Bridging the Gap

The Evolving Doctrine on ESCR and ‘Maximum Available Resources’

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I. Introduction

Debates on resources stand at the core of the realization of economic, social and cultural rights (ESCR).¹ In addition to the key instrumental role of resources as essential inputs for the fulfillment of ESCR, there are also deep normative connections that should not go unnoticed. One of the most important yet contentious links is given by the maximum available resources clause (MAR clause) included in article 2 of the International Covenant on ESCR (ICESCR).² The MAR clause appears as an important qualification of the State’s duty to take steps to progressively realize ESCR. The future legal status of ESCR, especially their very nature as real legal entitlements and not as just moral aspirations, will depend on the understanding of the notion of MAR.

More than 20 years ago, in one of the most cited comments on this issue, Robert Robertson complained that despite being the most vital question in the field of ESCR, ‘little progress has been made in creating a set of workable standards which are detailed, systematic, and

¹ The authors want to thank Miguel Angel Buitrago for his assistance in research and Nicholas Lusiani, Gaby Oré Aguilar and Allison Corkery for their valuable comments to a previous version of this chapter.

² According to the International Covenant on Economic, Social, and Cultural Rights, art. 2(1), New York, 16 December 1966, in force 3 January 1976, 993 UNTS 3, each State party ‘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.’
authoritative and, as of yet, there is no answer to the question: What resources must be devoted to realizing ICESCR rights? Today we have a better understanding of this problem, largely because of the Committee on Economic, Social and Cultural Rights’ (CESCR) evolving doctrine around the issue, its periodic assessments of individual country reports, and important contributions from several experts and commentators. However, Robertson’s concern will remain valid as long as such a common understanding of the meaning of MAR is missing. Nowadays, there are still no broadly agreed upon answers to questions such as: What kind of ‘resources’ does the clause refer to? What is the scope of expressions such as ‘available’ or ‘maximum’? What kind of specific obligations does the MAR clause entail for States with regards to the mobilization, allocation, governance and use of resources? How to monitor compliance with these obligations?

Indeed, answering these questions is not an easy task, not only because of the normative and methodological complexities involved but also because of the different visions on the issue. On the one hand, there are those that disregard ESCR as mere programmatic goals or aspirations that will be taken care of in time, when resources are no longer scarce. Those who hold this position cling to the idea that obligations must be feasible for them to be real obligations: as Kant famously put it, ‘ought’ implies ‘can.’ But this position then interprets MAR as a clause that provides for a lack of obligations when resources are scarce. On the other hand, there are those that disregard resource constraints and ignore trade-offs in the mobilization, allocation and use of these resources for the fulfillment of ESCR. This position attempts to shift the argument of scarcity in favor of the advancement of ESCR. Following these conflicting positions, the MAR clause has been interpreted inadequately either as an absolute duty to fully realize ESCR regardless of resources considerations, or on the contrary as a clause that allows for the dismissal of ESCR obligations in contexts of scarcity and legitimately allows States to defend the status quo against the ambitions of ESCR practitioners.

Today it is clear that resource constraints must be considered to assess compliance with the duty to progressively realize ESCR, but this does not mean that any degree of progress, let alone inaction, is compatible with the ICESCR. However, the concrete steps that States must undertake to

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be coherent with the idea is an issue that remains unresolved. Hence, the clarification and development of the MAR clause must be taken seriously if the progressivity of ESCR is also to be taken seriously.

Aware of the importance of further clarification of the MAR clause for holding governments accountable in fulfilling the promise of ESCR around the world, the purpose of this chapter is to summarize and critically evaluate the doctrine of the CESCR concerning MAR and to propose a methodology that strengthens it. We focus on the work of the CESCR because it is the only universal treaty body that has the role of monitoring the fulfillment of all ESCR in State parties all over the world. Thus, the CESCR has become a privileged forum for legal and policy discussions concerning ESCR and its doctrine has a special status, as it is the legal interpreter of the content of the ICESCR. Nevertheless, because the MAR clause is incorporated in many other international treaties, we believe the analysis presented here is relevant to other monitoring bodies at the international and national level.4

In order to achieve this purpose, our chapter comprises five parts. In the first two sections, we provide a critical synthesis of the CESCR’s developments on the MAR clause, distinguishing, where appropriate, the established and the emerging doctrine based on general and concluding observations, as well as on other statements that the CESCR has made over the years. In the third section, we summarize some of the strengths and weaknesses of this doctrine. In section four, we turn to the examination of other approaches on the MAR clause proposed by scholars and human rights activists, to see if they offer ways for improving the monitoring of States’ compliance with their ESCR obligations. Thus, in section four, we present the main methodologies proposed by ESCR

scholars and practitioners to conceptualize and measure compliance with the MAR clause, highlighting both their strengths and weakness. In the fifth section, we build upon the critical review of the CESCGR’s doctrine and ESCR experts’ methodologies, to propose a dialogical framework to monitor compliance with the MAR clause, that combines some technical elements, some normative standards and the need of States or political authorities in the States to offer sound justifications and explanations when they invoke the MAR clause as a justification for their poor results concerning the full realization of ESCR.

II. Current Doctrine

CECSR has a robust and relatively established doctrine around the issue of MAR, which mainly dates back to General Comment No. 3 (1990) and a general statement titled ‘An Evaluation of the Obligation to Take Steps to the “Maximum of Available Resources” under an Optional Protocol to the Covenant’ (2007).5 We believe this established doctrine is better understood when divided into the following six claims:

(1) the MAR obligation is considered to be of immediate effect regardless of the available resources that each State has, in the sense that all States have to take some steps to fulfill ESCR and have to at least satisfy the core content of ESCR; (2) the CESCGR has developed a broader understanding of what qualifies as ‘resources’, including non-financial resources, international aid and cooperation. It is common for the CESCGR to ask whether developed countries are contributing enough resources or whether developing countries have taken advantage of said resources;

(3) State parties are required to provide adequate and timely information regarding the resources being deployed to finance ESCR policies;

(4) any retrogressive measure regarding the financing of ESCR is presumed contrary to the obligation of progressive realization. The CESCGR has strict argumentative requirements that governments must overcome to justify the adoption of retrogressive steps. Unlike the first three, this claim delves fully into the complexities of MAR

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and involves a higher degree of sophistication on the part of the CESCR;

(5) State parties have the autonomy to determine their resource policies in ways that they see fit, but this faculty has limits derived from human rights standards; and

(6) the squandering of resources related more broadly to corruption is deemed contrary to the MAR clause.

