The Right to Food as a Justiciable Right: Challenges and Strategies

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I. Introduction

This article will discuss some of the problems and challenges regarding the consideration of the right to food as a justiciable right – that is, as a right that can be interpreted by the courts and can be the subject of litigation. Firstly the debate regarding the justiciability of economic, social and cultural rights will be discussed in general; secondly the focus will shift to some particular issues that arise when the general problem of justiciability is considered in the context of the right to food. Then some of the strategies for advancing justiciability of the right to food that have proved to be successful in different domestic and regional legal systems will be presented and discussed. Finally, some summary conclusions from the discussion will be drawn.

II. The Debate on the Justiciability of ESC Rights and the Right to Food

Is there any role for courts in the full realisation of the right to food? In order to clarify some of the aspects to be taken into consideration, a first attempt to answer this question involves placing it in the broader

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Max Planck Yearbook of United Nations Law, Volume 11, 2007, p. 317-337.

context of the debate on the justiciability of economic, social and cultural rights (hereinafter, ESC rights).

While ESC rights have been part of the international human rights regime at least since the adoption of the Universal Declaration of Human Rights in 1948, considerably less effort has been made to develop a conceptual framework to give them content and to construct protection mechanisms to enforce them, than in the case of civil and political rights. One of the traditionally neglected issues regarding ESC rights has been their justiciability – that is, the possibility for alleged victims of violations of ESC rights to file a complaint before an impartial body, and request adequate remedies or redress if a violation is deemed to have occurred. There has been – and there still is – a passionate debate regarding the issue of the justiciability of ESC rights: according to some critics, ESC rights are by their nature different from civil and political rights, and are not suitable for judicial adjudication.[1] Other voices maintain that differences between civil and political, on the one hand, and ESC rights, on the other hand, are differences of degree and not differences of nature, and that – therefore – nothing prevents ESC rights from being the object of judicial adjudication.[2]

The central arguments which arise in this debate will not been expanded here: it is enough to point out that, according to the present author's viewpoint, the idea that, due to their specific nature, ESC rights are *in toto* not suitable subjects for judicial enforcement is a misguided idea, and does not reflect the largely accumulated empirical evidence against it – i.e., an amount of comparative case law in which judges adjudicate situations of alleged violations of ESC rights.

Of course, there are some aspects of ESC rights which may make judicial adjudication more complicated – but, again, these aspects are

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1 See, from different points of view, A. Neier, "Social and Economic Rights: A Critique", *Human Rights Brief* 13-2 (2006), 1-3; G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?,* 1991; C. Tomuschat, "An Optional Protocol for the International Covenant on Economic, Social and Cultural Rights?", in: *Weltinnenrecht. Liber amicorum Jost Delbrück,* 2005, 815 et seq.

2 See again, from different viewpoints, V. Abramovich/ C. Courtis, *Los derechos sociales como derechos exigibles,* 2nd edition, 2004; R. Alexy, *Theorie der Grundrechte,* 2nd edition, 1994; COHRE (Centre on Housing Right and Evictions), *Litigating Economic, Social and Cultural Rights. Achievements, Challenges and Strategies*, 2003; C. Fabre, *Social Rights under the Constitution: Government and the Decent Life,* 2000.

not alien to civil and political rights either, and have never been used to suggest a claim that civil and political rights are not justiciable *in toto*.

To avoid Byzantine discussions, it is enough here to point out the matters that the present author considers to be relevant to the debate about the justiciability of ESC rights. There is no difficulty in recognising that judicial adjudication is not, and cannot be, the main means to fully realise ESC rights. The development and implementation of services and policies necessary to make these rights a reality are the kinds of tasks that mainly correspond to the political branches of governments, and not to the judiciary. Courts may not even be the best actors to perform the task of monitoring the general results of policies oriented to ensure the realisation of ESC rights – a task for which political and especially independent technical bodies are better equipped.

The functioning of courts is selective: courts typically deal with narrowly defined factual situations, so judicial proceedings are not necessarily the best forum to evaluate the empirical indicators, necessary to understand the full picture of variables, which characterise complex public policies in fields such as health, education, social security or housing. This is, however, also true for some obligations stemming from civil and political rights that require for fulfilment legislation and implementation of services, so this is not a decisive argument against justiciability of ESC rights.

But those who favour the justiciability of ESC rights do not propose otherwise. The relevant question is not whether litigation and judicial adjudication should be the main means through which ESC rights are advanced, but instead whether litigation and judicial interpretation should play *some* role – as opposed to *no* role whatsoever – in this area. Arguments in favour of the justiciability of ESC rights cannot be different from arguments in favour of the justiciability of human rights in general: that is giving voice to right-holders and offering them forms of reparation in case of a violation, subjecting duty-bearers to control in case of failure to comply with their legal duties, protecting the rights of minorities and disadvantaged groups against biased decisions of the political majority, offering means for the solution of situations of legal uncertainty and of conflicting interpretation of the law and finally – from the viewpoint of the institutional design of constitutional democracies – channelling the idea of mutual control of powers (frequently illustrated

with the image of "checks and balances") and defending the supremacy either of the constitution or of the law.[3]

Accepting that there is no insurmountable conceptual difficulty to conceive ESC rights as justiciable rights does not exempt them from meeting – as with any right – a number of pre-requisites, in order to be fit for adjudication. Some of these pre-requisites are: the existence of a clear "rule of adjudication" on the basis of which the legality of a legal norm or a factual situation can be assessed; identification of right-holders and duty-bearers; adequate judicial procedures; and the regular functioning of an independent and impartial judiciary. If these pre-conditions are not met, litigation before courts would hardly be an effective strategy to strengthen ESC rights – it would rather be a sure call for failure. Even if the pre-requisites are met, there are also other strategic considerations to be made in order to decide if litigation is the most convenient way to make claims regarding ESC rights. For instance, the length and cost of judicial proceedings, the confrontational character of litigation – which may lead to the interruption of negotiations with political authorities who will, eventually, be in charge of delivering the services necessary to satisfy ESC rights – , and the compatibility or consistency of litigation with other strategies to realising rights advanced by the right-holders.

