

The Development and  
Application of the Concept of  
the Progressive Realisation of  
Human Rights:  
Report to the Scottish National  
Taskforce for Human Rights  
Leadership

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This report was written by Manuel Jose Cepeda Espinosa, Kate O'Regan and Martin Scheinin, and submitted as evidence to the Scottish National Taskforce for Human Rights Leadership in December 2020. The authors note their thanks to Robert Freeman for his assistance in the preparation of this report.



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## EXECUTIVE SUMMARY

Tailored to assisting in the preparation of a statutory human rights framework for Scotland, this report outlines the development and application of the concept of the obligation of progressive realisation of economic, social and cultural rights (ESCRs) in international, regional and three examples of domestic law and practice. The report first provides a summary of the use of the obligation of progressive realisation in international human rights law and in three regional human rights systems. It observes that the obligation of progressive realisation is closely intertwined with the obligation of immediate realisation of rights, and that the two cannot helpfully be separated. The report then addresses the following question: to the extent that states parties to international human rights treaties bear an obligation of “progressive realisation”, what domestic legislative mechanisms have been designed and implemented to meet that obligation?

The report describes the diverse manner in which the constitutional and legislative frameworks of Colombia, Finland and South Africa provide for the fulfilment of international human rights obligations. Drawing on the lessons provided by these three very different systems, the report concludes that a democratic government seeking to fulfil its obligation to protect, promote and fulfil ESCRs must do more than merely repeat the text of the ICESCR or other international treaties that provide for ESCRs in national legislation or a constitutional text, although such legislative or constitutional enactment is both important and valuable.

The report suggests five principles that a government needs to bear in mind when seeking to provide for the domestic protection and fulfilment of international human rights obligations beyond their legislative restatement. Firstly, in the case of human rights that impose positive obligations, legislation – whether primary or secondary – should be enacted stipulating the benefits that will be provided by government (or where appropriate a private body) to fulfil the rights. Government, or the appropriate private actor, should then provide a process through which those benefits can be obtained. Secondly, government needs to ensure that state agencies (and where appropriate, private institutions) tasked with the fulfilment of human rights are properly resourced and undertake their duties effectively, responsively and openly. Thirdly, governments need to provide an effective process for monitoring the implementation of rights and for



monitoring budgetary allocations to the fulfilment of rights. Fourthly, governments should consider a pluralistic institutional model for rights enforcement involving parliamentary committees, courts, tribunals and fourth branch institutions such as ombuds and human rights commissions. Fifthly, government needs to determine what institutional provision will be made for circumstances where government fails to act progressively to realise rights. The report notes that in both Colombia and South Africa courts are central to this process, while in Finland a wider range of institutions play a role. In considering what institutional mechanism should be adopted to address this situation, the report suggests that attention be paid to questions of history, constitutional politics and legal culture.



## INTRODUCTION

The Scottish National Taskforce for Human Rights Leadership (“the Taskforce”) has been established by the Scottish Government to “design and deliver detailed proposals for a new statutory human rights framework for Scotland, together with the associated requirements for a public participatory process and for capacity-building initiatives”.<sup>1</sup> In preparing its proposals, the Taskforce must take into account three key principles identified by the First Minister’s Advisory Group on Human Rights Leadership (“the Advisory Group”): that there should be non-regression from current European Union (“EU”) rights; that nobody should be left behind in relation to the future progressive development of rights by the EU; and that Scotland ‘should take a lead’ in the protection and promotion of all human rights.<sup>2</sup> The Advisory Group adopted a methodology which focuses on structure, process and outcome, where structure is the human rights commitment made in the legal framework; process is the efforts made to implement those commitments and outcome is the result in real life of the structure and process.<sup>3</sup>

The Taskforce approached the Bonavero Institute of Human Rights at the University of Oxford to provide it with an expert report on the concept of “progressive relation” of human rights, and how that concept should be applied within a domestic human rights framework. This report has been prepared by Manuel Cepeda, Catherine O’Regan and Martin Scheinin, whose brief professional biographies are contained in Annexure A to this report.

The primary purpose of the Taskforce is to present proposals in preparation for a statutory human rights framework in Scotland. In some ways, its focus is therefore the “structure” of the human rights framework, but, in our view, in designing that structure, both the process and outcome elements of the Advisory Group’s methodology need to be borne in mind. The structure should provide clear guidance, and a clear path, to ensure that

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<sup>1</sup> See Scottish National Taskforce for Human Rights Leadership ‘Terms of Reference’ (November 2019) at para 6.

<sup>2</sup> See Scottish National Taskforce for Human Rights Leadership ‘Report to the First Minister: Recommendations for a new human rights framework to improve people’s lives’ (18 December 2018), available at <https://humanrightsleadership.scot/wp-content/uploads/2018/12/First-Ministers-Advisory-Group-on-Human-Rights-Leadership-Final-report-for-publication.pdf> at p. 64.

<sup>3</sup> Id at p. 10.



efforts may be made to implement structural commitments that impact the lives of ordinary people in Scotland. This report therefore considers not only the question of structure, but also its implications for process and outcome. In preparing this report, we observe that it is significant that the Taskforce will be advising the Scottish government on detailed proposals for a new statutory human rights framework. The report is tailored to the question of what a government can do to establish an effective human rights framework.

International human rights law protects not only civil and political rights, but also economic, social and cultural rights (ESCRs). At present, the UK Human Rights Act 1998, which is constitutional legislation in Scotland, protects only the rights entrenched in the European Convention on Human Rights (ECHR); largely civil and political rights.<sup>4</sup> So as to broaden this scope, the Taskforce is therefore investigating how economic, social and cultural rights should be protected within a domestic framework.

The roots of the concept of “progressive realisation” of human rights are to be found in article 2(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which 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.’<sup>5</sup>

This report sets out a brief account of the development and application of the concept of “progressive realisation” of economic, social and cultural rights in international human rights law and regional human rights law, and then turns to a key question for the

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<sup>4</sup> Some aspects of, inter alia, trade union rights; the right to education; and, through the notions of ‘possessions’ and ‘civil rights and obligations’ many social security benefits are also protected by the European Convention.

<sup>5</sup> For an historical account of how the term ‘achieving progressively’ came to be included in the ICESCR, see Ben Saul, *The Drafting of the International Covenant on Economic, Social and Cultural Rights* (Oxford, 2016). The wording evolves from the phrase ‘entitled to realisation’ in article 22 of the Universal Declaration of Human Rights, 1948.





Taskforce: to the extent that each State Party to the ICESCR, and other international human rights treaties, impose an obligation of “progressive realisation” on states parties, what domestic legislative mechanisms have been designed and implemented by different states parties to meet that obligation? The report considers, in particular, the manner in which three jurisdictions – Colombia, Finland and South Africa – have developed both constitutional and legislative frameworks that could be said to be in fulfilment of their international obligations to ensure progressive realisation.

In our view, it is not possible to separate the obligation of “progressive realisation” from the obligation to realise aspects of economic, social and cultural rights immediately, or from a prohibition against regression. These obligations (and concepts) are closely intertwined in international human rights law, as we shall explain in the next section. The obligation of immediate realisation also raises the question of whether there are “minimum core” obligations with respect to realising aspects of economic, social and cultural rights. Accordingly, this report will discuss the development and application of both progressive realisation and minimum core obligations in all the human rights frameworks discussed, whether international, regional or domestic.



## INTERNATIONAL HUMAN RIGHTS FRAMEWORK

Because of its origin in the ICESCR, the phrase “achieving progressively” has generally been associated with the protection of economic, social and cultural rights, and is often counterposed against the obligation, in article 2 of the International Covenant on Civil and Political Rights (ICCPR), to “respect and ensure” the protection of civil and political rights. In broad strokes, the rights in the ICCPR have been construed as “immediately realisable”, while those in the ICESCR are said to be “progressively achieved”.

At the same time, the *travaux préparatoires* of both the ICCPR and the ICESCR indicate that the term was never considered solely applicable to economic, social and cultural rights.<sup>6</sup> Early drafting discussions show an awareness of the extent to which all rights may have elements that are immediately attainable, and others which can only be progressively achieved.

The International Human Rights Law treaties adopted between 1965 and the mid-1980s tended to follow the ICCPR in construing rights as immediately realisable. For example, both the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) stipulate that policies to eliminate discrimination are to be pursued by states “without delay”.<sup>7</sup>

This general approach began to shift in the late 1980s in the context of the adoption of the Declaration on the Right to Development in 1986, which put emphasis on “constant improvement of... well-being.” Spurred by the International Commission of Jurists (ICJ) development of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights in 1987, the Committee on Economic, Social and Cultural Rights (CESCR) began, in 1989, to release General Comments with the

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<sup>6</sup> See further, Veronika Bílková, ‘The nature of social rights as obligations of international law: resource availability, progressive realization and the obligations to respect, protect, fulfil’ *Research Handbook on International Law and Social Rights* (Elgar, 2020) at p. 33.

<sup>7</sup> Article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965; Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.



aim of clarifying the nature of states parties' ICESCR obligations, including those arising from article 2(1).<sup>8</sup>

General Comment 1 inaugurated the term “progressive realisation”, noting, in its discussion of the reporting duties of states party to the convention, that “the Covenant attaches particular importance to the concept of ‘progressive realisation’ of the relevant rights and, for that reason, the Committee urges States parties to include in their periodic reports information which shows the progress over time, with respect to the effective realization of the relevant rights.”<sup>9</sup>

General Comment 3 – aimed specifically at clarifying the obligations arising out of article 2(1) – determines that “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant’s entry into force for the States concerned.”<sup>10</sup> It at the same time notes that, “the concept of progressive realisation constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.”<sup>11</sup> To this extent, “the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights.”<sup>12</sup>

General Comment 3 also introduced the idea that the rights in the ICESCR have a “minimum core” obligation which states party to the convention should be expected to realise immediately rather than progressively. As the Comment explains, “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... If the Covenant were to be read in such a way as not to establish such a minimum core

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<sup>8</sup> States party to the ICESCR are expected to comply with the CESCR’s interpretations on the basis of article 26 of the Vienna Convention on the Law of Treaties, 1969, which requires compliance in good faith with the obligations imposed by a treaty.

<sup>9</sup> CESCR *General Comment No. 1: Reporting by States Parties*, 27 July 1981, E/1989/22, available at: <https://www.refworld.org/docid/4538838b2.html> at para 7.

<sup>10</sup> CESCR *General Comment No. 3: The Nature of States Parties’ Obligations*, 14 December 1990, E/1991/23, available at: <https://www.refworld.org/docid/4538838e10.html> at para 2.

<sup>11</sup> *Id.* at para 9.

<sup>12</sup> *Id.*



obligation, it would be largely deprived of its *raison d'être*.”<sup>13</sup> At the same time, General Comment 3 notes that “any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned.”<sup>14</sup>

The concept of “minimum core obligations” at the heart of economic, social and cultural rights has subsequently attracted considerable debate.<sup>15</sup> Critiques of the concept have noted its many uncertainties: is the minimum core obligation context-sensitive? Does it vary over time and place? And who should determine its content?<sup>16</sup> One of the concerns is that the CESR has tended to burden the term with multiple meanings: elements of a putative minimum core have included “non-retrogression; obligations of immediate effect; immunity from the excuse of insufficient resources; and direct applicability” – obligations that we consider may be better considered as separate.<sup>17</sup>

In practice, through its concluding observations on the country reports submitted by states parties, the CESR has developed an approach to minimum core obligations that aligns with “progressive realisation”. Even where a minimum core has been identified by the Committee (as it has done for health, welfare and education) states are generally given the responsibility to set out what realising the obligation means in their own domestic jurisdiction. The result is that the Committee tends to scrutinise a state’s own methodology for establishing the meaning of a minimum core obligation closely, rather than asserting particular entitlements either generally, or in a particular jurisdiction.

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<sup>13</sup> Id at para 10. Italics added.

<sup>14</sup> Id.

<sup>15</sup> See Katharine Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content’ *Yale Journal of International Law* 33 (2008); Erika De Wet, *The Constitutional Enforceability of Economic and Social Rights: The Implications of the German Constitutional Model for South Africa* (Durban: Butterworths 1996); Max Harris, ‘Downsizing rights: why the ‘minimum core’ concept in International Human Rights Law should be abandoned’ *Public Interest Law Journal of New Zealand* 1 (2014); Mark Tushnet, ‘Social Welfare Rights and the Forms of Judicial Review’ *Texas Law Review* 82 (2003); David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford, 2008); Sandra Fredman *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, 2008) and John Tobin *The Right to Health in International Law* (Oxford, 2012).

<sup>16</sup> See Katharine Young, cited above n 15, at p. 113-114.

<sup>17</sup> See further Martin Scheinin ‘Core Rights and Obligations’ *The Oxford Handbook of International Human Rights Law* Dinah Shelton (ed.) (Oxford, 2013); Katharine Young, cited above n 15.



The idea of “progressive realisation”, together with associated minimum core obligations, has since become a mainstay of the CESR’s state-assessment mechanisms, and appears in most of the committee’s subsequent General Comments. General Comment 6 on disability rights for example notes that, “the obligation of States parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities;” while General Comment 7 dealing with eviction states that “in view of the nature of the practice of forced evictions, the reference in article 2.1 to progressive achievement based on the availability of resources will rarely be relevant. The State itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions.”<sup>18</sup>

General Comments 13, 14 and 15 on the rights to education, health and water, all observe that, “While the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect.”<sup>19</sup> Similarly, General Comments 18 and 21 on the right to work and cultural life set out that states must, “take deliberate and concrete measures aimed at the full implementation of the right,” and General Comment 22 and 25 note that these steps must be “targeted”.<sup>20</sup>

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<sup>18</sup> CESCR *General Comment No. 6: The Economic, Social and Cultural Rights of Older Persons*, 8 December 1995, E/1996/22, available at: <https://www.refworld.org/docid/4538838f11.html>; CESCR *General Comment No. 7: The right to adequate housing*, 20 May 1997, E/1998/22, available at: <https://www.refworld.org/docid/47a70799d.html>.

<sup>19</sup> CESCR *General Comment No. 13: The Right to Education*, 8 December 1999, E/C.12/1999/10, available at: <https://www.refworld.org/docid/4538838c22.html>; CESR *General Comment No. 14: The Right to the Highest Attainable Standard of Health*, 11 August 2000, E/C.12/2000/4, available at: <https://www.refworld.org/docid/4538838d0.html>; *General Comment No. 15: The Right to Water*, 20 January 2003, E/C.12/2002/11, available at: <https://www.refworld.org/docid/4538838d11.html>.

<sup>20</sup> CESR *General Comment No. 18: The Right to Work*, 6 February 2006, E/C.12/GC/18, available at: <https://www.refworld.org/docid/4415453b4.html>; CESR *General comment no. 21: Right of everyone to take part in cultural life*, 21 December 2009, E/C.12/GC/21, available at: <https://www.refworld.org/docid/4ed35bae2.html>; CESR *General Comment No. 22: Freedom of Thought, Conscience or Religion*, 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <https://www.refworld.org/docid/453883fb22.html>; CESR *General Comment No. 25: Article, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, available at: <https://www.refworld.org/docid/453883fc22.html>.



