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The Role of Experts in the Adjudication of Socio-economic Rights

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Abstract

It is strongly contended by the opponents of adjudication of socio-economic rights that, owing to the fact that judges lack both substantive and technical expertise in socio-economic matters, claims involving economic, social and cultural rights can hardly be adjudicated by courts of law. They argue that the obligations of the state require progressive realization, which should be assessed in the contexts of socio-economic situations (capacities) of each state over a given period of time. Therefore, knowledge of socio-economic performances of the state under consideration is a necessary factor for the determination of whether the state discharged its obligations under socio-economic rights. This task cannot be carried out by a judge who is trained to resolve disputes using the traditional (legal reasoning) process that involves application of a pre-existing legal rules to a certain established facts. Therewith they dismiss the claim that socio-economic rights are justiciable. On the other hand, proponents of judicial adjudication of socio-economic rights seem to forward that in the circumstances where it is not possible to make determinations based on the available facts or evidence submitted by parties to a case (usually an individual or group(s) of individuals on the one hand and the government on the other), judges can, like in any other judicial proceeding, rely on expert opinion(s). However, the question remains: what are the roles experts should play? Who should qualify as expert? Who should appoint an expert: the parties or the court? Is it effective and efficient to appoint experts in each and every cases of adjudication of socio-economic rights? These and related questions are yet to be researched in the context of adjudication of socio-economic rights. This writing, having analysed particularly the role experts play in adjudication processes, concludes that the argument against justiciability of socio-economic rights based on the alleged lack of expertise of the judges is inconsistent with the reality of judicial dispute settlements and, therefore, should be dismissed.

Key Words: adjudication of socio-economic rights; (appointment of) experts; justiciability; access to justice

The Role of Experts in the Adjudication of Socio-economic Rights

Introduction

Opponents of justiciability of socio-economic rights strongly argue that, owing to the fact that judges lack both substantive and technical expertise in socio-economic matters, claims involving economic, social and cultural rights can hardly be adjudicated by courts of law. They argue that the obligations of the State require progressive realization, which should be assessed in the contexts of socio-economic situations (capacities) of each State over a given period of time. Therefore, knowledge of socio-economic performances of the State under consideration is a necessary factor for the determination of whether the State discharged its obligations under socio-economic rights. This task cannot be carried out by a judge who is trained to resolve disputes using the traditional (legal reasoning) process that involves application of a pre-existing legal rules to a certain established facts. Therewith they dismiss the justiciability of socio-economic rights.

On the other hand, proponents of adjudication of socio-economic rights seem to forward that in the circumstances where it is not possible to make determinations based on the available facts or evidence submitted by parties to a case (usually an individual or group(s) of individuals on the one hand and the government on the other), judges can, like in any other judicial proceeding, rely on expert opinion(s). However, the question remains: what are the roles experts should play in the adjudication of socio-economic rights? Who should qualify as expert and who should appoint: the parties to the dispute or the court? Is it effective and efficient to appoint experts every time a case appears before a court concerning socio-economic rights? These and related questions are yet to be explored in the context of adjudication of socio-economic rights.

The aim of this writing is to address some of these issues. In attempting to tackle the questions raised, first, it is necessary to put the States' human rights obligations in context. As the introductory paragraph may indicate, the central opposition voiced against justiciability of socio-economic rights are the vagueness of the obligation of progressive realisations provided under Article 2 paragraph 1 of the ICESCR and the alleged claim that the realisations of socio-economic rights involve the direct provision of

goods and services by the State. In other words, it can be argued that, obligation to fulfil is the major contention against justiciability of socio-economic rights. Therefore, it is necessary to uncover the implications of this obligation in the context of socio-economic rights. In this regard the analysis by Fredman is very helpful in understanding the overall scheme of adjudication of socio-economic rights. This will be addressed in the first chapter of the writing.

Then, the question who an 'expert' is and what role the same plays in the adjudication process, particularly in the case of socio-economic and cultural rights, is addressed. The claims involved in the socio-economic rights primarily fall within the civil justice systems. Thus, it is important to draw on the role the experts play in different civil cases like tortuous claims. This does not mean that the role experts play in criminal justice system is not related to the former one. In essence, the task of expert is to assist the judiciary by providing reliable, relevant and objective information so as to enable the latter arrive at the just resolution of the case. Therefore, different cases involving experts are used to analyse their function in judicial proceedings in general and human rights adjudications (including socio-economic rights) in particular. Moreover, the role of *amicus curiae* as one form of experts, within the definition of experts in this writing, is further discussed.

The final chapter deals with more technical question: who should appoint experts in the adjudication of socio-economic rights? In this regard, the two models, party appointed and court appointed expert models, are put in perspectives. After discussing the two models, it will be argued that the issue is of less importance in the litigation of human right cases, whether civil and political or socio-economic rights.

Having analysed the practices of different national and international (quasi-) judicial institutions with regard to the role of experts, the discussions in this writing show that, though judges do lack some level of expertise in almost every kind of cases involving complex scientific, financial, and policy issues, this has never hindered them to handle such cases. They have been able to resolve difficult and complex issues pertaining not only to pure legal questions but also entailing complex scientific matters canvassed with legal arguments. The answer to the question how judges are being able to deal with issues they are not normally "trained" for lies in the role the experts play, in one way or

another, in the adjudication processes. Accordingly, the conclusion of this writing is straightforward. If the lack of expertise has never been used to argue against the adjudication of, for instance, complex tort cases involving complicated scientific theories and evidences, patent and copy rights, criminal cases involving different medical professions and if the lack of expertise is not preventing judges themselves from dealing with the same, it cannot and should not also prevent them from adjudicating right to food, water, health, housing and the like. As several experts are being engaged in assisting judges to resolve the complexity of sciences or facts in both civil and criminal, and other human right cases, the same is and should be true with regard to the adjudication of social-economic and cultural rights. Hence, the argument against justiciability of socio-economic rights based on the alleged lack of expertise of the judges is inconsistent with the reality of judicial dispute settlements and, therefore, should be dismissed.

1. Human Rights Obligations of the States: brief introduction

Human rights by definition impose obligations on the States Parties. The question is what kind of obligation do they impose? Human rights should be regarded as 'giving rise to the whole spectrum of duties, including duty of abstention and action.' This is well explained in the following terms:

> First, human rights hold out more than just the promise of freedom from state interference with their exercise. Human rights are based on a much richer view of freedom, which pays much attention to the extent to which individuals are in a position actually to exercise those rights. This positive view of freedom carries with it a substantive view of equality. Given that human rights promote freedom by removing constraints, the promise of equality must require all to be in a position actually to enjoy that freedom. Secondly, we are social beings who can only achieve fulfilment through society. While the state needs to be restrained from abusing its power, only the state can supply what is needed for an individual to fully enjoy her human rights. Thirdly, it cannot meaningfully be asserted that the state is neutral in respect of moral or ethical commitments. A clear value commitment is signalled by subscribing to democracy and human rights.[1]

Thus, it is now a well accepted scheme to analyze human rights obligations of the States in three different types or levels: obligation to respect, to protect and fulfil.[2] Accordingly,

> [t]he obligation to respect requires the state to abstain from interference with the freedoms of the individual. The obligation to protect refers to the duty on the state to prevent other individuals from interference with the rights of the [other.] [And that of] fulfil requires the state to take the necessary measures to ensure the satisfaction of the needs of the individuals that cannot be secured by the personal efforts of that individual.[3]

In other words, while obligation to respect ensures that the individual is protected from violation(s) by the State's own action, the obligation to protect imposes on the State itself to safeguard the right holder from potential horizontal violations. Finally, the obligation to fulfil provides that the State shall perform certain concrete positive acts like allocation of budgets, designing workable policies and strategies with a view to ensure that all sections of the society benefits from the exercising of the rights recognized. This is particularly important with regard to the vulnerable and disadvantaged parts of the society. It is in this understanding that the current international and regional human rights monitoring mechanisms assess whether the State is in compliance with its human rights

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[1] S. Fredman, Human Rights Transformed: positive rights and positive duties, Oxford University Press, 2008, p. 9

[2] General Comment 14 of the CESCR, The Right to the Highest Attainable Standard of Health (2000) (hereinafter G.C. 14), para. 33; see also generally H. Shue, Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy, Princeton University Press, 1980.

[3] See for example M. Craven, International Covenant on Economic, Social and Cultural Rights: *A Perspective on its Development*, Clarendon, 1995, p.108.

obligations or not. The recommendations they make mainly depends on the synthesis of these three types of obligations in the context of each of the rights recognized in the human rights instruments. Failure to perform any of these obligations would normally constitute violation of the rights under question.[4]

1.1. Obligation to Fulfil and its Implications

As stated above the obligation to fulfil requires States to take positive steps or measures with the view to satisfy the needs of those individuals who are unable to exercise their rights due to circumstances beyond their control.[5] This dimension of State obligation normally arises where the measures taken under the two other dimensions fail short of satisfying the requirements of the relevant human rights instruments.

It is basically due to the involvement of obligation to fulfil that some oppose the "human rights-nature" of socio-economic and cultural rights[6]. David Kelly, for instance, argued that welfare rights are concerned with guaranteeing freedom to have various goods and services that are regarded as necessities.[7] Cranston is particularly known for his radical view of socio-economic rights as utopian aspirations that the inclusion of these categories as human rights does not make sense.[8] It is not the aim of this article to discuss the (counter-) arguments against the human rights nature of socio-economic rights. For the purpose of this writing, it is suffice to mention that socio-economic rights are mainly construed, by opponents, as those imposing obligation to provide directly the rights, which in essence, opponents claim, involve substantial costs on the State. In other words, they define these rights in terms of direct provision of goods and services by the State_ the individual being passively receiving basic necessities all the time. However, such interpretation is not based on the correct analysis of the corresponding obligations of

[4] G.C.14, para33
[5] Mathew Craven, supra note 3, p.108
[6] Fredman, supra note 1, p.77; see also the Grootboom case, infra note 59, para 20 cum n.19, where Justice Jacoob on behalf of the Constitutional Court stated that "While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution as construed in the Certification judgment."
[7] D. Kelley, A Life of One's Own: Individual rights and The Welfare State (1998), *reproduced as extract in* H. Steiner and *et al*, International Human Rights Law in Context: Law, Politics, Morals, 3rd ed., Oxford University Press, 2007, p. 286.
[8] K. Arambulo, strengthening the Supervision of the International Economic Social & Cultural Rights: *Theoretical and Procedural Aspects*, Intersentia, 1999, p.58-59.

the States under socio-economic rights in general and of the obligation to fulfil in particular.

