

**The Justiciability of Social and Economic Rights:
An Updated Appraisal**

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Introduction

In this paper we consider the question of the justiciability of social and economic rights, both from a conceptual and an experiential perspective. We first review some of the major concerns that are raised about whether social and economic rights can or should be, adjudicated by courts, drawing on commentary from both experts and judicial and quasi-judicial bodies considering this question. This is followed by an overview of the growing body of jurisprudence from domestic courts, regional and international bodies which have adjudicated social and economic rights, This is provided in order to give a better sense of what the adjudication of social and economic rights really looks like, and how courts and other bodies solve the problems that have been raised about the justiciability of these rights.

1. What is at Stake in the Justiciability Debate?

The debate about the justiciability of social and economic rights is an old and well-worn one. In recent years, with an increasing number of countries including social and economic rights in their constitutions, and with domestic courts and regional bodies routinely adjudicating and ruling upon social and economic rights claims, the trend has been to pronounce that the debate is over, and that social and economic rights have been proven to be justiciable. As social and economic rights are litigated directly and indirectly before regional bodies, including the African Commission on Human Rights,¹ the Inter-American Commission of Human Rights,² the Inter-

¹ See, e.g., *Purohit and Moore v. Gambia*, Communication 241/200. Decided at 33rd Ordinary Session of the African Commission, 15-29 May 2003 (dealing with the right health of mental health patients); *SERAC and CESR v. Nigeria* African Commission on Human Rights, Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, from 13th to 27th October 2001 (dealing with the right to health and the implied rights to food and housing). For more on the Commission's treatment of social and economic rights, see Joe Olaka-Onyanga, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa', *California Western International Law Journal*, Vol. 26 (1995), 1; Danwood Chirwa, 'African Human Rights System: The Promise of

American Court of Human Rights,³ the European Committee of Social Rights⁴ and the European Court of Human Rights,⁵ and in many domestic courts⁶, it becomes increasingly difficult to argue with any credibility that these rights are not justiciable.

Yet, as the recent discussions at the United Nations about an optional protocol to establish a complaints mechanism to the International Covenant on Economic, Social and Cultural Rights (ICESCR) have shown, there remains resistance to recognising the full justiciability of social and economic rights on the part of some states. A Working Group established to consider the optional protocol has heard from a number of experts that social and economic rights must now be agreed to be justiciable.⁷ But this has not resolved the issue. While states less favourable to an optional protocol such as Canada and the U.K. are now more cautious about insisting in simplistic terms that social and economic rights are not justiciable, they continue to question the value of a complaints and adjudication procedure for many aspects of social and economic rights on the basis of the alleged “vagueness” of those rights and the inappropriateness of interference with governments’ decisions about socio-economic policy. In order to get the support of these states at the new Human Rights Council for a resolution mandating the Working Group to proceed with drafting an optional protocol, the resolution was altered to ensure that any first draft

Recent Jurisprudence on Social Rights’ in M. Langford (ed.) *Social and Economic Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, forthcoming).

² See, e.g., *Argentina: Jehovah's Witnesses, Case 2137*, Inter-Am. C.H.R. 43, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1979) (Annual Report 1978) (dealing with the right to education); *Jorge Odir Miranda Cortez et al. v. El Salvador* Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000) (admissibility decision dealing with the economic, social and cultural standards enshrined in the OAS Charter).

³ See, e.g., *Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, Inter-American Court of Human Rights Series C, No. 79, 31 August 2001 (involving the right to property); *Dilcia Yean and Violeta Bosica v. Dominican Republic*, Inter-American Commission on Human Rights, Report 28/01, Case 12.189, 7 December 2005 (involving the rights of the child).

⁴ *Autisme-Europe v. France*, Complaint No. 13/2002, 7 Nov. 2003, (dealing with the education rights of persons with autism); *FIDH v. France*, Complaint No. 14/ 2003, 8 Sept. 2004 (involving, *inter alia*, the right to medical assistance of non-nationals).

⁵ For a list of decisions of regional bodies in relation to social and economic rights see A. Nolan et al, ‘Leading Cases on Economic, Social and Cultural Rights: Summaries – Working Paper No.2’ (Geneva; COHRE, 2005), available at www.cohre.org.

⁶ Jurisdictions in which social and economic rights have been deemed justiciable and judicially enforceable include, *inter alia*, Bangladesh Colombia, Finland, Kenya, Hungary, Latvia, the Philippines, Switzerland, Venezuela, South Africa, Ireland, India, Argentina and the USA. For a more details of decisions of national courts involving justiciability of social and economic rights, *see ibid*.

⁷ Report from the First Session of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR (2004) E/CN.4/2004/44; Report from the Second Session of the Open-Ended Working Group to consider options for an Optional Protocol to ICESCR (2005) E/CN.4/2005/52

prepared by the Chairperson would include options which would limit the “scope and application” of a complaints procedure.⁸ Some states continue to argue that a complaints procedure should be limited to only some components of rights under the ICESCR, or that this optional protocol, unlike those established for other human rights treaties, should provide states, upon ratification of the Optional Protocol, with an “à la carte” choice of which rights the complaints procedure would cover.

It is thus clear that the questions of how far to go in creating institutional mechanisms for the adjudication and enforcement of social and economic rights, how to demarcate the role of courts or other bodies in adjudicating those rights, and how to frame the relationship of these institutional mechanisms with the elected branches of government in this area remain real and important.

We have come to realise that the notion of what is ‘justiciable’ is largely determined by assumptions about the role and competence of courts, and that these assumptions themselves must be subject to question. The question of what rights or components of rights should be subject to adjudication and remedy by courts or other bodies raises critical questions about how governments are to be made accountable, in practical terms, to human rights norms. Our understanding of the role of courts must evolve with our changing understanding of fundamental rights and respond to new challenges and problems in relation to accountable governance and human rights.

When the justiciability debate is situated in a broader framework of questions about human rights, social citizenship and accountable governance, traditional assumptions about the role of courts are reassessed in terms of their implications for rights-holders. For example, the statement that social and economic rights are human rights but that it is not the role of courts or of a UN

⁸ Human Rights Council, Resolution 2006/3, Open Ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, para. 2. Available at http://www.ohchr.org/english/issues/escr/docs/res2006_3.pdf. Canada, for example, explained after the vote that it “continued to question the merits of a communications procedure for economic, social and cultural rights, and was concerned for the potential of undue interference by an international body, and the absence of a clear definition for many economic, social and cultural rights, as well as for clear criteria for judging compliance.”(UN Press Release, ‘Action on Resolution on Working Group on Optional Protocol to the International Covenant on Economic, Social and Cultural Rights’, 29 June 2006).

body to interfere with governments' decisions about how to allocate its resources may seem, at first instance, to be only about institutional roles. Yet the statement translates directly into a response to those who are denied the basic requirements of security and dignity by poverty, homelessness or other violations of social and economic rights. For them, any decision that the judiciary should not interfere with governments' choices of socio-economic policy and resource allocation is likely to mean that there will be nowhere for them to go for a hearing in relation to violations of these rights and that no institution will hold governments accountable for violating them.

States opposed to the Optional Protocol to the ICESCR tend to affirm a commitment to social and economic rights as human rights but at the same time argue that there should be no interference with governments' decisions resulting in violations of these rights. Denying access to any effective remedy when these rights are violated, however, attacks the central place accorded to rights holders as the "subjects" of rights. This is why a process for hearing and adjudicating claims is generally seen as central to ensuring meaningful accountability to human rights norms. Questions about the role of courts in relation to ESC rights need to be framed within a broader commitment to these core human rights values. If social and economic rights are recognized as central to human rights and democratic accountability, but states have concerns about the competence of courts or other bodies to intervene in this area, they might want to investigate how courts or other bodies can enhance their capacity in this area, or how they can be assisted by other institutional actors in performing their necessary role, rather than suggesting that rights claimants should be left without any hearing or remedy at all.

The justiciability debate, seen from the perspective of those whose rights are at stake, is reminiscent of the children's story called "The Little Engine that Could," in which passengers stranded in a broken down train seek the help of various train engines to get them over a mountain. The first, powerful engine who is asked for assistance responds that it is not its role. "I could, if I would, but I won't." That is the 'legitimacy' concern, that it is not the role of courts to deal with social and economic problems and that to do so would be an inappropriate use of judicial powers. The second engine, lacking in self-confidence, says: "I would, if I could, but I can't." That is the competency concern, that courts lack the institutional capacity to deal with

social and economic rights violations. The third engine, the only engine to really consider the plight of the passengers, focuses on the importance of the task and manages to pull the train over the mountain. Scott and Macklem have observed that, “courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary.”⁹

The U.N. Committee on Economic, Social and Cultural Rights (CESCR) has made it clear that, regardless of whether or not domestic courts in a particular legal system are able to enforce all, or only some aspects of social and economic rights, these rights must still be subject to effective remedies.¹⁰ There must be somewhere to go to be heard and there must be an effective remedy provided if a right has been violated. As emphasized by the Committee, this is fundamental to the relationship between human rights and the rule of law.¹¹

The justiciability debate must also be informed by an appreciation of the role of rights-claiming and rights adjudication in our understanding of the contextual meaning of human rights. Most people who have participated in human rights hearings at the domestic or regional level will have experienced a kind of pivotal moment in the adjudication of a human rights claim when, through the “voice” of the rights claimant, the subjective struggle for dignity and security breaks through the legal argument to bring home the real issues of human dignity that are at stake in a claim.

The South African experience since the adoption of its new Constitution in 1996 containing fully justiciable social and economic rights has demonstrated the way in which recognition of the justiciability of social and economic rights facilitates the hearing of previously silenced voices. There was considerable debate in South Africa surrounding the inclusion and application of social and economic rights.¹² This debate touched on all the common concerns about

⁹ Craig Scott & Patrick Macklem, ‘Constitutional Ropes of Sand or Justiciable Guarantees? 141 University of Pennsylvania Law Review, Vol. 141 (1992) 1, pp. 35-36.

¹⁰ CESCR *General Comment No. 9, The Domestic Application of the Covenant*, (Nineteenth Session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para 2.

¹¹ *Ibid.* paras 3, 14.

¹² For more on the South African debate on the constitutionalisation of social and economic rights, see also, Etienne Mureinik, ‘Beyond a Charter of Luxuries: Economic Rights in the Constitution’, *South African Journal on Human Rights*, Vol. 8 (1992), 646; Nicholas Haysom, ‘Constitutionalism, Majoritarian Democracy and Social and Economic Rights’, *South African Journal on Human Rights*, Vol. 8 (1992), 451.

justiciability. The Constitutional Court itself had to address the question early on in its *First Certification Judgment*.¹³ However, upon reading the first decision of that Court involving the right to have access to adequate housing, the *Grootboom* case,¹⁴ one is struck by the fact that the debates about whether to make social and economic rights justiciable were really about maintaining the integrity of the Constitution's 'promise' for all members of society. Justice Yacoob describes the plight of Irene Grootboom and her family, living under plastic on the Wallacedene Sports Field, with the winter rains arriving. He writes: "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream."¹⁵ The real issue in the debates about whether to make social and economic rights justiciable was whether Irene Grootboom and others like her would, through a new 'adjudicative space', be able to bring to life this link between social and economic rights and the promise of dignity and equality that is at the core of all human rights.

