

RETROGRESSION OF ECONOMIC, SOCIAL  
AND CULTURAL RIGHTS: MEXICO  
IN THE CONTEXT OF AUSTERITY  
AND CRISIS

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*ABSTRACT: Mexico is facing a time of change in the allocation and distribution of public funds due to what the Mexican government has called “republican austerity”. Such change has caused public discordance since it is said to be regressive to human rights. The first article of the Mexican Constitution explicitly states the obligation of all authorities, within the scope of their powers, to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility, and progressivity. Also, Mexico is a member state of international covenants on human rights, such as the International Covenant on Economic, Social and Cultural Rights, from which some obligations derive. One of these obligations is the progressive realization of economic, social, cultural rights, and the prohibition of retrogression. Even though, limited economic resources require the careful allocation and redistribution of public spending, a practice that has led to the reduced allocation of public resources for some programs considered essential in the acquisition of human rights. The shift in the allocation of public spending in Mexico may ultimately deepen in the coming months and couple years, because of the imminent economic crisis caused by the COVID-19 pandemic. This article analyses the extent to which the Mexican government can, based on austerity, redistribution, or economic crises, make decisions that imply retrogression of rights without violating the obligation to progressive fulfillment stated in the International Covenant on Economic, Social and Cultural Rights.*

*KEYWORDS: Retrogression of right, International Covenant on Economic, Social and Cultural Rights, Mexico, austerity; crisis.*

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RESUMEN: *México atraviesa un momento de cambios en la asignación y distribución de los fondos públicos, debido a lo que su gobierno ha denominado “austeridad republicana”. Dichos cambios han provocado críticas y protestas porque se dice que son regresivos a los derechos humanos. El primer artículo de la Constitución mexicana establece explícitamente la obligación de las autoridades, en el ámbito de sus competencias, de promover, respetar, proteger y garantizar los derechos humanos de conformidad con los principios de universalidad, interdependencia, indivisibilidad y progresividad. Además, México es un Estado miembro de pactos internacionales de derechos humanos, como el Pacto Internacional de Derechos Económicos, Sociales y Culturales, del que se derivan obligaciones. Una de ellas es la realización progresiva de los derechos económicos, sociales y culturales y la prohibición de la regresión. No obstante, los recursos económicos limitados requieren una asignación y redistribución cuidadosa del gasto público y ello ha llevado a reducir la asignación de recursos públicos a algunos programas considerados esenciales para garantizar los derechos humanos. Los cambios en la asignación del gasto público en México pueden profundizarse en los próximos meses y par de años debido a la inminente crisis económica provocada por la pandemia de COVID-19. En este artículo se analiza si el gobierno mexicano puede, con base en la austeridad, la redistribución o crisis económica, tomar decisiones que impliquen la regresión de derechos sin violar la obligación de realización progresiva establecida del Pacto Internacional de Derechos Económicos, Sociales y Culturales.*

PALABRAS CLAVE: *Regresión de derechos, Pacto Internacional de Derechos Económicos, Sociales y Culturales, México, austeridad, crisis.*

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#### I. INTRODUCTION

One of the Mexican government’s key policies is “republican austerity”, a tool used to mitigate social inequality, corruption, greed, waste of national

assets and resources, efficient resource management, effectiveness, economic deterioration, transparency and honesty.<sup>1</sup> However, one of the consequences of republican austerity has been budget cuts to programs which are precisely linked to making human rights effective. For example, in the budget for 2019, resources were not assigned to the community dining program (*Programa Comedores Comunitarios*);<sup>2</sup> a program in operation since 2013 that was subsidized with federal resources. Similarly, the budget for the Infant Stay to Support Working Mothers Program (*Estancias Infantiles para Apoyar a Madres Trabajadoras*) decreased to almost half of its former value. The Ministry of Welfare argued that they were working on the rules of operation for the program and that it was not going to disappear. The same Ministry stated that the principle of progressive realization of human rights was not being violated.<sup>3</sup> According to the new operating rules for 2019, the support was to be delivered directly to the mother, father, or guardian, according to the authorized budget.<sup>4</sup>

Both resource change allocations were met with criticisms and protests. One argument against the changes was that they could affect human rights and that they violated the principle of progressive realization of human rights.<sup>5</sup> In the case of Children's Stay to support working mothers' program,

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<sup>1</sup> Ley Federal de Austeridad Republicana [L.F.A.R.] [Federal Law of Republican Austerity], as amended, *Diario Oficial de la Federación* [D.O.F], 19 de noviembre de 2019 (Mex.).