Generally speaking, the obligation to fulfil is a positive obligation. States are obliged to adopt a wide range of measures in the form of legislative, administrative, budgetary, judicial, and others with the view to fully realize the rights.[9] According to the committee's interpretation, this obligation can be disaggregated into three subcategories: *obligation to facilitate, obligation to promote and obligation to provide*.[10] There is no universal agreement of what these means for all socio-economic rights. The reading of General Comments of CESCR indicates that the committee uses more or less similar statements in interpreting various covenant rights. For instance, in General Comment 14 (on 'right to health,') the three aspects are described as follows;

> The obligation to *fulfil (facilitate)* requires States inter alia to take positive measures that enable and assist individuals and communities to enjoy the right to health. States parties are also obliged to *fulfil (provide)* a specific right contained in the covenant when individuals or a group are unable, for reasons beyond their control, to realize the right themselves by the means at their disposal. The obligation to *fulfil (promote)* the right to health requires States to undertake actions that create, maintain and restore the health of the population.[11]

In General Comment 15 ('right to water'), the committee repeated in more or less similar wordings that;

> [o]bligation to facilitate requires the State to take positive measures to assist individuals and communities to enjoy the right/ the obligation to promote obliges the State party to take steps to ensure that there is appropriate education concerning the hygienic use of water, protection of water sources and methods to minimize water wastage. States parties are also obliged to fulfil (provide) the right when individuals or groups are unable, for reasons beyond their control, to realize that right themselves by the means at their disposal.[12]

The fact that the committee employs similar wordings may give the impression that States should adopt similar measures for each socio-economic and cultural right. In essence, General Comments are used to clarify conceptual underpinnings of the covenant rights. They provide abstractions of the rights and corresponding States Parties' obligations. Moreover, it may also be the case that the committee has to ensure consistency and uniformity in the interpretation of the nature of the rights and

[9] G.C.14, para.33
[10] See for example General Comment 15of the CESCR, The Right to Water (art.11 and 12) (2002) (hereinafter G.C.15) para.25 and G.C.14, para.33
[11] G.C 14, para.37.
[12] G.C.15, para.25.

corresponding obligations of the States Parties ensuing from the covenant. This is important particularly as it deals with divergent socio-economic and legal systems that should give effect to its interpretations at the domestic level.

Nevertheless, uniformity of interpretation does not in any way imply uniformity of measures. First, the difference in the nature of rights may give rise to different measures. Second, due to the differences in the level of availability of resources in different jurisdictions, it is almost absolutely impossible for the committee to recommend the adoption of similar measures across the systems. Thirdly, and may be most importantly, the national measures are predominantly determined through national political goals and the pressing needs of that society. Therefore, it is possible to argue that 1. The specific measures to be adopted are the function of national realities 2. As the measures the State Parties should adopt for different rights may differ, the particular implications of the three aspects of obligation to fulfil may also vary.

The subdivision of obligation to fulfil into facilitation, promotion and provision may not be as watertight as it appears to be. It is possible that certain measures fall under different aspects of obligation to fulfil. Despite this, it provides important analytical framework in assessing steps States are required to take towards the full realization of a particular socio-economic right. Under obligation to facilitate, the key aspect is not the State taking direct participation in the provision of the rights. Rather, the State plays a 'managerial' role through creation of favourable and sustainable normative and policy frameworks that make the action of others possible or smoother. This may entail removal of pre-existing legislations or administrative procedures and arrangement of incentive schemes[13] that would encourage, for example, private sectors or others to engage in the provision of the rights. The obligation to facilitate also implies creation of institutions that will oversee the realization of the rights in the domestic legal systems.

The obligation to promote is another crucial aspect of obligation to fulfil. It can be said that, generally, the obligation to promote is one of the central ideal to the works of UN and other regional human rights institutions. Consonant with its purposes and

[13] This can be done in the form of, for example, tax exemptions or reductions for certain period of time; providing access to premises (land, building, etc) as a special treatment scheme, etc.

principles,[14] Article 55 (c) of UN Charter creates, with regard to human rights, primary obligation of the Organization *to promote*, *inter alia*, 'universal respect for, and observance of, human rights and fundamental freedoms far all.' The obligation to promote generally implies creation of awareness through education, training, standard setting, seminars, information dissemination and the like to different sectors of the society. It is necessary that the policy and lawmakers and other related authorities and institutions (whether public or private) are aware of the implications of human rights on their daily activities. As the committee stated "the exercise of and strengthening of respect for human rights can take place only when there exist awareness of those rights by both the authorities and individuals"[15] In other words, "the enjoyment of many economic, social and cultural rights depends to a great extent on the information level of individuals in question. The rights cannot be exercised without access to a minimum level of information."[16] For this reason, the committee puts greater emphasis on monitoring whether the State has taken sufficient steps to promote the rights recognized in the covenant.[17] According to the committee's understanding, "human right education" is defined as a separate human right in itself that should be included in the curriculum of formal and non-formal education.[18] The obligation to promote, therefore, constitutes the obligation to make human rights happen or take active steps to encourage its happening in the real life of the population than engaging in the direct provision of goods and services.

The third aspect of obligation to fulfil is obligation to provide the rights. As already stated, it entails the obligation of States Parties to directly provide socio-economic rights recognized by the State concerned. In essence, it is more of an exception than a rule. It only comes into picture where particular individuals or groups are, due to reasons beyond their control, unable to realize the right themselves by the means at their disposal. That is to say, "[t]he provider function of the State only comes into play when

[14] See Art.2 (2-3) and preamble, para2-3 of United Nations Charter.
15 Quoted by M. Sepulveda, The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights, Intersentia, 2003, p.244.
[16] Id., p. 245.
[17] Id.
[18] Id., p. 246.

people have failed to satisfy their own needs due to circumstances beyond their control."[19] In the *Grootboom* case, the court held that,

> [t]he state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the state has met its obligations in terms of them [20]

There are different situations that may render individuals or groups incapable of exercising or enjoying one or more of the socio-economic rights by themselves. "Among the situations in which the committee has recognized that individuals are unable to enjoy rights for reasons beyond their control are cases of persons under detention and mentally ill persons in State institutions, low-income groups and victims of natural disasters."[21] It is also possible to mention that the situations of persons with disabilities and those leaving under absolute poverty trigger the obligation of the State to provide. For instance, State might have developed poverty combating schemes (as obligation to facilitate facilitate) but where that scheme could not meet the intended target and certain groups are, as a result, left in distress, the State is required, as a matter of priority[22], to provide goods and services for such individuals while also developing mechanisms that will enable them to earn their own life. It is inevitable that, in such situations, the State may incur certain amount of costs. However, the involvement of costs in the realization of all human rights is an obvious fact. It is not only associated with socio-economic rights. There can be no difference in essence between provision of defence lawyer for individuals accused of crime on the one hand and provision of free medical services for the indigent part of the community on the other. As without a lawyer the accused could suffer from miscarriage of justice, the poor would also suffer from curable disease if not provided with medical care. Poverty is the cause for both sufferings. From the equality of interests' point of view, the nature of suffering should not matter. Human rights law requires the State to allocate proportional budget for the realization of both individual rights.[23]

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[19] Id., p. 242.
[20] Grootboom, infra note 59, para. 24.
[21] Sepulveda, supra note 15, p. 241.
[22] General Comment 3of the CESCR, the Nature of States Parties Obligations (1990), para. 11.
[23] VDPA, para. 5.

As the above discussions show, equating obligations imposed by socio-economic rights with the obligation to provide is clearly out of context and inconsistent with the spirit of the covenant. The crucial aspect of obligation to provide is, in lieu of providing basic goods and services necessary in exceptional situations, taking necessary and targeted measures to facilitate and promote the rights.[24]

1.2. Progressive Realization

In contrast to Article 2(1) of the covenant on civil and political rights, progressive realization is considered to be the dominant nature of the obligations imposed by socio-economic and cultural rights under Article 2(1) of ICESR which reads,

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

This formulation of States' obligation on a progressive scale has been the centre of controversy. In particular some argued that Article 2(1) does not impose strict legal obligation, but provides a policy aspiration towards which States should progress over a period of time.[25] As a consequence, all the rights protected by the covenant are interpreted as constituting directive policy principles without having the status of enforceable individual claims.

Considering the way Article 2(1) is formulated, it is not wrong to argue that the obligations imposed are general or vague. What is unacceptable is the conclusion drawn from such premises that the rights protected by the covenant have no normative value. Such conclusion is opposable. To begin with, as Sepulveda rightly argued, it is very difficu`1lt to dispute that *the full realization of all human right*, whether civil, political, economic, social or cultural essentially require progressive realization.[26] To date, there is no State or system that could be mentioned to have given effect to fundamental human rights and freedoms as per the standards defined under the International Bill of Rights. The attainment of such absolute standards requires fundamental changes in institutional,

[24] Sepulveda, supra note 15, p. 241.
[25] Sepulveda, supra note 15, p. 311.
[26] Id., p. 312.

normative and policies on the one hand and the resource capacity to realize the goals on the other. In this regard, the flexibility in the formulation of States Parties' obligations on the sliding scale is a necessary aspect of socio-economic rights in general. For one thing, immediate and full realization of the rights recognized would be an onerous project. For the other, devising uniform and definitive international standards agreeable to all States Parties with divergent socio-economic and politico-legal systems is extremely difficult. On the other end, the need to ensure the States' compliance with the full realization of the rights in question[27] has to be maintained. Thus, progressively realization of socio-economic rights under article 2(1) of ICESCR reflects the rational and honest consideration of the real situations of the States Parties.[28] Having said this, the question that remains here is, then, how can this obligation of the State be subjected to judicial scrutiny and what the potential role of the experts would be to which the following discussions turn.

1.3. Justiciability vs. Progressive Realization

The concept "justiciability" may be used in different contexts to refer to different things. For instance, in domestic procedural law, a substantive right is regarded as justiciable only if there is a mechanism for enforcing the rights through (quasi-) judicial organs. That is, justiciability refers more to the existence of the procedure than to the right itself. The effect is that it is possible to have (declaratory) rights without remedy due to lack of procedural rules. Moreover, in the context of general international law, justiciability "refers particularly to the doctrine that no State can exercise jurisdiction over another State."[29] This doctrine is based on the principles of sovereignty and sovereign equality of all States.[30] This writing, however, adopts the concept of justiciability as it is understood within the meaning of human rights law particularly in

[27] A. Chapman, '*Core Obligations Related to Right to Health*' *in* A. Chapman and S. Russel (eds.), Core Obligations: Building a Framework For Economic, Social and Cultural Rights, Intersentia, 2002, pp. 4-5.
[28] See G.C.3, para.3-7; In other words, the fact that the realization of the rights over a period of time (progressively) is foreseen under the covenant should not be misinterpreted as depriving the obligation of States of all meaningful content.

[29] See M. Shaw, International Law, 6th ed., Oxford University Press, 2007, p. 180.
[30] Id.

the context of socio economic and cultural rights jurisprudence. In that sense, despite minor differences as to its specific meaning, it is not disputed that justiciability (of human rights) essentially implies the competence of courts or tribunals including international monitoring organs to deal with the claims of violations of rights and to address the remedies thereof.[31] It is in this regard that the question whether socio-economic rights are justiciable or not has become a matter of intense debate among writers, practitioners and policy makers.[32] One of the reasons against adjudication of socio-economic and cultural rights is due to the argument that *judges lack necessary knowledge and skill [expertise] about detailed financial, economic, social and political matters to effectively deal with the issues involved therein*.[33] Moreover, it is also contended that adjudication of socio-economic rights would be contrary to the traditional doctrine of separation of powers.[34] According to Langford;

> [a] bundle of arguments has traditionally been used to deny the legal, and by extension, justiciable nature of economic, social and cultural rights by distinguishing them from civil and political rights. The arguments include the claims that the rights are vague, inherently of a positive nature and resource dependent. The counter arguments are well-rehearsed and some commentators have declared the debate almost over […]. As to the abstract nature of economic social and cultural rights, they are phrased no differently than civil and political rights; the right to freedom of speech is no more concrete in expression than the right to social security.[35]

He further added that "the sheer weight of the [socio-economic rights] jurisprudence makes it difficult to argue against the *possibility* of social rights' justiciability." [36]

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[31] See generally Frans Viljoen, '*Justiciability of Socio-economic and Cultural Rights: Experience and Problems*' *in* Yvnne Donders And Vladimir Volodin (eds.), Human Rights in Education, Science and Culture, UNESCO PUB., 2007, PP. 55-56; Fons Coomans(ed.), Justiciability of Economic and Social Rights: Experience from Domestic Systems, Intersentia, 2006, pp.4-5; Martin Scheinin, '*Economic and Social Rights as Legal Rights*' *in* Asbjorn Eide and et al(eds.), Economic, Social and Cultural Rights: A Textbook, 2nd Rev. ed. Martinus Nijhoff Pub., 2001, pp.29-30.

