Enforcing the Right to Health before the Courts: The case of HIV-AIDS in Chile.

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The enforcement of the right to health raises many questions: is there a right to health; which are the different ways of enforcing economic rights and which is the most appropriate for the right to health; can any person seek in court the enforcement of the right to health; are judges institutionally capable of addressing this issue; etcetera. The objective of this article is to provide some light to these questions in a non-technical way, doing two things: presenting the experience of Chile regarding judicial enforcement of the right to health in cases of people with HIV-AIDS, and providing some insight from the international doctrine concerning the enforcement of this right.

I. The experience of litigation on HIV-AIDS in Chile.

1. The cases.
The history of HIV-AIDS litigation in Chile has been written mainly through the intervention of the Clinic of Public Interest of Diego Portales´ University Law School. That history shows three important stages: the year 1999, 2000 and 2001. The responsiveness of the courts in those stages is quite different and shows an interesting evolution. All cases were more or less similar: a person o several people, with HIV-AIDS, requested from the Public Health System treatment for HIV-AIDS (basically tritherapy); petitions were denied because not enough medicine was available, so patients filed a Constitutional Action[1] against the Public Health System, invoking their right to life, recognized by the Constitution.

In 1999 the Clinic sponsored one case[2], which was declared inadmissible[3]. In 2000, three cases were presented before the court, involving 25 people in total[4]. In that opportunity, all cases were declared admissible, full procedures were developed, but petitions were dismissed and all arguments rejected. At least they successfully passed the admissibility barrier[5]. In 2001, three cases were presented to the courts, involving three people in total, all sponsored by the Clinic of Public Interest. The central importance of this round of cases is that the Court of Appeals decided in favor of petitioners for the first time in Chile. The Court of Appeals declared:
1. Respondents have not provided the medicine requested, putting petitioners´ lives in danger.
2. According to article 1 section 4 of the Constitution, the State is at service of the human person and its duty is to promote the common good; article 19 N°1 assures every person the right to life; according to article 6 of the International Covenant of Civil and Political Rights, the right to life is inherent to the human person; d) according to article 4 section 1 of the American Convention of Human Rights, every person has a right that his life ought to be respected and that such a right should be included in the law.
3. Life is an inherent right and should be respected by everyone, particularly by those who have solemnly declared to assure every person his o her right to life.
4. Considering the imminence of petitioners´ death if treatment is not provided immediately, it is not acceptable that the one who is at the service of the human person and has assumed the obligation to take care of sexually transmitted deceases –including HIV-AIDS-, simply observes

or contemplates without intervention how those people whose lives have been assured, loose them.
5. The argument of scarcity of resources for not providing the medicine is "…unacceptable because the right to life is an absolute right and it is beyond any possible patrimonial negotiation. To establish a priority ordination that allow people with HIV to access to pharmacological treatment which may allow them to live, based on technical reasons but finally determined by economical reasons is juridical and morally unacceptable because that establishes necessarily an arbitrary discrimination among people in the same situation."
6. Not to provide the medicine needed, arguing the State that such a medicine is or will be provided to other people also sick, imports a discriminatory differentiation that lacks an objective and reasonable justification and, therefore, constitutes a violation of equality before the law, a fundamental right recognized by article 19 N° 2 of the Constitution."
Consequently, the petition is accepted. "It is ordered that respondents must provide petitioners, immediately and effectively, the necessary medicine to survive according to the current parameters of control of the decease, and also respondents must take care of all the necessary medical exams and monitor the evolution of the decease."

This was the first and only occasion in which a court of law in Chile declared that public health authorities were obliged to provide medical treatment to HIV-AIDS patients. Nevertheless, that decision was appealed before the Supreme Court, which overruled it in a three-page decision. That decision[6] stated:
1. Article 11 of the law N° 18.469 establishes that health benefits should be provided by the appropriate public health authorities (...) through available human and physical resources. The same provision declares that the Secretary of Health will regulate access, quality and opportunity for the provision of the benefits.
2. According to those statements, the issue presented before the court constitutes a public health issue, where policies should be defined and implemented by the pertinent authorities, which are the qualified personnel for regulating access to medical benefits, having in consideration that such regulation must consider a wide variety of parameters, among others, costs involved and available resources.
3. The appealed decision implies precisely the contrary to what the law pretends, because it orders under arbitrary circumstances the provision of medical benefits to petitioners for the sole circumstance that they came to the court, and also because to establish a proper criterion is necessary to have into consideration not only petitioners medical data and situation but also any other patients in a serious situation, something that can and should be handled by health authorities, except of course a situation in which undue preferences were made, which is not the case.
4. The right to health is recognized by article 19 N°9 of the Constitution, but article 20 only provides protection to the right of every individual to choose to which health system he or she might like to be registered in, either public or private; but that is not the case before the court.
Consequently, petitions are dismissed and the appealed decision, revoked.

