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Instruments and Allies



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ABSTRACT

The objective of this paper is to analyze the different courses of action developed by human rights organizations that work in the field of economic, social and cultural rights. In this vein, from the definition of the principle characteristics of these rights and their structure, we shall first analyze the possibility of claiming them through judicial channels, together with the problems and limitations of judicial protection strategies. Second, we shall address the debate on the role of the courts on matters related to social policies, and examine, from the perspective of human rights organizations, the apparent impasse between strategies of a judicial nature and those of a political nature, and the possible cooperation between the two. [Original article in Spanish.]

COURSES OF ACTION IN ECONOMIC, SOCIAL AND CULTURAL RIGHTS: INSTRUMENTS AND ALLIES*

Víctor Abramovich



The structure of economic, social and cultural rights and possible judicial strategies**

Those who subscribe to the thesis that economic, social and cultural rights as demandable rights contain a “defect of origin” believe that the impossibility of claiming them lies in their very nature. The arguments put forward by opponents of the judicial enforcement of economic, social and cultural rights are based on a distinction between the nature of these rights and the nature of civil and political rights.

One of the arguments most often used to support this purported distinction between civil and political rights on the one hand, and economic, social and cultural rights on the other, is the presumed character of negative obligations implied by the former class of rights, while economic, social and cultural rights suggest positive obligations that, in the majority of cases, may only be fulfilled by resorting to funds provided by the public treasury.¹ According to this viewpoint, in performing its negative obligations the state merely adopts a “do not” approach: not arbitrarily detaining persons, not administering punishments without prior justice, not restricting freedom of expression, not violating the privacy of correspondence nor of private papers, not interfering with private property, etc. In

* This article was prepared with the collaboration of Julieta Rossi.

** This part of the text expresses the conclusions of a broader research paper prepared together with Christian Courtis (2002).

See the notes to this text as from page 206.

The references of the sources quoted in this text are found on page 214

contrast, the structure of economic, social and cultural rights is characterized by obliging the state “to do”, that is to say, to provide positive services: supply health services, ensure education, preserve the cultural and artistic heritage of the community.

In the former case, it would be sufficient to limit the activity of the state, prohibiting it from involvement in certain areas. In the latter, the state must necessarily allocate resources in order to provide the claimed services, in a positive form.² These distinctions are based on a distorted and “naturalistic” view of the role and the functioning of the state apparatus, which coincides with the position of a minimalist state, one that guarantees only justice, security and defense.³ Nevertheless, even the most traditional theorists of classical political economy, such as Adam Smith and David Ricardo, saw that the very obvious interrelation between the supposed “negative obligations” of the state – especially the guarantee of the freedom of commerce – and the long list of positive obligations related to the maintenance of political, judicial, security and defense institutions, was a necessary condition for the exercise of individual liberty.

Smith, for example, assigns the state an active role in the creation of institutional and legal conditions for the expansion of the market.⁴ The same could be said for many other “civil and political” rights – such as due process of law, access to justice, the formation of associations and the right to elect and be elected – that imply the creation of the corresponding institutional conditions by the state (the existence and maintenance of courts, the establishment of rules and regulations that lend legal relevance to collective action of a group of people, the calling of elections, the organization of a system of political parties, etc.).⁵

Even certain rights that appear to be more easily classified as “negative obligations”, that is to say, those that require a limitation of the state’s activities so as not to impinge upon the liberty of its citizens – for example, the prohibition of arbitrary detention, of prior censorship of the press, or of violation of correspondence and of private papers – also require intense state activity to prevent either agents from the state itself or private citizens from infringing on this liberty, so much so that the precondition for exercising these rights is the

fulfillment by the state of the functions of police, security, defense and justice. Evidently, the fulfillment of these functions implies positive obligations, characterized by the allocation of resources, and not merely the state refraining from acting.⁶

In short, the structure of civil and political rights may be described as a series of negative and positive state obligations: the obligation to refrain from acting in certain spheres and to carry out a series of functions to guarantee the enjoyment of individual autonomy and to prevent this autonomy from being violated by other citizens. Given the historical concurrency of this series of positive functions with the definition of the modern liberal state, the characterization of civil and political rights has tended to “naturalize” this state activity and emphasize the limits of its action.

From this perspective, civil and political rights differ from economic, social and cultural rights more in matter of degree than in any substantial way.⁷ We can recognize that the most visible features of economic, social and cultural rights are the obligations “to do”, and it is because of this that they are sometimes called “service rights”.⁸ Nevertheless, it is not hard to discover, when observing the structure of these rights, the concomitant existence of obligations “to do not”: the right to health implies a state obligation to not damage health; the right to education presupposes the obligation not to worsen education; the right to preservation of the cultural heritage entails an obligation not to destroy this heritage.

This is why many of the legal actions aimed at the judicial enforcement of economic, social and cultural rights are designed to correct state activity when the state fails to fulfill obligations “to do not”. Similarly, therefore, economic, social and cultural rights may also be described as a series of positive and negative state obligations, although in this case the positive obligations acquire a greater symbolic importance for identifying them. Thus, for example, Contreras Peláez, realizing the impossibility of a clear distinction between the two types of rights, states that “for social rights ... the state service truly represents the substance, the nucleus, the essential content of the right; in cases such as the right to healthcare or education, state intervention occurs every time the right is exercised; the non-provision of this service by the state automatically presupposes the denial of the right”.⁹

It is also possible to illustrate another type of conceptual problem making it difficult to distinguish radically between civil and political rights on the one hand and economic, social and cultural rights on the other, underscoring the limitations of these differentiations and reaffirming the need for a common theoretical and practical treatment in relation to everything that is substantial. The theoretical concept – including the specific legal regulations of the various rights that are traditionally considered “rights of autonomy” and that generate negative obligations for the state – has changed so much that some of the rights classically considered “civil and political” have acquired an unquestionable social aspect. The loss of the absolute character of the right to property based on public interest is the most fitting example, although it is not the only one.¹⁰ The current trends in the right to civil liability damages has made the social distribution of risks and benefits a key criteria in determining the obligation to compensate.

The rather sudden emergence of a right to consume has substantially transformed contractual relations in which there are consumers and users participating in the relationship.¹¹ The traditional interpretation of freedom of expression and of the press has taken on social dimensions that have grown in importance through the formulation of freedom of information as a right for each member of society – which comprises, in certain circumstances, the positive obligation to produce public information. Corporate and commercial freedoms are restricted when their objective or their development has an impact on health or on the environment.¹² In short, many rights that are traditionally classified as civil and political have been reinterpreted from a social point of view, so that absolute distinctions also lose meaning in such cases.¹³ In this respect, the jurisprudence of international human rights organizations and, in particular, the European Court of Human Rights (ECHR), has established as positive obligation of states: to remove the social obstacles that preclude access to jurisdiction; to take appropriate steps to prevent environmental changes from constituting a violation of the right to private and family life;¹⁴ and to develop positive steps to prevent foreseeable and avoidable risks from affecting the right to life.¹⁵

