

# STANDARDS TO MAKE ESC RIGHTS JUSTICIABLE: A SUMMARY EXPLORATION

*Christian Courtis*\*

## 1 Introduction

Social rights – or economic, social and cultural rights (ESC rights) – are not a new idea. There have been examples of the statutory recognition of ESC rights since the last third of the nineteenth century.<sup>1</sup> ESC rights entered the language of constitutional law in the period between the two world wars – early examples include the 1917 Mexican Constitution, the 1919 German Constitution and the 1931 Spanish Constitution – and have become part of constitutions in most of the world since the end of the Second World War. ESC rights have also been part of international human rights since the adoption of the Universal Declaration of Human Rights in 1948, and perhaps even before, since the adoption of the ILO Constitution and the Charter of the League of Nations. Yet, compared to civil and political rights, considerably less attention has been devoted to the need to produce a conceptual framework to develop the content of ESC rights and the protection mechanisms needed to enforce them. One of the traditionally neglected issues with regard to ESC rights is the question of their justiciability, that is, the possibility for people who claim to be victims of violations of these rights to file a complaint before an impartial body and request adequate remedies or redress if a violation has occurred or is likely to occur.

This article examines some developments in the field of the justiciability of ESC rights. A number of arguments have been raised against the justiciability of ESC rights. I will focus here on the developments that enable courts to overcome the alleged vagueness of ESC rights as an obstacle to adjudication.<sup>2</sup> According to this argument, ESC rights recognised in constitutions or human rights instruments are phrased in such a vague or indeterminate way that they – allegedly – do not offer intelligible standards about what they require, and thus – the argument goes – they cannot constitute the basis for a judgment about whether a legal duty has been complied with or not. Sometimes, this argument is expressed by saying that ESC rights are merely ‘aspirational’ or ‘programmatic’, implying that they should be understood as guidelines for legislative or administrative action but not as rules or principles to be adjudicated upon by judges.

While some of the developments I will comment on were originally elaborated by scholars and academics, they are reflected in soft law instruments,<sup>3</sup> and – more importantly – they have been endorsed by domestic, regional and international courts and adjudicative bodies across the world.

---

\* International Commission of Jurists, Geneva; Universidad de Buenos Aires.

<sup>1</sup> See, for example, François Ewald, *L'Etat providence* (Paris: Grasset 1986); Cristina Monereo Atienza, *Ideologías jurídicas y cuestión social. Los orígenes de los derechos sociales en España* (Granada: Comares 2007); José Luis Monereo Pérez, *Fundamentos doctrinales del Derecho social en España* (Madrid: Trotta 1997); Carlos M. Palomeque López, *Derecho del trabajo e ideología* (Madrid: Tecnos 2003, 3rd ed.); and José Reinaldo Vanossi, *El Estado de derecho en el constitucionalismo social* (Buenos Aires: EUDEBA 1994).

<sup>2</sup> There are, of course, other objections, including the alleged incompatibility of the adjudication of ESC rights with the principle of division of powers in a democratic regime and the existence of procedural and institutional constraints that allegedly render adjudication on these issues either useless or undesirable. For a further discussion, see International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Human Rights and Rule of Law Series No. 2 (Geneva: ICJ 2008) – on which this article is partially based. See also our discussion in Víctor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles* (Madrid: Trotta 2004, 2nd ed.).

<sup>3</sup> See, for example, 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

Finally, the arguments made here should not be interpreted as a call to reduce ESC rights to their justiciability or to limit the mechanisms for monitoring the compliance with ESC rights *only* to litigation. It is simply a call to *include* litigation as a mechanism, in conjunction with other mechanisms, such as political mobilisation, monitoring by specialised or independent agencies or national human rights institutions, parliamentary inquiries or the international review of state reports.

## 2 Some Preliminary Comments

A number of preliminary clarifications may be useful before addressing the main issue to be discussed here.

First, the overall assumption that ESC rights are not justiciable as a whole category because of some inherent impossibility of defining their content seems to ignore the evidence of almost a century of functioning of labour courts and of a massive quantity of case law in such fields as social security, health or education before courts in all regions of the world. This evidence may entail a qualification: the uncertainty or vagueness of ESC rights does not refer to rights defined by legislative statutes or administrative regulations but of those contained in constitutions or human rights treaties. According to this qualification, while statutes or regulations may offer a more solid basis for adjudication, constitutional or human rights treaty provisions are less concrete and certain. But, of course, the same can be said about constitutional or human rights treaty provisions enshrining civil and political rights, and no one has ever denied their justiciability on this basis. In fact, the language of human rights provisions enshrining civil and political rights is often similar – and sometimes even identical – to the language of human rights provisions enshrining ESC rights.

Secondly, blanket arguments against the justiciability of ESC rights seem to assume that the content of these rights corresponds to a single formal pattern, with a unique trait that would identify all such rights as members of the same set. However, a review of any accepted list of ESC rights – for example, the list of rights provided by the International Covenant on Economic, Social and Cultural Rights 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) – would indeed show the opposite: there is no single formal pattern, but a wide variety of provisions that establish ESC rights, some stated as freedoms, some as obligations on the state regarding third parties and some as obligations on the state to adopt measures or to achieve a certain result. Moreover, exactly the same could be said about civil and political rights. Taking as an example instruments such as the International Covenant on Civil and Political Rights, the European Convention on Human Rights and Fundamental Freedoms or the American Convention on Human Rights, one finds a wide variety of provisions establishing freedoms for individuals, prohibitions on state action, obligations regarding third parties, duties to adopt legislative and other kinds of measures, duties to protect special subjects – such as families and children – and duties to provide access to services or institutions. General classifications – such as ‘civil and political’ and ‘ESC’ rights – are too broad to capture the nuances and different features of every single right. Rights placed under the same category may share some ‘family resemblance’ but may otherwise be very different.

---

Economic, Social and Cultural Rights (Maastricht Guidelines).

The Limburg Principles were adopted at 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 at the University of Cincinnati (Ohio, United States) from 2 to 6 June 1986. The Limburg Principles are reproduced in UN Doc. E/CN.4/1987/17.

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

See also Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties’ obligations (5th session, 1990), UN Doc. E/1991/23.

There is no common trait or feature capable of defining either civil and political rights or ESC rights as if they were perfectly consistent sets of rights. The effort to reduce civil and political rights to ‘negative rights’ – rights that require abstention from the state – and ESC rights to ‘positive rights’ – rights that require action from the state – is clearly mistaken. Every right – regardless of whether it is classified as a civil, political, economic, social or cultural right – requires *both* abstention and positive action by the state, and there is hardly any right that does not require resources to be implemented and protected.

