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ABSTRACTS

Social Rights and WTO Law
Is socio-economic Certification of Bioenergy compatible with International Trade Law?

By Jochen von Bernstorff, Heidelberg

The “move to bioenergy” has far reaching and world wide implications for the promotion and protection of a range of economic and social human rights. Replacing traditional food production by large scale biomass-production in third world countries not only affects rural land use, ownership structures and employment opportunities, it can also affect the availability of locally produced food in local communities. In order to mitigate negative repercussions of the “green gold rush”, private and public actors have considered introducing socio-economic certification measures (alongside ecological ones) regarding the production of bioenergy with the aim of restricting imports of bioenergy, the production process of which did not fulfil specific criteria. One of the central arguments in the political debate against the introduction of such certification measures is their perceived incompatibility with non-discrimination rules under international trade law. The paper, a more extended version of which served as a legal background document for the 2008 UN High Level Conference on Food Security, focuses on the human rights dimension of bioenergy production as a legal basis for certification schemes and analyzes in detail the claim of incompatibility of rights-based certification with WTO Law. It concludes that rights-based certification measures are in conformity with international trade law as long as they display certain legally required characteristics. The paper argues that an international co-operative effort regarding a joint certification standard based on universally accepted human rights standards as well as globally co-ordinated implementation activities would help to prevent the occurrence of trade related disputes over such measures. Measures taken on the basis of such universally agreed socio-economic standards for the production processes of bioenergy are unlikely to conflict with substantive provisions of the GATT and – in case of a conflict – are more likely to be saved from illegality as an authorized exception under Article XX GATT.

Opportunities and Challenges of a Soft Law track to Economic and Social Rights – The Case of the Voluntary Guidelines on the Right to Food

By Marie von Engelhardt, Geneva

Where a legal regime suffers from the stigma of ineffectiveness, the occurrence of soft law can pose an opportunity or challenge to existing standards. Soft law can complement hard
law by elaborating, operationalizing or developing its content – or it can occur as an alternative to hard law in place, threatening its gradual softening or demise.

Economic and social rights are established legal norms so widely disregarded in practice that the search for alternative routes to advancing implementation becomes a compelling task. The Voluntary Guidelines on the Right to Food constitute a pertinent case study to highlight both opportunities and challenges arising where soft law interacts with existing but ineffective economic and social rights. A set of non-binding policy recommendations adopted at the Food and Agricultural Organization in 2004, they are a promising approach to bridge the gap between abstract obligation and policy implication. Yet where states renegotiate the substance of assumed obligations, the extent of congruence between the Guidelines and the legal right to food must be analyzed to avoid that soft law renders voluntary what is already obligatory.

This article argues that soft law, more than mere policy tool or precursor to hard law, can lead to the spread or retrenchment of legalization. Where it is used to complement economic and social rights, it should be confronted with a reasonable combination of impartiality and caution. An analysis of the Right to Food Guidelines shows that only with an understanding of its possible normative impact can the potential of soft law to overcome the alleged weaknesses of socio-economic rights be fully grasped.

Socio–Economic Rights in India: Democracy Taking Roots

By Uday Shankar / Divya Tyagi, Kharagpur / Raipur

Civilization of a society scales upon realization of human rights. Human rights are inalienable rights of every individual. Every society constitutes certain principles to promote and protect human rights. After tyrannical rule of Britshers, the Indian society also adopted a new dispensation containing human rights. Human rights were distinguished in two categories; fundamental rights as justiciable and directive principles as non-justiciable in court of law. Fundamental rights were largely in the nature of civil and political rights whereas directive principles were in nature of socio-economic rights. The categorization was based upon Indian values and guided by struggle of independence. The judicial approach to non-enforceable rights raised serious doubts about commitment of legislature and executive in implementation of these rights. The judiciary started with negative note realized the importance of socio-economic right in humane development. However, judicial effort is to be viewed in the light of inherent limitations of the institution in ordering priorities based on budget and related factors. Therefore, a study is undertaken to examine the judicial approach in India and to suggest an establishment of suitable enforcement of institution to enforce socio-economic rights so that socio-economic rights need not take shelter of civil and political rights for their enforcement.
What’s the use of socio-economic rights in a constitution? – Taking a look at the South African experience

By Mirja Trilsch, Montreal

In the past, socio-economic rights have rarely been the subject matter of constitutional law. The Constitution of the Republic of South Africa has radically changed this. Not only does it feature a number of provisions guaranteeing enforceable socio-economic rights – such as the rights to have access to housing, health care, water and social security –, the country’s Constitutional Court has also taken up the task of providing these rights with a workable methodology for judicial review.

The article will review the historical developments that led to the inclusion of socio-economic rights in the post-apartheid Constitution for South Africa, the normative structure of the relevant provisions and their interpretation by the Constitutional Court. Three landmark rulings have marked the South African socio-economic rights jurisprudence: Soobramoney, Grootboom and Treatment Action Campaign. A brief outline of these cases will serve as a basis for an assessment of the achievements as well as the drawbacks of this jurisprudence. It will be shown that while the methodology developed by the Constitutional Court is praiseworthy for its innovative force in rendering socio-economic rights justiciable, it is not entirely beyond reproach.

The so-called “test of reasonableness” is at the heart of the Court’s approach to socio-economic rights and is footed in the limitations set by the Constitution for the positive obligations resulting from socio-economic rights. Unequivocally dismissing concerns about the non-justiciability of these rights, the Court uses the “test of reasonableness” to strike a balance between the doctrine of separation of powers and the constitutionally mandated review of governmental conduct in drafting social policy and legislation. It will be shown that in doing so, it has developed a practical set of criteria for reasonableness review. It has also let itself be inspired by international human rights law without however assuming all of its concepts in relation to economic, social and cultural rights. Finally, given the long-lasting lack of jurisprudence on the enforceability of socio-economic rights before Soobramoney & Co., the burgeoning jurisprudence of the Constitutional Court has invited extensive comparative analysis on the subject matter of the constitutional protection of socio-economic rights.

The Jurisdiction of the Columbian Constitutional Court on Social Rights

By Rodolfo Arango, Bogotá

In this essay I would like to describe the role of the Colombian Constitutional Court in the realization of the social fundamental rights. Therefore I divided the article into three sections: First I refer on historical circumstances, which make possible the adoption of an ambitious fundamental rights catalogue and an extensive law system for its protection.
Afterwards I describe briefly the composition, functions and influence of the Colombian constitutional law system. In a third part the principal guidelines of the constitutional jurisprudence on social fundamental rights are to be summarized. This material could be useful in order to reflect over the political effect of constitutional activism per social rights from the perspective of „not well ordered societies“ likes the Colombian, i.e. societies with high levels of social injustice and general malfunction of the social state.
ABHANDLUNGEN / ARTICLES

Social Rights and WTO Law
Is socio-economic Certification of Bioenergy compatible with International Trade Law?

By Jochen von Bernstorff, Heidelberg*

Introduction

Modern bioenergy is gaining prominence with new forms of land use, based on cash crops and plantations and with the use of technologically advanced processing of biomass into liquid biofuels. This “move to bioenergy” has far reaching and world wide implications for the promotion and protection of a range of economic and social human rights. Replacing traditional food production by large scale biomass-production in third world countries not only affects rural land use, ownership structures and employment opportunities, it can also affect the availability of locally produced food in local communities. Moreover, it may also increase the dependence on foreign imports and on ever more volatile global food prices. It seems undisputed that such developments have a human rights dimension, in particular through their impact on the enjoyment of the right to an adequate standard of living and the right to adequate food. As the concrete effects of the move to bioenergy can only assessed through contextual and individualized studies, some general legal questions have arisen in the bioenergy debate. In order to mitigate negative repercussions of the “green gold rush”, private and public actors have considered introducing socio-economic certification measures (alongside ecological ones) regarding the production of bioenergy with the aim of restricting imports of bioenergy, the production process of which did not fulfil specific criteria. One of the central arguments in the political debate against the introduction of such certification measures was their perceived incompatibility with non-discrimination rules under international trade law. This article focuses on the human rights dimension of bioenergy production and analyzes the claim of incompatibility of rights-based certification with WTO Law.

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The text falls into two parts. Part I focuses on relevant standards derived from international human rights law, while Part II assesses their implications from an international trade law perspective. The analysis of relevant principles and provisions shows that many states have entered into relevant binding obligations under both these regimes. Hence, there is the possibility that obligations under one regime require a state to take specific measures which might conflict with obligations under the other regime. Thus the question arises how to deal with such potentially contradicting legal prescriptions. In international law, there is a strong presumption against normative conflict. As a recent report of the International Law Commission put it: “Treaty interpretation is diplomacy, and it is the business of diplomacy to avoid or mitigate conflict.” The suggestion of harmony between different legal regimes has evolved into a widely accepted principle of interpretation in international law. When creating new obligations, States in general are assumed not to derogate from their obligations. As the International Court of Justice stated in the Right of Passage case:

"it is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and intended to produce effects in accordance with existing law and not in violation of it."

Many findings contained in this study can be seen as the result of the application of this general rule of interpretation. However, in some cases, harmonisation through interpretation in the light of provisions of the respective other regime might not be possible. In case of emerging genuine conflicts between obligations under international human rights law and international trade law obligations in the field of bioenergy regulation, international law as it stands today does not establish general rules prioritizing one source of obligations over another. According to the International Law Commission, WTO law is not isolated from general international law, nor does it automatically override other special regimes of international law, such as human rights law. The available priority rules such as the lex

2 Case concerning the Right of Passage over Indian Territory (Preliminary Objections) (Portugal v. India) ICJ Reports 1957 p. 142.
*specialis rule do not establish a general hierarchical relationship between human rights law and international trade law. Only in case of human rights obligations belonging to *ius cogens* is a clear hierarchy in favor of human rights norms established.⁴ Thus, such conflicts would have to be resolved on a case by case basis by competent (quasi-) judicial and political actors.

**Part I: Bioenergy, Human Rights and Food Security Certification**

Bioenergy is a renewable source of energy, which has the potential to provide new employment and income opportunities for rural populations. In principle, the move to bioenergy could benefit the masses of poor small-scale farmers. At the same time, however, poor and landless people are themselves consumers and marginal price increases may ruin the livelihoods of those who spend up to 80 percent of their income on food. FAO research shows that food prices will be increasingly linked to oil prices. As most of the 82 low-income countries with food deficits are also net oil importers, the competing pressures on crop use will increase. Moreover, the expansion of land used for the production of biomass feedstock raises concerns related to food security. As the biofuels industry becomes an increasingly attractive investment opportunity, the concentration of a few large corporations on the agricultural commodity market may be to the detriment of smallholders.

As countries set well-intended and ambitious blending targets for the proportion of bioenergy to be reached in coming years, socio-economic criteria so far have not played a significant role in bioenergy legislation. The 2009 EC-Directive on the promotion of the use of energy from renewable sources for instance does not set out criteria for socio-economic certification of bioenergy, while not precluding such an option for the implementation of the directive. There is, however, an uncontestable need for national and international regulation of the socio-economic consequences of the move to bioenergy. A range of recent initiatives and studies has developed standards and proposals for certification focusing mainly on ecological criteria. In contradistinction to these studies the following report focuses on socio-economic criteria from an international law perspective. It assesses relevant human rights standards in the light of the move to bioenergy and analyses international trade law implications of proposed regulatory initiatives.

**A. Global food security standards and bioenergy**

The FAO defines food security as a “situation that exists when all people, at all times, have physical, social and economic access to sufficient, safe and nutritious food that meets their dietary needs and food preferences for an active and healthy life”. The most comprehensive

⁴ Obligations under Article 11 CESCR are generally not considered *ius cogens*. 
global standard on the right to adequate food is contained in the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security (Voluntary Guidelines). This document takes a rights based approach to national food security and was adopted by consensus by the 127th FAO Council in 2004. The objective of the Voluntary Guidelines is to provide practical guidance to States in their implementation of the right to adequate food in the context of national food security, in order to achieve the goals of the World Food Summit Plan of Action. The guidelines provide a global instrument to combat hunger and poverty and to accelerate the attainment of the Millennium Development Goals. The central recommendations contained in this document are based on principles and obligations emanating from right to adequate food, which is not only set out in the Universal Declaration of Human Rights but also in the International Covenant on Economic, Social and Cultural Rights (CESCR). Non of these instruments refers specifically to the nexus between food security and bioenergy. The following analysis, however, attempts to assess these norms in the context of new challenges to food security posed by the rapid development of bioenergy. It will start with an overview of basic obligations stemming from international human rights law and then – as a second step – analyze the Voluntary Guidelines from a bioenergy angle.

I. Overview of obligations and responsibilities emanating from the right to adequate food enshrined in Article 11 CESCR

According to General Comment No. 12 of the Committee on Economic, Social and Cultural Rights, the right to food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. As it is the case with all the rights set out in the Universal Declaration of Human Rights but also in the International Covenant on Economic, Social and Cultural Rights (CESCR), some dimensions of this right need only be realized progressively. However, the CESR Committee makes it clear that States have a core obligation to take necessary action to mitigate and alleviate hunger as provided for in paragraph 2 of Article 11. In the bioenergy context, the following general legal obligations might therefore become relevant.

1. Ensuring economic accessibility in the face of high food prices

Regarding high food-prices, which can be linked to enhanced bioenergy production, the question of economic accessibility of food comes to the fore. According to the General

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6 General Comment, note 5, para 6.
Comment, economic accessibility implies that personal or household financial costs associated with the acquisition of food should be at a level such that the attainment and satisfaction of other basic needs are not threatened or compromised. FAO research shows that food prices will come increasingly to be linked to global energy prices. Given that price increases disproportionately affect poor people, States are under an obligation to take measures to alleviate the effects of price increases on the most vulnerable segments of the population. National food accessibility safety nets including a range of corrective measures are required to counter the increasing interdependence between energy prices and food prices. Such safety nets can include priority rules for national and local consumption and trade related measures, such as import subsidies or export taxes taken in order to combat food insecurity at home.

2. Ensuring a hunger eradication focus in legislation, strategies and policies related to bioenergy

Obligations under the CESCR require States to assess the implications of bioenergy legislation and policies, including trade policies, for national food-security. In the implementation of such policies, States should respect and protect the rights of individuals with respect to resources such as land, water, forests, fisheries and livestock without any discrimination. Land allocation policies in the bioenergy context should also be consistent with other human rights norms, such as the prohibition of forced evictions (Article 11:1 CESCR) in case expropriation measures for enhanced bioenergy production are envisaged. Legislation should help to secure equitable access to land, guarantee secure tenure and strengthen pro-poor growth. In general, violations of the CESCR occur when a state fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation, it is important to distinguish the inability from the unwillingness of a State party to comply. Violations can occur through direct action of States or other entities insufficiently regulated by States.

3. International Obligations

In addition, States must take into account their international legal obligations regarding the right to food when entering into agreements with other States or with international organizations. According to General Comment No. 12, States parties should also take steps to

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7 General Comment, note 5, para 13.
8 On WTO compatibility see below part II B of this study.
9 General Comment, note 5, para 17.
respect the enjoyment of the right to food in other countries. States parties should, by way of international agreements, ensure that the right to food is given due attention and should consider the development of further international legal instruments in that regard.\textsuperscript{10} Thus, international human rights law addresses not only the effects of regional and national policymaking on citizens at home but increasingly refers to the effects such policies might have on foreign populations (international obligations).\textsuperscript{11}

In line with General Comment No. 12, the role of the United Nations agencies, including through the United Nations Development Assistance Framework (UNDAF) at the country level, in promoting the realization of the right to food is of special importance.\textsuperscript{12} In the context of the evolving crisis in food prices, coordinated efforts towards the realization of the right to food could be undertaken to enhance coherence and interaction among all the actors concerned, including the various components of civil society. In the bioenergy context, the food organizations, FAO, WFP and the International Fund for Agricultural Development (IFAD) in conjunction with the United Nations Development Programme (UNDP), UNEP, UNICEF, the World Bank and the regional development banks could also cooperate on the implementation of the right to food at the national level, building on their respective areas of expertise. The international financial institutions, notably the International Monetary Fund (IMF) and the World Bank could pay greater attention to the protection of the right to food in their lending policies and credit agreements and in international measures to deal with the nexus between bioenergy and food security.

\section*{II. Specific requirements for national legislation, strategies and policies regarding national bioenergy production}

Successful food security strategies in the context of increased bioenergy production will depend on various institutional, social, economic, political and ecological circumstances, which vary substantially from country to country. Legislation, strategies and policies ensuring food security in this context should therefore not only be tailored to national and local conditions but should also leave room and flexibility for short term adaptations to global food price developments. Given the general obligations and responsibilities set out above, national legislation on bioenergy and food security should inter alia integrate the following aspects:

\textsuperscript{10} General Comment, note 5, para 36.
\textsuperscript{11} General Comment, note 5, para 36-41.
\textsuperscript{12} Ibid.
1. **Priority for local and national food supply**

This aspect becomes relevant when bioenergy plantations spread to arable lands competing with traditional food-crops for arable soil and scarce water resources, as is often the case with sugarcane cultivation. Bioenergy cultivation which is restricted to marginal agricultural land or cultivable wasteland is less likely to conflict with the food production for local or national consumption. The mapping and identification of such land would help to increase bioenergy production in a food-secure manner. In general, countries are under an obligation to assess the impact of increased bioenergy production on national and local food supply and to design strategies for land use accordingly. Such strategies might involve maximum percentage thresholds for land used for bioenergy production. Regulations could make permissions for bioenergy production dependent on the condition that a certain percentage of the land will still be used for food production for national and local consumption. FAO, UN agencies as well as other international institutions may, when required by States, assist in the conduct of such food security assessments of bioenergy legislation and strategies.

2. **Prohibition of forced evictions and of violations of traditional land rights**

In line with the Voluntary Guidelines, States should respect and protect assets that are important for people’s livelihoods. States are under an obligation to protect farmers and smallholders of forced evictions carried out in the context of enhanced land use for bioenergy production. States should, to the maximum extent possible, refrain from claiming or confiscating housing or land for enhanced bioenergy production, in particular when such action does not contribute to the enjoyment of human rights. For instance, an eviction may be considered justified if measures of land reform or redistribution, especially for the benefit of vulnerable or deprived persons, groups or communities are involved. According to the UN Basic Principles and Guidelines on Development-based Evictions, States must ensure that adequate and effective legal or other appropriate remedies are available to those who undergo, remain vulnerable to, or defend against forced evictions in the context of enhanced bioenergy production. Traditional land rights and other rights of indigenous people should be respected.

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13 On this obligation in general terms: General Comment, note 5, para 21.
15 UN-Basic Principles and Guidelines on Development-based Evictions, note 14, para 22.
3. **Development of jobs and rural growth through energy cropping systems**

According to Guideline 8 of the Voluntary Guidelines, States should design and implement programmes that include different mechanisms to ensuring that the poorest populations benefit from agricultural development. In addition, the Guidelines aim at fostering the use of agricultural production methods, which provide opportunities for work providing remuneration allowing for an adequate standard of living for rural wage earners and their families. Given that bioenergy can be produced in multiple ways and according to diverging production models, national regulators should prescribe or promote those models that create local employment. Attention should be paid to fair and healthy working conditions and the problem of child labour in line with relevant international standards. Furthermore the role of women and their contribution to rural livelihoods, primarily through small-scale farming, should be respected and promoted (see 2008-FAO Report *Gender and Equity Issues in liquid Biofuels Production*). Country studies suggest that the choice of the production model is decisive to the question whether bioenergy production fosters local development. It is within the responsibility of the legislator to regulate land use for bioenergy production in a way that promotes rural livelihoods.

4. **Preservation of local water resources and the right to water**

Bioenergy production can lead to water pollution and can require high amounts of irrigation water. In areas with scarce water resources bioenergy production can conflict with governmental obligations emanating from the human right to water. Water-related human rights obligations are derived from Article 11:1 and Article 12 of CESCR. According to General Comment No. 15 of the Committee on Economic, Social and Cultural Rights, “the human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements”.

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16 General Comment, note 5, para 21.
17 *D. Kashyap / M. Glueck*, Liquid Biofuels for Transportation: India country study on potential and implications for sustainable agriculture and energy, 2006, 64-70.
18 Ibid., 62.
Individual access to clean water is the precondition of the enjoyment of other rights. According to General Comment No. 15, priority in the allocation of water must be given to the right to water for personal and domestic uses. Priority should also be given to the water resources required to prevent starvation and disease.

The Committee also notes the importance of ensuring sustainable access to water resources for agriculture to realize the right to adequate food. Attention should be given to ensuring that disadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology. Referring to the duty in Article 1, paragraph 2, of the Covenant, which provides that a people may not “be deprived of its means of subsistence”, the Committee requires States parties to ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples. All of these water-related obligations and responsibilities seem highly relevant for legislation and regulatory activities in the context of water-intensive bioenergy production.

5. Participation of local people in decision making

According to recognized cross-cutting human rights principles, the formulation and implementation of national bioenergy strategies and policies should respect, inter alia, the principles of non-discrimination and people’s participation. The right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning enhance bioenergy production. Individuals and groups should be given full and equal access to information concerning bioenergy production held by public authorities or third parties.


20 See also General Comment, note 5.
21 FAO-Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, preface para 7.
6. Monitoring

In order to live up to the above mentioned obligations and responsibilities and in line with the Voluntary Guidelines, States should establish mechanisms to assess, monitor and evaluate the effects of enhanced bioenergy production on the progressive realization of the right to adequate food. States could consider conducting “Right to Food Impact Assessments” in order to identify the impact of relevant bioenergy policies, programmes and projects on the progressive realization of the right to adequate food of the population at large and vulnerable groups in particular. Such assessments could form a basis for the adoption of the necessary corrective measures. Monitoring could involve the creation of national ombudspersons for food security and bioenergy and co-operation with FAO and UN-special procedures dealing with the right to food.

B. Socio-economic certification of bioenergy as a means to ensure adherence to global standards

In general, mandatory and voluntary certification schemes are being increasingly recognized as valuable tools to harness market forces to create incentives in support of sustainability outcomes. In order to be successful, relevant standards must be widely accepted and well known to stakeholders and consumers. However, a general concern regarding sustainability certification arises from the fear that sophisticated certification mechanisms overburden developing countries that are not able to meet the standards or that find it difficult to comply with the administrative requirements involved. Due to unpredictable market dynamics, certification mechanisms must also be continuously reviewed and adapted to changing societal and market conditions.

A number of stakeholder groups has recognized the need for bioenergy sustainability certification. There have been various initiatives directed at the development of concrete bioenergy certification systems. The IAEA Bioenergy Task 40 on International Sustainable Bioenergy Trade, consisting of governmental bodies, NGOs and industry, aims to investigate a policy framework for a bioenergy commodity market. Another initiative is the G8 Global Bioenergy Partnership (GBEP), providing a coordination forum for G8...
countries regarding bioenergy policies.\textsuperscript{27} Further fora are the Roundtable on Sustainable Palm Oil (RSPO)\textsuperscript{28} and the Roundtable on Sustainable Soy (RTRS).\textsuperscript{29} Recent research has provided several valuable overview documents regarding these and various other initiatives.\textsuperscript{30} From different perspectives, governments, companies and civil society organisations have started to develop possible standards and criteria for the sustainable production of biofuels. Most of these initiatives focus on environmental criteria for bioenergy certification.\textsuperscript{31} Various initiatives from NGOs also include socio-economic criteria.\textsuperscript{32} In contrast to this study, however, these initiatives do not derive their criteria from explicit provisions of international human rights law related to the right to food. A coalition of Dutch NGOs has postulated the introduction of food security criteria, including concern for land competition and local socio-economic development. In the same vein, the World Wild Life Fund (WWF) and the Brazilian NGO-network FBOMS have stressed the importance of paying attention to land-use conflicts and priority for food supply.\textsuperscript{33} All three proposals also focus on labour conditions and human health impacts as relevant socio-economic criteria.

As to the practicalities of bioenergy certification, there seems to be an emerging consensus that there should be an internationally accepted framework for certification,\textsuperscript{34} that a great diversity of competing systems would be a problem and that a common certification system should include a wide variety of stakeholders to ensure credibility.\textsuperscript{35} At the same time, a ‘one size fits all’ approach should be avoided, since countries need to have sufficient flexibility to adapt criteria to their particular food security needs. It also seems clear that developing countries will need assistance in the implementation of such mechanisms. Given the relevance of the FAO Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security and the status of these Guidelines as a consensus document adopted by 187 States, adjusted standards for food

\textsuperscript{28} RSPO, RSPO Principles and Criteria for Sustainable Palm Oil Production, 2005.
\textsuperscript{29} On this initiative \textit{J. van Dam / M. Junginger}, note 25, 19.
\textsuperscript{30} Ibid.
\textsuperscript{31} Ibid.
\textsuperscript{32} With a comprehensive overview over developed criteria \textit{U.R. Fritsche et al.}, Sustainability Standards for Bioenergy, 2006.
\textsuperscript{33} Ibid.
\textsuperscript{34} IEA Bioenergy Task 40 (www.bioenergtrade.org).
\textsuperscript{35} P. Forest, Developing a mechanism for palm oil tracebility from plantation to end user, annex 6, commended by RSPO, 2006.
security and bioenergy production could take the form of an annex to the Voluntary Guidelines. Such an annex could include common food security criteria for bioenergy production, a blueprint of a globally co-ordinated certification mechanism as well as a set of national, regional and global emergency measures to deal with rising food prices.

Conclusion

Customary international law, the International Covenant on Economic, Social and Cultural Rights and the FAO Voluntary Guidelines prescribe a number of concrete obligations and responsibilities relevant to the nexus between food security and bioenergy production. These range from measures to prevent and alleviate hunger and water deprivation to the prohibition of gender discrimination and forced evictions. First country studies suggest that the choice of the production model is decisive regarding the question whether bioenergy production contributes or threatens local and national food security. It is within the responsibility of the legislator to devise land use for bioenergy production in a way that increases national food security through the promotion of rural livelihoods.

Food security risks involved in the move to bioenergy production necessitate public regulation. Legislation, programmes and strategies in the field of bioenergy production should focus on hunger eradication and should provide for the participation of local communities in policy making. It may be necessary to adopt emergency measures to alleviate the effects of rising food prices. Moreover, food security assessment and monitoring are vital elements of any legislative or regulatory undertaking in the field of bioenergy. Socio-economic certification can be a crucial element of such strategies. Recent research on certification suggests that a proliferation of criteria and standards would be counterproductive. International institutions, such as the FAO thus have a crucial role to play in leading states to a co-ordinated approach regarding food security in bioenergy production and measures addressing the global food price crisis.

Part II: WTO Law Implications

The following analysis will assess cross-cutting legal principles of WTO law contained mainly in the General Agreement on Tariffs and Trade (GATT) 1994 which might be affected by socio-economic certification of imported bioenergy products. Secondly, it will also address the WTO compatibility of specific measures taken by food-importing countries.

36 The question of WTO-compatibility of certification schemes will be at the centre of part II on international trade law implications.

37 D. Kashyap / M. Glueck, note 17, 62.
countries to counter negative effects of food price increases on national food security in the context of increased bioenergy production (B).

A. Socio-economic certification of imported bioenergy

Certification schemes relating to socio-economic criteria of bioenergy production can take various forms. Such schemes may be established by global, regional or national institutions. They can be run by private or public actors. They can be mandatory or voluntary and they can entail various diverging consequences once a bioenergy product fails to fulfil certain criteria, ranging from a ban on the product to labelling purely for consumer information purposes. With regard to the environmental performance of bioenergy products, for instance, a number of schemes are under discussion regarding regional and national legislation, i.e. differential taxation and financial incentives for using certified biofuel, mandatory standards based on percentages or quantities of certified bioenergy in fuel blends or for specific purposes (public transportation) and limits on the amount of non-certified biofuel that can be contained in an authorized fuel blend.

The WTO legality of these measures depends on the entirety of any given, scheme and eventually will have to be decided on a case by case basis. A common feature of socio-economic certification based on the food security criteria discussed in Part I is that they relate to the way that bioenergy has been produced and not to the physical characteristics of bioenergy products. Regulation (certification) which refers to these so called “processes and production methods” (PPMs) in foreign countries is one of the most disputed issues in WTO law. Case law in this area is sparse and the issue of legality of PPMs is far from being settled as a matter of WTO law.

This debate has primarily concentrated on the WTO legality of environmental PPMs. A general analysis of the legal implications of socio-economic certification can demonstrate whether and to what extent WTO law leaves room for socio-economic certification of bioenergy products. For this purpose, the report differentiates between two different groups of certification measures: first, socio-economic certification measures which are of a voluntary nature and are not linked directly or indirectly to benefits or disadvantages granted or imposed by public legislation; and, second, measures of a voluntary or mandatory nature which directly or indirectly entail benefits or disadvantages granted or imposed by public legislation or regulation.

I. Socio-economic certification of bioenergy and the TBT Agreement

The TBT Agreement sets out rules for technical product standards and regulations. It differentiates between binding technical norms (regulations) on the one hand and non-binding norms (standards) on the other hand. The main thrust of the agreement is to promote standards and regulations that are based on international standards. According to Article 2.5 TBT, such measures are presumed not to create an unnecessary obstacle to
trade. The TBT Agreement covers certification measures based on product characteristics and processes and production methods reflected in the physical characteristics of the product. Regarding the issue of bioenergy production it is disputed whether the agreement also includes socio-economic certification based on (bioenergy-) production methods that have no effect on the physical characteristics of a product. The WTO political and dispute settlement organs, including the TBT Committee have so far not decided this issue.

Under the definitions provided in Annex 1 of the TBT agreement, a “technical regulation” is a “document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method” (emphasis added). A “standard” is a “document which lays down product characteristics or their related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method” (emphasis added).

