

The rights-based approach to social protection in Latin America

From rethoric to practice

Magdalena Sepúlveda



UNITED NATIONS

ECLAC



**NORWEGIAN MINISTRY
OF FOREIGN AFFAIRS**

SOCIAL POLICY

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This document was prepared by Magdalena Sepúlveda Carmona, consultant with the Social Development Division of the Economic Commission for Latin America and the Caribbean (ECLAC) and United Nations Special Rapporteur on extreme poverty and human rights, in the framework of the joint cooperation programme between ECLAC and the Government of Norway, “Promoting equality in Latin America and the Caribbean”. A draft version of this document was presented at the international seminar “Public policies for equality: towards universal social protection systems”, which took place in Montevideo on December 4-5, 2013. The author is grateful for comments and suggestions made by Simone Cecchini, Rodrigo Martínez and María Nieves Rico.

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Executive summary

This paper aims to contribute to developing the normative framework for rights-based social protection systems and discusses lessons learned in some emblematic programmes implemented in Latin America which have sought to advance a rights approach.

The paper first emphasizes the added value of the rights-based approach and describes the normative content of the right to social security. It then describes the basic elements of a rights-based approach and examines how it is operationalized in the design, implementation and evaluation of landmark social protection programmes in the region. The paper seeks to demonstrate that, despite the large gap that still exists between the rhetoric of a human rights approach and its implementation in specific policies, there have been significant achievements in some countries in Latin America. It argues that some of the good practices in the region can serve as policy examples to follow elsewhere. The paper concludes with a number of public policy recommendations with a view to consolidating the rights perspective in social protection programmes.

Introduction

As the Economic Commission for Latin America and the Caribbean (ECLAC) has argued, the great task of the twenty-first century is to build inclusive, more egalitarian societies with full respect for a framework of rights (ECLAC, 2010). One of the levers for achieving these objectives is to ensure that the entire population is adequately covered by social protection systems.

In recent years, social protection systems have gained unprecedented prominence in the political debate over development and poverty reduction. The rapid expansion of social protection has indeed been called “a quiet revolution” (Barrientos and Hulmes, 2008). Latin American countries have been in the vanguard of that revolution, investing substantial public resources in social protection programmes. These advances in the area of social protection have gone hand in hand with ever-increasing calls for a rights-based development agenda.

The growing insistence on rights is in line with the constitutional and international obligations of countries of the region. The protection of human rights, which includes respect for and protection of the specific features and needs of diverse population groups, is not just another option for public policy, but instead constitutes a response to State obligations assumed by virtue of a broad range of national and international legal norms concerning human rights. According to those norms, States are obliged to guarantee that human rights are the central focus in the design, implementation, monitoring and evaluation of all public policies, including those relating to social protection.

Nevertheless, and despite the forceful human rights rhetoric that emerges in various public policy documents, countries of the region still have far to go in their practical implementation. To make the rights-based approach a reality, countries will need to move toward a conceptual framework that defines more clearly how to design, implement and evaluate social protection policies and programmes from a rights perspective.

This paper is intended as a contribution to the theoretical and conceptual development of a rights-based approach in social protection policies and programmes, and analyses the lessons learned in flagship programmes around the region that have sought to advance the rights-based approach.

The paper begins with a brief reference to the obligatory nature and the value added of the rights-based approach. It goes on to describe the normative content of the right to social security, and how that

right is understood as synonymous with social protection in international human rights law. The paper then describes in detail the basic elements of a human rights perspective, analysing the implications of these principles for the design, implementation and evaluation of social protection policies and programmes. After describing the basic elements of the rights-based approach, it examines some specific social protection programmes in place in the region. Through an analysis of some specific cases, the paper seeks to demonstrate that, despite the glaring gap that still exists between the rhetoric on the rights-based approach and its implementation in concrete policies, some countries of the region have made significant progress. Achievements to date can serve as an example for consolidating a rights-based approach within and beyond the region. The paper concludes with some recommendations for consolidating a rights-based approach in social protection policies and programmes.

I. The obligatory nature and the value added of the rights-based approach

The progressive development of international human rights law has brought about a profound transformation in modern international and constitutional law, by imposing on States the duty to respect human dignity and human rights standards as a constraint on sovereignty or State power.

The majority of constitutions of Latin American countries incorporate a broad range of human or fundamental rights, which includes not only civil and political rights but also economic, social and cultural rights (ESCR¹). At the same time, constitutions of the region enshrine broad protection for the principle of equality and non-discrimination. This principle imposes a prohibition on discrimination by reason of sex, age, ethnic origin, disability, state of health, and other grounds; the guarantee of treatment under equality of conditions for the entire population; and the obligation to adopt special measures for the protection of certain groups that have suffered structural discrimination, such as women, children, indigenous peoples, persons with disabilities, seniors, persons with a different sexual orientation, or persons living with HIV/AIDS.²

In addition to the ESCR expressly enshrined in national constitutions, there are also international human rights treaties adopted both through the United Nations and through the Organization of American States (OAS). These international treaties, which recognize a broad range of rights,³ have been

¹ See for example the Constitution of the Plurinational State of Bolivia, Constitution of Colombia, Constitution of the Bolivarian Republic of Venezuela, Constitution of Brazil, Constitution of Ecuador, Constitution of the Republic of Paraguay.

² See for example the Constitution of Colombia (articles 7, 10, 23, 47, 68 and 70), or the Constitution of Ecuador, article 11 of which provides: "...All persons are equal and shall enjoy the same rights, duties and opportunities. No one shall be discriminated against for reasons of ethnic belonging, place of birth, age, sex, gender identity, cultural identity, civil status, language, religion, ideology, political affiliation, legal record, socio-economic condition, migratory status, sexual orientation, health status, HIV carrier, disability, physical difference or any other distinguishing feature, whether personal or collective, temporary or permanent, which might be aimed at or result in the diminishment or annulment of recognition, enjoyment or exercise of rights. All forms of discrimination are punishable by law. The State shall adopt affirmative action measures that promote real equality for the benefit of the rights-bearers who are in a situation of inequality." The emphasis on affirmative policies that seek to enhance the enjoyment of rights by the most disadvantaged groups is also evident in a great number of national human rights plans, for example, the National Human Rights Plan of Peru 2006-2011; the 2010-2011 Action Plan of Paraguay, and the 2007-2017 National Human Rights Action Plan of Guatemala.

³ Although the International Covenant on Economic, Social and Cultural Rights (ICESCR) is the normative instrument that spells out these rights most comprehensively, there are other, subsequent international treaties, such as the International Convention on the Elimination of

incorporated into the constitutions of countries of the region, where they take precedence over domestic law and in some cases over the constitutional provision itself.⁴ This means that the human rights, including ESCR, enshrined in international treaties are part of the domestic legal order of States parties.

This normative framework constitutes the basis for incorporating a rights focus into public policies. In effect, incorporation of the rights-based approach in public policies, and in particular in social protection programmes, is the result of a legal and institutional development required by national constitutions themselves, which make it mandatory to protect, promote and respect all human rights.

This normative advance in the area of human rights is reflected in the growing incorporation of a rights-based approach in a wide variety of public policy instruments. Within the region, it is not unusual to find that national development plans borrow directly from the language of human rights or indeed make the observance of human rights one of their central or crosscutting themes.⁵

Consequently, incorporating the rights focus into social policies is not just another policy alternative, one that countries can choose to adopt or ignore, but rather a legal obligation assumed through their own constitutions, international treaties, and national laws.

A rights-based approach to social protection is not only a legal obligation, but also a means to achieving various ends.

First, a rights-based approach can serve as a catalyst for establishing or strengthening social protection systems, in particular non-contributory systems. The rights focus can help to achieve political and social consensus that will give priority in the public agenda to expanding or strengthening social protection systems and allocating the necessary resources for implementing them on a sustainable basis.

Second, it can help in defining the levels of social protection that are considered acceptable in each society. In accordance with international standards, acceptable levels of social protection would be those that ensure an adequate standard of living for all individuals, with a minimum guarantee for the enjoyment of ESCR, without discrimination.

Third, the rights-based approach can contribute to equality by reducing the opportunity gaps and the social exclusion that persist in the region. International norms promote universal access and require respect for standards of accessibility, adaptability, acceptability, adequacy and quality in public services.

Fourth, recognizing that all rights are indivisible and interdependent, a rights focus can contribute to a comprehensive institutional design that will emphasize synergies and coordination among social programme agencies and providers, with the objective of maximizing their potential.

Lastly, the rights-based approach can contribute to establishing accountability mechanisms and mobilizing the citizenry against various forms of discrimination, while promoting greater enjoyment of rights.

In the current context of high levels of inequality in the region's distribution of incomes and wealth, a rights-based approach has the potential to be an effective instrument for achieving the objective of universal social protection. By emphasizing universality, a rights focus can make for progress in protecting the most disadvantaged population segments, even though they generally have no direct voice in political processes.

All Forms of Racial Discrimination (ICERD), the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the International Convention on the Rights of Persons with Disabilities (CRPD) at the global level, as well as the Protocol of San Salvador at the regional level, that also enshrine important economic, social and cultural rights, in many cases adapted to the specific features of the groups they protect.

⁴ See for example the Chilean Constitution (1980), article 5.2; the Constitution of Guatemala (1986, article 46; the Constitution of Nicaragua (1995), article 46; the Constitution of Brazil (1998), article 4; the Constitution of Colombia (1991), article 93; the Constitution of Argentina (1994, article 75; the Constitution of Ecuador (2008), article 11; the Constitution of the Bolivarian Republic of Venezuela (1999), article 2; the Constitution of Paraguay (1992, article 137; the Constitution of Costa Rica (2001), article 7; the Constitution of El Salvador (2000), article 144.

⁵ See for example, Republic of Ecuador: National Development Plan: *Plan Nacional para el Buen Vivir* ("National Plan for Good Living") 2009-2013: Building a Plurinational and Intercultural State, National Planning and Development Secretariat, Quito, 2009; Republic of Colombia, National Development Plan 2010-2014: Prosperity for All, National Planning Department, Bogotá, 2011; and Republic of Paraguay. Paraguay for All, Proposed Public Policy for Social Development 2010-2020, Asunción, 2010

II. Social protection with a human rights focus

A human rights focus does not by itself prescribe the policies that States must adopt, as States have the power to formulate the policies they deem most adequate to their own circumstances. However, observance of international and national human rights standards does impose some obligations of performance and of outcomes. This means not only that policies must tend to a greater enjoyment of human rights on the part of the entire population, but also that the processes of designing, implementing and evaluating policies must be consistent with human rights standards.

When it comes to social protection, there is a wide variety of constitutional provisions that are important for pursuing a rights-based approach. For example, in the lengthy list of ESCR enshrined in the constitutions of the region we find, in many cases, the right to social security understood in its contributory and non-contributory forms.⁶ As well we must consider the provisions guaranteeing equality of treatment, the prohibition of all forms of discrimination, and the obligation to take affirmative action to protect certain groups that have suffered structural discrimination, or that are vulnerable.⁷ Other constitutional provisions, such as those establishing the right of the people to participate in policy formulation, the principle of accountability, access to information, and provisions relating to political and administrative decentralization, are also important and must guide the establishment of social protection policies.

A. The right to social protection versus the right to social security

The terms “social protection” and “social security” carry a wide variety of meanings, and we must therefore explain the manner in which they will be used in this document. The “right to social security” is established in various international human rights treaties (see table 1), and consequently a brief reference to the normative content of that right in the various instruments is useful.

⁶ See for example the Colombian Constitution (article 48), Constitution of Brazil (section IV), and Constitution of Costa Rica (article 73).

⁷ See footnote 5 above.

The first international instrument to recognize social security as a right was the Declaration of Philadelphia, adopted in 1944. Subsequently, in 1948, the right to social security was officially recognized for all persons as members of society, in the Universal Declaration of Human Rights (Article 22).

The Universal Declaration of Human Rights (1948) provides as follows:

Article 22. “Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

Article 25. “1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

This right was subsequently included in a series of binding international treaties such as the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (article 5.e.iv), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, article 11.1e), the 1989 Convention on the Rights of the Child (CRC, article 26), the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Their Families (article 27) and the 2006 International Convention on the Rights of Persons with Disabilities (CRPD, article 28).

At the regional level (for example, in the ambit of the OAS), the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”)⁸ makes specific reference to the right to social security. This right is also enshrined in various conventions adopted within the framework of the International Labour Organization (ILO).⁹

Most of these legal instruments mentioned employ the expression “right to social security”, with the exception of the International Convention on the Rights of Persons with Disabilities (Article 28), which uses the term “social protection”.

From the work of the Committee on Economic, Social and Cultural Rights (the body responsible for supervising compliance with the ICESCR) we may conclude that the concepts of “social security” and “social protection” are synonymous.¹⁰

This is evident, for example, in General Comment no.19 of the Committee, which indicates as follows:

“1. Article 9 of the International Covenant on Economic, Social and Cultural Rights (the Covenant) provides that, ‘The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.’ The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.

⁸ The States parties, as of February 2014, are Argentina, Bolivia (Plurinational State of), Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay

⁹ See for example Convention 102 (1952), Convention 118 (1962) and Convention 157 (1982). Of particular relevance (although not binding on States) is Recommendation 202 (2012) on social protection floors.

¹⁰ On this point there are differing views. Pautassi (2013) argues that social security and social protection cannot be treated as synonymous, as the first concept relates to a package of benefits (established, for example, in ILO Convention 102) and the State plays a preponderant role in their delivery, regulation and financing, while the concept of social protection refers to a more restrictive model, in which persons, families, communities and civil society play a more active role. In turn, Cecchini and Martinez (2011), recognizing that social protection is a concept in evolution, differentiate between social protection and social security, treating the second as one of the components of the first, together with social assistance and labour market regulation.

“2. The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.

“3. Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.

“4. In accordance with article 2 (1), States parties to the Covenant must take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security, including social insurance. The wording of article 9 of the Covenant indicates that the measures that are to be used to provide social security benefits cannot be defined narrowly and, in any event, must guarantee all peoples a minimum enjoyment of this human right. These measures can include:

(a) Contributory or insurance-based schemes such as social insurance, which is expressly mentioned in article 9. These generally involve compulsory contributions from beneficiaries, employers and, sometimes, the State, in conjunction with the payment of benefits and administrative expenses from a common fund;

(b) Non-contributory schemes such as universal schemes (which provide the relevant benefit in principle to everyone who experiences a particular risk or contingency) or targeted social assistance schemes (where benefits are received by those in a situation of need). In almost all States parties, non-contributory schemes will be required since it is unlikely that every person can be adequately covered through an insurance-based system.”

Thus, and in line with the way the concept is used by the ILO, in the framework of international human rights law, and consequently for this paper, the expressions “right to social security” and “social protection” are synonymous.

TABLE 1
THE RIGHT TO SOCIAL SECURITY IN INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

International treaties	Provisions
Universal Declaration of Human Rights (1948)	Article 22 guarantees the right to social security. Article 25 recognizes that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
International Covenant on Economic, Social and Cultural Rights (1966)	Article 9 recognizes the right of everyone to social security. Article 10 (2) recognizes the right of working mothers to receive “adequate social security benefits”. Article 10 (3) requires State parties to take special measures of protection and assistance on behalf of children and young persons.
Convention on the Elimination of All Forms of Discrimination against Women (1979)	Article 11 (1) e) provides that States parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:... the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave. Article 11(2), b), requires States parties to introduce maternity leave with pay or with comparable social benefits. Article 14 (2) proclaims the duty of States parties to eliminate discrimination against women in rural areas and, in particular, to ensure to such women the right ... to benefit directly from social security programmes.

Table 1 (concluded)

International treaties	Provisions
Convention on the Rights of the Child (1989)	Article 26 recognizes for every child the right to benefit from social security, including social insurance. Moreover, article 27 (1) recognizes the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. By virtue of paragraphs 2 and 3 of article 27, States parties are obliged, in accordance with national conditions and within their means, to take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
International Convention on the Elimination of All Forms of Racial Discrimination (1965)	Article 5 e) (iv) recognizes the duty of States parties to prohibit and eliminate racial discrimination in the exercise of, among others, the right to social security and social services.
International Convention on the Protection of the Rights of All Migrant Workers and Their Families (1990)	Article 27 provides that, with respect to social security, migrant workers and members of their families shall enjoy in the State of employment the same treatment granted to nationals in so far as they fulfil the requirements provided for by the applicable legislation of that State and the applicable bilateral and multilateral treaties. The competent authorities of the State of origin and the State of employment can at any time establish the necessary arrangements to determine the modalities of application of this norm. Where the applicable legislation does not allow migrant workers and members of their families a benefit, the States concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances. Article 54 provides that migrant workers who are documented or who are in a regular situation shall enjoy equal treatment with nationals of the State of employment, in relation, inter alia, to unemployment benefits
Convention on the Rights of Persons with Disabilities (2006)	Article 28 declares that States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right.
Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, "Protocol San Salvador"	Article 9 provides that everyone shall have the right to social security protecting him from the consequences of old age and of disability which prevents him, physically or mentally, from securing the means for a dignified and decent existence. In the event of the death of a beneficiary, social security benefits shall be applied to his dependents. As well. It provides that, in the case of persons who are employed, the right to social security shall cover at least medical care and an allowance or retirement benefit in the case of work accidents or occupational disease and, in the case of women, paid maternity leave before and after childbirth.

Source: Prepared by the author on the basis of ILO (2011b).

B. The normative content of the right to social security

The majority of countries in the region are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹ which enshrines the "right to social security" (article 9).

The Committee on Economic, Social and Cultural Rights, the body responsible for overseeing the ICESCR, has developed the contents of that right. By analogy, we may apply this interpretation to the other international human rights provisions that contain the right to social security.

In its General Comment no. 19 on the right to social security, the Committee has indicated that the essential elements of the right to social security include "the right to access and maintain benefits,

¹¹ As of February 2014, the following countries of the region are States parties to the ICESCR: Argentina, Bahamas, Barbados, Bolivia (Plurinational State of), Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Granada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, St. Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, Venezuela (Bolivarian Republic of), Belize and Cuba are signatory States.

whether in cash or in kind, without discrimination in order to secure protection, inter alia, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; (c) insufficient family support, particularly for children and adult dependents.”¹²

The Committee is emphatic in stating that the normative content of the right to social security embraces both social insurance (contributory regimes) as well as social assistance (non-contributory regimes).¹³

The Committee has specified that the social security system must cover (i) health care, (ii) sickness, (iii) old age, (iv) unemployment, (v) employment injury, (vi) family and child support, (vii) maternity, (viii) disability, and (ix) survivors and orphans,¹⁴ pointing out that the level of benefits must be adequate and that all persons must be covered by the social security system. The conditions for obtaining these benefits must be reasonable, proportionate, transparent and accessible to all who are entitled to them.