Indeed, some rights are difficult to classify in this or that category. For example, the drafters of the International Covenants on Civil and Political and Economic, Social and Cultural Rights included some rights in *both* instruments, such as the freedom to form and join trade unions and the right of families and children to state protection. Some other rights, while included in civil and political rights instruments, are in fact transversal and apply to both civil and political *and* ESC rights. This is the case, for instance, as regards the right to a fair trial, respect for due process, the principle of equality and the prohibition of discrimination. One of the possible meanings of the notions of interdependence and indivisibility of all human rights is the fact that duties stemming from different rights may overlap – so the same duty can be identified with different rights. A typical example of this is the idea that the right to life involves positive obligations, including access to a basic level of medical services – a duty that can also be identified with the right to health. Finally, some rights resist a strict compartmentalisation. For example, the right to education has been considered to be a civil, political, economic, social *and* cultural right.<sup>4</sup>

These preliminary ideas suggest that general assumptions about the justiciability of civil and political rights and the non-justiciability of ESC rights should be approached with caution – the span of human rights may well be regarded as a continuum rather than two watertight categories. As we will see, the experience of different courts around the world actually offers good evidence of the need for a more practical and less dogmatic approach.

### 3 Some Developments Regarding the Justiciability of ESC Rights

In this section, I will review examples of how different courts and adjudicative bodies – domestic, regional and international – have applied innovative conceptual approaches in order to overcome the anachronistic assumption that ESC rights are not justiciable. The examples are not meant to be exhaustive, but merely illustrative – both of innovative conceptual approaches themselves and of the case law applying them. I will focus here on conceptual developments that may apply to any ESC right – and arguably to all human rights. However, it is important to underscore that there have also been conceptual efforts to develop the content of specific ESC rights, such as the right to health, the right to food, the right to housing, the right to education or the right to social security.<sup>5</sup>

<sup>4</sup> See UN Commission on Human Rights, Annual Report of the Special Rapporteur on the right to education, Katarina Tomaševski, submitted in accordance with Commission on Human Rights resolution 2000/9, UN Doc. E/CN.4/2001/52, 11 January 2001, para. 6: ‘The right to education straddles the division of human rights into civil and political, on the one hand, and economic, social and cultural, on the other hand. It embodies them all.’

<sup>5</sup> For example, the Committee on Economic, Social and Cultural Rights has devoted several General Comments to specific rights contained in the International Covenant on Economic, Social and Cultural Rights, offering useful guidance for their interpretation either by international bodies or by domestic courts. See Committee on Economic, Social and Cultural Rights, General Comment No. 4: The right to adequate housing (6th session, 1991), UN Doc. E/1992/23; General Comment No. 7: The right to adequate housing: force evictions (16th session, 1997), UN Doc. E/1998/22; General Comment No. 9: The domestic application of the Covenant (19th session, 1998), UN Doc. E/C.12/1998/24 (1998); General Comment No. 11: Plans of action for primary education (20th session, 1999), UN Doc. E/C.12/1999/4 (1999); General Comment No. 12: Right to adequate food (20th session, 1999), UN Doc. E/C.12/1999/5 (1999); General Comment No. 13: The right to education (21st session, 1999), UN Doc. E/C.12/1999/10 (1999); General Comment No. 14: The right to the highest attainable standard of health (22nd session, 2000) UN Doc. E/C.12/2000/4 (2000); General Comment No. 15: The right to water (29th session, 2003), UN Doc.

The conceptual approaches employed by courts can be presented in different ways. I will use the distinction between duties of immediate effect and duties linked with the progressive realisation of ESC rights as a starting point, but this does not exclude other ways of addressing the issue.

### 3.1 Duties of Immediate Effect and Duties Linked to the Progressive Realisation of ESC Rights

Some of the objections against the justiciability of ESC rights draw on their alleged 'different nature' in comparison to civil and political rights, which are taken as a model of justiciable rights. Remarks about their 'aspirational' or 'programmatic' nature are allegedly confirmed by the reference to the notion of 'progressive realisation' included in Article 2(1) of the International Covenant on Economic, Social and Cultural rights. According to this notion, the full realisation of ESC rights is dependent on budgetary allocations, adoption of legislation and regulations and proper implementation – and thus requires time and cannot be achieved immediately. However, academic literature, the doctrine of the Committee on Economic, Social and Cultural Rights and case law from different courts have all stressed that, while, on the one hand, some aspects of ESC rights are subjected to progressive realisation, on the other hand, there are a number of duties that are immediately required of the state.

Courts have made a fruitful use of this distinction, finding in many cases that the recognition of an ESC right in a constitution or – when applicable – a human rights instrument entails some immediate duties where 'progressive realisation' or similar notions play no role whatsoever.

### 3.2 Duties of Immediate Effect

#### 3.2.1 Negative Protection

Courts have taken account of the existence of duties of immediate effect, for example when granting right-holders protection against state action that violates ESC rights. In these cases, where state action violates duties to respect rights, courts are required to provide negative protection, that is, to order the state to refrain from engaging in action that violates the right, to stop that action or to offer compensation if the breach has already taken place.

Judicial protection against forced evictions is a good example: the right to adequate housing is not limited to positive duties, i.e. making housing accessible to people in need, which could require progressive implementation. The state has also an immediate negative duty to refrain from forcefully evicting persons from their housing without

---

E/C.12/2002/11 (2003); General Comment No. 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) (35th session, 2005) UN Doc. E/C.12/GC/17 (2006); General Comment No. 18: The right to work (35th session, 2006), UN Doc. E/C.12/GC/18 (2006); General Comment No. 19: The right to social security (39th session, 2007), UN Doc. E/C.12/GC/19 (2008). For an overview of the international efforts to define the content of specific socio-economic rights, see the different essays in Víctor Abramovich, María José Añón and Christian Courtis (eds.), *Derechos sociales: instrucciones de uso* (Mexico: Fontamara 2003).

Domestic courts have also played an important role in the clarification of the content of specific ESC rights. The Colombian Ombudsman Office (*Defensoría del Pueblo*) provides some excellent overviews of how international and domestic constitutional standards regarding ESC rights can be integrated. See, for example, Defensoría del Pueblo, *El derecho a la educación en la Constitución, la jurisprudencia y los tratados internacionales* (Bogotá: Defensoría del Pueblo 2003); id., *El derecho a la salud en la Constitución, la jurisprudencia y los tratados internacionales* (Bogotá, Defensoría del Pueblo 2003); id., *El derecho al agua en la Constitución, la jurisprudencia y los tratados internacionales* (Bogotá: Defensoría del Pueblo 2005); and id., *Contenido y alcance del derecho individual al trabajo. Marco para la evaluación de la política pública del derecho al trabajo desde una perspectiva de derechos humanos* (Bogotá: Defensoría del Pueblo 2005).

legal justification and, even if there is a legal justification, without due compliance with procedural guarantees. The Supreme Courts of India and Bangladesh have issued important decisions in this regard, underscoring the importance of the state's procedural duties that must be complied with as a prerequisite for a lawful eviction.<sup>6</sup> For instance, in *ASK v. Bangladesh*,<sup>7</sup> the Supreme Court of Bangladesh ruled 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.