[32] See for instance Y. Ghai & J. Cottrell(eds.), Economic, social & cultural Rights in Practice: The Role of Judges in Implementing Economic, Social & Cultural Rights, INTERIGHTS, 2004;

[33] See particularly the discussion by Lord Lester of Herne Hill QC & Colm O'Cinneide, '*The Effective Protection of Socio-Economic Rights' in* Ghai and Cottrell (eds.), id., pp. 18-22; A. Neier, Social and Economic Rights: A Critique (2006), *reproduced as extrac*t *in* Steiner and et al, supra note 7, pp. 283-285; d. Kelley, cited at supra note 7; see also generally C. Courtis, Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experience of justiciability, International Commission of Jurists, Human rights and Rule of Law Series No. 2, 2008, pp. 73-105 (available at http://www.unhcr.org/refworld/docid/4a7840562.html[visited in February 2010]]

[34] Already discussed in my thesis see the citations

[35] M. Langford (ed.), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, Cambridge University Press, 2008, p. 30.

[36] Id., p. 28.

(E*mphasis original*) The question, then, is how can courts effectively adjudicate whether the State has fulfilled its obligation of progressive realization or not?

Fredman argued that "whether a duty is fulfilled can be answered according to criteria deduced from the underlying principle behind the implication of positive duties in the first place."[37]

> Positive duties aim to secure to all the ability to exercise their rights. This requires the removal of constraints, as well as the provision of resources or the facilitation of activities which ensure that all are substantively equal in the ability to participate fully as citizens in the society.[38]

According to Fredman, four parameters can be deduced from this broad aim_ Effectiveness, Participation, Accountability and Equality.[39] With regard to effectiveness, she stated that what ever actual level of provision is made at any particular time, or what ever particular steps are taken to facilitate self-provision, these must be appropriate and aimed at achieving the right.[40] Participation criteria means that the involvement of those affected in the process is essential for the result to be meaningful.[41] Accountability implies that the authorities must be in a position to explain and justify the view taken of the steps taken to optimize the right. Accountability is a necessary aspect of the autonomous space for the State to decide what specific measures should be taken. While those measures cannot be predetermined, the State must be accountable for the measures actually taken.[42] Finally, concerning equality parameter, Fredman argued that the focus of the positive duty to fulfil is on the disadvantaged, those who are under more constraints in their ability to enjoy the right than others. This means that it goes beyond equality of treatment to substantive equality, which might include giving the less-advantaged a greater share of resources.[43] These criteria are not all-or-nothing standards, but permit degrees of fulfilment.[44] They also leave the precise action to be taken to be determined in a context-manner.[45]

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[37] Fredman, supra note 1, p.77
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Id.
[43] Id.
[44] Id.
[45] Id., pp. 77-78.

In concluding this part, it should, therefore, be noted that obligation of progressive realization is not intended to leave the State at their own accord. Rather, it is a carefully constructed human rights obligation of the States, having as its basis, the assumption that a democratically accountable (responsible) government gives due attention to the socio-economic needs of its citizens and strives to meet the same through rational political choices.

2. The Role of Experts in Adjudication of Socio-Economic and Cultural Rights

The involvement of experts in judicial processes has been common practices since time immemorial. Their role is becoming more and more 'significant and ever-increasing' both in criminal and civil litigations.[46] At the same time the relationship between law and science is continuously getting more complex than ever.[47] This complexity might have led some writers to describe the relationship of the two fields as an "uneasy partnership".[48] The aim here is neither to discus the relationship of law and science nor to give in-depth analysis of the role of experts in judicial processes. Rather, the section is concerned with exposing how the use of 'experts' in the adjudication of socio-economic rights can easily refute the argument that: *judges lack the necessary expertise to deal with issues of socio-economic, market and financial matters and hence should not be allowed to adjudicate the same*. In the following, first, the definition of expert is given both in the general and in the context of socio-economic rights adjudication. Next, the rationale and the function of experts are discussed by relating to some real cases. Finally, the discussion on the role of *amicus curiae* submissions is provided.

[46] L. Meintjes-van der Walt, Expert Evidence In The Criminal Justice Process: *A Comparative Perspective*, Rozenberg Publishers, 2001, p. 63; see also P. Robert and A. Zuckerman, Criminal Evidence, Oxford University Press, 2004, pp.290

[47] See the discussion by Robert and Zuckerman (*id*.,), p.291.(discussing complexity of fields of studies)

[48] K. Reisinger, Court-Appointed Expert Panels: A Comparison of Two Models, 32 Ind. L. Rev. 255, 1998, p. 225.

2.1. Who is Expert?

2.1.1. *General*

One may ask what standards of qualification one should have to be designated as an expert. The answer may not be as complicated as the term 'expert' itself seems to portray. Black's Law Dictionary defines "expert" as a person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.[49] According to this definition, to be an expert means to possess a required skill or knowledge on certain specific subject. The manner of acquiring the skill or knowledge is immaterial; it may be from experience, hobby or training.[50] In one of the leading case laws on the subject, it was a point of contention whether a solicitor who, outside his professional work, had acquired 'expertise' on handwriting should be allowed to testify as an expert in relation to the disputed handwriting before the court. In the case, Chief Justice held that such witness must be *peritus,* "but we cannot say that he must become *peritus* in the way of his business or in any definite way. The question is, is he *peritus*? Is he skilled? Has he an adequate knowledge?"[51] There is also no requirement that the field of expertise be a certain organized field of study or profession. Meintjes-van der Walt stated;

> [f]or a discipline to be considered as a field of expertise it is not necessary that it should be an academically or professionally organized branch of study with formal qualifications. What is of importance is to look at the substance of the expert's knowledge than how it was acquired.[52]

The concept of expert is more or less common to both continental and common law legal systems that "a person who possesses specialized knowledge of any kind can qualify as an expert."[53] It may be the case that the level of experience or knowledge one may have is different from the other. It may also be true that the knowledge or experience of one person is more specialized than the other. However, such matters are related to the

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[49] Bryan A. Garner, Black's Law Dictionary, 8th ed., Thomson West Pub, 2004.
[50] Meintjes- Van Der Walt, supra note 45, p.65.
[51] R v. Silverlock, (1984) as quoted in Meintjes-Van der Walt, supra note 45, p. 65 see also Solomon Salako, evidence, available at www.insitelawmagazine.com/evidencech14.pdf [visited September 2010], p. 221.
[52] Meintjes-van der Walt, supra note 45, p. 66; (she further stated that, based on the jurisprudence of the 'Hoge Raad' in relation to oral expert evidence, that knowledge includes all special knowledge one possesses or is assumed to possess, even though such knowledge does not qualify as 'science' in the more limited sense of the word.)
[53] Id., p. 66 (having discussing the meaning of experts in three different jurisdiction representing both common law and civil law legal systems)

weight or values that the court should give to such expert evidences or opinions than to the substantive question: who an expert is.[54] It is important to note that 'expertise' is a relative concept. It is relative to the profession and time.[55] Though the possibility of a person having expertise in different fields cannot be ruled out, normally, the connotation depicts that a person has a special knowledge or skill on certain particular subject. In this regard, it is stated that:

> Whether a person qualifies as an expert varies with the circumstances and thus no all-encompassing definition is possible. Nonetheless principles have evolved to control the testimony of proposed experts. An expert is limited to testifying to matters within his or her area of expertise. Experts are not to consider or comment on facts that are not subject to his professional expert assessment.[56]

Thus, the test for expertise is the knowledge or skill in the field in which the opinion of the person is sought.[57] Whether a person possesses the necessary expertise or not is often decided by the court or parties during the process of evaluation of admissibility of evidences. This being said, let's consider expertise in the context of socio-economic rights.

2.1.2 Who is an Expert in Socio-economic Rights adjudication?

Litigation of economic, social and cultural rights may entail wide ranging facts and issues pertaining to different fields like economics, sociology, education, agriculture health, accounting and statistics and also from government socio-economic policies and budget allocations in different sectors. For these reasons, it may be difficult to set hard-and-fast criteria for predetermination of appropriate experts. Again, this is not unique to the adjudication of socio-economic rights. It is equally true that in all kinds of litigations the need for, and then, qualification of an expert is determined in the context of a particular dispute. Nevertheless, it is possible to State that the nature of the socio-economic rights under litigation and the corresponding issues, and the type of evidence or opinion sought are important departure points in the search for relevant expertise.

Accordingly, it can generally be stated that an 'expert' in the case of adjudication of socio-economic and cultural rights should be understood as a person or group of

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[54] See citation at supra note 50.
[55] See the discussion under section 2.2 below.
[56] R. Bogoroch & L. Goldstein, Forensic and Demonstrative Evidence for Insurance Claims: Reflections on the Role of Expert Witness, 2003, pp. 3-4 (citing *Kozak v. Funk*,[1995] S.J. No. 569, para.15).
[57] Id., quoting Freiman M.J. and Berenblut M.L. (1997) The Litigator's Guide to Expert Witness(sic), p. 4.

persons who, through education or experience (that is, familiarity with the subject matter), has developed sufficient knowledge or skill in the subject relating to the issues before the court. That is, any one acting on behalf of the judge to establish the existence or otherwise of the facts in issue, can be considered as an expert provided that the selection is carried out based on certain factor such as possession of knowledge, skill, experience or familiarity with the subject matter under consideration by the judge. It is already stated in the above paragraph that the nature of the rights claimed and the type of expert opinion sought can serve as important guidelines in the appointment of relevant expertise. With regard to the nature of rights claimed, for instance, suppose that a judge is required to decide on whether exposure to certain polluting substances released from a near by plant causes a particular health problem or not. In order to establish a causal link between the said substance and the claimed health problems, it is necessary that the judge should take into account expert opinions of medical professionals and those specialized in the area of toxic substances. This was the case in *López Ostra* case decided by ECtHR.[58] In that case, both the trial and appeal courts as well as the ECtHR relied on expert opinions and reports from individual experts and institutions.[59]

In the similar manner, suppose that the case before the court alleges that the government has failed short of its obligation to fulfil the realization of right to housing. The effective and just adjudication of the right to housing may not always be achieved through a normal pure fact-law analysis. Circumstances may force the court to engage in the critical evaluation of the overall housing policies and program of the government, which, in turn requires the availability of relevant and adequate information. In such situations, it is necessary that the court should establish its own inquiry commission or rely on expert services of other individuals or institutions.

The famous *Grootboom* case is relevant in this context for it specifically concerned with the right to housing vis-à-vis the corresponding constitutional obligation of the State. The applicants complained that the government failed short of its obligation to fulfil the right. There, the Constitutional Court clearly stated that, among other things,

[58] See *Lopez* , infra note 102..
[59] Id. The following served as experts in before the national courts: regional Environment and Nature Agency of Spain(id., para. 11), a scientist from the University of Murcia, National Toxicology Institute, Ministry of Justice's Institute of Forensic Medicine in Cartagena(id., para 18-19).

it had engaged in the evaluation of the housing programs adopted by South Africa in the light of the obligations imposed upon the State by section 26 of the constitution.[60] One may wonder how the court was able review the government policies both at the national and local level for such tasks require special skill or expertise in policy and budget analysis. The close reading of the background information and judgment of the court reveals that there were several experts and *amicus curiae* submissions and *in loco* investigations providing relevant information and perspectives for the court. This is briefly indicated in the court's final judgment that,

> After the application for leave to appeal had been granted by this Court but before argument had been filed by any of the parties, the Human Rights Commission and the Community Law Centre of the University of the Western Cape applied to be admitted as amici curiae. That application was granted and the amici were permitted to present written and oral argument. Mr Budlender of the Legal Resources Centre submitted written argument and appeared on behalf of the amici at the hearing. *We are grateful to him, the Human Rights Commission and the Community Law Centre for a detailed, helpful and creative approach to the difficult and sensitive issues involved in this case.*[61] *(emphasis mine)*

Explaining how the submissions helped the court in, among other things, understanding the facts and issues involved in the case, the court stated that

> the written argument filed on behalf of the amici sought to broaden the issues by contending that all the respondents, including those of the adult respondents without children, were entitled to shelter by reason of the minimum core obligation incurred by the state in terms of section 26 of the Constitution. It was further contended on behalf of the amici that the children's right to shelter had been included in section 28(1) (c) to place the right of children to this minimum core beyond doubt. Respondents' counsel filed further written contentions in which they supported and adopted these submissions. No objection was taken to the issues having been thus broadened**.** [62] **(***Emphasis added***)**.

