

## A. Linking Health to Development and the Future Vision of Barbados

As Barbados sets a new trajectory as a new Republic, we encourage the “craftsmen of our fate” to ensure that Barbados’ new Constitution reflects the high hopes of a people driven by future desires and not current fears. The Bill of Rights in the 1966 Barbados Constitution clearly tells the story of our struggles and aspirations at that juncture of our history. In 2023, the right to health and the right to adequate food fully reflect the struggles and hopes of the new Republic of Barbados. The COVID-19 pandemic was a wake-up call for a number of issues, notably health, including but not limited to the stark reality of the burden of noncommunicable diseases (NCDs) and the vulnerability of small island developing states like Barbados. In Barbados, 8 out of every 10 deaths are due to a NCD,<sup>1</sup> and the economic burden is estimated at Bds \$375 million annually in direct and indirect costs.<sup>2</sup>

As highlighted in our previous submission to the Barbados Constitutional Reform Commission,<sup>3</sup> explicit inclusion of the right to the enjoyment of the highest attainable standard of physical and mental health and the right to adequate food as fundamental rights aligns with international human rights treaties, which Barbados has ratified/acceded to.<sup>4</sup> Likewise, alignment is also found in the vision of Barbados that has been articulated by Prime Minister, the Honourable Mia Mottley, both locally and internationally. Most recently, on May 1<sup>st</sup> 2023, Prime Minister Mottley led her government in the signing of the Declaration of Mission Barbados,<sup>5</sup> a document designed to realise national transformation over the next seven years. It is significant that two of the “Six Missions” to engender sustainable development and prosperity include:

- Ensuring that by 2030 all Barbadians have equitable and reliable access to clean water and nutritious food that is affordable; and
- Creating a society that prioritises wellness and happiness by 2030, and that there is improvement of public health and safety which will result in a 50% reduction in new cases of non communicable diseases.

The battle against NCDs that is being championed by the current government, and reflected in its implementation of policies, such as the increase of the Sugar-Sweetened Beverage tax to 20% in

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<sup>1</sup> Government of Barbados, Ministry of Health and Wellness. The Barbados National Strategic Plan for the Prevention and Control of Non-communicable Diseases 2020-2025. [https://www.iccp-portal.org/system/files/plans/brb\\_B3\\_s21\\_NCD%20Strategic%20Plan%202020-2025.pdf](https://www.iccp-portal.org/system/files/plans/brb_B3_s21_NCD%20Strategic%20Plan%202020-2025.pdf)

<sup>2</sup> *Ibid*, para. 13. “Further estimates showed that NCD-related out-of-pocket (OOP) spending, prevention and treatment expenditures, and decreased productivity are costing Barbados not less than Bds \$375 million per year, and could be costing as much as Bds \$ 825 million per year.”

<sup>3</sup> HSFB HCC UWI LHRU O'Neill Submission to the Barbados Constitutional Reform Commission. Email submission dated April 14, 2023.

<sup>4</sup> See e.g., International Covenant on Economic, Social and Cultural Rights (ICESCR) (acceded to on 5<sup>th</sup> January 1973); Convention on the Rights of the Child (CRC) (ratified on 9<sup>th</sup> October 1990); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified on 24<sup>th</sup> July 1980); Convention on the Rights of Persons with Disabilities (CRPD) (ratified on 27<sup>th</sup> February 2013); and American Convention on Human Rights (ACHR) (ratified on 5<sup>th</sup> November 1981).

<sup>5</sup> Government Information Service. Government & Social Partnership Sign Declaration. (May 3, 2023). <https://gisbarbados.gov.bb/blog/government-social-partnership-sign-declaration/>.

2022,<sup>6</sup> and the implementation of the Barbados School Nutrition Policy in 2023,<sup>7</sup> is not just a health issue; it is a human rights issue; it is our nation's fight against the ills of slavery, colonialism and neo-imperialism; it is a battle to break ties with our past which should be embedded in the heart of our new republican Constitution.

On May 5<sup>th</sup> 2023, Barbados underwent its Universal Periodic Review before the United Nations (UN) Human Rights Council.<sup>8</sup> A clear example of the current government's commitment to human rights was that during that meeting, Minister of Foreign Affairs, the Honourable Kerrie Symmonds, assured the UN Human Rights Council that Barbados "remains committed to human rights, both in word and in deed".<sup>9</sup> Minister Symmonds made a strong global statement, indicating Barbados' commitment to incorporating the United Nations Convention on the Rights of the Child into the proposed Barbados Children's Bill. This incorporation would demonstrate that Barbados is a State that takes human rights seriously, and accepts that accountability is an important part of the realisation of rights, including the right to health and the right to adequate food.

To leave out a right to health and a right to adequate food from the Constitution at this juncture of our history because of fear of redress is to declare freedom to a people while chaining them to their past. The people of Barbados deserve better. Let us step boldly into our future as a newly minted Republic with a Constitution that reflects the new path and transformative vision we have chosen, one that is able to deliver on the hopes and aspirations of Barbadians and residents alike.

## **B. Constitutionalisation as an enabling legal environment to protect health and adequate food**

The right to the enjoyment of the highest attainable standard of physical and mental health (the right to health) was first expressed in 1946 as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."<sup>10</sup> Since then, the right to health has been included in a number of legally binding human rights instruments,<sup>11</sup> and authoritatively interpreted by treaty bodies as an inclusive right, which contains freedoms, such as "the right to

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<sup>6</sup> Barbados Revenue Authority. Policy Note P&F No. 004/2022. <https://bra.gov.bb/News/Policy-Notes/Excise-Tax-on-Sweetened-Beverages.aspx>.

<sup>7</sup> Ministry of Education, Technological and Vocational Training. Barbados School Nutrition Policy. <https://mes.gov.bb/Download.ashx?file=Attachments%2FThe+Barbados+School+Nutrition+Policy+Revised.pdf&name=The+Barbados+School+Nutrition+Policy>.

<sup>8</sup> United Nations. 43rd Session of Universal Periodic Review. Barbados' human rights record examined by Universal Periodic Review. 5 May 2023. <https://media.un.org/en/asset/k15/k15wuqa5wr>.

<sup>9</sup> *Ibid.*

<sup>10</sup> Constitution of the World Health Organisation, U.N. General Assembly, entered into force 17 Nov. 1947, A/RES/131, preamble. <https://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf>.