Given the interdependence of civil and political rights with economic, social and cultural rights, in many cases

violations of the former also affect the latter, and vice versa. The apparently incontrovertible distinction between the two categories has a tendency to dissipate when one seeks to identify the violation of rights in specific cases. Often the interest protected by a civil right also covers the interest protected by the definition of a social right. The dividing line between one category and the other is at the very least tenuous. Whenever there are no direct mechanisms for judicially protecting economic, social and cultural rights in the domestic law of states or in the international system of human rights protection, an indirect strategy consists of reformulating the obligations subject to the justice of the state into matters of civil and political rights, so as to address the violation through this channel. Such procedure is of utmost importance in countries like Spain and Chile, where judicial protection, by means of such legal actions as *amparo* [appeal for protection of constitutional rights], is restricted to a limited list of rights labeled as “fundamental”, which in general correspond with those on the classic list of civil rights. Accordingly, it is impossible to gain access to judicial protection in situations when there is a blatant violation of a social right. In this respect, it is particularly useful to consult the mechanism for judicially protecting social rights in connection with fundamental rights in the jurisprudence of the Colombian Constitutional Court, as an example of a means of indirect protection of social rights resulting from their close relationship with a civil or political right.¹⁶

To refer to the right to life so as to protect interests safeguarded by social rights is another strategy for indirectly protecting economic, social and cultural rights resorted to on a domestic level, but which may also be applied to the mechanisms of international human rights protection. In the European system, right to life has been used as a means of protecting interests associated with the right to health and to claim from the state positive protection obligations. In the case of *L.C.B. v. the United Kingdom*, the ECHR declared that the first paragraph of Article 2 of the Convention obliges states not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard life. The case in question addressed the scope of the duty of the state to supply adequate information to the applicant on

the circumstances that could have minimized or prevented the disease she was suffering from.

Also explored as a strategy for indirectly claiming social rights, is the close relationship between the choice of an individual way of life and the exploitation of the cultural heritage that identifies, for example, a given minority, or an indigenous people. In this vein, the right to autonomy – or the right to establish one’s own life project in an autonomous way – draws closer to the social right to participate in certain cultural practices or groups. One can argue, therefore, that the life project of each member of this group depends greatly on the enjoyment of the cultural heritage – language, religion, ancestral lands and traditional economic customs – of indigenous peoples.¹⁷

One could say, therefore, that the assignment of a right to the category of civil and political rights or economic, social and cultural rights has a heuristic, ordering and classifying purpose; nevertheless, a stricter conceptualization would produce a *continuum* of rights, in which the place of each right would be determined by the symbolic weight of the positive or negative obligations components outlined in it. According to this reasoning, some rights clearly liable to be classified as negative state obligations fall into the province of civil and political rights – the case, for example, of freedom of thought or freedom of expression without prior censorship. On the other hand, some rights which in essence are classified as positive state obligations may be found in the catalogue of economic, social and cultural rights – for example, the right to housing.¹⁸ In the space between these two extremes lies a range of rights consisting of a combination of positive and negative obligations in differing degrees: to determine whether one of these falls into the category of civil and political rights or the group of economic, social and cultural rights is a conventional, more or less arbitrary decision.

Along the same lines, authors such as van Hoof and Asbjorn Eide propose an interpretive system that consists of establishing “levels” of state obligations that would characterize the identification of each right independently of its assignment to the group of civil and political rights or economic, social and cultural rights. According to van Hoof’s proposal,¹⁹ for example, one could discern four “levels” of obligations: to

respect, to **protect**, to **fulfill** and to **promote** the right in question. Obligations to **respect** are defined as the duty of the state not to interfere nor hinder or bar access to the enjoyment of resources that constitute the object of the right. Obligations to **protect** consist of preventing others from interfering, hindering or impeding access to these resources. Obligations to **fulfill** entail ensuring access to the resource when holders of the right cannot do so themselves. Obligations to **promote** are characterized as the duty to create the conditions so that holders of the right can have access to the resource.

As we can see, the concept of “levels” of obligations can be applied perfectly to the entire spectrum of rights, regardless of whether they are classified as civil and political rights or economic, social and cultural rights. Much of the work performed by human rights organizations and by international bodies that enforce international human rights regulations concerning the right to life and the right to physical and psychological integrity (and the corresponding prohibitions of death and torture) – rights generally classified as civil and political – consists of reinforcing the aspects associated with the obligations to protect and satisfy these rights. Various methods are used to do this, such as: investigation of violational state practices; trial and establishment of civil or criminal liabilities for their perpetrators; compensation for the victims; modification of legislation to establish special forums for trying cases of death, disappearance and torture; modification of programs to form the military and security forces; and the inclusion of human rights education in school curricula.

Positive obligations and negative obligations

It is important to repeat here that objections to the judicial enforcement of economic, social and cultural rights stem from the simplistic view that these rights establish exclusively positive obligations – an idea that, as we have seen, is far from being correct.²⁰ Civil and political rights, as well as economic, social and cultural rights, all constitute a series of positive and negative obligations. It is appropriate, therefore, to investigate this concept in greater detail, since its clarification will improve the extension and scope for claiming both types of right.

When referring to negative obligations, we mean the

obligations of the state to refrain from certain activities; for instance: not impeding the expression or the dissemination of ideas; not violating correspondence; not detaining people arbitrarily; not impeding a person's affiliation with a union; not interfering in strikes; not worsening the state of health of the population; not impeding a person's access to education.

As for positive obligations, it is appropriate to establish some distinctions that give us an idea of the type of measures that can be claimed from the state. It is somewhat automatic to link positive state obligations directly with the obligation to dispense funds. There is no doubt that this is one of the most characteristic ways of fulfilling the obligations to do or to give, particularly when the issue at stake concerns health, education and access to housing. However, positive obligations extend beyond the actions that require the dispensation of budget reserves for the provision of services. Obligations to provide services may be characterized by the establishment of a direct relationship between the state and the recipient of the service. But the state can also ensure the enjoyment of a right in other ways, in which other obligated individuals can take an active part.

1. Some rights can be characterized by the obligation of the state to establish some type of regulation, without which the exercise of a right has no meaning.²¹ In these cases, the state's obligation is not always associated with the transfer of funds to the recipient of the service, but rather with the establishment of precepts that ascribe relevance to a given situation or with the organization of a structure that implements a given activity. To give an operational example, the right to free association implies an obligation by the state to give legal relevance or recognition to the association resulting from the exercise of this right. Similarly, the right to form a union or to affiliate oneself with a union implies the right to ascribe the relevant legal consequences to their activities.

The political right to elect presupposes the possibility of choosing from among different candidates, which in turn implies the existence of a regulation to ensure the possibility of various candidates representing political parties and running for election. The right to information

implies at the very least the establishment of a state legislation intended to ensure access to information from various origins and the plurality of voices and opinions. The right to marry implies the existence of a legal regulation that confers some validity to the act of getting married. The right to the protection of the family presupposes that there are legal precepts that assign to the existence of a family group some form of differential consideration that its non-existence would not have.

The enjoyment of these rights implies a series of precepts establishing relevant legal consequences, resulting from the original permission. Once again, these may be new permissive precepts (the possibility of an association entering into contracts, or a married couple registering their home as a family asset, to protect it from potential foreclosures, etc.); prohibitions against the state (making it impossible to impose arbitrary or discriminatory restrictions against the exercise of the aforementioned rights, or prohibiting discrimination against children born out of wedlock); or even obligations of the state (to recognize candidates submitted by political parties, or union delegates).