Benefits must be at an adequate level, i.e. they must be sufficient in their amount and duration to ensure an adequate standard of living and health care. As well, this right must be exercised without discrimination and under conditions of equality between men and women. The Committee explicitly mentions the prohibition on discriminating in the exercise of this right on the grounds of race, colour, sex, age, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, state of health (including HIV/AIDS), sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.¹⁵

The Committee has also emphasized the importance of giving priority to the most disadvantaged groups. In the words of the Committee, “whereas everyone has the right to social security, States parties should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, in particular women, the unemployed, workers inadequately protected by social security, persons working in the informal economy, sick or injured workers, people with disabilities, older persons, children and adult dependents, domestic workers, homeworkers, minority groups, refugees, asylum-seekers, internally displaced persons, returnees, non-nationals, prisoners and detainees.”¹⁶

The right to participate in the administration of the system and the right of access to information are also essential elements of this right. As the Committee has indicated, “beneficiaries of social security schemes must be able to participate in the administration of the social security system. The system should be established under national law and ensure the right of individuals and organizations to seek, receive and impart information on all social security entitlements in a clear and transparent manner.”¹⁷

While the Covenant provides for progressive realization and acknowledges the constraints owing to the limits of available resources, it also imposes on States parties various obligations which are of immediate effect. States parties have immediate obligations in relation to the right to social security, such as guaranteeing exercise of this right without any discrimination, and ensuring equality of rights between men and women.

The Committee has held that one of the basic obligations that this right imposes on States parties is to ensure the satisfaction of the minimum essential level of benefits that will enable persons to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education. If a State party cannot provide this minimum level for all risks and

¹² Committee on Economic, Social and Cultural Rights (CESCR), General Comment no. 19, para. 2.

¹³ CESCR, General Comment no. 19, para. 2-4.

¹⁴ CESCR, General Comment no. 19, para. 12-21.

¹⁵ CESCR, General Comment no. 19, para. 29.

¹⁶ CESCR, General Comment no. 19, para. 31.

¹⁷ CESCR, General Comment no. 19, para. 26.

contingencies within its maximum available resources, the Committee recommends that the State party, after a wide process of consultation, select a core group of social risks and contingencies.¹⁸

It is important to note that the allocation of resources is not left entirely to the discretion of States. States parties must accord a certain priority in the allocation of resources in order to guarantee enjoyment of the ESCR of all persons within its territory.

The obligation of progressivity means that regressive measures are unacceptable (Sepúlveda, 2001). Consequently, if States parties adopt measures to reduce the scope or level of benefits under social protection programmes, they must demonstrate that these measures have been taken after examining all the alternatives, and that they are duly justified by reference to the totality of ESCR.¹⁹

The Committee acknowledges that the realization of the right to social security carries significant financial implications for States parties, but notes that the fundamental importance of social security for human dignity and the legal recognition of this right by States parties mean that the right should be given appropriate priority in law and policy. States parties should develop a national strategy for the full implementation of the right to social security, and should allocate adequate fiscal and other resources at the national level. If necessary, they should avail themselves of international cooperation and technical assistance in line with article 2, paragraph 1, of the Covenant.²⁰

C. The right to social security (social protection) as a lever for the enjoyment of other rights

In highly unequal society such as those of Latin America, respect for human rights, including ESCR, as well as for the principle of equality and non-discrimination, requires concrete measures of protection for the most vulnerable population segments, designed to guarantee enjoyment of at least the minimum essential levels of ESCR, under equality of conditions with the rest of the population.

There is a symbiotic relationship between the right to social security or social protection and other ESC rights such as the right to enjoy the highest possible level of physical and mental health; the right to education; the right to an adequate standard of living, including the right to food, clothing and housing; the right to work and rights at work (see table 2). In effect, evidence shows that social protection programmes can contribute significantly to helping the poorest people enjoy minimum essential levels of some ESCR (Barrientos and Niño-Zarazúa, 2010).

As Cecchini and Martínez (2011, p. 10) have pointed out, “social protection... greatly reduces or eliminates the probability of failing to cope with a contingent risk; it curbs the vicious circle of poverty and inequality by preventing families from mortgaging future key assets for human development, such as health and education; and it facilitates the implementation of strategies for empowering the most vulnerable groups to cope with risk, particularly children, elderly people and women.” In other words, the introduction of social protection programmes makes it easier to give effect to a series of human rights, above all those relating to the enjoyment of minimum essential levels of ESCR.

¹⁸ CESCR, General Comment no. 19, para. 59.

¹⁹ See General Comment 3, Paragraph 12; General Comment 12, Paragraph 28; General Comment 14, paragraph 18, and General Comment 19, paragraphs 40 to 42

²⁰ CESCR, General Comment no. 19, para. 41.

TABLE 2
FUNCTIONS OF A COMPREHENSIVE SOCIAL PROTECTION SYSTEM AND ITS NORMATIVE FRAMEWORK IN INTERNATIONAL HUMAN RIGHTS LAW

Functions of a comprehensive social protection system	Normative framework
I. Guarantee an income sufficient to sustain the basic quality of life essential for personal development.	Obligation to respect, protect and fulfil the right to social security/social protection International Covenant on Economic, Social and Cultural Rights (art. 9 ICESCR) Convention on the Elimination of All Forms of Discrimination against Women (art. 11 CEDAW) Convention on the Rights of the Child (art. 26 CRC) International Convention on the Rights of Persons with Disabilities (art. 28 CRPD) Obligation to ensure continuous improvement in living conditions (art. 11 ICESCR)
II: Identify unmet demand and guarantee access to social services (such as health, education and housing) and promotion services to boost people's human capital and self-reliance	Take steps, to the maximum of available resources, to ensure progressive satisfaction of at least a minimum essential levels (art. 2(1) ICESCR, art. 4 CRC) of the following rights: Right to an adequate standard of living, including housing, clothing and food (art.11 ICESCR, art. 27 CRC) Right to health (art. 12 ICESCR, art. 12 CEDAW, art. 24 CRC) Right to education (art. 13 ICESCR, art. 10 CEDAW, art. 28 CRC)
III. Foster decent work by promoting better labour policies to help overcome labour market risks, ensuring the realization of workers' rights and progressively integrating into the formal labour market the bulk of a country's economically active population	Respect, protect and fulfil: Right to work and rights at work (arts. 6 y 7 ICESCR, art. 11 CEDAW) Inclusion of women. Ensure gender equality in enjoyment of the right to work and ESCR (art. 2 ICESCR, art. 1 CEDAW) Eliminate stereotyped roles and prejudices that impede women's incorporation into the labour (art. 5 CEDAW) Inclusion of persons with disabilities: Protect and ensure the full and equal enjoyment of the right to work and the other rights of persons with disabilities (art. 1 CRPD) Ensure full and effective participation and inclusion in society for persons with disabilities (art. 3 CRPD)

Source: Prepared by the author on the basis of Cecchini and Martínez (2011).

III. Basic elements of a rights-based approach

As indicated above, a rights-based approach to social protection (social security) means that social protection policies and institutions must be designed to achieve greater enjoyment of rights for the entire population, and must at the same time be based on the standards and principles of human rights enshrined in the country's Constitution, its laws, and the international treaties it has ratified.

To help give effect to a rights-based approach in protection policies and programmes, this section identifies the essential elements of a framework of rights, consistent with the standards and norms of international human rights law.

A. An appropriate legal and institutional framework

A key aspect of the human rights focus is that social protection policies and programmes must be established and defined through an appropriate legal and institutional framework, supported by a national strategy and action plan. The legal framework must constitute the formal expression of a State's intentions, and have a permanent and legally binding nature.

In general, there are different levels to a legal framework, with a degree of hierarchical coherence that comprises the Constitution (the constituent power), laws (the legislative branch) and regulations and policy documents (the executive branch). An appropriate framework for social security would cover the entire normative field, from the constitutional recognition of the right to social security all the way to an operational manual that contains specific details for a given programme.

It is essential that social protection policies and programmes be established by a law resulting from a democratic legislative process, although this may vary from one country to the next. As well, it is appropriate to examine the overall normative framework relating to this issue, to detect any contradictory provisions and to repeal or amend any that conflict with a rights-based approach.²¹

When social protection programmes are not based on laws, but simply on presidential decrees, policy statements, directives or operational manuals (adopted by the executive branch), the enjoyment of

²¹ CESCR, General Comment no. 19, para. 67.

human rights by programme beneficiaries is at risk. Unless they are approved by a formal law, policies and programmes are vulnerable to changes in government, and the very existence of the programme may be jeopardized if a new government does not consider it politically advantageous.

The lack of an appropriate legal framework undermines the very idea of a rights-based approach, as it will be difficult for beneficiaries to insist that they have an entitlement which can be enforced against the State and for which the public authorities are responsible. As well, the absence of an appropriate legal and institutional framework violates the principle of accountability, as it will be hard to identify the various components of the programme, such as its specific beneficiaries, its duration, or the authorities responsible for its implementation.

If social protection programmes are not established by law, there is also a greater risk that they will not be sustainable and, hence, that they might be abruptly terminated, leaving the situation of beneficiaries more difficult than it was before implementation, due to the loss of benefits they were receiving under the programme.

A legal and institutional framework and a national strategy are essential prerequisites for guaranteeing that a programme in fact represents State policy, with a long-term institutional commitment to support it with adequate financial and human resources.

As a minimum, a legal and institutional framework must define: (i) eligibility criteria; (ii) the functions and responsibilities of the various players involved in implementing the programmes (for example, national and local governments); (iii) long-term financial needs and their sustainability; (iv) complaint and appeal mechanisms; and (v) ways and means of participation by civil society and beneficiaries.

B. A comprehensive, coherent and coordinated social protection strategy

Because human rights are interdependent, indivisible and mutually reinforcing, they demand an integral approach. Fragmentation or the lack of coordination among programmes, players and levels of government responsible for implementing social policies will increase the likelihood that a given policy will be ineffective, and that the rights of the poor will be overlooked.

As the Committee on Economic, Social and Cultural Rights has declared, if the right to social security is to be guaranteed, “the strategy and action plan should be reasonably conceived in the circumstances; take into account the equal rights of men and women and the rights of the most disadvantaged and marginalized groups; be based upon human rights law and principles; cover all aspects of the right to social security; set targets or goals to be achieved and the time-frame for their achievement, together with corresponding benchmarks and indicators, against which they should be continuously monitored; and contain mechanisms for obtaining financial and human resources. When formulating and implementing national strategies on the right to social security, States parties should avail themselves, if necessary, of the technical assistance and cooperation of the United Nations specialized agencies.”²²

When programmes are scattered among isolated initiatives, implemented by different ministries or public or civil society organizations, this can cause overlapping and can sap their effectiveness. Fragmentation, duplication or lack of coordination among social policies not only diminishes their impact but poses a problem from the human rights perspective, as it will be impossible to assign clear responsibilities for their execution, or to identify who was responsible for their failure.

If social protection programmes are to be effective and consistent with human rights, they must fit within broad national strategies for addressing the multidimensional nature of poverty. A human rights

²² CESCR, General Comment no. 19, para. 68.

focus must take a comprehensive view of all economic, civil, social, political and cultural rights, and must recognize that all these rights are interdependent and interactive.

C. The principles of equality and non-discrimination

The prohibition of discrimination and the principle of equality are fundamental elements of a rights-based approach. These principles impose upon States a series of concrete obligations in the design of public policies in general, and of the social protection systems in particular.

International human rights instruments prohibit discrimination as to “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”²³ The phrase “other status” indicates that this is an open-ended list. Consequently, other prohibited grounds for discrimination include “physical or mental disability, health status (including HIV/AIDS, sexual orientation, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of rights.”²⁴ International treaties have expanded or made more specific the prohibition on discrimination by reason of sex and disability.²⁵

The prohibition applies to any form of discrimination, whether it is direct or indirect, and thus covers any measure that, while not intended to discriminate, has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of rights.²⁶

According to international human rights law, the principles of equality and non-discrimination are not satisfied by the mere prohibition of discriminatory acts, but demand measures to be taken to achieve substantive equality. These principles, then, are understood to require special attention to groups of individuals that suffer historical or persistent prejudice. It is not sufficient to give them the same formal treatment as that accorded other persons who are not in the same disadvantaged situation. States parties must therefore immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination. To this end, States parties may in some cases be under an obligation to adopt special measures —such as “positive action” measures— involving explicit differentiation, based on the prohibited grounds of discrimination. Such measures will be legitimate to the extent that they represent reasonable, objective and proportionate means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved.²⁷

The application of these principles in relation to social protection legislation and practice will require, among other things: (i) progressively extending the coverage of social protection to all inhabitants of the country, without any distinction, and giving priority to the most disadvantaged persons or groups; (ii) ensuring equal treatment between men and women; and (iii) guaranteeing access for the most vulnerable groups to meet their particular needs.

1. Respecting the universal nature of rights: targeted versus universal programmes

From a rights perspective, all persons are equal before the law and must enjoy all their rights, including ESCR, without any kind of discrimination. As applied to the right to social security, this means that all persons must be covered by a system of social protection, with priority to persons belonging to the most disadvantaged or marginal groups.

This implies that public policy decisions must ensure the universal enjoyment of all rights, including the right to social security. Thus, taking universality as a goal, targeting can be only an instrument. States must take measures, to the limit of their resources, to expand the coverage of social

²³ See for example article 2 of ICESCR and the International Covenant on Civil and Political Rights.

²⁴ CESCR, General Comment no. 19, para. 29.

²⁵ See for example CEDAW and CRPD.

²⁶ See for example CESCR, General Comment no. 20, para. 7.

²⁷ See for example CESCR, General Comment no. 20, paras.8 and 9.

protection systems progressively. If universal coverage is to be guaranteed, non-contributory systems will be necessary.

When social protection programmes are not universal, the targeting mechanisms used must be examined carefully from a human rights viewpoint. The effective application of targeting mechanisms depends on the management capacity of the bodies administering the programme. The more sophisticated and complicated the calculation method adopted for targeting, the more opaque will be the eligibility criteria, and in the end this will make oversight by the beneficiaries difficult if not impossible. Moreover, the less transparent the process, the harder it will be for people to understand how to access the programme, and they will tend to see it, not as a right to which they are entitled, but rather as a political privilege.

Universal-access social programmes often represent the simplest, most transparent structure, and they have lower administrative costs. Moreover, universal coverage is better aligned with the universality of rights, it reduces opportunities for corruption, and it generates no stigma for beneficiaries. As well, by including the middle classes, it fosters political support for ensuring the sustainability of social protection programmes over time.

When financial constraints lead governments to opt for targeted programmes, they must also respect the principles of equality and non-discrimination. This means, for example, that eligibility rules must be fair, reasonable, objective and transparent, and that people must have recourse in case they are mistakenly excluded. Targeted programmes must also avoid stigmatizing their beneficiaries.

To meet these requirements, especially in countries where government management capacities are limited, it would seem best to use simple targeting mechanisms, such as category-determined eligibility (for example, focused on children or seniors, or geared to place of residence) and, within each category, delivery should be universal (for example, universal coverage of all persons over the age of 65). As the government's management capacity evolves, more sophisticated targeting mechanisms can be incorporated. In any case, the rights-based approach requires measures to ensure that coverage expands progressively as more resources become available.

It is important to note that, while there is no “perfect” targeting mechanism from a human rights perspective, errors of inclusion (whereby a benefit or service is provided to someone who is not part of the target group) are less problematic than errors of exclusion (failure to reach the target group).

2. Ensuring that women benefit under equality of conditions with men

Ensuring full equality of rights between men and women is a fundamental theme of the rights-based approach.²⁸ Social protection systems should actively promote gender equality and women's empowerment. For this, social protection policies and programmes must address the asymmetries of power and structural inequalities between men and women. Social protection policies and programmes that are gender-neutral may in the end exacerbate de facto discrimination against women. To ensure that women enjoy the same rights as men and achieve substantive equality in the enjoyment of those rights, it is sometimes necessary to grant them differentiated treatment, such as through quotas.²⁹

The design of social protection programmes must take into account the many forms of discrimination that women suffer, and must ensure that their concrete needs are addressed at each stage of their lives—childhood adolescence, adulthood, and old age.

Bearing in mind that social protection programmes are implemented in differing social, economic, political and cultural contexts, there is no single solution valid for all cases. Nevertheless, we may identify some basic gender dimensions that social programmes must respect.

²⁸ See, inter alia, the International Covenant on Civil and Political Rights arts. 2.1 and 3, ICESCR arts. 2.2 and 3, and CEDAW, in particular arts. 2(f), 5(a) and 11

²⁹ CEDAW Committee, General Recommendation 28, paragraph 22

Before designing and implementing a social protection programme, States must undertake a comprehensive analysis of gender issues, assessing the vulnerabilities of both sexes as potential beneficiaries. It is essential to have data disaggregated both by sex and by age, not only in order to establish effective social protection programmes but also to understand the gender dynamics underlying each context.

Social protection policies and programmes must address the imbalances, the risks and the barriers that women face, especially when it comes to access to productive resources, education, health and employment, and they must take account of women's reproductive and productive function. They must therefore address the concrete obstacles that prevent men and women from participating in social protection programmes under conditions of equality.

Recognizing that international human rights law requires States to take measures to eliminate cultural and traditional practices based on the idea of the inferiority or superiority of one of the sexes, or on stereotyped roles for men and women,³⁰ all social policies must strive to transform society's existing gender dynamics and to disavow any patriarchal biases that keep women in poverty. Social protection programmes must respect and appreciate the role that women play as caregivers, without reinforcing patterns of discrimination or negative stereotypes (CEDAW article 5). In this respect, as will be discussed below, a rights-based approach will be cautious in endorsing the "co-responsibility" that some cash transfer programmes impose on female heads of household, as this may tend to perpetuate traditional notions about gender roles within the family, rather than help change them.³¹

Social protection programmes must strive for an equitable distribution of the burden of unpaid caregiving, which for the most part is performed by women and constitutes an enormous obstacle to the enjoyment of a broad range of rights, including access to paid employment and enjoyment of the right to education and health (Sepúlveda, 2013b). Measures must be taken to recognize the value of caregiving and to shift the responsibility for that task from families and communities to the State, while encouraging men to take a more active role in caring for members of the family.

Social protection programmes must seek to mitigate the gender-based asymmetries of power in the decision-making process, both within the household and in the community. States should ensure that women can participate effectively in social protection programmes, for example, by setting quotas in their governance structures.

Social protection programmes should use all possible opportunities to promote gender equality and to mobilize women to organize themselves. Programme administrators should consider the forms of permanent interaction with beneficiaries that can be used to address the gender inequalities prevailing in the community and to identify the obstacles facing women's access. If community meetings are to be held, for example, they can be used to address the question of women's time constraints and to mobilize groups of women around the issue of gender violence.

