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The role of judges in the protection of economic, social and cultural rights

1. Introduction

The first statutory recognitions of economic, social and cultural rights date from the last third of the 19th century.[1] Economic, social and cultural rights entered the language of constitutional law in the period between wars – the 1917 Mexican, the 1919 German and the 1931 Spanish constitutions being early examples –, and have become part of the constitution in most of the world since the end of the Second World War, including many African countries.[2] Economic, social and cultural rights have also been part of international human rights since the adoption of the Universal Declaration of Human Rights in 1948 – as well as included in the ILO and WHO constitutions and the Charter of the League of Nations. Regional human rights instruments, such as the African Charter of Human and Peoples' Rights, also include economic, social and cultural rights.

Yet, compared to civil and political rights, there has been considerably less attention placed on the need to produce a conceptual framework to develop the content of economic, social and cultural rights and the protection mechanisms needed to enforce them. One of the traditionally neglected issues with regard to economic, social and cultural 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 economic, social and cultural rights. A number of objections have been directed against the justiciability of economic, social and cultural. The focus here is on the developments which enable courts to overcome the alleged vagueness of economic, social and cultural rights as an obstacle for

[1] See, for example, François Ewald, *L'Etat providence* (Paris: Grasset, 1986); José Reinaldo Vanossi, *El Estado de derecho en el constitucionalismo social* (Buenos Aires: EUDEBA, 1994).

[2] African countries which have recognized some economic, social and cultural rights in their Constitutions include, *inter alia*, Angola, Burundi, Cameroon, Cape Vert, the Democratic Republic of Congo, Egypt, Ethiopia, Madagascar, Malawi, Morocco, Mozambique, Namibia, Nigeria, Rwanda, Senegal, South Africa, Swaziland, Tanzania and Uganda.

adjudication.[3] According to this objection, economic, social and cultural rights recognized in constitutions or human rights instruments are phrased in such a vague or indeterminate way that – allegedly – they do not offer intelligible standards about what they require, and thus they cannot constitute the basis for a judgment about whether a legal duty has been complied with or not. Sometimes this objection is expressed by saying that economic, social and cultural rights are merely "aspirational" or "programmatic" – that is, that they should be understood as guidelines for legislative or administrative action, but not as rules or principles to be adjudicated upon by judges.

Some of the developments I will comment on are reflected in soft law instruments,[4] and – more importantly – they have been endorsed by domestic, regional and international courts and adjudicative bodies across the world.

Finally, the arguments made here should not be interpreted as a call to reduce economic, social and cultural rights to their justiciability, or to limit the mechanisms for monitoring the compliance with economic, social and cultural rights *only* to litigation. It is just a call to *include* litigation as a mechanism, in conjunction with other mechanisms – for instance, political mobilization, monitoring by specialized 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.

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[3] There are, of course, other objections. Among them, the alleged incompatibility of the adjudication of economic, social and cultural 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 this 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, ICJ, Geneva, 2008 – on which this article is partially based.

[4] See, for example, Limburg Principles on the Implementation of the International Covenant on Economic, social and cultural Rights (Limburg Principles), and Maastricht Guidelines on Violations of Economic, social and cultural Rights (Maastricht Guidelines).
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).
See also Committee on Economic, Social and Cultural Rights, General Comment No. 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23.

First, the overall assumption that economic, social and cultural rights are not justiciable 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 massive case law in such fields as social security, health or education before courts of all regions in the world.

Secondly, blanket arguments against the justiciability of economic, social and cultural 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 belonging to one category. However, a review of any accepted list of economic, social and cultural rights – for example, the list of rights provided by the International Covenant on Economic, Social and Cultural Rights – would indeed show the opposite: there is no single formal pattern, but a wide variety of provisions that establish economic, social and cultural rights, some stated as freedoms, some as obligations on the State regarding third parties, some as obligations on the State to adopt measures or to achieve some 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, one finds a wide variety of provisions, stating 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 – or duties to provide access to services or institutions. General classifications – such as "civil and political" and "economic, social and cultural" rights – are too broad to capture the nuances and different features of every single right. Rights placed under the same category may share some "familiar resemblance", but can otherwise be very different.

There is no common trait or feature capable of defining either civil and political rights, or economic, social and cultural rights, as if they were perfectly consistent sets of rights. The effort to reduce civil and political rights to "negative rights" – that is, rights that require abstention from the State – and economic, social and cultural rights to "positive rights" – that is, rights that require action from the State – is clearly misconceived. All human rights – regardless of being classified as a civil, political, economic, social or cultural right – requires *both* abstention and positive action by the State, and there are hardly any rights which does not require resources to be implemented and protected.