A decision of the Constitutional Court of South Africa also illustrates this point. In *Port Elizabeth Municipality v. Various Occupiers*,<sup>8</sup> the Court declined to grant an eviction order to evict 68 people squatting on privately owned land. The Court considered the eviction petition under three criteria: the circumstances under which the unlawful occupier occupied the land and erected the structures, the period the occupier has resided on the land and the availability of suitable alternative land. It concluded that, according to the circumstances of the case, the municipality had not shown that it made any significant attempt to listen and consider the problems of the occupiers.

The African Commission on Human and Peoples' Rights expressly endorsed the above-mentioned approach in the *Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria* case.<sup>9</sup> 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.<sup>10</sup>

The Commission found that the government of Nigeria breached its duty to respect the right to health and the right to a healthy environment by directly 'attacking, burning and destroying several Ogoni villages and homes'.<sup>11</sup> The Commission also considered 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 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.<sup>12</sup>

Similarly, the Commission found that the state had also breached its duty to respect the right to food.<sup>13</sup>

In a case regarding the prohibition of forced labour,<sup>14</sup> the European Committee of Social Rights reviewed the Greek legislation and practice regarding the civil service to

<sup>6</sup> See Supreme Court of India, *Olga Tellis & Ors v. Bombay Municipal Council* [1985] 2 Supp SCR 51, 10 July 1985; Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government of Bangladesh & Ors*, 19 BLD (1999) 488, 29 July 2001.

<sup>7</sup> See Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government of Bangladesh & Ors*, 19 BLD (1999) 488, 29 July 2001.

<sup>8</sup> See Constitutional Court of South Africa, *Port Elizabeth Municipality v. Various Occupiers*, Case CCT 53/03, 4 March 2004.

<sup>9</sup> See African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication No. 155/96, 13-27 October 2001.

<sup>10</sup> *Id.*, at para. 45 (footnote omitted).

<sup>11</sup> *Id.*, at para. 54.

<sup>12</sup> *Id.*, at paras. 61-62.

<sup>13</sup> *Id.*, at para. 66.

<sup>14</sup> See European Committee of Social Rights, *Quaker Council for European Affairs (QCEA) v. Greece*, Complaint No. 8/2000, 27 April 2001.

be performed by conscientious objectors. The Committee found that, as the civil service requirements involved an excessive duration of service compared to the duration of military service, this amounted to a disproportionate restriction on the right of the worker to earn his living in whichever occupation he freely chose to enter.

The German Federal Constitutional Court provides further examples. It has held in several cases that state tax power cannot extend to the material means necessary to cover the 'existential minimum'.<sup>15</sup> Thus, the legislature has a duty to respect the means for basic livelihood and cannot impose taxes beyond these limits.

### 3.2.2 Procedural Protection

While ESC rights are often identified with substantive aspects, there are some undeniable procedural dimensions to them that also constitute a solid basis for judicial adjudication. The idea of due process was originally devised for the protection of traditional civil rights, such as the right to property. Yet, there is no conceptual impediment to extending procedural protections to ESC rights.<sup>16</sup> Procedural guarantees can take multiple forms. They can be set as a prerequisite to the adoption of certain general measures and policies by the state (as in the case of the right to a public hearing or the right to be consulted before the adoption of measures or policies). They can also establish the steps the state is obliged to undertake before granting, denying or depriving particular individuals or groups of an entitlement. Finally, procedural guarantees can also be aimed at establishing the basis for the administrative or judicial review of decisions adopted by the administrative or political authorities.

Principles regarding access to courts and fair trials and administrative procedures are particularly relevant in the area of ESC rights, where the actual recognition of individual entitlements depends to a great extent on the action of the administration. These principles can include equality of arms, equal opportunities to present and produce evidence, the opportunity to challenge evidence brought by the opponent, proceedings of reasonable length, fair review of administrative decisions, access to legal counsel, access to the file and relevant information and the impartiality and independence of the adjudicative body, among many others. From a substantive viewpoint, the fact that ESC rights are frequently linked with access to the most basic human needs, such as food, shelter, healthcare or ensuring a subsistence level income, highlights the need for timely and fair procedures.

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 an extensive jurisprudence regarding the application of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (the right to a fair trial) to social security and social assistance payments and to labour rights.<sup>17</sup> In this regard, the Court has considered the principle of equality of arms, access to courts in order to review decisions by administrative bodies, due compliance with judicial decisions and the length of proceedings, among other issues.<sup>18</sup>

<sup>15</sup> See, for example, German Federal Constitutional Court, BVerfGE 82, 60 (85), BVerfGE 87, 153 (169).

<sup>16</sup> See Víctor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles* (Madrid: Trotta 2004, 2nd ed.) 179-200.

<sup>17</sup> See, for example, European Court of Human Rights, *Feldbrugge v. the Netherlands*, 29 May 1986 (concerning the right to compensation for a work-related accident); *Schuler-Zgraggen v. Switzerland*, 24 June 1993 (right to an invalid pension); *Schouten and Meldrum v. the Netherlands*, 9 December 1994 (social security contributions); and *Mennitto v. Italy*, 5 October 2000 (family disability allowances).

<sup>18</sup> See, for example, the following cases of the European Court of Human Rights brought on the basis of violations of Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms: *Feldbrugge v. the Netherlands*, 29 May 1986 (lack of a fair hearing to challenge administrative decision); *Deumeland v. Germany*, 29 May 1986 (length of the proceedings exceeded reasonable time); *Vocaturo v. Italy*, 24 May 1991 (length of proceedings for determination of labour rights exceeds reasonable time); *X v. France*, 31 March 1992 (length of proceedings for determination of a health-related tort claim exceeds reasonable time); and *Pramov v. Bulgaria*, 30 September 2004 (lack of access to court to establish lawfulness of dismissal from work).

In another set of cases, the Court found violations of Article 6(1) for failure of the government to comply

In turn, the Inter-American Court of Human Rights has applied Article 8 (right to a fair trial) and Article 25 (right to judicial protection) of the American Convention on Human Rights in matters regarding labour rights, social security rights, recognition of the legal personality of indigenous groups and access to communal lands by indigenous groups.<sup>19</sup> The Court has considered issues such as the length of proceedings, the possibility of judicial review of administrative decisions and compliance with judicial decisions by the government.

