

## INTRODUCTION: THE JUSTICIABILITY OF ESC RIGHTS AND THE INTERDEPENDENCE OF ALL FUNDAMENTAL RIGHTS

*Kristin Henrard\**

This special issue came about due to the interesting presentations given at a conference to celebrate the official launch of the International Commission of Jurist's book, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, by Christian Courtis (hereinafter, 'the ICJ book').<sup>1</sup>

The publication of this book, with its thematic analysis of a rich compilation of national, regional and global jurisprudence on economic and social rights, marks an important phase in the development of theories on (the characteristics of) economic and social rights. Hence, the official launch of this seminal book at the Erasmus University of Rotterdam in April 2009 was considered to merit a conference on the justiciability of economic, social and cultural rights. Some of the articles included in this special issue emerged from this conference, and some were commissioned by the editor (in consultation with Christian Courtis). All of them refer to the ICJ book (in different degrees of explicitness).

The title of the ICJ book reveals its focus on the justiciability of economic, social and economic rights. However, it is important to realise that the justiciability issue is tied up with several other, allegedly typical characteristics of social and economic rights.

It therefore seems appropriate to briefly sketch developments in thinking about social and economic rights before providing an overview of the articles included in this special issue and their relationship to the ICJ book and to each another.

It is common knowledge that, when the Universal Declaration of Human Rights was transformed into legally binding norms, the decision was ultimately taken to enshrine civil and political rights and social, economic and cultural rights in separate conventions. The key reason for this decision was supposedly that the nature of these two categories of rights and the concomitant state obligations are fundamentally different. Crudely speaking, three differences tended to be put forward. Firstly, civil and political rights were 'mere' negative obligations of abstention for states, while economic, social and cultural rights created positive obligations. Secondly – and consequently – the state obligations in relation to civil and political rights were immediate, whereas the positive obligations relating to economic, social and cultural rights were merely progressive. Thirdly – and flowing from the two preceding characteristics – civil and political rights were justiciable, while economic, social and cultural rights were not (because they were too indeterminate).

The preceding account already reveals that these three characteristics are closely interwoven. Indeed, the reason that economic and social rights were supposedly not justiciable was their vague – i.e. conditional – and progressive nature. In terms of the margin of appreciation left to states, the margin in relation to economic, social and cultural rights was supposedly too extensive for them to be justiciable. As explained more fully below, this interrelatedness of justiciability and state obligations also emerges in the articles of this special issue.

Over time, and especially since the 1993 World Conference on Human Rights,<sup>2</sup> the thinking on this issue developed and shifted towards the recognition that all human rights are interdependent and indivisible. Consequently, their core characteristics could

\* Professor of Minority Protection and Associate Professor of Constitutional Law and Human Rights, Erasmus University Rotterdam.

<sup>1</sup> ICJ, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, Human Rights and Rule of Law Series No. 2 (Geneva: ICJ 2008).

<sup>2</sup> The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, 23 June 1999, UN Doc. A/Conf.157/23, Part I, para. 5.

not be that different. In relation to negative and positive state obligations, it is now argued that all rights entail some positive and some negative state obligations. It cannot be denied that civil and political rights are increasingly seen as giving rise to positive state obligations, also with a view to the effective enjoyment of fundamental rights. This is visible in the jurisprudence of the European Court of Human Rights<sup>3</sup> as well as the UN treaty bodies.<sup>4</sup> Some of the jurisprudence concerning positive obligations has actually implied that the interpretation of civil and political rights (to some extent) enables one to tread on the terrain of social and economic rights.<sup>5</sup> This would also imply that the social and economic rights are justiciable (because they are being adjudicated).

As regards economic, social and cultural rights, the traditionally broader margin of appreciation of states is circumscribed in several ways. This is visible in the text of the more recent instruments relating to economic, social and cultural rights, in the sense that they are formulated in a less conditional way, often with less emphasis on their progressive nature. For example, it is striking that, in contrast to the formulations in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the progressive nature of state obligations in relation to the rights included in the European Social Charter is much less explicit.<sup>6</sup> This phenomenon of social and economic rights being formulated in a stronger, less conditional, less intrinsically progressive way is also noticeable in several of the later UN human rights conventions, such as the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC), as well as various regional conventions. The African Charter on Human and Peoples Rights is generally regarded as a codification of both civil-political and socio-economic rights, reflecting their indivisibility, interdependence and interrelatedness (as confirmed in the fifth paragraph of the preamble). What is remarkable is that, in the African Charter, the enforcement mechanisms for civil-political rights and the (quasi-)judicial procedures are equally applicable to and valid for the socio-economic rights.

