

# Implementation Discretion and Relevancy of Economic and Social Rights

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## 1. *De Facto* Hierarchy-Construction Can Undermine Economic and Social Rights

The 1948 Universal Declaration of Human Rights proclaimed its individual rights as “a common standard of achievement” and called for their recognition and observance “by progressive measures”.<sup>1</sup> Some areas of the world have seen significant economic and social development during the past 30 years, notably China among them, although poverty, unemployment, health service shortage, and environmental degradation persist in many countries.<sup>2</sup> It is unclear to which extent this advancement has been pursuant to a ‘rights-based approach to development’<sup>3</sup> as opposed to factors such as peace, market access, planning and distribution, investments, and work ethic.

China has accepted the substantive international human rights treaties on economic and social rights (‘ESCRs’), not only the general 1966 International Covenant on Economic, Social and Cultural Rights (‘ICESCR’), but also the provisions on such rights in four of the specialised human rights treaties.<sup>4</sup> In doing so, China’s formal acceptance of these international legal norms – quite

apart from uneven implementation conditions – amounts to a position similar to, for example, the Scandinavian countries, albeit a tall yardstick. In contrast, the United States has only ratified one of the five treaties that emphasize ESCRs, namely the 1965 Convention on the Elimination of All Forms of Racial Discrimination (‘CERD’). From a formal international norm-acceptance perspective, China and Europe have more in common in this area, than Europe and the United States.

Compared to civil and political rights (‘CPRs’) – which in Philip Alston’s view have “dominated the international agenda”<sup>5</sup> – ESCRs have oftentimes been relegated by Governments to a secondary status. In reality, ESCRs have suffered a *de facto* lower hierarchical status in the human rights narrative of several States, in particular that of the United States. From a Chinese perspective, there can be little doubt that the human rights rhetoric of the United States, the Anglosphere in general, and some other Western countries has positively discriminated in favour of the political rights cluster of expression, assembly, association and elections. This raises questions about the sincerity of this rhetoric when it is directed against China in ways that push ESCRs into a distant background or pay mere lip-service to hard-earned achievements with regard to economic and social development.

There may well be a need to mitigate the negative consequences on the will to use international human rights law as a governance tool caused by this one-sided preoccupation with political rights on the part of the Anglosphere. Implementation discretion – to, for example, prioritise or sequence the realisation of rights – for those States that have indeed embraced an ESCR-based approach to development, could probably to a certain extent function as such a mitigating factor. ‘Margin of ap-

<sup>1</sup> The 1948 Universal Declaration of Human Rights (<http://www.legal-tools.org/doc/de5d83/>).

<sup>2</sup> Human Development Report 2013 (<http://www.legal-tools.org/doc/120b0d/>).

<sup>3</sup> For an authoritative statement on a human-rights based approach to development, see Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, 2006, Geneva (<http://www.legal-tools.org/doc/3ee27e/>).

<sup>4</sup> These four treaties are the 1965 Convention on the Elimination of All Forms of Racial Discrimination (Article 5(e) provides for equality in the enjoyment of economic, social and cultural rights) (<http://www.legal-tools.org/doc/43a925/>); 1979 Convention on the Elimination of All Forms of Discrimination Against Women (Articles 10-14) (<http://www.legal-tools.org/doc/6dc4e4/>); 1989 Convention on the Rights of the Child (Articles 23-24, 26-29 and 31-32) (<http://www.legal-tools.org/doc/f48f9e/>); and 2006 Convention on the Rights of Persons With Disabilities (Articles 24-25, 27-28 and 30) (<http://www.legal-tools.org/doc/06e036/>).

<sup>5</sup> Philip Alston, ‘Putting Economic, Social and Cultural Rights Back on the Agenda of the United States’, in *Center for Human Rights and Global Justice Working Paper*, No. 22, 2009.

preciation' is a term used in the context of the 1950 European Convention on Human Rights, referring to "the room for manoeuvre the *judicial* institutions at Strasbourg are prepared to accord national authorities in fulfilling their Convention obligations"<sup>6</sup>. The concern of this policy brief is the 1966 ICESCR, also for States Parties that have not yet accepted the jurisdiction of the Committee on Economic, Social and Cultural Rights. Even if 'margin of appreciation' is not a suitable term for their discretion under the Covenant, the "principled management of national" discretion<sup>7</sup> – balanced with our common concern that States should give full effect to treaties they ratify – remains a challenge also in the area of ESCRs. This brief asks whether such State Party discretion can help make ESCR treaty-provisions more relevant in national development narratives.