Thus, having such dozens of expert materials analyzing the case from various angles including its socio-political and policy relevance, it could be argued that, afterwards, it was a matter of routine judicial exercise for the court to engage in the analysis of the government's constitutional obligation vis-à-vis its housing policies or programs.

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[60] Constitutional Court of South Africa, Case CCT 11/00, Judgment (4 October 2000) (hereinafter referred to as Grootboom), para. 17; section 26 of the constitution (quoted by the court) provides;
"(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."(*sic*)

[61] Id., para. 17.

[62] Id., para. 17.

2.2. The Rationale for Experts in Adjudication

"A judge cannot be an expert on every subject."[63] This statement clearly summarizes the justification for the experts in all kinds of litigations. Generally, judges are experts in judicial dispute settlements in the sense that they are specifically trained for that purpose. However, modern dispute settlement systems are growing towards more specialized adjudication systems which, in turn, require law professionals to acquire specialty in particular fields of law than traditional generalist knowledge. This is not limited to legal profession. Scientific knowledge is getting more and more localized. Nowadays, it is a matter of common knowledge that, even in particular field of study, areas of specialties are growing deeper and deeper.[64] For this reason, it can be argued that, the need for judicial specialization is a systematic response to the pressure from other professions and market. That is, as the cases or disputes before the courts continue to involve 'foreign' concepts, usually in the form of scientific theories or market analysis, it is inevitable that the judiciary had to react in one way or another to these external pressures. Even then, *"[a] judge cannot be an expert on every subject."* [65]*(Italics added).* The reason is that specialization in itself implies relativity of knowledge. As we have said, knowledge is, in essence, relative both to the time and field of study or profession. The fact that knowledge is relative and local implies the inevitable existence of a gap_ a gap in knowledge or expertise. Judges are trained to resolve disputes through application of legal norms to the facts argued by the parties to the dispute through judicial techniques of inferences and interpretations, otherwise called judicial reasoning.

Unless the dispute concerns the interpretation of legal norms, which can be addressed by the judiciary with a relative ease, the question whether certain factual situations are governed by the norm in force, primarily, requires comprehension of the facts. This may mean understanding the theories behind the facts (how they coexist or differ), relevance or non-relevance the facts under question and the like. The involvement of new concepts or ideas, which the judges could not, in the normal course of things, handle, will, thus, create a "gap in judicial expertise". This may be described as the

[63] S. Jackson, Technical Advisor Deserve Equal Billing with Court Appointed Experts in Novel and Complex Scientific Cases: Does the Federal Judicial Centre Agree? 28 Envtl L. 431(1998), p. 446.
[64] Robert and Zuckerman, supra note 45.
[65] See generally Jackson, supra note 62.

difference between the level of expertise the judges normally possess or are expected to possess on the one hand and the level of expertise that the actual understanding of the facts requires on the other. In those circumstances, it is normal for the judiciary to look elsewhere for assistance to fill the gap.[66]

Therefore, in essence, the rationale for the involvement of experts or expert evidences in adjudication process is due to the relative limitations of the scope of human knowledge in general and of the judiciary in particular. For this reason, experts are and continue to be crucial parts of adjudication processes so as to ensure the just resolution of complex cases involving 'unusually difficult problems that goes beyond the regular questions of fact and law with which judges must routinely grapple.'[67]

As already stated, one of the reasons against justiciability of socio-economic rights is that, opponents argue, judges lack expertise regarding social, economic and policy matters.[68] Judges may lack knowhow not only with regard to socio-economic matters but also in other fields like scientific or technological innovations, medical professions, etc. However, it has never been contended that judges could or should not engage in the adjudication of issues involving, for example, medical science, patent and copy rights, psychiatry, and etc, which nowadays constitute a routine business of the judiciary. In the final analysis, therefore, the arguments against justiciability of socio-economic rights based on the lack of expertise of the judges cannot stand against the actual practice of the judicial dispute settlements. As it is to be seen in the discussion to follow, courts do rely, in almost all kinds of cases, on expert-services of different kinds for issues that lie beyond their normal comprehension.

2.3. The Function of Experts in Judicial Process

If we agree that the involvement of experts in all kinds of litigation process is a common phenomenon, it is possible to discuss some of their specific roles. In his final

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[66] Meintjes-van der Walt, supra note 45, p. 63(stating that "it is trite law that [expert] is there to assist the court")

[67] Jackson, supra note 62; this is also well observed by Reisinger, supra note 47, p. 233(where he stated "all commentators seem to agree that the need for and use of scientific testimony in product liability litigation is likely to increase as products become more complex and science advances more rapidly."

[68] See for example Ghai's and Cottrell, supra note 32.

report on Access to Justice in England and Wales, Lord Woolf had identified some major roles that experts can play in civil justice systems: assisting a party to establish the facts and assess the merits of a case; providing expert evidence (may be in the form of opinion or report) to a court; conducting inquiries on behalf of the court and report their findings; sitting as assessors with judges to assist the court to understand the technical evidence which the court has to consider.[69]

In *Ikarian Reefer* case, Justice Cressewell summarized the role and responsibility of experts, to which Lord Woolf himself referred repeatedly.[70] One of the key functions the expert should perform, according to Cressewell J is providing "*independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise*."[71] A decade before, Justice Dickson, relying also on *R v. Turner*[72], in *R v. Abbey* case held that,

> With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. [In such cases,] [*a]n expert's function is precisely this*: to provide the judge and jury with a ready- made inference which the judge and jury, due to technical nature of the facts, are unable to formulate. "An expert opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience of and knowledge of a judge or jury.[73] (*Italics added*)

As stated before, the justification for expert-service is due to the existence of gap in judicial expertise. "If on the proven facts a judge or a jury can form their own conclusions without help, then the opinion of the expert is unnecessary."[74] It has been repeatedly emphasized in both case laws and literatures[75] that experts should have their ways into court-room as expert *only when it is necessary*. It is important to note, therefore,

> [t]he fact that an expert witness has impressive scientific qualifications does not *by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful* than that of jurors[for that matter judges] themselves; there is a danger that they

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[69] Interim report of Lord Woolf on Access to Justice, available at http://www.dca.gov.uk/civil/final/sec3c.htm#c13 (visited in September 2010)

[70] Reproduced in K. Rix, Experts evidence and the courts: 1. The history of expert evidence, APT(1999), vol. 5, 71-77, p. 74; available at http://apt.rcpsych.org/cgi/reprint/5/1/71.pdf(visited (in September 2010)

[71] Id., for role of experts in criminal justice system, see generally Meintjes-van der Walt supra note 45.

[72] *R. v. Turner* (1974), 60 Crim. App. R. 80, at p.83 (as quoted by Dickson J in *R. v. Abbey*[1982] 2 S.C.R., p.42; also available at http://netk.net.au/UKTurner.asp(visited in September 2010)(hereinafter cited as *Turner*)

[73] Dickson J in *R v. Abbey*, p.42 available at http://csc.lexum.umontreal.ca/en/1982/1982scr2-24/1982scr2-24.pdf(visited (visited in September 2010)

[74] *Turner*, supra note 71.

[75] *Turner*, and *Davie v. Edinburgh Magistrates [1953] both quoted in R. v. Norman Gilfoyle* [2000] (hereinafter *Gilfoyle*) available at http://netk.net.au/UK/Gilfoyle.asp (visited in September 2010)

> think it does… Jurors [or judges] do not need [experts] to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and stains of life. [76]

It is true that the role experts should play may differ in different cases particularly based on the nature or type of the case, and instructions of the judges. Nevertheless, two general roles can be mentioned. First, experts play significant role in educating the judges on fundamental scientific concepts (jargons) and theories lying behind the facts in the case.[77] This is particularly important in at least two situations, i.e., where the case involves complex scientific evidences submitted by parties and where the expert evidences introduced by party hired experts leave the judge in dilemma. The role of an independent expert here is so vital in educating the judge to understand the complexity involved in the case as well as to evaluate the validity of each testimonies or evidences submitted by the parties.[78]

In countries like USA (common law legal system) courts are particularly responsible to act as the "gatekeeper" of good science. In the landmark decision[79] regarding the standards for admitting scientific evidences (expert testimonies), the US Supreme Court held that Rule 702, which specifically deals with expert testimony, imposes gatekeeping role of scientific testimony on the judge by "ensuring that the an expert's testimony both rests on reliable foundation and is relevant to the task at hand."[80] Rule 702 of US Federal Rules of Evidence reads as follows;

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. [81]

According to the Supreme Court, expert testimony, the subject of which should be scientific knowledge, must be reliable and relevant. These two elements are underscored that 'the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but also reliable.'[82] Reliability is used to refer to the trustworthiness

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[76] *Turner* quoted in *Gilfoyle*.
[77] Jackson, supra note 62, pp.433, 443 & 448.
[78] Id., p. 443.
[79] Supreme Court of the United States, William DAUBERT, et ux., etc, et al, v. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579, 113 S.Ct. 2786, judgment, (28 June 1993) (hereinafter referred to as *Daubert*) (also available through Westlaw)
[80] *Daubert*, at 2790, p. 580.
[81] Quoted in *Daubert* , at 2793, p. 588.
[82] Id., p. 589.

of the scientific testimony in which case the court stated "in a case involving scientific evidence, evidentiary reliability will be based upon scientific validity."[83] And relevance implies that the evidence or testimony must be sufficiently tied to the facts or issues of the case so as to assist the trier of the fact in understanding the evidence or determining a fact in issue. [84]

Whether certain expert testimony is reliable and relevant or not is a matter of preliminary assessment by the court. The court is required to make preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology can properly be applied to the facts in issue.[85] There are major considerations that the judge should employ in deciding whether a theory or technique is a scientific knowledge that will assist the trier of the fact. These are testability, peer review and publication, error rate and general acceptance.[86]

The second important role of experts is investigation. Experts are important tools to carryout investigations on behalf of the court especially where these facts are not within the normal reach of the judge. Inquiry or fact-finding commissions are more often established by courts so that the former perform an independent investigation and report the findings to the court.[87] Thirdly, experts may be constituted for the purpose of assessing the amount of damages suffered by one party, for instance, due to medical malpractices those caused by industrial pollutions and the like. Moreover, the court may seek the assistance of experts to better inform itself on the general technical issues

[83] Id., p. 590
[84] Id., at 2796-2797, pp. 590-95.
[85] Id.
[86] Id., pp.593-95-; these are not exhaustive lists but important considerations that the trial judge should take into account. relying on different literatures and analysis explained the following; by *Testabilit*y scientific theory should be able to falsifiability, or refutability or testability; *peer review and publication* is not a necessary element but submission to the scrutiny of scientific community is a component of good science in part because it increases the likelihood that substantive flaws in methodology will be detected; in connection with *error rate*, it is stated that the court in the case of particular scientific technique, ordinarily should consider the known or potential rate of error , and the existence and maintenance of standards controlling the technique's operation ; *general acceptance*, the court stated reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community Another important note is that these role in itself calls for increased role of experts in the judicial process that the court has to rely definitely on independent expert's service or assistance in evaluating the methodology.
[87] Jackson , supra note 62, pp. 444 & 447

involved in the case so as to determine the relevance or otherwise of certain facts or evidences submitted by the parties.[88]

Having said these**,** for our discussion, the relevant question is: in what situations do courts specifically need the role of experts in relation to socio-economic and cultural rights? Much can be said as to when a judge who is seized with the adjudication of economic, social and cultural rights may need the assistance of experts. That is, there can be several instances where, just like in any other cases, the issues or facts involved in a particular case may go well beyond the normal comprehension of the judiciary. For the purpose of analysis, it is possible to consider two general scenarios where the court is required to rely on experts.

