6. Judging Resource Availability

Malcolm Langford

[The court saw precision and cost implications as matters of degree. Scott and Macklem commenting on Schachter v Canada]

1. Introduction

When a simple Gini coefficient test reveals substantial income inequity in almost every country, it might be reasonable to ponder the relative scarcity of cases raising issues of distributive justice directly, particularly in those jurisdictions where economic, social and cultural (ESC) rights are fully actionable. Indeed, the revolutionary flood of litigation predicted by critics of ESC rights appears, at first glance, to be a mere trickle.

Potential explanations for this paradox range from the theoretical to the practical. Some may triumphantly interpret it as evidence that the resource-dimension of ESC rights lacks sufficient precision for litigation, such that courts have been unable to formulate relevant and reasonable legal standards to hold governments accountable to their obligation to devote maximum available resources to the realisation of the rights. Or, with equal exultance, that the relevant stakeholders in ESC rights litigation – the judiciary, the legal profession and the victims – have acknowledged the lack of judicial capacity or legitimacy to adjudicate claims that

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7 Senior Legal Officer, ESC Rights Litigation Programme, Centre on Housing Rights & Evictions (COHRE). My thanks to Carolina Fairstein and Ashfaq Khalfan for helping me access Colombian and Canadian jurisprudence.


9 A country’s Gini rating is between 0 and 100, with 0 indicating perfect income equality and 100 indicating absolute income inequality. In 2002, the most equal country – Slovak Republic – had a coefficient of 19.5 while Sierra Leone had a figure of 62.9, whereby the richest 20 per cent of the population had 63.4 per cent of the income and the lowest 20 per cent had 1.1 per cent of income. Only 24 countries had a Gini coefficient below 40. See World Development Indicators 2002. The World Bank. What is perhaps startling is that many countries with very high Gini coefficients – for example Brazil and South Africa – have progressive legal instruments with respect to the justiciable nature of ESC rights.

10 Cf. section 2 of this chapter.

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73 Khosa, supra, para. 74 (footnotes omitted).
raise significant resource questions.\[^6\] Or is the explanation more mundane? Is there a relative lack of awareness of the potential justiciability of ESC rights resulting in fewer cases? Or do judiciaries simply respond to such claims in a conservative manner? Or are cases involving significant allocation of resources more likely to be resolved through collective complaints, which almost by definition will mean fewer cases of this nature? One commentator on the proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) envisages, for example, that the majority of the Committee’s case-load would be dominated by cases raising negative obligations – the requirement that States refrain from interfering with self-help mechanisms.\[^7\]

If the causes are the latter ones, then the issue is merely one of education and awareness-raising, at least for those concerned with the advocacy of such rights, or the mathematical acknowledgment that the median of the case-load will be cases concerning negative obligations. If the explanation relates to the nature of the rights themselves, however, then re-analysis of whether ESC rights are fully justiciable may be required.

With these issues in mind, the preparation of this chapter involved a desk review of the various human rights judgments or decisions that raised the issue of resources directly. The surprising result of the analysis was not only the well-worn proposition that the judiciary faces the prospect of making orders with budgetary consequences in all areas of human rights – even if they are more pronounced in some rights than others – but that the reasoning, whether explicit or implicit, employed by decision-makers is remarkably consistent. The latter part of this chapter seeks to draw these common factors together – which interestingly could all be grouped under the heading of the principle of ‘reasonableness’ – as articulated in the previous chapter by Liebenberg – and postulates that the number of successful cases will increase as societies, particularly the legal profession, acknowledge explicitly or implicitly the fundamental value of the interests that ESC rights seek to protect. In some ESC rights cases, however, some innovative or more deferential approaches will be called for. This chapter, like others in this volume, examines how adjudicative authorities can utilise standard legal principles to solve the seeming complexity of some difficult cases.

\[^6\] One leading ESC rights advocate has noted the difficulty, for example, of judicialising the obligation of non-retrogression. See interview with Victor Ababovitch in Centre on Housing Rights and Evictions, \textit{Legislating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies}, (Geneva: COHRE, 2003) at 60-65. The decision not to litigate, however, appears more strongly motivated by the potential conservative response since the lawyers involved were able to formulate judicial tests that would protect the relevant public nutrition program from extinction.