The argument here is that justiciability should be considered as *another* or additional means of enforcement and implementation of ESC rights, as is the case with civil and political rights. Considering that ESC rights should be completely devoid of any kind of judicial protection, and left to the complete discretion of political branches of government, has actually contributed to the considerable devaluation of ESC rights in the legal hierarchy. While courts and litigation should not be seen as the only means for the realisation of ESC rights, the complete absence of any resource to courts of law in relation to these rights clearly downgrades the span of mechanisms available for victims of rights violations, makes state accountability weaker, erodes deterrence and fosters impunity.

If the right to food is to be considered a right in a meaningful – and not just in a rhetoric or metaphoric – way, the above considerations should also apply to it. In the next section some consequences of these

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3 See, for example, Y. Rabin/ Y. Shany, "The Case for Judicial Review over Social Rights: Israeli Perspectives", *Israel Affairs*, forthcoming. Available at <http://ssrn.com/abstract=896289>.

general ideas about justiciability of ESC rights in the particular context of the right to food will be discussed.

III. Particular Challenges Regarding the Right to Food

What shall be explored here are some issues regarding justiciability that are specific for the right to food, and thus may not apply to the same extent to the whole category of ESC rights – even if there could be relevant analogies drawn regarding other ESC rights.

The first issue is related to the "rule of judgment" regarding the right to food. While the right to food has been enshrined in the International Covenant on Economic, Social and Cultural Rights for more than 40 years now, efforts to develop and clarify its content are relatively recent, especially in comparison with other rights recognised by the same covenant – i.e. labour rights. Landmarks in this process of clarification are General Comment No. 12 on the Right to Adequate Food of the Committee on Economic, Social and Cultural Rights, adopted in May 1999, and the FAO *Voluntary Guidelines to Support the Progressive Realisation of the Right to Adequate Food in the Context of National Food Security*, adopted in November 2004.[4]

A number of factors may explain this situation – among them the fact that, for a long time, ESC rights were mainly conceived as rights related only to work, under the assumption that, given that people were part of the formal workforce and, thereby, ensured a decent income, the primary allocation of this income would be oriented to the satisfaction

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[4] See, in this sense, H. Faúndez-Ledesma, "The International Recognition of the Right to Food and Access to Justice"; S.A. Way, "The Right to Food and Access to Justice: Understanding the Right to Food as a 'Negative' Right" and P. Spitz, "Justiciability of the Right to Food: Interdisciplinary, Transversal Character and Conflicts", all of them in: M. Borghi/ L. Postiglione Blommestein (eds), *The Right to Adequate Food and Access to Justice,* 2006, 21 et seq.; 45 et seq. and 57 et seq. respectively, L. Weingärtner, "The Concept of Food and Nutrition Security", in: K. Klennert (ed.), *Achieving Food and Nutrition Security. Actions to Meet the Global Challenge,* 2005, 14-15. For a pioneer work, paving the road for the clarification of the content of the right to food, see A. Eide, *The Right to Adequate Food as a Human Right*, 1989. Compare also Skogly, in this Volume, footnote 30.

of basic needs, such as nutrition, housing and healthcare.[5] While this assumption seems empirically sound, it seems that its premise – the progressive inclusion of the whole population in the formal workforce – was optimistic in excess – both for developing countries, where the pace for inclusion in the formal workforce is much slower than it was thought, and for developed countries, where permanent long-term jobs have become the exception and not the rule.

The political strategy of pegging ESC rights to the position of the worker in the formal workforce has proved to be a limited one, as it weakens or denies protection to those who have little chance to be incorporated into the formal workforce, and have no links of dependency to someone who is in the formal workforce. The paradox is that this group often includes those who are worse off in society – that is, the neediest, who should actually be the preferred target of ESC rights. In consequence, during the last 20 years, international efforts have been devoted to developing the content of ESC rights outside of a formal labour contract. Even within this process, while some rights – such as the rights to health, the right to education and the right to housing – have gathered considerable attention, the content of the right to food – along with the more recently framed right to water – has only recently started to be developed in a more systematic fashion. The legal standards regarding the content of the right to food are, therefore, comparatively recent to be agreed upon as developed standards upon which litigation can be based, without reference to other rights.

Yet another particular issue is the fact that, while other ESC rights – such as the rights to health and to education – have had broader constitutional recognition throughout the world, this has not been the case for the right to food, and thus there are fewer countries with an express constitutional provision of this right.

A third problematic factor is, that statutes regarding food security and other food issues usually state public policy goals and principles, but rarely enunciate an individual (or collective) right to food.