These preliminary ideas suggest that overall assumptions about the justiciability of civil and political rights and against the justiciability of economic, social and cultural rights should be taken with caution – the span of human rights may be well considered as a continuum, rather than two watertight categories. As we will see, the experience of different courts in the world actually offers good evidence of the need to a more practical and less dogmatic approach.

3. Some developments regarding the justiciability of economic, social and cultural rights

In this section, I will review examples of how different courts and adjudicative bodies – domestic, regional and international – have applied innovative conceptual approaches, overcoming the anachronistic assumption that economic, social and cultural rights are not justiciable. The examples are not meant to be exhaustive, but just illustrative – both of innovative conceptual approaches and of case law applying them. I will focus here on conceptual developments that may apply to any economic, social and cultural right – and arguably to all human rights. But it is important to underscore that there have been also conceptual efforts to develop the content of specific economic, social and cultural 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.[5]

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 realization of economic, social and cultural 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 with the progressive realization of economic, social and cultural rights

Part of the objections against the justiciability of economic, social and cultural 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

[5] 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 (Sixth session, 1991), U.N. Doc. E/1992/23; General Comment No. 7, Forced evictions, and the right to adequate housing (Sixteenth session, 1997), U.N. Doc. E/1998/22; General Comment No. 9, The domestic application of the Covenant (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998); General Comment No. 11, Plans of action for primary education (Twentieth session, 1999), U.N. Doc. E/C.12/1999/4 (1999); General Comment No. 12, Right to adequate food (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999); General Comment No. 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999); General Comment No. 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 No. 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. 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), (Thirty-fifth session, 2005) U.N. Doc. E/C.12/GC/17 (2006); General Comment No. 18, The right to work, (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006); General Comment No. 19, The right to social security, (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008) and General Comment No. 20, Non-discrimination in Economic, social and cultural Rights (Forty-second session, 2009), E/C.12/GC/20 (2009).

Domestic courts and national human rights institutions have also played an important role in the clarification of the content of specific economic, social and cultural rights.

the reference to the notion of "progressive realization", included in article 2.1 of the International Covenant on Economic, Social and Cultural Rights. According to this notion, the full realization of economic, social and cultural 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 stressed that while on the one hand some aspects of economic, social and cultural rights are subjected to progressive realization, on the other hand, there are a number of duties which are immediately required to the State.

Courts have made a fruitful use of this distinction, finding in many cases that the recognition of an economic, social and cultural right in a constitution or, when applicable, in a human rights instrument, entails some immediate duties where "progressive realization" or similar notions play no role whatsoever.

3.1 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 economic, social and cultural 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, of 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 legal justification and, even if there is a legal justification, without due compliance with procedural guarantees. The Supreme Courts of India and of Bangladesh have issued important decisions in this regard, underscoring the importance of the State's procedural duties which must be complied with as a requisite for a lawful eviction.[6] For instance, the Supreme Court of Bangladesh ruled, in *ASK v. Bangladesh*,[7] 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.

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[6] See 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.

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

A decision of the Constitutional Court of South Africa also illustrates this point. In *Port Elizabeth Municipality v. Various Occupiers*[8] the Court declined to grant an eviction order to evict 68 people squatting privately owned land. The Court considered the request for eviction petition under three criteria – 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 – and 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 mentioned approach in the *Social and Economic Rights Action/Center for Economic and Social Rights v. Nigeria* case[9]. 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."[10]

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".[11] The Commission also considered violations to 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

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[8] See Constitutional Court of South Africa, *Port Elizabeth Municipality v. Various Occupiers*, case CCT 53/03, 4 March 2004.
[9] See African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication No. 155/96, October 13-27, 2001.
[10] Ibid, para. 45 (footnote omitted).
[11] Ibid, para. 54.

> constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1) of the African Charter."[12]

Similarly, the Commission found that the State had also breached its duties to respect the right to food.[13]

In a case regarding the prohibition of forced labour,[14] the European Committee of Social Rights reviewed the Greek legislation and practice regarding the civil service to 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 the state tax power cannot extend to the material means necessary to cover the "existential minimum".[15] 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 economic, social and cultural rights are often identified with substantive aspects, they also have procedural dimensions to them, which 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 economic, social and cultural rights. Procedural guarantees can take multiple forms. They could be set as a prerequisite to the adoption of certain general measures and policies by the State (for example, the right to a public hearing or the right to be consulted before the adoption of such measures or policies). They could also establish the steps the State is obliged to undertake before granting, denying or depriving particular individuals or groups from an entitlement. Procedural guarantees could also be aimed at establishing the basis for the administrative or judicial review of decisions adopted by administrative or and other political authorities.