In addition to developments that can be gleaned from the formulation of economic, social and cultural rights, developments in the interpretation of these rights have also reduced the progressive nature of the concomitant state obligations. This was already visible in the third General Comment of the treaty body of the ICESCR. According to its first paragraph, the prohibition of discrimination creates an immediate state obligation, while paragraph 10 identifies so-called minimum core obligations that entail quasi-immediate state obligations. The General Comment also narrows the state's discretion by indicating that, while resource constraints have to be taken into account, vulnerable persons should in any event enjoy such minimal protection (paragraph 12).

More generally, there appears to be a trend to narrow the margin of appreciation of states in relation to socio-economic rights. For instance, recent decisions of the European Committee on Social Rights arguably bear testimony to such a trend. Indeed, while the Committee explicitly applies the margin of appreciation doctrine, it has devised a set of criteria to evaluate whether states are complying with their obligations. *De facto*, these criteria restrict this margin of appreciation considerably, especially in relation to the progressive nature of positive state obligations. The Committee requires a reasonable time frame as well as measurable progress, while the state should be able to demonstrate that it has indeed used the maximum possible resources.<sup>7</sup> In other words, the Committee

<sup>3</sup> See, *inter alia*, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004).

<sup>4</sup> See, *inter alia*, A. Rosas and M. Scheinin, 'Implementation Mechanisms and Remedies', in A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Kluwer 2001) 440-441.

<sup>5</sup> Ellie Palmer's article in this special issue discusses this matter extensively. See also O. de Schutter, 'The Protection of Social Rights by the European Court of Human Rights', in P. Van Der Auweraert et al. (eds.), *Social, Economic and Cultural Rights: An Appraisal of Current European and International Developments* (Maklu 2002) 207-239.

<sup>6</sup> In the case of the European Social Charter, the explicit acknowledgement of the progressive nature of the related state obligations is the exception rather than the rule, like in Articles 2(1), 3 and 4.

<sup>7</sup> See, *inter alia*, European Committee on Social Rights (ECSR), *ERRC v. Bulgaria*, No. 31/2005, 18 October 2006, para. 37; ECSR, *Autism-Europe v. France*, No. 13/2000, 4 November 2003, para. 53; ECSR, *MDAC v. Bulgaria*, No. 41/2007, 3 June 2008, para. 39.

does allow some room for progressive realisation, but at the same time it is careful not to grant states carte blanche to determine the rhythm of implementation. Furthermore, in a more general sense, the Committee underscores the obligation to devote special attention and concern to the impact of policy choices on groups with heightened vulnerability.<sup>8</sup>

The preceding account demonstrates that the enhanced acceptance of a measure of justiciability of socio-economic rights is part and parcel of the more general acknowledgement of the interdependence and indivisibility of all fundamental rights. To the extent that civil and political rights are interpreted in a way that identifies positive state obligations that pertain, *de facto*, to socio-economic rights, those socio-economic rights are – at least to some extent – justiciable. Similarly, as state obligations in relation to social, economic and cultural rights become more clearly and more strictly circumscribed, their justiciability increases.

## 1 Overview

This special issue consists of five articles. The first article is by Christian Courtis and provides a superb overview of the arguments (and data) contained in the ICJ book, tracing the justiciability of economic, social and cultural rights. In the second article, Ellie Palmer focuses on the jurisprudence of the European Court of Human Rights, mapping the extent to which the interpretation of civil and political rights enhances the *de facto* justiciability of economic and social rights. The following two articles focus on two particular social rights – the right to education and the right to health – and the way in which they can be considered justiciable. The special issue concludes with an article with a critical political science perspective and a special focus on the right to health.

In his keynote article, Courtis examines the extent to which the perceived problem of the justiciability of economic, social and cultural rights is related to the allegedly vague, aspirational and progressive character of these rights. Slowly but surely, the practice of national and regional courts has revealed that these rights concern a wide variety, just like civil and political rights, and that there are indeed several socio-economic rights that are so clear and unconditional that they are justiciable. Indeed, these courts no longer reject the justiciability of these rights in a wholesale manner.

