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Hesselman, Marlies; Hallo de Wolf, Antenor; Toebes, Brigit

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# 1 Common challenges for socio-economic human rights and essential public services provision

*Marlies Hesselman, Antenor Hallo de Wolf and Brigit Toebe\**

Access to essential public services, including safe drinking water, healthcare, energy, roads, transportation, sanitation or environmental services, is a key condition for leading a life in human dignity and well-being.<sup>1</sup> Access to basic services in a reliable, affordable and adequate manner lies at the core of fostering healthy, inclusive and sustainable societies. It is no doubt for this reason that the United Nations' 'Sustainable Development Goals' now stress the need to:

[. . .] by 2030 ensure that all men and women, particularly the poor and the vulnerable, have equal rights to economic resources, as well as *access to basic services*, ownership, and control over land and other forms of property, inheritance, natural resources, appropriate new technology, and financial services including microfinance.<sup>2</sup>

[emphasis added]

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- 1 P. J. Brook and S. M. Smith, Contracting for *Public Services: Output-Based Aid and Its Applications* (World Bank 2001) ix; UN Habitat, 'International Guidelines on Access to Basic Services for All' (7 January 2009) UN Doc HSP/GC/22/2/Add. 6 and HSP/GC/22/2/Add. 6/Corr.1/Rev.1, Annex, para 1: '[b]asic services contribute to the fulfilment of human sustenance, human dignity, quality of life and sustainable livelihoods'. See also C. Graham, 'Socio-Economic Rights and Essential Services: A New Challenge for the Regulatory State', in D. Oliver, T. Prosser and R. Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press 2010) 158.
- 2 UN General Assembly Resolution 70/1, 'Transforming Our World: The 2030 Agenda for Sustainable Development' (25 September 2015) UN Doc A/RES/70/1, SDG 1.4, at 15.

Indeed, the harsh reality is that, 15 years after the Millennium Development Goals (MDGs) were adopted, large parts of the world population still lack access to even some of the most basic essential public services. For example, 700 million people worldwide lack access to clean water, 2.5 billion persons have no access to adequate sanitation,<sup>3</sup> 40 per cent of the current world population lacks access to modern energy services,<sup>4</sup> and large parts of the global population fail to obtain access to providers of essential medicines, including those for even basic pain treatment.<sup>5</sup> The United Nations Human Development Index calculates, moreover, that well over 1.5 billion persons globally live in ‘multi-dimensional poverty’.<sup>6</sup> This means that large parts of the global human population are left behind on the path to inclusive development, better living conditions or even basic human rights enjoyment. This is clearly unacceptable; inequalities nationally and internationally need to be addressed with urgency.

In this book, we present the first comprehensive analysis of two important interrelated human development and sustainable development agendas: (i) the provision of essential public services to all persons; and (ii) the protection of basic socio-economic human rights law. Essential public service provision (EPSP) and basic human rights protection clearly have shared socio-economic objectives, yet, remarkably, the academic literature and policy debates about EPSP have not explored the opportunities for mutual reinforcement, to date, in depth.

This edited volume actively engages with this nexus between EPSP and human rights protection, with a special emphasis on socio-economic human rights (ESR) law. The volume identifies practical *common challenges* for EPSP. It also provides an initial framework for understanding how *socio-economic human rights guideposts* can help achieve better EPSP, in order to improve living standards and access to basic goods and services for all. In this introduction, we first of all set out a range of tough common challenges for EPSP, as they appear from the literature, from policy practice, and certainly as they appear from the various contributions to this book.

In respect of the latter, the contributions to this book offer rich, different perspectives: they discuss EPSP and ESR in different geographical areas and for different essential services, taking into account different disciplinary perspectives and approaches. The volume includes country studies on Uganda, India, China, Brazil, Sweden, Mozambique and Colombia, and to some extent Greece. It also includes inquiries into the challenges and opportunities of regulating EPSP and ESR at and across various levels, including perspectives on the EU, Council of Europe, World Bank, World Trade Organization or

3 See Chapter 4 by Ambrus, or figures of UN Water at [www.unwater.org/water-cooperation-2013/water-cooperation/facts-and-figures/en/](http://www.unwater.org/water-cooperation-2013/water-cooperation/facts-and-figures/en/).

4 Figures via United Nations Sustainable Energy for All Initiative, [www.se4all.org/our-vision\\_our-objectives\\_universal-energy](http://www.se4all.org/our-vision_our-objectives_universal-energy), and also new Sustainable Development Goal 7.1.

5 See Chapter 3 by Sellin, Chapter 2 by Gispén, or Chapter 9 by Zinzombe.

6 Human Development Index and Multi-Dimensional Poverty Index via <http://hdr.undp.org/en/content/multidimensional-poverty-index-mpi>.

international drug control framework. Equally, the contributions span different types of services, such as healthcare access, medicines provision, electricity access, water services access, disaster management services or environmental services. They are drafted by persons from different disciplinary backgrounds, and at least two contributions include field research.<sup>7</sup>

In this introduction, we focus on extrapolating and situating the different challenges for EPSP and ESR enjoyment. The first challenge we put up for discussion is trying to define what it actually means to ensure ‘EPSP’ in the first place (section 1). Second, we move on to the need to balance interests and prioritise EPSP and ESR in decision-making (section 2); the challenge of resources mobilisation and allocation for EPSP (section 3); the challenge of universal access and inclusivity (section 4); and the challenge of checks and balances (section 5). Our concluding chapter will gather up the threads, and in particular also suggest how and which socio-economic human rights guideposts can be harnessed to regulate EPSP further. In that chapter, we also offer a further research agenda.

## 1. Defining ‘essential public services provision’

A first practical challenge for discussing EPSP and ESR is the need for a definition of what EPSP might entail. What do we mean by or expect from EPSP? Who is involved and who is affected? What is required? On the topic of ESR, we note that we primarily draw from the international human rights framework, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in particular.<sup>8</sup> However, other chapters may draw on other treaties or on national law, and make comparisons to international law.