General Comment 10 details the special responsibilities of state-sanctioned human rights institutions, pointing out that, “Article 2(1) of the Covenant obligates each State party ‘to take steps ... with a view to achieving progressively the full realization of the [Covenant] rights ... by all appropriate means’... one such means, through which important steps can be taken, is the work of national institutions for the promotion and protection of human rights.”<sup>21</sup> This ‘framework’ approach aligns with the Paris Principles adopted by the UN General Assembly in 1993, which encourages the use of a broad-range of actors in the enforcement of human rights.<sup>22</sup>

Notably, the 2008 Convention on the Rights of Persons with Disabilities (CRPD) parts with the approach taken by human rights treaties pre-1990. It splits the rights obligations of states with respect to disability into those in the ICESCR which are “progressively realisable”, and those in the ICCPR which can be immediately fulfilled.<sup>23</sup> This shift adheres with the general increase in the prominence of “progressive realisation” in international human rights law discourse.

Understanding what “progressive realisation” entails in a substantive sense remains a work in progress. In general, states, especially those party to the ICESCR, “have a specific and continuing obligation to move as expeditiously and effectively as possible towards the full realisation [of the applicable] rights.”<sup>24</sup> General Comment 3 says that legislative mechanisms are likely to be required but are not in all cases necessary; nor is legislation an “exhaustive” response.<sup>25</sup> In assessing a country’s policies with the aim of determining whether they have complied with their duties to progressively realise rights, the CESR tends to consider the extent to which they are available, adequate, accessible and adaptable.<sup>26</sup> In General Comments 12 and 13, the CESR employed the typology of

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<sup>21</sup> CESR *General Comment No. 10: The role of national human rights institutions in the protection of economic, social and cultural rights*, 10 December 1998, E/C.12/1998/25, available at: <https://www.refworld.org/docid/47a7079c0.html>.

<sup>22</sup> UNGA *Paris Principles Resolution 48/134*, 20 December 2003.

<sup>23</sup> Article 4 Convention on the Rights of Persons with Disabilities, 2008.

<sup>24</sup> CESR *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author*, 12 January 2016, E/C.12/GC/17, available at <https://www.refworld.org/docid/441543594.html>.

<sup>25</sup> *General Comment 3* above n 10 at para 4.

<sup>26</sup> As Lilian Chenwi notes, availability requires states to ensure that the necessary goods and services and institutional arrangements needed to enjoy a right are practically available to an individual regardless of



“respect, protect and fulfil”, with the latter obligation entailing the obligations to “facilitate” and “provide”.<sup>27</sup> In general comment 19, this approach was supplemented by an obligation to “promote”.<sup>28</sup> Each of these imperatives has been interpreted and construed in multiple ways by the CESR in its assessment reports.

Various General Comments also make clear that there is a concomitant negative obligation to not take regressive steps which impede the progressive realisation of rights unless there are strong countervailing reasons for doing so. States may not act retrogressively in relation to the fulfilment of rights in the absence of cogent justification.<sup>29</sup> In its 2007 statement on regarding the Optional Protocol, the CESR has made clear that the burden for proving that steps have not been regressive “rests with the state party”.<sup>30</sup> While the obligation progressively to realise ESCRs may take some time to be achieved, “under no circumstances [should] this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realisation.”<sup>31</sup> Certain economic, social and cultural rights are, moreover, immediately realisable, at least to some extent. Concomitantly, the 1997 Maastricht Guidelines explain that a state cannot use “progressive realisation” as a pretext for non-compliance nor justify derogations or limitations of rights on different social, religious and cultural backgrounds.<sup>32</sup>

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how this is achieved. Adequacy requires that the goods and services provided to the individual are sufficient to meet all the requirements of the right. Accessibility relates to both physical and economic accessibility especially for vulnerable and disadvantaged groups, and also requires that beneficiaries are able to participate in the administration of a measure aimed at realisation of a right. Acceptability requires that the manner in which socio-economic rights are provided respects societal and cultural norms that are consistent with human rights. Lilian Chenwi ‘Monitoring the progressive realisation of socio-economic rights: Lessons from the United Nations Committee on Economic, Social and Cultural Rights and the South African Constitutional Court’ *Research paper written for Studies in Poverty and Inequality Institute* (2010).

<sup>27</sup> CESR *General Comment No. 12: The Right to Adequate Food*, 12 May 1999, available at: <https://www.refworld.org/docid/4538838c11.html>; CESR *General Comment No. 13: The Right to Education*, 8 December 1999, E/C.12/1999/10, available at: <https://www.refworld.org/docid/4538838c22.html>.

<sup>28</sup> CESR *General Comment No. 19: The right to social security*, 4 February 2008, E/C.12/GC/19, available at: <https://www.refworld.org/docid/47b17b5b39c.html>.

<sup>29</sup> General Comment 3 above n 10 at para 9.

<sup>30</sup> CESCR *Statement: An evaluation of the obligation to take steps to the ‘maximum available resources’ under an Optional Protocol to the Covenant*, E/C.12/2007/1, 10 May 2007 at para 36.

<sup>31</sup> *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, 1987 at para 21.

<sup>32</sup> The *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* were developed by the International Commission of Jurists (ICJ) in 1997 on the tenth anniversary of the *Limburg Principles*.





The Optional Protocol to the ICESCR introduces the idea of “reasonableness” to the assessment of individual complaints concerning a state’s compliance with the “progressive realisation” obligation in article 2(1), requiring that, “When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant.”<sup>33</sup> This reasonableness standard incorporates consideration of the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights; whether discretion was exercised in a non-discriminatory and non-arbitrary manner; whether resource allocation is in accordance with international human rights standards; whether the State party adopts the option that least restricts Covenant rights; whether the steps were taken within a reasonable timeframe; whether the precarious situation of disadvantaged and marginalized individuals or groups has been addressed; whether policies have prioritized grave situations or situations of risk; and whether decision-making is transparent and participatory.

In summary, ‘progressive realisation’ in international law entails an obligation upon states not to act retrogressively in relation to the implementation of ESC rights as well as an obligation to take steps that progress towards the goal of realising ESC rights (rather than steps which regress or maintain the status quo). Progressive realisation is necessarily a flexible device “reflecting the realities of the real world”, while also imposing an obligation to move as “expeditiously and effectively as possible” towards the realisation of ESCRs.<sup>34</sup> While in some cases requiring that “minimum core” standards be met, the CESR has generally entrusted states with the obligation to set the benchmarks appropriate for the realisation of ESCRs in their own jurisdiction.

The second aspect of the international obligation of progressive realisation (to take steps to progress towards the goal of realising rights) can be seen primarily as an obligation of result, which entails that each State has considerable flexibility in choosing the appropriate means through which this obligation is met. There may not, therefore, be a

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<sup>33</sup> Article 8(4) *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (OP-ICESCR). OP-ICESCR came into force in 2013, and has currently been signed by 45 parties, and ratified by 25.

<sup>34</sup> *General Comment 3* above n 10 at para 9.





provision or doctrine in domestic law capable of transforming the international obligation of “progressive realisation” into domestic law. It is also consequently conceptually possible that a State may be committed to progressive realisation at the international level while nevertheless leaving its domestic implementation to the political process, without affording the judiciary an active role.

With respect to implementation, international law encourages states to take an holistic approach incorporating “administrative, financial, educational and social measures.”<sup>35</sup> In monitoring the setting and enforcement of standards for progressive realisation, the CESR supports Court supervision, but also encourages the use of state-sanctioned human rights organisations and other extra-curial avenues for redress.<sup>36</sup>

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<sup>35</sup> CESCR *Statement: An evaluation of the obligation to take steps to the ‘maximum available resources’ under an Optional Protocol to the Covenant*, E/C.12/2007/1, 10 May 2007.

<sup>36</sup> See *General Comment 10* above n 21.



## **REGIONAL HUMAN RIGHTS FRAMEWORKS: THE EUROPEAN CONVENTION ON HUMAN RIGHTS, THE INTER-AMERICAN CONVENTION ON HUMAN RIGHTS AND THE AFRICAN CHARTER OF HUMAN RIGHTS AND FREEDOMS**

In addition to international human rights law, various regional instruments promote the progressive realisation of economic, social and cultural rights. This section gives a brief summary of the regional position in Europe, South American and Africa, while the subsequent section gives a national example from each region.

In Europe, ESC rights are primarily guaranteed by the European Social Charter, originally adopted in 1961. Various aspects of ESC rights, including those expressly protected by the Charter, have also been found to be protected by sections of the European Convention on Human Rights. Institutionally, the rights in the Charter are safeguarded by the European Committee on Social Rights (ECSR), while the Convention is enforced by the European Court of Human Rights (ECtHR).

Prior to 1995, the ECSR conducted its work principally by adopting “conclusions” on reports submitted by countries, subsequently reviewed by a committee of government delegates and the Council of Europe’s Committee of Ministers. In the early 1990s, the language of “progressive realisation” began to enter these reports, including in conclusions on France and Portugal.<sup>37</sup> From 1995, the ECSR was empowered to receive “collective complaints” from bodies including Non-Governmental Organisations and Trade Unions, and the list of rights guaranteed by the Charter was expanded. The ECSR has since produced an extensive range of case law, which has resulted in the use of the language of “progressive realisation” in numerous national jurisdictions, including Finland as outlined below. Importantly, because of its periodic review of the performance of most European countries, the ECSR has been able to adopt a regional comparative approach and to assess not only structural issues but also outcomes such as pecuniary spending on various social security benefits; something even national courts may find to be outside of

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<sup>37</sup> ECSR *Concluding Report on Portugal*, 1994 GC(1994)5; ECSR *Concluding Report on France*, 1995 GC(1995)12.



their jurisdiction, especially where the levels in question have been established in legislation.

This development was preceded by the adoption, in the Americas, of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights in 1988. This Protocol (also referred to as the San Salvador Protocol) established a country reporting system, and allows the Inter-American Commission and Court of Human Rights to receive individual petitions related to specific rights – principally related to education and trade union organising. The Protocol built on Article 26 of the American Convention, which refers specifically to “progressive realisation”.<sup>38</sup> Both through the reporting system and individual petitions, the language of progressive realisation has since entered numerous national jurisdictions across the Americas. The Inter-American Court of Human Rights has also protected ESC rights through numerous of its decisions.

In Africa, while the African Charter on Human and People’s Rights is silent on “progressive realisation”, the African Commission on Human and People’s Rights has found, in a general comment, that “the [progressive realisation of ESC rights] has been implied into the Charter in accordance with articles 61 and 62 of the African Charter. States parties are therefore under a continuing duty to move as expeditiously and effectively as possible towards the full realisation of economic, social and cultural rights.”<sup>39</sup> “Progressive realisation” has also been included in the Commission’s Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter. While the Commission’s jurisprudence expanding on the concept is limited, it has found that states bear the obligations to “take reasonable and other measures” and “concrete and targeted steps” to bring about the realisation of ESC rights in the Charter.<sup>40</sup>

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<sup>38</sup> Article 26 American Convention on Human Rights, 1969.

<sup>39</sup> African Commission on Human and Peoples’ Rights *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples’ Rights* (2011) at para 14.

<sup>40</sup> *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Communication 155/96 (2001) AHRLR; *Purohit and Moore v The Gambia* Communication 241/2001 (2003) AHRLR.



## **DOMESTIC FRAMEWORKS FOR REALISATION OF ESC RIGHTS**

Given that the Scottish National Task Force on Human Rights Leadership is mandated to design proposals for a new human rights framework in Scotland, this Report identifies three key jurisdictions that have different approaches to the domestication of their international human rights obligations. Each has ratified the ICESCR, as well as other human rights treaties, and each has adopted a divergent system for the protection, promotion, and fulfilment of human rights. These three systems are described under eight questions to facilitate comparison across countries:

- (1) What legal framework protects economic, social and cultural rights in the jurisdiction?
- (2) In what way and to what extent is the obligation to 'progressively realise' ESC rights incorporated into domestic law?
- (3) How does specific legislation that seeks to protect or fulfil individual ESCRs fit into the overall human rights framework?
- (4) Are there mechanisms for public participation or consultation in determining the content of ESC rights/obligations?
- (5) Are there legal requirements for the measurement/monitoring of the realisation of ESC rights?
- (6) What substantive standards regulate ESCRs?
- (7) How is the 'progressive realisation' of ESC rights enforced?
- (8) What institutions and remedies have been used to enforce the progressive realisation of rights?



## COLOMBIA

### **(1) What legal framework protects economic, social and cultural rights in this jurisdiction?**

Title II of Colombia's 1991 Constitution is dedicated to rights and duties. It is known as the "Bill of Rights" and has 85 articles distributed in five chapters on (i) fundamental rights, (ii) Economic, Social and Cultural Rights, (iii) collective and environmental rights, (iv) protection and enforcement of rights, and (v) duties and obligations. Most provisions relating to ESCRs are contained in Chapter 2 of Title II of the Constitution, which consists of 35 articles. However, other provisions in the Constitution also protect ESCRs. For example, Article 25 (the right to work) is contained in Chapter 1, concerning fundamental rights. Also, some provisions in Chapter 2 have not been subsequently enforced as ESCRs. This is the case of the right to property contained in Article 58. Although it is protected through abstract judicial review of legislation, its protection in individual controversies is left to civil remedies.

The language in the Constitution includes minimum guarantees, specific progressive realisation duties, and obligations to promote access or effectiveness. For example:

Minimum guarantees: "The non-renounceable right to social security is guaranteed to all inhabitants" (Article 48, paragraph 2); "Every child younger than one year who is not covered by any kind of protection or social security, shall have the right to free care in all healthcare institutions that receive government funds. The law shall regulate this subject." (Article 50); "Education shall be free in state institutions, notwithstanding the collection of academic fees from those who can cover them" (Article 67, paragraph 4); "The state shall guarantee [to the elderly] the services of integral social security and a food subsidy in case of indigence" (Article 46, paragraph 2).

Specific progressive realisation duties: "The state, with the participation of private individuals, shall progressively enlarge the coverage of social security..." (Article 48, paragraph 3). The non-renounceability of the right to social security protects against retrogression.



Obligations to promote: “The state shall promote access to property, in accordance with the law” (Article 60, paragraph 1); “All Colombians have a right to dignified housing. The state shall establish the conditions necessary to make this right effective and shall promote plans for social interest housing, adequate long term financing systems and associative forms for the implementation of these housing programs” (Article 51); “The state has the duty to promote access to culture by all Colombians with equality of opportunity, through permanent education and scientific, technical, artistic and professional training...” (Article 70, paragraph 1); “... The state shall create incentives for persons and institutions that develop and promote science and technology...” (Article 71).

The Constitutional Court has also recognized and enforced “unenumerated rights” (Article 94 of the Constitution), such as the right to a vital minimum, which was derived from a systematic interpretation of the Constitution.<sup>41</sup> More recently, the Court has protected the right to water, and has used General Comment 15 of the ESCR Committee to define its content.<sup>42</sup> The Court has also protected the right to food, in line with General Comment 12 of the ESCR Committee.<sup>43</sup>

The reference to human rights treaties and their interpretation by the competent international or regional organs is expressly mandated by Article 93 of the Constitution, according to which “International treaties and conventions ratified by the Congress, which recognise human rights and prohibit their limitation in states of emergency, prevail in the internal legal order. The rights and duties enshrined in this Constitution, shall be interpreted in accordance with international human rights treaties ratified by Colombia”. The Constitutional Court has held that international human rights treaties form part of a “constitutional block”, along with the constitutional provisions, and both must be harmonised and simultaneously applied.<sup>44</sup>

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<sup>41</sup> The vital minimum is defined as a “minimum of material elements to subsist”. See Decision T-426/92.

<sup>42</sup> Decision T-418/10.

<sup>43</sup> Decision T-325/17.

<sup>44</sup> Decision C-225/95.



