

# Toward a Comprehensive Framework for ESC Rights Practice

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## 1. The Crisis in ESC Rights

Practitioners of economic, social and cultural (ESC) rights have for many years been preoccupied with defending ESC rights litigation in response to simplistic attacks on the very idea of using courts. We have rarely had the opportunity to reflect together on the more difficult questions that arise from our work and to allow our emerging experience to generate new understandings and collaborative approaches. Reflection on the nature of our practice, however, is long overdue in a field that has largely been defined by a kind of siege mentality.

There has been a tendency among ESC rights practitioners to be somewhat defensive about the problems we encounter in our work when in fact, many of the obstacles we confront in ESC rights advocacy are common to human rights practice generally. All forms of human rights practice have faced judicial bias, timidity or incompetence, absence of the rule of law, misplaced assertions of domestic or legislative sovereignty, barriers to access to justice, inadequate legal and constitutional provisions, and problems in fashioning effective remedies. All human rights practitioners must address concerns about the problematic relationship between legal discourse and social movements. These are challenges which must be addressed in specific contexts, but do not constitute serious challenges to the legitimacy of the enterprise of ESC rights litigation.

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There are also predictable challenges associated with a nascent practice in a new area of human rights. Like others working in new areas of rights practice, we take novel claims forward, even when institutional capacity may be lacking, in the hope that such capacity will emerge in response to new claims. We advance new types of legal claims using old legal constructs, invariably confronting a gap between the existing framework of law and the nature of the claims we are advancing. These are the kinds of challenges one expects in a new area of human rights practice, however.

Beyond the challenges of human rights practice in general, and of new fields of practice in particular, however, we are confronting, in ESC rights practice, a more serious challenge, more in the order of what I would call a foundational ‘crisis’. While a disconnect between the legal framework in which we advance ESC rights claims and the nature of the claims themselves may be understandable in light of the relative novelty of ESC rights practice, what is more troubling is the absence of shared methodology or commitment to challenging this disconnect. A fully elaborated legal framework is certainly not the pre-condition of ESC rights practice. Such a framework ought to emerge from the practice of claiming and adjudicating rights claims, rather than being set out in advance of such claims. But one would expect ESC rights practice to be founded upon a shared commitment to the possibility and the value of an adequate legal framework for these rights to be claimed and adjudicated. Instead, what we see in ESC rights jurisprudence and practice is a perpetual uncertainty about the legitimacy of such a framework and a chronic ambivalence about the value of asserting ESC rights advocacy as a form of legal practice. The project of elaborating an over-arching framework for the adjudication of ESC rights claims is too often marginal, tentative and incoherent.

I am drawn, by way of analogy, to the use of the term ‘crisis’ by the German philosopher Edmund Husserl in his last work, *The Crisis of the European Sciences*.<sup>2</sup> In that work, Husserl attempted to define and address what he and others saw as a crisis created by the gulf between two increasingly irreconcilable paradigms of science and knowledge in Europe in the 1930s. On the one hand, there was a more traditional notion of absolute or universal truth that had been discredited for having ignored the subjective and historical nature of

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<sup>2</sup> Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (translated by D. Carr) (Northwestern University Press, 1970). Originally published in German in 1937.

knowledge and scientific practice. On the other hand was the view that subjectivism and historical relativity made the very idea of objective knowledge illusory. The way forward, in Husserl's view, was a more rigorous understanding of the 'practice' of knowing: how human beings as subjects collaboratively create the possibility of knowledge through an active relationship with the material world. It seems to me that we are in need of a similar grounding of the conceptual basis for ESC rights in a more rigorous understanding of ESC rights as 'practice', as a collaborative project linking social and economic policy to human rights norms and values, grounded in the act of rights claiming, rather than in predefined legal constructs.

ESC rights practice brings to the fore methodological issues that may be more hidden in other forms of human rights practice. Subjective values and historical relativism are certainly components of civil and political rights as well, but ESC rights often demand more rigorous understanding of rights as 'relational', tied to collaborative historical action, linked to the assertion of social values and collective aspirations, and embedded in material aspects of life. ESC rights thus place at the centre of the legal project the question of how to ground objectivity and adjudication in areas of social life in which collaborative action, social and historical context, and material and social wellbeing are central. They constantly challenge us to reconcile the notion of objective adjudication with the subjective aspects of rights claiming as a form of historical agency.

Just as Husserl and others in the mid-war period struggled with the legitimacy of science as a project or collective accomplishment, capable of recognising its subjective and historical aspects without entirely abandoning the notion of objective knowledge, the human rights movement is challenged, in dealing with ESC rights claims, to place the subjective act of claiming rights within a legal framework for adjudicating them. Confronted with the effects of globalisation and historic assaults on the role of the state in safeguarding social values against the effects of market forces, we seek out a normative framework of legal rights in the field of social and economic life as a collaborative humanitarian project which affirms, rather than subverts, historical agency.

The nature of the ESC rights crisis was evidenced in early discussions at the Open Ended Working Group mandated by the UN Commission on Human Rights to consider options

for the elaboration of an Optional Protocol to the ICESCR. Rather than proceeding on the assumption that at the core of ESC rights, as with all rights, is a notion of individual dignity and citizenship which relies, in part, on rights holders having access to adjudication of rights, discussions about claiming ESC rights tended to commence with an entirely different premise. Support for a complaints procedure was seen by some states to be contingent on a pre-existing, universal framework for predetermining the outcome of complaints. Interpretive uncertainty or openness and the idea of placing a subjective voice at the centre of such interpretation was seen as somehow problematic rather than essential to ensure an appropriate jurisprudential framework. Canada and some other countries suggested that the rights must be better defined, even thirty years after the Covenant came into force, before claimants should be heard. The value of rights claiming was thus seen as dependent on identifying components of ESC rights, by way of predefined legal frameworks, which may reduce the impact of a subjective voice or of particular circumstances in the the determination of the scope and meaning of the rights.

It is difficult to answer questions about the value of a complaints procedure raised in this context because the value of participation of rights claimers is, from a practitioner's standpoint, more of a presupposition of human rights practice than something which ought to be justified or proven. It reminds me of a recent hearing before a human rights tribunal into alleged discrimination against a woman on social assistance in which I was involved. When the claimant became ill, one of the lawyers in the case asserted that 'We don't need to hear from her', meaning that the objective facts to which she would testify could be entered in other ways. But of course, the claimants 'voice' and particular perspective on issues of dignity and equality would be silenced. It was difficult to come up with a quick response to justify what should be central to the entire exercise of rights adjudication.