Programmes should foster women's capacity to enforce their rights. It is essential for social protection programmes to include mechanisms of participation and accountability that are accessible to women and men alike. Moreover, gender indicators should be built into the monitoring and evaluation of social protection programmes. To achieve these objectives, training will be needed for those who carry out social programmes, both at the national and at the local level, in order to make them more sensitive to gender issues. As well, to ensure women's equal enjoyment of the benefits of a social protection policy or programme, there must be guaranteed access (both financial and physical) without discrimination to public services, which must also take account of gender questions. This means that policymakers must understand and take into account the different problems that men and women face when they try to access these services

Women must also be assured exercise of their sexual and reproductive rights, as much through access to sexual and reproductive health services as through the existence of a legal and social

³⁰ See for example, CEDAW article 5.

³¹ See Chapter III, Section 4.

framework guaranteeing that women can take free and unrestricted decisions with respect, for example, to the number and spacing of pregnancies.

If social policies are to help diminish gender inequality, they must be accompanied by legislative and other measures to foster women's equality in other fields. In most countries of the region, social protection alone will not be sufficient to alter the disadvantaged status of women. Policies guaranteeing women's access to land, productive resources and credit, protection against gender violence, access to justice, and greater political participation by women, for example, are essential for moving toward gender equality.

3. Meeting the particular needs of the most vulnerable and marginalized individuals and groups

International human rights law today recognizes the specific features and needs of diverse population groups, and seeks to achieve material (substantive) equality. To this end, it obliges States to pay special attention to the members of the most disadvantaged and marginalized segments of society. The principle of equality is understood not only as prohibiting any form of discrimination but also as requiring affirmative or positive action in some situations to diminish or eliminate the factors that give rise to discrimination or tend to perpetuate it.

Paying attention to concrete problems in relation to gender, age and disabilities is an essential task from a rights perspective. Of particular relevance in this respect are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the International Convention on the Rights of Persons with Disabilities (CRPD) (see box 1).

BOX 1

SPECIAL MEASURES IN RELATION TO WOMEN, CHILDREN AND PERSONS WITH DISABILITIES

The Convention on the Elimination of All Forms of Discrimination against Women (1979) seeks not only to eradicate discrimination against women and its causes, but also to encourage strategies to promote equality. It therefore contains rules to prohibit discrimination as well as rules to accelerate equality through affirmative action such as special and temporary measures to alleviate and remedy the discriminatory model that is prejudicial to women.

The Convention on the Rights of the Child (1989) marked a milestone in the treatment of children and adolescents by recognizing them as having their own rights, emphasizing the need to protect all their human, civil, economic, political, social and cultural rights, and establishing the duty to respect the best interest of the child, among other provisions.

The International Convention on the Rights of Persons with Disabilities (2006) has also had important consequences for promoting and protecting the rights of persons with disabilities. This treaty not only gives "visibility" to this group within the international system for protecting rights, but irreversibly recognizes the disability phenomenon as a human rights question, whereby States undertake to ensure "reasonable accommodation" to guarantee for persons with disabilities the enjoyment or exercise, under equality of conditions with others, of all fundamental human rights and freedoms (Preamble and Article 5).

Source: Prepared by the autor.

This means, for example, that social protection policies and programmes must address the many vulnerabilities confronting children. Recognizing the essential role of the adults (parents or guardians) who are responsible for child maintenance, it must also be borne in mind that children experience poverty and vulnerability differently from adults (for example, they are more vulnerable to malnutrition, disease, abuse and exploitation) and that they are dependent on adults for their development and protection.

Although many social protection measures are of benefit to children, directly or indirectly, even minor tweaking that will make the design, implementation and evaluation of social protection policies and programmes more sensitive to the particular needs of children can make a great difference and can

have the potential to benefit not only the child population but their families and communities as well, and to contribute to national development as a whole (DFID and others, 2009, p. 2) (see box 2).

BOX 2 PRINCIPLES OF CHILD-SENSITIVE SOCIAL PROTECTION

The following principles should be considered in the design, implementation and evaluation of child-sensitive social protection programmes:

- Avoid adverse impacts on children, and reduce or mitigate social and economic risks that directly affect children's lives.
- Intervene as early as possible where children are at risk, in order to prevent irreversible impairment or harm.
- Consider the age- and gender-specific risks and vulnerabilities of children throughout the life-cycle.
- Mitigate the effects of shocks, exclusion and poverty on families, recognizing that families raising children need support to ensure equal opportunity.
- Make special provision to reach children who are particularly vulnerable and excluded, including children without parental care, and those who are marginalized within their families or communities due to their gender, disability, ethnicity, HIV and AIDS or other factors.
- Consider the mechanisms and intra-household dynamics that may affect how children are reached, with particular attention paid to the balance of power between men and women within the household and broader community.
- Include the voices and opinions of children, their caregivers and youth in the understanding and design of social protection systems and programmes.

Source: www.unicef.org/socialpolicy. "Joint statement on advancing child-sensitive social protection".

Sex, age and disability are not the only aspects that must be taken into account. Social protection programmes have a differentiated impact as well in relation to other criteria, such as ethnic origin, geographic location, or other characteristics of beneficiaries.

A differentiated approach with respect to geographic location would imply, for example, establishing specific mechanisms to ensure access to social protection programmes for those living in disadvantaged geographic or territorial zones, where there is a greater concentration of poverty, and where infrastructure and social services are generally less developed. In many cases, a territorial focus could make it possible to cover some other crosscutting aspects of vulnerability. According to statistical data, the majority of persons with disabilities around the world as well as in Latin America (for example in Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Panama and Uruguay), and particularly those over the age of 60, are likely to be living in rural areas (ECLAC 2012b, p. 189). Consequently, ensuring access for rural dwellers would reach a greater number of persons with disabilities.

When it comes to addressing the needs of particularly disadvantaged groups, whose development and social inclusion depends on access to social services, it is essential to understand that there must be a system of social protection with a comprehensive set of policies that goes beyond income transfers.

Children are the main indirect beneficiaries of income transfers. Yet there is also evidence that income transfers are inadequate for improving the overall status of children, when there are no public services available or they are inadequate. By analogy, the absence of integrated public services for seniors and persons with disabilities undoubtedly reduces the impact of income transfers.

4. Standards of accessibility, adaptability, acceptability and adequacy

The principles of equality and non-discrimination also demand that public policies comply with the standards of accessibility, adaptability, acceptability and adequacy that have been developed in relation to ESCR.

If social programmes are to be accessible they must be free of administrative and physical obstacles that prevent the most excluded or disadvantaged sectors from the programme's benefits because of their age, disability, ethnic origin, geographic location or other factors.

For example, some administrative requirements for benefiting from a social programme, such as the submission of ID documentation for registration, can effectively exclude some sectors of the population from the programme. ID documents are often costly and they can be obtained only in urban centres that may be far away. Other requirements, such as having to fill out a form in writing, using a complex and formalistic language, can also exclude the most vulnerable people from a social protection programme.

Social protection programmes must also be physically accessible. Services must be delivered at a convenient place and time without imposing a disproportionate cost on beneficiaries. The people most in need of social protection programmes are typically those who live in the most isolated places and who must confront the greatest physical and practical obstacles, such as having to travel long distances to collect benefits and the high transportation and opportunity cost of accessing services.

Moreover, there are additional barriers that affect certain groups such as persons with disabilities, seniors, indigenous peoples, ethnic minorities and persons living with HIV/AIDS.

Social programmes must also be adapted to the varying needs of the population and to local contexts and hardships. Information about social programmes must be disseminated with the specific objective of reaching particularly vulnerable or excluded groups. This will require using channels accessible to the poorest sectors of society (for example radio spots or community theatre skits) and they must include concrete mechanisms for overcoming barriers to mobility, in particular for seniors and for persons with disabilities.

Social protection programmes must also be culturally acceptable, given the many forms of discrimination that can emerge at the intersection of race, gender, class, disability etc. The cultural values of indigenous peoples and ethnic minorities must be taken into account in the design and implementation of any social programme. This means, for example, that in order to guarantee the cultural acceptability of the health programme in areas inhabited by indigenous peoples the personnel staffing the health centres should be able to speak or at least understand the local language and they must be attuned, to the extent possible, to traditional health practices. Information on programmes and mechanisms for complaint and recourse must also be available in the languages spoken by indigenous peoples, and accessible even to those who are illiterate or have a disability.

Lastly, social protection programmes must deliver benefits that are adequate in their amount and their duration. According to the international normative framework, States have the obligation to guarantee at least the essential minimum levels of ESCR and to take steps, up to the limit of the resources available, to achieve progressively their full effectiveness (ICESCR article 2). This obligation requires, in the case of cash transfers for example, a regular analysis of their impact on beneficiaries' purchasing power, to ensure in particular that they offer the possibility of obtaining an essential minimum of goods and services and that they establish mechanisms for adjusting the amounts of the transfers over time and in line with inflation.

The quality and quantity of public services must also be sufficient to meet people's needs. The services essential for the exercise of ESCR, such as healthcare and education, must be economically and physically within the reach of the poor. Nobody should be denied access to essential public services because he is unable to pay for them. To ensure that the direct and indirect costs of public services are within the reach of the most disadvantaged segments of the population, States must in some cases provide them free of charge. For example, international obligations require that primary education must be free, compulsory, and exempt from indirect costs.³²

³² See ICESCR articles 13 and 14 and General Comment 13 of the ESCR Committee, CDN Article 29, CEDAW articles 10 and 14, CERD Article 5 and Convention on the Rights of Migrant Workers Article 20.

D. Ensuring that conditionalities (co-responsibilities) do not violate rights

The region's flagship social protection programmes are the conditional transfer programmes (CCT)³³. Although the CCTs implemented in the region reveal important differences in terms of their magnitude, coverage, management, and the manner in which benefits are delivered, they all have several aspects in common that may in fact conflict with a human rights focus. These aspects relate to: (a) the imposition of a condition (co-responsibility) linked to enjoyment of the right; (b) the imposition of penalties for non-compliance with conditions; (c) an imbalance between the rising demand created by conditionality and the supply of public services; and (d) the gender impact.

The very essence of the concept of rights is dignity, with respect to the independence and freedom of all persons to take decisions about their own welfare and that of their families. Human rights, including ESCR, are not dependent on meeting any condition: they are rights inherent to the individual. Thus, it is the responsibility of the State to guarantee the basic social services needed for the enjoyment of rights such as education and health, which do not depend on their holders' compliance with co-responsibilities. From a rights approach, the "beneficiaries" of a social protection programme have in fact an "entitlement" to social security (including social assistance) and the State is obliged to satisfy that entitlement, at least to an essential minimum level.

Consequently, the imposition of conditions undermines the very basis of human rights, by requiring that people living in poverty must demonstrate (by fulfilling conditions) that they are "deserving" of their right to social security. This also represents an attack on their dignity and their independence, by assuming that they are unable to make rational decisions that will improve their living standards or those of their children.

If, as we have indicated, there is no persuasive social or economic evidence to show that CCT conditions are necessary to achieve the desired investment in terms of human capital, since the same improvements in health and education could be achieved without imposing conditions (Barrientos, 2011, p. 19), we may conclude that conditions not only infringe upon independence but are in fact unnecessary.

Conditions may also conflict with the principles of equality and non-discrimination, in particular the concept of equal treatment, as they entail a behavioural control over the poorest segments of the population that is not imposed on other social and economic sectors that also benefit from public policies, such as those high-income earners who enjoy tax credits (ECLAC, 2012c, p. 59).

In some cases, imposing conditions could worsen the specific living circumstances of the most disadvantaged. The imposition of conditionalities often exacerbates the imbalances of power between the beneficiary community and the programme authorities, and at the same time increases the opportunities for abuse on the part of agents involved in enforcing compliance (such as teachers, health personnel, and programme administrators). For example, the requirement that children must attend school or achieve certain grades which must be certified by teachers can have an adverse impact on the school environment. For one thing, it gives teachers a tool for meddling in the welfare of poor families, one that is not related to the quality of the teaching they provide.

From a rights perspective, we must also analyse the compliance controls and the penalties that are established in each case, and which vary with each programme, ranging from reduction of benefits to expulsion from the programme. The more punitive the controls imposed, the greater the conflict with human rights. No person should be excluded from programmes and services that are essential to the enjoyment of minimum levels of ESCR.

There are even some programmes that claim to establish a penalty in case of non-compliance with conditions but that in practice have no mechanism for control or supervision (generally because of the

³³ These programmes have been extensively studied, and this section is therefore limited to indicating the tensions that these programmes can generate in relation to the beneficiaries' human rights.

high administrative costs involved), and this again conflicts with human rights standards. To make people believe that there are conditions for obtaining programme benefits when in practice those conditions are not enforced not only offends against morality but undermines the right to information and transparency.

The imposition of conditions tends to boost demand for public services. If greater demand is not accompanied by an increase in the supply and the quality of services, then beneficiaries' rights will be at risk. Greater unmet demand diminishes the quality of the services delivered and creates disincentives for beneficiaries to seek access. In the face of inadequate financial and human resources, public service providers may lack the skills or the capacity to cope adequately with the needs of the poor, who often encounter prejudice and stigmatization in accessing basic public services.

It is not enough to boost the supply of services: it is also important to improve their quality and to ensure a gender focus. There are many forms of discrimination that affect women and girls (for example, indigenous women or women with disabilities) and these add to the obstacles for complying with the conditions imposed by CCTs. To improve quality and ensure a gender focus, in most cases, will require training for service providers in culturally appropriate practices, in line with women's specific needs.

Administrative costs, as well as the private costs borne by beneficiaries in complying with conditionalities, also need to be examined carefully. In Mexico, for example, studies suggest that the cost of implementing conditionalities in 2000 represented 24% of the overall administrative costs of the *Oportunidades* programme, and the private costs to beneficiaries in complying with them were some 50% higher than the costs in non-conditional programmes (Kidd and Calder, 2011). Thus it has been argued that in low-income countries, it will be better to invest resources in expanding existing social services instead of increasing the costs associated with the monitoring of conditions (Cecchini, 2009).

Finally, there is a conflict between conditionality and the rights of the women (mothers) responsible for overseeing compliance. As has been noted, in CCT programmes it is the women who received the transfers, not as persons entitled to social security by right, or in their status as women, but as “pass-throughs” for a benefit aimed at their children (ECLAC, 2012c).

To make women solely responsible for ensuring compliance with conditions can have a direct effect on the exercise of their rights. This task demands significant allocation of time, especially in countries where public services are deficient, where infrastructure is poor and public transportation inadequate and costly, and where care services are lacking (for example, a shortage of childcare facilities). The unequal burden of unpaid care work can have an enormous impact on the enjoyment of a range of women's rights, including the right to health, education and participation in political, economic and social life (Sepúlveda, 2013b).

Moreover, to give mothers the sole responsibility of caring for their children's education and health not only exacerbates women's workload and lack of time, which is one of the reasons behind their social and economic inequality, but also reinforces the gender stereotype that views the man as the family breadwinner and the woman as being mainly and naturally responsible for child rearing and domestic chores. This runs counter to the obligations assumed by States parties to the CEDAW, which calls for the elimination of prejudices and of customary and all other practices that are based on the idea of the inferiority or superiority of either sex, or on stereotyped male and female roles (article 5). As noted above, social policies should not reinforce and perpetuate traditional gender roles, but should rather help to change them by promoting a more equitable distribution of the care burden between men and women.

E. Participation³⁴

The right of individuals and groups to participate in the taking of decisions that affect them must be incorporated into any programme, policy or strategy for social protection.³⁵

If social protection policies and programmes are to contribute to the process of transformation that human rights demand, they must guarantee effective and significant public participation. From a rights perspective, participation is not merely useful in terms of entitlement and the sustainability of the policy or programme, but in fact represents a right in itself: the right to participate in public affairs.

States must establish an environment conducive to effective participation by all vulnerable and disadvantaged groups in the design, implementation and evaluation of social protection policies and programmes, bearing in mind the limitations as well as the asymmetries of power that exist at the national and local (community) levels.

Given the asymmetry of power between the beneficiaries of social programmes and the public authorities who administer them, those programmes are often incapable of protecting beneficiaries' rights without fair and effective mechanisms that allow them to participate actively in the programme. Without participation mechanisms, social protection programmes are at risk of political manipulation.

The lack of participation also means that programme administrators and policy makers receive no input from beneficiaries, and this in turn undermines the effectiveness and the sustainability of the programme. Participation also helps to guarantee social cohesion and to garner political support for programmes.

The principal objective of human rights is to transform the dynamics of power within societies, in order to challenge oppression, subvert the subordination and marginalization of certain groups and individuals, and promote individual agency (understood as the capacity to act in defence of one's own interests), autonomy and respect for the inherent dignity of each human being. This being the case, a central question for human rights theory and practice is how to prevent powerful actors from imposing their will or interest at the expense of others through coercion, force or manipulation. Consequently, participatory processes based on human rights do not accept power dynamics as they are. Rather, they start from the premise that power differentials must be eliminated and they seek explicitly to recognize and challenge inequality, including structural and systemic power imbalances in social and economic life. In order to do so, we must understand the way that power plays out in a particular context, diagnose asymmetrical power relations and understand how power is exercised both within and between communities to control and exclude disadvantaged groups.

Through meaningful and effective participation, people can exercise their agency, autonomy and self-determination. Participation also limits the capacity of elites to impose their will on individuals and groups who may not have the means to defend their interests. Conceived as a right, participation is a means of challenging forms of domination that restrict people's agency and self-determination. It gives people living in poverty power over decisions that affect their lives, transforming power structures in society and creating a greater and more widely shared enjoyment of human rights.

Rights-based participation is particularly necessary in order to ensure that the poorest and most marginalized people can make their voices heard, because of its principal foundations of dignity, non-discrimination and equality. Therefore, in contrast to some supposedly "participatory" processes that are pro forma, tokenistic or undertaken to give predetermined voices a veneer of legitimacy, rights-based participation aims to be transformative rather than superficial or instrumental. It promotes and requires the active, free, informed and meaningful participation of persons living in poverty at all stages of the design, implementation and evaluation of policies that affect them, based on a comprehensive analysis of

³⁴ This section is based on the report prepared by the author for the United Nations Human Rights Council, document A./HRC/23/36, 2013.

³⁵ CESCR, General Comment 19, paragraph 69.

their rights, capacity and vulnerabilities, power relations, gender relations, and the roles of different actors and institutions.

A rights-based approach demands that mechanisms of participation be established throughout the cycle of a social protection programme, from its design to its evaluation. This requires strengthening beneficiaries' capacity to understand and insist on their rights, while establishing specific institutional mechanisms at different levels of decision-making to overcome the obstacles that prevent effective participation by the most disadvantaged groups.