<sup>11</sup> Most notably, the most comprehensive provision on the right to health can be found in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). See also Articles 10, 11 and 12 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Article 24 of the Convention on the Rights of the Child (CRC); Article 25 of the Convention on the Rights of Persons with Disabilities (CRPD); Article 5.(e).(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); and Articles 28, 43.1.(e) and 45.1.(c) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

control one's body, including sexual and reproductive freedom"<sup>12</sup>, and entitlements, such as timely and appropriate health care as well as the underlying determinants of health.<sup>13</sup>

In recent years, research addressing the social determinants of health,<sup>14</sup> or those "non-medical factors that influence health outcomes", has begun to identify, describe and conceptualise the different social and economic causes of injury and disease.<sup>15</sup> In this context, the notion of "legal determinants of health" has been used to depict how law can structure, perpetuate, and mediate a myriad of medical and non-medical factors that influence health outcomes, including food, education, housing, income, employment, sanitation, and health care.<sup>16</sup> From pandemic responses to the prevention and treatment of non-communicable and infectious diseases, law is a crucial determinant of what is achievable: empowering and obligating agencies to safeguard the public's health, regulating access to goods and services, and protecting individual rights by placing limits on government and private action.<sup>17</sup>

Constitutional law underpins all enacted laws and regulations and, as such, is a key legal determinant of health in any country. When it comes to the rights to health and to adequate food, a constitution can be used to:

- ***Set out the freedoms and entitlements that make up the right to health and other Economic Social and Cultural Rights (ESCRs).*** Constitutional law can set out the rules that shape social and economic interactions. In the case of health, a constitution typically defines the government's obligations to safeguard the public's health and to protect personal freedoms and rights. At the same time, it can recognize a right to health and set out the specific freedoms and entitlements that make up this right, and that were referenced above. This creates an enabling legal framework that not only protects the

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<sup>12</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See para. 8.  
<https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>13</sup> See, e.g., Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See paras. 8 and 11.  
<https://www.refworld.org/pdfid/4538838d0.pdf>; Inter-American Court of Human Rights. Case of Poblete Vilches et al. v. Chile. Merits, reparations and costs. Judgement of March 8, 2018, paras. 105-110.  
[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_349\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_349_ing.pdf).

<sup>14</sup> "The social determinants of health (SDH) are the non-medical factors that influence health outcomes. They are the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life." See World Health Organisation. "Social determinants of health", [https://www.who.int/health-topics/social-determinants-of-health#tab=tab\\_1](https://www.who.int/health-topics/social-determinants-of-health#tab=tab_1).

<sup>15</sup> Cassandra de Lacy-Vawdon, and Charles Livingstone. "Defining the commercial determinants of health: A systematic review". 2020. *BMC Public Health* 20, 1022,  
<https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-020-09126-1>.

<sup>16</sup> Lawrence O. Gostin, John T Monahan, Jenny Kaldor, Mary DeBartolo, Eric A Friedman, Katie Gottschalk, et al. "The legal determinants of health: harnessing the power of law for global health and sustainable development". 2019. *The Lancet* 393, page 1859.  
[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)30233-8/fulltext#seccesstitle530](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)30233-8/fulltext#seccesstitle530).

<sup>17</sup> *Ibid*, page 1894.

conditions in which people can achieve physical, mental and social well-being, but also sets rules to guide and limit individual behaviour to protect the public's health and reduce the risk of injury and disease.<sup>18</sup>

- **Build legal capacities and empower governments.** A constitutional text can create the infrastructure for drafting, implementing, and enforcing laws that promote health with justice. At the same time, it can empower governments to safeguard the public's health, establish key governmental agencies and allocate responsibilities between levels of government. For instance, a constitution can introduce the power to tax and spend to create economic incentives or disincentives for individual and corporate conduct that affects health; the power to restrict deceptive advertising and inform the public about the health effects of products; or the power to alter the socioeconomic environment through redistributive taxation, safety nets, and social welfare policies.<sup>19</sup>
- **Set the tools to hold actors and institutions accountable.** At the same time that it empowers governments to protect health, the constitution can also set limits on those powers, and establish other rules to protect individuals from both State and non-State actors that may have an impact on health outcomes. Similarly, the constitution can design legal mechanisms for fairly resolving health-related grievances that arise and providing effective remedies.<sup>20</sup>
- **Recognise the international consensus around the interdependence and indivisibility of human rights.** There is international consensus around the interdependence and indivisibility of human rights, or the understanding that one right cannot be fully realised or enjoyed without the other rights.<sup>21</sup> Relatedly, Barbados' willingness to comply with its international obligations under the various international human rights treaties is evidence of its acceptance of this international consensus. Likewise, the rights-based 2030 Agenda for Sustainable Development, widely endorsed by 193 United Nations Member countries, including Barbados, includes goals that are

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<sup>18</sup> *Ibid*, page 1868.

<sup>19</sup> *Ibid*, page 1864.

<sup>20</sup> *Ibid*, page 1894.

<sup>21</sup> United Nations. Office of the High Commissioner for Human Rights. What are human rights?  
<https://www.ohchr.org/en/what-are-human-rights#:~:text=All%20human%20rights%20are%20indivisible,economic%2C%20social%20and%20cultural%20rights.>

relevant to the realisation of ESCRs, such as the right to health and to adequate food.<sup>22</sup> As such, ESCRs should have the same constitutional status as civil and political rights.<sup>23</sup>

In this context, the constitutionalisation of ESCRs, like the rights to health and to adequate food, sets the legal foundations for the State's duty and power to safeguard and improve the wellbeing of its population, while also imposing limits on the use of State power. As explained by the Committee on Economic, Social and Cultural Rights (CESCR),<sup>24</sup> it might be difficult to fully realise rights in the absence of sound legislative foundations for the necessary measures.<sup>25</sup> Considering this obligation to establish normative bases, and given that the Constitution is, par excellence, a founding norm, the constitutionalisation of ESCRs contributes to the compliance with such an obligation, allowing States to implement health laws and policies and to defend them before individuals, organisations and other levels of government. They not only favour a robust protection of the different aspects of health and wellbeing, such as healthcare and the underlying determinants of health, but also allow the State and its organs to respond to a wide range of pressing health problems and future threats. Importantly, the constitutionalisation of ESCRs has the potential to create an environment that is more prone to action - across all branches of government - to respect, protect and fulfil those rights.<sup>26</sup>

There are different examples across a number of jurisdictions where governments have relied on constitutional ESCRs to pass and uphold legislation and regulations that, for example, increase excise taxes and prices on tobacco products or limit aggressive marketing and advertising of unhealthy foods to children. Some cases examined below provide examples of how courts have relied on a constitutionally protected right to health, as well as international human rights law, to uphold public health measures that were challenged by businesses or industry actors.