Of course, as practitioners we are also sceptical about the role of law and courts in ESC rights practice. We have all had the experience of seeing claimants sitting voiceless in court, while lawyers and judges debate their fate, using concepts and terms which have little resonance with their lived experiences. We see how claimants often must relinquish their voice at the critical moment at which their claim receives a hearing, so that lawyers and judges may control the dialogue. The social realities and perspectives of rights claiming constituencies, rather than being considered the starting point of the analysis, are too often

displaced by judicial deference to the assumed reasonableness of the decision-making apparatus of the state or the market. A systemic displacement of the claimant from the interpretation of rights, which often seems to be the precondition of adjudication of legal rights claims, is at the heart of our ambivalence about the project of ESC rights as a legal practice.

When I suggest that a chronic ambivalence about the role of law within ESC rights advocacy constitutes a ‘crisis’, I am not, therefore, suggesting that our misgivings about the problems of rights claiming in a judicial context are misguided. On the contrary, I believe that ESC rights practice, and the legal frameworks that are proposed for ESC rights adjudication, ought to prioritize these concerns. Commitment to ESC rights practice is not premised on a naïve faith in virtues of legal discourse or judicial remedies. On the contrary, we need to realize that striving to ensure that the active, rights claiming constituencies and the historical struggles that inform social rights values are *not* displaced from the legal analysis will remain a constant theme and struggle within ESC rights practice.

Concerns about the centrality of rights claiming to the evolving understanding of rights are particularly important in ESC rights practice because so much ESC rights jurisprudence, particularly at the UN Committee on Economic, Social and Cultural Rights (CESCR) has been developed in the absence of claimants and adjudication. There has, as a result, been a tendency to develop and rely on legal frameworks that seek out a foundation for adjudication *without* the claimant’s voice, free of subjective values and historical context. Identifying categories of state obligations and violations of the rights which do not require reference to unique situations of particular claimants or constituencies have often, for this reason, been seen as a priority. Now that we have an emerging practice of ESC rights, there is an opportunity to reorient our understanding of legal frameworks around the central act of claiming and adjudicating rights. This will mean allowing history and social context to infuse the legal framework, rather than trying to exclude it.

### 3. The Misguided Search for Universal, Transcendental Components of ESC Rights

While it has been affirmed in documents such as the Maastricht Guidelines<sup>3</sup> that not only ESC rights but also civil and political rights, are progressively realised and resource-dependent, ESC rights jurisprudence, in seeking out a basis for objective adjudication of claims and violations modelled on civil and political rights, has tended to seek conformity with a more rigid, ahistorical model of legal rights. Since explicit acknowledgement of progressive realisation is unique to the ICESCR among human rights treaties, it has been assumed that legal enforcement of ESC rights may rely on identifying those components of ESC rights which are immune from progressive realisation. The project of creating a legal framework for ESC rights has thus been confused with a quest for ahistorical universals and absolutes. The CESCR, the Maastricht group and others have sought to identify components of ESC rights in which universal standards can be assessed independently of historical realisation, individual circumstances, subjective values of claimants, resources available to the state and competing rights of other groups. Affirming the legal enforceability of ESC rights has thus been associated with a project of disaggregating rights into components and analysing ‘obligations’ of states independent of particular relationships with rights claiming constituencies or contextual adjudication of particular claims. The CESCR has seemed to suggest that only ‘certain components’ of ESC rights or certain obligations ought to be legally enforceable.<sup>4</sup>

The notion of ‘minimum core’ content of ESC rights is often linked to this enterprise of extracting absolutes from the content of ESC rights. Minimum core is posited as a quantifiable or objectively ascertainable standard that can be applied universally, either as a

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<sup>3</sup> See, for example, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997, para. 8, in which it is stated that civil and political rights are also subject to progressive realisation.

<sup>4</sup> See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) (“General Comment No. 14”) at para. 1 and f.n. 1, referring to ‘certain components’ of the right to health which are legally enforceable, and giving the example of the right to non-discrimination in access to health services, goods and facilities as an enforceable component. This seems an extremely restricted notion of a legal framework for the enforcement of ESC rights.

basis for a *prima facie* finding of a violation<sup>5</sup>, or more radically, as a standard for identifying violations of ESC rights that is entirely independent of historical development, unique circumstances or available resources.<sup>6</sup> The concept of a universal minimum obligation associated with compliance by states, which has little resonance in civil and political rights jurisprudence, has thus risen to the fore in ESC rights jurisprudence in response to a concern that historical relativity is a particular ‘problem’ in ESC rights. A defensiveness about the concept of progressive realisation as a legally enforceable standard has led the CESCR, for example, to suggest that it is the minimum core content of the rights which will be enforceable by courts when these rights are incorporated into domestic law.<sup>7</sup>

The notion of transcendent universal components of ESC rights, independent of progressive realisation may have provided some reassurance that at least some components of ESC rights conform to traditional ideas of rights as universally enforceable, objective rules. However, this approach now tends to deprive ESC rights jurisprudence of the benefits of a more modern conception of human rights, not as transcendent rules but rather as historically grounded values linked with active social citizenship and tied to the value of democratic and inclusive governance. Paradoxically, civil and political rights jurisprudence, because it has been more grounded in rights practice, is now often friendlier to the historical and subjective aspects of rights claiming than the rigid notions of limited justiciability that appear in some ESC rights jurisprudence. It is well established in civil and political rights jurisprudence that rights must be adjudicated in historical contexts and must incorporate an

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<sup>5</sup> Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), (‘General Comment No. 3’), at para. 10.

<sup>6</sup> While General Comment No. 3 does not suggest that minimum core is independent of available resources, later General Comments do. See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health*, (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) para. 47. The Maastricht Guidelines also state that ‘minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.’ (*supra*, at para. 9)

<sup>7</sup> See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999) (‘General Comment No. 12’) at para. 34. ‘The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant.’ Also, in General Comment 14, *supra*, para. 60: ‘Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.’

understanding of the subjective component of dignity related interests. There is an understanding that the dialectical tension between subjective claiming and impartial adjudication of claims is central to human rights. The fact that human rights rely on values that may be historical and subjective in nature is no longer seen as undermining the idea of rights as legal practice. Rather, it is recognized that the ongoing claiming and adjudication of rights in a legal framework allows human rights to emerge as collaborative, ongoing accomplishment that infuses the application and interpretation of law with human rights values.

In its early jurisprudence under the *Canadian Charter of Rights and Freedoms* (the *Charter*), the Supreme Court of Canada seemed to affirm this modern view of rights when it rejected what it labelled ‘rigid formalism’ in favour of a ‘flexible and nuanced’ framework that permits historical evolution of the Court’s and society’s understanding of rights. The Court has recognised that the analysis of the dignity interest in equality claims must adopt the perspective of the claimant, and that this analysis must have both subjective and objective components. The adjudication and interpretation of the right must incorporate both the individual circumstances and traits of the claimant and the history of the constituency to which the rights claimant belongs.<sup>8</sup> Courts will consider both positive and negative obligations associated with the right to equality, and will determine positive measures in light of available resources.<sup>9</sup> Thus, within the evolving understanding of the idea of justiciability as it is understood in the contexts of human rights more broadly, there is no longer a perceived need to identify components of rights which are independent of historical relativity or subjective values. Far from restricting adjudication to components of rights that are free of any historical relativity or subjectivity, modern adjudication of substantive rights claims focuses on the subjective and historical dimensions as critical to a proper understanding and application of human rights norms and values.

