to respect, protect and fulfil);
  - the application of the prohibition of discrimination, the principle of equality and procedural guarantees in the field of ESC rights; and
  - the interconnection between civil and political and ESC rights.

- None of the traditional objections pose insurmountable impediments to the justiciability of ESC rights. However, they should be taken into consideration in order to identify issues which may require the adoption of legislation and development of new procedural mechanisms, beyond the recognition of ESC rights in constitutional and human rights provisions.
- It is possible to determine the content of ESC rights, both in the general context of constitutional and human rights treaties, and in the more specific context of statutes and regulations. Methods for the determination of their content have been widely used by judges in many other legal fields.
- Domestic legislative and administrative regulations identifying the right-holder, the duty-bearer and the content of the duties will be a helpful tool for strengthening the justiciability of ESC rights. There is also space for the application of general constitutional and human rights standards – such as non-discrimination, equality, reasonableness, and respect for due process – to State legislation and practice.
- The expansion of legal principles and standards originating in the field of civil and political rights (and administrative law) to ESC rights would also be a helpful means of fostering justiciability.
- Comparative international and domestic developments, both in terms of conceptual frameworks and case law, can offer good examples to follow in other jurisdictions in the adjudication of ESC rights.
- Retaining the balance between different branches of the State does not preclude judicial involvement in the adjudication of ESC rights.

- In cases where there is a wide variety of means of achieving a constitutional obligation (or human right), judges have traditionally deferred to the political authorities, so the dangers of 'government by judges' are frequently overstated.
- Massive and serious violations or omissions by political authorities may, however, require firm judicial interventions in order to re-establish the rule of law – this is the case both for civil and political and ESC rights.
- Judges are no less capable of deciding matters relating to ESC rights than any other matter involving technical or complex issues. Not every case concerning ESC rights involves highly technical or disputed questions; when this is so, procedures can be adjusted to include proper expert testimony and a broader range of relevant voices.
- Adequate procedural arrangements are an important feature of making ESC rights justiciable – but this is also the case for civil and political rights and for any other rights.
- ESC rights litigation may involve collective grievances or require collective remedies: provision of effective procedural frameworks would ensure proper treatment of these cases. Comparative experiences show that the contemporary evolution of procedural law can take into consideration these kinds of claims.
- The application of classic due process and fair trial requirements – such as equality of arms, judicial review of administrative decisions or compliance with judicial decisions by the administrative branch – are also key elements for strengthening the justiciability of ESC rights.
- Comparative domestic case law concerning ESC rights provides a useful source of law and tools to encourage the expansion of justiciability in the international sphere, including the development of international complaint mechanisms in cases of violation of treaty-based ESC rights.
- International and regional experiences can also offer valuable arguments to help overcome prejudices in those jurisdictions where there are still limitations on the possibility of enforcing ESC rights through litigation. Both domestic and international good practices in this field can be mutually reinforcing.

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