In the case of the *5,000 Citizens Against Article 3 of Law No. 28705* (2011), the Constitutional Court of Peru made a specific connection between tobacco control, fundamental rights, and the

<sup>22</sup> United Nations. Consensus Reached on New Sustainable Development Agenda to be adopted by World Leaders in September. 2 August 2015. <https://www.un.org/sustainabledevelopment/blog/2015/08/transforming-our-world-document-adoption/>. Broadly, Sustainable Development Goal (SDG) 2 aims to "end hunger, achieve food security and improved nutrition, and promote sustainable agriculture" and SDG 3 aims to "ensure healthy lives and promote well-being for all at all ages". Under SDG3, target 3.4 specifically states "[b]y 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment and promote mental health and well-being."

<sup>23</sup> United Nations. Key concepts on ESCRs - Are economic, social and cultural rights fundamentally different from civil and political rights? Office of the High Commissioner for Human Rights. <https://www.ohchr.org/en/human-rights/economic-social-cultural-rights/escr-vs-civil-political-rights>.

<sup>24</sup> The Committee on Economic, Social and Cultural Rights (CESCR) is the authoritative interpreter of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>25</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para. 3. <https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>26</sup> See General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities (2017).



idea of violation by omission; that is, the violation of fundamental rights as a result of the lack of enactment or implementation of specific tobacco control measures. The decision noted that the right to health entailed an obligation of the State to adopt measures aimed at reducing NCDs related to tobacco consumption. Relying on a constitutionally-protected right to health<sup>27</sup> and international treaties<sup>28</sup>, the Court concluded that a regulation that banned smoking in certain public places was a suitable, necessary and proportional means to continuously and substantially reduce the prevalence of tobacco use and exposure to tobacco smoke. Most notably, the decision found that said regulation was not only valid and enforceable under the constitutional text, but also as part of the State's right-to-health obligations under International Human Rights Law.<sup>29</sup>

In *Nobleza Piccardo v. Provincia de Santa Fe* (2015), the Argentine Supreme Court similarly relied on the right to health, protected by national and subnational constitutional texts and by the human rights treaties ratified by Argentina, to uphold a subnational law establishing a complete ban on tobacco advertisement, promotion and sponsorship. The Court considered that the measure was constitutionally valid since it was evidence-based, guided by international standards, and grounded on the State's duty to protect public and individual health.<sup>30</sup> Contrary to the industry's argument, the decision found that the measure was reasonable and proportionate to achieve the goals of continuously and substantially reducing the prevalence of tobacco consumption and exposure to tobacco smoke.<sup>31</sup>

In *Brazilian Association of Radio and Television Broadcasts v. Legislative Assembly of the State of Bahia* (2021),<sup>32</sup> a Brazilian trade association challenged the constitutionality of a law that prohibited advertising to children at schools. The association alleged, on the one hand, that the State legislature did not have the competence to regulate commercial advertising and, on the other, that such prohibitions violated their rights to information, free enterprise, and free

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<sup>27</sup> The decision relied on Article 7 of the Peruvian Constitution, which recognizes a right to the protection of health, and Article 9 of the Peruvian Constitution, which requires the State to designate the national health policy. See Constitutional Court of Peru. 5000 Citizens v. Article 3 of Law N.º 28705, EXP. N.º 00032-2010-PI/TC. 2011, para. 82.

<sup>28</sup> The decision interpreted the right to health in the Constitution in light of human rights treaties ratified by Peru, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights ("Protocol of San Salvador") and the Framework Convention on Tobacco Control (which was also classified as a human rights treaty by the Court). See Constitutional Court of Peru. 5000 Citizens v. Article 3 of Law N.º 28705, EXP. N.º 00032-2010-PI/TC. 2011. See, e.g., paras. 82 and 143.

<sup>29</sup> *Ibid*, paras. 80-82, 91, 103 and 118.

<sup>30</sup> Supreme Court of Argentina. *Nobleza Piccardo S.A.I.C. y F. c/ Provincia de Santa Fe*, 188/2006 (42-N)/CS1. 2015. See paras. 18, 24 and 25.

<sup>31</sup> *Ibid*, paras. 24-26.

<sup>32</sup> *Brazilian Association of Radio and Television Broadcasts v. Legislative Assembly of the State of Bahia*. 2021. Brazil. Supreme Federal Court. Decision. <https://live-foodlaw.pantheonsite.io/documents/brazilian-association-of-radio-and-television-broadcasts-associacao-brasileira-de-emissoras-de-radio-e-televisao-v-legislative-assembly-of-the-state-of-bahia-assembleia-legislativa-do-estado-da-ba/>.

competition. In ruling that the law was constitutional, the Supreme Court of Brazil<sup>33</sup> found that ESCRs enshrined in Brazil's Constitution, including the right to health,<sup>34</sup> as well as Brazil's international human rights obligations to protect public health and children's rights, empowered the State to protect children through the imposition of restrictions to commercial speech.

Lower courts have also used constitutional ESCRs to defend public policies. For instance, in a recent case in Mexico, a federal court relied on the constitutionally protected right to health to support the government's efforts to amend regulations derived from the General Law for Tobacco Control.<sup>35</sup> In that case, an industry actor had challenged the government's attempts to establish, among others, prohibitions against the direct or indirect display of tobacco products at the point of sale. Relying on a constitutional right to health, international human rights law, and judicial precedent, the Court found that this regulation was in line with the State's duty to realise the right to health of its population. The constitutionalisation of the right to health was critical to defend these measures in relation to industry challenges to government action.

### **C. Economic, Social and Cultural Rights: Types of Obligations and Justiciability**

Barbados, having acceded to or ratified international human rights treaties that recognise the right to the enjoyment of the highest attainable standard of health and the right to adequate food, among other human rights, has corresponding international obligations. The constitutionalisation of these rights, as discussed above, would improve the efficacy of such rights whilst also contributing to Barbados' compliance with its international obligations. This section considers the nature of obligations imposed under international human rights law regarding ESCRs, and discusses the justiciability of ESCRs, providing concrete examples of such.

#### *a. Nature of State obligations imposed*

Under international human rights law, ESCRs impose two types of general legal obligations: (i) obligations of immediate effect, and (ii) the duty of progressive realisation.<sup>36</sup> Following the

<sup>33</sup> The highest Courts in Brazil are the Federal Supreme Court (STF) and the Superior Court of Justice (STJ).

<sup>34</sup> "Health is a right to be enjoyed by all and a duty of the State; it shall be guaranteed by economic and social policies that aim to reduce the risk of disease and other maladies and by universal and equal access to all activities and services for its promotion, protection, and recovery."

<sup>35</sup> Collegiate Circuit Courts. Gazette of the Judicial Weekly of the Federation. Book 23, March 2023, Volume IV, page 4088. <https://sjf2.scjn.gob.mx/detalle/tesis/2026247>.