Within this framework it is not helpful in advancing the justiciability of ESC rights in litigation to suggest that adjudication of these rights is in any way premised on an ability to define their universally applicable minimum core content. It seems entirely counter-

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<sup>8</sup> *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at paras. 3, 59.

<sup>9</sup> See, for example, *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624.



productive as a litigation strategy, in fact, to suggest to a court that it must first determine what everyone is entitled to, in all contexts and at all times, in order to determine whether an individual circumstance that is before the court constitutes a violation of a right. A requirement that universally applicable entitlements must be determined in advance of the adjudication of particular claims places an insuperable obstacle upon claimants of ESC rights. It is a common strategy of respondents, therefore, to argue that courts must resolve the universal questions in order to adjudicate the particular, and on this basis to submit that courts are not competent to adjudicate ESC rights claims. In claims related to the right to an adequate standard of living in Canada, for example, governments have routinely argued that the inability of experts to agree on a clearly defined poverty line of universal application is proof that courts should not wade into this area of policy.<sup>10</sup> Similarly, in cases on the right to health under the *Canadian Charter*, governments have argued that adjudicating such a right would require courts to ‘micromanage’ the healthcare system by determining in precise detail which health services are constitutionally required and in what circumstances.<sup>11</sup>

We argue on behalf of claimants, however, that there is no need for courts to define what is constitutionally required in every circumstance in order to adjudicate a particular claim. The cases that have been before the courts have been clear enough for the courts to make findings in those particular circumstances. From these findings emerge principles which it is up to governments to apply in the development of policies of more universal application. The ‘value added’ in the adjudication of particular claims is not to assign to the court the task of designing universal minimal entitlements. Rather, rights adjudication must be based on the individual context of each claim and focus on the underlying interests that are meant

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<sup>10</sup> This has always been a primary strategy of government lawyers when they have cross examined me in cases in which I have filed an expert affidavit on poverty as a ground of discrimination or on the inadequacy of government responses to poverty or homelessness. I am almost always asked in cross-examination to agree that there is no universally agreed upon measure of what constitutes poverty or the minimal requirements of an adequate income. Lawyers for respondents to ESC rights claims, of course, have a strategic interest in shifting the focus from qualitative and contextual aspects of compelling cases of violation of dignity and security to the more abstract questions of absolute statistical measures and indicators. The effect of the ‘universalising’ discourse is to displace the focus on what has occurred to a particular claimant or constituency, in a particular context, which no expert would have difficulty agreeing to be a violation of dignity and human rights.

<sup>11</sup> These arguments have been advanced by governments in cases such as *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Anton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; and *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

to be protected. An attempt to develop minimum standards of universal application would work against this contextual nature of rights adjudication.

Ironically, trying to restrict the justiciable component of ESC rights to minimum core aspects of the right, usually advanced as a strategy to avoid questions of allocation of resources and competing demands which are seen to be beyond the competence of courts, is actually more likely, rather than less likely, to push courts beyond their perceived competence. Courts and other adjudicative bodies correctly shy away from determining issues in the abstract, such as defining the minimum entitlements to housing or healthcare which would apply to those who are not party to a particular claim. Courts and tribunals perceive their institutional competence not in terms of determinations of universal entitlements to goods or services but rather, in terms of the role of adjudication itself. In other words, courts consider themselves competent to hear and adjudicate rights claims in the particular social and historical context that is presented to them, reviewing decisions and policy against the rights of particular parties or constituencies that have appeared before them. Effective ESC rights advocacy appeals to and relies on this understanding of judicial competence by advancing ESC rights claims as contextual in nature, and based on a particular relationship between a rights claiming constituency and the state which can be adequately presented in evidence to the court.

By contrast, a minimum core approach to justiciability tends to divorce rights claims from individual circumstances and unique interests that may be at stake. It shifts the focus of a claim from the particular relationship between a rights claiming community and government to a more abstract debate about quantifiable universal entitlements and minimum obligations of governments to all citizens. Courts are understandably reluctant to engage in this kind of debate. The South African Constitutional Court demonstrated this reluctance when it found that determining minimum core was beyond that Court's competence in adjudicating the right to housing in the *Grootboom* case or the right to health in the *Treatment Action Campaign (TAC)*,<sup>12</sup>. The court's reluctance to move beyond its perceived competence did not limit the scope of the protection, however, but rather ensured that all aspects of ESC rights,

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<sup>12</sup> *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C); *Minister of Health and Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC).

including those which are historically relative and subject to available resources, would be subject to judicial protection and remedy.

The concept of minimum core, of course, need not be equated with the notion of ‘justiciable components’ of ESC rights. When the term was first introduced by the CESCR in General Comment No. 3 of the CESCR, it referred only to an onus on states to show 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, its minimum core obligations to provide essential levels of the rights.’<sup>13</sup> In my view, however, the allocation of onus of proof in such cases should not rely on any formal reference to minimum core content. The onus should be on the state to show that resources have been allocated reasonably. This is consistent with the adjudication of positive rights claims under human rights legislation, such as those related to the accommodation of disabilities, where it has always been clear that the onus is on the respondent to establish a defence of reasonableness or undue hardship in light of available resources.<sup>14</sup> This structure has been carried through in claims under the *Canadian Charter* where the onus remains on respondent governments to justify reasonable limitations on rights, including limitations based on scarce resources or competing demands.<sup>15</sup> It is important, in my view, that at this early stage of ESC rights jurisprudence, we argue consistently that in all ESC rights claims related to progressive realisation or the allocation of resources, the onus must be on the state to establish that available resources have been allocated in a manner that is consistent with the right of the claimant.

I share the concern expressed by some advocates in South Africa, however, that ESC rights must affirm more than an entitlement to a reasonable policy.<sup>16</sup> As noted in the intervention of the Community Law Centre and the Institute for Democracy in South Africa in the Treatment Action Campaign, conflating right and duty such that the right is limited to the

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<sup>13</sup> General Comment No. 3, *supra* at para. 10.

<sup>14</sup> On a practical level, there is some leakage in this framework in equality rights adjudication. An allegation that a right has been violated by failure to take necessary positive measures to accommodate a disability may be informed by a preliminary assessment on the part of the claimant that such measures would have been reasonable. Still, it is important to ensure that in the final analysis, the burden of legal proof remains on the respondent to show reasonableness.

<sup>15</sup> See, for example, *Eldridge*, *supra* note 11; *Newfoundland (Treasury Board) v. N.A.P.E.* [2004] 3 S.C.R. 381 at paras. 63-76 and 74-75.