In his article, Courtis describes how the case law of national and regional courts has developed in relation to socio-economic rights and now reflects an acceptance that these rights also have some duties of immediate effect that could be justiciable. He consecutively analyses negative protection (e.g. judicial protection against forced eviction); so-called procedural protection or procedural guarantees in relation to substantive economic, social and cultural rights (principles regarding access to courts and fair trial); equal protection and the prohibition of discrimination (in relation to access to socio-economic rights); and minimum core obligations (entailing the possibility of defining absolute minimum levels of a right, without which that right would be meaningless or devoid of any practical meaning).

Subsequently, he discusses the extent to which the courts have added requirements in relation to the progressive realisation of social and economic rights, such as reasonableness, appropriateness and proportionality, thereby reducing the ‘traditional’ state discretion in this field. These requirements basically underscore that this progressiveness only pertains to the *full* realisation of the rights and does not imply boundless discretion with regard to the way in which and the speed at which the realisation of these rights is furthered. Courtis shows that the analysis used in this respect is very akin to the well-known ‘legitimate limitations doctrine’ that has been developed for civil and political rights.

Courtis also points out that more attention is being devoted to the prohibition of deliberately introducing retrogressive measures. This is the other side of the coin of the duty to take steps to progressively achieve the fully realisation of socio-economic rights.

<sup>8</sup> ECSR, *Autism-Europe v. France*, No. 13/2000, 4 November 2003, para. 53.

For each point he makes while mapping the growing justiciability of socio-economic rights, Curtis provides a rich set of examples of global, regional and national quasi-jurisprudence and related supervisory practice, referring where possible to actual norms and standards to buttress his arguments.

The article by Ellie Palmer goes on to chart jurisprudential trends and developments in the protection of socio-economic rights through the interpretation of the civil and political rights in the European Convention on Human Rights by the European Court of Human Rights. Her analysis shows that the European Court already started to lay the foundations of a socio-economic rights jurisprudence in the late 1970s and that it has developed this jurisprudence since. A critical tool in this process was and remains the positive obligations that the Court has identified in addition to the traditional negative obligations of non-interference. In relation to Articles 3 and 8 of the Convention, Palmer notes a certain progress towards a jurisprudence concerning positive obligations, which provides for the basic human needs of vulnerable individuals in a range of contexts. The jurisprudence on the basis of Articles 6 and 14 has developed towards a more substantive conception of equality and non-discrimination, which is more capable of achieving fairness in the distribution of public goods (countering systemic inequalities).

However, Palmer is rather critical of this overall jurisprudential development, on the grounds that the European Court has failed to devise a consistent underlying theory and guiding principles for its positive obligations doctrine. Consequently, the limits of state responsibility in this respect remain fluid and contested (as does the margin of appreciation left to states, which represents the other side of the coin).

Coomans's article traces the justiciability of the right to education and, more particularly, the following three dimensions of this right: availability, accessibility and acceptability. The author has opted for a selective and illustrative approach, analysing the case law of a number of domestic jurisdictions and international bodies on a variety of educational issues. As regards domestic jurisdictions, Coomans has ensured that a broad cross-section of countries is included, covering developing and developed countries and representing different constitutional systems. Coomans's analysis demonstrates that courts may on occasion defer to the political branches of government when balancing various interests, but it is crystal clear that the right to education can be – and has been – fully justiciable, either directly or indirectly. While the prohibition of discrimination is shown to be of key importance for the indirect justiciability of the right to education, the right to life and general provisions on the protection of children's rights also play an important role in this respect.

Sellin's article focuses on a particular dimension of the right to health, namely access to medicines. In her analysis of the relevant case law, however, she also takes account of judgments by the selected courts relating to other social rights with similar characteristics. She presents the similarities and differences between two developing countries – South Africa and India – in relation to the justiciability of access to medicines. This analysis is set against the international framework of the right to health and its justiciability in the ICESCR. While both legal systems have overcome the arguments raised against the justiciability of social rights, in part by taking account of resource constraints, the context and methods used are very different.