<sup>36</sup> This conceptualisation stems from Article 2.1 of the International Covenant on Economic Social and Cultural Rights (ICESCR), which has a dynamic relationship with all other provisions of the Covenant, and which indicates that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures". International Covenant on Economic, Social and Cultural Rights (ICESCR). 1996. Article 2.1.

authoritative interpretations of the CESCR, the nature and content of these duties can be described as follows:

***Obligations of immediate nature.*** The idea of immediate nature or effect refers to the fact that these obligations should be complied with immediately, or within a reasonably short time after the entry into force of human rights treaties, and are not tied to the availability of resources.<sup>37</sup> These include (i) the undertaking to guarantee that ESCRs will be exercised without discrimination, and (ii) the duty to “take steps” towards the full realisation of ESCRs. This last obligation requires States to take measures that are deliberate, concrete and targeted towards meeting the goals and obligations that derive from each ESCR.<sup>38</sup> Appropriate measures may include, for instance, the enactment of legislative policies or the implementation of administrative or educational measures aimed at realising these rights.<sup>39</sup>

The Inter-American Human Rights System, of which Barbados is a member, has similarly recognized that ESCRs impose obligations of immediate effect. According to the Inter-American Court of Human Rights (IACtHR), these obligations consist in (i) adopting effective measures in order to guarantee that ESCRs are exercised without discrimination, and (ii) adopting adequate, deliberate and specific measures in order to achieve the full realisation of ESCRs.<sup>40</sup> In particular, the IACtHR has recently noted that the duty to supervise and control risky activities is also part of the universe of obligations that are not subject to the availability of resources.<sup>41</sup>

Additionally, the CESCR has indicated that there exists “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”, in order to give real meaning to ESCRs.<sup>42</sup> In this sense, there are “essential” elements that should be provided

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<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>. See also Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. <https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>37</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para. 2. <https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>38</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para. 2. <https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>39</sup> *Ibid*, para. 7.

<sup>40</sup> See, e.g., Inter-American Court of Human Rights. Case of Pobleto Vilches et al. v. Chile. Merits, reparations and costs. Judgement of March 8, 2018, para. 104. [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_349\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_349_ing.pdf).

<sup>41</sup> Inter-American Court of Human Rights. Case of the Workers of the Fireworks Factory in Santo Antônio de Jesus and their families v. Brazil. Preliminary objections, merits, reparations and costs. Judgement of July 15, 2020, paras. 120-122, 131, 173 and 175 (explaining that the lack of control of the working conditions in the fireworks factory was going to be analysed under the umbrella of the obligations of immediate nature that stem from Article 26 of the American Convention on Human Rights). [https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_407\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_407_ing.pdf).

<sup>42</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para. 10.



for within the minimum core of these rights. With respect to the right to health, these include the provision of facilities, goods and services in a non-discriminatory way, with a focus on vulnerable or marginalised groups, access to minimum essential, nutritionally adequate and safe food, the provision of essential drugs, and the adoption and implementation of a national public health strategy and plan of action to address the population's health concerns, among others.<sup>43</sup> The right to adequate food requires that, at a minimum, States "take necessary action to mitigate and alleviate hunger" by creating programmes that "improve methods of production, conservation and distribution of food" and that "ensure an equitable distribution of world food supplies in relation to need".<sup>44</sup> It is this minimum core that States can start with as they move towards the full realisation of these rights.

**Progressive realisation.** The second level of obligations are those subject to progressive realisation. Essentially, this constitutes a recognition of the fact that full realisation of all ESCRs will generally not be able to be achieved in a short period of time.<sup>45</sup> As such, the duty of "progressive realisation" refers to the obligation to take appropriate steps to the maximum of the State's available resources with a view to achieving the full realisation of ESCRs over time.<sup>46</sup> It means that States must constantly and consistently promote the full realisation of ESCRs, including the rights to health and adequate food.

The notion of progressivity also entails a correlate duty of non-retrogression.<sup>47</sup> States must refrain from adopting unjustified regressive measures, that is, any act or omission that has the effect of

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<https://www.refworld.org/pdfid/4538838e10.pdf>. The IACtHR has agreed with this interpretation. See, e.g., Inter-American Court of Human Rights. Case of Gonzales Lluy et al. v. Ecuador. Preliminary objections, merits, reparations and costs. Judgement of September 1, 2015, para. 193.

<sup>43</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See para. 43.  
<https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>44</sup> ICESCR, Article 11; Committee on Economic, Social and Cultural Rights (CESCR). General Comment 12: The Right to Adequate Food (Article 11). 1999. See para. 6. <https://www.refworld.org/pdfid/4538838c11.pdf>. See also International Covenant on Economic, Social and Cultural Rights (ICESCR). 1996. Article 11.2. <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>45</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para. 9.  
<https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>46</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR). 1996. Article 2.  
<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>.

<sup>47</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). See para. 9. See also Navtej Singh Johar v. Union of India 2018 (10) SCALE 386 ("The 'doctrine of progressive realisation of rights', as a natural corollary, gives birth to the doctrine of non-retrogression. As per this doctrine, there must not be any regression of rights ... The doctrine of non-retrogression sets forth that the State should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise").

reducing the content or level of the enjoyment of ESCRs. This implies that, unless it is a justified regression, States must improve conditions over time without retrogression of any kind.<sup>48</sup> As the CESCR in General Comment No. 14 explains, “there is a strong presumption that retrogressive measures taken in relation to the right to health are not permissible. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant in the context of the full use of the State party’s maximum available resources”.<sup>49</sup> Importantly, as it relates to the right to health, adopting any retrogressive measures that are incompatible with the State’s core obligations, discussed above, is a violation of that right.<sup>50</sup>

The duties of progressive realisation and non-retrogression also exist within the Inter-American Human Rights System. The IACtHR has repeatedly emphasised that, under Article 26 of the American Convention on Human Rights<sup>51</sup>, States have specific and continuing obligations (i) to move as expeditiously and effectively as possible towards the full realisation of the ESCRs, to the maximum extent of their available resources and through legislation or other appropriate means, and (ii) to refrain from adopting deliberately retrogressive measures in relation to ESCRs, provided that they are not justified by reasons of sufficient weight.<sup>52</sup>

Although progressive realisation, that is, this “flexibility device”, was developed to take into account the reality of low-resource countries,<sup>53</sup> it does not mean that the realisation of rights is

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<sup>48</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para. 9. <https://www.refworld.org/pdfid/4538838e10.pdf>; General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See paras. 32 and 48. <https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>49</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See para. 32. <https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>50</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See para. 48. <https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>51</sup> “The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realisation of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organisation of American States as amended by the Protocol of Buenos Aires”. Organisation of American States (OAS). American Convention on Human Rights, “Pact of San Jose”, Costa Rica. 1969. <https://www.refworld.org/docid/3ae6b36510.html>

<sup>52</sup> See, e.g., Inter-American Court of Human Rights. Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgement of October 1, 2021, para. 96; Case of Cuscul Pivaral et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs. Judgement of August 23, 2018, para. 81.

