Article 2 & Governments’ Budgets
Ann Blyberg & Helena Hofbauer
Many people and organizations played a role in nurturing the development of this handbook, taking part in numerous discussions and reflections over the course of four years. The core group that drove the “Article 2 Working Group” and defined its tasks comprised:

- Martín Sigal and Gustavo Maurino, Asociación Civil por la Igualdad y la Justicia, Argentina;
- Jorge Santos and Ricardo Zepeda, Centro Internacional para Investigaciones en Derechos Humanos, Guatemala;
- Gabriel Lara, Diego de la Mora, Maríana Pérez and Miguel Pulido, Fundar - Centro de Análisis e Investigación, Mexico;
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- Denisse Wolfenson, International Human Rights Internship Program;
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- Jay Kruuse and Daygan Eagar, Public Service Accountability Monitor, South Africa.

Other organizations participated at meetings and provided information, examples, comments and opinions: CAD-Mali; Center for Economic and Social Rights, Spain; Grupo Faro, Ecuador; HakiElimu and Sikika, Tanzania; Insitiatif, Indonesia; the Institute for Economic Affairs, Kenya; the National Campaign for Dalit Human Rights, Samarthan and the Centre for Budget Governance and Accountability, India; Sonora Ciudadana, Mexico; SEND Foundation, Ghana; and the Treatment Action Campaign, South Africa.

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Last but not least, we want to express our gratitude to the team involved in making this handbook a visually beautiful resource: Marco Partida, lead designer; Víctor García, artwork; and Rocío Pérez, frame/box.

Without the spirited collaboration of these individuals and organizations and without their unflinching commitment to the realization of human rights, our task of producing this handbook would not only have been much less enjoyable; it would have been, quite simply, impossible.

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Progressive realization

Article 2 & Governments’ Budgets

ICESCR Article 2(1):

Each State Party to the present Covenant undertakes to take steps, [...] especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means [...]
What does the obligation of progressive realization\(^1\) in article 2 mean?

This is a question that governments serious about realizing their people's rights and living up to their treaty obligations necessarily ask themselves. It is also one that civil society groups monitoring the government's compliance with its human rights obligations will have to address.

The UN Committee on Economic, Social and Cultural Rights (CESCR) is the body that provides the most authoritative interpretation of the meaning of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR is charged with overseeing implementation of the ICESCR. States that have ratified the ICESCR must, as part of their treaty obligations, report regularly to the CESCR on steps they have taken to implement the treaty and on the status of the enjoyment of economic, social and cultural (ESC) rights in the country.

The Committee makes comments and recommendations on each country report. These comments and recommendations often set out the Committee's best understanding of the meaning of specific treaty provisions. Occasionally, the Committee also issues a “General Comment” (GC) on a topic that has arisen repeatedly during its deliberations in order to provide greater clarity to governments and others as to the meaning of specific rights and obligations in the ICESCR.

This booklet highlights the principal guidance that the Committee has provided through these reports and its General Comments on what the obligation to progressively achieve the full realization of ESC rights means, particularly for governments' budgets.

N.B. While this booklet focuses on the obligation to achieve progressively the full realization of ESC rights, it is essential when addressing an issue to consider this obligation in conjunction with the other two obligations in article 2—use of maximum available resources and non-discrimination. The meaning and implications of these two obligations can only be properly understood, and complied with, in conjunction with the obligation of progressive realization—and vice versa.

\(^1\) Human rights advocates refer to this obligation as either “progressive realization” or “progressive achievement.” In this booklet, the two phrases are used interchangeably.
Realistic, but also demanding

The obligation to achieve progressively the full realization of ESC rights reflects an understanding that full realization will take time and depend, in part, on the resources available to a government.

This obligation should be seen as going hand-in-hand with the obligation to use the maximum of available resources. Thus, while “progressive achievement” is a realistic obligation, it does not let governments off the hook. Governments, while taking steps to progressively achieve realization of rights, must demonstrate that they are using the maximum of available resources to continue improving the conditions of their people.

The government’s budget and progressive achievement

Analyzing whether a government is complying with its obligation of progressive achievement involves looking at people’s actual enjoyment of their rights, using indicators that reveal whether school enrollment is growing, unemployment and the number of homeless people are decreasing, and so on.

Of course, the government’s budget is central to the realization of rights. There is not, however, a direct correlation between an increase in a government’s budget and an increase in people’s enjoyment of their rights. A growing budget may be poorly targeted or wastefully spent, while a shrinking one may be used more efficiently and actually expand services to people.

It is thus important to remember that people’s situation “on the ground”—not the budget—is the most valid indicator of whether a government is complying with its obligation of progressive achievement.

With these cautionary notes in mind, here is what the CESCR has said about the obligation of progressive achievement, and what this implies for governments’ budgets.
Continuously improve conditions

Firstly, governments must continually improve conditions that are fundamental to the realization of ESC rights. (See case study on Progressive Realization: Budget increases and meeting the obligation of progressive realization.)

Moreover, governments do not have all the time in the world to do so. Even though they may have limited resources, they cannot delay taking such steps as developing policies and plans, which are essential to a sound development process and do not require a lot of resources. Beyond this, governments must move as expeditiously and effectively as possible towards full realization of the rights in the ICESCR.

The Committee has also said that it expects that resources allocated to the realization of the ESC rights will increase in proportion to any global increase in resources. This means, for example, that if the government brings in increased revenue, it must ensure that the share of the budget allocated to and spent on ESC rights-related areas increases proportionally. In other words, these areas should benefit from the “expanding pie.”

Even if a government has limited resources, it cannot postpone meeting certain obligations—most particularly the obligation of non-discrimination. While taking steps to realize, for example, the right to education or health, the government must ensure that the steps, however small, benefit all in a non-discriminatory fashion.
Do not take steps backwards

Secondly, the obligation of progressive achievement means that a government should not deliberately take what are called “retrogressive measures”—steps that diminish people’s current enjoyment of their rights.

With regard to the government’s budget, this means that the government generally should not cut budgets affecting ESC rights-related areas. While the true measure of progressive achievement is what happens to people’s actual enjoyment of rights, normally a cut in a budget leads to a cut in goods and services, which in turn affects people’s enjoyment of their rights. (See case study on Progressive Realization: Retrogression due to tax reforms reducing funds for the realization of ESC rights.) However, a cut in the budget would not amount to a “retrogressive measure” if the government were to introduce compensatory measures or efficiencies in spending that have the effect of neutralizing any negative impact from cuts.

That said, a substantial budget cut to programs essential for the enjoyment of ESC rights would be cause for concern. The government should explain the factors that prompted the cut and monitor its impact on the realization of related rights. It should also thoroughly investigate the impact of the cuts on different populations, to ensure that such cuts are not discriminatory. (See booklet on the obligation of non-discrimination.)

Times of economic crises and natural disasters

When an economic crisis or natural disaster hits a country, the government often has to divert resources from existing programs to respond to the situation. While this is understandable, the Committee has said that the obligation of progressive achievement puts certain limits on what a government can do. In particular,

- Vulnerable members of society must be protected by, for example, the adoption of relatively low-cost measures; and
• Certain minimum standards must be maintained for all with regard to safe drinking water, food, shelter, health care and other essentials for human life.

In addition, once the resource constraints caused by the economic crisis or natural disaster disappear and the economy recovers, the government must reverse the measures it took that led to a reduction in ESC rights-related expenditures. It must also work to repair any damage populations have suffered as a result of the resource constraints—again, paying particular attention to vulnerable groups.

If a government concludes that it has to cut its budget and it is clear that such a cut will result in a reduction in the goods and services necessary for the realization of rights, the CESCR has said that:

• The government has the burden of proving that it has made its decision only after the most careful consideration of all alternatives;
• It has arrived at its decision keeping in mind its obligations with regard to all of the rights in the ICESCR; and
• It has used the maximum of available resources to avoid making the cuts.
The Article 2 project

This booklet is part of the Article 2 & Governments’ Budgets handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures.

Article 2 of the ICESCR sets out that governments are obligated to “[…] take steps, individually and through international assistance and co-operation, […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant […] without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This handbook is, primarily, a resource for civil society organizations, human rights commissions, and even legislators, to hold governments to account for their human rights obligations. Download the complete handbook at: www.internationalbudget.org/publications/ESCRArticle2.

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Progressive realization

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Retrogression due to tax reforms reducing funds for the realization of ESC rights
Brazil is one of the largest economies in the world, but also one of the most unequal, with a high concentration of wealth in the top 1 percent of the population. While the Brazilian tax system is supposed to be based on fiscal and social justice, solidarity, equality, universality, and the ability to pay, the complementary laws needed to enforce these constitutional principles have never been passed. Indeed, a series of steps in the opposite direction have produced an unfair and regressive tax system.

During the second Lula presidency, the government sent a tax reform proposal to Congress. If that reform had passed, provisions that earmarked specific revenue for social security, education and labor programs would have been eliminated. Such a development would have undermined the government’s ability to realize the basic social and economic rights of the poorest sectors of society, thereby leading to a failure to comply with its obligation of non-retrogression.

The Instituto de Estudos Socioeconômicos (INESC) produced high-quality technical notes analyzing and explaining the impact of the intended tax reform on the funds for social policies. It linked the debate around the reform to the government’s compliance or failure to comply with the principles and rights established in the Brazilian Constitution. INESC also facilitated the construction of a broad-based coalition to fight the proposal by clearly illustrating the negative impact on whole sectors of the population of an apparently technical reform. The multi-pronged advocacy strategy that they followed illustrates the many different players that are relevant and the many different strategies that have to be employed when trying to stop large, negative, structural reforms.
Poverty is widespread in Brazil, and government programs in a wide range of areas, including health, labor, education and social security, are essential to enabling the poor to survive and participate in the social and economic life of the country. The Lula government’s tax reform proposal would have had a substantial negative effect on funding for these key programs.

Brazil has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) which guarantees a range of rights whose realization was threatened by the proposed tax reform, including:

- The right to work and decent conditions of work (articles 6 and 7);
- The right to social security (article 9);
- The right to an adequate standard of living, which includes the right to food (article 11);
- The right to health (article 12); and
- The right to education (article 13).

A government’s obligation to progressively realize ESC rights means that year-by-year an increasing number of people should be able to enjoy their rights and enjoy them more fully. This does not mean that a government has to continually increase budgets directed to ESC rights-related areas. That said, an increasing budget is normally necessary to extend and deepen benefits necessary for the enjoyment of rights, and cuts to budgets typically result in diminished access to such benefits, particularly access by the most vulnerable in the society.

Analysis not only by INESC, but also by the Brazilian Ministry of Health, showed that without a dedicated flow of funds to these social service areas, budgets of the relevant ministries would be cut significantly, resulting in fewer or poorer quality services. Where a government proposes to cut a budget for ESC rights-related areas, it should be able to demonstrate that such cuts would not result in cuts to relevant services. In this case the government made no such showing. The result of the Lula government’s proposal to remove the earmarking for social services from key revenue would have constituted retrogression in people’s enjoyment of their rights.
Case study in detail

Inequality and the tax system

Brazil is one of the ten largest economies in the world, but also one of the most unequal, in which a small number of people enjoy enormous wealth while a large number are mired in poverty. This despite the fact that the framework for the Brazilian tax system, set out in the 1988 Federal Constitution, promised a tax system based on fiscal and social justice, solidarity, equality, universality, and the ability to pay. It further declared that taxation should be direct, personal, and progressive.

In order for these fine constitutional principles to have effect, Congress needed to adopt a complementary law, which to date it has not done. Even worse, tax reforms enacted during the Cardoso presidency (1995-2003) produced an extremely unfair and regressive tax system. That system exacerbates inequality through high taxation on production and thus on consumption, and low taxes on income, profits, and financial surpluses. Between 1995 and 2009, the tax burden in Brazil increased from 27 to 35 percent of GDP, largely as a result of increases in taxes on consumption. According to a study by the Brazilian Institute of Geography and Statistics, in 2003 those who earned up to twice the minimum wage spent 45.8 percent of their earnings on consumption taxes. Meanwhile, households with an income greater than 30 times the minimum wage spent only 16.4 percent of their income on these same taxes. Moreover, income tax, a potentially progressive tax, has placed a huge burden on wage income, as the wealthy have found creative ways to exploit tax exemptions on income from capital, such as dividend payments.

The obligation to use the maximum of available resources (MAR) to realize ESC rights implies that governments should raise as much revenue as they reasonably can, so as to have substantial funds to direct to the realization of rights. However, in making decisions about revenue, this MAR obligation must be considered in conjunction with the government’s other obligations, particularly that of non-discrimination, in order to ensure that increased revenue does not unfairly impact specific groups of people, particularly the poor.

Another unfair tax reform proposal

Article 195 of the Constitution earmarks specific taxes on income, sales, profits, and company payrolls for financing the social security budget, which funds welfare, social services, health, and unemployment policies.
During the second Lula presidency, the government sent a new tax reform proposal to Congress. The proposed Constitutional Amendment (PEC 233/2008) would have had dire consequences for social and economic rights in Brazil, because it would have ended the earmarking of particular funding sources for social security, education, and labor policies. The elimination of the earmarks would have meant that programs related to the realization of ESC rights would have to compete for resources with other functions in the budget. Since the poor depend heavily on these programs, their rights were at particular risk from the reforms.

**Step one: Setting up a broad campaign**

INESC has analyzed the federal budget and revenue issues for many years, identifying programs and expenditures that are relevant to the realization of ESC rights. After examining the Lula government’s tax reform proposal, the organization concluded that its effects would be detrimental to poor sectors of society. It thus decided to put its energy into preventing its adoption. Used to working in coalitions and networks to gain strength and bring the government to the table, INESC built a broad coalition to oppose the reform, comprised of grassroots organizations, social movements, labor unions, religious organizations and research groups linked to universities. Under INESC’s leadership, the Movement to Defend Social Rights under Threat by the Tax Reform (MDSR) was created, bringing together more than 100 civil society organizations (CSOs).

The MDSR worked for over two years, employing a variety of strategies. It produced technical and policy analyses to illustrate the negative implications of the reform for social policies; educated and mobilized civil society around these consequences; carried out a systematic campaign to educate and engage legislators; held meetings with government officials of diverse ministries; reached out to the federal prosecutors to highlight how the reform would undo key achievements of the 1988 Constitution; and turned up the heat through media outreach.

To most people governments’ budgets are opaque, technical documents. In reality, however, they are a central embodiment of a government’s values as well as a key to where political power in the country lies. A central challenge for CSOs seeking to mobilize large numbers of people around budget issues is to identify and speak to the values and political power that are, in reality, shaping the seemingly arcane technical issues.

**Step two: Opening channels to Congress**

The first challenge for the coalition was to develop channels for dialogue with the government and Congress. A letter signed by 71 CSOs, asking for an open and inclusive discussion forum on the reform, was submitted to the President of Congress.
While he remained unresponsive, the Social Security and Family Committee held a day-long public hearing, which numerous representatives as well as the Ministry of Finance’s Deputy Rapporteur for the PEC 233/2008 attended.

INESC published a technical note providing its assessments of the reform. This became a reference for all the organizations in the MDSR and the backbone of the movement’s manifesto, endorsed by more than 100 CSOs. The manifesto warned that the proposed tax reform would put social rights at risk, especially those of the poor, and that it required mature reflection from society, Congress and the very executive that had drafted it. The movement argued that the proposal should not even be submitted to a vote without necessary amendments.

Dozens of meetings were held with party leaders and the President of the Chamber of Deputies. All of them committed to raise the issue with the Special Committee dealing with the reform. The Social Security and Family Committee held a second public hearing, this time to examine the impact of the proposal on the financing mechanisms for social policies. Several government officials attended, including the Executive Secretary of the Ministry of Health, who stated that under its current structure, the tax reform would decrease resources for health policy by R$15 billion (US$ 6.7 billion). It became clear to the movement that even within government there were sympathetic allies who would speak out against the reform.

Step three: Working with technical bodies

At the same time, INESC used the solid analysis in its technical note to engage the Council for Economic and Social Development (CDES), a governmental body comprising the Presidency of Brazil, the Statistics Institute and other relevant agencies. The strategic and political relevance of engaging this highly qualified, public body, which is responsible for safeguarding equity and social development, was unquestionable. The collaboration resulted in a technical opinion on equity and the tax system, as well as a letter to the President. Both the CDES document and INESC’s technical note underscored the need to build a fairer tax system, while safeguarding the earmarked sources of financing for the social policies that make up the Brazilian social security system. The front opposed to the tax reform proposal was broadening.

Step four: Questioning the constitutionality of the reform

In a meeting with the federal prosecutor for citizens’ rights, MDSR representatives asked the public prosecutor to intervene with the executive and legislative powers on the grounds of a likely unconstitutionality of PEC 233/2008. The MDSR produced yet another technical study, identifying the criteria for social funding that should be upheld in order to guarantee social rights in line with the Constitution.

Based on this study, the prosecutor, warning them that PEC 233/2008 could be unconstitutional, called for explanations from the Ministers of Finance, Education, Health, Social Development and Hunger Alleviation, and Social Welfare, the President of the Senate and the President of the Chamber of Deputies. In line with previous statements, the Ministry of Health expressed agreement with the position of the MDSR, while the Ministry of Social Development, the Ministry of Employment, and the Ministry of Social Development and Hunger Alleviation expressed concerns about the tax reform and its negative impact on the social rights enshrined in the Constitution.

Withdrawing the tax reform proposal

Ultimately, the Presidency of Brazil withdrew the tax reform proposal from Congress, not even allowing it to be put to a vote. It was an astounding, marked success for the Movement, which by associating the tax reform with social rights, had managed to involve a wide array of players in realizing its strategy.
Questions you might ask yourself or your government about progressive realization and taxes.

Is the government securing as much revenue as it reasonably can in order to meet its obligation to progressively realize people's rights?

What is the country's tax burden and how does that compare with the tax burden in similarly situated countries?

How does the current mix of taxes affect different groups of people in the country? The top quintile? The bottom quintile? Has there been a marked trend in recent years to greater or lesser equality in the impact of taxes on individuals?

