

**Courts and the Making of Public Policy  
*and* The Social Contract Revisited**

# The Role of Courts in the Implementation of Economic, Social, and Cultural Rights A Right to Health Case Study

**Paul Hunt and Rajat Khosla**

The Foundation for Law, Justice and Society

in affiliation with

The Centre for Socio-Legal Studies,  
University of Oxford

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## Executive Summary

- There has been a tendency to construe the social contract very narrowly. The contract's social element – economic security, education, an effective health system – has been neglected.
- This truncated conception of the social contract has influenced contemporary human rights, which have tended to privilege civil and political rights and neglect economic, social, and cultural rights.
- In recent years the focus of contemporary human rights has begun to broaden. There has been renewed attention to economic, social, and cultural rights, one feature of which has been the increasing willingness of courts to adjudicate cases on these rights, including the right to the highest attainable standard of health.
- This policy brief sets out some of the recent case law on the right to the highest attainable standard of health and argues that this jurisprudence exposes the unnecessarily narrow construction of the social contract. The boundaries of the social contract can be expanded to encompass not only the civil and political elements, but also the social.
- Economic, social, and cultural rights may be vindicated by the 'judicial' or 'court' approach, as well as the 'policy' approach. The traditional human rights techniques – test cases, 'naming and shaming', letter writing campaigns, sloganeering and so on – continue to play an important role, but alone they will be insufficient for the 'policy' approach to prosper. The 'policy' approach demands the development of new tools, such as impact assessments, indicators, benchmarks, and budgetary analysis. In recent years, the health and human rights movement has made significant progress towards the development of these new methodologies.
- The social contract requires both the 'judicial' and 'policy' approaches to the vindication of economic, social, and cultural rights, including the right to the highest attainable standard of health.

# The Role of Courts in the Implementation of Economic, Social, and Cultural Rights

## A Right to Health Case Study<sup>1</sup>

### **Problem**

There has been a tendency to construe the social contract very narrowly. In some quarters, it has been understood as having a civil element: the rights necessary for individual freedom, such as freedom of speech, thought, and faith; and a political element, such as the right to participate in the exercise of political power. Surprisingly, the social contract has often been constructed in a way that neglects the social element, such as economic security, education, and access to a responsive health system. Moreover, these three elements cannot be properly understood without an appreciation of gender, ethnicity, culture, participation, and the complexities of democratic accountability. Yet, in the context of the social contract, these vital issues have not always attracted the attention they deserve.

Critically, this truncated conception of the social contract has influenced the conception of contemporary human rights. As is well known, states have tended to favour civil and political rights, and to neglect economic, social, and cultural rights. They have, for example, been less willing to establish accountability mechanisms for social rights than for political rights. In other words, states have tended to favour the civil and political elements of the social contract, and neglect the social element.

However, in recent years the focus of contemporary human rights has begun to broaden. Since the 1990s, after prioritizing the classic civil and political

rights, such as the prohibition against inhumane treatment, the right to a fair trial, and freedom of speech, the international community has begun to devote more attention to economic, social, and cultural rights, including the rights to education, food, and shelter, as well as the right to the highest attainable standard of physical and mental health. This renewed international attention to economic, social, and cultural rights has manifested itself in numerous ways, from the adoption of relevant international instruments, such as the San Salvador Protocol, to the creation of United Nations Special Rapporteurs on the rights to education, housing, food, and the right to the highest attainable standard of health. At both the international and national levels, a feature of this renewed attention has been the increasing willingness of courts and tribunals to adjudicate cases on economic, social, and cultural rights.

Of course, there are many forms of accountability. While some are general (e.g., fair elections, a free press), others are specific to human rights (e.g., inquiries by national human rights institutions). While some are judicial (e.g., bills of rights enforceable in the courts), others are administrative (e.g., human rights impact assessments). While some are national (e.g., a constitutional court), others are international (e.g., a human rights treaty body). Within each state there has to be a range of such mechanisms, and just as the forms of accountability are likely to vary from one state to another, so will the appropriate mix. All mechanisms of accountability should be accessible, transparent, and effective.

1. The full formulation of the right is the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. As a shorthand, we will use either 'the right to health' or 'the right to the highest attainable standard of health'.

This policy brief focuses on just one form of accountability – judicial accountability – with a particular focus on the right to the highest

attainable standard of health.<sup>2</sup> It examines how judicial accountability has enhanced protection for, and also deepened understanding of, economic, social, and cultural rights, such as the right to the highest attainable standard of health.

