BUDGETS AND HUMAN RIGHTS

Guidelines for litigators

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DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES

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I. Introduction

States' allocations and expenditures of public resources are not discretionary activities. On the contrary, budgets are inseparably related to rights[1]. States, having undertaken obligations to guarantee those rights, are not free to simply decide, for example, to allocate funds for superfluous purposes or to underspend resources of rights related programs if basic needs are not met.

When States allocate and spend their budgets, they are subject to duties emerging from international human rights law and domestic legislation. This document will focus on the former —particularly, on the principles established in article 2 of the International Covenant on Economic, Social and Cultural Rights (hereafter "ICESCR"), which establishes that "[e]ach State Party to the present Covenant undertakes to take steps…, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means…," and "…to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The precise content of these duties is not entirely clear from the quoted text, as international human rights treaties tend to be very general. However, the Committee on Economic, Social and Cultural Rights (hereafter "CESCR") and judicial rulings from around the world provide some further degree of certainty, as part of a global tendency towards evaluating budgets from a rights-based perspective.

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[1] Although in this document we will only focus on the relationship between budgeting and rights, tax policy also needs to be analyzed from a human rights perspective. On this approach, see for instance the Report of the Special Rapporteur on extreme poverty and human rights, A/HRC/26/28, presenting fiscal policy, and particularly taxation policies, as a major determinant in the enjoyment of human rights.
The Inter-American Commission on Human Rights, in its 156 period of sessions, held a public hearing on Human Rights and the Impact of Fiscal Policies. The participants of the hearing put together a document highlighting the main points and arguments of the human rights and fiscal policy relationship, available at: http://cesr.org/downloads/cidh_ddhh_fiscalidad_exec_summary_eng.pdf

In this short guide, we will explore different worrying scenarios —such as budgetary cuts or inefficiencies in human rights related to spending— and discuss possibilities to take States to court to mend those scenarios. We will provide arguments and supportive case law aimed at serving as tools for this kind of litigation. In addition, we will offer a number of arguments to respond to typical defences made by State's in litigation involving budgeting.

The selected judicial rulings illustrate how different courts have engaged in budgetary analysis from a rights-based perspective, scrutinizing States' actions and omissions that have a negative impact on rights and declaring those decisions illegal, unconstitutional, or void.

II. The separation of powers argument: how may one overcome States' usual first defence?

In trials, when respondent States ask judges to abstain from granting orders directed towards the satisfaction of rights which have budgetary implications, they often allude to the separation of powers principle and the idea that the Judiciary shall not get involved in governmental issues.

However, under the doctrine of judicial review, legislative and executive actions are subject to scrutiny by the Judiciary and must be invalidated if found contrary to norms of higher hierarchy, such as —paradigmatically— Constitutions. Otherwise, States would be virtually irresponsible, and the separation of powers would lose its balance, since judges would not be able to perform checks on the two other branches of the State.

Besides, there is nothing in the substance of decisions related to budgeting that makes them "naturally" not liable to judicial review. If a State is, for example, deliberately not fulfilling its constitutional duty to provide education to all persons, then it is appropriate for courts to concede a remedy if a case is brought forward by

someone with standing. This does not mean that judges should adjust the whole education funding policy or decide where to detract funds from.

The Supreme Court of Argentina has expressed this idea very clearly, stating that "…in contrast with the review of public policies, which is clearly a non-justiciable issue, there is no doubt that the national Judiciary is in charge of ensuring the effectiveness of rights and preventing their infringement, as a fundamental and guiding goal when administering justice and deciding disputes. Both matters partially overlap when a public policy infringes rights, which is why jurisdiction is always argued against, alleging that in those scenarios there is an unduly interference in politics by the Judiciary, when in reality the Judiciary is only safeguarding rights and invalidating that public policy only inasmuch as it infringes them, acting in its respective sphere of competence and with the prudence that the each case calls for. Public policies have a constitutional framework that they cannot exceed, constituted by the guarantees that the Constitution establishes which shelter all the inhabitants of the nation. It is true that judges limit and evaluate policies, but only to the extent that it exceeds that framework and as part of the Judiciary's specific duty. Ignoring this premise would be equivalent to completely neutralizing the effectiveness of constitutional review. This does not consist in evaluating which public policy would be more convenient for the better realization of certain rights, but in preventing consequences which clearly and decidedly threaten or infringe fundamental legally protected interests which are safeguarded by the Constitution…"[2]