<sup>53</sup> Office of the United Nations High Commissioner for Human Rights. Frequently Asked Questions on Economic, Social and Cultural Rights. Human Rights Fact Sheet No. 33. <https://www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf>. See also Committee

dependent on States achieving a certain level of economic development. On the contrary, “progressive realisation” requires States “to move as expeditiously and effectively as possible towards the full realisation of”<sup>54</sup> ESCRs. The minimum core, examined above, is also meant to account for the resource constraints within a country. Where a State fails to meet at least its minimum core obligations, “it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort” to meet this minimum.<sup>55</sup>

It is also important to bear in mind that there are human rights compliant measures that States can adopt to help with the availability and allocation of resources. Fiscal measures, in particular taxation, have been identified by experts and key actors at the national and international levels, particularly from the Global South, as a way to mobilise resources, define agendas and priorities, and establish accountability mechanisms for individuals and the State.<sup>56</sup> The CESCR, in its universal periodic reviews, has identified taxation as a critical tool to mobilise resources specifically for the realisation of ESCRs rights.<sup>57</sup> Such fiscal measures are recommended to help increase the budget allocation available for States to move towards the progressive realisation of these rights.<sup>58</sup>

#### *b. On the justiciability of ESCRs*

The CESCR has clarified that ensuring the justiciability of social rights is among the measures that States should take to ensure the full realisation and enjoyment of these rights.<sup>59</sup>

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on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant). 1990.

<https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>54</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See para. 31.

<https://www.refworld.org/pdfid/4538838d0.pdf>.

<sup>55</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para 10.

<https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>56</sup> Philip Alston (ed) and Nikki Reisch (ed). Tax, Inequality, and human rights. Oxford University Press.

2019. <https://academic.oup.com/book/36464>. See also: Center for Economic and Social Rights. Principles of Human Rights in Fiscal Policy. 2021. <https://www.cesr.org/principles-human-rights-fiscal-policy/#:~:text=The%20Principles%20for%20Human%20Rights,and%20assessment%20of%20fiscal%20policies>.

<sup>57</sup> Committee on Economic, Social and Cultural Rights (CESCR). Concluding observations on the third periodic report of Benin. 2020. See para. 11.

<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW9oVixnwFxc9xL1Osr7QWlckqHT%2FVr%2BYtQLq3a18G3fqOCeNou7YpWzECObR2xF93spsUPfQRkNHyhBHv9ewR%2B5eiacCZs33L5IFOsCgFFmo>. See also CESCR. Concluding observations on the third periodic report of Guatemala. 2014. See para. 8. <https://digitallibrary.un.org/record/789389>.

<sup>58</sup> Committee on Economic, Social and Cultural Rights (CESCR). Concluding observations on the third periodic report of Serbia. 2022. See para. 24. <https://digitallibrary.un.org/record/3969915?ln=en>.

<sup>59</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant. 1998. See para. 7. <https://www.refworld.org/docid/47a7079d6.html>.

Certainly, in its *General Comment No. 3*, the CESCR explained that one of the appropriate measures to satisfy the obligation “to take steps” is the provision of judicial or other effective remedies for any person whose rights recognized as justiciable, including ESCRs have been violated.<sup>60</sup> In that context, the CESCR made special reference to the justiciability of the right to non-discrimination in relation to the enjoyment of such recognized rights, including ESCRs.<sup>61</sup>

In *General Comment No. 9*, the CESCR made clear that, in light of the principles of international law and the right to an effective remedy, States should not limit the justiciability of ESCRs since “there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions”.<sup>62</sup> According to the CESCR, judicial remedies will be necessary whenever a Covenant right cannot be made fully effective without some role for the judiciary, like the case of the duty of non-discrimination with respect to ESCRs.<sup>63</sup> Regarding some dimensions of ESCRs, administrative remedies may be adequate as long as they are accessible, affordable, timely and effective, and there is an ultimate right of judicial appeal.<sup>64</sup> In *General Comment No. 9*, the CESCR also underscored that any rule that would put ESCRs beyond the reach of courts would be arbitrary and incompatible with the right to an effective remedy and the principle of indivisibility and interdependence of human rights.<sup>65</sup> In the specific context of the rights to health and adequate food, the CESCR has expressly indicated that all persons or groups who are victims of violations of these rights should have access to effective judicial or other appropriate remedies.<sup>66</sup>

When examining the periodic reports of States, the CESCR has repeatedly cited *General Comment No. 9* to indicate that States should take appropriate measures to ensure that ESCRs are enforceable before judges, lawyers and prosecutors, and to raise awareness of the justiciability of ESCRs among members of the judiciary and the general public. For instance, in its *Concluding Observations on the Third Periodic Report of Chile* (2004) and the *Fourth Periodic Report of Chile* (2015), the Committee recommended measures to ensure that judicial training takes full account of the enforceability ESCRs, to raise awareness of the possibility of invoking

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<sup>60</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant). 1990. See para 5. <https://www.refworld.org/pdfid/4538838e10.pdf>.

<sup>61</sup> *Ibid.*

<sup>62</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant. 1998. See para. 10. <https://www.refworld.org/docid/47a7079d6.html>.

<sup>63</sup> *Ibid.*, para. 9.

<sup>64</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant. 1998. See paras. 3, 9-10. <https://www.refworld.org/docid/47a7079d6.html>.3.

<sup>65</sup> *Ibid.*, para. 10.

<sup>66</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment 12: The Right to Adequate Food (Article 11). 1999. See para. 32. <https://www.refworld.org/pdfid/4538838c11.pdf>; General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See para. 59. <https://www.refworld.org/pdfid/4538838d0.pdf>.

ESCRs before the courts, and to guarantee the comprehensive recognition and necessary legal protection of ESCRs in the constitutional text.<sup>67</sup>

The Inter-American Human Rights System has reached similar conclusions. Through its case law, the IACtHR has explained that, under articles 2 and 25 of the American Convention on Human Rights, States have an obligation to provide all persons under its jurisdiction with an effective remedy against acts that violate their rights under the Convention,<sup>68</sup> which would include the rights to health and other ESCRs.