<sup>2</sup> The Federal Budget and Fiscal Responsibility Law (*Ley Federal de Presupuesto y Responsabilidad Hacendaria*), article 77, provides that the Chamber of Deputies, in the expenditure budget, may indicate the programs through which subsidies are granted. The community kitchens program is a program within the National Crusade Against Hunger, which emerged in 2013 and sought to eradicate food poverty. The program came to host a network of more than five thousand five hundred community kitchens distributed throughout the country dedicated to serving more than one million meals. See, Presidencia de la República EPN, SEXTO INFORME DE GOBIERNO (2018) (Oct. 25, 2020), available at <https://www.gob.mx/epn/articulos/sexta-informe-de-gobierno-173378?idiom=es>. However, in its 2016 Public Account report, the Superior Audit of the Federation concluded that the program did not meet its objectives. See, AUDITORIA SUPERIOR DE LA FEDERACIÓN, INFORME GENERAL EXECUTIVO. CUENTA PÚBLICA 2016 (2018), at 64, available at <https://www.asf.gob.mx/Trans/Informes/IR2016ii/documentos/InformeGeneral/IG2016.pdf>.

<sup>3</sup> See, Secretaría de Bienestar, *Cambios en el Programa de Estancias Infantiles no Incumplen el Principio de Progresividad ni Violan Derechos Humanos* (2019), available at <https://www.gob.mx/bienestar/prensa/cambios-en-el-programa-de-estancias-infantiles-no-incumplen-el-principio-de-progresividad-ni-violan-derechos-humanos-206703>.

<sup>4</sup> Acuerdo por el que se emiten las Reglas de Operación del Programa de Apoyo para el Bienestar de las Niñas y Niños, Hijos de Madres Trabajadoras para el ejercicio fiscal 2019 [Agreement by which the Operating Rules of the Support Program for the Well-being of Girls and Boys, Children of Working Mothers are issued for fiscal year 2019], *Diario Oficial de la Federación* [D.O.F], 28 de febrero de 2019 (Mex.).

<sup>5</sup> María Elena Morera, *Hacia atrás...*, EL UNIVERSAL (2019), available at <https://www.eluniversal.com.mx/articulo/maria-elena-morera/nacion/hacia-atras>; Víctor Polenciano, *Más de mil personas son afectadas por cierre de comedores*, EL UNIVERSAL (2019) (Oct. 01, 2020), available at <https://www.eluniversalqueretaro.mx/municipios/mas-de-mil-personas-son-afectadas-por-cierre-de-comedores>; Redacción

even the National Human Rights Commission recommended the Secretary of Welfare, among others, to take immediate and necessary actions in order to guarantee the rights of girls and boys to: a dignified life, survival and development, well-being, a healthy integral development, education, health protection, inclusion, participation, play, and recreation based on their best interests. The necessary actions also included the implementation of procedures by the Secretary of Welfare on its own, and before the corresponding authorities, towards the establishment of a mechanism that, regardless of its name, restores to girls and boys, fathers and mothers, managers and workers of children's stays, the rights that were violated on the occasion of the issuance of the Rules of Operation of the Welfare Support Program and the reduction of budget.<sup>6</sup>

The case was taken to court and after various injunctions, the Judicial Power of the Federation determined in *Amparo* trial to suspend provisionally the reduction of financial resources that was made to the Infant stay to support working mothers' program in the Expenditure Budget of the Federation for the fiscal year 2019. The provisional *Amparo* resolution determined that children, parents, or guardians be granted the support that corresponds to them in accordance with the program's operating rules for the fiscal year 2018.<sup>7</sup>