With respect to the first claim, the CESCR has clarified that States have certain immediate obligations of conduct regardless of the level of resources that a country has. This is most evident in the case of the non-discrimination requirement, which ‘frequently requires adoption and implementation of appropriate legislation and does not necessarily require significant resource allocations.’\(^6\) It’s also understood that ‘even in times of severe resource constraints, State parties must protect the most disadvantaged and marginalized members or groups of society by adopting relatively low-cost targeted programmes.’\(^7\) Moreover, there is also a ‘view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations.’\(^8\) The reason for this provision is that in the absence of such a minimum core obligation, the ICESCR would be largely deprived of its *raison d’être*, which is ‘to establish clear obligations for State parties in respect of the full realization of the rights in question.’\(^9\) This *basic needs requirement* points to obligations of conduct that have an immediate effect, even when they are tied to significant fiscal burdens. Hence, State parties are required to demonstrate that ‘every effort’ has been made to

\(^6\) CESCR, ‘An Evaluation of the Obligation to Take Steps to the “Maximum Available Resources”’, para. 7; General Comment No. 3, art. 2(1). In General Comment No. 20: Non-Discrimination in Economic, Social, and Cultural Rights, 2 July 2009, E/C.12/GC/20, para. 8, the CESCR distinguishes between ‘formal’ and ‘substantive’ discrimination. This latter form of discrimination will often require strong budgetary measures and is thus better understood in terms of ‘progressive realization.’

\(^7\) CESCR, ‘An Evaluation of the Obligation to Take Steps to the “Maximum Available Resources”’, para. 4.

\(^8\) General Comment No. 3, para. 10.

\(^9\) Ibid., para. 19.
use all resources that are at their disposal in an effort to satisfy, as a matter of priority, those core obligations.\textsuperscript{10}

While it is true that the concept of ‘progressive realization’ is an acknowledgement of resource constraints that impede the full realization of ESCR results in short periods, this obligation, qualified with the MAR clause, is also of immediate effect.\textsuperscript{11} The CESCR is explicit when stating that ‘where the available resources are demonstrably inadequate, the obligation remains for a State party to ensure the widest possible enjoyment of [ESCR] under the prevailing circumstances.’ In other words, even if a State has limited resources, it is still obliged to take steps to fully realize ESCR to the maximum of available resources.\textsuperscript{12}

The second claim is that CESCR’s understanding of ‘available resources’ in theory goes far beyond its financial dimension and that taking ‘all appropriate measures’ to enforce the ICESCR means taking legislative, judicial, administrative, educational and other measures.\textsuperscript{13} In practice, however, the CESCR has focused almost exclusively on financial resources.

In addition, MAR includes not only domestic resources but also those available through international development assistance. These resources are most likely financial but can also entail ‘the furnishing of technical assistance’ as well as ‘other activities.’\textsuperscript{14} This obligation of international cooperation will be ‘particularly incumbent upon those States which are in a position to assist others in this regard.’\textsuperscript{15} This means that the CESCR will be holding developed nations to account with respect to their contributions (mostly according to benchmarks established by other international treaties and the State parties), and also developing nations

\textsuperscript{10} Ibid., para. 10; CESCR, Concluding observations on the combined second and third periodic reports of Armenia, 16 July 2014, E/C.12/ARM/CO/2–3, para. 9.
\textsuperscript{11} CESCR, ‘An Evaluation of the Obligation to Take Steps to the “Maximum Available Resources”’, para. 7.
\textsuperscript{13} General Comment No. 3, paras. 3–7. This expansive understanding of resources is aligned with the CRC’s more succinct statement: ‘Resource must be understood as encompassing not only financial resources, but also other types of resources relevant for the realization of economic, social and cultural rights, such as human, technological, organizational, natural and information resources. Resources are also to be understood in qualitative terms and not solely quantitative.’ CRC, Day of General Discussion on ‘Resources for the Rights of the Child – Responsibility of States’, 46th session, 21 September 2007, para. 24.
\textsuperscript{14} General Comment No. 3, para. 13.
\textsuperscript{15} Ibid., para. 14.
with respect to their use of these resources. As we will show further on, more recently the CESC\textsuperscript{R} is increasingly focusing on issues of debt financing and tax policy.

The third claim is a more straightforward one: State parties have an immediate obligation to ‘monitor the extent of the realization, or more especially of the non-realization, of [ESCR], and to devise strategies and programmes for their promotion’.\textsuperscript{16} The CESC\textsuperscript{R} is incapable of adequately assessing the implementation of the ICESC\textsuperscript{R} in the absence of sufficient information. The provision of adequate information is a common recommendation for developing countries, which often lack the administrative capacity to fully oversee their populations, but it has also proven important in more developed countries. For example, in the Committee’s review of France of 2016, the CESC\textsuperscript{R} recommended the development of ‘suitable methodologies for gathering information and compiling disaggregated statistics on visible ethnic minorities’ and requested France ‘include the overseas departments and regions and overseas communities in its statistics.’\textsuperscript{17}

The fourth claim is grounded in a simple idea, though it has come to be one of the most sophisticated aspects of the CESC\textsuperscript{R}’s doctrine. If State parties have the obligation of progressively achieving the enjoyment of ESCR, then it is also reasonable to conclude that they have the obligation of not moving backwards once a certain level of protection has been achieved for an ESCR. Regarding the adoption of retrogressive steps, ‘[T]he burden of proof rests with the State party to show that such a course of action was based on the most careful consideration and can be justified by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources.’\textsuperscript{18} Ultimately, the CESC\textsuperscript{R} ‘will respect the margin of appreciation of the State party to determine the optimum use of its resources and to adopt national policies and prioritize certain resource demands over others.’\textsuperscript{19} But this burden of proof is not easily dismissed, as is made clear by the CESC\textsuperscript{R} in its 2007 statement that explained that if a State uses ‘resource constraints’ as a justification for a retrogressive step, then this

\textsuperscript{16} Ibid., para. 11.
\textsuperscript{17} CESC\textsuperscript{R}, Concluding observations: France, 13 July 2016, E/C.12/FRA/CO/4, para. 17; see also: CESC\textsuperscript{R}, Concluding observations: Serbia, 10 July 2014, E/C.12/SRB/CO/2, para. 10.
\textsuperscript{18} CESC\textsuperscript{R}, ‘An Evaluation of the Obligation to Take Steps to the “Maximum Available Resources”’, para. 9.
\textsuperscript{19} Ibid. at para. 12.
explanation would be evaluated in the light of criteria such as: ‘a) the country’s level of development; b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; c) the country’s current economic situation, in particular whether the country was undergoing a period of economic recession; d) the existence of other serious claims on the State party’s limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict; e) whether the State party had sought to identify low-cost options; and f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.’