International law has long proclaimed the interdependence and indivisibility of economic, social and cultural and civil and political rights.¹⁶ At a practical level, this manifests itself in the multidimensionality of most rights claims. There are social and economic rights dimensions to most civil and political rights claims, and civil and political rights dimensions to most social and economic rights claims. Denying judicial protection to social and economic rights does not simply exclude one category of rights. It excludes a critical dimension of all human rights, and has vast implications for the extent to which civil and political rights, such as the right to equality, will be protected by the courts, particularly for the most disadvantaged groups in society. Excluding some rights or certain types of governmental obligations from the courts' authority leads to serious inequalities or hierarchies in the practical application of rights, with fundamental human rights such as the right to equality or the right to life being enforceable for some groups and rendered largely illusory for others.

¹³ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) para 78 (hereafter the '*First Certification Judgment*').

¹⁴ *South Africa v. Grootboom*, 2001 (1) SA 46 (CC) ('*Grootboom*').

¹⁵ *Ibid.*, para 2, *per* Yacoob J for the court.

¹⁶ See, e.g., the Vienna Declaration and Programme of Action (1993) (Article 5) and the Proclamation of Tehran (1968) (para 13). For a discussion of the concept of interdependence in the context of human rights, see C. Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', *Osgoode Hall LJ*, Vol. 27 (1989), 769, 779-790.

As noted by the CESCR in its General Comment No. 9 on the Domestic Application of the Covenant

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.¹⁷

In its dismissal of the first corporate economic rights challenge to government regulation under the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada noted that, “vulnerable groups will claim the need for protection by the government, whereas other groups and individuals will assert that the government should not intrude.”¹⁸ Many of the concerns about justiciability, in fact, relate to the nature of claims advanced by vulnerable groups to positive measures from governments, rather than to the social and economic nature of the right being claimed. If courts exhibit a systemic preference for claims challenging government interference, and a reluctance to engage with claims to positive measures of protection, they invariably exclude critical issues of injustice and inequality from judicial review and thereby entrench systemic patterns of exclusion. People with disabilities, for example, often require positive measures to make housing or workplaces accessible, but this is because housing and workplaces have been designed as if people with disabilities did not exist. If claims to positive measures or claims affecting resource allocation such as these are not heard by courts, or if courts excessively defer to legislatures in these areas, they exacerbate existing patterns of social exclusion and effectively deny remedies to the most disadvantaged groups in society.

The issue of whether social and economic rights should be recognized as justiciable is thus really more about whose rights will be taken seriously enough to provide for meaningful mechanisms of enforcement rather than about whether challenges to socio-economic policy in general are

¹⁷ CESCR, *General Comment 9, The Domestic Application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 10.

¹⁸ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R.927, 993.

properly subject to adjudication and remedy. This is demonstrated by the fact that many of those states which argue against a complaints procedure for social and economic rights on the basis that socio-economic policy choices are not justiciable questions, vigorously promote new mechanisms for the adjudication of the economic rights of investors under trade and investment agreements. Complex issues of social and economic policy are often at the centre of disputes adjudicated before these fora, and the outcome of cases have important implications for the distribution of resources.

2. Responding to the Primary Concerns about Justiciability of Social and Economic Rights

Concerns about the justiciability of social and economic rights have been based on three general assumptions or propositions: i) that social and economic rights are inherently different from civil and political rights; ii) that it is not legitimate or appropriate for courts to intrude into the sphere of social and economic policy; and iii) that courts or other decision-making bodies lack the capacity to properly adjudicate and enforce social and economic rights. All three of these assumptions are highly questionable.

2.1 Characterisation of differences between civil and political and social and economic rights

Many concerns about the justiciability of social and economic rights are based on inaccurate characterisations of social and economic rights and their civil and political counterparts. Claims about the different nature of social and economic rights and civil and political rights respectively, include: (i) the negative/positive nature of civil and political and social and economic rights in terms of the duties they impose on states; (ii) the notion that, as rights to resources, social and economic rights may not be practicable where such resources are scarce, while civil and political rights are always practicable or realisable; (iii) the belief that the obligations imposed by social and economic rights are vague and indeterminate in contrast to more precise civil and political rights, and iv) the idea that the obligation to fulfill or progressively realise social and economic

rights involves the courts in reviewing state inaction while civil and political rights involve review of state action.

i) Civil and political rights impose negative obligations, while social and economic rights give rise to positive ones

This assertion is based on a misconception of the nature of both sets of rights. All human rights require a combination of negative and positive conduct from states and varying levels of resources.¹⁹ For instance, an individual's political right to participate in the political life of her state by exercising her right to vote cannot be ensured without the state providing that elections are held at periodic intervals. Furthermore, it is clear that social and economic rights do not merely impose positive obligations. Where someone enjoys a social and economic right, the state is prohibited from acting in a way that would interfere with or impair the individual's enjoyment of that right. This would occur where restrictive zoning forces shelters for the homeless out of a neighbourhood in violation of the right to housing, or where the state withdraws the funding necessary to maintain local health clinics, resulting in a violation of the right to health.

The combination of negative and positive duties imposed by rights has been expressly recognised in the phrasing of rights in international human rights treaties²⁰, in domestic constitutions²¹ in the statements of international treaty-monitoring bodies²², and in national

¹⁹ Sandra Liebenberg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa', *South African Journal on Human Rights*, Vol. 11 (1995), 359, 362.

²⁰ E.g. article 2 of the *International Covenant on Civil and Political Rights* requires each State Party to undertake to **respect and to ensure** to all individuals ... the rights recognized in the present Covenant.

²¹ See, e.g., Section 7(2) of the Constitution of the Republic of South Africa which provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

²² See, e.g., the Committee on Economic, Social and Cultural Rights has repeatedly emphasised that all human rights impose three types/levels of obligations on States Parties: the obligations to respect, protect and fulfil. See CESCR, *General Comment No.13, The Right to Education* (Twenty-first session, 1999), U.N. Doc. (1999), para 46; CESCR, *General Comment No. 15, The Right to Water* (Twenty-ninth session, 2002), U.N. Doc. E/C.12/2002/11 (2003), para 20; CESCR, *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), para 33, and CESCR, *General Comment No. 12, The Right to Adequate Food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para 15. For the use of this tri-partite typology of obligations see, *General Comment No. 4, Adolescent Health and Development* (Thirty-third session, 2003), U.N. Doc. CRC/GC/2003/4 (2003), of the Committee on the Rights of the Child

constitutional jurisprudence.²³ Civil and political rights have been recognised by international, regional and domestic judicial bodies as imposing many positive duties on the state, while social and economic rights have been held to give rise to many negative ones.

While admittedly social and economic rights often require relatively greater state action for their realisation than do civil and political rights, this difference separates the two sets of rights more in terms of degree than in kind.²⁴

ii) Resource Dependent Social and Economic Rights v. Costless Civil and Political Rights

The heart of assertion (ii) is that, since civil and political rights are “rights that certain things not be done”, they are largely costless or resource-independent, and therefore always realisable.²⁵ In contrast, social and economic rights are said to be inevitably resource dependent and, therefore, cannot be satisfied where there is a scarcity of resources.

The claim that one set of rights is costless while the other always involves the expenditure of resources is clearly unsustainable. Whether or not a right is cost-free will depend on the obligation in question, rather than the classification of the right imposing that obligation as either civil and political or social and economic in nature.²⁶ For example, the provision and maintenance of the infrastructure crucial to the realisation of civil and political rights such as the right to a fair trial will certainly entail expenditure. On the other hand, even many of the positive obligations with respect to social and economic rights may, in the longer term, cost nothing at all or may actually save the state considerable expenditure. For instance, ensuring the provision of adequate education and training or eliminating obstacles to access to land, housing or employment may significantly reduce state expenditures related to social security, unemployment, or homelessness.

²³ See Part 3 below.

²⁴ Philip Alston, & Gerard Quinn, ‘The Nature and Scope of States Parties’ Obligations under the International Covenant on Economic, Social and Cultural Rights’, *Human Rights Quarterly*, Vol.9 (1987), 156, 183-4.

²⁵ Robert Plant, ‘Needs, Agency and Rights’ in C. Sampford & D. Galligan (eds.), *Law, Rights and the Welfare State* (London: Croom Helm, 1986) 22, 31.

²⁶ This is exemplified by the case of *August and Another v. Electoral Commission and Others* (1999 (3) SA 1 (CC); 1999 (4) BCLR 363 (CC)) in which the Court, in order to afford prisoners the right to vote, directed the Electoral Commission to alter its election policy, planning and regulations, with manifest cost implications”.

The perception of the realisation of civil and political rights as not entailing expenditure is at least partially rooted in the fact that the societal structures necessary to ensure such rights are already in place in developed countries. It is not that the right to vote does not entail expenditure, but rather that this expenditure is not questioned as being required to ensure a fundamental right. Thus, the enforcement of civil and political rights through resource allocation is often seen as less controversial, and assumed to have less serious implications for existing distributions of resources.

While it is true that some obligations with respect to social and economic rights are more likely to entail the expenditure of resources than efforts to assure civil and political rights, as with claim (i), this difference between social and economic rights and civil and political rights is of degree, rather than of nature.

(iii) 'Vague', social and economic rights vs. 'precise' civil and political rights

The idea that social and economic rights are inherently so indeterminate as to be incapable of judicial enforcement by the courts is belied by the increasing body of jurisprudence relating to such rights at the international, regional and national levels. As Sandra Liebenberg has pointed out, "It is through recourse to the conventions of constitutional interpretation and their application to the facts of different cases that the specific content and scope of a right emerges with greater clarity ... The fact that the content of many social and economic rights is less well-defined than civil and political rights is more a reflection of their exclusion from processes of adjudication than of their inherent nature."²⁷ Indeed, there are strong arguments in favour of open-textured framing of all human rights, so that courts are able to respond adequately to individual circumstances and historical developments in concretising their meaning over time.

²⁷ Sandra Liebenberg, 'Social and Economic Rights' in M. Chaskalson et al (eds.), *Constitutional Law of South Africa* (Cape Town; Juta, 1996) 41-11.

Many civil and political rights, such as the right to life, the right to liberty and security of the person or the rights to ‘human dignity’ and ‘privacy’,²⁸ are vague and open-textured in their formulation. Some social and economic rights, in comparison, are given relatively more precision. For example, the right to the highest attainable standard of health in the ICESCR makes specific reference to infant mortality, “environmental and industrial hygiene”,²⁹ and the “treatment and control of epidemic, endemic, occupational and other diseases”³⁰ while the right to education specifically refers to the requirement that primary education be compulsory and free.

iv) State inaction v. state action

The idea that the obligation to fulfil or progressively realise social and economic rights involves the courts in reviewing governments’ inaction while civil and political rights involve review of state action is similarly a gross over-simplification.

Courts have generally found the state action/inaction dichotomy extremely problematic as a basis for determining if a right is justiciable, in part because most examples of ‘inaction’ can be recast as examples of ‘action’.³¹ A failure to provide a service, for example, may be recast as a decision to limit a programme to particular services, or to refuse to provide one service in favour of providing others.

On a practical level, the question of whether or not a right is infringed should not depend on whether the situation complained of is seen as state action rather than inaction. Where people

²⁸ Adapted from Liebenberg, *ibid.*.

²⁹ Article 12(2)(b) ICESCR.

