Universität Basel
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The Justiciability of Economic, Social and Cultural Rights in Switzerland

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für das Recht auf Nahrung

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Abbreviations

AsylA	Asylum Act
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CPNM	Framework Convention for the Protection of National Minorities
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms / European Convention on Human Rights
ECtHR	European Court of Human Rights
ESC rights	Economic, Social and Cultural rights
Fed. Cst.	Swiss Federal Constitution
FSCA	Federal Supreme Court Act
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OP/CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women
OP/CRPD	Optional Protocol to the Convention on the Rights of Persons with Disabilities
OP/ICCPR	Optional Protocol to the International Covenant on Civil and Political Rights
OP/ICESCR	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights
SCHR	Swiss Centre of Expertise in Human Rights
UDHR	Universal Declaration of Human Rights
3OP/CRC	Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure

I. INTRODUCTION

Economic, social and cultural rights (ESC rights) contain international guarantees for individuals to participate in the economic and cultural life of the community and to enjoy certain employment standards and general living conditions.[1] Despite the states' claim to consider all human rights as universal, indivisible, interdependent, and interrelated, and to treat all "human rights globally in a fair and equal manner",[2] ESC rights do not generally enjoy the same degree of recognition as civil and political rights.[3] In this context, the justiciability of ESC rights, which is situated at the crossroad of legal-philosophical, international, constitutional and administrative law considerations,[4] is a particularly debated question. The practice of many states' domestic courts[5] and the entry into force in 2013 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP/ICESCR), which foresees an individual complaint mechanism at the international level, show that ESC rights can be applied and enforced by (quasi-) judicial bodies.[6] Even states, which traditionally rejected the idea of the justiciability of ESC rights, seem to reconsider their positions.[7]

The Committee on Economic, Social and Cultural Rights (CESCR) in its last concluding observations repeated its regret about Switzerland's "persistent position, that most of the provisions of the Covenant merely constitute programmatic objectives and social goals rather than legal obligations."[8] The Swiss government took the CESCR seriously and organised a seminar in 2011 on the implementation of

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1 See RIEDEL / GIACCA / GOLAY, The Development of ESC Rights in International Law (2014), p. 8-9.

2 UN World Conference on Human Rights, Vienna Declaration and Plan of Action, 12 July 1993, UN Doc. A/CONF.157/23, Part I, para. 5.

3 See, among others, TRILSCH, Justiziabilität (2012), p. 1.

4 See KRADOLFER, Justiziabilität sozialer Menschenrechte (2013), p. 522.

5 Analyses of these cases can be found, among others, in: SQUIRES, John / LANGFORD, Malcolm / THIELE, Bret (eds.), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights* (Australian Human Rights Centre: Sidney, 2005); COOMANS, Fons (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia, 2006); LANGFORD, Malcolm (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008); COURTIS, Christian, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (Geneva: International Commission of Jurists, 2008).

6 See, among others, SCHEININ, Justiciability and Indivisibility (2005), p. 17, and RIEDEL / GIACCA / GOLAY, The Development of ESC Rights in International Law (2014), p. 34.

7 See LANGFORD / THIELE, The Road to a Remedy (2005), p. 4.

8 CESCR, Concluding Observations Switzerland (2010), para. 5. See also CESCR, Concluding Observations Switzerland (1998), para. 10.

the recommendations.[9] According to the participants of Working Group 3 on the justiciability of ESC rights, the Swiss Federal Council and the Federal Supreme Court found themselves in a deadlock with respect to the justiciability of ESC rights, as they reciprocally referred to one another in order to justify their sceptical positions.[10] This study analyses in more detail this problem and explores whether an improvement took place over the last six years. According to Mirja A. Trilsch, a scholar in the field of ESC rights, the debate about justiciability should not pause at the question of *whether* ESC rights are justiciable, but *how* they can be justiciable.[11] Taking into account her opinion, this study adopts a broad approach to justiciability in order to analyse different strategies for the protection of ESC rights and to find a way out of the deadlock. On the one hand, the study explores and critically appraises the Federal Supreme Court's strategies for the protection of ESC rights. On the other hand, it analyses whether the implementation of ESC rights into Swiss domestic law is sufficient in order to pave the way out of the blockade.[12] The study shows that the Federal Supreme Court should engage to a larger extent in the adjudication of ESC rights in order to guarantee their effective protection, and suggests possible ways to do so.

The study focuses on the developments since 2010 when the CESCR issued its last concluding observations concerning Switzerland. However, in order to understand the development of the Federal Supreme Court's approach towards the justiciability of ESC rights, it is necessary to take into consideration cases prior to 2010. The paper is based on a variety of different legal sources. Firstly, the normative instruments with respect to ESC rights play an important role for the analysis, namely binding international treaties and Swiss domestic legislation. Secondly, the domestic case law of the Federal Supreme Court is analysed. Case law of regional human

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[9] In 2013, the Final Report of this seminar was published, see SKMR / Geneva Academy, Abschlussbericht des Seminars (2013).

[10] See SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Report on Working Group 3 (Jörg Künzli), p. 33.

[11] TRILSCH, Justiziabilität (2012), p. 2. Similarly, Malcom Langford, according to whom "(…) the key issue is not *whether* social rights are justiciable but rather *how* they can be consistently adjudicated with measure of integrity, respecting the institutional nature of adjudicatory bodies and the call for justice inherent in human rights" (LANGFORD, The Justiciability of Social Rights (2008), p. 43 (italic type added by the author of the Master Thesis).

[12] As suggested by the participants of the Working Group 3 of the seminar about the implementation of the concluding observations of the CESCR, see SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Report on Working Group 3 (Jörg Künzli), p. 33.

rights courts is taken into consideration to provide different perspectives and insights. Thirdly, the paper takes into account the materials of the different treaty bodies, whose fundamental mandate is to monitor the implementation of their respective international instrument.[13] Last but not least, the paper shall not forget to refer to the opinions of the legal doctrine.[14]

In a first step, preliminary clarifications help to better understand the issue at stake and to demarcate the key definitions (Chapter II). In order to be able to explore the research questions, it is necessary to present a brief overview of the normative framework of the ESC rights in Switzerland (Chapter III). Having clarified the main definitions and examined the legal basis for ESC rights in Switzerland, we explore the different strategies which the Federal Supreme Court uses to protect ESC rights (Chapter IV). Can these strategies serve as a way out of the deadlock? In a next step, we analyse whether the implementation of ESC rights into Swiss domestic law provides for sufficient protection of international guarantees (Chapter V). The conclusion summarises the key findings and points out the possibilities for the Federal Supreme Court and the Swiss Federal Council to bypass the deadlock with respect to the justiciability of ESC rights. As this study is part of the Human Rights Clinic on Poverty and Human Rights of the University of Basel, the conclusion contains recommendations to the human rights non-governmental organisation FIAN Switzerland (Chapter VI).

[13] See SPENLÉ / TRAUTWEILER, Rechtsnatur (2011), p. 150.

[14] As a source of law, the legal doctrine is explicitly mentioned at art. 1(3) of the Swiss Civil Code. It is also reflected in art. 38(1)(d) of the Statute of the International Court of Justice, according to which the teachings of the most highly qualified publicists constitute a subsidiary mean for the determination of the rule of law.

II. PRELIMINARY CLARIFICATIONS

1. Definition of Justiciability

This study adopts a broad definition of justiciability, which "refers to those matters which are appropriately resolved by the courts"[15] or quasi-judicial bodies, in contrast to matters, which are exclusively in the competence of the executive and the legislator. This approach allows an extensive analysis of different strategies of judicial protection of ESC rights and how these rights can fall under the scrutiny of judicial organs. When discussing the justiciability of ESC rights, the debate is generally about their direct justiciability, which refers to the ability of a legal norm to be invoked, as such, in a proceeding before a judicial body.[16] In other words, it means, whether "people who claim to be victims of violations of these rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have any remedy enforced."[17] However, a judicial body can also exercise judicial scrutiny over ESC rights by protecting them in an indirect manner, even though these rights are formally not guaranteed by the applied legal norm.[18] In other words, "(…) the indirect protection of ESC rights [is] possible through the judicial application of duties deriving from civil and political rights where those duties are closely interrelated to ESC rights obligations."[19] ESC rights, which are considered not to be directly justiciable, can also be taken into account by (quasi-) judicial organs as a guide for interpretation. Besides the application of ESC rights enshrined in international instruments, domestic law can implement international guarantees as justiciable rights in its domestic legislation. In this case, it is the domestic norm, and not the international guarantee, which directly transfers a justiciable right to the individual. We analyse these different layers of justiciability in Chapters IV and V of this study.

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15 CESCR, General Comment No. 9 (1998), para. 10.

16 See CHATTON, Aspects de la justiciabilité (2012), p. 349. Therefore, this study uses the terms "justiciability" and "direct justiciability" interchangeably.

17 See COURTIS, Courts and the Legal Enforcement of ESC Rights (2008), p. 1.

18 See CHATTON, Aspects de la justiciabilité (2012), p. 349 – 350.

19 COURTIS, Courts and the Legal Enforcement of ESC Rights (2008), p.65. It should be noted, that the indirect protection of ESC rights is also possible through other strategies than the application of substantive civil and political rights, see Chapter IV (Different Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches), Section 2.1. (Different Ways of Indirect Protection of ESC Rights).

2. Distinction between Justiciability and Formal Validity

It depends on the constitutional framework of the state whether it is a priori possible for a treaty provision to be applied by judicial organs.[20] In Switzerland, international law, including the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other treaties guaranteeing ESC rights, is directly part of its domestic law through the system of monism.[21] This means that all international treaties, if ratified by and entered into force in Switzerland, are formally valid in Switzerland and part of the Swiss legal order. However, the formal validity of a treaty does not necessarily entail the direct justiciability of its provisions by the state's judicial organs. In other words, not all formally valid international treaties contain provisions that can serve as legal basis for claim-rights of individuals before courts. Consequently, Swiss courts only enforce international norms that are considered to fall within their competence, in other words, that are considered to be justiciable.

3. Distinction between Justiciability and Direct Applicability

In Switzerland, the Federal Supreme Court decides on the justiciability of an international norm.[22] The opinion of the executive can have some significance but is not binding.[23] The Federal Council itself recognised that it is on the judicial organs to decide on the applicability of an international norm.[24] According to the case law of the Federal Supreme Court, an appeal based on an alleged violation of international law presupposes the existence of a norm, which is of self-executing character, thus directly applicable.[25] The question, whether a norm is of self-executing character or not, has to be resolved via interpretation.[26] The Federal Supreme Court considers an international norm to be self-executing when the two following conditions are

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[20] See SCHEININ, ESC Rights as Legal Rights (2001), p. 50; GOLAY distinguishes between formal validity, which can be established via adoption, incorporation, transformation or interpretation, and justiciability (GOLAY, The Right to Food and Access to Justice (2006), p. 118-121).

[21] See, among many others, MALINVERNI, Les Pactes dans l'ordre juridique interne (1997), p. 71; WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 33.

[22] See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 207.

[23] See ibid., p. 75-83.

[24] See Swiss Federal Council, Botschaft CEDAW (1995), p. 923

[25] Among many others: BGE 136 I 297 (Children Allowances), c. 8.1; Judgment of the Federal Supreme Court 2C_738/2010 of 24 May 2011 (Home Schooling), c. 3.2.1. The Federal Supreme Court, as well as the majority of the legal doctrine, uses the terms "direct applicability" and "self-executing character" as synonyms (See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 44). Therefore, in this study these two terms are used interchangeably.

[26] See BGE 121 V 246 (Injury Insurance for Foreigner), c. 2. b.

fulfilled.[27] Firstly, the norm must be sufficiently concrete and precise in order to form the basis for a decision in a concrete case. Secondly, the norm must be addressed to the judicial organs and describe rights and obligations of individuals. The Federal Supreme Court sometimes defines this second condition as the justiciable character of a norm. Thus, the Federal Supreme Court does a priori not apply an international legal norm which is insufficiently concrete or precise or which is not addressed to the judicial organ, but to the legislator.

However, it is important not to confuse the concept of justiciability with the concept of the direct applicability of a norm,[28] despite the fact that these two terms are often used as synonyms by the Swiss legal doctrine.[29] As we have seen, justiciability refers to the question of whether the judicial organs are competent to decide on a certain question,[30] in other words, whether it is possible to enforce a provision in a proceeding before judicial organs.[31] The direct applicability of a norm deals with the question of whether a legal norm is "capable of being applied by courts without further elaboration"[32] by the legislator. Provisions which are addressed to the legislator in order to be concretised in the domestic law, are by definition not self-executing.[33] Nevertheless, it is still possible for them to fall under the scrutiny of judicial organs under certain circumstances. As we see later in this study, this is particularly true for norms with a mandate for the legislator to act.[34] According to Eibe Riedel, a member of the CESCR and a prominent scholar in the field of ESC rights, the categorisation of self-executing and non-self-executing norms, and thus their classification as directly or not directly applicable, is not suitable for human rights treaties.[35] In his opinion, this classification places human rights instruments on the

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[27] See BGE 136 I 297 (Children Allowances), c. 8.1.

[28] The CESCR points out the importance of this distinction in its General Comment No. 9 (1998), para. 10.

[29] See KRADOLFER, Justiziabilität sozialer Menschenrechte (2013), p. 528; WÜGER, for example, uses these two expressions interchangeably (WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 9).

[30] See Section 1. (Definition of Justiciability) in this Chapter.

[31] See KRADOLFER, Justiziabilität sozialer Menschenrechte (2013), p. 529.

[32] CESCR, General Comment No. 9 (1998), para. 10; See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 42.

[33] See KRADOLFER, Justiziabilität sozialer Menschenrechte (2013), p. 529.

[34] See Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches), Section 1.1.5. (Justiciability of Mandate for the Legislator to Act).

[35] See SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Speech of Prof. Eibe Riedel, p. 12.

same level as trade agreements and does not give consideration to the special objectives of human rights instruments.[36]

4. Distinction between Effective Remedy and Justiciability

As expressed in art. 8 of the Universal Declaration of Human Rights of 1948 (UDHR),[37] the right to an effective remedy is a crucial element for the enforcement of human rights. Contrary to art. 3(a) of the International Covenant on Civil and Political Rights of 1966 (ICCPR), the ICESCR does not explicitly foresee the right to an effective remedy. However, according to the CESCR, "(…) a State party seeking to justify its failure to provide any domestic remedies for violations of economic, social and cultural rights would need to show either that such remedies are not 'appropriate means' within the terms of art. 2.1 of the Covenant or that (…) they are unnecessary, [which] will be difficult to show."[38] In its latest concluding observations concerning Switzerland, the CESCR recommended to "guarantee effective judicial remedies for the rights enshrined in the Covenant."[39] Furthermore, according to Magdalena Sepulveda Carmona, the former Special Rapporteur on extreme poverty and human rights, "the right to an effective remedy is a key element of human rights protection and serves as a procedural means to ensure that individuals can enforce their rights and obtain redress."[40] In her opinion, the absence of effective remedies constitutes a violation of international human rights instruments.[41] Furthermore, she explicitly links the existence of an effective domestic remedy to the question of the justiciability of a human rights norm, as the refusal to recognise the justiciability of ESC rights aggravates the lack of judicial review.[42]

Nevertheless, one can share the opinion of the Swiss legal scholar Daniel Wüger, according to whom an obligation to ensure effective remedies for the violation of rights does not in itself constitute an obligation to consider the norms to be

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[36] Ibid., p. 12.