2. Cases Concerning Resources

The review mentioned above divided the various human rights decisions or judgments that raised the issue of resources directly into four categories: (1) civil and political rights decisions that concern social issues; (2) non-discrimination or associated equality rights; (3) negative obligations to respect ESC rights; and (4) various positive obligations to protect and fulfil ESC rights. These are discussed below.

2.1 Civil and political rights

As many authors have pointed out, the realisation of civil and political rights carries a financial cost in addition to court-ordered remedies, such as compensation.\[^9\] These costs are inevitable since the effective respect and protection of human rights requires some level of intervention by the State – whether to regulate itself or others – and any intervention ordinarily carries a price. As the positive-obligation dimension of civil and political rights has been gradually tested, courts have been called upon to make decisions with budgetary consequences. Of course, any judgment that denies an individual a course of action may have economic consequences – protection of cultural rights in ancestral land may for example forestall development – but the focus of this chapter will be on budgetary costs as opposed to what economists call opportunity costs.

Perhaps the best illustration of the fiscal dimensions of civil and political rights is the jurisprudence of the European Court of Human Rights. Another potent example is judicial reform of prisons and mental hospitals in the US.\[^10\] In the well-known 1979 case of \textit{Airey v Ireland},\[^11\] the court determined that the complexity of divorce proceedings in Ireland necessitated the provision of legal aid, noting that: ‘Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.’\[^12\] Since it was ‘most improbable that a person in Mrs. Airey’s position could effectively present his or her own case’ a violation was found of the right to fair hearing in the

\[^8\] In North America, judges have tended to take traditional common law private entitlements as the essential components of a largely unarticulated normative baseline. What plays usually in the invocation of such a baseline is the fact that property and the right to construct require extensive positive state action to be effective legal institutions, and can in fact be seen as the state structure upon which modern industrial society emerged.’ Scott and Macklem, supra, at 46-47.

\[^9\] It should of course be noted that while it is commonly accepted that compensation is payable upon violation of a right the State is disbursing moneys outside a yearly budget plan, simply on account of human rights obligations it is has accepted, whether in legislation, a constitution or international treaty.


\[^11\] \textit{Airey v Ireland} 32 (1979); 1979 2 E.H.R.R. 305.

\[^12\] \textit{Bib.}, at paras. 26.
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determination of a person's civil rights and obligations. In addition, a violation of the right to privacy and family life was also identified. This conclusion was achieved by reference to positive obligations that flow from the right:

Although the object of Article 8 . . . is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life...\textsuperscript{13}

Subsequent to the judgment, Ireland enacted a means-tested legal aid system for civil proceedings.\textsuperscript{14}

The European Court of Human Rights has derived a number of other positive obligations in specific cases from various Convention rights, for example, the duty to protect residents from industrial pollution,\textsuperscript{15} prevent loss of life and property from potentially explosive gases,\textsuperscript{16} and the requirement to facilitate a gypsy way of life.\textsuperscript{17} In a decision concerning an applicant suffering metabolic myopathy, the court indicated, in language remarkably similar to that of \textit{Airey v Ireland}, that respect for privacy may necessitate the provision of housing to those with serious disabilities or illnesses:\textsuperscript{18}

Although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual.

In the latter jurisprudence, however, the court has clarified that there must be a direct and immediate link between the measures sought by an applicant and the latter's private life\textsuperscript{19} which indicates that the court is conscious of the potential breadth of the various positive obligations. Indeed, it is difficult to conclude that the jurisprudence is voluminous, or even necessarily consistent, in this regard. Nonetheless, it appears relatively clear that where there is a clear relationship, in

\textsuperscript{13} Ibid., at para. 32.

\textsuperscript{14} Communication with Mr Brendan Walsh, Solicitor for Mrs Airey.

\textsuperscript{15} Lupus Ostreae Spavor (1995) 20 EHRR 277.

\textsuperscript{16} Privacy v Turkey (No. 48933/99), European Court of Human Rights, 18 June 2002.