<sup>16</sup> See, for example, Chapter 5 in this volume.

demand that the state discharge a particular duty imposed upon it may displace the appropriate focus on the rights at stake for claimants and the remedies to which they are entitled<sup>17</sup>. Reasonableness review ought not to displace the starting point of the adjudication of ESC rights claims from the rights of claimants and the interests at stake in particular circumstances onto the decision-making of governments. Rather than considering whether a decision seemed reasonable from the perspective of the decision-maker – which could be done without ever hearing from a claimant - the starting point must be the effect of the decision on the rights and dignity interests of the claimant. This is the essence of the value added in human rights adjudication – that the decisions of government are measured not against their own standards of decision-making, but rather, against the rights of citizens.

The South African Constitutional Court has attempted to ensure that reasonableness review will include consideration of the dignity interests of claimants and the nature of the interest at stake. It remains to be seen, however, whether reasonableness review in South Africa may nevertheless tend to displace the unique circumstances of claimants and their entitlement to a remedy from the central place these considerations ought to occupy in the adjudication of ESC rights claims.

Certainly in the context of social rights claims advanced in Canada as substantive equality claims, we frequently encounter the problem of an unspoken judicial ‘presumption of reasonableness’ in assessing resource allocation decisions, which tends to undermine the central place which the Court has stated is to be accorded the rights claimant and the interest that is meant to be protected in the adjudication of *Charter* rights. These ongoing tensions and struggles, linked to the standard of review, the place of deference and the onus of proof, remain critical to the evolution of ESC rights practice in many different legal contexts.

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<sup>17</sup> See, for example, the Submissions of The CLC AND IDASA in *Minister Of Health And Others v. Treatment Action Campaign And Others* (Constitutional Court Of South Africa, Case Cct8/02) online at [www.communitylawcentre.org.za/ser/docs\\_2002/TAC\\_MTCT\\_Case\\_Heads\\_of\\_Arguments.doc](http://www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc)

## 4. The Typology of State Obligations

In addition to the idea of a minimum core component of ESC rights, the other conceptual framework which is often linked to the adjudication of ESC rights claims is the typology of state obligations – the ‘respect, protect, fulfil’ typology, and its variations. While these categories certainly have utility in explaining the various dimensions of obligations of governments in relation to rights, a predominant focus on state obligations that has become unique to ESC rights jurisprudence also has serious drawbacks in terms of ESC rights practice. Like the concept of minimum core content, the obligations typology demonstrates a tendency to displace the rights claimant from the understanding and application of ESC rights. Rather than emphasising the central role of rights claiming in our evolving understanding of rights and obligations and the importance of the perspective of the claimant in assessing whether the state has met its obligations, the obligations typology tends to adopt the perspective of the state.

Shifting the focus of legal analysis from the nature of claimants’ rights to the nature of state obligations may often serve to cover up systemic patterns of injustice which are only apparent from the claimant’s perspective. In the field of disability rights, for example, the obligation of the state to install wheelchair ramps and elevators in public buildings would be categorized as an obligation to ‘provide’, within the category of the obligation to ‘fulfil’. People with disabilities, however, will point out that this ‘provision’, requiring an allocation of resources, is only made necessary by the fact that buildings were designed as if people with disabilities did not exist. Defining the right only in terms of the nature of the state obligation does not challenge the pattern of social exclusion that lies behind the need for positive measures to fulfil or to provide for the right. The understanding of the nature of the interest at stake, the reasonableness of a policy, and the appropriate remedy, needs to start from the perspective of the claimant of the right and an understanding of the underlying interest protected by the right.

It is for this reason that the typology of state obligations seems somewhat discordant with the domestic practice of rights, at least in the Canadian context. In domestic advocacy, we emphasise that courts ought to interpret and apply s right in a manner that is sensitive to the social and historical context in which the claim is advanced. We promote a holistic, rather

than a disaggregating approach to rights, so as to encourage an approach that is informed by the values behind fundamental human rights and the recognition of the inter-dependence of rights.

Formal categories or typologies of state obligations often work against a more contextual and value-informed approach to interpretation and application of ESC rights. Clearly, government decision-making and obligations must become a critical issue in the adjudication of ESC rights, but it is important that the nature of the obligations and the reasonableness of the decision-making is viewed through the lens of the rights claims, understood from the standpoint of particular claimants in particular circumstances and through a purposive approach to the right that is to be protected. This is the critical difference between a rights based approach and a mere review of government policy in relation to agreed upon obligations and commitments.

The CESCR's suggestion that only certain 'components' of ESC rights will necessarily be subject to legal remedy raises the alarming possibility that obligations of fulfilment, for example, may somehow be excluded from effective remedies, or from a complaints procedure under the ICESCR. This kind of misuse of the obligations typology to restrict admissibility of critical rights claims, regardless of the interest at stake for claimants, clearly has discriminatory consequences for those groups whose unique needs, disadvantaged status, or historical patterns of exclusion, leaves them in a situation in which positive measures are required to ensure the equal enjoyment of ESC rights.

While some ESC rights practitioners find the obligations typology useful, my own experience is that applying these disaggregations of rights to concrete claims is largely a matter of trying to put Humpty Dumpty together again. It is unclear to me, for example, how Canadian courts might have situated some of the central social rights claims such as the challenge to the refusal to fund interpreter services for the deaf and hard of hearing in *Eldridge*, the challenge to grossly inadequate social assistance provided to those under thirty years of age not participating in an employment program in *Gosselin*, or the challenge to a decision not to pay out on a pay equity award in *N.A.P.E.*<sup>18</sup> These claims, like most

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<sup>18</sup> These cases are discussed below.

substantive social rights claims, tend to bridge different categories of obligations. As such, it is difficult to see how the typology of obligations is of much assistance in developing a framework for their adjudication.

