



Papeles el tiempo de los derechos

“THE REVERSIBILITY OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN CRISIS CONTEXTS”

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THE REVERSIBILITY OF ECONOMIC SOCIAL AND CULTURAL RIGHTS IN CRISIS CONTEXTS

Felipe Gómez Isa*

Introduction

The aim of this paper is to analyse the international legal obligation assumed by states in the area of economic, social and cultural rights (ESCR), and to what extent these obligations can be modified in response to the global financial crisis which has engulfed the world economy since August 2008. International human rights law has increasingly imposed clearer and more precise obligations on states in the area of ESCR. But at the same time these same laws offer flexible legal mechanisms to accommodate imperatives arising from the responses that states need to provide in light of the deepening economic and financial crisis. However, the danger exists, as has happened on many occasions, that ESCR will pay a high price for a crisis caused by the excesses of unbridled global capitalism which is allergic to any type of constraint or regulation¹. While fully aware of the specific weakness of ESCR accountability mechanisms, both nationally and internationally², this paper will show how international law establishes a number of limits – a sort of red line for ESCR – that states should not overstep.

Nature of state obligations in relation to ESCR

The affirmation of the indivisibility and interdependence of all human rights, as expressed in most international human rights instruments³, is often a mere rhetorical

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¹ Although “the content of current Public International Law tends towards a more equitable globalisation”, Jordi Bonet is fully aware of its limitations as a mechanism for regulating economic activity and as a determining factor in social and economic policies, as expressed in BONET, J.: “Las funciones del Derecho Internacional Público y las políticas económicas y sociales estatales: algunas consideraciones sobre su interacción”, *Revista Jurídica de la Universidad de Puerto Rico*, Vol. 78, 2009, p. 743.

² ABRAMOVICH, V. and COURTIS, C.: *Los derechos sociales como derechos exigibles*, Trotta, Madrid, 2002.

³ In the preamble common to the two international human rights international covenants of 1996, it is stated that “Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political

affirmation that conceals the fact that the satisfaction of civil and political rights prevails over the so-called second-generation rights. One reason adduced to justify the shortfalls in ESCR is the different nature of the obligations arising from the two categories of rights. Whereas civil and political rights (CPR) imply *immediate* obligations⁴, ESCR obligations are, on the contrary, *progressive*; and it is precisely this progressive nature which has given rise to numerous problems in interpreting the scope of ESCR. But, it also provides the rationale for the core issue discussed in this paper: the prohibition of regression in the fulfilment of ESCR.

Article 2.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁵ underscores the progressive nature of these rights.

“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 realization of the rights recognized in the present Covenant ...” (Author’s italics.)

From the outset – when the ICESCR was adopted and the subsequent creation of the Committee on Economic, Social and Cultural Rights (CESCR) – it was evident that the main challenge was the need to define the nature and implications for states of the obligations arising from the progressive nature of ESCR⁶. In order to shed light on this issue, an experts meeting was held in the Maastricht Centre for Human Rights at the University of Limburg, attended by several members of the CESCR. The most notable outcome of this fruitful meeting was the *Limburg principles on the implementation of*

rights”. See the study by BLANC ALTEMIR, A.: “Universalidad, indivisibilidad e interdependencia de los derechos humanos a los cincuenta años de la Declaración Universal”, in BLANC ALTEMIR, A. (Ed.): *La protección internacional de los derechos humanos a los cincuenta años de la Declaración Universal*, Tecnos, Madrid, 2001, pp. 13-35.

⁴ As stipulated in article 2.1 of the International Covenant on Civil and Political rights, “Each State Party to the present Covenant undertakes to *respect and to ensure* to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. Likewise, each State Party “undertakes to take the necessary steps, ... to adopt such laws or other measures as may be necessary to *give effect* to the rights recognized in the present Covenant.” (Article 2.2). Lastly, each State undertakes to ensure that “...any person whose rights or freedoms as herein recognized are violated shall have an *effective remedy* ...” (Article 2.3a). (Author’s italics.) Covenant accessed at <http://www2.ohchr.org/english/law/ccpr.htm>.

