

Justiciability of Economic and Social Rights in Chile

Rodolfo Figueroa.
Diego Portales' University
Chile

Justiciability of economic and social rights (ESR) is a controversial topic in Chile (and, of course, in many other countries) and I guess a majority of Chilean lawyers and judges probably think those rights are not justiciable. An example of this mentality is the decision of the Chilean Supreme Court in the cases of people living with HIV/AIDS (2001), where gravely ill patients sought tri-therapy treatment from the public health System. The request was denied by the court on financial budgetary considerations and also upon the idea that courts cannot get involved in these issues.¹ This doctrine has detrimental impact in the configuration of both the role of the judiciary and the administration, leaving individuals unprotected, excluding the administration from judicial control and, consequently, granting the administration strong discretion on public health issues. In this paper I try to delineate and justify a model of judicial review of ESR within the Chilean constitutional context.

I think that in order to determine a model of judicial review for ESR, we must pronounce some ideas regarding the following topics: 1) The role of the judiciary and the principle of separation of powers, 2) The problem of adjudicating in topics where scarcity of resources is crucial, 3) Standards of review to be applied by the courts, and 4) Declarations of the courts.

1) The role of the courts and the principle of separation of powers.

In this subject, the experience of the Constitutional Court of South Africa (CCSA) is very illuminating, because it presents a model according to which courts must intervene in ESR but in a restrained manner. For example, in the TAC case² the CCSA: admitted the institutional limitations of the courts to deal with the factual and political considerations involved in ESR; declared that the courts should not decide how public resources should be spent; said that the Constitution contemplates a restrained and focused role for the courts; regarding ESR, the role of the courts is to ensure that legislative and other measures taken by the state are reasonable, and courts should “guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness.”³

These citations show how aware the court is about the necessity of being moderate when intervening in issues pertaining to policies made by political bodies. However, the court is clear that in such matters judges should intervene if a constitutional right is at stake. The reasoning of the court is the following: a) The primary duty of courts is to enforce the Constitution and the law. b) The Constitution requires the state to “respect, protect, promote, and fulfill the rights in

1 The Supreme Court said “[h]ealth authorities are the only one entitled to enforce public health policies designed and implemented by the administration, according to the available resources and other parameters that are not to be elucidated under this jurisdiction.” Case N° 3.599-2001, September 10th, 2001. Section 6.

2 CCT 8/02, 2002.

3 See CCT 8/02, 2002, sections 36-38.

the Bill of Rights". c) If a state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. d) If the court should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. e) If that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself.⁴

All these considerations are perfectly applicable to Chile, where the Constitution: i) Recognizes ESR in the Bill of Rights.⁵ ii) Demands from all state organs to respect and promote all those rights recognized by the Constitution and International Treaties ratified by Chile.⁶ iii) Declares that the provisions of the Constitution are mandatory for every state organ, person, institution or group.⁷ iv) Declares that judges could never excuse themselves from exercising their jurisdiction.⁸

We cannot pretend that those rights exist only in paper, as the CCSA pointed out in the Grootboom case.⁹ In consequence, ESR are justiciable in Chile and courts must fulfill this duty. The problem -which is not a small one- is to determine how can ESR be justiciable. This issue will be addressed later. For now, in relation to the principle of separation of powers, the key idea is to **control the policy, not make it**. A Judicial review that controls the policy, under certain criteria, that leaves sufficient space for the administration to make the appropriate decisions, which intervenes only because a constitutional right has allegedly been infringed, is compatible with the principle of separation of powers. Such a principle cannot be construed as shielding the administration from review; it must be understood in connection to the idea of rule of law. Therefore, this principle demands control over the administration to ensure respect for the Constitution.

2) Adjudicating in a context of scarcity of resources.

Scarcity of resources is a crucial fact when exercising judicial review of policies involving positive obligations on the part of the state (or the government). Sometimes the government relies on this fact to justify its particular policies in any given subject, trying to shield them from judicial scrutiny. The jurisprudence of the CCSA, again, contains interesting lessons in this subject: a) Scarcity of resources must always be taken into consideration by courts when reviewing governmental policy. Judges cannot think about rights as if resources were not a

⁴ See CCT 8/02, 2002, section 98.

⁵ Right to health protection, article 19 No 9; right to education, article 19 No 10; right to social security, article 19 No 19, etc.

The Chilean Constitution does not have any section titled Directive Principles of State Policy, like it is the case of the Irish (article 45) or the Indian (article 37) Constitutions, according to which some rights are not enforceable.

⁶ Article 5.

⁷ Article 6.

⁸ Article 76.

⁹ CCT 11/00, 2000, section 20.

constraint.¹⁰ b) The State cannot be forced to do more than its resources allow.¹¹ c) Governmental authorities are the ones to decide on the spending, not judges.¹² However, the previous considerations do not prevent the review of governmental policies: i) The government must protect ESR regardless the always-existent scarcity of resources. Scarcity only limits the range of protection, but does not exclude it. ii) Courts should make sure the government is fulfilling its obligations, within the available resources. This control does not put the judiciary in a managerial position, nor does it replace governmental officials with judges. The idea is to control the policy, not to make it. Judges will not decide the spending. iii) A judicial control on the use of resources in a given policy allows checking: if there is a policy, if that policy is reasonably conceived (not just a paper prepared only for having something to show in court), if it is not discriminatory, etcetera. iv) Even acknowledging that positive obligations could only be fulfilled progressively due to the scarcity of resources among other factors, courts can review if the government is adopting those progressive steps aimed to fulfill its obligations. v) Even rationing decisions or *tragic choices* are reviewable¹³: they are not only professional or technical but sometimes ethical; they involve options, and judicial control fosters administrative accountability. “[R]ationing decisions and processes should be based on visible and consistent criteria, should be capable of rational justification and should be subjected to objective scrutiny, so as to ensure that they resonate with values of accountability, equity and fairness.”¹⁴ The idea is to “..empower the public and enrich the democratic process by making (...) choices more visible. It would thereby render legislative acting more responsive to public values and less open to special-interest-group influence.”¹⁵ Courts may have a role in that process, helping those rationing choices to be explicit and reviewable.¹⁶

3) The standards of review.