\textsuperscript{17} The eviction of the applicant and his family from the local authority house was 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: \textit{Cassese v United Kingdom}, (European Court of Human Rights, Application no. 66746/01, 27 May 2004) at para. 98.

\textsuperscript{18} (1999) 28 EHRR CD 175.

\textsuperscript{19} Ibid., See also \textit{Botta v Italy} (1998) 26 EHRR 241 at paras. 33-34.

\textsuperscript{20} [Although 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: \textit{Zwaal-de Vries v the Netherlands}, Communication No. 182/1984, (9 April 1987) at para. 12.4.

\textsuperscript{21} For example, in Taylor v United Kingdom Case-382/98, 16 December 1999, the European Court of Justice ruled that the lower-age threshold for a winter fuel benefit discriminated against elderly men. The government subsequently reduced the age level for men to the same age at women but opposition parties criticized the government for failing to publicize the new entitlement: see \textit{The Independent}, 2 January 2002, at 2.

\textsuperscript{22} 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.'
Court of Justice in 1935— to go beyond preventing mere format, or procedural, non-discrimination in law to the duty to eliminate discrimination 'in fact'. This not only often creates significant positive obligations to address the needs of marginalised and vulnerable groups, but would also appear to forestall retrogressive action in many cases. The Human Rights Committee has commented:

"The 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. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population."

In Canada, this position has been accepted. In the Eldridge case—discussed in more detail by Roach in this volume—the Canadian Supreme Court rejected the British Columbia provincial government’s arguments that the budgetary implications of providing interpretive services to the deaf justified the denial of such services. The court held that there was no reasonable basis for concluding that a total denial of such services was a justified limitation on their right to equal protection and equal benefit of the law. While the court examined the cost of providing sign language interpretation within the province, it was not persuaded that there was any significant burden for the government: only $150,000 or approximately 0.0025% of the provincial health budget at the time was needed.

In the Aton case, British Columbia’s provincial government argued that increased health costs justified its decision not to fund certain autism treatments. However, the British Columbia Supreme Court rejected this argument on the basis that this decision violated the equality rights of those suffering from autism. In reaching this decision, the court held that the savings achieved by assisting the children to develop their educational and social potential might offset the costs of

23 Minority Schools in Alaska, PCIJ Reports 1935, Series A/B, No. 64: "There 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 being a minority."


25 Section 15(1) of the Canadian Charter on Rights and Freedoms reads: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." The courts have subsequently declared that "the principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field." Eldridge v British Columbia (Attorney General) [1997] 3 S.C.R. at para. 87.


27 Aton v云南省 ad hoc of v British Columbia (Minister of Health) (2000) 78 B.C.L.R. (3d) 55 (B.C.S.C.), at para. 148. This case has been appealed to the Canadian Supreme Court in 2003. See Roach in this volume.

28 Ibid., at paras. 67-83.

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to protection from forced evictions in India is located in the more
circumscribed right to life, as opposed to the fully-fledged right to housing. The
court found in Olga Tellis that the government was in breach of its duty to provide
due process before carrying out the eviction, but declined to make a binding order
on alternative shelter for those evicted, holding that alternative sites should be
provided to long-term residents, and high priority should be given to resettlement
of all dwellers. The precedent of this leniently-worded order has been adopted
in neighbouring Bangladesh which possesses a similar constitution. The apex
court of that country ruled that the government should develop master guidelines,
or pilot projects, for the resettlement of the slum dwellers. However, the Indian
Supreme Court has shown some signs of making more strongly worded orders on
resettlement.

The South African cases on evictions, however, reveal a judiciary more willing to
impose binding obligations on authorities for the adequate resettlement of evicted
squatters, which is not surprising given the constitutional prohibition on evictions
not sanctioned by a court. Although they have not entrenched an absolute right to
alternative accommodation, however, the presumption is certainly there:

There is therefore no unqualified constitutional duty on local authorities to ensure
that in no circumstances should a home be destroyed unless alternative
accommodation or land is made available. In general terms, however, 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.