Unfortunately, a common definition of the term ‘essential public services provision’ is not readily available. This is clear from the various chapters to this volume in which authors either adopted our working definition, or provided their own based on the legal context they studied (e.g. EU definitions or constitutional definitions of EPS).<sup>9</sup>

The following sections highlight some of the different possible understandings of ‘EPSP’, and discuss in particular: (i) the nature of ‘*publicness*’ in EPSP; (ii) the ‘*essential*’ quality of EPSP; and (iii) the meaning of ‘*services*’ as such. In addition, we stress that *provision* always signifies a continuous and active engagement on the part of responsible service providers to ensure that the service is available, accessible, acceptable and of good quality.<sup>10</sup> At the end of this section, a working definition of EPSP for this volume is proposed.

7 Chapters by Gispén and Van der Ploeg *et al.*

8 International Covenant on Economic Social and Cultural Rights (adopted by General Assembly resolution 2200A (XXI) on 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

9 See chapters by Houben and ten Oever or Murillo Chávarro in this volume.

10 On these criteria (the AAAQ), see our concluding chapter.

### 1.1. Defining 'public' services

Defining the 'public' nature of 'essential public services provision' is a first hurdle, because what distinguishes a 'public' service from a 'private' service exactly? A number of observations are in order here, for example as suggested by Houben and ten Oever in Chapter 7 of this volume, the European Commission considers that the 'public nature' (as opposed to 'private' nature) of EPSP may depend on the following questions: (a) Is the service offered to the general public at large? (b) Is the service assigned a clear specific public interest or purpose? (c) Is the service subject to particular ownership or status of the entity providing the service (a public entity)?

Of course, in many cases, these various qualities might overlap. For example, when *public authorities* provide vaccinations to *all members of the public*, or to all young children, in the *larger interest of public health* and/or *for the protection of the health of those persons*, we see an overlap of all three qualities.

On the contrary, access to electricity or access to water services may be supplied by a private provider, but the delivery of these services may still need to be universal in nature, to all members of the public, and for the benefit of all these members individually and for the public interest at large.<sup>11</sup> Such requirements are typically referred to as 'universal service obligations' (USOs).<sup>12</sup> In this case, the 'publicness' of the service is thus defined mostly by qualities (a) and (b), but not by (c), because the service provider is a private party. In fact, especially when 'private service providers' are involved, the imposition of certain 'universal service obligations' through regulation by the State can reflect the concerns of 'publicness' of the service, or its 'essential nature'. The Inter-American Court of Human Rights considered illustratively, in the case of *Ximenes-Lopez v Brazil*, that:

[r]endering public services implies the protection of public interests, which is one of the objectives of the State. Though the States may delegate the rendering of such services, through so-called outsourcing, they continue being responsible for providing such public services and for protecting the public interest concerned.<sup>13</sup>

Hence, the 'public interest or purpose' of the service is an important qualifying factor in determining whether a service is a 'public service'. As a result of this definition, all services with a demonstrable 'public interest', and

11 E.g. A. MacBeth, *International Economic Actors and Human Rights* (Routledge 2010) 152: '[...] a change in the identity of the service provider of a particular service naturally does not alter the importance of that service to the realization of human rights'.

12 See A. Hallo de Wolf, 'Human Rights and the Regulation of Privatized Essential Services' (2013) 60 *Netherlands International Law Review* 165, 187–189.

13 *Case of Ximenes-Lopez v Brazil*, Judgment of 4 July 2006 (Merits, Reparations and Costs), IACtHR, Series C No. 149, para 96; A. Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia 2012) 144–145; Hallo de Wolf (2013) 175–176.

as are necessary to fulfil human rights, even if privately delivered, are brought within the legitimate regulatory sphere of government authorities.<sup>14</sup>

At the same time, our understanding of the ‘private’ or ‘public’ nature of a service might change over time, or with the situation. A few good examples of services that may typically be considered ‘private services’ are ‘private taxi services’, ‘high-quality broadband Internet services’, or accessing a certain set of ‘TV channels’. These are also offered by private providers generally, and typically not necessarily in the wider public interest; in short, we do not assume that all individuals should be able to have access to these services in their daily lives. A good example of the ‘public’ variant of ‘private taxi services’ might be ‘public transport’. The latter is offered in the public interest (mobility, transportation, safety) to all members of the public and often by State authorities, although not always. Yet, at the same time, private taxi services can be subject to regulation by the State as well (e.g. when taxi services fulfil particular public interests and needs, such as in emergencies, or transportation of handicapped persons). Especially in situations where ‘public transport’ is not (sufficiently) available or adequate (e.g. in certain geographical locations and/or at night), it could be considered appropriate for the State to step in and regulate an otherwise ‘private’ service in the public interest. The State can ensure accessibility for the public by imposing restrictions on the price or prohibit the denial of customers’ access to the car. Common-law countries have developed a number of legal doctrines to deal with these issues, including the doctrines of ‘common callings’, ‘common carriage’, ‘businesses affected with a public interest’, and the doctrine of ‘prime necessity’. Broadly speaking, these concepts require the providers of essential services (suppliers of ‘prime necessities’) to supply these services to all who need them for a fair and reasonable price, in sufficient quantity and quality and in a non-discriminatory way, in particular if the providers have a dominant or monopoly position.<sup>15</sup> Gatti, in Chapter 6, describes how a rationale of basic human rights protection may lead private ambulance services to become publicly regulated in case of disaster management, which is aimed at saving lives and protecting victims of disaster. Similarly, Lane, in Chapter 8, posits that the ‘Internet’ (of various speed and quality) is increasingly understood as a human right, or in any event as an ‘essential public service’, in present-day society, which could require some type of public interest regulation, including universal service obligations. The Internet is related to the right to education, access to information, freedom of expression and meaningful participation in society.<sup>16</sup>

14 Also see MacBeth (2010) 152–153.

15 Hallo de Wolf (2012) 541–542. See also, in general, M. Taggart, ‘The Province of Administrative Law Determined?’ in M. Taggart (ed.), *The Province of Administrative Law* (Hart Publishing 1997) 6–8.