### **Why the problem is important**

The Vienna Declaration and Programme of Action reaffirmed the indivisible, interdependent, and interrelated nature of all human rights. States pledged, 'to respect human rights and fundamental freedoms and to undertake individually and collectively actions and programmes to make the enjoyment of human rights a reality for every human being' (Paragraph 5). It might be argued that the Declaration recommitted the international community to an international social contract aimed at the realization of these rights, an issue that is briefly revisited in the last section of this policy brief.

However, in its statement to the Vienna World Conference of 1993 the United Nations Committee on Economic, Social and Cultural Rights (CESCR) acknowledged, 'States and the international community as a whole continue to tolerate all too often breaches of economic, social, and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action' (UN Doc. E/1993/22).

This willingness to tolerate the unacceptable is influenced by the narrow, truncated view of the social contract signalled earlier. Thus, any evidence that human rights are challenging the narrowly constructed boundaries of the social contract deserves attention. Consequently, this policy brief introduces some recent cases that have adjudicated upon the right to health and health-related rights.

### **An analysis of the problem: a right-to-health case study<sup>3</sup>**

The limitations of judicial processes are well known. However, as the following cases illustrate, courts can clarify the meaning of the right to health and health-related rights and also secure better health-related services for individuals and communities. The cases are broadly grouped under some of the key concepts found in international human rights law.<sup>4</sup>

#### **Progressive realization, resource availability, and immediate obligations**

According to international, and some national, human rights law, the right to the highest attainable standard of health is subject to progressive realization and resource availability.<sup>5</sup> Progressive realization means that states are expected to do better next year than they are doing today, while resource availability acknowledges that what is required of a rich country is of a higher standard than what is required of a low- or middle-income country.

The Constitution of South Africa includes a Bill of Rights which, under section 27, recognizes the right of access to health care services. According to the Bill of Rights, the state is required to take reasonable measures, within its available resources, to achieve the progressive realization of this human right. The case of *Minister of Health v. Treatment Action Campaign* (2002 (5) SA 721, CC) concerned state provision of Nevirapine, an antiretroviral drug used to prevent mother-to-child transmission (MTCT) of HIV. Applying the concepts of progressive realization and

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3. This section of the policy brief is based on the report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, UN Doc. A/HRC/4/28, 17 January 2007, accessible at: <[http://www2.essex.ac.uk/human\\_rights\\_centre/rth/docs/council.pdf](http://www2.essex.ac.uk/human_rights_centre/rth/docs/council.pdf)> Last accessed 22 August 2008.

4. Some cases could properly be located in more than one group. For example, *Samity* is not only an example of a case that gives rise to immediate obligations, it also illustrates how states have a duty to make health services available.

5. See, for example, article 2(1) ICESCR and article 27(2) Constitution of South Africa.

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2. The focus here is on judicial developments in Asia, Africa, and South America. There are similar developments in other jurisdictions as well; for a more detailed analysis see UN Doc. A/HRC/4/28.

resource availability, the Constitutional Court confirmed that the government must 'act reasonably to provide access to the socio-economic rights identified in the Constitution on a progressive basis' and it ordered the authorities to 'devise and implement, within its available resources, a comprehensive and coordinated programme to recognize progressively the rights of pregnant women and their new-born children to have access to health services to combat MTCT of HIV.'

The South African Constitutional Court also reflected on the issue of resource availability in *Soobramoney v. Minister of Health KwaZulu Natal* (1998 (1) SA 765, CC). The applicant suffered from chronic renal failure and required dialysis to survive. His condition was diagnosed as irreversible. While he was initially able to pay for private treatment, he then ran out of funds and sought treatment in a state-funded hospital. Due to its limited resources, the hospital was not able to provide dialysis to all patients. The hospital had therefore adopted a policy and guidelines regarding access to dialysis. Only patients who suffered from acute renal failure, which can be treated and remedied by dialysis, were automatically entitled to treatment. For patients suffering from chronic renal failure, the primary requirement for admission to the dialysis programme was eligibility for a kidney transplant. Patients also suffering from significant vascular or cardiac diseases were not eligible for a transplant. Mr Soobramoney failed to satisfy the hospital requirements for dialysis.

According to section 27(3) of the South African Constitution, 'No one may be refused emergency medical treatment.' In Mr Soobramoney's case, had the hospital violated this provision of the Bill of Rights? The Court held that it had not because the patient was not an 'emergency' in the sense of a sudden catastrophe; rather, his condition was an 'ongoing state of affairs'. As already noted in the *Treatment Action Campaign* case, however, the Bill of Rights also includes a right of access to health care services, requiring the state to take reasonable measures, within available resources, to achieve the progressive realization of this human right.