These three factors may create some difficulties in the identification of a firm legal basis to take a case to court regarding the right to food. If there is no express constitutional basis for the right to food, and there is no clear statutory basis either, directly arguing a case on the basis of the text of the International Covenant on Economic, Social and Cultural

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5 For this argument, see V. Abramovich/ C. Courtis, *El umbral de la ciudadanía. El significado de los derechos sociales en el Estado social constitucional,* 2006, Chapter 1.

Rights and on soft law documents such as the already mentioned General Comment No. 12 and the FAO Voluntary Guidelines on the Right to Food, before domestic courts with little or no knowledge about international law, can be a highly uncertain bet. This is the case even in the (monistic) legal systems where international law is directly part of domestic law and can be directly invoked before courts. Difficulties increase in dualistic systems, where international law is not automatically incorporated into domestic law. Moreover, the right to food is a relatively "young" right and lacks a consistent body of case law on which to draw in order to frame a new case and apply law to a new set of facts.

While these issues may indeed constitute obstacles for the justiciability, they are not insurmountable – most of them are actually effects of the lack of an interpretive tradition identifying the right to food as a autonomous right. There is no conceptual impediment to define the content – or some aspects of the content – of the right to food in a legislative statute or to include the right to food in a constitution; the experience of directly applying international human rights instruments and standards is also a growing practice in domestic courts in different parts of the world. And the absence of case law is just a state of affairs that can change gradually, when cases start being decided by courts and therefore accumulate.

Even in those cases where the right to food is not directly enshrined in a constitution or defined by a legislative statute, and even when international law cannot be directly invoked before domestic courts, or – as a matter of fact is not frequently invoked before domestic courts – comparative legal experiences highlight a number of indirect ways of protecting the right to food through litigation. Some of these experiences will be explored in the next section.

There is also another characteristic of the right to food that may call for further attention in the context of developing the possibilities of justiciability. The satisfaction of the right to food has traditionally been entrusted, in a high degree, to the market – in this regard, the right to food can be compared to the right to housing and the right to work, and is different in this respect compared to rights which are often dealt with in a more centralised/state-dependent fashion, such as the right to healthcare and the right to education. On the supply side, food is a good characterised by the multiplicity of producers and providers. On the demand side, leaving aside those who produce or directly obtain their own food – mostly traditional communities, peasants and inhabitants of rural settings, who are an ever decreasing percentage of the world population – as a result of the growth of urban dwellers and the

extension of the social division of labour, most of the world's population depends on someone else's food production and distribution – typically satisfying its nutrition needs through purchasing food in the market.

The definition of the right to food offered by the Committee on Economic, Social and Cultural Rights actually grasps this dimension. When asserting that,

> "the right to adequate 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" (para. 6),

it points both to *access to food* and to *the means for its procurement*. An adequate income is, of course, part of those means for the procurement of food through purchase.

Thus, the right to food involves the existence of a multiplicity of actors: right-holders, but also other private actors, especially those who produce and distribute food, those who are involved or can affect the means for the procurement of food, and of course the state. This requires an understanding of the complex ramifications of the right to food. The relative importance of the array of state duties stemming from the right to food vary dramatically, depending on the different situation of the right-holders and of third parties involved in the production and distribution of food, or those who could affect the means for its procurement.

Duties to fulfil, requiring the direct provision of food by state authorities, typically arise in cases of acute market failure – failures in the supply side, and failures in the possibilities of purchase by deprived segments of the population. In many other relevant scenarios, state duties stemming from human rights instruments regarding the right to food are mostly duties to respect – i.e., to abstain from interfering in the means through which individuals and groups satisfy their access to food – and especially duties to protect – to regulate, and to monitor the conduct of the relevant private parties. But, as the means for the procurement of food can be different, regulating and monitoring the relevant parties may also involve a number of different situations: private parties affecting access to land and commodities such as water necessary to produce food in rural environments, the quality of food produced and distributed by private parties, private parties with enough power to affect or distort the supply in food markets, private parties – such as employers, or persons in charge of sustenance or alimony duties in the

family context – that play some role or may affect the availability of salaries or income necessary to purchase food, an so on. The state itself can also be a relevant actor regarding the provision of the income necessary to obtain food, such as old-age pensions or social assistance benefits.

What consequences does this range of involved actors and variety of situations, relevant to satisfying the right to food, have on its justiciability? A pessimistic approach would probably stress that such a complex array of interrelations makes it difficult to consider the right to food as a coherent unity and difficult to define its limits. Doubts might be cast even on the possibilities of defining the content of the right to food, and on its conceptual viability.

But this kind of complexity is not only a characteristic of the right to food, but of many other human rights. The multiplicity of actors, the variety of situations in need of regulation and monitoring, and the fact that rights are multifold, and cannot be reduced to a single, nuclear duty, are not alien to many other rights, such as *inter alia*, the right to life, the right to liberty and security of the person, the right to a fair trial, freedom of expression, the right to vote and to participate in elections, labour rights, the right to health or the right to education. Indeed, the classification of "levels of duties", employed by the Committee on Economic, Social and Cultural Rights, intended to encompass this complexity, and is not only devised to be applicable to ESC rights, but to any other human right. The diversity of actors and situations involved by the human right to food does not foreclose, but actually opens up the opportunities for justiciability. While in the international sphere the state is the subject of responsibility for any violation of the right to food, domestic legislation enacted by states in order to comply with their international duty to protect can impose obligations on private parties, and establish private-to-private legal actions in different spheres. Examples are labour relations, protection against forced evictions, protection of dependent children from a failure by their parents to comply with sustenance duties, food consumer protection, antitrust protection, and many others.