BOX 3 PARTICIPATION AS A DEFENCE AGAINST CORRUPTION

Most States of the region are parties to the United Nations Convention against Corruption (UNCAC). That Convention, which entered into force in 2005, establishes a series of measures that States parties must adopt to prevent and combat corruption. Article 13, in particular, provides as follows:

Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

- (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes.
- (b) Ensuring that the public has effective access to information.
- (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula.
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:
 - (i) For respect of the rights or reputations of others.
 - (ii) For the protection of national security, public order or public health or morals.

Source: United Nations Convention against Corruption.

F. Transparency and access to information

From a rights perspective, all public policies must be transparent in order to prevent corruption, abuse, mismanagement and political manipulation. Transparency and access to information are also key elements of accountability.

Transparency requires that beneficiaries, and society in general, must be able to understand how the programme functions and who are the people responsible for implementing it, at both the national and local levels. There must also be transparency in the various components of social programmes, such as the selection of beneficiaries, targeting mechanisms, eligibility criteria, services, complaint mechanisms, and paths of recourse. The results of the programme should be published on a regular basis, including the outcome of any evaluations and impact studies. As we shall see below, the citizenry must be guaranteed access to full and up-to-date information.

Information must be provided in a manner that is readily understandable and through channels that are physically and culturally accessible to the most disadvantaged persons or groups, and those channels must be designed so as to allow those people to overcome such barriers as lack of or limitations on literacy, access to technologies (for example the Internet), or economic resources for transportation.

Flexible and inclusive access to information mechanisms could include, for example, free telephone hotlines and mechanisms to overcome literacy barriers. It is particularly important in Latin America that information on social protection programmes should be available in indigenous languages.

Power asymmetries, gender inequality, and patterns of discrimination can have the effect of denying access for various groups to information about a social programme. To ensure equal access for women to information about the programme, for example, the channels of information must be gender-sensitive.

Access to social programme information is a right that the State must guarantee for all its inhabitants (see box 4). Consequently, programme officials must be trained to process requests for information and they must respond promptly and fully to such requests. As well, steps must be taken to ensure that access to public information does not come at the expense of the right to data privacy.

BOX 4
FREEDOM OF THOUGHT AND EXPRESSION

The Inter-American Court of Human Rights has held that the right to freedom of thought and expression (article 13 of the American Convention on Human Rights) includes the right to seek and receive information in the hands of the State. As the Court has ruled, that article:

“...protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied. The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it. In this way, the right to freedom of thought and expression includes the protection of the right of access to State-held information, which also clearly includes the two dimensions, individual and social, of the right to freedom of thought and expression that must be guaranteed simultaneously by the State.”

Source: Inter-American Court of Human Rights, Claude Reyes and others, Judgment of 19 September 2006, para. 77 [English version found at the Court's website, www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf].

G. Accountability and access to means of redress or remedies/claims and reparations

Another key element of the rights-based approach is to enable persons to demand the effective guarantee of their right to social security and to hold public officials liable in cases of error, abuse or mismanagement.

Bearing in mind the profound asymmetries of power that exist between those who are responsible for managing social programmes and those at whom they are aimed, the establishment of accountability systems is essential for guaranteeing the exercise of social rights for the most disadvantaged groups.

Without mechanisms of accountability or reparations, social policies are less likely to be understood in terms of benefits and rights, and they will be seen as tools of patronage or “clientelism” and thus subject to political manipulation.

With respect to social protection policies and programmes this implies, for example, the need to establish rules, procedures and controls for limiting the discretion of officials, employees and politicians in the exercise of the public function, as well as mechanisms for investigating and punishing misdeeds committed by public servants.

These accountability mechanisms are essential, in particular, with respect to three fundamental elements of programmes: (i) qualification and maintenance within the programme; (ii) complaints

concerning improper demands in the context of programmes, such as political support, financial solicitation, threats or sexual harassment; and (iii) supervision of payment procedures.

Recourse mechanisms must be independent from any political interference and they must be effective for supervising social programme administration and for receiving and processing complaints. They must also meet certain technical requirements to ensure that the most disadvantaged individuals or groups have access to them: they must be physically and financially accessible, they must guarantee confidentiality, they must allow for individual and collective complaints, they must have sufficient human and financial resources to be effective, and they must take into account questions of culture and gender.

There must also be the possibility of bringing judicial or other action for enforcing rights in the case of violations. The Committee on Economic, Social and Cultural Rights has clearly stated that the existence of means of redress, or remedies, both individual and collective, is indispensable for the effective enjoyment of ESCR.³⁶

In order to ensure accountability, there are various institutional areas that deserve particular attention because of the risk factors they pose: these include training and understanding of the programme by the public officials responsible for it; the existence of manuals and regulations; staff recruitment and selection; and interagency coordination.

One of the greatest obstacles is the physical and financial access to information and complaint mechanisms. An important step here is to establish free telephone hotlines available to the entire population, including those who do not speak the official language (for example indigenous language speakers). The existence of these telephone lines must be widely publicized, the people who staff those lines must be sufficiently trained, and confidentiality assured.

³⁶ CESCR, General Comment no. 9, Domestic Application of the Covenant.

IV. Lessons learned

This section examines selected social protection policies and programmes in place in the region that show promise in their efforts to implement a rights-based approach. Bearing in mind that the rights perspective presupposes equal standards of protection for the entire population, this analysis focuses on those social protection programmes that, in highly unequal societies with widespread and persistent poverty, are designed to combat inequality by seeking inclusion for the most disadvantaged groups. The emphasis in this analysis is on non-contributory programmes.

A. Consolidating an appropriate legal and institutional framework

As noted earlier, the constitutions of Latin American countries generally include a broad range of civil, political, economic, social and cultural rights, including in some cases the right to social security.³⁷

The constitutional and legal recognition of human rights in the countries of the region has translated into the growing incorporation of the human rights approach in a variety of public policy instruments. It is by no means unusual in the region to find national development plans that borrow directly from the language of human rights or indeed make the observance of human rights one of their central or crosscutting themes.³⁸ For example, Ecuador's National Plan for Good Living 2009-2013 declares that "human rights and the rights of nature shall be a constituent part of the plan, they are its objective, its essence and its *raison d'être*. Consequently, rights are the very substance of the plan and not merely the expression of 'an approach'.³⁹ In Uruguay, the Equity Plan declares that "to ensure that the residents of this nation have the effective possibility to pursue a decent life is one of the fundamental rights of the citizen, and therefore the responsibility of society as a whole and of the State in particular. To provide protection for those who need it, to guarantee people's fundamental rights, and to do so

³⁷ See footnote 5 above.

³⁸ See footnote 2 above.

³⁹ Republic of Ecuador: National Development Plan: *Plan Nacional para el Buen Vivir* ("National Plan for Good Living") 2009-2013: Building a Plurinational and Intercultural State, National Planning and Development Secretariat, Quito, 2009, p. 81.

throughout their lives, by building equity, generating equal conditions and opportunities for all in the face of diverse social, economic and living conditions.”⁴⁰

Beyond the explicit reference to the need to achieve development with full respect for human rights, consistent with their constitutions, the national development plans of countries of the region place a strong emphasis on fairness and on overcoming income inequalities (Armijo, 2010). At the same time they give priority to social areas in line with economic and social rights such as the right to education, to health, to employment, to adequate housing, and to participation.

In several countries of the region, the incorporation of a rights approach in the design of social protection systems is the outcome of the legal and institutional development required by their constitutions. For example, in the case of Brazil, the Constitution of 1998 recognizes a broad range of social rights (chapter 2), such as the rights to education, health, employment, leave, social security, pensions, protection of maternity, as well as the right to social assistance (section IV), which includes the guarantee of a minimum wage (article 203). It also sets comprehensive standards of special protection for children and seniors (chapter VII) as well as for indigenous peoples (chapter VIII). A number of other constitutional provisions are also important for the development of a rights-based approach to social protection, such as those relating to political and administrative decentralization, the right to public participation in policy formulation, and citizen oversight of actions at all levels (article 204), the principle of equality before the law and access to information (chapter 1).

In compliance with this constitutional requirement, Brazil has gradually developed a legal and institutional framework that guarantees a rights focus in social protection. This framework includes a great variety of laws, such as the Organic Law on Social Assistance (*Lei Orgânica da Assistência Social*, LOAS, 1993) and the establishment of various institutions to support and coordinate social programmes, including the creation in 2004 of the Ministry for Social Development and Fight Against Hunger (*Ministério do Desenvolvimento Social e Combate à Fome*, MDS).⁴¹

In the case of the Plurinational State of Bolivia, although there is no explicit constitutional provision recognizing “the right to social security”, a number of other constitutional norms are relevant for a rights-based approach to social protection. Examples are those relating to the model, purposes and values of the State (chapters I and II) and the broad protection of ESCR such as the rights to food, education, health and adequate housing, and universal and equitable access to basic water, sewage, electricity, gas, postal and telecommunications services. Other relevant provisions are those enshrining the right to organize public participation in decision-making and in managing the public health system as a whole, as well as the guarantee of specific rights for children, seniors and persons with disabilities. These rights (and their attendant obligations) form the legal basis for establishing social protection programmes with a human rights focus.

Particularly noteworthy in the region has been the establishment of legal frameworks with an explicit rights focus in the area of health. A number of constitutions enshrine health as a right⁴² and, consistent with those constitutional provisions, several countries have established a series of legal guarantees such as community participation, transparency and access to health information.⁴³

The impact that the legal and institutional framework can have on the implementation of a social policy can be appreciated, for example, in the broad range of legal and institutional frameworks through which cash transfer programmes have been implemented in the region. It is no coincidence that in those countries where such programmes have been institutionalized and incorporated into a national social protection strategy, through a broad legal framework that includes norms of different hierarchy and detail (for example, the Constitution, various national laws as well as operational rules), they have been

⁴⁰ See http://www.bps.gub.uy/5420/plan_de_equidad.html

⁴¹ For a detailed analysis of Brazil’s legislative and institutional framework, see Robles and Mirosevic (2013).

⁴² See for example, Constitution of the Bolivarian Republic of Venezuela (Article 83), Constitution of the Plurinational State of Bolivia (Article 7), Constitution of Columbia (Articles 44 and 49), Constitution of El Salvador (Article 35), Constitution of Paraguay (Article 68-72, and Constitution of Ecuador (Article 32).

⁴³ See for example Peru, General Health Law 26842; Chile, Law 19 966 establishing a Health Guarantees Regime.

consolidated as State policies, with greater legal certainty and protection for beneficiaries, and have therefore functioned better than in those countries where transfer programmes are based solely on presidential decrees or on operational manuals and directives, without any legal or juridical foundation.

B. The quest for integral social protection strategies

As noted above, the fact that human rights are indivisible and interdependent imposes the need to adopt a comprehensive strategy for social protection.

Within the region, the quest for an integral approach seems to be a lesson learned, although it is applied to varying degrees of success by various countries. One of the first experiments with an integral approach was Solidarity Chile,⁴⁴ the design of which was based on four components (psychosocial support, family protection bonus, guaranteed cash subsidies, and preferential access to social promotion, labour benefits and pension programmes).

A number of other countries in the region have gradually been incorporating an integral concept into their social protection strategies. One of the most positive recent experiments is the Brazil without Extreme Poverty programme (*Brasil Sem Miséria*).⁴⁵ This plan has three aspects: (a) an income guarantee through the *Bolsa Família* conditional cash transfer scheme and a continuing benefit through *Bolsa Verde*, (b) employment support (“productive inclusion”: in urban areas, for employment and income generation, and in rural areas for boosting production and incorporating non-wage earners), and (c) access to public services. This plan has two essential elements for ensuring its comprehensiveness: greater State involvement to ensure inclusion in the programme of all those persons who “fall below the radar”, and an emphasis on coordination through the signing of contracts with subnational levels of authority, involving all ministries.⁴⁶

Despite the progress made, the region still faces the challenge of building social protection systems with a systemic institutional design that goes beyond sector approaches. There is also a need to boost efforts to integrate and institutionalize cash transfer programmes, which in many cases still represent isolated interventions (Cecchini and Madariaga, 2011).

It is not necessarily an expensive undertaking to make programmes comprehensive. Even in the current context of limited resources, some countries of the region could offer their citizens greater social protection by improving the cross-sector management and coordination of programmes.

Experience in some countries of the region suggests that the State will have to assume an active role in making programmes more comprehensive, by setting up formal structures for cross-sector coordination, developing suitable information systems that support integrated management, and ensuring that social security institutions have the resources, the capacities and the financial and political support needed to implement integral programmes. A pending challenge is to achieve better integration among programmes, in particular between contributory and non-contributory ones, in order to consolidate a true system of social protection (Fiszbein, 2013).

In short, countries of the region must place greater emphasis on an integral approach and must continue to improve coordination among their various policies, if they are to achieve unrestricted respect for human rights and social protection.

⁴⁴ Solidarity Chile (*Chile Solidario*) was established in 2002, and represents a management model that works via various programmes: *Puente* (“Bridges”), aimed at families living in extreme poverty; *Vinculos* (“Linkages”, for vulnerable seniors; *Calle*, aimed at adults living “in the street”, and *Caminos* (“Pathways”), for children of families with a parent who has been incarcerated. See <http://www.chilesolidario.gob.cl>.

⁴⁵ Decree 7492 of 2 June 2011.

⁴⁶ <http://www.brasilemmiseria.gov.br>.

C. Ensuring respect for the principles of equality and non-discrimination

For most countries of the region, the principle of equal treatment and non-discrimination is one of the pillars of their social protection system, and is enshrined as such in their constitutions and their legislation. As noted above, this principle demands substantive and not merely formal equality, and includes the need to take affirmative measures to ensure special attention for those who suffer structural discrimination or are in a situation of vulnerability.

The current trend of boosting the coverage of social protection programmes and, in some cases, providing universal access is in line with the obligation, imposed by international human rights law, to extend the enjoyment of ESCR progressively to all inhabitants without discrimination.

There have been various efforts in the region both to ensure universal access to certain social programmes and to include the most disadvantaged groups actively in a given programme, bearing in mind their specific needs.

1. The road to universality: the example of health

Recent decades have seen efforts, with varying degrees of success, to achieve universality in healthcare in the region. It is useful from this viewpoint to compare two significant reforms: the Plan for Universal Access to Explicit Health Guarantees in Chile and the Single Health System in Brazil.

The System of Universal Access with Explicit Guarantees (the AUGE Plan)⁴⁷ in Chile guarantees the right of beneficiaries to coverage for 80 illnesses, and the persons entitled to those benefits can enforce their rights. There is moreover a legal framework (legislation and decree) guaranteeing access, quality, timeliness and financing.⁴⁸

As a result, the list of illnesses covered has been progressively extended, patients have recourse to the courts if the guarantees are not satisfied, and there is a legal framework focused on the rights and guarantees of patients.

Nevertheless, despite its rights-based rhetoric, this system has some severe limitations:

The plan is free only for certain affiliates of the National Health Fund (FONASA), while persons affiliated with the health insurance institutions (ISAPRES) are subject to a 20% co-payment. As well, the Solidary Compensation Fund⁴⁹ violates the principle of fairness, as lower-income taxpayers must pay proportionately more than those with high incomes, both as participants in FONASA and in the ISAPRES (Roman and Muñoz, 2008, p. 1602).

Although access is defined as universal, treatment is in fact limited to patients suffering from one of the 80 predefined illnesses. This provision has been criticized for violating the universal right to integral health (Roman and Muñoz, 2008, pp. 1600-1602): it means, in effect, that if a patient's affliction is not included in the "basket of benefits", he is not protected. To this must be added the fact that infrequent or marginal illnesses are excluded, even though they could require special care. This "universal" guarantee also excludes illegal immigrants and undocumented persons, who have no access to the available services (World Bank, 2007).

Some studies have shown that despite strategies to encourage people to demand their rights, there is still a generalized lack of information on the part of beneficiaries, who are unaware of their rights and thus rely to a large extent on support from health professionals, which in most cases is not forthcoming (Missoni and Solimano, 2010). For example, in one survey, 45% of the persons interviewed said that

⁴⁷ Law 19.966 of 3 September 2004.

⁴⁸ Law 19.966 (2004) and Decree 4 (2013) of the Ministry of Health.

⁴⁹ The purpose of this Fund (*Fondo de Compensación Solidario*) is to pool health risks among beneficiaries of the ISAPRES in relation to the health problems contained in the decree approving the Explicit Health Guarantees under the AUGE plan. See Decree 142 of 23 June 2005.

their doctors had not recommended use of the guarantees regime, even though they were required to do so by law (World Bank, 2007). Another failing from a rights perspective is the lack of explicit mechanisms for accountability and social oversight.

In the end, and despite the enormously positive impact that has flowed from introduction of explicit health guarantees to redress a highly inequitable healthcare system in Chile, there are still a number of shortcomings from a rights perspective that must be corrected. The right of access to health care without discrimination is far from universally guaranteed, and in financial terms the system is highly regressive, given the persistently great differences in the type and quality of care offered to those with and without resources.

More closely aligned with the rights focus is the single and universal public health system of Brazil, the *Sistema Único de Saúde*, SUS. The SUS is one of the largest public health systems in the world, assuring comprehensive and completely free care for the entire population, and covering a broad range of illnesses. The SUS has been in effect for more than two decades, and is recognized as a solid public health system with satisfactory results. The programme includes a number of measures to make the system universal and free, including recognition of health as a right, special measures for the indigenous population, measures to protect healthcare consumers in the face of information asymmetries, and mechanisms to guarantee community participation (De Souza, 2012). These features make the SUS particularly noteworthy in the region.

The universality of health coverage is defined in the Brazilian Constitution, which provides that “health is a right of all and a duty of the State” (article 196). Pursuant to that mandate, the SUS recognizes health as a right and a responsibility of the State, and is guided by the principles of universal and equitable access to services of health promotion, protection and recovery. In effect, the Organic Health Law⁵⁰ instituting the Single Health System declares (in Chapter II, Principles and Directives) that one of the principles of the SUS is “universality of access to health services at all levels of care” (article 7).

To achieve universality in practice there has been a major move to decentralize responsibilities, powers and resources from the federal to the State and municipal levels, and in this way to ensure that the entire population has access to quality care at all levels of the system, regardless of place of residence. Decentralization has a thorough normative framework, based on the Constitution, the Organic Health Law, implementing directives and operating rules (instituted through ministerial orders). Its implementation has been accompanied by a process of training and continuous performance evaluation (De Souza, 2012).

From a rights perspective, it is important to note, first, the special measures introduced in 1999 to ensure access to the SUS for indigenous populations, who until that time faced health conditions disproportionately inferior to those of the general population⁵¹ and, second, the creation of the National Supplementary Health Agency (ANS),⁵² which seeks to guarantee the rights of health service consumers who require special protection because of information asymmetry, and to establish effective instruments for preventing abuse.