2. Lessons from the Chilean experience.
Some lessons from the Chilean experience can be inferred.
a) It was not a good idea to present a case of HIV-AIDS as a case involving the right to life. A case of HIV-AIDS seems to be more likely related with the right to health or health care rather than the right to life. Because the Constitution protects the first and not the second one, the Clinic framed the case under the right to life, but that was a mistake.
b) In Chile and in many countries economic rights are not directly protected. In Chile, Article 20 of the Constitution grants especial protection for civil rights but not for economic rights.

Therefore, if the later are going to be enforced or made justiciable before the courts, that must be done through other procedures, like a declarative procedure. Actually, this is the kind of procedure used in other countries to enforce economic rights, like the litigation before the Constitutional Court of South Africa.
c) The judiciary is probably not the best instance to enforce economic rights. The Chilean Supreme Court declared that this issue is out of the scope of the judiciary. The Court considered that cases involving a discussion on the allocation of public resources are not to be decided by the courts. This issue is vastly discussed in intentional law doctrine, but there is no consensus. We will return to this in the next section.

3. Impact of the litigation on HIV-AIDS in Chile.
a) Even thought the Clinic could not get a favorable decision from the judiciary, the litigation obtained attention from the media and put health authorities under public scrutiny. That sole fact exercised pressure on that authority, and generated special attention for HIV-AIDS demands and needs. The consequence was that the coverage for HIV-AIDS increased. This is a positive outcome of this kind of litigation and sometimes it is the most important and expected one.
b) Besides that, after 2001, more cases, similarly framed, were presented to the courts, asking for temporary emergency remedy, until the case were decided. The courts usually granted temporary treatment, and then the cases were suspended and archived without a final decision.

Currently in Chile there are no mayor problems related with access to treatment for patients with HIV-AIDS, because the Global Fund[7] provided resources for treatment[8]. The relevant issues now are basically two: a) people with HIV-AIDS have been fired from their jobs; b) women with HIV-AIDS have been sterilized against their will in public hospitals. Therefore, the Clinic for Public Interest is now sponsoring cases of people discriminated and sterilized. In consequence, the problem of access to treatment is no longer a relevant issue in Chile, but that happened not as a result of the legal system.

II. New perspectives towards the enforcement of the right to health.

In this part I present briefly some interesting perspectives concerning the enforcement of the right to health care, taken from some international law doctrine.

1. A right to health care?
The first question is if there is a right to health care. The Chilean Constitution, like many others, recognizes the right to health, so there is no question about the existence of the right. The problem is in which way can it be enforced. It is clear that it cannot be enforced in Chile by the special procedure of article 20 and no other procedures have been tried. The U.S. Federal Constitution does not mention a right to health so this issue will depend on State Constitutions. For those Countries that have yet to recognize the right to health in their Constitutions, the last resource would be International Law, like the ICESCR[9]. Certainly, the treaty must have been ratified by the State.

In the Constitution of a country does not recognize the right to health and the country has not ratified any intentional treaty granting that right, then the existence of such a right would depend entirely on what the courts might be willing to say. They might say that such a right can be inferred from other constitutional provisions, as it happened with the right to privacy in the Griswold case, in the U.S. (1965). But it is highly probable that the answer would be negative.