Judicial protection in these areas is another means through which state duties to protect are complied with. Domestic judicial protection should also involve legal proceedings against state actions or omissions, both against violation of negative duties, and violations of positive duties, when their content is well defined or can be reasonably determined.

Indeed, it will be shown in the next section, that the comparative experiences of judicial protection of the right to food are, in the most part, indirect, through the interconnection of the right to food with other rights, or through framing violations of the right to food as violations of some other right. The right to food offers a practical lens through which to view the notion of interdependence of human rights, and especially a particular "intra-ESC rights" dimension of that interdependence: the close connection of the different components of the right to an adequate standard of living, such as food and housing, with the means to satisfy these needs, such as self-production, a job in the labour market, and other means to secure an adequate income.[6]

IV. A Comparative Perspective of the Justiciability of the Right to Food

Bearing in mind this background scenario, it is time to turn to the illustration of some comparative experiences regarding the justiciability of the right to food.[7] The main point will be to show that different aspects of the right to food have been actually considered in a number of different ways by courts, regardless of the actual usage on the denomination "right to food".

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6 These connections can be clearly identified in the International Covenant on Economic, Social and Cultural Rights. For example, article 7 (a) (i) defines the notion of "fair ... remuneration" as "remuneration which provides all workers, as a minimum, with: (ii.) a decent living for themselves and their families in accordance with the provisions of the present Covenant. The referral links this definition with the right to an adequate standard of living, provided by article 11.1: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions."

7 For other approaches on this topic, see C. Golay, "The Right to Food and Access to Justice: the International Covenant on Economic, Social and Cultural Rights Before National Jurisdictions"; A. Beurlen de França, "The Juticiability of the Right to Adequate Food in Brazil" and M.C. Cohen/ M. Ashby Brown, "The Right to Adequate Food, Justiciability, and Food Security: the Cases of the United States of America, India and South Africa", all of them in: Borghi/ Postiglione Blommestein, see note 4, 117 et seq.; 199 et seq. and 219 et seq., respectively.

To start with, there are, in the comparative experience, cases decided on the right to food. Argentine local courts provide some examples. The local courts of the city of Buenos Aires ordered preliminary measures in the context of injunctive actions, directing the Administration to include the plaintiff and her family in a food plan,[8] and, in another case, to include a food plan and provide adequate food to a patient under a cancer treatment.[9] Similar cases were registered in local courts of the Provinces of Entre Ríos[10] and Tucumán.[11] There is actually no constitutional mention in respect of a right to food: its textual basis lies exclusively in article 11 of the International Covenant on Economic, Social and Cultural Rights and arts 24 (2)(c) and 27 (3) of the Convention on the Rights of the Child, treaties that were granted constitutional hierarchy through a 1994 constitutional amendment.

U.S. courts, while not referring to a human or constitutional right to food, have frequently dealt with statutory food stamp programs. The U.S. Supreme Court, for example, decided that a statutory restriction in the eligibility conditions for a food stamp program was unconstitutional,[12] confirming a lower court's decision to include plaintiffs in the program. A U.S. Federal District Court also held that eligibility decisions concerning food stamp programs by administrative authorities should be delivered promptly, within statutory guidelines.[13]

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8 See Buenos Aires Administrative Trial Court No. 3, *C.M.D. y otros c. GCBA s/amparo*, of 11 March 2003.

9 See Buenos Aires Administrative Court No. 4, *González Rayco, Artidoro c. GCBA s/amparo*, of 19 May 2005.

10 See Paraná (Entre Ríos) Family and Juvenile Court No. 2, *Defensor del Superior Tribunal de Justicia c. Estado Provincial-Acción de amparo*, of 28 August 2002.

11 See Tucumán Administrative Court of Appeals, Chamber I, *Rodríguez, José Angel y otra c. Sistema Provincial de Salud y otro s/amparo s/medida cautelar*, of 10 December 2003.

12 See U.S. Supreme Court, *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528, June 25, 1973. The challenged statute excluded from food stamp benefits any household containing an individual who was unrelated to any other household member. The Court found that the exclusion violated the due process clause of the U.S. constitution, finding the distinction "wholly without any rational basis."

13 See U.S. District Court, 2nd district, *Robidoux v. Kitchel*, 876 F. Supp. 575 (D. Vt. 1995). The decision states that "in establishing a processing deadline for all applications, the federal government recognized the interest of all applicants in a timely decision. Individuals deemed eligible for benefits

The right to food has also been cited in less traditional settings. For example, the High Court of Fiji struck down a punishment imposed by the prison authorities to an inmate, consisting in reducing his food rations by half. The High Court considered that the reduction of food rations and the use of food as a means of control was not consistent with article 11 (1) of the ICESCR.[14]

While there are indeed comparative cases where the basis of a judgment was the right to food, most of the experiences regarding justiciability of the right to food have involved framing duties related to the right to food in relation to the violation of a different right. This is hardly an argument against the justiciability of the right to food, where the right to food is recognised in the constitution, in a statute or through the domestic applicability of international human rights treaties. The same cases could have been argued on the basis of the right to food. Also a supplementary claim on the violation of the right to food could have been made. This is actually a proof of the interdependence or interrelatedness of human rights.

