



## **Application of standards on ESCR into domestic Law Seminar on Justiciability of Economic, Social and Cultural Rights**

**10 June 2015**

**OIDEL, together with the Permanent Mission of Portugal, held a seminar on the Justiciability of Economic, Social and Cultural Rights (ESCR) at the Palais des Nations (Room XXVII) on 10 June 2015. This seminar was organized in collaboration with the Special Rapporteur on the Right to Education, the School of Medicine (University of Geneva), the Manchester International Law Centre (University of Manchester), the Collège Universitaire Henry Dunant and the NGO Platform on the Right to Education.**



## Summary

The seminar on Justiciability of ESCR followed Human Rights Council Resolution 28/12 which “underlines the importance of an effective remedy for violations



of ESCR, and in this regard takes note with appreciation of measures taken to facilitate access to complaints procedures and the domestic adjudication of cases, as appropriate, for victims of alleged human rights violations” (par. 9) and “welcomes the steps taken at the national level to implement ESCR, including the enactment of appropriate legislation and adjudication by national courts” (par. 10). This seminar has shown, from a cross-regional approach, examples of the application of ESCR on a domestic level, particularly examples of jurisprudence concerning the content of ESCR.

17 Permanent Diplomatic Missions as well as 15 NGOs and Universities participated in this seminar.

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The event was moderated by Ms. Claire de Lavernette (Representative of OIDEL to the United Nations) and introduced by Mr. Nuno Cabral (First Secretary of the Permanent Mission of Portugal). The main speakers were Dr. Kishore Singh (Special Rapporteur on the Right to Education), Ms. Sandra Ratjen (Senior Legal Advisor of the International Commission of Jurists and member of the Board of ESCR-Net), Professor Emmanuel Kabengele (Professor of the Global Health Institute of the Faculty of Medicine of the University of Geneva) and Dr. Maria Smirnova (Researcher for the European Research Council project on the Sociology of Transnational Constitutional Law of the University of Manchester).

Mr. Nuno Cabral wanted to first of all remind on this day, Portugal’s National Day, his country’s commitment to ESCR. He explained the link between democracy and ESCR, mentioning Portugal’s history as a good example of this since Portugal signed the International Covenant on Economic, Social and Cultural Rights the same year it achieved democracy.

He then explained the problematics of understanding the essence and content of ESCR. The causes of these problems are neither a matter of academic capacity nor of diplomacy, they are rather the consequence of a lack of training of diplomats on this topic. It is for this reason and in order to solve this problem that Portugal co-sponsored this seminar.

Dr. Kishore Singh (Special Rapporteur on the Right of Education) welcomed the initiative taken by the organizers and commended the theme of this seminar which is of key importance for the reinforcement of the right to education not

only for the present but also in the framework of the Post-2015 Development Agenda and its implementation. He then recalled that even though the right to education is a justiciable right, many States still do not realize its full significance.

He underline the need for taking measures in order to make justiciability a reality and recalled some of the recommendations he made in his report on the justiciability of the right to education, presented to the Human Rights Council 2013 (A/HRC/17/29) and emphasized on the importance of:

- reinforcing – or creating – appropriate independent institutions,
- explicitly recognizing the right to education in constitutions and domestic laws as established in the international treaties,
- limiting the costs of litigation and providing legal assistance, especially public interest litigation
- creation and strengthening of appropriate independent institutions and mechanisms

He further mentioned that one of the constraints on the justiciability of the right to education is the lack of an effective system of the rule of law. He also stressed the importance of both judicial and quasi-judicial mechanisms of justifiability, and the need to strengthen the quasi-judicial mechanisms to which the course is easier.

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Along the same lines of what was said by Mr. Cabral, Dr. Singh encouraged judges, lawyers and other professionals to better appreciate the state obligations for the right to education when it comes to upholding it as a justiciable right. He also underlined the importance of raising public debate on the justiciability of the right to education as well as research and reflections in the academic world.

**The urgency of building conscience of what ESCR are is linked to the necessity to clarify what justiciability means: these objectives could be reached through a better appreciation of the universality of these rights.**

Finally, he remarked that the phenomenon of privatization of education is in part provoked by the fact that the states' obligations for the provision of good quality of education is not fully assumed, nor do states effectively regulate private providers in face of commercialization of education. Justiciability therefore plays an inherently key role to move forward in the application of the right to education.

Ms. Sandra Ratjen (Senior Legal Advisor of the International Commission of Jurists and member of the Board of ESCR-net) began her statement by reflecting on the existing prejudice against ESCR. She stated that many people consider ESCR as secondary rights. This is due to the fact that many Bills of Rights only recognize Civil and Political Rights. However, many new constitutions, as well as recent constitutional reforms, have included a comprehensive list of rights that include ESCR. A good example of this is the South African Constitution.