#### **D. The Justiciability of the ESCRs: Some Concrete Experiences**

As noted by the CESCR in its *General Comment No. 9*, all ESCRs contain at least some content or dimension that is capable of immediate application or review by judicial or administrative bodies with jurisdictional powers.<sup>69</sup> This section elaborates on this point by using a comparative approach to show how different dimensions of ESCRs have been adjudicated by courts, without necessarily resulting in any significant economic impact or interfering with budgetary priorities that fall under the purview of other branches of government, both at the domestic and international levels.

##### *a. Litigation on non-resource intensive obligations*

When adjudicating ESCRs, courts will not always be called upon to discuss political trade-offs or matters with important resource implications. Some dimensions of ESCRs, particularly those relating to freedoms concerned in these rights, are not resource-intensive, and some State obligations imposed by these rights are not subject to the availability of resources.

Much of the international litigation on the right to health has involved such dimensions, notably those relating to freedoms. They include, for example, the right to control one's health and body, including sexual and reproductive freedom, the right to informed consent, the right to be free from torture and non-consensual medical treatment and the right to professional or medical secrecy.<sup>70</sup> The case law from the IACtHR examined below depicts how these aspects of the right to health

<sup>67</sup> Committee on Economic, Social and Cultural Rights (CESCR). Concluding observations on the third periodic report of Chile. 2004. See para. 29; Concluding observations on the fourth periodic report of Chile. 2015. See para. 7.

<sup>68</sup> See, e.g., Inter-American Court of Human Rights. Case of Granier (Radio Caracas Television) v. Venezuela. Preliminary Objections, Merits, Reparations and Costs. Judgement of June 22, 2015, para. 314; Case of Vera Rojas et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs. Judgement of October 1, 2021, para. 87.

<sup>69</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 9: The domestic application of the Covenant. 1998. See paras. 9-10. <https://www.refworld.org/docid/47a7079d6.html>.

<sup>70</sup> Committee on Economic, Social and Cultural Rights (CESCR). General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12). 2000. See paras. 8 and 12. <https://www.refworld.org/pdfid/4538838d0.pdf>.



that are not resource intensive, but are nevertheless critical for individuals to be protected, have been approached by the Court when adjudicating individual cases.

In *I.V. v. Bolivia* (2016), the IACtHR addressed the involuntary sterilisation of Mrs. I.V. in a public hospital, which had resulted in the permanent and forced loss of her reproductive function.<sup>71</sup> The Court found that the right to health also encompasses the freedom of each individual to control his or her own health and body, and to be free from non-consensual medical treatment.<sup>72</sup> As such, this right imposed an obligation on Bolivia to obtain, through health personnel, Mrs. I.V.'s prior, free, full and informed consent before performing the surgical procedure.<sup>73</sup> Determining whether the State had complied with that obligation was a clearly justiciable question, which the IACtHR addressed through an analysis of the facts of the case and Bolivia's domestic law. The decision found that, despite having a general rule on informed consent, these standards were ambiguous, imprecise and even contradictory. Accordingly, the Court concluded that Bolivia had failed to take the necessary regulatory measures to establish a clear obligation to obtain prior, free and informed consent in cases such as that of I.V.<sup>74</sup>

In *Poblete Vilches et al. v. Chile* (2018), a case about the involuntary treatment of an elderly man, the IACtHR addressed two components of the right to health that are not resource-intensive: informed consent and the principle of non-discrimination in relation to health facilities.<sup>75</sup> In this case, the Court again ruled that informed consent is part of the right to health, and explained that this right imposes an obligation to adopt measures to ensure the equal treatment of groups that have historically been excluded or that are at greater risk of suffering from discriminatory practices.<sup>76</sup> In its decision, the Court limited its analysis to the scope of the core and immediate obligations of the right to health. The Court noted that Mr. Vilches was in need of urgent medical care that the public health system did not provide, and that his age had proved to be a limitation for him to access the required services. The decision also noted that the State had failed to obtain the informed consent of Mr. Vilches' family members before his surgery, and to guarantee access

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<sup>71</sup> Inter-American Court of Human Rights. Case of *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgement of November 30, 2016, paras. 1 and 64.  
[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_329\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf).

<sup>72</sup> *Ibid*, para. 155. (Note: The right to health in this case was still adjudicated through indirect justiciability under Article 26 of the American Convention on Human Rights. It is important to note, for the purposes of this brief, that even where the explicit right to health was not yet recognised, the Court was still able to derive such a right, as well as its contents).

<sup>73</sup> *Ibid*, para. 165.

<sup>74</sup> Inter-American Court of Human Rights. Case of *I.V. v. Bolivia*. Preliminary Objections, Merits, Reparations and Costs. Judgement of November 30, 2016, para. 220.  
[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_329\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_329_ing.pdf).

<sup>75</sup> Inter-American Court of Human Rights. Case of *Poblete Vilches et al. v. Chile*. Merits, reparations and costs. Judgement of March 8, 2018. The IACHR, for the first time, pronounced that the right to health is an autonomous, justiciable right protected under Article 26 of the American Convention on Human Rights as part of the protected economic, social, cultural and environmental rights.

<sup>76</sup> *Ibid*, para. 123.

to information on the medical care provided. Therefore, the Court unanimously concluded that the State of Chile had not met its right-to-health obligations under the American Convention.<sup>77</sup>

Informed consent in relation to the right to health has again been adjudicated by the IACtHR in the case of *Guachala Chimbo et al. v. Ecuador* (2021), which involved the uninformed treatment, and the disappearance of a person with mental disabilities from a public hospital in Ecuador. Here, in addition to reiterating the fundamental importance of informed consent as part of the right to health, the Court noted the special obligation with respect to persons with disabilities.<sup>78</sup> The decision noted that, under the right to health, a patient's disability cannot be used as a justification to provide treatment without informed consent, but rather it creates an additional obligation to provide the necessary support system so that patients with disabilities can make informed decisions on their own behalf.<sup>79</sup> In other words, the Court adjudicated both freedom and non-discrimination dimensions of the right to health when addressing this case.

In *Vera Rojas et al. v. Chile* (2021), the IACtHR addressed the case of Martina, a girl living with various disabilities due to a rare neurodegenerative disease called Leigh Syndrome, who was in need of constant home care.<sup>80</sup> Originally her father's private insurance covered the costs associated with that home care. However, the private insurer unexpectedly terminated coverage of her home care based on a 2005 regulation which granted private insurers power to determine whether to exempt chronic diseases from the home care regime, without any duty to consider the patients' health requirements. The IACtHR held that Chile had violated Martina's rights to life, dignified life, personal integrity, health, social security, non-discrimination, and special protection as a child under the American Convention on Human Rights. Further, it also held that Chile had failed to adequately regulate private insurers by allowing them to make arbitrary and discriminatory decisions that risked jeopardising Martina's health and life. This case also highlights that the right to health includes palliative care and rehabilitation services for children and families, especially those living with disabilities. Further, the IACtHR declared that Chile had violated the non-retrogression principle by way of the regressive and unjustified regulation that effectively withdrew coverage based on the effluxion of time.