The first is inaccessibility of the necessary facts or evidences that the judge may, in turn, need to arrive on the just resolution of the case. A just resolution of a case by judicial or quasi-judicial organs necessarily requires the availability of sufficient facts regarding a particular case. That is, inaccessibility of the necessary facts may make legal analysis incomplete and the outcome of the case unacceptable.[89] In accessibility of facts may occur either due to the total absence of the fact (information) or due to institutional incapacity of the court to solicit, by its own, the those necessary facts. In the former case, it is a matter of common knowledge that parties to a dispute submit facts which supports or strengthens their own version of the story and omit or hide the rest. That same information may not be available to the other party to bring to the attention of the court. Especially, in developing countries, the availability of information on socio-economic matters is, let alone in an organized manner, seldom available to the general public. Although, in some countries, it may be possible to obtain some data from public domain, it is quite difficult to ascertain the credibility of such information. In the latter sense, even though the information can be obtained through thorough investigation, the institutional capacity of courts (limited human and financial resources as well as time constraints) may not allow them to perform such tasks. In this situations, the principle of access to

[88] Id.

[89] See for instance, European Communities- Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Appellate Body, AB-2000-11(WT/DS135/AB/R), Judgment, (12 March 2001) , para.79 (stating the effect of absence of sufficient facts on its legal analysis) (hereinafter referred to as EC-*Asbestos* case) the case is available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm(visited (visited in September 2010)

justice demands that the court shall resort to other alternative mechanisms. There are practices confirming the point under discussion.

In the case of *Said v. the Netherlands,* ECtHR had to decide whether the return of the applicant to his country of origin would run real risk of suffering treatment proscribed by Article 3 of ECHR. Accordingly, the court stated that in order to evaluate the issues involved in the case, it had to take not only the materials submitted by parties, but also, "*if necessary*, material obtained *proprio motu*."[90] *(Italics added*). Stating its inherent authority to obtain relevant and necessary information in its own motion so as to arrive on the just resolution of the case, the court relied on the reports and information from, *inter alia*, Amnesty International and US State Department concerning human rights situation of Eritrea.[91] In another case, the court already held that, though as a general rule, it is incumbent on persons who allege that their human right is violated to adduce, to the greatest extent practically possible, material and information allowing the Court to assess the claim, it should be recognized that, in certain circumstances, individuals may not be able to produce relevant materials to substantiate their human rights complaint.[92] Thus, within the meaning of 'experts' in this writing, it can be said that the court used the reports of Amnesty and others as 'expert-reports' for the fact that they have relevant experience and expertise regarding the matter before the court.[93]

Another important case is *Paschim banga Khet Samity v. State of West Bengal case,*[94] where the Indian Supreme Court was required to decide "whether the *non-availability of facilities for treatment* of the serious injuries sustained by Hakim Seikh in the various Government hospitals in Calcutta has resulted in denial of his fundamental right guaranteed under Article 21 of the Constitution."[95] To arrive at conclusion, the court heavily relied on the report of the Inquiry Committee established to make, among other

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[90] Case of *Said v, The Netherlands*, (application no. 2345/02), Judgment (5 July 2005) (hereinafter referred as Said), para. 49.(all cases of ECtHR cited in this writing are available through http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en)

[91] Id., para. *54cum* 31-35.

[92] *Bahaddar v. the Netherland* case, quoted in *Said* case(*id*) , para .49(where the court held that the direct documentary evidence proving that an applicant himself or herself is wanted for any reason by the authorities of the country of origin may well be difficult to obtain)

[93] See note 90.

[94] Paschim *banga Khet Samity v. State of West Bengal, Case No. 169*, Judgement (6 May 1996), (hereinafter referred as *Samity)*
also available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401236&country=13549

[95] *Samity*, para . 4

things, 'a complete and thorough investigation of the incident'.[96] Had it not been for the extensive investigation and report of the inquiry commission, the court would have had difficulty in dealing with such complex cases directly concerning the availability or otherwise of the resources at the said medical centres.

Furthermore, it is also important to mention the fact that the ILO organs responsible for the monitoring of the conventions often use the procedure known as Direct Contact Missions when faced with the inaccessibility or unavailability of relevant information concerning the complaints relating to the violation of the ILO convention rights.[97] This method,

> enables the examination by a representative of the Director-General of the ILO with representatives of the country concerned of problems affecting the ratification or implementation of Conventions or the discharge of obligations relating to Conventions and Recommendations or a case before the Committee on Freedom of Association.[98]

In essence, therefore, it is a fact-finding role in a Member State by independent persons (which may also include the officials of ILO) with relevant expertise concerning all aspects of the matter[99]. The persons designated to carryout the function can adopt their own working methods appropriate for their situations so as to "enable the government concerned to explain all the elements of the case, in order that the supervisory bodies may in turn be enabled to assess all relevant facts."[100] As the text below indicates, the method involves dialogue with authorities or institutions that have direct relation with the matter under investigation:

> The representative of the Director-General may, in agreement with the government concerned, visit the country to hold discussions with government representatives, explain the comments of the supervisory bodies, obtain a detailed acquaintance with the government's position and the exact nature of the difficulties met with, and make available to the supervisory bodies all relevant information supplied by the government.

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[96] *Samity*, para. 6[The case was an individual who, as a result of his failure from train, sustained head injury and brain haemorrhage. At the material time, though the patient visited seven public hospitals or health centres as the case may be, he did not receive medical treatment required by his situation. At final admitted to private medical research institute. The petitioner claimed that the refusal of medical treatment by public hospitals violated his right life protected by the constitution [right to life as for the court includes right to health].

[97] See Handbook of procedures relating to international labour Conventions, (Revised), International Labour Standards Department, International Labour Office, Geneva, 2006, pp. 54-55, para. 88(a-j)
and Recommendations Describe the method here officially introduced and consensual

[98] Id.

[99] Id., para. 88(f).

[100] Id., para. 88(e)

The practical impact of this method is well summarized as follows;[101]

> In practice, direct contacts have performed three functions. In many instances they have constituted a form of technical assistance, providing advice to Member States on how to comply with the requirements under ILO conventions or on the regular procedure described in Article 22. In some cases, direct contacts have involved fact-finding, which enables the Committee of Experts o reach its conclusions and submit its reports with due regard to all relevant considerations. Finally, where major problems or conflicting views between a government and ILO supervisory bodies have existed, direct contacts have provided the opportunity for a more complete explanation of the considerations underlying the positions adopted by each party. Instead of public criticism by the supervisory bodies, quiet diplomacy can be given a limited period of time in which to work. Direct contacts, in short, represent a highly flexible technique that, nonetheless, possesses serious potential for development.[102]

The second scenario justifying the need for expert in socio-economic rights litigation is the complexity of the issues or facts involved in the case before the court. It is cannot be expected that cases before the court are all straightforward. Some cases may require the court to engage in complex policy analysis. This is usually the case if the allegation, for instance, concerns the systematic discrimination of the policies of the government. Here, in order to resolve whether the government policy in fact resulted in discrimination against certain part of the population or individuals, it is necessary to analyze different policies of the government vis-à-vis the relevant human rights. In addition, analysis of some complex financial and auditing books as well as statistical figures normally need the assistance of experts. Moreover, some cases, as stated above, may also involve complex scientific facts or theories. For instance, whether there is a causal link between certain diseases and the chemicals released by a certain plants in a particular community usually require special expert opinions.

The case of *López Ostra v. Spain* well explains this point. The applicant alleged that, *inter alia*, the smells, noise and polluting fumes caused by a plant for the treatment of liquid and solid waste sited a few meters away from her home caused her family's living conditions unbearable and caused both her and them serious health problems.[103] In this case, both the national and international courts used various expert opinions and reports to establish whether or not the alleged acts constitute violations within the meaning of article 8 of the convention;

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[101] E. Gravel and C. Charbonneau-Jobin, The Committee of Experts on the Application of Conventions and Recommendations: Its Dynamics and Impact, ILO, Geneva, 2003, p. 16 (stating that the Direct Contact Method has become commonly used and since its introduction in 1968 and has produced positive results).

[102] C. Romano, The ILO System of Supervision and Compliance Control: *A Review and Lessons for Multilateral Environmental Agreements*, International Institute for Applied Systems Analysis, 1996, pp. 19-20.

[103] Case of Lopez *Ostra v. Spain* (application no. 16790/90), Judgment (09 December 1994) (hereinafter referred to as *Lopez*).

On the basis of medical reports and expert opinions produced by the Government or the applicant […], the Commission noted, inter alia, that hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant's daughter's ailments.[104]

The complexity of the fact need not involve scientific evidences of 'hard' sciences. Whether certain facts involved in the case are complex or not depends, inter alia, on the nature of the issues to be resolved by the court and the corresponding ability of the judge to correctly analyze those facts. For instance, the ICSID Tribunal, indicating how the case it was dealing with involved complex issues necessitating the acceptance of *amicus curiae* submissions, stated that "[the water distribution and sewage] systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations."[105] Moreover, in the Asbestos case[106], both the Panel and Appellate Body used detailed expert inquiry reports and *amicus curiae* submissions (see the discussion below) in order to dispose the case which involved complex scientific issues between EC and Canada. The Panel, in justifying its right to seek expert opinion on individual basis, stated the following;

we draw attention to article 13 of the Understanding which states *inter alia* that 'each panel shall have the right to seek information and technical advise from any individual or body which it deems it appropriate' and 'panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter.

[…]

In this case, it appeared to us that consultation of experts on the individual basis was the, most appropriate method inasmuch as it would be the most appropriate way of allowing the Panel to obtain useful information and opinions on the scientific and technical issues raised by this case. In view of the wide variety of fields of competence involved, in particular, it appeared to us to be preferable to obtain different information and opinions individually rather than requesting a joint report on the various scientific or technical issues raised. [107](*sic*)

For instance, as indicated in the Asbestos case, the following issues cannot be judiciously resolved without the assistance of experts;

[examination of] physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In the case of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation.[108]

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[104]Id., para .18-19 *cum* 49.
[105] With regard to *amicus curiae*, see discussion under section 2.4 below.
[106] EC-*Asbestos* case (AB), supra note 88.
[107] EC-*Asbestos* case, Panel Report of (September 2000), Para. 8.9-8.10
[108] Id., Appellate Body Report (12 March 2001), para. 114.[quote from Panel Report (*id.*)].

These relevant case laws of different (quasi-)judicial bodies clearly indicate that the incapacity, if at all it is, is not limited to one particular area of litigation. It is a cross-cutting limitation that judges do need expertise in matters involving facts beyond their normal expertise. As such, there is no doubt that judges who are able to engage in the review of complex issues involving science or technology, like in toxic torts, industrial pollution, medical malpractice, etc, can with relative easy adjudicate disputes pertaining to socio-economic and cultural rights. Judicial practices of different jurisdictions show that socio-economic rights adjudications require no unique judicial expertise than is required to resolve other court cases. And, when faced with complex cases, courts do rely on expert opinions or reports as they normally do in other cases.