Principles regarding access to courts and fair trial and administrative procedures are particularly relevant in the area of economic, social and cultural rights, where the recognition of individual entitlements depends to a great extent on the action by 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

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[12] Ibid, paras. 61-62.
[13] Ibid, para. 66.
[14] See European Committee of Social Rights, *Quaker Council for European Affairs (QCEA) v. Greece*, Complaint No. 8/2000, April 27, 2001.
[15] See, for example, German Federal Constitutional Court, *BVerfGE 82, 60(85), BVerfGE 87, 153(169)*.

reasonable length, fair review of administrative decisions, access to legal counsel, access to the file and relevant information, and impartiality and independence of the adjudicative body, among many others. From a substantive viewpoint, the fact that economic, social and cultural rights are frequently linked with access to the most basic human needs, such as food, shelter, health care or ensuring a subsistence level income, particularly 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 economic, social and cultural rights. The European Court of Human Rights has 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.[16] In this regard, the Court has considered 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, among other aspects.[17]

In turn, the Inter-American Court of Human Rights has applied article 8 (concerning the right to a fair trial) and article 25 (on the right to judicial protection) of the American Convention on Human Rights in matters regarding labour rights, social security rights, recognition of legal personality of indigenous groups, and access to communal lands by indigenous groups.[18]

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[16] See, for example, European Court of Human Rights, *Feldbrugge v. the Netherlands*, May 29, 1986 (concerning the right to compensation for a work related accident); *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).

[17] See, for example, 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*, 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); *Vocaturo v. Italy*, May 24, 1991 (length of proceedings for determination of labour rights exceeds reasonable time); *X v. France*, March 31, 1992 (length of proceedings for determination of a health related tort claim exceeds reasonable time); *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.

[18] 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

The Court 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 of procedural guarantees in the field of economic, social and cultural rights is even broader. The extent to which the State, or private parties, comply with procedural burdens before adopting decisions that may impair the realization of economic, social and cultural rights has also been a regular subject of judicial review. A number of examples illustrate this idea. Respect for procedural guarantees is a key element of protection against forced evictions;[19] termination of social benefits;[20] and adoption of measures that could affect indigenous communities,[21] users and consumers of public utilities,[22] patients,[23] the environment[24] and other stakeholders.[25] Compliance with procedural prerequisites such as the requirement for rights to be regulated by parliamentary statute,[26] and the requirements for fair notice, access to information, public hearings, group consultation or individual

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articles 8 and 25 for lack of compliance with judicial decisions protecting arbitrarily dismissed of workers).

[19] 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.

[20] See, for example, US Supreme Court, *Goldberg v. Kelly*, March 23, 1970, 397 U.S. 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).

[21] 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.

[22] 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, upon finding that there had been a failure to provide adequate information to users.

[23] See, for example, UN Committee on the Elimination of Discrimination against Women, *Andrea Szijjarto v. Hungary*, Communication No. 4/2004, 14 August 2006 (sterilization without properly obtained informed consent violates, *inter alia*, the right to health of women).

[24] 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.

[25] 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).

[26] 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.

informed consent prior to decision-making, are important elements which may affect economic, social and cultural.

3.2.3 Equal protection and the prohibition of discrimination

An important number of issues regarding the justiciability of economic, social and cultural rights involve questions regarding either discrimination claims, or challenges based on illegitimate or unreasonable distinctions established by law, or resulting from law, linked with access to those rights or to the services which provide those rights. It is not by chance that empirical data shows that poverty particularly affects some 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 it that the prohibition of discrimination is an obligation of immediate effect in the International Covenant on Economic, Social and Cultural Rights.[27] Other international human rights instruments also contain the same obligation: article 26 of the International Covenant on Civil and Political Rights, which makes the equal protection principle applicable to any legislation passed by the State, regardless of its substantive content, encompassing legislation meant to regulate economic, social and cultural rights. Several clauses enshrined in the Convention on the Elimination of All Forms of Racial Discrimination, the Convention for the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, make explicit reference to its application to norms and practices regarding economic, social and cultural 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 worldwide.