The Court routinely refers to pronouncements by treaty bodies, such as the UN ESCR Committee, in interpreting the content of ESCRs.<sup>45</sup>

There is no single legislative act that protects ESCRs. Individual legislation has been passed to implement specific ESCRs. One example is Law 100 of 1993, which organizes the social security system in Colombia (healthcare and pensions). The contents of the law are enforceable by courts as part of the minimum core of the constitutional rights to health and social security. However, courts have gone beyond the content of the law, for instance to protect a vulnerable petitioner.

In 2015, a statutory law (legislation requiring an absolute majority and designed specifically to develop a fundamental right previously reviewed by the Constitutional Court) was passed to regulate the right to health. The law provides the core content of the right to health, as well as its limitations (e.g. limitations on public financing of medical treatments).<sup>46</sup> It also stated that the social right to health is a fundamental right and regulated the negative and positive duties of the state and private actors, following a previous decision of the Constitutional Court.<sup>47</sup>

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<sup>45</sup> As explained under question 6 below, most ESCRs have been defined by reference to the ESCR Committee's General Comments: right to water (Decision T-418/10), right to housing (Decision T-986A/12), right to education (Decision T-122/18), right to health (Decisions T-760/08 and C-313/14).

<sup>46</sup> Law 1751 of 2015 has 26 articles. Two should be highlighted. Article 2: "Nature and content of the fundamental right to health. The fundamental right to health is autonomous and non-renounceable, both individually and collectively. || It comprises access to health services in a timely, effective manner and with quality for the preservation, improvement and promotion of health. The state shall adopt policies to ensure equality of treatment and of opportunity in the access to promotion, prevention, diagnostic, treatment rehabilitation and palliative activities for all persons. In accordance with Article 49 of the Constitution, its provision as an essential and mandatory public service is executed under the non-delegable direction, supervision, organisation, regulation, coordination, and control of the state." Article 6: "Elements and principles of the fundamental right to health. The fundamental right to health includes the following essential and interrelated elements: a) Availability: [...] b) Acceptability: [...] c) Accessibility: [...] d) Quality and professional suitability: [...] Also, the fundamental right to health includes the following principles: a) Universality: [...] b) Pro homine: [...] c) Equity: [...] d) Continuity: [...] e) Opportunity: [...] f) Prevalence of rights: [...] g) Progressive realisation: [...] h) Freedom of choice [of insurer]: [...] i) Sustainability: [...] j) Solidarity: [...] k) Efficiency: [...] l) Interculturality: [...] m) Protection of indigenous peoples: [...] n) Protection of indigenous, rom, black, Afro-Colombian, raizal and palenqueras communities: [...]"

<sup>47</sup> Decision T-760 of 2018.



## **(2) How/to what extent is the obligation to ‘progressively realise’ ESC rights incorporated into domestic law?**

Article 85 of the 1991 Constitution specifically designated certain rights as “immediately enforceable”. The list of rights in this designation refers mainly to civil and political rights. This designation, at the time, mirrored the idea that the rights which were not “immediately enforceable” would need to be subsequently developed through legislation. Nevertheless, abstract judicial review of legislation allows the Constitutional Court to strike down legislative norms that violate an ESC, or any other constitutional clause. Thus, ESCs were immediately enforceable in abstract judicial review proceedings.

Moreover, through the interpretation of the Constitutional Court, the obligation to progressively realise has been applied to ESCRs. The Court’s jurisprudence has developed in at least two stages since 1992. First, the Court distinguished ESCRs from fundamental rights, but protected certain aspects of the ESCRs if it found that a violation of an ESCR was “connected” to a violation of a fundamental right. For example, if a violation of the right to health by withholding medication threatened a patient’s life, the Court held that there was also a violation of the right to life, and ordered the insurer to provide the medication.<sup>48</sup> Since dignity is a fundamental right, the “connection” doctrine applied to several ESC, on a case by case basis.

However, at a later stage, the Court held that there should not be a categorical distinction between “fundamental” and “social” rights. Every right in the Constitution entails both positive and negative obligations.<sup>49</sup> Instead, the Court distinguished between immediately enforceable aspects of each right, and those subject to progressive realisation. Where legislation has already provided a positive obligation, the extent of that obligation forms part of the judicially enforceable content of the right. Where legislation has not provided a duty, courts may nevertheless find a judicially enforceable duty if necessary to protect a fundamental right.

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<sup>48</sup> Decision SU-480/97.

<sup>49</sup> Decision T-595/02.





The progressive realisation of ESCRs is supported by budgetary obligations concerning social spending.<sup>50</sup> Finally, where there is a structural failure to protect or fulfil a right, courts can intervene through structural remedies to encourage the development of ESCRs or remove barriers to their effective enjoyment.<sup>51</sup>

### **(3) How does specific legislation that seeks to protect or fulfil individual ESCRs fit into this overall framework?**

There is no general requirement that ESCRs be provided for in legislation. Certain constitutional provisions mandate the development of legislation. Some examples:

- “The law shall establish the terms under which basic healthcare for all inhabitants shall be free and mandatory” (Article 49, paragraph 4).
- “Congress shall pass a labour statute. The law shall take into account, at least, the following minimum principles: ...” (Article 53, paragraph 1).

If legislation is passed, its contents are enforceable by courts. If legislation is not passed, courts can enforce the minimum contents of the right, as ascertained by the courts. The lack of legislation can be taken as evidence of the lack of a plan to guarantee the enjoyment of a right, and therefore, of the duty of progressive realisation (see answer to question 6). The lack of legislation or regulation, as well as gaps in legislation or regulation, has also been interpreted as creating a space for judicial enforcement of ESCRs to protect vulnerable individuals or groups, mainly in extreme situations of hardship.

Legislation is subject to abstract judicial review, which can be triggered by an application from a single citizen of Colombia (*actio popularis*). For instance, in 2003 the Court struck down an extension of the value added tax (VAT) to basic goods and services previously excluded or exempted. The Court underlined that, as drafted and in the actual context, this indiscriminate universalization of the VAT would have had the effect of decreasing, without any compensatory policy, the income of the poorest families in Colombia, and therefore would violate their right to a vital minimum.<sup>52</sup>

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<sup>50</sup> See further under question 4 below.

<sup>51</sup> See further under question 8 below.

<sup>52</sup> Decision C-776/03.



Legislation on ESCRs can be reviewed for violating the *prima facie* prohibition of regressive measures or for otherwise decreasing ESCR protections. The Court applies a non-regression test following strict proportionality analysis in context (see answer to question 6).

If there is a complete lack of legislation, or if despite the existence of legislation there are structural failures which entail widespread violations of ESCRs, the Court can intervene through structural remedies (see answer to question 8). If the omission is absolute, the Court cannot order Congress to pass legislation. For example, the new labour statute has not been approved, but the Court has never ordered Congress to adopt one. Rather, the Court has expanded labour rights by interpreting existing legislation adopted before the 1991 Constitution in generous way compatible with ESC (modulative judgments, which include reading in).

#### **(4) Are there mechanisms for public participation or consultation in determining the content of ESC rights/obligations?**

Public participation mechanisms are not provided specifically for ESCRs. General public participation mechanisms include the legislative process, which itself includes the possibility of holding hearings with the participation of stakeholders, civil society organizations and members of the public.

Budgetary obligations include a constitutional requirement that “public social spending” has priority over every other budgetary allocation (Articles 350 and 366). According to the organic law on budgeting (Decree 111 of 1996), social spending cannot be decreased from one year to the next (Article 41). Social spending is defined by the law as “spending the objective of which is the solution of unsatisfied basic needs in health, education, environment, water, housing, and those tending to the general welfare and improvement of quality of life of the population...” (Decree 111 of 1996, Article 41).

The Constitutional Court’s structural decisions (see answer to question 8) have generally included mechanisms for public participation and consultation. Also, the duty of



progressive realisation entails a general obligation of having the plans and policies adopted through participatory processes.<sup>53</sup>

## **(5) Are there legal requirements for the measurement/monitoring of the realisation of ESC rights?**

Every four years, the incoming presidential administration must propose to Congress a National Development Plan. According to Law 152 of 1994, the National Development Plan must include national goals, strategies, and policies for economic and social development, as well as a four-year investment plan, which must prioritize “social public spending”. The National Development Plan includes baseline assessments and indicators for every strategy. Some of these strategies coincide with specific ESCRs. However, there are no legal requirements relating specifically to the measurement or monitoring of the realisation of ESCRs.

Structural remedies can include monitoring obligations, and can entrust this job to independent state institutions (ombudsperson), civil society or to courts themselves (see answer to question 8).

## **(6) What substantive standards regulate ESCRs?**

As set out in answer to question 2, substantive standards on ESCRs have been progressively developed by the Constitutional Court. The Court first distinguished “fundamental” from “non-fundamental” rights, the latter category including most ESCRs. In this first stage, ESCRs were enforced by courts if their violation was “connected” to a violation of a “fundamental” right, such as the right to life, mainly of children, when sewerage is not available (Decision T-406/92).

However, the law has evolved and now there is no categorical distinction, between fundamental rights and ESCRs that excludes ESCRs from judicial enforcement. Rather, the Court has held that every right entails both negative and positive obligations.<sup>54</sup> For

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<sup>53</sup> Decision T-595/02, see further answer to question 6 below.

<sup>54</sup> Decision T-595/02.



instance, there is a “right to personal security”, which, in certain cases may involve a positive obligation to provide physical protection to at-risk individuals.<sup>55</sup>

The content of the positive obligation has been developed by the Constitutional Court mainly taking into account the guidance of the ESCR Committee. For instance:

Right to water: the Court has used the definition proposed by General Comment 15 of the Committee on ESCRs, which refers to availability, quality, and accessibility.<sup>56</sup> However, the Court has developed a case by case approach to determine when this right can be directly enforced. For instance, the Court has protected the right to water when the provision of water is intermittent and sporadic, and this itself affects other fundamental rights, or when a whole community does not have access to drinking water. At the same time, the Court has declined to enforce the right to water when a person’s service is suspended for outstanding fees.

Right to housing: the Court has defined the content of the right to housing with reference to General Comment 4 of the Committee on ESCR, which refers to legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.<sup>57</sup> However, the Court has enforced this right mainly in situations of natural disasters, such as a risk of landslides that could affect housing units (Decision T-585 of 2008), and forced evictions (Decision T-349/12).

Right to education: the Court has defined the “essential core” of the right to education with reference to General Comment 13 of the ESCR Committee, which refers to availability, accessibility, acceptability and adaptability (Decision T-122/18). The Court has protected the right to education in situations such as the absence of school transportation for rural students (Decision T-122/18), excessive tuition fees for university students (Decision T-198/19), or access to student loans and stipends (Decision T-089/17).

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<sup>55</sup> Decision T-719/03.

<sup>56</sup> Decision T-418/10.

<sup>57</sup> Decision T-986A/12.



Right to health: the right to health was defined in Law 1751 of 2015 as a right which “comprises access to health services in a timely and effective manner and with quality, for the preservation, improvement and promotion of health.” The Court reviewed this definition and held that it should be interpreted extensively to include other aspects contained in General Comment 14 of the ESCR Committee, such as access, not only to services, but also to “facilities” and “goods”.<sup>58</sup> The Court also said that the legislative definition of the right to health could “expand and incorporate other features which tend to ensure the effective enjoyment of the right to health”.<sup>59</sup>

In most cases, the minimum core and the aspects of the right subject to progressive realisation are judicially protected in concrete cases. The minimum core of the right of the petitioner is protected and a specific individual remedy is granted. In any right to health case, the Court will order - if prescribed by the attending physician and other required conditions are met - the provision of a medication or treatment with a deadline of generally 48 hours. For instance, in a recent routine decision, the Court ordered an insurer “within the next 48 hours, from the notification of this decision, to authorise the procedure of “resection of benign tumour in the right ear lobe”, which shall be carried out, at the latest, in two months, guaranteeing all other services that [the petitioner] may require due to the treatment and the illness ... such as post-surgery care, transportation and lodging of the petitioner and her companion”.<sup>60</sup> ESCRs are generally enforced against both public and private entities. Tutela actions (see answer to question 7) proceed against private parties if the private entity is in charge of providing a public service, which is the case with healthcare, education, public utilities, and most services related to ESCRs. Constitutional rights have direct horizontal application in situations in which there is an evident imbalance of power among private actors, as explicitly authorized by the last paragraph of Article 86 of the Constitution.<sup>61</sup>

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<sup>58</sup> Decision C-313/14.

<sup>59</sup> Decision C-313/14.

<sup>60</sup> Decision T-090/19. See answer to question 8 for context on healthcare insurers and providers in Colombia. Most health insurers are private, but funded through state subsidies or payroll taxes.

<sup>61</sup> “Article 86. [...] The law shall establish the cases in which the tutela action proceeds against private parties in charge of the provision of a public service or whose conduct seriously and directly affects the collective interest, or against those with whom the petitioner is in a relation of subordination or defencelessness”.



The progressive realization aspects of the right can be the object of judicial enforcement by remedies that order a plan, policy or program giving sufficient margin to the executive to design and implement them. For instance, in a right to water case, the Court ordered the municipality to “adopt adequate and necessary measures to design a specific plan for the rural community to which the petitioners belong, to ensure that they will not be last in line in the access to water”.<sup>62</sup> However, in some cases the progressive realization aspects of the right can be the object of judicial enforcement either through individual remedies, if there is an urgent need (e.g. a threat to a person’s life) or structural remedies (see answer to question 8). In the same right to water case, the Court also ordered the municipality to adopt an alternative measure for immediate access to water for the petitioners, while the long-term plan was implemented.<sup>63</sup> The Court thus goes beyond the minimum core in concrete cases to protect the urgent needs of individuals, especially if they are vulnerable.

Even if there is no immediate remedy that can be ordered, the Court has emphasised the need for progressive realisation to include concrete actions by the state. In Decision T-595/02, the Court protected the rights of persons with physical impairments who alleged that the capital city’s public transport system was not wheelchair-accessible. The Court stated that the petitioner did not have an immediate right to have the city guarantee his access, because the right to accessibility to transportation was subject to progressive realisation. However, the Court also held that progressive realisation entails, at least, the following obligations:

- There must be a plan for the progressive realisation of the right.
- The plan must be directed at guaranteeing the “effective enjoyment” of the right, which excludes policies that are only written but not implemented, or policies which “are not sensitive to the real problems and needs of the right-bearers”.
- The plan must be conceived in a participatory process.

In the concrete case, the Court ordered the public transportation company to design and implement a plan for wheelchair accessibility in the span of two years, and to report to

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<sup>62</sup> Decision T-418/10.

<sup>63</sup> Decision T-418/10.



the petitioner, belonging to an NGO specialized on this issues, every three months on the status and impact of this plan.

In Colombia, both the minimum core and the progressive realisation of ESCRs are enforced by courts. The difference lies in the remedies used. The minimum core is protected through direct and immediate orders that protect the petitioner. Progressive realisation is enforced through both direct orders, when it is feasible for a duty bearer to provide a good or service to a petitioner, or complex orders in which the duty bearer must implement gradual actions to achieve a result. The concept of progressive realisation in Colombian law does not admit of paralysis in the gradual achievement of the enjoyment of a right, and does not admit of regressive measures, unless they can be justified by applying a strict proportionality test.