Despite the barriers and difficulties many ways exist to litigate for ESCR. Ms. Ratjen stated that the lack of litigation for ESCR is only a myth. Proof of this is the massive jurisprudence of ESCR that can be found in a variety of countries with different legal and cultural traditions. She encouraged the audience to check the database of the ICJ to verify the amount of jurisprudence available on this subject – [www.icj.org](http://www.icj.org).

To illustrate her point Ms. Ratjen mentioned three examples of jurisprudence on three different ESCR in different countries. She first of all presented a Brazilian case from 2010 on the right to education. This example concerned the constitutionality of introducing race quotas in universities. In this case judges used ICESCR data.

The second case she presented was a decision of the Supreme Court of New York from 1978. The case concerned a group of people whose health had been affected by poor living conditions in a hotel. The court recognized that the right to health of these people had been violated.

The third case came from Hong Kong in 2013. The case concerned a migrant's request to obtain social security. Law required he provide proof of 7 years of permanent residence to have access to social security provisions. In this case the court recognized his right to social security by arguing that the content of the relevant article of law was irrational and went against the core content of social security.

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Prof. Emmanuel Kabengele (Professor of the Global Health Institute of the Faculty of Medicine of the University of Geneva) discussed the problems to guarantee and make effective those rights due to the difficulty of their justiciability. He explained that despite a long critic epistemological controversy of this right, some people still deny the justiciability of the right to health. The arguments speaking against its justiciability are its ambiguous definition, the high costs of its implementation and the conflict that exists between individual health and collective health. Prof. Kabengele explained however that there is a way to get beyond this problem globally.

He also gave a regional approach specially focused on critical areas such as Latin America and Sub-Saharan Africa, where there an amazing progress on justiciability has been observed in the last 20 years. For instance, between 1990 and 2007 there have been 90.000 judicial processes concerning the right to health in Colombia. Moreover, in the state of Rio Grande do Sul (Brazil), lawsuits against the state over health responsibilities have increased by more than 1500% in 7 years.

Prof. Kabengele pointed out that today the main barriers against justiciability of the right to health are:

- the financing models of health systems,
- the global nature of health problems,
- the fatalism of the international community when facing health problems,
- the corporatism of health professionals,
- the dysfunctions of judicial systems,
- the lack of good practices,
- the impunity,
- the absence of guarantees of this right in many domestic legislations,
- the lack of specific training of some judges on this right and the problems in the access to justice and
- the high costs of judicial procedures.

Finally, Prof. Kabengele mentioned three necessary elements to ensure the justiciability of the right to health: 1st. the inscription of the right to health in constitutions and domestic legislations, 2nd. the social mobilization for the protection and advocacy of ECSR, 3rd. international cooperation and solidarity on this domain.

Dr. Maria Smirnova (European Research Council project on the Sociology of Transnational Constitutional Law of the University of Manchester), after quoting relevant examples in the field of the rights to education and health, provided a framework of the justiciability of Economic, Social and Cultural Rights in the Russian Federation.

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Despite the ratification of international instruments and the constitutional recognition of ESCR, individuals should be granted further minimum entitlements referring to them. The implementation of these principles is however limited by obstacles that undermine their full realization.

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She then explained the situation of the justiciability of the right to education and the right to social security in the Russian Federation. One of the most common reasons of exclusion from the enjoyment of these rights concerns residence registration. While ESCR should be recognized and applicable to everyone, acts of discrimination are committed (as for example in the application of social security measures or in the access to education) towards those who do not have residence permits. Russian courts pronounce many sentences on this domain.

In the field of education, there have been many debates concerning the place of cultural, linguistic and religious identity within education. This is due to the fact that public education is secular. Alternative education (such as confessional ed-

ucation) is only offered in private educational institutions. Also, one of the most common violations concerning the right to education is due to the lack of security.

Dealing with the right to health, Dr. Smirnova provided a clear example of violation of this right: people affected by certain illnesses (such as HIV) are forced to leave the country. The court, by using international law and principles as a legal basis in these cases, made it however possible for those who have a family to stay in the country. Indeed, their forced displacement would have represented a violation of their rights.

The Supreme Court has also made some progress in providing facilities and implementing ESCR for workers and disabled people.

Dr. Smirnova concluded by highlighting how the recent jurisprudence of the Supreme Court has taken a step forward in ensuring the respect and application of ESCR. Furthermore, she stressed the persistence of the Federal government to have courts apply international principles and legal instruments. The utilization of those instruments has enabled the Supreme Court to avoid or reduce obstacles to the full implementation of such provisions lacking in domestic rule.