In *Soobramoney*, the Constitutional Court found that the hospital's policy and guidelines were reasonable and fairly applied, and it held that the failure to provide treatment did not violate the Bill of Rights in this case.

While many elements of the right to the highest attainable standard of health are subject to progressive realization and resource availability, the right also gives rise to some obligations of immediate effect that are subject to neither. Equal treatment between women and men, for example, is not subject to progressive realization and resource availability. A state may not argue that presently it has insufficient resources to provide equal services for women and men and so, for the time being, it is going to focus on services for men, but it will progressively make available the same services for women over the next few years as soon as the necessary funds become available. As the next case shows, some courts have held that other elements of the right to health also give rise to immediate obligations that are subject to neither progressive realization nor resource availability.

In *Paschim Banga Khet Mazdoor Samity v. State of West Bengal* (1996 SCJ 25), the Supreme Court of India held that the government could not escape its responsibility, on account of financial constraints, to provide emergency treatment. In this case, a man fell from a train and suffered serious head trauma. He was taken to a number of state hospitals but none were able to provide him with emergency treatment, since they lacked bed space, as well as trauma and neurological services. The issue before the Court was whether inadequate medical facilities for emergency treatment constituted a denial of the right to life.

The Court found that it was the duty of a state to ensure that medical facilities for emergency treatment are adequately available. It required the state to ensure that primary health centres are equipped to provide immediate stabilizing treatment for serious injuries and emergencies. In addition, the Court ordered the state to increase the number of

specialist and regional clinics around the country available to treat serious injuries, and to create a centralized communication system among state hospitals so that patients could be transported immediately to the facilities where space is available. The Court recognized that substantial expenditure was needed to ensure that medical facilities were adequate. However, it held that 'a state could not avoid this constitutional obligation on account of financial constraints'.

### **Available, accessible, acceptable and good quality**

According to CESCR, General Comment 14, paragraph 12, health facilities, goods and services must be available, accessible, acceptable, and of good quality, as illustrated by the following cases. The precise practical application of these requirements may vary from one country to another depending upon, for example, resource availability.

#### **Available**

The right to health requires functioning health facilities, goods, and services to be available in sufficient quantity throughout a state.

In the case of *Mariela Viceconte v. Ministry of Health and Social Welfare* (Case No 31.777/96, 1998), Mariela Viceconte and the National Ombudsman asked the Court to order the Argentine government to take protective measures against haemorrhagic fever that threatened 3.5 million people.<sup>6</sup> More specifically, they asked the Court to order the government to produce a World Health Organisation-certified vaccine (Candid-1) for Argentine haemorrhagic fever. According to the Court, it was the government's responsibility to make health care available in a situation where the existing health care system, including the private sector, was not protecting individuals' health. In light of the

Constitution's incorporation of international treaties that recognize the right to health, the Court found that the government had not 'fulfilled its obligations to make available the Candid-1 vaccine'. Because the private sector saw the production of the vaccine as unprofitable, the Court ordered the state to produce Candid-1.

#### **Accessible**

The right to health imposes an obligation on a state to ensure that health facilities, goods, and services are accessible to everyone within its jurisdiction. In this context, access has four main dimensions. The facilities, goods, and services must be: physically accessible, economically accessible (i.e., affordable), and accessible without discrimination. Also, subject to confidentiality of personal data, health information must be accessible.

In *Minister of Health v. Treatment Action Campaign*, as well as considering the issue of resource availability and progressive realization, the South African Constitutional Court also considered whether or not Nevirapine was accessible. The government provided Nevirapine at only two research and training sites per province. The drug could also be obtained from private medical providers. As a result, mothers and their babies who did not have access to the research and training sites, and who could not afford access to private health care, were unable to gain access to Nevirapine. The government argued that 'until the best programme has been formulated and the necessary funds and infrastructure provided ... the drug must be withheld from mothers and children who do not have access to the research and training sites.' However, the Court held that the state's limited provision of Nevirapine was unreasonable. It ordered that the government act without delay to provide, inter alia, the drug in public hospitals and clinics when medically indicated.

#### **Acceptable**

The right to health requires that all health facilities, goods, and services must be respectful of medical ethics, such as the requirements of informed consent, and culturally appropriate. In *Andrea*

6. For a further discussion of the case see Abramovich, V. (2003) 'Argentina: The Right to Medicines'. In: *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*. Geneva: Centre on Housing Rights & Evictions.