[37] „Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

[38] CESCR, General Comment No. 9 (1998), para. 3.

[39] CESCR, Concluding Observations Switzerland (2010), para. 5.

[40] UN General Assembly, Report of the Special Rapporteur on Extreme Poverty and Human Rights, 9 August 2012, UN DOC A/67/278, p. 4, para. 8.

[41] Ibid., p. 9, para. 32.

[42] Ibid., p. 9, para. 32.

justiciable.[43] General public international law does not, in principle, determine the relationship between international law and domestic law, including the question of the justiciability of an international norm.[44] This is also true for the ICESCR, as the CESCR does not explicitly oblige the states to render ESC rights directly justiciable.[45] On the one hand, the CESCR considers the need to ensure justiciability to be "relevant when determining the best way to give domestic legal effect to the Covenant rights."[46] According to the Committee, a number of rights arising from the ICESCR are of immediate application, and that "any suggestion, that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain."[47] On the other hand, it cautiously holds that "*within the limits of the appropriate exercise of their functions of judicial review*, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant."[48]

Therefore, the two Swiss scholars Jörg Künzli and Walter Kälin correctly submit that the question of the direct justiciability of an internationally guaranteed ESC right is only relevant insofar as domestic law does not guarantee the right.[49] In other words, if the effectiveness of domestic judicial remedies is guaranteed without considering ESC rights enshrined in international treaties as directly justiciable, the state fulfils its international legal obligations. This is equally true, when courts decide to protect ESC rights in another way than through their direct justiciability, for example by applying procedural or substantive civil and political rights. Chapters IV and V analyse whether the strategies adopted by the Swiss Federal Supreme Court sufficiently provide for an effective judicial remedy, even in case the ESC rights enshrined in international instruments would not be considered as directly justiciable, and/or whether the Swiss legislator sufficiently implemented ESC rights into Swiss domestic legislation.

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[43] See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 197-198, with respect to art. 13 ECHR, which was not interpreted by the ECtHR as construing such an obligation.

[44] See ibid., p. 84. See also CESCR, General Comment No. 9 (1998), para. 5.

[45] See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 101.

[46] CESCR, General Comment No. 9 (1998), para. 7.

[47] CESCR, General Comment No. 3 (1990), para. 5.

[48] CESCR, General Comment No. 9 (1998), para. 14 (italic type added by the author of the Master Thesis).

[49] See KÜNZLI / KÄLIN, Bedeutung des UNO-Paktes (1997), p. 107.

5. Legal Value of Opinions of UN Treaty Bodies

As mentioned in the Introduction, this paper relies on materials from UN treaty bodies which monitor the implementation of their respective international legal instruments.[50] The opinions expressed by such quasi-judicial organs, whether in general comments or recommendations, concluding observations on state reports or views on individual communications, are legally not binding.[51] However, they possess an important legal significance and authority, in particular in situations where they refer to violations or the interpretation of treaty provisions.[52] A state, which does not follow the interpretation of these bodies created for the implementation of the treaties, bears a considerable burden to explain and justify its position.[53] As for the Federal Supreme Court, it acknowledges the authority of UN treaty bodies' opinions and considers them as an important source of information for the interpretation of the treaty in question.[54] For these reasons, it is not only legitimate but also necessary to pay particular attention to the considerations of these treaty bodies when evaluating the Swiss approach to the justiciability of ESC rights.

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[50] The CESCR is legally speaking not a treaty body, as it is not the ICESCR, which establishes the Committee, but a resolution by the UN Economic and Social Council (ECOSOC Res 1985/17 of 28 May 1985) (See SIMMA / BENNIGSEN, Wirtschaftliche, soziale und kulturelle Rechte im Völkerrecht (1990), p. 1494).

[51] See SPENLÉ / TRAUTWEILER, Rechtsnatur (2011), p. 154.

[52] See ibid., p. 154, with respect to concluding observations. This finding is also valid for general comments and views on individual communications (KLEIN, Allgemeine Bemerkungen und Empfehlungen (2005), p. 29).

[53] See KLEIN, Allgemeine Bemerkungen und Empfehlungen (2005), p. 29.

[54] See BGE 126 I 240 (Introduction of Enrolment Fees), c. 2. g.; BGE 137 I 305 (Gender Equality Commission), c. 6.5, with respect to the Committee CEDAW. In fact, the Federal Supreme Court, compared to courts in other states, refers relatively often to treaty bodies' general comments (see KLEIN, Allgemeine Bemerkungen und Empfehlungen (2005), p. 30).

III. LEGAL BASIS FOR ESC RIGHTS IN SWITZERLAND

Before analysing the Federal Supreme Court's approaches to the judicial protection of ESC rights in Switzerland (Chapter IV) and the implementation of ESC rights into Swiss domestic legislation (Chapter V), it is useful to briefly give an overview of the existing normative framework for ESC rights in Switzerland both with respect to international (1) and domestic law (2).

1. International ESC Rights Instruments

While Switzerland has ratified a number of important international treaties (1.1), it is still reluctant to be bound by individual complaint mechanisms (1.2).

1.1. Legal Instruments with Substantive ESC Rights

The ICESCR was the first international legally binding instrument enshrining an extensive catalogue of ESC rights.[55] Switzerland ratified the ICESCR, together with the ICCPR, in 1992. Besides the ICESCR, Switzerland has ratified a number of human rights treaties aiming at the protection of specific categories of vulnerable groups, which contain ESC rights that are adapted to the concrete situations of these vulnerable groups. Firstly, the International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD) guarantees ESC rights without distinction as to race, colour, or national or ethnic origin.[56] Secondly, the UN Convention on the Elimination of All Forms of Discrimination Against Women of 1979 (CEDAW) plays an important role for the protection of ESC rights of women, as the discrimination and inequality of women have grave consequences in social, economic and cultural spheres.[57] It entered into force in Switzerland on 26 April 1997 and contains a series of ESC rights linked to the right of women to their non-discriminate and equal enjoyment.[58] Thirdly, the UN Convention on the Rights of the Child of 1989 (CRC) contains ESC rights of children.[59] And finally, the UN

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[55] Art. 6 – 15 ICESCR.

[56] In particular: art. 5 (e) includes a catalogue of ESC rights, for which racial discrimination is prohibited.

[57] See FAHRA, CEDAW-Committee (2008), p. 553.

[58] In particular: art. 10 (equal rights in the field of education); art. 11 (equal rights in the field of employment, including the right to work, the right to equal remuneration and the right to social protection); art. 12 (equal right to access to health care); art. 13(c) (equal right to participate in cultural life); art. 14(2)(h) (housing for rural women) and art. 16 (right to marriage and family relations).

[59] In particular: art. 3(1) (the best interest of the child); art. 4 second sentence (general obligation with respect to ESC rights); art. 23 (rights of children with disabilities); art. 24 (right to the enjoyment of

Convention on the Rights of Persons with Disabilities of 2006 (CRPD) does also, in principle, not create new material ESC rights,[60] but concretises existing human rights for persons with disabilities.[61] These specific conventions, which protect the human rights of a particular group of people, are insofar important as they codify civil and political rights and ESC rights in the same legal instruments and confirm the indivisible character of all human rights.[62] However, when ratifying these international human rights treaties, the Swiss government repeatedly emphasised the programmatic character of the ESC rights in these instruments, considering them to be addressed to the legislator and not to fall under the scrutiny of the courts and the obligations corresponding to ESC rights of an exclusively progressive character.[63]

It should be noted, however, that the mere ratification of the CRPD, which entered into force in Switzerland in 2014, has implications on the question of the justiciability of ESC rights going beyond the scope of the Convention alone. Art. 4(2) CRPD, which states the general obligations of states with regard to ESC rights, asks for the progressive realisation of the rights, but adds to this obligation the terms “without prejudice to those obligations that are immediately applicable according to international law.” According to the Swiss scholar Jörg Künzli, this is the first legally binding international instrument, which clearly establishes that ESC rights also contain immediately applicable obligations.[64] The reference to international law entails that it is the practice of international control organs, such as the CESCR, that has to be taken into account for the determination of such obligations of immediate effect.[65] In his opinion, which can be shared, the significance of art. 4(2) CRPD for the understanding of ESC rights goes beyond the CRPD alone, and the Swiss

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the highest attainable standard of health); art. 26 (right to social security); art. 27 (right to an adequate standard of living); art. 28 (right to education); art. 30 (right of children belonging to a minority); art. 31 (right to participate in cultural life).

60 See Swiss Federal Council, Botschaft CRPD (2012), p. 666-667(paras. 1.1 and 1.2).

61 In particular: art. 4(2) (general obligation with respect to ESR rights); art. 20 (right to personal mobility); art. 24 (right to education); art. 25 (right to the enjoyment of the highest attainable standard of health); art. 27 (right to work); art. 28(1) (right to adequate standard of living); art. 28(2) (right to social protection, including right to clean water and public housing programs); art. 30 (right to participate in cultural life).

62 With respect to the CEDAW, see SCHLÄPPI / WYTTENBACH / ULRICH, Kommentar zum CEDAW-Übereinkommen (2015), p. 51; FAHRA, CEDAW-Committee (2008), p. 557.

63 See Swiss Federal Council, Botschaft ICESCR/ICCPR (1991), p. 1202, para. 431; Swiss Federal Council, Botschaft CEDAW (1995), p. 925, para. 31.

64 See KÜNZLI, Umsetzung (2010), p. 470. In this context, the terms immediately applicable and directly applicable are understood as synonyms.

65 See ibid., p. 470.

government and the Federal Supreme Court could not maintain their positions that ESC rights are merely programmatic in their character.[66] In this regard, the Federal Council's remark in its message on the ratification of the CRPD that art. 4(2) CRPD corresponds to art. 2(1) ICESCR and to art. 4 second sentence CRC is not entirely correct.[67] Contrary to the ICESCR and the CRC, which qualify the obligations corresponding to ESC rights as obligations of progressive realisation, art. 4(2) CRPD clearly establishes the existence of immediately applicable obligations. Despite certain positive developments in the Federal Council's approach on the understanding of ESC rights in its message on the ratification of the CRPD,[68] the reluctance of the executive and the legislator to acknowledge the justiciability of ESC rights is further expressed by the fact that Switzerland refuses to recognise a number of important individual complaint mechanisms.

1.2. Reluctant Recognition of Individual Complaint Mechanisms

Despite the fact that the Federal Council considers the establishment of effective control mechanisms as an indispensable instrument for the enforcement of human rights and for the concretisation of their content,[69] Switzerland has so far expressed its openness to individual control mechanisms only with respect to the CEDAW and the CRC. However, while Switzerland has ratified the Optional Protocol to the CEDAW (OP/CEDAW), which foresees at art. 2 an individual complaint mechanism, it has made clear that it considers the mechanism to apply only to directly applicable rights, and not to provisions of a programmatic character.[70] When preparing the ratification of the CEDAW, the Federal Council considered only four provisions to contain directly applicable rights, all of which are not ESC rights.[71]

Besides the already ratified OP/CEDAW, the Swiss Parliament will, most probably, soon approve the ratification of the Optional Protocol to the CRC on a communications procedure (3OP/CRC), which also foresees an individual complaint

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66 See ibid., p. 470.

67 See Swiss Federal Council, Botschaft CRPD (2012), p. 681, para. 3.2.

68 See Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches), Section 1.2.1. (Non-Recognition of the Triple-Typology of Obligations).

69 See Swiss Federal Council, Botschaft OP/CEDAW (2006), p. 9794, para. 2.1, and p. 9817, para. 8; Swiss Federal Council, Erläuternder Bericht OP3/CRC (2015), p. 6, para. 1.5.

70 See ibid., p. 9813, para. 4.1.

71 See Swiss Federal Council, Botschaft CEDAW (1995), p. 923-925, para. 31.

mechanism.[72] According to its art. 5, the individual complaint mechanism is open for an alleged violation of "any of the rights set forth" in the Convention and the two Optional Protocols. Therefore, a violation of ESC rights contained in the CRC can also be communicated.[73] However, in the Federal Council's view, art. 10(4) 3OP/CRC imposes on the Committee a certain degree of reservation when dealing with ESC rights, as it obliges the Committee to "bear in mind that the State party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention."[74] Nevertheless, art. 10(4) 3OP/CRC gives the Committee the explicit competence to "consider the reasonableness of the steps taken by the State party."[75]

With the exception of the CEDAW and the CRC, Switzerland is reluctant to accept the competence of treaty bodies to receive individual communications, which mirrors its sceptical approach to the justiciability of ESC rights.[76] Firstly, a parliamentary motion aiming at the ratification of the OP/ICESCR received little support and was rejected by 119 - 61 votes.[77] According to the then Minister of Foreign Affairs, Micheline Calmy-Rey, Switzerland repeatedly made clear during the negotiations that it considers the provisions of the ICESCR as programmatic in their character and not directly applicable.[78] She further explained the government's refusal to ratify the OP/ICESCR by the fact that Switzerland's proposal to establish an à la carte mechanism, which would have allowed states parties to identify the provisions subject to the new procedure, was not followed by the majority of the other states

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[72] The Parliamentary Motion Amherd (2012), which asked the Federal Council to take steps for the ratification of the 3OP/CRC, was approved by the two parliamentary chambers on 19 September 2013 and on 17 March 2014. Furthermore, the large majority of participants in the consultation endorsed the ratification, see Swiss Federal Council, Bericht über die Ergebnisse OP3/CRC (2015), p. 7.

[73] See Swiss Federal Council, Erläuternder Bericht OP3/CRC (2015), p. 7, para. 2.1.1.

[74] See ibid., p. 8, para. 2.1.1.

[75] According to art. 10(4) 3OP/CRC, *"when examining communications alleging violations of economic, social or cultural rights, the Committee shall consider the reasonableness of the steps taken by the State party in accordance with article 4 of the Convention. In doing so, the Committee shall bear in mind that the State party may adopt a range of possible policy measures for the implementation of the economic, social and cultural rights in the Convention."*

[76] See Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches), Section 1. (Direct Justiciability of ESC Rights).

[77] Parliamentary Motion Allemann (2009).

[78] See then Minister of Foreign Affairs, Micheline Calmy-Rey, in her Statement on the Parliamentary Motion Allemann (2009).

parties.[79] Secondly, while proposing the Parliament to ratify the CRPD, the Federal Council refused the ratification of the Optional Protocol to the CRPD (OP/CRPD) and based its reasoning on the lack of justiciability of ESC rights.[80] According to the assessment of Christoph Spenlé, the deputy head of the section of human rights at the Directorate of International Law of the Swiss Ministry of Foreign Affairs, these Optional Protocols remain off the table at the moment.[81] His appraisal can be followed, especially in light of the political power relations in the current Parliament after the parliamentary elections of November 2015.

2. Swiss Domestic Law

As already analysed, the obligation to provide for an effective judicial remedy does not comprise an obligation to recognise ESC rights as directly justiciable.[82] In other words, states parties can choose to implement the ESC rights arising from international instruments through the adoption of domestic legislation. Therefore, it is relevant to examine the characteristics of Swiss domestic legislation with respect to ESC rights.[83]

2.1. ESC Rights Guaranteed by Federal and Cantonal Law

Under Swiss constitutional law, the guarantees arising from internationally guaranteed ESC rights touch on areas of legislation within the competence of both the federal and the cantonal legislator.[84] Accordingly, not only federal guarantees but also cantonal law can foresee subjective claim-rights in the area of ESC rights. However, this paper's goal is not to offer an extensive overview of all ESC rights guaranteed by the different (constitutional, federal and cantonal) levels of Swiss domestic law. In fact, the Swiss Centre of Expertise in Human Rights (SCHR) conducted such a study in 2014 for the Swiss government.[85] This study analysed, whether Swiss domestic law contains subjective justiciable rights for all the ESC

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79 See ibid.