In the United States, at least twenty state courts, based on constitutions that provided the right to education, have considered education funding schemes, for instance, to be a justiciable issue.[3] It has been stated that "[c]onstitutional

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[2] "Verbitsky, Horacio s/ habeas corpus" (Fallos: 328:1146), May 3rd, 2005, available at http://www.cels.org.ar/common/documentos/fallo_csjn_comisarias_bonaerenses.pdf

[3] "McDuffy v. Secretary of Executive Office of Education" (615 N.E.2d 516) (Mass. 1993); "DeRolph v. State" (677 N.E.2d 733, 740) (Ohio 1997); "Edgewood Independent School District v. Kirby" (777 S.W.2d 391) (Tex. 1989); "Pauley v. Kelly" (255 S.E.2d 859) (W.Va. 1979); "State v. Campbell County School District" (32 P.3d 325) (Wyo. 2001); "Columbia Falls Elementary School District v. State" (109 P.3d 257, 261) (Mont. 2005); "Rose v. The Council for Better Education, Inc. et. al." (790 S.W.2d 186) (Ky. 1989); "Londonderry School. District v. State" (907 A.2d 988) (N.H. 2006); "Robinson v. Cahill" (351 A.2d 713, 720) (N.J. 1975); "Hoke County Board of Education v. State" (599 S.E.2d 365) (N.C. 2004); "Brigham v. State" (889 A.2d 715) (Vt. 2005); "Seattle School District v. State" (585 P.2d 71) (Wash. 1978); "Campaign for Fiscal Equality, Inc. v. State" (801 N.E.2d 326) (N.Y. 2003); "Pendleton School

provisions imposing an affirmative mandatory duty upon the legislature are judicially enforceable in protecting individual rights, such as educational rights…As the final authority on constitutional questions, the judiciary has the constitutional duty to declare unconstitutional that which transgresses the state constitution."[4]

The same type of analysis can be found in rulings of courts in many other countries. The Supreme Court of India, for example, has interpreted that "[t]he State Administration cannot shirk its responsibility of ensuring proper education in schools and colleges on the plea of lack of resources. It is for the Authorities running the Administration to find out the ways and means of securing funds for the purpose."[5] In other cases, scarce budgetary allocations have been understood by judges as indicative of non-compliance with international human rights commitments of the States.[6]

In the same line, the CESCR interprets that the appropriate means to fully realize rights may include judicial remedies, and that "...the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of arts. 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, 'shall have an effective remedy.'"[7]

District v. State" (200 P.3d. 133) (Or. 2009); "Hull v. Albrecht" (960 P.2d 634) (Az. 1998); "Abbot by Abbot v. Burke" (149 N.J. 145) (N.J. 1997); "Lake View School District v. Huckabee" (91 S.W.3d 472) (Ark. 2002); "Montoy v. State" (112 P.3d 923) (Kan. 2005); "Idaho School for Equal Educ. Opportunity (ISEEO) v. State" (129 P.3d 1199) (Idaho 2005); "Vincent v. Voight" (614 N.W.2d 388) (Wisc. 2000); "Davis v. State" (804 N.W.2d 618) (S.D. 2011).

[4] "State v. Campbell County School District" (2001 WY 90 32 P.3d 325), Wyoming Supreme Court, October 2nd 2001, available at http://legisweb.state.wy.us/LSOWeb/SchoolFinance/Documents/Campbell_III.pdf

[5] "The Chandigarh Administration vs Mrs. Rajni Vali And Others", January 12th, 2000, available at http://indiankanoon.org/doc/1836045/

[6] See, for example, "R.J.S.A. VDA. DE R. vs. ESSALUD" (Case Nº 3081-2007-PA/TC), Constitutional Court of Peru, November 9th, 2007, available at http://www.tc.gob.pe/jurisprudencia/2008/03081-2007-AA.html

[7] General Comment 3, "The nature of States parties obligations (Art. 2, par.1)", E/1991/23, 1990, available at http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/1_Global/INT_CESCR_GEC_4758_E.doc

III. Non-retrogression and progressive realization: when are budgetary cuts adopted by States or lack of augmentations considered illegitimate?