Has the government introduced additional taxes in recent years? When it has done so, has it done a tax incidence analysis prior to introducing the tax, to determine how the tax would impact different groups in the country? If not, why not? Did it make the results of its analysis public?

If the government introduced additional taxes, did this result in an increase in overall government revenues? If so, what ministries or programs benefitted most from the increased revenue? Which saw little or no increase in their budgets?

Has the government cut taxes in recent years? If so, who has benefitted most from the tax cuts? Who least?

Did the tax cuts result in cuts in the budgets of social programs? If so, which ones? Did the budget cuts result in cuts in services? If so, who was most affected by the cuts in social programs?

Does the government earmark specific revenue for social programs? If so, which revenue and which programs?

Has the earmarked revenue increased, or decreased, over the years? If it has increased in nominal terms, has it also increased in real terms? Has the revenue allowed for a real increase in expenditure for beneficiaries of the targeted social programs? If not, why not?

If the earmarked revenue has failed to increase in real terms, or in per capita terms, and if the need for the social programs continues to exist, what additional revenue, if any, has the government directed to the targeted programs?
Established in 1979, INESC is one of Brazil’s leading civil society organizations. Over the last 20 years, INESC has used the analysis of public budgets as a strategic tool to influence public policies, with the ultimate mission of deepening democracy, strengthening citizenship, and realizing human rights in Brazil.

INESC’s work focuses on three programmatic areas:

- **Budget, Rights, and Inequalities** – measuring the government’s commitments to human rights through applied budget analysis;
- **Globalization, Development, and Sustainability** – deepening work around budgetary and development issues at the subnational level; and
- **Democracy, Congress, and Society** – deepening democracy, mainly through the Platform of Social Movements for the Reform of the Brazilian Political System.

For more information on INESC, go to: inesc.org.br

The Article 2 Project

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Progressive realization

Budget increases and meeting the obligation of progressive realization

Article 2 & Governments’ Budgets
As of 2003, 5.3 million adults and children in South Africa were living with HIV/AIDS. Despite the human tragedy these figures represented, the South African government refused to implement a comprehensive HIV/AIDS prevention and treatment program. High-ranking government officials, including President Thabo Mbeki, were in AIDS denial, questioning the link between HIV and AIDS, refusing to accept the findings of scientific research. The government also maintained that the implementation of comprehensive drug-based prevention and treatment was not affordable.

That was in 2003. By a decade later, South Africa had increased the public money going to the fight against HIV/AIDS by an astounding 1,850 percent—from R214 million (US$28.5 million) to R3.96 billion (US$528 million). This increase reflected the adoption of two public health policies that were instrumental in enabling the South African government to progressively realize the right to health of people in the country: the provision of drugs that prevent the transmission of HIV from mother to child (PMTCT), and distribution of anti-retroviral drugs (ARVs) to people living with HIV. As of 2013, the PMTCT program reached close to 100 percent of the women receiving care in the public health sector. More than 1.2 million people received ARVs.

These achievements were not the result of chance. The Treatment Action Campaign (TAC), launched in 1998 with the purpose of ensuring access to treatment for people living with HIV/AIDS, played a crucial role. Over the years TAC grew into a vibrant movement of outspoken activism, community organizing, mass mobilization, and civil disobedience. TAC has used strong, evidence-based arguments (derived in part on budget analysis) as well as negotiation when those approaches have worked, and has resorted to more confrontational tactics of protest and legal action when the latter have been needed to move government.
The human rights issue

Article 11 of the South African constitution guarantees the right to life, and article 27 promises access to health care services. Article 27 also obligates the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right to health care services].” This latter phrasing echoes ICESCR article 2’s obligation on governments to progressively achieve ESC rights using the maximum of available resources.

Articles 11 and 27 also have counterparts in article 6 of the International Covenant on Civil and Political Rights (ICCPR), which guarantees the right to life, and article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which guarantees the right to health. The latter elaborates further by providing that States Parties must take steps necessary “for the reduction of […] infant mortality and for the healthy development of the child.” It also obligates government to work for the “prevention, treatment and control of epidemic […] diseases.”

The CESCR’s General Comment 14 on the right to health reiterates these guarantees in the ICESCR by specifying as core government obligations:

- To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care [para. 44(a)]
- To take measures to prevent, treat and control epidemic and endemic diseases [para. 44(c)]
- To provide essential drugs [para. 43(d)]

The human rights argument

South Africans suffering from HIV/AIDS have a right to life and to health care services (South African Constitution, arts. 11 and 27) as well as “enjoyment of the highest attainable standard of physical and mental health” (ICESCR, art. 12). These guarantees mean that government must progressively prevent, treat and control HIV/AIDS, an epidemic disease, and should prioritize child health. An important weapon in the fight against HIV/AIDS is drugs—those that are effective in controlling the spread of HIV/AIDS to newborn children, as is Nevirapine, and those, such as anti-retrovirals, that are effective in treating people already suffering from it.

Progressive realization means that people should enjoy increasingly better health, and that an increasing number of people over time should be healthy. When increasing government expenditures can lead directly to ensuring that fewer people catch the disease and more are able to live a healthier life, as was and is true in this case, government has an obligation to devote the maximum of available resources to the effort.
The fight for PMTCT

By 1994 medical research had concluded that the anti-retroviral drug AZT could dramatically reduce the risk of transmission of HIV from mother to child. This meant that it had become possible to prevent many children from being infected with HIV during childbirth and while breastfeeding. This evidence provided a strong basis for the demand made by the Treatment Action Campaign (TAC) since its inception for a comprehensive PMTCT program. However, the South African government denied the existence of an HIV-AIDS link; it even suspended its own PMTCT AZT trials. It additionally claimed that such a PMTCT program would be too costly. Indeed, the health minister went on record in March 1999 saying that the R500 (US$67) needed to treat one pregnant woman was too much and would strain an already limited budget.

Soon thereafter, new scientific evidence revealed that Nevirapine was as effective as AZT, and could be administered in a single dose at a considerably lower cost. In April 2001 the Medicines Control Council of South Africa cleared Nevirapine for use in the country. The government, however, refused to act. TAC filed papers with the High Court, claiming that the government’s position was unconstitutional. It asked the Court to order the government to make “Nevirapine available to pregnant women with HIV who give birth in the public health sector, and to their babies, where in the judgment of the attending medical practitioner or health professional this is medically indicated.”

In this case progressive realization of the right to health was directly related to increases in allocations in the budget. A budget increase was necessary to pay for the new interventions as well as new drugs, as these had not previously been available in the public health system. As the budget increased year by year, more people had access to the interventions and drugs. However, in other situations, a budget could increase without a comparable increase in people’s enjoyment of their rights. Funds could be directed to ineffective interventions, not spent, wasted, etc. In other words, the correlation between increases in the budget and the progressive realization of rights is not always direct and clearly visible. (See the booklet on progressive realization).

Debunking the government’s argument

To strengthen their case, TAC requested affidavits from diverse experts, one of which included cost projections that TAC could not have done on its own. However, because of the legitimacy of its demands as well as its solid network of relationships, it was able to identify an expert willing to do such a projection. Health economist Nicoli Nattrass produced evidence showing how public funds spent on a PMTCT program would save the government money in the long run by reducing the costs associated with future HIV/AIDS cases. In her affidavit Nattrass pointed out how the total cost of a comprehensive PMTCT program (Nevirapine, counselling, testing and ARV treatment for children that required it) would be less than the costs of treating all children who would be born HIV-positive in the absence of such a program.

Nattrass combined the cost of individual interventions into a comprehensive package of treatment, then estimated the global costs of attending all mothers and children that were projected to require interventions in a given time frame. She took a further step, comparing these projections to projections of the monetary cost of government inaction, which would inevitably translate into recurrent hospitalizations of and
interventions for HIV-positive children. Nattrass provided solid evidence showing that by using Nevirapine the government would save at least R341,000 (US$45,000) every six months, thus countering the government’s claim of the unaffordability of a PMTCT program.

In its defense, the government presented evidence to the court indicating that a full roll-out in the provinces of Nevirapine would cost R250 million (US$33.33 million), arguing, once again, that such a sum was not available. TAC debunked this claim, pointing out that the government was currently failing to use the maximum of available resources. This fact emerged from the 2001 Intergovernmental Fiscal Review, which reported that in 2000 provincial departments of health had underspent their budgets by R473 million (US$63.1 million)—considerably more than a full roll-out of Nevirapine would cost.

In December 2001 the High Court ruled in favor of TAC and ordered the government to draw up a plan for the implementation of a national PMTCT program using Nevirapine. It was clear to the judge that such a program was affordable, and that the availability of resources could thus only influence the pace of the program’s extension. While additional resources would have to be made available, proper planning would make full coverage possible. Ultimately, the judge found that the state had violated Section 27 of the South African Constitution, by failing to take reasonable steps within its available resources to provide women access to programs that would prevent HIV transmission from mother to child. Following an appeal by the government, this ruling was confirmed by the country’s Constitutional Court, which ordered the government to remove the restrictions that prevented Nevirapine from being made available at public hospitals and clinics.

Careful planning is necessary for the progressive realization of rights, but plans alone are not enough. It is essential that the government develop realistic, targeted budgets that are in line with details in the plans. In this way it can better ensure that there will be sufficient funding to allow implementation to proceed smoothly and effectively. In this context, a performance budget, which relates a government’s plans closely to its budgets, can be valuable. Multi-year budgets are also important, because “progressive realization” by its nature requires several years, and it is necessary to know the funds that will be necessary in future years to implement well-conceived plans.
Pushing farther

The PMTCT case was not the last time TAC had to demonstrate the financial viability of an HIV/AIDS program. The South African government’s resistance extended to the roll-out of a large-scale anti-retroviral (ARV) program. To bring the government to the table, TAC established a broad coalition with unlikely allies, such as the Congress of South African Trade Unions (COSATU) and the National Economic, Development and Labour Council (NEDLAC). It also formed a research committee of health economists and medical professionals that was tasked with producing a draft comprehensive National Treatment Plan (NTP).

Related research that TAC commissioned included a paper that examined the effect an NTP would have on HIV/AIDS-related mortality and infections, which concluded that the plan would save 3 million lives and prevent 2.5 million new infections by 2015. A second analysis found that the cost of providing comprehensive ARV treatment would rise from R224 million (US$31.8 million) in 2002 to R6.8 billion (US$907 million) in 2007. An astounding R18.1 billion (US$2.4 billion) could potentially be needed by 2015, assuming that there were no further reductions in the costs of medicines. While recognizing the serious cost implications of a comprehensive NTP, TAC claimed that failing to spend on ARVs was not actually saving money, but only draining it away through other channels.

The government rejected the draft NTP. It claimed that it was awaiting the results of a Joint Task Team that had been established by Treasury and the Department of Health to research the costing of an ARV plan. Following government delays, TAC announced a civil disobedience campaign and said that it was considering legal action once again. In early 2003 the organization secured, and then leaked, a copy of the report of the Joint Task Team. That report concluded that an ARV treatment plan was affordable and would save hundreds of thousands of lives.

In November 2003 the cabinet approved a plan for an ARV program in South Africa. In 2007, the cabinet endorsed an HIV/AIDS and STI (sexually transmitted infections) Strategic Plan for South Africa (2007-2011). The plan committed the government to spending R45 billion (US$6 billion) on HIV and AIDS prevention and treatment over a five-year period. The plan was drawn up in consultation with TAC; the organization was able to significantly influence the content of the plan.

Progressive realization of rights, by definition, requires sustained, long-term efforts. The tactics used by TAC, and their engagement with diverse stakeholders and decision-makers over more than a decade, illustrate that, in the fight for progressive realization, there are no short-cuts or easy victories. Civil society organizations must be aware that moving a government’s budget into human rights priorities will always be a long-term project.
Questions you might ask yourself or your government about progressive realization and increases in the government’s budget:

Does the government monitor progressive realization of ESC rights? If not, why not?

If the government monitors progressive realization of rights, how does it connect these efforts to programmatic and budgetary revisions?

If the realization of rights is not increasing, does it analyze the role of the budget in the failure to progressively realize the rights?

Where funds for ESC rights-related areas are inadequate to allow for progressive realization of the corresponding rights, does the government examine the rest of the budget to determine if there are funds in other areas of the budget that could be re-directed to ESC rights-related areas?

Does the government develop performance budgets for ESC rights-related areas? If not, why not?

Does the government develop multi-year budgets for the purpose of ensuring the sustainability of progressive realization of ESC rights over a number of years?

When the government adopts a significant new program or project, does it cost out how much the program or project will cost? Does it determine whether there will be adequate funds in the budget to realize the program or project now, and in the future?

When the government costs out how much would be necessary to support new programs or projects important for the realization of ESC rights, does it at the same time assess the likely cost to government and society of a failure to adequately support the new programs or projects? Does it make this information publicly available?
Treatment Action Campaign

Founded in December 1998 in Cape Town, South Africa, TAC advocates for increased access to treatment, care and support services for people living with HIV/AIDS, and campaigns to reduce new HIV infections. With thousands of members across South Africa and some 220 staff, TAC has become the leading civil society force behind comprehensive health care services for people living with HIV/AIDS in South Africa. Since its inception TAC has held the government accountable for health care service delivery, campaigned against AIDS “denialism” by government, challenged the world’s leading pharmaceutical companies to make treatment more affordable, and cultivated community leadership on HIV and AIDS.

For more information on TAC, go to: www.tac.org.za

The Article 2 Project

This booklet is part of the Article 2 & Governments’ Budgets handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures. The project encourages the use by civil society and governments of the legal provisions of article 2 to monitor and analyze governments’ budgets. Download the complete handbook at: www.internationalbudget.org/publications/ESCRArticle2.


Authors: Ann Blyberg and Helena Hofbauer
February 2014
Progressive realization

Article 2 & Governments’ Budgets
Benefits of increased expenditures not reaching the most vulnerable
Guatemala is a poor country with one of the highest rates of hunger and malnutrition in Latin America. Over the course of decades successive governments have introduced a series of food supplement programs to address the problem. While some of the programs have succeeded in improving the situation of food-insecure populations, most have failed to make a significant dent in the hunger, and instead have been plagued with problems of political manipulation and corruption along with a failure to institutionalize and regularize them. The Vaso de Leche Escolar (School Glass of Milk, VLE) program was one such initiative.

VLE began in 2005 and continued until 2008. The Centro Internacional para Investigaciones en Derechos Humanos (CIIDH), which had earlier done extensive research and advocacy on malnutrition and hunger in Guatemala, undertook an in-depth analysis of VLE in 2007. It found that while each year the government was devoting increased funding to the program—a fact that definitely looked good on paper—VLE was failing to reach many children in the most food-insecure regions of the country.

This unfortunate result was the product of a series of government decisions not all of which were driven by human rights considerations. CIIDH learned, for example, that the government had contracted with private milk-producing companies to transport the milk, but the latter had little capacity to reach remote areas. The deliveries were also erratic, did not reach all schools every day, and the milk was too often sour. Moreover, the cost of the VLE rations was higher, on a per capita basis, than were other government-run food supplement programs. Ironically, milk was not even part of the staple diet of the indigenous peoples in Guatemala, many of whom are lactose-intolerant.

When a new government came into power in 2008, it decided to suspend the VLE program while it considered alternatives that would be more effective in reaching the most food-insecure groups in the country. (Subsequent programs have, unfortunately, been similarly ill-fated.)
The human rights issue

Guatemala is party to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (the Protocol of San Salvador), article 12 of which guarantees the right to food. In addition, it has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which in its article 11 guarantees the right to adequate food and to be free from hunger.

General Comment 12 of the UN Committee on Economic, Social and Cultural Rights elaborates on the right to food guarantees in ICESCR article 11. In addition to stressing the importance of targeting the most vulnerable in the population, it points out that the right to food means that food must be physically accessible, of good quality and culturally appropriate. It also calls upon States Parties to regulate third parties, including companies, whose actions may interfere with people’s right to food.

The human rights argument

Funding for the VLE was increased from 2005 to 2007, which would have seemed to indicate that the Government of Guatemala was progressively realizing children’s right to food through the program. However, the program failed in important ways to meet its central purpose, which was to provide essential nutritional supplements to the most food-vulnerable children in the country, many living in remote rural areas.

Specifically, analysis of data on the VLE uncovered the fact that the milk was delivered irregularly, with days going by when students received no milk. On other occasions, the milk that arrived was sour, thus failing to meet the standard of adequate quality. Moreover, milk was culturally inappropriate for many children, in that a large part of the indigenous population of Guatemala, who make up the vast majority of the most food-insecure, suffer from lactose intolerance.

Most importantly, the analysis revealed that the most vulnerable, for whom the program was specifically designed, were receiving less milk than those in least need. In other words, despite the fact that during the years 2005 to 2007 the government annually increased funding for VLE, it failed through the program to meet its obligation to progressively realize the right to food of the most food-insecure children in Guatemala.

Hunger in Guatemala

Guatemala is one of the poorest countries in Latin America. As of 2006 more than half the population was considered poor. The indigenous population was twice as likely to be poor as the non-indigenous, and more than three times as likely to be extremely poor. Poverty is especially concentrated in the rural areas.

Guatemala has one of the highest rates of child malnutrition in the world. The country’s National Policy on Food Security and Nutrition (PSAN) provides a good framework for tackling this problem, having as one of its goals to ensure the availability of a continuous, adequate supply of food of a decent quality for the population. Another goal is developing and strengthening mechanisms to prevent nutritional problems, with priority given to groups that are at higher risk due to age, area of residence, socioeconomic status, and cultural identity, among other factors.

In 2002 half of the children living in rural areas of Guatemala suffered from chronic malnutrition and stunted growth, whose debilitating effects normally last a lifetime. Between 1986 and 2001 this stunting could be seen in the changing heights of children. In areas of
Since the 1980s the various governments in the country have implemented school feeding programs, which have had as a goal tackling this problem of child malnutrition. These programs, which have consisted of food supplements, such as fortified beverages or cookies, school breakfasts and lunches, have been administered by the Ministry of Education (MINEDUC) or the Ministry of Agriculture, Livestock and Food (MAGA).