80 See Swiss Federal Council, Botschaft CRPD (2012), p. 676, para. 2.2.

81 On the basis of the Interview with Christoph Spenlé, conducted on 6 May 2016.

82 See Section 4. (Distinction between Effective Remedies and Justiciability) in Chapter II. (Preliminary Clarifications).

83 The sufficiency of the Swiss domestic legislation with respect to the obligations arising from international law will be analysed in Chapter V. (Sufficient Protection through Swiss Domestic Law?).

84 See KÜNZLI, Umsetzung im kantonalen Verwaltungsrecht (2010), p. 458.

85 KÜNZLI / EUGSTER / SPRING, Anerkennung (2014).

rights guaranteed by the ICESCR. We come back to the findings of this study when analysing the effectiveness of the Swiss domestic legislation's protection of ESC rights in Switzerland.[86] Nevertheless, it is necessary to keep in mind Daniel Wüger's correct statement, according to which the problematic question of the justiciability of ESC guarantees under international law is closely linked to the general question of the status of ESC rights in constitutional law and domestic legislation.[87] It follows that in order to be able to understand the Swiss Federal Council's and Federal Supreme Court's stances on the justiciability of ESC rights, it is necessary to analyse the protection of these rights at the federal constitutional level.

2.2. Limited ESC Guarantees in the Swiss Federal Constitution

The Federal Constitution of the Swiss Confederation (Fed. Cst.) contains a limited number of justiciable constitutional social rights which guarantee certain public benefits and protections.[88] They were labelled small social rights in order to point out that they only guarantee minimum social benefits[89] and include the right to assistance when in need (art. 12 Fed. Cst.), the right to an adequate and free basic education (art. 19 Fed. Cst.), the right to strike (art. 28(3) Fed. Cst.), and the right to free legal assistance (art. 29(3) Fed. Cst.).[90] According to the Federal Supreme Court, only a minimum of state benefits is claimable before courts under the constitution.[91]

Besides the constitutional social rights, which are fundamental rights just as much as the traditional civil and political rights,[92] art. 41 Fed. Cst. provides for a list of social objectives. These objectives, introduced as a compromise between those advocating

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[86] See Chapter V. (Sufficient Protection through Swiss Domestic Law?).

[87] See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 206. In order to avoid confusion, the expression 'ESC rights' generally refers to those rights contained in international human rights instruments, whereas the expressions "constitutional social rights", "constitutional rights" or "fundamental rights" refer to those rights guaranteed by the domestic constitution.

[88] See SCHWEIZER, Sozialverfassung (2014), p. 885.

[89] See HERTIG RANDALL / CHATTON, Les droits sociaux fondamentaux (2014), p. 303; MEYER / SIKI, Bestand und Umsetzung der Sozialrechte (2010), p. 5-6.

[90] See AUER / MALINVERNI / HOTTELIER, Les droits fondamentaux (2013), p. 683. Some authors include the right to the protection of children and young people of art. 11 (e.g. SCHWEIZER, Sozialverfassung (2014), p. 887; KAUFMANN, Soziale Grundrechte (2015), p. 573), whereas other authors consider the right to legal assistance as a procedural right and the right to strike as part of the liberty of coalition (e.g. HÄFELIN / HALLER / KELLER, Schweizerisches Bundesstaatsrecht (2012), p. 291-292).

[91] See BGE 129 I 12 (Constitutional Social Rights), c. 6.4.

[92] See AUER / MALINVERNI / HOTTELIER, Les droits fondamentaux (2013), p. 679.

for a broader catalogue of constitutional social rights and the opponents of a social dimension in the Constitution,[93] are not justiciable subjective rights.[94] However, the social objectives are legally not meaningless and constitute a medial position between fundamental rights and programmatic goals.[95] Firstly, they certainly constitute a clear and precise mandate to the legislator to implement these social objectives.[96] Secondly, as Margrith Bigler-Eggenberger and Rainer Schweizer point out,[97] the Federal Supreme Court concretised some of these social objectives to individual subjective rights, as, for example, the right to medical treatment in prison or some claim rights of disabled persons. Thirdly, judicial organs shall take into consideration the social objectives for the interpretation.[98] Nevertheless, one should not overestimate the normative significance of art. 41 Fed. Cst. for judicial scrutiny, as the social objectives are primarily directed towards the legislator.[99] In particular, art. 41(4) Fed. Cst., according to which "no direct right to state benefits may be established on the basis of these social objectives", prevents the direct interpretation of social objectives as constitutional social rights.[100] Margrith Bigler-Eggenberger called art. 41 Fed. Cst. an unbinding and programmatic fair-weather declaration.[101] In the context of this study, it is also important to note that art. 41 Fed. Cst. is often used as a justification for the classification of ESC rights, even those recognised in international human rights instruments, as generally being of a programmatic character.[102] However, Margrith Bigler-Eggenberger and Rainer Schweizer correctly indicate that art. 41(4) Fed. Cst. does not prevent the direct justiciability of ESC rights enshrined in international treaties or domestic law.[103]

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93 See KAUFMANN, Soziale Grundrechte (2015), p. 574.

94 See SCHWEIZER, Sozialverfassung (2014), p. 883.

95 See ibid., p. 883.

96 See AUER / MALINVERNI / HOTTELIER, Les droits fondamentaux (2013), p. 684.

97 BIGLER-EGGENBERGER / SCHWEIZER, Art. 41 (2014), p. 889.

98 See KAUFMANN, Soziale Grundrechte (2015), p. 574.

99 See SCHWEIZER, Sozialverfassung (2014), p. 883; AUER / MALINVERNI / HOTTELIER, Les droits fondamentaux (2013), p. 684.

100 See BIGLER-EGGENBERGER / SCHWEIZER, Art. 41 (2014), p. 913.

101 BIGLER-EGGENBERGER, Nachgeführte Verfassung (1998), p. 513 ('Schönwettererklärung').

102 See, for example, the speech of Ambassador Jean-Jacques Elmiger, in the SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Speech of Ambassador Jean-Jacques Elmiger, p. 7.

103 See BIGLER-EGGENBERGER / SCHWEIZER, Art. 41 (2014), p. 913.

3. Intermediate Conclusion

Despite the fact that Switzerland has ratified an important number of international instruments foreseeing substantive ESC rights, the executive's and the legislator's denial to recognise international individual complaint mechanisms for ESC rights is emblematic and in line with their reluctance towards the direct justiciability of these rights. When exceptionally accepting an individual complaint mechanism, as in the case of the OP/CEDAW and potentially the 3OP/CRC, the Swiss Federal Council has always cautiously tried to downplay the role of such a mechanism with respect to ESC rights. The reluctance towards the recognition of the justiciability of ESC rights is further reflected in the limited protection of ESC rights at the federal constitutional level and the distinction between social objectives and fundamental rights. Having identified the international ESC instruments applicable in Switzerland and the characteristics and limitations of the federal constitutional protection of ESC rights, we shall now move to the analysis and critical appraisal of the Federal Supreme Court's use of the different strategies for the judicial protection of ESC rights (Chapter IV) and the analysis of the sufficiency of Swiss domestic legislation for the protection of ESC rights (Chapter V).

IV. STRATEGIES FOR THE JUDICIAL PROTECTION OF ESC RIGHTS AND THE FEDERAL SUPREME COURT'S APPROACHES

As we have seen, the obligation to ensure effective domestic remedies does not comprise the obligation to recognise the direct justiciability of ESC rights.[104] Accordingly, domestic courts can choose from a number of different strategies on how to guarantee the protection of ESC rights. The following paragraphs analyse and critically appraise the Swiss Federal Supreme Court's use of these different strategies, namely the recognition of the direct justiciability of ESC rights (1), the indirect protection of ESC rights (2) and the use of ESC rights as interpretative guides (3).

1. Direct Justiciability of ESC Rights

As pointed out earlier in this study, the direct justiciability of ESC rights refers to the ability of a legal norm, as such, to be invoked in a proceeding before a judicial body and to form the basis of a decision.[105] This Section analyses the development of the case law of the Federal Supreme Court with respect to the direct justiciability of ESC rights (1.1) and critically appraises the Court's position (1.2). A short intermediary conclusion on the direct justiciability of ESC rights completes this Section (1.3).

1.1. The Case Law of the Federal Supreme Court

Despite a certain consistency, the analysis of the Federal Supreme Court's stance on the direct justiciability of ESC rights also shows some variations. Firstly, the Federal Supreme Court balanced between the clear denial of the direct justiciability and its examination in each concrete case (1.1.1). Secondly, while the Court recognised the justiciability of a limited number of ESC rights (1.1.2), its negative position was, and still is, clear with respect to the right to non-discrimination (1.1.3). However, the Court acknowledged the justiciability of minimum core obligations (1.1.4) and, in one case, the justiciability of a mandate for the legislator to act (1.1.5).

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[104] See Section 4. (Distinction between Effective Remedy and Justiciability) in Chapter II. (Preliminary Clarifications).

[105] See CHATTON, Aspects de la justiciabilité (2012), p. 349. See Section 1. (Definition of Justiciability) in Chapter II. (Preliminary Clarifications).

1.1.1. From Denial of Direct Justiciability towards Examination in Each Concrete Case?

In a first stage, the Federal Supreme Court simply denied the justiciable nature of ESC rights as such.[106] It referred to the message of the Federal Council in its earliest cases in 1994 after the ratification of the ICESCR in 1992 and established its constant case law, according to which the provisions of the ICESCR (and other international treaties' provisions concerning ESC rights) are, in principle, of a programmatic character and do not establish subjective and justiciable rights of the individual.[107] Besides referring to the (legally non-binding) message of the Federal Council, the Federal Supreme Court based its argumentation on the allegedly different nature of ESC rights compared to civil and political rights. The different nature of ESC rights was said to derive from the fact that the ICESCR, contrary to the ICCPR, did not foresee an individual complaint mechanism and from the obligation of progressive realisation of art. 2(1) ICESCR.[108] The Federal Supreme Court also referred to the opinion of the Swiss legal doctrine at that time, which was said to be in line with its own approach.[109] With reference to the conditions for the direct applicability of an international legal norm,[110] it considered the provisions of the ICESCR not to be addressed to individuals but to the legislator who shall take them merely into account as guidelines for its activity, and in any event not to be sufficiently concrete and precise in order to form the basis for a decision in a concrete case.[111]

However, the justiciability of an international norm should be analysed separately for each (part of a) provision and in light of each concrete case. According to Matthias Kradolfer, a Swiss scholar in the field of social security law, case BGE 126 I 240 (Introduction of Enrolment Fees) in the year 2000 constituted an explicit turning point towards a new methodological analysis of the question of justiciability, namely in light

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[106] See KRADOLFER, Justiziabilität sozialer Menschenrechte (2013), p. 535.

[107] See BGE 120 Ia 1 (Increase of Enrolment Fees), c. 5. c.; BGE 122 I 101 (Tax Exemption and Emergency Aid), c. 2. a., and Swiss Federal Council, Botschaft ICESCR/ICCPR (1991).

[108] See, among others: BGE 120 Ia 1 (Increase of Enrolment Fees), c. 5. c.; BGE 121 V 246 (Injury Insurance for Foreigner), c. 2. d.; BGE 126 I 240 (Introduction of Enrolment Fees), c. 2. g.

[109] See ibid., c. 2. c.

[110] See Section 3. (Distinction between Justiciability and Direct Applicability), in Chapter II. (Preliminary Clarifications).

[111] See BGE 120 Ia 1 (Increase of Enrolment Fees), c. 5. c. and c. 5. d.

of the concrete case at hand.[112] This case dealt with the compatibility of the introduction of enrolment fees at a university of applied sciences with the obligation to progressively introduce free education (art. 13(2)(b) and (c) ICESCR). While analysing the justiciability of these articles in light of the concrete case at hand, the Federal Supreme Court explicitly referred to the concerns of the CESCR regarding its earlier approach to the justiciability of ESC rights.[113] Nevertheless, it followed its established case law and decided that the introduction of enrolment fees (in this concrete case) did not constitute a retrogressive measure violating the obligation to progressively introduce free higher education.[114] Even if it is true that the Federal Supreme Court increasingly analyses the justiciability of ESC rights in the light of each concrete case, this development shall not be overestimated. There are also recent cases where the Court excluded the justiciability of the provisions of the ICESCR as such, without a more thorough analysis of the right at stake and the concrete case at hand.[115] With respect to the right to remuneration for public holidays (art. 7(d) ICESCR), the Federal Supreme Court repeated in BGE 136 I 290 (Compensation of Public Holidays) in 2010 its two main arguments, considering the norm to be addressed to the legislator and not to be sufficiently concrete and precise in order to be directly applicable.[116] Thus, in principle, the Federal Supreme Court remained true to its established case law.

However, there are some more recent decisions where the Federal Supreme Court left the question explicitly open on whether norms providing for ESC rights are justiciable or not. In BGE 133 I 156 (Transport Costs Gymnasium) in 2007, it decided that the right to basic education (art. 13(2)(a) ICESCR; art. 28(1)(a) CRC) is fully covered by the constitutional right to education (art. 19 Fed. Cst.).[117] As there are no rights from these international treaties going beyond the constitutional guarantees, the question as to what extent these norms are justiciable was left open.[118] The same line of argumentation was used in Judgment 2C_738/2010 of 24 May 2011 (Home

[112] See KRADOLFER, Justiziabilität sozialer Menschenrechte (2013), p. 535.

[113] See BGE 126 I 240 (Introduction of Enrolment Fees), c. 3.

[114] See ibid., c. 3. b.

[115] See, for example, Judgment of the Federal Supreme Court 2C_491/2012 of 27 July 2012 (School Age), c. 4.

[116] See BGE 136 I 290 (Compensation of Public Holidays), c. 2.3.3.

[117] See BGE 133 I 156 (Transport Costs Gymnasium), c. 3.6.4.

[118] See ibid., c. 3.6.4. However, the Federal Supreme Court also made clear, that art. 13(2)(b), which was not invoked by the claimants, would not be self-executing.

Schooling), when the Federal Supreme Court had to decide on the existence of a right to private home-schooling. The Court left the question open as to whether art. 13(3) ICESCR, according to which the states parties "undertake to have respect for the liberty of parents (…) to choose for their children schools, other than those established by the public authorities (…)", is justiciable, as it did not consider a right to private home-schooling to derive from this article.[119] Interestingly, the Federal Supreme Court did not simply chose to declare the article as non-self-executing in order to justify its inapplicability. The Court took the detour and analysed the substance of the right enshrined in art. 13(3) ICESCR, referring to the travaux préparatoires of the ICESCR and existing legal doctrine. Thus, the Federal Supreme Court clearly analysed the substance of the right arising from art. 13(3) ICESCR. In doing so, it narrowed down the difference between the decision on the justiciability of a norm and the decision on the merits of a case. In other words, if the Federal Supreme Court had found a claim to private home-schooling to be covered by the right enshrined in art. 13(3) ICESCR, it would have applied this international norm and would have rendered it justiciable. This case stands for the important distinction between the *claimability* of a right compared to the *justiciability* of a right, if the content of that right covers the claim. Recognising the justiciability of the *right* to social security, for example, would not mean, that each *claim* linked to social security would be covered by that right.