In the *Case of Manuela et al. v. El Salvador* (2021),<sup>81</sup> the IACtHR advanced the recognition of the right to medical secrecy under the American Convention, by virtue of the rights to health, autonomy and private life. In its decision, the Court explained that, pursuant to the essential

<sup>77</sup> *Ibid*, paras. 160-169 and 174-176.

<sup>78</sup> Inter-American Court of Human Rights. Case of Guacala Chimbo et al. v. Ecuador. Merits, Reparations and Costs. Judgement of March 26, 2021, para. 96.  
[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_423\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_423_ing.pdf)

<sup>79</sup> *Ibid*, paras. 120-121.

<sup>80</sup> Inter-American Court of Human Rights. Case of Vera Rojas et al. vs. Chile, (Preliminary Objections, Merits, Reparations, and Costs). Judgement of October 1, 2021,  
[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_439\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_439_ing.pdf).

<sup>81</sup> Inter-American Court of Human Rights. Case of Manuela et al. v. El Salvador. Preliminary objections, merits, reparations and costs. Judgement of November 2, 2021,  
[https://www.corteidh.or.cr/docs/casos/articulos/seriec\\_441\\_ing.pdf](https://www.corteidh.or.cr/docs/casos/articulos/seriec_441_ing.pdf).

element of acceptability of this right, health services must be provided in a manner that respects confidentiality. By the same token, States are under an immediate obligation to respect and guarantee the right to medical secrecy, which amounts to a duty to ensure confidentiality of medical care and health data. The decision underscored that all the information received by medical staff, including physical evidence that may be perceived in the course of medical care, is protected by the right and duty of professional secrecy and cannot be disclosed. Finally, the Court noted that professional secrecy in relation to obstetric emergencies, such as in situations where life is at stake, must always be safeguarded, even when there are general reporting duties for citizens or specific duties for public officials. Disrespect for medical confidentiality may inhibit persons suffering an obstetric emergency from seeking medical care for fear of being criminalised, endangering their health, personal integrity and life.

### *Jurisprudence unpacking progressive realisation*

Some domestic constitutions that have enshrined ESCRs have also included language that mirrors the concept of progressive realisation.<sup>82</sup> In this context, some courts have had a role in defining the scope and content of the duty of progressive realisation when addressing individual cases.

For example, the Constitution of South Africa protects a number of ESCRs such as the right to health care, food, water, housing, and education, all of which are subject to progressive realisation. The Constitutional Court of South Africa has adjudicated a number of cases that provide guidance on how progressive realisation should be interpreted as governments seek to realise constitutionally protected human rights.

In *Soobramoney v. Minister of Health* (1997) the Constitutional Court of South Africa was faced, for the first time, with the need to adjudicate the right to health care enshrined in its constitutional text in the face of resource constraints.<sup>83</sup> In this case, a terminally ill patient had sued the State for being denied dialysis treatment by a State-funded hospital because he did not meet the hospital's requirements for such treatment. Relying on the concept of progressive realisation and the undisputed lack of resources available to the State in this instance, the Court held that the

<sup>82</sup> See, e.g., the Mexican Constitution, mentioning a duty to guarantee the progressive expansion of health services (article 4). The Constitution of Mexico, [http://www.oas.org/juridico/spanish/mex\\_res3.pdf](http://www.oas.org/juridico/spanish/mex_res3.pdf); the Constitution of Kenya, where Article 21 identifies progressive realisation as the means to achieve the economic and social rights enshrined in the Constitution. The Constitution of Kenya, <http://kenyalaw.org/lex/actview.xhtml?actid=Const2010>; and the Constitution of South Africa, where progressive realisation is mentioned in relation to the right to adequate housing (section 26), the right to health care (section 27), and the right to education (section 29). The Constitution of the Republic of South Africa. <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>.

<sup>83</sup> Constitutional Court of South Africa. *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997). <http://www.saflii.org/za/cases/ZACC/1997/17.html>

State could not accommodate the patient's need for dialysis in this case. The Court noted that the social and economic rights protected in the constitution were all "limited by reason of the lack of resources" and wrote that "the guarantees of the Constitution are not absolute but may be limited in one way or another".<sup>84</sup> Examining the appellant's case against the health care needs of the country, the Court concluded that expanding this treatment would have severe implications on the health budget. In this sense, the Court acknowledged that there are instances, such as this one, where it should not interfere with the allocation of resources determined by those "better equipped" to make such decisions.<sup>85</sup>

In *Government of the Republic of South Africa v. Grootboom* (2000), a case about the right to adequate housing protected by the Constitution, the Constitutional Court unpacked the minimum core obligations and provided guidance on how to determine the progressive realisation of socio-economic rights. Acknowledging the difficulty in defining such a minimum core in relation to the diverse needs of the population, the Court provided a three-pronged analysis to determine the extent of the obligations of the State: (a) the obligation to "take reasonable legislative and other measures"; (b) "to achieve the progressive realisation" of the right; and (c) "within available resources."<sup>86</sup> With respect to the first point, the Court explained that reasonableness would be determined by considering "housing problems in their social, economic and historical context and (...) the capacity of institutions responsible for implementing the programme."<sup>87</sup> The Court examined the progressive realisation of the right to access adequate housing against the backdrop of the overall goals of the constitution, which was to meet the basic needs of the whole of society. The Court found that "accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses."<sup>88</sup> However, the decision underscored that both the reasonableness of the measures, and the analysis of progressive realisation, should be done within the context of available resources.<sup>89</sup> The Court noted that this requires a "balance between goal and means" where the reasonableness of the measures undertaken by the State will in part depend on the availability of resources.<sup>90</sup>

*Mazibuko et al. v. City of Johannesburg* (2009) is another case where the Constitutional Court once again had to determine the reasonableness of State measures taken that involved the constitutionally protected right to water. In reviewing the detailed accounts of how the project in question was adopted and implemented, the Court concluded that the policy was reasonable and

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<sup>84</sup> *Ibid*, para. 43.

<sup>85</sup> *Ibid*, para. 59.

<sup>86</sup> Constitutional Court of South Africa. *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000). See para. 38. <http://www.saflii.org/za/cases/ZACC/2000/19.html>.

<sup>87</sup> *Ibid*, para. 43.

<sup>88</sup> *Ibid*, para. 45.