The *prima facie* prohibition of retrogression has been enforced in both abstract and concrete review. In Decision C-1165/00, the Court struck down a legislative rule which diminished public spending on the promotion of access to health by the poor. The Court stated that “the reduction of funding for the subsidized health system does not fulfil the constitutional mandate of progressive enlargement of coverage of social security, ordered by Article 48 of the Constitution”.<sup>64</sup> The Court has also invalidated legislation which makes it harder to obtain the provision of a social service. In Decision C-428/09, it held that the creation of a fidelity requirement for disability pensions was regressive, because it made it harder to obtain a pension and imposed a higher burden on beneficiaries. However, the prohibition of retrogression is not an absolute rule. In Decision C-038/04, a labour reform passed a proportionality test. The Court declined to arbitrate the competing economic theories of the government and opposition parties with regard to the effectiveness of a legislative reform aimed at stimulating employment by reducing employment benefits. In 2014, the Court upheld a labour reform which decreased overtime payments for private and public employees and reduced the scope of labour rights of the newly employed as trainees. In its decision, the Court applied a strict proportionality test, ascertained the presence of public deliberation in the legislative decision, and subjected the enforcement of the reform to periodic impact evaluations by Congress, specifically on whether the

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<sup>64</sup> Decision C-1165/00.



reform, by reducing labour costs, promoted the right to work by diminishing unemployment which was the declared objective of the labour reform.<sup>65</sup>

This same prohibition has been enforced in concrete review. Particularly in structural remedies (see answer to question 8).

## **(7) How is the 'progressive realisation' of ESC rights enforced?**

Progressive realisation is enforced by courts, mainly through the "acción de tutela" (Article 86 of the Constitution), a constitutional judicial procedure which is not subject to strict formalities and can be used without the need for a lawyer by any person, even a child. The procedure applies to all violations of fundamental rights and the complaint must be decided in ten days. All judges in Colombia have jurisdiction to decide tutela procedures, and the Constitutional Court has the power to select individual cases (certiorari) and review the judges' decisions. The Court enforces the progressive realisation of ESCRs through the following remedies:<sup>66</sup>

- Individual remedies: any court may order the provider of a public service to carry out their duty to fulfil. For instance, a health insurer can be ordered to cover a treatment, or a pension fund can be ordered to recognize and disburse a pension payment. This also applies to private insurers and pension funds.
- Structural remedies: the Constitutional Court has issued structural orders, directed not at solving an individual situation, but at addressing the structural failure of the state to provide certain basic goods and services. Among the most well-known structural decisions are those relating to the assistance of internally displaced persons and the right to health (see answer to question 8).<sup>67</sup>

Structural remedies are sometimes ordered along with a declaration of an "unconstitutional state of affairs", which is a situation of widespread and recurrent violation of fundamental rights of a large number of similarly situated persons,

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<sup>65</sup> Decision C-038/04.

<sup>66</sup> D Landau, "Choosing Between Simple and Complex Remedies in Social Rights Cases" (2019) *University of Toronto Law Journal*

<sup>67</sup> Decision T-025/04; Decision T-760/08.





which is not attributable exclusively to the defendant, but instead is due to structural causes derived from precarious state capacity and a very significant lack of economic resources (Decisions SU-090/00 non-payment of public servants pensions in Chocó department, T-025/04 situation of internally displaced persons, T-762/15 living conditions in prisons and T-302/17 situation of children of Wayuu indigenous community).

The Constitutional Court receives over 600 000 “tutela” case files each year. Over half of “tutela” cases deal with the protection of ESCRs. Last year, the Court selected and reviewed 404 cases. If a case is not reviewed, the lower court decision stands.

Between January of 2019 and March of 2020, 240 821 “tutela” complaints alleged a violation of the right to health, 46 351 requested protection of the right to vital minimum, 26 275 alleged the right to social security, and 24 910 alleged the right to humanitarian assistance (to victims or internally displaced persons). During the same time period, among the most requested orders, relating to the right to health, were the following: timely provision of medical services (84 946), timely provision of medicine (57 558) and scheduling of medical appointments (31 253).<sup>68</sup> Most “tutela” complaints now refer to timely access, since after Decision T-760 of 2008, “tutela” complaints to access services or medicines excluded from the health plan gradually diminished.

Aside from judicial enforcement, several autonomous organs in Colombia monitor the achievement of the progressive realisation of ESCR. The *Defensoría del Pueblo* (ombudsman office) has an office specifically tasked with monitoring and promoting ESCR. The *Defensoría* produces reports and alerts government officials about critical situations regarding human rights. Additionally, the *Procuraduría General de la Nación* (which imposes disciplinary sanctions on public servants) and the *Contraloría General de la República* (which oversees public spending) two constitutional oversight bodies, also monitor different policy areas, which may include those relating to the enjoyment of ESCRs.

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<sup>68</sup> Data retrieved from <https://www.corteconstitucional.gov.co/lacorte/estadisticas.php>.



## **(8) What institutions and remedies have been used to enforce the progressive realisation of rights?**

When the content of and ESCR is provided for in ordinary legislation, it can be enforced through different kinds of judicial or administrative procedures. For instance, pensions are litigated before labour courts. The remedy is an individual labour remedy, such as ordering the pension fund to grant a pension to the petitioner.

The main ESCR issue that comes before the courts is the right to health. This right is enforced through the “acción de tutela” and, alternatively, a judicial procedure carried out by the administrative agency in charge of overseeing the health system (Superintendencia Nacional de Salud). Through either of these procedures, the right to health can be protected with a strong individual remedy, directing a health insurer or a health provider to give access to the medical service or medicine if certain conditions are met.

However, individual orders do not do enough to nudge the state towards progressive realisation. After nearly two decades of activity, in which the right to health was protected through individual orders, the Court issued a structural decision, aimed at overcoming system wide failures which were leading to repeated litigation over the same issues.<sup>69</sup>

Since 1997, the Court had expanded the right to health to include medications and treatment outside of the mandatory health plan, when the right to life, the right to integrity or human dignity were threatened. The Court had held that, in these cases, insurers had a right to be reimbursed by the state for the additional expense.<sup>70</sup>

This solved individual cases, but not the structural problem that caused the thousands of constitutional complaints each year. In 2008, the Court consolidated a number of health cases and issued a single decision, dealing not only with their individual petitions but also the structural failures of the health system. In its decision, the Court noted that “the responsible organs for ... the regulation of the health system have not made decisions to ensure the right to health”. After dealing with the protection required in each individual case, the Court stated that “only resolving the individual cases would be insufficient”, and

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<sup>69</sup> D Landau, “The Reality of Social Rights Enforcement” (2012) 53 *Harvard International Law Journal*

<sup>70</sup> Decision SU-480/97.



therefore instated measures aimed at “correcting regulatory failures” in the health system.<sup>71</sup> The Court invoked several treaties and General Comment 14 of the ESCR Committee, to identify the content of the obligations to respect, protect and fulfil, but developed their scope in the context of the case.

Most health insurers are private. They are incorporated as Health Promotion Enterprises (*Empresas Promotoras de Salud*) which are heavily regulated. With respect of their affiliates, they have the same duties as public health promoters. They finance medical services provided by hospitals and physicians. All are part of a national health system created by Law 100 of 1993. Individuals have the right to choose the health insurer and may change freely from a public to a private one. Insurers must finance the health plan defined by regulation. The health plan for poor Colombians is mainly financed by the state which transfers public resources to the public or private insurer. The health plan for non-poor Colombians is financed by a special health payroll tax.

The Court analysed the following general problems of the health system and the corresponding infringement of state and private obligations:

Uncertainty about the content of benefit plans and their regular updates: according to the Court, the health benefit plans had not been revised and updated for years in accordance with the criteria laid down by the law (demographic structure of the population, national epidemiological profile, available technology and financial conditions). The Court ordered the National Commission for Health Regulation to review the benefit plan and to clearly establish which treatments are included and which are excluded. The Court also ordered the Commission to justify each exclusion in terms of prioritization of other health needs, to set goals for the enlargement of the benefit plan, and to ensure the participation of doctors and patients in this review. The Court held that the state obligation to protect the right to health required regulations a tuned with the health needs of the population.

Structural inequality in the health system and no universal coverage: the health system was originally conceived in two sub systems. A “contributive” sub system funded by employers and employees, and a “subsidized” sub system funded by the

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<sup>71</sup> Decision T-760/08.



state to protect poor Colombians and the unemployed. The subsidized system had a smaller benefit package, half the package of the contributive system. The law established a goal for the two benefit plans to be unified by the year 2001. This goal was not achieved and later the provision containing the deadline was repealed by Congress, leaving no legislated deadline in place for unification of the two health plans. The Court held that the state obligation to protect the right to health required regulations that did not discriminate on the basis of income to access basic health services. Additional non basic health services may be dependent on capacity to contribute to financing them. The Court noted that “there are no plans or calendars for the advancement towards the unification of the benefit plans”. It held that “it is not for the Court to fix the deadlines or the calendar for the unification of the benefit plans, but it must urge the competent authorities to design a plan to achieve this goal”. The Court ordered the National Commission for Health Regulation to unify the benefit plans for children, and to draw up a plan for the gradual and progressive unification of the benefit plans for adults. The Court also noted that a legislated goal of universal coverage for 2001 had also not been achieved, and ordered the Health Ministry to draw up a plan to reach this goal. Since the unification of the health plans required an increase of public spending, the Court gave ample margin to the regulator to define how to do it and when to end the structural inequality that affected poor Colombians. It also ordered the regulator to ensure the financial sustainability of the new unified health plan and to determine health priorities taking into account epidemiological studies and giving participation to the medical community and civil society organizations. Only with respect to the unification of the health plans for children did the Court set a deadline and fix a consequence (extension of the contributive health plan to poor Colombian children). Therefore, a combination of weak and strong remedies was used, as well as a mixture of open and close ended dialogical remedies.

No regulation for provision of excluded treatments: for patients to obtain a treatment excluded from the benefit plan, but needed to enjoy a fundamental right, they had to file a “tutela” complaint. This led to thousands of complaints each year, as the judicial decision was seen as a prerequisite for the insurer to authorise



the medical treatment. The Court ordered the National Commission for Health Regulation to regulate an internal procedure for insurers to authorise excluded treatments, if certain conditions were met, without the need for a judicial decision in each case. The Court held that the state obligation to protect the right to health required regulations to resolve on scientific grounds conflicts between the attendant physician that prescribed a specific medicine or medical service, on the one hand, and the health insurer, on the other hand, which usually disapproved the prescription of the attendant physician on administrative or other non-medical grounds.

Prolonged delays in included services: the Court noted that over 50% of constitutional complaints dealt with services that were included in the benefit plans, but were denied or extensively delayed by the private insurers. The Court ordered private insurers to stop this practice since they had the obligation to respect the right to health, noting that private actors in position of power are bound to respect fundamental rights of those subject and defenceless to their power. The Court also ordered the Ministry of Health to adopt measures to identify the insurers that most frequently denied or extensively delayed the provision of health services and make this information publicly available.

Problems in reimbursements: insurers had the right to be reimbursed by the state for the provision of treatments excluded from the benefit plans, but these reimbursements were delayed, which in turn endangered the financing of further health services and put at risk the financial sustainability of the health system. The Court held that the state obligation to ensure the effective enjoyment of the right to health required that economic resources did flow through the health system in a timely manner, which was a necessary condition to provide medical services. The Court ordered the Ministry of Health to adopt measures to speed up the reimbursement procedures, as well as to draw up a contingency plan to address the backlog in payments to insurers. The Court did not order a specific measure, but gave the government a wide margin of discretion to propose the measures needed to make the reimbursement procedure efficient and report on the measures adopted.



Lack of information on the rights of patients: patients did not fully understand their rights. The Court ordered the Ministry of Health to adopt measures in order for insurers to give to every user a list of their rights.

Limits on the scope of the right to health. the Court held that the fundamental right to health could be limited, as long as the limitations imposed respected equality and other rights, as well as passed a proportionality test. Thus, it does not violate the right to health to require the attending physician to verify if the health plan included a medicine, even generic, or a treatment, which was effective, before prescribing medicines or treatments not included in the plan. It was also constitutional to exclude from the health plan purely cosmetic interventions and experimental treatments.

The Court retained jurisdiction and ordered the health regulator as well as other relevant executive agencies to present to the Court progress reports in fixed deadlines.<sup>72</sup> The reports should be based on result indicators designed by the government carefully tailored to allow for measuring progress in the respect, protection and effective enjoyment of the right to health. The Court invited *Defensoría del Pueblo, Procuraduría General de la Nación and Contraloría General de la República* to cooperate in the monitoring and follow up process to ensure the adequate implementation of the Court's orders. After ten years with several public hearings and governmental reports, most of the orders of the Court had been implemented.<sup>73</sup> Moreover, from 2017 to 2020 the government adopted tax reforms and financial decisions to increase the budget for the health system and ensure the flow of resources not only to insurers but also to hospitals. "Tutela" complaints continue in great numbers, but they mainly concern timely access to medical services, not complaints against exclusion of medicines or treatments from the health plan. Giving to private insurers (*Empresas Promotoras de Salud*) such an important role in the health system continues to be part of the political debate.

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<sup>72</sup> D Landau, "The Colombian Model of Structural Socioeconomic Rights Remedies" in Alejandro Linares-Cantillo (ed) *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press: 2021).

<sup>73</sup> See Alicia Ely Yamin, "Decision T-760 (2008) (Colom)" *Max Planck Encyclopedia of Comparative Constitutional Law*, 2017 available at <https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e742>.



The healthcare system decision is one among several structural decisions issued by the Court to enforce ESCRs. These decisions go beyond concrete cases and aim to make the progressive realisation of ESCR effective to significant segments of the population. However, they do not take over policy formulation and implementation and they do not impose specific means on government. They recognize that ESCRs depend on state public policies and that scarce resources should be allocated through public democratic deliberation. The Court's decisions set general goals, and even allow the government to establish the specifics of these goals, such as the date by which they should be achieved and the indicators to prove progress. This approach allows government a sufficiently wide margin to set priorities and allocate budgets, while at the same time, making government accountable for the gradual achievement of ESCR related goals. Nevertheless, these open-ended dialogical remedies are sometimes accompanied by specific consequences if the government does not show progress in a fixed delay or does not justify excessive delays or lack of significant progress.

In 2011, the government proposed a constitutional amendment aimed at limiting the protection and legal remedies to enforce ESCRs, known as the "fiscal sustainability" amendment. The first version of the amendment stated that fiscal sustainability was a constitutional principle. The purpose was for courts to balance the protection of ESCRs with fiscal sustainability and to limit the scope of their protection to the rules established in the laws developing the respective right. However, during the legislative procedure, fiscal sustainability was downgraded from a "principle" to a "criterion" for interpretation, the subordination of the constitutional right enforcement to the content of a Congressional statute was eliminated and the legislature added language to the effect that fiscal sustainability could not be used as a reason to abstain from protecting fundamental rights. In Decision C-288/12, the Court interpreted the amendment to the effect that fiscal sustainability should be valued to ensure the resources to finance policies needed for the effective enjoyment of all constitutional rights, not to restrict their content or scope.

The amendment also created a specific judicial procedure, after the judgment has been rendered, that allows government to allege that a judicial decision creates serious consequences for public finance, and to request a modification of the remedies. The



amendment states that this procedure cannot be used to affect the “essential core of fundamental rights”. The Court has not yet modified any order under this procedure.





## FINLAND

### **(1) What legal framework protects economic, social and cultural rights in this jurisdiction?**

Finland is both a Nordic welfare state and a country with a legalistic tradition influenced by German positivism. As a consequence, it developed a comparatively strong post-World-War-Two legislated framework for economic, social and cultural rights. Until 1995, these protections mainly took the form of ordinary statutes enacted by Parliament. Since 1995, the new constitutional catalogue of fundamental rights came to include also a modern formulation of most commonly recognised ESC rights. Before that, any constitutional protection for ESC rights was based on (a) rather rudimentary substantive clauses on some ESC rights combined with the effect of more general procedural protections in old constitutional texts from 1919 and 1928, (b) the above-mentioned legalistic approach to rights and regulation, also in the field of ESC affairs, reflected in a central place in legal doctrine for the notion of ‘subjective rights’, i.e. individual and justiciable entitlements based on statutory law, and (c) the regular incorporation into domestic law of international treaties on human rights, including the ICESCR in 1976,<sup>74</sup> and the ESC in 1991.<sup>75</sup> Finally, subsection 4 of Section 19 contains a fairly general positive obligation for public authorities to “promote the right of everyone to housing and the opportunity to arrange their own housing”.