1.1.2. Recognition of Justiciability Limited to Art. 8(1)(a) and Art. 8(1)(d) ICESCR

Already in some of its first cases after the ratification of the ICESCR in 1992, the Federal Supreme Court did explicitly not exclude that some of the norms of the Covenant could be justiciable. In particular, it mentioned the right to form trade unions and to join the trade union of a person's choice (art. 8(1)(a) ICESCR) in an obiter dictum as self-executing, while (negatively) deciding on the self-executing character of the prohibition of discrimination (art. 2(2) ICESCR) and the right to social security (art. 9 ICESCR).[120] In BGE 125 III 277 (Right to Strike) in 1999, the Federal Supreme Court recognised that there are considerable reasons in favour of the self-

[119] See Judgment of the Federal Supreme Court 2C_738/2010 of 24 May 2011 (Home Schooling), c. 3.2.4.

[120] See BGE 121 V 246 (Injury Insurance for Foreigner), c. 2. e.

executing character of the right to strike (art. 8(1)(d) ICESCR).[121] Nevertheless, it left the question open as to whether this article is directly applicable, and established the right to strike on the basis of its power to fill legislative gaps.[122] In other words, it accepted the self-executing character of an ESC right enshrined in the ICESCR, but did not let it *'self-execute itself',* which shows once again the Federal Supreme Court's reluctant approach towards the justiciability of ESC rights. It should further be noted that these two guarantees (art. 8(1)(a) and 8(1)(d)) remain the only internationally guaranteed ESC rights whose justiciability the Court explicitly recognised, and there was no evolution in this regard in the years since the latest CESCR concluding observations. The Federal Supreme Court's stance on the justiciability of the prohibition of non-discrimination in relation to ESC rights, which is analysed in the next Section, is emblematic for the Court's position.

1.1.3. Denial of Justiciability of the Right to Non-Discrimination

The right to non-discrimination forms an integral part of all international instruments guaranteeing ESC rights. Contrary to art. 26 ICCPR, the right to non-discrimination of art. 2(2) ICESCR is not of an autonomous character but is accessory to rights guaranteed by the Covenant.[123] Since the very beginning, the Federal Supreme Court's reluctant approach to the justiciability of ESC rights led to the denial of the justiciability of the right to non-discrimination. The Court argued that since an ESC right in question is not of a justiciable character, the non-autonomous right to non-discrimination of art. 2(2) ICESCR cannot be applied either.[124] The analysis of more recent cases shows that the Court did not change its position. In BGE 139 I 257 (Widow's Pension Discrimination) in 2013 concerning the allocation of widow's pensions, the allegedly unjusticiable character of the right to social security (art. 9 ICESCR) prevented the application of the non-discrimination clause of art. 2(2) ICESCR.[125]

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[121] See BGE 125 III 277 (Right to Strike), c. 2. d. bb.

[122] See ibid., c. 2. e. and f.

[123] See, among many others, KÜNZLI / KÄLIN, Bedeutung des UNO-Paktes (1997), p. 109.

[124] For example, in BGE 121 V 246 (Injury Insurance for Foreigner).

[125] See BGE 139 I 257 (Widow's Pension Discrimination), c. 6. We will come back to this case when analysing the indirect protection of ESC rights, in Section 2.1.3. (The Prohibition of Discrimination) in this Chapter.

However, according to many Swiss scholars, whose opinions can be shared, the discrimination-free enjoyment of substantive ESC rights constitutes a justiciable right and can therefore be enforced by judicial organs.[126] It is true that the reasoning is not only based on the argument that art. 2(2) ICESCR uses the strong term "guarantee", but also on the argument that the realisation of the principle of non-discrimination generally does not involve the provision of state benefits.[127] Nevertheless, the application of the right to non-discrimination should not be limited to those types of obligations that do not entail the provision of state benefits. Furthermore, according to the CESCR, the principle of non-discrimination is one of the obligations of immediate effect.[128] Thus, there is no reason why the right to non-discrimination included in international instruments containing ESC rights shall not be considered as directly justiciable by the Federal Supreme Court. We come back to the right to non-discrimination when analysing the indirect protection of ESC rights.[129]

1.1.4. Recognition of Minimum Core Obligations

According to the CESCR, "(…) 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."[130] The Swiss legal doctrine, for example, Jörg Künzli and Walter Kälin, recognises the justiciable character of the obligation to fulfil minimum core obligations.[131] In BGE 121 I 367 (Minimum Level of Subsistence) in 1995, the Federal Supreme Court recognised the existence of an (at that time) unwritten constitutional right to a minimum level of subsistence, limited to what is indispensable for a life in human dignity free from a dishonourable mendicant existence.[132] In BGE 131 I 166 (Foreigners and Art. 12 Fed. Cst.), decided in 2005, the Court confirmed that all individuals on Swiss territory should benefit from art. 12 Fed. Cst., including asylum seekers with a negative decision and an obligation to leave the country.[133]

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[126] See, among others, KÜNZLI / KÄLIN, Bedeutung des UNO-Paktes (1997), p. 109; WILSON, L'applicabilité des droits economiques, sociaux et culturels (2010), p. 1509.

[127] See KÜNZLI / KÄLIN, Bedeutung des UNO-Paktes (1997), p. 109.

[128] See CESCR, General Comment No. 3 (1990), para. 1.

[129] See Section 2.1.3. (The Prohibition of Discrimination) in this Chapter.

[130] CESCR, General Comment No. 3 (1990), para. 10.

[131] See KÜNZLI / KÄLIN, Universeller Menschenrechtsschutz (2013), p. 103 and 127.

[132] See BGE 121 I 367 (Minimum Level of Subsistence), c. 2.c. This unwritten constitutional right was included in the new Federal Constitution in art. 12 as the right to assistance when in need (sometimes called the right to emergency aid).

[133] See BGE 131 I 166 (Foreigners and Art. 12 Fed. Cst.).

The Federal Supreme Court's case law establishing an unconditional right to assistance when in need is appreciated. Nevertheless, there are a number of problematic considerations with respect to the adjudication of ESC rights. Firstly, even though the Court's case law could be considered as an implicit recognition of the justiciability of the minimum core content of the right to an adequate standard of living (art. 11 ICESCR) or the right to social security (art. 9 ICESCR), it did not refer to the ICESCR at all when establishing this unwritten constitutional right in 1995. In BGE 131 I 166 (Foreigners and Art. 12 Fed. Cst.), the Court refused to compare the adequacy of the scope of art. 12 Fed. Cst. with the guarantees deriving from art. 11 ICESCR concerning the right to housing, on the grounds that the claimant did not sufficiently substantiate his claim that 13 CHF/day is insufficient to enjoy this right.[134] Secondly, according to Malcom Langford and Jeff A. King, the minimum core obligations have to be understood in context, so that "a country that has more ample resources must be hold to a higher level of realisation of the Covenant rights."[135] In the context of the right to social security, the Federal Supreme Court's constant case law distinguishes between the federal constitutional right to assistance when in need (art. 12 Fed. Cst.) and the right to social aid enshrined in cantonal legislations, which are more extensive.[136] While the federal constitutional right to assistance when in need only protects physical survival, the rights to social aid recognised in the cantonal legislations include a social dimension and are aimed at ensuring a decent existence in society. However, according to the study of the SCHR,[137] the right to social aid, thus not only the right to assistance when in need, can be considered to fall under the scope of the minimum core obligations.[138] One can share this opinion, in particular in light of the need to contextualise the minimum core obligations according to the economic situation of a state. Thus, while the initial approach of the Federal Supreme Court to recognise an unwritten constitutional right to a minimum subsistence level is welcomed, it would be useful for the Court to show the links between art. 12 Fed. Cst. and the ICESCR and take into account the minimum core

[134] See ibid., c. 8.5.

[135] LANGFORD / KING, CESCR (2008), p. 495.

[136] See, for example, Judgment of the Federal Supreme Court 8C_455/2015 of 08 March 2016 (Social Aid / Emergency Aid), c. 7.2.1.

[137] See Section 2.1. (ESC Rights Guaranteed by Federal and Cantonal Law) in Chapter III. (Legal Basis for ESC Rights in Switzerland).

[138] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 29.

obligations with respect to each individual ESC right as well as in light of the particular context of Switzerland.

1.1.5. Justiciability of Mandate for the Legislator to Act

The above-mentioned study of the SCHR correctly submitted that under Swiss domestic law, not only norms which explicitly transfer a right to an individual, but also norms which are shaped in the form of a legal obligation for the state, fall under the scrutiny of courts and can be considered as justiciable.[139] In this regard, BGE 137 I 305 (Gender Equality Commission), decided in 2011, merits our particular attention, as it evidences a promising development with respect to the will of the Federal Supreme Court to react to the inaction of a cantonal legislator.[140] The case was about a complaint against the decree of the cantonal parliament of Zug not to prolong the legal basis for a gender equality commission, without providing for an alternative.[141] The Federal Supreme Court considered itself to be competent to examine the legislator's inaction if a clear and certain mandate for the cantonal legislator can be derived from federal *or international* law, whether explicitly or via interpretation.[142] When the complexity of the case does not allow for another solution, it could also declare a situation to be unconstitutional or launch an appeal to the legislator to act.[143] The Federal Supreme Court accepted the complaint to be admissible, as the applicants have sufficiently substantiated an obligation to create a gender equality commission arising from the Fed. Cst. in conjunction with art. 2 CEDAW and the recommendations of the Committee of the CEDAW.[144] The Federal Supreme Court adopted a pragmatic approach for solving the case. It held that there was an obligation deriving from international and constitutional law to establish gender equality, but that the *how* remained within the canton's discretionary power.[145] It considered it to be problematic if the canton decided to abolish the gender equality commission without providing for an alternative.[146]

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[139] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 2.

[140] See a discussion of the case in RANDALL / CHATTON, Les droits sociaux fondamentaux (2014), p. 325.

[141] See BGE 137 I 305 (Gender Equality Commission).

[142] See ibid., c. 2.5.

[143] See ibid., c. 2.5.

[144] See ibid., c. 2.5. and 2.7.

[145] See ibid., c. 4.

[146] See ibid., c. 5.2. and 7.

Of particular interest for this paper is the fact that the Federal Supreme Court considered the case to be beyond the distinction between self-executing and non-self-executing norms.[147] Thus, an international norm, which may not be sufficiently concrete and precise to be self-executing and to create individual subjective rights to obtain a certain benefit from the state, may still contain a sufficiently clear mandate for the legislator to act. This clearly shows that norms, which are considered to be not directly applicable, can still fall under the scrutiny of courts. Thus, the Federal Supreme Court seems to take a step into the right direction if we consider the opinion of Eibe Riedel, according to whom the categorisation of self-executing and non-self-executing is not suitable for human rights treaties.[148] Therefore, the departure from this categorisation in the context of human rights instruments presents a feasible conceptual step in order to recognise the direct justiciability. For this reason, the distinction adopted in this study between justiciability and the direct applicability of a norm is relevant and justified. According to Maya Hertig Randall and Gregor Chatton, the impacts of this case law on the future development of ESC rights remain to be determined.[149] They hold, however, that the case proves the sufficiently precise formulation of ESC rights enabling courts to control the legislator's inactivity or to hinder him to adopt retrogressive measures taken without compensation or alternatives.[150]

1.2. Critical Appraisal

The CESCR, as well as the long-lasting debate about the justiciability of ESC rights, helped to develop conceptual frameworks to further clarify the general obligations with respect to ESC rights.[151] This Section will critically appraise the Federal Supreme Court's approach to the direct justiciability of ESC rights by contrasting the Court's approach with existing conceptual frameworks. Besides the already criticised non-recognition of the justiciability of the right to non-discrimination,[152] the Federal Supreme Court's refusal to consider the triple-typology of obligations arising from all

[147] See ibid., c. 3.3.

[148] See Section 3. (Distinction between Justiciability and Direct Applicability) in Chapter II. (Preliminary Clarifications).

[149] RANDALL / CHATTON, Les droits sociaux fondamentaux (2014), p. 336.

[150] See ibid., p. 336.

[151] See also Chapter I. (Introduction).

[152] See 1.1.3. (Denial of Justiciability of the Right to Non-Discrimination) in this Chapter.

human rights (1.2.1) as well as its reluctance towards the prohibition of retrogressive measures (1.2.2) is analysed in the following paragraphs.

1.2.1. Non-Recognition of the Triple-Typology of Obligations

It lays in the particular nature of human rights treaties that the states parties to such treaties not only bear obligations towards the other states parties, but also obligations which have to be realised domestically towards the individuals under their jurisdiction.[153] Nowadays, it is widely accepted that all human rights, including ESC rights, consist of three types of obligations, namely the obligation to "respect (refrain from impeding), protect (ensure others do not impede), and fulfil (actually provide) the conditions necessary for realising human rights."[154] Not only Swiss scholars promote the conceptual framework of the triple-typology of obligations,[155] but also the Swiss Federal Council, which, for the first time, mentioned it in 2012 in its message to the Parliament on the ratification of the CRPD.[156] In particular, the Federal Council accepted that all obligations to respect are directly applicable and justiciable and that the same is true for obligations to protect if they do not require the legislator to be active.[157] It went so far as to acknowledge the justiciable character of obligations to fulfil, with respect to minimum core obligations and obligations owed to persons in custody of the state.[158] According to Christoph Spenlé, the deputy head of the section of human rights at the Directorate of International Law of the Swiss Ministry of Foreign Affairs, it is highly probable that the forthcoming state report to the CESCR will mirror the same line of argumentation.[159] It is worth noting that the Swiss Fed.

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[153] See KÜNZLI / KÄLIN, Universeller Menschenrechtsschutz (2013), p. 101.

[154] LANGFORD, Malcom and KING, Jeff A. (LANGFORD / KING, CESCR (2008), p. 484) point out, that this typology of obligations was developed by the former UN Special Rapporteur on the Right to Food, Asbørn Eide (A. Eide, The Right to Food (Final Report), U.N. Doc. E/CN.4/Sub.2/1987/23 (1987), para. 66-69), before it was adopted by the CESCR (CESCR, General Comment No. 12 (1999), para. 15) as well as the CEDAW Committee (General Comment No. 28, para. 9).

[155] By way of examples, Jörg Künzli and Walter Kälin consider the justiciability of the obligations *to respect* and *to protect* not to be disputed, and at least two types of obligations *to fulfil* as directly justiciable, namely the minimum core obligations and the obligations of a state towards individuals in a situation of complete state control (KÜNZLI / KÄLIN, Universeller Menschenrechtsschutz (2013), p. 103 and 127). See also SCHLÄPPI / WYTTENBACH / ULRICH, Kommentar zum CEDAW-Übereinkommen (2015), p. 215-216.

[156] See Swiss Federal Council, Botschaft CRPD (2012), p. 673, para. 2.1.

[157] See ibid., p. 675, para. 2.2.

[158] See ibid., p. 675, para. 2.2.

[159] On the basis of the Interview with Christoph Spenlé, conducted on 6 May 2016.