Duties stemming from a particular human right usually overlap with duties stemming from other rights, so protecting the first one may also result in protecting the second. In fact, in legal systems where ESC rights are generally not granted a complaints mechanism, such as the jurisdictions of the European and the Inter-American Courts of Human Rights, or in domestic systems where ESC rights have no constitutional recognition, or where the doctrine of non-justiciability of ESC rights is still prevalent among judges, judicial protection of ESC rights has mainly been channelled through its interconnection with civil and political rights or with general human rights principles – such as the prohibition of discrimination.[15] So the case of the right to food is actually not different from other ESC rights cases.

Some courts have, of course, framed violations of the right to food as violations of the right to life. This strategy may not cover all the as-

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need assistance quickly. Those who are found to be ineligible need to seek alternative resources, and potentially pursue an appeal, as soon as possible."

14 See High Court of Fiji, *Tito Rarasea v. State*, of 12 May 2000. Moreover, the Court found that the reduction of food as a means of punishment was incompatible with human dignity, and amounted to degrading and inhuman treatment.

15 For an account of cases which illustrate this strategy, see Abramovich/ Courtis, see note 2, Chapter 3.

pects of the right to food. If the right to life is interpreted strictly, it would cover only those cases where lack of access to food is life-threatening – freedom from starvation. A broader interpretation of the right to life, as a right to a dignified life, or a life according to human dignity, may encompass a wider variety of aspects of the right to food, such as those relating to food adequacy. In legal systems, where the right to health is considered to be a justiciable right, similar connections could be made between food and health.

Two noted cases could serve as examples. While the Indian constitution does not enshrine expressly the right to food, the Supreme Court of India decided in the *People's Union For Civil Liberties v. Union of India* case[16] that state failure to implement food schemes and distribution in cases of starvation and risk of starvation, even when there were grain stocks available, amounted to a violation of the right to life, and issued a number of interim measures prompting the state to implement the Famine Code and detailing a number of measures to be complied with, especially in relation to vulnerable groups. In a similar vein, the Inter-American Court of Human Rights decided that the Paraguayan state had violated the right to life for failing to ensure access to food, water and health services to 19 members of an extremely poor indigenous community, 18 of them being children.[17] The Court stated that the state's positive obligations concerning the right to life, including providing access to food, are triggered when the state authorities

> "knew or should have known about the existence of a real and immediate risk for the life of a determinate person or group of persons, and did not take the necessary measures, within the realm of its powers, which could be reasonably deemed adequate to prevent or avoid that risk."[18]

A second, somewhat related strategy consists in deriving duties regarding the right to food from a "right to a vital minimum" or "existential minimum", considered to stem from the constitutional formula of the social or welfare state, and sometimes from the notion of human

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16 See Supreme Court of India, *People's Union For Civil Liberties v. Union of India and others*, of 2 May 2003.

17 See Inter-American Court of Human Rights, *Sawhoyamaxa Indigenous Community v. Paraguay*, of 29 March 2006, paras 150-178, especially 159, 167, 168, 170, 173 and 175.

18 Ibid., para. 155, quoting its own judgment in the *Pueblo Bello Massacre v. Colombia* case, and the European Court of Human Rights' judgements in *Kilic v. Turkey*, *Öneryildiz v. Turkey* and *Osman v. the United Kingdom*.

dignity. The reasoning implied here is that the goal of the social or welfare state is achieving at least the material conditions necessary to honour its commitment to human dignity. Access to food is therefore considered to be one of these material conditions.

The German Federal Constitutional Court and Federal Administrative Court provide examples of the "minimum core content" strategy, deriving from the constitutional principles of the welfare (or social) state and of human dignity. The Courts decided that these constitutional principles translate into positive state obligations to provide an "existential minimum" or "vital minimum", comprising access to food, housing and social assistance to persons in need.[19]

Similarly, the Swiss Federal Court, the highest court in Switzerland, ruled that an implicit constitutional right to a "minimum level of subsistence" (*"conditions minimales d'existence"*), even for undocumented foreigners, could be enforced by courts.[20] The plaintiffs were three stateless persons, who found themselves in Switzerland with no food and no money. As they had no papers, they could neither work, nor leave the country. For the same reason, they were not eligible for social assistance and cantonal authorities rejected their claim in this regard. The Court considered that they had, at least, a right to basic minimum conditions, including "the guarantee of all basic human needs, such as food, clothing and housing", to prevent a situation where people "are reduced to beggars, a condition unworthy of being called human." It therefore ordered political authorities to grant the plaintiffs relief.

Courts have also offered negative protection against inadequate food products that constitute potential threats to human life. The Supreme Court of Bangladesh, for example, interpreting the constitutional clause enshrining the right to life, decided that the government should remove threats posed by a consignment of powdered milk which exhibited levels of radiation above the acceptable limits. The Court stated that the right to life includes the protection of health and normal longevity of an

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19 See, for example, German Federal Constitutional Court (BVerfG) and German Federal Administrative Court (BVerwG), BVerfGE 1, 97 (104 et seq.); BVerwGE 1, 159 (161); BVerwGE 25, 23 (27); BVerfGE 40, 121 (134); BVerfGE 45, 187 (229).