³⁰ Article 12(2)(c) ICESCR.

³¹ In Canada, the Supreme Court of Canada has recognised that any attempt to restrict the role of the court to violations of rights on the basis of the “very problematic distinction” between legislative action and inaction would be both impractical and unfair. See *Vriend v. Alberta* [1998] 1 S.C.R. 493, para. 53. That Court has found that where inaction or omission results in a violation of a right, this may suggest more deference to the legislature in fashioning the remedy, but should certainly not suggest that the right at issue is not justiciable. In the case of *Doucet-Boudreau v. Nova Scotia*, [2003] 3 S.C.R. 3, where the Court was required to address governmental inaction with respect to the guarantee of minority language education rights, the province was required to make “best efforts” to provide homogeneous French-language facilities and programs by particular dates. For a refutation of the claim that the distinction between negative and positive rights has no conceptual value at all because it merely rests on differences in the way those rights are usually phrased, see Cecile Fabre, *Social Rights under the Constitution – Government and the Decent Life* (Oxford: Oxford University Press, 2000), pp. 49 -51.

with disabilities are barred from benefiting from health services, this will amount to a violation of their right to health care services regardless of whether or not this ‘barring’ is the result of a facially discriminatory exclusionary policy or, alternatively, of a discriminatory failure to take positive measures to provide access. Whether prisoners are actively abused or, alternatively, not provided with adequate food and clothing ought to be irrelevant to the determination of whether their rights have been violated. Whether a right has been infringed, and whether it is to be protected and enforced by the court, ought to depend on the effect of the impugned law or policy, rather than on whether the measure at issue is categorised as an instance of state action or inaction.

2.2 Legitimacy Concerns Regarding the Judicial Enforcement of Social and economic Rights

i) Democratic Legitimacy

One objection that is made regularly with regard to the legitimacy of adjudication involving social and economic rights is the alleged ‘anti-democratic’ or ‘counter-majoritarian’ nature of such adjudication. It is argued that administration of the public purse or formulation of social or economic policy should only be carried out by elected representatives of the people. However, it is necessary to consider why these kinds of concerns are given greater weight in relation to social and economic than civil and political rights. It is arguably the essence of constitutional human rights norms in democratic states that they will restrain, limit or direct the actions of democratically elected representatives. Complaints about the ‘anti-democratic’ nature of social and economic rights adjudication must therefore be assessed in light of the broader debate on the legitimacy of judicial constraints on democratically elected organs and the role of human rights in enhancing, rather than undermining, democratic governance.

It is often because of a perception that social and economic rights cases have greater implications for state resource procurement and spending that concerns about the democratic legitimacy of judicial review tend to be emphasised more in relation to social and economic rights.³²

³² Marius Pieterse, ‘Coming to Terms with Judicial Enforcement of Social and economic Rights’, *South African Journal on Human Rights*, Vol. 20 (2004), 383, pp. 390-1.

Heightened resistance to ‘undemocratic’ intrusions into governments’ fiscal decisions may have historical origins, particularly in common law jurisdictions. The idea that fiscal decision-making requires more rigorous protection of parliamentary sovereignty and executive power than other areas of governance dates back, in the English context, to reforms in the mid-seventeenth century to limit the power of the monarchy by conferring taxation powers solely to parliament. However, the modern idea that the judiciary has an important role to play in enhancing democratic governance by reviewing governments’ decisions for compliance with fundamental rights has very different origins. The democratic legitimacy of such review is derived from the need to ensure that the rights of minorities or of politically powerless groups are not violated by majoritarian decision-making. Decisions about social and economic programmes or policies may have fiscal consequences in areas that were historically defended as the preserve of elected branches of government, but they are also those in which the most disadvantaged and politically marginalised groups will often have the most at stake in terms of personal security and dignity. Seen in this light, judicial review of government actions by courts to ensure that human rights are not violated would seem to be as legitimate in the socio-economic realm as in other areas of governmental action. The categorisation of the human right at issue as ‘social and economic’, ‘civil and political’, or both, does not provide any useful basis on which to resolve the question of the democratic legitimacy of the court’s role.

ii) Separation of Powers

Another objection to the legitimacy of the courts dealing with social and economic rights is that judicial involvement in social and economic rights claims will result in a violation of the separation of powers among the three branches or organs of government (the legislature, the executive and the judiciary).³³ This is because, where courts deal with social and economic

³³ Under a ‘rigid’ or ‘pure’ version of the separation of powers doctrine, each branch of government is confined to the exercise of its own function and must not encroach upon the functions of the other branches. (Michael Vile, *Constitutionalism and the Separation of Powers* (Oxford: Clarendon Press, 1967) at 13). The tendency has been to identify the legislature with enunciation of rules; the executive with implementation; and the judiciary with applying the rules to particular circumstances, or ‘particularisation’. (Burt Neuborne, ‘Judicial Review and Separation of Powers in France and the United States’, *New York University Law Review*, Vol. 57 (1982), 363, at 370. This version of the separation of powers as mutually exclusive functional enclaves, however, does not reflect reality. In the words of one American commentator, the reality is more along the lines of a “pragmatic mixture of functions” (ibid. p.371). “Courts enunciate policy whenever they decide a hard case; executive officials enunciate policy, both formally and informally, whenever they administer an even mildly complex scheme; legislatures implement policy

rights, such activity allegedly entails the courts exercising functions traditionally associated with other, elected branches of government, such as considering budgetary implications and prioritising expenditure³⁴ or dealing with programs and policies that normally belong on the agenda of the legislature.³⁵ A final assertion is that, “if social and economic rights are made justiciable and are vindicated by the courts, the result will tend to distort the traditional balance of the separation of powers between the judiciary and other branches of government in that more power will flow to the judiciary.”³⁶

With regard to the concern with the budgetary implications of adjudication of social and economic rights, the Committee on Economic Social and Cultural Rights has observed that, “courts are generally already involved in a considerable range of matters which have important resource implications”.³⁷ In the *First Certification Judgment*, the South African Constitutional Court made a similar point when it expressly rejected the argument that the inclusion of social and economic rights in the South African Constitution was inconsistent with the separation of powers because, *inter alia*, it would result in the courts dictating to the government how the budget should be allocated:³⁸

A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including social and economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers ... The fact that social and economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.³⁹

whenever they act to advance existing goals (constitutional or otherwise); courts routinely implement policy whenever they act in aid of an existing rule; legislatures frequently resolve disputes about the meaning of existing policies; and the executive resolves of actual and legal disputes as a matter of course”. (Ibid. p. 370-1).

³⁴ Gerard Hogan ‘Directive Principles, Social and economic Rights and the Constitution’, *Irish Jurist*, Vol. 36 (2001), 174, 189.

³⁵ Bruno De Villiers, ‘Social and Economic Rights’ in Van Wyk, J. Dugard, B. de Villiers and D. Davis (eds.), *Rights and Constitutionalism – The New South African Legal Order* (Oxford: Clarendon Press, 1996) 529 at 606.

³⁶ Gerard Hogan, “Judicial Review and Social and economic Rights” in Binchy & Sarkin (eds.), *Human Rights, the Citizen and the State: South African and Irish Approaches* (Dublin; Roundhall Sweet & Maxwell, 2001) 1at 8.

³⁷ See CESCR, *General Comment No. 9, The Domestic Application of the Covenant*, (Nineteenth Session, 1998), U.N. Doc. E/C.12/1 998/24 (1998), para 10.

³⁸ ‘*First Certification Judgment*’, para 76.

³⁹ Ibid. paras 77,78.

The concern about transferring additional power to the judicial branch is equally problematic. The task of reviewing state action for compliance with fundamental human rights is generally assigned to the courts or a similar adjudicative body. Where a court reviews governmental decisions, policies or programmes for compliance with fundamental human rights, there is a 'flow of power' to the judiciary that is part of the very notion of balance of powers in democracies based on human rights. Excluding social and economic rights from judicial review is in essence to allocate the judicial role, in the case of social and economic rights, to the legislature. This would seem to distort the traditional roles of the respective institutions in a democracy. Granting the legislature authority to review its own actions for compliance with fundamental rights amounts to granting it a function that is generally reserved to the judiciary and confers unchecked power to the elected branches of government in critical areas of decision-making.

While the separation of powers doctrine is a significant doctrine, it must be applied consistently with other principles, such as the rule of law and, in the case of constitutional democracies, constitutional supremacy. Under the principle of the rule of law, courts must ensure that all rights are subject to effective remedy and that governments are not exempted from the responsibility to uphold and respect rights.⁴⁰ According to the principle of constitutional supremacy, the courts are obliged to ensure that the constitution is upheld, and that other branches of government respect and fulfil their constitutional obligations, including those in relation to social and economic rights.

In the Irish *TD* case, Denham J, in her minority judgment, pointed out that,

[A]n important principle of the [Irish] Constitution is that the basic law - the Constitution - is supreme and the superior courts are its guardian ... it is the power, duty and responsibility of the High Court and the Supreme Court to guard the Constitution ... The

⁴⁰ The Committee on Economic, Social and Cultural Rights has stated with regard to the rule of law that '[w]ithin the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.' (CESCR *General Comment No. 9, The Domestic Application of the Covenant*, (Nineteenth Session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para. 14).

principles of the separation of powers and the principle that the Constitution is supreme must be construed harmoniously⁴¹ ...

A corresponding approach was adopted by the South African Constitutional Court (CC) in the case of *Minister of Health v. Treatment Action Campaign (No.2)*⁴² when dealing with the argument that judicial intervention in relation to governmental policymaking would violate the separation of powers doctrine. The CC stated that,

[T]here are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others [footnote omitted]. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy ... The primary duty of courts is to the Constitution and the law, “which they must apply impartially and without fear, favour or prejudice”. The Constitution requires the state to “respect, protect, promote, and fulfil the rights in the Bill of Rights”. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether, in formulating and implementing such policy, the state has given effect to its constitutional obligations. *If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.*⁴³

The Supreme Court of Canada enunciated a similar position in response to a lower court judgment suggesting that applying the Canadian Charter so as to require governments to allocate resources in a particular fashion violated the separation of powers doctrine. “The *Charter* has placed new limits on government power in the area of human rights,” the Court noted, “but judicial review of those limits involves the courts in the same role in relation to the separation of powers as they have occupied from the beginning, that of the constitutionally mandated referee.”

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⁴¹ *T.D. v. Minister for Education* [2001] IESC 86 (17th December, 2001), para 140. While recognising that the separation of powers is an important aspect of the Constitution, Denham J pointed out that in addition to that doctrine there is the jurisdiction of the courts to protect fundamental rights. This is not only a jurisdiction but a duty and obligation of the courts under the Constitution.” (para 157). Denham J stated further that where there is a balance to be achieved between the application of the doctrine of the separation of powers and protecting rights or obligations under the constitution, the Courts have a specific constitutional duty to achieve a just and constitutional balance (para. 142). Another member of the Court, Hardiman J, expressly disagreed with Denham J on this point in his judgment and a majority of the Supreme Court rejected her suggested approach, favouring a rigid interpretation of the separation of powers doctrine at the expense of the principle of constitutional supremacy.

⁴² 2002 (5) SA 721 (CC) (‘*TAC*’.)

⁴³ *TAC* (n. 42 above), para 99 [footnotes omitted, emphasis added].

⁴⁴ *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381, para. 105.