Certainly, we can think of different levels of judicial intervention in public policies and hence, different standards of review. Again, the experience of the CCSA is useful, for it shows that: i) Upon the South African Constitution, the standard of judicial review is reasonableness, though it has been interpreted in different ways: as mere rationality, in a more substantive sense, and

10 This idea can be inferred from Soobramoney, Case CCT 32/97, 1997, sections 11, 19, 24, 28, 30, 31.

11 See Grootboom, CCT 11/00, 2000, section 46.

12 See Soobramoney.

13 See Marius Pieterse, Health Care Rights, Resources and Rationing, 124 SALJ 514, 527 (2007); Gregg Bloche, The Invention of Health, 91 CALIF. L. REV. 247, 302 (2003); Keith Syrett, Deference or Deliberation: Rethinking the Judicial Role in the Allocation of Healthcare Resources, 24 MED LAW 309, 317 (2005); Rhoda James & Diane Longley, Judicial Review and Tragic Choices: Ex Parte B, 1995 PUBLIC LAW 367, 372 (1995); Alan Parkin, Allocating Health Care Resources in an Imperfect World, 58 MOD. L. REV. 867, 868 (1995); Leonard M. Fleck, Models of Rationing: Just Health Care Rationing: a Democratic Decisionmaking Approach, 140 U. PA. L. REV. 1597, 1599 (1992). However, he is not necessarily supporting the judicial review of these issues.

14 Pieterse, *supra* note 15, at 514-5.

15 Gregg Bloche, The Invention of Health, 91 CALIF. L. REV. 247, 302 (2003).

16 Pieterse, *supra* note 15, at 536.

even as proportionality.¹⁷ ii) Therefore, there are several standards of review, not just one applicable to all cases; iii) The appropriate standard of review ought to be determined on a case-by-case basis, not in general.

I think this experience is valuable for Chile. Certainly, a standard of review must be determined on a case-by-case basis and there could be different standards of review, in theory. The Chilean Constitution mentions a standard of review, which is *arbitrariness*. However, it is recognized only for the case of the *Action for Protection*¹⁸, one of the multiple constitutional actions instituted by the Chilean Constitution. In civil rights cases, Chilean courts have interpreted *arbitrariness* as reasonability and also in connection to proportionality. Therefore, we can say that Chilean jurisprudence recognizes reasonability and proportionality. In any case, Chilean courts have not distinguished different meanings or levels of scrutiny for those standards.

There is no reason why those standards could not be applied in Chile for cases of ESR. If that happens, it should be the practice of adjudicating on ESR in Chile which will probably show the need and the way of identifying a sliding scale of levels of scrutiny and standards of review.

4) Declarations of the court.

Sometimes objectors to the justiciability of ESR elicit this topic: What could courts do if they are neither to make the policy nor to decide on the spending? What could they declare?

The jurisprudence of the CCSA shows a variety of declarations that a court could issue: a declaration of rights, an interdict, a mandamus, or any other relief that may be considered necessary to ensure the protection of constitutional rights. The court also added –in TAC- that if necessary, the courts may even have to “...fashion new remedies to secure the protection and enforcement of these all-important rights.”¹⁹

I am not prepared to propose the endorsement of that experience for the case of Chile. In a context of skepticism about judicial review of public policies on ESR, as it is the case of Chile, I think that a mere declaration of unconstitutionality is, for the moment, as very relevant aspiration. I have said the courts should control the policy but not make it and should respect sufficient space for political bodies to make political determinations and appreciations, without replacing them and assuming their role. Well, a model of mere declarations of unconstitutionality is clearly compatible with those parameters. A court could (and should) declare unconstitutional any governmental plan if it infringes a constitutional right and such declaration would not be merely symbolic. It may produce a significant political impact on the government, and put it under the political obligation of designing a new policy, in compliance with the Constitution. Advocates of ESR will consider this proposal insufficient, but in a system where the courts have not said this, as it is the case of Chile, to start doing so is a considerable step, and a promising one.

¹⁷ See Murray Wesson, Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court, 20 SAJHR 284; Danie Brand, Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale, in JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS. EXPERIENCES FROM DOMESTIC SYSTEMS 225 (Fons Coomans, ed., Intersentia, 2006).

¹⁸ Article 20.

¹⁹ CCT 8/02, 2002, Section 102.

The Chilean Action of Protection allows the judiciary to emit orders to the government.²⁰ However, this constitutional action does not apply directly to any ESR. In order to do that, a given governmental plan must infringe a protected right, like the right not to be discriminated against, or the right to life, among others. If that is the case, then it would be possible to request from the court an order to the government in relation to an ESR, and such a petition would not need any particular justification for it is explicitly indicated in the Constitution.

Conclusion.

ESR are enshrined in the Chilean Constitution and judges have a constitutional duty to enforce them. There are some excellent examples we can consider to learn how to do this, like the case of the CCSA. Nevertheless, each country must find its own way and surmount its own specific obstacles, which in Chile seems to be a generalized conception that ESR are not justiciable. A discussion of this topic, considering, for example, the issues of separation of powers, an appropriate margin of deference with the administration, the scarcity of resources and progressive fulfillment of obligations, the levels of scrutiny and declarations the courts could emit and their possible impact in the system, opens the door – I hope- for a promising future for Chile in this regard.

²⁰ See article 20.