The CESCR has solid normative criteria on non-retrogression that has evolved from its country reviews.

In some cases, State parties will be able to sustain such burdens, but only after showing that the measure at issue was carefully considered and ultimately deemed necessary and proportionate. Such is the case when the financing of a right has turned inequitable or totally inefficient in the sense of *diminishing marginal returns* to investment. A State party can claim for example, that public expenditure is stagnant because additional resources are better spent financing the pursuit of other objectives or even other ESCR. It can also claim that a retrogressive measure was necessary, such as when highly adverse economic conditions leave the State party with no other reasonable alternatives.

State parties can also claim that retrogressions are due to the adoption of fiscal consolidation programs – including structural adjustment and austerity programs – but only when they are ‘necessary and proportionate, in the sense that the adoption of any other policy or failure to act would be more detrimental to economic, social and cultural rights.’ This has led to considerable debt financing in the contexts of economic crisis. According to the CESCR, both lending and borrowing states must then carry out a human rights impact assessment prior to the provision of the loan. In particular, these measures should not have sustained

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20 Ibid. at para. 10.
impacts over time and plans have to be made so that the austerity measures are progressively waived and ESCR are ‘enhanced in line with the progress achieved in the post-crisis economic recovery.’

States should also ensure that these austerity measures do not have a disproportionate negative impact on discriminated populations or those who live in situations of vulnerability.

The fifth claim is that even though the CESCR has highlighted the primary role of each State ‘in formulating or adopting, funding and implementing laws and policies’ as well as the margin of appreciation each State has to ‘determine the optimum use of its resources to adopt national policies and prioritize certain resource demands over others’, it has also recognized specific obligations that States must respect deriving from the MAR clause. For instance, in several concluding observations, the CESCR has recognized that States must take steps to use their limited resources on major priorities, to increase allocation of resources to particular non-attended economic and social rights, to play a major role in maximizing the resources available to address ESCR needs when they are largely devoted to other purposes (i.e., debt servicing).
and ‘to ensure that limited resources, public as well as private, are used in the most effective manner to promote the realization of rights.’

Furthermore, the CESCR recently has defined a set of criteria to assess if the steps taken effectively by a State are ‘adequate’ or ‘reasonable’ in the context of an individual communication concerning an alleged failure of a State party to take steps to the MARs. These criteria will include, inter alia, ‘(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights; (b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner; (c) whether the State party’s decision (not) to allocate available resources is in accordance with international human rights standards; (d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights; (e) the time frame in which the steps were taken; (f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.’

The CESCR has also stated that in its assessment of whether a State party has taken reasonable steps to the maximum of its available resources to achieve progressively the realization of the provisions of the ICESCR, it ‘places great importance on transparent and participative decision-making processes at the national level.’

The sixth and final claim is fairly straightforward. The CESCR often expresses concern about the persistence of corruption that leads to the draining of resources. The waste of resources due to these phenomena is seen as a lack of commitment to the MAR clause. For instance, the Committee’s review of Venezuela of 2015 took note of the steps taken to combat corruption but expressed concern over ‘the lack of specific information on the outcomes of cases that have been investigated and prosecuted and by reports suggesting the lack of independence of the

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30 Economic and Social Council, Report of the United Nations High Commissioner for Human Rights, Agenda Item 14 (g) of the provisional agenda, Geneva, 25 June 2007, UN Doc. E/2007/82, para. 35. With regards to the mobilization of private resources, the CESCR has recalled that ‘the rights of investors should in no circumstance undermine the State’s obligations to protect, respect and fulfill the Covenant rights’; CESCR, Concluding observations: Sudan, 27 October 2015, E/C.12/SDN/CO/2, para. 14.


32 Ibid. at para. 11.
bodies established to prevent and combat corruption. It then recommended conducting awareness-raising campaigns, improving the transparency of the public administration and taking measures to guarantee the independence of the bodies responsible for preventing and investigating cases of corruption. In several other cases, it has also called for the protection of whistle-blowers, the enforcement of anti-corruption legislation and for the protection and compensation of victims of corruption. However, there are a great deal of questions pertaining to the effectiveness of these recommendations and whether they remain exceedingly vague.

III. Emerging Doctrine

In addition to CESCR’s regular statements, the Committee has made relevant recent statements in the concluding observations of individual country reviews that push forward the understanding of MAR. In the face of State parties arguing ‘resource constraints’ as sufficient justification for their actions (or inactions) with regard to the advancement of ESCR, the CESCR is increasingly opened to various types of analyses and recommendations. These statements could be taken to be the CESCR’s emerging doctrine with regard to MAR compliance. The following five newer claims, for example, have created something akin to a series of unfavorable presumptions on the States that they are not fulfilling their ESCR obligations, to which they must provide a response.

First, whenever there is stagnant public expenditure with respect to the financing of ESCR, there is a *presumption* of non-compliance with MAR. In these cases, the burden of proof is shifted against governments that then have to explain why this doesn’t translate into non-compliance. There are, however, many ways in which the burden can and has been

sustained. State parties can argue that stagnant spending is justified inasmuch as the remaining expenditure is still sufficient and that the resources at issue are better-used financing other rights. Furthermore, other expenses such as investing in infrastructure, for example, might be necessary to secure the rights to work, housing, health, etc. In the Committee’s review of Kenya of 2016, after a dialogue regarding issues of allocation and budget execution across different ESCRs, the CESCR decided to recommend the State party ‘increase the level of public funding, at both national and county level, to ensure the progressive realization of ESCR, particularly rights to housing, water and sanitation, social security, health, and education, and make all efforts to improve its budget execution process with a view to spending all the allocated funding in a timely, effective, and transparent matter.’ \(^{35}\)

Second, when public expenditure is lacking precisely in areas where they are deemed more urgent, the CESCR presumes non-compliance with the MAR clause. For example, when resource allocation is reinforcing geographic inequalities in the enjoyment of ESCR. Such is the case in the Committee’s review of Sudan of 2015, in which the CESCR pointed out that the more disadvantaged regions of Darfur and Kordofan received fewer federal resources than other better-off regions. Consequently, the CESCR recommended allocating adequate budgetary resources to close regional disparities in the level of enjoyment of ESCR.