The first sentence of the two definitions links the words “product characteristics” and “processes and production methods” with the terms “or their related”. This formulation indicates that process-related measures with no effect on the physical characteristics of the product are not included in the definition. However the connecting term “or their related” is missing in the second sentence. Some authors infer from this fact that the definition might also include measures relating to PPMs that have no relevance whatsoever for the characteristics of the product. This assumption is rebutted by most scholars with the argument that the insertion of “related” in the negotiations in the first sentence was meant to exclude non-product related PPMs from the scope of application of the TBT agreement. The first sentence of the definitions therefore sets out the widest possible definition of the scope of application of the agreement. Thus, PPMs unrelated to product characteristics are not included in the TBT Agreement definition of a “technical regulation” or a “standard”.

See G/TBT/W/11 of 29 August 1995.


A. Pastowski et al., note 39, 122; M. Hilf / S. Oeter, WTO-Recht. Rechtsordnung des Welthandels, 2005, 353; M. Wolkewitz, Das Verhältnis zwischen internationalem Freihandel und Umwelt-
The distinction between product-related PPMs and non-product-related PPMs is not always clear-cut. Responding to this, in July 1995 the TBT Committee formally adopted the decision that all mandatory labelling requirements have to be notified irrespective of the kind of information which is provided by the label. This Decision clarifies WTO Members’ obligations under the notification provisions of the TBT Agreement. It was not meant to change the above mentioned definition of “standards” and “regulations” in that Agreement. In the context of socio-economic certification the Decision makes clear that, for the sake of regulatory transparency, the TBT Committee requires all certification measures to be notified by the relevant state.

In summary, it can be concluded that the TBT Agreement is not applicable to socio-economic certification measures relating to processes and production methods of bioenergy which have no impact on the physical characteristics of the product. This is not altered by the fact that, for the sake of transparency, all certification measures must be notified to the TBT Committee.

II. Socio-economic certification and the GATT

1. Voluntary socio-economic certification which is not linked directly or indirectly to advantages or disadvantages granted or imposed by public authorities

Voluntary socio-economic certification without government involvement is clearly beyond the scope of GATT disciplines. However, the GATT legality of voluntary certification with government involvement must be addressed in more detail. In the GATT panel report Tuna I, a voluntary labelling scheme, based on the US Marine Mammal Act and the Dolphin Protection Consumer Information Act (DPCIA), was designed to inform consumers about those tuna products which were caught in a dolphin-friendly manner in a certain area of the Pacific Ocean. It applied to US products and foreign tuna products alike. Mexico argued that this measure was inconsistent with US obligations under Art. XI: 1 (general elimina-

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41 GATT Secretariat, Negotiating History of the Coverage of the Agreement on Technical Barriers to Trade with regard to Labelling Requirements, Voluntary Standards, and Processes and Production Processes Unrelated to Product Characteristics, WT/CTE/W/10; G/TBT/1/Rev.1, Aug. 10, 1995, also available on http://wto.org/ddf/ep/Z2/Z2511e.wpf>.
tion of quantitative restrictions) and Art. I:1 (general most-favoured-nation treatment). The panel rejected this argument, stating that the voluntary labelling scheme did not discriminate between products from specific countries but referred to all products, regardless of origin, that had been caught in a particular area of the Pacific Ocean. Furthermore the panel stressed that the labelling provisions prevented tuna-products without the “Dolphin-Safe” label being sold in the US, nor granted any advantage from the US government for products carrying the label. Advantages would only occur if consumers who, as a result of the label, were put in a position to discriminate between dolphin friendly tuna and non-dolphin friendly tuna, preferred tuna products carrying the label. In other words the panel concluded that voluntary labelling that is not linked to advantages or disadvantages granted by public authorities and which applies to all products on the market (irrespective of origin) is in conformity of the GATT.

Hence, voluntary socio-economic certification which is not linked to direct or indirect advantages or disadvantages granted or imposed by public authorities and which is applied to all products on the market irrespective of the exporting country is in conformity with the GATT.

2. **Voluntary or mandatory socio-economic certification of bioenergy, which is directly or indirectly linked to disadvantages or advantages granted by public authorities**

Socio-economic certification schemes for bioenergy can also be linked to public advantages or disadvantages. The most far-reaching measure from the perspective of the GATT would be a ban on non-certified bioenergy. Other regulatory options range from differential taxation of certified bioenergy to requirements to use particular percentages or quantities of certified bioenergy in fuel blends or for specific purposes (such as public transportation). In the following, certification measures which are directly or indirectly linked to disadvantages or advantages granted or imposed by public authorities will be assessed in the light of the relevant GATT provisions.

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42 Tuna I, para 5.42-5.43.
a. Article XI: I – General Elimination of Quantitative Restrictions

Article XI:1 GATT prohibits any quantitative measures restricting market access at the border. This provision is to be contrasted with Article III GATT, which applies to regulatory measures (fiscal and non-fiscal) which place imported products in a less favourable position compared to domestic products once they have entered the market. A strict ban or quota for imported bioenergy which fail to comply with criteria set out in a socio-economic certification-scheme would be in contravention of Article XI:1 regardless of its purpose. However, such a measure might still be justified under Article XX GATT (see on this general exception below).

It has also been argued that all measures that relate to PPMs automatically fall under the prohibition in Article XI:1 GATT. This argument is based on the assumption that Article III:4 GATT cannot be applied to bioenergy certification relating to PPMs. As will be demonstrated in the next sections of this report, this assumption is not supported by more recent decisions of the Appellate Body (US - Shrimp) and must be considered to be incorrect.

b. Article III National Treatment

“National Treatment” under GATT means that imported products will be accorded no less favourable treatment than domestic products. There are slightly different rules for taxation (Article III:2) and other forms of regulation (Article III:4). Most of the regulatory measures that can be attached to socio-economic certification in order to privilege certified bioenergy products would have to be considered in the context of this obligation. Any measure, whether fiscal or non-fiscal, which foresees less favourable treatment for imported bio-energy than for a “like” product grown or produced domestically might violate Article III GATT. The central question is whether a particular measure is more burdensome for foreign producers than domestic producers. Two preconditions must be fulfilled in order to come to the conclusion that “national treatment” has not been granted: first, the challenged treatment must be given to a product “like” other (domestic) products not disfavoured by the measure. Otherwise there would be no discriminatory treatment. And second, the treat-

44 G.G. Sander / A. Sasdi, note 3, 133 et sequ.; J. Wiers, note 40, 277. Note Ad Article III states that border measures enforcing a domestic measure are to be treated as domestic measures.
ment accorded to the imported product must be “less favourable” than the treatment accorded to domestic products.

- Socio-economic certification and the question of “like” bioenergy products

The Appellate Body in *EC-Asbestos* found that the question of likeness is to be answered by reference to the extent to which the following elements are being found in common in the two products: physical characteristics, end-use, consumer preference and to some extent tariff classification.\(^47\) The main problem regarding socio-economic certification of bioenergy products is that they do not relate to physical product characteristics but to production and process methods (PPMs). With regard to the likeness test often the only difference between the products will be one of consumer preference.\(^48\) However, as dynamic developments in the area of human rights-labelling demonstrate, socio-economic criteria are of increasing importance to consumers. It could therefore be argued that bioenergy produced in violation of the above mentioned socio-economic criteria are not ‘like’ products which have been produced in conformity with these criteria even though they have similar (or even identical) product characteristics.\(^49\) It should be borne in mind, however, that the more remote the distinguishing conditions in the scheme are from features that consumers can associate with a particular product, the more probable the products are “like”.\(^50\) In general, socio-economic criteria should refer to concrete methods involved in production process, such as minimum standards regarding the way that energy products are produced. A general reference to a lack of protective legislation in a foreign country, without any further evidence that socio-economic standards are in fact violated in the production process, seems too unspecific to distinguish bioenergy products as “unlike”.\(^51\)

Current initiatives to introduce a separate harmonised product classification for bioenergy products – if successful – could potentially have an influence on the legal assessment of socio-economic certification measures. It might become more difficult for importing states to argue that a product falling under this new classification category is “unlike” other products in the same category because the production process did not conform to socio-economic standards.


\(^49\) *R. Howse / D. Regan*, note 46, 249-289.

\(^50\) IPC-Discussion Paper, October 2006.

\(^51\) *S. Charnovitz*, note 40, 59-110, 107.
Socio-economic certification and the question of “less favourable” treatment

It has been recognized in recent WTO jurisprudence that not every negative effect on a “like” foreign product will amount to “less favourable treatment”. In *Dominican Republic - Cigarettes* the Appellate Body held that a detrimental effect on a given imported product does not necessarily amount to less favourable treatment if it is explained by factors or circumstances unrelated to the foreign origin of the product. Following this case, in *EC - Biotech* a panel took a flexible approach to “less favourable treatment”, entitling regulatory authorities to take into account factors such as risk assessments, even if these *de facto* constitute a burden for foreign exporters. The question whether socio-economic production conditions in the exporting country can be a legitimate factor to be considered by the regulator without constituting “less favourable” treatment has not been clarified in WTO dispute settlement. It seems clear, however, that the insistence on relevant socio-economic standards in the production process of foreign products will amount to discriminatory treatment if it is not applied equally to domestic and foreign producers. Some authors have argued that a decisive factor in this regard is the question whether the national regulator bases its criteria on international standards (i.e. international human rights law), so long as they are not origin specific. It has been argued that in these cases certification measures do not provide “less favourable treatment” in line with the reasoning of the Appellate Body in *Dominican Republic - Cigarettes*. In the food security context it would therefore be advisable to base criteria used in socio-economic certification on universally recognized standards.

Given that there is still considerable opinion against the emerging position that regulatory criteria referring to production processes (PPMs) can lead to the conclusion that products are “unlike” or not treated “less favourably” in the sense of Article III GATT the following conclusions can be drawn: Voluntary or mandatory socio-economic certification measures which are directly or indirectly linked to disadvantages or advantages granted by public authorities do not necessarily violate Article III GATT. Such certification measures can, however, amount to discrimination against foreign products in the sense of Article III GATT, in particular if they are used as disguised protectionist measures or in an origin oriented manner. Even if a specific measure is in contravention of Article III GATT it may still be justifiable as an exception under Article XX GATT (see on Article XX below).

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54 L. Bartels, note 47, p. 15.
c. Article I:1 General Most Favoured Nation Treatment

The central non-discrimination principle of the GATT is the most favoured nation obligation, according to which all foreign products must be treated equally. This obligation covers both border and internal measures. Foreign products may not be accorded “less favourable” treatment than “like” products from other foreign countries. Thus, in the context of certification measures referring to production methods in foreign countries (PPMs) similar questions arise (see under b.). In order not to violate Article I:1 GATT, socio-economic certification measures need to apply the same standards to all exporting countries. Even if a specific measure is in contravention of Article III GATT it may still be justifiable as an exception under Article XX GATT (see on Article XX GATT below).

d. Article XX General Exceptions

Even if socio-economic certification measures violate Article XI:1 (general elimination of quantitative restrictions), Article III:4 (national treatment on internal taxation and regulation) and Article I:1 (most-favoured-nation treatment) they may nevertheless be justified under the general exceptions set out in Article XX GATT. This provision saves regulatory measures from illegality provided that they fall under one of the enumerated exceptions in Article XX (a-j) GATT and that they pass a further non-discrimination test contained in the chapeau of Article XX GATT.

- Article XX b) Protection of Human Life and Health

Socio-economic certification of bioenergy relating to processes and production methods could fall under the exception in Article XX (b). There is a clear relationship between the exception clause and the relevant international social standards referred to in Part I of this study. As the UN Secretary-General stressed in his report on globalization and its impact on the full enjoyment of all human rights:

“The exceptions referred to [in Article XX] call to mind the protection of the right to life, the right to a clean development, the right to food and health, the right to self determination over the use of natural resources, the right to development and freedom from slavery to mention a few”

It seems clear that the exception for measures “necessary to protect human …life and health” in Article XX(b) can be used to safeguard human rights within the territory of the state that adopts the relevant measure. What is less clear is the question to what extent this exception allows for measures linked to an assessment of foreign processes and pro-

duction methods based on standards prescribed by international bodies or even by the importing state itself. In these cases the question of extraterritorial effects of internal regulatory measures becomes an issue. The first Appellate Body decision that ruled on the legality of measures relating to processes and production methods in foreign countries taken under Article XX GATT was US-Shrimp, which involved an import ban on shrimp from countries that did not have a turtle-conservation regime comparable to that of the United States. In the decision the Appellate Body clarified that measures requiring exporting countries to comply with certain standards in the production process cannot be excluded a priori from justification under Article XX GATT. The Appellate Body hereby further inspired the debate about whether the exceptions in Article XX included only inward oriented regulatory measures or also outward-oriented ones. In the words of the Appellate Body:

"It is not necessary to assume that requiring from exporting countries compliance with, or adoption of, certain policies (although covered in principle by one or another of the exceptions) prescribed by the importing country unilaterally prescribed by importing country, renders a measure a priori incapable of justification under Art. XX. Such an interpretation renders most, if not all, of the specific exceptions of Art. XX inutile, a result abhorrent to the principles of interpretation we are bound to apply".

The Appellate Body did not pass upon the question of whether there is an implied jurisdictional limitation on the exceptions set out under Article XX. Instead it held that for the purposes of Article XX (g) there was a “sufficient nexus” (here territorially) between the protected entities (migrating turtles) and the state (US) taking the measures. In the case of socio-economic certification measures falling under Article XX (b) the question arises whether a similar requirement would apply. In the absence of WTO case law on socio-economic certification measures it remains to be seen whether a connection between the protected entity and the state taking the measure will be required by WTO adjudicators. The insistence on some connection between the protected entity and the importing state, however, resonates with the rules of international customary law on extraterritorial jurisdiction.

59 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 133.
taken for instance by the European Union and bioenergy products from a non-European exporting country? A legal nexus could be obligations or responsibilities emanating from treaties or standards both countries have signed up to. In the food security context, Article 11 of the International Covenant on Economic, Social and Cultural Rights and the Voluntary Guidelines on the Right to Adequate Food come to mind. One could argue that the exporting state, which has signed up to a specific human rights standard, is estopped from opposing regulatory standards in the importing state attempting to enhance compliance with such a joint standard.

In addition, any measure taken under Article XX (b) must be necessary in order to achieve one of the enumerated objectives. In EC - Asbestos, the Appellate Body confirmed that a measure is "necessary" within the meaning of GATT Article XX(b) if less trade restrictive measures, which a Member could reasonably be expected to employ to achieve the regulatory objective, are not available to it. Furthermore, the greater the contribution of the measure to the end pursued, the more likely it will be considered "necessary" by the Appellate Body (Brazil – Tyres).

- The Chapeau of Article XX
The Chapeau of Article XX requires that a measure may not be applied in a manner that constitutes a means of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade". The focus is on the concrete application of the measure. In Brazil-Tyres the Appellate Body underlined that the Chapeau is an expression of the principle of good faith. It serves to avoid an abusive exercise of the exceptions set out in Article XX. The task of interpreting the chapeau for the Appellate Body is essentially one of marking out a line of equilibrium between the right of a member to invoke an exception under Article XX and the rights of other members under varying substantive GATT provisions.

- Unjustifiable discrimination
Socio-economic certification measures would have to be applied in a manner that does not constitute "unjustifiable discrimination between countries where the same conditions pre-

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61 Ibid.
62 Ibid.
64 Brazil – Measures Affecting Imports of Retreaded Tyres, note 63, paras. 213-216; see also United States – Import Prohibitions of Certain Shrimp Products, note 58, para 158.
65 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 159.
vail". In Brazil-Tyres the Appellate Body held that “analyzing whether discrimination is arbitrary or unjustifiable usually involves an analysis that relates primarily to the cause or the rationale of the discrimination”. The rationale of the measure must relate to pursuit of one of the objectives set out in the paragraphs of Article XX. In this case the Appellate Body concluded that the Brazilian measure was unjustifiable because “it was based on a rationale that bears no relationship to the objective of the measure”.

In US-Shrimp the disputed US measure was considered “unjustifiable discrimination” because in its practical application it required all exporting states to adopt essentially the same policy as that enforced within the US. What amounted to “unjustifiable discrimination” in this case was not the extraterritoriality of the measure but the fact that it established a rigid and unbending standard by which US officials decided whether or not countries could be certified, without taking into account different conditions prevailing in the territories of those other member states. In the context of socio-economic certification this would mean that any socio-economic standard developed for the production of bioenergy would have to leave enough room for flexibility in its application in order to take into consideration different conditions in exporting countries. In the words of the Appellate Body:

“We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries”.

Another factor that led the Appellate Body in US-Shrimp to the conclusion that the US measure constituted “unjustifiable discrimination” in the sense of the Chapeau was the fact that the US had applied the measure without previous efforts to negotiate with the respective countries bilaterally or multilaterally on enhanced protection measures for the endangered turtles. The Appellate Body found that existing multilateral agreements regulating the political and legal framework of the protection measures could be seen as an expression of the equilibrium of interests which the Chapeau of Article XX was supposed to maintain. This again demonstrates that an important factor for the WTO legality of socio-economic certification measures is the question whether countries imposing the measure do

69 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 164.
70 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 165.
71 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 167 et seq.
72 United States – Import Prohibitions of Certain Shrimp Products, note 58, para 170.
so in a co-operative spirit based on shared standards, in the development of which exporting countries had a say. Regarding the reasoning of the Appellate Body in Brazil – Tyres and US-Shrimp it can be concluded that socio-economic certification of bioenergy products based on specific global standards is not only unlikely to conflict with the substantive provisions of the GATT but could also eventually been saved from illegality by Article XX GATT.

• Arbitrary Discrimination and Disguised Restrictions of International Trade
There is little jurisprudence on these criteria of the Chapeau of Article XX. In general, the Appellate Body also seems to subsume the principles of due process and procedural fairness under the “arbitrary discrimination” criterion. Hence, a socio-economic certification measure would have to bear a direct relationship to the objective of enhanced food-security and would have to be applied equally (irrespective of the origin of the product) and in a fair and transparent manner. Whenever such measures are (also) applied to pursue a (disguised) protectionist agenda, they are unlikely to pass as a justifiable exception under the chapeau of Article XX GATT. Reliance on objective and globally shared socio-economic criteria in the application of such measures would help to demonstrate that specific certification measures do not aim at protecting domestic producers but are taken to implement globally shared social standards.

In summary, it can be concluded that voluntary or mandatory socio-economic certification measures which are directly or indirectly linked to disadvantages or advantages granted by public authorities do not necessarily violate WTO law. The reliance on universally agreed socio-economic standards for bioenergy production reduces the risk of violating substantive provisions of the GATT. Even if such measures are found in contravention of the relevant substantive GATT provisions by WTO adjudicators, they may still be justifiable as an exception under Article XX GATT.

Conclusion
On the specific question of socio-economic certification no panel or Appellate Body reports and no explicit provisions exist under WTO law. Concrete measures will have to be assessed on a case by case basis taking into account all relevant factors and circumstances of the applied measure. Despite the resulting insecurity as to the question of how WTO bodies would actually deal with this issue in case of a concrete dispute, the analysis of the relevant provisions leads to the following conclusions with regard to the legal context, in which socio-economic certification takes place:

Voluntary socio-economic certification which is not linked to direct or indirect advantages or disadvantages granted or imposed by public authorities is in conformity with WTO law. Moreover, the TBT Agreement is not applicable to socio-economic certification measures relating to production-processes which have no impact on the physical character-
istics of the product. Even voluntary or mandatory socio-economic certification measures which are directly or indirectly linked to disadvantages or advantages granted or imposed by public authorities do not necessarily violate WTO law. Whenever a specific measure is in contravention of the relevant GATT provisions it may still be justifiable as an exception under Article XX GATT.

In more concrete terms, socio-economic certification schemes which are linked to import bans, tax cuts or other specific benefits or disadvantages granted or imposed by public authorities can collide with various norms of the GATT, such as Article XI:1 (general elimination of quantitative restrictions), Article I:1 (general most-favoured-nation treatment) and Article III:4 (national treatment on internal taxation and regulation). Violations of these provisions can not be deduced from the mere fact that such certification measures will relate to processes and production methods (PPMs). The reference to process-related factors in a certification-scheme alone does not amount to a prima facie violation of the GATT (US-Shrimp). Socio-economic certification measures can, however, amount to a discrimination against foreign products in the sense of the relevant provisions, in particular when they are used in an origin-specific manner. Rather than referring to general governmental policies in exporting countries, socio-economic certification should be based on how-produced standards aimed directly at odious production practices. Even if a certification measure violates one of the GATT non-discrimination rules it may still be justifiable under Article XX GATT (general exceptions). In order to be justified, the measure needs to fulfil a number of conditions emanating from Article XX itself (US-Shrimp).

An international co-operative effort regarding a joint certification standard based on universally accepted human rights standards as well as globally co-ordinated implementation activities would help to prevent the occurrence of trade related disputes over these measures. Measures taken on the basis of such universally agreed socio-economic standards for the production processes of bioenergy are unlikely to conflict with substantive provisions of the GATT and – in case of a conflict – are more likely to be saved from illegality as an authorized exception under Article XX GATT.


Opportunities and Challenges of a Soft Law track to Economic and Social Rights – The Case of the Voluntary Guidelines on the Right to Food

By Marie von Engelhardt, Geneva*

A. Introduction

Where a legal regime suffers from the stigma of ineffectiveness, the occurrence of soft law instruments can be an opportunity and a challenge to existing norms. Such is the case with economic and social rights: established legal norms, they have been widely disregarded due to their ambiguous wording, alleged impracticability, and institutional weaknesses. A great variety of soft law instruments have emerged to interact with socio-economic rights set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other binding sources. On the one hand, they are frequently sought to elaborate, operationalize, or otherwise complement existing norms to address limitations of the regime. On the other hand, soft law sometimes appears as an alternative rather than a supplement to standards in place, resulting in their gradual softening or replacement. In either role – complementing or challenging hard law – the impact of soft law instruments on existing legal standards can only be understood where they are not perceived as mere policy tools, but as capable of producing legal effects.

The Voluntary Guidelines on the Right to Food, a set of non-binding policy recommendations adopted at the Food and Agriculture Organisation (FAO) in 2004 to assist states in the implementation of the right to food, constitute a novel and prima facie promising approach in this perspective. The first document negotiated by states to interpret and operationalize an economic and social right, they are politically significant and address familiar weaknesses of the regime. Yet only if the Guidelines are understood as a soft law instrument that can considerably impact on the content and scope of established hard law, the legal challenges implicit where states in a sense renegotiate the substance and policy implications of already assumed obligations are fully grasped.

Examining the effects of soft law instruments on established but widely neglected economic and social rights is of both theoretical and practical relevance. From a theoretical perspective, analysing the impact of soft law on pre-existing hard law may add to the understanding of the complex interaction of binding and non-binding norms, which has

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received less attention in legal scholarship than the role of soft law as a pioneer to hard law. From a practical perspective, the persisting neglect of economic and social rights makes the search for alternative routes to advancing implementation a compelling task, and the approach taken by the Voluntary Guidelines constitutes a possible model for other socio-economic rights.

The first part of this article establishes the theoretical framework for subsequent deliberations, setting out the functions of soft law and its interactions with hard law. Since soft law instruments are capable of triggering compliance and producing legal effects, they can promote either spread or retrenchment of legalization. Two factors are identified as influential in determining the scope of such impact: the legitimacy or authority of a soft law instrument, and its relation to hard law in place.

In the second part, attention will turn to the realm of economic and social rights, where soft law instruments assume a particularly significant role in conjunction with otherwise ineffective legal norms. Drawing on the example of the right to food, it will be shown how soft law is instrumental in the clarification of conceptual understandings and the gradual strengthening of state support.

Finally, the Voluntary Guidelines on the Right to Food constitute a pertinent case study to highlight the opportunities and challenges of a soft law approach for economic and social rights. Assumptions and expectations as to their normative effects differ widely, but clarity over their potential impacts on the legal right to food is crucial to avoid the impression that such a novel approach could make voluntary what is already obligatory.

B. Soft Law and the Legal Challenges of Non-binding Norms

The proliferation of informal regulatory instruments can no longer be captured by recourse to the traditional sources of international law.¹ With view to the mounting complexity of the international legal order, the term “soft law” lends itself to circumscribe a seemingly “infinite variety” of forms of agreements emerging to regulate state and non-state behaviour.² The following part sets out preliminary theoretical considerations on the meaning and functions of soft law, focussing on its impact on pre-existing hard law standards.


² See Baxter, note 1, p. 566. For the argument here made, it suffices to concentrate on “public codes of conduct”, i.e. soft law standards elaborated by states, states parties to a treaty, or international
I. Definition and Function of Soft Law

Soft law norms set out behavioural standards that are non-binding according to traditional modes of law-making. Nonetheless, they are capable of influencing state behaviour, i.e. “they attract compliance” and have certain legal effects.\(^3\) They may be more or less specific in wording, specialist or programmatic, involving various degrees of coercion or monitoring of compliance. Such variations can be captured where soft law is understood, according to Abbott and Snidal, as a form of legalized institution that falls short on one of the three defining dimensions of legalization: obligation, precision, and delegation.\(^4\) States make recourse to soft law where they seek to address an ever-growing number of transnational problems whose complexity, changing nature, and multiplicity of (non-state) actors involved appear to require more flexible and de-normalized standard-setting.\(^5\) In contrast to hard law norms, the negotiation process may be faster and less politicized for soft law instruments, which come with the advantage of relative flexibility to adapt to new developments. Non-binding norms are also politically attractive for governments who expect non-compliance and seek to avoid the cost of sanctions.\(^6\) More generally, soft law is frequently chosen where states are still unwilling to enter into legally binding commitments, but nonetheless seek a means to express shared values or to create expectations of compliance. Where international legal norms exist to impose obligations on states, however, the function of subsequently adopted soft law changes. It can be utilized to fill gaps or resolve ambiguities in the text of hard law instruments that “proved to be ineffective”, or act as a “fallback provision” for those not (yet) legally bound.\(^7\)

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\(^6\) Guzman, note 5, p. 596.

The line between hard and soft law is often blurred, causing authors like Shelton to advise that soft and hard forms of legalization be considered as complementary rather than exclusive, as continuum rather than dichotomy. But the coexistence and convergence of hard and soft norms poses a challenge to the international legal system. Some authors caution the introduction of “soft law” as an intermediate category between law and non-law because they are concerned that it might blur a clear concept of normativity in international law. Certainly, the proliferation of soft norms that are not subject to international treaty law, and the according lack of rules on collision, interpretation and application, bears a challenge for the discipline. Beyond questions of classification, however, there is a general unease that the acceptance of a culture of soft “promotionalism” or “voluntarism” as the bottom line will distract efforts to achieve or strengthen hard law standards. Soft norms can lack legitimacy consequential to a deformalized process of standard-setting, and their capacity to produce legal security and predictability is limited. The often weak surveillance and enforcement mechanisms attached to it cause the apprehension that “soft law may promote compromise, or even compromised standards.”

In any case, soft legalization cannot be denied any capability of affecting “the incentives and behaviour of states” and triggering compliance. Whereas empirical work on why states comply with non-binding norms is scarce, scholars put forward factors that influence compliance, i.e. the adherence by states to a norm in their behaviour. The perceived legitimacy of the norm-generating process and outcome are central, just as the link of a soft norm to existing treaty obligations may add to its authority. Precision and clarity of soft norms, as opposed to ambiguity and open-endedness in wording, possibly increase

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8 Dinah Shelton: Introduction, in: Shelton, note 1, p. 8, Kirton/Trebilcock, note 3, p. 12: “hard law and soft law may be more complementary than competitive, might also blend and overlap in a single regime, or combine separately to reinforce each other and fill gaps”.
13 Guzman, note 5, p. 610.
compliance. Monitoring and enforcement mechanisms, and the linkage to a machinery of follow-up procedures and capacity-building programmes in the context of established international institutions, provide further incentives to act in accordance with soft law. In sum, even where the distinction between soft law and traditional sources of international law is upheld, theoretical studies on compliance with nonbinding norms substantiate the view that soft standards can have considerable effects on state behaviour. These effects, together with the interaction of soft law norms with binding norms, may catalyse normative development and impact on pre-existing hard law standards that cover essentially the same subject matter as the subsequently agreed soft law.

II. The Impact of Soft Law on Pre-existing Hard Law

Soft standards are increasingly used in international treaty regimes, where they interact with and impact on treaty standards in various ways. As the wording of treaties and the meaning of particular provisions are often indeterminate, soft law takes on an important function in the clarification and interpretation of hard law. Soft law instruments can explicitly provide definitions and concepts as interpretative aid, or offer a framework for the legal discourse on the application of norms. For example, resolutions adopted by the United Nations (UN) General Assembly have further elaborated the content of the UN Charter and provided an authoritative interpretation of certain articles. Commitments expressed in soft law instruments may qualify subsequent state practice under a treaty and draw attention to its potential interpretative effect. Treaty obligations that are thus concretised can become more practicable and likely to attract compliance. However, a positive effect on compliance is to be expected mostly where the interpretative process and outcome are regarded as legitimate.

Where soft law is used to “provide detailed rules and standards required for implementation” of binding norms, the boundaries blur between mere interpretation and progressive normative development. For instance, in international environmental law, soft

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16 See Friedrich, note 2, at 31 and 32.
17 Ulrich Fastenrath, Relative normativity in international law, Eur. J. Int’l L. 4 (1993), p. 314: “[t]he importance of such informal instruments in the development of law intra legem has frequently been confirmed by judicial decisions and doctrine.”
law instruments setting behavioural standards to be achieved by the parties in satisfying their obligations often complement framework conventions which are binding but open-ended in wording. Soft and hard standards blend into a normative regime wherein soft standards serve various functions, from offering guidance on interpretation, operationalizing abstract provisions and gap-filling, to preparing the ground for future legal developments. Soft law can allow for the concretization and advancement of treaty norms, e.g. where they could not be devised to encompass for all prospective circumstances.