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<sup>74</sup> See, Martin Scheinin, *Ihmisoikeudet Suomen Oikeudessa [Human Rights in Finnish Law]* (Helsinki, 1991) at p. 155-159. Note, however, that until 1990 the doctrine concerning incorporation of international treaties was underdeveloped, and some human rights treaties that were ratified with the consent of Parliament were incorporated into the domestic legal system through a Government Ordinance rather than an Act of Parliament. This could happen in principle where existing legislation was assessed as being in all respects in harmony with the treaty in question. In practice, this approach was applied when joining the ICERD and the ICESCR but not for instance the ICCPR. Since Opinion 2/1990 by the Constitutional Law Committee of Parliament issued in the process for the ratification and incorporation of the ECHR, any new ratification of a human rights treaty has always been accompanied by incorporation through an Act of Parliament.

<sup>75</sup> Scheinin above n 71 at p. 170-172. Following Opinion 2/1990 by the Constitutional Law Committee, the Parliament Committee on Social Affairs in its Report 14/1990 was explicit in stating that the incorporation of the ESC into Finnish law through an Act of Parliament would result in the applicability of its provisions by judicial and administrative authorities



An ambitious fundamental rights reform in 1989–95 resulted in the inclusion of main ESC rights in amended Chapter II of the old Constitution Act of 1919. In a subsequent comprehensive reform of the Constitution, these provisions were included in Chapter II of the current 1999 Constitution.<sup>76</sup> The key provisions are:

- *Section 16* protects educational rights, including “the right to basic education free of charge” (16.1) and the positive obligation of public authorities “to guarantee for everyone equal opportunity to receive other educational services in accordance with their ability and special needs, as well as the opportunity to develop themselves without being prevented by economic hardship” (16.2)
- *Section 17* establishes other cultural rights: linguistic rights and the right to culture, including a minority and indigenous rights clause (17.3).
- *Section 18* is on the right to work and the freedom to engage in commercial activity, including clauses on the positive obligations of public authorities towards “the protection of the labour force” (18.2) and “to promote employment” (18.3).
- *Section 19* establishes the right to social assistance and social security. This section includes a whole set of social rights starting from an individual and justiciable needs-based right to social assistance and care: “Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care” (19.1). This provision establishes an individual and justiciable (i.e. ‘subjective’) right which however is narrow in scope and primarily serves as the ultimate safeguard when risk-based legislated social security schemes fail.
- *Subsection 2* has in practice become the most important ESC rights provision. It creates a constitutional obligation to maintain legislation on comprehensive social security schemes and sets constitutional requirements related to the substantive contents of such legislation: “Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.” While insurance-based private schemes for these situations of social risk are permissible, there also must be a statutory scheme established through an Act of Parliament that guarantees benefits sufficient for ‘basic subsistence’ and that is comprehensive by

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<sup>76</sup> An English translation of the 1999 Constitution, including amendments, is provided by the Ministry of Justice available at <https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>.



protecting 'everyone'. While the right to social assistance under subsection 19.1 will be a needs-based and justiciable individual constitutional right, the social security entitlements under subsection 19.2 shall be regulated by Act of Parliament and status-based. Their pecuniary amount, guaranteeing 'basic subsistence' shall be higher than what is needed for 'indispensable subsistence' under subsection 19.1.

- *Subsection 3* mainly relates to services, rather than pecuniary benefits, in the field of social affairs and health. There are less stringent requirements than under subsection 2 concerning the contents of such relevant schemes which must be established in the form of an Act of Parliament but with more discretion left to the legislator. And unlike subsection 1 there is no 'subjective' (justiciable) right to such services directly under the Constitution. Instead, the clause would mainly have interpretive effect in courts, even if a gap-filling function cannot be excluded. The clause guarantees to everyone adequate social, health and medical services, obliges the public authorities to support families so that they can ensure the wellbeing and personal development of children. The provision also includes a specific clause on positive obligations under the right to health as an obligation of public authorities 'to promote the health of the population'.

The constitutional ESC rights provisions are complemented by detailed ordinary laws, many of which predate the 1995 and 1999 constitutional reforms. For instance, the notion of 'subjective' (justiciable) rights provided by statutory law is fairly common and may relate to, for instance, social security benefits, municipal day-care for small children, free education at all levels, and access to many forms of medical treatment.

Chapter II of the Constitution does not contain a general clause on permissible limitations to constitutional rights. Many of the civil and political rights provisions contain specific clauses to allow certain types of limitations. The authoritative doctrine concerning permissible limitations was expressed by the Committee of Constitutional Law of Parliament in its Report 25/1994, prior to the adoption of amended Chapter II.<sup>77</sup> The doctrine primarily addresses typical criteria for restricting civil and political rights, such as

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<sup>77</sup> A Report is issued to the plenary of Parliament, while an Opinion represents constitutional advice and instruction given to the standing Committee that has main responsibility over the substance of a Government Bill, in the case of ESC rights often the Committee on Social Affairs and Health.



the inviolability of the core of a constitutional right, the requirement of being prescribed by an Act of Parliament, the requirement of precision, the requirement of a legitimate aim, the requirement of necessity, the requirement of proportionality, the requirement of effective remedies and the requirement of compliance with international human rights treaties. There is no explicit 'progressive realisation' clause in the Constitution, either in general or related to ESC rights. That said, the requirement of progressive realisation can be read into general Section 22 (see below) or the final clause in Section 19.3 (see above) on the obligation to promote the health of the population.

Section 6 on equality and non-discrimination includes references to the field of ESC rights, in particular in the context of working life. ESC rights are also reflected in Section 1 of the Constitution which proclaims the foundational principles of the Constitution: "The Constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society" (1.2, second sentence). Section 22, in turn, provides for a general positive obligations clause addressed to all who exercise public authority to guarantee the enjoyment of constitutional rights and (international) human rights. This provision provides the basis for doctrines on, inter alia, a prohibition against retrogressive measures, on a duty to prioritize constitutional and human rights where resources are scarce, and a duty of administrative and judicial authorities to interpret any provision of law in a constitutional and human rights conforming manner.

The mechanisms in Finland for protecting the enjoyment of constitutional rights and international human rights represent a highly pluralistic model of 'weak-form constitutional review'<sup>78</sup> where different actors complement each other. Courts do have a role in securing the enjoyment of ESC rights but other actors are equally, or more, important. The historical background for the current situation is that until the entry into force of the new Constitution in 2000, courts were interpreted as having the power to interpret and apply provisions of the Constitution but not explicitly to declare an Act of Parliament as unconstitutional or to set it aside as being in conflict with the Constitution.

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<sup>78</sup> Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, *Rights-based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, *International Journal of Constitutional Law*, vol. 9 (2011) pp. 505–531.



At best, a court might use the notion of 'interpretation' in order to give de facto primacy to the Constitution, even if not declaring the Act of Parliament unconstitutional.<sup>79</sup>

The main mechanisms for the protection of ESC rights by state institutions or other public authorities are: (i) the Committee on Constitutional Law, one of the standing Committees of Parliament, that scrutinises any Government Bill where doubts arise as to its constitutionality or compatibility with international human rights treaties, (ii) courts, and (iii) multiple separate oversight authorities, with the Parliamentary Ombudsman and the Chancellor of Justice as the two most important. Below, a brief account is given on the role of these actors in respect of ESC rights.

(i) The Committee on Constitutional Law is composed of Members of Parliament, proportionally representing different political parties. At the same time, it, however, is seen as an authoritative interpreter of the Constitution. To achieve this, it hears legal experts, typically constitutional law professors, in every matter before it. According to constitutional convention the Committee should not depart from a clear view presented by the experts and should strive for consensus in matters of constitutional interpretation, even when a matter under consideration is subject to political controversy. The Committee has issued a wealth of Opinions, including under the ESC rights provisions of the Constitution.

It is relatively rare but it nevertheless does happen that the Committee finds a Government Bill unconstitutional and the proposed legislation therefore never passes.<sup>80</sup> Much more often the Committee issues an opinion with one or more findings of unconstitutionality but also advises how the proposal should be amended in order to repair the unconstitutionality. Also, quite often the Committee approves a proposal as constitutional but also advises how the protection of constitutional rights could be improved. The last-mentioned type of statements can be categorised under the notion

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<sup>79</sup> This doctrine and its evolution, not the least influenced by increased interest in the direct applicability of international human rights treaties because of their formal incorporation into Finnish law was a central theme in Scheinin 1991 where one of the prime examples of courts de facto giving primacy to the Constitution, beyond any traditional understanding of the notion of interpretation, was Supreme Court case 1984 II 95.

<sup>80</sup> A recent example is Opinion 32/2020 by the Committee on Constitutional Law, in which one of the many Government Bills related to COVID-19 was assessed as irreparably unconstitutional.



of progressive realisation, even if the Committee does not issue them under that rubric.

In 2012, a new mechanism of a periodic national Action Plan for constitutional and human rights was introduced. This Action Plan, presented by the Government to Parliament, is also considered by the Committee on Constitutional Law. The instrument provides for public consultation and enhanced attention to positive obligations, including those related to progressive realisation. When considering the second Action Plan for the years 2017-2019, the Committee in Opinion 56/2017 emphasised that for the systematic furtherance of the realisation of constitutional and human rights an Action Plan should be presented for each term of the Cabinet (which usually lasts for one electoral cycle of Parliament). The Committee explicitly linked the function of the Action Plan to the positive obligations dimension of Section 22 in the Constitution.

(ii) The courts are organised into two parallel hierarchies, one under the Supreme Court composed of first-instance and appeal courts with jurisdiction in civil disputes and criminal matters, and another under the Supreme Administrative Court composed of regional administrative courts. There is no constitutional court but, instead, the Constitution is applicable law in any court. As ordinary courts have civil and criminal law jurisdiction, they would less frequently than administrative courts apply the ESC rights provisions of the Constitution. Since the enactment of the new Constitution of 2000, there are nevertheless dozens of cases citing the ESC rights provisions by ordinary courts, and hundreds by administrative courts. In constitutional matters, courts tend to exercise a degree of deference in respect of the *travaux préparatoires* of Acts of Parliament and the eventual assessment of the law in question by the Constitutional Law Committee before its adoption. Three main areas where courts have made a genuine contribution towards effective protection of ESC rights, relate to the notion of 'subjective right', entailing an individual and enforceable entitlement, under Section 19.1 of the Constitution or under an Act of Parliament that implements Section 19.2 or Section 19.3, to situations where administrative authorities base a negative decision on resource constraints, and to rights of persons with disabilities, often in that context but also more generally. In contrast, the courts have stayed away from assessing the constitutional adequacy of the pecuniary levels of benefits. In short,



the contribution of the courts has been in securing equal access to benefits or services without discrimination, exclusion or undue invocation of scarce resources.

In the case KHO 2001:35, the Supreme Administrative Court relied on Section 19.1 of the Constitution when quashing a decision to deny social assistance pursuant to the Act on Social Assistance to a person who due to insufficient progress in their studies had been denied student allowances under the Act on Study Allowances:

'A student, who due to insufficient progress in studies has been denied student allowances and who has not sought to be engaged in gainful employment, cannot be put in a different situation than other applicants of social assistance. Taking into account Sections 1.1 and 10.4 of the Act on Social Assistance, indispensable subsistence for a life of dignity must in any case be secured to everyone.'

In KHO 2001:50 the Supreme Administrative Court ordered the municipality to reimburse the family's expenses for private orthodontic treatment for a child, as well as legal expenses, when such treatment had been requested through, but denied by, public health care. Section 15a.3 of the old Constitution Act (now Section 19.3 of the Constitution) was relied upon by the Court.

In KHO 2008:61 the same court relied on Section 22 of the Constitution when quashing a decision denying to a family with a child with disabilities financial support by the municipality through a scheme provided under the Act on Services for Persons with Disabilities to subsidize the adaptation of one's housing to accommodate disability-related special needs. "When taking into account the nature, causes and manifestations of C's severe disability, their right to outdoor activity corresponding to the age of the child and the importance of outdoor activity for their development, the fencing of the garden is to be assessed as necessary for C's ability to pursue activities of everyday life."

(iii) The Parliamentary Ombudsman and the Chancellor of Justice are two parallel institutions for general oversight of legality. Both are based on a mandate provided by the Constitution. While the Chancellor works closely with the Government (Cabinet), including by participating in its meetings, the Ombudsman office is based in the premises of Parliament and entails reporting only to Parliament. The role of both is one of independent oversight. There are also other, sectoral, *ombud* institutions as



established by statutory law. Both the Chancellor and the Ombudsman receive complaints directly from individuals. This is not a procedure of appeal that could overturn a decision but may result in legal sanctions, including prosecution, for illegalities or irregularities in the exercise of public authority. The oversight institutions conduct also on-site monitoring, including in places of detention. More than the other two main mechanisms for protecting constitutional and human rights, the respective mandates of the oversight institutions are well-suited for addressing positive obligations, including those related to the progressive realisation of ESC rights.

In their Annual Reports of 2013 and 2016 the Ombudsman has presented a list of ten central human rights problems in Finland. Many of them relate to ESC rights and positive obligations under them. The list includes rights of the elderly in institutions, rights of children in foster homes or institutions, rights of persons with disabilities generally and their right of personal self-determination in institutions, rights of foreigners, rights of prisoners, gaps in the provision of health care, problems in schools, delays in trials and gaps in the prevention and effective remedying of human rights violations.<sup>81</sup>

## **(2) How/to what extent is the obligation to ‘progressively realise’ ESC rights incorporated into domestic law?**

There is no explicit progressive realisation clause in the Constitution. That said, constitutional law doctrine is well aware of the notion, and references to ICESCR article 2 were frequent in the process when the ESC rights provisions were drafted. Section 22 of the Constitution, mentioned just above, is the closest counterpart to a general progressive realisation clause and provides for comprehensive positive obligations for all exercise of public authority – including the exercise of legislative or budgetary power – to guarantee the enjoyment of (domestic) constitutional rights and (international) human rights. The wording of the clause is:

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<sup>81</sup> Annual Report 2016 by the Parliamentary Ombudsman (Report 8/2017 in the proceedings of Parliament).





Exercise of public authority shall ensure the enjoyment of constitutional rights and (international) human rights.<sup>82</sup>

Notably, one important element of the 1995 constitutional rights reform, later incorporated in the 1999 Constitution, was the elimination of earlier clauses in the Parliament Act that provided for one third of the members of Parliament the possibility to veto many pieces of legislation, so that they could be approved through a majority vote only after intervening parliamentary elections. In practice and through piecemeal constitutional amendments, laws restricting the scope, introducing new requirements or reducing pecuniary benefits under social security schemes had become the area where such clauses had real application – mainly at times when political parties of the left were not included in the government coalition. The 1995 constitutional rights reform abolished the veto power of a parliamentary minority. All actors were highly conscious of the fact that the new clauses on ESC rights would become subject to constitutional interpretation as to what is required and what is allowed under them. Obstacles to retrogressive measures became, in particular, a key dimension of Section 19.2 of the Constitution as it in a fairly detailed way spells out constitutional requirements concerning legislation on social security schemes.