20 See Swiss Federal Court (Tribunal fédéral suisse), *V. v. Einwohnergemeinde X und Regierungsrat des Kanton Bern*, BGE/ATF 121 I 367, 371, 373 V. JT 1996, of 27 October 1995. For an academic comment, see A. Auer/ G. Malinverni/ M. Hottelier, *Droit Constitutionnel Suisse*, 2000, 685-690.

ordinary human being, and that these can be threatened by the consumption and marketing of food and drink injurious to health.[21]

A third strategy advanced before different courts purports to protect the right to food through protecting the means to procure for oneself food. This strategy varies, of course, depending on the relevant means to procure food for oneself.

A first cluster of cases is related to the protection of income, obviously relevant for those who procure themselves food through purchasing it. In this light, it is possible to encompass all judicial strategies directed to claim the recognition and payment of a basic income (be it a salary, a pension, other kinds of social security or social assistance allowances, alimony, etc.), and the adequacy of this income in terms of its sufficiency to cover food requirements. While most ordinary litigation before social courts (typically, labour and social security courts) seeking to obtain work and pension payments could be seen as an example of this strategy, the focus here will be on specific cases where components regarding access to food are apparent. In some of these cases, the discussion concerns the maintenance of a certain level of income necessary to cover, *inter alia*, food needs, against degradation caused by factors such as the increase of the cost of living, or tax impositions.

Again, the German Federal Constitutional Court provides an interesting example: it has held in several cases that the state tax power cannot extend to the material means necessary to cover the "existential minimum,"[22] which includes food needs. Thus, the legislature has a duty to respect the means for basic livelihood, and cannot impose taxes beyond these limits.

A number of cases decided by the Argentine Supreme Court are also good examples of this approach. These cases involved the judicial review of reasonability of the methods utilised to readjust the levels of payments deriving from labour and social security benefits, taking into account the maintenance of the purchasing power of wages and of social security payments. In the *Jáuregui*[23] case, the Court decided that the method employed by a lower court to award a compensation for unfair dismissal in times of high inflation did not reflect adequately the

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21 See Supreme Court of Bangladesh (High Court Division), *Dr. Mohiuddin Farooque v. Bangladesh and Others (No. 1)*, of 1 July 1996.

22 See, for example, German Federal Constitutional Court, BVerfGE 82, 60 (85), BVerfGE 87, 153 (169).

23 See Argentine Supreme Court, *Jáuregui, Manuela Yolanda c. Unión Obreros y Empleados del Plástico,* of 7 August 1984.

deterioration of the purchasing power of wages, and ordered that a different formula be used. In the *Rolón Zappa* case[24], the Court, arguing on the same basis, confirmed that a legislative statute, which regulated the method for levelling old-age pension payments, was unconstitutional, for affecting disproportionately their amount. In the *Martinelli*[25] case, the Court reviewed the way in which the executive branch fixed the level of the minimum wage, to which the compensation for unfair dismissal was referred, finding it unconstitutional. In the *Vega*[26] case, the Court found that a failure to update the minimum wage level by political authorities, in order to calculate compensations regarding worker's injury payments, was unconstitutional, and amounted to a deprivation of any value of the credit due to the worker. The Court ordered a new determination of the payment amount. In the *Sánchez*[27] case, the Court, made express reference to the close relation between the level of the minimum wage and access to food, housing and health care, and decided that barring social security payments from automatic readjustments according to inflation rates was unconstitutional, and ordered a recalculation of the payment, in line with the judgment.

However, as stated before, the means to procure food for oneself does not mean solely purchasing food in the market, but also growing and producing one's own food or obtaining food through traditional activities, such as hunting and fishing. Most of these activities are characteristic for rural, indigenous or traditional communities, and in many cases, they constitute definitive traits of these communities' cultures. The judicial protection of these activities against arbitrary interference by state authorities or third parties, and judicial enforcement of measures oriented to promote access and security of tenure of land, such as those derived from agrarian reforms or land distribution, are thus further examples of the (indirect) judicial protection of the right to food.

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24 See Argentine Supreme Court, *Rolón Zappa, Victor Francisco,* of 30 September 1986.

25 See Argentine Supreme Court, *Martinelli, Oscar Héctor Cirilo y otros c. Coplinco Compañia Platense de la Industria y Comercio S.A.,* of 23 April 1991.

26 See Argentine Supreme Court, *Vega, Humberto Atilio c. Consorcio de Propietarios del Edificio Loma Verde y otros/ accidente-ley 9688,* of 16 December 1993.

27 See Argentine Supreme Court, *Sánchez, María del Carmen c. ANSeS*, of 17 May 2005.

Agrarian law and agrarian courts, common in a number of countries throughout the world, offer a good example of the judicial treatment of thousands of conflicts regarding, *inter alia*, access and security of tenure of rural lands.[28]

The Inter-American Court of Human Rights has also followed this approach in a number of cases regarding the indigenous peoples' right to the recognition and titling of traditional communal lands.[29] The Court stresses that access and security of legal tenure of ancestral lands is particularly important in the case of indigenous peoples, as a means to survive, obtain food, carry out their traditional productive activities and maintain their own culture. Thus, the court has developed a broad interpretation of the right to property enshrined in article 21 of the American Convention on Human Rights, reading it in the light of Convention No. 169 of the ILO, in order to highlight the special link that indigenous peoples have with their traditional land. Judicial enforcement of access and proper legal recognition of ancestral lands can therefore be seen as a way to guarantee the access and cultural adequacy of food for indigenous peoples.