## 2. Hierarchy and Discretion in Relevant Treaties

Peremptory norms of international law occupy a position of superior hierarchy in the overall scheme of public international law as broadly accepted, and within international human rights law there are relative hierarchical terms of discourse such as "basic human rights"<sup>8</sup>, "elementary rights"<sup>9</sup> or "supra-positive rights"<sup>10</sup>. But the 1948 UDHR includes both categories of CPRs and ESCRs without any sense of separateness or priority.<sup>11</sup> This is also the case with the 1965 CERD, the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, and the 2006 Convention on the Rights of Persons With Disabilities ('CRPWD'). As regards individual rights, the 1966 ICESCR is only about ESCRs, and it contains no indication of rank or priority between such rights and CPRs regulated in the sister-ICCPR.

On a systemic level, we are advised by the Office of the High Commissioner for Human Rights that,

[h]uman rights are also indivisible and interdependent. The principle of their indivisibility rec-

<sup>6</sup> Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?', in *UCL Human Rights Review*, Vol. 3, p. 2 (italics added).

<sup>7</sup> *Ibid.*

<sup>8</sup> Theodor Meron, 'On a Hierarchy of International Human Rights', in *American Journal of International Law*, Vol. 80, No. 1, 1986, p. 5. See also Kristin N. Wuerffel, 'Discriminating Among Rights? A Nation's Legislating a Hierarchy of Human Rights in the Context of International Human Rights Customary Law', in *Valparaiso University Law Review*, Vol. 33, 1998, p. 372; and Ian D. Seiderman, 'Hierarchy in International Law: The Human Rights Dimension', School of Human Rights Research Series, Vol. 9, 2001, p. 5.

<sup>9</sup> Theo. van Boven, 'Distinguishing Criteria of Human Rights', in Karel Vasak (ed.), *The International Dimensions of Human Rights*, Greenwood Press, 1982, pp. 44–45.

<sup>10</sup> *Ibid.*

<sup>11</sup> Henry J. Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, Third Edition, Oxford University Press, 2008, p. 275.

ognizes that no human right is inherently inferior to any other. Economic, social and cultural rights must be respected, protected and realized on an equal footing with civil and political rights. The principle of their interdependence recognizes the difficulty (and, in many cases, the impossibility) of realizing any one human right in isolation.<sup>12</sup>

In other words, there is no formal hierarchy between human rights from the perspective of international human rights law. If a State nevertheless wants to create a *de facto* hierarchy of human rights for its own purposes, it can choose not to accept an entire category of human rights – for example, ESCRs – by not ratifying the relevant treaties. This is what the United States has done. But that does not change the fact that under international law, ESCRs are not inferior to CPRs (or one ESCR *vis-à-vis* another). *Mutatis mutandis*, China could not respond to the Anglosphere criticism by saying that, for example, CPRs are of a lower hierarchical importance than ESCRs by referring to international law (although it is China's sovereign right to remain a non-State Party to the 1966 ICCPR).

More constructively, and along another track, can States like China find discretionary room *within* the parameters of the ESCR-treaties that they have accepted? The relevant treaties do address this need to balance interests of good faith treaty application and challenging national development agendas, recognising that ESCRs cannot be realised overnight but through processes that may take many years.<sup>13</sup> Article 2(1) of the ICESCR reflects this reality fundamentally:

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 [italics added].<sup>14</sup>

Whereas Article 2(1) of the sister-ICCPR calls on States Parties "to respect and to ensure" the rights contained in that Covenant, ICESCR Article 2(1) creates a cumulatively-tamed obligation for States Parties (a) to only "take steps [...] by all appropriate means", and to do so recognising (b) the limitations caused by the actual availability of resources, and (c) that the full realisation

<sup>12</sup> See *supra* note 4, p. 2. This was reaffirmed by States in the 1986 Declaration on the Right to Development (<http://www.legal-tools.org/doc/3c76f1/>) and the 1993 Vienna Declaration and Programme of Action (<http://www.legal-tools.org/doc/5fdaa4/>).