As a Nordic country with a civil law tradition, Finnish law attaches much weight to the *travaux préparatoires* as an authoritative source of law, second only to the text of the law. For the interpretation of the Constitution, the relevant Government Bills and Reports by the Parliament's Committee on Constitutional Law in the consideration of constitutional amendments enjoy prime place. As was explained above, it is also the same Committee that through its Opinions authoritatively assesses whether a Government Bill is compatible with the Constitution.

The 1995 constitutional rights reform was introduced to Parliament as Government Bill 309/1993. In that context, current Section 22 (originally introduced as new Section 16a inserted into the 1919 Constitution Act) was explained as a comprehensive positive obligations clause with a whole range of consequences. One notion used here was the

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<sup>82</sup> Here the text departs from the English translation provided by the Ministry of Justice: "The public authorities shall guarantee the observance of basic rights and liberties and human rights."



'duty to promote' (edistämisvelvollisuus) which closely relates to the internationally known term of 'progressive realisation'.<sup>83</sup>

In the same Government Bill, current Section 19 (then proposed as new Section 15a to be inserted in the old Constitution) was explained with direct references to the obligations under the ICESCR and the ESC. The central provision now in Section 19.2 was presented with clear references both to the obligation of progressive realisation and to the prohibition against retrogressive measures while at the same time leaving room for interpretation of the constitutional clause itself. The most important paragraph read:

'Legislative amendments that would entail significant impact on the benefits in question that provide for basic subsistence would not be compatible with the requirements of the provision. The provision would also include a positive obligation addressed to the legislator. Therefore, it is natural that social security will be directed and developed in accordance with the economic resources of society. The purpose of the provision is to secure that the protection of basic subsistence income will be secured also in the long run. Explicitly to mention the mandate continuously to develop social security has however not been considered necessary'.<sup>84</sup>

In its Report 25/1994 the Committee on Constitutional Law (re)stated, *inter alia*, the following about the last-mentioned provision:

'It would be in accordance with the nature of the mandate prescribed for the legislator that social security will be directed and developed in accordance with the economic resources of society'.<sup>85</sup>

Immediately after their enactment in 1995 as amendments to the old Constitution Act, many of the ESC rights provisions were put to test because of controversial Government Bills that sought to introduce structural reforms in several areas of social security and welfare services. The Parliament's Committee on Constitutional Rights issued a whole series of Opinions on these Bills, clarifying the interpretation of many of the ESC rights provisions, in part confirming expectations concerning their legal validity and effect but also in some issues demonstrating a significant degree of interpretive flexibility, to some

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<sup>83</sup> Government Bill 309/1993 at p. 75.

<sup>84</sup> *Id* at p. 71.

<sup>85</sup> Report 25/1994 by the Committee on Constitutional Law of Parliament at p. 10.



extent bowing under political and financial realities.<sup>86</sup> The principle of equal access to benefits or services, and the notion of a 'subjective right' to them, were maintained but the Committee showed itself reluctant to draw from the Constitution definitive pecuniary levels for social security or social assistance benefits, or to exclude non-discriminatory eligibility requirements imposed in the form of an Act of Parliament.<sup>87</sup>

### **(3) How does specific legislation that seeks to protect or fulfil individual ESC rights fit into this overall framework?**

There is no uniform structural relationship between an ESC rights clause in the Constitution and ordinary statutes (Acts of Parliament) that implement the constitutional obligation. Many social security schemes, as well as statutes on educational or social services, predate the inclusion of ESC rights in the Constitution. Many of those laws, however, have been modernised, amended or even replaced during the 15 years when the constitutional ESC rights provisions have been in place. Equally importantly, the Constitution itself intentionally applies different wording in respect of various ESC rights, so that it may create a 'subjective' (justiciable) right directly as a constitutional right where ordinary laws fail (Section 19.1), or establish clear substantive requirements for laws to be enacted (Section 19.2), or it may provide for a more general obligation to legislate to implement the constitutional right (Section 19.3, first sentence). For some ESC rights, there is an even more generic formulation of the resulting positive obligation which is addressed to public authorities without specifying legislation as the required medium (Section 19.3, second sentence, and Section 19.4).

Legislative proposals that seek to create or amend the implementation of ESC rights are subject to scrutiny before their enactment, primarily by the Parliament Committee on Constitutional Law. Once enacted, the laws are subject to review by courts in individual cases. It is regarded as a duty of administrative authorities and courts under Section 22 of the Constitution to strive for an interpretation of any law or regulation that will be in

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<sup>86</sup> A critical survey of the Committee's Opinions in question is presented in, Martin Scheinin, *Sosiaaliset perusoikeudet ja lainsäätäjä [Constitutional Social Rights and the Legislator]*, Parts I and II, Oikeus 4/1995 and 1/1996.

<sup>87</sup> As examples, reference can be made to Opinions 17/1996 and 43/1996 by the Committee on Constitutional Law.



conformity with the Constitution and with international human rights treaties. Should an actual conflict emerge, Section 107 prescribes that administrative authorities and courts alike shall set aside statutory instruments of lower rank than an Act of Parliament whenever they conflict with the Constitution. If the competing provision, however, is in an Act of Parliament, only judicial authorities have, under Section 106, the power to refuse its application in an individual case, and even then, only if the conflict is 'evident' (manifest).

#### **(4) Are there mechanisms for public participation or consultation in determining the content of ESC rights/obligations?**

There are some positive examples of good practice what comes to public information or consultation.

(i) Above, reference was already made to the fact that academic experts, in particular professors of constitutional law are regularly heard by the Committee on Constitutional Law of Parliament whenever doubts arise as to the constitutionality of a legislative proposal, and that there is a constitutional convention that the Committee will not deviate from a clear view presented by the experts. Once the Committee has issued its Opinion in a matter, the briefs by the experts are also made public. Indirect consequences of this arrangement are that there is lively academic interest in constitutional law practice, including ESC rights, which then is reflected in the form of academic teaching and events, as well as on a Finnish-language constitutional law blog, *Perustuslakiblogi*.

(ii) It is well-established practice that prior to a Government Bill being presented to Parliament, there is a process of consultation that may have been targeted specifically to hearing public authorities and private actors with a clear financial or other interest. However, this mechanism has been upgraded to include a public online consultation phase where anyone can submit comments or proposals concerning the drafting of a Bill. NGOs and independent experts make use of this possibility.



## **(5) Are there legal requirements for the measurement/monitoring of the realisation of ESC rights?**

Finland's periodic reporting under its human rights treaty obligations provides a third avenue for public consultation. It has become established practice that the Ministry for Foreign Affairs subjects any draft periodic reports to a consultative process where civil society actors – including human rights and social affairs NGOs, are able to raise their concerns about Finland's performance under the respective treaty. Quite often NGOs also submit so-called shadow reports to respective treaty bodies. These processes amount to periodic national-level stocktaking of the status of (also) ESC rights, typically when Finland is to submit a report under the ICESCR, the ESC, the Convention on the Rights of the Child (CRD) or the CRPD. Perhaps more than under the other mechanisms for public consultation, this third one is particularly well-suited for addressing also positive obligations, such as those related to progressive realisation. Since 2012, periodic Action Plans on constitutional and human rights have complemented this role of periodic reporting under human rights treaties (see above). As administrative courts and Parliament's Committee on Constitutional Law both have proven quite reluctant to determine any specific pecuniary levels of social security or social assistance benefits as being required by the Constitution, it appears that periodic reporting and complaints mechanisms under the ICESCR and the ESC, together with national stocktaking processes may be more likely to produce outcomes that on the basis of Section 22 of the Constitution and the treaties just mentioned would address Finland's obligation of progressive realisation in respect of ESC rights.

Unlike Parliament's Committee on Constitutional Law and national courts, the European Committee of Social Rights, acting under the ESC, has not shied away from addressing what levels of pecuniary benefits are adequate in the circumstances of Finland. It has held, *inter alia*, that the level of social assistance is inadequate for purposes of ESC article 13(1), as well as the levels of sickness, maternity and unemployment benefits under ESC article 12(1). Also, in several collective complaints cases the conclusion has been that Finland is in breach of the ESC.<sup>88</sup> Against this background it is important that Parliament's

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<sup>88</sup> A Country Factsheet, maintained by the Council of Europe, provides easy and relatively up-to-date access to the findings by the European Committee of Social Rights, with hyperlinks to the materials



Committee on Constitutional Law has expressed its strong support to the implementation of the findings by the European Committee of Social Rights (Opinions 40/2018 and 47/2017) and called upon the Cabinet to launch a thorough examination of the matter. Even if the ESC has been incorporated into Finnish law at the rank of an Act of Parliament, many of the requirements flowing from it, including in the field of progressive realisation, are apparently treated as obligations of result and therefore primarily calling for action by the Executive to secure that Finland will live up to its international obligations.

## **(6) What substantive standards regulate ESC rights?**

One of the key substantive standards for ESC rights established by the Constitution is the justiciable right, based on individually assessed needs, to 'indispensable subsistence and care' (Section 19.1). This right is being implemented through the Act on Social Assistance and through legislation on universal access to basic health care but would exist even if legislation were to fail.

ESC rights beyond what is indispensable are protected by other subsections of Section 19, which are operationalised through constitutional requirements concerning regulation at the level of Acts of Parliament. Key notions here are the terms 'everyone' and 'basic subsistence', as well as a list of situations of social risk in Section 19.2, as well as 'adequate social, health and medical services', 'support families' and 'the wellbeing and personal development of children' in Section 19.3.

The Committee on Constitutional Law has held that any 'essential' weakening of social security benefits providing for basic subsistence would be unconstitutional (Opinion 45/2017), but nevertheless also concluded that the freezing of the publicly funded national basic pension for one year, by amending a statutory clause on annual increases based on inflation was a measure of 'relatively minor' effect, and therefore was not unconstitutional. The Committee nevertheless emphasized the obligation of the Government to keep the matter under close monitoring (Opinion 40/2018).

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<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680492888&format=pdf>.



The reference to 'everyone' in Section 19.2 is interpreted to entail a requirement that social security schemes regulated through Acts of Parliament must be comprehensive, so that there are no categories of persons who would fall into cracks between them (Opinion 25/2013). The Committee has nevertheless emphasized that this does not constitute an obstacle to include statutory conditions for qualifying as recipient under each scheme (Opinion 45/2017). On this basis, the Committee approved as constitutional the different treatment of persons under the age of 25 in respect of certain unemployment benefits, presented under the justification that separate schemes and incentives existed to facilitate their participation in education that qualifies for working life (Opinion 19/2018).

Finnish constitutional law doctrine includes the standard of a prohibition against retrogressive measures,<sup>89</sup> even if the exact contours of the norm have remained undefined.

Opinion 59/2018 by the Committee on Constitutional Law relates to a rare case of a clearly retrogressive measure in respect of a specific category of persons, even if not to ESC rights. In 1985 an Act was adopted to exempt Jehovah's Witnesses from both military and alternative service. In 2018, the Helsinki Court of Appeals acquitted a pacifist conscientious objector from a criminal charge for refusal to perform alternative service, on the grounds that a criminal punishment would constitute prohibited discrimination. The Government proceeded by presenting a Bill to abolish the exemption of Jehovah's Witnesses who as a consequence will also be required to perform alternative civilian service. The Committee held that the Bill was constitutional as it sought to implement the equality clause of the Constitution (Section 6), while also taking into account the clause about conscription, with provision for alternative service (Section 127) and the freedom of conscience and religion clause (Section 11).

Opinion 51/2017 concerning proposed incremental retrogressive measures in the scheme for Housing Allowances encapsulates many aspects of the doctrine related to ESC rights. The Committee stated that Section 19 of the Constitution does not as such guarantee a specific current level of benefit or its advancement at the rate of inflation. It is in

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<sup>89</sup> A fairly recent survey of the doctrine concerning retrogressive measures and its challenges is Pauli Rautiainen, *Perusoikeuden heikennyskielto* [Constitutional Obligation Not to Take Retrogressive Measures] (Oikeus: 2013) (42); 3: pp. 261-283.



accordance with the legislator's positive obligations that social security is developed as the economic resources of society allow and that the state of the national and public economy may affect the levels of benefits directly paid from public funds. When cuts are deemed necessary in the state budget it will form a legitimate aim somewhat to adjust levels of benefits that are protected by the Constitution, provided that this will not endanger the realization of the constitutional right in question. Any retrogressive measure must not render meaningless the essential core of a constitutional or human right. As the proposed measures did not entail such an effect, the Committee did not consider them unconstitutional.

**(7) How is the 'progressive realisation' of ESC rights enforced?**

See the discussion in sections 1(b)(iii), 4(iii) and 5, above.

**(8) What institutions and remedies have been used to enforce the progressive realisation of rights?**

See the discussion in sections 1(b)(iii), 4(iii) and 5, above.





## SOUTH AFRICA

### **(1) What legal framework protects economic, social and cultural rights in this jurisdiction?**

Chapter 2 of the South African Constitution, 1996, contains a Bill of Rights, which is “a cornerstone of democracy in South Africa”.<sup>90</sup> In addition to civil and political rights, the Bill of Rights entrenches a range of economic, social and cultural rights including the right “to have access to adequate housing”,<sup>91</sup> to “health care services, including reproductive health care”,<sup>92</sup> to “sufficient food and water”,<sup>93</sup> to “social security, including if they are unable to support themselves and their dependants, appropriate social assistance”,<sup>94</sup> and the right to “basic education, including adult basic education”<sup>95</sup> and “further education”.<sup>96</sup> The Chapter also confirms the right of “everyone” “to use the language and participate in the cultural life of their choice”.<sup>97</sup>

These rights draw directly on those entrenched in the ICESCR. In addition, the Constitution draws on the CRC in protecting the economic and social rights of children, notably, the right “to basic nutrition, shelter, basic health care services and social services.”<sup>98</sup> The Bill of Rights protects other economic and social rights too: for example, it provides that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property,”<sup>99</sup> and perhaps more importantly that “a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament,

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<sup>90</sup> Section 7(1) of the Constitution of the Republic of South Africa, 1996 (Constitution); the first clause of the Bill of Rights.

<sup>91</sup> Section 26 of the Constitution.

<sup>92</sup> Section 27(1)(a) of the Constitution.

<sup>93</sup> Section 27(1)(b) of the Constitution.

<sup>94</sup> Section 27(1)(c) of the Constitution.

<sup>95</sup> Section 29(1)(a) of the Constitution.

<sup>96</sup> Section 29(1)(b) of the Constitution.

<sup>97</sup> Section 30 of the Constitution.

<sup>98</sup> Section 28(1)(c) of the Constitution.

<sup>99</sup> Section 25(1) of the Constitution.



either to tenure which is legal secure or to comparable redress”.<sup>100</sup> There is also a provision which provides that everyone has the right to “fair labour practices”<sup>101</sup> as well as the right to form and join trade unions, to participate in trade union activities and to strike.<sup>102</sup>

The state bears an obligation to respect, protect, promote and fulfil the rights in the Bill of Rights.<sup>103</sup> The Constitutional Court has recognised that each right needs to be interpreted to ascertain the nature and scope of the obligations imposed.<sup>104</sup> Obligations include negative duties not to interfere with a right, as well as positive duties to take steps to ensure that the right is fulfilled. The economic and social rights entrenched in sections 26 and 27 (the rights of access to adequate housing, health care services, sufficient food and water and social security) provide, in their first subparagraph, a statement of the relevant right – for example, “Everyone has the right to have access to adequate housing”.<sup>105</sup> The second subparagraph then states that “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right”.<sup>106</sup> This clause, which draws on international human rights law, has been interpreted as defining the ambit of the state’s positive obligations to fulfil the right.<sup>107</sup> Aspects of the state’s negative obligations not to interfere with the right are also explicitly provided for in both clauses. For example, section 26(3) provides that “no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”<sup>108</sup>

But not all the social and economic rights in the Constitution are structured in this way. Notably, the right to a basic education is structured differently. There is no “second

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<sup>100</sup> Section 25(6) of the Constitution. See also section 25(7) which provides that “[a] person or community dispossessed of property after 19 June 2013 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”

<sup>101</sup> Section 23(1) of the Constitution.