While these school feeding programs have reached a large number of schools and students, they have regularly been plagued with problems of inadequate financing, political manipulation, poor implementation and lack of institutionalization, sloppy record-keeping, and inadequate outreach. One result is that they have not had the significant impact on child hunger and malnutrition that is among PSAN’s aims.

**Vaso de Leche Escolar (VLE)**

The VLE program, established in 2005 as a pilot project and administered by MAGA, was the brainchild of Guatemalan commercial milk producers and the Chamber of Commerce. It was intended not simply to provide a nutritional supplement for children, but also to help revive the domestic dairy industry with a view to enabling it to compete internationally.

In 2005 the pilot program reached 1,108 schools in 35 municipalities in five departments and two areas of the capital city. It became a regular program in 2006 and by 2007 had been extended to 100 municipalities, serving 3,525 schools. In 2005 the government spent approximately Q33 million (33 million quetzales or US$2.3 million) on the VLE program; in 2006, Q61 million (US$ 7.7 million); and in 2007, Q107 million (US$ 13.47 million).

**Problems with the VLE**

In 2007 CIIDH decided to look more closely at the VLE. Using information from MAGA, it developed the following table on the distribution of VLE rations in 2007. Organized by Department (equivalent to a province), the chart provides data on the number of schools and students in each Department to whom VLE rations were to be provided as well as the number of VLE rations that were actually administered through the program. The most telling figures here, however, are the percentages. These show, for example, that while Huehuetenango—an area with very high food-insecurity—had 4.18 percent of the children who were supposed to receive the VLE, only 0.81 percent of the rations of milk reached the schools in that region.

Even when an increase over time in a government’s budget for an ESC rights-related program is necessary for the program to progressively realize more people’s rights in a fuller fashion, the increase in itself does not meet the government’s obligation of progressive realization of ESC rights. In order to assess whether progressive realization is being achieved, it is necessary at the same time to look at additional indicators, ones not directly related to the budget. In the case of the VLE, for example, a telling indicator would have been rates of hunger in schools attended by children at high risk of hunger and malnutrition.
## Departments with very high vulnerability

<table>
<thead>
<tr>
<th>Department</th>
<th>Number</th>
<th>Percentage</th>
<th>Number</th>
<th>Percentage</th>
<th>Quantity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Huehuetenango</td>
<td>149</td>
<td>4.22</td>
<td>18,775</td>
<td>4.18</td>
<td>241,000</td>
<td>0.81</td>
</tr>
<tr>
<td>Chimaltenango</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>El Quiché</td>
<td>118</td>
<td>3.34</td>
<td>13,691</td>
<td>3.05</td>
<td>63,910</td>
<td>0.22</td>
</tr>
<tr>
<td>Sololá</td>
<td>180</td>
<td>5.10</td>
<td>24,654</td>
<td>5.49</td>
<td>1,136,871</td>
<td>3.84</td>
</tr>
<tr>
<td>Totonicapán</td>
<td>41</td>
<td>1.16</td>
<td>7,666</td>
<td>1.71</td>
<td>412,593</td>
<td>1.39</td>
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<tr>
<td>San Marcos</td>
<td>65</td>
<td>1.84</td>
<td>9,401</td>
<td>2.09</td>
<td>774,113</td>
<td>2.62</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>553</strong></td>
<td><strong>15.67</strong></td>
<td><strong>74,187</strong></td>
<td><strong>16.52</strong></td>
<td><strong>2,628,487</strong></td>
<td><strong>8.88</strong></td>
</tr>
</tbody>
</table>

## Departments with high vulnerability

<table>
<thead>
<tr>
<th>Department</th>
<th>Number</th>
<th>Percentage</th>
<th>Number</th>
<th>Percentage</th>
<th>Quantity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alta Verapaz</td>
<td>315</td>
<td>8.93</td>
<td>37,760</td>
<td>8.41</td>
<td>3,063,809</td>
<td>10.36</td>
</tr>
<tr>
<td>Baja Verapaz</td>
<td>350</td>
<td>9.92</td>
<td>39,530</td>
<td>8.81</td>
<td>2,710,024</td>
<td>9.16</td>
</tr>
<tr>
<td>Chiquimula</td>
<td>372</td>
<td>10.54</td>
<td>23,176</td>
<td>5.16</td>
<td>1,574,053</td>
<td>5.32</td>
</tr>
<tr>
<td>Jalapa</td>
<td>219</td>
<td>6.21</td>
<td>20,856</td>
<td>4.65</td>
<td>1,820,369</td>
<td>6.15</td>
</tr>
<tr>
<td>Quetzaltenango</td>
<td>48</td>
<td>1.36</td>
<td>7,665</td>
<td>1.71</td>
<td>431,419</td>
<td>1.46</td>
</tr>
<tr>
<td>Suchitepéquez</td>
<td>210</td>
<td>5.95</td>
<td>31,026</td>
<td>6.91</td>
<td>2,177,313</td>
<td>7.36</td>
</tr>
<tr>
<td><strong>Subtotal</strong></td>
<td><strong>1,514</strong></td>
<td><strong>42.91</strong></td>
<td><strong>160,013</strong></td>
<td><strong>35.65</strong></td>
<td><strong>11,776,987</strong></td>
<td><strong>39.81</strong></td>
</tr>
</tbody>
</table>

## Departments with moderate vulnerability

<table>
<thead>
<tr>
<th>Department</th>
<th>Number</th>
<th>Percentage</th>
<th>Number</th>
<th>Percentage</th>
<th>Quantity</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petén</td>
<td>164</td>
<td>4.65</td>
<td>24,014</td>
<td>5.35</td>
<td>1,805,249</td>
<td>6.10</td>
</tr>
<tr>
<td>Izabal</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

In other words, despite the increasing budget and outreach from one year to the next, in 2007 the areas of the country with very high vulnerability to hunger and malnutrition, with 16.5 percent of the school population, received only 8.9 percent of the VLE rations. Departments with somewhat less (i.e., high) food vulnerability fared better, receiving shares of milk rations more or less in line with their shares of the school population (with the exception of Quetzaltenango). At the same time, Departments with low and moderate vulnerability generally benefitted from receiving shares of the total milk rations at or above their shares of school population (with the exception of the Department of Guatemala).

This means that the VLE was distributed least effectively where it was most needed. CIDH’s findings for 2007 did not vary significantly from its findings for the two previous years.

The obligation of progressive realization must be assessed along with the obligation of non-discrimination. Overall figures for a country or area of a country can be misleading. While statistics may show an overall improvement in nutrition, the situation may be quite different for specific groups, particularly the poor, ethnic minorities, women, children or other vulnerable groups. While looking at broader trends, it is thus essential to also look at disaggregated data to find out who is benefitting most, and who least, from ESC rights-related programs.
CIIDH learned that the reason milk delivery failed to reach many of the most food-vulnerable children was that, under an agreement with the government, the milk producers were responsible for transporting and delivering the product to the schools. The producers did not have the transport capabilities necessary to deliver milk to the more remote parts of the country, where many of the most food-vulnerable children live. Implicitly, the program was giving a higher priority to buying milk from the producers than to distributing that milk for the purpose of reducing hunger and malnutrition.

CIIDH identified some additional problems with the VLE. These included the fact that milk delivery was irregular; some days schools received no milk at all. At other times, the milk was sour when it arrived at the schools. Thus, the program was failing to provide food with the required quality.

One of CIIDH’s most important findings was that the majority of indigenous people in Guatemala, who comprise most of the population in areas of very high food insecurity, are lactose-intolerant. Milk as a nutrition supplement was thus not appropriate for them. Atole, which is a water-based beverage prepared from finely ground corn, can be stored for a long time before consumption. As one of the staple food products of indigenous people, atole would have been more culturally appropriate. Moreover, the VLE was more expensive per student than other food supplement programs underway at the same time, while atole would have been cheaper. That, however, would not have benefitted the dairy industry.

In other words, the Government of Guatemala was implementing a faulty program, which did not ensure access to nutrition for communities suffering most from hunger and malnutrition, was not culturally adequate, and, in practice, was applied with a discriminatory effect.

The obligation of progressive realization of ESC rights is integrally related to the obligation to use the maximum of available resources (MAR) to realize those rights. Even if a program is effective, for example, in relieving hunger among a growing population over the course of a few years, if it is doing so in a way that wastes money, then it is failing to meet its MAR obligation. Similarly, if indicators show that a program is reaching a growing number of people, but failing at the same time to reach those vulnerable groups for whom the program would be particularly important, then the government is not only discriminating against the latter groups, but also failing to meet its MAR obligation, because the program is not effective in realizing the rights of the most vulnerable.

Analysis of faulty programs often gives rise to these types of dilemmas. Given the fluidity in Guatemalan public policies, however, CIIDH did not have to make a decision as to what to recommend. Shortly after it released its findings, a new government came into power in Guatemala. It discontinued the VLE program and developed other options, including a conditional cash transfer program. These, however, had faults of their own. The challenge of ensuring that the Government of Guatemala takes its obligation of progressive realization seriously continues.
<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does the government explicitly target the most vulnerable groups in its ESC rights-related policies and programs? If not, why not?</td>
<td></td>
</tr>
<tr>
<td>Do programs related to ESC rights include indicators and evaluation mechanisms that allow for the assessment of the progressive realization of the relevant rights?</td>
<td></td>
</tr>
<tr>
<td>Does the government include representation of the most vulnerable groups in the development of ESC rights-related policies and programs? If not, why not?</td>
<td></td>
</tr>
<tr>
<td>Does the government undertake a benefit incidence analysis prior to adopting ESC rights-related policies and programs to ensure that the policies and programs are appropriately designed to reach the intended beneficiaries? If not, why not?</td>
<td></td>
</tr>
<tr>
<td>Does the government acknowledge and try to address inclusion and exclusion errors in programmatic design, that is, the inclusion of people who do not need the program and the exclusion of those who do?</td>
<td></td>
</tr>
<tr>
<td>What structures and processes does the government have in place to monitor and assess the implementation of ESC rights-related programs to ensure that they are reaching the populations they are intended to benefit? Do these structures and processes have the resources necessary to run efficiently and effectively? Are they doing so? If not, why not?</td>
<td></td>
</tr>
<tr>
<td>Do these structures and processes assess the cultural appropriateness of programs? How? If not, why not?</td>
<td></td>
</tr>
<tr>
<td>Are the intended beneficiaries of these programs included in the monitoring and assessment of ESC rights-related programs that are supposed to benefit them? If not, why not?</td>
<td></td>
</tr>
</tbody>
</table>
The International Center for Human Rights Research (CIIDH) in Guatemala was formed in 1993 to support and seek justice for victims of the Guatemalan civil war. CIIDH focused on investigating past human rights abuses and winning reparations for victims, as well as protecting political rights in the postwar era. The Guatemala City-based organization began budget work and policy advocacy in 1997, following negotiation of the Peace Accords. In addition to promoting political reconciliation under the Accords, CIIDH monitored military spending in Guatemala and has since expanded the scope of its work to include research and advocacy on fiscal policy, analysis of social spending, and the promotion of budget transparency and accountability.

CIIDH seeks to “contribute to the construction of a democratic, inclusive, just and equitable nation, with respect for human rights” with its Social Observatories (Observatorios), which monitor a wide range of issues in Guatemala and advocate for progressive solutions.

For more information on CIIDH, go to: www.ciidh.org

The Article 2 Project

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Authors: Ann Blyberg and Helena Hofbauer

February 2014
Non-Discrimination

Article 2

Governments’ Budgets

ICESCR Article 2(2):

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
What does the obligation of non-discrimination in article 2 mean?

This is a question that governments serious about realizing their people’s rights and living up to their treaty obligations necessarily ask themselves. It is also one that civil society groups monitoring the government’s compliance with its human rights obligations will have to address.

The UN Committee on Economic, Social and Cultural Rights (CESCR) is the body that provides the most authoritative interpretation of the meaning of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR is charged with overseeing implementation of the ICESCR. States that have ratified the ICESCR must, as part of their treaty obligations, report regularly to the CESCR on steps they have taken to implement the treaty and on the status of the enjoyment of economic, social and cultural (ESC) rights in the country.

The Committee makes comments and recommendations on each country report. These comments and recommendations often set out the Committee’s best understanding of the meaning of specific treaty provisions. Occasionally, the Committee also issues a “General Comment” (GC) on a topic that has arisen repeatedly during its deliberations in order to provide greater clarity to governments and others as to the meaning of specific rights and obligations in the ICESCR.

In 2009 the CESCR issued its General Comment 20 (GC 20), which talks about ICESCR article 2(2) on non-discrimination (E/C.12/GC/20). This booklet highlights in particular those parts of GC 20 that have important implications for governments’ budgets.

N.B. While this booklet focuses on the obligation of non-discrimination, it is essential when addressing an issue to consider the non-discrimination obligation in conjunction with the other two obligations in article 2—progressive realization and the use of maximum available resources. The meaning and implications of these two other obligations can only be properly understood, and complied with, in conjunction with the obligation of non-discrimination—and vice versa.
Ensuring non-discrimination may require a government to adopt different priorities, and to modify existing policies, plans and programs so that they are in line with the new priorities. It may also mean that the government must implement affirmative action initiatives. Such changes will likely impact the government’s budget. GC 20 makes a few direct references to the budget. It says, for example:

*Economic policies, such as budgetary allocations [...] should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination.* (para. 38)

While this paragraph makes particular mention of budget allocations, the same standard would apply to the ways governments raise revenue and spend their money. Revenue-raising schemes, in other words, should not only be progressive, but must not unduly penalize particular groups along such lines as gender, ethnicity, religion or income. Expenditures must be similarly non-discriminatory and should, in addition, lead to greater equality.

**An immediate obligation**

Non-discrimination is an immediate and cross-cutting obligation (GC 20, para. 7).

In other words, while other parts of article 2 talk about taking steps to progressively achieve realization of rights, governments must *immediately* comply with this non-discrimination obligation.

GC 20 directly addresses the situation where a government recognizes that some people are not receiving benefits that others in the population receive, but maintains that it cannot afford to make the same benefits available to all immediately. Of this situation, the Committee says:

*A failure to remove differential treatment on the basis of a lack of available resources is not an objective and reasonable justification unless every effort has been made to use all resources that are at the State party’s disposition [...] to address and eliminate the discrimination, as a matter of priority.* (para. 13; underlining added)

(See case study on Non-Discrimination: Discriminatory expenditures based on health status.)

A government in such a situation must thus reorient its budget to treat all equally. Doing so can be quite complex, and the process should be guided not only by the obligation of non-discrimination, but by the other two article 2 obligations—progressive achievement and use of maximum of available resources. Extending essential goods and services to previously disadvantaged groups, for example, may not be feasible without at least temporarily cutting back on some non-essential goods and services currently provided to the
general population. The government should carefully determine the extent to which the cuts it makes are diminishing the latter’s enjoyment of their rights, and should ensure that, as paragraph 13 emphasizes, it is using the maximum of available resources to avoid any retrogression. (See booklets on the obligations of progressive realization and the use of maximum available resources.)

**Different types of discrimination**

GC 20 provides some interpretations of non-discrimination that, while not explicitly mentioning the budget, have important implications for it. It says, for example, that States parties to the ICESCR must eliminate both

- **formal** discrimination, that is, discrimination explicitly encouraged or allowed in laws, policies, etc.; and

- **substantive** discrimination—where discrimination is not explicitly set out in the laws, policies, etc., but where the **impact** of the laws and policies is discriminatory (otherwise known as *de facto* discrimination). (para. 8; underlining added)

With regard to the budget, this means, for example, that funds cannot be disproportionately allocated for or spent in areas where a specific ethnic group lives simply out of a desire to favour that ethnicity, or directed away from areas which support opposition parties simply because the government does not like their political opinions. (See case study on *Non-Discrimination: Discrimination in allocations and spending on the basis of geography.*)

Substantive discrimination can be harder to spot in the budget than formal discrimination, since, by definition, the figures would look neutral. Thus, identifying substantive (or *de facto*) discrimination will likely involve looking not only at budget figures, but also analysing the relationship of those figures to other information, including population data, data on the distribution of existing services, information about the needs of different groups, as well as about the impact on different groups of the government’s spending (or revenue-raising schemes).
For example, a low-income housing scheme may on its face exhibit a concern for the very poor. However, if the application process involves complicated forms that would be challenging for those with little education, the housing will go to the better educated. Similarly, a job creation scheme that focuses on building roads may be open to men and women, but it may nonetheless be problematical when, for cultural reasons, few women will take advantage of the scheme. Such schemes would be, *de facto*, discriminatory.

In order to identify instances of substantive discrimination and modify programs so that they comply with the obligation of non-discrimination, government should carefully monitor the impact of its programs on different populations. (See case study on Non-Discrimination: Discriminatory allocations and expenditures on the basis of socio-economic status.)

GC 20 says that to “attenuate or suppress conditions that perpetuate discrimination,” States parties may, and in some cases should, take special measures, which, in turn, must be discontinued once substantive equality has been reached. (para. 9) These special measures will, in many cases, require not only that government provide greater access to jobs, housing and so on to those groups that have historically been discriminated against, but also that it direct disproportionately greater financial resources to them.

These types of measures and the associated funding are a familiar feature of initiatives that have been designed to redress historic discrimination in a number of countries. (See case study on Non-Discrimination: Failure to allocate and spend funds specially designated to counter the lingering effects of historic discrimination.)
**Discrimination by private actors**

What about discrimination in the private sphere? GC 20 says:

*States parties must [...] adopt measures [...] to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.* (para. 11)

What would this look like in the budget? Among other things, it would mean that the budget should include funding for legislation, monitoring processes and/or the work of regulatory bodies. That funding should be sufficient, for example, to enable the latter to do a proper job of ensuring that private actors (whether individuals or corporate bodies) are providing goods or services in a non-discriminatory manner.