2.4 ESC Rights: Positive Obligations

It is commonly assumed that positive obligations to realise ESC rights will impose
the greatest burden on a government budget. Craven attributes the division of

31 AK, Ali O, Sultah Kander v Bangladesh (Supreme Court of Bangladesh, 1999).
32 In Amrabad Municipal Corporation v Narash Khan Gulah Khan v Ors [1997] 11 SCC 121, the Supreme
Court said that: 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. Further, the mere fact that encroachers have approached the 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 rehousing the urban poor. See generally Colin Gornals, Rights
33 Part Elizabeth Municipal v Various Occupiers Case CCT 53/05, judgment delivered 1 October 2004 at para.
28.
34 For example, the Canadian government representative in a United Nations Working Group established to
examine the creation of an international complaints mechanism for enforcement of such rights, said that
she accepted that if social benefits are already provided, there must be equal access, but questioned whether
someone should have the right to bring a complaint for an increase in social benefits.

35 It was the primary justification both for allowing States to implement the [ESC] rights in a progressive
manner and for having a reporting [as opposed to a petitions] system as the means of supervision under the
International Covenant on Economic, Social and Cultural Rights (ICESC) see Matthew Craven, The
International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development (Oxford
University Press, 1995) at 136. The attempt of States parties to partially denude the ESC rights in the Covenant
of their potential judicial character – by denying it complaints mechanisms and not explicitly requiring States
to make the rights domestically enforceable – now seems myopic.
36 Indeed, many of the checks and balances are already built into the Covenant, in particular the obligation
to progressively realise the rights and obviously provide a measure of comfort to poorer states. Further,
State parties are granted the right to decide on the requisite policies for realising the rights, providing such
measures are ‘appropriate’. Article 2(1) of the Covenant states. Each State Party to the present Covenant
undertakes to take steps, individually and through international assistance and co-operation, especially
economic and technical, to the maximum of its available resources, with a view to achieving progressively
the full realisation of the rights recognised in the present Covenant by all appropriate means, including
particularly the adoption of legislative measures.’
37 RJ v Portugal, Complaint No. 1/1998 (European Committee of Social Rights).
presumably has some definable limit, it should be noted that independent studies on proposed water privatisation schemes have indicated that most developing countries lack the capacity to effectively regulate the pricing and other activities of multinational water companies.39

As Budlender has also outlined in this volume, in the case of forced evictions, the Supreme Court of Appeal of South Africa has gone as far as to order the State to purchase the private land upon which 40,000 squatters were residing in order to avoid the forced eviction of the residents.40 The order, based on the duty to protect the right to housing, was predicated on two critical factors. First, the relevant authorities had failed to develop a housing program that was designed to progressively realise the right to housing of the residents in accordance with the Constitution. Second, no other land appeared to be available for the settlement of the residents.

2.4.2 Failure to provide the ‘Minimum Essential Level’

The minimum core obligations of States – or its various mutations – have been discussed in more detail elsewhere in this volume by Craven, Porter and Liebenberg. The Committee of Economic, Social and Cultural Rights 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 party.41 In later General Comments the concept essentially embraces all immediate obligations of States parties to the Covenant. However, an escape clause, although rather tightly defined, is provided for States deprived of the requisite resources.42

The South African Constitutional Court interestingly 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

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40 Maddeshikwe Squatters v Maddeshikwe Barberry (Pty) Ltd, President of the RSA v Maddeshikwe Barberry (Pty) Ltd Supreme Court of Appeal case no 187/03 and 213/03, judgment delivered 27 May 2004.
42 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*, at para. 11.

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programmatic terms.43 However, there are a myriad of ways that the court could have addressed the minimum core obligation, at the very minimum asking whether the government has a method of identifying and securing immediate and essential needs. Liebenberg, in this volume, challenges the conclusion of the court and argues that the court’s existing reasonable test could be adapted to cover ‘survival interests’. For example, there could be a presumption that government programs do not meet the test of reasonableness if the minimum is not met. Alternatively, the government could be required to demonstrate that its resources are adequate when survival interests are threatened, or the court could adopt a proportionality analysis that questions whether the government has taken, or considered taking, sufficient steps to immediately realise the minimal interest. Indeed, it is arguable that the distinction in practice between a minimum core obligation, and that of progressive realisation, may be difficult to identify in practice. The only difference may be the degree of scrutiny.