The SUS is also noteworthy in its respect for the right of community participation, which is made effective through the Health Conferences of the Health Boards established by the Organic Health Law.⁵³ The Health Conferences are held every four years with representatives of the different social segments, and with the objective of assessing the health situation and proposing guidelines for health policy formulation at the corresponding levels. The conferences are held in ascending order, from the municipal through the state levels, and culminating in a National Health Conference. The Health Boards, in turn, are collegial bodies comprising representatives of the government, service providers, health professionals and users, with this last group representing 50% of the membership (De Souza, 2012). These bodies have a permanent and deliberative nature, and provide input into the formulation of strategies and the oversight of health

⁵⁰ Law 8080 of 19 September 1990.

⁵¹ Law 9836 of 23 September 1999.

⁵² Law 9961 of 28 January 2000.

⁵³ Supplementary Law 8142 of 28 December 1990.

policy execution at the corresponding level. These boards are again constituted within an ascending network, with municipal health boards, a state health board in each state, and a national health board. Among other tasks, they define strategies and monitor execution of health policies.

Given its characteristics, the SUS is today part of a State social policy that has survived successive changes of government over more than 20 years. Despite its significant impact, there are still some challenges in terms of full implementation of a rights-based approach: these include the disparities of health indicators between the rich and the poor, between whites and black and indigenous people, between urban and rural areas, and between men and women (Pan American Health Organization, 2012).

2. Ensuring the inclusion of especially disadvantaged groups

a) Women and gender focus

Achieving full equality between men and women in the enjoyment of the right to social security, both in its contributory and its non-contributory components, is one of the great persistent challenges facing the region, where the proportion of women among the poor has increased despite economic growth and the overall reduction in poverty (ECLAC, 2012c, p. 38).

With respect to contributory plans, a number of countries in the region have taken steps to deal with the fact that older women are often excluded from social security (because they work in the informal sector or as unpaid caregivers) or their pensions are far lower than those of men (because they stopped work at some point in their life to care for children, or because they received lower pay, and in some countries because they were required to retire earlier than men despite their longer life expectancy).

In this area we may note, for example, the pension reform in Chile which established the “basic solidarity pension” with a child credit designed to boost the pension savings of women and thereby achieve greater equity.⁵⁴ That pension reform was accompanied (in the same year) by other measures to enhance protection for working women, such as laws to ensure equal pay between men and women, to expand guarantees for medical care and health services, to gear public policies toward single mothers, and to enhance their possibilities for training and access to justice.⁵⁵

Many of the conditional cash transfer (CCT) programmes introduced in the region have been presented as schemes for enhancing the inclusion of women. Yet when it comes to gender equality, these programmes need to be looked at carefully. Although the benefits typically go to women, CCT programmes have been widely criticized for their “maternalistic” stance. In other words, the focus on women is not based on recognition of their rights, but are seen rather as an instrument for benefiting their children. As well, CCTs assume that it is women who will shoulder the burden of domestic chores and the care and rearing of children, effectively relieving men of any responsibility for these tasks (Cecchini and Madariaga, 2011).

A review of the ample literature on the gender impact of CCTs points to the following aspects as critical from a rights perspective:

CCTs do little to transform patriarchal relations and attitudes and the stereotypes that cast the man as the family breadwinner, while the woman is left with responsibility for raising the children and for traditional domestic chores. By assuming that women are exclusively responsible for unpaid domestic work, CCTs are in fact perpetuating these traditional stereotypes, with the attendant adverse impact on a series of women's rights (Sepúlveda, 2013).

CCTs do not promote women's access to paid employment, but on the contrary encourage their confinement to the home. CCTs do nothing to reorganize gender roles in ways that would reduce or avoid tensions between paid and unpaid work, and in some cases they increase tensions in terms of equality of time use.

⁵⁴ Law 20,255 (2008) on Pension Reform recognizes the right to a basic non-contributory pension, a child credit and financial compensation for divorce, and it establishes progressively a minimum taxable income for female domestic workers.

⁵⁵ See, for example, Law 20,348 (2009), Law 20,336 (2008); Law 20,286 (2008); and Law 20,279 (2008).

In light of these forceful criticisms of the shortcomings of CCTs, some important policy recommendations have been put forward to overcome them (see box 5).

BOX 5
RECOMMENDATIONS FOR REVISING AND REFORMULATING CCTS
FROM A GENDER PERSPECTIVE

ECLAC has prepared a series of recommendations that can be summarized as follows:

- Abandon the maternalistic approach to social policy, recognizing that women have their own right to social protection.
- Revise conditionalities and the forms of implementing them so as to expose the areas where the State falls short instead of imposing controls and penalties.
- Contribute to changing traditional gender roles, in particular the care-giving role assigned to women.
- Revise programmes so that the transfers will contribute to women's autonomy

Source: ECLAC, 2012c, pp. 70 and 71.

Just as there appears to be a degree of consensus on the need to reform conditional cash transfer programme so as to mainstream a gender focus, another aspect of social protection that deserves more detailed analysis is the “invisibility” of unpaid care work in the majority of CCT policies in the region.

With some notable exceptions, concerns regarding unpaid care work are explicit in only a small proportion of social protection policies.

One recent study, examining 50 public policies in 18 countries of the region, found only six instances, confined to four countries, of social protection policies that could be considered successful in terms of addressing the issue of unpaid care work explicitly. The six programmes were in Argentina (with its Universal Child Allowance, the former Unemployed Heads of Household Plan, and the Universal Pregnancy Allowance), Chile (Solidarity Chile), El Salvador (Universal Basic Pension), and Uruguay (PANES). Yet with the exception of the El Salvador programme, all these “successful” policies are geared to redistributing unpaid care work from the family to the State. No “successful” policies were identified that addressed the redistribution of unpaid care work from women to men (Chopra and others, 2013).

Solidarity Chile⁵⁶ provides daycare facilities during training sessions for single mothers. Another noteworthy aspect is that it establishes preschool programmes adapted to reach the target population by providing free access, as well as flexible hours to meet the needs of working mothers. Yet despite these features, some evaluations have shown that the preschool enrolment rate was low (4.6%), because of a prevailing cultural perception that children are better cared for at home: that perception was cited in 90% of the voluntarily reported reasons for non-enrolment (Galasso, 2011).

With respect to the distribution of the burden of unpaid care work in the region, comprehensive early childhood programmes are of particular interest. Some of these programmes have a positive impact not only in terms of greater protection and respect for the rights of children, but also in terms of shifting the burden of unpaid care work from families to the State, as well as within the family (from the woman to the man).

Among the most comprehensive policies and programmes with an explicit rights focus is Uruguay's National Strategy for Children and Adolescents (ENIA). That strategy states specifically that the equitable distribution of care duties between men and women and, above all, their recognition as a social responsibility are key to any real broadening of welfare rights and opportunities (ENIA, 2010, p. 25).

Various programmes in the region have been designed to redistribute care work from the family to the State, by offering accessible childcare services that meet the needs of working mothers, and these represent an important step towards gender equality. This is the case with the *Hogares Comunitarios* (community nurseries) that are being implemented in several countries, including the Plurinational State

⁵⁶ See footnote 46 above.

of Bolivia, Guatemala, Mexico, Peru and Colombia. These programmes generally have a positive impact on bringing women into formal employment, as well as on children's nutrition and even their size.

In Guatemala, for example, the community nurseries programme allows women (particularly single mothers) to hold formal employment (which is usually more stable and better paid) while offering them greater social and health benefits (Ruel and others, 2006). In Peru, the national *Wawa Wasi* community centres programme reports improvements in terms of reducing chronic malnutrition and increasing access to the national identity document for beneficiary children (Ministry of Women and Social Development, 2011). It also enables mothers to work or study, by allowing them to send their children to the *Wawa Wasi* centres without worrying about their safety (Cueto and others, 2009).

In Colombia, the *Hogares Comunitarios* child care and nutrition programme was established in 1986 to provide child care and nutrition to children under seven years of age. It is now the country's largest welfare programme, serving more than 1 million youngsters in approximately 80,000 centres, and it is having a positive impact on children's physical growth and development (Attanasio and others, 2010, p. 3).

In conclusion, we may say that the region has seen significant progress in training and support for families (fathers and mothers), and a better distribution of care-giving tasks from the family to the State. Yet despite this progress, achieving real gender equality in the region will require boosting the visibility of care-giving work in national policy agendas and achieving a more equitable distribution of the care burden between women and men, and between families and the State. Bringing men within the scope of care policies—an essential element from the rights perspective—is still a pending task in the region. It will require comprehensive policies with a coordinated and sustained cross-sectoral focus on the part of State providers of health, child care, education and other services.

b) Children

The childhood strategies implemented in the region often have an explicit rights focus, stressing as primary objectives the equality of all children in the development of capacities, recognition of children as having their own rights, and priority to the best interest of the child.

An outstanding example within the region is the National Strategy for Children and Adolescents 2010-2030 (ENIA) of Uruguay. ENIA is explicitly founded on international standards concerning the rights of children and adolescents, and in particular those contained in the Convention on the Rights of the Child (ENIA, 2008, p. 3). As well, and in line with the Convention's emphasis on active participation in the community as one of the fundamental rights of children, the process of formulating the ENIA included consultations with children and adolescents, who contributed their voice and their perspective to the final text. As well, the strategy provides expressly that its implementation "must be guided by the goal of promoting and respecting rights" (ENIA 2008, p. 29).

Another prime example is the *Brasil Carinhoso* ("Brazil Cares") programme,⁵⁷ which is part of Brazil without Extreme Poverty. This programme was established with a firm political commitment to strategies for eradicating and reversing the persistent poverty and inequality that were still shackling the children of Brazil 10 years after the *Bolsa Família* was introduced (Robles and Mirosevic, 2013). The programme has three pillars: (a) income support, through an early-childhood poverty alleviation benefit; (b) education, through an increase in the number of available places in preschool facilities; and (c) health, through efforts to increase supplements of vitamin A and iron sulphate, and to improve access to free medications against asthma.

In Argentina, the Universal Child Allowance (AUH)⁵⁸ offers a monthly benefit to parents who are unemployed or working in the informal economy and who have children under the age of 18 (recognizing that the great majority of women do not work in the formal sector) (Roca, 2011). Consistent with a rights-based approach, the AUH thus extended coverage to workers who were traditionally excluded. This benefit is justified from a rights perspective in that it is intended to serve

⁵⁷ See <http://www.brasilemmiseria.gov.br/brasil-carinhoso/brasil-carinhoso>

⁵⁸ Decree 1602/09, Amending the Family Allowances Law 24,714.

“the best interest of the child”, and to achieve to the maximum “the integral and simultaneous satisfaction of their recognized rights and guarantees, including the right to a good quality of life, to education, and to social security benefits.”

Despite the progress that this allowance represents, it is regrettable from a rights perspective that it has been established only through a decree and not through a formal law, which would protect it against changes in government. The programme has also been criticized from a human rights viewpoint for not respecting the principles of universality, equality and non-discrimination, in that it imposes requirements that exclude certain groups such as persons in detention and migrants who cannot show that they have resided in the country for at least three years, and it sets a limit of five children for payment of the benefit (Pautassi, Arcidiácono and Straschnoy, 2013).

It has also been argued that some of the conditions attached to the programme may unnecessarily exclude certain beneficiaries. For example, the requirement that schooling must be taken in public institutions excludes the 20% of potential beneficiaries who attend private subsidized schools with dining facilities and school shifts that allow them to work. The 2009 household survey (EPH) indicates that 6.8% of the extremely poor and 10.5% of moderately poor fall within this category (Gasparini and Cruces, 2010).⁵⁹

The requirement that informal workers receive less than the minimum wage has also been criticized as impossible to implement in practice and as opening the way to political patronage. An alternative proposal for minimizing the patronage risk would be to generalize the allowances to all persons who do not receive them through their formal employment (Gasparini and Cruces, 2010). On the other hand, it has been argued that the programme’s health and education conditionalities burden women with responsibilities without giving them adequate support through care infrastructure (Pautassi, Arcidiácono and Straschnoy, 2013).

c) Older persons

The region’s elderly population faces high levels of insecurity. This is not surprising, given the high percentage of older people in the region who receive neither pensions nor retirement allowances. In 2009, for example, only four out of every 10 Latin Americans 65 years and older were receiving an allowance or pension, and there were great differences between countries, with coverage ranging from 89% in Argentina to 7% in Honduras.

Given this situation of vulnerability, the option of universal income transfers for seniors has been presented as an effective tool for the enjoyment of essential minimum levels of ESCR by all older persons, without discrimination.

This is exactly what is being done in the Plurinational State of Bolivia, through its *Renta Dignidad*⁶⁰ scheme, which provides a universal non-contributory pension for seniors. The programme is in line with the broad protection of seniors’ rights guaranteed in the Constitution, which declares that “all older persons have the right to a dignified old age, with quality and human warmth. The State shall provide an old age pension within the framework of integral social security, in accordance with the law” (Article 67). At the subnational level, Mexico City also provides a pension for seniors.⁶¹

Non-contributory universal transfers to older persons, in contrast to targeted programmes, require a simpler structure with lower administrative costs if they are to be successful in achieving their purposes. These universal pensions make it possible to avoid the disincentives (inherent in targeted systems) for low-income workers to save for their old age, or for older workers to continue working beyond retirement age (Mkandawire, 2005). They also reduce the opportunities for corruption, as they are available to everyone who meets the age requirement, and they place no social stigma on beneficiaries.

⁵⁹ The National Social Security Administration of Argentina (ANSES) reports that it has launched a study to overcome this weakness. See <http://www.anses.gov.ar/noticia/los-chicos-que-concurren-a-escuelas-privadas-continuaran-cobrando-la-asignacion-universal-por-hijo-15>.

⁶⁰ Law 378 of 16 May 2013 on the Universal Old-Age Income.

⁶¹ Paid to all persons age 68 and over who have lived in the Federal District for 3 years or more. See http://www.adultomayor.df.gob.mx/documentos/pension_alimentaria.php and Yanes, 2011.

As well, non-contributory pensions are more sensitive to gender issues, as men and women receive the same level of benefits regardless of their labour market status, thereby recognizing women's contribution in the form of unpaid care work. Another potential advantage of universal programmes over targeted systems has to do with the fact that, in most Latin American countries, women face structural discrimination through gender stereotypes, which tend to diminish their influence over decision-making and can leave them excluded from targeted pensions. In universal regimes, it is not possible to manipulate access to women's detriment. This means that, in many countries of the region, universal pensions such as the *Renta Dignidad* may be the only means of guaranteeing old-age incomes for the majority of women.

d) Indigenous peoples

There has been significant progress over the last decade, both in legislation and in jurisprudence, towards recognizing the individual and collective rights of the region's indigenous peoples (ILO, 2009). The design of public policies has also moved toward greater incorporation of an intercultural focus intended to reinforce the identity of different communities through appreciation of their values, their customs and their knowledge.

Countries of the region have adopted various national development plans as well as specific policies or strategies that recognize and value cultural diversity. In the course of their implementation, many specific programmes have been geared to meeting the needs of users in indigenous areas. It is particularly important to take specific measures to reach the indigenous population in Latin America, where indigenous peoples are more prone to poverty than other groups (United Nations Development Programme, 2004).

Advances on the normative front have translated into progress in the enjoyment of rights. For example, there has been a significant increase in the proportion of indigenous children enrolled in the school system (ECLAC, 2013, p. 83). This progress has been especially meaningful for indigenous girls between the ages of 12 and 17 years. At the beginning of this century, around half of indigenous girls in this age group were outside the formal education system, while the censuses from 2010 show an enrolment rate of over 70%. One factor that may have helped to expand educational coverage is the conditional cash transfer programmes that have reached ever-larger numbers of indigenous people (Robles, 2010), although it must be recognized that very few countries in the region have adapted the design and implementation of their CCTs to the requirements of indigenous peoples.⁶²

Yet despite this progress, many challenges remain for ensuring that the region's indigenous peoples can enjoy their rights under equal conditions with the rest of the population. Ethnic, generational and gender inequalities persist. As well, and despite better access to education, there is still no guarantee of quality and cultural relevance in the teaching-learning process for indigenous youngsters (ECLAC, 2013, pp. 82-88).

There has been little in the way of comprehensive analysis of the impact of social programmes on the economic and social situation of the region's indigenous peoples, and the few examples available reveal persistent inequalities. In Mexico, for example, the National Health and Nutrition Survey (ENSANUT) for 2006 and 2012 shows that, despite some improvements, social inequality persists in terms of living conditions, health status and access to health services, between indigenous people (9.4% of the population) and the non-indigenous population (Instituto Nacional de Salud Pública, 2012).

To meet the needs of the region's indigenous population will require the design and implementation of policies aimed at improving the structural conditions of indigenous peoples' lives, geared in particular to reducing access barriers to social protection and health services. It is essential for social protection policies and programmes to recognize the multicultural nature of the region's societies.

e) Persons with disabilities

The region has few programmes designed or structured to overcome the specific barriers that persons with disabilities face in accessing social protection, and in this way to fulfil the international obligations flowing from the Convention on the Rights of Persons with Disabilities (in particular, article 28).

⁶² There are some exceptions, for example Colombia and Panama (Robles, 2010).

Among the few programmes targeted at persons with disabilities are the universal non-contributory pensions regimes established in Uruguay, in Brazil,⁶³ and in the Dominican Republic.⁶⁴

The Brazilian allowance (BPC) is noteworthy for its coverage (as of March 2012 there were 3.6 million beneficiaries across the country, of whom 1.9 million were persons with disabilities and 1.7 million were seniors)⁶⁵ and for the fact that its reform in 2012 expanded the assessment criteria for recognizing psychosocial barriers restricting access to the allowance for persons with disabilities, in explicit recognition of the obligations imposed by the Convention (ISSA, 2012).

Unfortunately, in all three cases cited, the amounts offered by these non-contributory pensions do not even approach the value of the minimum wage, and they are insufficient to meet the economic needs of persons with disabilities (Alm eras, 2013).

The region as a whole must go further to fulfil international norms and standards concerning persons with disabilities, and they will have to eschew any “welfare” optic in order to create integral systems that will promote the autonomy and inclusion of persons with functional disabilities. To this end they will have to offer greater support for remaining in the education system, together with improvements to infrastructure, access to employment, and credit.

f) Special emphasis on the territory

The principle of equality and non-discrimination also obliges States to take into account the most disadvantaged territories, which remain invisible. In Latin America, the heavy geographic concentration of the population and of economic activity goes hand-in-hand with great territorial disparities, which can be measured by the gaps in territorial GDP per capita (ECLAC, 2010). This inequitable situation demands an appropriate response from public policies.