**Discrimination by sub-national government**

Government authorities at all levels (from the national down to the local) are obligated to be non-discriminatory in their policies, laws, etc. The primary responsibility for many government services central to the realization of ESC rights—schools, health clinics, water provision, food subsidies, work programs, etc.—rests with provincial and local governments. Their budgets are thus often central to the functioning of these services. GC 20 reminds us that these budgets too must comply with the government’s obligation of non-discrimination—both formal and substantive.

(See case study on *Non-Discrimination: Discriminatory allocations and expenditures on the basis of socio-economic status.*)
The Article 2 project

This booklet is part of the Article 2 & Governments’ Budgets handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures.

Article 2 of the ICESCR sets out that governments are obligated to “take steps, individually and through international assistance and co-operation, […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant […], without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

This handbook is, primarily, a resource for civil society organizations, human rights commissions, and even legislators, to hold governments to account for their human rights obligations. Download the complete handbook at: www.internationalbudget.org/publications/ESCRArticle2.

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Non-Discrimination

Discrimination in allocations and spending on the basis of geography

Article 2 & Governments’ Budgets

Discrimination in allocations and spending on the basis of geography
At the time Peace and Development Volunteers (PDV) undertook its project, Sudan had one of the fastest growing economies in Sub-Saharan Africa. Despite this, as of 2012 the maternal mortality rate (MMR) was 216/100,000. While this was a significant improvement over the situation in 2006, when the MMR was considerably higher, it still fell far short of the MDG goal of 134/100,000. When these statistics are broken down by geographical area (urban/rural), the picture becomes even more disturbing, as the MMR was 225/100,000 for women in rural areas and 194/100,000 for those in urban areas. These figures parallel 2010 statistics, which revealed that 89 percent of women in urban areas were attended by trained personnel during delivery, compared to only 66 percent of women in rural areas.

In 2008 PDV undertook a study of maternal mortality in a rural locality in Khartoum State. Carried out in conjunction with the Khartoum State Ministry of Health, the study provided a close-up of the disparities evident in these national statistics. PDV focused on one of the seven localities in the state, and surveyed a large number of women to learn about their experiences with health care during pregnancy, delivery and post-partum recovery. It also analyzed the federal health budget as well as the budget of Khartoum State. Primary health care services have been devolved to the states, which are expected to fund them from their own revenue. Such a financing scheme means, in practical terms, that people in poorer states will have access to less-well-funded health services. The study identified analogous disparities within states, with wealthier, more urbanized areas having better facilities and more medical personnel available to them. The fact that hospitals and clinics charge fees for services further aggravates the situation. People in rural areas tend to be poorer and less able to afford the fees.
The human rights issue

The Bill of Rights of the Interim National Constitution of Sudan promises that the State shall:

[...] provide maternity and child care and medical care for pregnant women... [art. 32(4)]; and

[...] provide free primary health care and emergency services for all citizens. (art. 46)

In addition, all rights enshrined in international human rights treaties that Sudan ratifies “shall be an integral part” of the Bill of Rights [art. 27(3)].

Sudan has ratified the ICESCR, which in article 12 guarantees the right to health. The CESCR in its General Comment 14 has interpreted this article to mean that health facilities, goods and services should be both geographically and financially accessible. It also says that one of the State’s core obligations is to ensure reproductive and maternal (pre-natal as well as post-natal) health care, and the equitable distribution of all health facilities, goods and services. (paras. 43 and 44)

The human rights argument

All levels of government (national, state and local) are responsible for guaranteeing human rights. National governments are also responsible for ensuring that sub-national governments fulfill the rights of people within their jurisdictions.

The availability, quality and accessibility of health care goods, services and facilities in Sudan vary enormously between states and within states, particularly between urban and rural areas. Sudan’s federal government currently fails to equalize this situation, because it does not allocate and spend its budget in ways that would address these disparities. The national government also fails to monitor state budgets to ensure that state governments appropriately prioritize health spending. As a result, per capita health spending across states is not sufficiently similar, impeding equal access to health care facilities, goods and services. Moreover, there is no system by which state governments ensure that their health care spending treats different areas within their jurisdictions with equity.

The obligation of non-discrimination set out in ICESCR article 2 guarantees equal access to the right to health, and prohibits discrimination on the basis of geography and income, among other grounds. The differential access of women to reproductive health care services between states and within states amounts to a failure by the federal and state governments to comply with their obligation of non-discrimination.
The health care system in Sudan

Public health services in Sudan were offered free of charge from the colonial period until the 1990s. In response to economic hardship and reform prescriptions by the International Monetary Fund (IMF), from the early 1990s the government encouraged the development of private health care, limited public health spending and introduced user fees for various health services. In the 1990s the government also decentralized the public health system, so that Sudan would have a Federal Ministry of Health (FMoH) and a State Ministry of Health in each State. The FMoH is responsible for developing national health policies and strategic plans, as well as monitoring and evaluating health system activities, including at the state-level. State Ministries of Health (SMoH) have the principal responsibility for state-level plans and strategies as well as detailed health programming and project formulation. Management and financing of most of the health system have been devolved to the states and, within states, to localities (sub-divisions within states).

A range of problems has developed following decentralization, having their roots, in part, in inadequate managerial and administrative capacities at the state and local levels. The system also suffers from insufficient financial resources, even in the more well-off states, as the federal government, in devolving its responsibilities, did not provide resources to support the devolved responsibilities. At the same time states had limited, although varying, revenue-raising capacities. A 2003 report undertaken by an international body estimated that the federal and state governments’ health budgets together amounted to approximately 2 percent of total government expenditures.

As a result of this seriously inadequate funding, public health services, particularly in the poorer states of Sudan, have degraded steadily over the years. In many places, facilities and services are either sorely inadequate or non-existent. People’s reluctance or inability to take advantage of such poor quality care is further exacerbated by the imposition of user fees. As a result, basic health services in Sudan are estimated to cover less than half of the population.

Human rights do not dictate how a health system should be structured and financed. Government can move to private providers, charge fees, and/or decentralize responsibilities for services. When doing so, however, it cannot rid itself of its human rights responsibilities. Government continues to be obligated to guarantee the right to health, and it must establish effective monitoring and/or regulatory processes to ensure that people continue to have access to health care services on a non-discriminatory basis.

First approach: Comparing official statistics with the results of user surveys

Peace and Development Volunteers focused its study on a limited geographical area, Sharq Alneel locality in Khartoum State. It worked in collaboration with the Khartoum State Ministry of Health (KSMoH), which enabled it to have access to epidemiological, programmatic and budget information. The narrow focus of the study also enabled the organization
to do in-depth surveys and interviews, and thereby present a vivid picture of the impact of the structure and financing of the health system on people, particularly women.

Collaboration by CSOs with government ministries or agencies can prove fruitful for both. CSOs often have substantial access to communities and can thus be a good source of information to government on the effect of government plans and programs. CSOs, on the other hand, may benefit from better access to government information. Moreover, their findings may be considered more legitimate for audiences that might not otherwise take the work of civil society seriously. Such collaboration has its risks, of course, and CSOs must always be ready to take an independent stance, even one that is not well-received by its government colleagues.

The Sharq Alneel Health Office (the government agency with primary responsibility for health care provision in the locality) shared its 5-year strategic plan (2007-2011) with PDV. That plan contained the following statistics:

• Roughly 71 percent of the pregnant women in the locality had made one or more antenatal care visit to a health center; only 58 percent made as many as three.
• Only 36 percent of the deliveries in the locality were assisted by trained personnel.
• Most deliveries were in the home, with only 16 percent of women having their baby in a hospital.

The figures arising out of PDV’s survey and interviews were somewhat different from those of the Health Office, but similarly grim. Only a third of the women PDV interviewed had had antenatal checkups at a health center during their pregnancy. More revealing, 92 percent of the women said that, because of the fees, they did not have such checkups unless they felt there was something wrong with the pregnancy. In addition, they reported being worried about the delivery fees charged at hospitals. It is fair to assume that these fees thus contributed to the fact that approximately half of the women surveyed delivered their babies at home with the assistance of a midwife. In practice, the fees undermine access to basic health care.

Combining field research and desk budget analysis can render valuable insights into the consequences of budget decisions and the implementation of specific policies. The Sharq Alneel Health Office’s statistics about antenatal visits were considerably higher than the numbers reported by the survey of women who should be using the services. Furthermore, these same women shed light on the detrimental effect of user fees on their choices regarding antenatal care and delivery. As a result, a policy of free primary care that, de facto, encourages local health facilities to raise much needed revenue at the service delivery point, in reality undermines its ultimate purpose, by driving away potential users.
Second approach: aligning per capita spending and health system information

Khartoum State comprises seven localities, three of which are predominantly urban: Bahri, Omdurman and Khartoum. The remaining four (Sharq Alneel, Jabal Awlia, Karary and Umbada) are predominantly rural. Primary health services are offered within localities. Funding for them comes from the State Ministry of Health through its regular budget (82 percent), with the remaining funds coming from the State Ministry of Finance. The SMoH allocates funds to localities on the basis of a number of criteria, including income level, wealth generated by the locality, and population. While at face value the criteria seem adequate, the way in which the different elements are combined and weighted does not render a fair result. From its budget analysis, PDV found that in 2007 this formula led to the following per capita expenditures (in Sudanese pounds, SDG) for primary health in the seven localities:

Most people in Sharq Alneel locality are poor, with a majority suffering extreme poverty. The population cannot afford private health care, and so must rely on government services. Despite this and despite the fact that residents in the urban centers of Khartoum State (Bahary, Omdurman and Khartoum) are wealthier than those in rural areas, significantly less was spent per capita on health care for people in the rural areas of the State. The results for other years were similar.

Lower per capita spending might be justifiable if the localities receiving less money already had higher quality services. However, the data PDV uncovered on health personnel alone indicated the contrary: Sharq Alneel, for example, had only one doctor for every 26,000 people, while in Khartoum locality, the ratio was 1: 8,400. Such disparities would call for a substantial effort to be made to increase spending in underserved areas, until a similar level of service provision has been achieved in all areas.

PDV’s recommendations

While a government crackdown on civil society prevented PDV from bringing extensive public attention to its findings, it did share with government ministries and agencies, legislators and civil society colleagues the following recommendations:

- The SMoH should seek to ensure that its spending improves health care services in rural areas, and equalizes access to quality health care among different localities.
- Overall, funds available for health care services within Khartoum State are too low. The federal government, with its ability to bring in much larger revenue than state governments, should significantly increase its spending on health care, and direct a substantial share of that increase to states in the form of conditional grants earmarked for primary health care services.

All governments use formulas to help them determine how much to disburse or devolve to lower levels of government. While these formulas may be based on sound criteria (such as population, poverty levels, etc.), they may nonetheless prove, in practice, to result in an unsatisfactory sharing of resources, because they fail to take into account important specificities that differ from area to area. In order to ensure compliance with the obligations of non-discrimination, government should regularly assess whether the formulas it uses actually enhance equality among different geographical regions.
Questions you might ask yourself or your government about ensuring that allocations and expenditures on ESC rights-related areas do not discriminate on the basis of geography.

- Does the government develop or have access to current data disaggregated by geographical regions that can be used to assess people’s access to enjoyment of their ESC rights? If so, what is that data? If not, why not?

- Is such data used by the (national and/or sub-national) government in developing its budgets touching on ESC rights-related areas? If not, why not?

- Are per capita allocations for services in such areas as health, education, work, water and so on similar across different areas of the country (or state)? If not, why not?

- Are people in specific geographic regions particularly disadvantaged in accessing their ESC-related rights? If so, which areas of the country are those?

- How does the (national and/or sub-national) government develop its budget to ensure that people in these areas will increasingly be on a par with other areas of the country in terms of their enjoyment of their ESC rights?

- Are there any programs, besides universal programs, that target these particularly disadvantaged areas, so as to close gaps?

- Has there been a process of decentralization in the country in recent years in the country? If so, what programs and services have been decentralized? How are these decentralized programs and services funded?

- If sub-national authorities are responsible for providing at least some of the funding for the services, what has the national government done to ensure equity among different areas of the country, given different funding capacities of different sub-national authorities?

- If national or sub-national government provides lower levels of government with block or conditional grants, what factors are included in the formula for allocations to different parts of the country or area? What difficulties has the government encountered in applying the formula (e.g., inadequate population data)? How has it sought to address these difficulties?

- Who was/is involved in developing the formula? Overseeing its implementation? Have questions been raised within the government or by civil society as to the equity of the formula? If so, what has been the government’s response to these questions?
The Article 2 Project

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Non-Discrimination

Article 2 & Governments’ Budgets

Failure to allocate and spend funds specially designated to counter the lingering effects of historic discrimination
The case in brief

In India Dalits are “outcasts,” people who fall outside the traditional four-fold caste system. They are physically and socially excluded, isolated from the rest of society. Historically they were considered “untouchables.” For centuries they were not permitted to own land and were barred from education. As a result, the majority live in poverty and over half are illiterate.

In more recent years legal protections have been put into place to address these injustices. A policy issued in 1979 by the Planning Commission of India called the Schedules Castes Sub Plan (SCSP) sought to ensure that Dalits were receiving their fair share of government spending. So that the government could more effectively move towards this goal, in 1995 the Planning Commission created a Minor Sub Head budget code, 789, to categorize all SCSP funds; in other words, expenditures by national and state departments targeting Dalits were to be marked with code 789. For years, however, the code was not applied. Without consistent application, it was impossible to know the extent to which government was complying with the SCSP mandate.

Since 2007, the National Campaign for Dalit Human Rights has worked with the Centre for Budget Governance and Accountability to document the failure of state and national governments to apply the code. They have also sought to track SCSP funds. To the extent that they have been successful in doing so, they have found that allocations have regularly been well below the 16 percent of the budget that should be earmarked for Dalits (in line with their share of the population). They have also uncovered numerous instances of funds designated for Dalits being diverted to uses that were in no way intended to advance Dalit rights.
The human rights issue

ICESCR article 2(2) prohibits both formal and substantive (de facto) discrimination. General Comment 20 of the UN Committee on Economic, Social and Cultural Rights (CESCR) elaborates on this provision. In paragraphs 8 and 9 of the General Comment the Committee says:

(a) Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice [...] States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination [...] (para. 8)

(b) In order to eliminate substantive discrimination, States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination [...] (para. 9)

In paragraph 7 the CESCR also says that non-discrimination is an immediate obligation.

The human rights argument

The Schedules Castes Sub Plan (SCSP) was adopted by the Planning Commission of India as a measure to “prevent, diminish and eliminate” historical conditions and attitudes that caused and perpetuated discrimination against Dalits. As a result, the SCSP would be permissible under the interpretation of ICESCR article 2(2) set out in General Comment 20.

The obligation of non-discrimination is an immediate one and, accordingly, governments must take immediate measures to correct conditions and attitudes that perpetuate discrimination. In this case, the Planning Commission created a code, 789, to allow funds directed to Dalits to be tracked, to ensure that an appropriate share of the national budget was being directed to Dalits. It appears, however, that for several years the Indian government failed to employ the code, thus making it impossible for it or outside monitoring agencies to determine whether appropriate shares of the budget were going to Dalits. Moreover, it appears that the government has regularly failed to fully allocate and spend the SCSP funds mandated by law, thus allowing the conditions that have resulted from systemic discrimination to persist unnecessarily.
Case study in detail

Introduction

The Constitution of India guarantees non-discrimination and declares that the “state shall promote with special care the educational and economic interests [...] in particular, of Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.” In 1979 the Planning Commission of India introduced a Special Component Plan (SCP), which made it mandatory for the government to ensure that a proportion of the government’s overall funds commensurate with the size of the Dalit population would be directed to programs for Dalits. In 2006-07 SCP was renamed Scheduled Caste Sub Plan (SCSP). The central objective of SCP/SCSP has been to proactively promote the education as well as social and economic development of Dalits, and play a “positive interventionist role to neutralise the accumulated distortions of the past” (National Policy of Education, 1986).

In practice, the SCP/SCSP has been plagued by a chronic under-allocation of funds. In 2007-08 only 6.1 percent of developmental funds were channelled through the SCP/SCSP mechanism. In 2011-2012, the allocations amounted to only 8.84 percent of the total outlay, when they should have been 16.2 percent. Moreover, many allocations were not in line with the purpose of the SCP/SCSP. At the state level, there have also been many cases of SCSP funds being diverted to activities that have no relation to the progress of Dalits.

An allocation is the amount the government intends to spend for a designated purpose. However, allocations on their own provide limited insight into a government’s compliance with its human rights obligations. To get a fuller picture, it is essential to examine what happens after an allocation is approved—by looking at how much of the allocation is spent and how it is spent. An allocation may appear to be in line with the government’s human rights commitments, but the spending may not be.

Initial Research

In 1995, the Planning Commission created Minor Sub Head code 789 to categorize all SCSP funds. However, when the Commission originally issued the instruction, it set no time frame for compliance, and the code was not implemented. While SCSP allocations
were notionally made in the national consolidated annual and five-year plan documents (that is, there were allocations stated in those documents in broad terms), these allocations were not reflected in the detailed “Demand for Grants” that the Executive submitted to the legislature for approval.

In 2007 the National Campaign for Dalit Human Rights (NCDHR) filed public interest litigation claiming that the government of Delhi state had not allocated the funds stipulated for Scheduled Castes. The state government insisted that it had, in fact in excess of the stipulated percentage of Scheduled Caste and Scheduled Tribe populations in the state. The government, however, was referring to notional (i.e., suggested) allocations and not to actual allocations in the detailed Demand for Grants.

NCDHR and the Centre for Budget Governance and Accountability (CBGA) gathered further evidence on SCSP allocations throughout the budget. They compared budget allocations with detailed Demands for Grants. They discovered that there was no way to really identify the funds, because code 789 was not being applied. It was thus impossible to know the extent to which governments were complying with the SCSP mandate—and impossible to confirm whether adequate resources were being spent for the benefit of Dalits.