2. In other cases, obligations require the regulation established by the state to limit or restrict the powers of citizens or to impose some form of obligations upon them. Legislation associated with labor and union rights in general share this characteristic, as do the relatively recent precepts governing consumer defense and environmental protection. Consequently: the establishment of a minimum wage; the principle of equal salaries, which establishes equal remuneration for equal work; obligatory breaks; the limited workday and annual paid vacations; protection against arbitrary dismissal; guarantees enabling union delegates to perform their work, etc, would make little sense if they could only be claimed when the state is the employer. In market economies, the state has an obligation to establish a regulation that extends to private employers. The same applies for the precepts governing consumer relations and environmental obligations.

There are also cases in which state regulation may establish limits or restrictions on the free interplay of market forces, in order to promote or assist access by low income groups to rights such as the right to housing. State regulation of interest rates for mortgages and of leasing for family housing are examples of this type of measure. Moreover, such restrictions are not limited to the economic field. The right to retraction and the right to reply are a good example: the state places restrictions on private journalistic media for the benefit of citizens who feel negatively affected by false or offensive information.

3. Finally, the state can fulfill its obligation of providing services to the population, either exclusively or through forms of mixed coverage that include not only state contribution, but regulations that contemplate the citizens affected by restrictions, limitations or obligations. State measures to fulfill its positive obligations can take on multiple forms: the organization of a public service (for example, courts that ensure the right to jurisdiction; provisions for the position of public defender, ensuring the right to counsel for those who cannot afford a private lawyer; or the organization of a public education system); the provision of development and training programs; the establishment of scaled public/private forms of coverage (for example, through the organization of private forms of contribution for the maintenance of social services that cover the right to health of employed people and their families, and the establishment of a public health system for people not covered through the employment structure); the public administration of different forms of credit (for example, mortgage loans for housing); the creation of subsidies; the implementation of public works; the provision of tax benefits or exemptions.

As we can see, the series of obligations a single right can encompass is extremely varied. Economic, social and cultural rights are characterized precisely because they involve a vast spectrum of state obligations. Consequently, it is false to assert that there are scant possibilities of judicially enforcing these

rights: each type of obligation offers a range of possible actions, which vary from denouncing the non-fulfillment of the negative obligation, the various forms of controlling the fulfillment, to demanding the fulfillment of the non-fulfilled positive obligation.

Judicial strategies

From what has been said thus far, we can draw conclusions that clearly call into question the idea that only civil and political rights fall into the sphere of the Judiciary.²² Nevertheless, if we understand that all rights generate for the state a series of negative and positive obligations, we need to analyze what types of obligations offer the possibility of being claimed through judicial action. The problem leads us to the classical discussions on the definition of rights: the relationship between a right and the judicial action that exists to claim it. Some conceptual issues raised by this discussion – a source of constant circular responses – refer to the strict bond between the classical idea of the subjective right, the idea of property and the model of the liberal state.²³ The essential ideas and procedures that shape the traditional continental legal system have emerged largely from the conceptual framework determined by this bond; this is why many of the almost automatic responses about the possible judicial enforcement of economic, social and cultural rights draw on the lack of actions and specific legal guarantees that protect these rights.

Some of the facets these responses highlight refer to the collective nature of many of the claims dealing with economic, social and cultural rights. They also refer to the inadequacy of the structure and the position of the Courts to impose obligations that, to be fulfilled, require that the political authorities provide the appropriate funding, or to the inequalities that would arise from the success of some individual cases in which a given right of a given person becomes claimable, whilst the rights of other identical situations that have not been questioned judicially would remain non-fulfilled. In this vein, some authors note that the limited cognitive framework of a judicial case is an obstacle to judicial protection: the decision framework of judicial litigation is not always the most suitable place for discussing and deciding

on matters of public policies that could imply prioritizing objectives, distributing resources, balancing opposing interests, etc.²⁴ Others refer to the professional training of magistrates: certain matters submitted to the consideration of the judiciary require specific technical knowledge and large amounts of information on the facts, making a specialized administrative agency better qualified for the job than a judge or a Court of Law.²⁵

Although we must admit theoretical difficulty – which evidently places limits on the judicial protection of certain obligations resulting from economic, social and cultural rights – we need to conduct a more precise analysis to clarify the distinct types of situations in which violations of economic, social and cultural rights are correctable through judicial action. Moreover, we need to add that the inexistence of specific legal instruments to remedy the violation of certain obligations arising from economic, social and cultural rights does not mean it is technically impossible to create and develop them. The argument that draws on the inexistence of appropriate actions merely exposes a state of affairs²⁶ susceptible to be modified. We could say that the traditional legal instruments – emerging from the context of disputes aimed at individual interests, the right to property and the concept of an abstentionist state – appear limited when it comes to judicially claiming such rights.²⁷

On the one hand, as we have seen, violations of economic, social and cultural rights often result from the non-fulfillment of negative obligations by the state. In addition to the many examples given, it is useful to remember that one of the underlying principles established for economic, social and cultural rights is the obligation for the state not to adopt a biased approach in the exercise of these rights (see Article 2.2 of the International Covenant on Economic, Social and Cultural Rights – ICESCR), which in fact establishes important negative obligations of the state. Violations of this type open up an enormous field for claiming judicial protection of economic, social and cultural rights, whose recognition therefore constitutes a limit and, consequently, a standard for contesting state activity that does not respect these rights.

Consider, for instance, state violation of the right to health as a result of the contamination of the environment by its

agents; or the violation of the right to housing as a result of forced eviction of residents from a given area without the provision of alternative dwelling; or the violation of the right to education as a result of restrictions on the access to education based on sex, nationality, economic conditions or other discriminatory factors; or the violation of any other right of this type when the legislation that establishes the conditions of access and enjoyment are discriminatory. In these cases, many of the traditional legal avenues are perfectly viable, whether they are cases of unconstitutionality, cases to contest or revoke regulatory acts of general or private scope, declaratory actions, *amparo* proceedings, or even suits for damages. The positive action of the state, which ends up violating the negative limits imposed by a given economic, social or cultural right, is judicially contestable and, if this vulnerability is proven, the judge may decide to strip the illicit manifestation of the state's will of any legitimacy, compelling it to make the necessary corrections so as to respect the affected right.

On the other hand, we also come across cases in which the state fails to fulfill positive obligations, that is, when the state neglects its obligations to carry out actions or measures to protect and satisfy the rights in question. This is where the greatest number of doubts and questions concerning the judicial protection of economic, social and cultural rights come into play. However, the issue involves a multiplicity of aspects that need to be reviewed. One could say that in an extreme case, that is, when the state completely and absolutely fails to fulfill all of its positive obligations, it would be extremely difficult to compel direct fulfillment through judicial action. There is some sense to the traditional objections concerning this: the Judiciary is not suited to conduct planning in public policy; judicial cases are not very appropriate for discussing measures of general scope; judicial discussion raises problems of inequality for those persons affected by the same failure to fulfill an obligation but who have not participated in the case; the Judiciary lacks the compulsory means of enforcing a verdict that compels the state to provide a service that had been neglected for all the cases involved, or to edit the neglected regulation; the substitution of general measures for *ad hoc* decisions made by the judge in a private case could also prompt undesirable inequalities, etc.

Despite the evident difficulties, it is worth pointing out some of the nuances of these objections. In principle, it is difficult to imagine a situation in which the state utterly and absolutely fails to fulfill every positive obligation associated with economic, social and cultural rights. As we have already seen, the state partly fulfills its obligation concerning rights to health, to housing or to education through legislation that extend these obligations to citizens, interfering in the market with regulations and the exercise of police power, performed *a priori* (through authorizations, accreditations and licenses) or *a posteriori* (through inspections). So much so that, given that the obligations to take appropriate steps to guarantee these rights are partly fulfilled, even when the steps do not imply the full provision of services by the state, there is always the possibility of judicially contesting the violation of state obligations, by alleging discriminatory provision of the right.