2. Right to health or right to health care?

Should we speak of a right to "health" or a right to "health care"? In this article I have spoken of a right to health instead of "health care" because the Chilean Constitution recognizes that right in that sense, but that is not necessarily the common rule in other Constitutions, nor in international documents. From the perspective of the doctrine, relevant literature[10] shows that it is more appropriate to speak of a right to health care instead of a right to health. The reason is that "health" is a state, both physical and mental, that probably can never be acquired completely by an individual. To be healthy is an objective, which achievement probably is never going to be fulfilled completely. In consequence, there cannot be a right to health or to be healthy. Besides that, each individual has a great amount of responsibility regarding his or her health. This means that an individual´s health cannot be said to rest or depend only on third parties, in example, the State. For example, if an individual deteriorates his own health by consuming dangerous substances, he would not be entitled to claim that a third party is accountable for infringing his right to health.

For these reasons, relevant literature proposes to speak of something more tangible, like "health care". Certainly, the right to health care should be determined, carefully, and in the doctrine there is extended discussion as to what obligations derive from such a right and for what may the government be held accountable. But in order to try to make those precisions, it is better to speak of health care, of services to be given and actions to be performed.

3. Are judges capable of performing judicial control of economic rights?

International Law doctrine exhibits decades of discussion over this issue. The Chilean Supreme Court has declared that the judiciary has no purpose controlling the policies of the administration involving public resources. The assumption of that ruling is that the judiciary would be replacing the administration, confusing the separation of powers and assuming a political role. I would like to propose two ways for confronting that position: first, we can sustain the idea that judges can adjudicate without making public policy, that is, they can *control* the policy without *making* it. Second, we can say that judges usually make policy and therefore, nothing anomalous would be happening when controlling an economic right, like the right to health care.

Mureinik says that the most frequently objection against justiciability of economic rights is that economic rights can be realized in several ways and judges lack expertise and political accountability to choose among different alternatives. Against that background, the idea is to propose that judges may review the process of political decisions without making those decisions.[11] Courts may ask the government to explain and justify decisions adopted, in order to fulfill the particular right[12]. In doing this "[*T]he court, therefore, would be reviewing policy choices, not making them."*[13] This author aggregates that even though the court may perform a political function when reviewing the policy, that is what courts usually do when they exercise judicial review over civil liberties.[14] Besides that, judges are accustom, and are especially apt, to interpret general rules y give them legal effect in a juridical context, concludes Mureinik[15].

He provides an example. Lets say the government decides to address the problem of famine and develops a plan, which involves the use of large amount of public resources. A court may be able to control that plan, without designing the plan itself. The test to be applied is a test of rationality and sincerity towards the performance of the government. Only dishonest or irrational means would be out ruled. Courts may provide remedy in a negative form, striking down only what cannot be justified[16]. *"If in court the government could not offer a plausible justification for the*

programme that it had chosen -if it could not show a sincere and rational effort to eradicate starvation– then the programme would have to be struck down."[17]

The second alternative I mentioned consists in affirming that judges are relevant actors in the political decision process. Hunt says that in the common law jurisdiction judges have always been involved in the formulation of the law and policies, and judicial creation of the law is not something incidental or peripheral with respect to policy in general.[18] He cites three interesting opinions in that jurisdiction: "Lord Reid: There was a time when it was thought almost indecent to suggest that judges make law –they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin´s cave there is hidden the Common Law in all its splendor and that on a judge´s appointment there descends on him knowledge of the magic words Open Sesame… But we do not believe in fairy tales anymore.[19] Sir Richardson: [j]udges make law and are expected to make law, and in doing so necessarily weigh public policy considerations.[20] Wade: judges are up to their necks in policy, as they have been all through history."[21]

This perspective is also becoming a common place for other legal systems than the Common Law system. Hunt declares that when courts adjudicate in cases involving civil rights, they get involved in political issues. For example, in the case Brown vs. Board of Education en USA.[22] In sum, judges get involved in political issues when addressing civil liberties cases; they also do it when they confront economic problems.[23] Both at domestic and international level, there are several examples of cases involving human rights in which courts decide about civil liberties that implicate *broad policy questions*. If the political dimension is not an obstacle with respect to those rights, then it shouldn't be either for economic rights.[24]

Finally, I would like to make a comment regarding the doctrine of separation of powers. The basic idea of that doctrine is to assure control among different powers (*accountability*), not to shield them from control. That doctrine implies that the administration and the legislature adopt decisions, create the law and ratify treaties, and when those decisions come into force, the judiciary is supposed to exercise control over those decisions. This should not be seen as a violation of the doctrine of separation of powers; on the contrary, it is the way to comply with it; that is the reason for which it was elaborated.[25]

4. Economic Rights under International Law: justiciability and the progressiveness clause of the ICESCR[26].

The right to health is recognized by article 12 of the ICESC[27], among other treaties, and therefore, all those countries that have ratified that treaty are obliged to comply with it, like Chile. There is vast literature devoted to interpret this provision and we cannot address it here. The point here is to review what has been said about the justiciability of this right. The main problem is that the right to health, like many other economic rights, is vague. Therefore, some authors have claimed that those rights are not justiciable.