Mr. Christian Courtis (Office of the High Commissioner for Human Rights) summarized the relevant aspects of what had been brought up in the discussion so far, giving his interpretation of various questions dealing with the definition of both justiciability and the content of ESCR.

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### **The distinction between ESCR and Civil and Political Rights is not relevant to define the justiciability of ESCR**

Firstly, he pointed out that the distinction between ESCR and Civil and Political Rights is not relevant to define the justiciability of ESCR.

As the other speakers explained, the two kinds of rights are interrelated and affect each other mutually. This link emerges in the judicial arena, where cases dealing with one group of rights often imply a reference to the other. This close relationship is also demonstrated by the instruments of justiciability. In both cases a variety of approaches is available and reference is made to international principles and laws to judge violations.

Secondly, he defined justiciability as going beyond the mere assessment of violations: it is a process dealing with creativity. Concerning the interaction between domestic and international law, Mr. Courtis pointed out that international law is not the legal roof, but the legal base and that the role of domestic law is to develop the content of international law to ensure justiciability. This can provide better results if those characteristics are observed.

Finally, he concluded by mentioning some requirements that must be observed to realize justiciability in its most genuine significance: 1st. the accessibility for all, especially for those who are often left behind, 2nd. the adequacy of available

remedies, 3rd. the possibility of creating mechanisms to set up and follow up the implementation of court decision.

Following this discussion, relevant questions were asked by the representatives of States attending the meeting. Among them were the representatives of South Africa and the Russian Federation who thanked the Permanent Mission of Portugal and OIDEL for the organisation of the seminar. The representatives asked Dr. Smirnova to explain the difference between the justiciability of ESCR and that of Civil and Political Rights. Dr. Smirnova and Mr. Courtis agreed that the difference lies in the procedure by which both kinds of rights are judged. The most accessible systems of justiciability are those relating to administrative issues, which themselves frequently relate to Civil and Political Rights. However, efforts have been made to encompass ESCR in administrative protection mechanisms.

A second question was asked by Mr. Xavier Du Crest (Aide et Action International) and addressed to Prof. Kabengele. The question concerned the ongoing process of privatization of education and the threat it represents for society. Dr. Kabengele replied that while a risk does exist, privatization has both positive and negative aspects. A balance must therefore be found. In doing so, states must however never forget their core obligations. It is the role of the state, in elaborating policies, to ensure harmony between its obligation to rule and the possibility for other stakeholders to fulfil the aforementioned right.

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Mr. Philippe Richard (OIEC) reminded the importance of judiciability in order to ensure education as a public good. He said that as long as education was understood as a political and economic tool rather than as a right with legal consequences for those violating it, education will not be considered as a public good or right.

Ms. Caroline Staffell (Graduate Women International) also made some remarks mentioning the importance of international instruments in facilitating the justiciability of the right to education. In this sense, the General Comment n°13 as well as the Vienna Declaration and Program of Action have to play a more important role to ensure the essential content of the right to education.

Finally, Mr. Stefano Nobile (Caritas Internationalis) stressed the importance of the role of NGOs and civil society in building a favourable environment for justiciability through actions of cooperation.

## List of participants

### Permanent Missions

Permanent Mission of Algeria  
Permanent Mission of Bosnia and Herzegovina  
Permanent Mission of Brazil  
Permanent Mission of Ecuador  
Permanent Mission of Finland  
Permanent Mission of France  
Permanent Mission of Greece  
Permanent Mission of Honduras  
Permanent Mission of Mexico  
Permanent Mission of Portugal  
Permanent Mission of the Republic of Korea  
Permanent Mission of Russia  
Permanent Mission of South Africa  
Permanent Mission of Spain  
Permanent Mission of Sweden  
Permanent Mission of Switzerland  
Permanent Mission of Thailand  
Permanent Mission of Tunisia  
Permanent Mission of the United States of America  
Permanent Mission of the Organisation Islamic Conference

### NGO

Aide et Action International  
Al-Hakin Foundation  
Associazione Comunita' Papa Giovanni XXIII (APG23)  
Caritas Internationalis  
Company of Mary Our Lady  
Congregation of Our Lady of Charity of the Good Shepherd  
Defence for Children  
Dominicans for Justice and Peace (Order of Preachers)  
Geoexpertise  
Graduate Women International  
ICJ (International Commission of Jurists)



Ocaproce Int.

OIEC

Points-Cœur

## **Others**

Collège Universitaire Henry Dunant

OHCHR

Université de Genève

University of Manchester