Third, the CESCR is starting to presume non-compliance with MAR whenever there is evidence of strong and prolonged economic growth that has not been followed by the allocation of resources for ESCR expenditure. In the case of Sudan, the CESCR expressed its concern because ‘significant revenue gained from the exploitation of natural resources prior to the secession of part of the country has not led to tangible progress in the realization of economic, social and cultural rights for most persons living in the State party.’ \(^{36}\) Such is also the case in Angola’s 2008 observation. \(^{37}\) The CESCR first ascertained their low levels of ESCR enjoyment, despite having one of the highest GDPs per capita in sub-Saharan Africa due to oil reserves. With this information in hand, the CESCR forcefully recommended allocating more public expenditure to education and housing policies.

\(^{35}\) CESCR, Concluding observations: Kenya, para. 18.

\(^{36}\) CESCR, Concluding observations: Sudan, para. 15.

Fourth, the CESCR is increasingly likely to presume non-compliance with MAR whenever tax policy is either insufficient or discriminatory in nature. This means that the concept of MAR can be interpreted in terms of potential or foregone resources. There are cases such as the Committee’s review of Burundi of 2015 in which the CESCR recommended improving tax collection levels and, particularly, reviewing the allowable tax exemptions inasmuch as they reduced tax revenue without any clear justification.\(^38\) In the case of the Committee’s review of Paraguay of 2015, the CESCR recommended taking ‘the measures needed to ensure that its tax policy is socially just, with a view to improving tax collection and thus increasing the availability of resources for the implementation of economic, social and cultural rights’ and further urged the effective and transparent application of the income tax.\(^39\) In the case of the Committee’s review of Ireland of 2015, the CESCR recommended the State party ‘consider reviewing its tax regime, with a view to increasing its revenues to restore the pre-crisis levels of public services and social benefits, in a transparent and participatory manner.’\(^40\) In the Committee’s review on Egypt of 2013, the CESCR expressed its concern at the ‘increasing recourse to regressive indirect taxes without prior assessment of their potentially severe human rights impacts and careful consideration of more equitable revenue collection alternatives.’\(^41\) In the Committee’s review of Canada of 2016, the CESCR urged the State party ‘to adopt and implement a tax policy that is adequate and socially equitable and improves tax collection, so as to ensure the mobilization of resources is sufficient for implementing ESCR, with special attention paid to disadvantaged and marginalized individuals and groups.’\(^42\)

In other cases, the CESCR has considered tax policy instruments as tools that can either affect or promote specific rights. For instance, in the Committee’s review of Mongolia of 2015, the CESCR suggested that the State party ‘should consider lowering taxes, as necessary, to legalize the activities of [small-scale] miners.’\(^43\) And in the Committee’s review of

\(^{38}\) CESCR, Concluding observations: Burundi, 16 October 2015, E/C.12/BDI/CO/1, para. 14; see also CESCR, Concluding observations: Guatemala, 9 December 2014, E/C.12/GTM/CO/3, para. 8.


\(^{40}\) CESCR, Concluding observations: Ireland, 8 July 2015, E/C.12/IRL/CO/3, para. 11(C).

\(^{41}\) CESCR, Concluding observations: Egypt, 13 December 2013, E/C.12/EGY/CO/2–4, para. 6.

\(^{42}\) CESCR, Concluding observations: Canada, 23 March 2016, E/C.12/CAN/CO/6, para. 10.

\(^{43}\) CESCR, Concluding observations: Mongolia, 7 July 2015, E/C.12/MNG/CO/4, para. 16.
Uganda of 2015, the CESCR recommended the State party reintroduce tax benefits as incentives for hiring persons with disabilities.\(^4\) This means that tax policy has also been recognized as a tool for economic stimulus on its own and, as such, is part of the fiscal repertoire for ensuring the realization of ESCR.

Fifth, the CESCR has also considered that, whenever high levels of economic inequality are established to be an ESCR problem, redistributive policies are warranted to achieve further progress of ESCR enjoyment. In the Committee’s review of Namibia of 2016, after taking note of the extremely high level of inequality prevailing in the country (one of the highest in the world according to World Bank data) and the ineffectiveness of fiscal policy to reduce it, the CESCR recommended the State ‘implement a more redistributive fiscal policy and regularly assess its impact on combating inequalities.’\(^5\) In the Committee’s review of Macedonia of 2016, the Committee recommended the State party ‘intensify its efforts to combat poverty, including … effective measures to reduce income inequality among the population, including through reforms of the tax system and social security system.’\(^6\) Similar recommendations have been made in other cases.\(^7\)

The sixth set of issues is related to a wider understanding of extraterritorial obligations regarding MAR, which go beyond traditional concerns with international cooperation and assistance. This wider understanding involves concerns with cross-border tax evasion, illicit financial flows and corruption on a global scale.\(^8\) For instance, in the Committee’s review of Honduras of 2016, the CESCR urged the State to

\(^4\) CESCR, Concluding observations: Uganda, 8 July 2015, E/C.12/UGA/CO/1, para. 19.
\(^5\) CESCR, Concluding observations: Namibia, 23 March 2016, E/C.12/NAM/CO/1, para. 25(C).
\(^8\) Member states in the Human Rights Council have endorsed the UN Guiding Principles on Extreme Poverty and Human Rights, which affirms that ‘States should take into account their international human rights obligations when designing and implementing all policies, including … taxation.’ These Principles further explain that States must ‘take deliberate, specific and targeted steps, individually and jointly, to create an international enabling environment conducive to poverty reduction … This includes cooperating to mobilize the maximum of available resources for the universal fulfillment of human rights.’ UN Human Rights Office of the High Commissioner, UN Guiding Principles on Extreme Poverty and Human Rights, 12 October 2009, A/HRC/RES/12, paras. 61 and 96,
‘take rigorous measures to combat illicit monetary flows and tax evasion and fraud.’

In the Committee’s review of Burkina Faso of 2016, the CESCR recommended the State party ‘redouble its efforts to combat corruption, illicit financial flows and related impunity and to ensure absolute transparency in the conduct of public affairs, both in law and in practice.’

More recently, in the United Kingdom’s 2016 concluding observation, the CESCR expressed concern over the harmful effects of ‘financial secrecy legislation’ and ‘permissive rules on corporate tax’ on MAR obligations. The CESCR went further still and recommended intensifying efforts to address the global tax abuses made possible by the intricate network of tax havens spread around the United Kingdom’s Overseas Territories and Crown Dependencies (e.g., Cayman Islands, Jersey, Isle of Man). The idea that State parties’ extraterritorial obligations regarding MAR involve controlling tax havens and illicit financial flows would probably never have reached the light of day without the methodological efforts of civil society organizations like the Center for Economic and Social Rights, Global Financial Integrity and Tax Justice Network as well as the joint efforts of human rights organizations to bring these issues before the CESCR.