<sup>13</sup> See 1966 ICESCR Articles 6(2), 11(1), 11(2)(a), 13(2)(b)-(c) and (e), and 14.

<sup>14</sup> Article 4(2) of the 2006 CRPWD has a similar provision.

of the rights will only be achieved progressively.

As regards (a), the ICESCR Committee claims that steps “must be taken within a reasonably short time after the Covenant’s entry in force for the States concerned” and that such steps “should be deliberate, concrete and targeted”.<sup>15</sup> “[A]ll appropriate means”, it says, entails that legislation in many instances is “highly desirable”, but “by no means exhaustive”.<sup>16</sup> Whereas a State Party “*must decide for itself which means are the most appropriate under the circumstances with respect to each of the rights*”, the Committee reserves “the ultimate determination as to whether all appropriate measures have been taken”.<sup>17</sup> It moves on to elevate judicial remedies among these measures, suggesting ESCRs are self-executing, and that “appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place”.<sup>18</sup> It strongly encourages “direct incorporation” of the Covenant in national law as that “provides a basis for the direct invocation of the Covenant rights by individuals in national courts”.<sup>19</sup>

As regards (c) – “with a view to achieving progressively the full realization of the rights” – the Committee describes the “progressive realization” language as “*a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights*”.<sup>20</sup>

Although Committee interpretations enjoy limited binding effect,<sup>21</sup> States have little to fear from the above-quoted General Comments. The Committee respects the discretion of States Parties to decide which means are the “most appropriate”, and does not narrow the “progressive realization” clause. It would therefore seem that States Parties do enjoy prioritization and sequencing discretion under Article 2(1).

### 3. The Risk of Irrelevancy of Economic and Social Rights in Economic Development

Let us move briefly from the realities of international human rights law to the “realities of the real world”, to

<sup>15</sup> The 1990 General Comment No. 3 (“The Nature of States Parties Obligations”) (<http://www.legal-tools.org/doc/63c57d/>).

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.* (italics added).

<sup>18</sup> The 1998 General Comment No. 9 (“Domestic Application of the Covenant”) (<http://www.legal-tools.org/doc/4b625f/>).

<sup>19</sup> *Ibid.*

<sup>20</sup> General Comment No. 3, *op. cit.* (italics added).

<sup>21</sup> The Committee assumed the practice of General Comments pursuant to UNGA resolution 42/102 “with a view to assisting the States parties in fulfilling their reporting obligations”, see its Report on the Third Session (6-24 February 1989), Annex 3: General Comments, para. 1, p. 87, UN doc. E/C.12/1989/5 (<http://www.legal-tools.org/doc/8c52ef/>).

quote the ICESCR Committee’s choice of words. Given that China has accepted an ESCR-based approach to development, how prominently has international human rights law featured in the Chinese decision-making and -implementation that have led to this development? What has brought about the dramatic economic and social development in China during the past 30 years?

Starting with the first factor from the bottom, Figure 1 below represents a series of possible factors and a pragmatic approach to the development of China. Only at the end of the ladder is there a loose cluster of reasons which we, for the purposes of this brief, may label as the “9. Quality of societal understanding of importance of economic and social development”. It is within this group that international economic and social human rights would feature, if at all.



Fig. 1: Possible factors behind Chinese development.

An explanatory paradigm such as this confronts us head on with the problem of relevancy of ESCRs in the “real world”. Sadly, ESCRs are often irrelevant to the socio-political processes behind economic and social development – outside foreign ministries and international law communities – although that is not always the case.