<sup>102</sup> Section 23(2) of the Constitution.

<sup>103</sup> Section 7(2) of the Constitution.

<sup>104</sup> See *Mazibuko and Others v City of Johannesburg and Others* [2009] ZACC 28 at paras 46-48.

<sup>105</sup> See section 26(1) of the Constitution, and similarly sections 27(1)(a), (b) and (c).

<sup>106</sup> See sections 26(2) and 27(2) of the Constitution.

<sup>107</sup> See *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19 at para 38.

<sup>108</sup> And see section 27(3) which provides that “no one may be refused emergency treatment”.



clause” that defines the ambit of the government’s positive obligations as a duty to take reasonable legislative and other measures progressively to realise the right. Accordingly, the Constitutional Court has held that the right to a basic education is immediately realisable.<sup>109</sup> In an important decision concerning the provision of textbooks to school learners, the Supreme Court of Appeal held that a policy adopted by the government in terms of which it committed to provide a textbook to each learner could be interpreted as determining the content of the immediately realisable right to basic education.<sup>110</sup> The precise ambit of the positive obligations imposed by the right to a basic education has not yet been fully explored, but have also been found to include school furnishing, transport to school, and teacher post provisioning.<sup>111</sup> The right to further education on the other hand imposes an obligation of progressive realisation upon the state.<sup>112</sup>

Although the Constitutional Court has been asked to define the “minimum core obligation” (to use the language of international human rights law) that arise under sections 26 and 27, the Court has been reluctant to do so.<sup>113</sup> It has taken the view that it is for the government to determine the scope of the minimum core obligation rather than the courts, but that determination will be subject to scrutiny by the courts. This approach has been criticised by some commentators,<sup>114</sup> but approved by others.<sup>115</sup> Where the government fails to take steps to fulfil economic and social rights, the courts will compel it to act.<sup>116</sup> If the government then takes steps to protect the economic and social rights,

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<sup>109</sup> See *Governing Body of the Juma Musjid Primary School & Others v Essay NO and Others* [2011] ZACC 13 at para 37.

<sup>110</sup> See *Minister of Basic Education v Basic Education for All* [2015] ZASCA 198 at para 42.

<sup>111</sup> *Section 27 v Minister of Education* [2012] ZAGPPHC 114; *Madzodzo v Minister of Basic Education* [2014] ZAECMHC 5; *Tripartite Steering Committee v Minister of Basic Education* [2015] ZAECGHC 67; *Centre for Child Law and Others v Minister of Basic Education* [2012] ZAECGHC 60.

<sup>112</sup> See section 29(1)(b) of the Constitution which provides that everyone has the right “to further education, which the state through reasonable measures, must make progressively available and accessible.”

<sup>113</sup> See, for example, *Grootboom*, cited above n 104 at para 33.

<sup>114</sup> See, for example, Craig Scott and Philip Alston, “Adjudicating constitutional priorities in a transnational context: A Comment on *Soobramoney’s* legacy and *Grootboom’s* promise” (2000) 16 *SA Journal on Human Rights* 206-268, D Bilchitz above n 15.

<sup>115</sup> See, for example, Carol Steinberg, “Can reasonableness protect the poor? A review of South Africa’s socio-economic rights jurisprudence” (2006) 123 *South African Law Journal* 264-284; Karin Lehmann “In Defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core” (2006) 22 *American University International LR* 163-197; Cass Sunstein “Social and economic rights: Lessons from South Africa” (2001) 11 *Constitutional Forum* 123-131.

<sup>116</sup> See, for example, *Grootboom*, cited above n 104.



but does so in a manner that is unreasonable, the court will also require government to act to correct the problem, and may, where it can, make an order that amends the policy to ensure that it is reasonable.<sup>117</sup> Where government seeks to halt a policy that has been fulfilling an economic and social right, the court will order government to continue the implementation of the policy.<sup>118</sup>

Finally, it should be noted that, unlike the European Convention on Human Rights, the South African Bill of Rights contains a general limitations clause which provides that the rights in the Bill of Rights may be limited by law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>119</sup> It is generally accepted therefore that the distinction between absolute and qualified rights that is a feature of the ECHR is not replicated in the South African Bill of Rights.

## **(2) How/to what extent is the obligation to ‘progressively realise’ ESC rights incorporated into domestic law?**

The Constitutional Court has repeatedly held that the state is under an obligation progressively to realise the economic and social rights in the Constitution.<sup>120</sup> It has also held that the approach to the obligation of progressive realisation set out in General Comment 3 of the International Committee on Economic, Social and Cultural Rights is persuasive in considering the scope of the obligation of progressive realisation imposed upon the government by provisions in the Bill of Rights. In a recent case, the High Court was concerned with a decision by the Minister of Basic Education and eight provincial education ministers to suspend the national school nutrition programme during emergency school closures in the context of the COVID pandemic.<sup>121</sup> The Court held that “any deliberate retrogressive measure needs to be fully justified”<sup>122</sup> and that the government had failed to provide justification for the decision. The Court accordingly

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<sup>117</sup> See *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) [2002] ZACC 15.

<sup>118</sup> See *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306.

<sup>119</sup> Section 36(1) of the Constitution.

<sup>120</sup> See, for example, *Grootboom*, cited above n 104 at para 45.

<sup>121</sup> See *Equal Education* above n 115.

<sup>122</sup> *Id* at para 46.



ordered the government “without delay” to implement the national school nutrition programme so that a daily meal was provided to all school learners.<sup>123</sup>

### **(3) How does specific legislation that seeks to protect or fulfil individual ESC rights fit into this overall framework?**

The government is under an obligation to take reasonable legislative and other measures to implement many of the economic and social rights entrenched in the Constitution. If government does not take such steps, then the courts will require them to do so. How this works can be illustrated by litigation brought by Equal Education against the Minister of Basic Education. The South African Schools Act, 84 of 1996, provides that the Minister may prescribe minimum norms and standards for school infrastructure. Equal Education brought litigation to compel the Minister to enact minimum norms and standards for school infrastructure and in July 2013 entered into a settlement agreement with the Minister in terms of which the Minister undertook to publish draft regulations for minimum uniform norms and standards for school infrastructure by a certain date.<sup>124</sup> After a period of comment, the final regulations were published and Equal Education then challenged aspects of the regulations, for example, the failure to provide a timeframe by which unsafe structures and hazards would be eliminated in all schools and there was no prohibition on inappropriate building materials in schools such as asbestos. The Court upheld the challenge.<sup>125</sup>

### **(4) Are there mechanisms for public participation or consultation in determining the content of ESC rights/obligations?**

The South African Constitution imposes a general obligation on the two houses of the national Parliament as well as on provincial legislatures to facilitate public involvement in their legislative and other processes.<sup>126</sup> The Constitutional Court has held that in fulfilling this obligation the legislatures have a duty to act reasonably, and, where they fail to do

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<sup>123</sup> Id.

<sup>124</sup> The history of the litigation is set out in *Equal Education and Another v Minister of Basic Education and Others* [2018] ZAECHC 6.

<sup>125</sup> Id.

<sup>126</sup> See sections 59(1)(a) and 118(1)(a) of the Constitution.



so, legislation that has been enacted without public involvement will be held to be invalid.<sup>127</sup> The more public interest there is in the subject matter of the bill, the more likely it is that the Court will consider it unreasonable if the relevant legislature does not provide an opportunity for public comment or public hearings during the legislative process.<sup>128</sup>

Given the likely public interest in legislation that is enacted that gives effect to economic, social and cultural rights in the Constitution, the obligation to facilitate public involvement in the legislative process is likely to require opportunities to be afforded to the public to comment on draft bills and also for public hearings to be held. The Constitutional Court has, for example, struck-down an act governing land restitution (aimed at rectifying pre-Constitutional racially discriminatory land policy) on the basis of its failure to facilitate public involvement in the legislative process.<sup>129</sup>

Where the content of ESC rights and obligations is set in secondary legislation, rather than in primary legislation enacted by either the national or provincial legislature, it is not clear whether there is a duty upon government to afford an opportunity of notice and comment before the secondary legislation is promulgated.<sup>130</sup> The practice of affording such an opportunity is now widely followed as for example was seen in the case of the promulgation of national minimum norms and standards of school infrastructure mentioned above.<sup>131</sup>

South African courts have also increasingly required that there be “meaningful engagement” in the enactment of government policy or legislation that impacts on ESC rights. In a number of cases relating particularly to housing and education, the Constitutional Court has ordered that meaningful engagement with an affected person

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<sup>127</sup> See, for example, *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11 at para 146.

<sup>128</sup> *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22.

<sup>129</sup> *Id.*

<sup>130</sup> See *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14 at para 13 where the Court divided on the question whether the promulgation of regulations constituted “administrative action”.

<sup>131</sup> See *Equal Education and Another v Minister of Basic Education and Others* [2018] ZAECBHC 6.



or community be conducted before a policy or law is imposed.<sup>132</sup> While largely procedural, the requirement that the participation be “meaningful” means that any participatory process must amount to more than just “lip service,” and should engage with the broader social conditions of those impacted by the policy or law.<sup>133</sup>

## **(5) Are there legal requirements for the measurement/monitoring of the realisation of ESC rights?**

The Constitution requires the South African Human Rights Commission (the SAHRC) to “monitor and assess” the observance of human rights, including ESCRs.<sup>134</sup> To date the SAHRC has published nine reports in terms of this mandate, but the most recent was in 2012 – 2013.<sup>135</sup> The methodology followed by the SAHRC is to ask government departments to complete questionnaires and the report is then based on the responses to the questionnaires. This methodology has proven largely unsatisfactory.

South Africa ratified the ICESCR in January 2015 and in accordance with article 17 of the Covenant lodged its state report with the UN Committee on Economic, Social and Cultural Rights two years later. The ESCR considered that initial report, together with other documentation, at its 42nd, 43rd and 44th meetings and issued its concluding

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<sup>132</sup> On the necessity of meaningful engagement in the context of eviction see, for example, *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* [2009] ZACC 16; *Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Another* [2012] ZACC 9; and in the context of the right to education see, for example, *Head of Department, Department of Education, Free State Province v Welkom High School and Another*; *Head of Department, Department of Education, Free State Province v Harmony High School and Another* [2013] ZACC 25; *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34; *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14.

<sup>133</sup> *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* [2008] ZACC 1.

<sup>134</sup> See section 184(1)(c) of the Constitution.

<sup>135</sup> Reports available at <http://www.sahrc.org.za/home/21/files/Final%20S184%283%29%20Report%202012-2013.pdf>.





observations in October 2018. The Committee's concluding observations provide a useful assessment of the state of compliance with ESCRs in South Africa.<sup>136</sup>

Several commentators in South Africa have noted that there is a need for a methodologically rigorous framework to assess the realisation of ESCRs.<sup>137</sup> There has been growing attention globally to this question.<sup>138</sup> A South African research institute, Studies in Poverty and Inequality Institute (SPII) has developed a monitoring tool to measure human rights compliance,<sup>139</sup> built on a three-step methodology. The first step assesses the policy effort implemented by government, the second assesses the allocation and expenditure of resources by government in respect of specific rights and the third seeks to measure the attainment of rights. The methodology thus has strong similarities to the structure, process and outcome framework proposed by the Advisory Group. SPII has produced several reports based on this methodology and also produced an assessment of South African government spending on socio-economic rights in the period between 2008-09 and 2017-18.<sup>140</sup> In that report, SPII concludes that the publicly available government data was not adequate to enable a full assessment of human rights compliance. This conclusion echoes that of the UN Committee on Economic, Social and Cultural Rights, when assessing South Africa's country report in 2018.<sup>141</sup>

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<sup>136</sup> The report can be accessed at [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en).

<sup>137</sup> See, for example, Hannah Dawson, "A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-economic rights in South Africa" *Studies in Poverty and Inequality Institute*, July 2014, available at <http://spii.org.za/wp-content/uploads/2014/08/SER-Monitoring-Tool-Framework.pdf>; Lilian Chenwi, "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" 2013 *De Jure* 39.

<sup>138</sup> See for example the OPERA framework developed by the Center for Economic and Social Rights, available at <https://www.cesr.org/opera-landing> and also the Human Rights Indicators tool developed by the Office of the High Commission on Human Rights, available at <https://www.ohchr.org/EN/Issues/Indicators/Pages/HRIndicatorsIndex.aspx>.

<sup>139</sup> See Dawson above n 134.

<sup>140</sup> See Thandiwe Matthews, "Within Its Available Resources – an assessment of South African government spending on socio-economic rights from 2008/09 to 2017/18" *SPII Occasional Paper*, September 2017 available at [http://spii.org.za/wp-content/uploads/2018/03/SPII-Occ.-Paper\\_FINAL.pdf](http://spii.org.za/wp-content/uploads/2018/03/SPII-Occ.-Paper_FINAL.pdf).

<sup>141</sup> See para 11 of the CESR's 'Concluding observations on the initial report of South Africa' available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2fCO%2f1&Lang=en).





## **(6) What substantive standards regulate ESC rights?**

As described above, the Constitutional Court has held that the primary responsibility for determining the manner in which the obligation to fulfil economic and social rights lies in the first instance with government. Accordingly, legislation in the fields of housing, access to land, education, social security and healthcare are of central importance to the fulfilment of social and economic rights. An example was set out above of how government has been required to develop norms and standards in the field of basic education in compliance with its obligations under section 29 of the Constitution.

The Constitutional Court has also required that government policy must provide short term relief for those in serious socio-economic need – a principle most often expressed in eviction cases, where adequate alternative accommodation must be provided to any evicted person.<sup>142</sup> While the meaning of the ‘reasonableness’ requirement in sections 26 and 27 of the Bill of Rights remains a work in progress, South African Courts have required that any social policy must not exclude particular social groups, and required that the policy must be substantively “capable of facilitating the realisation of the right”.<sup>143</sup>

As is the case for all rights in the South African Bill of Rights, ESC rights are applicable ‘horizontally’ as well as ‘vertically’. This means that private parties are also responsible for progressive realisation. For example, the Constitutional Court has found that a private landowner is in some cases obliged to provide basic amenities to a tenant on their property, and cannot take steps which will prevent the tenant from realising their socio-economic rights.<sup>144</sup>

## **(7) How is the ‘progressive realisation’ of ESC rights enforced?**

At the moment, the primary mechanism for the enforcement of progressive realisation is the courts. Where government adopts a retrogressive measure in relation to the protection of human rights, as happened recently in relation to the school nutrition

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<sup>142</sup> *Grootboom* above n 104; *Treatment Action Campaign* above n 114; *Olivia Road* above n 130; *Blue Moonlight*; *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* [2011] ZACC 33.

<sup>143</sup> *Grootboom* above n 104.

<sup>144</sup> *Daniels v Scribante and Another* [2017] ZACC 13.



programme,<sup>145</sup> courts will require government to produce cogent justification for the retrogressive measure, failing which they will be required to reinstate the original measure. In addition to courts, the SAHRC has an obligation to promote the protection, development and attainment of human rights.