However, the extent of procedural guarantees in the field of ESC rights is even broader. The extent to which the state or private parties comply with procedural burdens before adopting decisions that may impair ESC rights has also been a regular subject of judicial review. A number of examples can illustrate this idea. Respect for procedural guarantees is a key element of the protection against forced evictions,<sup>20</sup> the termination of social benefits<sup>21</sup> and the adoption of measures that could affect indigenous communities,<sup>22</sup> users and consumers of public utilities,<sup>23</sup> medical patients,<sup>24</sup> the environment<sup>25</sup> and other stakeholders.<sup>26</sup> Compliance with procedural prerequisites, such as the requirement for rights to be regulated by parliamentary statute<sup>27</sup> and the requirements for fair notice, access to information, public hearings, group consultation or individual informed consent prior to decision making, is an important factor that may affect ESC rights.

with social security and labour-related payments determined by judicial decisions. See, for example, *Burdov v. Russia*, 7 May 2002; *Makarova and Others v. Russia*, 24 February 2005; *Plotnikov and Poznakhirina v. Russia*, 24 February 2005; and *Sharenok v. Ukraine*, 22 February 2005.

<sup>19</sup> See, for example, Inter-American Court of Human Rights, *Baena Ricardo et al. (270 workers v. Panama)*, 2 February 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*, 31 August 2001, paras. 115-139 (violation of Article 25 for lack of adequate procedures for demarcation and titling of indigenous community's land); '*5 pensioners*' v. *Peru*, 28 February 2003, paras. 127-141 (violation of Article 25 for lack of compliance with judicially ordered pension payments); *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, paras. 63-119 (violations of Articles 8 and 25 for lack of adequate procedures for recognising the legal personality of an indigenous community and for demarcation and titling of community's land); and *Acevedo Jaramillo and Others v. Peru*, 7 February 2006, paras. 215-278 (violations of Articles 8 and 25 for lack of compliance with judicial decisions protecting arbitrarily dismissed of workers).

<sup>20</sup> See Supreme Court of India, *Olga Tellis & Ors v. Bombay Municipal Council* [1985] 2 Supp SCR 51, 10 July 1985; Supreme Court of Bangladesh, *Ain o Salish Kendra (ASK) v. Government of Bangladesh & Ors*, 19 BLD (1999) 488, 29 July 2001.

<sup>21</sup> See, for example, US Supreme Court, *Goldberg v. Kelly*, 397 U.S. 254, 23 March 1970 (where the Court found that due process, including the right to a hearing and the right to defence, should be respected before termination of social benefits).

<sup>22</sup> See, for example, Colombian Constitutional Court, Decision *SU-39/1997*, 3 February 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 that the government had failed to conduct proper consultations with the indigenous community under the terms of ILO Convention No. 169. See also Decision *T-652/1998*, 10 November 1998, in which the Court declared an environmental licence to build a dam to be illegal, as the government had failed to conduct consultations with the local indigenous community in compliance with ILO Convention No. 169.

<sup>23</sup> See, for example, Argentine Federal Administrative Court of Appeals, Buenos Aires District, Chamber IV (*Cámara Federal en lo Contencioso-administrativo 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*, 10 February 1999. In this case, the Court of Appeals suspended a bid to privatise the social security agency upon finding that there had been a failure to provide adequate information to users.

<sup>24</sup> See, for example, UN Committee on the Elimination of Discrimination against Women, *Andrea Szijarto v. Hungary*, Communication No. 4/2004, 14 August 2006 (sterilisation without properly obtained informed consent violates, *inter alia*, the right to health of women).

<sup>25</sup> See, for example, Australia, Environmental Court of New South Wales, *Leatch v. Director-General of National Parks & Wildlife Service and Shoalhaven City Council*, 23 November 1993, NSWLEC 191. The Court in this case applied the precautionary principle to revoke a licence to take or kill endangered fauna.

<sup>26</sup> See, for example, Supreme Court of Pakistan, *Shehla Zia and Others v. WAPDA*, 12 February 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 a consultation was carried out. See also Supreme Court of Venezuela, Political-Administrative Chamber, *Iván José Sánchez Blanco y otros c. Universidad Experimental Simón Bolívar*, 10 June 1999 (striking down the introduction of a university fee for failure to comply with formal requirements).

<sup>27</sup> See, for example, Constitutional Court of the Czech Republic, *Pl. US 33/95* (1996), in which it was

### 3.2.3 Equal Protection and the Prohibition of Discrimination

While not necessarily overlapping with the full range of duties that stem from them, an important number of issues regarding the justiciability of ESC rights involve questions regarding discrimination claims or challenges based on illegitimate or unreasonable distinctions made or produced by law, linked with access to those rights or to the services that provide those rights. It is not by chance that empirical data shows that poverty particularly affects certain social groups, such as women, members of ethnic minorities, rural populations and persons with disabilities, among others. The Committee on Economic, Social and Cultural Rights has made clear that, within the International Covenant on Economic, Social and Cultural Rights, the prohibition of discrimination is an obligation of immediate effect.<sup>28</sup> Other international human rights instruments also stress this feature. For example, Article 26 of the International Covenant on Civil and Political Rights makes the equal protection principle applicable to any piece of legislation passed by the state, regardless of its substantive content, and thus encompasses legislation meant to regulate ESC rights. Several clauses enshrined in the Convention on the Elimination of All Forms of Racial Discrimination and the Convention for the Elimination of All Forms of Discrimination against Women make explicit reference to its application to norms and practices regarding ESC rights, social policies and social services. The same could be said about the protection granted by non-discriminatory and equal protection principles grounded in constitutions in every region of the world.

Traditional anti-discriminatory litigation, based on challenges to normative distinctions grounded on suspect categories or on showing that legislation or administrative practices have a disproportionate impact on a particular social group, can be perfectly suited to – and has been extensively employed in – the field of ESC rights, social policies and social services. Litigation based on the challenge of unreasonable normative distinctions, i.e. over-inclusive restrictions or under-inclusive eligibility criteria in order to be granted entitlements, follows a similar pattern, even if legislative or administrative authorities may be subject to less strict forms of scrutiny than in the case of the employment of suspect categories such as gender or race. The potential identification of other social conditions, such as socio-economic status, as suspect categories or as an unreasonable factor for normative distinctions could also expand the protection offered by the prohibition of discrimination and the principle of equal protection of the law in relation to the enjoyment of ESC rights.<sup>29</sup>

Probably the most famous case in US constitutional law, *Brown v. Board of Education of Topeka*,<sup>30</sup> is actually a case regarding the application of the equal protection clause to the right to education. In that case, the US Supreme Court decided that the existence

held that the regulation of the right to health as a fundamental right required a formal statute adopted by the Parliament.