It is notable that courts in some other jurisdictions have felt less reluctance about their ability to identify the minimum core – explicitly or implicitly – if called upon:

- 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 acknowledged its lack of legal competence to determine resource allocation but said it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights.44

- 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.45 The court refused to hear arguments on lack of resources given the seriousness of the case, noting that the government should ‘cut the flab somewhere else’.

- In Colombia, the Constitutional Court, in a series of cases since 1992, covering unemployment subsidies or water supply for those living in refuges, has recognised a fundamental right to what it called the ‘minimo vital’. According to this jurisprudence, the government is obliged to take all those

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43 Government of the Republic of South Africa v Graaff-Reinet and Others 2000 (11) BCLR 1169 (CC) at paras. 32-33.
44 U v Eizerhorigerungen X and 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 (XI8); ReoRFGE 40, 121 (133) (Federal Constitutional Court of Germany).
45 People’s Union for Civil Liberties v Union of India, No.196 of 2001, Interim Order of 2 May 2003.
positive and negative measures in order to prevent individuals from being deprived of the most basic conditions that allow her or him to carry on a decorous existence.46

- An Argentinean Provincial Court of Appeals affirmed a lower court decision that within two days of the decision, 250 litres of drinking water per person per day was to be temporarily delivered to inhabitants until the government resolved the contamination of a community's water supply by heavy metals. Both courts based their decisions on the fact that the government had not taken any reasonable measure to tackle the pollution problem that seriously affected the health of the Payenmil even though it was well informed about the situation. The Court of Appeals stated that 'even though the government has performed some activities as to the pollution situation, in fact there has been a failure in adopting timely measures according with the gravity of the problem.'87

2.4.3 Denial of Access to a Vulnerable Group or Individual

In some cases, access to a government provided service will be denied to a group for reasons unconnected with traditional prohibited grounds for discrimination. In many cases, the explicit reason for exclusion may be seemingly innocuous but actually represents a proxy for wealth and income, or geographical region. While this ground potentially falls 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.48

Where the categories of discrimination cannot be stretched,49 economic and social rights can be invoked. For example, in Colombia a local quota system for education resulted in a female student being placed in a school outside her neighbourhood, even though her mother was able to afford the transport fees. The Constitutional Court of Colombia found a violation of the right to education due to the lack of effective access to education.50 Analogously perhaps, the Campaign for Fiscal Equity alleged that the State of New York's education financing scheme failed to provide public school students with an opportunity to obtain a sound basic education. The court found that the State had failed in its constitutional duty 'to provide for the maintenance and support of a system ... wherein all children may be educated.51

At times, however, courts will be required to fix the parameters of the relevant group. The Colombian Constitution provides that all persons will be guaranteed access to services to promote, protect and restore health, and that the law will designate the terms in which basic health care for all inhabitants will be free and obligatory.52 The court, however, has made the provision of health care subordinate to the existence of economic resources, although available resources should be used in a rational and equitable fashion in cases in which the restoration of health is actually possible. The court applied this reasoning to a situation in which a girl had been treated in a hospital, and was in a stable but irreversible condition. The hospital wished to discharge the girl against the wishes of her parents, on the basis that there was nothing more it could do. The court approved the hospital's action on the basis that hospital beds and room should not be occupied by persons whose state of health was not expected to improve, so as to deprive other persons of care.53

2.4.4 Removal of Access: Retrospective Measures

Retrospective 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 UN Committee on Economic, Social and Cultural Rights noted the potential violation of ESC rights:

[.]n any 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.54

The parameters of this obligation still remain somewhat unresolved, as is evident from the cases. What are, for example, the acceptable and non-acceptable justifications for the introduction of retrogressive measures with budgetary implications? In some cases, the inquiry is made relatively simple by express constitutional provisions. For instance, in Ecuador the constitution provides that