16 O. De Schutter, ‘Corporations and Economic Social and Cultural Rights’, in E. Riedel, G. Giacca and C. Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 204–208.

In any case, understandings of the ‘public interest’ of certain services may be fluid, and change over time or with the situation. It appears, though, that human rights concerns and standards will inform our understanding of what constitutes an essential ‘public’ service, subject to a requirement of ensuring access for all. In this sense, we certainly underscore that while markets could play a useful role in delivering services to the public (e.g. because they are more efficient, knowledgeable or have resources), the notion of EPSP implies that services delivery needs to meet certain quality and universality standards to truly serve the whole public and the public interest. Some might challenge the role and appropriateness of the market in EPSP and human rights outright; however, we take a somewhat less radical proposition in this volume, posing that free markets are useful but may need to be reigned in and controlled in the public interest, including based on human rights standards, when EPSP fails. The contributions by Gatti, Houben and ten Oever, and Merkouris, demonstrate how the EU, as an economic, free-market union traditionally, has become concerned with regulating EPSP, in line with human rights as well. Similar developments seem underway within the World Bank, as discussed by Ambrus.

Finally, it is possible to argue that another, overarching public interest is met by taking human rights law into account in EPSP, namely the public interest in observing international legal human rights law by the State. Such an observation alone can also give rise to essential services regulation in the public interest, even if service provision is in the hands of a private actor.<sup>17</sup> The human rights guideposts that could, and to some extent should, be used to guide and inform EPSP regulation are further discussed in the concluding Chapter 16.

### *1.2. Defining ‘essential’*

The ‘essential’ nature of ‘*essential* public services provision’ is also an important consideration, because there could be various shades of ‘urgency’ or ‘indispensability’ of services in the public realm. In our view, EPSP can be understood as a prerequisite for protecting specifically vital interests of public order and/or for collective or individual well-being and prosperity.<sup>18</sup> Therefore, healthcare services, clean water access, sanitation and waste treatment, electricity, roads, telecommunication, clean air, but also, arguably, a well-functioning judiciary, well-trained military/police forces, prisons and independent media services, are among the most basic services that people in society may need access to. Some of these essential public services might directly serve to protect the lives of individuals (e.g. disaster management services, emergency healthcare, clean air), while others are ‘indispensable’ to attain a basic or adequate standard of living, or ensure that all persons can participate, develop and prosper in society inclusively and fully.

17 Hallo de Wolf (2013) 185.

18 See also Graham (2010) 158.

As will be stressed in Chapter 16, these ideas on EPSP also resonate very much with the ideas on ‘progressive’ and ‘full’ realisation of ESR or the ‘right to development’. In short, arguably, ‘essential’ services are those that fulfil a pressing need for development and should be equally accessible to all.

### *1.3. Defining ‘services’*

The *Oxford English Dictionary* defines ‘services’ as ‘a system supplying a public need such as transport, communications, or utilities such as electricity and water’. Especially this reference to a *system* of supply is important, since we have to acknowledge that most EPSP requires substantial organisation for a service to be provided. In many areas of EPSP, such as electricity or water access, but also healthcare, medicines, disaster management, or different types of civil and political bureaucracy, a whole system (or network) of facilities, resources, goods and services is needed to ensure that the service is available and accessible.

In fact, the practical meaning of ‘services’ provision can be further debated from different perspectives. One question is whether ‘services’ provision includes the offering, sale, or delivery of both tangible goods and intangible services. In short, does it include access to actual foodstuffs, gallons of water, a house, particular medicines, as well as access to a well-trained doctor or nurse, a teacher, a registration system for social housing, access to medical information, access to infrastructure for communication, and transportation or acceptable contracts for water or electricity provision? In our view, it includes all these aspects, because without these aspects the enjoyment of the services, and their benefits, fails. That the coming together of all these aspects is a challenge in developing countries in particular is particularly stressed in the chapter of Gispen on Uganda, but also in other chapters.

A second question might be: Do ‘services’ represent mostly ‘material’ or mostly ‘non-material’ interests to people (i.e. are services to be understood as the delivery of ‘economic’ or ‘non-economic’ goods or services mostly, or a mix of both)?<sup>19</sup> The answers to such questions are important, as they can impact our understanding of or preferences for the manner in which services are (to be) delivered, realised or regulated (e.g. by whom, to whom, to which principles, or under which conditions). Ambrus, in Chapter 4 on water services, submits that ‘water’ is understood differently in different international institutions and ‘clusters’ of international law. Water can be understood (and is regulated) as an important ‘social good or service’ (human rights law), as an essentially ‘economic (or commercial) good or service’ (international economic

19 See also the contribution by Houben and ten Oever in Chapter 7. See, in general, U. Neergaard, ‘Services of General Economic Interest: The Nature of the Beast’, in Krajewski, Neergaard and van de Gronden (eds), *The Changing Legal Framework for Services of General Interest in Europe: Between Competition and Solidarity* (TMC Asser Press 2009) 17–50.



law), or even as an ‘environmental good or service’ (in international environmental law, or in GATS).<sup>20</sup>

The various chapters in this contribution certainly highlight the tensions between the ‘social’ and ‘economic’ dimensions of many essential public services. One example where this tension is very visible is essential medicines provision, and the role of pharmaceutical companies therein.<sup>21</sup> It seems that the key is to acknowledge that, at least, many EPS fulfil or contribute to the realisation of non-material interests of all people, while at the same time some services, such as the provision of potable water and sanitation, the manufacturing of, production, and distribution of essential medicines, as well as the generation and distribution of energy, simply cost money and resources. They need to be paid for. The aspect of resources mobilisation, and regulation of commercial interests of private actors, is further discussed in section 3.

#### *1.4. A working definition of EPSP*

Despite the various different possible arguments and perspectives on defining ‘essential public services provision’, we submit that a number of common elements can nevertheless be extrapolated. In fact, based on discussions above, literature, the chapters in our volume, and documents from the human rights framework, such as the Universal Declaration on Human Rights, we proffer the following working definition for ‘essential public services provision’ in this volume (Box 1.1).