The Portuguese Constitutional Court, for example, has managed to take centre stage in the Portuguese debate by striking down State financial austerity measures as unconstitutional six times during two years, blocking the Government’s attempts to meet international legal obligations.<sup>22</sup> As a consequence, the country’s finance minister was considering “pre-submitting next year’s budget to the court” in “a bid to regain control of the deficit-reduction strategy”, while the prime minister said “the court needed ‘better judges’ subjected to ‘greater scrutiny’”.<sup>23</sup> These are interesting words illustrating how complex is the meeting of judicial review, constitutional

<sup>22</sup> Peter Wise, ‘Portugal court ruling on austerity measures threatens tax rises’, *Financial Times*, 1 June 2014.

<sup>23</sup> Peter Wise and Sarah Gordon, ‘Portuguese government grapples with its constitutional court’, *Financial Times*, 15 June 2014.

protection of individual rights, and economic realities. Roman Herzog, former President of Germany and of the German Constitutional Court, has highlighted this further: “For in a modern (and comprehensive) economy, he who decides the money automatically decides the politics, which cannot be financed without it. With questions of budgetary control *there is indeed considerable danger that their answers can lead to direct conflicts with the core of democratic constitutional life*”.<sup>24</sup>

Mainstream relevancy comes with challenges. If ESCRs and their judicial review are deliberately placed under the societal mammoths of State spending and finance, the chief fields of contestation and vying for political power, the utility of ESCRs in the national development narrative may simply be crushed. This brief suggests that irrelevancy is the main threat to ESCRs today. When, exceptionally, ESCRs do take central stage through judicial enforcement, political actors may well allege judicial overreach.

#### **4. State Discretion to Sequence and Prioritize Can Make Economic and Social Rights More Relevant**

The ICESCR Committee plays a predictable and important role when it seeks to watch over the 1966 Covenant by means of General Comments. The Office of the UN High Commissioner for Human Rights also fulfils expectations when it releases its policy documents, such as the 2006 statement on a rights-based approach to development. It may, however, serve the law just as well when it acknowledges that “[h]uman rights standards by themselves can rarely resolve complex policy choices and trade-offs”<sup>25</sup>, and concedes prioritization discretion to States Parties: “The principle of ‘progressive realization’ recognizes that some rights may have to be given priority over others, because not all rights can be fulfilled at the same time or at the same place”.<sup>26</sup>

This is where the High Commissioner – as the Committee above – comes to the end of the legal basis of her

<sup>24</sup> Roman Herzog, ‘We Ought To Be EU-Skeptic’, *Der Spiegel*, 23 May 2014 (italics added). For an analysis of the important *Hinterland* of reluctance in the German legal community to accept the justiciability of ESCRs, see Mirja A. Trilsch, ‘The Justiciability of Economic, Social and Cultural Rights in Domestic Law’, in *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*, Band 234, 2012, pp. 505–512.

<sup>25</sup> See *supra* note 4, p. 11.

<sup>26</sup> *Ibid.*, p. 12.

attempts to preserve the integrity of international human rights law in the face of the “realities of the real world”. Rather than fearing such frontier territory and being defensive on behalf of the ICESCR, international lawyers should welcome how the flexibility of the Covenant may empower States Parties to use it with greater ease, creating a comfort zone that should spur “serious and assiduous”<sup>27</sup> fulfilment of treaty obligations in accordance with the ordinary meaning of the relevant provisions.

The ESCR-movement benefits greatly from China’s acceptance of economic and social rights in five treaties. But the responsibility for China’s economic development does not rest with international human rights law or the 18 members of the ICESCR Committee. It rests squarely on the Government of China. The exercise of that responsibility affects the basic needs of more than 1.3 billion individuals. Sharing that responsibility with courts – when they are still undergoing a process of professionalization – or with a monitoring body of a treaty, begs profound and sober reflection.

Recognizing comfortably, on the other hand, the room States Parties such as China have to prioritize and sequence the implementation of rights under the ICESCR – their discretionary space, which should be further mapped and analysed – may increase the willingness of States Parties to make reference to international economic and social human rights in their development activities, policies and political language.

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<sup>27</sup> From China’s commitment in her second periodic report to the ICESCR Committee, UN doc. E/C.12/CHN/2, 6 July 2012, p. 9 (<http://www.legal-tools.org/doc/7334d7/>). For the first report, see UN doc. E/1990/5/Add.59, 4 March 2004 (<http://www.legal-tools.org/doc/7d20de/>).