<sup>28</sup> See also Principles 13, 22 and 35-41 of the Limburg Principles and Guidelines 11, 12 and 14(a) the Maastricht Guidelines.

<sup>29</sup> For a general overview, see Marcelo Alegre and Roberto Gargarella (eds.), *El derecho a la igualdad* (Buenos Aires: Lexis-Nexis 2007); María Ángeles Barrère Unzueta, *Discriminación. Derecho antidiscriminatorio y acción positiva a favor de las mujeres* (Madrid: Civitas 1997); Christian Courtis, 'Legislación y las políticas antidiscriminatorias en México: El inicio de un largo camino', in Gustavo Fondevila (ed.), *Instituciones, legalidad y Estado de derecho en el México de la transición democrática* (Mexico: Fontamara 2006) 167-200; Owen M. Fiss, 'Groups and the Equal Protection Clause' (1976) 5(2) *Philosophy and Public Affairs* 107-177; Robert C. Post, *Prejudicial Appearances. The Logic of American Antidiscrimination Law* (Durham: Duke University Press 2001); Fernando Rey Martínez, *El derecho fundamental a no ser discriminado por razón de sexo* (Madrid: McGraw-Hill 1995); Roberto Saba, '(Des) igualdad Estructural', in Jorge Amaya (ed.), *Visiones de la Constitución, 1853-2004* (Buenos Aires: UCES 2004) 479-514. On the application of the equal protection and non-discrimination principles to ESC rights, see Víctor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles* (Madrid: Trotta 2004, 2nd ed.) 169-179.

<sup>30</sup> See US Supreme Court of Justice, *Brown v. Board of Education of Topeka*, 347 U.S. 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 an historical account, see M.V. Tushnet, *Making Civil Rights Law:*



of schools segregated according to racial criteria amounted to a breach of the equal protection clause and ordered that the school system be redesigned in accordance with the ruling.

The UN Committee on Racial Discrimination (CERD) has also considered violations of ESC rights through discrimination on the basis of racial origin. In the case of *Ms. L. R. et al v. Slovakia*,<sup>31</sup> the CERD dealt with a municipal decision revoking a housing policy aimed at fulfilling the needs of the Roma population, finding that this revocation amounted to a discriminatory impairment of the right to housing based on grounds of ethnic origin.

The Human Rights Committee (HRC) has also decided cases where the right to equal protection under the law and the prohibition of discrimination were applied to ESC rights. In the *Zwaan-de Vries* case,<sup>32</sup> for instance, the HRC decided that the Dutch social security legislation providing unemployment benefits discriminated against married women, requiring them to satisfy additional eligibility conditions that did not apply in the case of married men. Differential treatment on the basis of gender was found to be in breach of Article 26 of the ICCPR. Similar cases were decided by the European Court of Human Rights, which considered social benefits to be protected by the right to property enshrined in Protocol No. 1 to the European Convention.<sup>33</sup>

Similarly, the South African Constitutional Court considered a constitutional challenge to the Social Security Act, which restricted access to social assistance benefits to South African citizens.<sup>34</sup> The plaintiffs, a group of indigent Mozambican nationals with permanent resident status in South Africa, alleged that the Social Security Act discriminated against them on the basis of their national origin. The Constitutional Court rejected the government's arguments that the exclusion of non-citizen permanent residents was justified because including them in the social assistance system would attract a flood of immigrants to South Africa, who would come to the country for the sole purpose of gaining access to social assistance benefits, thus placing an unsustainable additional financial burden on the social assistance budget. It 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 Security Act unconstitutional and proceeded to extend the application of the provisions so that permanent residents would also be eligible for access.

The European Court of Human Rights has also scrutinised the application of the principle of non-discrimination on the basis of national origin in relation to social security and social assistance benefits, interpreting them as being protected by the right to property enshrined in Protocol No. 1 to the European Convention. In the *Gaygusuz* case,<sup>35</sup> the Court considered that the difference in treatment between nationals and non-nationals regarding eligibility for a contributory emergency assistance scheme was not based on any objective and reasonable justification and that it was thus discriminatory. In the *Koua Poirrez* case,<sup>36</sup> the Court considered an alleged discriminatory violation of the right to property, once again based on national origin. The Court considered that the law refusing a non-contributory allowance for adults with a disability on the basis of national origin was unjustifiable and amounted to discriminatory treatment.

---

*Thurgood Marshall and the Supreme Court 1936-1961* (New York: Oxford University Press 1994) Chapter 11; R. Kluger, *Simple Justice: The History Of Brown v. Board of Education and Black America's Struggle for Equality* (New York: Knopf 1975).

<sup>31</sup> See UN Committee on the Elimination of Racial Discrimination, *Ms. L.R. et al. v. Slovakia*, Communication No. 31/2003, 10 March 2005.

<sup>32</sup> See UN Human Rights Committee, *Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, 9 April 1987. See also *Broeks v. the Netherlands*, Communication No. 172/1984, 9 April 1987.

<sup>33</sup> See European Court of Human Rights, *Wessels-Bergervoet v. the Netherlands*, 4 June 2002 (gender-based discrimination regarding the period of coverage of welfare benefits: paras. 46-55); *Willis v. the United Kingdom*, 11 June 2002 (gender-based discrimination regarding widows' payment and widower mother's allowance: paras. 39-43).

<sup>34</sup> See Constitutional Court of South Africa, *Khosa and Others v. Minister of Social Development and Others*, 2004 (6) SA 505 (CC), 4 March 2004.

<sup>35</sup> See European Court of Human Rights, *Gaygusuz v. Austria*, 16 September 1996, paras. 46-52.

<sup>36</sup> See European Court of Human Rights, *Koua Poirrez v. France*, 30 September 2003, paras. 46-50.