*Table 1.1* Working definition of EPSP

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Essential public services are those services that perform an activity or provide a good or service without which it would be difficult to realise/protect a vital public interest in society, such as the protection of public health, general well-being, including an adequate standard of living, public order, or poverty alleviation.

Essential public services are requisite for the fulfilment of essential individual interests within the wider society as well, including those phrased as individual human rights and the values that such rights protect (e.g. non-discrimination and protection of the vulnerable, human dignity, subsistence rights, ‘*liberté, égalité* and *fraternité*’, and the free development of the human personality).

Essential services therefore require universal availability, accessibility, acceptability, and adequate quality of services for all members of the public. In case private actors are involved in the delivery of the service, particular regulatory acts by the State vis-à-vis private actors may be required to ensure such access.

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20 See also CteeESCR, ‘General Comment 15 on the Right to Water’ (20 January 2003) UN Doc E/C.12/2002/11, para 8: ‘Water should be treated as a social and cultural good, and not primarily as an economic good’. See Hallo de Wolf (2012) 575–585.

21 See chapters by Zinzombe and Sellin.

## **2. Balancing interests and commitments**

As already considered, to some extent, in the previous section, one challenge of ensuring EPSP is certainly that States have to manage various (competing) public and private interests at stake in the delivery of a service. They are likely engaged in complex policy decisions in respect of regulation, resources mobilisation and allocation, and in setting priorities in socio-economic planning and regulation. While it is impossible to highlight all the different balancing exercises that States may have to engage in, it is possible to underline two aspects.

First, competing demands on the State can come about at different regulatory levels, and involve a broad range of actors. This is certainly evident from the chapters by Gispén and Sellin, who both highlight that States may have subscribed to different international regulatory regimes, with different actors involved (e.g. human rights law, WTO law, or international drug control treaties). At first sight, these regimes may appear to make competing or conflicting demands of States that are difficult to reconcile. Nevertheless, both authors are optimistic that it is possible to balance (competing) interests and reconcile different types of obligations. Zinzombe writes in the context of protecting patents for pharmaceutical companies within the WTO and human rights based medicines access, that in this area the debates about potential conflicts of interests have been framed in terms ‘co-existence’ and ‘conflict’ schools of thought. The ‘conflict’ school submits that when human rights ‘conflict’ with other interests, the interests of human rights should be given primacy, because of their essential nature. On the other hand, those from the ‘coexistence’ school argue that – without apparently causing detriment to either framework – it is possible to reconcile the interests of both regimes.

This leads to the second observation on ‘balancing’ and reconciling interests in EPSP, namely: What is the place of human rights law in these debates? Does human rights law present a trump card in debates on EPSP regulation? Is it even sufficiently integrated in decision-making at present, whether as a matter of binding law, or as a matter of primary policy principle? Of course, the debates on ‘conflict’ and ‘coexistence’ might be observed in other areas of EPSP as well (e.g. in ‘human rights and investment law’ debates),<sup>22</sup> or per Gispén, in the area of ‘human rights and drugs control’. The aspects of ‘balancing’, ‘conflict’ and ‘primacy’ are certainly areas that need more research. Alternatively, it is a matter of political will and commitment, in particular a matter of committing to human rights and EPSP over other interests.

## **3. Resources mobilisation and distribution**

Realising EPSP, in a universal manner, to all members of the public, will require a lot of resources, financially, technically or otherwise, including human

22 For some insights on this matter in the context of international investment arbitration related to privatised water provision, and whether human rights obligations trump obligations flowing from, for example, bilateral investment treaties, see Hallo de Wolf (2013) 199–200.

resources and expertise, no matter how one looks at it. One of the great challenges for EPSP is how to ensure, at all times, the availability of such sufficient resources to deliver and provide essential services to all members of the public.

For a long while, socio-economic human rights law has battled with the myth, but also with the realities, of the ‘costliness’ of realising ESR. These challenges provided many persons with grounds to dispute the immediate or long-term meaningfulness of such rights in the first place, in particular because they are not readily enforceable or of a more ‘policy-oriented’ nature.<sup>23</sup> At the same time, the arguments of ‘costliness’ of ESR were effectively countered since the 1980s by scholars, activists and courts, particularly in response to their so-called ‘non-costly’ counterparts, civil and political rights.<sup>24</sup>

Indeed, it seems now commonly accepted – though still not sufficiently stressed and understood in many cases – that civil and political rights are also costly, or may have socio-economic implications.<sup>25</sup> The maintenance of a well-trained, well-equipped and well-functioning legal, judicial or administrative system; providing State-funded legal aid; covering the costs of regular elections; ensuring independent media broadcasting systems; maintaining well-trained military and law enforcement forces, all require continuous mobilisation and dedication of public resources.<sup>26</sup> It is often pointed out in budget analyses that large parts of national budgets are reserved to sustain military forces, rather than ESR objectives.<sup>27</sup> In some cases, ESR experts have urged a more balanced spending towards socio-economic objectives in this respect, so as to foster greater ESR enjoyment.<sup>28</sup> A typical complaint about spending on socio-

23 See e.g. B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials* (OUP 2014) 134–136; I. Cismas, ‘The Intersection of Economic, Social and Cultural Rights’, in E. Riedel, G. Giacca and C. Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 460–461.

24 E.g. R. Robertson, ‘Measuring State Compliance with the Obligation to Devote the “Maximum Available Resources” to Realizing Economic, Social, and Cultural Rights’ (1994) 16 *Human Rights Quarterly* 693, 693–714.

25 See, for a discussion, P. Merkouris in this volume (Chapter 5).

26 E.g. A. Blyberg, ‘Government Budgets and Rights Implementation: Experience from Around the World’, in J. Heymann, A. Cassola and M. Ashley Stein (eds), *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (CUP 2012) 195–196. On the issue of legal aid, see e.g. ECtHR judgment *Airey v Ireland* (1979) Series A no. 32.