A comparable case was decided by the Supreme Court of Canada. The Court partly struck down a criminal prosecution directed against a member of an indigenous community who was charged for fishing without a requisite license in a natural reserve. The Court held, *inter alia*, that the requirement of a license infringes the aboriginal right to fish for food.[30]

In the same context, the right to housing can play a relevant role in the protection of different aspects of the right to food. Judicial protection against forced evictions in rural settings is another strategy through

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28 See, for example, a description of Mexican agrarian law and courts in M. Chavez Padrón, *El derecho agrario en México,* 1999; A. De La Ibarra, *Derecho agrario,* 1983; I. Rivera Rodríguez, *El nuevo Derecho Agrario mexicano*, 1994; Tribunal Superior Agrario, *La nueva justicia agraria. Años de fundación: 1992-1994,* 1994.

29 See Inter-American Court of Human Rights, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, of 31 August 2001, paras 148, 149 and 153; *Yakye Axa Indigenous Community v. Paraguay*, of 17 June 2005, paras 131, 132, 135, 136, 137, 140, 143, 146, 147, 154 and 155; *Sawhoyamaxa Indigenous Community v. Paraguay*, of 29 March 2006, paras 118, 119, 120, 131, 132, 133, 139 and 143.

30 See Supreme Court of Canada, *R v. Cote,* (1996) 138 DLR (4th) 385, of 3 October 1996.

which housing and food rights can be connected, in those cases were people both live and procure their food on the same piece of land, a common feature of rural, traditional and indigenous communities. Judicial monitoring of procedural conditions before state authorities or third parties decide or carry out evictions is a fundamental safeguard against arbitrary interference both to the rights to food and to housing.[31] For instance, growing attention is being paid to establishing necessary steps, including *inter alia* consultation, fair notice and alternative re-accommodation *before* massive displacements justified by development and infrastructure projects occur.[32]

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31 See, for example, Federal District Court of Brazil, Maranhão District (Justiça Federal de 1º Instância, Seção Judiciária do Maranhão, 5ª Vara), *Joisael Alves e outros v. Diretor Geral do Centro de Lançcamento de Alcântara*, Sentença No. 027/2007/JCM/JF/MA, Processo No. 2006.37.00. 005222-7, of 13 February 2007 (preliminary measure forbidding activities of a space centre that would affect traditional subsistence activities of an afro-descendant community). The example was kindly provided by Letícia Osorio. For a dramatic case where both violations to the right to housing and the right to food were found, see African Commission on Human and Peoples' Rights, *SERAC and CESR v. Nigeria*, Communication No. 155/96, of 13-27 October 2001, paras 63-69. For a comment on this case, see F. Coomans, "The Ogoni Case Before The African Commission on Human and Peoples' Rights", *ICLQ* 52 (2003), 749 et seq. For international legal standards regarding forced evictions, see Committee on Economic, Social and Cultural Rights, General Comment No. 7, *The Right to Adequate Housing (Art. 11 (1) of the Covenant): forced evictions* (1997), Doc. E/C.12/1997/4; COHRE, *Forced Evictions and Human Rights. A Manual for Action*, 1999.

32 See, in this vein, Colombian Constitutional Court, Decisions SU-039/1997 (environmental licence to conduct oil explorations in indigenous peoples' ancestral land found illegal for failure to conduct proper consultation with indigenous community – violations of rights to participation, to a due process, and to ethnical, cultural social and economic integrity of the indigenous community) and T-652/1998 (environmental licence to build a dam declared illegal for failure to conduct consultation with indigenous community – violations of rights to participation, to a due process, to the survival of the community and to the respect of its ethnic, cultural, social and economic integrity). On forced evictions caused by development and infrastructure projects, see, "The Practice of Forced Evictions: Comprehensive Human Rights Guidelines On Development-Based Displacement", adopted by the Expert Seminar on the Practice of Forced Evictions Geneva, 11-13 June 1997; Special Rapporteur on Adequate Housing as a component of the right to an adequate standard of living, and on the right to

Furthermore, violent interference with housing rights and with assets necessary to produce food have also been considered violations of civil rights. The European Court of Human Rights has held in a number of cases that forced evictions,[33] forced displacements and destruction of homes and property,[34] may amount to a violation of the right to privacy, family life and home, to a violation of the right to property,[35] and even to inhuman and degrading treatment.[36] In the same vein, the Inter-American Court of Human Rights decided that forced evictions and displacements, and destruction of homes constitute a violation of the right to property,[37] and to freedom from interference with private life, family, home and correspondence.[38]

The Committee against Torture considered a case where the police failed completely to intervene when a mob destroyed, vandalised and

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non-discrimination in this context; *Basic Principles and Guidelines on Development-based Evictions and Displacement*, Doc. E/CN.4/2006/41.

33 See, for example, European Court of Human Rights, *Connors v. the United Kingdom*, of 27 May 2004, paras 85-95; *Prokopovich v. Russia*, of 18 November 2004, paras 35-45.

34 See, for example, *Aakdivar and others v. Turkey*, of 16 September 1996, para. 88; *Cyprus v. Turkey*, of 10 May 2001 (rights of displaced persons, paras 174-175); *Yöyler v. Turkey*, of 10 May 2001, paras 79-80; *Demades v. Turkey*, of 31 October 2003, paras 31-37 (article 8); *Selçuk and Asker v. Turkey*, of 24 April 1998, paras 86-87; *Bilgin v. Turkey*, of 16 November 2000, paras 108-109; *Ayder v. Turkey*, of 8 January 2004, paras 119-121; *Moldovan and others (2) v. Romania*, of 12 July 2005, paras 105, 108-110.