2.3 Institutional Capacity of Courts to Adjudicate Economic and Social Rights

The broad assertion that adjudicating social and economic rights issues is beyond the institutional capacity of the judicial branch can be broken down into four primary claims. These are:

- (i) that the courts lack the information required to deal with social and economic rights;
- (ii) that the judiciary lacks the necessary expertise, qualification or experience to deal with social and economic rights issues;
- (iii) that the courts are incapable of dealing successfully with ‘polycentric’ tasks, such as those entailed by adjudication involving social and economic rights; and
- (iv) that the courts lack the necessary tools and remedies to deal effectively with social and economic rights

(i) that the courts lack the information required to deal with social and economic rights

The concern about a lack of ‘information’ necessary to resolve social and economic rights issues primarily relates to rationales for, and implications of, specific social and economic policies or decisions to prioritise certain areas in the allocation of resources.

Judges can be provided with information by a variety of actors and in many different ways. Lawyers for the parties in a case will have the primary responsibility for ensuring that the adequate information is presented to the court. Once before the court, such information will be subject to adversary review, encouraging parties to bring as much detailed supporting evidence before the courts as possible and deterring them from presenting inaccurate or incomplete material. During the course of hearings, courts may seek further evidence from witnesses or from lawyers. Additional information is available to courts in many jurisdictions through *amicus curiae* (‘friend of the court’)⁴⁵ or third party interveners.

⁴⁵ The procedures and conditions for admission of *amicus curiae* vary from jurisdiction to jurisdiction. In some domestic legal systems, the procedures and conditions for the admission of *amicus curiae* are expressly set out in the rules of the court (e.g. the United States). In others, they have been enunciated in case law (e.g. the Australia, England). Alternatively they may be set out in both (e.g. Canada).

One must consider whether there is information, on the basis of which policy decisions are made by governments, which cannot be conveyed to courts by way of evidence. Since legislatures themselves rely on bringing witnesses before committees to be questioned, it is difficult to see any category of information which is the exclusive domain of the legislature, particularly in the area of social and economic policy. The experience of advocates for social and economic rights, in fact, is that preparing and presenting evidence for judicial review of government action often brings forth new information that was not adequately considered by governments or exposes problems with the information on the basis of which the government acted.

Information that is compiled to assess compliance with rights often has a different focus (for example, on the effect of policies on vulnerable groups) which may have been lacking in the information on which governments were basing their decisions. As Scott and Macklem point out, the ability of courts to relate the expert evidence to the real life circumstances of a rights claimant may provide an important new dimension to information before the court that was not available to the legislature.⁴⁶ In this sense, judicial review of decision-making in relation to social and economic rights may enhance the quality of governmental decision-making in this area, in part by bringing forth new information or more ‘rights-based’ analysis of existing information.

(ii) that the judiciary lack the necessary expertise, qualification or experience to deal with social and economic rights issues

It has been argued that judges may lack the experience and skill to interpret and process specialised information of a financial or policy nature and are, therefore, incapable of adjudicating social and economic rights claims competently.⁴⁷

The first response to the concern about the qualifications or expertise of judges is that this concern reflects a misunderstanding of the nature of the expertise which is required of courts in

⁴⁶ Scott & Macklem “Ropes of S and” (n.9 above).

⁴⁷ For a detailed defence of this claim, see David Horowitz, *The Courts and Social Policy* (Washington DC: The Brookings Institute, 1977), pp. 25-32. While Horowitz writes in an American context, many of his points apply equally to other jurisdictions.

adjudicating any kind of rights claim. Rights claimants do not turn to courts for some kind of superior expertise in the policy issues, but rather for an expertise in reviewing government decisions or policies against the requirements of the law. They rely on the exercise of ‘traditional’ judicial competences: hearing from the rights claimant and other witnesses about the particular situation at issue, considering evidence from expert witnesses about the broader policy issues, hearing argument from the parties and, finally, applying the law to the facts in a fair and impartial manner.

Judges, of course, often specialise in different areas of law, whether through prior private practice or through development of special interests after appointment to the Bench. While judges may not start off with expertise in particular areas such expertise may be acquired through on-the-job experience and judicial education. If the courts are considered capable of evaluating and drawing conclusions on the basis of complex technical and medical evidence in, for example, a criminal or tort law context, then there can be no presumption that they are unable to do so in a social and economic rights context. In addition, it is often possible for judges to ‘delegate’ particular tasks where they deem it appropriate. For instance, in the US, courts have appointed individuals and bodies including special masters, advisory juries, and court-appointed experts to help courts to, *inter alia*, evaluate evidence and resolve technical issues. Similar mechanisms exist in other jurisdictions.⁴⁸

Where courts are presented with adequate information and are willing to do so, there can be no *prima facie* presumption that they lack the institutional capacity to deal with evidence of a statistical, scientific, financial, or other nature.

(iii) that the courts are incapable of dealing successfully with ‘polycentric’ tasks, such as those entailed by adjudication involving social and economic rights

Lon Fuller argued that legal adjudication cannot deal successfully with ‘polycentric’ situations.⁴⁹ In a judicial context, a ‘polycentric’ situation is one in which a judicial decision will have

⁴⁸ For instance according to 52(1) of the Canadian Federal Courts Rules, the Court may call on an assessor (a) to assist the Court in understanding technical evidence; or (b) to provide a written opinion in a proceeding.

⁴⁹ Lon Fuller, ‘The Forms and Limits of Adjudication’, *Harvard Law Review*, Vol. 92 (1978), 353.

complex repercussions that will extend beyond the parties and the factual situation before the court. It has been alleged that courts are ill-suited to make polycentric decisions because of several features of the adjudicative process, principally the 'triadic' nature of the average judicial proceeding (two parties and a judge), its adversarial nature, and the limitations on the types and amounts of evidence before the court.

O'Regan J of the South African Constitutional Court ('CC') has pointed out that determining a dispute with budgetary implications is a classic polycentric problem: "Each decision to allocate a sum of money to a particular function implies less money for other functions. Any change in the allocation will have a major or minor impact on all the other decisions relating to the budget."⁵⁰ Social and economic rights adjudication may also involve complex policy choices with far-reaching social and economic ramifications.

There is no question that, in order for courts to adjudicate social and economic rights effectively, they must be sensitive to the issue of competing needs and claims on resources. Remediating a violation which is presented to the court, without appropriate consideration of all of the resource demands posed by other issues that are not before the court, could force governments to neglect the needs of those who do not have access to courts in favour of those who do. This concern with litigation as "queue jumping" is not, of course, one that is unique to social and economic rights. The civil and political rights claims of one group may impact upon the rights of others. They also often have budgetary consequences, and adjudication that does not involve social and economic rights may also have complex, unforeseeable policy and administrative implications. Competence in balancing rights, such as, for example, the right to freedom of expression and the right to privacy or dignity are central to the adjudicative function of courts in all areas of human rights.

Sandra Liebenberg has argued, "[t]he mere fact of far-reaching or unforeseen consequences should not imply total abdication by the judiciary of its primary responsibility of upholding the

⁵⁰ Kate O'Regan, 'Introducing Social and economic Rights', Opening Address given at *Giving Effect to Social and economic Rights: The Role of the Judiciary and other Institutions* Workshop, Cape Town (6 and 7 October 1998), published in *ESR Review*, Vol. 1 (1999),

norms and values of the Constitution.”⁵¹ In the words of the High Court of South Africa⁵² in *Rail Commuter Action Group & Ors. v. Transnet Limited & Ors.*⁵³

The problems of polycentricity must clearly act as important constraints upon the adjudication process, particularly when the dispute has distributional consequences. But polycentricity cannot be elevated to a jurisprudential mantra, the articulation of which serves, without further analysis, to render courts impotent to enforce legal duties which have unpredictable consequences.⁵⁴

Liebenberg has indicated how ‘polycentricity’ considerations may operate in the context of constitutional adjudication:

The fact that there is a wide range of policy options for giving effect to a particular right suggests that a broader margin of discretion should be accorded to the legislature. It also suggests a measure of remedial flexibility which affords the legislature an opportunity to fashion an appropriate scheme falling within the bounds of constitutionality [footnotes omitted].⁵⁵

Social and economic rights jurisprudence does not suggest any reason to presume that courts will not be sensitive to these kinds of concerns about ‘polycentricity’.

In addition, it is important that the question of whether a legislative body is able to deal more effectively with polycentric issues (and, therefore, should be subject to judicial deference) should be assessed on a case by case basis. We should not presume that legislatures are always more competent at dealing with polycentricity. Division of governmental responsibilities in different ministries, lack of overall accountability or transparency in the budget setting process, failure to consider competing evidence and a tendency to respond to the most vocal or powerful lobby groups may present significant obstacles on the legislative side. In some cases, the judicial process may, in fact, be better suited to the consideration of competing needs or rights of those who do not have access to political decision-making processes. It may bring to light consequences of policies that were not foreseen by the government and may reveal alternative remedial responses that were not considered by the legislature or executive.

⁵¹ S. Liebenberg, ‘Social and economic Rights’ (n. 27 above), 41 -11.

⁵² Cape of Good Hope Provincial Division.

⁵³ Case No. 109 68/2001, 6 February 2003.

⁵⁴ Ibid. para 112.

⁵⁵ Liebenberg, ‘Social and economic Rights’ (n. 27 above), 41 -11.

(iv) *that the courts lack the necessary tools and remedies to deal effectively with social and economic rights*

Social and economic rights can be vindicated in a wide variety of ways. Orders that have been employed by courts in rulings involving social and economic rights include: damages; reparation in kind; declaratory orders; mandatory orders; ‘reading in’ of additional protections in a legislative scheme where a group has been unlawfully excluded, and supervisory jurisdiction, through which a Court may retain jurisdiction over a matter in order to provide the legislature time to remedy a violation.

‘Reading in’ as a remedy for social and economic rights violations has been developed by a number of courts as a way of ensuring that the court need not unnecessarily strike down legislation which only needs to be altered. The South African Constitutional Court has employed this on several occasions in order to, *inter alia*, ensure the right of permanent residents to have access to social security,⁵⁶ and the right of debtors whose homes had been attached to have access to housing.⁵⁷ In Canada, this remedy has been used to extend security of tenure protections to public housing tenants and to extend a number of other legislative protections and benefits to excluded groups.⁵⁸

Complex mandatory orders have been issued by the highest courts in the US,⁵⁹ Canada,⁶⁰ India,⁶¹ and South Africa.⁶² These courts have also made clear that the exercise of supervisory jurisdiction is also permissible where necessary to ensure that constitutional social and economic rights are vindicated.⁶³ There have been numerous instances in which courts have exercised

⁵⁶ *Khosa & Ors v. Minister of Social Development & Ors.*, Case No.s CC T12/03 & CCT13/03 4 Mar. 2004.

⁵⁷ *Jaftha & Anor. v. Van Rooyen & Anor.* Case No. CCT74/03, 8 Oct. 2004/

⁵⁸ *Dartmouth/Halifax County Regional Housing Authority v. Sparks* [1993] 101 D.L.R. (4th) 224 (N.S.C.A.); *Schachter v. Canada*, [1992] 2 SCR 679; *Vriend v. Alberta*, [1998] 1 SCR 493; (1998), *Rosenberg v. Canada (Attorney General)*, 158 D.L.R. (4th) 664.