27 See e.g. discussion by M. Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (OUP 2009) 63–64.

28 Magdalena Sepúlveda, *The Nature of The Obligations under the International Covenant on Economic, Social and Cultural Rights* (Intersentia 2003) 317, 334; UNHRC, ‘Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Magdalena Sepúlveda Carmona, on the Human Rights Based Approach to Recovery from the Global Economic and Financial Crisis, with a Focus on Those Living in Poverty’ (17 March 2011) UN Doc HRC/17/34 para 14; A. Chapman and S. Russell, ‘Introduction’, in A. Chapman and S. Russell, *Core Obligations: Building a Framework for Economic, Social and Cultural Rights* (Intersentia 2002) 11.

economic essential public services, especially as compared to civil and political rights oriented services, is that lending requirements in structural adjustment policies of international financial institutions required many resources to be cut from socio-economic services, without ensuring that alternative resources were brought in place.<sup>29</sup> In short, spending on ESR took a back seat, even though all essential public services require dedicated mobilisation and distribution of resources.

In international human rights law, the acknowledgement that all human rights require a mix of ‘positive’ and ‘negative’ State action, as well as regulation of private actors, has led human rights law experts to support that all human rights are subject to a so-called ‘tripartite typology’ of human rights obligations.<sup>30</sup> It requires that all human rights, whether civil and political or ESR, need to be ‘respected’, ‘protected’ and ‘fulfilled’ by the State, for all.<sup>31</sup> The obligation to ‘respect’ requires from States not to interfere in existing rights enjoyment, while the obligation to ‘protect’ refers to an obligation to ‘regulate’ human rights impacts of third (private) parties.<sup>32</sup> The obligation to ‘fulfil’, in particular, requires States to take active measures, to secure rights, including resources mobilisation and distribution, when people cannot enjoy such rights themselves, for any reason beyond their fault and control. A good example of ‘fulfilling’ civil and political rights would be the requirement that States provide legal aid to poor persons in court cases,<sup>33</sup> or that they make available and deploy police forces to protect demonstrators’ rights to free assembly and speech.<sup>34</sup> Merkouris, in Chapter 5, usefully demonstrates the developments in this area under the European Convention on Human Rights, where it is acknowledged that ‘there is no water tight division separating that [the socio-economic] sphere from the field covered by the Convention’. At the same time, Merkouris’ contribution also underscores the importance of ESR law in separate frameworks, since treaties on civil and political rights cannot not deliver the whole and full range of EPSP necessary for people to prosper.

29 Saul, Kinley and Mowbray (2014) 116.

30 H. Shue, *Basic Rights, Subsistence, Affluence and US Foreign Policy* (Princeton 1980) and H. Shue, ‘The Interdependence of Duties’, in P. Alston and K. Tomaševski (eds), *The Right to Food* (SIM 1984) 83–97; Ssjenyonjo (2009) 23–36.

31 Shue (1980); Shue (1984); UNCHR, ‘Final Report of the Special Rapporteur on the Right to Food, Asbjørn Eide’ (18 July 1987) UN Doc E/CN.4/Sub.2/1987/23; Sepúlveda (2003) 157–165.

32 Idem and see further Hallo de Wolf (2013) 174–184 and Chapter 16.

33 Again, consider *Airey v Ireland*, and text to note 26.

34 This is also often mentioned as an example of the ‘obligation to protect’; however, after the Brussels terrorist attacks in March 2016, peace protests had to be cancelled because the demand for police officers to protect protesters could not be met, essentially affecting civil and political rights due to a lack of resources. ‘Right-Wing “Hooligans” Battle Belgian Policy at Shrine’ (*CBS News*, 27 March 2016) [www.cbsnews.com/news/belgian-peace-march-cancelled-but-right-wing-hits-streets/](http://www.cbsnews.com/news/belgian-peace-march-cancelled-but-right-wing-hits-streets/).

In this volume, we firmly break with some of the typical narratives in mainstream human rights law about (public) resources for human rights in general, and for ESR in particular. Importantly, we suggest, first of all, that *any* EPSP will require substantial mobilisation and allocation of resources to ensure access for all, no matter what service is involved. States should, in all cases, effectively and actively seek ways to guarantee the availability of required resources to ensure EPSP. This results, in part, from the indivisibility of human rights. States have to actively regulate all relevant actors and activities within their territory or subject to their jurisdiction, to the effect that sufficient resources are leveraged and made available. If States manage to leverage and allocate a budget for the military or law enforcement bodies, they should also be able to manage a budget for other EPSP.<sup>35</sup>

Second, again breaking with the narrative that the provenance of resources for EPSP always have to be fully ‘public’ (i.e. State resources), but also underscoring that the State plays an essential role in leveraging resources, we suggest that resources for EPSP can originate from many different sources in society, as appropriate.<sup>36</sup> They can come, respectively, from *the State* directly; from *individual (or groups of) end user(s)* themselves (e.g. by pooling resources or by paying some fee for the service directly); or from *private (business) actors* who have become involved in the provision of the service, typically in the hope of or with the expectation to see some return on their investments.<sup>37</sup> The State clearly has a mediating or regulatory role to play in all respects; in particular, it has the responsibility to set the conditions (create an enabling environment) for EPS delivery when needed, which could include setting maximum or differentiated service fees,<sup>38</sup> setting any conditions for disconnection or continuity of service; it could tax companies and individuals directly on their profit, income, wealth or consumption of non-essential goods to generate resources for EPSP; or it can engage in socially responsible (concession) contracts and require universal service obligations for investments and public procurement; or it can require companies to provide services directly to

35 Saul, Kinley and Mowbray (2014) 147.

36 Chapman and Russell (2002) 11–12; Ssjenyonjo (2009) 62; Saul, Kinley and Mowbray (2014) 143. Also, UNGA, ‘Post 2030 Sustainable Development Agenda’ (2015), para 41.