*Szijarto v. Hungary* (Convention on the Elimination of all forms of Discrimination against Women [CEDAW], Communication No. 4/2004), a Hungarian woman of Roma origin alleged that she had been coercively sterilized. In 2000, she went into labour and was taken to hospital. Upon examination, it was found that the foetus had died and a caesarean section was urgently needed. On the operating table, she was asked to sign a form consenting to the caesarean section, as well as a 'barely legible note' handwritten by the doctor giving permission for sterilization. The reference to sterilization was in a language that she did not understand. In her application to CEDAW, she alleged that this conduct constituted a violation of her right to appropriate health care services, as well as her right to decide freely and responsibly on the number and spacing of her children. The Committee decided that Hungary had 'failed to provide Andrea with appropriate information and advice on family planning, and ensure that Andrea had given her fully informed consent to the operation' and it recommended that the government provide the applicant with appropriate compensation.

### Good quality

Health facilities, goods, and services must be scientifically and medically appropriate and of good quality. The Bangladeshi Supreme Court considered this requirement in *Dr Mohiuddin Farooque v. Bangladesh* (48 DLR (1996) HCD 438). Dr. Farooque challenged the failure of the authorities to take effective measures to deal with a large consignment of imported skimmed milk powder that contained radioactive material. The Court found that the contaminated powder was a threat to health and thereby gave rise to a breach of the right to life under Article 32 of the Bangladeshi Constitution. Through an interpretation of Article 18 of the Constitution, which requires the state to improve the quality of health and nutrition, the Court interpreted the right to life to include, among others, the 'protection of health and normal longevity of an ordinary human being'. The Court ordered the government to test the consignment's radiation level.

### Duties to respect, protect, and fulfil

Human rights place duties on states to respect, protect, and fulfil. Thus, states have duties to respect, protect, and fulfil the right to the highest attainable standard of health.<sup>7</sup>

### Respect

According to CESCR, General Comment 14, paragraph 34, the duty to respect requires the state to refrain from denying or limiting equal access for all persons, including prisoners, minorities, asylum seekers, and illegal immigrants, to preventive, curative, and palliative health services.

*Karen Noelia Llantoy Huamán v. Peru* (Human Rights Committee, Communication No. 1153/2003, hereinafter *K.L. v. Peru*) concerned a seventeen-year-old Peruvian who was denied a therapeutic abortion. When K.L. was fourteen weeks pregnant, doctors at a public hospital in Lima diagnosed the foetus with anencephaly, a foetal abnormality that would endanger K.L.'s health if pregnancy continued. Under Peru's Criminal Code, therapeutic abortion is permissible when necessary to safeguard the life or health of the woman. However, K.L. was denied a therapeutic abortion by the director of the hospital. She was compelled to carry the foetus to term and forced to feed the baby until his inevitable death several days after birth. According to K.L., Peru's failure to respond to the reluctance of some of the medical community to comply with the legal provision authorizing therapeutic abortion violated the International Covenant on Civil and Political Rights (ICCPR). The Human Rights Committee held that, by denying the complainant's request to undergo an abortion in accordance with the Peruvian Criminal Code, the government was in breach of its obligations under the ICCPR.<sup>8</sup> The Committee decided, *inter alia*, that the government must take steps to prevent the future occurrence of similar violations.

7. CESCR, general comment 14, paras 34–7.

8. The Committee found a violation of Articles 2, 7, 17, and 24 of ICCPR.

One way for the government to conform to its existing obligations under the Criminal Code is to provide clear, appropriate guidance to health professionals about when a therapeutic abortion is lawful and should be available.

### Fulfil

According to the CESCR, General Comment 14, paragraph 33, the duty to fulfil requires states to adopt appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of the right to health.

In *Purohit and Moore v. Gambia* (African Commission on Human and Peoples' Rights, Communication No. 241/2001, 2003), mental health advocates witnessed the inhuman treatment of mental health patients in the psychiatric unit of the Royal Victoria Hospital in Gambia. They submitted a complaint to the African Commission on Human and Peoples' Rights on behalf of the mental health patients detained in the unit. The principal legislation governing mental health in Gambia was the Lunatics Detention Act (1917). The complaint pointed out that, from the human rights perspective, this colonial legislation was seriously deficient in numerous respects. The Commission held that the legislation was 'lacking in terms of therapeutic objectives'; 'matching resources and programmes' for the treatment of persons with mental disabilities were also inadequate. The Commission ordered the government to replace, as soon as possible, the Lunatics Detention Act with a new legislative scheme for mental health that was compatible with the African Charter on Human and Peoples' Rights, as well as more specific international standards for the protection of persons with disabilities.