⁵⁹ For example, see the US school desegregation cases of *Brown et al v. Board of Education of Topeka et al* 347 US 483 (1954).

⁶⁰ See, e.g. *Doucet-Boudreau v. Nova Scotia* [2003] 3 S.C.R. 3.

⁶¹ See, e.g. *M.C. Mehta v. State of Tamil Nadu and Others* [1996] 6 SCC 756.

⁶² See e.g., *TAC* (n. 42 above).

⁶³ Although the CC in *TAC* did not ultimately decide to exercise supervisory jurisdiction, it stated that “the

supervisory jurisdiction effectively.⁶⁴ Careful phrasing and the inclusion of a good level of detail in an order may reduce the likelihood of non-implementation. Introducing a reporting requirement, under which the state must report back on what it has done to give effect to the court's decision, allows for the possibility of ongoing dialogue between the court and the state and enables the state to seek clarification or explanation where it is uncertain about its constitutional obligations.⁶⁵ It is also open to courts to structure an order so as to delegate the monitoring function to an appropriate body that may report back to court.⁶⁶

3. Review of jurisprudence

We are at a significant advantage in considering the validity of concerns about the justiciability of economic and social rights in comparison to commentators in earlier years. There is now a large amount of case law that allows us to assess whether, in fact, courts have been able to deal with some of the problems considered above, and what strategies have been developed to address them.

Social and economic rights (or aspects of them) have been brought before, and have been dealt with, by courts in numerous ways. First, social and economic rights have been litigated directly before courts, resulting in judgments and orders being made expressly on the basis of such rights. Second, as stated above, many civil and political rights have social and economic aspects or implications⁶⁷ and the acknowledged interrelationship and indivisibility of both kinds of rights

power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented.” (TAC, para 104).

⁶⁴ See, for example *City of Cape Town v. Rudolph & Ors.* 2003 (11) BCLR 1236 (C) (High Court, South Africa); *Viceconti v. Ministry of Health and Social Welfare* Poder Judicial de la Nación, Causa no. 31.777/96, June 2, 1998 (Federal Court of Appeals, Argentina), and *People's Union for Civil Liberties v. Union of India* (2001) (Supreme Court of India).

⁶⁵ Kent Roach & Geoff Budlender, ‘Mandatory Relief and Supervisory Jurisdiction: When Is It Appropriate, Just and Equitable?’, *South African Law Journal*, Vol. 122 (2005) 325. Ultimately, however, where a state agency is experiencing a budgetary or competence crisis, it seems unlikely that anything short of the courts’ taking steps to address the systemic problem faced by the relevant agency will succeed in guaranteeing implementation.

⁶⁶ This function was offered to the South African Human Rights Commission in the *Grootboom* decision.

⁶⁷ At a regional level, the European Court of Human Rights has stated that, “While the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature... [T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention”. (*Airey v. Ireland* (European Court of Human Rights, 32 Eur Ct HR Ser A (1979):

have led to elements of social and economic rights being protected by means of provisions relating to civil and political rights. In some instances, economic and social rights have been derived from such rights.⁶⁸ Third, some rights, which may be classified as either civil and political or social and economic in nature, for example, trade union rights and equality rights, may be employed by litigants and courts in order to give effect to social and economic interests.⁶⁹

The argument that economic and social rights lack the qualities of justiciability cannot, therefore, be sustained in the face of any reasonable survey of jurisprudence at the national and international level.⁷⁰ The same is true in relation to the contention that only ‘some’ aspects of economic, social rights are, or might be, inherently justiciable.⁷¹ In a surprising number of cases from a variety of legal systems, courts have demonstrated that they are capable of identifying the relevant legal standards to apply in cases concerning alleged violations of economic and social rights, while at the same time respecting their limits in relation to the distinctive role and competencies of governments.

[1979] 2 E.H.R.R. 305, para 26). See, e.g., *Henry and Douglas v. Jamaica*, Communication No. 571/1994, 25 July 1996. In this case, the Human Rights Committee held that the failure to provide adequate medical care to prisoners (a violation of the social and economic right to health) constituted a violation of the right to freedom from torture or to cruel, inhuman or degrading treatment or punishment and of the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (provided for by Articles 7 and 10 of the International Covenant on Civil and Political Rights (here after ‘ICCPR’), respectively).

⁶⁸ For instance, the Indian courts have held the right to life to “take within its sweep” the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in (see *Shantistar Builders v. Narayan Khimatal Tomtame*, Supreme Court of India, Civil Appeal No. 2598/1989, 31 January 1990).

⁶⁹ E.g., the Human Rights Committee has held that: the right to equality/non-discrimination provided for in Article 26 ICCPR applies to the enjoyment of social and economic rights, including social security benefits (See, e.g., *Zwaan-de Vries v. the Netherlands* (Communication No. 182/1984, CCPR/C/29/D/182/1984, (1987).

⁷⁰ For other international and comparative reviews of case law see Scott & Macklem “Ropes of Sand” (n. 9 above); Fons Cooman and Fried van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights held from 25-28 January 1995 in Utrecht*, (Utrecht: SIM Special No. 18); J. Squires, M. Langford and B. Thiele, *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney: Australian Human Rights Centre and University of NSW Press, June 2005). For a comprehensive review of over 30 jurisdictions see M. Langford (n. 1 above).

⁷¹ This proposition was given some support in the earlier General Comments of the UN Committee of Economic, Social and Cultural Rights but discarded later as the Committee became apprised of jurisprudential developments and itself applied all aspects of the rights: See CESCR, *General Comment No. 3, The Nature of States Parties’ Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1990) with CESCR *General Comment 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998). However, this fragmented vision of justiciability is sustained by some other commentators: see Michael Dennis and David Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’, *American Journal of International Law*, Vol. 98 (2004), 462, at 515.

3.1 Adjudicating different types of obligations

Obligations of governments in relation to social and economic rights are commonly expressed as a tri-partite typology of obligations: the duties to respect, protect and fulfil.⁷² The obligation to respect requires states to refrain from interfering with the enjoyment of social and economic rights.⁷³ The obligation to protect requires states to take measures that prevent third parties from interfering with the enjoyment of such rights. The obligation to fulfil requires states to take steps to facilitate individuals and communities enjoying the right and, when an individual or group is unable to realise the right themselves, to provide what is necessary for the enjoyment of the right.

The most controversial obligations with respect to justiciability are the obligations related to positive duties to fulfil, or to *progressively realise* the rights and devote the *maximum available resources* to their fulfilment. Some academic writers have focused primarily on this aspect.⁷⁴ However, such an approach tends to overlook the way in which the duty to fulfil economic and social rights is difficult to separate from the duties of states to respect and protect such rights. While Mathew Craven has legitimately cautioned against putting too much emphasis on the justiciability of the 'respect/protect' dimensions so as to prioritise the largely negative civil and political rights style obligations over the more positive obligations,⁷⁵ it is important to consider the adjudication of both the defence of ESC rights and the progressive achievement of an adequate level of fulfilment to understand the variety of ways in which courts and other bodies are now adjudicating social and economic rights.

⁷² This notion of the various obligations endangered by rights was first pinpointed by Henry Shue in *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980). Shue suggested that, "every basic right, and most other moral rights as well, could be analysed using a very simple tripartite typology of interdependent duties of avoidance, protection and aid". (H. Shue, 'The Interdependence of Duties' in P. Alston and K. Tomasevski (eds.), *The Right to Food*, (Netherlands Institute of Human Rights, 1984), pp. 83-110. Later, variations on Shue's typology of duties were offered by several commentators. Members of the CESCR subsequently adopted and employed the tripartite typology of duties described in the text below as their interpretive framework for analysing the rights contained in the ICESCR.

⁷³ See generally 'Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997,' published in *Human Rights Quarterly*, Vol. 20 (1998), pp. 691-705.

⁷⁴ For an example of this approach, see Cecil Fabre, "Constitutionalising Social Rights", *The Journal of Political Philosophy*, Vol. 6, No. 3 (1998), pp. 263-284, at 280.

⁷⁵ Mathew Craven, 'Assessment of the Progress on Adjudication of ESC Rights', in Squires, Langford and Thiele, *Road to a Remedy* (n. 70 above), Chapter 3

3.1 Defending the enjoyment of ESC Rights – The duties to ‘respect’ and ‘protect’ ESC rights

One of the earliest cases dealing with the defence of statutory entitlements linked with social and economic rights was the 1971 U.S. case of *Goldberg v. Kelly* which affirmed that the right to procedural due process could be invoked by an applicant whose social security benefits had been terminated without an evidentiary hearing.⁷⁶ In its ruling, the Supreme Court noted that “welfare provides the means to obtain essential food, clothing, housing, and medical care”,⁷⁷ but refrained, as it has done in later cases,⁷⁸ from deriving these economic and social rights from the constitutional Bill of Rights.

The granting of procedural, and increasingly substantive, protections against State interference has been particularly evident in cases concerning forced evictions. Forced evictions constitute violations of the obligation to respect the right to housing. In the well-known case of *Olga Tellis v. Bombay Municipal Corporation*,⁷⁹ the Indian Supreme Court applied the *Goldberg v Kelly* principle of the right to be heard. It then took the further step of grounding this entitlement in a right to livelihood and shelter, which it derived from the ‘civil’ right to life. This decision has been heavily criticised, however, as the Court ultimately ordered that the evictions could proceed (on the basis that the Court hearing accounted for due process) and refrained from making a binding order in relation to the right to resettlement. The Bombay pavement dwellers were subsequently evicted during the monsoon period. More recently, the Indian Supreme Court has indicated that the right to resettlement is more than hortatory,⁸⁰ though the principle is irregularly applied.⁸¹

⁷⁶ *Goldberg v. Kelly* 397 U.S. 254 (1970). For a history of some earlier U.S. cases where the Supreme Court, for a period, edged its way towards some recognition of social guarantees see Cass R. Sunstein, *The Second Bill of Rights: FDR’s unfinished revolution and why we need it more than ever* (New York: Basic Books, 2004), ch. 9.

⁷⁷ *Goldberg v. Kelly*, *ibid.*

⁷⁸ See *Lindsey v. Normet* 405 U.S. 56 (1972). The Supreme Court held in this case that the appellants, month-to-month tenants, could not refuse to pay their monthly rent until substandard conditions were remedied on the ground of a right to housing of a certain quality since the right was not contained in the Constitution. For a general discussion of the approach of the US Supreme Court’s approach, see Cass Sunstein, *The Second Bill of Rights: FDR’s unfinished revolution and why we need it more than ever* (New York: Basic Books, 2004), pp. 149-171.

⁷⁹ *Olga Tellis v. Bombay Municipality Corporation* [1985] 2 Supp SCR 51 (India); (1987) LRC (Const) 351.