It is not infrequent that States reduce budgetary allocations of certain rights related programs despite the pressing needs of their beneficiaries[8]. Inflation often generates an equivalent effect —that is, a reduction of the allocation not in nominal terms, but in real ones— or at least aggravates that situation. This contravenes the strong presumption against retrogressive measures and violates the obligation to progressively realize rights.

On the principle of non-retrogression, the CESCR has stated that "[a]ny deliberately retrogressive measures…would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."[9] If a State party uses resource constraints as an explanation for any retrogressive

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[8] States need to comply with certain obligations under the Covenant on ESCR, even when they take austerity measures in times of recession. According to the CESR, any proposed policy change or adjustment has to meet the following requirements: the policy has to cover only the period of crisis; the policy must be necessary and proportionate; the policy must not be discriminatory and shall comprise all possible measures to support social transfers that mitigate inequalities; finally, the policy must ensure protection of the core content of rights. Letter dated 16 May 2012 addressed by the Chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights.
In this sense, it has been claimed that "[o]f particular resonance to the debate over austerity is the prohibition of non-retrogression. As stated above, states are not required to fulfil all economic and social rights overnight, but instead must move as swiftly as possible towards this goal by realising the rights over time through measurable progress. The logical corollary of this duty of progressive realisation is that governments must avert retrogression in the realisation of ESC rights, even in times of severe resource constraints such as economic recessions", Council of Europe Commissioner for Human Rights, "Safeguarding human rights in times of economic crisis", available at: http://www.enetenglish.gr/resources/article-files/prems162913_gbr_1700_safeguardinghumanrights_web.pdf
[9] General Comment 3

steps taken, the relevant criteria that should be considered include: "[t]he severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant"; "[t]he existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict"; and "[w]hether the State party had sought to identify low-cost options."[10]

Judges throughout the world have further specified the meaning of this obligation when evaluating whether States' budgets conform to it or not. The Constitutional Court of Colombia, when dealing with a case about the rights of displaced populations, found that budgetary allocations were insufficient to guarantee the affected rights and ruled against their further reduction.[11] The Court observed that the allocation of resources expressly and specifically oriented towards the execution of policies for displaced populations had been reduced that year by 32%. It held that once a certain level of protection of social rights has been reached, the legislature's discretion is diminished in at least one significant aspect: every recoil from that level must be presumed *prima facie* unconstitutional and is therefore subject to strict judicial scrutiny. For it to be considered constitutional, authorities must demonstrate that there are imperious reasons that make that regressive step necessary. The Court, after establishing that there was a violation of fundamental rights of the displaced populations in that particular case, directed orders to ensure their effective enjoyment and identified appropriate remedies to overcome structural flaws. It stressed that that was compatible with the constitutional principle of harmonic collaboration between the different branches of power in the assurance of the effective protection of rights and respectful of judges' competence with regard to rights which have a positive dimension. The Court concluded that the lack of concordance between the seriousness of the rights violation and the volume of resources effectively destined to ensure the actual enjoyment of those rights was unconstitutional. It directed the Executive Power to assess the magnitude of that discordance and the quantity of resources needed, and to design

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[10] "An evaluation of the obligation to take steps to the 'maximum of available resources' under an optional protocol to the Covenant", E/C.12/2007/1.

[11] "Abel Antonio Jaramillo, Adela Polanía Montaño, Agripina María Nuñez y otros" (Case T-025/04), January 22nd, 2004, available at http://www.corteconstitucional.gov.co/relatoria/2004/t-025-04.htm

and implement a plan to overcome the situation, setting out a mandatory timeframe.

In a case concerning the right to education, the Constitutional Chamber of the Supreme Court of Justice of Costa Rica held that curricular adjustments (additional support lessons) that had already been approved for a child with disabilities who needed them could not be cut back for budgetary reasons in the context of an educational reform.[12] It rejected the School's contention that it did not have tutors appointed by the Ministry of Public Education due to the fact that the Budgetary Authority had not approved the necessary resources to cover the cost of support services. The Court stated that failing to provide already approved additional support lessons would mean incurring in retrogression with regard to the protection of children's fundamental rights, which, on the contrary, must be progressive in order to promote their full incorporation into the educational process and inclusion into society. It quoted article 26 of the American Convention on Human Rights, whose wording is very similar to that of article 2 of the ICESCR.