⁵ A comprehensive study of the ICESCR is found in CRAVEN, M.: *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development*, Clarendon Press, Oxford, 1998 (with corrections).

⁶ On this, see the seminal study by ALSTON, P.: “Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol. 9, 1987, pp. 332-381.

*the International Covenant on Economic Social and Cultural Rights*⁷, which served as a guide and a source of inspiration for the CESCR during its first years⁸. An important element of the Principles is that, in addition to stating that several immediate obligations derive from the Covenant⁹, all states parties to the ICESCR “have the obligation to begin immediately to take steps to fulfil their obligations under the Covenant”¹⁰. Based on the guidelines set out by these Principles, the CESCR drew up its well-known General Comment 3 in 1990, on “The nature of States parties obligations (Art. 2, par. 1)”¹¹, which was one of the most significant and systematic attempts to define the scope of the progressive obligations of states in relation to ESCR¹².

First, the Committee begins by acknowledging that “while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.”¹³ This implied a clear break with the distinction that had been drawn between the immediate obligations of the International Covenant on Civil and Political Rights (ICCPR) and the progressive obligations of the ICESCR, as mentioned above.

The Committee strove to clearly define the progressive nature of the obligations deriving from the ICESCR and, in doing so, it acknowledged a stark reality: the realisation of ESCR faces huge difficulties owing to the lack of economic resources in many countries, hence their *progressive* nature; as states become more developed, they will be better able to assume greater responsibility in the area of ESCR. In the words of the ICESCR supervising body, “full realization of all economic, social and cultural

⁷ *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, UN Doc. E/CN.4/1987/17. These principles also appear in *Human Rights Quarterly*, Vol. 9, 1987, pp. 122-135. Accessed at <http://www.unhcr.org/refworld/docid/48abd5790.html>.

⁸ A retrospective analysis of the content and impact of the Limburg Principles can be found in COOMANS, F.: “The Limburg Principles on Socio-Economic Rights”, in FORSYTHE, D. (Ed.): *Encyclopedia of Human Rights*, Oxford University Press, Oxford, 2009, Vol. 3, pp. 448-452.

⁹ As stated in Principle 22, “some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2.2. of the Covenant”.

¹⁰ Principle 21.

¹¹ Committee on Economic, Social and Cultural Rights, General Comment 3, The nature of States parties' obligations (Fifth session, 1990), UN Doc. E/1991/23, <http://www1.umn.edu/humanrts/gencomm/epcomm3.htm>

¹² An exhaustive analysis of the general observation can be found in SEPULVEDA, M.: *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Intersentia-Hart, Antwerp, 2002. See also COOMANS, F.: “The International Covenant on Economic, Social and Cultural Rights. From Stepchild to Full Member of the Human Rights Family”, in GOMEZ ISA, F. and DE FEYTER, K. (Eds.): *International Human Rights Law in a Global Context*, Deusto University Press, Bilbao, 2009, pp. 304 and following.

¹³ UN Doc. E/1991/23, par. 1.

rights will generally not be able to be achieved in a short period of time”¹⁴. Nevertheless, progressive realisation does not mean that states are exempted from assuming any obligation or that they are free to choose which obligations they assume. As emphasised by the Committee, “the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.”¹⁵ The Committee is aware of the need for *flexibility* to tackle these obligations “... reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.”¹⁶ (Author’s italics.) In this context, the Committee formulated the most interesting reflections from the point of view of the prohibition of regression for ESCR. For the Committee, “any deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources”¹⁷. In other words, any retrogressive measure affecting ESCR should be based, firstly, on a careful study of its impact, bearing in mind the need to guarantee the totality of the rights provided for in the Covenant¹⁸. Moreover, if a state intends to take such steps, it should take into account the resources available, including those provided by international cooperation¹⁹.