In light of this situation, national development plans in the region tend to include explicitly the objective of achieving territorial equity, in such a way as to comply with this principle of equality. For example, Ecuador's National Plan for Good Living 2009-2013 declares that “the guarantee of rights (...) demands the generation of public policies that will ensure conditions of territorial equity.”⁶⁶

The “Citizenship Territories” programme (*Programa Terr torios da Cidadania*)⁶⁷ in Brazil is a good example of the rights focus at work.⁶⁸ It is designed to reduce inequality in the most disadvantaged territories and to “promote economic development and universalize basic programmes for the citizenry through a strategy of sustainable territorial development.” The programme aims to improve the quality of life for Brazilians living in the neediest regions, particularly in rural areas. It has three kinds of action: support for production activity, enjoyment of rights, and strengthening of institutions and infrastructure. In this way, it fosters social inclusion by encouraging the generation of incomes in rural activities, such as citizen participation in the planning of sustainable territorial development and access to essential public services: civil documentation, food and nutritional security, health, education and culture, social organization, and infrastructure (housing, access roads, energy and sanitation).

In addition, as indicated above, the Brazil without Extreme Poverty plan gives priority to the most vulnerable families, territories and people in access to social policies, for example by establishing basic health units in areas with the highest poverty indices.

⁶³ The Continuing Social Assistance Allowance, BPC (*Benef cio de Presta o Continuada da Assist ncia Social*) was established by the 1988 Constitution, and is regulated by the Organic Law on Social Assistance-Disability Allowances, Law 8742 of 12 July 1993, by Law 12.435 of 16 July 2011 and by Law 12.470 of 31 August 2011, which amends disability, and the provisions Decree 6214 of 26 September 2007 and Decree 6564 of 12 September 2008.

⁶⁴ The *Pensi n Solidaria del R gimen Subsidiado* of the Dominican Republic was established by law in 2001, but has not yet been implemented. Regulations for the regime were approved in 2013.

⁶⁵ <http://www.mds.gov.br/assistenciasocial/beneficiosassistenciais/bpc>

⁶⁶ Rep blica del Ecuador. Plan Nacional de Desarrollo: Plan Nacional para el Buen Vivir 2009-2013: Construyendo un Estado Plurinacional e Intercultural, Secretar a Nacional de Planificaci n y Desarrollo, Quito, 2009, p. 33

⁶⁷ See <http://www.territoriosdacidadania.gov.br>.

⁶⁸ Government of Brazil, Programa Terr torios da Cidadania: integration of public policies for reducing inequality, March 2009.

D. Participation

In recent decades the region has become more open to citizen participation, as expressed in the establishment of a normative framework in various countries enshrining the right to participation and defining concrete mechanisms for implementing it at the constitutional level and through laws, decrees, regulations and operating rules (Hevia, 2011).

Given the region's legacy of patronage and corruption in social policy, measures to promote greater participation have a potentially important impact. This new openness to participation is particularly evident in the expansion over the last 15 years of participatory budgeting initiatives that have been implemented by various local or municipal governments in at least 15 countries of the region (UNIFEM, 2010). On the social protection front, various countries in the region have established special mechanisms for participation in relation to health⁶⁹ and nutrition.⁷⁰

Mechanisms for direct participation have been introduced in various programmes, with differing degrees of success, in Argentina, Brazil, Colombia, Mexico and Peru.

Brazil is among the countries of the region that have made the most progress in encouraging citizen participation in social programmes. That progress is in line with the Constitution and with national legislation establishing “deliberative participation” by the population. Thus for example the Single Social Assistance System (SUAS), following the example of the health sector, has two participatory mechanisms: conferences and management boards. These boards function at the national, state and municipal levels and their membership is equally divided between civil society and government representatives.

In Mexico, beneficiaries of the *Oportunidades* programme are organized in community promotion committees, established to “forge a link between beneficiary families and personnel of the health and education services and the national coordination office, as a means of channelling their petitions and suggestions, strengthening the activities of each programme component, fostering community development, promoting social oversight and transparency of the programme” (Government of Mexico, 2010). These committees have been criticized, however, as a mechanism that lacks the autonomy, functions or powers that would make it a true instrument for citizen participation, rendering it instead a mechanism of compulsory participation (Hevia, 2011).

Despite these reproaches, there are some positive aspects that must be recognized. For one thing, in Mexico (as in Brazil) progress in the area of social policy participation has been supported by an appropriate normative and institutional framework. Of particular note are the Federal Law on Transparency and Access to Basic Government Information (LFTAIPG), the creation and operation of the Federal Institute for Access to Public Information (IFAI), and the adoption of a variety of state laws and municipal regulations governing transparency and access to information.

Notwithstanding this progress, the region still faces enormous structural obstacles to effective participation by the most disadvantaged and excluded groups, because of their level of incomes, gender inequality, geographic location, and ethnic and racial discrimination. Greater efforts are needed to put into practice the constitutional and legal mandates for citizen participation, and to pursue political and administrative decentralization and accountability. This means that citizen participation must be institutionalized in all social programmes in order to provide a real response to the demands of the public.

⁶⁹ For example, article 98 of the Constitution of Guatemala established as the right of communities to participate in health programmes: “Communities have the right and duty to participate actively in the planning, execution and assessment of health programmes.” See also article 14 of the General Health Law (Law 26,842) of Peru. For Brazil, see the provisions on participation in the Single Health System (SUS), section IV.3.A supra.

⁷⁰ See for example, in Peru, article 2 of Law 27.731 regulating participation by “mothers’ clubs and self-managed people’s canteens” in food support programmes.

E. Accountability, transparency and access to information

The rights-based approach stresses that the public authorities are answerable to the citizenry for their management, and that there must be accessible mechanisms for enforcing that responsibility. For accountability to be effective there must be transparency and access to information.

Most social programmes in the region lack effective mechanisms for transparency, and this represents a great challenge from the right's perspective.⁷¹ This is of particular concern when we recognize that several countries in the region earn corruption perception scores that are among the worst in the world, according to the Transparency International index.⁷²

On the bright side, access-to-information laws have been adopted in various countries—including Brazil (2011), Colombia (1985), Chile (2008), Ecuador (2004), Guatemala (2008), Mexico (2002) and Peru (2002)—and “citizen service systems” have been established where people can consult information and submit claims and complaints (for example, in Argentina, Chile and Mexico).

When it comes to social protection programmes, the greatest progress has been made with CCTs, some of which have incorporated flexible and inclusive mechanisms for access to information that represent models for others to follow. For example, Ecuador's human development bonus programme has set up toll-free hotlines, while Mexico's *Oportunidades* programme has established access-to-information mechanisms that take into account the barriers of illiteracy, lack of Internet connectivity, and the high cost of transportation. As a result, access to information on the part of certain disadvantaged groups of beneficiaries has improved.

Just as there has been progress in terms of transparency and access to information, several countries in the region have also established mechanisms in recent decades that allow for citizen control over public officials responsible for implementing social programmes, through submission of complaints or claims in cases of irregularities or abuse of power

In Mexico, for example, there are three channels of recourse open to the public: the *Dirección General de Atención Ciudadana of the Secretaría de la Función Pública* (the complaints window of the Civil Service Ministry), the *Sistema de Atención Ciudadana* (SAC) of the *Oportunidades* programme, and the complaints filing system of the *Fiscalía Especializada para la Atención de Delitos Electorales* (office of the special prosecutor for electoral crimes).

The SAC receives and processes complaints filed by citizens and beneficiaries of the *Oportunidades* programme. Between 2003 and 2009 it received more than 780,000 submissions, including requests, complaints, suggestions and claims (Hevia and Gruenberg, 2010). Despite the system's potential to investigate complaints and claims, in practice this is limited, as most submissions involve merely requests or consultation. For example, over those six years the great majority (83.2%) of SAC responses related to requests and consultations (Hevia and Gruenberg, 2010).

The region needs to move further to guarantee the social rights of social programme beneficiaries in the face of political patronage and corruption. In this connection, Gruenberg and Pereyra Iraola (2009) have suggested that one viable option would be to adopt a strategy of “persuasion” that involves more flexible administrative measures, lenient penalties, and proper management of information and transparency.

The region seems to have made the greatest progress in relation to accountability and evaluation mechanisms for the CCTs of broad coverage such as *Bolsa Familia* in Brazil and *Oportunidades* in Mexico. The efforts that these programmes have made to establish mechanisms of accountability, access to information and evaluation, and to make them accessible to the poorest segments of the population, should serve as lessons for all social protection policies and programmes, and for public policies more generally.

⁷¹ Economic Equality in Latin America (EELA) program of Transparency International. Available at http://www.transparency.org/whatwedo/activity/transparencia_y_rendicion_de_cuentas_en_programas_sociales_de_latinoamerica.

⁷² For example, of the 176 countries evaluated in 2012, Mexico ranked 105, Honduras 133, Paraguay 150, Haiti and Bolivarian Republic of Venezuela 165. See Corruption Perceptions Index 2012, Transparency International.

On this point, we may note some of the recommendations of Hevia (2009) concerning access to information on social protection programmes. These include: (i) maintaining and improving the information available to beneficiaries; (ii) facilitating the public's submission of complaints or claims to the relevant bodies; (iii) strengthening the response to complaints/claims submitted by telephone to the various bodies, recognizing the legal constraints of the citizen response services, institutional resistance, and the limited response of institutional counterparties; (iv) establishing closer linkages between the bodies that provide training and those that receive and investigate complaints and claims, and the State and internal oversight bodies; (v) reviewing existing legislation to limit the ability of political parties and players to use social programmes for propaganda purposes; (vi) making social programme registers more transparent, while protecting confidential data, to avoid their illicit use in electoral campaigns; and (vii) requiring that beneficiaries receive information on the recommendations from external impact evaluations, in order to improve the operation of social programmes.

V. Judicial enforcement of social rights and its impact on the design of social protection policies

The constitutional recognition of ESCR has led to a growing body of jurisprudence on the part of the region's tribunals.⁷³ This is particularly the case in those countries where there is constitutional protection for ESCR, including Argentina (constitutional article 43), the Plurinational State of Bolivia (article 19), Brazil (article 05, LXXI and 103), Colombia (article 93) and the Bolivarian Republic of Venezuela (article 27).

Yet we must recognize that the judicial enforcement of these rights has been uneven across the region, because of differing legal, social and cultural contexts (Tushnet, 2007, p. 9). Save for the exceptions mentioned above, in many countries of the region there is still a perception (however outmoded it may be) that ESC rights constitute mere declarations of intent and programmatic standards that are not enforceable through the courts. In some countries, this means that these rights are still excluded from constitutional protection (Courtis, 2010).

It has traditionally been considered that ESC rights are distinct in their legal nature from civil and political rights, because they are vague, of an inherently positive nature, and dependent on available resources (Sepúlveda, 2005). This restricted vision of the juridical nature of ESCR has been the subject of broad doctrinal debate, which may now be deemed concluded (Sepúlveda, 2001). It is possible, of course, to argue that some obligations imposed by ESCR require greater public investment than do civil and political rights, but this is more a problem of degree than of substance.

Other arguments against making ESCR litigable relate to the potential violation of the principle of separation of powers between the different branches of the State, as the judicial branch would then assume the role of executor of public policies and would allocate resources, whereas its role should be

⁷³ For a detailed analysis of the judicial review of economic, social and cultural rights in Argentina, Brazil, Colombia and the Bolivarian Republic of Venezuela, see Langford, Malcolm (ed.) (2008), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Cambridge University Press, 2008.

confined to interpreting and applying the law, and not “creating public policy.” However persuasive this argument may appear, the fact remains that to ask a court to review a case is not to ask it to make laws or public policies but rather to review decisions, acts and omissions on the basis of a set of criteria, in this case human rights.

Lastly, it has also been argued that the courts lack the capacity to decide cases relating to ESCR. In the face of this argument we must understand that judicial decisions on these rights seek to protect fundamental rights while determining the processes and criteria whereby the burden of proof is transferred to the State authorities, who are then obliged to justify their inaction or their disregard of rights. The courts employ their discretion in establishing remedies, in order to find appropriate ways, in light of the context, to oblige the authorities to fulfil their duties.

Although the debate over judicial enforcement of ESCR might be deemed to be concluded, that debate still seems to be open in various countries of the region, for various reasons including the inherently conservative nature of the courts and the legal profession. The fact is that, despite a large body of comparative jurisprudence regarding ESCR, traditional positions and arguments, while superseded, are still evoked.

A. The case of the Constitutional Court of Colombia

Although a detailed examination of the judicial protection and enforcement of ESCR is beyond the scope of this paper, it is useful to cite a few concrete cases in order to understand how judicial review of ESCR can have a significant influence on social protection policies and programmes.

A trailblazing case in the protection of ESCR via the judicial route was decided by the Constitutional Court of Colombia, through an action for *tutela*.⁷⁴ A constitutional action for *tutela* (protection) may be brought by any person whose “fundamental constitutional rights” are threatened or violated by the act or omission of any public authority. The action may proceed only if there is no other judicial remedy available for the affected party, unless the action is used as an interim means of avoiding irreparable damage (article 86, Colombian Constitution).

The Constitutional Court has recognized that ESCR obligations are of a progressive nature,⁷⁵ but it has frequently responded to petitions for *tutela* by demanding immediate compliance with those rights, through a broad interpretation of the right to life, dignity and security. It has also developed the concept of *mínimo vital para una vida digna* (roughly, “minimum conditions for living in dignity”).

As early as 1992, in a landmark decision that demonstrated judicial activism in guaranteeing rights, the Constitutional Court, in hearing an action for *tutela*, ordered the Colombian State to provide economic assistance to a 63-year-old citizen, who was living in extreme poverty and had no contact with his family, to allow him to undergo an eye operation that would restore his sight. In its judgment, the Court recognized that the scope and content of social benefits must be determined by law. Nevertheless, it held that the legislature had not complied with its duty to adopt a law that would look after persons in the situation of the plaintiff, and that this omission in the social security system justified protection by the Court. Consequently, the Court granted a writ of *tutela* and ordered the Social Insurance Institute to pay for the treatment.

The reasoning adduced by the Court in this case has been applied in several subsequent judgments in which it again held that, under exceptional circumstances, the right to social security is immediately enforceable. To determine when that right is immediately enforceable, the Court said, the following conditions must apply: (a) the individual is in a situation of manifest vulnerability because of his economic, physical or mental situation; (b) there is no possibility for the individual or his family to take

⁷⁴ For a detailed analysis of the jurisprudence of the Colombian Constitutional Court in the area of economic, social and cultural rights, see Sepúlveda, Magdalena, “Select National Jurisdictions: Colombia”. In *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*, Langford, Malcolm (ed.), Cambridge University Press, 2008.

⁷⁵ See for example SU-111/97.

action that would remedy the situation; (c) the State has the possibility to remedy or mitigate his condition; and (d) the State's inaction or omission will affect the individual's ability to enjoy the minimum conditions for a dignified life.⁷⁶

If these conditions are met, the Court will order the State to comply immediately with its duty to provide social assistance. The State has thus been obliged, *inter alia*, to provide medical treatment,⁷⁷ to admit free of charge an indigent, mentally ill woman in a public sanatorium,⁷⁸ and to place an elderly man in a retirement home to end his days.⁷⁹

In regard to the enjoyment of the right to social security in its contributory component, the Court has ordered the State to maintain the purchasing power of pensions, by indexing the monthly allowances on which their beneficiaries depend.⁸⁰ It has also reviewed the fairness of administrative procedures involved in the provision of social benefits. In this respect, the Court has ruled that any social programme must respect the principles of due process, i.e. comply with such obligations as the following: (a) to take special care of vulnerable or disadvantaged people, including older persons and persons with physical or mental disabilities, so as to avoid social exclusion and discrimination; (b) to allow participation by beneficiaries in hearings and committees that decide on their situation; and (c) to provide timely, pertinent, accurate and comprehensive information on the procedures required to obtain the relevant subsidy.⁸¹ Thus for example the Court granted a writ of *tutela* in the case of an elderly man who had not received a State subsidy because he had been given erroneous information from the relevant administrative entity on the procedures necessary to obtain the subsidy.⁸²

Although the writ of *tutela* is not the appropriate route for requiring the payment of unpaid social security benefits (because there are other legal means available), the Court has declared that, if the lack of payment implies a violation of the fundamental rights of the petitioners, it is possible to enforce that right through such a writ. For example, while an order for the payment of maternity benefits is outside the scope of *tutela*, if the minimum conditions for a dignified life of the mother and newborn depend on the payment of maternity benefits, the right becomes a fundamental right that is immediately enforceable by a writ of *tutela*.⁸³

It is worth noting that a *tutela* procedure to enforce the right to social security is not open to everyone. Such protection will be granted only in exceptional circumstances where individuals find themselves in a state of dire need that requires immediate judicial protection. Consequently, not all seniors, unemployed persons or mothers can effectively invoke their right to social security through a petition for *tutela*, but only those individuals whose minimum subsistence depends on such benefits.

Another important area where ESC rights are subject to judicial review relates to the right to health (article 49, Colombian Constitution).⁸⁴ In general, the Court has held that this right is of a progressive nature, and thus not subject to the requirement for judicial review, except when there is a link to a fundamental right, or in the case of children's right to health, which according to the Constitution is a fundamental right *per se* and subject to immediate enforcement by the courts (article 44).

⁷⁶ See Judgment T-533/92. In the Court's words, "When a person is in a situation of manifest vulnerability because of his economic, physical or mental condition which neither he nor his family can remedy, the State is, exceptionally, under an obligation to provide special protection for that person. In such a situation, there is an inversion in the order of application of the principle of social solidarity, which obliges the State to provide direct and immediate services in favour of a person in circumstances of manifest vulnerability, without prejudice to the right of the State authority, as may be the case, to subsequent reimbursement of costs by the beneficiary or his family."

⁷⁷ Judgment T.-533/92.

⁷⁸ Judgment T.-zero 46/97.

⁷⁹ Judgment T.-1330/01.

⁸⁰ Judgment T.- 457/09.

⁸¹ See for example judgments T.-149/02 and T.-499/95.

⁸² Judgment T.-149/02. The court ordered the relevant authority to re-examine the case and to provide assistance to the man throughout the proceedings.

⁸³ See judgments T-568/96, T-270/97, T-567/97, T-662/97, T-175/99, T- 362/99, T-496/99, T-104/99, T-139/99, T-210/99, T-365/99, T-458/99, T-258/00, T-467/00, T-1168/00, T-736/01, T- 1002/01, T-497/02, T-664/02 and T-707/02.

⁸⁴ For a detailed analysis of the protection of this right by the Constitutional Court, see Rodríguez Garavito, Cesar and Yamin, Alicia (eds.), *Justicia y salud: la Corte Constitucional y el derecho a la salud en Colombia*, Ediciones Uniandes, Bogotá, 2011.