Following the same logic, but concerning the right to housing, the Administrative and Tax Law Appeals Chamber of the City of Buenos Aires, Argentina, ruled in an already quoted case that discontinuing the payment of a subsidy to a homeless person (owing to the fact that a decree set out a time limit) constitutes an impermissible retrogression.[13] Therefore, the judges ordered that the Government continue paying the subsidy until the motives that had justified its provision disappeared and, in consequence, its purpose was fulfilled. They pointed out that the discontinuation of the allowances violated the principle of non-retrogression, i.e. the prohibition of the adoption of policies and measures that worsen the current situation of social rights. According to that principle, once a right is recognized and its enjoyment by persons in a precarious socioeconomic situation is made effective, the State cannot later on eliminate its effects without offering reasonable alternatives. In effect, the Court stated that once the Administration fulfils its

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[12] "Ana Lorena Bolaños Montes" (Case Nº07-003265-0007-CO), April 13th, 2007, available at http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_Documento.aspx?param1=Ficha_Sentencia&param2=1&nValor1=1&nValor2=385044&tem1=Presupuesto&strTipM=T&lResultado=3&strTem=ReTem

[13] "Mansilla María Mercedes contra GCBA sobre Amparo (Art. 14 CCABA)"

constitutionally mandated duties and, in consequence, widens the scope of protection of the rights of the worst-off, it is obliged to abstain in the future from behaving in a way that threatens that situation.

With regard to the principle of progressive realization, the CESCR has said that "…the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content…[T]he phrase must be read in the light of the overall objective, indeed the *raison d'être,* of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal."[14]

The implications of this obligation with regard to budgets have been considered by different judges. In a case concerning the rights of indigenous people, the Constitutional Court of Colombia held that budgetary constraints invoked by the State to justify its inactivity were unwarranted.[15] It stated that judges analysing the positive aspects of constitutional rights must bear in mind that state inactivity is not constitutionally legitimate in virtue of the principle of progressive realization. That principle, besides prohibiting unreasonable and disproportionate regressions in the scope and effectiveness of constitutional rights, orders States to "take steps forward" towards a fuller protection. The Court stated that even though judges cannot act as co-administrators or establish financial and technical parameters for the elaboration of a public work, neither can they, after determining that there has been a violation of a constitutional right, abstain from adopting any measures.

In an emblematic case about the right to health, the Constitutional Court of South Africa declared that the government must "…devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV."[16] It

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[14] General Comment 3
[15] "Cabildo Mayor Indígena del Cañón del Río pepitas"
[16] "Minister of Health v Treatment Action Campaign" (Case CCT 8/02), July 5th, 2002, available at http://www.saflii.org/za/cases/ZACC/2002/15.html

stressed that "[t]he state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society." The Court expressed that it was "…conscious of the daunting problems confronting government as a result of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the state by the Constitution."

Finally, the Constitutional Court of Peru, in another case concerning the right to health of patients with HIV, held that the principle of progressive realization with regard to expenditures cannot be understood in an indeterminate sense and shall not serve, in that way, as a frequent argument in face of state inactivity. [17] On the contrary, the duty of progressive realization must be fulfilled in reasonable time frames, and should involve concrete and constant State actions to implement public policies.

IV. Maximum available resources: is there something to say in court against States' inefficient spending and/or under expenditures?

Unfortunately, inefficiencies in budget allocations and expenditures are not an uncommon problem at all. These may be due to the fact that resources allocated are concentrated on non-essential activities or that disbursements are delayed (consequently constraining the ability to plan effectively). Moreover, resource leeks may be explained by reference to cases of corruption, with government departments and officials unjustly enriching themselves at the expense of the

[17] **"José Luis Correa Condori" (Case N°2016-2004-AA/TC), October 5th, 2004, available at http://www.tc.gob.pe/jurisprudencia/2005/02016-2004-AA.html**

genuine beneficiaries. There are also scenarios in which funds allocated for rights related programs are simply not spent.