The possibilities are more evident when the state provides a partial service, discriminating against entire portions of the population. Of course, judicial and operational obstacles may hamper the formulation of similar cases, but it is hard to argue that the partial or discriminatory fulfillment of a positive obligation is not a viable case for demanding judicial protection. Accordingly, appeals that draw on equality of treatment for claiming social rights have been an avenue traditionally pursued by human rights movements in their litigation strategies. From the women's rights movement, which pushed for equal salaries in the workplace, to the civil rights movement in the United States, in claiming equality in access to jobs, equal salaries and identical education and public health conditions, equality of treatment and prohibition of discrimination are avenues that have been successfully pursued for indirectly claiming economic, social and cultural rights for groups and sectors of society that enjoy less protection from the state. Also in this respect, it is very useful to consult the development of the criteria and standards of equality and non-discrimination established by the Constitutional Court of Colombia, and their application concerning social rights.²⁸

Secondly, beyond the multiple theoretical and practical difficulties besetting the organization of collective actions, non-fulfillment by the state can often be reformulated, even in a traditional judicial context, into individual and specific

violations, rather than generic. The general violation of the right to health can be redirected, or reformulated, through the organization of an individual case filed by a single plaintiff who alleges a violation caused by the lack of production of a vaccine or by the denial of a medical service on which his or her life or health depends; by the establishment of discriminatory conditions in access to education or housing; or even because of unreasonable or discriminatory rules for access to social welfare benefits (for example, the prohibition of extending to illegal immigrants the benefits of an AIDS treatment medicine program). The ability to argue this will be founded on the intelligent description of the violations of positive and negative obligations, or otherwise on a conclusive demonstration of the consequences of the violation of a positive obligation based on an economic, social and cultural right, on the enjoyment of a civil and political right. If the violation affects a broad group of people, a situation known in contemporary procedural law as “homogenous individual interests or rights”,²⁹ the numerous individual judicial decisions will alert the political authorities to a situation of widespread failure to fulfill obligations of importance to public policy – a particularly valuable consequence for the issue we shall address next.

The response of the Courts to collective and direct social rights cases prompted by the inactivity of the state may assume various profiles. In principle, the role of the Judiciary may consist of declaring that the omission of the state constitutes a violation of the right in question, thereby compelling the state to take the appropriate action. In these cases, it is the role of the Judiciary to advise the public authorities as to the nature of the appropriate action, either by notifying the specific result required, without determining what method to employ (for example, access of a portion of the population to medical services or the relocation of arbitrarily evicted people); or, in cases when there is only one possible means of obtaining the required result, by describing in detail the action that must be taken. In such cases, the public information available and the prior conduct of the state, its “own acts”, acquire enormous importance, as they add to the discussion on matters of “public policy” or of a technical nature – for example, concerning budget priorities or priorities to formulate, develop and

implement specific official measures. It is in this type of case, in which the obstacles to claiming social rights are more evident, that the Judiciary tends to act more reticently.

There is no doubt that the implementation of economic, social and cultural rights depends in part on planning and budget forecasting, which, given their nature, are the job of the public authorities, and only in limited cases may the Judiciary intervene to make up for its inefficiency. Even in these cases, however, there are a variety of opportunities for judicial activity, and courts have found ways of guaranteeing the validity of social rights that have been violated, basing their intervention on legal standards established by constitutions and human rights treaties, and seeking, in each case, the best way of shielding the scope of the action from the other branches of the state. On occasion, they redirect the case after having established its legal framework, in order to define the measure, or public policy, necessary to remedy the violation of the rights in question.

The jurisprudence of domestic courts in Latin America provides examples of some of the avenues successfully explored by them to perform their function of guaranteeing economic, social and cultural rights. Among other important cases, this was the avenue pursued by judges who succeeded in compelling the state to provide drugs to all AIDS patients in the country; to manufacture and administer vaccine to the entire population suffering from an endemic disease; to create maternal/child care centers for a socially discriminated group; to supply drinking water to an indigenous community; to extend the coverage of an educational or welfare benefit to an originally excluded group; to return to private secondary school students who were unfairly expelled.³⁰

The role of the Judiciary and cooperation between legal and political strategies

An analysis of the historical circumstances that led up to a greater judicial activism concerning economic, social and cultural rights in Latin America is directly related to the existence of political factors that assigned the Judiciary a special legitimacy to occupy a place in the decision-making arena that was previously restricted to the other branches of the state.

The weakness of the representative democratic institutions, together with the deterioration of the traditional centers of social and political mediation, have contributed to this transfer to the judicial domain of collective conflicts that were previously settled in other social or public spheres, restoring primarily the topic of social rights – the old controversy over the degree of maneuverability of judicial bodies in relation to administrative bodies. To a certain extent, the recognition of judicially protectable rights limits or restricts the government's maneuverability. But an analysis of this matter does not fall within the conceptual framework of this paper. However, we understand that this is not a question that can be answered in an abstract manner, without back-up from the social and institutional context in which the intervention of justice is sought.³¹

It is clear, therefore, that judicial intervention in these fields should be, in the interest of preserving its legitimacy, firmly based on a legal standard: the “rule of judgment”, in which the intervention of the Judiciary is grounded, may only be used as a criterion for analyzing the measure in question if has its roots in a constitutional or legal precept (for example, the principles of “reasonableness”, “proportionality” or “equality”, or an analysis of minimum content that may be found in the very precepts that establish rights). Therefore, it is not the job of the Judiciary to devise public policies, but rather to examine existing policies with the use of applicable legal standards and, whenever discrepancies are found, forward the matter back to the appropriate authorities so they can adjust their activity.

When, in public policy planning, the constitutional or legal precepts determine agendas on which the validity of economic, social and cultural rights depend, and the appropriate authorities have not adopted the necessary measures, it is the job of the Judiciary to chasten this omission and send the matter back to the authorities so that appropriate measures are taken. This aspect of the judicial action can be regarded as participation in a “dialogue” between the various branches of the state to observe the legal and political program established by the Constitution or by human rights conventions.³² Only under exceptional circumstances, when justified by the magnitude of the violation or by the sheer lack

of cooperation by the political authorities, do judges proceed to define, according to their own criteria, the measures that must be adopted.³³

In this sense, in the following we will attempt to characterize typical situations in which the Judiciary assumes the task of verifying compliance with legal standards in the development and application of public policies.

The first type of situation is the judicial intervention that tends to give legitimacy to public policy measures assumed by the state without judging the public policy itself – transforming measures developed by the state within a framework of arbitrariness into legal obligations that are, consequently, subject to sanctions in cases of non-compliance. In its analysis, the court accepts the measure that has been created by the other branches of the state, transforming its character from a mere arbitrary decision into a constituted obligation. Accordingly, the Judiciary becomes the guarantor that the measure will be properly applied. In many such cases, the measure developed by the state coincides with what is being demanded by claimants, only its adoption now assumes a mandatory character, and its application is not subject only to the government body it was developed by. One example is the *Viceconte* case,³⁴ in which the Argentine state made a political decision to manufacture a vaccine against an epidemic and endemic disease, going so far as to set up a time schedule for its production. All the court did alter the character of this measure, transforming it into a legal obligation; for this reason, it took the word of the state concerning the time schedule, determining sanctions in the event of non-compliance.