37 A. Nolan, ‘Budget Analysis and Economic Social Rights’, in E. Riedel, G. Giacca and C. Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 378–381; De Schutter (2014) 198–217; Hallo de Wolf (2013) 165–204; Marlies Hesselman, ‘Realizing Universal Access to Modern Energy Services: Exploring Avenues for Private Stakeholder Accountability in International Human Rights Law and Governance’, in A. McCann, M. van Rooij, A. Hallo de Wolf and A. Neerhof (eds), *When Private Actors Contribute to Public Interests* (Eleven Publishing 2014) 107–130; see on this point also further in Chapter 16.

38 Consider A. Kalra and Z. Siddiqui, ‘India Caps Prices of 36 More Drugs to Improve Access: Government Official’ (*Reuters* 19 September 2014) [www.reuters.com/article/us-india-drug-prices-idUSKBN0HE11C20140919/](http://www.reuters.com/article/us-india-drug-prices-idUSKBN0HE11C20140919/). This point is revisited in Chapter 16.

employees or local communities in their immediate spheres of influence, which can free up budget from the State, again subject to regulation and control as may be required.<sup>39</sup> Of course, resources might be available elsewhere as well, including in times of need, such as from international financial institutions, international organisations, other States, philanthropic entities, NGOs, or other stakeholder groups that manage to leverage resources to support vulnerable groups temporarily or permanently (e.g. refugees).<sup>40</sup> In such cases, the State may also have to play an enabling regulating role, or be ready to take over in case respective actors no longer manage to provide access to these services. That the latter is a particular challenge is clear from Chapter 10 by van der Ploeg, Vanclay and Lourenço. They describe the great role that companies can play in setting up EPSP in project-induced displaced communities, as paid for by companies, but that there is a risk of fallback when the company takes up and leaves and the State does not have any resources to continue the services delivery. In such cases, very careful planning and regulation is necessary; or it could be that alternative strategies for (additional) resources mobilisation need to be followed.

Finally, individuals themselves also have resources to invest in EPSP directly, for example by paying (differentiated) service fees for regularly needed services (water access, electricity access, telephone connections), or they can also pool and leverage private resources for EPS access by collectivising in contributory insurance systems (as common for services where usage might be less predictable and/or the costs high, such as in the health sector, social security sector, or legal aid insurance). Equally, (groups of) individuals may need access to differentiated pricing, targeted subsidies or (micro) financing to afford upfront connections or access costs to be able start enjoying the service (electricity or water pipe connection).<sup>41</sup> Again, in all these cases, States may have a regulatory enabling role to play in setting up or regulating the requisite resources schemes, even if they do not publicly own the resources themselves.

Importantly, however, any mix of regulatory tools for the mobilisation of adequate resources for EPSP needs continuous (re)assessment of the suitability of these tools for EPSP. Such considerations should primarily be based on the condition of whether all members of society are indeed able to access the service in an acceptable, affordable, reliable manner. In this sense, this volume builds on work being done elsewhere on human rights and ‘State budgeting’, or on human rights and investment. In fact, this book fits in very well with other recent work that seeks to make human rights, and in particular ESR, more practicable and central to ‘regulation’, ‘planning’, ‘budgeting’ and ‘governance’

39 On the opportunities and challenges of doing this, see the contribution of van der Ploeg, Vanclay and Lourenço in Chapter 10, as well as Lane in Chapter 8.

40 See, for similar perspectives, UNGA, ‘Post 2030 Sustainable Development Agenda’ (2015), para 41; also, Gatti in Chapter 6.

41 UN Habitat (2009) para 40 (a) and (b).

again.<sup>42</sup> All these efforts represent an attempt to move beyond the legalistic discussions that long dominated the ESR scholarship, in particular their comparison to civil and political rights and the strict enforceability (justiciability) of ESR in courts. The purpose of this approach is to make ESR a much-needed part of debates on development, public policy and decision-making again, including specifically in the area of EPSP.<sup>43</sup> This is not to say that these efforts do not very usefully draw upon legal developments discussed in past decades, such as the identification of more concrete obligations in the area of ESR, and their justiciability.

Finally, a progressive taxation scheme for all actors in society may be one of the most effective tools to ensure that sufficient resources are available for EPSP at all times, and can be (re)distributed when and where needed.<sup>44</sup> State-controlled taxation schemes normally allow for popular control, participation and accountability for resources mobilisation and distribution.<sup>45</sup> In fact, progressive national and international taxation for inclusive development, including international tax evasion, is getting more attention recently, also from economists.<sup>46</sup> As already stated, however, private business resources (in the form of investments in EPSP) might be tapped more directly as well. Van der

42 See e.g. Nolan (2014) 369–390; A. Nolan *et al.* (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic Social and Cultural Rights* (Hart 2013); R. O’Connell *et al.*, *Applying an International Human Rights Framework to State Budget Allocations: Rights and Resources* (Routledge 2014); Blyberg (2012) 195; R. Bissio, ‘Budgets, Information and Participation: Civil Society Approaches to Increasing Rights Accountability’, in J. Heymann, A. Cassola and M. Ashley Stein (eds), *Making Equal Rights Real: Taking Effective Action to Overcome Global Challenges* (CUP 2012); UNHRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, on Taxation and Human Rights’ (22 May 2014) UN Doc HRC/26/28; UNHCHR, ‘Report on Austerity Measures and Social and Economic Rights’ (2013) UN Doc E/2013/82/EN; CteeESCR, ‘Letter from CESCR Chairperson to States Parties in the Context of the Economic and Financial Crisis’ (16 May 2012) UN Doc CESCR/48yh/SP/MAP/SW; UNHRC, ‘Report of the Independent Expert on the Question of Human Rights and Extreme Poverty’ (2011); Hallo de Wolf (2013); Hans Morten Haugen, ‘Trade and Investment Agreements: What Role for Economic, Social and Cultural Rights in International Economic Law?’, in E. Riedel, G. Giacca and C. Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 227–259; Holger P. Hestermeyer, ‘Economic, Social and Cultural Rights in the World Trade Organization: Legal Aspects and Practice’, in E. Riedel, G. Giacca and C. Golay, *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 260–285.