Traditional anti-discriminatory litigation, challenging normative distinctions based on forbidden grounds or showing that legislation or administrative practices have a disproportionate impact on a particular social group, are well-suited – and has been extensively employed – to the field of economic, social and cultural rights, social policies and social services.[28]

One ofthe most famous cases in US constitutional law, *Brown v. Board of Education of Topeka*,[29] is a case regarding the application of the equal

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

[28] For a general overview, see Owen M. Fiss, "Groups and the Equal Protection Clause", in *Philosophy and Public Affairs*, Vol. 5, No. 2 (Winter, 1976), pp. 107-177; Robert C. Post, *Prejudicial Appearences. The Logic of American Antidicrimination Law* (Durham: Duke University Press, 2001).

[29] 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*

protection clause to the right to education. In that case, the US Supreme Court decided that the existence of schools segregated by race 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) also considered situations of violations of economic, social and cultural rights through discrimination on the basis of racial origin. In the case of *Ms. L. R. et al v. Slovakia*,[30] CERD dealt with a municipal decision revoking a housing policy directed towards to fulfilling the needs of the Roma population, finding that such revocation amounted to a discriminatory impairment of the right to housing based on grounds of ethnic origin.

The Human Rights Committee (HRC) has also considered cases where the right to equal protection under the law and the prohibition of discrimination were applied to economic, social and cultural rights. In the *Zwaan de Vries* case[31], 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, considering social benefits to be protected by the right to property enshrined in Protocol 1 to the European Convention.[32]

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.[33] 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 including them in the social assistance system would attract a flood of immigrants to South Africa and would place an unsustainable financial burden on the social assistance budget. The court 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

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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).

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

[31] 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.

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

[33] See Constitutional Court of South Africa, *Khosa and others v Minister of Social Development and others,* 2004 (6) SA 505 (CC), March 4, 2004.

declared the offending provisions of the *Social Assistance Act* unconstitutional and proceeded to extend the application of the provisions so that permanent residents would also be eligible.

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. The Court has interpreted these benefits to be protected by the right to property enshrined in Protocol 1 to the European Convention. In the *Gaygusuz* case,[34] 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 thus was discriminatory. In the *Koua Poirrez* case,[35] the Court considered an alleged discriminatory violation of the right to property, based again on national origin. The Court considered that the law refusing a non-contributory allowance for adults with a disability on the basis of national original was unjustifiable and amounted to discriminatory treatment.

The United Kingdom 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 (the prohibition of discrimination) of the European Convention on Human Rights and Fundamental Freedoms in relation to article 8 (the right to respect of family and private life) of the European Convention, applicable under the *Human Rights Act*.[36]

Some courts have dealt with violations of the equal application of economic, social and cultural rights based on new 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 economic, social and cultural 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

[34] See European Court of Human Rights, *Gaygusuz v. Austria,* September, 16, 1996, paras. 46-52.
[35] See European Court of Human Rights, *Koua Poirrez v. France*, September 30, 2003, paras. 46-50.
[36] See UK House of Lords, *Ghaidan v. Godin-Mendoza* [2004] UKHL 30.

settlements,[37] while in other cases the Supreme Court ruled that the State should adopt measures to address the inequalities,[38] or it validated the measures shown to be adopted by the Government in order to modify the situation.[39]

In the *Klickovic, Pasalic and Karanovic* case,[40] the Human Rights Chamber for Bosnia and Herzegovina decided that the disparity in pension payments given to pensioners returning to Bosnia and Herzegovina, versus those pensioners who 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.

In addition to prohibiting active discriminatory practices either by State agents or private parties, anti-discriminatory action also requires active measures providing protection for disadvantaged, vulnerable or minority groups. Children, for example, are a group that has deserved particular attention as the target for special protection measures. There is also a growing consensus that persons with disabilities require pro-active measures to make environments accessible and in order to allow full social inclusion. Respect for the cultural traditions of indigenous peoples is a further example of the need to consider relevant differences for some social groups.

A case decided by the Canadian Supreme Court can illustrate this point. In the *Eldridge* case,[41] the Court decided that health care 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 considered that 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 the disadvantaged group can equally benefit from public health services.

Courts have also addressed the need to respect cultural 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,

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[37] 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 centers for unrecognized Bedouin villages in the Negev.

[38] 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.

[39] 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.

[40] 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.