### Conclusion

These cases illustrate the indispensable role of accountability to the courts. Without accountability, a state could use progressive realization and the scarcity of resources as grounds to do virtually nothing. It could respond to whichever interest group has the loudest voice. Independent, effective, and accessible mechanisms of accountability compel a

state to explain what it is doing and why and how it is moving, as expeditiously and effectively as possible, towards the realization of the right to health for all.

Courts are usually reluctant to intervene. They tend to give the state a wide 'margin of discretion'. They are well practised in striking balances between competing interests in a principled but pragmatic way: in the *Treatment Action Campaign* case, the Court held that the government was not doing all it reasonably could, while in *Soobramoney* the same Court declined to intervene because the hospital had a fair policy in place. Supported by appropriate legislation, courts can ensure that the interests of the poor and disadvantaged – so often overlooked – are given due weight. In appropriate cases, they have the crucial responsibility of saying that the state could be doing better and requiring it to try again. Of course, courts are not a panacea; for example, sometimes authorities are slow to comply with court orders. Nonetheless, as one form of accountability, courts have a significant role to play in the promotion and protection of health-related rights.

### Implications

Nationally and internationally, economic, social, and cultural rights are attracting more attention than ever before. Courts are increasingly enhancing protection and holding states to account with respect to economic, social, and cultural rights. It is important that this judicial contribution deepens and becomes more widespread.

Crucially, these developments expose the unnecessarily narrow construction of the social contract. The deepening jurisprudence on economic, social, and cultural rights demonstrates that it is possible to push the boundaries of the social contract beyond the civil and political, to encompass the social element. By empowering the disadvantaged – women, minorities, indigenous peoples, those living in poverty and so on – economic, social, and cultural rights can invigorate the social contract and make it more meaningful to all members of contemporary, heterogeneous, culturally diverse societies.

The United Nations Committee on Economic, Social, and Cultural Rights has rightly observed that when the core elements of economic, social, and cultural rights are grouped together they establish an international minimum threshold below which nobody should be permitted to fall.<sup>9</sup> This international minimum threshold prefigures, and is part of, an international social contract.

Finally, in addition to the 'judicial' or 'court' approach, it is also most important that economic, social, and cultural rights, including the right to health, are brought to bear upon all relevant local, national, and international policymaking processes. For this approach to prosper, the traditional human rights techniques –

taking test cases in the courts, 'naming and shaming', letter-writing campaigns, sloganeering and so on – will not be sufficient. The 'policy approach' demands the development of new right-to-health skills and tools, such as budgetary analysis, indicators, benchmarks, and impact assessments. This approach demands close cooperation across a range of disciplines. In recent years, the health and human rights community has made significant progress towards the development of these new methodologies.<sup>10</sup>

The social contract demands that both the 'judicial' and 'policy' approaches are used to vindicate economic, social, and cultural rights, such as the right to the highest attainable standard of health.

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9. CESCR's statement on poverty, UN Doc. E/C.12/2001/10, dated 10 May 2001, para 17.

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10. For a discussion about the health and human rights movement's progress and obstacles see chapter II of the report (UN Doc. A/HRC/4/28) dated 17 January 2007 accessible at: <[http://www2.essex.ac.uk/human\\_rights\\_centre/rth/docs/council.pdf](http://www2.essex.ac.uk/human_rights_centre/rth/docs/council.pdf)> Last accessed 22 August 2008.



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**Paul Hunt** was elected as an independent expert on the UN Committee on Economic, Social, and Cultural Rights in 1998. In 2002, he was appointed UN Special Rapporteur on the right to the highest attainable standard of health, in which capacity he has written some thirty UN reports. His books include *Reclaiming Social Rights* (1996) and *World Bank, IMF and Human Rights* (co-ed, 2003). He is a Professor of Law at the University of Essex (England) and Adjunct Professor at the University of Waikato (New Zealand).

**Rajat Khosla** is a Senior Research Officer in the Right to Health Unit, Human Rights Centre, University of Essex. He is a human rights lawyer researching and writing on issues related to economic, social, and cultural rights. He is also the coordinator of a postgraduate course on Human Rights and Development, part of the University's LLM in International Human Rights Law.

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our website at [www.fljs.org](http://www.fljs.org)  
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College  
Linton Road  
Oxford OX2 6UD  
T · +44 (0)1865 284433  
F · +44 (0)1865 284434  
E · [info@fljs.org](mailto:info@fljs.org)  
W · [www.fljs.org](http://www.fljs.org)