Cst. in its art. 35(3) itself provides for this typology, at least concerning the first two dimensions to respect and to protect.[160]

Despite the Committee's, the Federal Council's (recent) and the Swiss legal doctrine's support of this triple-typology of obligations corresponding to all human rights, the Federal Supreme Court has so far, in its case law on constitutional rights or internationally guaranteed human rights, not taken into account the concept of the triple-typology of obligations.[161] If the Court is willing to further engage in the analysis of the justiciability of ESC rights, the concept of the triple-typology of obligations would serve as a useful starting point to identify justiciable layers of ESC rights and to analyse each ESC right in more depth.[162]

1.2.2. Prohibition of Retrogressive Measures

With respect to ESC rights, it is art. 2(1) ICESCR spelling out the general obligations of states.[163] According to this article, each state party "undertakes to take steps (…) to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights (…)."[164] Despite the reference to the progressive realisation of the rights, the CESCR made clear that there are not only obligations of progressive achievement, but also obligations of immediate effect.[165] In fact, the concept of progressive realisation, which can be considered as "the linchpin of the whole Covenant"[166], "should not be misinterpreted as depriving the obligation of a

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[160] Art. 35(3) Fed. Cst.: "The authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons." In this sense, HERTIG RANDALL / CHATTON, Les droits sociaux fondamentaux (2014), p. 315.

[161] See HERTIG RANDALL / CHATTON, Les droits sociaux fondamentaux (2014), p. 315.

[162] See discussion on the indirect protection of ESC rights, and how the triple-typology of obligations could serve as a mean to protect these rights directly, in Section 2.2.1. (No Need For Indirect Protection?) in this Chapter.

[163] Off course, the general obligations arising from art. 2(1) ICESCR only apply to the specific ESC rights foreseen by the ICESCR. However, art. 2(1) formulates *the nature* of states obligations with respect to ESC rights in general, not only with respect to the ESC rights contained in the ICESCR.

[164] Here, the general obligations of states with regard to ESC rights are analysed, and not the specific obligations arising from each individual ESC right. Other studies have examined the normative density of particular ESC rights, as e.g. KRADOLFER, Verpflichtungsgrad sozialer Menschenrechte (2012) with respect to the right to social security (art. 9 ICESCR); GOLAY, The Right to Food and Access to Justice (2006), with respect to the right to food (art. 11 ICESCR). Furthermore, a series of specific general comments of the CESCR concretise state obligations with respect to particular ESC rights.

[165] See CESCR, General Comment No. 3 (1990), para. 1. See in this regard the impact of the CRPD, discussed in Chapter III. (Legal Basis for ESC Rights in Switzerland), Section 1.1. (Legal Instruments with Substantive ESC Rights).

[166] ALSTON / QUINN, Nature and Scope of States Parties' Obligations (1987), p. 172.

meaningful content."[167] Furthermore, the obligations, which are of a progressive nature, imply as their counterpart a (not absolute) prohibition of retrogressive measures.[168] According to Jörg Künzli and Walter Kälin, the prohibition of retrogressive measures is potentially justiciable.[169] In their opinion, it is conceivable that courts are able to examine whether the legislator or the executive fulfilled their obligations to motivate and justify a reduction of state benefits falling within the scope of ESC rights.[170] Another Swiss scholar, Barbara Wilson, shares this opinion. She considers the prohibition to take retrogressive measures to be justiciable in Switzerland, given that it does not ask for the adoption of positive measures in the domestic law.[171]

The question of the prohibition to take retrogressive measures is of particular interest with respect to the cases before the Federal Supreme Court dealing with the increase of enrolment fees at Swiss universities and the obligation to progressively introduce free higher education (art. 13(2)(c) ICESCR).[172] Even though these cases date back several years, they are still relevant for this study. According to the Court, a decision on enrolment fees has to be put in context and be analysed with other existing measures to make higher education equally accessible for all.[173] In the opinion of the Federal Supreme Court, art. 13(2)(c) ICESCR would only provide a subjective right if an increase of enrolment fees did not have any links to education policy and would only serve as a relief for public finances or serve the goal to limit access to higher education.[174] However, in Barbara Wilson's point of view, the court should always proceed to a balance of interests in case of a retrogressive measure, taking into account all the available resources.[175] This line of argumentation can be followed. Art. 13(2)(c) ICESCR, but also all the other ESC rights shall be read in light of the general obligation to take steps to the maximum of the available resources with

[167] CESCR, General Comment No. 3 (1990), para. 9.

[168] See ibid., para. 9.

[169] KÜNZLI / KÄLIN, Universeller Menschenrechtsschutz (2013), p. 103 and 128.

[170] KÜNZLI / KÄLIN, Bedeutung des UNO-Paktes (1997), p. 111.

[171] WILSON, L'applicabilité des droits économiques, sociaux et culturels (2010), p. 1511.

[172] In particular, BGE 120 Ia 1 (Increase of Enrolment Fees_1); BGE 121 I 273 (Increase of Enrolment Fees_2); BGE 126 I 240 (Introduction of Enrolment Fees); BGE 130 I 113 (Increase of Enrolment Fees_3).

[173] See BGE 130 I 113 (Increase of Enrolment Fees_3), c. 2.4.

[174] See ibid., c. 2.6.

[175] See WILSON, L'applicabilité des droits économiques, sociaux et culturels (2010), p. 1511.

a view to achieving progressively the full realisation of the rights (art. 2(1) ICESCR). As confirmed by the CESCR, the obligation to take steps is of immediate character and "steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned."[176] Therefore, an increase of enrolment fees at an institution of higher education shall be examined by striking a balance between all the involved interests as well as by taking into account all the available resources. As noted above, the case law established in BGE 137 I 305 (Gender Equality Commission) on the justiciability of an obligation for the legislator to act could serve as a basis to analyse the obligation to progressively realise all the ESC rights enshrined in art. 2(1) ICESCR, including the obligation to progressively introduce free higher education.[177] In fact, the increase of enrolment fees can be interpreted as the unwillingness of the legislator to realise an internationally guaranteed mandate to act and the Court has the power to control whether or not sufficient alternatives to provide for the equal access to education have been taken.

1.3. Intermediate Conclusion

In general, the executive's and legislator's reluctance towards the justiciability of ESC rights, as analysed in Chapter III, is mirrored by the Federal Supreme Court's reluctant recognition and examination of the direct justiciability of ESC rights. The case law on the right to non-discrimination serves as an emblematic example. Nevertheless, the situation is not as black and white as it may seem. Firstly, the Federal Supreme Court explicitly recognised the justiciability of the right to form trade unions and to join the trade union of a person's choice as well as the right to strike. Secondly, it recently explicitly left the question of justiciability open. Thirdly, it was ready to examine the compatibility of the legislator's inaction with constitutional and international guarantees, proving the need to distinguish between justiciability and direct applicability of a norm and opening the door to apply the prohibition of retrogressive measures. Fourthly, the Court increasingly examined the justiciability in light of each particular right and concrete case at hand. In these cases, when the Federal Supreme Court analysed whether or not a *claim* is covered by the content of an ESC right, it implicitly recognised the justiciability of that *right*.

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[176] CESCR, General Comment No. 3 (1990), para. 2.

[177] See Section 1.1.5. (Justiciability of Mandate for the Legislator to Act) in this Chapter.

Nevertheless, these positive signs should not cover the fact that the Federal Supreme Court's engagement with ESC rights remained weak. Neither did it take into account the well-developed and widely accepted triple-typology of obligations, nor did it sufficiently examine claims concerning the prohibition to take retrogressive measures in light of all available resources to the state or establish adequate criteria to control retrogressive measures. Furthermore, the Federal Supreme Court did not link the right to assistance when in need and the right to social aid to internationally guaranteed ESC rights, and it did not analyse these rights in the particular context of the available resources.

The next Section analyses whether the reluctance to recognise the direct justiciability of ESC rights by the Federal Supreme Court led to the application of different strategies, such as the indirect protection of ESC rights via the application of legal norms which do formally not guarantee ESC rights.[178]

2. Indirect Justiciability of ESC Rights

The European Court of Human Rights (ECtHR) acknowledged the indivisibility of all human rights, which lies at the basis of the strategy of the indirect justiciability of ESC rights. It did so by declaring that "the Convention may extend into the sphere of social and economic rights [and] there is no water-tight division separating" [179] the sphere of social and economic rights from the field covered by the European Convention on Human Rights (ECHR). This Section analyses (2.1) and critically appraises (2.2) the Federal Supreme Court's use, in contrast to the ECtHR, of different ways to indirectly protect ESC rights, before drawing an intermediate conclusion (2.3). This thesis' purpose is not to provide an exhaustive list of cases, in which the Federal Supreme Court protects ESC rights indirectly, but to point out relevant cases in order to understand the Federal Supreme Court's approach, to compare it to the ECtHR and to suggest alternative ways to proceed.

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[178] See CHATTON, Aspects de la justiciabilité (2012), p. 349 – 350.

[179] ECtHR, Case of Airey v. Ireland, 1979, para. 26. It should be noted that not only the ECtHR uses the strategy of the indirect protection, but also the Inter-American Court of Human Rights. For an analysis of the latter's case law, see, for example: MELISH, Inter-American Court of Human Rights (2008). However, this thesis will focus on the case law of the ECtHR and compare it to the Federal Supreme Court's approach. This delimitation is pertinent, as the ECtHR exerts a certain degree of influence on the Federal Supreme Court, in contrary to the Inter-American Court of Human Rights, given that Switzerland is Member State of the ECHR.

2.1. Different Ways of Indirect Protection of ESC Rights

Different ways of indirect protection of ESC rights are possible. The following are relevant with respect to the case law of the Federal Supreme Court:[180] Firstly, civil and political rights can be interpreted as "umbrella provisions"[181], so that their substantive guarantees cover areas of ESC rights (2.1.1). Secondly, certain civil and political rights can serve as "procedural devices for ensuring fairness in the enforcement, distribution or coverage of such rights"[182] (2.1.2). Thirdly, the right to non-discrimination can be used to extend existing ESC rights to all individuals under the jurisdiction of a State (2.1.3). Fourthly, we briefly analyse the Federal Supreme Court's stance on poverty as a ground of discrimination (2.1.4).

2.1.1. Civil and Political Rights as Umbrella Provisions

The ECtHR protects different aspects of ESC rights, for example the right to work and the right to an adequate standard of living, including the right to health and the right to housing as components of an adequate standard of living, via the interpretation of the substantive guarantees of the right to life (art. 2 ECHR), the prohibition of torture and inhuman or degrading treatment (art. 3 ECHR) and the right to respect of family and private life (art. 8 ECHR).[183] The Federal Supreme Court also protects ESC rights through the application of substantive guarantees of constitutional rights or provisions of the ECHR. Two recent cases, which were analysed by Thomas Hugi Yar, inter alia active as clerk at the Federal Supreme Court, serve as relevant examples.[184]

In BGE 138 I 246, decided in 2012 (Refused Asylum Seeker's Right to Work), the Federal Supreme Court had to decide, whether the prohibition to work after a negative asylum decision was in line with the individual's constitutional and

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[180] This categorisation was used by CHATTON, Aspects de la justiciabilité (2012), p. 347 – 414, with respect to the ECtHR. Other authors use similar categories of indirect protection of ESC rights, but with some variations (See CLEMENTS / SIMMONS, European Court of Human Rights (2008), p. 409 – 427; MELISH, Inter-American Court of Human Rights (2008), p. 388).

[181] This term was used by Tara J. Melish, with respect to the indirect protection of ESC rights through the Inter-American court of Human Rights (MELISH, Inter-American Court of Human Rights (2008), p. 388).

[182] Ibid., p. 388.

[183] See for a more extensive overview of the case law of the ECtHR: CLEMENTS / SIMMONS, European Court of Human Rights (2008), p. 409 – 427; CHATTON, Aspects de la justiciabilité (2012), p. 347 – 414.

[184] HUGI YAR, Praxis des Bundesgerichts (2012), p. 8, 10.

conventional rights. It analysed the question on the basis of art. 8 ECHR.[185] Given the long duration of the person's stay in Switzerland, the Court decided that if the enforcement of the negative asylum decision cannot be realised in foreseeable time for objective reasons, the personal interest to enjoy the right to work and not to be dependent on assistance when in need (art. 12 Fed. Cst.) would outweigh the public interest in the enforcement of immigration law.[186] A second case in 2012, namely BGE 138 II 229 (Case of Hardship Residence Permit), concerned a married woman without Swiss citizenship, who was a victim of domestic violence. According to Swiss legislation, a divorced person without Swiss citizenship loses their residence permit if the duration of the marriage was less than three years.[187] However, a victim of domestic violence is entitled to a residence permit after divorce, even if the marriage was less than three years, on the basis of a permit for case of hardship.[188] The Federal Supreme Court acknowledged a case of hardship based on the right to respect of private life of art. 8 ECHR.[189] In particular, the woman was deprived of a number of ESC rights, which she could not realise during her marriage due to the constraints exercised on her by her husband, including the rights to work, education and participation in cultural life.[190] The Federal Supreme Court missed the opportunity to point out the existing links between domestic violence, the problematic Swiss asylum law in this regard and the violation of ESC rights. These links were not only pointed out by Thomas Hugi Yar in an analysis of the case after the decision[191] but were already subject to the latest concluding observations of the CESCR with respect to Switzerland.[192]

2.1.2. Civil and Political Rights as Procedural Devices

The ECtHR also uses different procedural rights in order to protect ESC rights.[193] The right to a fair trial, enshrined in art. 6(1) ECHR, is particularly interesting in the

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[185] BGE 138 I 246 in 2012 (Refused Asylum Seeker's Right to Work), c. 3.3.2.

[186] Ibid., c. 3.3.2 and 3.3.4. As a result, the Federal Supreme Court granted the authorities a few months to enforce the negative asylum decision; otherwise they would have had to grant him a work permit on the basis of art. 8 ECHR.

[187] BGE 138 II 229 (Case of Hardship Residence Permit), c. 2.

[188] Ibid., c. 3.1.

[189] Ibid., c. 3.3.4; HUGI YAR, Praxis des Bundesgerichts (2012), p. 10.

[190] BGE 138 II 229 (Case of Hardship Residence Permit), c. 3.3.2. See also HUGI YAR, Praxis des Bundesgerichts (2012), p. 10.

[191] HUGI YAR, Praxis des Bundesgerichts (2012), p. 10.

[192] CESCR, Concluding Observations Switzerland (2010), para. 15.

[193] See, for an extensive analysis, for example CHATTON, Aspects de la justiciabilité (2012).

context of this thesis, as it shows the discrepancy between the ECtHR and the Federal Supreme Court. The ECtHR interprets the terms "civil rights and obligations" of art. 6(1) ECHR in a broad sense, in order to apply the guarantees of the right to a fair trial to claims with respect to ESC rights.[194] According to the Swiss scholar Gregor Chatton, the Court places the whole area of social security, including social aid, under the term civil rights, rendering the procedural rights of art. 6(1) applicable to social security claims against the state.[195] This innovative approach was also applied in the case of Schlumpf v. Switzerland in 2009.[196] The ECtHR had to decide whether the costs for a gender reassignment surgery were covered by the compulsory medical insurance. The Federal Supreme Court denied the coverage, as the surgery took place prior to the expiration of a two-year observation period.[197] The condition of a two-year observation period was determined by the Federal Supreme Court. According to the ECtHR, the claimant's right to a fair trial was violated as the Swiss courts should also have taken into account other evidence such as medical certificates and expert opinions.[198] Interestingly, in the subsequent revision case BGE 137 I 86 (Schlumpf Revision Case) in 2010 implementing the ECtHR judgment, the Federal Supreme Court questioned the demarcation between the subject-matter jurisdiction of the ECtHR and Swiss jurisdiction in the area of social insurance claims.[199] It further questioned whether the ECtHR did not overstep its competences with its decision.[200] The expressed criticism of the ECtHR's case law clearly shows that the protection of ESC rights, in particular the guarantee of claim-rights in the area of social security via the right to a fair trial, is not conceivable directly before the Federal Supreme Court.