IV. An Evaluation of CESCR Doctrine on ESCR

The synthesis developed in the previous sections shows that significant progress has been made by the CESCR in clarifying the normative content of the MAR clause. In particular, it is clear that this is neither an ‘empty clause’ without any substantive effect on qualifying the obligation of progressive realization of ESCR, nor is it a sort of ‘strict and detailed prescription’ inappropriately limiting the margin of appreciation each State has to adopt its own resource policies. The evolution of the MAR clause shows that the CESCR has accepted some procedural and


50 CESCR, Concluding observations: Burkina Faso, 12 July 2016, E/C.12/BFA/CO/1, para. 10.
substantive criteria, whether explicit or implicit, to assess the ‘adequateness’ or ‘reasonableness’ of the discretionary steps taken by States to consider them compatible or not with the MAR clause. Furthermore, although the criteria and the methodology applied to assess compliance could vary depending on each case, the MAR clause applies regardless of the amount of resources that a country has or its level of development. Hence, it is clear that the clause imposes a duty to advance as expeditiously and effectively as possible towards the full enjoyment of ESCR. However, several conceptual and methodological gaps and challenges persist.

First, in regard to the meaning of ‘resources’, the CESCR has established clearly that it includes domestic as well as international resources coming from development assistance. However, numerous issues remain unclear. For instance, with regards to which policy areas must be considered within the analysis of the MAR clause it is not clear whether monetary, debt and other kinds of resource policies must be assessed, or the use of private resources for the realization of ESCR. Neither is it certain what kind of non-financial public resources must be considered (human, technical, digital, etc.). Up to now, the CESCR has focused almost exclusively on financial resources; initially on budgets, then on international development assistance, debt and most recently on tax issues, but the other areas have been almost completely absent in the analysis.

Second, with reference to the ‘availability’ of resources, even when the CESCR has recognized in some situations the discrepancy either between available resources and the actual ESCR needs of people or between the normative content of specific rights and the resources devoted to fulfilling them, most of its statements have focused on assessing whether resources have been invested in ESCR areas, utilizing government-reported decisions on the amount of resources mobilized as given. The issue of whether those available resources are sufficient or not to comply with covenant obligations has received less attention. In other words, the CESCR has focused mainly on allocation, governance and use of resources and only more recently on resource generation for ESCR purposes.

This gap is critical for considering the key role of domestic resource mobilization policies for the realization of ESCR, particularly tax policies,

an issue that has been increasingly developed by Special Rapporteurs and human rights organizations. Indeed, there is an increasing recognition among human rights practitioners that tax policy must be seen as an integral part of the commitments to ensure the full respect of ESCR. In the words of Philip Alston, tax policy ‘is, in many respects, human rights policy. The regressive or progressive nature of a State’s tax structure, and the groups and purposes for which it gives exemptions or deductions, shapes the allocation of income and assets across the population, and thereby affects levels of inequality and human rights enjoyment.’

Third, in the matter of determining how the steps taken are up to the ‘maximum’ of available resources, the emerging doctrine reflects an important trend of considering empirical and comparative methods as technical instruments to aid in monitoring States. Much of this emerging doctrine would have been impossible in the absence of the creative methodological innovations proposed in submissions made by ESCR practitioners. These are issues in which comparative assessments are very persuasive in raising questions such as why do similar countries collect more resources or why do they have more egalitarian tax systems? Empirical research methods are particularly useful in raising questions that could have otherwise gone under the radar. However, there is no detailed and systematic set of workable standards to assess compliance with the MAR clause. This gap suggests that there is a risk that serious consideration of MAR becomes dependent on the contingent fact that submissions with relevant data and methodologies come up within the context of country reviews. This gap also poses issues of transparency and predictability in the work of the CESCR.

It is worthwhile to highlight the way in which the CESCR is beginning to address economic inequality as a human rights problem. Even though

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there is no ‘right to equality’ in the ICESCR and other international treaties, the relationship between high levels of economic inequality and ESCR enjoyment can be established on empirical grounds, especially with research from social sciences or epidemiology.\footnote{See e.g., Richard Wilkinson and Kate Pickett, \textit{The Spirit Level: Why More Equal Societies Almost Always Do Better} (New York, NY: Bloomsbury Press, 2009).} This seems to be the rationale behind some of the recommendations that the CESR has given to countries with high levels of inequality where the absence of redistributive policies has been considered as an obstacle to the enjoyment of ESCR. Given the important threat that increasing economic inequalities create for the enjoyment of ESCR, we consider that it is critical to build stronger bridges between economic equality and ESCR as well as to reinforce the equalizing potential of international ESCR law.

The MAR doctrine has evolved over the years and continues to do so. However, we would be remiss to ignore the important advances taking place outside the CESCR. Have scholars or human rights activist made conceptual contributions to the interpretation of the MAR clause? Have they developed approaches with the potential to fill the gaps of the CESCR’s doctrine? We will now try to answer these questions.

V. An Appraisal of Some Methodological Perspectives on MAR

There are many scholars and practitioners working tirelessly to advance the understanding of the MAR clause. In this section, we will first explore the conceptual clarifications they have made on the issue, and then we will discuss some of the creative methodological innovations they have produced.

A. Expanding the Understanding of the MAR Clause

Some ESCR practitioners have developed a wider understanding of ‘resources’ than is usually recognized by the CESCR, but that in a way also builds upon individual country observations. This wide understanding includes five interrelated dimensions: government expenditure, government revenue, development assistance, debt and deficit financing and monetary policy and financial regulation.\footnote{Radhika Balakrishnan, James Heintz and Diane Elson, \textit{Rethinking Economic Policy for Social Justice: The Radical Potential of Human Rights (Economics as Social Theory)} (Abingdon, UK: Routledge, 2016), p. 23; see also Scott Leckie, ‘Another Step Towards}
suggests that non-financial resources (natural, human, informational, organizational and cultural) must be considered as an important part of the State’s resource fund.\textsuperscript{58} Some others have suggested that the clause must include quantitative and qualitative aspects of resources and their use.\textsuperscript{59} Chapman argues that the concept of resources should include not only public resources but also the resources available in the wider society, including private resources mobilized to fulfill ESCR.\textsuperscript{60} Building on all these perspectives, Shahid proposes a broader scope of ‘maximum available resources’ to include public-sector resources, international assistance and cooperation and private-sector resources, incorporating both quantitative and qualitative dimensions. He develops a cross-disciplinary model that includes assessing the dimensions of resource mobilization, allocation, utilization and governance in the analysis.\textsuperscript{61}

Although these conceptual expansions could enrich the scope of the MAR concept, the real challenge is designing operative methodologies that allow different users, including the CESCR, to assess compliance with the MAR clause. Some of the conceptual innovations proposed by commentators are far from having a correlative methodological development. In the next point, we will explore the main methodological approaches to turning the MAR clause into an operative concept, along with their virtues and deficiencies.