ICESCR article 2 prohibits both formal and substantive (de facto) discrimination. In this case the SCSP requirement that funding for Dalits be in line with their share of population could be said to have met the requirement of formal non-discrimination. However, Demands for Grants were not forthcoming, and expenditures fell far short of that share. The government was thus not complying with its obligation of substantive (de facto) non-discrimination.

First round of advocacy and mobilization

NCDHR prepared brief informative documents that summarized its main code 789 findings. It disseminated these to institutions and individuals concerned with human rights, to national and international organizations, and the media. In this first round, it sought to harness support from within the government system. It identified allies within important government structures committed to the advancement of Dalits. It gained access to high-level stakeholders to whom its findings were relevant and who had the capacity to put pressure on relevant decision-making and regulatory bodies.

NCDHR also approached the Comptroller and Auditor General (CAG) because of the latter’s responsibility for auditing all government accounts. It brought its findings to the attention of the Planning Commission and provided members of Parliament with information based on its analyses.

In addition, NCDHR worked to build the capacities of social activists and administrators. It organized meetings in 14 states and Delhi to explain budget analysis, share its findings and disseminate information to the grassroots. It organized workshops on the importance of code 789 and how to track funds earmarked with it.
In Delhi, a large demonstration and day-long sit-in brought attention to the fact that funds that had been promised had never really reached Dalits.

NCDHR next filed a Right to Information (RTI) application with the Delhi government, asking why the code was not being used in the state. The application, together with advocacy and networking activities, exerted so much pressure on the Delhi government that it ordered all departments to introduce code 789 in May 2008. That same year, the CAG directed finance departments of the government and states to assign budget code 789 to all SCSP allocations.

While these booklets focus on ICESCR article 2, human rights are inter-related and interdependent. This relationship is vividly illustrated by the role RTI applications have played in this case. Civil society and communities can be far more effective in ensuring that their economic and social rights are guaranteed if, at the same time, the government is realizing people’s rights of access to information and to participate in public affairs.

More research – Dalit funds diverted

In November 2010 New Delhi hosted the Commonwealth Games. The media regularly reported on allegations of corruption and misuse of funds related to the Games. The Housing and Land Rights Network, which was carrying out research on the social, human and financial costs of the games, came across a document indicating that SCSP funds were being used for the games. They alerted NCDHR, which then examined the budget. Using information resulting from an RTI application, it confirmed that INR 7.44 billion (roughly USD 163 million) originally earmarked for SCSP had been diverted to the Games.

Turning up the heat

The corruption scandals surrounding the Games attracted a lot of media attention. The moment seemed right to put a spotlight on the diversion of SCSP funds. A report, “Whose Wealth? Whose Commons?”, which gave the names of public officials and political leaders who had authorized the diversion, caught fire in the media. NCDHR held many press conferences, using the opportunity to educate journalists on the SCSP issue. Subsequent media reports raised public awareness of the issue, and as journalists increasingly questioned officials, pressure on the latter increased.

NCDHR prepared informative notes for members of Parliament (MPs) and the legislative assembly. This information allowed MPs to ask the right questions. In August 2010, the Home Minister of India acknowledged the misuse of funds and committed the government to providing restitution. (Since then, over 75 percent of the funds have been returned).

Finally, a November 2010 report by a Planning Commission Task Force concluded that “Hardly any ministry is showing its SCSP outlays under separate budget heads. Some ministries are showing a notional earmarking, but the criterion followed in doing so is not uniform and transparent. Also, in the absence of this outlay being shown under a separate minor head (789), such notional earmarking does not have much significance, nor is its non-divertibility ensured.” In February 2011 the Union Government opened code 789 and all departments started using it.

The government’s obligation of non-discrimination is integrally related to the other obligations in ICESCR article 2. The CESCR has said that corruption in government expenditures amounts to a failure by the government to comply with its obligation to use the maximum of available resources to realize ESC rights. (See booklets on use of maximum available resources).
Questions you might ask yourself or your government about allocations and expenditures necessary to implement special measures adopted to combat the effects of historic discrimination.

Are there groups in the country that would qualify for special measures? If so, who are they? Does the government have in place policies, plans and programs to address and alleviate the effects of historic and/or systemic discrimination experienced by these groups?Were the affected groups involved in the formulation of these policies, plans and programs?

If there are such groups, are there specifically earmarked allocations in the budget to respond to the particular needs of the groups? If so, were the allocations arrived at by building on the relevant policies, plans and program designs? If not, on the basis of what factors was the size of the allocations determined?

Have accounting codes been established that distinguish such earmarked funds from other funds in the budget?

What processes, if any, has the government put into place to monitor the expenditure of these funds? Have the affected groups been formally involved in this monitoring process? If not, why not?

If they have not been formally involved, have independent civil society groups been monitoring expenditure of the funds? If so, what have been their findings?

Does such monitoring include:
- Matching policy and implementation plans to budget allocations and audited expenditures?
- Benefit incidence analyses to ensure that the affected groups are benefitting from the policies, plans and programs as intended?
- A designated procedure for reviewing all of the above by the legislature (specific committees, hearings, etc.)?

Are the policy, budget allocations, and expenditure and audit reports available to the public and easy to understand?
The Article 2 Project

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The case study in this booklet is derived from Vimala Ramachandran and Sapna Goel, “Tracking Funds for India’s Most Deprived: The Story of the National Campaign for Dalit Human Rights’ ‘Campaign 789’,” Albert van Zyl (Coord.), From Analysis to Impact, Partnership Initiative Case Study Series, IBP, 2011.

Authors: Ann Blyberg and Helena Hofbauer

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Non-Discrimination

Discriminatory allocations and expenditures on the basis of socio-economic status

Article 2 & Governments’ Budgets
Argentina is a federal system and local governments have the authority to plan, organize, finance and administer their local educational systems. Argentina’s national constitution respects the principle of equal opportunity and guarantees the provision of free primary education for every child in the country from five years of age. The City of Buenos Aires goes beyond the promises in the national constitution in guaranteeing in its own constitution access to education for every child in the city from 45 days of age. It also mandates that the budget allocated to education must not be spent on anything else.

From 2002 to 2009 the number of children in early education (45 days to 5 years) in Buenos Aires remained constant, even though there had been a steady increase in the number of children applying for early education. As a result, thousands of children were unable to participate in early education in public schools. Between 2002 and 2006, the number of excluded children increased by 37 percent. In 2006, 6,047 children were left out; by 2008 that number had risen to almost 8,000.

This increasing exclusion did not affect all children equally. Children living in the six poorest districts of the city were disproportionally affected; they accounted for more than half of all excluded children. In comparison, less than 15 percent of the excluded children lived in affluent districts.

The Asociación Civil por la Igualdad y la Justicia (Civil Association for Equality and Justice, ACIJ) was established in 2002 with the goals of strengthening democracy and protecting the rights of disadvantaged groups in Argentina. Their combination of public interest litigation with research and advocacy uniquely positioned them to take up the case of early education for the children of Buenos Aires.
The human rights issue

The Constitution of the City of Buenos Aires guarantees access to education for every child from 45 days of age. This is in line with, and indeed, goes beyond, the right to education guarantees in article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which Argentina has ratified.

The UN Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment 20 makes clear that ICESCR article 2(2), which prohibits discrimination on a wide range of grounds (including socio-economic status), encompasses both formal and substantive discrimination (para. 8). It says the following:

(a) Formal discrimination: Eliminating formal discrimination requires ensuring that a State’s constitution, laws and policy documents do not discriminate on prohibited grounds…

(b) Substantive discrimination: […] The effective enjoyment of […] rights is often influenced by whether a person is a member of a group characterized by the prohibited grounds of discrimination. Eliminating discrimination in practice requires paying sufficient attention to groups of individuals which suffer historical or persistent prejudice instead of merely comparing the formal treatment of individuals in similar situations.

The human rights argument

When formulating and spending its budget, a government must bear in mind its obligation of non-discrimination. It must not favor or disfavor particular groups solely on the basis of their ethnicity, gender, sexual orientation, political opinion or other grounds in the way that it allocates and spends its budget.

Budget allocations must be non-discriminatory; they must not unfairly earmark funds for certain groups or areas of a city or country (that is, governments must ensure formal non-discrimination). The related expenditures must also have a non-discriminatory impact (substantive non-discrimination).

While a budget or related policy may not, on its face, formally discriminate against these groups or areas, governments must also monitor the corresponding expenditures to ensure that different groups are benefitting equally from expenditures. When a government consistently spends less on key ESC rights-related goods and services directed to certain groups or geographical areas, this constitutes strong evidence of substantive discrimination.
Beginnings

From its inception, ACIJ has recognized that in order to represent and fight for the rights of poor communities, it needs to have genuine connections to these communities. While in this case it could not work directly with the affected families, it did collaborate with grassroots organizations in urban slums. This work allowed ACIJ to witness the failures of the education system and to document inequality in access.

ACIJ found that the difference between schools in poor and affluent districts in Buenos Aires was enormous. While in the poor districts classrooms were poorly constructed, overcrowded, without heating, and sometimes with no electricity or teaching materials, schools in affluent districts had computer labs, sport facilities, adequate heating in the winter and an abundance of teaching and learning materials.

Case study in detail

The most common forms of discrimination in government budgets are those based on gender, ethnicity, and socio-economic status. Discrimination is often multi-dimensional, because, for example, ethnic minorities are often disproportionately poor, and women are typically the poorest of the poor. Certain areas of a country (or state or city) are also often under-served in such sectors as health services, education, policing, affordable housing, etc., compared to other areas.

Challenges in access to information

Since a shortage of available spaces and materials in schools seemed part of the problems they had identified, ACIJ concluded that the budget was a critical piece in the puzzle. The organization soon learned, however, that neither the federal nor provincial government made detailed information of the education budget readily available.

ACIJ put the Freedom of Information Act in Buenos Aires to use, requesting of the government the following information:

- The total number of schools offering early education;
- The number of children applying for early education between 2001 and 2006, disaggregated by school;
- The number of children placed on waiting lists between 2001 and 2006, disaggregated by school;
- The budget allocated to infrastructure between 2001 and 2005, disaggregated by school; and
- Expenditure on construction, maintenance and school provisions, for the same period, disaggregated by school.
When the government failed to provide ACIJ with the requested information, the organization decided to go to court. In April 2006, the government was forced by a court decision to hand over the requested information.

Armed with the disaggregated data, ACIJ was able to compare the budget that had been allocated year after year for infrastructure and maintenance with the budget that was effectively spent. By means of this simple comparison, ACIJ made a shocking discovery: the city of Buenos Aires had been under-spending its budget for infrastructure, maintenance and supplies for schools offering early education, notwithstanding the ever-growing waiting list of children. Indeed, between 2002 and 2005 an average of 32.3 percent of the resources allocated for these purposes had not been spent.

**Changing gears—A class action lawsuit**

In December 2006 ACIJ filed a class action lawsuit against the government of Buenos Aires. It claimed that from 2002 to 2006 the government had not fulfilled the guarantee of early education and had violated its obligation of non-discrimination. ACIJ showed that:

- There was a consistent pattern of children being denied access to early education because of insufficient space in schools. While this situation affected the whole city, it was much worse in the poorer districts.
- The government consistently under-spent budget resources that had been allocated to improve school infrastructure and maintenance. These resources could have been used to build more schools or classrooms and thus open space for more students.

ACIJ accompanied its lawsuit with a campaign to create public awareness about the crisis and to encourage citizens to write letters of complaint to public officials. In addition, they engaged the media in publicizing their findings. The media was interested, because the case showed a consistent failure to provide early education, regardless of who was in power in the city.

In response to the lawsuit, the government denied that it had failed to fulfill its obligations, pointing to infrastructure investments it was then undertaking. However, it could not refute ACIJ’s findings regarding the under-spending of its budgets. Six months later, the Court sided with ACIJ, ruling that the government’s failure to guarantee early education in line with the constitutional directive clearly called for the judiciary to intervene.

The court concluded that the government had to finance universal access to early education, and ordered it to submit detailed information about all work and projects related to satisfying the demand for spaces in early education. The court also ordered the government to develop plans that would guarantee access to early education for every child between the age of 45 days and 5 years from 2008 on.
The tide turns

The government appealed the court's ruling. Following confirmation of the ruling by the appeals court, the case arrived at the city’s highest court, where *amici curiae* briefs from other CSOs, litigants and experts poured in. Fortuitously, a change in the city cabinet brought with it a more flexible minister of education who proved to be open to dialogue. The court suggested that the parties work towards an agreement. One was reached in 2011 after months of negotiations between state agencies, public officials and ACIJ.

ACIJ and the government agreed to develop a feasible work plan, with concrete deadlines. The government agreed to satisfy the demand for early education spaces, prioritizing the districts with the biggest backlog. It committed itself to making available the resources necessary to carry out the plan, and to clearly identifying subsequent budget lines that would attend to new needs. The government also committed itself to developing a database to systematize information on space shortages in early education, and to establishing a monitoring mechanism.

Overall, ACIJ’s case took more than five years. Reaching an agreement could only be considered a first step in the next phase of the struggle. Implementation has to be monitored.

In analyzing the budget to identify possible discrimination, it is necessary to look for both

1) allocations and expenditures where different treatment of different groups is readily apparent from line items in the budgets (when considered together with other relevant data, such as population figures); and

2) allocations and expenditures that seem equitable on their face, but which, in their impact, affect different groups differently.
Questions you might ask yourself or your government about discrimination in allocations and/or expenditures:

Does the government develop or have access to current data disaggregated by geographical areas and socio-economic groups that can be used to assess people's access to enjoyment of their ESC rights? If so, what is that data? If not, why not?

Is such data used by the government in developing its budgets touching on ESC rights-related areas? If not, why not?

Are people in specific geographic regions or socio-economic groups particularly disadvantaged in accessing their ESC-related rights? If so, who are they?

Are per capita allocations for services in such areas as health, education, work, water and so on the same in different areas of the country/region; for different socio-economic groups? If not, why not?

How does the government adjust its budget, if it does, to ensure that people in disadvantaged areas or socio-economic groups will increasingly be on a par with other areas and socio-economic groups in terms of their enjoyment of their ESC rights?

Does the government have in place a system for monitoring expenditures to ensure that they are made on a non-discriminatory basis? If not, why not?

If it does have such a system, how does the system work?

If the government has no system in place for monitoring expenditures, has civil society raised issues about discrimination in expenditures?

If so, what issues have they pointed to? What has the government done in response to the evidence they have provided?

Are certain groups of people more negatively affected by under-spending than others? If so, which ones and why?

What measures, if any, has the government taken to address the problem of under-spending?
Founded in 2002, the Asociación Civil por la Igualdad y la Justicia (ACIJ) is dedicated to the defense of the most disadvantaged groups and to the strengthening of democracy in Argentina. Its goals are to promote effective enforcement of the National Constitution and the rule of law, compliance with laws that protect disadvantaged groups, and eradication of all discriminatory practices. ACIJ also seeks to contribute to the development of participatory and deliberative democratic practices in Argentina. To these ends, ACIJ:

• Engages in collaborative efforts to improve functioning and greater transparency in public institutions;
• Promotes the enforcement of the National Constitution and effective compliance with laws that protect disadvantaged groups, and seeks the eradication of laws and practices which discriminate against historically marginalized minority groups;
• Raises awareness among citizens about their basic rights and the channels available for their protection;
• Makes proposals for public policy reforms; and
• Trains professionals from diverse disciplines who are committed to public interest issues.

For more information on ACIJ, go to: acij.org.ar/

The Article 2 Project

This booklet is part of the Article 2 & Governments’ Budgets handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures. The project encourages the use by civil society and governments of the legal provisions of article 2 to monitor and analyze governments’ budgets. Download the complete handbook at: www.internationalbudget.org/publications/ESCRArticle2.


*http://www.youtube.com/watch?v=JyuZ0gktahA&feature=player_detailpage

Authors: Ann Blyberg and Helena Hofbauer

February 2014
Non-Discrimination

Discriminatory expenditures based on health status

Article 2 & Governments’ Budgets
Access to Mexico’s public health system is directly related to a person’s employment status. A number of agencies and insurance systems provide this access to different sectors of the population. The Mexican Social Security Institute (IMSS) provides health services to people formally employed in the private sector, while the Institute for Social Security and Services for State Workers (ISSSTE) provides and regulates health services for public employees. Mexico’s oil company and the military each have their own systems, while the informally employed or unemployed have access to a network of hospitals and clinics that are run by the federal and state ministries of health, as well as by the popular insurance scheme.

This highly fragmented structure is governed by a heterogeneous set of by-laws and regulations, some of which have threatened to undermine the realization of the rights to health and social security. This was the case of public employees affiliated with the Sonora state ISSSTE (ISSSTESON), who were denied access to health services due to pre-existing medical conditions, with the institute arguing that covering such conditions would negatively affect its finances. Such exclusions, whether in the private insurance market or in public schemes, are not consistent with the rights to health and social security, as well as the guarantee of non-discrimination, contained in the Mexican Constitution.

In 2007, Sonora Ciudadana took on the case of a public worker who for a decade had been denied his rights to health and social security as a result of these regulations. Using strategies ranging from budget analysis to strategic litigation and media campaigns, Sonora Ciudadana succeeded in getting a ruling from the Supreme Court, which ultimately led to the elimination of discriminatory practices affecting a large number of public workers who suffered from pre-existing medical conditions at the time they were hired.
The human rights issue

The Mexican constitution guarantees the enjoyment of rights on a non-discriminatory basis, explicitly stating that a health condition cannot be used as a basis for discrimination (article 1). Article 4 provides for the right to the protection of one’s health, while article 123 guarantees the right to work and to social security, stating that provisions should cover health care for problems that are both work-related and those that are not.

Mexico has ratified the International Covenant on Economic, Social and Cultural Rights (ICESR), which guarantees non-discrimination (article 2), the right to work and to “equal remuneration for work of equal value without distinction of any kind” (article 7), and the right to social security (article 9).

The UN Committee on Economic, Social and Cultural Rights (CESCR) devoted General Comment 19 to the right to social security, saying that “[…] States parties […] must take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security […]” (para. 4).