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Televisa, *Crisis en Guerrero por cancelación de programas sociales*, TELEvisa, 2019 (Oct. 01, 2020), available at <https://noticieros.televisa.com/ultimas-noticias/guerrero-programas-sociales-cancelados-afectan-pobres/>; Elías P. Medina, *Cierran comedores populares; hay 4 mil afectados*, EL SUDCALIFORNIANO, 2019 (Oct. 01, 2020), available at <https://www.elsudcaliforniano.com.mx/local/cierran-comedores-populares-hay-4-mil-afectados-3184701.html>; Redacción Animal Político, *Cancelación de estancias infantiles dejó a niños sin cuidado y puso en riesgo el trabajo de sus padres CNDH*, ANIMAL POLÍTICO, 2019 (Oct. 01, 2020, 13:00 PM), available at <https://www.animalpolitico.com/2019/06/recomendacion-cndh-estancias-infantiles/>; Redacción de Milenio, *Piden a AMLO aceptar recomendación de CNDH sobre estancias infantiles*, MILENIO DIGITAL, 2019 (Oct. 01, 2020), available at <https://www.milenio.com/politica/amlo-piden-presidente-seguir-recomendaciones-cndh-apoyo-estancias>; Redacción La Silla Rota, *Cancelación de estancias infantiles impide el pleno desarrollo de las mujeres: ONG*, LA SILLA ROTA, 2019 (Oct. 01, 2020, 13:00 PM), available at <https://lasillarota.com/nacion/cancelacion-de-estancias-infantiles-impide-el-pleno-desarrollo-de-las-mujeres-ong-ong/29488>.

<sup>6</sup> Comisión Nacional de los Derechos Humanos, *Recomendación No. 29/2019 Sobre el caso de la violación a los derechos humanos de las personas usuarias y beneficiarias del "Programa de Estancias Infantiles para Apoyar a Madres Trabajadoras"*, available at [https://www.cndh.org.mx/sites/default/files/documentos/2019-06/Rec\\_2019\\_029.pdf](https://www.cndh.org.mx/sites/default/files/documentos/2019-06/Rec_2019_029.pdf).

<sup>7</sup> See, SUSPENSIÓN PROVISIONAL EN EL AMPARO PROMOVIDO CONTRA LA REDUCCIÓN DE RECURSOS ECONÓMICOS AL PROGRAMA DE ESTANCIAS INFANTILES PARA APOYAR A MADRES TRABAJADORAS, EFECTUADA EN EL PRESUPUESTO DE EGRESOS DE LA FEDERACIÓN PARA EL EJERCICIO FISCAL 2019. PROCEDE CONCEDERLA A LAS MADRES TRABAJADORAS, PADRES SOLOS O TUTORES QUE TRABAJAN, BUSCAN EMPLEO O ESTUDIAN Y A SUS HIJOS, PARA QUE SE LES OTORGUEN LOS APOYOS QUE LES CORRESPONDAN CONFORME A LAS MODALIDADES ESTABLECIDAS EN LAS REGLAS DE OPERACIÓN PARA EL EJERCICIO FISCAL 2018. Tribunales Colegiados de Circuito (T.C.C.) [Collegiate Circuit Courts], *Semanario Judicial de la Federación y su Gaceta, Décima Época, Libro 67, Tomo VI, junio de 2019*, Tesis: XVII.1o.P.A. J/25 (10a.), p. 4948 (Méx.); and: SUSPENSIÓN PROVISIONAL EN EL AMPARO PROMOVIDO CONTRA LA REDUCCIÓN DE RECURSOS ECONÓMICOS AL PROGRAMA DE ESTANCIAS IN-

Another case that has been subject to discussion is the extinction of various public trusts. On April 2020, by decree, the President of Mexico instructed the agencies and entities of the Federal Public Administration and other organizations to carry out the corresponding processes for the extinction of public trusts, mandates and those alike, unless they were established by mandate of Law or legislative decree, and whose extinction required constitutional and legal amendments.<sup>8</sup> In November 2020, legislative amendments for the extinction of remaining trusts established by mandate of law and legislative decree were enacted.<sup>9</sup>

For the current government, the extinction of trusts is part of its commitment to growth with austerity, without corruption and to the fight against the waste of national assets and resources.