This leads to the introduction of a key element when assessing the compatibility or not of retrogressive measures in the context of ICESCR: *priorities*. A state must recall its international ESCR obligations when undertaking social spending cuts, by ensuring that priority budget areas are not affected. For example, in the case of the right to the highest attainable standard of health, the Committee has indicated that “investments should not disproportionately favour expensive curative health services

¹⁴ *Ibid.*, par. 9.

¹⁵ *Ibidem*.

¹⁶ *Ibidem*.

¹⁷ *Ibidem*.

¹⁸ An analysis of the need for impact studies, and the constraints on States when a privatization process is carried out that affects essential rights, can be found in GOMEZ ISA, F.: “Globalisation, Privatisation and Human Rights”, in DE FEYTER, K. and GOMEZ ISA, F. (Eds.): *Privatisation and Human Rights in the Age of Globalisation*, Intersentia, Antwerp-Oxford, 2005, pp. 14 and following.

¹⁹ The role of international cooperation resources has been analysed by the Committee in par. 13 of General comment 3. A study of the international obligation to cooperate within the framework of the ICESCR can be found in GOMEZ ISA, F.: “Transnational Obligations in the Field of Economic, Social and Cultural Rights”, *Revista Electrónica de Estudios Internacionales*, Vol. 18, 2009, pp. 1-30.

which are often accessible only to a small, privileged fraction of the population, rather than primary and preventive health care benefiting a far larger part of the population”²⁰.

Perhaps the most important consequence of the debate on public spending priorities is that when the state intends to introduce retrogressive norms or public policies, the burden of proof is inverted; it is the state’s responsibility to prove the need for the proposed measures and that they are justified within the totality of rights recognised in the ICESCR. This is the meaning of the words of the Committee when it refers to the state’s obligations in relation to the right to the highest attainable standard of health. In their opinion,

“As with all other rights in the Covenant, there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources.”²¹

On the basis of these declarations, Christian Courtis has indicated that any state that intends to adopt retrogressive measures will need to prove, first, that there exists a “qualified state interest”. Then, the state should be able to argue “the imperious nature of the measure”, and lastly, demonstrate “the inexistence of less restrictive alternative courses of action affecting the right in question”²² Furthermore, “the state cannot use general arguments of public policy, fiscal discipline or refer to other financial or economic gains, but instead must prove that other rights provided for under the Covenant have been improved by the measure”²³.

²⁰ General Comment 14 (2000), UN Doc. E/C.12/2000/4, par. 19. Accessed at <http://www.unhcr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En>.

²¹ *Ibidem.*, par. 32. Also see General comment 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*, UN Doc. E/C.12/GC/17, par. 27, accessed at <http://www.unhcr.org/refworld/type,GENERAL,CESCR,,441543594,0.html>; General comment 21, *Right of everyone to take part in cultural life*, E/C.12/GC/21/Rev.1, accessed at <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.

²² COURTIS, C.: *El Mundo Prometido. Escritos sobre derechos sociales y derechos humanos*, Fontamara, México, p. 86.

²³ *Ibidem*, p. 87.

Furthermore, in General Comment 3, the Committee outlines a concept that became naturalised from then on²⁴ and which has proved essential in further defining the scope of the obligations deriving from Article 2.1 of the CESC. This concept is the *essential level* of each right²⁵. As the Committee states, “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”²⁶. The Committee continues “If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*”²⁷. On the other hand, the Committee recognises that resource constraints may seriously affect a state’s capacity to comply with the minimum obligations which is why, “In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, *as a matter of priority*, those minimum obligations”²⁸ (Author’s italics). Regarding the right to water, the Committee considers that “a State party cannot justify its non-compliance with the core obligations set out in paragraph 37 above, which are non-derogable”²⁹. Consequently, the adoption of retrogressive measures incompatible with the core obligations would constitute a violation of the right to water³⁰. Therefore, we can conclude that the Committee is establishing an absolute prohibition of regression when the measure affects the satisfaction of essential levels of the rights recognised in the CESC³¹.