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[194] See CHATTON, Aspects de la justiciabilité (2012), p. 351, 353.

[195] CHATTON, Aspects de la justiciabilité (2012), p. 353, commenting on ECtHR, Case of Schlumpf v. Switzerland, 8 January 2009.

[196] ECtHR, Case of Schlumpf v. Switzerland, 2009. The ECtHR applied this approach already in 2003, in a similar case concerning the costs of a gender reassignment surgery (case of Van Kück v. Germany, 2003, para. 64-65).

[197] ECtHR, Case of Schlumpf v. Switzerland, 2009, para. 11, 28, 35.

[198] Ibid., para. 57. It should be noted, that the ECtHR also found a violation of art. 8 ECHR. Thus, the ECtHR also protected the right to social security via the application of civil and political rights, analysed in Section 2.1.1. (Civil and Political Rights as Umbrella Provisions) in this Chapter.

[199] BGE 137 I 86 (Schlumpf Revision Case), c. 7.3.2.

[200] Ibid., c. 7.3.3.

2.1.3. The Prohibition of Discrimination

As we have seen in the discussion on the direct justiciability of ESC rights, the Federal Supreme Court does not recognise the direct justiciability of the right to non-discrimination as enshrined in international instruments guaranteeing ESC rights.[201] However, the right to non-discrimination can also be used as an *indirect* tool for the protection of ESC rights as "the relationship between the right to equality and non-discrimination and social and economic rights is of central importance to the adjudication of social and economic rights."[202] The Human Rights Committee (HRC), for instance, applied art. 26 ICCPR in order to protect the indiscriminate right to social security.[203] With respect to the ECtHR, the prohibition of discrimination of art. 14 ECHR can be applied when the facts of the case fall "within the ambit"[204] of one of the substantive rights guaranteed by the ECHR. Considering the ECtHR's "broad understanding"[205] of the right to respect for private and family life (art. 8 ECHR), violations of ESC rights could fall within the ambit of this right and be protected by the prohibition of discrimination. As this Section tries to explore the Federal Supreme Court's approach, in contrast to the one followed by the ECtHR, it focuses on the right to social security linked to the right to property, where the discrepancy between the two bodies is particularly evident.

One of the strategies of the ECtHR, in order to protect the indiscriminate enjoyment of the right to social security, is via the application of the right to property (art. 1 of Protocol No. 1 of the ECHR), applied in conjunction with art. 14 ECHR.[206] According to the ECtHR, claims based on social security guarantees are properties in the sense of art. 1 Protocol No. 1. Therefore, if a state establishes a social security system under its domestic law, such a system has to respect the guarantees arising from art. 14 ECHR.[207] The following three cases are examples, where the Federal Supreme Court refused to indirectly protect the indiscriminate enjoyment of the right to social

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[201] See Section 1.1.3. (Denial of Justiciability of the Right to Non-Discrimination) in this Chapter.

[202] NOLAN / PORTER / LANGFORD, Justiciability of Social and Economic Rights (2007), p. 27.

[203] E.g. HRC Zwaan-de Vires v. the Netherlands, Communication No. 182/1984, 9 April 1987.

[204] EUROPEAN COMMISSION, The Prohibition of Discrimination (2005), p. 21. The ECtHR uses the expression "falling within its ambit" with respect to art. 14 ECHR (see, for example, ECtHR, Case of Stec and Others v. The United Kingdom (2005), para. 39).

[205] See EUROPEAN COMMISSION, The Prohibition of Discrimination (2005), p. 21. There are other rights of the ECHR, under whose "ambit" the right to social security could fall, in particular art. 8 ECHR.

[206] See CHATTON, Aspects de la justiciabilité (2012), p. 379.

[207] ECtHR, Case of Stec and Others v. the United Kingdom (2006), para. 53.

security. In BGE 139 I 257 (Widow's Pension Discrimination), decided in 2013, the Federal Supreme Court denied a woman aged lower than 45 years and without children, in accordance with federal legislation, a widow's pension, despite the fact that she took care of her husband for more than eight years.[208] When analysing the question of the prohibition of discrimination, the Court explicitly held that Switzerland is not obliged to follow the case law of the ECtHR, as it has not ratified Protocol No. 1 of the ECHR.[209] In BGE 140 V 385 of 2014 (Social Security of Employee of International Institution), the Federal Supreme Court refused to grant invalidity insurance for a child with autism of an employee of an international organisation. In essence, the Federal Supreme Court repeated the same reasoning as in BGE 139 I 257 (Widow's Pension Discrimination).[210] In BGE 138 I 205 (People of the Travellers, Minority Rights), decided in 2012, the Federal Supreme Court refused to apply art. 8(2) Fed. Cst. to uphold the right to disability insurance of a person of the travellers.[211] In fact, disability insurance was initially refused on the ground that the person could have chosen an alternative work adapted to her illness. This work, however, would have forced the person to a sedentary way of life.[212] According to the Federal Supreme Court, art. 8(2) cannot be the legal basis for the provision of a state benefit, in particular in the area of social insurance.[213] We will see when analysing the use of ESC rights as interpretative guides, that the Federal Supreme Court nevertheless found another way to protect the right to social security of the person.[214]

Thus, the Federal Supreme Court does not protect ESC rights through the non-discrimination clause as extensively as, for example, the ECtHR. Even though Switzerland has not ratified the Protocol No. 1 of the ECHR, the Federal Supreme Court could still have considered a similar interpretation of art. 26 Fed. Cst. guaranteeing the right to property.

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[208] As already seen in Section 1.1.3. (Denial of Justiciability of the Right to Non-Discrimination) in this Chapter, the Court also denied the direct justiciability of art. 9 ICESCR and art. 11(e) CEDAW as well as art. 2(2) ICESCR.

[209] BGE 139 I 257 (Widow's Pension Discrimination), c. 5.3.3. The Court also held, that art. 8 ECHR is not applicable.

[210] BGE 140 V 385 (Social Security of Employee of International Institution), c. 5.2.

[211] BGE 138 I 205 (People of the Travellers, Minority Rights), c. 5.4. This case was analysed by Thomas Hugi Yar (HUGI YAR, Praxis des Bundesgerichts (2012), p. 10).

[212] See BGE 138 I 205 (People of the Travellers, Minority Rights), c. 2.2.

[213] Ibid., c. 5.4.

[214] See Section 3.2. (The Protection of National Minorities) in this Chapter.

2.1.4. Poverty as Ground of Discrimination

The insufficient enjoyment of ESC rights in the case of poverty can be a ground of discrimination for the enjoyment of other rights.[215] The CESCR also points out the relationship between poverty and discrimination, considering that "a person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatisation and negative stereotyping (…)."[216] Property, which is explicitly listed as a prohibited ground of discrimination in art. 2(2) ICESCR, is understood as a broad concept and covers both real property and personal property, such as income, "or the lack of it."[217] According to Alexander Suter's comprehensive study on poverty and discrimination in Switzerland, the tendency of the Federal Supreme Court's case law goes towards the non-recognition of poverty as a ground of discrimination under art. 8(2) Fed. Cst, as people living in poverty are not considered to be sufficiently defined as individuals or as a group.[218] The case BGE 141 I 241 (Precautionary Taking of Evidence), decided in 2015, serves as a recent example and confirms this tendency as well as the conclusions of Suter's study.[219] The Federal Supreme Court denied the legal aid for the precautionary taking of evidence, even though it recognised that a person who is not able to pay the costs of taking evidence in advance, is excluded from the procedure of the precautionary taking of evidence.[220] Concerning the applicability of art. 8(2) Fed. Cst., the Federal Supreme Court decided that people with a lack of property, in other words, people living in poverty, do not constitute a well-defined group in order to fall under the protection of the prohibition of non-discrimination.[221] Despite the fact that art. 8(2) Fed. Cst. does not list property as an explicit ground of discrimination, in contrary to art. 2(2) ICESCR, the Federal Supreme Court could nevertheless take

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[215] See, for an extensive analysis of poverty as a ground of discrimination, SUTER, Armut und Diskriminierung (2015).

[216] CESCR, General Comment No. 20 (2009), para. 35.

[217] Ibid., para. 25.

[218] See SUTER, Armut und Diskriminierung (2015), p. 331.

[219] This case was analysed by Alexander Suter in his presentation on 27 April 2016 at the Human Right Clinic of the Faculty of Law, University of Basel.

[220] BGE 141 I 241 (Precautionary Taking of Evidence), c. 4.3.3.

[221] Ibid., c. 4.3.3. In its decision, rendered in German, the Federal Supreme Court explicitly used the terms "Menschen ohne hinreichendes Vermögen" in quotation marks.

into account the CESCR's view on the relationship between poverty and discrimination.[222]

2.2. Critical Appraisal

This Section first analyses, whether the Federal Supreme Court has a real need to use the strategy of the indirect protection of ESC rights (2.2.1). In a second step, it points out the need of advocates to refer to ESC rights in their appeals as a mean to reduce the indirect protection of ESC rights (2.2.2).

2.2.1. No Need for Indirect Protection?

The main purpose of the indirect protection of ESC rights is to ensure the respect of ESC rights, where these rights are beyond the subject-matter jurisdiction of the respective judicial body. This is the case in particular for the ECtHR and the HRC, as their respective legal instruments, the ECHR and the ICCPR, do not explicitly contain ESC rights. In contrast to these international instruments, internationally guaranteed ESC rights form an integral part of the Swiss legal system.[223] For this reason, the Federal Supreme Court does not need to make a detour in order to protect ESC rights indirectly, but could guarantee their fulfilment by recognising the ESC rights' direct justiciability. This increased engagement in and examination of ESC rights would lead to a better definition of the scope and content of these rights, in particular by taking into consideration the general comments of the CESCR on the respective rights. As already mentioned in the critical appraisal of the Federal Supreme Court's approach to the direct justiciability of ESC rights,[224] the triple-typology of obligations could serve as a useful tool for the increased engagement with ESC rights. For example, in the case concerning the refused asylum seeker's right to work in BGE 138 I 246,[225] the refusal to issue a work permit to the person was a violation of the obligation to respect the person's right to work, which could not have been legitimately restricted for such a long duration. Thomas Hugi Yar confirms that this decision could have been linked to the right to work arising from art. 6 ICESCR.[226] In

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[222] We should note, however, that the question as to whether poverty should be recognised as a ground of discrimination under art. 8(2) Fed. Cst., despite being linked to the issue of ESC rights, does not directly involve the question of the justiciability of ESC rights.

[223] See Chapter III. (Legal Basis for ESC Rights in Switzerland).

[224] See in this Chapter, Section 1.2.1. (Non-Recognition of the Triple-Typology of Obligations).

[225] See Section 2.1.1. (Civil and Political Rights as Umbrella Provisions) in this Chapter.

[226] HUGI YAR, Praxis des Bundesgerichts (2012), p. 8-9.

his opinion, it would have been desirable at least to point out the connections to the right to work in the reasoning.[227] The Court could also have referred to general comment No. 18, which foresees the "obligation to respect the right to work by (…) refraining from denying or limiting equal access to decent work for all persons, especially disadvantaged and marginalized individuals and groups, including (…) migrant workers."[228] Such an approach would have clarified the criteria applicable to persons in a similar situation. In the case concerning the case of hardship residence permit for the foreign victim of domestic violence,[229] the Federal Supreme Court preferred to protect a number of ESC rights, such as the right to work, education and participation in cultural life, via the right to respect of private life arising from art. 8 ECHR. However, the recognition of the direct justiciability of these ESC rights, guaranteed by international human rights instruments such as the CEDAW and the ICESCR as well as the right to non-discrimination, via the obligation to protect would also have been conceivable and preferable. In other words, the Federal Supreme Court could have recognised the justiciability of an ESC right in a concrete case with respect to its corresponding obligations to respect or to protect, without the need, in these concrete cases, to pronounce on the disputed question of the justiciability of the obligation to fulfil.

The direct justiciability of ESC rights would allow the Federal Supreme Court to develop specific criteria with respect to each ESC right, which would increase the legal foreseeability. The indirect protection, in contrast, leaves ESC rights as 'prisoners' of the specific characteristics of civil and political rights and makes them dependent on the will of the judicial organ to interpret the latter in a broad way.[230] With respect to the application of the right to non-discrimination in order to indirectly protect ESC rights, in particular the right to social security, the ECtHR shows, for example, a greater will than the Federal Supreme Court.[231] The recognition of the direct justiciability of the right to non-discrimination enshrined in international human rights treaties containing ESC rights would decrease this dependency on the Federal

[227] HUGI YAR, Praxis des Bundesgerichts (2012), p. 8-9.

[228] CESCR, General Comment No. 18 (2005), para. 23. This is only valid if asylum seekers are considered to fall within the category of "especially disadvantaged and marginalized individuals and groups".

[229] See BGE 138 II 229 (Case of Hardship Residence Permit), discussed in Section 2.1.1. (Civil and Political Rights as Umbrella Provisions) in this Chapter.

[230] See CHATTON, Aspects de la justiciabilité (2012), p. 385-386.

[231] See Section 2.1.3. (The Prohibition of Discrimination) in this Chapter.

Supreme Court's will to broadly interpret (or not) substantive or procedural civil and political rights.[232]

2.2.2. Need to Invoke ESC Rights in the Appeals

According to art. 106(1) of the Federal Supreme Court Act (FSCA), the Federal Supreme Court applies the law on its own motion. However, it examines the violation of constitutional rights as well as internationally guaranteed human rights only insofar as such an appeal was put forward and substantiated in the appeal (art. 106(2) FSCA).[233] Therefore, it is important that advocates always refer to the international guarantees of ESC rights in their appeals if the concrete case falls within the scope and content of an ESC right. Otherwise, the Federal Supreme Court is not bound to look at the ESC rights arising from international treaties. This can lead to the indirect protection of ESC rights through the guarantees of civil and political rights arising from the Fed. Cst. or the ECHR, despite the fact that ESC rights instruments would directly protect the same rights. In order to develop and to understand the normative scope and content of ESC rights, it is necessary to apply these rights in specific cases.[234] In other words, "the generally phrased provisions of the treaties will gradually, on a case-by-case method, be concretised and the proper meaning of a particular right will be made clearer progressively."[235]

2.3. Intermediate Conclusion

This Section showed that the Federal Supreme Court is generally more reluctant to protect ESC rights via procedural rights, such as the right to a fair trial, or via the right to non-discrimination, compared to the ECtHR. With respect to the use of substantive civil and political rights for the protection of ESC rights, we have analysed two relevant cases, namely the case about the denied asylum seeker's right to work (BGE 138 I 246, 2012) and the case about the ESC rights of a foreign victim of domestic violence (BGE 138 II 229, 2012). In these cases, the Court did not refer to

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[232] Of course, in the end, it depends on the will of the Federal Supreme Court to recognise the direct justiciability of the right to non-discrimination. However, once recognised, the legal foreseeability would be increased.

[233] Art. 106(2) only mentions constitutional rights. However, according to the Federal Supreme Court, it also covers internationally guaranteed human rights.

[234] See RIEDEL / GIACCA / GOLAY, The Development of ESC Rights in International Law, p. 11, with respect to the individual complaint mechanism available at the international plane, but the reasoning is also valid for domestic adjudication. See also our discussion in the Section 2.2.1. above (No Need for Indirect Protection?).