The mentioned cases are just examples of the link between the allocation of budgetary resources and the effectiveness of human rights, but there are

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FANTILES PARA APOYAR A MADRES TRABAJADORAS, EFECTUADA EN EL PRESUPUESTO DE EGRESOS DE LA FEDERACIÓN PARA EL EJERCICIO FISCAL 2019. PROCEDE CONCEDERLA A LOS RESPONSABLES DE DICHO ESTABLECIMIENTOS, PARA QUE SE LES OTORGUEN LAS CANTIDADES QUE LES CORRESPONDAN CONFORME A LAS MODALIDADES ESTABLECIDAS EN LAS REGLAS DE OPERACIÓN PARA EL EJERCICIO FISCAL 2018. Tribunales Colegiados de Circuito (T.C.) [Collegiate Circuit Courts], *Semanario Judicial de la Federación y su Gaceta, Décima Época, Tomo VI, junio de 2019, Tesis: XVII.1o.PA.J/24 (10a.)*, Libro 67, p. 4950 (Méx.).

<sup>8</sup> Decreto por el que se ordena la extinción o terminación de los fideicomisos públicos, mandatos públicos y análogos [Decree ordering the extinction or termination of public trusts, public mandates and similar] *Diario Oficial de la Federación* [D.O.F], 02 de abril de 2020 (Méx.).

<sup>9</sup> Decreto por el que se reforman y derogan disposiciones de la Ley para la Protección de Personas Defensoras de Derechos Humanos y Periodistas; de la Ley de Cooperación Internacional para el Desarrollo; de la Ley de Hidrocarburos; de la Ley de la Industria Eléctrica; de la Ley Federal de Presupuesto y Responsabilidad Hacendaria; de la Ley General de Protección Civil; de la Ley Orgánica de la Financiera Nacional de Desarrollo Agropecuario, Rural, Forestal y Pesquero; de la Ley de Ciencia y Tecnología; de la Ley Aduanera; de la Ley Reglamentaria del Servicio Ferroviario; de la Ley General de Cultura Física y Deporte; de la Ley Federal de Cinematografía; de la Ley Federal de Derechos; de la Ley del Fondo Mexicano del Petróleo para la Estabilización y el Desarrollo; de la Ley de Bioseguridad de organismos Genéticamente modificados; de la Ley General de Cambio Climático; de la Ley General de Víctimas y se abroga la Ley que crea el Fideicomiso que administrará el fondo de Apoyo Social para Ex Trabajadores Migratorios Mexicanos [Decree amending and repealing provisions of the Law for the Protection of Human Rights Defenders and Journalists; the Law of International Cooperation for Development; of the Hydrocarbons Law; of the Electricity Industry Law; of the Federal Law of Budget and Fiscal Responsibility; of the General Law of Civil Protection; of the Organic Law of the National Finance Office for Agricultural, Rural, Forestry and Fishing Development; of the Law of Science and Technology; of the Customs Law; of the Regulatory Law of the Railway Service; of the General Law of Physical Culture and Sports; of the Federal Cinematography Law; of the Federal Law of Rights; the Law of the Mexican Petroleum Fund for Stabilization and Development; of the Law of Biosafety of Genetically modified organisms; of the General Law of Climate Change; of the General Victims Law and the Law that creates the Trust that will administer the Social Support Fund for Former Mexican Migrant Workers is repealed] *Diario Oficial de la Federación* [D.O.], 06 de noviembre de 2020 (Méx.).

others. Indeed, fiscal policy, in its two dimensions: budgetary and taxation, is related to the effectiveness of human rights. This leads us to ask, what is the margin of maneuver that the Mexican government has in the allocation of budgetary resources to the different programs that are linked with the effectiveness to guarantee the protection of human rights? Moreover, in times of austerity or crisis, are measures that lead to the retrogression of rights admissible without violating the obligation to ensure progressive realization of ESCR, obligation contracted in the International Covenant on Economic Social and Cultural Rights?

The relationship between fiscal policy and human rights was first addressed by the Inter-American Commission on Human Rights (IACHR) in 2015 in a thematic hearing within the 156th period of sessions. At the time, the foundations were laid for the debate on fiscal injustice as a human rights issue. The role of fiscal policies towards inequalities, the transformative and redistributive potential of fiscal policy, and the obligations of States to use their resources to guarantee human rights were also discussed.<sup>10</sup> In this sense, without pretending, at this time, an assessment on the correctness of the resource allocation in the cases mentioned above or others, there is a need to discuss the margin of maneuver of the State and its government in the design of fiscal policy. It becomes more important in the current context of “republican austerity” and crisis which Mexico and several other States are experiencing as a result of the so declared COVID-19 pandemic.