There are points of conflict in discussions on the problems of the Judiciary's legitimacy in this type of collective action, or actions which result in a collective impact, in cases when a decision is required concerning exclusively the fulfillment by the state of very clear obligations established by law or by regulations on social matters. Supposing this does occur, it is not up to the court to establish conduct or policy, only to compel the state to observe and apply what is stated in the law. We could take, as an example, a law dealing with AIDS that clearly defines the benefits due to affected persons, or a Ministry of Health regulation that determines the scope of

welfare coverage for AIDS cases in all public hospitals, in compliance with a judicial mandate. There is no discussion here about the existence of an obligation, in the legal sense, to provide a service, only an examination of its non-fulfillment by the state.

Although every act of interpretation of the law results to a certain extent in an act of creating law, judicial action follows the guidelines and the agendas set by Congress, which, in the classic theory of the division of powers, is the expression of the political will of the majority.³⁵ The same occurs when the Courts are summoned to apply regulations or acts emanating from the state, from which derive legal obligations for the state. The possible interference in areas or spheres of activity reserved for the other branches of government is not a question that can be validly posed in these cases. The Judiciary is limited to compelling the state to fulfill the obligations determined by law, or by the state itself, in its regulatory capacity.

The second type of situation arises in cases when a Court of Law examines the compatibility of public policy with the applicable legal principle and, consequently, its aptness to satisfy the right in question. Under these circumstances, if the court considers the policy – or any aspect of it – to be inconsistent with the principle, it sends that matter back to the appropriate authorities for them to reformulate it. The principles employed by the courts to analyze a public policy are reasonableness, proportionality, non-discrimination, progressiveness, non-retroactivity, transparency,³⁶ etc. In this respect, for example, in the *Grootboom* case,³⁷ the Constitutional Court ruled that the housing policy developed by the South African government was not reasonable, as it did not allow for the immediate provision of housing solutions for sectors of the population with urgent housing needs – the court concluded that one aspect of the policy conflicted with the principle of reasonableness, but it did not question the policy as a whole. Generally speaking, courts allow the other branches of government a broad leeway to develop public policies, so as not to substitute them in choosing the guidelines that are in keeping with the applicable legal principles.

As long as the political authorities act in keeping with

the legal principles, the Judiciary will never have to analyze whether some alternative policy could have been adopted. The degree of control also depends on the principle: the analysis of “reasonableness” is less rigorous than the analysis that could be performed based on the notion of “appropriate steps” contained in the International Covenant on Economic, Social and Cultural Rights. It is important to emphasize that, in this type of case, the judicial action in the application stage does not consist of the compulsory imposition of a penalty, understood to be a detailed and self-sufficient ruling, such as the imposition of an obligation to pay a net and exigible sum; instead, continuity is given to a directive established in general terms, and which is shaped throughout the case through “dialogue” between the judge and the state. So much so that the sentence, far from constituting the end of the process, is like a point of inflection that alters the direction of the jurisdictional action: once the award is pronounced, it is up to the state to plan how it will comply with the instructions of the magistrate, while the court limits itself to supervising the adjustment of the concrete measures adopted as a result of the order it delivered.

In the third type of situation, the Judiciary takes responsibility for establishing the measure to be adopted. In this case, the passivity of the other branches of government in the face of the vulnerability of a social right prompts the court to check the existence of a single suitable measure of public policy – that is, the inexistence of alternatives to satisfy the right in question – and order its application. A good example is the *Beviacqua* case,³⁸ in which the preservation of the life and health of a boy with a serious bone marrow disease required treatment with a specific drug that his parents could not afford. In this instance, unlike in previous cases, the Judiciary took upon itself to choose the measure to be adopted and, consequently, the appropriate conduct.

We could consider a fourth type of judicial intervention that is limited to declaring that the omission of the state is illegal, without proposing remedial steps. Even if the judge’s award is not directly applicable, there is value in a judicial action in which the Judiciary declares that the state is delinquent or has failed to fulfill its obligations concerning economic, social and cultural rights. Both in judicial cases that

are enforceable – such as the aforementioned *Beviacqua* case – and in judicial decisions that declare the non-fulfillment of state obligations in a given area, and possibly informing the political authorities thereof, the sentences delivered by the Judiciary can constitute important vehicles for advising the political authorities of the demands of the public agenda, through a grammar of rights and not merely by lobbying or party political demands.

The multiple forms of judicial intervention, which conform to different levels or degrees of activism, determine the potential of the various legal strategies, and also the possibility of establishing fruitful cooperation with other political strategies – supervision of social public policies, lobbying in government bodies or in Parliament, negotiation, social mobilization and public opinion campaigns. This is why it would be wrong to think that legal strategies cannot embrace other political strategies, or to propose, as alternatives, to take action in court or in the field of public policy. In principle, every strategy employed to claim rights, specifically in cases involving collective disputes or situations of homogenous individual interests, has a clear political sense. Moreover, in all the actions for claiming economic, social and cultural rights, the key to success lies in the very cooperation between the different fields, so that the resolution of the legal case can contribute to transforming the institutional deficiencies, state policies or the social situations that are the heart of the dispute. In general, successful legal strategies are usually those that are backed up by the mobilization and by the activism of the protagonists of the actual dispute.

At times, legal avenues preserve or improve the effectiveness of the “victories” obtained on a political level.³⁹ Within the framework of our fragile democracies, the sanction of laws by Congress does not always ensure that the acknowledged rights are upheld and, as we have seen, it is sometimes necessary to litigate to make sure these rules are implemented and observed. Accordingly, in a much-flawed institutional system, not even legal victories concerning social rights or political triumphs are definitive, and they require the use of all the available means of action and means of claim.

One of the reasons for adopting constitutional clauses

or treaties that establish rights for persons and obligations and commitments for states is to make it possible to claim fulfillment of these commitments – not as a gracious concession, but rather as a government program adopted both domestically and internationally. It seems evident that, in this context, it is important to establish mechanisms of communication, debate and dialogue that remind the public authorities of their commitments, compelling them to incorporate into government priorities measures geared towards fulfilling their obligations when it comes to economic, social and cultural rights. In this vein, it is particularly important for the Judiciary itself to “communicate” to the appropriate public authorities any failure to fulfill these obligations.

The logic of this process is similar to that which requires the exhaustion of internal resources as a prior condition for accessing the international human rights protection system: of giving the state the chance to acknowledge and fix the alleged violation before appealing to international circles to denounce the non-compliance. When the Executive does not fulfill its obligations and it is therefore labeled “delinquent” by the Judiciary, in addition to the possible adverse consequences on an international level, it will have to face from its own citizens the political accountability of its delayed action.

We have seen how the range of action of the Judiciary can vary considerably, depending on the direct actions taken to claim economic, social and cultural rights – legitimize a public policy decision already taken by the state; enforce a law or an administrative directive that establishes legal obligations in social matters; establish a standard within which the Executive must plan and implement concrete actions and supervise their application; determine a conduct to be followed; or, under certain circumstances, label the state delinquent concerning an obligation, without imposing any legal remedy or means of enforcement. Cooperation between the legal actions that produce any of the above results and other strategies of a political nature is the key to an effective claim strategy. One may suppose that the greater the moderation with which the Judiciary acts, the more active the political effort must be to ensure that the legal decision translates into the satisfaction of the rights in question. However, there are

no factors in play obliging us to consider that legal strategies exclude political channels.