46Sentencia T-426 of June 24, 1992, Sala Segunda de Revision de la Corte Constitucional.
47Ménotas Comunidad Payenmil de acción de amparo, Exp. 311-CA-1997, Sala II. Cámara de Apecciones en lo Civil, Neuquen, 19 May 1997.
48See Craven, supra, at 175.
49Cf. Karsytre & Ors v Beaudes Ltd & Ors, Board of Inquiry, Ontario Human Rights Code, Canada.
50Decision T-170/03 [Munis v Bogota District Education Secretary & Ors], Colombian Constitutional Court, February 28, 2003.
52Articles 49 (1) and (3).
54Committee on Economic, Social and Cultural Rights, General Comment No. 3, supra, at para. 9.
the health care budget must rise at the same rate as GDP. In most jurisdictions, however, such an explicit baseline is not always available. The judiciary could either use the existing system of provision as a baseline for measuring retrogression or refer to the actual rights themselves. The problem with the latter approach is that in wealthier countries significant and therefore potentially harmful retrogression may be permissible, particularly if the content of the right is narrowly defined. This dilemma arose before the Hungarian Constitutional Court when confronted with the elimination of a wide range of maternity, children’s and educational benefits. Instead of solely relying on a standard ‘minimum’ entitlement analysis, earlier enshrined in the jurisprudence, the court opted for a doctrine of legal certainty, noting that families and individuals had made decisions based on the availability of the benefits, a form of the doctrine of legitimate expectations that has developed in some common law jurisprudence. Otherwise, most of the benefits would be lost for a large sector of the population.

Such judicial manoeuvring, however, left the court open to some criticism. While the argument of legal certainty has a certain legitimacy, there is a question mark over how long the benefits must be maintained and whether all socio-economic classes of society should be entitled to them. However, if a less minimalist position is adopted – for example, relying on the rights as expressed in the ICESCR which are often framed in terms of adequacy or highest possible attainment – then the principle may have more relevance. The principle of equality may have also protected some of the benefits: some groups would be disadvantaged by the cuts in comparison to others.

While these arguments are certainly feasible, there is of course the question of resource constraints or the margin of discretion that may be allowable for policy change and development. But this presents a formidable hurdle for applicants if they have to demonstrate that funds should be cut from elsewhere. Moreover, it is unlikely that the judiciary would feel comfortable conducting such an exercise. However, if the cut would cause significant harm to the realisation of ESC rights, or is particularly and unjustifiably sudden, as has been noted in some cases above,

courts may be less reluctant to step in and halt or moderate the retrogressive action. It is most likely a matter of degree.

There are two other approaches that could be employed in non-retrogression cases. The first is to place the burden of justification upon the government once an applicant has demonstrated a prima facie case. Liebenberg, in this volume, essentially advocates a similar approach for the minimum core. The second type of legal approach to retrogressive measures is to rely upon various rights to information and participation as described by Abramovich, also in this volume.

2.4.5 Failure to Fulfil or Take Steps to Ensure Progressive Realisation

Interestingly, there is an emerging and significant case law on the obligation to fulfil or, as expressed in many instruments, an obligation to take steps to progressively realise the rights within maximum available resources. One notable case arose in Finland. There, ESC rights are mostly justiciable, and decisions have been made faulting local authorities for failing to take sufficient steps to secure employment for a job seeker, speedily find a child-care placement for a family, and provide suitable shoes for a woman with a physical disability. Indeed, in the case of Finland, it is evident from some of the cases that the obligation is neither progressive nor resource-contingent.

Even where adjudicatory bodies are constrained – explicitly or implicitly – by these exceptions, violations have been found. For example, the European Committee on Social Rights, after acknowledging the difficulties of providing education to persons with autism, held that:

\[\text{[N]otwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has}\]

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55 However, the Ecuadorian courts have so far failed to enforce this constitutional provision and a case is currently before the Inter-American Commission.
56 Scott and Macklem state: Whatever the justificatory burdens and criteria, a non-justified downward movement could be that individuals not find themselves backing core minimum entitlements as a result of such change. supra, at 81.
59 See respectively KKO 1997: 141 (Employment Act Case) Yearbook of the Supreme Court 1997 No. 141 (Supreme Court of Finland), Case No. S 98/25 (Child Care Services Case) Helsinki Court of Appeals 28 October 1999, Case No. 3119 (Medical Aids Case) Supreme Administrative Court, 27 November 2000, No. 3118. For English summaries of a wide range of cases see:
www.nordichumanrights.net/teams/omega/caselaw/
60 The European Committee on Social Rights recently stated: Where the achievement of one of the right is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum available resources. See Antón-Espinoza v. France; Complaint No. 18/2002, Decision on the Merits. A similar approach was adopted by the African Commission on Human and Peoples’ Rights: Purushet and Moore v. Gambia, African Commission on Human and Peoples, Communication 241/2000, Decided at 33RD Ordinary Session of the African Commission (15-29 May, 2003) (Purushet and Moore v. Gambia). The lack of legal reasoning is criticized in a comment on the case by Mareno Aniyikobo, Right to Health, 1 Human Rights Quarterly 1 (2004).
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failed to achieve sufficient progress in advancing the provision of education of persons with autism.61