⁸⁰ In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan & Ors.*,⁸⁰ the Supreme Court of India stated, “it is the duty of the State to construct houses at reasonable rates and make them easily accessible to the poor. The State has the constitutional duty to provide shelter to make the right to life meaningful...[and] ...[T]he mere fact

Other jurisdictions have been more rigorous in their application of human rights norms to evictions. The South African Constitutional Court in *Port Elizabeth Municipality* affirmed “the need for special judicial control” of the process of eviction, concluding that while there is no constitutional requirement that the state provide housing to any evicted household, “a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.”⁸² In *Connors v. UK*, the European Court awarded €15,000 in compensation for the distress caused by the eviction carried out by a local housing authority, finding that it was without adequate justification or procedural safeguards.⁸³

At a regional level, in *SERAC v Nigeria*, the African Commission on Human and Peoples’ Rights (African Commission) endorsed General Comment No. 7 on Forced Evictions, issued by the CESCR, which provides for a wide range of protections against forced eviction.⁸⁴ In the European context, the European Committee on Social Rights held in *ERRC v Greece* that: “[t]he Committee considers that illegal occupation of a site or dwelling may justify the eviction of the illegal occupants. However the criteria of illegal occupation must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should

that encroachers have approached this court would be no ground to dismiss their cases. *Where the poor have resided in an area for a long time, the State ought to frame schemes and allocate land and resources for rehabilitating the urban poor.*” [Emphasis added.] In *SAHAJ v. Vadora Municipal Corporation* Supreme Court of India, (19 Dec 2003), the Court accepted that the petitioners had made a *prima facie* case that demolition of ‘hutments’ without the provision of alternative accommodation violated the right to housing and shelter in the constitution. For discussion, see Colin Gonsalves, ‘The Right to Housing – The Preserve of the Rich’, *Housing & ESC Rights Litigation Quarterly*, Vol. 1, No. 2 (2005), pp.1-3.

⁸¹ See Shri Muralidhar, ‘India’, in Langford, (n. 1 above), Chapter 6.

⁸² *Port Elizabeth Municipality v. Various Occupiers* (1) 2005 SA 217 (CC) paras 18, 28. In its jurisprudence on forced evictions, the South African Constitutional Court has relied extensively on a reasonableness test to assess the state’s obligations. See, e.g., statements of the Constitutional Court in *President of South Africa & Ors v. Modderklip Boerdery & Ors*, Constitutional Court of South Africa, Case CCT 20/04, Unreported judgment of 13 May 2005, para. 43.

⁸³ *Connors v. United Kingdom*, (European Court of Human Rights, Application no. 66746/01, 27 May 2004), para. 95. The Court noted that, ‘the eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a ‘pressing social need’ or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.’

⁸⁴ Communication 15 5/96, para. 63.

be sufficiently protective of the rights of the persons concerned.”⁸⁵ It is notable that, across jurisdictions, there is a growing convergence towards common standards on forced evictions, regardless of whether the protection from forced eviction is derived from economic and social rights such as the right to adequate housing or from civil rights such as respect for the home or right to life (although the existence of the former tends to ensure more consistent decision-making).

Courts have also applied this substantive approach to the ‘duty to respect’ to a range of other economic and social rights. For instance, courts in Argentina, Brazil and South Africa have reversed disconnections of water supplies on human rights grounds. In *Bon Vista Mansions*, the High Court of South Africa found a violation of the constitutional right to water on the basis that the Applicants had existing access to water before the Council disconnected the supply. “The act of disconnecting the supply was *prima facie* in breach of the Council’s constitutional duty to respect the right of access to water, in that it deprived the Applicants of existing access.”⁸⁶ An interim injunction was issued ordering the local authority to restore the water supply to the residents.

In Brazil, the Special Jurisdiction Appellate Court of Paraná found that the disconnection of a water supply, even for non-payment, violated constitutional and consumer rights to essential services.⁸⁷ In Argentina, the disconnection of water for non-payment by a private water company was held to violate, amongst other things, Section 42 of the Argentine Constitution. Section 42 provides that ‘as regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment.’ The disconnection was, therefore, struck down by the Civil and Commercial Court of First Instance. The judge held the applicants had a right to an uninterrupted minimum flow of 20 0 litres per family per day.⁸⁸

⁸⁵ Complaint No. 15, para. 51

⁸⁶ *Residents of Bon Vista Mansions v SMLC* 2001 (High Court) App No.123 12 (South Africa), para. 20.

⁸⁷ Bill of Review, 020 8625-3.

⁸⁸ *Quevedo Miguel Angel y otros c/Aguas Cordobesas S.A. Amparo*, Cordoba, City, Juez Sustituta de Primera Instancia y 51 Nominación en lo Civil y Comercial de la Ciudad de Córdoba (Civil and Commercial First Instance Court), 8 April 2002.

Courts have intervened to strike down restrictions on access to social security payments. For example, suspension of pension payments to a prisoner were ruled by the Russian Constitutional Court to be an inadmissible restriction on the right to social security.⁸⁹ The European Court of Human Rights has provided similar protection under the rights to property, non-discrimination and a fair trial. In *Gaygusuz v Austria*, the European Court of Human Rights found that social assistance entitlements under a statute-based scheme amounted to property for the purposes of applying the article on non-discrimination.⁹⁰ In another case, the same Court found that the Convention right to a fair trial for determination of civil rights and obligations encompasses social security benefits set out in national legislation.⁹¹

We have focused on cases involving evictions, water, and social security, but a similar evolution from procedural to substantive protections have occurred in many other areas as well, such as in cases concerning unfair dismissal,⁹² restrictions on union organisation,⁹³ pollution,⁹⁴ closure of schools⁹⁵ and denial of access to health care and education.⁹⁶

⁸⁹ Decision of the Constitutional Court of Russia, 16 October 1995, (1995) 3 *Bulletin on Constitutional Case-Law* 340, quoted in Nihal Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002).

⁹⁰ *Gaygusuz v Austria*, ECHR, 16 September 1996 (39/1995/545/631): ‘The Court considers that the right to emergency assistance – insofar as provided for in the applicable legislation – is a pecuniary right for the purposes of article 1 of Protocol No.1. That provision is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay ‘taxes or other contributions’ (paragraph 41). For an analysis of the judgment see Martin Scheinin and Catarina Krause, ‘The meaning of article 1 of the First Protocol for social security rights in the light of the *Gaygusuz* judgement’ pp. 59–73, in Stefaan Van den Bogaert (ed.), *Social Security, Non-discrimination and Property (Antwerpen-Apeldoorn, 1997)*, pp.59-73. The right to non-discrimination can only be invoked in relation to rights in the Convention and Protocols.

⁹¹ See *Salesi v. Italy*, [1993] IIHRL 18 (26 February 1993) and *Schuler-Zgraggen v Switzerland* [1993] IIHRL 48 (24 June 1993).

⁹² Most countries have legislation on unfair dismissals that provides for judicial review. ILO Convention No. 158, Termination of Employment Convention, 1982 sets out minimum standards. Article 4 provides that: ‘The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.’ See *Qantas Airways Limited v. Christie* [1998] HCA 18 (19 March 1998) in relation to application of the ILO Convention in the domestic context.

⁹³The ILO Freedom of Association has ruled on over 2000 cases on trade union freedom of association: see www.ilo.org/ilolex/english/caseframeE.htm. In relation to strikes they have stated that ‘strikes are one of the essential means that workers and their organisations should have to further and defend their economic and social interests’ (see *The International Confederation of Free Trade Unions v. China*, Case No. 1500, 270th Report of the Committee on Freedom of Association, 1989. With regard to other aspects of the freedom of association, such as collective bargaining, see *National Union of Belgian Police v. Belgium*, (1974) 1 EHRR 578 and *Attorney-General of Guyana v. Alli*, Court of Appeal of Guyana, [1989] LRC (Const) 474; and *Dunmore v. Ontario (Attorney General)*[2001] 3 S.C.R. 1016

The obligation to protect has also attracted judicial scrutiny, with governments being faulted for failing to take steps to prevent violations by private actors and establish the requisite regulatory mechanisms and law. With respect to the former, the African Commission in *SERAC v Nigeria* found that Nigeria had violated its duty to protect by failing to prevent a private multinational oil company from polluting the environment.⁹⁷ Similarly, the European Court of Human Rights has criticised governments for failing to protect rights to the home, family and private life by not regulating industrial pollution properly.⁹⁸ In *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd and others*,⁹⁹ a Court nullified a 6-year-old water privatisation contract on the basis that the municipality did not comply with the necessary consultation and public participation requirements.

Courts have also ordered states to adopt measures to prevent future violations by private actors. One example, involving security of tenure, is the *Awas Tingni Case*.¹⁰⁰ In this case, the Inter-American Court of Human Rights held that that the State was obliged to delimit, demarcate and title the territory of the indigenous population and ensure that the territory was protected from interference in accordance with the right to property. Similarly, the Latvian Constitutional Court found a social insurance scheme incompatible with the right to social security on the basis that it provided no effective enforcement mechanism to ensure employers paid their premiums.¹⁰¹ In *ICJ v. Portugal*, the European Committee on Social Rights determined that legislation regulating child labour insufficiently addressed children working in the agricultural sector and that the number of labour inspectors was too low for ensuring that employers respected the legislation.¹⁰²

⁹⁴ See for example, *López Ostra v. Spain*, (1994) Series A No 303-C; (1995) 20 EHHR 277; *SERAC v. Nigeria African Commission on Human Rights*, Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, from 13th to 27 th October 2001.

⁹⁵ See *World Organisation Against Torture, Lawyers' Committee for Human Rights, Union Interafricaine des Droits de l'Homme, Les Témoins de Jéhovah / Zaire*, African Commission on Human and People's Rights, Communications 25/89, 47/90, 56/91, 100/93.

⁹⁶ See for example, *TAC* (n. 42 above); *Decision T-170/03, Mora v. Bogota District Education Secretary & Ors*, Constitutional Court of Colombia, Decision T-170/03. February 28, 2003.

⁹⁷ Communication 15 5/96, para. 63.

⁹⁸ See *Lopez Ostra v Spain* [1994] IIHRL 106 (9 December 1994).

⁹⁹ Case No. 127 7/2001 (unreported)

¹⁰⁰ Inter-Am. Ct. H.R., *The Mayagna (Sumo) Indigenous Community of Awas Tingni*, Judgment of Aug. 31, 2001 (Ser. C) No. 79.

¹⁰¹ *Case No. 2000-08-0109 (2000)*, Constitutional Court of Latvia.

¹⁰² Complaint No. 1/1 999.

3.2 Adjudicating the fulfilment of ESC rights: ‘progressive realisation’ and other issues¹⁰³

There are a number of different ways in which courts have ensured that states give effect to their duty to fulfil economic and social rights. The opening parts of this section focus on two of these: the judicial application of equality norms with regard to states’ positive obligations to address the needs of disadvantaged groups, and adjudication by courts upon whether governments have taken concrete steps towards the fulfilment of social and economic rights. The final part of this section considers judicial responses to ‘retrogressive measures’ on the part of states.

3.2.1 Equality rights and the duty to fulfil social and economic rights

The relationship between the right to equality and non-discrimination and social and economic rights is of central importance to the adjudication of social and economic rights. Violations of most social and economic rights are directly linked to systemic inequalities and may, in many cases, be challenged as such. Thus, in jurisdictions lacking explicit protections of social and economic rights, the right to equality can serve as a critical vehicle for disadvantaged groups seeking to enforce their social and economic rights. The CESCR has affirmed that “Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.” Reference to social and economic rights may be important in moving courts beyond a narrow or formal notion of equality focused on comparative, rather than substantive equality.