Being a public sector employee in Mexico promises important benefits in the areas of health care, retirement and other social services. However, because of certain exclusions within the regulations governing the provision of social security benefits in Sonora, Mexico, public employees were vulnerable to discrimination in the enjoyment of a number of their rights, including the rights to work, to social security and to health. By excluding employees with certain pre-existing health conditions from access to benefits, Sonora was failing to comply with the obligation of non-discrimination in ICESCR article 2, and in article 1 of the Mexican Constitution, which specifically excludes health conditions as a ground for discrimination.
Case study in detail

The beginning

Abel Montenegro is a public worker of the municipality of Hermosillo in the state of Sonora, Mexico. He suffers from hypertension, which has not hindered him in carrying out his work-related duties. When he started working for the municipality in 1998, he did all the paperwork required to sign up for the social security system for public employees in Sonora, ISSSTESON.

Despite the fact that the Mexican Constitution guarantees the right to health services, article 6 of ISSSTESON’s by-laws on medical services required that public employees be in good health in order to be affiliated. On the basis of this article, Mr. Montenegro was barred from access to much-needed health services for a decade. Because he was not affiliated with ISSSTESON, Montenegro also lost out on other entitlements that normally come with formal employment: a pension fund, housing credits or a mortgage, and health services for his family, among others.

In 2007, Mr. Montenegro approached Sonora Ciudadana to explore if the organization could be of help. It agreed to take his case.

Governments at all levels (central, state or municipal) are obligated to realize human rights. The national or central government has the added obligation of ensuring that governments at the sub-national level are carrying out their human rights obligations, and if they are failing to do so, the national government must step in and provide for realization of those rights.

The importance of access to information

As a first step, Sonora Ciudadana used Mexico’s access to information law to secure documentation to help it understand the origins and evaluate the scope of the problem. Its access to information requests helped the organization document the numbers of people affected by the ISSSTESON by-laws just mentioned. Sonora Ciudadana learned that over the previous seven years, more than 400 public employees (including police officers, teachers and other low-wage workers) and their families had been refused coverage due to such pre-existing health problems as hypertension and diabetes. Especially alarming was the fact that the practice seemed to be on the rise.

In addition, the bases for denying access to ISSSTESON’s medical services seemed to be broadening. While the vast majority of cases comprised people suffering from diabetes, the institute had more recently started to turn down people affected by cancer and morbid obesity.

These public employees were being told that they had no entitlement to health care or the other benefits of social security, even though each day they put in their hours of work in public service. By-laws that should have been simply ensuring the effective operation of an institution were hindering the enjoyment of rights.

In addition to the information it gathered through these access to information requests, Sonora Ciudadana learned in a meeting with ISSSTESON’s board of directors that, from ISSSTESON’s perspective, it was not financially viable for
the Institute to affiliate people suffering from pre-existing medical conditions, especially those with chronic degenerative diseases.

**A strategic partnership for strategic litigation**

The regulations and by-laws that permitted ISSSTESON to discriminate against Mr. Montenegro appeared to be unconstitutional. However, Sonora Ciudadana had no legal staff to push the case to the courts. Therefore, it decided to join forces with Fundar–Center for Analysis and Research, a Mexico City-based organization dedicated to transparency, accountability and human rights. Fundar’s legal strategy pursued two goals: to ensure ISSSTESON’s fulfillment of Abel Montenegro’s rights and to secure a precedent that would be applicable to others’ cases.

In November 2008, the two organizations took Mr. Montenegro’s case to Mexico’s Supreme Court, which six months later ruled that ISSSTESON’s practices were indeed unconstitutional, because they were contrary to the spirit of articles 1, 4 and 123 of the Constitution. The court ordered ISSSTESON to immediately provide health services to Mr. Montenegro and his family. In June 2009, Abel Montenegro was formally affiliated with ISSSTESON.

**Increasing the pressure to reform the law**

The Supreme Court’s judgment, while clearly setting a precedent, only applied to Mr. Montenegro, which meant that ISSSTESON’s discriminatory clause continued to affect the rest of the excluded employees in Sonora. Many public workers approached Sonora Ciudadana for help. Using the Supreme Court decision, they started advocating for their rights through a campaign called “The Rebellion of the Sick”, which was eager to push for change through diverse tactics.

In response to ISSSTESON’s claim that affiliating all previously excluded public employees was not financially feasible and in support of the Rebellion campaign, Sonora Ciudadana submitted hundreds of additional requests for information, this time for detailed budget information, seeking to demonstrate that the government had money that could be used for this purpose. The organization identified several important pieces of information, all of which they used in their advocacy. They learned that:

- While ISSSTESON had incurred deficits every single year, several public institutions owed it money (500 million pesos as of 2008, approximately US 47.6 million); they had not paid the quotas due from them to affiliate their employees.

- Each year ISSSTESON paid increasing amounts to private health institutes to provide services that it could not offer. From 2002 to 2009 it also spent over 400 million pesos (US 38 million) to buy out-of-stock medicines from private drug stores, at a considerably higher price than what they were paying through their own procurement process.

- In the state budget as a whole, there were numerous non-essential expenditures that could be cut back in order to make room for an increased budget for ISSSTESON. The government had, for example, spent over 4 million pesos (close to US 381,000) to hire a dancer for a ceremony.
Finally, with the help of the “Rebellion of the Sick”, Sonora Ciudadana developed an estimate to determine how much it would cost to provide medical attention to those suffering from diabetes. The costing determined that medicines, medical appointments and blood tests for one patient for a year would amount to 25,482 pesos. Sonora Ciudadana estimated that providing care to the public employees who had been denied affiliation because of diabetes would cost ISSSTESON no more than 20 million pesos.

Members of the “Rebellion of the Sick” received training in understanding the budget evidence and were coached to speak about it in public rallies, talk shows and hearings in Congress. Under increasing pressure, the Health Committee in Congress commissioned its own costing study, which produced an estimate very close to that of Sonora Ciudadana.

Finally, on December 28, 2010, the state Congress of Sonora reformed the ISSSTESON law, to say that discrimination against public employees seeking affiliation due to pre-existing medical conditions was prohibited. ISSSTESON was forced to remove article 6 of its by-laws.

“Costing” can be an invaluable analytical tool in advancing human rights arguments, as this case demonstrates. In simple terms, “costing” is the process of assessing how much a specific good or service would cost to purchase. While arriving at a true cost for a good or service to be provided by a government can be difficult for a CSO, because of the technical nature of costing and because CSOs normally do not have access to such figures as government administrative costs, a carefully-reasoned estimate put forward by a CSO can have the effect of shifting the “burden of proof” onto the government, forcing it to justify its failure to provide the desired benefits.

Epilogue
Sonora Ciudadana documented affiliation practices of social security institutes in every one of the 32 federal states of Mexico. It uncovered the fact that social security institutes of 14 states had clauses that allowed them to discriminate against sick people, although only the state of Nuevo León was applying theirs. Indeed, the discrimination clauses in Nuevo León referred not only to employees with pre-existing conditions, but also to persons who were joining public services for the first time and were older than 50.

Sonora Ciudadana identified a group of employees in Nuevo León who had been denied their rights, documented the extent of the practice (more than 1,100 employees had been disqualified), analyzed the budget, developed a costing exercise, and launched a social marketing and advocacy campaign. This time around, the precedent of Abel Montenegro’s case and the reform of ISSSTESON’s bylaws in Sonora, paved the way for an expedited resolution. The state Congress of Nuevo León reformed the legal framework of ISSSTESON to prohibit discrimination on the basis of health conditions as well as age.

General Comments 19 (para. 10) confirms that “social security should be treated as a social good, and not primarily as a mere instrument of economic or financial policy.” While social security can be an important tool in stimulating an economy, for example, by providing purchasing power to the poor, this General Comment is saying that first and foremost, social security is a right and should be assessed by a different set of values than those used for assessing tools for advancing economic goals.

Governments have an obligation to use the maximum of available resources to realize economic and social rights. When a government says that it does not have the resources to guarantee specific rights, such as social security, to all the people, it must be able to show that it has explored all possible options for securing the necessary resources. Sonora Ciudadana’s budget analysis in this case demonstrated that the Sonora state government had failed to do such a full investigation.

N.B. This case also demonstrates how the obligation of non-discrimination goes hand-in-hand with the other obligations in ICESCR article 2.
# Questions you might ask yourself or your government about discrimination in the access to rights-related benefits

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<td>What rights-related benefits does the government provide to people in the country? Are these benefits dependent on employment status or are they provided to all people regardless of employment?</td>
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<td>Does the government maintain records on who has been denied rights-related benefits? If not, why not? If so, does it maintain records of the reasons for denial?</td>
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<td>If it does maintain records of the reasons it denies benefits, what reasons does it rely on? Is there a pattern that would indicate that certain people are being denied benefits as a result of their gender, disability, age, or other status that is not allowable as a basis for discrimination?</td>
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<td>Does government regularly assess its benefits-related regulations to ensure that they enhance people’s enjoyment of related rights and not serve as impediments to such enjoyment?</td>
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<td>Is the denial of benefits consistent across the country or is it more prevalent in certain areas? What are the reasons for different treatments?</td>
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<td>Does the national government monitor regulations used by sub-national governments related to benefits, to ensure that those regulations are consistent in different parts of the country, and that the regulations do not inappropriately interfere with people’s enjoyment of rights-related benefits?</td>
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<td>Does the government deny certain benefits to individuals on the basis of their health status? If so, which benefits? Which health status? What rationale does government provide for denying benefits?</td>
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<td>Does the government justify denying benefits to certain groups of people because it lacks adequate financial resources? If so, can the government demonstrate that it has explored all possible options for increasing resources to provide the specific benefits, including shifting resources from less essential areas, increasing efficiencies in expenditures, developing additional revenue-raising schemes, etc.?</td>
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SONORA CIUDADANAA

Founded in 2005 and based in the Mexican state of Sonora, Sonora Ciudadana is a civil society organization that promotes human rights, transparency, and accountability at the local level. Over the years, Sonora Ciudadana has focused on democratizing state institutions by advocating for greater citizen participation in policy processes. Sonora Ciudadana seeks to be an agent of change in the state of Sonora and beyond, by using access to information, social marketing, media and evidence-based advocacy to promote transparency and accountability, especially in relation to health.

For more information on Sonora Ciudadana, go to: www.sonoraciudadana.org.mx

The Article 2 Project

This booklet is part of the Article 2 & Governments’ Budgets handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) for how governments should develop their budgets, raise revenue and undertake expenditures. The project encourages the use by civil society and governments of the legal provisions of article 2 to monitor and analyze governments’ budgets. Download the complete handbook at: www.Internationalbudget.org/publications/ESCRArticle2.

The case study is based on Guillermo Noriega y María Eugenia Jaime Bracamonte, Discriminación y Acceso a los Servicios de Salud, Sonora Ciudadana-Fundar, Hermosillo, 2009; Artemiza Michel y Guillermo Noriega, La rebelión de los enfermos: No somos números, somos personas—Cronología de una historia de participación ciudadana y exigencia del derecho a la salud, Sonora Ciudadana, Hermosillo, 2011; and Guillermo Noriega, La rebelión de los enfermos: Auditoría Ciudadana—La discriminación en el ISSSTELEON, Sonora Ciudadana, Hermosillo, 2012.

Authors: Ann Blyberg and Helena Hofbauer
February 2014
The Use of Maximum Available Resources

Article 2 & Governments’ Budgets

ICESCR Article 2(1):

Each State Party to the present Covenant undertakes to take steps, […] especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means […]
What does the obligation to use the maximum of available resources in article 2 mean?

The UN Committee on Economic, Social and Cultural Rights (CESCR) is the body that provides the most authoritative interpretation of the meaning of article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The CESCR is charged with overseeing implementation of the ICESCR. States that have ratified the ICESCR must, as part of their treaty obligations, report regularly to the CESCR on steps they have taken to implement the treaty and on the status of the enjoyment of economic, social and cultural (ESC) rights in the country.

The Committee makes comments and recommendations on each country report. These comments and recommendations often set out the Committee's best understanding of the meaning of specific treaty provisions. Occasionally, the Committee will also issue a “General Comment” (GC) on a topic that has arisen repeatedly during its deliberations in order to provide greater clarity to governments and others as to the meaning of specific rights and obligations in the ICESCR.

At various points in these recommendations and General Comments, the CESCR has made reference to the government obligation to use the maximum of available resources to realize ESC rights, explaining where and how they believe a government has complied or failed to comply with this obligation. From these various sources, it is possible to distil the Committee's understanding of the obligation. This booklet elaborates on those interpretations that have most direct bearing on governments' budgets.

N.B. While this booklet focuses on the obligation to use the maximum of available resources (MAR), it is essential when addressing an issue to consider the MAR obligation in conjunction with the other two obligations in article 2—progressive achievement of the realization of ESC rights and non-discrimination. The meaning and implications of these two other obligations can only be properly understood, and complied with, in conjunction with MAR—and vice versa.
Mobilize as many resources as possible

The obligation to use the maximum of available resources (MAR) means that a government must do all that it can to mobilize resources within the country in order to have funds available to progressively realize ESC rights. While any country typically has a range of potential resources (human, natural, etc.), the financial resources represented by the government’s budget are key to realizing ESC rights.

The MAR obligation means that as long as fuller realization of ESC rights requires that more government resources be devoted to it, the government must make all possible efforts to raise as much revenue domestically as it can, without, of course, undermining the long-term viability of the economy. This means that the government must make every effort to collect all taxes and other revenue due it, all the while complying with the obligations of progressive realization and non-discrimination, and ensuring that people have access to the relevant information.

A government may believe that not taxing the economy heavily will better realize people’s ESC rights. Human rights obligations do not prohibit governments from pursuing such a course. The MAR obligation does mean, however, that if a government chooses to go this route, it must be able to show that this economic policy choice has, in fact, been more effective in realizing people’s ESC rights than a heavier tax regime would have been.

Many countries simply do not have enough of their own resources to fully realize their people’s rights. The MAR obligation means that where domestic resources are scarce, the government must do all it can to secure international assistance, including Official Development Assistance (ODA) so as to better be able to realize rights.

Incurring debt may also give government access to additional resources, and thus should be considered as one means of complying with MAR. However, it is essential to consider carefully the likely human rights impact of taking on more debt. Repayment of the debt can in the longer term cut into the resources available for ESC rights. The terms of the debt (e.g., high interest rates) may also have severe long-term consequences. In addition, it is essential to consider the use to be made of the funds. Will they go to ESC rights-related areas? Will they be invested so as to enhance the productivity of society in the long term or will they be squandered?
Give due priority to ESC rights

The CESCR has said that the MAR obligation means that governments must give “due priority” to ESC rights in the use of their resources. For a government’s budget this means that allocations and expenditures should be directed to ESC rights-related areas as a matter of priority.

To determine whether a government is giving ESC rights such “due priority,” it is useful to consider the share of the budget going to ESC rights-related areas, particularly when this share is compared to need. It can also be useful to compare this share across similarly-situated countries.

To assess whether a government is complying with its MAR obligation, it is also necessary to look at the composition of the funds directed to ESC rights-related areas. Priority should be given within these areas to meeting the government’s “core obligations” (as defined by the CESCR in its General Comments). In health, for example, these include reproductive health care and immunization (GC 14). When funds are needed to meet these core obligations, spending on lower priority items within ESC rights-related areas can amount a failure to comply with MAR.

It can be difficult to define precisely what constitutes “ESC rights-related” areas. Spending that is more directly related to such as health, water, food and education generally qualifies. However, funding in other areas, such as roads, for example, can also fall in this area if an important benefit of the roads will be to enable small farmers to bring their produce to market more easily (right to food). Funding for the tourism sector can be ESC rights-related if it is targeted to creating good jobs (right to work).
Expenditures must be efficient

Wasting funds amounts to a failure to use the maximum of available resources. Funds can be wasted in a number of ways, including:

- The government may pay more than it should for goods and services, or it may get poor quality for the funds spent.
- Waste also occurs when the government buys unnecessary items or items that are not useful for meeting priority needs. (See case study on The Use of Maximum Available Resources: Expenditures on non-essential items.)
- The government may decide that certain goods and services are needed to address a problem, while sound research points to other goods and services as more appropriate.
- When a department or agency receives its funding near the end of the fiscal year, it may spend it quickly, without sufficient thought.

The CESCR has said that a failure to spend funds efficiently may amount to a failure to comply with MAR. However, some expenditures that could be required from a human rights perspective—for example, for developing and maintaining health clinics in remote rural areas—might be considered an “inefficient” use of resources by some economists. Such clinics would be expensive to develop and maintain; more people would likely benefit if a similar amount of money were spent in a more densely-populated urban area. Because a larger number of people would potentially benefit, some economists would consider the latter a more “efficient” use of funds. It is important for human rights advocates to understand the different uses economists make of the word “efficient,” be clear about which of those uses are human rights-“friendly” and which are not, and argue against “efficient” expenditures that do not advance, and may even undercut, human rights by failing, for example, to ensure that the rights of marginalized groups are respected.
Expenditures must be effective

To comply with its MAR obligations, a government must spend its money effectively. The expenditures must have the effect of enhancing people’s enjoyment of their rights.

This means that even if a government spends its money efficiently, intending to realize people’s rights, it would be failing to meet its MAR obligations if the spending does not, in fact, help increase people’s enjoyment of their rights. In such a situation the government should look at its plans, the design of its programs and activities as well as their implementation, to determine how the spending might more effectively realize people’s rights. (See case study on The Use of Maximum Available Resources: Expenditures on items that are not effective in guaranteeing rights.)

Corruption can take many forms. Government agencies may, for example, buy goods and services from friends of employees at inflated prices, or funds may be siphoned off at various stops along the way from the national treasury down to the point of service delivery. Whatever shape or form it takes, failure by a government to tackle corruption is also a failure to comply with its obligation to use the maximum of available resources to advance ESC rights, because the funds that have been diverted or misused are wasted funds.