It is fitting to analyze other situations that enable cooperation between these two channels when it comes to claiming economic, social and cultural rights. It is sometimes possible to employ judicial intervention purely for the purpose of illustrating other available means of making demands of the state's administrative or legislative bodies. These are complementary legal strategies, arising from a "procedural focus" or perspective: no service is claimed, nor is any policy or measure referring to social rights called into question. Their only purpose is to guarantee the conditions that make it possible to adopt deliberative processes for producing legislative directives or administrative acts.

In these situations, the demands do not expect the Judiciary to have a direct knowledge of the collective dispute and guarantee a social right; only that it complements the other actions of a political nature, for instance, claims to the Judiciary for the opening of institutional forums for dialogue, the establishment of their legal frameworks and procedures, or the guarantee that potentially affected persons may participate in these forums, under equal conditions. These cases may also be used to request access to public information that is indispensable for the prior control of policies and decisions to be adopted, and their legitimacy; the production of data, if the case calls for it; as well as the enforcement and observance of settlement agreements achieved by persons or social organizations, in the various formal or informal bodies of interchange and communication with the Executive.

In some Latin American countries, organizations of users and consumers have successfully developed these channels of action. They have claimed, for example, the holding of public hearings prior to tariff rises for public services – electricity, water, gas – or executing contracts with concessionary companies, calling for access to public information that is indispensable to uphold their rights in these areas and protecting (at times with judicial intervention) the results achieved once the deliberative proceedings are over. Environmental organizations have also developed their own legal strategies, for the purpose of claiming forums for participation and access to information before measures or

policies that involve environmental risks are adopted. The same form of legal strategy is also employed in the judicial actions of indigenous peoples seeking to secure mechanisms to consult and participate in decisions concerning their cultural homelands.

The human rights movement has a lot to learn about these strategies. When the state provides space for civil participation to discuss or analyze certain measures or policies (public hearings in Parliament or in administrative bodies, participative preparation of rules, participatory budget, strategic planning councils in cities), the actions may have as a goal to discuss the conditions of admission, as well as mechanisms of debate and dialogue, in order to ensure basic rules of procedure. In these situations, even though the right to civic or civil participation is formally discussed, the social rights in question may define the scope of this participation – for example, by outlining the affected group, the sector deserving priority attention of the state, or by having an institutional space for participation before adopting a social policy decision.

Thus, for example, in the case brought by the Independent Federation of the Shuar People of Ecuador (FIPSE, in Spanish) against the Arco oil company, the use of judicial *amparo* proceedings prevented the company from negotiating its entrance to the indigenous territory to conduct exploration activities without consulting the legitimate political authorities of the indigenous people. This case, not unlike the traditional trade union classification and trade union legalization disputes in collective bargaining processes, intended to protect the rules of the negotiation process, by defining the players legitimately authorized to negotiate.⁴⁰

Occasionally, judicial intervention may be necessary merely to enforce an agreement executed after negotiating with a state: for example, an agreement to relocate a group of people exposed to the risk of compulsory eviction. Even though these cases deal with enforcing decisions already taken by the state, the characteristics of the social rights in question – such as the right to housing – determine the maneuverability of the Judiciary and the interpretation of the very scope of the obligations emanating from these agreements.⁴¹

Among the most important legal actions that could be

expanded within the framework of indirect legal, or “procedural”, strategies are those that seek access to and production of public information.⁴² The right to information constitutes an indispensable instrument for rendering more effective civil control over public policies in the economic and social sectors, while also contributing to the monitoring, by the state itself, of the degree of effectiveness of economic, social and cultural rights. The state should possess the necessary means of guaranteeing access to public information under equal conditions. Concerning economic, social and cultural rights more specifically, the state should produce and place at the disposal of its citizens, at the very least, information on: (a) the conditions of the different affected areas, particularly when their description requires measurement expressed by indicators; and (b) the content of developed or planned public policies, with express mention of their motives, objectives, timescales and the resources involved. The actions employed to access information are usually legal avenues that support the work of supervising social policies and documenting economic, social and cultural rights violations.⁴³

What characterizes these indirect or complementary actions is that the judicial avenues, far from being the center of the strategy for claiming economic, social and cultural rights, serve to back up other political actions employed to advance the demands for rights in a collective dispute: direct complaints to the Executive, development of channels of negotiation, or even lobbying with officials, Congress or private companies. Once again, it is clear that there are no exclusive or isolated options and that legal instruments can help maximize the political strategy.

NOTES

1. See F. Hayek, 1976, vol. 2, chap. 9.
2. Another attempt at differentiation consists of correlating a specific type of state obligation with each category of rights. Thus, for some authors, civil and political rights correspond to obligations in terms of results, while economic, social and cultural rights correspond only to obligations of conduct. For a more thorough look, consult R. Garretón Merino, 1996, p. 59; and P. Nikken, 1994. See also A. Eide, 1993, pp. 187-219. See opposing arguments in G.H.J. van Hoof, 1984, pp. 97-110; and P. Alston, 1991. In fact, despite the possibility of supporting the distinction, it turns out to be of little relevance when differentiating between civil and political rights, and economic, social and cultural rights.
3. C. Nino (1993, p. 17) describes this position as "conservative liberalism", although he does clarify that it is "more conservative than liberal".
4. For more on this, see also A. Smith, 1937; L. Billet, 1975, pp. 430 and followings; B. de Sousa Santos, 1991, pp. 175-178.
5. See van Hoof, 1984, pp. 97 and followings.
6. See also, on the topic, the opinion of C. Nino, pp. 11-17. From an economic point of view, this argument is the central thesis of S. Holmes & C.R. Sunstein, 1999. See also R. Bin, 2000; and R. Plant, 1992.
7. See also F. Contreras Peláez, 1994, p. 21: "Pure 'negative' obligations (or, in other words, rights that bring about exclusively negative obligations), therefore, do not exist, although it does seem possible to assert a difference of degree with respect to the relevance that services have for one type of right or the other".
8. See also Contreras Peláez, op. cit., pp. 17-20. And also B. de Castro, "Los derechos sociales: análisis sistemático", in *Derechos económicos, sociales y culturales*, by various authors. Murcia, 1981, pp. 15-17.
9. Contreras Peláez, op. cit. p. 21.
10. See the American Convention on Human Rights (Pact of São José, Costa Rica), Article 21.1: "Everyone has the right to the use and enjoyment of their own property. The law may subordinate such use and enjoyment to the interest of society" (emphasis added).

11. See *T. Bourgoignie*, 1994.

12. See *S. Felgueras*, 1996.

13. See also *F. Ewald*, 1985, Book IV.2.

14. ECHR, *López Ostra v. Spain*, A 303-C (1994). ECHR, *Guerra and Others v. Italy*, 19 February 1988.

15. See in European jurisprudence the case *Osman v. the United Kingdom*, ruling of 28 October 1998, in which the European Court established that these obligations included the primary duty of guaranteeing life, by implementing an effective criminal legislation to prevent crimes from being committed against people, and by maintaining a legal system to prevent and punish criminal behavior. This includes, under certain circumstances, the positive obligation of adopting operational measures to protect an individual or individuals whose lives are at risk due to the criminal acts of other individuals. The extent of the positive obligations imposed on the state varies considerably. Accordingly, for example, the duty of the state to officially investigate whether the death of an individual was caused by use of force was also considered to be covered by Article 2, read in conjunction with the general duty imposed by Article 1 of the Convention. See ECHR, *McCann and Others v. the United Kingdom*, ruling of 27 September 1995, and *Kaya v. Turkey*, ruling of 19 February 1998. More recently, in *Mahmut Kaya v. Turkey*, ruling of 28 March 2000, positive duties concerning the right to life were established based on the right to an effective remedy established in Article 13 of the Convention.