The South African Constitution explicitly enshrines the right to health, while recognising that the state's obligations are progressive and constrained by the available resources. The case law of the South African Constitutional Court with regard to social rights shows that, even though it refuses to use the minimum core obligation doctrine developed under the ICESCR, it does evaluate state compliance with its constitutional obligations in relation to social rights. Importantly, it has developed a reasonableness test to do so and has underscored that this test needs to be applied in a way that takes into account and is tailored to the specific circumstances of each given case.

In the Indian Constitution, the social rights are not framed as rights but as 'directive principles of state policy'. Nevertheless the Indian Supreme Court has recognised the justiciability of these particular directive principles. It has not only developed a creative interpretation of the right to life (so as to include social rights) but has also underscored that these directive principles concern issues that are crucial to a meaningful life with dignity and thus should be considered as complementary to the Constitution.

Finally, the article by Gloppen offers a critical political science perspective on the approach taken in the ICJ book. The article is constructed as a commentary on the book, identifying its strengths and weaknesses while comparing it to other publications in the field. The author lauds the concise analysis of the great variety of courts and supervisory bodies involved in the legal enforcement of socio-economic rights and is very positive about the attention the book devotes to the actual implementation of judgments. Nevertheless, the author still considers the book's approach too limited, because it does not take into account the broader societal and political context that determine the actual impact of judgments and the actual degree to which the social rights are realised from a societal (as opposed to a mere individual) perspective.

Gloppen's detailed assessments of the South African case law relating to health show how the broader context explains why these cases were also successful at societal level. Subsequently, she puts forward a model for estimating the number of external beneficiaries (in addition to the original litigants), with particular attention for the poor and marginalised sections of society. This model enables one to gauge the effects of litigation in terms of fairness and social justice. The latter appears to be higher when courts are involved in the formation of social policy rather than merely enforcing individual claims.

## 2 Closing comments

Two closing comments are in order. Firstly, it is striking that most articles explicitly address the South African case law on economic and social rights, while India also features often. This case law triggered a lot of attention worldwide for several reasons. While these judgments can indeed be regarded as 'guides' in relation to the justiciability of socio-economic rights, both the ICJ book and several of the contributions to this special issue reveal that they are not the only – and not even the first – cases in which economic and social rights were considered justiciable.

Secondly, the recognition of the justiciability of economic, social and cultural rights is growing and becoming stronger by the day. It is unfortunate that the ICJ book was not able to take on board several important subsequent developments, namely the adoption, after many decades of negotiations, of an optional protocol to the ICESCR establishing an individual complaints procedure in December 2008 and the development by the African Commission on Human and Peoples Rights of Draft<sup>9</sup> Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights in the summer of 2009.

Based on the African Charter on Human and Peoples Rights, and in view of the many obstacles that exist to the full enjoyment of civil and political rights in Africa, the African Commission has devised these principles and guidelines so as to provide more guidance on the meaning and basic characteristics of socio-economic rights, with the ultimate aim of enhancing their effective enjoyment. The draft mentions as one of the basic principles that 'economic, social and cultural rights are justiciable and enforceable rights and that state parties to the African Charter have obligations to ensure that individuals and peoples have access to enforceable administrative and/or judicial remedies for any violation of these rights'. The question of justiciability is further elaborated in Section II, and more particularly in the part on 'Immediate obligations regarding the implementation of economic, social and cultural rights'.<sup>10</sup> The many paragraphs in this part have subtitles such as 'minimum core obligations', 'non-discrimination' and even 'effective domestic remedies'. In the latter paragraph, it is emphasised that a rigid classification of economic and social rights, which would mean that they are by definition not justiciable, would be incompatible with the principle that human rights are interdependent and indivisible (paragraph 36). Furthermore '[a]dministrative tribunals and the courts should recognise

<sup>9</sup> Once these Guidelines have been officially adopted, they are meant to be used as reference points by the contracting parties when preparing state reports.

<sup>10</sup> The draft consists of three sections. The first section concerns interpretation, the second concerns the nature of state obligations and the third consists of an in-depth discussion of the meaning of the economic, social and cultural rights included in the African Charter.

the justiciability of ESC rights and grant appropriate remedies in the event of violations of these rights by State or non-State actors' (paragraph 37). All in all, the draft principles and guidelines make a very strong case in favour of the justiciability of economic, social and cultural rights.

While this African draft is not included at all in the contributions to this special issue, it should be noted that several of the contributing authors have explicitly referred to the remarkable development at the United Nations, thus providing insight into important developments since the publication of the ICJ book.