Where it is clearer which category of obligation particular claims invoke, judicial bias in favour of enforcing certain types of state obligations over others, particularly the preference for enforcing the obligation to respect rights over the obligation to provide for the fulfilment of rights, tends to lead to discriminatory consequences in the adjudication of ESC rights claims. This was demonstrated recently in the decision of the Supreme Court of Canada in the *Chaoulli* case<sup>19</sup>. Here the Court ruled on an allegation that unreasonable waiting times in the public health system for necessary health services in Quebec violated the right to life, where the state prohibited private health insurance whereby those able to pay might have access to alternative, private services in less time. While three of the judges held that “the *Charter* does not confer a freestanding constitutional right to health care”, they nevertheless held that the prohibition of private health insurance violated the right to life, liberty and security of the person in section 7 of the *Canadian Charter* by denying those who can afford or qualify for such insurance access to adequate health services. A majority of four justices held that the prohibition of private health insurance violated the right to life and personal security in the *Quebec Charter of Human Rights and Freedoms*. Those unable to pay for private healthcare were simply left to have their right to life and security of the person violated in the public healthcare system, without any remedy. A focus on the nature of the state obligation involved rather than the interest protected, and a bias in favour of judicial enforcement of a negatively oriented obligation of the state not to interfere with the ability of the rich to access healthcare over a positively oriented obligation to provide services necessary to the right to life and security of the person, led to a blatantly discriminatory application of rights by the Supreme Court of Canada. The Court provided a remedy for the rich and those without disabilities, while the poor and those with disabilities, who cannot gain access to private health insurance, were left without any benefit of *Charter’s* protection. As noted by Justices’ Binnie and Lebel in a dissent:

Those who seek private health insurance are those who can afford it and can qualify for it. They will be the more advantaged members of society. They are differentiated from the

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<sup>19</sup> *Supra.*, note 14.

general population, not by their health problems, which are found in every group in society, but by their income status. We share the view of Dickson C.J. that the *Charter* should not become an instrument to be used by the wealthy to “roll back” the benefits of a legislative scheme that helps the poorer members of society.<sup>20</sup>

If the typology of obligations were similarly applied to restrict access to a complaints procedure under the ICESCR to claims invoking particular types of obligations, the result would be similarly catastrophic for a coherent, inclusive approach to ESC rights. It would also be virtually unworkable. I cannot imagine, for example, how the CESCR would determine as an admissibility issue, whether the *Gosselin* case, challenging grossly inadequate social assistance to those under thirty, fell in the category of minimum core content of the right to an adequate standard of living, or if it related to the obligation to respect, protect or fulfil that right. At any rate, it is offensive to the dignity interest at the heart of human rights to suggest that access to a remedy for hunger or homelessness could depend on whether the necessary remedy requires the state to stop interfering, to provide necessary protections, or to facilitate or provide for what is needed. Conceptual typologies that, at best, illustrate the various dimensions of rights and obligations, must not be permitted to restrict access to adjudication and remedies to ESC rights.

## 5. Equality Rights and ESC Rights: Toward Convergence

An important aspect in CESCR jurisprudence which does recognise the importance of social context and the situation of rights claiming constituencies is the Committee’s consistent focus on the situation of vulnerable and marginalised groups as a lens through which to assess state obligations. It suggests the value of a convergent approach to legal frameworks governing ESC rights with those that have developed in substantive equality jurisprudence. Both frameworks affirm the idea that the obligations of governments must be assessed in light of the specific circumstances and histories of disadvantaged or marginalised groups. Both recognize the role of rights claiming constituencies as active agents for democratic governance and the rule of law. Where these voices are silenced or denied a hearing, legal principles and rights are not applied coherently or consistently,

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<sup>20</sup> *Chaoulli*, *supra* note 12, at para. 274, per Binnie and LeBel, JJ.



undermining the concept of universality and the rule of law as framing the interpretation and application of all human rights.

The CESCR's elaboration of obligations in relation to non-discrimination and equality are supportive of a convergent approach to equality and ESC rights. General Comment No. 5 on the rights of persons with disabilities, for example, recognises that positive measures are required to 'achieve the objectives of full participation and equality within society for all persons with disabilities' and that this 'almost invariably means that additional resources will need to be made available for this purpose.'<sup>21</sup> Similarly, General Comment No. 14, on the Right to Health describes the obligation to eliminate discrimination against women as requiring significant positive measures involving allocations of resources and strategies pursued over time:

To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.<sup>22</sup>

In these and similar passages, the CESCR adopts an expansive approach to the right to non-discrimination which subsumes the substantive enjoyment of ESC rights and places positive obligations on governments, including those which would fall within the category of progressive realisation.

However, while General Comments from the CESCR have strongly affirmed these substantive obligations in relation to non-discrimination and equality as 'programmatic', there remains a curious resistance in CESCR jurisprudence to affirming substantive equality

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<sup>21</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with disabilities*, (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995) at para. 9.

<sup>22</sup> General Comment No 14, at para. 21.

as a legal norm through which these sorts of positive obligations would be subject to adjudication and enforcement. The CESCR has described the right to non-discrimination as ‘subject to neither progressive realisation nor the availability of resources’<sup>23</sup> and has placed it in the category of ‘minimum core’ obligations.<sup>24</sup> The legal right to non-discrimination in respect of the right to health, despite the programmatic obligations described in General Comment No. 14 with respect to equality for women and other groups, is described as being of immediate effect.<sup>25</sup> The CESCR thus seems to suggest a distinction between equality as a legal norm that is subject to immediate effect and social and economic equality as a programmatic obligation of states, which may be subject to progressive realisation.

Perhaps this tension in the jurisprudence can be resolved by distinguishing between legal protection from discrimination, which must be of immediate effect, and the provision of remedies, which may be subject to available resources. Ensuring that disadvantaged groups have access to adjudication and to legal remedies to non-discrimination would thus be an obligation of immediate effect, even though the determination of appropriate remedies would be subject to available resources and may involve remedial action over periods of time. Such a distinction, however, would require a more coherent approach in CESCR jurisprudence to the obligation to provide effective remedies to substantive ESC rights involving allocation of available resources. The CESCR would need to unequivocally abandon the regressive notion that the types of remedies that are subject to legal enforcement are those that are independent of resources and linked to minimum core content of rights.<sup>26</sup>

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<sup>23</sup> Committee on Economic, Social and Cultural Rights, *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999): ‘The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.’

<sup>24</sup> See, for example, General Comment No 15 at para. 37(b) where ensuring the non-discriminatory right of access to water for disadvantaged and marginalised groups is defined as part of the minimum core obligations which are of immediate effect: Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003).

<sup>25</sup> General Comment No. 14, *supra* at para. 30.

<sup>26</sup> The Committee suggests both that non-discrimination is part of the core content of rights and also that there is particular obligation to prevent discrimination with respect to the core obligations associated with the right. See, for example, General Comment No. 12, *supra*, at para. 19.

In Canada, where we do not have the benefit of explicit constitutional protection of ESC rights, a primary vehicle for the protection of ESC rights has been through our understanding of the right to substantive equality as a social right. When equality seeking groups fought for a framework of ‘equality rights’ in the *Canadian Charter*, as opposed to a more formal right to non-discrimination, they frequently made explicit references to ESC rights as critical components of the right to equality.<sup>27</sup> Substantive equality thus tends to rely on the support of ESC rights to identify the central interests that must be addressed by positive measures. While courts in Canada have frequently failed to honour the expectations of equality seeking groups that fought for a substantive right to equality in the *Charter*, it is clear that in the Canadian context, a convergence of equality rights and ESC rights is really at the heart of the notion of substantive equality as a legally enforceable right.