43 See also Graham (2010) 169.

44 Saul, Kinley and Mowbray (2014) 144–145; UNHRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2014).

45 UNHRC, ‘Report from the Special Rapporteur on Extreme Poverty and Human Rights’ (2014).

46 E.g. T. Piketty, *Capital in the 21st Century* (trans A. Goldhammer, Belknap Press Harvard 2014) 493–539; R. Neate and S. Bowers, ‘UK and European Allies Plan to Deal “Hammer Blow” to Tax Evasion’ (*The Guardian*, 15 April 2016), [www.theguardian.com/business/2016/apr/14/uk-under-pressure-from-eu-states-over-beneficial-ownership-secrecy](http://www.theguardian.com/business/2016/apr/14/uk-under-pressure-from-eu-states-over-beneficial-ownership-secrecy). Especially, the recent affair of the ‘Panama Papers’ seems to lay bare the extent of tax evasion, and the need to reign in such practices for the public good.

Ploeg *et al.*, Lane, and Zinzombe all appraise the direct mobilisation and allocation of private resources for EPSP.<sup>47</sup> Gatti equally submits that private commercial or non-commercial services might be regulated and mobilised in the public interest. In many of these cases, there might be a prior or subsequent need for State regulation. At the same time, human rights law and practice also sees a growing discussion on the *direct* human rights responsibilities for corporations as well.<sup>48</sup> This can be especially relevant in the context of EPSP and private service providers. What are their responsibilities and obligations vis-à-vis service users *directly*?<sup>49</sup>

We conclude this section with the observation that control, participation and accountability for EPSP, including the *resources* for EPSP, are key conditions for adequate EPSP. Yet, we also observe that vulnerable people might not always have their voices heard in decisions on how resources are mobilised and redistributed, even in democratic systems; public taxation schemes, in particular, depend on the choices for taxation, the subsequent allocation of resources, and the adequate administration and enforcement of the taxation scheme. The question is whether human rights standards can help inform budgeting for the poor and vulnerable as well. We consider this in some greater detail in the concluding chapter.

#### 4. Universality and inclusiveness

Our definition of EPSP is premised on the idea of ‘universality’. It requires ‘access for all’, geared towards equal development opportunities for all. This implies that the State and/or other relevant EPSP providers need to be actively involved in assessing and ensuring that essential public services are at all times sufficiently available, accessible, acceptable and of good quality to all members in society who require them. Only when this is the case can the full public and individual benefits of EPSP be reaped. Yet, how can this be ensured?<sup>50</sup> How can it be structurally assessed who in society is left behind, who is lacking access to EPSP on par with others, and why?

In this section, we argue that exclusion from EPSP typically arises out of a number of different conditions of ‘vulnerability’. These include: poverty and the inability to pay for a certain service;<sup>51</sup> personal circumstances that preclude

47 Van der Ploeg, Vanclay and Lourenço in Chapter 10; Zinzombe in Chapter 9.

48 See e.g. N. Jägers, *Corporate Human Rights Obligations: In Search of Accountability* (Intersentia 2002); N. Jägers and M. van der Heijden, ‘Corporate Human Rights Violations: The Feasibility of Civil Recourse in the Netherlands’ (2008) 33(3) *Brooklyn Journal of International Law* 833–887, and more recently M. Addo, ‘The Reality of the United Nations Guiding Principles on Business and Human Rights’ (2014) 14 *Human Rights Law Review* 133–147.

49 See e.g. Chapters 7–10 in this volume; Hallo de Wolf (2012) 193–195; De Schutter (2014).

50 See, for concerns over inequality and socio-economic human rights: G. MacNaughton, ‘Beyond a Minimum Threshold: The Right to Social Equality’, in L. Minkler (ed.), *The State of Economic and Social Human Rights: A Global Overview* (CUP 2013) 271.

51 See Hallo de Wolf (2012) 569.



participation or enjoyment on par with others, such as age or disability; a lack of access to information or education, in general or about a particular service being available, or of importance, or how to obtain access to it (e.g. health services, modern energy services, media services); physical geographical location (i.e. remote rural areas or poor developing countries);<sup>52</sup> or lack of representation/voice in relevant decision-making processes, including mechanisms for regulation, participation and accountability, due to various reasons.<sup>53</sup> Especially the latter leads to poor decisions about resources mobilisation and allocation, and poor access to services for ‘especially vulnerable groups’ such as women, ethnic minorities, children, elderly, disabled persons, but potentially also for developing nations more generally.<sup>54</sup> Wilful discrimination against certain groups in society is certainly also a reason for poor access, as are more difficult to grasp local attitudes prevalent in society towards ‘vulnerability’.<sup>55</sup>

In understanding why some groups might be more disadvantaged than others in accessing services, it is important to note that often more than one type of vulnerability is at play simultaneously. Conditions of vulnerability, poverty and lack of access to EPSP can all be mutually reinforcing as well. Indeed, ‘poverty’ is often ‘multi-dimensional’, and poverty, exclusion and vulnerability, in their various manifestations, can be both cause and consequence of lack of development opportunities.<sup>56</sup> Murillo Chávarro, in Chapter 14, in this sense, celebrates the exceptionally low thresholds to access local courts in Colombia for all people, including poor people and people in remote areas, to complain about their lack of EPSP access. She considers this a prerequisite for the success of litigation on EPSP in Colombia. Without enabling support, it is well possible

- 52 See e.g. Gispén in Chapter 2. Challenges of access in remote areas are also common for ‘network-based’ services, such as electricity access, public transport, or in some cases water access. In addition, geographical location can also affect the need for services access in different way: Lang considers, in Chapter 12, how people in Chinese cities struggle to access clean air in polluted Chinese urban areas.
- 53 E.g. Mattsson and Zhang both highlight, in their respective chapters, how vulnerable persons of a certain age or in remote areas of a country can benefit from improved avenues for representation, participation and accountability (e.g. by Internet-based solutions or an Ombudsperson). See also T. Prosser, *The Regulatory Enterprise: Government, Regulation, and Legitimacy* (OUP 2010) 191–196.
- 54 Sellin, Gispén and Zinzombe, in Chapters 3, 2 and 9, respectively, describe the difficulties of making medicines available in developing countries, and the sometimes strained negotiation position of developing States in the international arena.
- 55 UNOHCHR, ‘Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies’ (2006) UN Doc HR/PUB/06/12, paras 29–33.
- 56 UNHRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona, on the Right to Participation of People Living in Poverty’ (11 March 2013) UN Doc A/HRC/23/35, paras 12–14; MacNaughton (2013) 274–266; Saul, Kinley and Mowbray (2014) 144; see also M. A. Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 11–19.

to remain trapped in underprivileged environments, and deprived of services access.<sup>57</sup>

The concluding chapter outlines how the human rights framework certainly offers relevant guideposts to improve inclusive EPSP, including without taking recourse to courts necessarily.