\section*{B. ESCR Concepts and Empirical Methods: Assessing MAR with New Methodologies}

Methodological advances to assess the MAR obligation are important for at least two reasons. First, they provide human rights obligations with the

\begin{itemize}
  \item Robertson, ‘Measuring State Compliance’, 695–696.
\end{itemize}
empirical substance needed to gain greater clarity of the meaning of the MAR clause. Second, they provide a way to frame resource claims in a rigorous evidentiary basis that allows for cross-communication among the CESCR, government officials and civil society organizations. The use of empirical methods is also crucial for evaluating the ‘reasonableness’ of particular government policies in terms of actual ESCR outcomes, as well as for evaluating potential efforts and anticipating unintended consequences.

ESCR-based indicators and benchmarks are needed to ensure that there is no separation between measurements and ESCR concepts. The Office of the High Commissioner for Human Rights has already moved forward on this front through its commitments-efforts-results framework that classifies human rights indicators into three types: structural, process and outcome indicators. The first type measures ‘the ratification and adoption of legal instruments and the existence as well as the creation of basic institutional mechanisms deemed necessary for the promotion and protection of human rights.’ The second type measures the steps taken by State parties to ensure compliance with their human rights obligations, such as budget allocations, population coverage, cases of judicial redress, quality of specific institutions, etc. And the third type measures the individual and collective enjoyment of various human rights.

While human rights indicators measure the actual level of attainment, ‘benchmarks set the projected level of compliance’ and are thus necessary for interpreting indicators in terms of human rights obligations. Benchmarks are particularly controversial because they encode value judgments and also because they seem unfeasible in terms of MAR. For example, it would be completely out of bounds for the CESCR to reach strong prescriptions such as defining a fixed ratio of tax revenue to GDP to serve as a benchmark for MAR compliance. Furthermore, such a stringent benchmark would allegedly be incompatible with ICESCR’s enshrined ‘right of self-determination.’ Ultimately, such benchmarks caricature the notion of MAR.

Nevertheless, this is perhaps the biggest issue facing ESCR monitoring bodies: it is impossible to assess progressive realization subject to MAR in

the absence of benchmarks, but most benchmarks are either unfeasible or highly controversial. A possible way out of this predicament is to request State parties to set their own benchmarks. This way, the CESCR can monitor progressive realization against uncontroversial benchmarks. Eibe Riedel, a former member of the CESCR, proposed the IBSA procedure – an acronym that stands for Indicators, Benchmarks, Scoping, Assessment – to get this done.64 According to this procedure, benchmarks would be chosen at a national level and then jointly considered with the CESCR with a view of reaching a consensus regarding ambitiousness and feasibility. Most State parties, however, seem reluctant to make such explicit commitments, although they have made some in certain fields that can be used as benchmarks to assess compliance. A good example is the commitment made by developed States to provide at least 0.7 percent of their GDP for Official Development Assistance, that was accepted in a resolution on 24 October 1970 by the UN General Assembly.65 The CESCR monitors that developed States comply with this benchmark.

When self-appointed benchmarks do not exist, another possibility is to use relative benchmarks drawn from comparisons with past performance or with similar countries.66 These latter comparisons are usually made with the help of statistical regressions that compare ESCR enjoyments to a resource-adjusted level of expected enjoyment. State parties whose performance are below average will then face a greater burden of proof with respect to the obligation of MAR. However, even though there is great merit to this approach, some might be unsatisfied with the nature of these benchmarks. After all, State parties that perform above average in an underperforming region are simply being measured against a lower yardstick. This type of approach ‘rates countries’ fulfillment of rights relative to the average performance across countries rather than best practice performance.’67 But the idea of MAR compliance should not be conflated with the idea of outperforming neighboring countries.

Perhaps the most promising example of an ESCR-based benchmark that assesses outcomes according to best practice performance is the Social and Economic Rights Fulfillment (SERF) index, created by Professor Fukuda-Parr and her collaborators. This index is highly ambitious in that it aims at ‘using international human rights as the standard to evaluate the success and failings of states and the progress of humanity’ as an alternative yardstick to GDP per capita.

The SERF index provides a summary measure of social and economic rights, incorporates ‘the correlate obligations of duty bearers – not only the enjoyment of rights by rights holders’, reflects ‘relative standards of fulfillment subject to resource constraints’ and uses ‘objective data and a methodology that is both transparent and accessible to a wide range of users.’ This index operationalizes differences in States’ capacities to progressively fulfill human rights in terms of an Achievement Possibilities Frontier (AFP) that measures the distance between actual ESCR enjoyment and a potential enjoyment taken from the historical experiences of similarly resource-constrained countries. This index is calculated in four steps. First, the AFP is calculated for various socio-economic indicators associated with various ESCR (e.g., ‘malnutrition prevalence’ for the right to food). Each indicator is plotted against available resources (i.e., GDP per capita) for all countries and an outer boundary is identified with the use of econometrics. Second, the percentage of fulfillment is calculated as the distance between actual and feasible levels of ESCR enjoyment. These indicators are then aggregated to construct single rights indices (e.g., a right to health index is constructed by aggregating life expectancy, child mortality and contraceptive prevalence). Finally, all these indices are aggregated once more into ‘a composite index, which provides a holistic measure of social and economic rights fulfillment.’ The index can then be disaggregated again to provide more nuanced analyses.

On the positive side, this method turns the idea of progressivity into an operative empirical concept such as the country’s maximum progress achievable across different human rights outcomes according to its GDP per capita (the apex points of the AFP). Certainly, this is an innovative way of including resource constraints in the analysis, as a factor determining the benchmarks by which each country’s performance is assessed. Benchmarks provided by the SERF index, however, should not be interpreted as definitions of the contents of each right (it would be against the

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68 Ibid., p. 7.
69 Ibid., p. 8.
70 Ibid., p. 42.
universal nature of the ESCR that these contents vary depending on a country’s level of income), but as proxies measuring the percentage of progress that a country has achieved according to its possibilities.