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

Awas Tingni v. Nicaragua,[42] and in subsequent cases,[43] the Court 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 *Awas 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 for the land.[44]

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 economic, social and cultural rights is the notion of *core content* (also called minimum core content, minimum core obligations,[45] minimum threshold or 'essential content', as it is known in the German constitutional tradition and the traditions which draw from it). This notion entails the possibility of defining minimum levels of a right, without which that right would be unrecognizable or meaningless.

This notion has been employed in different contexts, including when analysing civil and political rights, and 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 conceived 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.[46] Similarly, the Swiss Federal Court found that an implied constitutional right to a 'minimum level of subsistence'

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

[43] 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.

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

[45] See, for example, Maastricht Guidelines, Guideline 9. 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).

[46] 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).

(*'conditions minimales d'existence'*), both for Swiss nationals and foreigners, could be enforced by the Swiss Courts.[47]

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.[48]

Access to basic, essential medical care has also been 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 health care givers to fully provide essential medical services in case of need.[49]

Interestingly, even if the use of the notion of economic, social and cultural 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 which include the right to education, or mandate the government to provide free primary education. While the predominant strategy during the 1970s and 80s was focused on challenging inequities in the funding of public education among different municipalities of the same state (the so-called *equity cases*), in the beginning of the 1990s the strategy turned to defining the minimum standards that should be complied by the government in order to fulfill its constitutional obligations regarding public education (the so-called *adequacy cases*). Thus, even without speaking of "economic, social and cultural rights" or "core content", state supreme courts have developed definitions about 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.[50]

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

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

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

[50] Since the beginning of the 1990s, litigation in 21 out of 27 States has been favorable 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); 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,

3.3 Duties linked with the progressive realization of economic, social and cultural rights

Even in the case of duties which are linked to the notion of progressive realization, standards have been developed to review whether the State has met its obligations regarding economic, social and cultural rights. "Progressiveness" refers to the *full realization* of economic, social and cultural rights: it gives State some leeway in order to choose the means to achieve the full realization, but it does not mean 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 Executive and the Legislature. Thus, even though the Government has a margin of discretion or appreciation regarding the steps they undertake to ensure the enjoyment of rights,[51] some administrative and legislative activity or lack of activity 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 the legislative power and the regulatory power 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 tests, judges have developed tests to scrutinise the exercise of legislative or regulatory powers.[52] Some of the typical standards that have been developed and which are applied include those that ask whether the powers have been exercised in a way that is 'reasonable', 'adequate' or 'proportionate'.

The use of these standards is a common feature of constitutional review by courts, irrespective of the differences amongst diverse legal traditions. Similar formulae 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 fulfill 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

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2005), and Michael A. Rebell, "Poverty, Meaningful Educational Opportunity and the Necessary Role of the Courts", 85 North Carolina Law Review 102 (2007).

[51] See, for example, Maastricht Guidelines, Guideline 8.

[52] In the same sense, see Limburg Principles, Principles 49, 51, 56 and 57.

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 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.

The traditional ground for the employment of such analysis has been in the field of civil and political rights. There is, however, no reason why it cannot also be applied in relation to legislation or regulations regarding economic, social and cultural rights.

A number of examples show how these approaches can be used in the context of economic, social and cultural rights. The now famous *Grootboom* decision,[53] issued by the South African Constitutional Court, employed such analysis when it assessed the constitutional compatibility of a housing policy implemented by the Government.[54] A group of homeless people who had recently been evicted by a local authority from their informal settlements 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 had been resolved, as the State had reached a settlement with them in 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 to homeless people temporary shelter – 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 determine the 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 requirement to use available resources. Regarding the 'reasonableness' of the measures adopted, the Constitutional Court said that the State had a legal duty to, at least, 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

[53] Constitutional Court of South Africa, *The Government of the Republic of South Africa and others vs. Irene Grootboom and others*, 2001 (1) SA 46 (CC), October 4, 2000.
[54] The summaries of *the Grootboom* decision and the next case were written by Danie Brand.

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*[55] 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 NGO's 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, was unreasonable and breached the section 27(1) right of indigent mothers and their new-born babies to have access to health care services. 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.

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 Economic, social and culturallerosis Múltiple de Salta* case,[56] the Court upheld an appellate court decision which 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.

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

[56] See Argentine Supreme Court, *Asociación de Economic, social and culturallerosis 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.

The Czech Constitutional Court has followed a similar approach. In its *Pl. US 42/04*[57] decision, 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 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.