2.4. The Role of *amicus curiae* in the Adjudication of Socio-economic Rights

Participation of *amicus curiae* in the judicial process is neither a recent phenomenon. Nor is this writing the first in discussing the role they play before the proceedings of both national and international (quasi-)judicial organs). The purpose of this subsection is to locate the role of *amicus curiae* in the adjudication of socio-economic rights, which is yet to be explored, if at all, in full length as one key response to the debates relating to the capacity of judges to resolve issues pertaining to socio-economic policy of the government. Despite the fact that amici's participation before the (quasi-)judicial proceeding is ancient phenomena,[109] there seems to be no uniform standards applicable across all courts or tribunals. This is seen, for instance, in the following cases directly concerned with the admission of *amicus curiae* submissions.

For instance, in *Fose v. Minister of Safety and Security* case, the SA constitutional court had to decide on, inter alia, admission of *amicus curiae*. According to the court,

> [i]t is clear from the provisions of rule 9 that the underlying principles governing the admission of *an amicus in any given case*, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the amicus are relevant to the proceedings and raise new contentions which may be useful to the Court. The fact that a person or body has, pursuant to rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court's control over the participation of the amicus in the proceedings, because in terms of sub-rule (3) the terms,

[109] For general discussion on this topic, see D. Shelton, The Participation of Nongovernmental Organizations in Internaional Judicial Proceedings, 88 Am. J. Int'l. 611) (1994), p. 611.

conditions, rights and privileges agreed upon between the parties and the person seeking amicus status are subject to amendment by the President.[110] [*Emphasis added*]

The holding of the court sets out certain standards for admission of the amici in any given case appearing before the court for consideration. While justifying its refusal to admit the country's human rights commission as *amicus curiae* in this particular case, the court stated that,

[t]he Human Rights Commission's purported admission by consent as an amicus curiae was, as mentioned, well out of time and no proper application for condonation of its late admission was brought. Moreover the written argument which it lodged did not raise any substantially new contentions which might have been useful for the Court. Under these circumstances the Court declined to permit the Human Rights Commission to address argument to it.[111]

The same court, in *Re Certain Amicus Curiae Applications relating to TAC case*, had to decide on more or less similar issues as the above case. In this case the court held that it application for *amicus curiae* status should fulfil all the conditions set out in the *Fose* case, and, at the same time, such applications must be made timely and failing that, condonation must be sough without delay.[112] What is interesting in this case is the court's defined what the role and duty of amici should be;

The role of amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceeding without having qualified as a party, an amicus has a special duty to the court. The duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily, it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence. [113]

The ICSID Tribunal also dealt with the question whether or not to admit *amicus curiae* in one of its arbitration proceedings.[114] The reason for contentions regarding the admission of amici was the lack of specificity of the rules that "[n]either the convention nor the arbitration rules [of ICSID] specifically authorize or specifically prohibit the

[110]Constitutional Court of South Africa, Case CCT 14/96, Judgment (5 June 1997) (hereinafter *Fose)*, para. 7.
[111] Id., para.10.
[112] Constitutional Court of South Africa, Case CCT 8/02, Re Amicus Curiae Applications relating to Minister of Health and others v. Treatment Action Campaign and Others, Judgment(02 May 2002), para. 3.
[113] Id., para. 5.
[114] The ICSID Tribunal Recieved three Amicus Curiae applications from different nongovernmental organizations in 2005 and 2006 and 2007 (ICSID Case No. ARB/03/19, ICSID Case No. ARB/03/17, ICSID Case No. ARB/03/19 respectively) (hereinafter reference to paragraphs will be by the year of decision).

submission of nonparties of *amicus curiae briefs* or other documents."[115] Thus, the tribunal stated that two basic questions that had to be addressed. First, does the tribunal have the power to accept and consider *amicus curiae* submissions by nonparties to the case? And, second, if it has that power, what are the conditions under which it should exercise [this power]? In justifying its power to accept the *amicus* submissions based on its own inherent power to decide on certain procedural questions as well as the role the *amicus curiae* submissions play.[116] Drawing on the traditional role of *amicus curiae* in different national legal systems as well as before international for a, the Tribunal stated the following;

An *amicus curiae* is, as the Latin words indicate, a "friend of the court," and is not a party to the proceeding. *Its role in other fora and systems has traditionally been that of a nonparty*, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. *The traditional role* of an amicus curiae in an adversary proceeding is to help the decision maker arrive at a correct decision by providing the decision maker with arguments, perspectives, and expertise *that the litigating parties may not have provided*. In short, a request to act as amicus curiae is an offer of assistance – an offer that the decision maker is free to accept or reject. An amicus curiae is a volunteer, a friend of the court, not a party.[117][*Italics mine]*

As the above text indicates, *amicus* by definition is a non-party providing a friendly assistance to the court. The nature of the assistance is generally similar to the role of experts. That is why the tribunal, while dealing with one of the criteria for accepting *amicus* submission, emphasized that such submissions can only be accepted from persons who, inter alia, establish that they are *expertise* in the particular case. The role the *amicus* play is so crucial, particularly in situations where the issues before the court have larger effects beyond the parties to the case. This scenario is especially true in the cases of human rights litigation as such cases usually set precedents for the subsequent issues.[118]

[115] ICSID (2006), para. 10.
[116] ICSID (2006), Para. 7&12 and ICSID (2005), para. 6 & 11[stating that amicus curiae submission is a procedural matter and thu falls within the inherent power of the Tribunal to decide].
[117] ICSID (2006), para 9, 13 & 23; ICSID (2005), para. 8,& 24.
[118] See generally Shelton, supra note 108.

Having reviewed the *amicus* practices of other jurisdictions and forums,[119] the Tribunal decided that its exercise of the power to accept *amicus curiae* submissions should depend on three basic criteria. These are; the appropriateness of the subject matter of the case; the suitability of a given nonparty to act as *amicus curiae* in that case; and the procedure by which the *amicus* submission is made and considered. The tribunal also stated that "the judiciously application of these criteria will enable […] to balance the interests of non disputant parties to be heard and at the same time protect the substantive and procedural rights of the disputants to fair, orderly and expeditious arbitral process."[120]

In connection with the first criterion, i.e., appropriateness of the case for *amicus curiae* submissions, the tribunal made the following important observation;

Courts have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation *because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case.*[121]*(Italics added)*

The Tribunal did give reasons to show how the case before it constituted larger public interests and, thus, how the outcome of the case would affect those parties beyond the case;

The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of urban areas in the province of Santa Fe. Those systems provide basic public services to hundreds of thousands of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.[122]

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[119] It seems that this decision of ICSID concerning Amicus Curiae is highly influenced by the WTO Appellate Body's decision in the Asbestos case of 2000. There, the AB issued what it called additional procedure for that particular case to be able to receive submissions from third parties and nonparties so as to dispose the case fairly and orderly. All these and more are provided in the ruling; there should be written application; detailed description of the identity of the applicant(nature of membership, legal status, objectives it pursue); nature of interest in the case(appeal);identify specific legal issues covered in the panel's report and the legal interpretations developed thereof that are the subject of appeal; justification for granting leave to file brief; how it will contribute to the resolution of the case that is not likely to be repetitive of what has been submitted by other parties; relationship[direct or indirect] with the parties to the case and third parties[see EC-*Asbestos* case, Appellate Body Report, para. 52].

[120] Id.

[121] ICSID (2006), para. 18; ICSID (2005), para. 19.

[122] Id.

With regard to the second criteria, suitability, the Tribunal emphasized that it "only accept *amicus* submissions from persons who establish to the to the Tribunal's satisfaction that "they have the *expertise, experience, and independence to be of assistance in [the particular] case*."[123] [*Italics mine*] That is to say, the suitability of the non party for *amicus* status concerns the evaluation as to whether the petitioner has the necessary qualification or expertise to assist the court or tribunal in arriving at the just resolution of the dispute or a case. Whether the party making application for the *amicus* status possesses such quality is a matter of case-by-case determination by the relevant court or tribunal.[124] However, the onus of providing relevant information specifically in relation to their identity and background, their interests in a particular case, their financial or other relationships with the parties, and the reasons why the court or tribunal should accept the petitioners' *amicus curiae* brief lies on the petitioner for that status.[125]

And finally, with respect to procedural matters, it was stated that "the goal of such procedure will be to enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties." [126] Accordingly, in its 2007 ruling, the Tribunal set some technical guidelines regarding the submission of the briefs.[127]

The WTO Appellate Body and Panel also specifically addressed the issues concerning admission and procedure thereof of *amicus curiae* briefs. The case with Appellate Body is particularly interesting due to three basic reasons. First, it is the Appellate Body itself that took initiative in inviting nonparties to the case to file application to be granted leave for submission of *amicus curiae*. Secondly, it established concrete and detailed standards and procedures, in its own context, for the admission and submission of *amicus curiae* applications and briefs, respectively. Thirdly, the standards and procedures were drawn in consultation with all parties to the case. In light of the

[123] ICSID (2006), para. 23; ICSID (2005), para. 24.
[124] Id.
[125] ICSID(2006), para 24 & 29; ICSID(2005), para. 25. This information are particularly important for determination of whether the alleged experts possess the necessary qualities_ expertise, experience and independence.
[126] ICSID(2006), para. 28; ICSID(2005), para. 29.
[127] ICSID(2007), para. 26 (This includes, inter alia, page limits and font size, language of submissions); same is true with Additional Procedure adopted by WTO Appellate Body in EC- *Asbestos* case, Appellate Body Report, supra note 88, para. 52(3(a-b)) & 7(b)).

complexity of the facts and issues involved in the Asbestos case, the nonparty submissions are of vital significance. [128]

Even though the practice by which *amicus curiae* submissions are received varies, there are some important elements present in the discussion of each of the cases considered above. In this regard, it is also interesting to note that the ICSID Tribunal set those standards after reviewing the practices before different legal systems and international forums [including that of WTO]. This being said, the following observations can be made;

1. *Amicus Curiae* is a nonparty to the proceeding. It is volunteer and friend of court's offer for assistance. This implies that such nonparty should not drive any material benefit directly or indirectly from the outcome of the case.[129] The service, being voluntary assistance, they are not entitled for reimbursement of costs incurred in the processes of making submission to the court or tribunal.
2. It should make timely application for consideration providing relevant and necessary details about their identity and background, their interest in a particular case, financial or other relationships with the parties, and justification why their application is to be accepted. In this regard, the ICSID Tribunal stated that the application must show how the petitioner's experience, expertise, and perspectives would assist in arriving at decision. It also added that it is not enough, for example, for certain NGO to justify *amicus* submissions on general grounds that it represents civil society or it is devoted to humanitarian concerns. It must show to the tribunal how its background, experience, expertise or special perspectives will assist the tribunal in the particular case that it is called upon to decide.
3. The consent of the parties to the case is also one of the relevant considerations in accepting *amicus curiae* submissions. This does not mean that the *amicus* status will automatically be rejected because of the objection of the parties. It is for the

[128] In fact, the action of Appellate Body is in line with the definition of the Black's Law Dictionary, supra note 48, that Amicus Curiae can also mean a person requested by the court to file a brief in the action because that person has a strong interest in the subject matter.
[129] See also EC-*Asbestos* case (AB), Appellate Body Report, supra note 88, para 52(3g).

decision making organ to evaluate the grounds of opposition on reasonable grounds.