<sup>89</sup> *Ibid*, para. 46.

<sup>90</sup> *Ibid*, para. 46.

was neither unfair nor discriminatory. The Court also discussed deference to the legislative and executive, who are generally considered to be best placed to determine how best to achieve social and economic rights “and what steps [the] government should take to ensure the progressive realisation of the right”<sup>91</sup>, as an element to consider when defining the notion of progressive realisation. In that context, the decision highlighted that it would be inappropriate for a court to determine precisely what steps governments should take to ensure the progressive realisation since the legislature and executive are best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to ESCRs.<sup>92</sup> While both courts and constitutions are important checks on government action, this case illustrates that deference can be given to the actions of the government with regards to the implementation of reasonable measures.

In Colombia, the Constitution includes an express right to health, but it is the Constitutional Court's jurisprudence that has developed the content of this right, including that requiring the allocation of resources. In *T-760-08* (2008), a landmark judgement that examined multiple lawsuits invoking the right to health, the Constitutional Court ruled on the content and limits of this right and examined how to determine progressive realisation. In this case, the Court resolved the query by identifying the right to health as an autonomous, fundamental right. The Court also acknowledged that constitutional rights are not absolute and may be limited in accordance with criteria of reasonableness and proportionality. In that context, the Court recalled that the list of goods and services that should be covered under the right to health “does not need to be infinite but can be circumscribed to cover the health needs and priorities determined by the competent bodies to efficiently allocate scarce resources available”<sup>93</sup>. In its analysis, the Court distinguished aspects of this right that require immediate action by the State (e.g., where there is an immediate danger of suffering unreasonable harm) from those that can be examined in light of the State's duty of progressive realisation, due to the complexity of the actions and resources required to fully realise the right to health. The Court noted that, generally, the competent authorities are best suited to determine how best to use resources to progressively realise the different components of this right. Still, following the interpretation of the CESCER, the decision noted that progressive realisation requires, at a minimum, that authorities adopt a plan or policy outlining how the right to health and other ESCRs will be progressively realised.<sup>94</sup>

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<sup>91</sup> Constitutional Court of South Africa. *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC) (8 October 2009). See para. 61. <http://www.saflii.org/za/cases/ZACC/2009/28.html>.

<sup>92</sup> *Ibid*, para. 61.

<sup>93</sup> Constitutional Court of Colombia. Decision T-760 of 2008, para. 3.5.1. The Court then listed some examples of cases in which treatments and services have been denied, including: (i) cosmetic treatments and surgeries(...); (ii) eyeglasses and refractive eye surgery(...); (iii) fertility treatments(...); (iv) Alcoholic rehabilitation/detoxification(...); (v) prostheses not included in the POS (...); (vi) gastric bypass surgery (...); (vii) dental services (...); (viii) certain Allergy treatments using vaccines (...).

<sup>94</sup> *Ibid*, paras. 3.3.8, 3.3.9, 3.3.11.



The above case law aptly demonstrates that not all aspects of realising ESCRs are resource-intensive. Further, the cases demonstrate (i) the importance and positive impact of inclusion of ESCRs, like the rights to health and adequate food, within the constitutional text, (ii) the deference that can still be afforded to the legislative and executive branches of government, and (iii) that the concept of 'progressive realisation' has built in within it the flexibility to ensure that States take good faith steps to implement their obligations, but also are able to do so within the limits of their resources. This flexibility also indicates that there are sufficient safeguards to guard against "the floodgates" being opened regarding litigation in respect of perceived violations of these rights. Further, the above case law also highlights some elements that may be taken into account by the authorities in the implementation of progressive obligations in the field of ESCR, notably in resource-constrained jurisdictions, such as the importance of assessing reasonableness, the specific context and the overall goals and means of the State.

#### D. Summary/Conclusions

Barbados is undertaking a critical process to enact a new constitution. This constitutes a historic opportunity to pass a democratically and modernly drafted constitution that recognises and protects a range of fundamental human rights, including the right to health and the right to adequate food. The Barbados Constitutional Reform Commission should recommend the inclusion of these rights in the new Constitution of Barbados to not only reflect Barbados' ratification of international human rights instruments and its corresponding obligations,<sup>95</sup> but also to enhance the State and its organs' ability to respond to a wide range of pressing health problems and future threats to its sustainable development.

The constitutionalisation of the rights to health and adequate food, understood broadly,<sup>96</sup> would grant these rights the highest level of authority within Barbados' domestic legal system in a way that is consistent with the notion of the indivisibility and interdependence of rights, thereby setting the agenda and creating a path to inform and align the entire legal framework.<sup>97</sup> Such inclusion would also transcend political and governmental changes, and would help to safeguard the long-term recognition and realisation of these rights, while also creating greater awareness and recognition of these issues across society, including government, the private sector and civil society.<sup>98</sup> This, in turn, would create an enabling legal environment that supports public health and provides justice for Barbadians.

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<sup>95</sup> See e.g., International Covenant on Economic, Social and Cultural Rights (ICESCR) (acceded to on 5th

January 1973); Convention on the Rights of the Child (CRC) (ratified on 9th October 1990); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (ratified on 24th July 1980); Convention on the Rights of Persons with Disabilities (CRPD) (ratified on 27th February 2013); and American Convention on Human Rights (ACHR) (ratified on 5th November 1981).

<sup>96</sup> See written submission by HCC, HSFB, LHRU and O'Neill submitted to the Barbados Constitutional Reform Commission via email on April 14 2023 for an outline about the broad conception of both rights.

<sup>97</sup> United Nations Food and Agricultural Organisation. Guide on Legislating for the Right to Food. 2009. <https://www.fao.org/right-to-food/resources/resources-detail/en/c/129278/>.

<sup>98</sup> *Ibid.*

The rights to health and to adequate food are human rights and should be included within the Constitution as fundamental justiciable rights in order to allow for individuals to seek enforcement of, and redress for violations of, these rights before national courts and tribunals, where appropriate. However, as this brief illustrates, using comparative law, their inclusion should not necessarily be understood as potentially opening the floodgates of litigation, or as only requiring that the State divert limited resources to their full realisation. It is also worth re-emphasising that, as discussed above, there are many aspects of these rights that do not require deployment of significant resources.

Furthermore, this constitutionalisation provides a solid framework for Barbados to protect the measures it has already taken towards the realisation of these rights. For instance, through the implementation of the sugar-sweetened beverage tax and the School Nutrition Policy, Barbados is already a leader in taking legal and regulatory action to address the growing burden of NCDs. The constitutionalisation of these rights will provide an even stronger foundation to support present and future government action that could be subject to litigation by industry actors, as has been seen in other jurisdictions.