Given the austerity policy and the crisis caused by COVID-19, it is not unreasonable to think that the adjustments in the allocation of Mexico’s public resources to the different policies and programs will continue. Thus, the tensions and conflicts amongst the different actors with preferences, motivations, and different interests in how the budget should be allocated may also continue. The problem is not minor since allocation affects, in one way or another, the enjoyment of the human rights. As Bobbio points out, the underlying problem with respect to the rights of man (or humans rights) is not so much that of justifying rights but rather of protecting them,<sup>11</sup> and the allocation of resources is an important part of such protection.

Public administration manifests through policies and programs, which constitute the means through which the political system materializes human rights. Therefore, such policies and programs must be justified in terms of human rights’ obligations. The objective of this work is to determine whether the Mexican State and its government can, based on arguments of austerity, redistribution, or crisis, make decisions that imply the retrogression of certain human rights without falling in non-compliance of its obligation to the progressive realization of rights stated in the International Covenant on

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<sup>10</sup> OAS, IACHR WRAPS UP ITS 156<sup>TH</sup> SESSION (Oct. 28, 2015), available at [http://www.oas.org/en/iachr/media\\_center/PReleases/2015/120.asp](http://www.oas.org/en/iachr/media_center/PReleases/2015/120.asp).

<sup>11</sup> NORBERTO BOBBIO, *EL PROBLEMA DE LA GUERRA Y LAS VÍAS DE LA PAZ* 128 (Gedisa, 1982).

Economic, Social and Cultural Rights. As noted, the intention is not to assess the allocation of resources made by the current government. Although the topic is of utmost importance, it is a matter for another discussion.

## II. FISCAL POLICY AS A TOOL FOR THE REDISTRIBUTION OF WEALTH

### 1. *Redistributive Fiscal Policy*

Allusion to redistribution is justified since, in the case of Mexico, the government considers austerity and the reallocation of public resources as a means for redistribution. Fiscal policy is considered a tool for the redistribution of wealth or well-being. Thus, in this article, the concept of redistributive fiscal policy implies that fiscal or financial purpose is not the only justification of public revenue, and that tax neutrality is not always desirable.

According to the Merriam-Webster dictionary, to redistribute means “to alter the distribution of: Reallocate” or “to spread to other areas”.<sup>12</sup> Therefore, the redistribution of wealth or welfare implies its distribution in a different manner from how it was done previously. The redistribution of wealth can serve many purposes, even contradictory ones. Tax policy is any deliberate use of taxes and public spending to influence macroeconomic variables.<sup>13</sup> For the purpose of this article, we refer to the redistribution that is justified by social welfare reasons and is understood as one that seeks to benefit the groups less provided for in the collectivity.<sup>14</sup>

Fiscal policy is a branch of economic policy that is made up of three elements: 1. Public spending, which refers to the allocation of resources to different collective, social or public needs through expenses whether specific or general. In Mexico, these assignments are provided in an expenditure budget or as an exception, in a latter law issued by the Congress of the Union; 2. Revenue, which refers to resources obtained by the State, for example, tax revenues (taxes are considered the most significant state revenue) and non-tax revenue; and 3. Debt, which refers to financing or accrual of indebtedness, both internal and external. In Mexico, revenue and accrual of debt are projected in a revenue budget law of the federation for each fiscal year.

From a legal perspective, fiscal policy can be conceived as the set of both public revenue and expenditure programs designed to achieve previously established social purposes. That is, legally validated or motivated conducts

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<sup>12</sup> Merriam-Webster Dictionary, *Redistribute* (Oct. 28, 2020 updated), available at <https://www.merriam-webster.com/dictionary/redistributio>.

<sup>13</sup> JAMES M. BUCHANAN, *HACIENDA PÚBLICA* 68 (Editorial Derecho Financiero, 1968).