Further, in the context of treaty law regimes or certain institutional settings, soft standards can become obligatory as a consequence of their interaction with hard law. Commitments that are adopted in form of resolutions or recommendations of international organisations may create certain legal obligations for member states, such as obligations of good faith and due diligence, or according to follow-up procedures foreseen in the statute. Moreover, subsequently agreed soft law can have an effect on the accession to and status of existing treaties. As Kahler observed, legalization may “spread and harden or recede and soften over time” for various reasons, one being the availability of institutional substitutes. Where soft law presents itself as an alternative rather than a complement to treaty standards, states not yet parties to a treaty may prefer to stay absent from the binding regime. In turn, where voluntary compliance with soft law has reduced uncertainty over the estimated costs and advantages of choosing harder forms of legalization, non-parties may eventually decide to enter a treaty regime.

With regard to the domestic level, soft law may also facilitate the implementation of a hard law instrument. Treaty provisions that are vague and general are difficult to translate into domestic legislation. A soft law instrument providing behavioural guidelines suitable for practical implementation can thereby effectuate the incorporation of hard law into municipal law, in particular where it is equipped with an institutional machinery offering technical assistance for such purposes. However, it is a matter of state discretion whether

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20 See Friedrich, note 2, at 20 and 22. Gruchalla-Wesierski, note 18, p. 52. Beyond such institutional settings, it is a matter of controversy to what extent the legal principle of good faith may be applied in relation to non-legal norms, and whether soft law may constitute the basis of estoppel (p. 62).


22 Such concern has been voiced by Philip Alston as regards the adoption of the Fundamental Principles and Rights at Work (ILO, 86th Session, Geneva 1998). Alston, note 11, p. 467.

23 Widespread incorporation into municipal law, and the concurrent harmonization of domestic legislations on a particular subject matter, could again generate or concretize a rule of customary
and how to implement soft law, and the positive impact on pre-existing hard law is hence not guaranteed. Finally, where an international treaty is already incorporated into domestic legislation, judges may turn to a subsequently adopted soft law instruments as interpretative guide, or expression of international trends in normative development.

Beyond treaty regimes, soft law plays a significant role in the detection, clarification, and development of rules of customary international law. In the absence of authentic wording, state practice and *opinio juris* as constitutive elements of customary law must be determined by reference to various sources, including soft law. The commitments expressed in non-binding agreements can provide evidence of *opinio juris*, pointing to the existence or emergence of a customary rule. Soft law is suitable for such purposes in that it is capable of reflecting widespread consensus in a more immediate manner than treaties may. However, the role it can play in this regard depends on its perceived legitimacy and authority, and its non-binding nature can also be expressly invoked by states to preclude the induction of *opinio juris*. Where acts of states are in conformity with commitments expressed in a soft law instrument, they can more easily be qualified as state practice indicative of customary law, because the expectations of compliance created by soft law precludes the view that they may be fortuitous. Finally, the adoption of a soft law instrument contrary to an existing customary norm, though not capable of abrogating its legal status, could be seen as indicative of a change in *opinio juris* and gradually lead to doubts as to the status and content of that norm in its current form.

Beyond the specific impacts of soft law on established treaty or customary norms, most authors acknowledge its contribution to the future development of legal discourse in a respective field. Where states adopt a non-binding international agreement, mutual expectations, the future course of negotiations, and the process of interaction in what becomes a composite regime of hard and soft standards will not be the same as before. The need to

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24 "[T]he use of soft law in national law is purely subjective", and has accordingly been termed by Gruchalla-Wesierski a political, rather than a legal effect of soft law; note 18, p. 66.

25 For example, the South African constitutional court is held by means of constitutional provision 39 (1) b) to “consider international law” when interpreting the Bill of Rights.

26 Art. 38 (1) ICJ statute: “international custom, as evidence of a general practice accepted as law”.

27 See Boyle, note 19, p. 903.


29 Baxter, note 3, p. 565.
analyse these developments is reinforced where it is understood that they might indicate the “likely direction in which formally legal obligations will develop.”

III. Summary – The Opportunities and Challenges of Soft Law

Acknowledging the potential legal effects of soft law – its capability to attract compliance, and the various ways in which it interacts with hard law – should be a prerequisite for judging its impact on established legal norms. A preclusion of “any effect on the specific obligations already undertaken” is thereby exposed as premature, while it remains advisable to neither consider soft law solely in its role as a precursor to hard law, nor to portray it as “necessarily softening hard law.”

Where they complement established binding norms, soft law instruments promise to provide a flexible, informal, and often less politicized tool to clarify, concretize, and operationalize hard law, ultimately rendering it more effective. Meanwhile, the challenge remains that the adoption of soft norms could constitute a step backwards rather than a positive contribution to the further development of commitments already undertaken. Rhetoric depicting soft law as a more adaptable, effective means of responding to problems of transnational concern, particularly in the complex socio-economic realm, could lead to a prioritization of soft legalization that does not pay tribute to the many advantages of hard legal norms.

As one author put it: “The focus away from direct legal enforcement softens what is arguably most distinctive about rights discourse: the character of rights claims as ‘trumping’ claims.”

Finally, the preceding observations suggest at least two factors that appear influential in determining significance and scope of soft law’s impact on pre-existing hard law:

1. Legitimacy and Authority. Where the elaboration and adoption of a soft law agreement is considered legitimate by its addressees, levels of compliance increase and the agreement gains in political weight and capacity to produce legal effects. The perception as legitimate...
is particularly important for soft law, which does not presuppose a formal, consent-based and participatory standard-setting process, and usually lacks monitoring and enforcement mechanisms. Legitimacy, i.e. the “justification of authority”, could be induced, for instance, where soft law is elaborated in a participatory intergovernmental forum, or a properly authorised (and hence authoritative) body, to address concerns of legality and participation.\textsuperscript{34} Legitimacy is not only process-based, but also important in relation to the content, objectives, and perceived quality of a regulatory instrument.

2. \textit{Reference and congruence}. The relation of a subsequent soft law instrument to formally binding norms in place can be determined with view to first, the degree of reference it makes to established hard law, and second, the extent of congruence between soft and hard law instrument. Congruence can exist between the regulatory objectives in general, and the behavioural standards set out in specific rules respectively. Where the link is very close, soft law might constitute an authoritative interpretation, indicate subsequent state practice interpreting a treaty, or explicitly provide standards required for implementation. Further down the scale, it may still be more or less influential as an interpretative tool, or in the detection and development of customary law. Determining the relation of a soft law instrument to hard law along these lines can serve as a basis for understanding its role in relation to hard law: complementary, or rather substitutive.

C. Soft law in the Realm of Economic and Social Rights

The regime of economic and social rights suffers from a number of weaknesses in textual and institutional design that have contributed to its perception as ineffective. While socio-economic rights are no longer contested and neglected as two decades ago, even continuous lip service paid to the indivisibility, interdependence and interrelation of all human rights since the 1993 World Conference in Vienna cannot disguise the fact that they still suffer from widespread disregard and insufficient implementation.\textsuperscript{35} On the basis of the theoretical framework established before, the following part analyses the impact of different kinds of soft law instruments in the realm of economic and social rights, and their contribution to overcoming the alleged weaknesses of the regime.


I. Weaknesses of Economic and Social Rights

The debate about the nature and status of socio-economic rights, as opposed to civil and political rights, has accompanied the development of human rights law from the start, and it shall not be reproduced here. It suffices to give account of a number of commonly alleged weaknesses of socio-economic rights that are impedimental to their implementation, and that induce the perception of the regime as ineffective.

First, critics and proponents of economic and social rights alike have considered the lack of clarity and precision in wording with respect to the nature and extent of obligations as prejudicial to their realization. Where ambiguity persists as to what constitutes a violation, how responsibility can be attributed, and what is the remedy, effective implementation of rights becomes difficult. In other words, clear provisions have been acknowledged as a major requirement for effective international legislation, inter alia in that they are a precondition for the measurement of compliance. Specifying the nature of obligations becomes thus a principal policy challenge to achieving economic and social rights.

Socio-economic rights also suffer from the stigma of impracticability, which is partly related to their aforementioned ambiguity in wording, as well as to the connotation of “positive” or “affirmative” rights. While a certain level of abstraction is inherent in the codification of (human) rights, socio-economic rights are considered process-based and frequently associated with complex policy adjustments and budget allocations, explaining the more urgent demand for practicable models for their realization. At the same time, the sensitive link to redistributional policies, considered to belong to the domain of national democratic decision-making, makes the provision of common benchmarks of achievement to overcome misconceptions on socio-economic rights a complicate task.

Further, the institutional mechanisms for monitoring and enforcement under the ICESCR are considered weak, consisting principally of a system of state reporting, and no

39 See, for example, Philip Alston, Making economic and social rights count: A strategy for the future, The Political Quarterly 68 (2) (1997), p. 192-193 or Hertel/ Minkler, note 38, p. 53,
complaints mechanism. The Committee on Economic and Social Rights (CESCR), charged with monitoring the implementation of the Covenant, faces considerable challenges in fulfilling its mandate, partly built into its structure, partly linked to the general lack of support for socio-economic rights. The absence of an individual complaints mechanism contributes to the perception that they are not justiciable, the means for providing technical assistance to support their progressive implementation are inadequate, and the contribution of UN specialised agencies as foreseen in the Covenant, e.g. to provide technical expertise and possibly more practical, policy-oriented advice on implementation, falls short of its potential.

Taken together, the textual and institutional weaknesses of socio-economic rights have contributed to the fact that the culture of respect for economic and social rights is still embryonic. While recent developments, attributable inter alia to the end of the Cold War and the significant work done by the CESCR, give rise to cautious optimism, the commitment to the indivisibility of human rights “masks a deep and enduring disagreement over the proper status of economic, social and cultural rights.”

II. Soft law Instruments Elaborating Economic and Social Rights

To address the aforementioned limitations of economic and social rights – ambiguity, impracticality, institutional weaknesses and insufficient support – a variety of soft law instruments have been adopted both outside and within the context of treaty regimes, by state conferences, international organisations, or authorised bodies. With view to their

42 See, in particular, Art. 18 and 22 ICESCR. Thereon, Mary Dowell-Jones, Contextualising the ICESCR: Assessing the economic deficit, Leiden/Boston 2004, p.167-169, acknowledging that “the expertise of specialized agencies could play an important role in the conceptual development of the covenant”, but the “technicality and specialization of their work does not sit easily with the Committee’s more general methodology”. With view to the right to education, Katarina Tomaševski, notes the “absence of a link between normative and operational work”, with the right not yet “mainstreamed throughout the work of the UN.” Katarina Tomaševski, Has the right to education a future within the United Nations? A Behind-the-Scenes Account by the Special Rapporteur on the Right to Education 1998-2004. Hum. Rts. L. R. 5(2) (2005), p. 207.
diversity and number, Shelton suggests a distinction between primary soft law such as summit declarations, and secondary soft law like General Comments and concluding observations issued by the CESCR. Hence, it is advisable to proceed by considering the impact on existing obligations of a sample of primary and secondary soft law instruments, taking examples from soft law relevant to the right to food.

The right to adequate food is set out in various legal documents, with the central provision contained in Article 11 (1) ICESCR as part of the right to an adequate standard of living, and in Article 11 (2), recognizing the “fundamental right” to be free from hunger. In 1984, Philip Alston noted “few human rights have been endorsed with such frequency, unanimity or urgency as the right to food, yet probably no other human right has been as comprehensively and systematically violated on such a wide scale in recent decades.”

While the statement still applies in fact, primary and secondary soft law documents have since interacted and fuelled a process of normative development that was particularly dynamic in the case of the right to food, but is otherwise typical for a number of other ICESCR rights.

With view to primary soft law, the first milestone in the advancement of the right to food was the World Food Summit (WFS) in 1996, concluding with the adoption of the Rome Declaration that “reaffirmed the right of everyone to have access to safe and nutritious food.” World Summits frequently serve the objective of reiterating existing or pronouncing new standards, and concluding declarations or plans of action serve as an indica-

44 Shelton in: Shelton, note 1, p. 450. Primary soft law are non-binding instruments addressed to all states or states parties to an adopting organisation, proclaiming new norms or elaborate existing norms often considered as too vague and general. Secondary soft law includes documents emanated from institutions established on the basis of a treaty, clarifying or applying norms contained therein.

45 It has been argued that the “fundamental right” constitutes customary international law. Other relevant provisions include Art. 25 Universal Declaration on Human Rights (1948); Convention on Prevention and Punishment of the Crime of Genocide (1948), Art. 2; Convention relating to the Status of Refugees (1951), Art. 20 and 23; Convention on Elimination of All Forms of Discrimination Against Women (1979), Art. 12; Convention on the Right of Child (1989), Art. 24 and 27.


48 Rome Declaration on World Food Security and World Food Summit Plan of Action, Rome 1996.
tor of normative trends, particularly in that they express widespread state consensus. Increased publicity and a solemn context of adoption contribute to their elevated status, often referred to when seeking to establish the customary law status of a norm. The reiteration of the right on parts of states in the Rome Declaration paved the way for the incorporation of a rights-perspective into food security policies, an objective that human rights practitioners and nutritionists had been working to achieve since the early 1980s. The Declaration also stands out for advancing the conceptual development of the right by calling upon the relevant human rights treaty bodies and the OHCHR to “better define the right to food” and consider “formulating voluntary guidelines.” Such explicit references to existing obligations and advocacy for a normative approach in what is generally a policy-oriented setting are unusual. For instance, the Millennium Declaration adopted in 2000 deliberately avoids the use of rights-language in its commitment to achieving freedom from hunger.

The WFS initiated significant legal developments in the realm of secondary soft law. In 1999, the CESCRR adopted General Comment No. 12 that spells out the normative content of the right to food for state parties. General Comments are drafted by experts within the CESCRR and intend to provide guidance to states in preparing their periodic reports to the Committee. Clarifying the meaning of treaty provisions and thus facilitating the direct application of Covenant provisions by courts, they address the problems of textual ambiguity and impracticality of obligations. Yet their potential depends on factors such as perceived quality, reaction of states, and subsequent developments based on the Comments. The tendency of the CESCRR since the early 1990s to progressively develop rather than restate the law raised the question whether it engages in standard-setting that is no longer in conformity with the drafters’ intentions, and is perceived by state parties as a mere “aca-

49 The context within which a soft law document is negotiated, accompanying statements by states, and the degree of support reflected in voting outcomes, should be considered to assess the opinio juris of states. Alan Boyle/ Christine Chinkin, The making of international law, Oxford 2007, p. 226.
50 Rome Declaration, objective 7.4. The follow-up World Food Summit: five years later (WFS fyl) in 2002 went even further, commissioning an intergovernmental working group to elaborate the Voluntary Guidelines.
53 For example, Scheinin, note 36, p. 55. And Chinkin in: Shelton, note 1, p. 33: “the Committee has amplified the minimalist terms of the Convention through its thoughtful and detailed General Comments”, and the “impact of these measures has been to raise the level of obligation under the Covenant far beyond that originally envisaged.”
demic exercise” that can be ignored. The “inherently high degree of authority” derived from the fact that the Comments are drafted by a body of experts established under the treaty and independent of “individualistic interests” of states parties is thus diminished.

Another source of secondary soft law and important contribution to the elaboration of socio-economic rights is the work of Special Rapporteurs. In 2001, the Commission on Human Rights appointed a Special Rapporteur on the Right to Food, Jean Ziegler, who was mandated to seek, receive and respond to information on all aspects of the right, establish cooperation with governments and international organisations, and identify emerging issues. The work of Special Rapporteurs often skilfully combines a normative focus with a more practical approach and proximity to developments at the national level, and their annual, conceptual and country reports contribute to raising the overall profile of a right. However, such potential is circumscribed by a chronic lack of resources and support for their work, just as their weight depends to a great extent on “substantive quality, expert competence and state acceptance”.

This short overview has paid no attention to resolutions adopted by, for example, the Human Rights Council or the Sub-Commission on the Promotion and Protection of Human Rights. Like the World Summit outcomes, albeit in a more routine and often specialized setting, they constantly call for action to achieve the right to food, address emerging issues and at times generate momentum to promote normative development. Of further interest are other forms of secondary soft law emanating from the human rights treaty bodies, e.g.

54 See Gudmundur Alfredsson, Human Rights Commissions and Treaty Bodies in the UN-System, in: Wolfrum/ Röben, note 1, p. 561/ 564 and Michael Dennis/ David Stewart, Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?, Am. J. Int’l L. 98 (3) (2004), p. 495 (“revisionist views have not generally been accepted by states”). In this sense, the designation of General Comments as authoritative interpretation seems questionable.

55 Dennis and Stewart argue that the trajectory in CESR treaty interpretation made the task of bringing the US to ratify the Covenant even more difficult. See note 21 in Dennis/ Stewart.


57 On the contribution of the Special Rapporteur on the right to food, see Way, note 46, p. 222-225.

58 See Tomasevski, note 42, p. 213 and Alfredsson, in: Wolfrum/ Röben, note 1, p. 563. Jean Ziegler, for example, has been criticized for some of his positions “not in accord with the current development paradigm”, and denunciation of certain countries, in particular the US. See Way, note 46, p. 225.

59 Resolutions on the right to food adopted by Commission, Council, and General Assembly are available online: www2.ohchr.org/english/issues/food/overview.htm (accessed: 01/08/08).
reporting guidelines and concluding observations by the CESCR, all of which are influential in correcting misconceptions on content and implementation of socio-economic rights.

Finally, since human rights are gradually mainstreamed throughout the UN system, economic and social rights are no longer solely debated in Geneva’s human rights bodies. The example of FAO’s role in the advancement of the right to food is certainly striking, not just through the hosting of two World Summits, but through other, often persistent and less visible initiatives aimed at linking the (developmental) food security with the (normative) right to food agenda and establishing collaboration with human rights institutions. Yet other Covenant rights are increasingly taken up by UN specialized agencies in what could be called a process of “outsourcing” human rights from Geneva, whereby more institutions become entrusted with contributing to the effective realization of rights. The soft law resolutions adopted in such technical rather than human rights forums promise to overcome a politicized debate and press ahead with implementation through a rights-based approach. On a more cautious note, “the quality control of people knowledgeable in the legal dimensions” is still necessary to accompany the translation of benchmarks established in hard law into practical policies.

III. Summary – The Opportunities and Challenges of Soft Law for Economic and Social Rights

Hard law and soft law, primary and secondary, “interact to shape the content of obligations” in the realm of economic and social rights. Primary soft law documents, where their content is not qualified by accompanying statements or dissenting votes, often enjoy legitimacy derived from state consent expressed in a participatory intergovernmental forum or institution. As they do not directly emanate from a treaty regime, however, the link to established norms is not always clear, and reference and congruence to hard law are worth examining when considering their potential legal effects. Where primary soft law deliberately omits reference to existing norms on the same subject matter, it could appear as alternative, not complement to established hard law. If soft law is used to restate norms already adopted in treaty form in a modified (incongruent) manner, its effects on pre-existing norms are uncertain. For instance, the 1998 Declaration on Fundamental Principles and Rights at Work, which compresses the core principles of the International Labour Organisation’s

60 On FAO’s contribution, see Wenche Barth, From Food Security to the Right to Food, note 46, at 67.
61 Such a lesson draws Eide, note 46, p. 86.
numerous conventions into a soft law document reduced in content, but expanded in scope, has therefore been met with applause and scepticism.\textsuperscript{63}

Secondary soft law can be said to play a complementary role for hard law by definition: it is the soft law emanating from institutions established by a treaty to apply or elaborate norms contained therein. Questions of congruence and reference are thus of lesser concern, unlike questions of legitimacy and authority. Whether states acknowledge a soft law instrument, e.g. a General Comment, as authoritative interpretation or application of the law influences its potential to effectively establish behavioural benchmarks and provide conceptual clarifications.\textsuperscript{64} Still more, a former Special Rapporteur argued that “[d]enouncing abuses becomes possible only after a right has been properly defined by governments themselves.”\textsuperscript{65}

With view to the alleged weaknesses of economic and social rights, soft law documents have been instrumental in the gradual clarification of the nature and scope of obligations in general, and the content of certain rights in particular. They contribute to the gradual strengthening of support for socio-economic rights in what is a process of constant reaffirmation and amplification of commitments. Less advancement has been made at the level of implementation, not least because the explanations of the normative content of particular rights provided by authorised human rights experts contain only limited practical policy guidance. Meanwhile, a rights-perspective in the policies of UN specialized agencies has yet to take hold and proof itself as an opportunity to compensate for the regime’s institutional weaknesses.

D. The Case of the Voluntary Guidelines on the Right to Food

The adoption of the Voluntary Guidelines on the Right to Food (VG) constitutes the most recent peak in the gradual process of advancing the understanding and implementation of

\textsuperscript{63} Philip Alston cautioned the acceptance of soft “promotionalism” as the bottom line, gradual downgrading of ILO’s role through decentralization, and an “ethos of voluntarism in relation to implementation and enforcement” (Alston, note 11, p. 458). In favour: Langille, note 31.

\textsuperscript{64} Though of course, the authority owned by a treaty body that is charged by state parties to develop an understanding of their agreed human rights obligations puts the burden on dissenting states at least to argue against its interpretations. See Eckart Klein, Impact of treaty bodies on the international legal order, in: Wolfrum/ Röben, note 1, p. 572.

\textsuperscript{65} Tomaševski, note 42, p. 207 and elsewhere: “one ought to determine the extent to which governments are willing and able to meet their human rights obligations”, Katarina Tomaševski, Indicators, note 36, p. 392.
the right through soft law. Expectations as to their normative effect differ, however, widely. The VG state clearly that “[t]hey do not establish legally binding obligations for states or international organisations”, and that no provision in them is “to be interpreted as amending, modifying or otherwise impairing rights and obligations under national and international law.” Still, they have been greeted by experts as a “key tool to promote normative development”, and as a “first step in a process of developing detailed binding international rules.

The following part will examine the potential impact of the Guidelines on the right to food under international law, looking at the negotiating process and comparing the outcome document with established standards.

I. The Guidelines – Emergence of a “Human Rights-based Practical Tool”

At the World Food Summit: five years later in 2002, states had provided the mandate for an Intergovernmental Working Group (IGWG) to elaborate a set of voluntary guidelines on the right to food. The IGWG, an ad hoc body open to all FAO and UN member states, met four times over the following two years to negotiate the envisaged tool, with relevant international organisations, NGOs and other stakeholders participating as observers.

Although it was clear that the instrument should be non-binding, the drafting process proved extremely difficult. States not parties to the ICESCR or generally sceptical about

66 Voluntary Guidelines to support the progressive realization of the right to adequate food in the context of national food security, adopted by the 127th Session of the FAO Council, Nov. 2004, para 9.


68 See World Food Summit: fyl Declaration, op. 10 requesting the FAO Council to establish the IGWG.

69 The IGWG was established as a subsidiary body to the Committee on World Food Security (CFS); for its mandate, see Report of the 123rd Session of the FAO Council, Rome (28 Oct. -1 Nov. 2002), CL 123/REP-Revised. 70-90 government delegations took part in the negotiations.

70 This signals that states were well aware of the fundamental difference of a rights-based approach as compared to conventional food security policies. On the difficult negotiations, see Michael Windfuhr, Civil society groups working on the right to adequate food. A User’s guide to the Voluntary Guidelines, SCN News 30 (2005), p. 23; Oshaug, note 46, p. 278.
the binding nature of socio-economic rights were wary of additional commitments being created, while others feared that existing obligations might be watered down in the process. Much of the value added of the Guidelines certainly derives from the fact that they were negotiated by states. But intergovernmental (standard-setting) negotiations often entail characteristic pitfalls – political horse-trading, need for compromise, and attempts to dilute levels of commitment – and there was a risk that the state-owned outcome would not keep up with existing standards in international law.

Considerable challenges faced by the IGWG included that the ICESCR as most comprehensive source of the right to food was not universally ratified, opinions about nature and level of obligations differed greatly, and consensus was lacking on the structure, scope, and amount of detail of the Guidelines. Did General Comment No. 12 provide an authoritative interpretation (to be referred to in the VG), was the right justiciable (so that the VG should recommend legislative measures), and what did international obligations consist of (to be included in the VG)?

In the end, the outcome document was perceived as positive by the majority of participants and observers. Whereas General Comment No. 12 provided a conceptual basis, the Guidelines “might increase state’s commitment to the right to food, and create a sense of ownership”. Whereas previous soft law elaborations had gone far to overcome textual ambiguity and imprecision, the Guidelines proceed further on the implementation level, proposing a range of concrete measures aimed at fulfilling the right. And whereas UN specialized agencies had started to take up ICESCR rights in their work, the adoption of the Guidelines was described as the first attempt of human rights-mainstreaming dictated by

71 See Isabella Rae/ Julian Thomas/ Margret Vidar, History and Implications for FAO of the Guidelines on the Right to adequate Food, in: Wenche Barth Eide/ Uwe Kracht (eds.), Food and Human Rights in Development: Evolving issues and emerging applications, Vol. 2, Antwerpen 2007, p. 458, 467; or Oshaug, note 46, p. 269. Of the 187 FAO member states that adopted the VG in 2004, all were UN member states, but only 148 had ratified the ICESCR.

72 With General Comment No. 12 already in place, “developing another instrument with a largely overlapping content might seem questionable or even risky”. Mechlem, note 67, p. 6.

73 For example, most civil society organisations “called the text ‘no masterpiece of political will’”, but were nonetheless “finally satisfied with the results”. Windfuhr, note 70, p. 23.

74 Mechlem, note 67, p. 7. This contrast is emphasised in the VG, where it says in para. 4 that in General Comment No. 12, the CESCR provided “its experts’ views on the progressive realization of the right to adequate food”.

75 The comprehensive recommendations in the Guidelines range from general affirmations of good governance and the rule of law, to legal and institutional issues, economic governance and market systems, social policies and the vulnerable, nutritional aspects, and the international dimension.
The choice of such a specialized forum allowed the drafting process to benefit from FAO’s technical expertise, brought together professionals from a wide range of disciplines, and thereby depoliticized the difficult negotiations to a certain extent. Finally, the Right to Food Unit, established in the follow-up at FAO to assist member states in the implementation of the right using the Guidelines, provides an institutional setting for promotion, capacity building and technical assistance.

Therefore, what has been achieved for the right to adequate food has been considered a “major breakthrough in the development of social, economic and cultural rights” as a whole. A “human rights-based practical tool”, the VG lay out a promising approach to bridge the gap between abstract legal obligations and policies required for implementation. The question as to their legal impact on existing obligations remains, however, open.

II. Impacts of the Soft Law Guidelines on the Legal Right to Food

The Guidelines constitute soft law: they establish a set of behavioural standards to guide states “in their implementation of the progressive realization of the right to adequate food”, but not legally binding obligations. However, their designation as policy tool should not lead to the fallacy that they are devoid of any (soft) legal effects on obligations under the right to food.

The level of obligations under the right to food varies for different FAO member states, and the Guidelines have accordingly different implications for each, depending on whether they (partly) restate or exceed its existing obligations. For example, all states are bound by

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76 Rae/ Thomas/ Vidar, note 71, p. 458, 467.
77 E.g. Barbara Ekwall, Voluntary Guidelines on the Right to Food: The perspective of a development agency, SCN News 30 (2005), p. 28. FAO’s role consisted in providing a secretariat, servicing the IGWG and offering technical assistance, e.g. by producing background reports. As a stakeholder in food and agricultural policies, FAO naturally had an interest in the outcome of the process, but did not go beyond expressing some positions, anxious to remain a neutral forum. Margret Vidar, The Right to Food in International Law, available online: http://www.fao.org/Legal/Rtf/statements/vidar03.pdf (accessed 24.08.09), p. 15.
78 Right to Food Unit, see www.fao.org/righttofood/about_en.htm (accessed 14/08/08).
79 For example, Ekwall, note 77, p. 28.
80 VG, para 6 and 9. Though partly restating existing obligations, they do not form a “zebra law” that blends non-binding and binding substance, as was argued by Sven Söllner, The “Breakthrough” of the Right to Food: The Meaning of General Comment No. 12 and the Voluntary Guidelines for the interpretation of the Human Right to Food, Max Planck UNYB 11 (2007), p. 409. At most, they could be seen to create good faith obligations to respect for FAO member states, or for parties to the ICESCR that foresees a role for specialized agencies in promoting compliance.
customary law in relation to the right and general duties of international cooperation to promote human rights under the UN Charter, but each has not ratified the ICESCR. During the negotiation of the Guidelines, some states insisted on a clear demarcation between states parties and non-parties to the ICESCR, whereas others hoped that more vague formulations would allow creating additional obligations for non-parties. The final document refers to Art. 25 UDHR and Art. 55 and 56 of the Charter to acknowledge that all states are subject to obligations under the right to food, but that obligations of parties to the Covenant are more comprehensive.

How can the soft law Guidelines impact on obligations of parties to the Covenant? It has been noted by FAO experts and others that the understanding of the right to food adopted in the Guidelines can shape future interpretations of Art. 11 ICESCR, at the international level and potentially in domestic courts. The definition contained in the Guidelines is authoritative in that it is authored by states. At the same time, General Comment No. 12 already offers a definition of the right to food addressed to (but not binding on) parties to the Covenant. If an interpretation provided by an authoritative treaty body such as the CESCR would stand against an interpretation unanimously adopted by state parties, it could be assumed that the latter was more compulsive, particularly as the CESCR is not formally mandated by states to deliver authoritative interpretations.