These practices are contrary to the obligation to use the maximum of available resources to realize economic, social and cultural rights. The CESCR has affirmed, in an already quoted extract, that "[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[18] It has also emphasized that "…even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances…Similarly, the CESCR underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes."[19]

Judges have followed these directives and concluded that several States' measures violate the obligation to use the maximum of available resources. This was the case in many of the already quoted judicial rulings. For instance, with regard to the right to education in private schools that receive public financial aid, the Supreme Court of India held that "[c]oming to the contention of the appellants that the Chandigarh Administration will find it difficult to bear the additional financial burden if the claim of the respondents…is accepted, we need only say that such a contention raised in different cases of similar nature has been rejected by this Court. The State Administration cannot shirk its responsibility of ensuring proper education in schools and colleges on the plea of lack of resources. It is for the Authorities running the Administration to find out the ways and means of securing funds for the purpose."[20]

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[18] **General Comment 3**
[19] ***Idem.***
[20] **"The Chandigarh Administration vs Mrs. Rajni Vali And Others"**

In particular reference to inefficiency in budget allocations and expenditures, the Constitutional Court of Colombia held that the improper management of public resources does not exempt authorities from fulfilling their obligations in virtue of the principle according to which no one can invoke its own guilt. [21]

Similarly, the Argentine Supreme Court of Justice, concerning the right to housing of a homeless child with disabilities and his mother, ruled that the State had an obligation to make a budgetary investment that was adequate to their needs and efficient.[22] The Court considered that state intervention, even though it had involved a considerable economic effort, did not seem to be the outcome of an integral analysis aimed at finding the most efficient and "low-cost" solution in the terms advised by the CESCR. The judges explained that the point was not to evaluate the price that the State payed for a service and to consider its duty fulfilled because of the service's cost, but rather to assess its quality and adequacy to the present needs. They concluded that the State must intervene providing integral social assistance, which might even require a less stringent patrimonial effort than the one already in place. The Court stressed that the lack of an adequate and coordinated planning by the State has led to the wasting of resources: at that time the State was paying a very high price for an inadequate room in a hotel that exceeded the market price of renting a proper apartment.

There is also an interesting ruling of an Administrative Law Tribunal of the City of La Plata, Buenos Aires, Argentina, related to the issue of expenditures in non-essential items.[23] There, in a case concerning the right to housing and other socioeconomic rights of homeless children, the judge pointed out, as a public and notorious fact, the increasing government advertising exalting the personal image of the provincial governor. He considered that that circumstance demonstrated the availability of sufficient economic resources and the unexplainable lack of will to promote the rights of the most vulnerable people.

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[21] "Cabildo Mayor Indígena del Cañón del Río pepitas"
[22] "Q. C., S. Y. c/ Gobierno de la Ciudad de Buenos Aires s/ amparo"
[23] "Asociación Civil Miguel Bru y otros c/ Ministerio de Desarrollo Soc. Pcia. Bs. As. y otro/a s/ Amparo" (15.928), May 22nd, 2012, available at http://www.scba.gov.ar/falloscompl/infojuba/contenciosoesp21/15928.doc

From a similar point of view, but regarding the draining of resources due to corruption, the Constitutional Court of Peru, in an already cited case, held that sometimes it may be the case that without need to spend more resources than those already allocated in the budget, those same resources can be employed giving due priority to the attention of more serious or urgent situations. The Court highlighted that the political reality of the later years had shown how corruption in the use of public resources had affected the fulfilment of rights such as education, health, and housing.[24]

On this matter, the Office of the United Nations High Commissioner for Human Rights has stated that "…corruption undermines a State's human rights obligation to maximize available resources for the progressive realization of rights recognized in Article 2 of the International Covenant on Economic, Social and Cultural Rights. The corrupt management of public resources compromises the State's ability to deliver services, including health, education, and welfare, which are essential for the realization of economic, social and cultural rights. Corruption leads to discriminatory access to public services in favour of those able to influence authorities, including by offering bribes. Economically and politically disadvantaged groups and persons suffer disproportionately in these circumstances, because they are most dependent on public services but least able to influence State policies and corrupt officials."[25]