Even though economic rights are vague and present several differences with civil rights, they can be justiciable. *"...all human rights contain components that are justiciable in any courtroom of the world."*.[28] This have been remarked by the UN Committee on Economic, Social and Cultural Rights: *"...There is no Covenant right which could not, in the great majority of systems, be considered as to possess at least some justiciable dimensions."*[29] Türk, speaking of the ICESCR in his special report, explicitly declares that economic rights are justiciable[30]. Other authors also emphasize the idea that there is nothing intrinsic in economic rights that would render them not

justiciable.[31] The Limburg Principles (LP) reaffirm this. The ICESCR establishes in article 2° the criteria under which States shall assume their obligations:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

These remarks are not intended to argue that economic rights are justiciable in the same sense or to the same extent that civil rights are. They try to support the idea that there is some kind of justiciability for economic rights and to a certain extent which, of course, should be determine, becoming this issue the core of a whole new discussion.

Some authors see in the progressiveness clause an excuse for not doing anything on the part of the State, but the LP provide guidance to precise each of the concepts of that provision, especially "to take steps (...) by all appropriate means, including particularly the adoption of legislation"; "to achieve progressively the full realization of the rights"; "to the maximum of its available resources".[32]

The base for justiciability of economic rights is in LP 10 y 19. LP 10: "States Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant." LP 19: "States parties shall provide for effective remedies including, where appropriate, judicial remedies." Concerning the word "justiciability", its is used in paragraph 8: "Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time."

LP also provide guidance regarding interpretation of the progressiveness clause, in principle 21: The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to deter indefinitely efforts to ensure full realization. On the contrary all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.[33]

In consequence, the progressiveness clause cannot be interpreted as an excuse for not doing anything regarding the fulfillment of the rights; neither it can be understood in the sense that such rights could be placed beyond the scope of control.[34]

From another perspective, some authors explain that justiciability of economic rights requires to distinguish obligations of conduct and result, and emphasize that economic rights are more related (though not exclusively) with obligations of result. In that sense, some authors have argued in favor of the fulfillment of a minimum of economic rights, being that minimum justiciable. This is the *minimal threshold approach*, of Bard-Anders Andreassen[35], sustained by many others[36][37]. This view grants a reasonable level of flexibility for the government and thus, makes the issue feasible. The State keeps relevant space for deciding the way in which it will enforce these rights. This flexibility and margin of discretion for the State is recognized by the LP [38][39] and also by the Maastricht Guidelines[40].

The thesis of the minimal threshold is related with the idea of a basic core of the right and, in order the review the policy of the government, it requires to identify the most deprived groups.[41]

Focusing on the right to health, there is interesting literature explaining what could be the core of that right. Brigit Toebes[42] has presented a view concerning the meaning and scope of the right to health care in the context of international obligations framed by the treaties, including the ICESCR. She explains what could be the obligations of the State towards that right and she does that distinguishing three level of obligations following the doctrine of multi-layered obligations. I will mention this in the next section.

Some one may think that to talk of a minimum core of a right is not a great step forward. That would be a mistake. The implications of the minimum threshold approach are huge. Indeed, if we think that economic rights are no rights at all or rights that are not justiciable, then the State may remain passive towards them. But, if we think that there is at least a minimum core that the State must comply with, then the State must assume an active role towards them and their progressive realization, and it will be possible to review if the State is fulfilling its minimal obligations. The minimum threshold approach makes the difference between a passive and an active role, between control and the absence of it.