Similarly, the African Commission on Human and Peoples' Rights, after reading into the African Charter the requirement only to use maximum available resources, recommended that the Gambian Government provide adequate medical supplies to patients detained under the Lunatics Detention Act.62 This conclusion was admittedly bolstered by an admission from the government that it had insufficient drug supplies.

Perhaps the most interesting illustration of this obligation is found in the three leading cases of the Constitutional Court of South Africa. In Sookramoney v Ministry of Health, the applicant suffered chronic renal failure but was denied access to a renal dialysis machine that would have prolonged his life.63 The court, however, found that the case did not fall within the envelope of the constitutional provisions that 'no one may be refused emergency medical treatment' and 'everyone has the right to life'.64 Even though the applicant accepted 'that there are no funds available to provide patients such as the applicant with the necessary treatment',65 the court rejected his application that existing dialysis machines and nurses be utilised to provide patients such as himself with ongoing treatment. The decision was based on a number of grounds. The court rejected the view that any such treatment constituted 'emergency treatment' on the basis that the condition was chronic, but considered the case under the general provisions on the right to health.66 It considered, however, that the machines were already over-utilised, and that if everyone in the same condition as the appellant was to be admitted the carefully tailored programme would collapse and no one would benefit from that.67 The court considered the cost of the programme and noted its reluctance to interfere with 'rational decisions taken in good faith by the political organs and medical authorities', and concluded that:

The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with treatment. But the 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.

The conclusion as to whether the applicant's condition constituted an emergency will not be taken up here - the applicant died shortly after the judgment - but 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.68 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. This omission was, however, largely corrected in the subsequent Grootboom case where the court found the respective government authorities had failed to develop housing programmes directed towards providing emergency relief for those without access to basic shelter.69

The third case in the trifecta addressed both the Sookramoney and Grootboom cases in an interesting way. The case of TAC70 concerned denial of access to an available medical treatment. Doctors were prevented from supplying to pregnant women with HIV the drug nevirapine, a medicine which substantially reduces the risk of mother-to-child transmission of the virus. The Court condemned the denial of access and, unlike in Sookramoney, 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. In the circumstances we agree with the finding of the High Court that the policy of government in so far as it confines the use of nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state’s obligations under section 27(2) read with section 27(1)(a) of the Constitution.71

The Court also held that there was Grootboom-style obligation to extend the nevirapine program throughout the entire country:

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61 Sookramoney v Minister of Health, Kwazulu-Natal 1997 (12) BCLR 1636 at para. 47.
62 South Africa v Grootboom, 2001 (1) SA 46 (CC).
63 Minister of Health and Others v Treatment Action Campaign & Others 2002 (10) BCLR 1033 (CC)
64 Ibid, at para. 80.
3. Common factors?

This review of a number of jurisdictions and ESC rights-related obligations demonstrates a number of things. First, as many commentators have pointed out, adjudicators regularly issue human rights decisions that carry a financial cost. Second, the degree and extent to which judicial or quasi-judicial authorities will place a financial burden upon states is likely to be affected by a number of factors, in particular:

- The seriousness of effects of the violation of the right;
- The precision of the government duty;
- The contribution of the government to the violation; and
- The manageability of the order for the government in terms of resources.

However, as Lewis Carroll might have remarked today: perception is everything. The weight of each factor is surely determined by judicial perspectives and prejudices. For example, determining the seriousness of the effects of a violation is partly dependent on the view that the judiciary take of ESC rights. If the prohibition of hunger is viewed as of significantly less consequence than the prohibition on torture, a judge is likely to be less moved by the removal of a famine scheme than a change in prison guidelines on torture, and vice-versa.