16. The Constitutional Court established that judicial protection for economic, social and cultural rights will only be accepted in cases in which a fundamental right has been violated, in accordance with the corresponding requirements and criteria of distinction. See *C. Const.*, S. Primera de Rev. Sent T-406, June 5/92. Expte. n. T-778. M.P. *Ciro Angarita Barón*. See also *M.J. Cepeda Espinosa*, "Derecho constitucional jurisprudencial", *Legis*, Bogotá, 2001.

17. This was the argument used in the case of *Loverace v. Canada* (1981), Communication n. 24/1977. The applicant ethnically belonged to the Maliseet indigenous people. According to indigenous law and the community's own rules on usage of the Tobique reservation, where she used to live, women who marry non-Indians lose their right to live on the reservation, even though they might have been born there. The applicant, who was born on the reservation, married a non-Indian but later, after her divorce, wished to return to the reservation and live with the Maliseet people, to which she belonged. The community denied her this right. Basing her case on the International Covenant on Civil and Political

Rights, the author alleged violation of not only her right to participate in the community's culture, guaranteed by Article 27, but also her right to choose her place of residency (Article 12), her right to not suffer interference in her private or family life (Article 17), and her right not to be discriminated against on grounds of gender (Article 26). Her application, which was accepted by the Human Rights Committee (HRC), made clear the deep-seated relation between personal autonomy and the enjoyment of cultural heritage. Her life project was associated with the use of cultural territory, as only possible on that reservation lived the community she belonged to. The HRC understood that, in this case, Article 27 should be read in conjunction with Articles 12, 17 and 26, among others, and judged that Canadian legislation violated Article 27 of the Covenant.

18. Even in this case it is possible to illustrate negative obligations. According to van Hoof, the state would be violating the right to housing if it allowed the modest homes of lower-income people to be demolished and replaced with luxury housing beyond the economic means of the original inhabitants without offering them alternative housing on reasonable terms. See van Hoof, p. 99. More clearly, the state should refrain from carrying out this relocation under these conditions. The example is far from being theoretical: see the observations of the Committee on Economic, Social and Cultural Rights on the report presented by the Dominican Republic (UN Doc. E/C.12/1994/15), points 11, 19 and 20 (cited in H. Steiner & P. Alston, 1996, pp. 321).

19. See van Hoof, p. 99. Henry Shue (1980) originally suggested this distinction. In the field international human rights law, the distinction was assumed – with some corrections that reduces the enumeration to three categories: obligations to respect, obligations to protect and obligations to fulfill, satisfy and comply – in the principle interpretive documents of the ICESCR: Committee on Economic, Social and Cultural Rights: General Comment n. 3 (1990) "The Nature of States Parties' Obligations – Art. 2, paragraph 1 of the Covenant"; General Comment n. 4 (1991) "The Right to Adequate Housing – Art. 11, paragraph 1 of the Covenant"; General Comment n. 5 (1994) "Persons with Disabilities"; General Comment n. 6 (1995) "The Economic, Social and Cultural Rights of Older Persons"; "Limburg Principles" (1986); "Maastricht Guidelines" (1997); CIJ, "Bangalore Declaration and Plan of Action" (1995). Latin American Conference of Economic, Social and Cultural Rights Organizations: "Declaration of Quito" (1998).

20. In this respect, see the opinion of R. Alexy (1993, pp. 419-501), who defends a broad concept of the positive obligations of the state, or, as he calls it, "rights to positive actions of the state". These would include rights to

protection, rights to organization and to legal process and rights to services in a strict sense.

21. Alexy affirms that “an action can become legally impossible only if it is a legal act. Legal acts are actions that would not exist without the legal precepts that constitute them. Accordingly, without the precepts of contractual law, the legal act of entering into a contract would not be possible; without corporate law, the legal act of establishing companies would not be possible ... The constitutive nature of the precepts that make them possible characterizes these actions as institutional actions. Institutional legal actions become impossible when their constitutive precepts are repealed. Consequently, there is a conceptual relationship between the repeal of these precepts and the impossibility of institutional actions” (pp. 189-190). Our argument complements that of Alexy: “institutional legal actions” become impossible not only when their constitutive precepts are repealed, but also when these precepts are not created. If the constitution or human rights convention establishes rights whose exercise depends conceptually on the creation of precepts, this implies a positive obligation by the state to create these precepts. Alexy (pp. 194-195) comes back to this point when he discusses the rights to positive actions, distinguishing between rights to “real positive actions and normative positive actions”. Rights to normative positive actions are “rights to state acts of imposing precepts”.

22. In this respect, see the separate vote of Judge Piza Escalante in OC-4/84, 19 January 1984, “Proposta de modificación a la Constitución Política de Costa Rica relacionada con la naturalización”, of the Inter-American Court on Human Rights, in point 6: “... the distinction between civil and political rights and economic, social and cultural rights follows merely historical reasons, and not the legal differences between them; so much so that, in fact, the important thing is to distinguish, with a technical and legal criterion, between fully claimable subjective rights, i.e., that are ‘directly claimable in themselves’, and progressive rights, which in fact behave rather like reflected rights or legitimate interests, i.e., that are ‘indirectly claimable’, through positive political demands or pressure on the one hand and through legal actions to contest what opposes them or what grants them with discrimination. The specific criteria for determining what kind of right we are dealing with in each case are circumstantial and historically conditioned; but it can be said, in general, that whenever we can determine that a particular fundamental right is not directly claimable in itself, then we are dealing with a right that is at least indirectly claimable and that can be progressively realizable”.

23. See, in this respect, the lucid analysis of J.R. de Lima Lopes, 1994.

24. See also, for example, Lon L. Fuller, "The Forms and Limits of Adjudication", 92 *Harvard Law Review*, p. 353.

25. See also, for example, Cass R. Sunstein, "Response: From Theory to Practice", 29 *Arizona State Law Journal*.

26. A "gap" that indicates a flaw in the system, according to the terminology of Ferrajoli (1999, p. 24). The author states, "it should be noticed that for the vast majority of such rights [social rights], our legal tradition has not elaborated guarantees as effectively as those established for the rights to freedom. But this is primarily the result of the slow development of legal and political sciences, which until now have not theorized or projected a social state of law comparable to the old liberal state; this has allowed the social state to develop, in actual fact, through a simple enlargement of the arbitrary jurisdictions of administrative apparatus, the unregulated game of pressure groups and clientelism, the proliferation of discrimination and privileges, and the growth of the normative chaos that they themselves now denounce and think of as a 'crisis of the regulatory capacity of law'" (p. 30).