The UK House of Lords provides an example of upholding the prohibition on non-discrimination on the basis of sexual orientation in the area of housing protection. It held that differential treatment of same-sex partners as compared to different-sex partners with respect to protection of security of tenure amounted to illegitimate discrimination and a violation of Article 14 (prohibition of discrimination) of the European Convention on Human Rights and Fundamental Freedoms, read in conjunction with Article 8 (right to respect for family and private life) of the Convention, which applies in the United Kingdom through the Human Rights Act.<sup>37</sup>

Some courts have dealt with equality violations of ESC rights based on less traditional grounds. In many cases, various factors combine to produce discriminatory circumstances or apparently neutral grounds for legal distinctions indirectly affect a certain social group in a disproportionate manner. For instance, the Supreme Court of Israel has heard a number of cases regarding 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. These factors were geographical, ethnic and socio-economic. Geographical inequality in the distribution of services in Israel follows ethnic lines, negatively affecting Arab communities, which are in turn poorer, impinging on the quality of ESC rights enjoyed by these communities, particularly in relation to those enjoyed by the relatively richer Jewish communities. Some of the cases that were filed addressing these issues were solved through settlements,<sup>38</sup> while in other cases the Supreme Court ruled that the state should adopt measures to address the inequalities<sup>39</sup> or validated the measures shown to have been adopted by the government in order to modify the situation.<sup>40</sup>

In the *Klickovic, Pasalic and Karanovic* case,<sup>41</sup> the Human Rights Chamber for Bosnia and Herzegovina decided that the disparity in pension payments given to pensioners returning to Bosnia and Herzegovina as opposed to the payments given to those pensioners who had remained in Bosnia and Herzegovina during the armed conflict amounted to discrimination regarding the right to social security on the basis of the applicants' status as internally displaced persons.

Besides providing for the prohibition of active discriminatory practices, either by state agents or private parties, anti-discriminatory action may (or, if a stronger position is taken on this issue, should) also encompass active measures providing protection for disadvantaged, vulnerable or minority groups. Children, for example, are a group that has received particular attention as the target of special protection measures. There is also a growing consensus that persons with disabilities require pro-active measures to make their environment accessible and in order to allow 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 serves to illustrate this point. In the *Eldridge* case,<sup>42</sup> the Court decided that healthcare services delivered in a formally equal fashion to persons without any disability and persons with disabilities did not ensure persons with disabilities enjoyed the equal benefit of the law (as required by Section 15(1) of the Canadian Charter of Rights and Freedoms). In this case, the Court

<sup>37</sup> See UK House of Lords, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.

<sup>38</sup> See, for example, Supreme Court of Israel, H.C. 7115/97 *Adalah et al. v. Ministry of Health et al.* This case was settled, with the government agreeing to provide maternal and healthcare centres for unrecognised Bedouin villages in the Negev.

<sup>39</sup> See Supreme Court of Israel, H.C.J. 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 programme to more Arab municipalities.

<sup>40</sup> See Supreme Court of Israel, H.C.J. 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 programme for weak schools to more Arab schools.

<sup>41</sup> 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*, 10 January 2003.

<sup>42</sup> See Supreme Court of Canada, *Eldridge v. British Columbia (Attorney General)*, 151 D.L.R. (4th) 577, 616 (1997).

considered that the failure to provide sign language interpreters for deaf persons in medical services amounted to providing plaintiffs with a worse quality of service and ordered the government to undertake special measures in order to ensure that this 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 and opportunities 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, *Awás Tingni v. Nicaragua*,<sup>43</sup> and in subsequent cases,<sup>44</sup> 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, according to the indigenous group's world view and in light of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. In the *Awás Tingni* case, the Court ordered the state to abstain from granting permission for wood exploitation on the ancestral land of the indigenous group and ordered the state to proceed to demarcate and provide the community with a legal title to the land.<sup>45</sup>

### 3.2.4 'Core Content' or 'Minimum Core' Obligations

An important conceptual element concerning the determination of the responsibilities of a state in relation to ESC rights is the notion of *core content* (also called minimum core content, minimum core obligations,<sup>46</sup> minimum threshold or 'essential content', as it is known in the German constitutional tradition and the traditions that draw from it). This notion entails the possibility of defining the absolute minimum levels of a right, below which that right would become unrecognisable or meaningless.

This notion has been employed in different contexts, including when analysing civil and political rights, especially in the constitutional law tradition. When applied to rights that involve access to a service or benefits, this notion assists in defining their minimum mandatory level. Different constitutional constructions have justified this requirement as a corollary of the notion of human dignity or have treated it as a vital minimum or 'survival kit'.

The German Federal Constitutional Court and Federal Administrative Court provide examples of the 'minimum core content' strategy, which is derived from the constitutional principles of the welfare (or social) state and the concept of human dignity. In Germany, the Courts decided that these constitutional principles translated into positive state obligations to provide an 'existential minimum' or 'vital minimum', comprising access to food, housing and social assistance to persons in need.<sup>47</sup> Similarly, the Swiss Federal Court has found that an implied constitutional right to a 'minimum level of subsistence' (*conditions minimales d'existence*), both for Swiss nationals and foreigners, could be enforced by the Swiss courts.<sup>48</sup>

Brazilian courts have followed a similar path when considering that, on the basis of the express provision in the Brazilian Constitution establishing the right to education for

<sup>43</sup> Inter-American Court of Human Rights, *Mayagna (Sumo) Community Awás Tingni v. Nicaragua*, 31 August 2001.

<sup>44</sup> In the same sense, see *Yakye Axa Indigenous Community v. Paraguay*, 17 June 2005, paras. 123-156, especially paras. 131, 135, 137, 146, 147 and 154; *Sawhoyamaxa Indigenous Community v. Paraguay*, 29 March 2006, paras. 117-143.

<sup>45</sup> See Inter-American Court of Human Rights, *Mayagna (Sumo) Community Awás Tingni v. Nicaragua*, 31 August 2001, paras. 148-154.

<sup>46</sup> See, for example, Guideline 9 of the Maastricht Guidelines. For a general overview of this notion, see the articles compiled in Audrey Chapman and Sage Russell (eds.), *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Antwerp: Intersentia 2002).

<sup>47</sup> 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 (134); BVerfGE 45, 187 (229).

<sup>48</sup> See Swiss Federal Court, *V. v. Einwohnergemeine X und Regierungsrat des Kanton Bern*, BGE/ATF 121I 367, 27 October 1995.

children, the state is obliged to ensure access to day-care and kindergarten for children up to the age of six. According to the Brazilian Federal Supreme Court, compliance with this constitutional mandate cannot be left to administrative discretion.<sup>49</sup>

Access to basic, essential medical care is also considered to be a meaningful component of the right to health. The Argentine Supreme Court, upholding a Court of Appeals injunction, considered that, in the 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 healthcare givers to provide full essential medical services in case of need.<sup>50</sup>

Interestingly, even if the use of the notion of ESC rights is not common in the United States, there is extensive litigation before state (as opposed to federal) courts on the right to education in that country. Most of this litigation is based on state constitutional provisions that include the right to education or mandate the government to provide free primary education. While the predominant strategy during the 1970s and 1980s focused on challenging inequities in the funding of public education among different municipalities in the same state (the so-called *equity cases*), at the beginning of the 1990s the strategy turned to defining the minimum standards that should be met by the government in order to fulfil its constitutional obligations regarding public education (the so-called *adequacy cases*). Thus, even without speaking of ‘ESC rights’ or ‘core content’, state supreme courts have developed definitions concerning the minimum content of the right to education, finding in many cases that the government did not meet its duties, among other reasons for its failure to provide measurable standards to assess compliance, for inadequate funding or facilities or for poor academic results or clearly disparate academic results between richer and poorer sections of the population.<sup>51</sup>

### 3.3 Duties Linked to the Progressive Realisation of the Right

Even in the case of duties that are linked to the notion of progressive realisation, standards have been developed to review whether the state has met its obligations regarding ESC rights. ‘Progressiveness’ refers to the *full realisation* of ESC rights: it gives states some leeway in order to choose the means to achieve full realisation, but it does not imply absolute discretion and – even less – indifference regarding the outcomes. Examples of the standards used by courts are discussed in the next subsections.