²⁴ The Limburg Principles had referred to the notion of “minimum subsistence rights for all” (Principle 25), but it is in General Comment 3 and subsequent comments on specific rights that the concept of the *essential level of rights* was outlined.

²⁵ A very comprehensive study of the concept of essential levels of rights relating to each of the rights enshrined in the CESC is found in CHAPMAN, A. and RUSSELL, S. (Eds.): *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp, 2002.

²⁶ UN Doc. E/1991/23, par. 10. This concept of essential levels of ESCR has become one of the requisites demanded by the Committee when analysing the satisfaction levels of different rights. Thus, in General Comment 12 on the right to adequate food, the Committee emphasizes that “Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.” (UN Doc. E/C.12/1999/5, par. 17).

²⁷ UN Doc. E/1991/23, par. 10.

²⁸ *Ibidem*.

²⁹ General Comment 15, UN Doc. E/C.12/2002/11, par. 40, <http://www1.umn.edu/humanrts/gencomm/escgencom15.htm>

³⁰ *Ibid.*, par. 42.

³¹ COURTIS, C.: *El Mundo Prometido...*, *op. cit.*, p. 62. The same conclusion was reached in the *Maastricht Guidelines on Violations of ESCR*, Guideline 14.. The Guidelines can be consulted in *Human Rights Quarterly*, Vol. 20, 1998, pp. 691-705. An interesting analysis of the Guidelines is found in VAN BOVEN, TH.C., FLINTERMAN, C., WESTENDORP, I. (Eds.): *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Netherlands Institute of Human Rights, SIM Special N°. 20, Utrecht, 1998.

Finally, the ESCR Committee makes interesting comments on protecting the socio-economic rights of the most vulnerable groups in society. The Committee underscores, “even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected”³². Therefore, this should be a clear guideline for governments in the context of the current recession; any measure intended to mitigate the effects of the economic crisis should take account of the obligation to protect the most vulnerable members of society³³. In the case of the right to water, for example, the Committee has emphasized that one of the minimum obligations under the Covenant is “to adopt relatively low-cost targeted water programmes to protect vulnerable and marginalized groups”³⁴. On the right to the highest attainable standard of health, the Committee considers that “health facilities, goods and services”³⁵ have to be accessible to the most vulnerable and marginalized groups.

Challenges in monitoring the prohibition of retrogressive measures

Although both the ESCR Committee and the resulting doctrine have explicitly expressed the presumption of the invalidity of retrogressive measures for economic, social and cultural rights, the fact is that the possibilities for enforcing the prohibition are very limited.

First, the possibility of appealing to domestic courts in cases of ESCR violations is scarce, if it exists at all, as one of the hurdles facing ESCR is their lack of justiciability in many countries³⁶.

Second, in the area of ESCR, the ability to accurately measure compliance by states requires a huge amount of data analysed to a high level of statistical

³² UN Doc. E/1991/23, par. 12. (General Comment 3).

³³ *Bringing Human Rights to Bear in Times of Crisis: A Human Rights Analysis of Government Responses to the Economic Crisis*, ESCR-Net, 2010. Also, *Human Rights and the Global Economic Crisis: Consequences, Causes and Responses*, Center for Economic and Social Rights, New York, 2009.

³⁴ General Comment 15, UN Doc. E/C.12/2002/11, par. 37 (h).

³⁵ General Comment 14, *The right to the highest attainable standard of health*, UN Doc. E/C.12/2000/4, para. 12 (b).