Funds allocated for ESC rights must be fully spent

Under-spending is a common problem in many countries. There are a number of reasons why this occurs. They include:

• A lack of capacity within government. This capacity gap may slow down implementation or result in a program never being implemented at all.
• A department or agency may receive additional funding towards the end of the fiscal year and may not be able to spend it by year-end due to, for instance, lengthy procurement procedures.

• Programs may be designed or structured in such a way as to make it difficult or impossible for people eligible for the program to claim its benefits.

• While funds may be allocated for a specific program, there may be reluctance within the government to see the program realized. Funds may be disbursed slowly, if at all.

• While a donor may have agreed to provide funding for specific sectors, all or some of the funding may never materialize.

The CESCR has said that funds allocated for ESC rights must be fully spent. Thus, under-spending of such funds would constitute a failure by a government to comply with its MAR obligations. In such a case, the government must identify the reasons for the under-spending and do its utmost to correct the problems that lead to it. (See case study on The Use of Maximum Available Resources: Under-expenditure resulting from barriers to access and lack of governmental capacity.)

Funds allocated for ESC rights-related programs must not be diverted to other areas

A budget as approved by a legislature may reflect solid human rights priorities. However, during the course of a fiscal year funds in a budget may be moved from one program or department to another and occasionally even from one ministry to another. The MAR obligation means that, even when it is otherwise legal to move funds in this way, it is not acceptable if it involves moving ESC rights-related funds to pay for non-ESC rights related programs, goods and services. Similarly, it is not acceptable to use needed funds that are allocated to meet core obligations within an ESC rights-related area to cover non-priority expenses.

Moving funds between different ESC rights areas may also raise issues related to the obligation of progressive realization. If, for example, funds are moved from education to health, this may result in retrogression with respect to realization of the right to education.
This booklet is part of the *Article 2 & Governments’ Budgets* handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures.

Article 2 of the ICESCR sets out that governments are obligated to “[…]take steps, individually and through international assistance and co-operation, […] to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant […] without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This handbook is, primarily, a resource for civil society organizations, human rights commissions, and even legislators, to hold governments to account for their human rights obligations. Download the complete handbook at: [www.internationalbudget.org/publications/ESCRArticle2](http://www.internationalbudget.org/publications/ESCRArticle2).

**Authors: Ann Blyberg and Helena Hofbauer**

February 2014

The Use of Maximum Available Resources

Article 2 & Governments’ Budgets

Expenditures on non-essential items
The case in brief

Health outcomes are poor in Tanzania and the right to health has not been realized. Overall allocations to health are low, but instead of spending its very limited funds carefully, the Ministry of Health and Social Welfare (MoHSW) wastes substantial resources on non-essential spending. This spending includes travel by MoHSW staff, payment of sitting allowances to them, and the purchase of luxury vehicles.

Civil servants’ basic salaries are relatively low in Tanzania. Civil servants are keen to receive additional income from travel expenditures and sitting allowances (per diems paid by government when civil servants attend training workshops or meetings outside the office). It is possible to find numerous examples of these types of expenditures in the MoHSW budget.

The Tanzanian civil society organization (CSO) Sikika, has documented such non-essential expenditures. It has put sustained pressure on the Ministry to use its funds for goods and services that are more likely to ensure for people in Tanzania the availability of good quality health care.
The human rights issue

General Comment 14 of the UN Committee on Economic, Social and Cultural Rights has said that the right to health guarantees in the International Covenant on Economic, Social and Cultural Rights (ICESCR) mean that health services should be:

- Available;
- Accessible;
- Acceptable;
- Of good quality.

Article 2 of the ICESCR talks about what a government must do to realize the right to health. This includes using the maximum of its available resources to ensure availability, accessibility, acceptability and quality of health services.

The human rights argument

Where a government is spending funds on non-essential goods and services, it is failing to use the maximum of its available resources to realize economic and social rights.

It is not sufficient that a government’s allocations appropriately prioritize economic and social rights. It is essential to ask on what the funds – whether allocated for health, education, work programs, water, or some other related area – are being spent. Are they being spent on goods and services that are most appropriate for ensuring that people’s rights – to health, education, work, water, etc. – are being realized?

Civil society budget groups have found that government budgets in critical areas are too often “heavy” with administrative or non-essential expenses. While administration is essential for the adequate provisioning of services, sometimes such a significant share of resources is going to administration that direct service providers are short of funds. Alternatively, essential administrators may be spending funds on non-essential goods and services.
Case study in detail

Overview

Sikika examined allocations in the Tanzanian Government’s 2008/2009 budget after the latter was tabled in Parliament, and coined the term “unnecessary expenditures” to describe budget lines for such as travel and sitting allowances. For that year, Sikika found that in the health sector alone 22.6 billion Tanzanian shillings (Tshs) (approx. US$ 18.6 million) had been allocated for allowances, Tshs 3.9 billion (US$ 3.2 million) for workshops and training, Tshs 1.6 billion (US$ 1.3 million) for overseas and local travel, and Tsh 6.0 billion (US$4.9 million) for vehicles – for a total of Tshs 34.2 billion (US$ 28.2 million) in “unnecessary expenditures.” Sikika argued that this money should be allocated to items that would more effectively improve health care.

When these figures were presented at the Health Sector Review, which is attended by government, donors and CSOs, officials were extremely displeased. However, the issue got the attention of the Prime Minister, who announced the following month that future government spending on workshops and seminars would need to be approved by his office, and that restrictions would be placed on purchases of new vehicles. The Budget Guidelines of February 2009 included a special section that called for spending cuts on training, workshops, travel and vehicles.

Sikika’s subsequent analysis showed that in 2009/2010 overall allocations to “unnecessary” categories decreased by 22 percent. However, the decrease was concentrated in training and workshops, while other categories saw increases. In 2010/2011 there was a nominal increase in total unnecessary expenditures.

When items that directly and effectively realize people’s rights are not available in sufficient quantity (for example, essential medicines), spending on non-essential items constitutes a failure by government to use the maximum available resources to realize ESC rights. Government must monitor expenditures to ensure that funds in the budget are being used first and foremost for items essential to the realization of ESC rights.
Research and analysis

Here are the simple steps Sikika took to arrive at its findings.

1. In Tanzania the annual Controller and Auditor General (CAG) report identifies a range of questionable expenditures. Guided by findings in earlier CAG reports about questionable expenditures by the MoHSW, Sikika examined the Ministry’s budget proposal of 2008-09 and identified some problematic budget lines. Simple line-by-line addition resulted in shocking numbers:

<table>
<thead>
<tr>
<th>Item</th>
<th>Amount in TSh</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workshops/training</td>
<td>3,936,743,900</td>
</tr>
<tr>
<td>Overseas and local travel</td>
<td>1,649,302,200</td>
</tr>
<tr>
<td>Allowances</td>
<td>22,627,302,307</td>
</tr>
<tr>
<td>Vehicles</td>
<td>6,001,509,282</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>34,214,857,689</strong></td>
</tr>
</tbody>
</table>

2. In order to examine government-wide “unnecessary expenditures,” Sikika developed categories that would be easy to understand and comparable over time. It looked through the whole budget, noting line items of recurrent expenditures that appeared consistently across ministries. It developed six overarching categories of “unnecessary expenditures:”

1. Training (domestic and overseas);
2. Allowances (discretionary, non discretionary, and in-kind);
3. Travel (domestic and overseas);
4. Fuel, oil, and lubricants;
5. Purchase of new vehicles;
6. Hospitality.

Of course, not all such expenditures can automatically be labeled as “unnecessary.” Nonetheless, Sikika decided to single out these items, because they knew that in Tanzania allowances, training funds, and related expenditure are often used for political patronage or as perks for underpaid civil servants. Trainings are thus conducted in expensive hotels, and officials are paid allowances to attend them. Vehicles purchased are often luxury vans.

3. Each year when the new budget books are tabled in Parliament, Sikika updates its file on “unnecessary expenditures”. This allows it to identify trends among ministries and departments, as well as trends within specific agencies. Comparisons over three years allowed Sikika to document that while overall allocations to the categories decreased by 22 percent from 2008-09 to 2010-11, training carried the brunt of the reduction, with its allocation cut by 80 percent over two fiscal years. Allowances, on the other hand, kept increasing. Reductions were also not uniform across ministries, departments and agencies. For example, Public Debt and General Services reduced its allowances from TSh 4 billion (US$ 2.98 million) to TSh 307 million (US$ 226,000), while the Electoral Commission increased allowances from TSh 389 million (US$ 290,000) to TSh 27.3 billion (US$ 20 million).

Advocacy and outreach

Strategy 1: High-level advocacy

Sikika first presented its analysis to the Health Financing Technical Working Group, which plays an advisory role to the health sector. It did not make a significant impact on that group. The analysis was presented again, some months later, to the annual Health Sector Review, another gathering of government, donors, and CSOs, under the leadership of the Ministry of Health and Social Welfare. Presenting the analysis at that Review paid off, as was already mentioned.

It seems that Sikika’s high-level approach—within a space convened by the MoHSW, but in which other key players, such as donors, were also present—was a good strategic choice. The space provided direct
access to Sikika’s key target audience (the MoHSW) and enabled them to present their arguments in their own words. As it turned out, the timing proved to be perfect for influencing the subsequent year’s Budget Guidelines.

It is important to select the target audiences for an advocacy message carefully; it is also important to think about how to frame the message. Audiences such as the Technical Working Group or participants in the Health Sector Review would have a high level of knowledge about the health sector, policy and financing. As a result, it would likely be feasible and useful to present figures about funds directed to “wasteful expenditures” and how those funds might be better spent. These same audiences should be able to understand technical discussions about law and treaty obligations. It would thus be feasible to point to the government’s legal obligations under article 2.

Strategy 2: Advocacy with indirect decision-makers

Sikika’s analysis of “unnecessary expenditures” in the budget proposal for 2009-10 pointed to the fact that the Prime Minister’s directives and the Budget Guidelines were being followed only selectively. After targeting these findings to the Ministry of Finance and the MoHSW without positive responses, Sikika decided to direct its advocacy efforts towards Members of Parliament (MPs) serving on the Social Services Committee. By targeting that Committee—key players in the area of government accountability—Sikika hoped to strengthen its role in oversight and budget planning.

Legislators are part of government, and as such, have human rights obligations. Informing legislators and legislative committee members about issues and about their roles in oversight and budget decisions should include information about the government’s human rights obligations, the place of the budget in fulfilling those obligations, and what legislators should do to ensure that the government is meeting its human rights obligations.

Strategy 3: Media outreach

After reaching out to Parliament, Sikika decided to engage with the public via a media strategy to publicize its findings broadly and keep the issue alive. Media coverage was universally positive, and unnecessary expenditures have become an unavoidable topic of discussion whenever the budget is tabled. Now, when the government falls short in enforcing its own directives, the organization has been able to use the media to denounce its shortcomings—thereby keeping the issue in the public’s eye.

While ICESCR article 2 obligates governments to progressively achieve realization of the right to health (using the maximum of available resources), an increase in expenditures by a Ministry of Health may not, in itself, translate into increased realization of that right. Similarly, a decrease in unnecessary or wasteful expenditures would not, in itself, guarantee that additional funds are being spent in a way that effectively realizes people’s right to health. In other words, increases and decreases in funding for essential services are important pieces of evidence as to a government’s compliance with its article 2 obligations. More conclusive evidence, however, would have to be derived from trends in statistics related to mortality, morbidity, disease, etc.
Questions you might ask yourself or your government about expenditures on non-essential goods and services:

What share of the budget is spent on non-essential categories of expenditure? How has the share of such expenditure changed in recent years?

Who has the authority to decide on these expenditures—the specific ministries, departments or agencies (MDAs) making the expenditure, the Ministry of Finance or someone else?

What structures and processes does the government have in place to identify non-essential spending of various types? What regulations limit or regulate such expenses—a Finance Act? Treasury regulations?

Does civil society have a role in the structures and processes that monitor non-essential spending?

Over the past 3-5 years has the government identified instances of non-essential and at times excessive spending? If so, which MDAs were involved? What actions did the government take?

Over the past 3-5 years has the Supreme Audit Institution (SAI) identified instances of non-essential spending? If so, which MDAs were involved? What action did the legislature take on the SAI’s report?

Have any civil society groups brought to the government’s attention instances of non-essential or wasteful spending? If so, what actions has the government taken in response?
Sikika

Sikika, which means “be heard” in Kiswahili, is a civil society organization (CSO) focused on health advocacy in Tanzania. Founded in 1999, Sikika has been working on budget issues since 2005. The organization’s overall vision is a Tanzania where healthy and responsible citizens enjoy equitable, affordable, and quality health services as their basic right. At the local level, Sikika works with health service users, providers, district authorities, and policymakers in four districts. As part of this work, Sikika engages citizens in demanding transparency and accountability in health service provision through participatory monitoring of district health sector planning and performance. At the national level, Sikika works with policymakers in the Ministry of Health and Social Welfare, the Prime Minister’s Office and Parliament. Sikika advocates for the provision of timely and accessible information on the health sector as well as participatory planning, implementation, and evaluation of health and HIV/AIDS programs.

For more information on Sikika, go to:

sikika.or.tz

The Article 2 Project

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Authors: Ann Blyberg and Helena Hofbauer

February 2014
The Use of Maximum Available Resources

Article 2 & Governments’ Budgets

Under-expenditure resulting from barriers to access and lack of governmental capacity
The case in brief

In 2005 the Government of India passed the National Rural Employment Guarantee Act (NREGA), guaranteeing the country’s rural poor the right to work and to security of livelihood. The government promised to provide 100 days of unskilled work per year to every poor rural family needing employment. Not only could a person receive paid employment under the National Rural Employment Guarantee Scheme (NREGS), but once they demanded work, they would become eligible for compensation if paid employment were not provided within a 15-day period.

Implementation of NREGS has been plagued by bureaucratic glitches and riddled with corruption. In the first two years of the Scheme only slightly more than half of those registered for the program applied for work, and only 10 percent of those applying were offered the full 100 days promised. As a result of a range of such problems, funds allocated for NREGS were significantly under-spent.

The NREGS is implemented by the following system of governance

Under NREGS, the gram panchayat prepares a list of public works projects fitting the stipulations of the law. Administrative and technical approval for the list comes from the janpad panchayat. Together with program officers from the zilla parishad, a labor budget is prepared, covering those who might need work during the year. Funds are allocated accordingly.

The village secretary maintains a muster roll of people who work, the materials used and work done. This is submitted each week to the block level for technical evaluation. A payment order or check is subsequently issued to the bank account of the gram panchayat, which in turn issues a payment order for the bank to transfer wages into the bank accounts of the individual workers.
The human rights issue

General Comment 18 (GC 18) of the UN Committee on Economic, Social and Cultural Rights details the Committee’s understanding of the right to work. GC 18 says that the right to work means:

• Availability. States parties must have services designed to assist and support individuals to enable them to identify and find available employment;

• Accessibility. This includes a guarantee that access to work will be provided on a non-discriminatory basis. It also means that people have the right to seek and obtain information on the means of gaining access to employment;

• Acceptability and Quality. These two guarantees relate to working conditions, the right to form trade unions and to freely accept work.

The General Comment also says that States that are unwilling to use the maximum of their available resources for the realization of the right to work are in violation of their obligations under article 6 of the International Covenant on Economic, Social and Cultural Rights, guaranteeing the right to work.

The human rights argument

Despite the fact that the Indian economy has been growing rapidly in recent years, large sectors of the population still suffer from extreme poverty. Millions of people’s right to work is not being realized. When people lack work, they cannot secure the resources necessary to provide essential food, housing, education, health care and other necessary goods and services for themselves and their families.

The Government of India has enacted the National Rural Employment Guarantee Scheme, which, if properly implemented, would make a significant contribution to realizing people’s right to work. However, the Indian civil society organization (CSO), Samarthan, has documented numerous problems with implementation of the Scheme, including substantial under-spending of allocated funds, which has resulted in the Scheme’s falling far short of its promise of realizing the right to work.

Where a government is failing to fully spend funds allocated for ESC rights-related areas, it is failing to use the maximum of its available resources to realize these rights.
Case study in detail

Problems with NREGS

Samarthan has monitored implementation of NREGS since the NREGA was enacted. Early on it discovered that:

1. Many poor families had no clear understanding of their entitlements under the Scheme.
2. Many people lacked job cards, without which it was not possible to apply for work under NREGS.
3. Often, people applying for work failed to get a written receipt acknowledging their request. Without it, it was impossible to hold the village secretary accountable.
4. In many places, the village secretary kept people’s job cards, making it impossible for them to demand work.

Samarthan also documented that people who had worked received their payment only after considerable delays.

Awareness-raising within communities

Samarthan developed an ambitious awareness-raising campaign in ten villages to ensure that people knew about their right to work, knew how to apply for work under NREGS, and got paid for their work. Through youth groups, they:

- held meetings with people in the villages who needed work;
- launched a house-to-house awareness-raising effort;
- developed training materials on the requirements and procedures related to NREGS;
- trained other youth groups, who could then assist people in applying for work; and
- printed and distributed pamphlets to explain NREGS’s features.

Moving from house to house, Samarthan distributed job application forms and made them available in grocery stores. They stressed that applicants should get a dated receipt for their application. They assisted people in filing on-line application forms. Once work demands had been filed in a village, Samarthan and the applicants put pressure on the village secretary.

General Comment 18 emphasizes that governments have an obligation “to undertake […] educational and informational programs to instil public awareness on the right to work.” This means that it is not sufficient for a government to simply introduce a program like NREGS. It must ensure that people who need work know about the program, and are provided with detailed, accessible information about the opportunities it offers, who would qualify and how to successfully apply for it. In this case, both the federal and local governments were failing to meet this obligation in adequate ways.
Developing capacities of village officials

Samarthan, however, also discovered that village secretaries lacked the capacity to plan work projects or to budget for work demands; the federal government had not trained the officials to perform this task. As a result, the planning and budgeting were being undertaken by officers at the district level. This created imbalances and operational problems.