Some of the most far-reaching judgments enforcing the right of children to health have involved so-called “overseas treatment” cases, in which the Court has ordered healthcare providers (public or private) to cover the expenses involved in treatment outside Colombia when no such treatment is available within the country.

In 1995, in a historic case of a girl who suffered from leukemia and needed a complex treatment that could not be undertaken in Colombia, the Court ordered the social security system to pay for the girl’s treatment in a specialized clinic in the United States.⁸⁵

The tests applied by the Court in determining whether to order treatment abroad are these: (a) there are circumstances of extreme gravity that affect the life of the patient; (b) the required medical treatment cannot be had in Colombia; (c) there is medical certification that the treatment would be effective in the particular circumstances of the patient, and that treatment is not experimental; and (d) the patient (or the family) is unable to cover the cost, but the State has the resources available to do so.⁸⁶

These cases indicate that the right to health care implies, at least in the case of children, the right to receive expensive, specialized healthcare services when the patient's life or dignity is in danger. In these cases, according to the Court, it is up to the State to allocate the resources to cover the costs.

In general, except in the case of children, the judicial enforceability of the right to health through writs of *tutela* will depend on the circumstances of the case. It falls to the judge, then, to decide in the case of an adult if the right to health is directly enforceable or not. Of particular interest are those cases in which the Court orders the provision of treatment or medicines that are excluded by law from the catalogue of available treatments in the compulsory health plan. In these cases,⁸⁷ the Court has ruled that strict compliance with the compulsory health plan would entail a violation of fundamental rights. Thus the Court has, de facto, amended the law and the rules of procedure of healthcare institutions. This type of protection has been particularly important in HIV/AIDS cases.

When it comes to private entities, particularly healthcare providers, the Court has not limited its approach to ordering them to provide treatment or medicine, but has also retained the power to supervise the provision of these services so as to prevent the entities from violating the rights of individuals. For example, the Court has expressed concern when medical treatment is delayed because of inefficiencies in the response of private health providers. According to the Court, the State has a duty to ensure that medical services are supplied efficiently and with continuity, even when they are provided by private entities.⁸⁸ Nevertheless it is worth noting that when the Court orders private health providers to cover the cost of overseas treatment or to pay for medications or treatment excluded from the compulsory health plan, health care providers are entitled to request reimbursement of costs from the State.⁸⁹

Jurisprudence concerning the right to health, as detailed briefly in this section, has had some unintended consequences, including an explosion of petitions, frequently encouraged by the insurance companies that earned profits by charging the State for the cost of medications and treatments ordered by writs of *tutela*.⁹⁰ As demonstrated in a study conducted by the Public Defender's Office, between 1999 and 2009 the Colombian courts decided 775,102 requests for *tutela* concerning the right to health, and these represented over that time between 25% and 40% of all *tutela* petitions submitted in the country.⁹¹ By becoming an “escape valve” for failings in the health system, a good number of *tutela* writs ended up having a negative impact on the equity, the financial sustainability and the efficiency of the system

⁸⁵ Judgment T.-165/95. The Court also ordered the public institution, in addition to paying for the treatment, to cover airfares for the child and one of her parents, and to give them \$125,000 as advance against expenses.

⁸⁶ Judgment SU-819/99.

⁸⁷ See for example judgments SU-043/95 and SU-819/99

⁸⁸ See for example judgments T-227/01, T-428/98, T-030/94, T-059/97, T- 088/98, T-428/98, T-018/03 and T-658/03

⁸⁹ Expenses of this type are covered by a special solidarity fund, the *Fondo de Solidaridad y Garantía del Sistema General de Seguros y Salud*, established by law. See Law 100 (1993) and Legislative Decree 1283 (1996).

⁹⁰ For a detailed analysis, see Sepúlveda, Magdalena and Rodríguez Garavito, Cesar: Colombia: la Corte Constitucional y su contribución a la justicia social, in Teoría y jurisprudencia de los derechos sociales. Tendencias incipientes en el derecho internacional y comparado, Malcolm Langford (editor), Universidad de los Andes, 2013

⁹¹ See the three reports published by the Public Defender's Office on this matter: *La tutela y el derecho a la salud* (2003-2005); *La tutela y el derecho a la salud* (2006-2008); and *La tutela y el derecho a la salud* (2009), Defensoría del Pueblo de Colombia

(*Procuraduría General de la Nación y Centro de Estudios de Derecho, Justicia y Sociedad*, 2008). As well, the conventional judicial approach —i.e., case-by-case decisions— was found inadequate to deal with the structural shortcomings of the public policies and institutional design underlying the thousands of petitions for *tutela* that were being filed with the court clerks.

To address this dilemma, in 2008 the Constitutional Court issued a landmark ruling, judgment T-760/08, which accumulated 22 petitions illustrating the principal shortcomings of the health system, and issued orders of a structural nature to the Colombian government to address them. In this decision, the Court held that medical care services excluded from the compulsory health plan can be demanded immediately via the *tutela* route when: (a) the lack of medical service threatens the patient's right to life and personal dignity; (b) the service cannot be replaced by another that is covered in the compulsory health plan; (c) the patient cannot pay for the treatment or medication specified, and cannot obtain it through other health insurance systems such as those provided by the employer, supplementary prepaid plans, etc.; and (d) the service or medication has been prescribed by the attendant physician.

To give effect to this sentence, the Court issued a series of orders whereby the government was to improve the efficiency, equity and supervision of the health system. Among other things, those orders oblige the government to update periodically the benefits included in the compulsory health plan, on the basis of technical criteria and with “the direct and effective participation of the medical community and users of the health system.”

B. Milestones and challenges in judicial review

In societies such as those of Latin America, where there are very high levels of inequality and social exclusion, the judicial enforcement of ESCR is a fundamental tool for protecting persons against violations of those rights, by overseeing the design and implementation of public policies so as to ensure that vulnerable groups have the opportunity to use the available legal recourse and can enjoy their rights. It also serves to fill the gaps in the protection of the most vulnerable and disadvantaged groups of society when those gaps have been overlooked by politicians or legislators, or have simply gone unattended.

Nevertheless, the protection of ESCR through the courts is possible only in those jurisdictions where there is a strong guarantee of ESCR, i.e. where these rights are not only enshrined in the Constitution but where there is also a constitutional rule (for example the writ of *tutela*) that allows them to be enforced directly through the courts, as is the case in Colombia and Brazil.

In the particular case of Colombia, it has been argued that the protection of ESCR through the courts has not only shifted the balance of social and political power, by giving greater clout to persons who are weak, vulnerable, marginalized and disorganized, but that this protection has in fact been a tool against violence (Cepeda, 2004). According to that view, *tutela* has allowed groups that were traditionally underrepresented in the political system to promote their interests through constitutional channels, instead of through violence (Cepeda, 2004).

It has also been argued that the protection of ESCR through action for *tutela* has helped to bring about a change in the legal culture, by forcing policymakers to take those rights seriously and to give them political priority (Arango, 2003). As well, it has been maintained that judicial protection has improved the relationship between the individual and the public administration, by obliging the latter to fulfil its duties in accordance with due process (Uprimmy, 2001).

In the case of Brazil, judicial decisions relating to ESCR, and in particular to the free supply of medications, when combined with the well-coordinated and efficient strategies of judicial proceedings, are held to have provoked changes in the law and the adoption of public policies that are considered exemplary (Piovesan, 2008).

Notwithstanding their benefits, as can be appreciated in the Colombian case, judgments of this kind are often polemical and we may ask whether such decisions are sustainable, whether they actually make for more fairness in societies, or whether on the contrary ESCR litigation perpetuates the privileges of the middle and upper classes, who have greater access to the judicial system.

At first glance, given the multitude of economic, physical, social and cultural obstacles that the poor face in seeking access to justice,⁹² litigation in the area of ESCR tends to be monopolized by the middle and upper classes, and consequently they redound mainly to the benefit of those who are already privileged. Nevertheless, a more detailed and nuanced analysis shows that individual litigation can unleash more egalitarian structural processes.

Here again, it is useful to consider health litigation in Colombia, where, it is argued, such litigation has given rise to analysis and response in the executive, legislative and judicial branches that has contributed to greater equality, while it has had a positive symbolic influence in the sense of consolidating public opinion around the idea of ESCR as enforceable rights (Uprimny, Rodrigo and Durán 2013).

In any case, we must remember that judicial proceedings are not the only way of promoting and protecting these fundamental rights, and they are not always the most effective strategy. Considering the tremendous inequalities that exist in countries of the region, the scope for judicial litigation is obviously limited: in order to protect ESCR effectively, to close the great gaps in terms of social inequalities, to facilitate inclusion and participation of the population and economic and social life, and to ensure steady improvements in the living conditions of society's marginalized sectors will require a set of structural reforms that obviously cannot be confined to a judicial strategy.

On the other hand, to make successful use of the courts as a strategy for enforcing ESCR is a significant challenge. There are a number of obstacles that must be overcome, ranging from the lack of adequate standards for procedural legitimacy to the shortage of financial and critical resources. In order to guarantee the legitimacy of certain claims, the litigation strategy must be able to forge linkages between the communities bringing the action, social movements, and activists with experience in judicial litigation, and this again is a tall order.

Successful use of judicial review for protecting ESCR also depends on a series of factors, including the training of judges and legal practitioners in the use of national and international human rights standards; establishment of a normative framework that allows civil society to bring cases on behalf of those who otherwise could not access the judicial system; an active civil society that is prepared to concern itself with cases in the name of excluded and disadvantaged groups; and the willingness of the courts to take decisions that will provide guidance for policymaking and service delivery.

At the same time, there must be non-judicial mechanisms for promoting and protecting human rights, such as national human rights institutions (for example, public defenders or ombudsmen and national human rights commissions), and they must be competent, trained and prepared, and must have the financial and human resources to take the lead in ESCR cases.

Despite the challenges, a number of cases involving judicial protection of ESCR in the region have shown that it is possible to develop successful litigation strategies. One of the lessons learned is that the presence of civil society organizations in the judicial context can improve the system greatly. The capacity of these organizations to support victims and to initiate proceedings in their name can help reduce the economic and personal burden for plaintiffs in bringing legal action. When civil society organizations are allowed to bring suit in the public interest or to present an *amicus curiae* brief, they can open the way to justice for persons living in poverty. This is particularly the case with actions brought on grounds of structural or systemic discrimination or mistreatment affecting large numbers of poor people.

In most of the region's judicial systems, court rulings affect only the parties to the litigation, or those who file a suit, even when the cause has broader ramifications, a fact that favours the middle and upper classes who have the resources to overcome the obstacles and impediments to litigation. Despite this situation, however, there have been some trailblazing cases in which judicial protection granted in a specific case has been extended to embrace collective juridical solutions.

⁹² For a detailed account of these obstacles, see the Report of the Special Rapporteur on Extreme Poverty and Human Rights, Document A/67/278 of 9 August 2012.

This happened, for example, when the Constitutional Court of Colombia declared “an unconstitutional state of affairs.” This concept is not covered by the Colombian Constitution, and its development is a clear demonstration of judicial creativity. Whenever the specific cases under review by the Court reflect (a) systematic and generalized violations of various constitutional rights that affect a significant number of persons, and (b) those violations cannot be attributed solely to a State authority, but are rather the result of structural shortcomings, in such cases the situation is held to represent an “unconstitutional state of affairs,” and thus to require judicial remedies that will protect not only those bringing action for *tutela* but all individuals in similar circumstances.⁹³

Another way in which individual cases have produced benefits to non-litigants who find themselves in a similar situation is through the filing of lawsuits in the public interest. As with the cases of “unconstitutional states of affairs” in Colombia, lawsuits in the public interest can result in the direct granting of benefits to persons who were not involved in the specific court case. In high-profile cases, the rulings can also influence the formulation of public policies. As well, these cases can help to create awareness of the need to respect constitutional and international standards of ESCR.

Finally, States have the duty to establish accessible means of legal recourse that allow citizens to enforce respect for ESCR. The right to social security (social insurance and social assistance) as well as the right to health and other ESCR are enshrined in international treaties that are binding for countries of the region, and they are recognized in various constitutions: consequently, States must guarantee that all persons, in particular those in a situation of marginalization, will have access to effective judicial mechanisms when those rights are infringed.

Despite the risk that judicial review of ESCR can produce unintended results, there can be no justification for outright opposition to such review. To deny people the chance to demand the observance of ESCR via the judicial route, and to preclude independent tribunals from issuing orders to protect those rights in accordance with the guarantees of due process, would be openly contrary to a human rights perspective and to the obligations assumed by States in their constitutions and in international human rights treaties.

As noted above, criticism of the use of the courts as a route for social change is only sustainable when there are other viable alternatives, or when litigation worsens the situation, in the absence of other alternatives. Consequently, any criticism of a decision to turn to the courts must be based on more general strategies. If a person, a community, or a social movement has real options available —such as active mobilization, legal and policy reforms, negotiation, activism through the media, etc.— then the decision to go to court should be subjected to rigorous scrutiny, especially if it is to be the dominant strategy instead of a complementary one (Langford, 2008).

⁹³ On the doctrine and judgments concerning “unconstitutional states of affairs”, see Rodríguez Garavito, C., “Más allá del desplazamiento, o cómo superar un estado de cosas inconstitucional”, in Rodríguez Garavito, C., (ed.), *Más allá del desplazamiento: políticas, derechos y superación del desplazamiento en Colombia*, Ediciones Uniandes, Bogotá, 2009

VI. Conclusions and policy recommendations

Although human rights defenders and development workers alike recognize that rights play an essential role in combating poverty, and while they generally agree that there are synergies between human rights and development programmes, there is still a long way to go in constructing strategies that will serve as a bridge between these two paradigms.

In recent decades, governments of the region have paid increasing lip service to rights in their development strategies, as well as in their social protection policies and programmes. Unfortunately, despite the achievements, it seems clear that we are still at the early stages of the learning curve in terms of putting rights rhetoric into practice.

To continue along this learning curve, this paper has attempted, on one hand, to advance the conceptual development of the rights-based approach in social protection policies and programmes and, on the other hand, by examining selected cases, to analyze the degree to which human rights rhetoric is reflected in the actual design, implementation and evaluation of social protection policies.

Although many of the concrete cases discussed in this paper may be taken to exemplify a rights-based approach in social protection policies and programmes, it is clear that progress to date is not very encouraging. Latin America is still the most unequal region in the world, not only in terms of monetary incomes but also in the dimensions of gender, ethnic origin, class and territorial location. While the region's overall indices may have improved considerably, the most disadvantaged groups have seen no significant improvement in their enjoyment of rights such as those to health, education and decent work.

For broad sectors of the population, moreover, employment tends to be precarious, working conditions fall far short of decent standards, and there is no guaranteed access to social protection mechanisms. Despite the rhetoric about rights, the actual level of their enjoyment in the region is far from its full potential.

Throughout this paper we have seen that, despite the progress that Latin America has made in the area of social protection, some enormous challenges still lie ahead. Every country has its own specific characteristics, but beyond these the countries of the region face the pressing need to reinforce their focus on rights in order to satisfy demands from a population that is increasingly eager to participate in the formulation and implementation of policies, and ever more demanding in terms of transparency, access to information and accountability.

A greater effort to put into practice the rights proclaimed in many development plans and in government rhetoric would go a long way to overcoming the poverty and social exclusion that persist in many countries of the region.

A rights-based perspective can contribute to sustainable development in at least two ways. First, it reduces social and political risks by enhancing social justice and insisting on an inclusive and non-discriminatory approach. Second, it creates stronger and more equitable governmental, civil and community institutions (Moser and Norton, 2001, p. ix).

The promotion and observance of human rights can also be considered a central element in efforts to strengthen democracy and governance. This is particularly important in Latin America, where economic and social rights have not kept pace with civil and political rights, a situation that poses challenges for the region's democracies.

A. Making the leap from rhetoric to practice

To develop a policy centred on rights, it is not enough that its text should incorporate the language of rights—it must also translate into concrete measures for the full and effective exercise and enjoyment of those rights. In practice, a rights-based approach to social protection presupposes not only that social programmes will be shielded from electoral cycles and political vicissitudes but also that all members of society will be assured access to the minimum conditions for a decent life.

From this viewpoint, and despite the progress that has been made, the social protection policies and programmes implemented in the region have still not succeeded in assuring enjoyment of the essential minimum ESCR for the most disadvantaged and vulnerable groups. We are still confronted with unacceptable levels of poverty and inequality. According to statistics compiled by ECLAC for 18 countries in the region, on average the wealthiest 10% of Latin Americans take in 32% of total incomes, while the poorest 40% receive only 15% (ECLAC, 2012b). In 2012, 28.8% of the region's inhabitants were living in poverty, representing 167 million individuals, or 1 million fewer than in 2011. Meanwhile, the number of persons living in extreme poverty or indigence remained stable in 2012, at 66 million, the same figure as for 2011 (ECLAC, 2012b).

These figures show the urgent need to consolidate progress and to move forward. It is unacceptable that the most disadvantaged and marginalized sectors, as well as other specific groups such as women and indigenous peoples, should be left behind. A rights-based approach must promote interventions to reduce and eliminate the unfair and avoidable circumstances that deprive certain groups of their rights.

To make the leap from rhetoric to practice will require, above all, political will on the part of public decision-makers, especially the members of the legislative branch and of the key ministries such as those responsible for the economy and finance and for planning and development. A commitment to a rights focus that goes beyond words will in many cases require legal and administrative reforms, as well as budget appropriations commensurate with the proposed objectives. Putting in place social protection policies and programmes that respect the standards and principles of human rights both in their implementation and in their outcomes is a long-term task, and one that demands a State policy that transcends political cycles.

In many cases, civil servants will have to change their traditional approach to designing, implementing and evaluating social policies. To do so they will need special training as an essential tool for making them aware of how they can contribute through their work to achieving more inclusive societies with full respect for the dignity and rights of all citizens. Civil society also has a crucial role in promoting the rights perspective by sensitizing public opinion, preparing methodologies and tools for analysis, lobbying politicians, and monitoring the impact and evaluation of public policies.

More work is also needed to develop a solid conceptual and methodological framework to guide the technical and political translation of ESCR into social protection policies and programmes. While the region exhibits a variety of models, in general we may say that, to make the leap from rhetoric to

practice, the normative frameworks of individual countries should give specific recognition to the right to social security (social protection), and specify those who will be responsible for its implementation. As well, the mechanisms for accountability and recourse for the infringement of ESCR need to be institutionalized and strengthened, for without such mechanisms these rights cannot be enforced in practice.