[235] RIEDEL / GIACCA / GOLAY, The Development of ESC Rights in International Law, p. 11.

international human rights instruments explicitly protecting these rights, proving its preference to apply civil and political rights instead of ESC rights. This is unfortunate for three reasons. Firstly, the Federal Supreme Court is not forced to indirectly protect ESC rights and could instead directly apply ESC rights via the triple-typology of obligations. This would, secondly, lead to an increased engagement in and examination of ESC rights by the Federal Supreme Court and consequently to a better definition of the scope and content of these rights. Thirdly, the protection of ESC rights would depend to a lesser extent on the Federal Supreme Court's will to broadly interpret (or not) civil and political rights. In order to get the Federal Supreme Court to analyse ESC rights in each potential case, advocates need to refer to particular human rights instruments and their substantive guarantees in their appeals. The following Section analyses whether the Federal Supreme Court refers to ESC rights as to interpretative guides.

3. Using ESC Rights as an Interpretative Guide

Even norms considered to be not directly justiciable are not without legal significance.[236] Judicial organs can use such norms, which remain part of the objective legal system, as interpretative guidelines, in particular for an internationally-conform interpretation of domestic law.[237] Besides the CEDAW, whose role as an interpretative guide was explicitly recognised by both Federal Council and Federal Supreme Court,[238] the following cases concerning the best interests of the child (3.1) and the protection of national minorities (3.2) merit our attention as the norms used as interpretative guides influenced the outcome of the decision.

3.1. The Best Interests of the Child according to Art. 3(1) CRC

Even though the Federal Supreme Court denied the direct justiciability of art. 3(1) CRC, according to which "(…) the best interests of the child shall be a primary consideration", it still considers it as a guiding idea or a maxim of interpretation, which shall be taken into account for the interpretation of the law.[239] Based on this guiding idea or maxim of interpretation, the Federal Supreme Court changed its case

[236] See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 52.

[237] See ibid., p. 52.

[238] See Swiss Federal Council, Botschaft CEDAW (1995), p. 924, referred to in BGE 137 I 305 (Gender Equality Commission), c. 3.2.

[239] See BGE 136 I 297 (Children Allowances), c. 8.2 ('Leitgedanke' or 'Interpretationsmaxime').

law regarding the so-called reverse family unification in BGE 137 I 247 (Reverse Family Unification) in 2011.[240] The reverse family unification is about the question of whether a parent (without Swiss citizenship) of a Swiss child shall have a right to a residence permit or not. It is about the balance of interests between the public interest in the enforcement of a restrictive immigration policy and the private interest of the child, who would have to follow his parent into the foreign country.[241] According to the Federal Supreme Court, the balance of interests is mandatory and different in the context of art. 3(1) CRC, compared to the situation where the residence permit of a foreign partner alone is at stake.[242] This case proves that the use of an ESC right as interpretative guide can have a decisive impact on the outcome of a case, despite the fact that the provision itself is not directly justiciable.

Nevertheless, one should not overestimate the influence of the best interests of the child as a decisive interpretative guide with respect to the adjudication of ESC rights. In BGE 136 I 297 (Children Allowances) in 2010 concerning the right of an Indian citizen working in Switzerland to receive children allowances for his children in India, the Federal Supreme Court made clear that the *primary* consideration of the best interests of the child is not the *exclusive* or the *determinative* consideration, and that other interests of the parents or the State can also be considered and be influential.[243] In this case, the existence or not of an international treaty providing for children allowances was considered to be more determinative than the best interests of the child.[244]

3.2. The Protection of National Minorities

ESC rights used as an interpretative guide also influenced the outcome of BGE 138 I 205 (People of the Travellers, Minority Rights), decided in 2012, regarding the disability insurance for a member of the people of the travellers.[245] In this case, a person of the travellers had no right to disability insurance, as she could undergo

[240] See BGE 137 I 247 (Reverse Family Unification), c. 4.2.1. This case was analysed by Thomas Hugi Yar (HUGI YAR, Praxis des Bundesgerichts (2012), p. 13).

[241] See BGE 137 I 247 (Reverse Family Unification), c. 4.1.1. and 4.1.2.

[242] See ibid., c. 5.1.3.

[243] See BGE 136 I 297 (Children Allowances, art. 3 CRC), c. 8.2.

[244] See ibid., c. 8.2.

[245] BGE 138 I 205 (People of the Travellers, Minority Rights), ('Fahrende'). See discussion on this case in Section 2.1.3. (The Prohibition of Discrimination) in this Chapter.

work adapted to her illness. The Federal Supreme Court, which analysed the question under the right to private life of art. 8 ECHR and the personal liberties of the Fed. Cst., hold that these liberties do not grant a right to receive benefits from the State as it is on the legislator to define such a right to social insurance.[246] However, in light of the protection offered to minorities to preserve their traditional way of life, arising from constitutional personal liberties and international obligations, such as art. 27 of the ICCPR and the Council of Europe Framework Convention for the Protection of National Minorities (CPNM), the Federal Supreme Court considered it to be inadmissible to expect the person to adopt a job forcing her into sedentariness.[247] Thus, by using international law as a guide for the interpretation of domestic law, the Federal Supreme Court protected the social and cultural rights of a person being part of the travellers. While it is welcomed that the Federal Supreme Court found a way to protect the right to social security of the person by using international law as an interpretative guide, it would have been preferable to solve the case through the application of the right to non-discrimination. In fact, the clear recognition of the facts of the case as a problem of discrimination would have allowed establishing clear criteria for potential similar cases in the future. In fact, the CESCR noted with concern in 2010 "the lack of a coherent and comprehensive policy (…) regarding the promotion and protection of the culture and way of life of the Roma, Sinti and Yeniche."[248]

3.3. Intermediate Conclusion

The cases concerning the reverse family unification and the disability insurance of a person of the travellers prove that the Federal Supreme Court is willing to use internationally guaranteed ESC rights as an interpretative guide for the application of domestic or international law and that these interpretative guides can influence the outcome of the case. By doing so, the Federal Supreme Court also implicitly recognised a certain level of concreteness of these international norms, as it depends on the normative density of an international norm as to whether it can be used as an interpretative guide.[249] Nevertheless, the use of ESC rights as

[246] See ibid., c. 5.4. Thus, this case also falls into the category of indirect protection of ESC rights through the use of civil and political rights as umbrella provisions, see Section 2.1.1. (Civil and Political Rights as Umbrella Provisions) in this Chapter.

[247] See BGE 138 I 205 (People of the Travellers, Minority Rights), c. 6.2.

[248] CESCR, Concluding Observations Switzerland (2010), para. 23.

[249] See WÜGER, Anwendbarkeit und Justiziabilität (2005), p. 52.

interpretative guides is not a sufficient substitution for the non-recognition of the direct justiciability of ESC rights. As correctly pointed out by Daniel Wüger, an internationally-conform legal interpretation cannot be contrary to the text of the domestic legislation.[250] In other words, if domestic law was found to be contrary to the internationally guaranteed ESC rights standards, only the latter's direct justiciability provides for the protection of these guarantees.[251]

[250] See ibid., p. 53.

[251] See, in this respect, the discussion about the relationship between international and domestic law in Section 1.3. (Difficult Relationship between International Law and Domestic Law) in Chapter V. (Sufficient Protection through Swiss Domestic Law?).

V. SUFFICIENT PROTECTION THROUGH SWISS DOMESTIC LAW?

When discussing the distinction between effective domestic remedies and justiciability, we established that the obligation to provide for an effective remedy does not comprise the obligation to recognise the direct justiciability.[252] Therefore, if Swiss domestic legislation contains sufficient justiciable guarantees protecting the international standards, Switzerland would fulfil its international obligations. In the seminar on the implementation of the concluding observations by the CESCR, Working Group 3, dealing with the question of the justiciability of ESC rights, conceived that an overview of domestic legislation implementing international ESC rights guarantees with respect to the ICESCR could serve as the way out of the blockade.[253] In fact, Jörg Künzli suggested that Switzerland presented itself badly in its previous state reports to the CESCR by not sufficiently taking into account domestic legislation.[254] Following this seminar, the SCHR conducted a study in 2014 for the Swiss government, analysing whether or not Swiss domestic law contains subjective justiciable rights for all the ESC rights guaranteed by the ICESCR.[255] The study concluded that Switzerland implements the obligations, which the CESCR identified as immediately applicable, to a large extent in its domestic law in a way that individuals can base subjective claims on these domestically enshrined rights.[256] Considering the conclusions of the SCHR, it is highly probable that the upcoming state report of Switzerland to the CESCR will reflect the findings of this study in order to prove that Switzerland fulfils the obligations arising from the ICESCR despite the limited recognition of the direct justiciability of internationally guaranteed ESC rights by the Federal Supreme Court. In other words, Switzerland will try to demonstrate that it implements all the guarantees of the ICESCR in its domestic law.

This Chapter analyses whether the limited recognition of internationally guaranteed ESC rights by the Federal Supreme Court is indeed sufficiently compensated through the existence of Swiss domestic legislation providing for justiciable ESC rights. The general trend of the SCHR's study's conclusion is correct, and the fact that Swiss

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[252] See Chapter II. (Preliminary Clarifications) Section 4. (Distinction between Effective Remedy and Justiciability).

[253] SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Report on Working Group 3 (Jörg Künzli), p. 33.

[254] As mentioned by Jörg Künzli, the director of SCHR, in SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Speech of Prof. Jörg Künzli, p. 17.

[255] KÜNZLI / EUGSTER / SPRING, Anerkennung (2014).

[256] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 68.

domestic law has implemented many of the ICESCR's guarantees has to be appreciated. Nevertheless, there are remaining problem areas[257] where international guarantees are broader than their domestic counterparts (1), and the reliance on Swiss domestic law instead of the recognition of the justiciability of internationally guaranteed ESC rights faces a number of disadvantages (2), as well as a logical incoherence (3).

1. Problem Areas with Respect to Level of Protection

The domestic legislative incorporation of ESC rights does not seem to meet international standards with respect to the distinction between social aid and emergency aid (1.1) as well as concerning the prohibition of retrogressive measures (1.2). Thus, situations are conceivable in which Swiss domestic legislation is not compatible with internationally guaranteed ESC rights. In these cases, the problematic relationship between international law and domestic law would require clarification (1.3).

1.1. Distinction between Social Aid and Emergency Aid

In its concluding observations in 2010, the CESCR recommended Switzerland to "provide social aid, instead of emergency aid, as the last social safety net for everyone living in the State party's territory."[258] As we have seen, this is in line with the opinion of the authors of the SCHR-study, according to whom both the right to emergency aid *and* the right to social aid can be considered to fall under the scope of the minimum core obligations of the ICESCR with respect to the right to social security (art. 9 ICESCR).[259] According to the SCHR-study, there is an individually enforceable right to social aid in Switzerland if the conditions for the claim are realised.[260] While a justiciable right to social aid does neither exist on the federal nor, with a few exceptions, on the cantonal constitutional level, social aid is enshrined as a subjective right or an obligation of the canton in the respective cantonal laws on

[257] See SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Speech of Prof. Jörg Künzli, p. 17.

[258] CESCR, Concluding Observations Switzerland (2010), para. 12.

[259] See Section 1.1.4 (Recognition of Minimum Core Obligations) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches), See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 29.

[260] See ibid., p. 35.

social aid.[261] However, many cantons foresee that certain categories of persons can be excluded from social aid or that social aid can be reduced, namely for asylum seekers, provisionally admitted foreigners and persons in need of protection.[262] However, the SCHR-study does not examine the question as to whether the reduction of social aid or even the exclusion of such aid for certain categories of persons is compatible with international guarantees.[263] Taking into account the concerns of the CESCR expressed in its concluding observations concerning Switzerland in 2010 about "reports according to which 'illegalized' persons are excluded from social aid in some cantons and instead have to rely on emergency aid"[264], and the fact, that social aid falls under the minimum core obligations of the state, it is at least questionable whether Swiss legislation would be sanctioned by the CESCR in a potential individual complaint.[265] Therefore, the scope and content of the right to social security in conjunction with the right to an adequate standard of living (art. 9 and 11 ICESCR) is broader than the constitutional right to assistance when in need (art. 12 Fed. Cst.). This is a fortiori true if one agrees with the author of this thesis that the justiciable minimum core obligations have to be contextualised with respect to the available resources of a state.[266]

1.2. Non-Recognition of Prohibition of Retrogressive Measures

As we have seen, the prohibition to take retrogressive measures is one of the particularities of ESC rights linked to the general obligation of progressive realisation.[267] Swiss domestic law does not know a similar provision providing for such a prohibition. Thus, if the direct justiciability of ESC rights only covers those rights enshrined in Swiss domestic legislation, the internationally guaranteed prohibition to take retrogressive measures is not effective.[268] In other words, Swiss

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[261] See ibid., p. 31.

[262] See ibid., p. 31. According to art. 82(3) Asylum Act, the level of support given to these categories of people is substantially less than that given to the local population.

[263] Ibid., p. 35, footnote 121.

[264] CESCR, Concluding Observations Switzerland (2010), para. 12.

[265] Off course, such an individual communication would only be possible if Switzerland ratifies the OP/ICESCR.

[266] See Section 1.1.4. (Recognition of Minimum Core Obligations) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[267] See Section 1.2.2. (Prohibition of Retrogressive Measures) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[268] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 69.

domestic legislation does not apprehend the counterpart of the progressive dimension of the obligation to realise ESC rights.

1.3. Difficult Relationship between International Law and Domestic Law

The relationship between international law and domestic law is not clearly regulated by the Swiss Fed. Cst.[269] According to a recent judgment of the Federal Supreme Court, international human rights treaties seem to enjoy a general priority over Swiss domestic law.[270] However, this case concerned the status of the ECHR, and the Federal Supreme Court may be more reluctant with respect to international human rights treaties without such an institutional framework as the ECHR, which provides for the compulsory jurisdiction of the ECtHR.[271] The finding that Swiss domestic law does not comply with certain guarantees of international ESC rights instruments would put the Federal Supreme Court in a difficult situation, as it had to clarify its position on the relationship between domestic law and international law with respect to an international human rights instrument, which does not foresee the compulsory jurisdiction of an international judicial body. Thus, the decision not to recognise the justiciability of internationally guaranteed ESC rights might serve as a pretext for the Federal Supreme Court not to analyse the question of the relationship between Swiss domestic law and international law with respect to ESC rights.

2. Disadvantages

The exclusive reliance on justiciable domestic legal sources for the adjudication of ESC rights faces, besides the problem areas of insufficient protection as analysed in the Section above, two important disadvantages compared to the recognition of the direct justiciability of internationally guaranteed ESC rights, namely the lack of legal security (2.1) and the unequal level of protection between cantons (2.2).