#### 3.3.1 ‘Reasonableness’, ‘Appropriateness’, ‘Proportionality’ and Similar Standards

Constitutional and human rights norms typically impose duties and limitations on the political branches, including the legislature. Thus, even though the political branches of government have a margin of discretion or appreciation regarding the steps they undertake to ensure the enjoyment of rights,<sup>52</sup> some legislative activity – or inactivity –

<sup>49</sup> See Brazilian Federal Supreme Court (*Supremo Tribunal Federal*), RE 436996/SP, Opinion written by Judge Celso de Mello, 26 October 2005.

<sup>50</sup> See Argentine Supreme Court, *Reynoso, Nida Noemí c/ INSSJP s/amparo*, 16 May 2006 (majority vote agreeing with the Attorney General’s brief).

<sup>51</sup> Since the beginning of the 1990s, litigation in 21 of 27 states has been favourable to the plaintiffs. See, for example, Kentucky Supreme Court, *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989); Kansas Supreme Court, *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (Kan. 2005); New Jersey Supreme Court, *Abbott v. Burke*, 693 A.2d 417 (N.J. 1997); New York Supreme Court, *Campaign for Fiscal Equity v. State*, 719 N.I.Y.2d 475 (NY Sup Ct 2001); North Carolina Supreme Court, *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997); and Wyoming Supreme Court, *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995), among many others. For an overview, see Michael A. Rebell, ‘Adequacy Litigations: A New Path to Equity’, in Janice Petrovich and Amy Stuart Wells (eds.), *Bringing Equity Back: Research for a New Era in American Educational Policy* (New York: Teachers College Press 2005); and Michael A. Rebell, ‘Poverty, Meaningful Educational Opportunity and the Necessary Role of the Courts’, (2007) 85 *North Carolina Law Review* 102.

<sup>52</sup> See, for example, Guideline 8 of the Maastricht Guidelines.

could be inconsistent with the obligations and prohibitions that stem from constitutional and human rights norms. In different legal systems and traditions, judges perform the task of assessing the way in which both legislative power and the regulatory powers granted to the administration or the executive branch are exercised. While it is accepted that most constitutional and human rights norms are not absolute and are subjected to limitation, balancing or regulation, judges have developed tests to scrutinise the exercise of legislative or regulatory powers.<sup>53</sup> Some of the typical tests or standards that have been developed and are being applied include those that ask whether the powers have been exercised in a way that is 'reasonable', 'adequate' or 'proportionate'.<sup>54</sup>

The use of these tests is a common feature of constitutional review by courts, irrespective of the differences between diverse legal traditions. Similar formulas are 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.

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 goals required to be furthered by the constitution 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 regularly consider whether the piece of legislation or regulation ignored another constitutionally mandated goal.

With respect to the analysis of the means, 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 formulas for scrutiny vary: some are strict and some are 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.

The traditional grounds for the employment of such analysis are located in the field of civil and political rights. However, there is no reason why it cannot also be applied in relation to legislation or regulations regarding ESC rights.

A number of examples show how these approaches can be used in the context of ESC rights. The now famous *Grootboom* decision,<sup>55</sup> issued by the South African Constitutional Court, employed such analysis when it assessed the constitutional compatibility of a housing policy implemented by the government.<sup>56</sup> A group of homeless people who had recently been evicted from their informal settlements by a local authority approached the High Court seeking an order that the state was obliged to provide them with temporary shelter until such time as they were able to find more permanent housing. On appeal in the Constitutional Court, the plight of the particular group of claimants was resolved, as the state reached a settlement with them under terms of 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 temporary shelter to homeless people – was still before the Court. Relying on the constitutional right of everyone to have access to adequate housing, the Court held that the state had to put in place a comprehensive and workable plan in order to meet its housing rights obligations. The Court established that, in order to ascertain compliance with these obligations, three elements must be considered by the authorities: (1) the need to take reasonable legislative and other measures; (2) the need to achieve the progressive realisation of the right; and (3) the

<sup>53</sup> In the same sense, see the Limburg Principles, Principles 49, 51, 56 and 57.

<sup>54</sup> For an extensive overview, with specific reference to ESC rights, see Carlos Bernal Pulido, *El principio de proporcionalidad y los derechos fundamentales* (Madrid: Centro de Estudios Constitucionales 2005).

<sup>55</sup> 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), 4 October 2000.

<sup>56</sup> The summaries of the *Grootboom* decision and the next case were written by Danie Brand.

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 indeed 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.

In a similar vein, the South African Constitutional Court decided another important case involving the right to health. *South African Minister of Health v. Treatment Action Campaign*<sup>57</sup> 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 newborn 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 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 collection 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 pregnant women give birth to prevent the mother-to-child transmission of HIV and to devise a comprehensive plan to prevent the mother-to-child transmission of HIV. 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 were unreasonable and breached the Section 27(1) right of indigent mothers and their new-born babies to have access to healthcare services. In the 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 healthcare 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.

A similar path was taken by the Argentine Supreme Court, when deciding on a collective injunction regarding the right to health. In the *Asociación de Esclerosis Múltiple de Salta* case,<sup>58</sup> the Court upheld an appellate court decision that nullified 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 the exclusion of some previously protected situations from full medical coverage.

The Czech Constitutional Court has followed a similar approach. In its *Pl. US 42/04*<sup>59</sup> decision, the Court struck down mandatory statutory eligibility requirements for pension benefits, holding that they were unnecessary, disproportionate and contrary to the principle of equality. The statute required the potential beneficiary to file a claim during a two-year time frame in order to claim a pension to support a dependant child. The Court considered that, while the state goal (proper administration of public social security funding) involved limiting the possibilities for claiming the benefit and thus was legitimate, the same goal could be achieved by different means that would not affect the fundamental right.

<sup>57</sup> See Constitutional Court of South Africa, *South African Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721, 5 July 2002.

<sup>58</sup> 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 4 August 2003, Court decision of 18 December 2003.