³⁶ In this regard, it is worth noting that in Spain, ESC rights do not enjoy the same standard of protection as civil and political rights. ESCR are described in the 1978 Spanish Constitution as “Guiding principles of social and economic policies” (Chapter III of Title I) and violations cannot be appealed to the Constitutional Court (Article 53 of the Constitution). For a recent study on ESCR in Spain see ZAPATERO, V. Y GARRIDO GÓMEZ, I. (Eds.): *Los derechos sociales como una exigencia de la justicia*, Universidad de Alcalá-Defensor del Pueblo, Alcalá de Henares, 2009. A review of the recognition of ESCR in different Constitutions can be found in COOMANS, F. (Ed.): *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, Intersentia, Antwerp, 2006.

sophistication³⁷; this type of data is rarely available in the regular reports that states present to the Committee. It is evident that much remains to be done in this area. Some progress has been made in the debate on ESCR *indicators*³⁸, but there is still a long way to go before these indicators become a tool that can effectively monitor the degree of compliance of social and economic rights by states.

The lack of data on ESCR means that courts are reluctant to tackle the assessment of violations of these rights. As mentioned above, there is “hardly any tradition of litigation in courts based on proof that requires the systemization of empirical data”³⁹, not to mention the fact that traditionally these courts have been reluctant to become involved in decisions concerning public policies adopted by states⁴⁰.

Last, but not least, it is essential to highlight that ESCR monitoring mechanisms on an international level are very weak⁴¹. The periodic review mechanism, followed by general comments adopted by the ESCR Committee, has not proved effective in checking regressive policies imposed by states in response to the global economic crisis, and neither have the *ad hoc* statements on specific circumstances that significantly affect ESCR⁴².

³⁷ CHAPMAN, A. and RUSSELL, S.: “Introduction”, in CHAPMAN, A. and RUSSELL, S. (Eds.): *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, Antwerp, 2002, p. 5. On the difficulty of measuring the degree of compliance of ESCR, see ROBERTSON, R.: “Measuring State Compliance with the Obligation to Devote the ‘Maximum Available Resources’ to Realizing Economic, Social and Cultural Rights”, *Human Rights Quarterly*, Vol. 16, 1994, pp. 694 and following.; CHAPMAN, A.: ‘The Status of Efforts to Monitor Economic, Social and Cultural Rights’, in HERTEL, S. and MINKLER L. (Eds.): *Economic Rights. Conceptual, Measurement, and Policy Issues*, Cambridge University Press, Cambridge, 2007, pp. 143-164.

³⁸ CHACON MATA, A.M.: “Derechos económicos, sociales y culturales. Indicadores y justiciabilidad”, *Cuadernos Deusto de Derechos Humanos*, n° 43, 2007.

³⁹ COURTIS, C.: *El Mundo Prometido...*, *op. cit.*, p. 59.

⁴⁰ In some countries, however, significant progress has been made on justiciability for ESCR, as in the case of South Africa. See McLEAN, K.: *Constitutional Deference, Courts and Socio-Economic Rights in South Africa*, Pretoria University Law Press, Pretoria, 2009; MBAZIRA, C.: *Litigating Socio-Economic Rights in South Africa. A Choice between Corrective and Distributive Justice*, Pretoria University Law Press, Pretoria, 2009.

⁴¹ When the Optional Protocol to the ICESCR comes into force, new protection mechanisms will be included which will open new possibilities for realising ESCR. But at July 2010, only two states, Ecuador and Mongolia, have ratified the Optional Protocol, although 33 countries have signed it, among them Spain. Retrogressive measures is one of the aspects which will be considered by the ESCR Committee when the protocol takes effect, as specifically stated by the Committee. See “An Evaluation of the Obligation to Take Steps to the *Maximum of Available Resources* Under An Optional Protocol to the Covenant. Statement”, E/C.12/2007/1.

⁴² Although it is not easy to reach a definitive conclusion, it should be pointed out that the Committee’s statement on the world food crisis has not had any significant effect. See “The World Food Crisis. Statement”, UN Doc. E/C.12/2008/1. <http://www.unhcr.org/refworld/publisher,CESCR,SPEECH,,4a54bc08d,0.html>.