4. The submissions must be cogent and relevant to the case at issue and should provide helpful assistance to the court in arriving at the just resolution of the case particularly drawing the attention of the court to the relevant facts and law which the parties may not have provided. [130]
5. The question whether to accept or reject the submissions are assessed based on the criteria of appropriateness of the subject matter for *amicus* submissions, suitability of the particular applicant for the *amicus* status and the procedure governing such submissions.
6. The procedure regulating the submission of the *amicus curiae* should address further the goal of *amicus* submissions without unnecessarily jeopardizing the interest of the parties to the case. However, as ICSID Tribunal stated, there are some inevitable consequences that should be tolerated given the advantage the *amicus* submissions would provide in a particular cases.
7. Finally, but by no means the last element, the ultimate decision for acceptation or refusal as well as control of the direction of submission of such submissions is a discretionary power of the decision maker. There is no automatic right to *amicus* curiae status *per se*.

Amicus curiae submissions can emanate from different sources. As the practices of different forums indicate, governmental and nongovernmental organizations, including those concerned with human rights organizations, development, environments and climate changes, human rights commissions, academicians and research centres have acted as *amicus curiae* before different tribunals and courts both at national and international level. In addition, it should be noted that different human rights instruments (including the rules of procedures of the relevant monitoring organs) provide a 'default

130 This would constitute providing relevant arguments and perspectives on the case and expertise to the court in handling the complexities [as friends of the court] [facts which would not have been made otherwise and also which parties would have not provided; raise new contentions[actually this is about arguments and perspectives which may be useful to the court which could arise within the data before the court but no new evidence or fact and in doing so, no repetition of what is already submitted, as ICSID in jurisdictional issue rejected any such case for parties did well, for example]

amicus curiae or experts' from which information or opinion could be sought any time a case arise. For instance, Article 36 paragraph 2 and 3 of the ECHR provides the following;

> 2. The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
> 3. In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

Moreover, the Optional Protocol to the ICESCR also provides that, during examination of the individual complaints, the committee can seek information from different UN Specialized Agencies that has relevant connection with the matter before it. Thus WHO, WFP, UNESCO, UNEP, ILO and the like are important organs that could serve as *amicus curiae* (experts), not only before the committee but also before any other court or tribunal dealing with in the adjudication of socio-economic and cultural rights.[131]

Thus, *amicus curiae* briefs play important roles not only in the just resolution of a particular case but also in the realization of access to justice for the poor and disadvantaged parts of the society. It also significantly contributes in the development of norms by offering critical analysis of certain factual and legal situations uninfluenced by the exigencies of a particular case.

3. The Appointment of experts in Judicial Processes

In different kinds of judicial proceedings, the disputed part is not whether to use expert or not. Rather, the way such appointment should take place. The question of appointment raises crucial issues such as who should appoint_ parties or court. Another related question may be that of the costs and the number of experts required in a particular case. This chapter briefly addresses each of these questions.

3.1. Who Should Appoint Experts?

Traditionally, the nature of legal systems used to determine the role of court and adversaries in litigation process_ court, parties and their lawyers. In inquisitorial system of adjudication or fact finding, parties to the case are considered to be passive for most

[131] Optional Protocol to ICESCR, UN General Assembly Resolution, A/RES/63/117 (10 December 2008), Art. 8.

fact finding role lies on the court.[132] On the other hand, the Anglo-Saxon or common law legal tradition, with adversarial system of litigation, is characterized by the passive and active role of the judge and parties to the case respectively.[133] As a result while in inquisitorial systems it is court's main responsibility for establishing the existence of the facts and, thus, responsible also for appointing experts, the opposite was used to be true in countries with adversarial system.

However, due to longstanding advocacy for balanced role of each actors in the litigation process (common law for active judiciary and civil law for active role of parties as well), the distinctions between the two systems of adjudication are no longer mutually exclusive. That means, those factors which used to distinguish between the two are not as strong as they used to be. As the statement by Goldstein depicts;

> These portraits of accusatorial and inquisitorial systems are, of course, idealized. European criminal procedures are no more purely inquisitorial than ours [American] are purely accusatorial. Europeans too have accusatorial elements and mixed systems; they may tolerate more discretion than their literatures concedes and may, in many instances, be moving toward a greater role for counsel and more explicit protection for the accused. Nevertheless these are central tendencies.[134]

Particularly the Orucu's statement illustrates the current reality of the world legal traditions;

> *In our day all legal systems are mixing in one way or another. Legislators and courts are looking at other jurisdictions at least for inspirational if not for direct borrowing, in an effort to improve responses to shared human problems. Legal ideas and institutions are crossing borders rapidly.*[135]*(Italics original)*

It can be argued that the substantial role in the processes of such convergence is played by international (human rights) law and (human rights) tribunals or courts. For instance, In *Makwanyane* case, the court held that;

> . . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]. [136]

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[132] See generally H. Erichson, Mass Tort Litigation and Inquisitorial Justice, 87 Geo. L.J. 1983, (1999)
[133] Id. See also Reisinger, supra note 47; Jackson, supra note 62 and Meintjes-van der Walt, supra note 45.
[134] Quoted by Meitjes-van der Wal, supra note 45, p. 40.
[135] Id., p. 39 (quoting Orucu, Studies in Legal Systems: Mixed and Mixing (1996)).
[136] Reproduced in in Grootboom case, supra note 59, para. 26.

This should not be taken to mean that the two legal traditions are at complete convergence. Let alone the two legal systems, the tradition of each national legal systems retain some of their unique features, may be owing to the traditional values attached to the legal culture of the society. Moreover, the structural features and the degree to which emphasis are placed upon certain particular elements of adjudication processes remain distinct.[137]

However, as already discussed, in common law countries, after the decision of US Supreme Court in *Daubert* case and the Reform of UK's civil Justice Systems following the influential report of Lord Woolf, judges are no longer passive. Therefore, it is possible to argue that, in modern adjudication systems courts do play active managerial role while also giving some element of autonomy for the parties to the case. In this context, generally the question who should appoint can expert can be addressed under two models: party appointed expert and court appointed experts model.

3.1.1. Experts of the Parties

As already stated, due to its reliance on the disputant parties for the discovery of the truth, in the adversarial systems, the parties were responsible for introduction of their own experts. The philosophy of such litigation is that the truth of the matter can only be discovered by battle of the adversaries and, hence, the judge should remain passive and impartial until the closing of the hearings. Some argue that such systems maintained the so-called party-autonomy and control over the direction of the disputes as well as discovery of facts. Although it can be recognised that there exist some elements of truth in such approaches, it has, however, resulted in several unintended consequences. Lord Woolf's report identified some of these major problems. These are partisanship of experts; excessive delays in judicial processes, and excessive and inappropriate use of experts.

In essence, as well argued in *Ikarian Refeer* case,[138] "expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form and content by the exigencies of litigation." [139] To the contrary,

[137] See Meintjes-van derv Walt, supra note 45, pp. 40-62.
[138] See supra note 69.
[139] Id.; also cited in Woolf's interim Report, chapter 23, para. 5 (available at http://www.Dca.gov.uk/civil/interim/chap23.htm (visited in September 2010)

experts were used by each side of the parties to, inter alia, polarize issues and unwilling adhere to the guidelines.[140] In many cases the expert, instead of playing their appropriate role, had become a very effective weapon of parties' arsenal of tactics.[141] In connection with this, one of the concerns was the problem related to the "battle of experts". According to Jackson, in some cases the disparity between expert opinions is so extreme that opposing experts refuse to acknowledge each other's opinions altogether. That is, "otherwise reliable experts nullified each other's testimony and were effectively rendered incredible in the judges' estimation."[142] The consequence is that "[p]artisan experts often fail to clarify issues for the jury because the expert may tailor testimony to meet the needs of the client rather than make a full disclosure."[143] Moreover, complete freedom of parties to introduce their experts also gave rise to another critical problem, the "junk science" that, in some cases, opinions were portrayed as though they have valid scientific basis. [144] Such problems were not limited to accusatorial systems. They are almost inherent in all adjudication systems though the degree may differ.

Nonetheless, the basic point to be noted here is that each party had complete freedom to introduce his or her own experts. This is based on the principle of party autonomy which, in turn, is derived from the principle of equality of arms. In connection with the adjudication of socio-economic rights, however, it is very difficult to maintain the concept of party autonomy and equality of arms. To State the obvious, such adjudication often takes place between individual victim who are unable to satisfy their basic necessities on the one hand and the government on the other.

3.1.2. Court Appointed Experts

The problems associated with party experts discussed in the preceding sections have led towards heated debate and advocacy for court's enhanced role particularly in the admission of experts to judicial process. Particularly the adversarial system had been subject to heated criticisms for heavily relying on the parties and lacking effective

[140] Id.
[141] Id.
[142] Jackson , supra note 62, p. 443.
[143] Id.
[144] Reinsinger, supra note 47, p. 232.

judicial control.[145] Reisinger, while discussing how through course of history the problems of partisanship of parties' experts led to court appointed experts, wrote the following;

> Noted partisanship on the parts of doctors testifying at trial during the 1850s prompted calls for reform of expert testimony. Proposals for reform continued through the early 1900s judges responded to proposals by appointing their own experts using the inherent authority of the court. These early court appointed experts generally had the special skills necessary to assist the judge in narrowing the issues and interpreting complex financial data or auditing volumes of data. Experts utilized in this manner preserved the litigants' […] right to a fair trial by jury because their appointment only made the judicial process more efficient by simplifying issues without making ultimate fact determinations.[146]

These all led the judges particularly in common law to appoint their own independent and neutral expert as well as actively control admission of parties' expert evidences.[147] In this regard, it should be noted that court appointed expert is a normal practice in the civil law legal systems.[148]

There are several advantages attached to court appointed experts over party-hired experts. Mention can be made of the two major ones. The main advantage for the court appointed expert is the degree of impartiality and independence. That is, as these experts function subject only to the guidelines and requests provided to them by the court, the information they provide would directly address the questions posed to them by the court. Moreover, in the course of carrying out their inquiry or investigation, they are not subject to any pressure whatsoever from the parties but to the courts terms of reference and schedule. Impartiality is particularly re-enforced by the fact that all the selection processes (nomination) and criteria thereof are determined under the direct supervision of the court. The second advantage is efficiency and effectiveness. Court appointed experts are efficient compared to that of party appointed experts. The former involves substantially less cost and time. It is also flexible that courts can direct the investigation and further inquiry into the case. And, with regard to effectiveness, as they operate under the guidelines of the judge, the reports will enable the court in clarifying the complexities involved in the case and narrowing the issues for trail. In this regard, it should be

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[145] Woolf's interim Report, chapter 3, para. 3 (available at http://www.Dca.gov.uk/civil/interim/chap3.htm) visited in September 2010).
[146] Reisinger, supra note 47, pp. 228-29.
[147] For instance the *Daubert* case reemphasized the inherent and ruled based power of the court under US. Federal Rules of Evidence.
[148] Woolf's interim report, chapter 23, para. 21 (contrasting the two system with regard to court appointed experts); available at http://www.Dca.gov.uk/civil/interim/chap23.htm

mentioned that the problem of junk science and battle of experts will not take place in the case of court appointed experts. This is so because,

> a neutral expert is loyal to the court's interest in finding the truth[for the reason that they] are less susceptible to pressures to tailor their testimony to support a particular legal outcome than are partisan experts whose fees are paid by parties interested in the legal outcome.[149]

The effectiveness of the court appointed experts can also be seen from the perspective of the educational assistance they give to the judge. As provided in the *Dauberts* case, the responsibility of the judge with respect to scientific evidence is, *inter alia*, to ensure that the assertions or findings are based on valid scientific principles and methods.[150] This in itself requires the knowledge of what constitutes valid scientific principles and methods in certain particular field. Thus, by offering an educational approach to the reasoning and methods behind the scientific evidences, the neutral experts contribute for the effective adjudication of that particular case.