On the issue of under-expenditures, the High Commissioner for Human Rights has stated that "…comparing spending with budgetary provisions offers an important tool to evaluate State commitment to realizing economic, social and cultural rights. For instance, underspending in an area where some targets have not been met or in instances when indicators show significant gaps in the full realization of economic, social and cultural rights, may indicate a lack of compliance with the obligation to take steps 'to the maximum of [a State's] available resources'. Similarly, consistent underspending in one social sector, such as education or health, over a number of years may actually indicate that planning is inadequate or that funds for the sector

[24] **"José Luis Correa Condori"**
[25] **"The Human Rights Case Against Corruption" (HR/NONE/2013/120), November 2013, available at http://www.ohchr.org/Documents/Issues/Development/GoodGovernance/Corruption/HRCaseAgainstCorruption.pdf**

are not released promptly, rendering it impossible to use the allocated resources in time."[26]

Judges have also considered that under-expenditures go against the obligation to use the maximum of available resources. This was the case in a structural litigation for the right to early education in the context of lack of school places decided by the Administrative and Tax Law Appeals Chamber of the City of Buenos Aires, Argentina.[27] The Judges held that verified under-expenditures of the school infrastructure budget, which amounted to at least 63% of the budget, demonstrated that the State was not fulfilling its duty to adopt appropriate measures to guarantee rights "to the maximum of its available resources", as established in the ICESCR.

The High Court of South Africa, in its ruling against the State in the already mentioned HIV leading case (prior to the Supreme Court's), took into account the fact that several provinces had under-spent percentages of their health budgets that were sufficient to grant the petitioners' claim.[28] It specifically stated that "[t]he provinces have given figures of their budgets, the amounts spent on HIV/AIDS, the cost of the pilot projects and the projected cost of a MTCT [mother to child transmission] programme with 100% coverage. The figures show that the cost of a universal programme is not beyond the means of the provinces. Obviously universal programmes cannot be afforded immediately. The Eastern Cape had a health budget of R3,835 billion. Of that R33 million was allocated to HIV/AIDS (and not spent). A comprehensive programme is estimated to require an extra R56,8 million. These figures show, in my view, that with proper planning, it should be possible to achieve full implementation gradually. The Free State Province estimates the cost of a full programme to be R23 million. KwaZulu Natal's estimate is R36 million or R48 million. The Northern Province's estimate is R71 million. These figures,

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[26] "Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights" (UN doc E/2009/90), June 8th, 2009, available at http://www.ohchr.org/Documents/Issues/ESCR/E_2009_90_en.pdf

[27] "Asociación Civil por la Igualdad y la Justicia c/ GCBA s/ amparo (art. 14 CCABA)" (Case Nº23360), March 19th, 2008, available at http://acij.org.ar/wp-content/uploads/Caso_Vacantes._Sentencia_de_Amparo.pdf

[28] "Minister of Health v Treatment Action Campaign" (Case Nº21182/2001), December 14th, 2001, available at http://www.tac.org.za/Documents/MTCTCourtCase/mtctjudgement.txt

hypothetical as they are, are not without their discrepancies. They must be contrasted with the figures of the Western Cape, which are the figures of a province actually engaged in a roll out. At present the Western Cape is rolling out its programme from 50% to 90% of the affected population. The cost will be R12 million. The cost for the year 2002 - 2003, with universal coverage in mind, is estimated at R21 million. I repeat: a MTCT prevention programme with full coverage is affordable with proper planning."

It is worth mentioning that the Constitutional Court did not take into account this issue because it founded its decision on another circumstance which is also relevant for our purposes: the adoption of budget increases as evidence of the availability of resources to guarantee rights. It said that they "…were informed at the hearing of the appeal that the government has made substantial additional funds available for the treatment of HIV, including the reduction of mother-to-child transmission. The total budget to be spent mainly through the departments of Health, Social Development and Education was R350 million in 2001/2. It has been increased to R1 billion in the current financial year and will go up to R1,8 billion in 2004/5. This means that the budgetary constraints referred to in the affidavits are no longer an impediment. With the additional funds that are now to be available, it should be possible to address any problems of financial incapacity that might previously have existed."