Similarly, the US Supreme Court of the United States decided that a statutory restriction in the eligibility conditions for a food stamp program was unconstitutional,[58] confirming a lower court's decision to include the plaintiffs in the program.

3.3.2 Prohibition of retrogression

The Committee on Economic, Social and Cultural Rights has devoted some attention to the prohibition on States of deliberately introducing retrogressive measures.[59] The underlying principle is that if the International Covenant on Economic, Social and Cultural Rights requires the progressive realization of the rights it includes – acknowledging the necessary gradual character of their full enjoyment –, it also forbids States to take steps to worsen 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 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 criminal law principle is the retroactive character of the most benign criminal law; labour law requires

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

[58] See US Supreme Court, *U.S. Department of Agriculture v. Moreno*, 413 U.S. 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".

[59] See Committee on Economic, Social and Cultural Rights, General Comments No. 3, The nature of States parties' obligations (Fifth session, 1990), U.N. Doc. E/1991/23, para. 9; No. 13, The right to education (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999), para. 45; No. 14, The right to the highest attainable standard of health (Twenty-second session, 2000), para. 32; No. 15, The right to water (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003), para. 19; 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), U.N. Doc. E/C.12/GC/17 (2006), para. 27; No. 18, The right to work, (Thirty-fifth session, 2006), U.N. Doc. E/C.12/GC/18 (2006), para. 21; No. 19, The right to social security, (Thirty-ninth session, 2007), U.N. Doc. E/C.12/GC/19 (2008), paras. 42 and 64. See, also, Maastricht Guidelines, Guideline 14(e).

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.

While the prohibition of retrogression is not absolute, under the jurisprudence of the Committee on Economic, Social and Cultural Rights, deliberately retrogressive measures constitute *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. 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 (…).
>
> 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."[60]

In another case, the Constitutional Tribunal considered the constitutional challenge of a statute regulating a guaranteed minimum income benefit.[61] The new statute changed the minimum age limit for those receiving benefits, adjusting the age from 18 to 25 years, thus excluding people from 18 to 25 years old 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.[62] The previous system provided employees who claimed to be victims of occupational health and safety violations with an option: the employee had to chose 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 which overhauled the entire occupational health and safety compensation system. The court-based worker's compensation scheme was left 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.

The Colombian Constitutional Court has also held in a number of cases that retrogressive measures in the field of economic, social and cultural 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,[63] health coverage,[64] education,[65] and protections for the family and workers,[66] and also retrogressive administrative regulations regarding housing.[67] In some cases, however, the Court considered that the State's justifications for the

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[60] Portuguese Constitutional Tribunal (*Tribunal Constitucional*), Decision (*Acórdão*) Nº 39/84, April 11, 1984.
[61] Portuguese Constitutional Tribunal, Decision (*Acórdão*) Nº 509/2002, December 19, 2002.
[62] Argentine Supreme Court*, Aquino, Isacio c. Cargo Servicios Industriales S.A. s/accidentes ley 9.688*, September 21, 2004.
[63] See Colombian Constitutional Court, decision *T-789/2002*, September 24, 2002.
[64] See Colombian Constitutional Court, decision *T-671/2002*, August 20, 2002.
[65] See Colombian Constitutional Court, decision *C-931-2004*, September 29, 2004.
[66] See Colombian Constitutional Court, decision *C-991-2004*, October 12, 2004.
[67] See Colombian Constitutional Court, decision *T-1318/2005*, December 14, 2005.

introduction of retrogressive legislation regarding workers' protections against dismissal were enough to overcome the usual presumption against such steps.[68]

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 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".[69]

4. Concluding remarks

This presentation has tried to demonstrate that defining the content of economic, social and cultural rights and developing standards for their adjudication is not impossible, and that it has been done and continues to be done by courts and adjudicative bodies across the world. Innovative conceptual approaches have enabled judges to consider different aspects of economic, social and cultural rights: both negative and positive obligations, and both procedural and substantive duties. The list of standards offered here

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[68] 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.

[69] 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.

is not exhaustive, and the cases referred to – and of course other cases – can be also classified under other criteria.[70]

[70] For instance, under the distinction between duties to respect, duties to protect and duties to fulfill, 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, ICJ, Geneva, 2008, pp. 42-54. For an exhaustive discussion of the distinction between duties to respect, duties to protect and duties to fulfill, see Magdalena Sepúlveda, *The Nature of Obligations under the International Covenant on Economic, social and cultural Rights* (Antwerp: Intersentia, 2003).