Such considerations are rather hypothetical in the case of the Guidelines, as the definition agreed upon by governments closely follows the one adopted by the CESCR. However, it is striking that discrepancies appeared with regard to elements of the right that are usually most contested among states. For instance, the Guidelines recognize the “respect” and “protect” dimension of obligations, but there is no explicit recognition of the “fulfil” dimension, arguably the most demanding in the tripartite typology adopted by the

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81 An information paper provided by FAO some months before the conclusion of the final draft suggests that the IGWG considers whether it wants to restate or interpret existing customary or treaty obligations, progressively develop the right to food as contained in the ICESCR, or reaffirm interpretations suggested in General Comment No. 12. FAO Information Paper, Implications of the Voluntary Guidelines for parties and non-parties to the ICESCR, Rome 2004, para 28.
82 VG, para 17.
83 E.g. FAO Information Paper, note 81, para 3; Sölner, note 80, p. 14. According to the Vienna Convention on the Law of Treaties, Art. 31 (3) b): “any subsequent agreement between parties regarding the interpretation of a treaty or application of its provisions” shall be taken into account when interpreting it.
84 Supported by Ekwall, note 77, p. 29 (“retains the major elements”) or Ziegler/Way/Golay, note 67, p. 17. Meanwhile, an earlier draft of the Guidelines was considered by representatives from NGOs and UN human rights as a step backwards compared to the standard in existing documents.
The Guidelines focus clearly on policies required for progressive implementation, and do not encompass a notion of immediate or core obligations. Further, no agreement could be reached on the inclusion of a comprehensive guideline on international responsibilities going beyond a mere “do no harm”-commitment already pronounced in different contexts. The fact that recommendations concerning the international level had to be included in a separate section of the document conveys the impression that they are of somewhat secondary importance.\textsuperscript{86} On the other hand, with the respective legal framework still rudimentary, the mere inclusion of international responsibilities in the document could be regarded as a success, and positively influence the future normative debate on international obligations under the ICESCR.\textsuperscript{87}

Beyond providing an express definition agreed upon by states, the legal significance of the Guidelines rests in the elaboration of detailed measures required to implement the right to food. For states bound by the ICESCR, they constitute an “important orientation of national policies”, and the CESCR already stated that it would refer to the Guidelines when examining state reports.\textsuperscript{88} But does a state orientating its policies along the non-binding Guidelines automatically fulfil its obligations under the right to food? Members of the Right to Food Unit made clear that “[a]pplying the Guidelines does not equate to implementing the right to food”.\textsuperscript{89} As soon as states apply the Guidelines in a consistent and widespread manner amounting to subsequent state practice interpreting a treaty, deviations from hard law to either side could then signify an opportunity (i.e. supplementing) or challenge (i.e. diminishing) for existing standards.

Similar assumptions can be made regarding the development of customary law. Considered through the prism of theories on soft law, the Guidelines are quite likely to attract compliance: they are precise rather than ambiguous in wording, their recommendations are suitable for practical implementation, and they derive legitimacy from state-ownership and the link to established legal norms.\textsuperscript{90} A consistent state practice could thus emerge from

\textsuperscript{85} The difference becomes apparent by comparing para. 17 of the VG with para. 15 of General Comment No. 12. Despite the omission of “fulfil”, it must be recognized that major elements of the dimension are there, e.g. in the required establishment of safety nets. See Eide/Kracht, note 46, p. 156.

\textsuperscript{86} VG, Section III: International Measures, Actions and Commitments.


\textsuperscript{88} Windfuhr, note 70, p. 23.

\textsuperscript{89} Rae/ Thomas/ Vidar, note 71, p. 487.

\textsuperscript{90} The Guidelines cite a number of “basic instruments” in the introduction: most prominently, Art. 25 UDHR, Art. 11 ICESCR, and Art. 55 and 56 of the Charter.
states’ conduct in compliance with the Guidelines, a soft law document conceivable as expression of *opinio juris*. However, the fact that most states not only constantly reaffirmed the non-binding nature of the Guidelines, but were also determined to foreclose any norm-generating development, limits their potential to generate customary law reaching beyond existing standards.

Finally, for states not parties to the ICESCR, the level of legal obligations relating to the right to food is respectively lower. Without the link to an established legal norm, the VG seem to carry comparatively less weight or authority. On the other hand, the soft law Guidelines take on a greater role in providing benchmarks where they had been missing, so that the recognition on parts of non-parties of an individual human right to adequate food is significant by itself. Also, while it is hard to foresee whether the Guidelines will contribute to making accession to the Covenant more palatable, they can certainly reduce misconceptions as to the nature of the right to food, and other rights contained therein.

### III. Summary and Outlook – The Opportunities and Challenges of the Guidelines

The opportunities of the Guidelines for the advancement of the right to food have been shown to be manifold. Possibly the most valuable contribution of the state-owned Guidelines consists in overcoming traditional misconceptions about the nature of the right, and its negative stigma of impracticability in particular. The consequences are not just seen at the policy level, where effective implementation has improved and the right to food been placed squarely on FAO’s food security agenda. At the normative level, the standing of the ICESCR is likely to rise where perceptions of infeasibility are gradually being abolished, and monitoring is facilitated based on the benchmarks established in the Guidelines. Further, customary law could spread and harden, and the future legal discourse benefit from

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91 Except for circumscribed provisions applicable in certain situations (e.g. armed conflict) or to specific groups of persons (e.g. women), obligations for non-parties derive from a rudimentary norm in customary law, and general provisions in the UN Charter.

92 E.g. a common misconception regarding the right to food is that it equates to a “right to be fed.”


94 A member of the Right to Food Unit noted that it is often difficult to track the impact of the Guidelines on national policies as they mention the “right to food” rather than “the Guidelines”. Nonetheless, there has been progress in introducing the right in national laws, which can partly be credited to the work of the Unit in facilitating implementation on the basis of the Guidelines.
renewed self-commitment of states and a close dialogue between the development and human rights community.'

Yet some words of caution are needed before labelling the soft law approach taken with the Guidelines as a model path for the realization of other Covenant rights. The challenge of such an approach consists in the fact that states in a sense renegotiate content and policy implications of existing binding obligations, albeit in a soft law document. With view to familiar pitfalls of intergovernmental negotiations, and states’ often weak conceptual understanding paired with considerable scepticism concerning socio-economic rights, it was *prima facie* not clear whether the state-owned Guidelines would be grounded in, and not detract from existing obligations. Such preliminary unease was fuelled by observations of the drafting process and outcome, displaying certain discrepancies between the standards set out in General Comment 12 and the Guidelines. Certainly, the finalized Guidelines are largely congruent in substance with hard law, and legal consequences assumedly more supportive than detrimental. Nonetheless, certain insufficiencies remain, causing human rights proponents to advise that the normative dimension of the right – its ability to empower and to establish accountability – should not be lost in the process, or that gaps in the Guidelines “could be filled by using [them] always within the context of well-established and internationally-accepted human rights norms and principles.”

To avoid the effect of making “voluntary what is already obligatory”, perhaps the main lesson to be drawn from the Right to Food Guidelines is the need for clarity on the legal effects of such an instrument on established obligations. In more practical terms and as Wenche Barth Eide remarked, “the quality control of people knowledgeable in the legal dimensions” is still necessary to assist in the translation of legal obligations into policy recommendations.99

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95 Not only the Special Rapporteur and the CESCR announced they would refer to the Guidelines in monitoring, but also NGOs, e.g. FIAN (Windfuhr, note 70, p. 25).
96 As insisted on in advance, see FAO Information Paper, note 81, para 25.
97 Carlos López, Voluntary Guidelines on the right to food Overview of the process and outcome, SCN 30 (2005), p. 13. López notes further that “the most noticeable insufficiency concerns accountability”, after earlier drafts of the VG that were stronger on accountability did not survive the negotiation phase. Similarly, Oshaug, note 46, p. 269.
98 As clarified by the OHCHR, CESCR, and others during the negotiations. See: Summary Report of Issues Raised during the Second Session of the IGWG, Rome 27-29 October 2003 (2nd Session), p. 2.
99 Note 62. Similarly Oshaug/Eide, note 47, p. 369 noting before negotiations started on the Guidelines: “Central in this new approach could be the opportunity to claim the right to adequate food and to hold states accountable for their obligations. The forces against are many. Both intellectual skill and practical diplomacy will continue to be needed from an alert right to food movement.”
E. Conclusion

The opportunities and challenges resulting from the use of soft law as a tool to complement, develop, or supersede economic and social rights are as multifaceted as soft law itself. Having considered some of the ways in which non-binding and binding norms interact and blend into a normative regime wherein soft law instruments often elaborate and advance, and sometimes contest and replace socio-economic rights, it seems advisable to conclude on a suggestive, rather than judgemental note.

From a theoretical perspective, soft law has not yet received sufficient attention in its function as supplement rather than precursor or alternative to hard forms of legalisation. Relying on the general rule that a norm can only be modified by a norm of the same status, soft law may too easily be discounted as a tool of certainly political, but not legal effects. The potential of soft law to develop into hard law, or in other cases, its advantages over hard law in the first place, have thus been better understood than the significant ways in which soft law impacts on the substance and scope of obligations already undertaken.

From a practical perspective, such observations are of particular interest with view to economic and social rights. Partly due to discernible weaknesses, partly to regrettable misconceptions, the disparity in this field between established legal norms and political reality is so great that “hard” law appears alarmingly soft. The role of subsequently adopted soft law is thereby enhanced: it is strongly needed to tackle the limitations of the regime, but could also more easily accomplish its demise. As a result, it seems advisable to confront soft law with a reasonable combination of impartiality and caution, each time grounded in the cognition of its normative impact.

This is what has been attempted above with view to the Voluntary Guidelines. On a cautious note, it was considered necessary to question the extent of congruence between voluntarily agreed policy implications and legal obligations under the right to food. After all, having states negotiate the content of an already established right does not constitute a step forward in itself, and it is surprising that a greater effort has not been made to explore the normative impact of the Guidelines. Taking an impartial stand, it was nonetheless found that the complementing soft law track to advancing the right to food adopted by the Guidelines can serve as a model approach for other economic and social rights.

To conclude what has in parts been a rather legalistic enterprise, it must be remarked that acknowledging the challenge soft law may pose to international legal norms where it promotes the retrenchment rather than spread of legalization is not intended to constitute a value judgement on the preference of hard over soft law. Whereas the distinguishing normative dimension of socio-economic rights, their ability to establish accountability and empower, is worth defending, the many ways in which soft law has shown to usefully
complement binding standards alone speak against such a conclusion. Where hard law remains ineffective, the emergence of soft law as an alternative, rather than complement to hard law might present a challenge to existing standards, but an opportunity for the regulatory objectives once sought and never achieved.

As notes Asbjørn Eide, who’s contribution to the advancement of the right to food remains unmatched: “What counts, in the end, is whether human rights are realized in practice […] There is a constant need to check the reality and to move forward with determination when it can be shown that reality falls short of the promises contained in the international instruments.” Quoted by Oshaug/Eide, note 47, p. 365.
Socio-Economic Rights in India: Democracy Taking Roots

By Uday Shankar and Divya Tyagi, Kharagpur / Raipur*

A. Introduction

Human rights are inalienable and indispensable for dignified existence of human being. Over a period of time they have acquired global appeal. Societies and their people across the globe are gradually realizing the direct linkage of human rights to human dignity. Experience clearly indicates that human dignity is the first and the foremost casualty in conditions of large scale violations of human rights. Human rights are delineated into different categories depending on their characteristics of enforcement. One of the most striking features of contemporary human rights is the juridical marginalization of socio-economic rights. The extent of this marginalization may be gauged by the fact that the absence of any effective enforcement mechanism in respect of social and economic rights has led to the denial of rights’ status to these rights. Marginalized within legal systems, socio-economic rights represent one of the greatest challenges confronting the human rights community in the twenty-first century. At the practical level this marginalization has resulted in catastrophic effects in developing and underdeveloped countries of the world. Theirs are the people whose lives are mired in the vicious trap of poverty, hunger and illiteracy.

Another promising feature of modern era is the increasing acceptance of democracy as a system of political organization of societies leading to participatory governance therein. Acceptance is increasing because the process begins by attaining political democracy and is taken to its logical end in the form of making strenuous efforts for achieving economic and social democracy. That is how democracy as a system of governance is perfectionised. When so conceptualized in this manner, democracy holds the biggest hope for fulfillment of the dream of realization of socio-economic rights.

India, a leading ancient civilization, made her tryst with destiny through establishing democratic society on her independence when her people gave to themselves the constitu-

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1 Initially, human rights were recognized with non-interventionist feature refraining state to not to interfere in the realization of rights. The implementation of human rights was largely depended upon abstention of state. Such rights were categorized as ‘civil and political rights’. In this process, rights depended upon intervention of state in terms of resources were excluded from the discourse of human rights. These rights were known as ‘socio-economic rights’ deprived of their due position in the landscape of human rights.
tion of India. Aspirations and hopes of millions of Indians are being nurtured around the constitutional principles of political participation, social cohesion and economic prosperity. These principles are embedded in fundamental rights and directive principles of the Constitution of India which solemnly pledge to change the destiny of Indians. They worked it so well that it is regarded as the greatest/largest and the most vibrant democracy in the world.

This paper attempts to analyse her journey on the path of realization of socio-economic rights. The paper discusses the deliberations of framing of fundamental rights and directive principles in the Constituent Assembly. It explains the position of fundamental rights and directive principles in the Constitution of India. Further, it examines the judicial approach of dealing the relationship between fundamental rights and directive principles. The paper goes beyond the judicial domain and investigates the contribution of judicial institution in realization of socio-economic rights. In this light it looks into the enforceability of socio-economic rights and suggest establishment of independent institution for enforcement of socio-economic rights. Socio-economic rights constitute inalienable interest of every individual promised by the Indian Constitution in the chapter of directive principles. The reference of directive principles are primarily related to socio-economic rights included therein.

B. Socio-Economic Rights in India

I. Framing of the Indian Constitution: a formidable challenge

The stupendous task that the framers of the Indian Constitution undertook needs to be seen in the context of history of deprivation and sufferings. The oppressive regime of Britishers not only deprived citizens of their autonomy but also reduced them to a life of abject poverty. The framers of the Indian Constitution were therefore determined to build a nation where individual can posses everything essential for dignified existence. The lessons from the past encouraged them to incorporate human rights in the Constitution. The founding fathers of the Indian Constitution were anxious to ensure not only political freedom after independence but social and economic freedom to large sections of the community bound by traditions of caste-system and the scourge of untouchability. In this light, there is a need to understand the place and importance of socio-economic rights in the Constitution for fulfillment of shattered hope of those who are living at the periphery. The constitutionality of socio-economic rights in the Indian Constitution was very natural and outcome of values of the Indian society. Socio-economic needs of people is essential for vibrant democracy. Political democracy will not survive long in the absence of social and economic democracy. Social and economic democracy is availability and accessibility of material needs and opportunities to every individual. The founding fathers were conscious of the
fact that mere political democracy, i.e., getting the right to vote once in five years or so was meaningless unless it was accompanied by social and economic democracy.\(^2\) Democracy will become real when in practice there is sharing of power and responsibility by all sections of the people and it becomes illusory when it is about pursuit of power by the dominant sections alone. The directive principles, which are in the form of directives to state differs from fundamental rights as they are not enforceable in court of law, cannot be confined to mere rhetoric or to adhoc policies of electoral appeasement.\(^3\) Constitutionalisation of socio-economic rights does not owe its allegiance to alien source. It is very much imprinted and inscribed in the tradition of Indian society. In fact, the Indian Constitution without social and economic rights would have been a betrayal of aspirations and hopes of millions of people of this country.

The idea of incorporating socio-economic rights at par with civil and political rights floated during the debate of making of the constitution. Some of the members were doubtful about the effectiveness of directive principles in the absence of enforceability. It was suggested by Krishna Chandra Sharma to include a provision to the directive to the effect that ‘any law made in contravention of these principles shall to that extent be void’. He said such an addition would not affect the nature of directives as such. It would give jurisdiction to a court of law, though only a negative right to the people, to move a court that a law which went against the interests of the people, against providing primary education for the children and against providing work and employment for people, should be declared void, he added.\(^4\) R K Sindhwa was of the opinion that unless the directive principles were made justiciable, they would not give any satisfaction to the common man in India.\(^5\) K M Munshi in his initial working draft articles VII and VIII tried to secure right to food, living wage, conditions of work necessary to ensure a decent standard of life and primary education.\(^6\) It was suggested to use ‘fundamental’ in the place of ‘directive’ to reflect no difference between the rights contained in chapter on directives and in the chapter on fundamental

\(^1\) B. Shiva Rao, The Framing of India’s Constitution, Volume IV, 943
\(^4\) CAD, n. 3, pp 362-64.
There is a plea of Promotha Ranjan Thakur, a member to give similar effect to socio-economic rights, when he said that, “I do not know why economic fundamental rights should not be included in these justiciable rights. Economic rights are essential while framing a country’s constitution and they must also be made justiciable.”  

Similar concern was shown by B Das, a member of the Constituent Assembly, “I think it is the primary duty of Government to remove hunger and render social justice to every citizen and to secure social security … I am not satisfied, although portions of the Soviet Constitution or the Irish Constitution are somehow made into a jumble and included in these twelve paragraphs, that they bring any hope to us.”

Nevertheless, the Constituent Assembly decided to not to make them enforceable in court of law due to the nature of directives. The wordings of Article 37 are binding directions for the executive and the legislature. The duty imposed is not obligatory but mandatory in nature. It is imperative upon State to respect the ideals and infuse these ideals into the living law of the land. The formulation of Article 37 reflects that impetus has been attached to the principles enshrined therein. The expressions “fundamental in the governance of the country” and “it shall be the duty of the State to apply these principles in making laws” attracts broad and purposive interpretation to it. The expressions in different articles of directive principles such as ‘endeavour’, ‘primary duties’, ‘strive’, ‘in particular, direct’, ‘secure’, ‘shall take steps’ and ‘obligation’ strongly reflects the duty-full purpose of the directives. The language of the various provisions of the directives shows the mandatory nature of duties imposed upon the State. It would be wrong to

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7 Constituent Assembly Debates (CAD), Volume VII, pp 473-475.
8 Constituent Assembly Debates (CAD), Volume III, p 383.
9 The Report, n. 3 p 361.
10 Article 37 of the Constitution of India states that “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”
11 Articles 43, 44, 45, 48 and 48 A of the Constitution of India.
12 Article 47 of the Constitution of India.
13 Article 38 of the Constitution of India.
14 Article 39 of the Constitution of India.
15 Articles 39A and 41 of the Constitution of India.
16 Articles 43 A and 50 of the Constitution of India.
17 Article 49 of the Constitution of India.
describe the objectives as ‘pious expressions’\textsuperscript{18} ‘resolutions made on New Year’s Day which are broken at the end of January’\textsuperscript{19} ‘vague’\textsuperscript{20} or ‘cheque on a bank payable when able’\textsuperscript{21}. They are command to the government to act in conformity with socio-economic goals enshrined in Part IV of the Constitution. The ethos of ‘fundamental’ and ‘duty’ runs through all the provisions enumerated in the Part IV. A claimable expectation emanates from the duty imposed on the State. The claim becomes more prominent in the light of enumeration of certain socio-economic rights in the principles. Dr. Ambedkar on speaking on the importance of social order based on justice, social, economic and political observed that the State shall not be allowed to take any defence for non-implementation of the directives. He said that “…in framing this Constitution was really two fold: (1) to lay down the form of political democracy; and (2) to lay down that India’s ideal was economic democracy with the prescription that every Government, whatever, in power, would strive to bring about economic democracy. The use of the word ‘strive’ in the Draft Constitution was important because it was the intention of the framers that even if there were circumstances which prevented the government or which stood in the way of the Government giving effect to these Directive Principles, they would, even under hard and propitious circumstances always strive in the fulfillment of these directives.”\textsuperscript{22} These wordings of framers left no doubt in the mind about significance and importance of the Directives in reaching to the ideals. It is imperative on the State to pursue the policies in the directions of these directives. It would be disastrous to confer inferior meaning to these principles over individual rights.\textsuperscript{23}

II. Indian Constitution: challenge negotiated

The Indian Constitution was framed on the edifice of equality, liberty and fraternity.\textsuperscript{24} To strengthen these edifices, the framers included fundamental rights and directive principles in the new dispensation of the Country. The rights and principles thus connect India’s future, present and past, adding greatly to the significance of their inclusion in the Consti-

\textsuperscript{18} Shiva Rao, n. 6 p 225.
\textsuperscript{19} Shiva Rao, n. 6, pp 475-476.
\textsuperscript{20} Shiva Rao, n. 6, p. 244.
\textsuperscript{21} Shiva Rao, n. 6, pp. 479-480.
\textsuperscript{22} CAD, n. 7 p 384.
\textsuperscript{24} See, Preamble of the Constitution of India.
tution, and giving strength to the pursuit of the social revolution in India.\textsuperscript{25} The Indian Constitution provides for both the civil and political rights and the socio-economic rights. While the former are grouped as fundamental rights in Part III,\textsuperscript{26} the latter are placed along with other directives as the directive principles of State Policy, in Part IV of the Constitution\textsuperscript{27}. The directives partake the nature of the rights but are different from the rights contained in the chapter on fundamental rights. Part IV confers on the people positive rights – rights connected with tangible benefits while Part III grants to the people negative rights – rights not to be harmed and it easier for the law to prevent infliction of harm than to enforce these positive benefits.\textsuperscript{28} The Fundamental Rights Sub-Committee recommended that the ‘list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of directive principles of social policy…’\textsuperscript{29}

It is significant to reassert here that the scheme of human rights in the Indian Constitution is not entirely based upon the international discourse and it has given significant place to domestic concepts as well as exigencies.\textsuperscript{30} A close scrutiny of Part III and Part IV demonstrates overlapping of socio-economic rights with civil and political rights.\textsuperscript{31} The distinction between fundamental rights and directive principles is primarily based upon justiciability. Fundamental rights are made justiciable, in fact, the right to constitutional remedies itself is guaranteed as fundamental rights.\textsuperscript{32} Whereas directive principles are made

\textsuperscript{25}Granville Austin, The Indian Constitution Cornerstone of a Nation, Delhi, 1966, p 50.
\textsuperscript{26}Part III contains six sub-heading of fundamental rights. The fundamental rights are grouped as right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and right to constitutional remedies.
\textsuperscript{27}Part IV contains directive principles of state policy which includes socio-economic rights and other directives to the State.
\textsuperscript{29}CAD, n. 8 p 422.
\textsuperscript{30}The Country was recuperating from the wounds of bloodiest partition human society has ever witnessed. Both of safety of life as well as property was threatened by this partition. Therefore, the first priority for the Indian polity was to accord protection to life and property.
\textsuperscript{31}For instance, while the right to equal opportunity of work and the freedom to carry on trade, business, occupation and intercourse are placed along with civil and political rights, at the same time, right to legal aid is recognized as a socio-economic right in Part IV. It is also pertinent to mention that cultural rights are protected as fundamental rights in the Constitution and enjoy the status of civil and political rights.
\textsuperscript{32}Article 32 of the Constitution of India, itself a fundamental rights, guarantees constitutional remedies in case of violation of fundamental rights. Under this article, the Supreme Court of India
non-enforceable in the court of law and left its implementation on the executive and legislature. Individuals are entitled to approach High Courts or the Supreme Court to protect their fundamental rights, whereas the protection and promotion of socio-economic rights have been entrusted to the legislature and the executive. It indicates emulation of prevailing position of human rights at international level. Human rights in India cannot be claimed as completely based on the pattern of international human rights or constitutional scheme of any country. During the framing of the Constitution, the framers of the Constitution had referred to the constitution of the countries of the world. It would be wrong to say that the Indian Constitution is based on the scheme of one or the other constitution of the countries of the world. Rights are conditioned for a social order. While submitting the report of the Sub-Committee to the Advisory Committee, Chairman of the Sub-Committee Achraya J B Kriplani has observed, inter alia, that “when the Committee began its work, it was resolved that a difference should be drawn in the list of fundamental rights between which are enforceable by appropriate legal process and provisions which are in the nature of fundamental principles of the social policy that is to regulate the Governments concerned. In this respect, the Committee has followed the Irish model and adopted a middle course between the one adopted by the framers of the American Constitution and the one pursued in recent European Constitutions, which have mixed up the two set of rights … While the Committee has drawn upon the American and Irish Constitution as also upon the recent European Constitutions, the Committee has throughout kept in view the complexity of Indian conditions and the peculiarities of the Indian situation and has made appropriate changes.”

Fundamental rights were those conditions which every man must have if the purpose of human life was to be fulfilled and attained. They are based on the social values of the society. The type and nature of rights enumerated in Part III of the Constitution and the tenor of certain provisions included therein hardly support the proposition that the fundamental rights are listed in the Indian Constitution are rooted in the enigmatic, abstract and divine-willed doctrine of law of nature.

The object of fundamental rights is not merely to ensure development of personality of the individuals but it also aims at adjustment of the rights of individuals with the level of national existence. The striking feature of the provisions of Part III is that they expressly

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33 Article 37, n. 10.
34 The Report, n. 3, p. 93.
35 CAD, n. 7.
seek to strike a balance between written guarantee of individual rights and collective interests of the community.\textsuperscript{37} The rights guaranteed by the Constitution can be taken away in the interest of individual, society and nation. For instance, freedoms guaranteed under Article 19(1) can be curtailed on the grounds of national interest enumerated in clauses 2 to 6. It may be noted that Article 27 guarantees right against any compulsion to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion, Article 30(1) guarantees to all minorities the right to establish and administer educational institutions of their choice. There are provisions in the fundamental rights to remedy the malaise existing in the Indian society. Article 17 has abolished untouchability and forbidden its practice in any form. Article 24 prohibits employment of children below the age of fourteen in hazardous industry and mine. These provisions can be hardly grouped as civil and political rights; they are in form of injunction to the state. Moreover, the provisions relating to preventive detention by no imagination fit into the scheme of fundamental rights. The concept of fundamental rights included in the Indian Constitution must of necessity be ascertained from the types and nature of rights included therein and from the discernible intention of the framers.\textsuperscript{38} The rights enumerated in the Constitution must be understood in relation of social values of the prevailing in the society.

The foregoing discussion establishes the point that the human rights discourse in India is inked in its social and political values. It has been affirmed the Supreme Court, in \textit{Maneka Gandhi v Union of India},\textsuperscript{39} Bhagwati J., emphasizing on the importance of fundamental rights observed: “These Fundamental Rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave a pattern of guarantee on the basic structure of human rights and impose negative obligation on the state not to encroach on individual liberty in its various dimensions.” In addition of universality of rights, the Indian constitution has structured rights of individual in accordance with its own values and social mores. Individual’s right signifies conferment of human rights on an individual not only as an individual only but also as a member of society. It is part of a community ordering. Therefore, an individual can not waive a fundamental right.\textsuperscript{40} The importance of social order cannot be ignored in interpreting rights of individual. Human rights in India must be

\textsuperscript{37} A K Gopalan v State of Madras, All India Reporter 1950 Supreme Court 74.
\textsuperscript{38} \textit{Shetty}, n. 37 p 25.
\textsuperscript{39} All India Reporter 1978 Supreme Court 597.
\textsuperscript{40} Basheswhar Nath v CIT, All India Reporter 1959 Supreme Court 149.
viewed to bring prosperity to a society through empowering individual. It is also evident from the fact that members of the Constituent Assembly were arguing to include right to education in the chapter of fundamental rights whereas right was placed in the directives. Hence, the significance of rights relating to decent existence of individual to establish egalitarian society is very central to the discourse in India.

There is a need to focus on characteristic way of formulation of human rights in India. Fundamental rights are not necessarily referring to restrain by the government. Rights enumerated under Article 17 which refers to abolition of “untouchability” and Articles 23 and 24 refer to Right against exploitation impose positive duties on State. The rights guaranteed under those provisions cannot be fulfilled in the absence of a determinate action by the State. In addition, there are provisions in the fundamental rights which lay down duty of State as well as of individuals. The rights provided under Article 15(2), 17, and 18(2) refers to restrain individuals also. Interestingly, there are provisions in the list of fundamental rights which are in the nature of directives to Parliament or doesn’t refer to rights at all. Therefore, the listing of rights in the Constitution shows that it is not based only on western principles but on duty-oriented jurisprudence of east as well.

The reason of dividing rights into a group of fundamental rights and directive principles is to obviate administrative and practical difficulties in enforcing such rights depend upon economic development. The Advisory Committee on formulation of Fundamental Rights in its supplementary report submitted a chapter on directive principles. The first clause of the report stated: “The principles of policy set forth in this chapter are intended for the guidance of the State. While these principles shall not be cognizable by any Court, they are nevertheless fundamental in the governance of the country and their application in the making of laws shall be the duty of the State.” The idea underlying in the incorporation of non-justiciable directive principles was taken from the advice tendered by Mr. B N Rau, Austin, n. 25 p 79. Now, right to education is given a status of fundamental rights by inserting Article 21 A under the Part III through Constitution (Eighty-Sixth Amendment Act), 2002. Articles 33, 34 and 35 of the Constitution of India. Articles 31A, 31B, 31C of the Constitution of India. Interestingly, In the Commission on Human Rights, a body entrusted to draft the international human rights covenant, the Indian delegate suggested to bifurcate two categories of right on ‘justiciable’ ground. India argued that civil and political rights were ‘justiciable’ whereas economic, social and cultural rights were not. This required different measures of implementation, which could best be done through separate instruments. (see Summary Report of 248th Meeting, Commission on Human Rights, ESROR, 7th Sess., UN Doc. E/CN.4/SR.248, 6 (10th July 1951), for detail refer, Daniel J Whelan & Jack Donnelly, The West, Economic, and Social Rights, and the Global Human Rights Regime: Setting the Record Straight, 29 HUM.RTS.Q. 908-949.