Countries of the region should strengthen the various channels through which ESCR can be enforced: these include the judicial, quasi-judicial and administrative routes, all of which must complement each other. Judicial mechanisms comprise the formal legal system, including the tribunals and constitutional courts. Quasi-judicial mechanisms for reparation include the institutions established outside the judicial system to oversee the fulfilment of human rights (for example, human rights commissions and ombudsmen's offices). The administrative routes of recourse include complaints and internal mediation processes within the ministries and institutions that provide services, and the committee structures established around service facilities.

B. Establishing social protection systems

Despite the obvious differences in the design, components and coverage of social protection programmes around the region, one characteristic that many countries have in common would seem to be fragmentation. The fragmentation of social protection programmes limits their potential effectiveness, their synergy and their impact on poverty, inequality and exclusion. It is essential, then, for countries of the region to make a determined effort to build “social protection systems” that will guarantee the enjoyment of ESCR for the entire population.

One criterion, based on human rights, holds that those responsible for formulating policies should ensure that all persons are protected in an equitable and non-discriminatory manner. Bearing in mind the high levels of informality in the region, the principles of equality and non-discrimination demand special attention to the non-contributory pillar of social protection as a way of reaching the most disadvantaged groups that are left out of the contributory system.

To this end social protection systems must be enriched with initiatives that will ensure coordination of multiple programmes, and of the State institutions responsible for their design, financing, implementation, regulation, monitoring and evaluation, in order to have a positive impact on people's living conditions (Cecchini and Martínez, 2011).

This means going beyond the design of systems or networks: the achievement of cross-programme synergy will depend to a great extent on human resources, which will have to be properly trained at all levels, and on the adequacy of financial resources. A rights-based social protection model must guarantee universal access, with priority to the most disadvantaged and excluded groups.

C. Applying the lessons from cash transfer programmes to the design, implementation and evaluation of policies in general

After a decade and a half of experience in implementing successful and innovative cash transfer programmes, some important lessons have been learned that can be applied to the design of all public policies. While there is room for improvement in certain innovative mechanisms for promoting citizen participation, access to information, and accountability —primarily in terms of ensuring that the most disadvantaged groups can make effective use of them— those mechanisms should be systematically included in the design, implementation and evaluation of all social policies in the region.

The quality of management demanded in cash transfer programmes should become the standard for all social programmes. The external impact evaluation systems that have been implemented in these flagship programmes should also be considered for other social programmes.

At the same time, the rights component of these programmes should be further consolidated, and they should be established as permanent State policies, protected from political vicissitudes and assured

adequate funding. As well, steps must be taken for progressively improving compliance with the principles of equality and non-discrimination (including the gender focus), participation, transparency and access to information, and accountability. This will translate into greater legitimacy for existing programmes.

D. Structural changes to achieve equality

A human rights focus demands a frontal assault on the social exclusion and glaring inequalities that persist in the region. Social protection systems must expand their objectives to strive for a direct impact on inequality. For example, non-contributory programmes must be strengthened in their coverage and financing, recognizing that with their current limited funding they fail to reach important segments of the population who remain excluded from formal social protection systems.

Without denying the fundamental role of social protection, it will never be effective in reducing inequality and guaranteeing the essential minimum levels of ESCR unless it is part of a comprehensive strategy designed to reduce or eliminate the conditions that cause or help to perpetuate discrimination against certain segments of the population in such important spheres as employment, housing, food, social security, health, education, culture, and participation in public life.

This will require action on many fronts. From the normative viewpoint, it means adopting legal standards that guarantee the enjoyment of rights and access to services without discrimination of any kind. States must take positive measures to facilitate access for those who suffer structural discrimination, such as women, persons with disabilities, indigenous peoples, minorities, young people and older persons.

From the rights perspective, the principle of fairness demands special attention to the most disadvantaged and excluded social groups, so as to recognize their particular needs and ensure their inclusion. This means not only identifying these groups but also establishing specific strategies for their inclusion. Of particular concern is that segment of the population that is still not covered either by contributory or non-contributory systems. In the region's less-developed countries, this group comprises those people who are clearly marginalized and who systematically fall outside the scope of cash transfer policies (Cecchini and Martínez, 2011).

The task of reducing inequality, as required by a rights-based approach, cannot be shouldered solely by social protection. While it is not the purpose of this paper to analyse in detail the other actions that are needed, we must stress that the indivisibility and interdependence of all rights demands an integral focus and public policies that will respect, protect and comply with the entire spectrum of ESCR such as the right to health and education, labour rights etc. This implies the need to (i) improve the quality, adequacy and accessibility of public services, (ii) move toward quality education, and (iii) enhance labour rights.

1. Improving the quality, adequacy and accessibility of public services

There must be an assurance that facilities, goods and services in such areas as health, sanitation, water and transportation —on which the most disadvantaged individuals and groups are particularly dependent— are of the maximum possible quality, and the quality of the providers of those services must be supervised in particular. Even when facilities, goods and services involve participation by the private sector or civil society, governments are responsible for guaranteeing their quality, accessibility and coverage, and they have the duty of protecting people against abuses by private service providers.

2. Moving toward quality education

Further investment in education is needed to promote a structural change toward more egalitarian societies (ECLAC, 2012a). The right to education is a right in itself, but it is also a tool for ensuring the enjoyment of other rights, such as the right to work and to a decent standard of living.

Despite the progress made, including the increase in funding for education, the region has not succeeded in narrowing educational attainment gaps between different social groups, nor has it achieved clear improvements in the quality of education, measured as relevant learning throughout the formal education cycle (ECLAC, 2012a).

Human rights standards are explicit as to the obligations of States in relation to the right to education⁹⁴, which includes the elements of availability, accessibility, acceptability and adaptability that are common to instruction in all its forms and at all levels.

3. Enhancing labour rights

To have a positive impact on poverty and inequality, there will also have to be greater protection, guarantees and enforcement of labour rights. Evidence from around the region shows that labour markets have not served as the gateway to social protection, and that fewer than half of persons working (46%) are affiliated with social security.

This situation requires forward movement in the normative protection of these rights. Human rights standards demand that States must guarantee just and favourable working conditions, in particular a safe and healthy workplace, reasonable limitation of working hours, and periodic holidays with pay.⁹⁵ They must ensure the right of everyone to form and join trade unions and to engage in collective bargaining.⁹⁶ They must guarantee workers' access to a social security system that offers the widest possible coverage (for example health care, sickness compensation, old-age pensions and compensation for occupational injuries).⁹⁷ As well, States are prohibited from any form of discrimination against workers, for example, for reasons of sex, race, ethnic origin or religion.⁹⁸ Workers' remuneration must be fair, ensuring a decent living for themselves and their families, and equal pay for work of equal value without distinction of any kind, and in particular women must receive the same pay as men.⁹⁹ Special protection must be provided for women during pregnancy, and for persons with disabilities.¹⁰⁰

To guarantee observance of these obligations, States must regulate labour markets and establish mechanisms to strengthen the accountability of private agents. States can also enhance their capacity to meet their human rights obligations by establishing more channels for dialogue between employers and workers, and giving workers the opportunity to participate in the design and application of employment policies.

The obligations of non-discrimination and equality require States to ensure that employment creation policies benefit all sectors of society equally. Policies that enhance employment opportunities (for example through specialized training and professional development on request) for groups that face special obstacles in access to employment, such as women, persons with disabilities, young persons and indigenous people, will help States meet their human rights obligations. To eliminate obstacles to women's employment, States must make care services available (provided by the State, the community or the market), redistribute paid and unpaid work from a gender perspective, and eliminate all forms of discrimination by reason of gender. States are not only obliged to adopt effective laws to this end, but also to take measures to modify the social and cultural patterns of conduct of men and women.¹⁰¹

Beyond promoting and protecting a normative framework, it is recommendable, as ECLAC has indicated (2012a), that countries of the region should continue the trend to higher minimum wages, as their economies develop.

Countries of the region must also devote their efforts to generating opportunities for sustainable, productive and decent work in which individuals can exercise and realize their human rights. Employment policies must respect the framework of human rights, which has broad implications, from

⁹⁴ ICESCR, articles 13 and 14; see also CESCR, General Comment no. 13.

⁹⁵ ICESCR, article 7.

⁹⁶ ICESCR, article 8, and International Covenant on Civil and Political Rights, article 2.

⁹⁷ ICESCR, article 9, see also CESCR, General Comment 9, Paragraphs 12 to 21.

⁹⁸ See for example CEDAW, article 11, and the International Convention on the Elimination of All Forms of Racial Discrimination, article 5.

⁹⁹ ICESCR, article 7, and CEDAW, article 11.

¹⁰⁰ See ICESCR, article 10; CEDAW, article 11; and CRPD, article 27.

¹⁰¹ See CEDAW, articles 3 and 5.

protecting workers' rights to adopting policies that will guarantee equitable access to employment for the most vulnerable and disadvantaged groups of society.

E. Gender equity and care policies

It is important to recognize that social protection policies and programmes are not gender-neutral, and consequently they must be designed, implemented and evaluated in light of the many forms of discrimination that women face, while guaranteeing that they address women's specific needs throughout their lifecycle (childhood, adolescence, adulthood and old age).

While it is clear that gender equality must be an objective of all social policies, with the resources needed to achieve it, when it comes to social protection programmes it is essential to recognize the role that women play as care providers, without reinforcing patterns of discrimination and negative stereotypes.

Care work must be seen as a social and collective responsibility. Steps must be taken to promote the value of unpaid care work and to distribute it more equitably, for example by encouraging men to take a more active part in caring for family members. The State must play a more proactive role in providing care services, from daycare facilities and kindergartens to services that provide care and personal support at home for seniors and persons with disabilities who cannot look after themselves. In very few countries of the region do social protection policies today contain a clear agenda for distributing the care burden more equitably among the four components of the care economy: families, communities, the State, and the market (ECLAC, 2012a).

F. Harmonizing tax policies with economic, social and cultural rights

To achieve the effective enjoyment of rights, it is not enough to have protection mechanisms in place. There must be adequate funding available, it must be allocated to policies in accordance with a rights-based approach, and it must be sustainable. In particular, tax systems need to be made more progressive, and tax evasion combated, in order to launch a frontal assault against the region's great inequalities.

It is a complex matter to determine what resources are available in each country, one that requires analysing the prevailing economic and social model and a country's macroeconomic policies (monetary, exchange, fiscal and tax policies). States parties to the ICESCR are obliged to promote rights "to the maximum of available resources". This inevitably brings us to the issue of available fiscal revenues for ensuring adequate and sustainable public funding, and the need to boost tax receipts.

Low levels of tax collection leave the poorest sectors of the population at a disproportionate disadvantage and pose a considerable obstacle to the State's capacity to guarantee social programmes and public services in support of ESC rights. Over the last decade, tax revenues in the region as a percentage of GDP have shown a rising trend (ECLAC, 2013b), yet there is still a long way to go, especially with respect to the regressive nature of taxation and the dependence on direct taxes.

The overall tax base needs to be broadened, therefore, in order to maintain adequate levels of public social spending, and this will require appropriate planning by policymakers. For example, they will need to make the current tax systems more progressive by reducing exemptions under the income tax, a tax that should have a real redistributive effect and should protect the incomes of the poorest households. Favouring the poorest should be the central objective of any tax reform.

All these moves involve a number of challenges. For example, the accelerating rise in raw material prices has favoured many Latin American countries and some in the Caribbean, for which non-renewable resources have been an important and growing source of tax revenues. Yet the greater availability of resource-based tax revenues has tended to discourage efforts to collect taxes from the rest of the economy, and studies suggest that there is a considerable margin for increasing the tax take in the resource sector itself (Corbacho and others, 2013).

It would seem essential, then, to increase the progressivity of the two main pillars of Latin America's taxation systems, i.e. the value added tax (VAT) and the income tax, while reducing the currently high level of tax evasion (ECLAC, 2013b; Corbacho and others, 2013). Such measures would make for greater equity, by ensuring that all economic agents and citizens contribute their share to the collective effort.

Human rights principles demand that careful consideration be given to rebalancing the fiscal contribution of businesses and of high-income groups. The introduction of new or higher taxes must not redound to the disadvantage of those living in poverty. Enhancing the efficiency of tax collection requires a re-examination of tax holidays, exemptions and deferrals that are of disproportionate benefit to the better-off sectors of society.

A human rights criterion also demands that States take steps to eliminate the prevalence of tax evasion, which reduces the resources available for promoting human rights. States must also consider shifting their spending priorities toward social programmes (such as education and health) and away from military outlays, in order to ensure maximum use of available resources for achieving ESCR. As discussed further below, a human rights criterion requires States to sponsor an open debate on fiscal options, to avoid technocratic decisions taken behind closed doors, and instead to permit greater transparency and participation.

G. Overcoming capacity limitations and institutional barriers

In order to consolidate a rights-based approach in the region's social protection systems, there are a number of institutional barriers or constraints that must be overcome. This will require a long-term strategy whereby countries can reinforce the capacities and the continuity of their institutions and ensure the sustainability of resources, without being constrained by short-term partisan politics.

One of the most glaring institutional shortcomings in the region is the lack of reliable and detailed statistical data. This is a great obstacle from the rights perspective, for without adequate information it is impossible to give priority to the human rights of the most vulnerable and disadvantaged groups, whose needs must be identified and evaluated more accurately and efficiently.

The lack of disaggregated data renders essentially invisible certain sectors of the population, such as women, persons with disabilities, seniors and the Afro-descendent population, and impedes respect for the prohibition on discrimination. The lack of data also means that public policies will not be effective in reaching those who need them most. Data must be disaggregated in various dimensions, such as gender, age, geographic situation, ethnic origin, and health status.

If the rights-based approach to social protection is to be taken seriously, indicators will have to be developed for monitoring and evaluating the effectiveness of policies to promote ESCR.

From a right perspective, indicators must be sufficiently disaggregated to make visible the most disadvantaged groups, so that their situation can be properly monitored.

Despite the complexity of defining indicators and developing measurement systems and monitoring mechanisms, this challenge should provide an incentive for strengthening the linkages between social policies and rights (Pautassi, 2010).

To give effect to the rights-based approach will require institutional strengthening of national statistics offices and systems, in ways that will guarantee the quality and credibility of official statistics and allow the mainstreaming of the gender focus in statistical output.

The agencies responsible for social protection policies and programmes also need to be strengthened to give them the political clout, the budgetary resources and the technical capacity they need. This is particularly important for ensuring that their objectives can be applied in a cross-cutting manner. To manage policies with a human rights focus will also demand sufficient numbers of highly qualified personnel for implementing policies.

As well, steps must be taken to ensure that officials in key government departments are trained and have the analytical capacity to evaluate the human rights repercussions of their decisions. States should also establish coordination mechanisms to ensure communication and the sharing of information among government departments on human rights issues.

Lastly, it would be useful to consider introducing human rights impact assessments as a practice that has great potential for making explicit the conceptual linkages between the social, economic, environmental and development impacts of public policies (World Bank, 2013). These assessments can do much to strengthen existing practices with respect to participation and equality, by ensuring that those concerns are addressed more consistently and in full observance of international human rights standards.

H. Protecting the environment

Climate change and environmental degradation continue to threaten the lives and livelihood of people in the region, and they have a disproportionate impact on the poorest people, who frequently depend on natural resources for their survival.

Rural livelihoods, such as those based on farming, aquaculture and fishing, are particularly vulnerable to climate change. States should therefore adopt policies that take explicit account of the sustainability and development of all communities, rural and urban alike.

Social protection policies should in this way offer economic security to those most likely to suffer adverse climatic effects. Innovative programmes that link social protection with environmental protection objectives, such as the *Bolsa Verde* programme in Brazil, have great potential for the observance and guarantee of ESCR among the most disadvantaged groups.

I. Ensuring accountability and judicial recourse

To consolidate a rights-based approach there must be solid mechanisms of recourse and reparation. A key factor is to improve access to judicial review mechanisms for the poorest sectors of the population. The first step here is to move beyond the traditional dichotomy between civil and political rights, on one hand, and ESCR on the other, whereby the latter are seen as “programmatic” rights, as mere political objectives or declarations of good intentions. Following the example of several countries in the region, these rights must be enshrined at the constitutional level, and mechanisms established to make them enforceable through the courts.

Once any legal barriers have been overcome, it will be important to sensitize and train legal practitioners in presenting and resolving cases involving the enforcement of these rights in general, and violations of the right to social security in particular.

Civil society organizations also need support in bringing suit in the public interest. This will involve establishing legal rules that will allow these organizations to go to court on behalf of disadvantaged sectors, and that will guarantee their independence of action.

There must also be greater access to free and high-quality legal assistance to help the most disadvantaged groups enforce their rights through the courts.

J. Respecting the freedoms and rights essential or social participation

A rights-based approach requires active participation by multiple stakeholders in the design, implementation and evaluation of social protection policies. For participation to be real and effective, there must be a normative framework that guarantees a broad range of rights such as freedom of

expression,¹⁰² freedom of assembly,¹⁰³ freedom of association,¹⁰⁴ the right to seek, receive and impart information,¹⁰⁵ and the right to education, including education in the area of human rights.¹⁰⁶

All these rights are necessary prerequisites for participation: in order to participate effectively, all members of society must be able to organize, meet and express their views without intimidation or censorship, understand the pertinent facts and arguments, be aware of their rights, and have the necessary skills and capacity.

In terms of the right to information, States must do everything possible, including enacting the necessary procedures, to ensure easy, prompt, effective and practical access to information that may be of public interest. The fees charged for requests for information should not be such as to constitute an unreasonable impediment to access to information, and there should be provision for appeals against refusals to provide information (Human Rights Committee, 2011).

As well, States must ensure that the groups at greatest risk of falling into poverty, such as those exposed to discrimination by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, are not only duly represented in all decision-making processes that affect them but have the standing and support to express their opinions.

States must ensure that indigenous peoples, who are particularly vulnerable to poverty, enjoy the right to free, prior and informed consent through their own representative institutions with respect to any decisions that concern the use of their land, territory and resources by government and non-government agents.

States must also afford active protection for individuals, community organizations, social movements, groups and other nongovernmental organizations that support and defend the rights of the poor. The principles of equality and non-discrimination require affirmative action to ensure that all persons have the same opportunities for participation. To this end, States must identify the obstacles that prevent participation by vulnerable and disadvantaged groups, and introduce means for eliminating those obstacles, with a view to achieving substantive equality.

¹⁰² International Covenant on Civil and Political Rights, article 19.

¹⁰³ International Covenant on Civil and Political Rights, article 21.

¹⁰⁴ International Covenant on Civil and Political Rights, article 22; CEDAW, article 7 (c) and CRC, article 15.

¹⁰⁵ International Covenant on Civil and Political Rights, article 19.

¹⁰⁶ ICESCR, article 13.1; CRC article 29.1; and CRPD, article 24(c).

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