V. Non-discrimination: can courts override discriminatory budgets?

Sometimes budgetary allocations and expenditures unlawfully affect a specific group of people which is in a disadvantaged position, such as residents of the poorest geographical areas of a country or city.

The CESCR has held on the issue that one of the relevant considerations in examining an alleged failure of a State to take steps to the maximum of its available resources is "[w]hether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether

they were non-discriminatory, and whether they prioritized grave situations or situations of risk."[29] It has also stated, with reference to the right to education but through a reasoning that may be applied to other cases, that "[s]harp disparities in spending policies that result in differing qualities of education for persons residing in different geographic locations may constitute discrimination under the Covenant."[30]

Courts around the world have adopted this perspective. In South Africa, for instance, the Western Cape High Court decided a case in which the State was accused of breaching its obligations because it did not provide an adequate education for certain children with disabilities.[31] The only option for them was to attend centres administered by NGOs that received subsidies, but the financial support provided to them by the State was less than that given to other children. To reach that conclusion the Court examined in detail the numbers of the annual subsidies paid to each group and compared them. According to the Court, the State "…should at the very least have: 1. Explained why the budgetary shortfall should be carried by the affected children instead of being shared by all. 2. Explained why it is reasonable and justifiable that the most vulnerable should pay the price…3. Provided a budgetary analysis which shows what resources are available and what would be the additional cost of meeting the rights of these children". Therefore, the Court declared that the respondents had failed to take reasonable measures to make provision for the educational needs of that group of children, in breach of their right to education.

The Supreme Court of Canada decided a case concerning the rights of a child with dyslexia who had to be transferred to a private school because the educative centre he attended had been closed.[32] The reason given by the State for the closure was the budgetary crisis it faced. Although the Court accepted that there were financial

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[29] "An evaluation of the obligation to take steps to the 'maximum of available resources' under an optional protocol to the Covenant"
[30] General Comment 13
[31] "Western Cape Forum for Intellectual Disability v Government of The Republic of South Africa and Another" (Case Nº18678/2007), November 11th, 2010, available at http://www.saflii.org/za/cases/ZAWCHC/2010/544.html
[32] "Moore v. British Columbia (Education)" (2012 SCC 61, 3 S.C.R.), November 9th, 2012, available at http://www.canlii.org/en/ca/scc/doc/2012/2012scc61/2012scc61.pdf

difficulties, it observed that cuts were disproportionately made to certain programs (in that case, to special needs programs) and not to others. It pointed out that, despite their similar cost, the State retained some discretionary programs. It also emphasized that "…the District undertook no assessment, financial or otherwise, of what alternatives were or could be reasonably available to accommodate special needs students if the Diagnostic Centre were closed. The failure to consider financial alternatives completely undermined the District's argument that it was justified in providing no meaningful access to an education for J [the child] because it had no choice. In order to decide that it had no other choice, it had at least to consider what those other choices were". In consequence, the Court held that there was a discriminatory action.

In a similar fashion, the Supreme Court of Texas, United States, understood, regarding the right to education, that it was an obligation of the legislature "…to provide for an efficient system. In setting appropriations, the legislature must establish priorities according to constitutional mandate; equalizing educational opportunity cannot be relegated to an 'if funds are left over' basis. We recognize that there are and always will be strong public interests competing for available state funds. However, the legislature's responsibility to support public education is different because it is constitutionally imposed."[33] The case was based on the fact that the poorest districts received fewer funds for education than the wealthiest did because the funding system was partially based on taxation in those same districts.

VI. The burden of proof: which party is expected to provide the relevant budgetary information?

With regard to the procedural principles of burden of proof in budget related cases, it has been clearly stated that if a State argues that it does not have available resources to fully guarantee certain rights, then it should be the one proving that scarcity.