In practice, state incapacity and the legacy of *apartheid* have made the enforcement of ESCRs challenging. While both the executive and the legislature have mostly, although not invariably, been willing to comply with orders relating to the progressive realisation of rights, there have sometimes been considerable delays in implementation, resulting in litigants returning to court to seek enforcement. For example, in several cases relating to the provision of social assistance grants, the Constitutional Court has had to take increasingly forthright steps to ensure that grants are properly paid, including personal costs orders against the responsible Minister.<sup>146</sup> Where government does comply, the quality of implementation can also sometimes fall short of that envisioned by litigants. This has for instance been true in eviction and housing cases, where court-ordered temporary housing has often proven sub-standard, and long-term housing programmes have materialised only partially and more slowly than expected.<sup>147</sup>

The progressive realisation of ESCRs through courts has generally been more effective when accompanied by concerted civil society campaigns, as was the case around the provision of HIV antiretroviral drugs.<sup>148</sup> These campaigns have tended to take a multifocal approach that engages the government through multiple channels, using the language of rights and rights enforcement, not only through litigation.

## **(8) What institutions and remedies have been used to enforce the progressive realisation of rights?**

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<sup>145</sup> See *Equal Education* above n 115.

<sup>146</sup> See *Black Sash Trust v Minister of Social Development and Others* [2018] ZACC 36.

<sup>147</sup> See, for example, *Dladla and Another v City of Johannesburg and Others* [2017] ZACC 42; *Residents of Joe Slovo Community, Western Cape v Thebelisha Homes and Others* [2011] ZACC 8. The outcome of the internationally celebrated 'Grootboom case' is another telling example – see [Matthew Wilhelm-Solomon 'Irene Grootboom's unbuilt house' \*New Frame\*, 5 October 2020, available at <https://www.newframe.com/long-read-irene-grootbooms-unbuilt-house/>.](#)

<sup>148</sup> See *Treatment Action Campaign* above n 114.



The South African Constitution requires courts of competent jurisdiction who conclude that any law or conduct is inconsistent with the Constitution, for example, by being inconsistent with an ESCR, to declare such law or conduct invalid.<sup>149</sup> In making orders of invalidity, the Constitutional Court will use the techniques of severance (where words in a provision are severed in order to render the provision constitutional)<sup>150</sup> and reading-in (where words are read in to a provision to achieve a constitutionally compliant result).<sup>151</sup> The technique of reading-in was used, for example, in a case in which the Constitutional Court held that the government's exclusion of permanent residents from social security benefits was inconsistent with the equality guarantee in the Constitution. The court ordered that the words "or permanent residents" be read into the relevant provisions of the governing legislation.<sup>152</sup> In adopting these tools, the Court has reasoned that both severance and reading in can reduce the scope and effect of an order of invalidity.

The general principle when making an order of invalidity is that the order will be retrospective to the date on which the conduct occurred or the legislation was introduced (or came into conflict with the constitutional provision. However, courts have the discretion to limit the retrospective effect of such an order. Courts may, for example, order that the law or conduct will only be invalid prospectively rather than from the date on which it was enacted or performed.<sup>153</sup> A court may also suspend an order of invalidity in order to afford the relevant authority to correct the constitutional defect.<sup>154</sup>

In addition to a declaration of invalidity, the court may make any other order that is just and equitable.<sup>155</sup> In circumstances where government has been found to be in breach of its obligations arising from social and economic rights, orders are often mandatory orders, requiring government to take steps to remedy the situation. This wide-ranging remedial power has been used by the courts in a range of ways, including the making of structural

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<sup>149</sup> See section 172(1)(a) of the Constitution.

<sup>150</sup> See, for example, *Coetzee v Government of the Republic of South Africa, Matiso and Others v Commanding Officer Port Elizabeth Prison and Others* [1995] ZACC 7.

<sup>151</sup> See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17.

<sup>152</sup> See *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* [2004] ZACC 11.

<sup>153</sup> See section 172(1)(b)(i) of the Constitution.

<sup>154</sup> See section 172(1)(b)(ii) of the Constitution.

<sup>155</sup> See section 172(1)(b) of the Constitution.



interdicts or injunctions to impose mandatory obligations upon government to correct or remedy its unconstitutional conduct – as was the case in the textbook case mentioned earlier. While structural interdicts have sometimes been successful in bringing about the progressive realisation of rights, they have on other occasions been met by government intransigence. This can put pressure on courts to make more definite factual determinations or policy prescriptions, a role they have been reluctant to assume, especially at appellate level. For example, in a case where the Constitutional Court granted a structural interdict requiring the provision of basic amenities to persons wrongfully evicted, the Constitutional Court, following an application by the applicants in the original matter referred its supervisory order to the High Court to implement given that there were disputes of fact between the parties that could more effectively be determined by the High Court.<sup>156</sup>

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<sup>156</sup> *Pheko and Others v Ekurhuleni Metropolitan Municipality and Others (No 3)* [2016] ZACC 20.



## CONCLUDING REMARKS

Colombia, Finland and South Africa provide three examples of the domestic implementation of ESCRs. In each case, the question arises as to the role played by the political branches, on the one hand, and courts, on the other, in the protection of rights. This question has been answered differently in the three systems, reflecting differing levels of judicial deference connected to the efficacy of the legislature and executive in bringing about progressive realisation of ESCRs. These differences need to be assessed in light of the political, constitutional, historical, economic and social context of the three countries.

Colombia, whose system to protect and fulfil ESCRs has in significant respects been court led, has seen protracted internal armed conflict and high levels of social violence, in which the political branches of government have not led strongly on questions relating to the protection of ESCRs. As a result, the courts, empowered by Colombia's 1991 Constitution, have stepped into the gap. One of the constitutional projects undertaken by the courts has been to compel the political branches of government to protect and fulfil human rights, whether civil and political or economic, social and cultural.

South Africa's post-*apartheid* 1996 Constitution entrenched economic and social rights together with civil and political rights at the end of a long struggle for democracy. The courts, in crafting their role in relation to economic and social rights, have sought to ensure that the political branches do not shirk their obligations to formulate policies that protect and fulfil ESCRs. The courts have thus required the political branches to determine the content of the minimum core, a content which they will review for reasonableness (at least in relation to the rights that are not explicitly immediately realisable), and to implement their policies in a reasonable manner. Government will be required to take care to address the needs of the most vulnerable in formulating their policy and will be prevented from adopting regressive measures in relation to ESCRs.

Finland, on the other hand, is a strong parliamentary democracy with a long-established welfare state, where the protection and fulfilment of economic, social and cultural rights pre-dated their explicit incorporation into the Constitution in 1995. The political branches of government have thus played a key role in the protection and fulfilment of ESCRs and courts have been less important as primary actors in ensuring that government acts to



protect and fulfil these rights. Finland has developed some novel institutional mechanisms to monitor and safeguard the protection of rights. An important example is the Committee on Constitutional Law, one of the standing committees of Parliament, which is the authoritative interpreter of the Finnish Constitution. In issuing its opinions on issues of constitutional interpretation and the constitutional compliance of draft legislation, the Committee draws on the advice of constitutional experts. Finland provides an interesting example of a strong parliamentary democracy that has adopted a pluralist model to ensure the protection and fulfilment of human rights; one that is considerably less court-centred than either Colombia or South Africa, even if courts do also play a role.

What is clear from the three examples we have provided is that a democratic government seeking to fulfil its obligation to protect, promote and fulfil ESCRs must do more than merely repeat the text of the ICESCR or other international treaties that provide for ESCRs in national legislation. The methodology of “structure, process and outcome” urged by the Advisory Group makes plain that while a valuable exercise, the formal legal framework for the protection of rights is not sufficient to ensure that rights are protected in practice. In many ways, the more difficult question for governments to address is what institutional mechanisms should exist to ensure that steps are taken to give effect to the rights (the “process” element) and that those steps do lead to the protection and fulfilment of rights (the “outcome” element).

We also observe that in designing institutions to ensure that ESC rights are fulfilled in a domestic setting, close attention needs to be paid to history, constitutional politics and legal culture. What will work in one setting may not work in another. The role that courts may play in protecting ESC rights will depend in part on their constitutional role and in part upon the relevant legal culture. Legal culture varies from setting to setting: in some societies, there will be widespread acceptance of law’s autonomy from politics, whereas in others such acceptance will be absent or weak.<sup>157</sup> Institutions unique to one legal culture may be employed successfully for the implementation or monitoring of the progressive realisation of rights in one country, but be absent or ineffective in another. In assessing the three domestic systems described in this report, and in particular in assessing whether there is anything that can be learnt from them that will be of use to

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<sup>157</sup> See Theunis Roux, *The Politico-legal dynamics of Judicial review: a comparative analysis* (Cambridge, 2018) at p. 68.



the Taskforce, attention needs to be paid to these questions of history, politics and legal culture.

In relation to the international obligation to progressively realise rights, it is our view that this international obligation is best understood as imposing obligations upon states parties not to act retrogressively in relation to ESCRs and to continually act to give effect to ESCRs. In our view, the duty not to regress, save where there is strong justification for regression, is an important substantive principle that should be explicitly recognised. However, where states seek to extend the protection of ESCRs, the duty of progressive realisation is better understood in a domestic context as an obligation to produce, in the language of the Advisory Group, a “result” or “outcome”; an obligation that may be assured by a range of different institutional mechanisms. As a consequence, countries may make different choices concerning how to secure the recognised international obligation of progressive realisation within in their system of domestic law.

We suggest that there are five key principles that should guide a government that seeks to enact domestic legislation to meet their international obligation progressively to realise ESCRs.

First, in the case of human rights that impose positive obligations, of which ESCRs are arguably the prime example, a government that wishes to ensure that ESCRs are indeed protected and fulfilled needs to enact legislation, whether primary or secondary, to stipulate the benefits that will be provided by government (or where appropriate a private body) to fulfil the rights. Government, or where appropriate a private actor, then needs to provide a process whereby those benefits can be obtained. The precise contours of the content of the benefits to be made available should be a subject for debate in the political process – for example, ‘how many years of schooling do we consider to be required?’ – as the character of the benefits to be provided may vary. It is quite possible for the primary legislation enacting rights to contain a provision that the precise contents of the rights entrenched in the legislation will be spelt out in either primary or secondary legislation within a specific period of time. Enforcement of the ESCRs will then, primarily, be through the mechanisms provided by the primary or secondary legislation that gives content to the right (ie. stipulates the benefits that will be provided). Enforcement mechanisms may include administrative tribunals, ombuds and other processes, and they should be



accessible to ordinary people, and not be prohibitively expensive or distant, and their decisions should be made within a reasonable time.

Secondly, realising ESC rights requires adequately resourced, efficient, open and responsive government. Arguably one of the greatest threats to the achievement of ESC rights is inadequately resourced, weak, inefficient or corrupt government. The legislative framework established to give effect to ESC rights may simply not be implemented by a weak government. Accordingly, it is our view that a government that is committed to fulfilling ESC rights needs to ensure that as a government it operates effectively, responsively and openly and that it adequately resources those agencies and institutions tasked with the fulfilment of human rights. In both Colombia and South Africa, problems of inadequately resourced, weak, inefficient and/or corrupt government actors have undermined the capacity of the state to fulfil ESC rights. Their situation reminds us of the importance of taking steps to ensure efficiency in government for the fulfilment of human rights.

Thirdly, governments need to provide an effective process for monitoring the implementation of rights, including positive obligations under them (i.e. a mechanism enabling the measurement of “outcome”). To achieve this, there needs to be regular stock-taking of the extent to which rights are being implemented. Monitoring the implementation of rights could be undertaken by a range of institutions, including standing committees of Parliament, a human rights committee, or a specialist institution established for this purpose. Whichever institution undertakes the role will need the technical capacity to undertake quantitative and qualitative social science research to measure the extent to which the benefits that government has put in place to fulfil the ESCRs have in fact been made available. In addition to producing reliable statistics on the implementation of rights, we suggest that a process whereby the annual budget is scrutinised to ensure that sufficient resources are allocated in a manner that will enable the progressive realisation of rights be introduced. Accordingly, the institution should ensure that there is no regression without full justification of annual budget allocations that relate to the implementation of ESCRs. Without successful auditing and monitoring of whether rights are being achieved on the ground, and rights scrutiny of annual budgets, there will be no guarantee that ESCRs will indeed be achieved. The regular monitoring of implementation will, in turn, make reporting to treaty bodies a straightforward task.





Fourthly, we suggest that a pluralistic institutional model for rights enforcement is more likely to be successful than a single state institution. In particular, we caution against over reliance on domestic courts as the primary or only institution for the implementation of rights. Courts can and do play an important role in ensuring ESC rights are protected and fulfilled, but ideally they need to be part of a broader array of institutions. A pluralistic model, as the Finnish example illustrates, may not be entirely predictable, but it will ensure that a range of institutions are paying attention to the task of rights fulfilment. A pluralist institutional model could employ parliamentary committees, auditing oversight bodies, courts, tribunals, ombuds and human rights commissions. Another element of pluralism is respect in domestic systems for international mechanisms for rights protection. We see this in Finland, where international institutions, such as the European Committee for Social Rights, the European Court of Human Rights and the UN treaty bodies and special mechanisms, have been important sources of guidance for the pluralistic system of rights protection, for example providing greater scrutiny of budgetary allocation. Similarly, in Latin America, respect for the jurisprudence of the Inter-American Court of Human Rights by national courts has been an important part of rights protection, although until recently that Court has played a less significant role in relation to ESCRs. In South Africa, too, the constitutional principle that in interpreting rights international law must be considered has meant that international human rights law has been an important source of guidance for the courts.<sup>158</sup>

Fifthly, perhaps the most difficult question to consider in designing a human rights framework is deciding what provision should be made for circumstances where government fails to act progressively to realise rights. In both Colombia and South Africa, courts play a significant role in such circumstances, requiring government to take steps to fulfil rights. In Colombia, courts have often defined the obligations that government bears, while South African courts have been more reticent in this regard. Courts play a less prominent role in ordering government to act to fulfil human rights in Finland, although we note that in this jurisdiction, a world leader in human rights compliance, government has rarely failed to act with diligence in relation to its human rights obligations. It is also clear that in both Colombia and South Africa, that should government act retrogressively in relation to ESC rights, courts will expect government to

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<sup>158</sup> Section 39(1)(b) of the South African Constitution, 1996.



provide cogent reasons for their actions, and if none are forthcoming, will declare government's retrogressive actions to be unconstitutional and invalid. It will be for the Taskforce to consider what appropriate role courts could play in a new human rights framework in Scotland, and how to integrate other institutions into the enforcement of ESCRs. In considering that question we suggest that close attention be paid to questions of history, constitutional politics and legal culture, matters we consider the Taskforce to be in a better position to assess.

In conclusion, we note that in seeking to ensure that human rights are protected and fulfilled, the Scottish Government will take an important first step when it introduces framework legislation to protect all human rights, including ESCRs. However, framework legislation is only a first step, and ensuring that human rights are indeed protected will require the Government to continue to place human rights at the centre of its work. The obligation of progressive realisation of human rights requires government not only to avoid regression in its protection of human rights without compelling justification, but also to monitor and ensure that rights are in fact been protected and fulfilled, and where it finds that they are not being protected or fulfilled, to redouble its efforts. Government will need to establish a pluralist institutional framework for the protection of rights, which will need to include institutional mechanisms that can respond when government fails to act to implement human rights. The task of protecting and fulfilling ESCRs will require continual review and refinement in the years ahead. We hope that this report will assist the Scottish government and wish it well with the important and valuable project that it is undertaking.



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