CAD, n. 4 p 406.
Constitutional Advisor to the Advisory Committee. He suggested that such of those rights as were normally enforceable should be listed as justiciable fundamental rights and those which required administrative action should be incorporated in the Constitution as non-justiciable directives to the State. From this it is evident that distinction was made between fundamental rights and directive principles for the purpose of avoiding administrative and other practical difficulties that might arise if the directives were to be enforced at the behest of citizens. Therefore, the provisions in the first part of Article 37, which make the directive principles unenforceable, are solely intended to make these directives unenforceable in court of law. Justiciability does not constitute indispensable characteristics of human rights. Therefore, non-justiciability of the principles does not mean that the Constitution makers considered them less important than the fundamental rights. It would be fatal to read rights enumerated in Part IV as pious aspirations.

The formulation of rights in the Indian Constitution was a unique attempt to resolve the conflict between the two groups of rights. It was a remarkable effort to balance the conflicting rights. The rights are not categorized solely on the basis of its affiliation to a particular group of rights. The whole scheme was based on philosophy postulating a dialogue between individualism and social control. The Constitution makers believed in the equal importance of two sets of rights as a cardinal tenet of their philosophy. Human rights for them were indivisible and civil and political as well as social and economic rights had got to co-exist to make for true human happiness and lead to the fullest flowering of each human personality not only in individual but also in wider community interest. These two groups of rights are part of one scheme of human rights. They are means to achieve an end of social order envisaged by the framers of the Constitution. The core of the commitment to the social revolution lays in Part III and Part IV. These are the conscience of the Constitution.

The scheme of the Constitution of India places both the rights on the same sphere. The harmony and balance between both groups of rights is a basic feature of the Constitution. Social and political order cannot be achieved in the absence of either. On the one hand fundamental rights are important for democracy on other hand directive principles is indis-

49 T S R Sastry, A Perspective on Human Rights, in India and Human Rights, New Delhi, 2005, p 27.
50 Austin, n. 25.
51 Minerava Mills v Union of India, AIR 1978 Supreme Court 1789, 1847.
pensable for socio-economic justice. Individual liberty should not be a cherished value for a few. It is the directive principles which nourish roots of democracy and liberty, provide strength and vigour to it and attempt to make it a real participatory democracy. The objective underlying in the socio-economic rights of directive principles is to advance a holistic approach to human rights. Individual human rights enshrined in Part III will evaporate in the absence of socio-economic rights. The significance of socio-economic rights along with fundamental rights has to be understood in the Indian context where large number of populace is struggling to eke out their existence. The denial of socio-economic rights will take away spirit of the Constitution embedded in the Preamble.

C. Socio-Economic Rights: Judicial Approach

In India, the judiciary has been empowered to enforce rights enumerated in Part III whereas judicial intervention is forbidden with regard to rights in Part IV of the Constitution. The absence of power to enforce socio-economic rights is not to offend the prime role of protector and guardian of the Constitution. The realization of the directive principles, including socio-economic rights, involves factors of budget, human resources, and infrastructure and like. It is arising out of this fact that the nature of rights requires different mechanism and institution of its enforcement. The judiciary has been kept away to arbiter on the matters where the State seeks to formulate policies for the society as a whole in respect of social and economic matters.

The Indian Constitution keeps judicial organ of the state away from the matters relating to implementation of the directive principles. In doing so the framers of the Constitution had also kept socio-economic rights along with other principles of the fundamental importance out of the purview of the Court. However, the Supreme Court of India has designed a role for itself in the matter of socio-economic rights. The Court has been adopting different methodologies to deal with the conflict between the fundamental rights and the directives. The author proposes to travel the judicial journey of dealing the conflict between the fundamental rights and the directive principles in four different ways. The approaches analyses the different stages of relationship between fundamental rights and directive principles which are adopted by the court in last six decades.

First, the judiciary has been reading the meaning of “shall not be enforceable” under Article 37 in strictu sensu. In doing so, it had conferred higher status to the fundamental rights over the directive principles. Second, it has been reading the reason of incorporating the directive principles in the Constitution in a sacrosanct manner. The directive principles are aspirations of millions of people to establish socio-economic order. Therefore, the fundamental rights must pave way and can be sacrificed for its effective implementation. Third, the court has been reading both fundamental rights and directive principles as a part of integrated constitutional scheme to achieve welfare for all. In pursuance of this approach, it is giving harmonious interpretation to the conflicting legislation. The fourth
approach witnesses assimilation of socio-economic rights into fundamental rights. The court has been reading various socio-economic rights as a component of justiciable fundamental rights.

I. Fundamental Rights and Directive Principles: Relationship Negotiated

In relation to the first approach, the Court has been interpreting provisions of Article 37 vis-à-vis Article 13 of the Constitution to give precedence to Fundamental Rights over Directive Principles. Thus, the judiciary was critical in conferring status to socio-economic rights at par with civil and political rights. The Court has opined that the rights guaranteed under Part III of the Constitution can not be taken away in any circumstances in the light of Art. 13(2). In State of Madras v Champakam Dorairajan, the Supreme Court solemnly declared that “The Directive Principles of the state policy, which by Article 37 are expressly made unenforceable by a Court, cannot override the provisions found in part III, which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32. The chapter of fundamental rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate article in part III. The Directive Principles of State Policy have to conform to and run as subsidiary to the chapter of fundamental rights.” The Court was not willing to accept the significance of the ‘directives’ in the laying of constitutional scheme. It maintained the position that the directives runs subsidiary to the fundamental rights. The observation of the Court caused irreparable damage to the growth of socio-economic rights enshrined in Part IV of the Constitution. It is a matter of fact that the matters in which the court declared primacy to fundamental rights were related to general guidelines of the directive principles to be followed by the Government. As such, they were not conflicting to the socio-economic rights enumerated in Part IV.

The court was erred in preferring individual interest over interest of the society. It failed to reconcile competing interests. The court, in declaring directives subordinate to fundamental rights, had given its verdict primarily on the interpretation to the clause “shall not be

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52 Article 13 of the Constitution of India states that the pre-constitutional or post constitutional law shall not contravene or take away fundamental rights guaranteed in Part III. Such law shall be declared void to the extent of inconsistency with fundamental rights.


54 Article 13 (2) of the Constitution of India provides that post-constitutional law shall be declared unconstitutional if it takes away or abridges fundamental rights.

55 All India Reporter 1951 Supreme Court 226.
enforceable in any court of law". 56 The interpretation to treat guidelines relating to general welfare subsidiary to fundamental rights stifled the growth of the former. It leads to the surrendering of rights of teeming millions. 57 The deprioritisation of socio-economic rights and the weak pressure of political necessity have marginalized the impetus to bring them into being even though there has been an increase of unequal social and economic differentials within and across nation-states. Socio-economic rights have become optional rather than imperative. 58

II. Fundamental Rights and Directive Principles: Harmony Realized

In the second approach, the Apex Court realized that the directive principles must be read in much constructive fashion for its meaningful inclusion in shaping the life of individual. There was recognition of the fact that although the directives were non-justiciable in character the courts should recognize the importance for the simple reason that the directives formed a vital part of the Constitutional document. The court resorted to the ‘directives’ for the purposes of interpretation, maintainability or otherwise of a law. The court observed that legislation enacted in furtherance of the directives must be understood as reasonable restrictions in the exercise of fundamental rights. The Land Reforms legislation was validated on the ground of ‘public purpose’. It was observed that the legislation is giving effect to the interest of the community over the interest of individual. 59 The principles were drawn to define the content of reasonable restriction to limit the freedom guaranteed under article 19. 60 It was evident that the court has changed its approach towards the directives. Unfortunately, the court continued to deny equal status to the Directives. The Court maintained that the directives should conform to and run as subsidiary to the chapter on fundamental rights. The Court said that “A harmonious interpretation has to be placed upon the Constitution and so interpreted it means that State should certainly implement the Directive Principle but must do in such a way that its laws do not take away or abridge the Fundamental Rights, for otherwise the protecting provisions of Chapter III will be a mere rope of

56 See, e.g., Jagwant Kaur v State of Bombay, All India Reporter 1951 Bombay 461; Ajaib Singh v State of Punjab, All India Reporter 1952 Punjab 309; Biswambhar v State of Orissa, All India Reporter 1957 Orissa 247.
58 Dhavan n.23 p 19.
59 See, e.g., State of Bihar v Kameshwar Singh, All India Reporter 1952 Supreme Court 252; Bijay Cotton Mills v The State of Ajmer, (1955) 1 Supreme Court Recorder 752.
60 Nuserwanji Balsara v State of Bombay, All India Reporter 1951 Supreme Court 318.
It has also pledged to adopt the principle of harmonious construction to give effect to both as much as possible. This approach reflects the admission on the part of the court that it was ignoring the importance of the directives in its judicial pronouncements.

III. Fundamental Rights and Directive Principles: Harmony Acknowledged

In the third approach, the Court adopted a purposive construction to read the provisions of the directives while interpreting various legislations. It started referring to the principles when there was no conflict between the Part III and Part IV of the Constitution. The application of the principles was brought in to examine the validity of legislation. It was observed that though principles are not enforceable by courts of law are nevertheless a part of the Constitution. The harmonious construction extended much needed respect to the directives. The directives have been conceived as an inherent quality to enhance the quality of life of individuals. In UP State Electricity Board v Hari Shankar Jain, referring to Article 37, the Court reminded itself that, “… what the injunction means is that while courts are not free to direct the making of legislation, Courts are bound to evolve, affirm and adopt principles of interpretation which will further and not hinder the goals set out in the Directive Principles of State Policy. This command of the Constitution must be ever present in the minds of judges when interpreting statues which concern themselves directly or indirectly with matters set out in the Directive Principles of State Policy.”

The error of early days was corrected by the Court in Keshvanand Bharti v State of Kerala, a Bench of 13 judges asserted the importance of the directive principles. The Court said that the “…what was fundamental in the governance of the country could be no less significant than that which was fundamental in the interest of an individual and therefore fundamental rights and DPSP were complementary.” Justice Krishna Iyer has summed up the development in his characteristics way in State of Kerala v N M Thomas, that “Keshvanand Bharti has clinched the issue of primacy as between Part III and Part IV of the Constitution. The unanimous ruling there is that the Court must wisely read the collective Directive Principles of State Policy mentioned in Part IV into individual fundamental rights of Part III, neither Part being superior to the other! Since the days of Dorairajan, judicial opinion has hesitatingly tilted in favour of Part III but in Keshvanand

63 All India Reporter 1979 Supreme Court 65.
64 (1973) 4 Supreme Court Cases 225.
65 Ibid at 879.
66 All India Reporter 1976 Supreme Court 490.
Bharti, the supplementary theory, treating both Parts as fundamental, gained supremacy.” In Minerva Mills, the Court observed that “those rights (fundamental rights) are not an end in themselves but are means to an end. The end is specified in Part IV.”⁶⁷ The Court reflected a ‘perceptible shift’ in its approach when it observed in J P Unnikrishnan v State of AP⁶⁸ that, “It is thus well established by the decisions of this Court that the provisions of Parts III and IV are supplementary and complementary to each other and that fundamental rights are but means to achieve the goals indicated in Part IV of the Directive Principles.” The Court expressed that “the directive principle now stand elevated to inalienable fundamental human rights.”⁶⁹ Hereinafter, the directive principles started gaining recognition in the sphere of judicial interpretation. In State of Karnataka v Ranganatha Reddy,⁷⁰ Krishna Iyer, J. propounded the thesis that “the dialectics of social justice should not be missed if the synthesis of part III and part IV is to influence state action and court pronouncements. Constitutional terms cannot be studied in a socio-economic vacuum, since socio-cultural changes are the process of the newly equity-loaded. The judge is a social scientist in his role as a constitutional invigilator and fails functionally if he forgets this dimension in his complex duties.” In Kasturi Lal v State of Jammu and Kashmir,⁷¹ Bhagwati, J. while propounding the concept of reasonableness observed that, “this concept of reasonableness finds its positive manifestation and expression in the lofty ideal of social and economic justice which inspires and animates the Directive Principles.” Interestingly, the court completely transformed its approach towards the directives. It initiated a method of reading the directives to justify the legislative measures of the State. It started interpreting the various directives to provide meaningful content to welfare legislations like labour laws.⁷² The involvement of the court was justified by referring to the role directive plays in bringing harmony to the society.⁷³ The interpretations given advance the constitutional goal of attaining socio-economic justice to all.

⁶⁷ Minerva, n. 51.
⁶⁸ J P Unnikrishnan v State of AP, All India Reporter 1993 Supreme Court 2178.
⁶⁹ Air India Statutory Corporation v United Labour Union, All India Reporter 1997 Supreme Court 645.
⁷⁰ All India Reporter 1978 Supreme Court 215.
⁷¹ All India Reporter 1980 Supreme Court 1992.
⁷² Bijay Cotton Mills v State of Ajmer, All India Reporter 1955 Supreme Court 33; Crown Aluminium Works v The Workmen, All India Reporter 1958 Supreme Court 30; Express Newspaper Ltd v Union of India, All India Reporter 1958 Supreme Court 578.
⁷³ Standard Vacuum Refinery Co. v Its Workmen, All India Reporter 1961 Supreme Court 895.
IV. Fundamental Rights and Directive Principles: Integrated Approach

In the fourth approach, the court ushered into a new era by interpreting socio-economic rights as a scheme of fundamental rights. The court started reading the various rights of Part IV into Part III of the Constitution. The court expanded the meaning of ‘life’ by bringing ‘dignity’ component into it. This judicial tool proved to be very handy for the court to read many of socio-economic rights as an inherent part of right to life enshrined under Article 21 of the Constitution. On one hand the judicial activism strengthened the importance of socio-economic rights in the structure of human rights, on the other hand raised serious doubts about the commitment of law-makers. It also casts doubt on the propriety of judicial decisions with regard to the constitutional scheme.

In Randhir Singh v Union of India, the Court read the objective of equal pay for equal work enshrined in the Directive Principles into Article 14 and 16 (1) of the Constitution. The principle relating to right to free legal aid under Article 39 A has been read into Article 21 in M M Hoskot v State of Maharashtra. Right to free and compulsory education up to the age of 14 years was read into right of life and liberty.

The Court observed that “the citizens of this country have a fundamental right to education. The said right flows from Article 21. This is, however, not an absolute right. Its content and parameters have to be determined in the light of Articles 45 and 41 … the right to education further means that

74 Olga Tellis v Bombay Municipal Corporation, All India Reporter 1986 Supreme Court 180 the court stated that The right under Article 21 is the right to livelihood, because no person can leave without the means of living i.e., the means of livelihood. If the right to livelihood were not treated as part of the Constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. There is thus a close nexus between life and livelihood. And as such that which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life; Francis Coralie v Union Territory of Delhi, AIR 1981 SC 746 the court held that “We think that the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”; Bandhua Mukti Morcha v Union of India, AIR 1984 SC 802, in addressing the right to release and rehabilitation of bonded labor, has observed that “…these are the minimum requirements which must exist in order to enable a person to live with human dignity, and no State…has the right to take any action which will deprive a person of the enjoyment of these basic essentials

75 Article 21 of the Constitution of India states that “No person shall be deprived of his life and person liberty except according to procedure established by law.”

76 All India Reporter 1978 Supreme Court 1548.

77 (1978) 3 Supreme Court Cases 544.

78 Unnikrishnan, n 68.
a citizen has the right to call upon the state to provide educational facilities to him within the limits of its economic capacity and development. By saying so we are not transferring Article 41 from Part IV to Part III – we are merely relying upon Article 41 to illustrate the content of the right to education flowing from Article 21.”

The whole gamut of environmental jurisprudence has been developed by interpreting Article 21 along with Article 48 A of the Constitution. The right to life was read including right to doctor’s assistance and shelter. In Paschim Banga Khet Majdoor Samity v State of West Bengal, the Supreme Court carved out the right to emergency medical care for accident victims as forming core component of the right to health, which in turn was recognized as forming an integral part of the right to health. The significance of this decision lies in the implicit recognition of emergency medical care as a core minimum within the larger domain of the right to health.

In Sodan Singh v NDMC, the Supreme Court had held that in view of the global development in the sphere of human rights these judicial decisions are a strong pointer towards the recognition of an affirmative right to the basic necessities of life under Article 21. In the Shantisar Builders v Narayan Khimalal Totame, the expressed that “basic needs of man have traditionally accepted to be three, food, clothing, and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For the animal it is bare protection of the body, for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect – physical, mental and intellectual.” The Court reiterated that “in any civilized society, the right to live as a human being is not ensured by meeting only the animal needs of man. It is secured only when he is assured of all facilities to develop himself and is freed from restrictions, which inhibit his growth. All human rights are designed to achieve this object. Right to life guaranteed in any civilized society implies right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights are essential for the enjoyment of the right to life.”

79 Unnikrishnan, n.78, p 765.
80 M C Mehta v Union of India, All India Reporter 1987 Supreme Court 1086.
81 Pt. Parmanand Katara v Union of India, All India Reporter 1989 Supreme Court 2039.
82 Shantisar Builders v N K Totame, All India Reporter 1990 Supreme Court 5151.
83 (1996) 4 Supreme Court Cases 37.
84 (1989) 4 Supreme Court Cases 155.
85 (1990) 1 Supreme Court Cases 520; See also, Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan, (1997) 11 Supreme Court Cases 123
Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights.\textsuperscript{86} 

In CESC Limited v Subhas Chandra Bose,\textsuperscript{87} the Court signifies importance of socio-economic justice by observing that “Right to human dignity, development of personality, social protection, right to rest and leisure as fundamental human rights to common man mean nothing more than the status without means. To the tillers of the soil, wage earners, labourers, wood cutters, rickshaw pullers, scavengers and hut dwellers, the civil and political rights are “mere cosmetic” rights. Socio-economic and cultural rights are their means and relevant to them to realize the basic aspirations of meaningful right to life. The Universal Declaration, International Covenant on Economic, Social and Cultural Rights recognize their needs which include right to food, clothing, housing education, right to work, leisure, fair wages, decent working conditions, social security, right to physical and mental health, protection of their families as integral part of the right to life. Our Constitution in the Preamble and Part IV reinforces them compendiously as socio-economic justice, a bedrock to an egalitarian social order. The right to social and economic justice is thus a fundamental right.\textsuperscript{88} 

In the case of PUCL v Union of India,\textsuperscript{89} the Supreme Court made a giant leap in matters of socio-economic rights by passing an order on the matter relating to social welfare policies. The Court expressing its concern on drought identified the area of immediate attention, “To see that food is provided to the aged, infirm, disabled, destitute women, destitute men, who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases of where they or members of the family do not have sufficient funds to provide food for them.” The States were directed to ensure that all the Public Distribution System shops were reopened and made functional. Thereafter the States were asked to identify families below poverty line in a time-bound schedule and information was sought on the implementation of various government schemes that were meant to help people cope with the crisis. Significantly, the Court made a detailed order regarding the policies of the government: ‘the benefits available under eight nutrition related schemes of the government were recognized as entitlement, all the state governments were asked to provide cooked mid-day meals for all children in government and government-assisted schools and governments were asked to adopt specific measures for ensuring public aware-

\textsuperscript{86} Chameli Singh v State of Uttar Pradesh, (1996) 2 Supreme Court Cases 549. 
\textsuperscript{87} (1992) 1 Supreme Court Cases 441. 
\textsuperscript{88} CESC, n. 84, para 30. 
\textsuperscript{89} (2001) 5 SCALE 303.
ness and transparency of the programmes.\textsuperscript{90} The Court moved in an arena of policy making by passing specific orders to the Executive.

The judiciary which started in negative note to directive principles came down as savior of it. In the aftermath of emergency, the Supreme Court carved a role for itself in Indian politics quite differently from that which it had played since independence. The Court’s path breaking decision in Minerva Mills\textsuperscript{91} was the critical moment in this transformation. The court’s metamorphosis, from an executive serving institution to that of a dynamic one poised to exercise its solemn constitutional responsibility with aplomb and imaginative realism, “was partly an aspect of the post-emergency catharsis.”\textsuperscript{92} The Court intervention facilitates viewing the Constitution as a dynamic and evolving document and not merely an expression of the desired objectives in an open-ended time frame. In the face of an inactive or indifferent legislature or executive, it compels the state and civil society to engage as active participants in the scheme for realization of ESCR.\textsuperscript{93} The judiciary has been helping millions of homeless and destitute in realizing their dreams through judicial pronouncements. The innovative method entertaining a petition by a public spirited citizen or group has been a great relief to get justice for downtrodden sections of the society.\textsuperscript{94}

D. Looking beyond the court

The judicial interpretation of relationship between fundamental rights and directives principles provided much desired recognition to socio-economic rights. The integrated approach witness up gradation of socio-economic rights in terms of enforceability, though indirectly through the channel of fundamental rights. It would not be wrong to say that the journey of the judiciary entered into such areas which were not permitted by the framers by the Constitution. Nevertheless, despite the judicial activism, the Court has not been very consistent on protecting wide range of socio-economic rights. The judicial pronouncements

\textsuperscript{90} PUCL v Union of India, (2001) 7 SCALE 484.
\textsuperscript{91} Minerva Mills, n. 51. The Court in this case held that the harmony between fundamental rights and directive principles is a basic feature of the Constitution and cannot be taken away by amendment of the Constitution.
have created structural bias in favour of civil and political rights. This could be evidenced in the way in which almost all implied rights – livelihood, environment and medical facility – have been read into Article 21 and therefore translated as a civil and political right. Having stated so, the court has reminded that the socio-economic rights are to be viewed through prism of justiciability in court of law. In this process the court enforce the rights which are recognized as fundamental rights or attempts to bring within the fold of fundamental rights. But the mere fact that the courts are unable to do anything about the principles so as long as they were principles, but could enforce them if they were fundamental rights, points out in the direction of ineffectiveness, if not inferiority, of the principles. It brings the argument that enforceability of socio-economic rights is to be perceived outside the domain of judicial institution so that their realization need not depend upon fundamental rights.

Certainly, it has frequently been highly controversial, particularly in recent cases, when it has upheld environmental claims without heeding the consequences for its traditional constituency of the poor and disposed: the workers made unemployed when a polluting industry is shut down; pavement dwellers evicted as part of an urban ‘clean up’; people dispersed by dam construction, or reluctance to intervene in the decision of the government to disinvest its share in public sector undertaking on the ground that this was in the realm of economic policy. Adjudication of competing rights is resolved by adhoc balancing, which only cheapens the value of rights. More importantly referring these conflicts to the courts continually thrusts the courts into the role of omnipotent moral arbiter … which they are neither particularly well suited to perform nor are able safely to perform.

This development inherently lacks much desired focus on socio-economic rights. The judicial mechanism has been resorted to arbiter between two competing interests of individual or groups. It has generally been witnessed that all those who are affected in the

95 The Constitution (Eighty-Sixth Amendment Act), 2002 conferred status of fundamental rights to right to education which is already a right under directive principle by inserting article 21A. It establishes the point that fundamental rights enjoy better recognition than directive principles.


98 Court on its own motion v Union of India, C W No. 4441 of 1994 and 2112 of 2002.


In giving effect to the specific socio-economic rights, the court has been consistently referring to the economic constraints of the State. Having assumed this discretion, courts have not provided sufficient guidance on the criteria for the exercise of the discretion. It is pertinent to mention that the court, in recognition of socio-economic rights, has failed to draw any minimum core of obligations required for enforcement of such rights which it is inherently incompetent to undertake also. Courts have transgressed into areas such as legislation and administrative policies which have not traditionally belonged to the judiciary. By taking on these functions, they have not always been fully aware, and which they have not had the means to balance. And at least the Indians courts have made decisions whose implementation have been problematic, and so have detracted from the efficacy of the legal process. Socio-economic rights require a process of balancing, trade-offs, elaboration of standards and negotiation. The violation of socio-economic rights is likely to vary over time and across regions. There are no simple notion certainty and fixity. There is a need to indicate the responsibilities, identify ways in which rights have been violated, suggesting frameworks within which policy has to be made and like. The process of realization of socio-economic rights involves various agencies. Hence, the initiatives of the Court are not sufficient to implement the separate rights in the group of socio-economic rights. Each right calls for delineation of issues specific to that right and formulation of separate strategies. In fact, the implementation of socio-economic rights is not feasible and possible through traditional adjudication mechanism. The real and substantial concern for socio-economic rights evaporates due to overemphasis on the judicial intervention. The legislature and the executive evade responsibility to formulate meaningful programme for fulfilling constitutional obligations. In fact, the government is constitutionally obligated to take more realistic steps for fulfillment of the socio-economic needs of individual. More so, the matter comes before the court when there is a violation of the rights, the nature of socio-economic rights warrants attention of enforcing mechanism at the threshold stage. The realization of these rights must be debated outside the judicial realm, if so desired by the Constitution makers. The dynamic nature of rights requires structuring of dedicated methods for their enforcement. The significance of the rights must not be undermined due to unenforceability in a court of law. The socio-economic rights are enforceable interest of individual. The rights are to be

backed by adequate implementation mechanism in order to justify the pledge “fundamental in the governance of the country”.

E. Enforcement of Socio-Economic Rights

The concept of enforceability is central to any legal system. Litigation has been widely accepted as means to enforce rights. The need for remedies and accountability need not be automatically equated with judicial remedies. There are many other ways in which socio-economic rights might be effectively vindicated. They include administrative remedies and legislative responsiveness to reports by human rights commission and the like. Greater flexibility and responsiveness of some of those techniques can be better suited than litigation for achieving the goals of socio-economic rights.\textsuperscript{105} The enforcement of socio-economic rights indicates adoption of legislative measures so that the right could be enforced.\textsuperscript{106} In addition, it has been suggested to undertake measures like administrative, financial, educational and social measures.\textsuperscript{107} The conceptualization of enforcement of socio-economic rights needs to be developed in order to ensure complete satisfaction of rights. Effective implementation of these rights can be ensured through ‘enforceability’ which mandated recognition of the same. It does not require specific form of direction to State but identification of denial of rights. Such denial may be remedied by varied method such as, cooperation, compensation, assurance of non-repetition and like. ‘Enforceability’ brings recognition to these rights. Redressal of violation of socio-economic rights needs to be explored through other institutional agency apart from traditional ‘judicial body’. The enforcement of socio-economic rights must cover these aspects, firstly, recognition of rights in measures like legislative or policies and programmes, secondly, identifying minimum core obligations to measure violation of obligations of the State and thirdly, progressive steps to be taken for complete realization. Socio-economic rights warrant continuous monitoring of the implementation of policies in place for realization of such rights. The violation of rights may be successfully cognizable by the judiciary; the non-implementation of rights may not be adequately addressed due to involvement of other players in complete realization. The complete realization requires observance of rights, other than find-breaches of rights. The enforcement involves supervisory functions, identification of indicators, interpretation and applications of norms in implementation of rights. There is a need to review the indicators considering the level of development achieved by a constituency. The


\textsuperscript{106} General Comment No. 3, para 3, E/1991/23.

\textsuperscript{107} General Comment, n. 102, para 8.
adjudication in form of writs is not fit for these rights. The court might have succeeded in issuing direction to the state to contain violation of the rights, but it would be also necessary to take effective measures to ensure non-repetition of violations. The need of independent experts in understanding complexities of socio-economic rights indicates introduction of a tailored made institution which should capable of analyzing statistics and suggest necessary measures in case of violation of rights. The realization of socio-economic rights necessarily implies complete satisfaction of right. The tripartite obligation indicates about duty of State in relation of complete fulfillment of rights. The Court may succeed in enforcing the duty to respect and to protect, to some extent. But to promote constitutes essential element of obligation, particularly for those who are deprived and disadvantaged. The weak judicial determination will lack realization of socio-economic rights – that their coming into being as a real world phenomenon. Thus, the significance of socio-economic rights cannot be mortgaged to weak judicial remedy. The importance of obligation of ‘to fulfill’ cannot be negated due to incompetency of Court in ordering priorities. Hence, it would be better to entrust the responsibility of monitoring tripartite obligation of State in relation to socio-economic rights to an institution which can effectively and efficiently enforce it.

F. Enforcement Commission and Socio-economic rights

The debate on socio-economic rights indicates need of an independent Commission for Enforcement of Socio-Economic Rights (CESER) capable of addressing all the questions pertaining to nature and realization of rights. The CESER deserves constitutional status due to the nature of function to be entrusted to it. The significance and role of the CESER cannot to be undermined by political compulsions of the day. The CESER will address the concern of rights in order to define precise obligation of the state and non-state players.

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110 The idea of institutionalizing a Commission to enforce socio-economic rights is of authors. The strength has been drawn for such institution from emergence of many regulatory or other institutions to regulate the market in the present era. Therefore, it is argued to establish an institution to enforce socio-economic rights. See also, M P Singh, Directive Principles of State Policy in the Constitution of India, in B V Lal and T R Vakotra, Fiji and the World, Vol. 2, Suva, 1997, p 269 where he has argued that “In my view independent machinery similar to the human rights commissions at the national levels and state levels to monitor the implementation of the DPs is necessary.” Prof. M P Singh argues strengthening of existing National and State Human Rights Commissions in order to enforce these rights.
This could involve a formal process for assessing the evolving notion of what constitutes minimum basic needs within the distinct national context as the basis for determining the scope of the rights and setting benchmarks, which could potentially connect to an international forum for comparative discussions. Effective implementation of socio-economic rights requires identification of core content of rights in order to delineate specific obligation of duty-holders. Identification of core content involves deliberations with various branches of government. Collaborative and cooperative approach of all the wings of State through this CESER will help in developing indicators necessary to identify minimum threshold to lead a decent life. Such indicators must be drawn on the consideration of requirement of decent life and not on available resources with the state. The CESER will engage in analysis and lobbying to influence the design of systems of services so the State fulfills the right at stake. It will advocate for the resources essential to fulfill socio-economic rights. And it should also monitor state activities regarding specific obligations to assure and ensure preventive, prohibitive and corrective steps. The identification of minimum core content of rights and core obligations will not be an end of the obligation of the State. It will be only the initiating point of implementation of rights. It will be construed as springboard for further action of the state. It should be seen as a bottom or floor from which states should endeavour to go up. It will play a very instrumental role in observing compliance with the socio-economic goals by the State. Ultimately, it can effectively provide tool to monitor violation of socio-economic rights which will strengthen enforceability of rights. The review of the legislative and the executive action of compliance of directive principles, socio-economic rights in particular, is not only appropriate but also necessary in order to honor the commitments of constitutional values embedded in the Preamble.