[33] **"Edgewood Independent School District et al. v. William KIRBY et al." (Case NºC-8353), October 2nd, 1989, available at http://nces.ed.gov/edfin/pdf/lawsuits/Edgewood_v_Kirby_TX.pdf**

In effect, according to the CESCR, "[i]n order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."[34] Similarly, "...in case of failure to take any steps or of the adoption of retrogressive steps, the burden of proof rests with the State party to show that such a course of action was based on the most careful consideration and can be justified by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources."[35]

Courts of different countries have followed the same path. For instance, the Supreme Court of Argentina has understood that in order to justify a breach of basic obligations due to a lack of available resources, the State (and not the plaintiffs) must prove that it has made its best effort to comply with its obligations.[36] In general, courts have held that the burden of proof is attributed to the State due to the fact that the relevant budgetary information to show financial hindrances is in its power.[37]

But what is it exactly that States have to prove? Not only must they demonstrate that they lack sufficient resources to fulfil a petition, but they also have to specifically show that they have adopted all the measures they could to obtain those resources.[38] Generic arguments are considered insufficient, and courts have

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[34] ***Idem*.**

[35] **"An evaluation for the obligation to take steps to the 'maximum of available resources' under an optional protocol to the Covenant", Statement, E/C.12/2007/1, 2007, available at http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmlBEDzFEovLCuW1AVC1NkPsgUedPlF1vfPMlNXEbbCiHNYQTSFRZkK%2BAyyVQ4pAmo75BXoZebm0qNdTGp4QMnURBDu%2FN8i9x4ZZZpA2El2gO2lTlbuPcplfq5**

[36] **"Q. C., S. Y. c/ Gobierno de la Ciudad de Buenos Aires s/ amparo" (Fallos: 335:452), April 24th, 2012, available at http://www.csjn.gov.ar/jurisp/jsp/fallos.do?usecase=mostrarDocumento&fallold=5878**

[37] **"Cabildo Mayor Indígena del Cañón del Río pepitas" (Case T-235/11), Constitutional Court of Colombia, March 31st, 2011, available at http://www.corteconstitucional.gov.co/relatoria/2011/t-235-11.htm; and "Louis Khosa v. Minister Of Social Development" (Case CCT 12/03), Constitutional Court of South Africa, available at http://www.saflii.org/za/cases/ZACC/2004/11.html**

[38] **"Mansilla María Mercedes vs. CGBA" (Case Nº 13817/0), Administrative and Tax Law Appeals Chamber of the City of Buenos Aires, October 13th, 2006, available at http://www.e-pol.com.ar/newsmatic/imprimir.php?pub_id=99&sid=1046&aid=22976&eid=28&NombreSeccion=Jurisprudencia%20Ciudad%20de%20Bs.As&Accion=Imprimir&NombrePublicacion=EquipoFederal%20delTrabajo**

repeatedly rejected defences based on financial or economic constraints when States had not proven those circumstances.[39]

VII. Concluding remarks

All these cases illustrate how numerous rights violations are due to States' budget related actions or omissions. Our main point here was to show that judges can, must and often do intervene to remedy these situations when they are faced with this kind of cases[40]**. For litigants worldwide, this means that the incorporation of budgetary analysis in their arguments can meaningfully strengthen their cases and increase their chance of success.**

[39] **"Badaro, Adolfo Valentín vs. ANSeS s/ reajustes varios" (Fallos: 330:4866), Supreme Court of Argentina, 26th november, 2007, available at http://www.csjn.gov.ar/jurisp/jsp/fallos.do?usecase=mostrarDocumento&fallold=3384**

[40] More judicial rulings similar to the ones quoted here can be found at http://presupuestoyderechos.acij.org.ar/. For the time being, the contents of this database are only available in Spanish.

DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES

El sistema democrático requiere, necesariamente, del aporte de la ciudadanía en el fortalecimiento de las instituciones, como un ejercicio indirecto de la soberanía del pueblo. La corrupción es un flagelo que vulnera derechos humanos, acentúa la desigualdad social y afecta el desarrollo de la población. Hemos recorrido diferentes caminos que, a nuestro entender, conducen a construir más y mejor democracia poniendo en marcha una intensa labor respecto a este fenómeno que azota de manera especialmente severa a los países en vías de desarrollo.

La participación de la ciudadanía para enfrentar a la corrupción es una condición indispensable para obtener resultados positivos y sustentables. Con ese objetivo se desarrolla la labor del programa Acción Ciudadana y Lucha contra la Corrupción.

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