If the implementation of NREGS was to improve, village officials would need to learn how to plan and budget for it. Samarthan helped village officials to identify public works that, according to the law, could be used to respond to job demands. These public works were assembled into a plan, which provided officials with a list of projects readily available to generate employment. This plan received technical and administrative approvals from officials at the block level.

Samarthan also trained the village secretary to prepare and request labor budgets. On the basis of the number of people holding job cards together with the average number of people reporting for work during the previous year, Samarthan and village officials estimated the likely upcoming demand for work. These estimates were used to calculate the likely cost and finally translate it into a budget number.

Samarthan’s willingness to sit down with village officials and work with them to find solutions earned the organization their respect. That respect together with the organization’s ties to the communities gave it substantial power in dealing with officials above the village level.

When a government under-spends an ESC rights-related budget, it is failing to comply with its MAR obligation. Sometimes the under-spending may be the result of a lack of capacity by civil servants to properly and fully implement a program. Government must do its utmost to identify where such capacity is lacking and, when it has identified a lack, move quickly to increase the capacity of civil servants/government service providers to do their jobs.

Moreover, a government cannot excuse itself from its human rights obligations simply because a civil society group is willing to undertake a task that is the government’s responsibility.
Improving transparency and accountability

Samarthan has facilitated social audits in over 800 panchayats. Community leaders and youth volunteers have been identified as facilitators. Samarthan has developed district-level master trainers to support them, to ensure an effective social audit process. When officials have not wanted to provide NREGS records to the facilitators, online data has been downloaded by Samarthan and provided to them. Facilitators have verified these records directly with NREGS workers and communities.

The social audits have uncovered numerous cases of fake entries of payments, delayed payments to workers, and incomplete investments. These findings have resulted in proactive decisions in gram sabhas, in addition of being shared with NREGS officials and policy makers.

The social audit process has generated self-confidence among the villagers, and has proved that the community can influence and monitor delivery of their rights and entitlements.

Sub-national, as well as national, governments are obligated to use the maximum of available resources to realize ESC rights. In this case, all levels of government responsible for implementing NREGS must use the maximum resources available to ensure that people’s right to work is guaranteed. A national government has the added obligation of monitoring ESC rights-related programs at the sub-national level to ensure that those governments have the resources and capacity to implement the programs in an effective and efficient manner, and are doing so.

Media – only when all else fails

Early on Samarthan decided that its main strategies were going to be mobilization and collaboration, not confrontation. In the course of its work the organization has heard countless stories of people wanting to apply for work but being rejected, of altered muster rolls, job cards held back, corruption at project sites, etc. However, Samarthan has only handed stories about these situations to the media when they were failing to get the attention of the government in other ways.
Questions you might ask yourself or your government about under-expenditures that are a result of barriers to access and/or lack of capacity on the part of governmental officials.

- Do specific ministries, departments or agencies (MDAs) regularly under-spend their allocations? If so, which ones, and what are the reasons they do so? Do any sub-national governments regularly under-spend allocations in their budgets? If so, which ones, and why?

- Are there specific program areas within MDAs that regularly under-spend? If so, what are the reasons? Are specific program areas of sub-national governments regularly under-spent? If so, which ones? For what reasons?

- Is under-spending, whether by the national government or sub-national governments, more consistent in certain areas of the country? In urban or in rural areas? If so, what are the reasons?

- Are certain groups of people more negatively affected by under-spending, whether by MDAs or in program areas, than others? If so, which ones and why?

- What measures, if any has the government taken to address the problem of under-spending? How has it responded to reports by oversight institutions like the Supreme Audit Institution and questions by the legislature that refer to under-spending in ESC rights-related programs?

- When under-spending with regard to ESC rights-related programs has been the result of barriers that have impeded the access of intended beneficiaries to a program, what steps has the government taken to eliminate those barriers?

- When under-spending on ESC rights-related programs has been due to the incapacity of government officials—whether at the national or sub-national level—to efficiently implement the programs, what steps has the government taken to bring that capacity up to the necessary level?

- When programs in ESC rights-related areas under-spend, what is the procedure for deciding for the roll-over of such funds into the next fiscal year? Are efforts made to protect these funds or are they returned to the Ministry of Finance indiscriminately?


defended of the most vulnerable groups. To these ends, it 

• Engages in collaborative efforts to improve functioning and greater transparency in public institutions; 

• Promotes the enforcement of the National Constitution and effective compliance with laws that protect disadvantaged groups, and seeks the eradication of laws and practices which discriminate against historically marginalized minority groups; 

• Raises awareness among citizens about their basic rights and the channels available for their protection; 

• Makes proposals for public policy reforms; and 

• Trains professionals from diverse disciplines who are committed to public interest.

Samarthan

Established in 1994, Samarthan works in the states of Madhya Pradesh and Chattisgarh in India. The CSO promotes participatory development and governance through direct field action, capacity-building, research, and advocacy. Samarthan has trained both government officials and the public on India's Right to Information Act and has worked to facilitate community participation in development plans. It has worked with local village development committees to improve their capacity to participate in the Madhya Pradesh Rural Livelihood Project and has trained local governing bodies to monitor programs like NREGS. The organization's research activities include analyses of the implementation of the NREGA and the Right to Information Act, as well as assessments of the viability and activities of India's local government system (Panchayati Raj). Samarthan works on issue-based partnerships with more than 200 CSOs to demonstrate participatory governance and amplify the voices of the poor, Dalits (scheduled castes), tribal groups, and women in policy-making platforms.

For more information on Samarthan, go to: www.samarthan.org

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The case study in this booklet is derived from Ramesh Awasthi, “Samarthan’s campaign to improve access to the National Rural Employment Guarantee Scheme in India,” Albert van Zyl (Coord.), From Analysis to Impact, Partnership Initiative Case Study Series, coordinated by IBP, 2011.

Authors: Ann Blyberg and Helena Hofbauer

February 2014
The Use of Maximum Available Resources

Article 2 & Governments’ Budgets

Expenditures on items that are not effective in guaranteeing rights
The case in brief

The Seven Towers, a social housing project, is in an electoral ward in Belfast that has consistently been rated as one of the most deprived in terms of unmet housing needs in the whole of Northern Ireland. The Seven Towers Residents Group has collaborated with Participation and the Practice of Rights (PPR) since 2006 on a campaign to identify and seek to remedy problems that are obstacles to the residents' enjoyment of their right to housing. Surveys have consistently confirmed that large numbers of residents suffer from dampness and cold in their flats, and that the heating system in the Towers is inefficient and expensive. Temperatures remain low and dampness persists.

The Northern Ireland Housing Executive (NIHE) manages the flats for the Department for Social Development. In 2007 the residents learned of an NIHE plan to clad the exteriors of the Towers. Cladding would involve fitting a PVC rain screen to the building exteriors. Its primary purpose would be to help maintain the condition of those exteriors. It would have no significant impact on the dampness and cold in the flats.

Using existing Freedom of Information laws, PPR requested information about NIHE's expenditures on maintenance over the previous decade. From the limited information provided, PPR was able to deduce that little had been spent on maintenance related to the residents' needs. PPR also did an estimate of what it would cost to replace the existing heating system with one that was more efficient and less costly to residents. It concluded that such a replacement would cost little more than 25 percent of what the cladding would cost, while addressing directly the problems of cold and damp. In addition, the new heating system would save residents significant amounts on their heating bills.

Through a series of public meetings, PPR has managed to bring about greater public awareness of the problems in the Seven Towers. The residents and PPR also brought the results of their budget analysis to the attention of the Minister for Social Development. While he rejected the alternative proposed by them, the residents' and PPR's efforts have increased NIHE's awareness of residents' needs and of their right to housing, and has ensured greater accountability.
The human rights issue

The NIHE’s “Decent Homes Standard” says that publicly-funded housing must:
- Meet the statutory fitness standard— [...] be free from serious dampness...
- Provide a reasonable degree of thermal comfort.

This standard is in line with article 11 of the ICESCR, which guarantees the right to adequate housing. The CESCR’s General Comment 4 [para. 8(d)] interprets this right to include habitability:
Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp [...] or other threats to health...
General Comment 4 also guarantees affordability [para. 8(c)].

Article 25 of the International Covenant on Civil and Political Rights guarantees people the right to participate in public affairs.

The human rights argument

The CESCR has interpreted the obligation to use the maximum of available resources to realize ESC rights to mean that governments’ actions on ESC rights must be effective. They must have the effect of realizing rights, in this case the effect of ensuring the habitability and affordability of the social housing.

Governments have an obligation of conduct —i.e., they must take actions to realize human rights— and of result. With regard to the government’s budget this means that it is not enough for government to spend money, in this case on housing. Government must do its utmost, within the funding available to it, to ensure that the plans, programs and projects it intends to implement are those most likely to realize people’s rights.
When a government chooses, among the options available to it, projects and designs that are not likely to have the effect of realizing people’s rights—as the NIHE has done in this case—it is failing to use the maximum of available resources to realize ESC rights.

Moreover, by failing to give serious attention to informed alternatives proposed by residents, the NIHE has not respected their right to participate in a meaningful fashion in public affairs.
Case study in detail

Background

Northern Ireland is quite damp. Belfast experiences more than 200 rainy days annually and the city is cold during winter months. Staying dry and warm can be a challenge.

The Seven Towers is a social housing project in an area of North Belfast that has a majority Catholic population. The Catholic population in Northern Ireland has historically experienced higher rates of unemployment and greater poverty than have Protestants. In 2002, 80 percent of those in “housing stress” (i.e., with the greatest need for housing) in North Belfast were Catholic. By 2008 the number of Catholics so positioned had increased, while the city had also experienced a significant increase in the numbers (although still much smaller) of Protestants in “housing stress.”

Seven Towers is situated in the New Lodge area of Belfast, which has consistently been rated one of the most deprived in terms of unmet housing needs in Northern Ireland. The residents of the Seven Towers have regularly reported mold on the walls of their flats as a result of dampness. In winter the flats stay colder than what is considered healthy by the World Health Organization (WHO). Insulation is poor and the heating system is inefficient and expensive to run.

Seven Towers Residents Group and human rights indicators

Since 2006 the Seven Towers Residents Group has collaborated with Participation and the Practice of Rights (PPR) to address their housing problems. They use a human rights-based approach to campaign for change around identified problems that conflict with their right to an adequate standard of living, including the right to housing.

Using indicators and benchmarks that they have developed on the basis of international human rights standards, residents have been able to monitor whether or not their rights are being progressively realized. Among those indicators are the percentage of previously reported damp units still experiencing problems with damp, and the percentage of residents dissatisfied with the existing heating system.

In 2011 PPR learned from Seven Towers residents that:

- 45 percent of those surveyed had had problems with dampness over the past two years; and
- 89 percent were unhappy with the heating, with 85 percent of those unhappy considering the heating to be too expensive.
Participation is not only a right in itself, but also helps ensure that government actions are effective in furthering people’s enjoyment of their ESC rights. Through consulting with people to identify where enjoyment of their rights falls short, government can do a better job of targeting its spending to meet felt needs.

Government’s cladding proposal

The NIHE manages social housing for the Department of Social Development of Northern Ireland. In October 2007 the Seven Towers Residents Group was briefed by NIHE on a plan it had developed to clad (fit a PVC rain screen to) the exteriors of the Seven Towers buildings. According to the economic appraisal undertaken of this plan in November 2007, the cladding would cost £7million (approx. US$14.5m). The objectives of the cladding included upgrading the health of residents and safety of the buildings, providing accommodation that met the needs of residents, and reducing the costs of future maintenance of the exterior of the buildings.

When Seven Towers residents asked NIHE how the cladding would help heat retention and reduce damp in the flats, NIHE responded that it was not intended to do that, and would not greatly enhance insulation. Thus, according to the NIHE, the cladding proposal would not even fulfill its own objective of providing accommodation that met the needs of the residents. Moreover, the cladding would not improve health problems caused by dampness and cold in the buildings.

At the same time, according to one of NIHE’s regular assessments into the condition of social housing stock, this one undertaken in 2009, there were no structural integrity questions with regard to the exteriors of the buildings, and thus the cladding was not essential in enabling NIHE to meet the Decent Homes Standard of structural safety.

As a result of a Freedom of Information request made in August 2010, residents learned that over the previous nine years NIHE had spent £3.3million (approx. US$5.14m) on maintenance of Seven Towers. It appeared, however, that the bulk of that money had been directed to installing CCTV, replacing lifts (elevators), and maintaining the exterior of the buildings. PPR was unable to ascertain what had been spent in response to residents’ needs with regard to dampness, cold and the cost of heating.

CSOs in countries around the world have difficulty in accessing budget information. Even more difficult is accessing appropriately disaggregated data as well as information about sub-national budgets. The last Open Budget Index (2012)* reveals that the national budgets of 77 of the 100 countries surveyed—countries that are home to half the world’s population—fail to meet basic standards of budget transparency. Freedom of Information Acts can be critical in enabling CSOs to get better access to important budget information.

*http://internationalbudget.org/what-we-do/open-budget-survey/
A more effective alternative

From the response to a question posed in March 2010 to the Minister for Social Development by a member of the Northern Ireland Legislative Assembly, PPR learned that:

- NIHE was using a more efficient (natural gas) heating system in many other social housing units in Northern Ireland;
- The average cost per unit of replacing the type of heating system used in the Seven Towers with the natural gas system was £5,204 (approx. US$7,900); and
- The average annual savings in heating costs as a result of the switch would be £193 (US$293) per unit.

PPR, using these figures together with information on the number of flats in the Seven Towers (384) calculated that:

- It would cost approximately £1,998,336 (approx. US$3m) to replace the existing heating system with the natural gas system. This amounted to 28 percent of the cost of the cladding plan; and
- Altogether, Seven Towers’ residents would save £74,112 in heating costs (approx. US$112,600).

The Seven Towers' residents and PPR concluded that the government, by investing in a project that would not be effective in addressing the issues of habitability and affordability, was failing to use the maximum of available resources to realize their right to housing.

Advocacy

Seven Towers’ residents held a series of meetings with NIHE and in September 2011 met with the Minister for Social Development to discuss alternatives to the cladding proposal, ones that would be more effective in addressing the problems of damp and cold. Although their evidence was sound, the Minister rejected their suggestion, saying that the cladding would proceed as planned.

While the residents have not yet managed to have their demands met, their advocacy has succeeded in forcing NIHE to assess its plans in light of the residents’ needs and rights with regard to housing. The budget analysis also enabled the campaign to put forward an effective alternative to the cladding proposal.

The cladding of the Seven Towers had not yet begun as of June 2013. The Seven Towers Residents Group and PPR will continue to monitor the project and to demand through a multi-faceted campaign that their right to housing be realized.

Spending is likely to be more effective in advancing people's rights if it is directed to programs and projects that have been shown by evidence (gathered through research, surveys, etc.) to have made a positive difference in advancing those rights. Government must be able to show that the plans, projects and programs it is proposing are based on such evidence.
Questions you might ask yourself or your government about a lack of effectiveness in government spending.

Before deciding upon programs, projects and their related budgets, does the government consult with the communities likely to be affected by the proposed initiatives in order to establish their needs and interests?

Does government involve those likely to be affected by its decisions—on programs, projects and related budgets—in discussions as to their likely effectiveness?

Does the government report on the consultation efforts and factors informing their program, project and related budgetary decisions?

When developing programs, projects and their related budgets, does the government assess the likely impact of the programs, projects and spending on people’s enjoyment of their rights? If so, what process does it use? If not, why not?

How does the government weigh the likely benefits of diverse options for addressing shortcomings in infrastructure, operation and/or maintenance related to ESC rights? What mechanisms are in place to ensure that it chooses the option that will realize rights in the most effective way?

Does the government collect data about the effectiveness of its policies, programs and spending in realizing specific human rights guarantees—such as the availability, accessibility, affordability and quality of housing? If so, who collects the data? Who uses it? If it does not collect such data, why does it not?

Does it have a process for involving those actually affected by its programs, projects and related budgets in discussions about their effectiveness?
Participation and the Practice of Rights (PPR), located in Belfast, Northern Ireland, was founded in 2006 by internationally renowned trade unionist and human rights activist Inez McCormack. PPR supports groups to use a human rights approach in their monitoring, organizing, campaigning, strategizing and media work. Each of PPR’s working groups is made up of people who are directly impacted by the issue they work on. The groups launch campaigns that measure success not by when government makes a commitment, but by when change is seen on the ground. PPR aims to make the government decision-making processes more participatory and accountable.

PPR groups’ successes include the establishment of a new appointment system for mental health patients attending A&E (Accident and Emergency) units across Northern Ireland, re-housing of families from run-down tower blocks, and re-negotiation of regeneration plans from which residents had been excluded. PPR’s results demonstrate that people in the most deprived communities have valuable expertise about the problems they face and how they can be remedied.

For more information on PPR, go to: www.pprproject.org/

The Article 2 Project

This booklet is part of the Article 2 & Governments’ Budgets handbook. The handbook has been developed by the Article 2 Project, a working group housed first at the Partnership Initiative of the International Budget Partnership (IBP), and then at the Global Movement for Budget Transparency, Accountability and Participation. The project aims to enhance understanding of the implications of article 2 of the ICESCR for how governments should develop their budgets, raise revenue and undertake expenditures. The project encourages the use by civil society and governments of the legal provisions of article 2 to monitor and analyze governments’ budgets. Download the complete handbook at: www.internationalbudget.org/publications/ESCRArticle2.


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Governments budgets are fundamentally about people’s human rights. Budgets are the central means by which governments can help realize their people’s access to quality education, decent health care services, a safe working environment, potable water, and other opportunities, goods and services essential for people to live their lives with dignity.

Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out what governments are obligated to do to help realize those rights.

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This handbook, focused on civil society budget work, explores what “achieving progressively,” “to the maximum of its available resources” and “without discrimination” mean for the way that governments should raise, allocate and spend their budgets so as to best realize people’s human rights. It is intended primarily as a resource for civil society organizations, national human rights commissions, and even legislators, to hold governments to account for their human rights obligations.