27. The lack of adequate judicial mechanisms or guarantees says nothing of the conceptual impossibility of making economic, social and cultural rights the object of judicial protection, but – as we have already seen – it does require suitable legal instruments to be devised and created to advance such claims. Some of the progress in contemporary procedural law has been made with this in mind: the new perspectives for *amparo* proceedings, the possibilities of formulating cases of unconstitutionality, the development of declaratory actions, class actions, public civil actions, Brazil's *mandado de segurança* injunctions, and the legitimacy of the Justice Department or the Office of the Public Defender to represent collective interests, are all examples of this trend. It is worth emphasizing, moreover, that another source of supposed difficulties promoting cases that attempt to prove non-fulfillment of economic, social and cultural rights by the state lies in the privileges the state enjoys when legal action is brought against it, privileges that would not be admissible if similar issues were at stake among citizens.

28. See the research paper: "Análisis jurisprudencial. La igualdad en la jurisprudencia de la Corte Constitucional". In: Various Authors, *Pensamiento Jurídico – Revista de Teoría del Derecho y Análisis Jurídico*. Universidad Nacional de Colombia, n. 15, 2002, pp. 347-369.

29. See, in this respect, the Brazilian Consumer Defense Code, Article 81, sole paragraph (iii).

30. To examine cases of relevance to this topic, one may consult the experiences developed for Argentina, Dominican Republic, Venezuela and Nicaragua in the research paper: *Los derechos económicos, sociales y culturales. Un desafío impostergable* (IIDH, 1999).

31. In "Reyes desnudos. Algunos ejes de caracterización de la actividad política de los tribunales" (unpublished), Christian Courtis illustrates that the question concerning the legitimacy of judicial action cannot be answered in an abstract manner, considering just one or two normative variables, such as the role of the courts in a "pure theory" of democracy, or the non-elective origin of judges. The question of legitimacy requires empiric information on the functioning of the political system and a concrete knowledge of the historical context in which the judges act. In this vein, analysis of the legitimacy of judicial action implies the necessary comparison with the analysis of the legitimacy of the action of the other branches.

32. Concerning the legitimacy of a constitutional court in a social and democratic state, acting to protect the procedural conditions for the democratic genesis of law, which includes the guarantee of fundamental social rights that assure inclusion in the political process, see J. Habermas, 1994, pp. 311 and followings. On the role of judges in a constitutional and social state, see, also, Ferrajoli (pp. 23-28). Other authors justify strong judicial intervention to protect the majority of rights of disadvantaged social groups. See also Owen Fiss, 1999, pp. 137-159.

33. This occurred in the aforementioned structural reform disputes. It is useful to emphasize – in response to the objections posed against the incapacity of the Judiciary to resolve technical matters, or against the limitations of the judicial process to address cases that are complex or have multiple plaintiffs – that many analysts have applauded the role of the courts when they proceed to devise policies and change institutional practices. The lack of predisposition on the part of the Executive or Legislative to recognize and modify their illegal policies and actions determines the strict necessity for the matter to be addressed and resolved by an impartial and independent tribunal. See, for example, William Wayne, "Two Faces of Judicial Activism", 61 *George Washington Law Review* 1 (1992).

34. Cámara Nacional de Apelaciones en lo Contencioso Administrativo Federal, Sala IV, caso Viceconte, Mariela v. Estado Nacional-Ministerio de Salud y Acción Social s/ amparo, 2 June 1998, *La Ley*, Suplemento de derecho constitucional, 5 November 1998. The case may be consulted in the IIDH research paper: *Los derechos económicos, sociales y culturales*, p. 81.

35. In these cases, the discussion between judicially protectable rights and free conduct of political bodies is limited, as politics acts first through Congress and, in any extent, is limited to determining for itself legal obligations concerning social policy. Concerning the classic discussion over the tension between democracy and rights, with reference to judicially protectable rights, see G. Pisarello, 2001, and also E. Rivera Ramos, 2001. For a broader view of the debate that emerged in the United Kingdom with the incorporation of the human rights statute and the consequent attribution of new powers to the Judiciary to the detriment of Parliament, see M. Loughlin, 2001.

36. The reference is to the cases in which a legal precept imposes the obligation to develop processes to produce information and consultation – for example, for the recipients – during the stage of development and evaluation of a social policy. Therefore, in the case of *Defensoría del Pueblo de la Ciudad v. INSSJP*, the criterion for annulling the privatization process was precisely the lack of access to information for users of the system. Similarly, in other cases, the *contencioso-administrativo* resource (judicial review) in Argentina has annulled tariff hikes for public services due to the absence of public hearings – understood to be the consultation opportunity for users – prior to the adoption of the decision.

37. Constitutional Court of South Africa, case CCT 11/00, *The Government of the Republic of South Africa and Others v. Irene Grootboom and Others*.

38. CSJN, *Campodónico de Beviacqua, Ana Carina v. Ministerio de Salud y Acción Social – Secretaría de Programas de Salud y Banco de Drogas Neoplásicas, s/ recurso de hecho*, 24 October 2000.

39. In the *Asociación Benghalensis* case, a group of organizations that defend the rights of AIDS victims filed a class action that was judged by Argentina's Supreme Court of Justice. The verdict obliged the Executive to observe the law on AIDS referring to the obligatoriness of providing medicines. This law had been passed as a result of an intense political campaign, in part instigated by the same groups and plaintiffs who would later have to take judicial action to make it effective. It is also worth mentioning the cases in which women's organizations went to court to demand the implementation and observance of legislation on reproductive health for which they had fought in Congress.

40. See *Tarimiat, Firmes en nuestro territorio. FIPSE v. Arco*. Quito: CDES, 2001. Available at <http://www.infodesarrollo.org/archivos/6c70ae2fcdc4dc83dcd0aa5b37d87252/TARIMIAT_2DA_EDICION.pdf>. Last access on 7 January 2005.

41. In a case concerning an agreement made between evicted families and the Government of the City of Buenos Aires, the former judicially demanded fulfillment of the state's obligations that had been agreed: construction of housing on public land and a temporary solution to the housing needs of the group while the construction work was under way. In this case, which sought fundamentally to enforce the agreement, constitutional and international standards on the right to housing were used to interpret the scope of the obligation to provide temporary housing with certain characteristics, which was requested through a writ of prevention. The court judged the request and ordered the families to be housed in hotels in the city, under specific conditions of habitableness. Even though the agreement was a consequence of negotiation and political pressure on the government, it was the litigation that made the agreement effective and determined the legal scope of the obligations assumed by the state. See *Agüero Aurelio Eduvigio and Others v. the Government of the City of Buenos Aires on amparo* (Article 14 CCABA), Expte. n. 4437/0. Resolution of 26 February 2002.

42. When adopting the International Covenant on Economic, Social and Cultural Rights, the state undertakes the responsibility to raise information and formulate a plan, as the Committee on Economic, Social and Cultural Rights states. On some topics – such as the right to adequate housing – the obligation of the state to immediately implement an effective monitoring of the housing situation in its jurisdiction is expressly recognized, and for this it needs to conduct a survey of the problem and of the groups that find themselves in vulnerable situations or in difficulties – homeless persons and their families, persons inadequately housed, persons who do not have access to basic amenities, persons who live in illegal settlements, persons subject to forced eviction and low-income groups (General Comment n. 4, point 13). Concerning the right to compulsory primary education, free of charge, those states that did not have this already implemented at the time of ratification assumed the commitment to prepare and adopt, within a period of two years, a detailed plan of action for its progressive implementation (Article 14, ICESCR). These obligations to monitor, gather information and prepare a plan of action for the progressive implementation are extendable, as immediate measures, to the other rights sanctioned in the Covenant (General Comment n. 1, points 3 and 4).

43. See also Abramovich & Courtis, 2000.

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