In the 1987 case of *Zwaan-de Vries v. the Netherland*, the UN Human Rights Committee found that unemployment benefit legislation that excluded married women – on the assumption that their husbands would provide for their needs – discriminated on the basis of marital status and sex. At the same time, the Committee commented that the right to equality and non-discrimination does not oblige the State to enact legislation to provide social security in the first

¹⁰³ This section 3.2 is partially drawn from Malcolm Langford, ‘Judging Resource Availability’, in Squires, Langford and Thiele, (n. 70 above), ch 6.

place.¹⁰⁴ That position is difficult to reconcile, however, with the Committee’s statement two years later in its General Comment on the right to equality and non-discrimination in article 26 of the ICCPR that:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.¹⁰⁵

The standard ‘equality rights’ language adopted in many legal instruments¹⁰⁶ has also been frequently interpreted – beginning with the Permanent Court of Justice in 1935¹⁰⁷ – to go beyond preventing mere *formal*, or procedural, non-discrimination ‘in law’ to the duty to eliminate discrimination and inequality ‘in fact’. Equality rights thus create significant positive obligations to address and remedy the social and economic disadvantage of marginalised and vulnerable groups, including in situations where the disadvantage is not itself caused by discriminatory action by the government. In Canada, this position was clearly articulated in the *Eldridge* case, in which the Canadian Supreme Court rejected the British Columbian provincial government’s arguments that the right to non-discrimination did not require governments to allocate resources in healthcare in order to address pre-existing disadvantage of particular groups such as the deaf and hard of hearing. The Court rejected this “thin and impoverished vision of equality” and held that the government’s failure to fund or provide sign language services in the provision of healthcare to the deaf was discriminatory. In considering whether the denial of service could be justified as “reasonable” on the basis of resource constraints, the Court examined the cost of

¹⁰⁴ ‘[A]lthough article 26 [right to equality and non-discrimination] requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with article 26 of the Covenant.’ See the following decisions of the UN Human Rights Committee: *Zwaan-de Vries v. the Netherlands*, Communication No. 1 82/1984, (9 April 1987), para. 12.4.

¹⁰⁵ Human Rights Committee, Human Rights Committee, *General Comment No. 18, Non-Discrimination* Thirty-seventh session (1989), HRI/GEN/1/Rev.6, pp. 147 et seq. (1989), para. 10.

¹⁰⁶ Article 26 of the International Covenant on Civil and Political rights reads, ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

¹⁰⁷ *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No. 64: ‘[T]here may be no true equality between a majority and a minority if the latter were deprived of its institutions (schools in our case) and were consequently compelled to renounce what constitutes the very essence of it being a minority.’

providing sign language interpretation within the province, and was not persuaded that it would constitute any unreasonable burden for the government.¹⁰⁸

In some cases, however, access to benefit programs or services may be denied to a particular group for reasons unconnected with traditional prohibited grounds of discrimination. In many cases, the explicit reason for exclusion may be seemingly innocuous but actually represents a proxy for wealth and income. While the grounds of ‘poverty’ or ‘social and economic status’ potentially fall within the ground of ‘other status’ that is included in some legal provisions on equality, Craven notes that there may be some difficulties in including these grounds within the traditional conceptualisation of discrimination.¹⁰⁹ However, in *Kearney v. Bramalea Ltd.*,¹¹⁰ (a decision of the Ontario Board of Inquiry which was upheld by the Division Court in *Shelter Corporation v. Ontario Human Rights Commission*)¹¹¹ denials of housing on the ground of poverty or low income level was found to constitute discrimination on a number of grounds, including race, sex, marital status, age, citizenship status and receipt of public assistance - on the basis of the strong correlation between poverty and membership in groups protected from discrimination on each of these grounds.

In circumstances where the express or implicit categories of discrimination set out in legislation or a constitution cannot be applied to cover a particular group, economic and social rights may be invoked to address discriminatory exclusions. For example, in Colombia a local quota system for education resulted in a female student from a poor community being placed in a school outside her neighbourhood, even though her mother was unable to afford the transport fees. The Constitutional Court of Colombia found a violation of the right to education due to the lack of

¹⁰⁸ *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R., para. 87. Unfortunately, more recent judgments of the Supreme Court of Canada have suggested a retreat from the model of substantive equality affirmed in *Eldridge*. In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* [2004] 3 S.C.R. 657 the Court overturned a decision of the British Columbia Supreme Court which had applied the principles affirmed in *Eldridge* to require the funding of treatment of a new treatment for autism. (*Auton (Guardian ad litem of) v. British Columbia (Minister of Health)* (2000) 78 B.C.L.R. (3d) 55 (B.C.S.C.)). See Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations”, *Windsor Yearbook on Access to Justice*, Vol. 23 (2005), 145, available online at <www.20years.ca>.

¹⁰⁹ Mathew Craven, *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development* (London: Clarendon Press, 1995), 175.

¹¹⁰ (1998) 34 CHRR D/1. See Bruce Porter, “Homelessness, Human Rights, Litigation and Law Reform: A View from Canada”, in Philip Lynch and Dianne Otto (eds.), *Homelessness and Human Rights*, *Australian Journal for Human Rights*, Vol. 10 (2004), 133.

¹¹¹ (2001) 143 OAC 54.

effective access to education, thereby addressing the underlying poverty and marginalisation that had caused the girl's exclusion.¹¹² A similar example is *Edgewood Independent School District v. Kirby*¹¹³ which involved the use of an 'adequacy' rather than 'equity' argument to challenge school finance systems.¹¹⁴ In Texas, the wealthiest areas enjoyed disproportionately low taxes and well-financed schools and the Texas Supreme Court found that the State's property tax-based system for resourcing public education violated the State constitution, which contained the 'duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of free schools.' The resulting inequalities were found to be contrary to the requirement of efficiency, which demanded a "close correlation between a district's tax effort and the education resources available to it".¹¹⁵

3.2.2 Ensuring concrete steps towards the realisation of ESC rights

The obligation to fulfil social and economic rights includes an obligation to develop a plan to progressively realise ESC rights. This duty was elaborated upon by the CESCR in the context of housing in its General Comment No.4:

While the most appropriate means of achieving the full realisation of the right to adequate housing will inevitably vary significantly from one State party to another, the Covenant clearly requires that each State party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which ... "defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures" ...¹¹⁶

¹¹² Decision T-170/03 [*Mora v. Bogota District Education Secretary & Ors*], Colombian Constitutional Court, February 28, 2003.

¹¹³ 777 S.W.2d 391 (Tex. 1989).

¹¹⁴ Jessica Schultz, 'Economic and Social Rights in the United States: An Overview of the Domestic Legal Framework', *Human Rights Brief*, Vol. 11 (2003), available at <http://www.wcl.american.edu/hrbrief/11/1shultz.cfm>

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* at para 12.

The Committee has made similar comments in relation to, *inter alia*, the rights to health and education¹¹⁷

The duty to develop a programme to progressively realise ESC rights was famously discussed in the *Grootboom* case by the South African Constitutional Court.¹¹⁸ In this case, the Court found the respective government authorities had failed to develop adequate housing programmes directed towards providing emergency relief for those without access to basic shelter, thereby violating its duty to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the constitutional right to have access to adequate housing.¹¹⁹ The Court expressed the obligation in the following terms:

The measures [by government] must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable.¹²⁰

There is a significant amount of comparative case law on the obligation to have taken concrete steps towards fulfilling the plans and realising social and economic rights. The jurisprudence can be divided into two types of approaches.

One approach, particularly prevalent in jurisdictions in which civil and political rights have been used to protect economic and social interests, is to emphasise that a minimum level of realisation must be achieved immediately. The CESCR in General Comment No. 3 originally defined the minimum core obligation as the threshold which all states must meet immediately, stating that ‘the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State

¹¹⁷ CESCR, *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), para 36; CESCR *General Comment No.13, on The Right to Education* (Twenty-first session, 1999), U.N. Doc. (1999), para 52.

¹¹⁸ (n. 14 above).

¹¹⁹ S.26(2) of the Constitution of the Republic of South Africa.

¹²⁰ *Grootboom* (n. 14 above), para. 41.

party.’¹²¹ However, an escape clause, although rather tightly defined, is provided for states deprived of the requisite resources.¹²²

Courts in several jurisdictions have been prepared to identify the minimum core – either explicitly or impliedly - if called upon to do so. In the case of *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern*, the Swiss Federal Court determined that there was an implied constitutional right to basic necessities, which can be invoked by both Swiss citizens and foreigners. The Court held that it lacked the competence to determine resource allocation but said that it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights.¹²³

In Colombia, the Constitutional Court has recognised a fundamental right to what it is called the ‘*minimo vital*’ in a series of cases since 1992 that have covered a wide range of social and economic rights,¹²⁴ According to this jurisprudence, the Government is obliged to take all positive and negative measures required in order to prevent individuals from being deprived of the most basic conditions that allow her or him to carry on a decorous existence.¹²⁵ Even in the United Kingdom - a jurisdiction that has traditionally been hostile to social and economic rights - the House of Lords has been prepared to recognise that, “it is well arguable that human rights include the right to a minimum standard of living, without which many of the other rights would be a mockery”.¹²⁶

¹²¹ CESCR *General Comment 4, The right to adequate housing*, (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), para. 10.

¹²² ‘In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.’ Ibid. para. 11. The South African Constitutional Court has rejected this approach, principally out of concern that it could not secure the necessary information to make an order or resolve how that minimum core should be satisfied in programmatic terms. See *Grootboom*, (n. 14 above), paras. 32-33. Sandra Liebenberg, however, argues that the Court’s reasonableness test, which it applies to the progressive realisation of the right, could be adapted to cover ‘survival interests’. There could be a presumption that government programs do not meet the test of reasonableness if certain minimums are not met. See Sandra Liebenberg, ‘Enforcing Positive Social and Economic Rights Claims: The South African Model of Reasonableness Review’ in Squires, Langford and Thiele (n. 70 above) ch 5.

¹²³ *V v. Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995). See also Constitutional Court of Hungary, Case No. 42/2000 (XI.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany);

¹²⁴ For a comprehensive analysis, see Magdalena Sepulveda, Colombia’, in Langford, (n. 1 above).

¹²⁵ Sentencia T 426 of June 24, 1992, Sala Segunda de Revisión de la Corte Constitucional.

¹²⁶ *Matthews v. Ministry of Defence* [2003] UKHL 4, para. 26

Judicial enforcement of social and economic rights that is confined to enforcing minimums, however, may risk encouraging governments to meet only minimal standards when resources are available for fuller enjoyment of social and economic rights. In situations where the state has access to greater resources, courts have been prepared to enforce social and economic rights ‘at the higher end’, in light of the standard of “available resources.” In Finland, where social and economic rights are largely justiciable, decisions have been made faulting local authorities for failing to take sufficient steps to secure employment for a job-seeker or speedily find a child-care placement for a family.¹²⁷ Likewise, the European Committee on Social Rights, after acknowledging the difficulties of the French government providing education to persons with autism, held that:

[N]otwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has failed to achieve sufficient progress in advancing the provision of education of persons with autism.¹²⁸

Beyond Europe, despite reading the qualification of “maximum available resources” into the right to enjoy the best attainable state of physical and mental health under the African Charter on Human and Peoples’ Rights, the African Commission went on to recommend that The Gambia provide adequate medical supplies to patients detained under the Lunatics Detention Act.¹²⁹ It was clear from the evidence presented to the Commission that resources were available.