## 5. Checks and balances for EPSP

The fifth and final common challenge for universal inclusive EPSP is a general need for better ‘checks and balances’. What happens when access to EPSP persistently or suddenly fails, or proves inadequate for certain people, or is simply not available? How can society as a whole, or intended beneficiaries, get involved in attaining or maintaining access for everyone?

In ESR law, the problem of ‘checks and balances’ has been typically framed as a matter of rights ‘enforcement’, or the ‘justiciability’ of rights and access to a court for ESR, which spurred much debate and controversy.<sup>58</sup> We consider that while access to a court is a very important, and at times useful, component in addressing EPSP failures, it is just one small component of sound societal decision-making and ensuring ‘checks and balances’. Admittedly, court access itself can take a number of different forms as well. In fact, as Borges illustrates with great insight in Chapter 13, improved access to services through courts can take the form of individual enforcement, negative injunctions, weak-form enforcement, and structural enforcement.<sup>59</sup> She also observes that in Brazil, individual litigation has usefully led to various structural reforms and approaches to healthcare provision. Similarly, Murillo Chávarro notes the difference between the *tutela* action and the popular action in the Colombian court system, with especially the first action being highly useful to enforce EPSP.

At the same time, instead of ‘justiciability’ and courts’ involvement – or alongside this – the more general concept of (human rights) ‘accountability’ is increasingly emerging in (inter)national law and governance debates. The same goes for the concept of ‘participation’. Both these concepts are further addressed in the concluding chapter as important human rights guideposts for EPSP.

57 E.g. A. Chapman and B. Carbonetti, ‘Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights’ (2011) 33 *Human Rights Quarterly* 682, 683–684; UNHRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2013) paras 12–14 on the ‘vicious cycle of powerlessness’.

58 Saul, Kinley and Mowbray (2014) 164–166; Malcolm Langford, ‘Judicial Review in National Courts: Recognition and Responsiveness’, in E. Riedel, G. Giacca and C. Golay (eds), *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges* (OUP 2014) 417–447; Fons Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia 2006); CteeESCR, ‘General Comment 9 on the Domestic Application of the Covenant’ (3 December 1998) UN Doc E/1998/24, para 10.

59 This follows the work of David Landau, ‘The Reality of Social Rights Enforcement’ (2012) 53 *Harvard International Law Journal* 402, 402–459.

In fact, both notions are part of the so-called ‘Human Rights Based Approach’ to development as well.<sup>60</sup> In respect of softer forms of ‘participation’ and ‘accountability’, Zhang and Lang each reflect on the Chinese settings and realities to achieve EPSP, and the roles and forms of public participation and accountability there. In fact, in China, direct access to a court is not the most sought-after or readily available manner to address failures of EPSP, for various reasons. In this sense, Lang analyses the opportunities for and recognition of a right to public participation in decision-making, and what this means. Zhang, in turn, emphasises how Chinese citizens make use of social media outlets (social accountability) to advance the right to health. Both contributions very usefully demonstrate that ‘accountability’ and ‘participation’, which jointly provide requisite ‘checks and balances’ for EPSP, can take many forms. As considered, these concepts will be further elaborated in the concluding chapter.

## **6. Conclusion: towards a human rights based approach to EPSP**

The above sections have demonstrated what the common and difficult challenges for EPSP are. These common challenges resonate with challenges, concepts, obligations, developments and standards that are well known within the human rights law framework as well. The chapters in this book each engage with different challenges for EPSP and they generate more insights into how human rights law plays a role in (improving) EPSP. Particularly, the chapters provide insights in the similarities between semantics at play in the domains of human rights law and EPSP, their shared concepts and standards, and avenues for improving access to services through socio-economic rights.

In extrapolating from these discussions, and in adding our own views to the deliberations, we provide a further overview of the most important ESR standards and guideposts we have identified for EPSP in the concluding chapter. These standards, as extrapolated from the international human rights law framework, and the developments under the International Covenant on Economic Social and Cultural Rights mostly, are:<sup>61</sup>

- the ‘AAAQ’ framework and ‘universal service obligations’;
- minimum essential levels/progressive realisation;
- non-discrimination and vulnerable groups inclusion;

<sup>60</sup> See Chapter 16, and note 61 below.

<sup>61</sup> E.g. the guideposts resonate with considerations by, for example, the UN Independent Expert on Extreme Poverty and Human Rights, listing the following human rights guideposts for recovery from the financial crisis: ‘using maximum resources available’, ‘ensuring minimum essential levels’, ‘avoiding deliberately retrogressive measures’, ‘non-discrimination and accountability’, ‘participation, transparency and accountability’, or the Human Rights Based Approach to development (HRBA). UNHRC, ‘Report of the Independent Expert on Extreme Poverty and Human Rights’ (2011).

- participation and accountability;
- mid-term/long-term planning and budgeting for EPSP; and
- private actor standards.

Throughout the project and drafting of chapters, all contributors to the volume have been asked to actively engage with these different themes, concepts and guideposts. As a result, each contribution offers an insightful further part of the puzzle. That the contours of the overall puzzle might not yet be visible, or that certain parts are still missing or might be better fitted, is also something that receives further attention in the final chapter.

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