G. Conclusion

Emphasis on socio-economic rights underscores the essential importance of human needs and values, which are often overlooked or undervalued in political and economic decision making. Highlighting those rights not only is individually empowering, but unquestionably helps (and inevitably pressures) governments in protecting and promoting those rights, giving them priority, and internalizing the relevant norms. The constitutionalisation of socio-economic rights in the Indian Constitution was well-thought exercise by the framers of the Constitution. The framers of the Constitution provided that the state not only not to violate the civil and political rights of the people but also to take affirmative action for the realization of social and economic rights necessary for the enjoyment of the former. Had

they not done so the Constitution and the rule of law on which it is based and which it promotes would have failed even before take off. \textsuperscript{112} They were convinced of the fact that the true realization of socio-economic rights, engraved in the large pool of directive principles, will make social parity and economic prosperity a reality which will ensure every Indian a dignified life. It is apt to quote that at the time of adoption of the Constitution Dr. Ambedkar (Chairman of the Drafting Committee of the Constitution), had warned the Assembly that the political democracy envisaged in the Constitution could not last long if the economic and social democracy were not brought. \textsuperscript{113} The judicial contribution regarding socio-economic rights in India (with whatever limitation) is a tribute to the conviction of framers of Indian Constitution for incorporating socio-economic rights as its integral part. The mark of struggle of independence and values of Indian society is evident in structuring of fundamental rights and directive principles. They are based on premise of non-negotiable principle. Judicial pronouncements, certainly, have brought the debate of realization of rights to the fore and reminded the stakeholders about importance of socio-economic rights in discourse of human rights. However, inherent limitation of judicial institution in dealing with realization of socio-economic rights brings need of institutionalizing alternative mechanism to undertake enforcement of these rights. The constitutionization of suitable institution to enforce these rights is a need of the hour.

“Poverty is far more inhuman than torture itself” – the statement speaks volumes about the effects of neglect of socio-economic rights in society. The denial of social and economic aspect of life will result in deprivation of mental and physical well-being to individual. Generation after generation will disappear in the absence of realization of subsistence needs of individual. The foundation of just and egalitarian society is based on assurance of enjoyment of dignified life. Non-realization of social and economic needs of individual as a matter of rights will jeopardize the survival of principles of constitutionalism.


\textsuperscript{113} Shiva Rao, n.2, Volume IV.
What’s the use of socio-economic rights in a constitution? –
Taking a look at the South African experience

By Mirja Trilsch, Montreal

1. Introduction

“Our Constitution protects the weak, the marginalised, the socially outcast, and the
victims of prejudice and stereotyping. It is only when these groups are protected
that we can be secure that our own rights are protected.”

Over the last 15 years, South Africa has become a role model for the domestic implementa-
tion and enforcement of constitutionally enshrined socio-economic rights. While drafting
what is nowadays considered to be the most progressive constitution of modern times,
South Africa chose to translate its aspirations for social justice and social welfare into
justiciable constitutional guarantees. Protecting the weak, the marginalised and the socially
outcast thus became a matter of constitutional rights: housing, health care, food, water and
social security.

As far as socio-economic rights are concerned, it can safely be said that the constitu-
tional development in South Africa defied all odds. Not only have these rights traditionally
been considered to be non-justiciable, they also seemed irreconcilable with British constit-
tutionalism and its core element, that is, parliamentary sovereignty as previously cham-
pioned in South Africa. Moreover, South Africa was and remains a country facing numer-
ous economic and social challenges and therefore hardly appeared to be able to fulfill the
costly demands expected to originate from social rights litigation.

The present article is intended to provide a general understanding of the socio-eco-
nomic rights contained in the South African Constitution. To this end, it will review the
historical developments leading to their inclusion, the wording of the relevant provisions as
well as their judicial interpretation by the Constitutional Court. It will also explain how the

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1 Hoffmann v South African Airways, 28 September 2000, Case CCT 17/00, 2001 (1) SA 1 (CC),
2000 (11) BCLR 1211 (CC), para. 34.
2 In fact, ever since the adoption of the Interim Constitution of the Republic of South Africa, Act
text of the Constitution in its current version after the Sixteenth Amendment Act of 2009 is avail-
able on the website of the Constitutional Court of South Africa (www.constitutionalcourt.org.za/
site/theconstitution/thetext, last visited 09/2009).
Court has ventured into developing a methodology for reviewing governmental compliance with the Constitution’s socio-economic guarantees. This constitutes a novelty in human rights jurisprudence and invites some reflection on the question of what is, after all, the issue with socio-economic rights in a constitution.

2. The inclusion of socio-economic rights in the South African Constitution

2.1. Background

While most national constitutions bear some amount of evidence of their country’s past, this is particularly true for the South African Constitution, which must be observed in light of the era of Apartheid preceding its adoption and the decades-long struggle to overcome this oppressive regime. Its preamble attests to the people’s desire to “[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.”

The drafting of this Constitution, however, presented quite a challenge in relation to the country’s pre-existing trauma, which made the transparency of the drafting process and the legitimacy of the document resulting from it, of paramount importance.

The making of the Constitution, therefore, was not a singular act, but consisted in a prudent exercise sometimes referred to as “transformative constitutionalism.” It was marked by an intermediate stage involving the inauguration of an interim Constitution, and two core safeguards to ensure that the substance of the final Constitution lived up to its intended standard: the so-called Constitutional Principles and the Certification Procedure. The former Principles were contained in Annex IV of the Interim Constitution and were meant to provide a general framework of thirty-four politically negotiated principles that had to be represented in the final Constitution. During the Certification Procedure, the newly appointed Constitutional Court was then charged with the task of verifying whether the final draft violated any of the Constitutional Principles.

The Certification Procedure proved to be the first judicial test for socio-economic rights under the new constitutional order. Prior to this, socio-economic rights were the subject of a political dispute and the question of their justiciability quickly became a major issue of

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4 The Interim Constitution of 1993, supra, note 2, contained a chapter devoted to “National Unity and Reconciliation” which opened with the terms: “This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”


6 Supra, note 2.
debate. During the drafting of the final text, an extensive public participation programme was convened, aimed at giving ordinary citizens a say in the shaping of the Constitution.\footnote{Sandra Liebenberg, South Africa’s evolving jurisprudence on socio-economic rights, online: www.communitylawcentre.org.za/Socio-Economic-Rights/research/socio-economic-rights-jurisprudence/evolving_jurisprudence.pdf, p. 2.} While many civil society organisations and most political parties campaigned for the recognition of these rights as enforceable rights, some legal scholars flatly rejected the idea.\footnote{Richard A. Epstein, Drafting a Constitution: A Friendly Warning to South Africa, American University Journal of International Law and Policy 8 (1993), p. 567-577; D. M. Davis, The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights except as Directive Principles, South African Journal on Human Rights 8 (1992), p. 475-490.} It was argued that these rights had no place in a constitution, first because they were political in nature and thus too vague to be the subject of adjudication, and second because they implied costly budgetary decisions over which the judiciary had no legitimate competence, according to the principle of the separation of powers.\footnote{Epstein, note 8, 568. As some authors rightly pointed out, these arguments were often driven not so much by scepticism for the constitutionalization of social rights, but rather by scepticism for constitutionalism as such; see Craig Scott/Patrick Macklem, Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a new South African Constitution, University of Pennsylvania Law Review 141 (1992), p. 17.} There was also a certain amount of concern for the stability of the Constitution, because if constitutionally enshrined rights turned out to be non-enforceable by the courts, this would have the potential to devalue the entire instrument.\footnote{Davis, note 8, 484.}

In the end, these concerns did not outweigh the fact that the struggle against apartheid and for democracy in South Africa had not simply been an appeal for civil and political rights for the African majority, but as much a call for equal opportunities and for freedom from hunger, poverty, landlessness and homelessness.\footnote{Eric C. Christiansen, Adjudicating non-justiciable rights: socio-economic rights and the South African Constitutional Court, Columbia Human Rights Law Review 38 (2007), p. 328 with further references.} Hence, among the general population, it was felt that the final Constitution’s aspirations for social justice needed to translate into binding legal guarantees with a view to rectifying existing social and economic inequalities. As a result, the final Constitution features express constitutional rights of a socio-economic nature, the core of which can be found in sections 26 to 29 (housing, health care, food, water, social security, children’s rights and education).

The political decision to include socio-economic rights as justiciable rights in the South African Constitution was subsequently approved by the Constitutional Court in its First
To begin with, the Court overruled objections relating to the separation of powers. Although it conceded that the adjudication of socio-economic rights may have budgetary implications, the Court pointed out that the enforcement of civil and political rights often had such implications as well and that “it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers”. Furthermore, the Court responded to concerns over the justiciability – or rather the supposed lack of justiciability – of the constitutional provisions on socio-economic rights, affirming that “these rights are, at least to some extent, justiciable” and that, at the very minimum, they could be “negatively protected from improper invasion”. The Certification Procedure thus attested to the legitimate presence of socio-economic rights in the final text of the Constitution which entered into force in 1997.

2.2. The provisions on socio-economic rights in the South African Constitution

The South African Bill of rights is not divided into distinct chapters dealing with different types of rights, and does not label rights according to specific categories. Therefore, the first question that arises, is which rights can properly be qualified as “socio-economic rights”. According to the Constitutional Court, such rights are contained in section 26, pertaining to the right to access to adequate housing, section 27 on the right to access to health care, food, water and social security, section 29 relating to the right to education, as well as section 28 which provides such rights specifically to children. Like most other rights in the Bill of rights, they are generally formulated in terms of “Everyone has the right to …” before laying down specific elements for each right. Some of these specific features are framed in negative terms, such as the prohibitions on the refusal of emergency medical treatment (section 27 (3)), and on home evictions without a court order (section 26 (3)). However, these two provisions also expressly acknowledge certain positive obligations with respect to the socio-economic rights guaranteed. Subsections (2)
of sections 26 and 27 each provide that “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.” Accordingly, these subsections create inherent limitations on the fulfillment of the positive obligations resulting from these rights: they are “qualified” by reference to reasonable measures, progressive realisation and resource constraints. Such qualifications are no novelty for social and economic rights, as the drafters of the Constitution clearly drew inspiration from article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Although only sections 26 and 27 contain specific language pertaining to positive obligations, this does not mean that the State’s obligation to take positive measures does not extend to the other rights provided for in the Bill of rights, even if these do not explicitly require that positive measures be taken. Section 7 (2) of the Constitution states that “The state must respect, protect, promote and fulfil the rights in the Bill of rights,” and thus establishes positive as much as negative obligations for every right guaranteed, irrespective of the category of rights to which it is attributed. Insofar, the Constitution once more borrowed from international human rights law by incorporating the concept of “respect, protect, fulfill”, as employed by the United Nations treaty bodies.

Finally, the Bill of rights provides for a general limitation clause in section 36, which applies indiscriminately to all rights guaranteed and according to which “The rights in the Bill of rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on

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16 Liebenberg, note 7, p. 5; Fons Coomans, Reviewing Implementation of Social and Economic Rights: An Assessment of the “Reasonableness” Test as Developed by the South African Constitutional Court, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 65 (2005), p.170; however, Coomans considers the rights as such to be qualified whereas it is in fact only the positive dimension of these rights that is subject to the said qualifications, see Jaftha v Schoeman and Van Rynev v Stoltz, Case CCT 74/03, 2005 (2) SA 140 (CC), 2005 (1) BCLR 78 (CC) [hereinafter: Jaftha], para. 31.
17 International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 U.N.T.S. 3 [hereinafter: ICESCR]. Article 2 (1) reads: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Inexplicably, the ICESCR remains the only major human rights treaty that South Africa has failed to ratify until this day; cf. Liebenberg, note 7, p. 2.
19 See, for example, Committee on Economic, Social and Cultural Rights, General Comment No. 19, The right to social security (art. 9), 4 February 2008, U.N. Doc. E/C.12/GC/19, para. 43ff.
human dignity, equality and freedom”. Since the positive obligations under sections 26 and 27 are subject to specific qualifications, section 36 will normally be invoked only in the context of the negative dimension of the rights in question. 20

All elements considered, the Constitution provides a general framework for socio-economic rights that is formulated entirely in abstract terms and which does not clarify the content of these rights. For example, whether the term “adequate housing” signifies anything more than shelter, in the form of a roof over one’s head, can in no way be derived from the wording of section 26. Likewise, the Constitution does not define what should be considered a “reasonable measure” within the sense of subsections 26 (2) and 27 (2). It has thus been left to the courts to explore the reasoning of these broad provisions and to specify their meaning through constitutional interpretation. What has ensued from this exercise is a body of jurisprudence that is unparalleled in both its ambition and its accomplishments.

3. The judicial protection of socio-economic rights in South Africa

Since 1997, the case law on socio-economic rights in the South African Constitution has continuously gathered momentum and has attracted considerable attention even beyond the country’s borders. While the number of cases dealing with these rights grows steadily, the three judgments of the Constitutional Court which will be analyzed in this section are considered to be the leading cases on socio-economic rights. These cases – Soobramoney, Grootboom and Treatment Action Campaign – may be characterized as a “landmark trilogy” which displays a distinctive narrative that draws a timeline from the infancy to the early adulthood of socio-economic rights jurisprudence, the latter phase being characterised by a discernible methodological maturity in the adjudication of these rights.

3.1. The trilogy of landmark cases

3.1.1. Soobramoney v Minister of Health (KwaZulu-Natal) 21

The very first case concerning socio-economic rights to come before the Constitutional Court, in 1997, dealt with the right to have access to health care (section 27) 22. The appel-
lant, Mr. Soobramoney, was an unemployed man with chronic kidney failure who was in need of regular, life-prolonging dialysis treatment. The state hospital in Durban denied him treatment because of scarce resources which, according to the hospital’s guidelines, were to be used to treat patients waiting for kidney transplants. Mr. Soobramoney also suffered from heart disease and cerebro-vascular disease, and was thus not eligible for a transplant, which precluded him from receiving dialysis treatment. In his appeal to the Constitutional Court, he asked for the hospital to be ordered to provide the treatment to extend his life, relying mainly on section 27 (3) which states that “[n]o one may be refused emergency medical treatment.”

The Court dismissed this argument, holding that the appellant’s chronic condition did not constitute an “emergency” in the sense of section 27 (3) but an ongoing state of affairs due to an incurable condition. Although the appellant’s submission did not address the question, the Court went on to probe whether section 27 (1), pertaining to the right to have access to health care services, could provide a basis for his claim. However, given the large margin of discretion granted to the state for the setting of budgetary priorities, the Court found that the hospital was justified in drawing up guidelines for determining which patients would get treatment, asserting that “[a] court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.” Consequently, the Court declined to order the remedy sought by Mr. Soobramoney.

There can be no doubt that high expectations weighed heavily on the shoulders of the Constitutional Court when it rendered its first judgment relating to socio-economic rights, and for the most part, these expectations were not met. While there was little to disagree about in the result of the judgment, that is, the refusal to order the provision of treatment, much criticism has been aimed at the Court’s reasoning and the language it employed. For instance, the Court’s willingness to defer to the political level of decision-making seemed to be in opposition not only to the Constitution’s commitment to judicially enforceable

c. social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.
3. No one may be refused emergency medical treatment.”

23 Ibid., para. 21.
24 Ibid., para. 29.
rights, but also to the Court’s proper analysis in the First Certification Judgment, where it was argued that budgetary decisions could legitimately be taken by courts whenever the adjudication of rights so required. As a result of this deference, the Court abstained from determining the extent of resources available to the state. Instead, the ruling suggested that “available resources” were whatever resources the state asserted to be available to it. Moreover, the Court was wary of the task of weighing specific socio-economic shortcomings against the constitutional standard of socio-economic rights, arguing instead that in the light of the multitude of problems to address, a “holistic approach to the larger needs of society” was preferable to focussing “on the specific needs of particular individuals.”

The central motive behind this approach was revealed in the concurring opinion of Madala J: “Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality should embark upon.” This language suggests that the Court was unable to distance itself from the classic preconception of a dichotomy between the two categories of human rights, that is, civil and political rights on the one hand and economic, social and cultural rights on the other. As a consequence, it conceived socio-economic rights as directive principles rather than as what the Constitution intended them to be, namely justiciable rights.

In sum, numerous questions remained unresolved after Soobramoney. The Court’s deferential approach gave rise to the concern that socio-economic rights were not taken seriously and the fact that the appellant died within days of learning about the results of the ruling only exacerbated this concern.

28 Charles Ngwena, Adjudicating socio-economic rights – Transforming South African society?: A response to Linda Jansen van Rensburg’s paper, Potchefstroom Electronic Law Journal 6 (2002), p. 3, online: http://ajol.info/index.php/pelj; Christiansen, note 11, p. 362, however, sees this differently, submitting that the Court had, in fact, reviewed “the actual evidence of the financial status of the hospital”, but this assertion is not corroborated by the judgment itself.
29 Soobramoney, note 21, para. 31.
30 Ibid., para. 42.
31 Ngwena, note 28, p. 4.
32 Christiansen, note 11, p. 364.
3.1.2. Government of the Republic of South Africa v Grootboom

Three years after Soobramoney, the Constitutional Court was again called to decide a case on socio-economic rights, this time involving the right to access to adequate housing as provided for by section 26 of the Constitution. The case is named after Irene Grootboom, who was part of a group of 900 squatters (which included 390 adults and 510 children), who had decided to unlawfully occupy a piece of private land after leaving an informal settlement due to intolerable hygiene conditions and were waiting to be allocated low-cost housing. The owner of the land pursued their eviction, following which the group camped out in a sports field under plastic sheeting. Consequently, an urgent application for an order requiring the government to provide them with “adequate basic temporary shelter or housing” was filed on their behalf before the Cape of Good Hope High Court. Their complaint relied upon section 26 (1) and – as far as the children in the group were concerned – upon section 28 (1)(c), which states that “Every child has the right - c) to basic nutrition, shelter, basic health care services and social services”. It proved to be successful at least insofar as the High Court ordered the government to provide shelter for the children, and the parents accompanying them. The Constitutional Court, however, reached quite a different conclusion and dismissed the claim under section 28. It based its reasoning solely on section 26, and concluded that the government’s housing programme “fell short of the obligations imposed upon the state by section 26 (2) in that it failed to provide for any form of relief to those desperately in need of access to housing”.

33. Government of the Republic of South Africa and others v Irene Grootboom and others, Case CCT 11/00, 2001 (1) SA 46 (CC) [hereinafter: Grootboom].
34. Section 26 provides:
   1. Everyone has the right to have access to adequate housing.
   2. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
   3. No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”
35. Ibid., para. 13.
36. Ibid., para. 16; for a summary of the High Court judgment, see Karrisha Pillay/Sandra Liebenberg, Grootboom v Oostenberg Municipality and Others Economic and Social Rights Review 2 (No. 3) (2000), p. 17.
37. Grootboom, note 33, para. 95.
resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing”. 38

The Constitutional Court’s judgment in Grootboom is noteworthy in several respects. The Court took an outright approach to the question of whether socio-economic rights were justiciable. Recalling the observations about justiciability in the First Certification Judgment, the Court explained that “[t]he question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.” 39 This standpoint set the stage for an interpretative analysis of the right to access to adequate housing and its inherent qualifications relating to reasonable measures, available resources and progressive realisation. The Court somewhat conflated these three elements into a single methodological test for the fulfillment of the state’s positive obligations, the so-called “test of reasonableness”. 40 Based on this test, the Court examined whether the measures taken by the state in relation to the situation of the squatters, notably the state’s housing programme, lived up to the constitutional requirements, which were detailed as follows: first, in order to pass the “test of reasonableness”, a programme must be comprehensive, coherent, coordinated and capable of facilitating the realisation of the right; second, it also has to be balanced and flexible and appropriate for short-, medium- and long-term needs. Third, a reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that financial and human resources are available. Fourth, it must be reasonably formulated and implemented and it must provide for the needs of those most desperate by providing relief for people who are living in intolerable or crisis situations. 41 It was this last criterion which the state’s housing programme failed to fulfill because it left out of account “the immediate amelioration of the circumstances of those in crisis” 42 and thus did not show that the state was meeting the positive obligations imposed on it by section 26 (2). As a result, the government was ordered to revise its housing programme, 43 however no order was issued to directly provide the plaintiffs with relief.

38 Ibid., para. 99.
39 Ibid., para. 20.
40 Ibid., para. 44; see also Christiansen, note 11, p. 366 on the fact that the Court somewhat abandoned the availability of resources and the progressiveness as separate legal requirements of section 26 (2). At para. 46 of the judgment, the Court explicitly explained that “the availability of resources is an important factor in determining what is reasonable.”
41 Grootboom, note 33, paras. 40-44.
42 Ibid., para. 64.
43 However, no specific time frame within which the state had to act was imposed with the result that little visible change was achieved, see Dennis Davis, Socio-economic rights in South Africa,
In many ways, the *Grootboom* judgment managed to make up for the shortcomings of *Sooabramoney*. Instead of watering down the right to have access to housing to a general aspiration to be strived for, the Court took this right for what it is: a constitutional right to be enforced by the courts. As a consequence of this change in mindset, the Court’s reasoning in *Grootboom* was clearly concerned with methodological considerations and went beyond the application of section 26 to the case at hand by developing an analytical framework for the adjudication of socio-economic rights. *Grootboom* thus became the leading precedent for all subsequent claims based on the socio-economic rights provided for in the Constitution.

3.2. Minister of Health vs Treatment Action Campaign

Completing the “landmark-trilogy” was a case initiated by the advocacy group Treatment Action Campaign, among other organisations, often referred to as the *Nevirapine case*. It concerned the government’s policies with respect to HIV/AIDS, more specifically those relating to mother-to-child-transmission of HIV at birth. The programme that was being challenged regulated the administration of the anti-retroviral drug Nevirapine, which is known to prevent the transmission of the virus during birth through a single dosage and which had been made available to the government by the manufacturer free of charge for a period of five years. The government had decided to limit access to the drug to a number of research and training sites, thus effectively blocking the coverage of 90% of all affected births nation-wide. Before the Constitutional Court, Treatment Action Campaign argued that this programme violated section 27 (1)(a) of the Constitution, the right to have access to health care services, including reproductive health. The case succeeded on all accounts, and the orders sought by the applicants were granted substantially in the terms sought.

Drawing on its judgment in *Grootboom*, the Constitutional Court relied on the “test of reasonableness” to decide that the programme which restricted the use of Nevirapine to the pilot sites, as well as the absence of a comprehensive and coordinated programme to combat mother-to-child-transmission, constituted breaches of the state’s obligations under

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46 *Supra*, note 22.
47 *Liebenberg*, note 7, p. 22.
section 27 (2). As a result, government was ordered to remove the restrictions and to devise and implement a more adequate programme to tackle the issue.  

The judgment in Treatment Action Campaign marked the end of all judicial debates about the justiciability of the socio-economic rights under the South African Constitution. The Constitutional Court in fact set off its reasoning with an unequivocal observation in this regard: “The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.”49 Having once and for all removed this traditional stumbling block for the adjudication of claims based on socio-economic rights, the Court devoted the core of its judgment to the examination of the criteria of “reasonableness” as laid out in Grootboom. It found that there was no justification for withholding a potentially life-saving drug from those who relied on the public health care system, most often due to poverty.50 Furthermore, given the fact that the entire governmental strategy with respect to mother-to-child-transmission of HIV was intricately linked to the conduct of research at the pilot sites, the Court could not help but conclude that the programme as a whole failed the “test of reasonableness” and had to be replaced with one that was in conformity with the state’s obligations under the right of access to health care.51

Although it was only the third judgment the Constitutional Court had handed down in the field of socio-economic rights, Treatment Action Campaign also marked the beginning of a profound doctrinal debate about an appropriate methodology for adjudicating socio-economic rights. While the Court was consistent in its application of the “test of reasonableness”, it did not significantly advance the methodology employed in Grootboom. This did not go unnoticed amongst scholars and many have criticised the Court’s reasoning on the basis of this lack of innovation.52 The following section will outline the main achievements of the South African jurisprudence on socio-economic rights as well as take up some of the criticism – and the constructive proposals – that have emerged from these cases.

48 Treatment Action Campaign, note 45, para. 135.
49 Ibid., para. 25. It would appear that the issue of justiciability of socio-economic rights was never again raised in the judgments of the Constitutional Court.
50 Ibid., para. 80.
51 Ibid., para. 95.
52 See, for example, David Bilchitz, Placing basic needs at the centre of socio-economic rights jurisprudence, Economic and Social Rights Review 4 (No. 1) (2003), p. 2; Mark Heywood, Contempt or compliance? The TAC case after the Constitutional Court judgment, Economic and Social Rights Review 4 (No. 1) (2003), p. 7.
3.3. Achievements and drawbacks of the South African case-law on socio-economic rights

Ever since the Constitutional Court’s judgment in Treatment Action Campaign, the South African jurisprudence on socio-economic rights has moved from novelty to normality. Subsequent cases in this field have not generated nearly as much attention as the three landmark cases presented above and the more recent judgments by the Constitutional Court have not substantially altered the methodological approach to socio-economic rights. The “test of reasonableness” in particular has remained unchanged. Some methodological issues not previously addressed in Grootboom and Treatment Action Campaign and unrelated to the “test of reasonableness” did, however, present themselves, such as the question of equality in the context of socio-economic rights and the limitation of the negative obligations resulting from these rights. The right to have access to adequate housing has been at the center of the later case law, with general considerations about the nature and meaning of socio-economic rights having become increasingly rare.

This may soon change, however, as a highly publicised case concerning the right to have access to water – commonly referred to as the Phiri water case – is currently before the Constitutional Court. The judgment in this matter is eagerly awaited amongst scholars and activists because it presents an opportunity to further develop the framework for socio-economic rights. The case concerns the question of whether the state has a duty to provide free water to its citizens and whether the instalment of pre-paid water meters is a measure that is in conformity with the Constitution’s guarantees. Not only has the Constitutional Court never pronounced itself on the right to water, the Supreme Court of Appeal’s judg-

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53 Khosa and Others v The Minister of Social Development and Others, Case CCT 12/03, 2004 (6) BCLR 569 (CC).
54 Jaftha, note 17.
55 President of the Republic of South Africa and Others v Modderklip Boerdery (Pty) Ltd and Others, Case CCT 20/04, 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC); Port Elizabeth Municipality v Various Occupiers, Case CCT 53/03, 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC); Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others, Case CCT 24/07, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (CC), [2008] ZACC 1.
56 The case is registered as Mazibuko and Others v City of Johannesburg and Others, Case CCT 39/09. The appeal against the judgment of the Supreme Court of Appeal – City of Johannesburg v L Mazibuko (489/08) [2009] ZASCA 20 [hereinafter: Mazibuko] – was heard by the Constitutional Court on 2 and 3 September 2009. For a case review of the judgment of the Supreme Court of Appeal, see Jackie Dugard/Sandra Liebenberg, Muddying the waters, The Supreme Court of Appeal’s judgment in the Mazibuko case, Economic and Social Rights Review 10 (No. 2) (2009), p. 11.
ment in the matter also indicates that the highest court will have to address some fundamental questions relating to the progressiveness of socio-economic rights and to the appropriate margin of discretion granted to the authorities when allocating fundamental goods and services.

The current state of the case law and its future relevance for cases such as the Phiri water case invites the question whether the development of the socio-economic rights jurisprudence has taken the right direction. Amongst the many aspects that could be dealt with in this respect, the following discussion will elaborate on three in particular: (a) the merits and the pitfalls of the “test of reasonableness”, (b) the coherence between the South African approach to socio-economic rights and the conception under international law, and (c) the impulse this case law has given to comparative analyses in the field of constitutionally enshrined socio-economic rights.

3.3.1. The test of reasonableness

While having become a recurrent element in socio-economic rights jurisprudence, the “test of reasonableness” is still a rather recent concept. As Liebenberg notes, the application of the doctrine of separation of powers and the extent to which the courts are willing to intervene in socio-economic policy matters remains a highly contested terrain. Reasonableness review has not fulfilled the herculean task of drawing a clear-cut line between these competing interests. However, it does touch upon both of them, because it not only operates as a standard of scrutiny for the courts to assess governmental conduct, but also as a standard for the government to conduct policy and draft legislation. In this sense, the Constitutional Court has created a flexible tool for the adjudication of claims based on socio-economic rights, which allows the government to frame its legislation according to the criteria set out by the Court. Some of the test’s elements come close to threshold requirements, most notably the obligation to cater to those whose needs are most urgent, which played a role in both Grootboom and Treatment Action Campaign.