5. Multi-layered obligations and the right to health care.

All rights, either civil or economic, imply multi-layered obligations. Some authors[43] distinguish three levels of obligations towards economic rights, like those recognized in the ICESCR: a) At a primary level, the obligation to respect. This obligation requires the State, together with its organs and agents, to refrain from doing anything that might impinge the integrity of the individual or his liberty. b) At a secondary level, the obligation to protect. This obligation requires the State and its agents to adopt those necessary measures to prevent other individuals or groups from violating the integrity, freedom of action or other human rights of the individual. c) At a tertiary level, the obligation to fulfill. This obligation requires the State to adopt those necessary measures to assure everyone, within its jurisdiction, the opportunities to obtain satisfaction to those needs recognized in international treaties that cannot be satisfied by the individual's own means.

This distinction is recognized by the Maastricht Guidelines[44] and it is quite important because it helps prove that economic rights, like the right to health care, imply obligations that are justiciable; at least, primary and secondary level obligations. This distinction is also important because it helps prove that vagueness is something related to a certain obligation level, not a kind of right. Indeed, tertiary level obligations are quite vague, compare to primary and secondary level obligations that are much more clear. And we must bear in mind that this happens with any right, either civil or economic. For example, primary obligations are clear in the case of the right to life or the right to education or health care. But tertiary obligations –obligations to fulfill- are considerably vague, either for a civil right, like the right to life or an economic right, like the right to education.

Lets consider an example of a civil right, like the right to a fair trial. What does that right require to be fulfilled (tertiary obligations)? That right implies the right to an impartial court. What is it required for a court to be impartial? Judges must be trained. What training is required? Judges must be appointed, under which procedure?, Judges must be reasonable paid to prevent cooptation. What amount of salary is required? The right to a fair trial requires free legal assistance. To what kind of counseling or lawyers are we entitled to? These are just some simple questions that arise when addressing the issue of tertiary level obligations related to a civil right.

If we think now on the justiciability of a right, the same reasoning applies and consequently, different level obligations will present different justiciability problems. For example, primary

level obligations are clearly justiciable, whether the right is civil or economic; and tertiary level obligations will be difficult to make justiciable, whether the right is economic or civil.

In consequence, for an economic right like the right to health care, if we focus on its primary and secondary level obligations, it would be possible to address its justiciability, and its vagueness would not appear as an insurmountable obstacle.

As I mentioned previously, Mrs. Toebes[45] proposed a list of obligations for the States derived from international law, following the scheme of multi-layered obligations. She develops a two-fold matrix: the first one is related to Health Care and the second to Underlying Pre-conditions of Health. In the first one, Toebes distinguishes the realm of health care and the realm of family planning and pre-postnatal care. With respect to health care, Mrs. Toebes explains which are the State obligations involved in the three multi-layered state obligations scheme:

Obligation to Respect: 1) Respect for equal access to health care; 2) No interference with the provision of health care; 3) No interference with the provision of health care related information.

Obligation to Protect: 4) Adoption of legislation and other measures in order to assure adequate access to health care provided by third parties; 5) Adoption of legislation and other measures in order to assure that adequate information of health care is provided by third parties.

Obligation to Fulfill: 6) Provision of health care services; 7) Provision of health care related information.

Upon this proposal of Toebes[46], we can see that the right to health, through three levels, encompasses at least seven different obligations. We can reasonably argue that the State has the obligation to enforce the right to health at least with respect to the primary and secondary level obligations. This means five obligations out of seven, which is not bad. The progressiveness clause of the ICESCR does not impede the state from complying with that immediately. Such a clause is more related to the third level of obligations, to fulfill (two obligations out of seven). And even in that level, as the doctrine and the LP have established, the State is under the obligation to adopt immediate steps towards that progressive fulfillment.

CONCLUSIONS.

There is a right to health care, at least for those States that have recognized that right in their Constitutions or have signed international treaties that recognize it, like the ICESCR.

It seems better to speak of a right to health care instead of a right to health.

The main problem regarding this right concerns its justiciability.

Local courts have proved sometimes to be not the best place to try to enforce this right. That is the case of Chile.

Besides that, international law doctrine argues about the best means to enforce this right.

A three-level obligation scheme seems to be of the most relevance to address issues of justiciability and determination of specific obligations.