35 See, for example, European Court of Human Rights, *Aakdivar and others v. Turkey*, of 16 September 1996, para. 88; *Cyprus v. Turkey*, of 10 May 2001 (rights of forcefully displaced persons, paras 187-189); *Yöyler v. Turkey*, of 10 May 2001, paras 79-80; *Demades v. Turkey*, of 31 October 2003, para. 46; *Xenides-Arestis v. Turkey*, of 22 December 2005, paras 27-32; *Selçuk and Asker v. Turkey*, of 24 April 1998, paras 86-87; *Bilgin v. Turkey*, of 16 November 2000, paras 108-109; *Ayder v. Turkey*, of 8 January 2004, paras 119-121.

36 See European Court of Human Rights, *Yöyler v. Turkey*, of 10 May 2001, paras 74-76; *Selçuk and Asker v. Turkey*, of 24 April 1998, paras 77-80; *Bilgin v. Turkey*, of 16 November 2000, paras 100-104; *Moldovan and others (2) v. Romania*, of 12 July 2005, paras 111, 113-114.

37 See Inter-American Court of Human Rights, *Moiwana Community v. Suriname*, of 15 July 2005, paras 127-135; *Ituango Massacres v. Colombia*, of 1 July 2006, paras 175-188.

38 See Inter-American Court of Human Rights, *Ituango Massacres v. Colombia*, of 1 July 2006, paras 189-199.

burnt the homes and agricultural assets of a Roma community, apparently in revenge for a crime attributed to one of its members. The brutal action of the mob caused the Roma community to flee and lose their homes, jobs and means of livelihood. The Committee considered that the state's failure to protect the group amounted to cruel, inhuman and degrading treatment,[39] while two partially dissenting members considered that the deeds constituted a case of torture.

Combining some of the previously reviewed approaches, the Colombian Constitutional Court has developed a strong jurisprudence in the field of internal displacements of poor rural population due to armed conflicts. In a considerable number of cases, the Court has included components related to the right to food in the description of the complex picture of violations caused by forced displacements, and in the kind of remedies ordered.[40] In this context, the Court has considered that food security is one of the rights threatened by forced displacements; it has included food relief as a component of the "right to a vital minimum", thus ordering political authorities to adopt positive measures to fulfil this right; it has also urged political authorities to develop and implement programs to achieve the re-establishment of the displaced population, including adequate nutrition, access to work and, when possible, return to their homes and places of origin.

The last way employed to protect the right to food through courts that will be mentioned here, with no intention of having been exhaustive, are consumer rights. While consumer rights do not form part of international human rights law, they indeed form part of the constitutional law developed in the last decades,[41] and consumer protection laws, and consumer protection agencies, have also regularly been part of domestic law throughout the world for the last 20 or 30 years. Consumer law has been one of the distinctive ways through which adequacy of food products has been dealt with before courts. For example,

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39 See UN Committee against Torture, *Hajrizi Dzemajl et al. v. Yugoslavia*, Communication No. 161/2000, of 2 December 2002.

40 See, for example, Colombian Constitutional Courts, Decisions T-227/1997, SU-1150/2000, T-1635/2000, T-327/2001, T-1346/2001, T-098/2002, T-215/2002, T-268/2003, T-419/2003, T602/2003, T-721/2003, T-025/2004, T-078/2004, T-097/2005, T-312/2005, T-563/2005, T-882/2005, T-1076/2005, T-086/2006, T-138/2006 and T-585/2006.

41 For example, constitutions of the following countries include consumer protection clauses: Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Paraguay, Peru, Portugal and Spain (the list is not exhaustive).

courts deal regularly with issues regarding non-compliance with food information requirements, and cases requiring withdrawal of food products from the market for failure to comply with health and sanitary standards are not rare.[42] Anti-trust legislation may also constitute a means through which monopolistic practice causing distortion in food supply and availability can be tackled.

V. Conclusions

To summarise the main points made in this article: sweeping arguments against the justiciability of ESC rights in general, and of the right to food in particular seem conceptually wrong and empirically unfounded.

On the other hand, justiciability is not necessarily a panacea, and should be carefully considered as a means to advance the right to food, taking into account advantages and disadvantages *vis-à-vis* other potential strategies for exigibility, such as mobilisation, political negotiation, civil society participation in the formulation, implementation and monitoring of public policies, etc.

However, one should not underestimate the possibilities of justiciability either: as the right to food has multiple aspects or components, most of them offer possibilities for judicial protection, both directly and indirectly. Courts throughout the world have dealt with a range of different claims related to the right to food, sometimes directly invoking this right, sometimes framing violations to duties, stemming from the right to food as violations of other rights, such as, *inter alia*, the right to life, the right to a vital minimum, the respect for human dignity, the right to health, the right to an income, the right to land, the respect for ethnic and cultural rights, the right to housing and consumer rights.

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42 See, for example –among many others–, Federal District Court of Brazil, São Paulo District (Justiça Federal de 1º Instância, Seção Judiciária de São Paulo-capital, 11ª Vara), Processo No. 200461000344728, of 27 October 2005 (preliminary measure ordering the Ministry of Agriculture to ban the production, import, sell and use, and to cancel the register of a chemical substance called Carbadox, used for feeding animals, for its potential toxic effects on human consumption). I am indebted to Inês Virginia Prado Soares for sending me the decision.