There are also some shortcomings to this method that will have to be addressed by future scholars. First, ‘the SERF Index does not attempt to assess the extent to which countries ensure the procedural rights of nondiscrimination, participation, and accountability’,71 nor does it account for equally important civil, political or cultural rights. Second, the index is based on outcome indicators but does not allow analyzing obligations of conduct such as the steps taken by States in terms of policy efforts, nor the manner in which resources are mobilized, allocated and used to fulfill ESCR. For instance, some public investments that matter significantly for the realization of ESCR are unaccounted for, such as ‘reliable law enforcement agencies and courts that can uphold the rights of the individuals and may be expected to address the claims of individuals with the required independence and impartiality.’72 ‘Third, the construction of this index is still intimately tied to GDP and this measurement does not account for an expansive understanding of “available resources”, such that it includes administrative or international cooperation resources. Furthermore, many developing countries lack the institutional capacity to make accurate portrayals of economic activity, and as such offer very misleading statistics. This is the case, for example, in many sub-Saharan countries, as shown in recent research by Morten Jerven.73 It’s also the case that the size of GDP is in many cases a direct result of government policy and this index will judge State parties that cause lower GDPs with greater leniency.74

But the SERF index is far from being the only creative attempt to provide ESCR concepts with methodological rigor and empirical content.

71 Ibid., p. 16.
74 De Schutter, ‘Economic, Social and Cultural Rights’, p. 23, points out that ‘in certain extreme cases, the mismanagement by a government of the country’s economy – resulting in a low GDP per capita – could be such that it could amount to a violation of the obligations imposed on the State by the Economic, Social and Cultural Rights Covenant, where the failure to take appropriate policy measures impedes the realization of economic and social rights.’
Cingranelli and Richards, for instance, propose a composite index of State ‘effort’ in fulfilling social and economic rights that considers the dimensions of willingness and ability.\textsuperscript{75} Other authors have tried to expand the implications of the MAR clause to assess the availability of resources in comparison not with best practices but with ESCR deficits. Anderson and Foresti, for example, suggest considering the amount of resources needed through \textit{costing exercises} to assess a government’s compliance with its obligation to fulfill specific rights.\textsuperscript{76}

Other ESCR practitioners prefer to mix quantitative and qualitative methods to trace a causal link between weak ESCR results and concrete policy actions or inactions.\textsuperscript{77} Many civil society organizations around the world have been creative at the moment of converting human rights concepts into measurable components visible in public budgets. For example, the Article 2 Project joined a group of organizations working on budgets and human rights in an attempt to clarify the scope of the MAR clause. They propose to include specific duties such as: mobilizing as many resources as possible, giving due priority to ESCR, spending budgets efficiently and effectively, not diverting them to other purposes and spending them fully as contents of the MAR clause, as well as using budget analysis tools to measure compliance with these duties.\textsuperscript{78} Such tools include \textit{budget allocation} analysis (how money is distributed in the budget), which is useful to verify whether fiscal priorities are aligned with public discourse, and budget \textit{expenditure} analysis (how governments spend the money), which is useful to verify the effectiveness of various government policies.\textsuperscript{79} These kinds of approaches would provide a necessary though still insufficient indicator of ESCR compliance. On the positive side, it tries to explain outcomes through resource analysis.


\textsuperscript{79} Felner, ‘Closing the “Escape Hatch”’, 417.
On the negative side, it does not include concerns for other dimensions of policy efforts different from financial resources.

The experience with public budget analysis also points to the importance of accessibility, availability, reliability and accountability of government information. Civil society organizations have also been creative on this front, with the example of the International Budget Partnership’s Open Budget Survey and Transparency International’s Corruption Perception Index. These tools are important for many political agendas but are also especially necessary for ESCR practitioners. Working with public budgets also provides a good opportunity for civil society organizations to engage in building ongoing relationships of trust with various state actors. This is necessary ‘not only to secure information and access to fiscal data, but also to ensure that the research process is accepted as legitimate and the recommendations are considered for implementation.’ In other words, claims based on the strong evidentiary basis provided by public budget analysis are increasingly being seen as legitimate by many state actors. Empirical methods provide a common language for governments, scholars and civil society organizations to settle their resource claims or argue that they are not being used to their ‘maximum’ in ways that are mutually comprehensible.

Finally, the OPERA (Outcomes, Policy Efforts, Resources, and Assessment) framework developed by the Center for Economic and Social Rights is a more comprehensive approach that mixes quantitative and qualitative methods to trace causal links between weak ESCR results and concrete policy actions and resource policies. OPERA is an acronym that represents a four-stage process in which researchers assess the level of realization of an ESCR (outcomes); the (lack of) commitments and efforts of the State party to realize those outcomes (policy efforts); the dimensions of resource mobilization, allocation and use applying

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substantive and procedural principles (the so-called PANTHER principles: participation, accountability, non-discrimination, transparency, human dignity, empowerment and rule of law) and a wide range of methods such as budget analysis (resources). Drawing together the previous findings, OPERA makes an overall assessment considering State’s constraints and the efforts to overcome them. Such a simple framework, combining normative standards with empirical methods, allows for the consideration of ESCR concepts in a decisive manner at each step, including an assessment of compliance with the MAR clause not in the abstract, but in reference to specific contexts and considering resources, policy efforts and exogenous States’ constraints.

VI. A Road Ahead to Monitor the MAR Clause?

These technical and methodological advances have the potential to fill an empty space in ESCR practice and doctrine, but ultimately they must be adapted to the CESCR’s possibilities. Some of them are very comprehensive but have not been sufficiently tested to prove they can function properly within the context of the report procedures made before human rights bodies, particularly the CESCR.

Indeed, the notion of MAR should not be reduced to a purely technical matter, or to an abstract consideration of compliance with normative standards. The MAR clause is relevant when two circumstances occur simultaneously: (1) a failure of ESCR outcomes that is assumed to be contrary to the ICESCR, an assessment task that entails having normative standards because the MAR could only be activated to the extent that a State party is not complying with its obligations to progressively achieve the full realization of the ESCR; and (2) evidence that this State could meet those obligations if it took action to the MARs. The determination of whether a State violates the MAR clause then requires empirical assessments because it has to be based on technical tools that allow the CESCR to demonstrate that the State is not using all available resources; it is also normative because it requires standards with which to contrast state policy and its results. But this assessment cannot be a purely technical or normative exercise for at least two reasons: (1) because it is impossible to establish a sort of Pareto-optimal that tells us exactly how resources should be assigned and which must be collected, for example, by taxes because there are various possible allocations and decisions that all might be reasonable; and (2) by the democratic principle and the right to self-determination according to which any
controversial decision on these issues corresponds to each individual country and not to the CESCR or any other monitoring body. In principle, these controversial decisions should be made by domestic democratically elected officials and not by judges or other monitoring non-elected bodies. But the fact that such decisions should be made by democratic institutions does not mean that these institutions have unrestrained discretion; that possibility would undermine the very value of human rights in general and of ESCR in particular as legal and moral obligations of States and as entitlements of groups and individuals. A process of public reasoning should then develop between State parties and the CESCR or other monitoring bodies that combines normative standards about the content of ESCR duties of States and the technical information and methodologies that help evaluate the compliance with the MAR clause. The OPERA framework, for example, combines empirical assessments with strong normative grounds.