Regarding HIV-AIDS cases and the right to health care, we may apply some international law doctrine to conclude that:

1. Judicial control.

A court can control the performance of the government towards that right. The idea is not to design the policy but to review it. This review may include: a) To check if the government has a plan to provide health services to patients with HIV-AIDS. b) To control if that plan is reasonably based. c) If there is not a plan to grant immediate access to health services for those patients, the objective of the control would be to review if there is a plan to take care of them in the medium term and to check if there is an emergency plan to address the period in between (like a famous case in South Africa[47]). d) To control if the plan is discriminatory.

The performance this kind of control does not secure that patients with HIV-AIDS will get the treatment they need, but performing it is better than not executing any control at all. With this control, some hypothesis may be ruled out.

2. Progressiveness.

States should attain economic rights in a progressive fulfillment basis. The State must adopt immediate steps to make those rights fulfilled in the future. The court may control: a) If the State is taking those immediate steps. This control rules out the possibility of the State doing nothing for the right to health care regarding patients with HIV-AIDS. b) The ICESCR requires the States to make an effort within the maximum of the available resources. The court may require the government to prove that it is making its best effort with the available resources. c) If the plan of the government is actually structured in a progressive logic, that is, to check if the government is complying with the progressiveness clause of the ICESCR in order augment health coverage in the next future.

3. Multi-layered obligations.

Not all obligations deriving from the right to health care may be fulfilled immediately nor with the same intensity, particularly, obligations to fulfill. But the court can control the other multi-layered obligations: a) Obligation to respect. The court may review if the administration itself is placing obstacles for patients to access health services. b) Obligation to protect. The court can review if third parties are placing obstacles for patients to enjoy health services and if the government is not preventing them from doing that.

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NOTES

1 This is a special procedure, established in article 20 of the Constitution, designed to provide expedite remedy to violations of certain rights, like the right to life, but not the right to health.
2 Case number 2613-99, June 14th, 1999. García against the Southeastern Metropolitan Health Service.
3 This means that the court did not even hear arguments. Inadmissibility is a formal declaration, pronounced by a special chamber of the court, before the case goes to the chamber that will finally see it. That chamber said: “the facts described in the petition overwhelms the boundaries of this procedure and therefore it cannot be admitted for review.”
4 Case N° 1705, from 14-4-2000; case N° 1825 from 20-4-2000 and case N° 1905 from 26-4-2000.
5 That barrier is quite difficult to pass. Currently, over 50% of cases under this special procedure are declared inadmissible.
6 September 10th, 2001.