The positive and negative obligations under the socio-economic rights provisions of the Constitution, notably under sections 26 and 27, are subject to different types of limitations. Judicial review of the negative obligations does not rely on the “test of reasonableness”, but

57 Liebenberg, note 7, p. 23f.
on the Constitution’s general limitations clause (section 36). However, it may be argued, that the fundamental principles lying at the heart of the “test of reasonableness” correspond with the notions that form the basis for the general limitations clause. Just like the general limitations clause, the “test of reasonableness” endorses the idea of government having to justify its policy choices. Also, it is designed to be sensitive to the historical and social context in South Africa and places great importance on taking into account the inherent dignity of all human beings in the evaluation of the reasonableness of state action. As the Court put it in Grootboom, “[t]he Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with housing is determined without regard to the fundamental constitutional value of human dignity. […] [H]uman beings are required to be treated as human beings.” In a more general sense, it may be said that the different elements which make up the “test of reasonableness” overall, are all inspired by fundamental constitutional values, such as human dignity, good governance or social justice. The criterion of reasonableness is therefore not an autonomous concept. “Reasonable” more precisely means “constitutionally reasonable” or “reasonable in the light of the Constitution”, which makes it a legitimate standard for reviewing the actions of a state that is, in any case, bound by such constitutional values. In sum, it can be said that the “test of reasonableness” is in fact a variation of the general limitations clause, namely one that is adapted to the review of positive obligations.

However, the success of the “test of reasonableness” in rendering socio-economic rights enforceable has also been one of the weaknesses of this jurisprudence, in some respects. As some authors have noted, the Court’s fixation on reasonableness review has had an adverse effect on the determination of the content of the rights in question. While Grootboom did contain some insights about what constitutes “adequate housing” in the sense of section 26

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60 Supra, note 20 and corresponding text.
61 Grootboom, note 33, para. 83.
of the Constitution, the Court’s judgment in *Treatment Action Campaign* completely omitted this initial step of defining the specific interests protected by the right to access to health care services. Such criticism had previously been aimed at the Court’s reasoning in *Soobramoney*, where the substance of the right to health care services was not examined, albeit for different reasons than in *Treatment Action Campaign*. The problem with the lack of interpretation of the rights concerned is the fact that it tends to misconstrue the meaning and purpose of socio-economic rights. Their primary purpose is not to identify insufficiencies in the justification of state measures. What is relevant for the adjudication of these rights in general, are those measures that touch upon fundamental individual interests. Yet, a governmental programme can be unreasonable without necessarily interfering with the constitutionally enshrined rights of individuals. The sole focus on reasonableness review tends to translate into an objective type of standard that is not supposed to be at the centre of rights adjudication. It may be argued that *Treatment Action Campaign* was not a case which necessitated lengthy considerations about the meaning and content of the right to access to health care services, since tolerating that newborns be infected with a deadly virus constituted such a flagrant breach of this right. However, a short clarifying remark by the Court in this regard could have offered some useful orientation for future cases.

3.3.2. The South African case law in the light of international human rights law

One of the particularities of the South African Constitution is its relationship to international law. Several provisions explicitly address the role that international law is to play in the interpretation of the Constitution. Among the general provisions set out in chapter 14, an entire sub-title “International Law” consisting of three sections addresses the binding force of international agreements and customary international law as well as their domestic application. Section 233 provides that a tribunal must always give preference to an interpretation of the law which is consistent with international law. In addition, the Bill of rights provides for a distinct provision on the consideration of international law in the interpretation of the rights guaranteed. Section 39 states that, when interpreting the Bill of rights, courts must consider international law. This includes binding as much as non-binding

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63 See *Grootboom*, note 33, para. 35 in which the Court declares that adequate housing “requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself.”

64 *Scott/Alston*, note 26, p. 249ff.

65 The complete wording of section 39 (1) is as follows:
“...When interpreting the Bill of Rights, a court, tribunal or forum—
  a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
international law.\textsuperscript{66} The Constitution itself thus creates an interconnectedness between the Bill of Rights and international human rights law, which is certainly due to the fact that most of its provisions on substantive rights are clearly inspired by international conventions in this field. The socio-economic rights in the Constitution are no exception in this respect.\textsuperscript{67}

Against this framework, it is somewhat surprising that the Constitutional Court’s methodology for socio-economic rights falls short of the international parameters for dealing with economic, social and cultural rights. In \textit{Grootboom}, the Court duly fulfilled its task of consulting the relevant international norms, most notably the ICESCR and its interpretation by the competent treaty monitoring body, the Committee on Economic, Social and Cultural Rights.\textsuperscript{68} Nevertheless, it clearly and explicitly departed from one of the key concepts advanced under international law, namely the so-called “minimum core obligations”. According to the Committee, the ICESCR obliges states to ensure the satisfaction of minimum essential levels of each of the rights, \textit{prima facie} without regard to resource constraints.\textsuperscript{69} In both \textit{Grootboom} and \textit{Treatment Action Campaign} it was argued that the same approach should be adopted in the context of sections 26 (2) and 27 (2) of the South African Constitution, given their resemblance with art. 2 (1) of the ICESCR. The Court however refused to embrace this concept, claiming at first that it did not have sufficient information to determine what would comprise the minimum core obligation in the context of the Constitution \textsuperscript{70} and later indicating that it was impossible to give everyone access to a core service immediately.\textsuperscript{71} There was also a certain measure of deference involved in the Court’s stance, as evidenced by its assertion that “the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards […] should be.”\textsuperscript{72} The “minimum core” thus became one factor

\textsuperscript{66} S v Makwanyane and Another, Case CCT 3/94, 1995 (3) SA 391 (CC), 1995 (4) BCLR 665 (CC), para. 35.
\textsuperscript{67} Supra, p. 553.
\textsuperscript{68} \textit{Grootboom}, note 33, paras 26ff.
\textsuperscript{70} \textit{Grootboom}, note 33, para. 33.
\textsuperscript{71} \textit{Treatment Action Campaign}, note 45, para. 35.
\textsuperscript{72} \textit{Ibid.}, para. 37.
The Court’s decision to reject the “minimum core” approach was met with criticism. It was contended that this decision had led to a situation where no clear guidance was given to the government as to the obligations that should be given priority under the socio-economic rights provisions. However, offense was primarily taken at the blanket observation that providing citizens with minimum essential levels of basic socio-economic goods and services went beyond the powers of the state. While this may have been true in the light of South Africa’s social and economic development at the time and perhaps even today, the statement was not supported by any kind of proof that the government did in fact lack this capacity. Rather than saying, that from a legal point of view, it was not desirable to construe socio-economic rights as possessing an absolute core that would entitle claimants to seek immediate relief, the Court brushed this idea off as unrealistic, and almost naïve. By doing so, it relieved the state of a considerable part of its burden to show that it had done everything in its power to ensure that the population’s most urgent needs were met. As a way of remedying this weakness, Liebenberg proposes to tighten the justificatory elements of the reasonableness test by requiring the state to show that its resources are inadequate for meeting basic human needs in the light of other compelling government purposes.

By rejecting the “minimum core” approach, the Constitutional Court dismissed the idea that socio-economic rights can have a definite content that is not subject to progressiveness and resource constraints. As a consequence, the socio-economic rights jurisprudence is certainly not as robust as it could be and as many scholars would wish for it to be. There are nevertheless some lessons to be drawn in the rejection of the “minimum core” at the national level. Before the South African jurisprudence developed, the only viable methodological approach to socio-economic rights was the one advanced by the Committee on Economic, Social and Cultural Rights. However, this Committee is concerned with the interpretation of an international treaty. Although the socio-economic rights in the South African Constitution may bear a striking resemblance to the provisions of the ICESCR, they do not operate in the same legal sphere. As Coomans notes, unlike the South African Constitutional Court, the Committee is not part of a system of separation of powers, and consequently does not have to show deference to another branch of government when

73 Grootboom, note 33, para. 33.
74 Bilchitz, note 62, p. 4.
75 Ibid., p. 4.
76 Liebenberg, note 59, p. 10.
assessing a state’s performance. State reporting procedures are weak when compared to any form of judicial rights protection, but particularly to constitutional rights protection. It remains to be seen whether the Committee will stand by its “minimum core” approach when it will eventually assume its quasi-judicial competence to hear individual complaints about the violation of the rights in the ICESCR.

Another difference between the Committee and the Constitutional Court is the fact that the state reporting procedure is not concerned with crafting out remedies for the violations the Committee finds to exist in a given state. While it may make particular suggestions and recommendations to the state parties, the Committee is not in a position to order the state to take specific action. However, in the case of the Constitutional Court, finding a breach of the Constitution generally entails granting appropriate relief. The Court is thus expected to remedy the violation and to formulate a court order which will specify the measures to be taken by government. By rejecting the concept of “minimum core obligations”, the Court arguably avoided difficult decisions of a political and budgetary nature in trying to find an appropriate remedy.

It should be noted that the Phiri water case may require the Constitutional Court to reconsider its stand on the “minimum core” approach since the case inevitably involves the question of what constitutes sufficient water in terms of section 27 (1) of the Constitution. Although the Supreme Court of Appeal did not explicitly invoke the concept of “minimum core”, its reasoning is clearly based on the assumption of the right to a minimum essential level of water: “A commitment to address a lack of access to clean water and to transform our society into one in which there will be human dignity and equality, lying at the heart of our Constitution, it follows that a right of access to sufficient water cannot be anything less than a right of access to that quantity of water that is required for dignified human exis-

77 Coomans, note 16, p. 185.
78 The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights providing for this competence was adopted by the United Nations General Assembly on 10 December 2008. It opened for signature on 24 September 2009 and will enter into force upon ratification by ten states.
79 Section 38 of the final Constitution reads as follows: “Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights, […]” According to section 172 (1), “When deciding a constitutional matter within its power, a court […] may make any order that is just and equitable.”
80 Christiansen, note 11, p. 384.
It will be interesting to see how the Constitutional Court will handle this issue and whether it will continue to distance itself from the international concept of “minimum core”.

Yet, even if this disparity should persist, there can be little doubt that the South African jurisprudence on socio-economic rights has significantly advanced the cause of economic, social and cultural rights at the international level. While for many years, scholars and human rights institutions had argued in favour of the justiciability of economic and social rights, this jurisprudence delivered a first-hand experience of what justiciability meant in practice. It single-handedly replaced the question of “whether” economic, social and cultural rights could be justiciable with that of “how” they could be justiciable. The fact that the Constitutional Court answered this question by relying heavily on concepts that were developed at the international level, is proof that the long-time international endeavours to realize economic, social and cultural rights bore fruit. Finally, it is probably safe to say that the South African jurisprudence had a positive influence on the process that led to the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, which provides for an individual complaints procedure.

3.3.3. The South African jurisprudence and comparative constitutional law

Another field in which the South African jurisprudence on socio-economic rights has had a lasting impact is the field of comparative constitutional law, more precisely comparative rights jurisprudence. The innovative force of the Constitutional Court’s case law did not go unnoticed in other constitutional systems around the world.

The South African Constitution itself encourages comparisons with other Constitutions because it invites the courts to consider foreign law when interpreting the Bill of Rights. While having regard to foreign law is an optional exercise, the courts are in no way limited to considering “comparable” foreign law. Any foreign legal system may thus be consulted and the Constitutional Court makes extensive use of this possibility in its judgments.

81 Mazibuko, note 56, para. 17; the Supreme Court of Appeal ruled that a minimum of 42 litres of water per resident per day would constitute sufficient water in terms of section 27(1) of the Constitution, ibid., para. 62.
82 Liebenberg, note 59, p. 7.
83 Supra, note 78.
84 Supra, note 65.
85 The Interim Constitution did in fact contain a limitation to comparable foreign law in its interpretative provision (section 35 (1)).
86 See, for example, the Makwanyane judgment, supra, note 66, on the unconstitutionality of the death penalty.
However, in the field of socio-economic rights, little foreign jurisprudence is available. The legal systems which the Court has preferred to consult in other contexts, such as the United States, Canadian and German Constitution, \(^{87}\) are mute on socio-economic rights. In Soobramoney, the Court had recourse to the case law of the Supreme Court of India concerning the positive obligations imposed on the state with respect to the right to life.\(^ {88}\)

The openness towards comparative rights analysis that transpires from the South African Constitution and jurisprudence may have served as a source of inspiration to foreign scholars. While the novelty of justiciable socio-economic rights would presumably have been in and of itself enough to attract the attention of those who had previously argued for the inclusion of this type of rights in their own constitutional order, the fact that the South African Constitutional Court explicitly pursued interpretative avenues based on international and comparative sources certainly added to its appeal. As a result, a number of authors have explored the methodological potential and the possibilities for reform which this jurisprudence presents for other constitutional systems.\(^ {89}\)

In many jurisdictions, the subject of socio-economic rights had, up until recently, solely been debated in terms of whether or not these rights were justiciable.\(^ {90}\) The debate has traditionally stalled at this point due to a lack of proof for either of the opposing arguments. The South African jurisprudence has changed this and recent publications dealing with justiciability attest to this.\(^ {91}\) In fact, many of the theoretical arguments brought forward against the justiciability of socio-economic rights can now be verified based on actual judicial experience. First, the assertion that the adjudication of socio-economic rights

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87 See the Court’s comparative analysis on the question of remedies in Treatment Action Campaign, note 45, para. 107ff.
88 Soobramoney, note 21, para. 15ff.
91 Nolan/Porter/Langford, note 90, p. 30.
would prove to be an inappropriate and unmanageable role for the courts has turned out to be unfounded. The South African Constitutional Court has demonstrated that it is quite capable of dealing with the implications of adjudicating socio-economic claims in a coherent and nuanced manner. Second, it was predicted that the Constitution would be discredited in the eyes of the public, since the courts would be unwilling and unable to enforce socio-economic rights. However, the opposite was shown to be the case. The jurisprudence that is continuing to develop has had a tangible impact on some of the most disadvantaged groups in society.

Finally, the South African cases also illustrate that socio-economic claims do not require courts to take resource-allocational decisions. As the Constitutional Court put it in *Treatment Action Campaign*, its judicial review in the form of the “test of reasonableness” “may in fact have budgetary implications” but is not “directed at rearranging budgets”. So while the Court will neither directly interrogate, nor prescribe the state’s budgetary decisions, it will not be discouraged to make a finding of unreasonableness even if this would have the consequence that the state itself would need to rearrange its budget.

The South African Constitutional Court’s take on justiciability is certainly unique. Essentially, the judges created a presumption of the justiciability of socio-economic rights when they stated that “clearly they are” justiciable. This did not imply however that deference to other branches of government was entirely excluded. Rather, justiciability and its specific scope became a matter to be decided based on the facts of a particular case after having analysed it under methodological and contextual aspects. As one author puts it, the Court thereby determines the “relative justiciability” of each case that comes before it within a certain “justiciability spectrum”, resulting in the fact that the intensity of review and the intrusiveness of the Court’s orders may vary according to the specific facts at hand.

It cannot simply be assumed that other constitutional courts would take as bold a stance on the issue as did the South African judges in *Treatment Action Campaign*. In many countries, those courts already face criticism for allegedly putting too strong a focus on the

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94 *Treatment Action Campaign*, note 45, para. 38.
96 Supra, note 49 and corresponding text.
97 Brand, note 95, p. 226f. and 235f.
enforcement of human rights in general. It is being contended that judges nowadays assume too much power by taking far-reaching decisions on politically sensitive matters without being democratically elected and thus lacking a representative mandate. This type of criticism would presumably be exacerbated in relation to the adjudication of socio-economic rights, which is still, up until today, seen by many as inherently political in nature.  

4. Concluding remarks

For proponents of justiciable socio-economic rights, there is much in the South African jurisprudence to rejoice over, most notably the fact that it has provided this category of rights with the kind of “stories” that depict the impact which they can have on the real-life experiences of individuals. Traditionally, the people and the stories behind human rights cases are one of the factors that drive human rights discourse. As one author puts it, “Drawing attention to the effects of programs and policies on real human beings, rather than beginning with an a priori policy position, has proven to be a tremendous strength of the human rights approach.” There can be no doubt that the South African jurisprudence has achieved just that. Socio-economic rights will forever be associated with the names and fortunes of people like Thiagraj Soobramoney and Irene Grootboom.

Unfortunately, the stories behind the South African jurisprudence have so far not had the happy endings one might hope for. As aforementioned, Mr. Soobramoney died very shortly after the Constitutional Court’s judgment in his case was delivered. Neither did Ms. Grootboom live to see the day that she would obtain social housing. She died in 2008, at the age of 39, living in the same shack that she had moved to during the Constitutional Court proceedings. Not even Treatment Action Campaign, the first case in which the Constitutional Court unambiguously ordered government to provide immediate relief to pregnant women with HIV who did not have access to Nevirapine until that point, proved to be the perfect success story. In fact, the government showed great reluctance to distribute antiretroviral medication to all deserving patients and in some provinces, the judgment’s

98 See, however, the development of the socio-economic rights jurisprudence by the Colombian Constitutional Court, which increasingly draws attention; Rodrigo Uprimny Yepes, Should courts enforce social rights? The experience of the Colombian Constitutional Court, in: Coomans, note 95, p. 355. See also Rodolfo Arongo, VRÜ 42 (2009), Nr. 4 (this issue), p. 576.


100 Supra, note 32 and corresponding text.

101 Francis Hweshe, ‘Heroine’ dies while still waiting, 4 August 2008, online: www.abahlali.org/node/3860.
orders were only implemented after the initiation of contempt of court proceedings against the relevant provincial authority. As for the case which is expected to be the next “landmark ruling” in the field of socio-economic rights, the *Phiri water case*, its first applicant after whom the case is named, Lindiwe Mazibuko, also passed away in 2008 without seeing the end of her vigorous fight against pre-paid water meters.

The human tragedies behind the judicial proceedings before the South African Constitutional Court are deplorable. Unfortunately, it is often in the light of such tragedy that human rights protection burgeons and that we understand its true meaning and value. In South Africa and elsewhere, coming to terms with social and economic suffering remains an ongoing struggle. The Constitutional Court, despite some weaknesses in it decision-making on socio-economic rights, has begun to pave a way of how to do so in a judicial context, which, in the end, is all one could ask from it.

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102 Christopher Mbazira, *Non-implementation of court orders in socioeconomic rights litigation in South Africa, Is the cancer here to stay?*, Economic and Social Rights Rev. 9 (No. 4) (2008), p. 4.

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Von Rodolfo Arango, Bogotá

Einführung


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A. Geschichtliche Umstände der Verfassungsänderung 1991

I. Auf internationaler Ebene


II. Auf nationaler Ebene


B. Das kolumbianische Verfassungsgericht

I. *Die Verfassungsgerichtsbarkeit*

Merkmale der kolumbianischen Verfassungskontrolle seit 1991 sind eine konzentrierte oder zentralisierte Verfassungsgerichtsbarkeit zur abstrakten Normenkontrolle und eine diffuse oder dezentralisierte Verfassungsgerichtsbarkeit zum Schutz der Grundrechte.

1. Konzentrierte Verfassungsgerichtsbarkeit bei abstrakter Normenkontrolle


2. Diffuse Verfassungsgerichtsbarkeit zum Grundrechtsschutz


Der Vorteil der diffusen Verfassungsgerichtsbarkeit gegenüber einem konzentrierten System, wie es Deutschland und Spanien kennen, liegt darin, dass die Rechtssuchenden nicht lange bis zur Entscheidung warten müssen. Seit 1992 sind bis Juli 2008 insgesamt ca. 16.000 Entscheidungen vom Verfassungsgericht getroffen worden, darunter ca. 11.500 Grundrechtsentscheidungen, was einen Schnitt von 1.000 Entscheidungen pro Jahr bedeutet; davon sind 72 % Grundrechtsentscheidungen und 28 % Entscheidungen der abstrakten Normenkontrolle. Im ganzen Land sind ca. 1 Million verfassungsrechtliche Entscheidungen.
in den 17 Jahren seit der Verfassungsänderung gefällt worden; darunter betrafen ca. 70% den Schutz sozialer Grundrechte, wie die Rechte auf Existenzminimum, medizinische Versorgung, Bildung, Arbeit, auf Wohnung und auf soziale Sicherheit. Ca. 65% der Verfassungsbeschwerden bezüglich sozialer Grundrechte wurden positiv entschieden.

II. Das Verfassungsgericht

Dem kolumbianischen Verfassungsgericht ist der Schutz der Verfassung als höchstrangiger Norm anvertraut. Dazu soll das Gericht die Verfassungsnormen sowie die Normen internationaler Menschenrechtsschutzabkommen –z.B. die Internationalen Menschenrechtspakte der UNO oder die Amerikanische Menschenrechtskonvention– anwenden, da die ratifizierten Internationalen Verträge Verfassungsrang besitzen.

1. Zusammensetzung und Amtsperiode


2. Entscheidungsarten und -effekte

rechte von Verhafteten2, Vertriebenen3 oder Patienten4 durch ein strukturelles staatliches Unterlassen verletzt wurden oder hätten verletzt werden könnten.

C. Leitlinien der verfassungsrechtlichen Rechtsprechung bezüglich sozialer Grundrechte

Einige Leitlinien der verfassungsgerichtlichen Rechtsprechung zu sozialen Grundrechten sollen kurz dargestellt werden. Sie lassen sich in sechs Punkten zusammenfassen:

I. Minimalismus


Das Recht auf Existenzminimum dient dem verfassungsrechtlichen Schutz minimaler Grundbedürfnisse des Einzelnen, soweit dieser bis zum Abschluss des instanzgerichtlichen Verfahrens nicht warten kann. Das gilt insbesondere bei Lohn- und Rentenforderungen, die nicht rechtzeitig vom Arbeitsgeber bezahlt werden7. Die Anerkennung des Rechts auf Existenzminimum sichert allerdings eine Person nicht vor jedwedem sozialen Risiko; sie vermeidet nur, dass jemand unter das materielle Niveau sinkt, welches es möglich macht, ihn als gleichwertig mit allen anderen anzuerkennen.

II. Internationalisierung

Mit Blick auf die Internationalisierung der Menschenrechtsstandards beim Schutz von sozialen Grundrechten bezieht sich das kolumbianische Verfassungsgericht regelmäßig auf die Leitlinien des Interamerikanischen Gerichtshofes für Menschenrechte, des ECOSOC

3 Corte Constitucional, Sentencia T-025 de 2004.
4 Corte Constitucional, Sentencia T-760 de 2008.
6 Corte Constitucional, Sentencia C-776 de 2003.
oder der ILO. In diesem Zusammenhang hat das Verfassungsgericht ein ministerielles Streikverbot für Staatsbedienstete für verfassungswidrig erklärt, weil nach ILO-Normen eine unabhängige Stelle und nicht die Regierung die Legalität eines Streiks zu überprüfen hat.8


III. Subsidiarität


Bei Entscheidungen über Verfassungsklagen zum Schutz der Grundrechte (acción de tutela) wendet das Verfassungsgericht kein einfaches Gesetzesrecht an, sondern beruft sich auf Verfassungsnormen, was verfassungswidrige Entscheidungen ausschließt. Im Gegensatz zur ordentlichen Gerichtsbarkeit, sind auf der Ebene der Verfassungsgerichtsbarkeit die Verfassungsgrundsätze ausschlaggebend. Nicht die strikte Anwendung des Gesetzes sondern die Maximierung der Grundrechtsnormen ist die Hauptfunktion des Verfassungsgerichts. Die Grundrechte legen minimale Gerechtigkeitsstandards fest; sie sollen durch die verfassungsgerichtliche Intervention gesichert werden, wenn die Gesetzesanwendungs- und Gesetzesauslegungsmöglichkeiten der Fachgerichtsbarkeit erschöpft sind.

IV. Solidarität

Letzteres bedeutet aber nicht, dass in Kolumbien – ähnlich wie in anderen Ländern Lateinamerikas – eine Konstitutionalisierung des Rechts ausgeblieben wäre. Im Gegenteil, die umfangreiche Rechtssprechungspraxis des kolumbianischen Verfassungsgerichts zeigt, dass das Solidaritätsprinzip und das Prinzip der Integralität der Menschenrechte ernst genommen werden. Zum Beispiel haben die Verfassungsentscheidungen zum Schutz der Grundrechte der durch den inneren bewaffneten Konflikt Vertriebenen dazu geführt, dass der

8 Corte Constitucional, Sentencia T-568 de 1999.
Staat mehrere Billionen Pesos zur Wahrung der minimalen internationalen Richtlinien zum Schutz der Menschenrechte von intern vertriebenen Personen bereitstellen musste.9


V. Differenzierung


13 Corte Constitucional, Sentencia T-149 de 2002.
VI. Ausstrahlungswirkung


Dank einer derartig fortschrittlichen verfassungsgerichtlichen Grundrechtsinterpretation zugunsten sozial ausgeschlossener oder schlecht stehender Personen, die alle Bereiche des einfach gesetzlichen Rechts umfasst, nehmen Behörden und Private in Kolumbien nunmehr Grundrechte und Verfassungsgrundsätze im Rahmen einer systematischen Auslegung durchaus ernst. Obwohl das Verfassungsgericht durch seine Rechtsprechung über den Ausstrahlungseffekt der sozialen Grundrechte allein außerstande ist, die Probleme der Armut und der Ungleichheit zu lösen, erfüllt es doch eine wichtige pädagogische und kritische Funktion: Es legt die Richtlinien eines humanen inklusiven Rechtsverständnisses und seiner Anwendung fest.

Schlussfolgerungen


Symposium on Solidarity as a Structural Principle of International Law, Max Planck Institute for Comparative Public Law and International Law, 29 October 2008

By Chie Kojima and Kazimir Menzel, Heidelberg*

On 29 October 2008, a symposium called “Solidarity: A Structural Principle of International Law” was held at the Max-Planck-Institute of Comparative Public Law and International Law in Heidelberg, Germany. Nearly 80 people including scholars, practitioners and researchers of more than 20 nationalities participated in the symposium. As laid down by Armin von Bogdandy in his opening address, the aim of the symposium was to discuss what constitutes the notion of solidarity in international law, whether the concept of solidarity could be characterised as one of the structural principles of international law, where it could apply to and to what extent it has already become a binding norm. Karel Wellens, Philipp Dann, Laurence Boisson de Chazournes and Dinah Shelton elaborated on the concept of solidarity from different perspectives, ranging from the theory of international law, the law of development cooperation and the responsibility to protect to intergenerational equity, and each talk was followed by a discussion with the floor.

The first presentation was given by Karel Wellens and entitled “Solidarity as Structural Principle of International Law: Expanding Role and Inherent Limits”. Wellens dealt with the principle of solidarity as a descriptive as well as a prescriptive norm in international law, summarising its origins, assessing the role it plays in various areas of international law and giving an outlook on its future developments. He placed the principle of solidarity within the normative framework of the constitutionalist school, based on the distinction between international community and international society and its origins in the ethics of international law since Emer de Vattel. Wellens proceeded to explore its expansion beyond the maintenance of peace and security, where it is deeply rooted, into the emerging field of international disaster law. As a result of the mostly non-binding provisions in the field, Wellens concluded that solidarity functions more as an inspirational than structural principle; its impact on the body of regulation nonetheless, affirms its constitutional character also in the field of international disaster law. In his assessment of other branches of international law, as the international humanitarian law, the international trade law and the law

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of State responsibility, Wellens found the principle of solidarity developed to various extents of a constitutional, but still mostly inspirational. He suggested that the lack of “widespread institutionalised mechanisms” to implement the principle constitutes the major hindrance to become a fully-fledged structural principle and has yet to be achieved. However, at the same time Wellens observed that the shaping impact of the principle of solidarity qualifies it already as a structural principle of international law.

In the second presentation “Solidarity as Guiding Principle for Institutional Development Assistance”, Philipp Dann analysed the normative operation of solidarity within the field of international development law. Using solidarity rather as a tool to assess the character of international development assistance and the law of institutional development cooperation than as a legal concept, he defined solidarity along three dimensions on the basis of its meaning in the domestic context: the assistance to advance a common goal, the equality among the partners involved, and the mutuality of obligations. He found all three parts of his “working definition” included in the non-binding law of international development, notably the Millenium Declaration and its follow-up documents, the Monterey Consensus and the Paris Declaration, though the term “solidarity” itself is evoked but rarely. Dann then proceeded with a comparison of the concrete development laws of the European Union and the International Development Association/World Bank. The results he reached showed a mixed picture of the extent to which the principle of solidarity has been realised in binding law. While the World Bank has integrated mostly the aspects of mutuality and assistance to advance a common goal, the European Union rests only upon the equality of donor and recipient. Dann identified especially the uneven representation of donors and recipients in the decision framework of the World Bank as the major limitation to equality and hence a fully-fledged solidarity, while the European Union development law in the context of the EC-ACP Cotonou Agreement’s shortcoming is due to its lack of transparency in the application of standards and the absence of mutuality. Hence he concluded that in the context of the law of institutional development cooperation, solidarity is “more promise than principle”.

In the third presentation “Responsibility to Protect: Reflecting the Principle of Solidarity?”, Laurence Boisson de Chazournes addressed the responsibility to protect as a manifestation of the notion of solidarity. After having developed a value-based notion of solidarity, she examined the roles of solidarity in the responsibility to protect, the interaction of both in the field of international humanitarian law and the consequence of inaction of solidarity where State responsibility might come into play. Boisson de Chazournes defined the notion of solidarity on the base of four elements: the assistance to realise a common objective, the moral obligation to provide assistance, the importance of a common value system on which the international community is grounded, and the distinction between beneficiaries and providers of solidarity. She characterised the responsibility to protect as the responsibility of States to prevent humanitarian catastrophes by the most appropriated means in subsidiary manner primarily by the State in question and, if needed, by the international community. Based on these definitions, Boisson de Chazournes observed that
solidarity can operate along two lines horizontal (State-to-State), as well as vertical (State-to-population), while the responsibility to protect is limited to the vertical operation. She argued that the responsibility to protect could be linked to solidarity because of its aim to achieve the common goal of providing humanitarian assistance to populations. Such link is based on the shared value system of human security and fuelled by the resulting moral obligation for States that possess the necessary means to act accordingly. She further elaborated the vertical operation of solidarity in the case of non-international conflicts, where States have to assume responsibility for all violations of humanitarian law, even when committed by non-State actors. She gave an example that the Security Council’s duty to act in cases of large-scale infringements of humanitarian law is a manifestation of the notion of solidarity and the responsibility to protect both of which are broader notions. She concluded that the responsibility to protect as a legal expression of solidarity can be instrumental to protect shared values of a human rights nature without relying on mutual or self-interests.