These cases squarely raise the issue of resource availability and demonstrate that courts are able to assess government measures to fulfil social and economic rights against available resources. An interesting illustration of judicial treatment of this aspect of the duty to fulfil can be found in a comparison of two leading cases of the Constitutional Court of South Africa. In *Soobramoney v. Ministry of Health*, the applicant suffered chronic renal analysis but was denied access to a

¹²⁷ See respectively KKO 1997: 141 (Employment Act Case) Yearbook of the Supreme Court 1997 No. 141 (Supreme Court of Finland), Case No. S 98/225 (Child-Care Services Case) Helsinki Court of Appeals 28 October 1999; Case. No. 3118 (Medical Aids Case) Supreme Administrative Court, 27 November 2000, No.3118. For English summaries of a wide range of cases see www.nordichumanrights.net/tema/tema3/caselaw/.

¹²⁸ Ibid. para. 54.

¹²⁹ *Purohit and Moore v. Gambia*, (n. 1 above).

renal dialysis machine that would have prolonged his life.¹³⁰ Even though the applicant accepted that ‘that there are no funds available to provide patients such as the applicant with the necessary treatment’,¹³¹ the Court rejected his request for an order that existing dialysis machines and nurses be utilised to provide patients such as himself with ongoing treatment. The Court rejected the view that any such treatment was concerned with the constitutional right to ‘emergency treatment’ on the basis that the condition was chronic, but considered the case under the general provisions on the right to have access to health care services.¹³² It found that the machines were already over-utilised and ‘if everyone in the same condition as the appellant were to be admitted the carefully tailored programme would collapse and no one would benefit from that’.¹³³ The Court considered the cost of the programme and the impact that expanding the programme to cover everyone who requires renal dialysis would have on the (already over-stretched) provincial health budget, concluding that:

[T]he state’s resources are limited and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security.¹³⁴

However, the subsequent Treatment Action Campaign (TAC) case¹³⁵ also concerned denial of access to an available medical treatment. In addition to actively preventing doctors from supplying antiretrovirals to all pregnant women in public hospitals living with HIV/AIDS (so as to substantially reduce the risk of mother-to-child-transmission of the HIV virus), the Government failed/refused to plan and implement a nation-wide comprehensive programme to

¹³⁰ *Soobramoney v. Minister of Health (Kwazulu-Natal)* (CCT32/97) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696; [1997] ZACC 17 (27 November 1997) (*‘Soobramoney v. Minister of Health’*).

¹³¹ *Ibid.* para. 25.

¹³² Section 27(1) of the South African Constitution. Section 27(2) provides, ‘The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights’.

¹³³ *Ibid.* para. 27.

¹³⁴ *Ibid.* The Court’s decision can be correctly faulted for failing to address the obligations the Government does have towards those patients suffering from chronic renal failure. Madala, in a separate but concurring judgment, speculates that a ‘solution might be to embark upon a massive education campaign to inform the citizens generally about the causes of renal failure’. While this comment points in the right direction, the precise duties to progressively realise the health rights of these patients was overlooked, even if resources were not currently available for renal dialysis immediately.

¹³⁵ (n. 42 above).

prevent mother-to-child transmission of HIV. The Court first condemned the denial of access and, unlike in *Sobrooma ny*, noted that resources were available:

Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child.¹³⁶

The Court held further that there was a *Grootboom*-style obligation on the State to take reasonable measures to extend the ARV programme throughout the entire country.¹³⁷ They stated that the state was obliged to, amongst other things, make provision for training of counsellors in hospitals and clinics where the programme was not in place .

The obligation to progressively realise a right in relation to available resources may also be built into longer term orders issued by courts. In *People's Union for Civil Liberties v. Union of India*¹³⁸ the Supreme Court of India – faced with complaints of starvation deaths – made extensive orders concerning increased resources for the poorly functioning famine relief scheme, the opening times of ration shops, the provision of grain at the set price to families below the poverty line (BPL), the publication of information concerning the rights of BPL families, the granting of a card for free grain to all individuals without means of support and the progressive introduction of midday meal schemes in schools.

2.2.3 A step backwards – challenging retrogressive measures

Retrogressive measures such as cuts in social benefits, removal of programs, increases in the prices of government goods and services or removal of legislative protections have been a regular feature of the political-economic landscape, particularly with the advent of neo-liberalism. As a corollary of the obligation of progressive realisation, the CESCR noted that:

¹³⁶ Ibid. para. 80.

¹³⁷ Ibid. para. 95.

¹³⁸ No.196 of 2001, Interim Order of 2 May 2003.

[A]ny deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.¹³⁹

The parameters of this obligation still remain somewhat unresolved. What are, for example, the acceptable and non-acceptable justifications for the introduction of retrogressive measures with budgetary implications?¹⁴⁰ In some cases, the inquiry is made relatively simple by express constitutional provisions. For instance, in Ecuador the constitution provides that the health care budget must rise at the same rate as GDP.¹⁴¹ In most jurisdictions, however, such an explicit baseline is not available and courts must either use the existing system of provision as a 'baseline' for measuring retrogression or refer to the substantive content of the actual rights themselves.¹⁴²

One example of litigation centring on retrogressive measures on the part of a State is *Ms. L. R. et al v. Slovakia*,¹⁴³ which was recently dealt with by the Committee on the Elimination of Racial Discrimination.¹⁴⁴ The case involved a resolution adopted by the Dobšiná municipal council, under pressure from right-wing anti-Roma groups, to cancel a previous resolution in which the council had approved a plan to construct low-cost social housing for Roma inhabitants living in very poor conditions. The petitioners contended, amongst other things, that Slovakia had failed to safeguard their right to adequate housing, thereby violating Article 5(e)(iii) of the International Convention on the Elimination of all forms of Racial Discrimination (ICERD). The Committee ruled that, taken together, the council resolutions in question – which consisted of an important practical and policy step towards realisation of the right to adequate housing, followed by its revocation and replacement with a weaker measure – amounted to an impairment of the

¹³⁹ CESCR, *General Comment No. 3, The Nature of States Parties' Obligations* (Fifth session, 1990), U.N. Doc. E/1991/23, annex III, 86 (1990), para. 9.

¹⁴⁰ For an examination of possible criteria for determining retrogressive action, see Malcolm Langford, 'The Right to Social Security and Implications for Law, Policy and Practice', in Eibe Riedel (ed.), *Perspectives on the Right to Social Security* (Heidelberg: Springer, 2006), ch. 3 and Scott & Macklem, (n. 9 above).

¹⁴¹ However, the Ecuadorian courts have so far failed to enforce this constitutional provision.

¹⁴² Scott & Macklem state 'Whatever the justificatory burdens and criteria, a *sine qua non* for permitting justified downward movement could be that individuals not find themselves lacking core minimum entitlements as a result of such change' (n. 9 above), 81.

¹⁴³ *Communication No. 31/2003: Slovakia* CERD/C/66/D/31/2003.

¹⁴⁴ The following paragraph is adapted from Aoife Nolan, 'Litigating Housing Rights: Experiences and Issues' in (2006) 28 *Dublin University Law Journal* 145.

recognition, or exercise on an equal basis, of the human right to housing. The second resolution reversing the initially positive step towards the realisation of the right to housing of the Roma can be regarded as constituting a retrogressive measure, even though it was not directly referred to as such by the Committee.

An equality rights approach to retrogressive measures was taken by the Supreme Court of Canada in a case in which a provincial government had revoked the payment of a compensatory pay equity award on the grounds of a fiscal 'crisis'. The Court found that this action had a discriminatory effect on women and was therefore a violation of the right to equality. However, the Court held the discrimination to be justified on the basis of a finding of a budgetary crisis and severe resource constraints.¹⁴⁵ A slightly different approach was taken by the Supreme Court of Canada when reviewing a decision by a newly elected provincial government to repeal legislation passed by a previous government to protect the rights of agricultural workers to organise and bargain collectively. Without relying on a finding of discrimination, the Court found that the action of removing these protections violated the right to freedom of association because it resulted in an under-inclusive enjoyment of this right.¹⁴⁶

In general, the way forward with respect to the review of retrogressive measures may be to combine a number of approaches developed by different courts and international bodies. Central considerations will be the substance of the right at stake, the negative effects of retrogression (on vulnerable groups, in particular), and whether the retrogression is deliberate. In general, governments will be held to a stricter test in relation to available resources when existing programs are cut than they might be with regard to a simple failure to take positive steps to create programs or enhance them.¹⁴⁷ There will also be distinctive issues in relation to

¹⁴⁵ *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R.381. The concern here is that courts must be cautious about applying the concept of progressive realisation to issues of discrimination so as to provide governments with a lesser standard of justification. Equal pay for work of equal value is not an aspect of equality to which resource limitations should easily be applied, since it could, if necessary, be accomplished on the basis of an averaging of wages between men and women, rather than a payment of additional resources. Under the ICCPR, therefore, the government would have to have met a standard of emergency circumstances to warrant the derogation from the right to non-discrimination, which would not be met by the evidence of a need for fiscal restraint.

¹⁴⁶ *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016.

¹⁴⁷ Courts must be cautious about providing resource based defences to discrimination claims where this may not be appropriate, however. Equal pay for work of equal value is not an aspect of equality to which resource limitations should easily be applied, since it could, if necessary, be accomplished on the basis of an averaging of wages between

retrogressive measures related to participatory rights, requiring rigorous criteria for due process in the relevant decision-making.¹⁴⁸

4. Conclusion

Both our appraisal of common arguments against making social and economic rights justiciable and our analysis of jurisprudence in this area suggest that concerns about the justiciability of social and economic rights are generally ill-conceived and run contrary to experience.

Critics of justiciability have relied on false or overly simplistic characterisations of civil and political and social and economic rights and on incorrect assumptions about the nature of the relationship between the judiciary and the legislative or executive branches of government when social and economic rights are adjudicated. We have seen that an understanding of the ways in which civil and political and social and economic rights are intertwined and interact with one another makes it impossible to declare the latter category non-justiciable without undermining protections of both categories of rights.

The position adopted by a particular state and of its courts on the issue of justiciability of social and economic rights has direct and important implications for access to justice and equality rights for disadvantaged groups. Where courts have considered the importance of the interests at stake in social and economic rights claims, and reflected on their mandate to protect and enforce fundamental human rights, they have played a constructive role in promoting more inclusive and responsive policies and programs. Some of these have saved thousands of lives.

In the context of widespread hunger and homelessness in both affluent and impoverished countries, the cases discussed in this paper and others involving economic and social rights may seem quite insignificant. Resolving the justiciability debate will not solve the systemic poverty and social exclusion that are the primary causes of social and economic rights violations. What

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¹⁴⁸ See the descriptions of the due process cases discussed above.

is cause for hope, however, are the signs of a newly invigorated and inclusive framework for the adjudication of fundamental rights at the domestic, regional and international levels. After too many years of delay, we are beginning to see the emergence of a shared commitment to the provision of fair hearings into violations of *all* human rights, not just a selective few. These developments in the administration of justice both reflect and reinforce the emergence of a new human rights movement that must be fully inclusive of those whose dignity, security and equality is assaulted by poverty, homelessness, hunger or violations of other social and economic rights. More creative responses to the challenges of claiming and adjudicating social and economic rights may provide a new framework for broader strategies at the local, national and international levels for addressing the violations of social and economic rights occurring in all countries.