My sense of the emerging jurisprudence in South Africa, where ESC rights are constitutionally protected as justiciable rights, is that a similar convergence has occurred there from the opposite direction. In the *Grootboom* and *TAC* cases<sup>28</sup>, the court focused its analysis of reasonableness on the requirements of decision-making in relation to the needs of disadvantaged and marginalised groups whose rights are at greatest risk. This implicit equality framework provided a lens through which to elaborate the content of ESC rights and the role of courts in reviewing government programmes and resource allocation decisions in relation to the progressive realisation of the rights. In other countries, a substantive approach to the right to life may similarly converge with notions of equality, dignity and social rights and thereby engage similar issues of reasonable resource allocation and historical fulfilment of rights. The starting point or the precise constitutional provisions may not actually be critical as long as there is a general convergence of approaches recognising the interdependence of rights and affirming the important role of courts in overseeing the relationship between the rights of marginalised groups and governmental decision-making.

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<sup>27</sup> Bruce Porter, “Twenty Years of Equality Rights: Reclaiming Expectations” (2005) 23 Windsor Yearbook on Access to Justice pp. 145 – 192.

<sup>28</sup> See *supra*, note 12.

Equality rights analysis must find its starting point in particular rights claiming constituencies and their historical and social situation. It cannot start from the standpoint of the state's obligations or from a requirement of a reasonable programme considered outside of the context of the rights of protected individuals or groups. This may be a benefit which a substantive equality framework brings to ESC rights adjudication. If, for example, the *Grootboom* claim in South Africa had been advanced as an equality claim, the fact that the community affected was made up predominantly of Black women and their children, was politically powerless, and had a history of oppression and struggle for security and dignity would be directly at issue in establishing the basis for a rights claim. A constituency acting as an historical agent for social justice and equality provides constitutional legitimacy to an equality claim.

On the other hand, a claim to the right to adequate housing *per se*, if it were not viewed through an implicit equality lens, may invoke no similar requirement to frame the legal analysis around the characteristics or the historic struggles of the group. The fact that the group is homeless or denied some entitlement that is a component of the right would be enough to establish a claim of a violation of the right to housing, regardless of the history of the group or its place in society. By way of reasonableness review, however, the Constitutional Court has read into the ESC rights framework consideration of the marginal social and historical position of the affected group. The reasonableness of government's efforts to progressively realise the right to housing is assessed in relation to the dignity interests of the group claiming the right and in light of the needs of those whose rights are most at risk. This convergence of review of reasonable allocation of resources with an implicit equality analysis, rooted in historical struggles, ensures that within ESC rights legal frameworks, the historical and social context of the rights claimants and the social movements that are linked to them can be centrally placed in the adjudication of ESC rights.

While a convergence with an equality framework enhances ESC rights practices, there are also perils associated with reducing ESC rights to an equality framework. Equality analysis, where it is not properly informed by the recognition of ESC rights, may tend to formalise the relationship between individuals and groups in terms of personal characteristics. The historical and social context of relationships between individuals, groups and social movements, and the broader patterns of injustice and social exclusion linked with systemic

violations of ESC rights may be lost to a focus on discriminatory treatment. The central issue of socio-economic disadvantage or oppression and its link with dignity interests may be displaced by a focus on issues related to prejudice and stereotyping.

The dangers of a formalized equality analysis, divorced from ESC rights, has been manifested in some recent decisions in social rights/equality cases in Canada.

In the long-awaited decision in the first explicit ESC rights claim under the Canadian Charter, the *Gosselin*<sup>29</sup> case, for example, the Supreme Court of Canada was unwilling to link equality even with the right to a level of social assistance necessary for basic requirements of security and dignity. Louise Gosselin challenged grossly inadequate welfare rates in Québec which were imposed on employable recipients under the age of thirty who were not enrolled in workfare or training programmes. A contested question in the evidence was whether in fact there was any realistic access to workfare or training programmes where the regular rate of assistance applied. Gosselin argued that treating younger recipients differently from others, subjecting them to the indignity of destitution, hunger and homelessness, violated the right to equality in section 15 of the *Canadian Charter* and further, that the deprivation of necessary assistance violated the right to ‘security of the person’ under section 7 of the *Charter*.

At trial a decade earlier, Ms Gosselin’s claim had been dismissed on the basis that social and economic rights are progressively realised ‘policy objectives’ that are not justiciable.<sup>30</sup> The court’s characterisation of social and economic rights was criticised by the CESCR in its 1993 review of Canada.<sup>31</sup> Fortunately, in finding against Ms Gosselin, the majority of the Supreme Court of Canada refrained from making any similar pronouncements on the status of social and economic rights under the Charter. Indeed, a minority decision, written by Justice Louise Arbour and supported by Justice L’Heureux Dubé, affirmed that the right to security of the person places positive obligations on government to ensure access to an adequate level of social assistance, while the majority left open the possibility that such a

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<sup>29</sup> *Gosselin v Quebec (Attorney General)*[2002] 4 S.C.R. 429.

<sup>30</sup> *Gosselin v Québec (Procureur Général)*, 1992, at 1676–1677.

<sup>31</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* UN Doc E/C.12/1993/5 (10 June 1993).

‘novel’ interpretation of section 7 of the *Charter* might be adopted in a future case. This was a significant victory.

The majority decision on the equality claim in *Gosselin*, written by Chief Justice McLachlin, however, sends a very negative message for the future of substantive equality claims that converge with ESC rights. The majority adopted what Martha Jackman refers to as a presumption of ‘reasonableness’ or ‘innocence’ in relation to governmental policy choices in social and economic policy.<sup>32</sup> This effectively displaces the claimant’s voice and any appreciation of social and historical context in which the claim is advanced. The Chief Justice’s reasoning revolves around an assumption that Ms Gosselin’s non-participation in training and work programmes was ‘because of her own personal problems and personality traits’ and that the government ‘did not force the appellant to do something that demeaned her dignity or human worth’ since the policy was designed to encourage young people to participate in work. The assessment of evidence was thus framed by assumptions about reasonable policy-making by governments which was given priority over the perspective of the claimant. Justice McLachlin believes that ‘falling through the cracks’ because of personal problems or character traits does not engage basic human rights or the protection of dignity.<sup>33</sup> Unless the policy seems unreasonable from the standpoint of governmental decision-makers, it cannot, in her view, affect the claimant’s dignity. Thus, the Court comes to the absurd conclusion that being forced to rummage through garbage, to turn to prostitution to survive, or to live in an unheated apartment in Montreal’s cold winter does not demean a person’s ‘dignity’.

According to the majority in *Gosselin*, the mere denial of critical benefits such as social assistance does not engage the dignity interest if the denial is not linked with stereotype and prejudice of the sort that non-discrimination provisions, in the view of the Court, are meant to address. Thus, while the majority appeared to accept the justiciability of social rights claims under the *Charter*, it restricted the scope of the dignity interest under equality rights analysis in a manner which tends to sever the right to equality from substantive ESC rights.