The fourth and last presentation was given by Dinah Shelton and named “Intergenerational Equity: Reflecting the Principle of Solidarity?” In her presentation, Shelton examined “solidarity among generations” in both domestic and international contexts. She found the question of solidarity across generations in areas such as economic wealth and development, culture and knowledge, life and well-being, and natural resources. In international law, expressions of intergenerational equity can be found in provisions of the Charter of the United Nations, a number of international conventions as well as non-binding international instruments in the field of natural and cultural resources. Shelton defined intergenerational equity as burden- and benefit-sharing aimed to achieve the highest level of distributive justice possible among all present and future generations. The principles that could determine equity among generations are, according to Shelton, the formal equality of outcomes, the protection of entitlement, difference in capacities, difference in needs and different historical responsibilities. The last principle adds the concept of collective justice to the concept of distributive justice. Shelton further assessed different ways to implement the concept of intergenerational equity and suggested that the public trust doctrine long-established under domestic laws of common law countries could effectuate the principle of intergenerational equity in international law. Going one step further, she proposed to grant rights to generations as such rather than indistinguishable future individuals. By admitting such rights, environmental rights would contribute more effectively to preserve the environment, rather than focusing on the damage caused to persons or property. Shelton underlined the advantages of this approach by referring to recent rulings by some domestic courts. Shelton observed that the consideration of the moral principle of solidarity would become indispensable in searching for a just global society as the interdependence of States and complexity of problems increase. She also argued that the principle of intergenerational equity could induce a wider participation by letting those States who have no direct interests be aware of interests of their future generations. Shelton ended her presentation by emphasising that equitable approaches not only serve to morality and justice, but also
contribute to solve issues of common concern and ensure compliance with norms of international law by all States.

In his concluding remarks, Rüdiger Wolfrum summarized the symposium and pointed out the necessity to research further on the definition of solidarity, how the value-based notion of solidarity plays a role in hard law, the addressee of the principle of solidarity and the relation of solidarity to other principles such as legitimacy and reciprocity. He concluded that the principle of solidarity is not a legal principle from which concrete rights and obligations are deducted, but the principle of solidarity can serve as a tool for interpreting certain regimes of international law as well as an instrument for a progressive development of international law. Although there was no consensus among the participants on whether solidarity can be characterized as one of the structural principles in international law, let alone whether it has become a legal principle in international law, the symposium was successful in drawing a complex picture of operations of solidarity in different branches of international law. The forthcoming proceedings of the symposium have been edited by Rüdiger Wolfrum and Chie Kojima and will be published from Springer together with two additional contributions from the participants of the symposium: “Military Intervention Without Security Council’s Authorisation as a Consequence of the ‘Responsibility to Protect’” by Tania Bolaños and “Common Security: The Litmus Test of International Solidarity” by Hanspeter Neuhold.
Zum Stand der Rechtsstaatlichkeit in Afghanistan

Von Parinas Parhisi, Frankfurt/Main*

I. Einleitung


Die entscheidende Frage ist: Wie will der afghanische Staat, angesichts zunehmendenTerrors und wachsender Unsicherheit, den Vorgaben der Verfassung sowie den diesbezüglichen Zusicherungen in offiziellen Papieren der Staatengemeinschaft Bedeutung verschaffen, sie gleichsam in die Lebenswirklichkeit übersetzen? Bezogen auf den Rechtsstaatsaufbau ist zusätzlich von Bedeutung, ob islamische Komponenten der afghanischen Verfassung (AV) in Konkurrenz zu rechtsstaatlichen Vorgaben stehen. Mit anderen Worten: Ist Rechtsstaatlichkeit in einer Islamischen Republik möglich? Die Antwort auf diese komplexe Frage muss sehr differenziert ausfallen, was den Rahmen eines Berichts gewiss

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II. Verfassungsrechtliche Spannungsfelder


Insgesamt ist festzuhalten: Das Verfassungsverständnis der afghanischen Juristen beschränkt sich vielfach auf das Hervorheben des Scharia-Vorbehaltes in Art. 3 und zwar jenseits der afghanischen Dogmatik, geschweige denn im Rahmen des Völkerrechts. Bei aller Kritik ist allerdings hervorzuheben, dass die Durchsetzung der Interessen ausländischer Staaten, insbesondere USA, eine große Rolle bei der Gestaltung der jetzigen Verfassung, insbesondere des Scharia-Vorbehaltes gespielt hat. So ist von Fachleuten, welche der Verfassungskommission zur Ausarbeitung der afghanischen Verfassung von 2004 beige-

wohnt haben, zu hören, dass jener Scharia-Vorbehalt eine qualitative Verschärfung erst erfahren hat, nachdem die USA auf dem Modell einer Zentralregierung bestanden.

### III. Kollisionen zwischen Gesetz, Scharia und Stammestradition


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die Problematik der Apostasie. Heftige Diskussionen prägen die Debatten um die Subsidiaritätsregel des Art. 130 AV, welche sogar so weit reichen, auch muslimische Dozenten als Ungläubige zu bezeichnen. Das dort verankerte Kollisionsregime wird beispielsweise als Legitimation der Strafe für die Apostasie angeführt. Mit Bezug auf das Gerechtigkeitserfordernis wird, erstaunt über die Norm, vorgebracht, dass Scharia nur gerecht sein könne. Gleichwohl: Macht man die vermeintlichen Experten des religiösen Rechts darauf aufmerksam, dass von den möglichen Auslegungen im hanafitischen Recht die gerechteste zu wählen sei, so wird dies kampflos akzeptiert.


IV. Schlussanmerkungen


In der „Entwicklungssackgasse“ haben viele Afghanen und ihre politischen Helfer eines gemeinsam: Sie müssten erkennen, dass eine Kultur des Unrechtsbewusstseins und der Rechtsstaatlichkeit noch nicht existiert. Es gilt zu erkennen, dass dies kein exportfähiges Gut ist, wenn die dazu korrespondierenden Überzeugungen nicht aus der Mitte der afghanischen Gesellschaft kommen. Es bedarf einer redlichen wie sorgfältigen Generalüberholung der Denkkonzepte aller politisch Beteiligten, also jener der afghanischen Machtherrn wie
auch ihrer politischen Helfer, um die Arbeit von unabhängigen Institutionen, wie etwa des MPI zu effektivieren.

Im Rahmen einer wertenden Gesamtbetrachtung bleibt festzuhalten: Alle kritischen Anmerkungen sollten von der Grundannahme ausgehen, dass eine Verfassung den soziologischen, ethnischen, psychologischen Gegebenheiten eines Landes Rechnung tragen muß. Diese können je nach Kulturkreis unterschiedliche Ausprägen haben und sollen das auch, denn eine Verfassung ist nicht mehr – aber auch nicht weniger – „eine sich aus staatlichen Interpretationen entwickelte und verwirklichte Vernünftigkeit eines Volkes“.


Niels Petersen
**Demokratie als teleologisches Prinzip**
Zur Legitimität von Staatsgewalt im Völkerrecht
Beiträge zum ausländischen öffentlichen Recht und Völkerrecht Band 204


policies and evaluate governmental activity”? (Susan Marks, The Riddle of All Constitu-
tions, Oxford 2000, S. 59). Die allein auf Wahlen bezogene Definition passt auch nicht zu
den Schlussfolgerungen, die der Autor selbst aus seinem teleologischen Demokratieprinzip
zieht. So sieht er Rückschläge des Demokratisierungsprozesses, gegen die sich das Prinzip
richtet, durchaus nicht nur auf Militärputsche begrenzt, sondern auch in dem „Abbau recht-
staatlicher Elemente“ (S. 138). Die Beziehung zwischen Rechtsstaatlichkeit und Demokra-
tie diskutiert der Autor am Ende des ersten Kapitels noch einmal im Rahmen der Bedeu-
tung demokratischer Regierungsformen für die wirtschaftliche Entwicklung eines Landes,
den Schutz der Menschenrechte und die Friedenssicherung. Er resümiert eine klare positive
Korrelation zwischen Demokratie und dem Schutz individueller Freiheiten. Auch sei die
viel kritisierte These vom Frieden zwischen Demokratien nicht grundsätzlich widerlegt,
die wirtschaftlichen Vorteile von Demokratien lägen eher in stabil herausgebildeten Institu-
tionen (S. 42).

Der zweite Teil der Arbeit baut auf den erarbeiteten Legitimitäts- und Demokratiekon-
zepten auf und entwickelt die zentrale These, dass das moderne Völkerrecht ein teleologi-
sches Demokratieprinzip anerkenne. Angesichts der Anzahl von Staaten, die nicht demo-
katisch verfasst sind, sucht der Autor nicht im Gewohnheitsrecht nach einer Demokratie-
norm, sondern konzentriert sich auf die Frage nach der Existenz eines Demokratieprinzips,
das von einer Rechtsüberzeugung der Völkerrechtsgemeinschaft getragen ist. Die Wendung
den zu den Prinzipien des Völkerrechts, denen auch in der Debatte um die Konstitutionalisie-
rung eine zentrale Funktion zukomme, erlaube „eine Vermeidung fester Wertehierarchien
und damit eine Flexibilisierung rechtlicher Standards“(S. 217). Zwar sieht der Autor in
dem Selbstbestimmungsrecht ein völkerrechtliches Verbot willkürlicher Machtausübung
und somit ein Legitimitätsprinzip begründet, jedoch kein Demokratieprinzip. Auch men-
schenrechtliche Vertragsbestimmungen wie Art. 25 des Internationalen Paks für bürgerli-
che und politische Rechte genügen nach der Auffassung Petersens nicht, um eine opinio
iuris der Völkergemeinschaft zu begründen, da wichtige Vertreter der Staatenverbindung
nicht Vertragsparteien sind. So analysiert der Autor demokratie relevante Resolutionen der
Vereinten Nationen mit dem Fazit, dass Legitimität im Völkerrecht nicht einem Menschen-
recht auf Demokratie entspricht, sondern dass Legitimität voraussetzt, „dass ein Staat An-
strengungen unternimmt, sich zu einer Demokratie zu entwickeln“(S. 105). Um diesen
Befund zu prüfen, untersucht der Autor anschließend die Praxis regionaler Organisationen
zur Förderung und zum Schutz der Demokratie, im Wesentlichen auf Europa, Amerika und
Afrika beschränkt. Dabei vernachlässigt Petersen die nicht-westlichen Staaten. Die Praxis
asiatischer Staaten im Rahmen der ASEAN streift er in einer kurzen Abhandlung. Die
Regionalorganisationen der arabischen Welt erwähnt er überhaupt nicht. Da jedoch auch
ein graduelles völkerrechtliches Demokratieprinzip eines Grundkonsenses der Staatenge-
meinschaft bedarf, wäre eine kritischere Analyse hier wünschenswert gewesen, um sich
nicht dem Vorwurf des vereinfachenden Universalismus auszusetzen. Zur Staatenpraxis
führt Petersen auch militärische pro-demokratische Interventionen auf. Insbesondere sieht
er in der Praxis des Sicherheitsrates der Vereinten Nationen eine Bestätigung des teleologi-
schen Demokratieprinzips. In Anlehnung an die These von Roth, nach der sich statt einer Demokratiernorm eine „norm of governmental illegitimacy“ herausbildet (Brad R. Roth, Governmental Illegitimacy in International Law, Oxford 1999), lässt sich nach Petersen ein Legitimitätsprinzip im Völkerrecht identifizieren, welches sich gegen Rückschritte eines Demokratisierungsprozesses wendet. Darüber hinaus verpflichtet dieses teleologisch verstandene Legitimitätsprinzip auch zur aktiven Entwicklung zur Demokratie.


Ende des Absolutismus den Anspruch erhoben, zum Wohle des Volkes – wie auch immer verstanden – zu handeln?

In *Demokratie als teleologisches Prinzip* versucht Petersen den schwierigen Spagat zwischen universeller Rechtsordnung, die die Akzeptanz aller Staaten findet, und dem Demokratie- und Legitimitätsgedanken, der staatliche Gewalt einem Rechtfertigungszwang unterwirft. Das Buch stimuliert die Diskussion über die Rolle des Völkerrechts nach der dritten Welle der Demokratisierung, wobei es eine Fülle an Literatur verarbeitet.

*Charlotte Steinorth, Heidelberg*

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*Mark Pieth / Lucinda A. Low / Peter J. Cullen*

**The OECD Convention on Bribery. A Commentary**


ähnlichen Vorschriften anderer Antikorruptionskonventionen, darunter vorwiegend die von EU, Europarat und UN, weniger von AU und OAS.


Mitherausgeber Peter Cullen hat Art. 3 (Sanktionen), Art. 5 (Durchsetzung) und Art. 6 (Verjährung) kommentiert. Interessant ist unter anderem seine Feststellung, dass die Formel „effective, proportionate and dissuasive“ als Vorgabe für die Sanktionen aus dem EG-Kontext entlehnt wurde (S. 212 f.). Cullen nutzt diesen Umstand für einen längeren Exkurs


Dieser Kommentar zum OECD-Bestechungsübereinkommen ist fraglos ein Buch von Experten für Experten. Wer sich ohne fundierte Vorkenntnisse mit dem Thema internatio-
Eine Korruptionsbekämpfung beschäftigen will, wird mit diesem Werk wenig Freude haben. Eine Ausnahme ist höchstens das von Pieth verfasste Einleitungskapitel mit seiner guten Einführung in die Gesamtthematik. Dem Experten dagegen bietet dieses sorgfältig editierte und hervorragend strukturierte Buch eine Fülle neuer Einsichten und interessanter Details. Vorbildlich ist auch die exzellente Bibliographie am Ende. Das Buch ist in jeder Hinsicht sehr zu empfehlen und dürfte sich rasch zu einem Standardwerk zum internationalen und vergleichenden Korruptionsstrafrecht entwickeln.

Sebastian Wolf, Konstanz

Gianluca P. Parolin
Citizenship in the Arab World
Kin, Religion and Nation-State


Die aktuelle Information zu Staatsangehörigkeitsgesetzen in den Ländern wird einerseits für diejenigen von Interesse sein, die in der Region oder an Fällen arbeiten, die aus arabischen Ländern stammende Personen betreffen. Andererseits ist die Kombination aus Theorien der vergleichenden Rechtswissenschaft, Soziologie, Politik- und Islamwissen-

schaft und sogar Sprachwissenschaft besonders inspirierend. Somit wird die Lektüre dieses Buches auch für Nicht-Rechtswissenschaftler interessant und zugänglich.


Die drei Hauptkapitel des Buches behandeln jeweils eine der drei Ebenen der „Zugehörigkeit“ oder „Mitgliedschaft“, auf denen Parolins Analyse basiert. Diese drei Ebenen der Mitgliedschaft bilden, wenn auch in unterschiedlicher Zusammensetzung, die Grundpfeiler in der Entwicklung von Staatsbürgerschaftsmodellen in allen Arabischen Ländern. Somit ist diese Dreiseitigkeit auch das spezifische Merkmal des Arabischen Modells, das die Systeme der einzelnen 18 mehrheitlich Arabischen Staaten verbindet und gleichzeitig gegen andere Modelle abgrenzt. Diese drei Ebenen sind Zugehörigkeit zur Sippe, zur Religionsgemeinschaft und zum Nationalstaat. „By intertwining and overlapping, the three levels of membership determine the actual extension of individual citizenship (muwātanah) and affect the local regulations on nationality (jinsīyah).“ (S. 127). Im abschließenden Kapitel fragt Parolin, wie sich das Zusammenspiel der drei analytischen Ebenen auf die Sphäre der individuellen Bürger-Rechte und -Pflichten in einer Gesellschaft auswirkt.

hinaus bleibt in manchen Fällen aufgrund restriktiver Einbürgerungsgesetze Nicht-Musli-
men der Zugang zur Staatsangehörigkeit von vornherein verschlossen. In anderen Fällen,
kann der Austritt aus der Muslimischen Glaubensgemeinschaft auch die Aberkennung einer
Staatsbürgerschaft bedeuten.

Lange nach dem Entstehen einer Islamischen Gemeinde hat sich später ein neues politi-
sches Konzept der Mitgliedschaft herausgebildet – Staatsangehörigkeit. Parolin argumen-
tiert, dass sich die Idee des Nationalstaats und der Bindung von Individuen an einen sol-
chen politischen Körper während des Niedergangs der Osmanischen Oberherrschaft in
Arabischen Ländern etabliert hat, als es nötig wurde, nach neuen, säkularen Formen der
Mitgliedschaft zu suchen. Deshalb beginnt seine Analyse in genau diesem Zeitraum.

Parolin kommt zu folgendem Schluss: „Membership in the kin group and in the reli-
gious community is still a relevant element for modern citizenship, both for the vertical
nationality (e.g. naturalisation or stripping of nationality on grounds of kin or religious
affiliation) and the horizontal citizenship (e.g. kin group political representation or confes-
sional constituencies).“ (S. 27) Das Ergebnis ist ein distinktes Arabisches Staatsbürger-
schaftsmodell, das eindeutig gemeinsame Merkmale aufweist.

Lisa Pilgram, Edinburgh

David T. Johnson
The Japanese Way of Justice – Prosecuting Crime in Japan

Werk vor, dessen Idee und Schwerpunktsetzung bereits im einführenden Zitat (von Robert
Jackson) umrissen wird: „The procuracy has more control over life, liberty, and reputation
than any other organization in Japan“ (S. 1, 3). Während also der Haupttitel des Buches
eine weit gefasste Abhandlung über das japanische Rechtssystem im Ganzen vermuten
lässt, bewegen sich die nachfolgenden Ausführungen – wie im Untertitel vorgezeichnet – in
einer großen Bandbreite um das zentrale Thema der Wirksamkeit und des Selbstver-
ständnisses der japanischen Staatsanwaltschaft.

Mit dieser Themenwahl stößt der Autor in ein Forschungsgebiet vor, das zumindest in
der westlichen Literatur noch weitgehend unbearbeitet ist. Es finden sich zwar durchaus
Arbeiten zum japanischen Recht1, doch beschäftigt sich keines dieser Werke vergleichbar
eingehend mit der hier aufgegriffenen Thematik. Da sich jedoch nach richtiger Feststellung

1 Nur beispielhaft seien genannt: Marutschke, Hans-Peter, Einführung in das japanische Recht;
Kitagawa, Zentaro, Wege zum japanischen Recht; Guntram Rahn, Rechtsdenken und Rechtsauf-
fassung in Japan; Eubel, Paul, Das japanische Rechtssystem, ein Grundriss mit Hinweisen und
Materialien zum Studium des japanischen Rechts; Nakayama, Ken’ichi, Strafrechtliche und straf-
prozessuale Fragen aus dem japanischen Recht; Bindzus, Dieter, Strafvollzug in Japan.
nicht nur eine Rechtsordnung, sondern darüber hinaus eine ganze Gesellschaft anhand der Art und Weise charakterisieren lässt, wie sie mit Verstößen gegen Recht und Gesetz verfährt (man denke an Roxins Bild vom Strafverfahrensrecht als Seismograph der Staatsverfassung), scheint es geradezu überfällig, dass die Strafverfolgung und die Strafverfolger hier in den Fokus der Betrachtung gerückt werden.


deutlich vernehmbarer Kritik („prosecutor brutality“, „problems in paradise“) an allzu erfolgsorientierten und teils rücksichtslosen Methoden.


Klaus Hoffmann-Holland, Berlin

Markus Porsche-Ludwig / Ching-peng Chu (eds.)
The Political System of Taiwan

Dieser Band versammelt 13 Einzelbeiträge verschiedener, meist taiwanischer Autoren zum politischen System von Taiwan, wie es sich nach den Präsidentschaftswahlen im Frühjahr 2008 darstellt. Die Herausgeber sind beide Wissenschaftler an der National Dong Hwa University Hualien/Taiwan. Der Schwerpunkt der Darstellung liegt auf dem Regierungssystem, den politischen Parteien sowie den Interessenverbänden auf lokaler Ebene; dazu
kommen Beiträge zur Transformation der politischen Kultur, zu Eliten und öffentlichem Dienst, zu taiwanischen indigenen Völkern sowie zur Taiwan-Frage.


in Zivil- und Strafsachen entscheidet und das Oberste Verwaltungsgericht in Verwaltungs- 
sachen. Das Justizamt ist überwiegend mit Angelegenheiten der Justizverwaltung befasst 
wie etwa der Gerichtsorganisation, Zuständigkeitsfragen, der Ernennung und Aufsicht über 
das Justizpersonal sowie mit Budgetfragen.

Was die Behandlung des völkerrechtlichen Status von Taiwan angeht, so wird nicht 
immer zwischen den folgenden Fragestellungen klar unterschieden: auf welche Weise 
Taiwan nach der Zession an Japan als Folge des chinesisch-japanischen Krieges im Jahr 
1895 durch den Vertrag von Shimonoseki wieder an China abgetreten wurde, Fragen der 
völkerrechtlichen Anerkennung einer Regierung, der völkerrechtlichen Erheblichkeit der 
Anerkennung von Staaten, der Vertretungsbefugnis sowie des Status von Taiwan in intern-
nationalen Organisationen. Ausgangspunkt der Diskussion des völkerrechtlichen Status ist 
Jellineks Drei-Elemente-Lehre, wonach Taiwan an sich die Voraussetzungen für einen Staat 
erfülle, da es über ein Staatsgebiet, ein Staatsvolk sowie eine effektive Regierung verfüge. 
Die deklaratorische und die konstitutive Theorie der Anerkennung von Staaten wird disku-
tiert. Dabei folgen die Autoren der herrschenden Ansicht, wonach ein neuer Herrschafts-
verband die Staatseigenschaft unabhängig von dem Rechtsakt der Anerkennung erwerbt. Im 
Anschluss daran behandeln und negieren sie die Frage, ob China unter dem Regime der 
„ungleich Verträge“, durch die Republikgründung, während des Bürgerkrieges zwischen 
1928 und 1937 oder durch die Gründung der Volksrepublik 1949 als Völkerrechtssubjekt 
untergegangen sei. Als konstituierend für Chinas Wiedererlangung der Souveränität über 
Taiwan wird der japanisch-chinesische Friedensvertrag von 1952 angesehen. Dann wird 
festgestellt, dass Taiwan trotz des verfassungsrechtlichen und außenpolitischen Wandels 
seit dem Ende der 1980er Jahre an dem Ein-China-Prinzip festhalte. Da auch unter dem bis 
2008 regierenden DPP Präsidenten Chen Shui-bian keine formelle Unabhängigkeitserklä-
run von China erfolgt sei, handele es sich bei Taiwan nicht um einen Staat, sondern um 
en einen Teil Chinas, der den Status eines stabilisierten de facto Regimes innehab.

Das Buch bietet einen leicht zugänglichen Überblick über das politische System Tai-
wans. Negativ fällt allerdings ins Gewicht, dass die Beiträge in diesem Sammelband von 
unterschiedlicher sprachlicher und auch inhaltlicher Qualität sind. Es beeinträchtigt die 
Lesbarkeit dieses Buches teilweise erheblich, wenn einfache Grundsätze der englischen 
Grammatik nicht beachtet werden. Auch würde sich der Leser eine besser strukturierte 
Darstellung wünschen, bei der die einzelnen Kapitel besser aufeinander aufbauen, aufein-
ander abgestimmt sind und sinnvolle Querverweise enthalten. Um dem Anspruch einer 
einer auch für Studenten geeigneten Einführung besser gerecht zu werden, wäre ebenfalls eine 
Erläuterung von Schlagwörtern, die auf bestimmte politische Ereignisse verweisen, wün-
schenswert. Positiv ist zu vermerken, dass den Beiträgen eine kurze aktuelle allgemeine 
Bibliografie zu Taiwan angehängt ist, die eine weitere Beschäftigung mit den in diesem 
Buch angesprochenen Fragestellungen erleichtert.

Björn Ahl, Hong Kong
Verfassung und Recht in Übersee VRÜ 42 (2009)

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Klaus Bodemer/Fernando Carrillo Flórez (eds.)
Gobernabilidad y reforma política en América Latina y Europa


Die regelmäßig im Dezember stattfindenden Jahrestreffen von REDGOB kreisen deshalb um aktuelle, meist politik- oder sozialwissenschaftlich dominierte Leit-Themen.1 Hier ging es um die Regierbarkeit als Problemfeld vor allem in Lateinamerika. Anders nämlich als der Buchtitel erwarten ließe, widmen sich spezifisch europäischen Facetten dieses Themas von den insgesamt achtzehn Beiträgen ganze drei.


reda, an der Universität von Bilbao in Politik- und Sozialwissenschaften promoviert, die Tauglichkeit von Regierbarkeitsindikatoren für die Entwicklungspraxis unter die Lupe nimmt. ("Los indicadores de gobernabilidad en el campo del desarrollo: alcance y utilidades").


Vergleichsweise breiten Raum beansprucht Kapitel IV "Reforma Judicial en América Latina", ein augenscheinlich immer noch nahezu unerschöpfliches Thema. Dieses gehen einleitend die in Salamanca forschende Politologin Pilar Domingo und ihre Kollegin Maria


Nicht alles, was der Band bietet, ist brandneu. Man wird aber, wie schon eingangs bemerkt, kaum Gleichwertiges in derart komprimierter Form zum Thema finden. Allein dies macht die Lektüre hinreichend empfehlenswert.

Karl-Andreas Hernekamp, Hamburg


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Annahmen, die dem geltenden Recht zugrunde liegen, und tatsächlichen Migrationsmustern sowie zwischen regulierenden Praktiken und Kapazitäten.


In Kapitel 5 gehen Lee Anne De la Hunt und William Kerfoot, Anwalt am Legal Resources Centre in Kapstadt, auf das Asylverfahren sowohl vor als auch nach dem Inkrafttreten des neuen südafrikanischen Refugees Act ein. Sie berücksichtigen für die Beurteilung, ob dieses als faires Verfahren ausgestaltet ist, internationale Verpflichtungen Südafrikas und Vorgaben der Verfassung. Die Autoren konstatieren teilweise bis heute bestehende Mängel, widmen sich Schwierigkeiten bei der Auslegung und Anwendung des Refugees Act 130 und behandeln die Problematik aus Perspektive der Rechtspraxis.


Nina Truchseß, Berlin

The following selected bibliography has been compiled in cooperation with the information centre of the German Institute of Global and Area Studies – GIGA – (former German Overseas Institute – DÜI) Hamburg.**

**RECHT UND ENTWICKLUNG ALLGEMEIN / LAW AND DEVELOPMENT IN GENERAL**


Bradlow, Daniel D., Developing countries debt crises, international financial institutions, and international law: some preliminary thoughts, in: German Yearbook of International Law (Berlin). 51 (2008), S. 111-142.


Li, Quan, Democracy, autocracy, and expropriation of foreign direct investment, in: Comparative Political Studies (Thousand Oaks/Cal.). 42 (August 2009) 8, S. 1098-1127.

* Diese Bibliographie dient ausschließlich der Information. Die angegebenen Titel können von VRÜ und GIGA nicht geliefert werden.

** This Bibliography serves information purposes only. Neither VRÜ nor GIGA can supply any of the titles listed.


AFRIKA / AFRICA


ASIEN / ASIA


Cartwright, Jan, India's regional and international support for democracy: rhetoric or reality?, in: Asian Survey (Berkeley/Cal.). 49 (May-June 2009) 3, S. 403-428.


Kim, Agnes S. M., Contradictions in the development of citizenship in Hong Kong: governance without democracy, in: Asian Survey (Berkeley/Cal.). 49 (May-June 2009) 3, S. 505-527.


NAHER UND MITTLERER OSTEN / NEAR AND MIDDLE EAST


LATEINAMERIKA / LATIN AMERICA


Schilling-Vacaflor del Carpio, Almut, Recht als unkämpftes Terrain: die neue Verfassung und indigene Volker in Bolivien.- Wien: Universität Wien, 2009, 416 S.


Call for Papers

»Verfassung und Recht in Übersee« ist eine Vierteljahresschrift für Fragen der Verfassungs- und Rechtsentwicklung der Staaten Asiens, Afrikas und Lateinamерikas. In ihr werden ebenfalls die internationalen, insbesondere regionalen Beziehungen dieser Staaten behandelt. Die Zeitschrift lädt alle, die an der Entwicklung dieser Kontinente interessiert sind, besonders die Wissenschaftler aus diesen Regionen, ein, sich an der Diskussion zu beteiligen.

»Verfassung und Recht in Übersee« is a Quarterly concerned with the various aspects of constitutional and legal development in the Asian, African and Latin American countries. It also deals with the international and particularly the regional relations of these countries. Everyone interested in the development of these continents, particularly scholars from these regions, are invited to take part in the discussion.

»Verfassung und Recht in Übersee« est une revue trimestrielle consacrée aux questions de l’évolution constitutionnelle et juridique des pays d’Asie, d’Afrique et d’Amérique Latine. Dans cette revue on étudiera également les rapports internationaux, surtout les rapports régionaux, de ces États. La revue invite tous ceux qui s’intéressent au développement de ces continents, notamment les spécialistes des régions en question, à participer à la discussion.

»Verfassung und Recht in Übersee« es una revista trimestral consagrada al estudio de cuestiones sobre el desarrollo constitucional y jurídico en Asia, Africa y Latinoamérica, dedicando asimismo su atención a las relaciones internacionales y, especialmente, regionales de cada área. La revista invita a todos los que se interesen por cuestiones relativas al desarrollo en estos continentes, y en especial a los investigadores de cada área, a participar en las discusiones.

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(b) journals: author’s surname / forename, title, name of journal volume (year), page number; do not cite the publishing company;
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