2.1. Lack of Legal Stability

International treaties, as ratified by Switzerland, are part of the Swiss legal system and lose their legal validity only after a lawful denunciation or withdrawal from the

[269] See HÄFELIN / HALLER / KELLER, Schweizerisches Bundesstaatsrecht (2012), p. 626.
[270] See ibid., p. 629, with respect to BGE 125 II 417.
[271] See ibid., p. 629.

treaty.[272] The denunciation of an international human rights treaty is in Switzerland politically rather improbable.[273] Compared to the relative stability of international treaties, the status of cantonal ordinances or cantonal legislation, which often constitute the source for justiciable ESC rights under Swiss domestic law, is more than unstable and depends on changing political environments.[274] The dependence on changing political environments is aggravated by the fact that neither domestic legislation nor the current case law of the Federal Supreme Court provide for a protection from retrogressive measures.[275]

2.2. Different Level of Protection between Cantons

As noted by the SCHR-study, the scope of the justiciable ESC rights under Swiss domestic law varies from canton to canton.[276] These differences do not constitute a violation of Switzerland's international obligations per se and are intrinsically linked to the Swiss federal system. As noted in the final report on the seminar about the implementation of the recommendations of the CESCR, a homogeneous implementation of international guarantees with respect to ESC rights is not desirable in a federal state such as Switzerland.[277] Nevertheless, one should take into account the recommendation of the CESCR to pursue the efforts "of harmonising cantonal laws and practices to ensure equal enjoyment of Covenant rights throughout the confederation."[278] Thus, it is necessary that the minimum level of protection, as guaranteed by international instruments, is respected by all cantons. Differences in protection are only admissible above this minimum threshold. The recognition of the direct justiciability of internationally guaranteed ESC rights would ensure such a minimum threshold, above which the cantons would be free to establish farther reaching ESC rights.

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[272] In such a case, Switzerland would have to respect the procedures of the Vienna Convention on the Law of Treaties, in particular art. 54 - 56 and 65 - 67.

[273] However, as the current political discussion on the ECHR shows, it can neither be completely excluded.

[274] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 68.

[275] See Section 1.2. (Non-Recognition of Prohibition of Retrogressive Measures) in this Chapter, and Section 1.2.2. (Prohibition of Retrogressive Measures) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[276] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 69.

[277] SKMR / Geneva Academy, Abschlussbericht des Seminars (2013), Report on Working Group 3 (Jörg Künzli), p. 33.

[278] CESCR, Concluding Observations Switzerland (2010), para. 5.

3. Logical Incoherence

Besides problem areas concerning the level of protection and practical disadvantages, the reliance on domestic sources for justiciable ESC rights while simultaneously denying the justiciability of international ESC rights is logically not coherent. The SCHR-study's approach was to prove that Swiss domestic law already incorporates the international guarantees arising from the ICESCR and that there are no deficits in the Swiss domestic law explaining the refusal to recognise the direct justiciability of these ESC rights.[279] Thus, the SCHR-study hoped to present a way out of the deadlock, in which the Swiss Federal Council and the Federal Supreme Court found themselves with their reciprocally legitimised sceptical positions on the justiciability of ESC rights. While it is true that the Swiss Federal Council seems to adjust its position through the adoption of the conceptual framework of the triple-typology of obligations, the Federal Supreme Court's position remains reluctant.[280] In the upcoming fourth state report to the CESCR, Switzerland will most likely argue on the basis of the SCHR-study and the Swiss Federal Council's position on the triple-typology of obligations. This would certainly present a step forward compared to the previous state reports and can be seen as one step out of the deadlock. However, if Switzerland will follow this line of argumentation, one could question its logical coherence with Switzerland's simultaneous refusal to ratify the OP/ICESCR. As we have analysed previously, the Swiss Parliament followed the argumentation of the Federal Council and refused to ratify the OP/ICESCR establishing an individual complaint mechanism at the international level.[281] If Switzerland argues in its upcoming fourth State report to the CESCR that it respects the obligations arising from the ICESCR through its domestic law despite the limited recognition of the direct justiciability of internationally guaranteed ESC rights by the Federal Supreme Court, what would then explain Switzerland's persistent refusal to ratify the OP/ICESCR? Furthermore, if Swiss domestic law foresees justiciable claim-rights in the areas covered by international ESC rights instruments, it could no longer argue that ESC rights are intrinsically of a programmatic character and that they could not fall under the scrutiny of judicial or quasi-judicial organs.

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[279] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 68.

[280] See Section 1.2.1. (Non-Recogntion of the Triple-Typology of Obligations) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[281] See Section 1.2. (Reluctant Recognition of Individual Complaint Mechanisms) in Chapter III. (Legal Basis for ESC Rights in Switzerland).

VI. CONCLUSIONS AND RECOMMENDATIONS

This study was written as part of the Human Rights Clinic on Poverty and Human Rights, in collaboration with the human rights non-governmental organisation FIAN Switzerland.[282] Therefore, the general conclusions (1) will be followed by more concrete recommendations directed at FIAN Switzerland (2).

1. General Conclusions

As outlined in the Introduction to this study, the goal was to explore whether the six years since the latest concluding observations of the CESCR brought a way out of the deadlock, in which the Federal Council and the Federal Supreme Court found themselves with respect to their reciprocally legitimised refusal to recognise the justiciability of internationally guaranteed ESC rights.

The following conclusions can be drawn:

Firstly, the Swiss Federal Council made a first step out of the deadlock through the adoption of the triple-typology of obligations arising from ESC rights.[283] This change in the executive's position may be based on the realisation that most of the internationally guaranteed ESC rights have justiciable counterparts under Swiss domestic law, and the refusal to recognise the justiciability of ESC rights contained in international instruments cannot be explained by a structural incompatibility of Swiss domestic law with international ESC rights.[284] Nevertheless, this line of argumentation should not hide the fact that Swiss domestic law does not apprehend the prohibition of retrogressive measures inherent in ESC rights, that it still makes a distinction between social aid and emergency aid, and that the reliance on domestic law faces a number of disadvantages such as legal instability and different levels of protection between cantons.[285]

Secondly, the study analysed the Federal Supreme Court's position on the justiciability of ESC rights. The adoption of a broad definition of justiciability allowed an extensive analysis of different ways to protect internationally guaranteed ESC

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[282] http://fian-ch.org/de/ (viewed on 04 July 2016).

[283] See Section 1.2.1. (Non-Recognition of the Triple-Typology of Obligations) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[284] See KÜNZLI / EUGSTER / SPRING, Anerkennung (2014), p. 68.

[285] See Chapter V. (Sufficient Protection through Swiss Domestic Law?).

rights, namely through the recognition of their direct justiciability, their indirect protection or the use of ESC rights as interpretative guides.[286] The Federal Supreme Court increasingly analysed the justiciability of ESC rights in light of the concrete case at hand or it left the question of the justiciability explicitly open.[287] However, it did not apply the framework of the triple-typology of obligations,[288] and in a number of cases, it preferred to protect these ESC rights indirectly through civil and political rights.[289] Furthermore, the use of ESC rights as interpretative guides had some positive and influential outcomes in a limited number of cases.[290] Nevertheless, as we have seen, the indirect protection of ESC rights and their use as interpretative guides do not serve as equivalent alternatives for the direct justiciability of ESC rights and could only be used as complementary means.[291]

Thirdly, despite the recognition that Swiss domestic law incorporates most of the ESC guarantees and the increased analysis of ESC rights by the Federal Supreme Court in light of the concrete case at hand, the Federal Council and in particular the Federal Supreme Court have still not found a clear way out of the deadlock. Both the non-ratification of the OP/ICESCR as well as the limitation of direct justiciability to the right to strike and the right to form and join trade unions emblematically prove this fact.

For these reasons, it is now on the Federal Supreme Court to further engage in the adjudication of internationally guaranteed ESC rights and to lead Switzerland out of the deadlock. This study suggests that the Federal Supreme Court could use three complementary approaches to do this. Firstly, the Court should follow the position of the Federal Council with respect to the triple-typology of obligations arising from ESC

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[286] See Section 1. (Definition of Justiciability) in Chapter II. (Preliminary Clarifications).

[287] See Section 1.1.1. (From Denial of Direct Justiciability towards Examination in Each Concrete Case?) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[288] See Section 1.2.1. (Non-Recognition of the Triple Typology of Obligations) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[289] See Section 2.2.1. (No Need for Indirect Protection?) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[290] See Section 3. (Using ESC Rights as an Interpretative Guide) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[291] See Sections 2.3. (Intermediate Conclusion) and 3.3. (Intermediate Conclusion) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

rights. In cases, where the scope and content of ESC rights are touched, the Federal Supreme Court should point them out and prefer to protect them directly rather than indirectly.[292] Secondly, the Federal Supreme Court should advance its reasoning developed in the case on the cantonal gender equality commission.[293] The important distinction between justiciability and direct applicability and the absence of the categorisation of self-executing and non-self-executing norms when it comes to human rights treaties could serve as a legal-theoretical basis to discuss ESC rights in more detail.[294] Thirdly, the increased analysis of the justiciability of ESC rights in light of the concrete case at hand is highly appreciated and should be continued. This study suggests that the mere analysis of whether a certain *claim* is covered by the substantial guarantees of an ESC *right* already constitutes an implicit recognition of the justiciability of the ESC right as such. In other words, while a certain *claim* is not justiciable, the *right* as such certainly is.[295]

Therefore, one can agree with the prominent scholar in the field of ESC rights Asbjørn Eide, according to whom the State obligations are never spelled out in great detail in human rights treaties, but are on the contrary "gradually clarified through additional, more specific instruments, and through the practice of monitoring bodies."[296] The Swiss Federal Supreme Court should start seeing itself as such a monitoring body, as the recognition of the justiciability of ESC rights is not only demanded for legal stability, harmonisation (from the bottom) between cantonal legislations and logical coherence, but also for ensuring a more effective protection of ESC rights.

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[292] See Section 2.2.1. (No Need for Indirect Protection?) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[293] See Section 1.1.5. (Justiciability of Mandate for the Legislator to Act) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[294] See Section 3. (Distinction between Justiciability and Direct Applicability) in Chapter II. (Preliminary Clarifications).

[295] See Section 1.1.1. (From Denial of Direct Justiciability towards Examination in Each Concrete Case) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[296] EIDE, ESC Rights as Human Rights (2001), p. 22.

2. Recommendations for FIAN Switzerland

Based on the conclusions of this study, the following recommendations for FIAN Switzerland in view of the upcoming fourth state report of Switzerland to the CESCR can be formulated:

- **Distinguish between justiciability and direct applicability of a norm.** The Federal Supreme Court showed its readiness to exercise judicial scrutiny with respect to provisions which, in themselves, do not fulfil the conditions for direct applicability, but which contain an obligation for the legislator to act. Following this line of reasoning, the persistent argument of the Swiss Federal Council and the Federal Supreme Court, that ESC rights are not sufficiently concrete and merely directed to the legislator, can be counterbalanced. The departure from the categorisation of self-executing and non-self-executing norms, in line with the opinion of Eibe Riedel, a member of the CESCR, could also serve as a jurisprudential way to recognise the justiciability of ESC rights.[297]

- **Point out the importance of the ratification of the CRPD with respect to the question of the justiciability of ESC rights.** The mere ratification of the CRPD, which entered into force in Switzerland in 2014, has implications on the question of the justiciability of ESC rights going beyond the scope of the Convention itself. It is the first legally binding international instrument clearly establishing that ESC rights also contain obligations of immediate effect and that it is the practice of international control organs, such as the CESCR and the Committee on the Rights of Persons with Disabilities, that has to be taken into account for the determination of immediately applicable obligations.[298]

[297] See Section 1.1.5. (Justiciability of Mandate for the Legislator to Act) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches), and Section 3. (Distinction between Justiciability and Direct Applicability) in Chapter II. (Preliminary Clarifications).

[298] See Section 1.1. (Legal Instruments with Substantive ESC Rights) in Chapter III. (Legal Basis for ESC Rights in Switzerland).

- **Refer to the triple-typology of obligations with respect to ESC rights.** This triple-typology of obligations was recognised by the Swiss legal doctrine as well as the Federal Council in its message on the ratification of the CRPD. It can serve as a starting point for the Federal Supreme Court to recognise the direct justiciability of ESC rights. Furthermore, the use of the triple-typology of obligations would allow for the application of ESC rights instruments instead of indirectly protecting them through substantive civil and political rights.[299]

- **Point out the welcoming tendency of the Federal Supreme Court to analyse each ESC right in light of the concrete case at hand.** When the Federal Supreme Court analyses whether a certain *claim* is covered by the substantive guarantees of an ESC *right,* it implicitly acknowledges the possibility of the ESC *right* to be justiciable in cases where it covers the *claim*.[300]

- **Promote ESC rights among advocates, so that they refer to them in their appeals.** The Federal Supreme Court examines the violation of fundamental rights, including internationally guaranteed human rights, only insofar as such a violation is put forward and substantiated in the appeal (art. 106(2) FSCA). Therefore, it is important that advocates always refer to the international guarantees of ESC rights in their appeals if the concrete case falls within the applicability of an ESC right. Otherwise, the Federal Supreme Court is not bound to look at the ESC rights arising from international treaties and can tend to protect them indirectly through the guarantees of civil and political rights arising from the Fed. Cst. or the ECHR.[301]

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[299] See Section 1.2.1. (Non-Recognition of the Triple-Typology of Obligations), and Section 2.2.1. (No Need For Indirect Protection?), in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[300] See Section 1.1.1. (From Denial of Direct Justiciability towards Examination in Each Concrete Case) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

[301] See Section 2.2.2. (Need to Invoke ESC Rights in the Appeals) in Chapter IV. (Strategies for the Judicial Protection of ESC Rights and the Federal Supreme Court's Approaches).

- **Continue to point out the problem areas, in which Swiss domestic legislation insufficiently protects ESC rights and the disadvantages and incoherence in relying on domestic law.** Switzerland has not implemented the last concluding observations of the CESCR with respect to the distinction between social aid and emergency aid. Furthermore, neither Swiss domestic legislation nor the Federal Supreme Court foresee the prohibition of retrogressive measures. Besides the insufficient level of protection, the reliance on domestic law entails a lack of legal stability and the unequal level of protection of ESC rights between cantons. Finally, if Switzerland argues in its upcoming fourth State report to the CESCR that it fulfils the obligations arising from the ICESCR through its domestic law despite the limited recognition of the direct justiciability of internationally guaranteed ESC rights by the Federal Supreme Court, what would then explain Switzerland's persistent refusal to ratify the OP/ICESCR or the OP/CRPD?[302]

- **In the long-term, an increased incorporation of ESC rights as fundamental rights at the constitutional level would be desirable.** Art. 41 Fed. Cst. is often used as a justification for the classification of ESC rights, even those recognised in international human rights instruments, as generally being of a programmatic character. One of the best ways to strengthen the role of ESC rights in Switzerland would be to better incorporate them as fundamental rights in the Fed. Cst. This could be done through a modification of current art. 41 Fed. Cst. Despite the current political power relations in Switzerland, the chances of such an undertaking could increase again in the future. The enshrinement of ESC rights as fundamental rights in a number of *cantonal* constitutions could serve as a first step.[303]

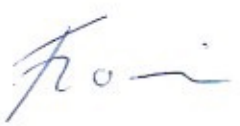
[302] See Chapter V. (Sufficient Protection through Swiss Domestic Law?).

[303] See Section 2.2. (Limited ESC Guarantees in the Swiss Federal Constitution) in Chapter III. (Legal Basis for ESC Rights in Switzerland).

Eigenständigkeitserklärung:

„Ich bezeuge mit meiner Unterschrift, dass ich meine Arbeit selbständig ohne fremde Hilfe verfasst habe und meine Angaben über die bei der Abfassung meiner Arbeit benützten Quellen in jeder Hinsicht der Wahrheit entsprechen und vollständig sind. Alle Quellen, die wörtlich oder sinngemäss übernommen wurden, habe ich als solche gekennzeichnet. Eine Überprüfung der Arbeit auf Plagiate unter Einsatz entsprechender Software darf vorgenommen werden. Ich habe zur Kenntnis genommen, dass unlauteres Verhalten zum Ausschluss vom Studium der Rechtswissenschaften führen kann."

Basel, August 2016



Florentin Weibel