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<sup>32</sup> Martha Jackman ‘Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases’ in S. Boyd, G. Brodsky, S. Day and M. Young (eds.) *Poverty: Rights, Social Citizenship, and Governance* (Vancouver: University of British Columbia Press, forthcoming).

<sup>33</sup> *Ibid.* at para. 52.

Poverty, according to the majority decision in *Gosselin*, does not count as an assault on dignity.

In a more recent decision, *Newfoundland (Treasury Board) v N.A.P.E.*<sup>34</sup>, the Supreme Court found that the decision of the Newfoundland government to renege on a significant pay equity award of \$24 million owed to public sector healthcare workers under a collective agreement discriminated on the ground of sex and thus violated the equality guarantee in section 15. While the Court found in that case that the failure to follow through on positive measures to redress systemic pay inequality of women violated the guarantee of equality and represented an assault on the dignity of the claimants, it nevertheless found that the discrimination was justified as reasonable in the context of the government's alleged fiscal crisis. The Court granted the government a 'wide margin of appreciation' in relation to decisions about fiscal management, even to the point of justifying a denial of equal pay for work of equal value. Judicial deference to governmental decision-making about resource allocation thus trumped the dignity interests of the claimants, even in relation to a denial of equal pay for work of equal value.

In *Auton*,<sup>35</sup> another recent case, the Supreme Court rejected claims advanced by parents on behalf of children with autism. The parents alleged that the denial of coverage of the cost of intensive behavioural therapy for autistic children violated the right to equality under section 15 of the *Charter*. The Court held that the claimants had failed to identify a similarly situated comparator group to ground a claim of discrimination and hence the claim failed to establish a violation of the right to equality. The Court found that to establish a claim of discrimination, the claimants were required to identify a group that does not have a mental disability, has been denied therapy that is important for present and future health, is emergent, and has only recently begun to be recognised as medically required. In contrast to the earlier decision in *Eldridge*, the Court's reasoning in *Auton* regresses to the kind of formal equality comparison which had been explicitly rejected when the wording of the right to equality in the Canadian Charter was being debated.<sup>36</sup> When it comes to dealing with

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<sup>34</sup> 2004 SCC 66. I have added reference to this case, which was released subsequent to the Geneva workshop.

<sup>35</sup> *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78.

<sup>36</sup> *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 170. See Bruce Porter 'Twenty Years of Equality: Reclaiming Expectations', *supra* note 27.

substantive equality claims intersecting with ESC rights, with significant implications for resource allocation, the Court now seems willing to revert to a rigid formal equality paradigm. The Court in *Auton* entirely avoided the issue of dignity and the contextual analysis of the interest at stake. By dismissing the claim to differential treatment on the basis of the absence of a formal comparator group, something which is essentially irrelevant to the interest at stake or the dignity of the claimants, the Court essentially reproduced and reinforced the historical marginalisation of autistic children.<sup>37</sup>

These three recent social rights claims considered by the Supreme Court of Canada share a common disturbing theme. Government decision-making in the social and economic field is accorded a presumption of reasonableness which largely displaces the claimant from the analysis. In *Gosselin*, this meant that dignity interests of those denied adequate social assistance were found not to be engaged, since a reasonable policy cannot demean dignity. In *N.A.P.E.* concerns about a budgetary deficit prevailed over the right to equal pay for equal value. In *Auton*, a decision to provide no service at all to autistic children was found to be immune from an allegation of discrimination because there was no group in a similar situation in relation to a particular government program. Rather than providing a critical forum for the hearing of rights claims from those who have been marginalized from governance and decision-making, the Supreme Court of Canada, in these recent decisions, has simply reinforced systemic patterns of discriminatory silencing.

## **6. Strategies for Constructing a More Coherent Legal Framework for ESC Rights Practice**

As I arrived at the Palais des Nations for Canada's recent review before the UN Committee on Economic, Social and Cultural Rights, I was recalling my first trip here in 1993 with Sarah Sharpe, a low income mother from Newfoundland and the President, at the time, of the National Anti-Poverty Organization. Sarah made her first trip across the ocean to lead off the first oral presentation by a domestic NGO to a treaty monitoring body in the context of a periodic review.

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<sup>37</sup> *Auton supra* at paras. 62-63.



We had a fairly clear vision at that time of how the CESCR could provide important support for domestic ESC rights litigation in Canada. We had decided to focus on two critical issues. First, we emphasised that progressive realisation was a reviewable standard on the basis of which affluent countries like Canada could be held to account for failures to apply available resources to address unnecessary poverty and homelessness. Second, we focused our submissions on the issue of legal remedies. We showed slides of low income Canadians who had gone to courts and human rights tribunals to challenge infringements of their rights to an adequate standard of living and their right to housing. We summarised and appended copies of government pleadings and court decisions in response to ESC rights claims. We sought, from the CESCR, a legal framework for the right to effective remedies for ESC rights claims in Canada that would provide a framework for emerging domestic litigation.

In the context of that review, the CESCR issued concerns and recommendations with respect to the obligations of governments involved in court cases to plead consistently with obligations under the ICESCR; the obligations of courts to interpret the *Canadian Charter* and human rights legislation, so as to provide remedies to violations of ESC rights; the obligation of human rights commissions to address ESC rights, the obligations of governments to include ESC rights in human rights legislation; and the obligation to provide enhanced legal recognition of ESC rights in Canadian law. All of these concerns recommendations, and similar ones which have followed in two subsequent reviews of Canada, addressed the needs of on-the-ground ESC rights advocacy, and the issues that were being challenged in courts and tribunals.

If we are to begin to construct a more coherent legal framework for ESC rights at the international level, we need to relinquish a tendency to construct abstract typologies of ESC rights and focus more attention on the inherent value and necessity of rights claiming. This would entail a more rigorous attention to the necessity of domestic procedures for claiming and adjudicating ESC rights, and the requirement of effective domestic remedies. We need a legal framework for the understanding of ESC rights which is centred more on ensuring that the practice of rights claiming can develop and thrive, rather than one which seems to bring

the basis and value of rights claiming and subjective agency into question by demanding objective minimum criteria or indicators of compliance.

The CESCR's General Comment No. 9 on the Domestic Implementation of the Covenant provides, in my view, the critical foundation for the emergence of more rigorous and consistent affirmation of the role of legal remedies and the right of access to adjudicative space for ESC rights. It situates rights claiming and the participation of rights holders at the centre of the legal framework by placing the onus on the state to justify any denial of judicial remedies and to demonstrate the availability and effectiveness of alternative administrative remedies. It establishes that any administrative decision-making must be informed by and consistent with ESC rights. It envisions an inclusive framework for the claiming of ESC rights, emphasising the importance of the rule of law, the application of consistent interpretive principles respecting ESC rights, and the convergence of ESC rights adjudication with the right to substantive equality. It thus lays the foundation for an affirmation of the central importance of rights claiming and a more coherent integration of ESC rights into our understanding of law and the process of adjudication of rights.