Nonetheless, I will make some brief comments on the presence of each of these factors in the ESC rights jurisprudence, remarks which may also indicate the way forward in litigation strategy in the sometimes difficult terrain of litigating resource availability. First, and perhaps tritely, it is clear from the reasoning in the judgments discussed above that courts were more prone to make more ambitious decisions where the human rights impact of government inaction or action was considerable. It is notable, for example, that many of the progressive decisions in Latin America and elsewhere concern access to medicines, in particular for HIV/AIDS. The South African court described it as the ‘greatest threat to public health in our country’ in justifying its decision to order progressive access to nevirapine. Likewise, the decisions of the European Court of Human Rights indicate that the Court was prepared to declare positive obligations where the applicant was clearly unable to realise their civil and political rights.

Second, while it is clear that precise and legally binding duties were identified in many of the cases, lawyers and judges sometimes had to be innovative in both substantive and procedural analysis to ensure that obligations were clear, reasonable and capable of being implemented. Thus, despite some apparent difficulties with the concept of minimum threshold, some courts have nonetheless gone on to find violations of various ESC rights where litigants clearly had no access to basic food, shelter, water or medicines. Likewise, jurisprudence has developed around the seemingly difficult concept of ‘progressive realisation’.

States can be held to a range of minimum standards, such as non-retrogression and developing and implementing strategies and plans. The degree to which the obligation can be identified in practice, however, will determine the nature of the order and remedy: the more precise the duty, the more likely a court will order that a certain right be guaranteed in a particular way. If the obligations are less precise and the availability of resources is not clear, then the courts still have remedies at their disposal; for example, sending the question back to the government for the state to demonstrate that it has a plan, or it has insufficient resources.

Third, a government’s contribution to a violation of ESC rights is partly a question of how their original obligations are viewed. For example, where there has been past active intervention with negative consequences, such as pollution or an earlier eviction, judges are likely to feel more comfortable ordering access to water or housing, even when the latter remedy is not directly linked to the earlier violation. Similarly, the judiciary often feel comfortable when the state has clearly been given significant time to address the problem, as is abundantly clear by the collective complaint Autisme-Europe v France discussed above. There are dangers in giving too much weight to this factor, however. While historical circumstances should definitely be considered – as they are in much affirmative action litigation – ESC rights speak particularly powerfully to the deprivation suffered by individuals and communities in the present day context.

Fourth, the question of whether a resource burden is manageable seems to be mired in politics, since the size of government is – or was – a dividing marker in left-right politics. Manageability in the cases discussed above, however, seems to be more a function of the current expenditure versus the current budget, although judges in booming economies seem to take implicit judicial notice of the growing wealth of a country. In a number of the cases discussed above, courts did not shy away from using rough indicators, such as examining the exact cost of a program and its relative share of the budget of the relevant government authority or of the
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State as a whole. As I have discussed elsewhere, in some cases the answer of the evidential question of resource availability is abundantly clear. In other cases some judicial legwork was required. However, what is clear from the judgments is that the judiciary are able to rationally examine the issues. Contrast for example the *Soodramoney* and *TAC* cases. In the former case, the court felt comfortable finding that resources are not available for the proposed remedy, while in the latter case it deemed that the provision of the medicine was affordable for the State.

4. Conclusion

The four factors discussed above must obviously be considered in context and in the correct theoretical framework. While they are not intended to be guiding principles for adjudicative bodies, they do provide an answer to the principal question posed at the beginning of this chapter: Is the relative paucity of cases raising redistribution or reallocation of resources caused by a conceptual problem with ESC rights theory? The answer is two-fold. First, that a number of factors need to be present before courts demonstrate a willingness to intervene in questions concerning the allocation of State resources. These factors, however, should be viewed on scale, and not in any binary fashion. The greater their strength, the more likely the order is to be made. Second, the perception by the legal profession of these factors needs to undergo a shift. When ESC rights are taken seriously, both theoretically and morally, these factors gain more weight in the judicial decision-making process.

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