Such a framework requires rigorous comparative judgments about the outcomes of potential institutional arrangements that advance ESCRs using a variety of methods. For example, the importance of tools like the SERF index within the context of CESCR’s reviews do not lie in their technical ability to prove or disprove government compliance. They are important because of their potential to create further questions and give birth to open dialogue among concerned stakeholders. However, during that dialogue other tools must be used to assess in a more comprehensive way the missing elements of the index, such as policy efforts and resources dimensions of States’ performances. Ultimately, the assessment of MAR compliance should articulate technical rigor and normative standards with an exercise in public reasoning.

The role of public reasoning is paramount because the interpretation of MAR can often be entrapped by parochialism. The CESCR has acted in the past as the sort of sympathetic outsider that calls into question local values and practices. As Sen writes, ‘[T]he apparent cogency of parochial values often turns on the lack of knowledge of what has proved feasible in the experiences of other people.’82 In other words, the CESCR has the capability to offset parochialism not only by bringing outside experiences to bear upon local ones but also by providing a public stage for civil society organizations to contribute to the scrutiny of human right policies.

The focus on MAR also paves the way for more general concerns about distributive justice, in that most of the time public resources are being aimed at the protection of some people instead of others. It places ‘the consideration of competing claims and interests in a distributive context in which it is understood that not everyone can get what they want or even what we ideally would like to secure for them.’ These competing claims on scarce resources have to be given proper consideration. We believe the human rights framework has important implications in offering guidance to economic governance, a guidance that would not entail ‘a neat ranking of policy options based on technical analysis’ but instead stress the importance of ‘well-informed democratic processes, grounded in human rights law.’ In some ways, this is something the CESCR has strived to achieve by offering an argumentative framework that enables the settlement of resource claims in a reasonable way.

Undeniably, the CESCR has moved forward in terms of developing normative standards and also in the use of empirical methods, albeit in a very intuitive manner. Some of these advancements are more sophisticated than others, such as the retrogression prohibition in which the CESCR compares normative standards with empirical claims while providing an opportunity for State parties to publicly justify their actions. However, ESCR practitioners in academia and civil society have also made great strides. The development of various methodological tools has proven useful to the work of the CESCR, although some of them might still need to be tested more thoroughly and probably simplified more to be used more effectively by a wider audience.

At this point in time, however, it does seem that the evolution of the MAR clause has had concrete effects. State parties are presumed to be in non-compliance with the MAR clause when ESCR fare poorly against benchmarks, wherever they are drawn from. This presumption sets in motion a process of public reasoning in which empirical methods and normative standards of procedure are once again essential, but this time for settlement of disputes about resource mobilization and allocation. In this context, the notion that the duties of States concerning ESCR imply a sort of prioritization is important because it triggers different levels of burdens of proof for States if they want to invoke the MAR clause as a justification of their poor results concerning the realization of ESCR. It has

84 Balakrishnan et al., Rethinking Economic Policy for Social Justice, p. 8.
already been shown, for example, that the CESCR is very strict when it comes to cases of discrimination against certain populations, the failure to satisfy the ‘minimum core’ content of ESCR or the adoption of retrogressive measures. In all those cases, the Committee presumes that States are violating the ICESCR and that invoking the MAR clause is in principle unacceptable. In those cases, a kind of ‘strict scrutiny’ should be adopted by the CESCR, similar to those developed by constitutional courts when they evaluate a policy based on discriminatory or suspect criteria, such as race or national origin. The CESCR or other monitoring bodies should accept only a justification based on a sort of impossibility test: for example, that in spite of all its efforts, the State could not comply with achieving the minimum core content. On the contrary, in some situations, for instance those concerning the progressive realization of the ESCR, the CESCR could adopt a more flexible standard of review, similar to the reasonableness and proportionality test developed by some Constitutional Courts. The CESCR would ask a specific State why a certain level of fulfillment of either ESCR in general or specific rights has not been achieved if, according to a methodology such as the SERF index or by comparisons with best performers or average regional standards, the State seems to have enough available resources to realize this ESCR. It is then up to the State to offer a reasonable justification for this situation. But the State’s justification should not be based on an impossibility argument, as we are in a situation in which invoking the MAR clause is acceptable in principle. It is enough for States to offer a reasonable justification. If all goes well, this exercise in public reasoning can result in new commitments on the part of State parties to achieve better outcomes or establish more ambitious benchmarks. The Figure 20.1 summarizes our proposal.

As we said in the introduction, the future of ESCR as real rights will depend, to a large extent, on the possibility that scholars, practitioners and monitoring bodies, such as the CESCR, are able to develop a sound doctrine on the content of the MAR clause and on methodologies to evaluate if this obligation is fulfilled by States. A great deal of progress has been achieved in the last two decades by a combination of two quite different but complementary works: on one hand, the CESCR and some legal scholars have made important developments concerning the conceptual dimension and legal content of ESCR in general and of the MAR clause in particular and, on the other hand, practitioners and scholars have proposed some methodologies to evaluate State’s compliance with the MAR clause. We think that a sturdier bridge between these fields is what is needed. But this bridge cannot be a technical or a purely normative one. The bridge that is developed should be an exercise of public
reasoning that combines some technical elements, some normative standards and the need for States or political authorities in the States to offer sound justifications and explanations when they invoke the MAR clause. This methodology is implicit in the work of the CESCR but should be acknowledged in a more systematic way; this methodology could be also relevant to other international or national monitoring bodies, such as other treaty bodies, national courts involved in ESCR and national human rights institutions.

Figure 20.1 Proposed framework to monitor the use of maximum available resources

This article was written without taking into account the impact of the environmental restrictions, especially those related to climate change, in the duty of States parties of realizing the full content of ESCR according to the maximum of available resources. It is a very important subject as these restrictions imply that some economic and material resources, that could be used in the past, are no longer ‘available’ as they are not sustainable because of their negative impact on climate change. It is a subject so important that it requires a specific analysis, that we hope we will be able to develop in the near future.