The CESCR has, to its credit, begun in the last few years to ask more pointed questions of States parties about the availability of remedies to ESC rights in domestic law. An increased focus on issues of access to domestic adjudication and effective remedies in its reviews of State party compliance will hopefully assist in establishing a better link between understandings of state obligations under the ICESCR and ongoing domestic ESC rights practice within countries being reviewed. After identifying possible violations of ESC rights in the context of periodic reviews of States parties, the CESCR may wish to review and address in a more systematic fashion the necessity of providing domestic remedies to such violations.

A more coherent focus on the requirement of effective remedies for ESC rights and the exercise of judicial and adjudicative functions consistently with ESC rights, as described in General Comment No. 9, would also provide an important framework for challenging trade and investment regimes. General Comment No. 9 emphasises that consideration of ESC rights in all adjudication and decision-making is a critical pillar of the rule of law. In an ongoing challenge to the investor-state dispute procedures in the North American Free

Trade Agreement, we have advanced the argument that conferring adjudicative authority over investors' constitutional-type challenges to public policy on tribunals that lack the competency or authority to consider the impact of such adjudication on fundamental human rights violates the rule of law and the *Charter* rights to equality and security of the person.<sup>38</sup> These kinds of arguments with respect to the guarantee of rights-informed adjudication could be reinforced in jurisprudence emanating from the CESCR, affirming that governments not only have an obligation to consider the effect of trade and investment agreements on ESC rights, but also to ensure that any adjudication of provisions of trade and investment agreements respects the primacy of fundamental human rights over investor rights.<sup>39</sup>

Finally, as has been noted above, evolving legal frameworks for ESC rights practice should affirm a more coherent convergence in international and domestic jurisprudence between substantive equality as a legal norm, and ESC rights adjudication. Such a convergence is critical to ensuring that ESC rights jurisprudence develops in active dialogue with equality concerns of constituencies such as women, Aboriginal people, and people with disabilities. An equality framework for ESC rights also acts as a safeguard from misapplication of ESC rights to protect the economic rights of more advantaged constituencies at the expense of

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<sup>38</sup> See Bruce Porter "Canadian Constitutional Challenge to NAFTA Raises Critical Issues of Human Rights in Trade and Investment Regimes" (2005) 2:4 ESC Rights Law Quarterly. The CCPI/CHC factum is at [www.dfait-maeci.gc.ca/tna-nac/documents/FactumoftheApplicants.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/FactumoftheApplicants.pdf).

<sup>39</sup> In its list of issues sent to Canada in advance of Canada's Fifth Periodic Report, the CESCR asks: "Please explain how the State party ensures that its obligations under the Covenant take primary consideration in the adjudication of North American Free Trade Agreement (NAFTA) disputes." (Committee on Economic, Social and Cultural Rights, Pre-Sessional Working Group, (17-20 May 2005) List of issues to be taken up in connection with the consideration of the fourth periodic report of Canada concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/4/Add.14) E/C.12/Q/CAN/220 May 2005, para. 19.

those who are disadvantaged.<sup>40</sup> It assures a legal framework through which we can resist the tendency in legal discourse and biased judicial reasoning to silence the claimant of rights and the historical, subjective dimension of rights claiming in order to engage in more of a two-dimensional dialogue between adjudicators and governmental decision-makers.

## 7. Conclusion

None of us will ever be likely to entirely overcome our chronic ambivalence about the use of courts to advance ESC rights, nor should we. The dynamic of displacement and silencing of claimants, the tendency toward legal formalism, a bias in favour of assumptions of reasonableness of government decision-making, and a discriminatory preference for negatively framed prohibitions of government action rather than positively framed remedies will remain ongoing challenges in ESC rights practice. We will constantly be reminded of the limits of legal advocacy and of the judicial institutions we rely on, as we have been by recent decisions from the Supreme Court of Canada. The courts may never be entirely friendly venues for ESC rights claimants, and certainly legal remedies will constitute only one component of successful ESC rights advocacy.

The fact that litigation must remain only one component of ESC rights advocacy, however, does not mean that we should not aspire to an inclusive, rather than partial, legal framework for ESC rights claiming. Affirming the value of an inclusive and flexible legal framework for ESC rights claims, consistent with the principle of the rule of law, and the principle that rights must have remedies and that all rights claimants deserve a hearing, in no way suggests

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<sup>40</sup> The first claim to a right to healthcare as a Charter protected social right in Canada was advanced by more affluent interests in the *Chaoulli* case, described above. The trial judge and the Quebec Court of Appeal found that the right to security of the person does protect the right of access to healthcare and that it may potentially be infringed by current waiting lists in the public system, but that the infringement is justified under section 1 of our Charter because protecting a universal public health system is necessary to the protection of the rights of those with low incomes. The court made explicit reference to the value of equality in considering whether decisions governing access to health care conform with the principles of fundamental justice. The majority judgment of Chief Justice McLachlan at the Supreme Court, however, made no reference to the paramountcy of equality rights under either the Quebec Charter or the Canadian Charter. Arguments by the Charter Committee on Poverty Issues and the Canadian Health Coalition for an inclusive, equality-informed approach to the right to health were entirely ignored by the majority. See Bruce Porter, “A Right to Healthcare: Only If You Can Pay For It” (2005) 6:4 ESR Review. The CCPI/CHC factum is available at [www.healthcoalition.ca/chaoulli.html](http://www.healthcoalition.ca/chaoulli.html)

that legal practice will displace broader strategies of political advocacy or the role of social movements. No one would suggest that the struggle for civil and political rights could in any way be reduced to legal advocacy. Clearly, social movements and political struggles have been a far more important avenue for realising civil and political rights than have courts. On the other hand, legal advocacy for civil and political rights affirms an inclusive framework of access to remedies and has generally been viewed as complementary to and supportive of other forms of advocacy. Surely the same can be true of ESC rights.

The point is not to develop legal practice in ESC rights which replaces historical social movements and other forms of rights claiming, but rather to develop a practice which complements them, which cedes a place, in the legal analysis, for recognition of the historical, subjective and collaborative aspect of rights claiming. As we emerge from a siege mentality in ESC rights advocacy, we need to move beyond antiquarian notions of law and adjudication premised on absolutes or universals that claim to be above history, and to affirm, instead, the legitimacy of a practice grounded in historical struggles, subjective claims and, embedded in social relations, collective values and collaborative projects. We may look forward to evolving understandings of ESC rights as a coherent framework of law that will emerge out of ESC rights claims, advanced in a multitude of ways, in many different venues, even as we continue to treat law and legal practice with a healthy degree of scepticism.