<sup>59</sup> See Constitutional Court of the Czech Republic, *Pl. US 42/04*, 6 June 2006.

Similarly, the US Supreme Court decided that a statutory restriction in the eligibility conditions for a food stamp programme was unconstitutional,<sup>60</sup> confirming a lower court's decision to include the plaintiffs in the programme.

### 3.3.2 Prohibition of Retrogression

The Committee on Economic, Social and Cultural Rights has devoted some attention to the prohibition on states against deliberately introducing retrogressive measures.<sup>61</sup> The underlying principle is that, if the International Covenant on Economic, Social and Cultural Rights requires the progressive realisation of the rights it includes, acknowledging the necessary gradual character of their full enjoyment, it also forbids states from taking steps to worsen their realisation.<sup>62</sup> 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 legislation 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. Such comparisons are not foreign in a range of areas of law: a common principle of criminal law is the retroactive character of the most benign criminal law; labour law requires a comparison of statutory and collectively bargained clauses in order to assess the validity of the most favourable clause; international investment law includes clauses granting most-favoured-nation treatment; and international human rights law enshrines the *pro homine* principle, which imposes a preference for the more protective human rights clause in case of overlap.

While the prohibition of retrogression is not absolute, under the jurisprudence of the Committee on Economic, Social and Cultural Rights deliberately retrogressive measures constitute a *prima facie* violation, unless the state can prove, under heightened scrutiny, that they are justified.

Domestic courts have employed this prohibition of retrogression in a variety of settings. The Portuguese Constitutional Tribunal provides interesting examples of its invocation. For instance, the Constitutional Tribunal heard a constitutional challenge against a statute that abrogated a previous statute establishing the National Health Service. The Tribunal held 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 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....

<sup>60</sup> See US Supreme Court, *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, 25 June 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'.

<sup>61</sup> See Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States parties' obligations (5th session, 1990), UN Doc. E/1991/23, para. 9; General Comment No. 13: The right to education (21st session, 1999), UN Doc. E/C.12/1999/10 (1999) para. 45; General Comment No. 14: The right to the highest attainable standard of health (22nd session, 2000) para. 32; General Comment No. 15: The right to water (29th session, 2003), UN Doc. E/C.12/2002/11 (2003) para. 19; General Comment No. 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), UN Doc. E/C.12/GC/17 (2006) para. 27; General Comment No. 18: The right to work (35th session, 2006), UN Doc. E/C.12/GC/18 (2006) para. 21; and General Comment No. 19: The right to social security (39th session, 2007), UN Doc. E/C.12/GC/19 (2008) paras. 42 and 64. See also Guideline 14(e) of the Maastricht Guidelines.

<sup>62</sup> For an in-depth analysis, see the articles compiled in Christian Courtis (ed.), *Ni un paso atrás. La prohibición de regresividad en materia de derechos sociales* (Buenos Aires: Editores del Puerto 2006).

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.<sup>63</sup>

In another case, the Constitutional Tribunal considered the constitutional challenge of a statute regulating a guaranteed minimum income benefit.<sup>64</sup> The new statute changed the minimum age limit for those receiving benefits, adjusting it from 18 to 25, thus excluding people aged between 18 and 25 who had previously been covered. The Constitutional Tribunal considered, among 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. It was thus 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.<sup>65</sup> 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, or a full compensation tort regime, where the plaintiff had to prove negligence. In September 1995, the Argentine Congress approved legislation that overhauled the entire occupational health and safety compensation system. The court-based worker's compensation scheme was discarded, 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 not only based its opinion on constitutional grounds (including the right of the worker to dignified and equitable working conditions) but also drew on international human rights standards.

The Colombian Constitutional Court has also held in a number of cases that retrogressive measures in the field of ESC rights are to be logically considered a breach of state duties and thus should be subjected to heightened constitutional scrutiny. For example, the Court struck down retrogressive legislation regarding pensions,<sup>66</sup> health coverage,<sup>67</sup> education<sup>68</sup> and protections for the family and workers,<sup>69</sup> as well as retrogressive administrative regulations regarding housing.<sup>70</sup> In some cases, however, the Court considered that the state's justifications for the introduction of retrogressive legislation regarding workers' protections against dismissal were enough to overcome the usual presumption against such steps.<sup>71</sup>

<sup>63</sup> Portuguese Constitutional Tribunal (*Tribunal Constitucional*), Decision (*Acórdão*) No. 39/84, 11 April 1984.

<sup>64</sup> Portuguese Constitutional Tribunal, Decision (*Acórdão*) No. 509/2002, 19 December 2002.

<sup>65</sup> Argentine Supreme Court, *Aquino, Isacio c. Cargo Servicios Industriales S.A. s/accidentes ley 9.688*, 21 September 2004.

<sup>66</sup> See Colombian Constitutional Court, Decision *T-789/2002*, 24 September 2002.

<sup>67</sup> See Colombian Constitutional Court, Decision *T-671/2002*, 20 August 2002.

<sup>68</sup> See Colombian Constitutional Court, Decision *C-931-2004*, 29 September 2004.

<sup>69</sup> See Colombian Constitutional Court, Decision *C-991-2004*, 12 October 2004.

<sup>70</sup> See Colombian Constitutional Court, Decision *T-1318/2005*, 14 December 2005.

<sup>71</sup> See, for example, Colombian Constitutional Court, Decision *C-038/2004*, 27 January 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.



In the same vein, the Belgian Court of Arbitration has interpreted 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:

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 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.<sup>72</sup>

#### 4 Concluding Remarks

This article has tried to show that it is not impossible to define the content of ESC rights and develop standards for their adjudication and that this has been done and continues to be done by courts and adjudicative bodies around the world. Innovative conceptual approaches have enabled judges to consider different aspects of ESC rights: both negative and positive obligations and both procedural and substantive duties. The list of standards offered here is not exhaustive, and the cases referred to – and, of course, other cases – can be also classified under other criteria.<sup>73</sup>

<sup>72</sup> See Belgian Court of Arbitration (*Cour d'Arbitrage*), Case No. 5/2004, 14 January 2004, para. B.25.3. See also Case No. 169/2000, 27 November 2002, paras. B.6.1 to B.6.6.

<sup>73</sup> For instance, under the distinction between duties to respect, duties to protect and duties to fulfil, frequently used by the UN Committee on Economic, Social and Cultural Rights. See, for example, International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights*, Human Rights and Rule of Law Series No. 2 (Geneva: ICJ 2008) 42-54. For an exhaustive discussion of the distinction between duties to respect, duties to protect and duties to fulfil, see Magdalena Sepúlveda, *The Nature of Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerp: Intersentia 2003).