7 See www.theglobalfund.org
8 This information is provided by Vivo Positivo (www.vivopositivo.cl), the most important NGO devoted to HIV-AIDS in Chile.
9 International Covenant on Economic, Social and Cultural Rights, article 12.
10 There are dozens of articles. Some of them are: Beauchamp, Tom L. and Faden, Ruth R. "The Right to Health and the Right to Health Care." The Journal of Medicine and Philosophy. Vol. 4, March 1979, Number 1. Boyle, Joseph M. "The Concept of Health and the Right to Health Care." Social Thought. Summer, vol. III, No. 3 (1977); Buchanan, Allen E. "Rights, obligations and the special importance of health care." In Boyle, Thomas J., Bondeson William B. Rights to Health Care (eds.). Kluwer Academic Publishers. Dordrecht, 1991. Childress, James F.. "A Right to Health Care?" The Journal of Medicine and Philosophy. Vol. 4, March 1979, Number 1: Den Exter, Andre & Hermans, Bert. "Constitutional Rights to Health Care: The Consequences of Placing limits on the Right to Health Care in several Western and Eastern European Countries." European Journal of Health Law. Vol. 5, No. 3 (1998).; Dickman, Robert L. "Operationalizing Respect for Persons. A Qualitative Aspect of the Right to Health Care." In In Search of Equity. Health Needs and the Health System. (Eds.) Ronald Bayer, Arthur L. Caplan and Norman Daniels. Plenum Press. New York, 1983; Engelhardt, H. Tristram. "Rights to Health Care: A Critical Apprisal." The Journal of Medicine and Philosophy. Vol. 4, March 1979, Number 1. Fried, Charles. "Rights and Health Care-Beyond Equity and Efficiency." The New England Journal of Medicine. Vol. 293. July, 1975; Giesen, Dieter. "A Right to Health Care?: A Comparative Perspective." 4 Health Matrix 277 (1994); Gutman, Amy. "For and Against Equal Access to Health Care." In Search of Equity. Health Needs and the Health Care System. (Eds.) Ronald Bayer, Arthur L. Coplan and Norman Daniels. Plenum Press. N.Y. 1983. Halper, Thomas. Rights, reforms and the health care crisis: problems and prospects. In Boyle, Thomas J., Bondeson William B. Rights to Health Care (eds.). Kluwer Academic Publishers. Dordrecht, 1991; Margolis, Joseph. "Reflexions on the Right to Health Care." In Bioethics and Human Rights. A Reader for Health Professionals. (Eds.) Elsie L. Bandman & Bertram Bandman. Little, Brown and Company. Boston, 1978; Toebes, Brigit C.A. The Right to Health as a Human Right in International Law. Intersentia. Antwerpen. 1999; Veatch, Robert M. "Just Social Institutions and the Right to Health Care." The Journal of Medicine and Philosophy. Vol. 4, March 1979, Number 1.
11 Hunt:156.
12 Mureinik:471.
13 Mureinik:472.
14 Mureinik:472.
15 Melish, 2002:34.
16 Mureinik:474.
17 Mureinik:471-472.
18 Hunt, 1993:154-155; Jackman, 1992:23-24.
19 Hunt, 1996:65. Lord Reid, The Judge as Lawmaker (1972) 12 JSPTL 22.
20 Hunt, 1996:66. Richardon, Ivor. "Public Interest Litigation." (1995) 3 Waikato Law Review 1.
21 Hunt, ibid. Wade H.W.R. Constitutional Fundamentals. 1989.
22 Hunt, 1993:155.
23 Haysom:459.
24 Hunt, 1996:67.
25 Melish, 2002:37-39.
26 International Covenant on Economic, Social and Cultural Rights.
27 Article 12.
1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.
28 Leckie, 1998:105.
29 General Comment N° 9. U.N. Doc. E/C.12/1998.
30 "States should establish, whenever possible, appropriate judicial or administrative review mechanisms concerning economic, social and cultural rights. The identification of core obligations of States regarding these rights should facilitate justiciability of those economic, social and cultural rights which cannot, as yet, be considered justiciable in all States." Türk, 1992: para.224.
31 Hunt, 1996:28.
32 Alston and Quinn, 1987.

33 See also General Comment N°. 3
34 Craven, 1993:369; Melish:35.
35 Bard-Anders Andreassen, et. al., 1988.
36 Beetham:59. Illustrative in this line of argument is the report of Daniel Lack, Minimum international standards for Economic, Social and Cultural Rights, 1989.
37 Eide, 1989:44-45. See also Scheinin´s reconstruction of rights, (Scheinin, 1994:76-78).
38 6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.
20. The appropriateness of the means to be applied in a particular State shall be determined by that State party…"
39 71. In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.
40 8. As in the case of civil and political rights, States enjoy a margin of discretion in selecting the means for implementing their respective obligations. State practice and the application of legal norms to concrete cases and situations by international treaty monitoring bodies as well as by domestic courts have contributed to the development of universal minimum standards and the common understanding of the scope, nature and limitation of economic, social and cultural rights. The fact that the full realization of most economic, social and cultural rights can only be achieved progressively, which in fact also applies to most civil and political rights, does not alter the nature of the legal obligation of States which requires that certain steps be taken immediately and others as soon as possible. Therefore, the burden is on the State to demonstrate that it is making measurable progress toward the full realization of the rights in question. The State cannot use the "progressive realization" provisions in article 2 of the Covenant as a pretext for non-compliance. Nor can the State justify derogations or limitations of rights recognized in the Covenant because of different social, religious and cultural backgrounds.
41 Eide, 1989:47.
42 Toebes, Brigit: 314-315.
43 Eide 1989: 37; 1992:5; Hunt, 1996:31ss; Puta-Chekwe & Flood, 2001:43.
44 "6. Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation."
45 Toebes, Brigit: 314-315.
46 Ibidem.
47 Case CCT 11/00 THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA, et. al., versus IRENE GROOTBOOM, et. al, October 4, 2000.