Having said this, the appointment of experts by court can take place in three ways. That is, they can be appointed using the inherent power of the courts, through consultation with parties to the case, or under certain specific procedural rules. In the first case, courts can exercise their inherent power to appoint experts regardless of the consent of the parties. It is also possible that the judge may engage the parties in the selection process of relevant expertise. And finally, it may be the case that certain rules of procedure may lay down specific guidelines as to the appointment of experts. Which ever way the appointment takes place, it is important to emphasis that the modern adjudication system puts the whole process of expert appointment and admission of their reports under the active control of the judiciary.

3.2. Appointment of Experts in the Adjudication of Socio-economic Rights

Though the question who should appoint experts is not irrelevant in socio-economic rights adjudication, it has only limited practical utility. This is so because such questions, as we have already discussed, normally arise in the situation where there are competing possibilities for the appointment of experts. That is, especially in private litigations, both parties to the case are considered to be equal and the court is only

[149] Reisinger, supra note 47, p. 234.
[150] *Daubert*, at 2796-97, pp. 593-95.

expected to keep the fairness of the processes. The rationale behind equality of arms principle is that, in private cases, both parties to the case are presumed to have equal opportunities and constraints to plead their arguments before the court. This is not an irrebuttable presumption however. There may be exceptional situations where the court may be required to take measures in favour of one of the parties.

On the contrary, it is very difficult to ensure the equality of arms principle without the active involvement of the court in the case of socio-economic rights adjudication process. The reason is that such adjudication is prima facie takes place between unequal parties_ an individual victim and the government_ unless courts, in their own motion, take active measures. To restate the obvious, in such cases, the claim of the individual usually rests on the adverse effects of poverty vis-à-vis the obligation of the government. Thus, is it not a paradox to expect the poor to be able to hire his or her own expert? Is it fair for the court or tribunal to consider the poor and the government as parties with equal opportunity and constraints in such circumstances?

International human rights law requires that individuals be given legal aid as an important element of right to fair trial and access to justice both in civil or criminal cases. For instance in the Airey case ECtHR reiterated one of its often quoted principle of human rights law that "[t]he Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[151] Having considered the nature of the case that it can only be handled by a specialist in the area and also her financial position to hire the lawyer, the Court held that it is "most improbable that a person in Mrs. Airey's position can effectively present his or her own case."[152] Despite the fact that, unlike criminal charges where right to free legal aid is clearly provided, the Convention does not provide a comparable right to free legal aid in civil cases, the court held that

> Article 6 para. 1 […] may sometimes compel the state to provide for the assistance of a lawyer when such assistance proves indispensable for an access to court either because legal representation is rendered compulsory, […], or by reason of the complexity of the procedure or of the case.[153]

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[151] *Airey* v, *Ireland*, (*Application* no. 6289/73), Judgement, (09 October 1979)(hereinafter referred as *Airey*), para 24 (she was disadvantaged not only because of the financial position but also due to the complexity of the procedure that a specialist can only handle)
[152] Id.
[153] Id., para. 26.

To put differently, the interest of justice demands that, especially in sensitive or complex cases, individuals are provided with free legal assistance in the situation where, mainly due to financial reasons, they are unable to secure by their own legal representation.[154] Applying the Airey's standards, both elements of complexity and indispensability are usually present in socio-economic and cultural rights adjudication particularly where the claim alleges the violation of obligation to provide_ as in the case of right to adequate housing, health, food, etc_ for it concerns not only pure legal analysis but also evaluation of comprehensive government policies and other socio-economic factors. Though at times individuals may have access to information that will enable them plead their cases effectively and also the possibility that they may receive free assistance from elsewhere, it does not seem to be inline with the general human rights law either to require the individuals to appoint experts or treat them on equal footings with the government.

There is another reason why the question of appointment of experts may be of less relevance in the adjudication of human rights. As stated above, several human rights instruments and rules of procedure of the relevant monitoring bodies provides that certain specifically designated organizations may submit their observations on the disputes concerning the rights they monitor. Moreover, *amicus curiae* submissions are also either clearly provided or are presumed to be in their inherent authority to receive the same any time a case appears for consideration. [155] These all make the question of expert appointment of less value under socio-economic rights. It is incumbent upon the court and the government, in the particular circumstances of each case, that the individual is guaranteed a proper legal representation. Thus, it can be argued that, access to justice and fair trial provide important legal basis for the court or tribunal dealing with adjudication of socio-economic rights to appoint its own experts.[156]

Though the purpose of this writing is related to the role experts play in the adjudication of socio-economic rights, in whichever form they are constituted, two issues

[154] For general discussion on this topic See A.R. Mowbray, The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights, Hart Publishing, Oxford-Portland Oregon, 2004, pp. 117-20

[155] See details of this…

[156] It can also be argued that the obligation to prove the compliance with its human rights obligation should rest on the government provided that the decision maker received consistent allegation of rights.

deserve passing notes. The first one is the form of court appointed experts: how many experts should be appointed to carryout investigation on behalf of the court? The question whether courts should follow single expert or expert panel model mainly depend on the nature of the complexity and sensitivity of the issues in a particular case.[157] For relatively simple and none sensitive cases, the single expert model may be efficacious than the panel. In complex and sensitive cases, the panel should be considered as an appropriate model.[158]

The second issue concerns the question of "balancing of interests'. We have been considering how experts play in judicial processes especially with regard to socio-economic and cultural rights. It is particularly stated that courts have inherent power to appoint their own experts regardless of the consents of the parties. This may, however, seem to contradict with the right of the parties to produce their expert evidences or call their expert witnesses which , in turn, is an essential aspect of the right to fair trial. Moreover, it can also be argued that the power of the court to appoint its own experts and at the same time giving each parties to call their own experts would increase the overall cost of litigation thereby creating unnecessary burden on the parties to the case. It is true that the power of the court to appoint its own experts should not be excised to jeopardize the right to fair trial of the parties. The rationale for court appointed experts and right to fair trial should not be seen as contradictory procedural principles. The fact that the court has the power to appoint an independent expert of its own motion does not mean that the parties are deprived of the opportunity to cross examine, or even in the circumstances of the cases, to call their own experts. One does not necessarily exclude the other. Furthermore, though these may be of general problems, in the context of socio-economic rights, courts, as discussed above, usually appoint fact-finding commissions or experts on behalf of the individual victims while also giving due regard to the procedural rights of the other party. As a result, it would be difficult to imagine, though theoretically possible, the scenarios where the two values actually conflict with one another.

[157] Lord Woolf himself, in his final report suggested that the rule should be single expert but then the judge has the power to decide in the circumstances of the case. See Lord Woolf, Access to Justice, Final Report, London:HMSO, 2006, pp. 140-142, para 16-24

[158] Id.

The costs of litigation should also be seen within the contexts of each case. Although it is relevant element consideration, the most important goal should be the just resolution of the case. Thus, cost of litigation should not hinder the court from appointing its experts when it is necessary to do so. It is also necessary to note that the State is required to provide individuals with legal assistance which, in turn, implies allocation of necessary resources for the realization of the right for the poor and disadvantaged part of the community. This being said, there are, however, several ways in which the court could keep such costs at a lowest minimum possible. First and foremost, the expert reports utilized in one case should be properly documented and publicly available to all so that they can be easily accessed and used for future litigations. This, in turn, has another important advantage. It helps not only to avoid the need for future appointment of experts but also to achieve consistency and uniformity of approaches to comparable situations. Another possible mechanism for reduction of costs is to effectively utilize the role of *amicus curiae* submissions from various organizations and individuals. The court can, of its own motion, solicit nonpartisan submissions from interested persons and entities.

4. Conclusion

Pursuant to the preceding discussions, the following conclusions can be made. Under human rights law, states have at least three levels of obligations: to respect, protect and fulfil. Which obligation of the State ensues from a certain right under question at certain specific time is a matter of determination within the context of the claim itself. Therefore, the argument that socio-economic right involve obligation to directly provide goods and services to the individual holds only little water. As do all human rights, the realisation of socio-economic rights may entail direct provision of the rights recognised by the State Party. The situation where a State is required to directly provide the rights is more of an exception than a rule. That is, the obligation to provide, aspect one of obligation to fulfil, implies that the State shall provide the rights for individuals who, because of the circumstances beyond their control, cannot enjoy their human rights.

Although it is true that the full realisation of socio-economic rights is defined in the progressive scale, whether the State is incompliance with its obligation of progressive realisation can perfectly be subjected to judicial scrutiny that should assess the measures taken in terms of its effectiveness, participation, accountability and equality. Such exercise may obviously entail

evaluation of complex measures or policies of the government. It may also be the case that judges lack certain level of expertise to assess such social-economic policies of the State. However, the lack of expertise of the judiciary is by no means a unique nature of adjudication of socio-economic rights. It concerns all kinds of cases_ civil, criminal and all human rights.

In this respect, it has been shown that courts routinely deal with civil and criminal cases where complex scientific facts or theories and financial issues are involved. However, in no time the lack of expertise over such matters prevented judges from adjudicating the issues involved therein. They have been and are able to resolve difficult and complex issues pertaining not only to pure legal questions but also entailing complex scientific matters canvassed with legal arguments. The truth is that judges have never been and cannot be experts on every aspect of issues in the cases. This is due to the fact that knowledge and skill is relative and local that no person can claim expertise in every aspect of life at all times. Particularly, the growth in science and technology as well as the sophistication in the fields of specialty continues to create more and more gaps in judicial expertise vis-à-vis all kinds of issues in the adjudication. In those circumstances, it is normal for the judiciary to look for the assistance of experts to fill the gap. Therefore, in essence, the rationale for the involvement of experts or expert evidences in adjudication process is the relative limitation of the scope of human knowledge in general and of the judiciary in particular. For this reason, experts are and continue to be crucial parts of adjudication processes so as to ensure the just resolution of complex cases involving unusually difficult problems that goes beyond the regular questions of fact and law.

Adjudication of socio-economic rights requires no unique expertise than is required in other kinds of litigations. In the situation where it is necessary, judges can, as they do in other cases, rely on the role of experts. As the practices of courts and tribunals show, inaccessibility of relevant facts or evidences as well as the complexity of issues or facts before the courts may necessitate the appointment of experts in socio-economic rights adjudication. Judges have inherent power to appoint their own experts or inquiry commissions to carryout investigations on certain aspects of the case before them. In connection with this, it is argued that, especially in the context of human rights litigations, access to justice and fair trial provide important legal basis for the court or tribunal to appoint its own experts. In this regard, the role of *amicus curiae* is vital not only in the just resolution of a particular case but also in the realization of access to justice for the poor and disadvantaged parts of the society. It also significantly contributes in the development of norms by offering critical analysis of certain factual and legal situations uninfluenced by the exigencies of a particular case.

In the final analysis, therefore, if the lack of expertise has never been used to argue against the adjudication of, for instance, complex tort cases involving complicated scientific theories and evidences, patent and copy rights, criminal cases involving different medical professions and if the lack of expertise is not preventing judges themselves from dealing with the same, it cannot and should not also prevent them from adjudicating right to food, water, health, housing and the like. As several experts are being engaged in assisting judges to resolve the complexity sciences or facts in both civil and criminal, and other human right cases, the same is and should be true with regard to the adjudication of social-economic and cultural rights. Hence, the argument against justiciability of socio-economic rights based on the alleged lack of expertise of the judges is inconsistent with the reality of judicial dispute settlements and, therefore, should be dismissed.