<sup>14</sup> Aldo A Arnaud, *Política fiscal y redistribución del ingreso*, 5 (1-2) REVISTA DE ECONOMÍA Y ESTADÍSTICA 45, 63 (1961).



related to the administration of three elements: revenue, expense, and debt. In addition to the laws of revenue and expenditure, provisions contained in article 31, section IV, of the Mexican Constitution that establishes the obligation to contribute to public expenditures in the proportional and equitable manner indicated by law, as well as article 25 of the constitution, which specifies that it corresponds to the State the leadership of national development to guarantee, among other things, a fairer distribution of income and wealth, are of interest.

Fiscal policy then, serves to pursue political, economic, and social ends, that is, extra-fiscal purposes,<sup>15</sup> in addition to fiscal or financial ones. When fiscal policy is carried out by governments with the objective of influencing equality, it is called redistributive fiscal policy. It is a discretionary fiscal policy because it aims to affect people's wealth through allocations in the expenditure budget and in the collection of taxes or other contributions. In this way, using fiscal policy as a tool for redistribution implies influencing inequality, and using public spending and taxation in specific ways, therefore, redirecting public spending. We may note, that redistributive fiscal policy is a circular process where the State captures tax and non-tax revenue and reinvests them in the society. To the extent to which the State captures resources from those who have the most, through taxation, and reinvest them in the society, especially in a way that resources reach those who have the least, it will be considered to redistribute and affect inequality.

## 2. *Fiscal Policy and Human Rights*

Material wealth is a central dimension of social inequality in modern societies. Alongside with money it can be converted into assets such as: security, health, housing, education, and others. According to John Finnis' theory of goods,<sup>16</sup> the central notion of rights refers not to the mere choice or personal autonomy, nor to the simple benefit or individual interest, but to the organization of rights; rights to a set of basic human goods, which constitute the central aspects of full human fulfillment. We can disagree with the author on the idea of natural law, or with his list of basic goods because of its arbitrariness or incompleteness, or with basic goods as the foundation of human rights. Nevertheless, we may be able to notice with him the relationship between basic goods and human rights. By this token, the basic goods of society such

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<sup>15</sup> Although examples of the application of taxes and public spending for non-fiscal purposes can be found in the past, for example, in scholastic doctrine and mercantilism, fiscal policy as it is understood today is associated with the Great Depression of 1929 and it was born in the theoretical field of Keynesian ideas. It appears as a result of the change in the conception of fiscal activity in the public sector and its influence on economic life. See, José Ramón Álvarez Rendueles, *Política fiscal y desarrollo económico*, 54 REVISTA DE ECONOMÍA POLÍTICA 7, 8 (1970).

<sup>16</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (Oxford, Clarendon Press, 1980).



as: health, housing, education, security, among others, can be understood as human rights.

Following Philip Alston,<sup>17</sup> extreme poverty can be defined as a condition in which most human rights have no chance of being realized. He points out that radical inequality inevitably sustains extreme poverty, just as it sustains extreme wealth. Therefore, inequality is not only a human right but an economic issue. This means that inequality and poverty must end to ensure that everyone receives the goods of value from society, that is, for the effectiveness of human rights for all. One way is through redistributive fiscal policies (though we must accept that this one measure will not solve the entire problem of poverty). Redistribution implies ensuring that all people obtain basic goods, that human rights are protected and guaranteed for everybody.

On the other hand, in terms of Holmes and Sunstein,<sup>18</sup> all human rights have a cost, not just economic, but social and cultural. Therefore, to know what rights a community guarantees, one should not look only at the constitution of that community, but to how many resources are allocated to ensure such rights. In this sense, for the authors, the government is an indispensable device to mobilize and direct dispersed resources of the community to strategically apply them to problems in specific operations. To point out, as evident truth, that rights depend on governments, it is necessary to add a logical corollary, rich in implications: rights cost money. They cannot be protected or enforced without funds. Therefore, we cannot unlink redistribution or the guarantee of human rights from fiscal policy.

Alston issues similar ideas when drawing attention to the relationship between resources and the nature of the obligation to guarantee respect for civil and political rights.<sup>19</sup> Alston notes that existing approaches have too often been based on the illusion that resource considerations are not relevant to assess government compliance with international human rights obligation issues. The issues on the availability of resources and equal access to those resources have been largely eliminated from discussions of international human rights with respect to civil and political rights; while in the case of economic, social and cultural rights they were given an overwhelming importance, so that the qualification contained in the International Covenant on Economic, Social and Cultural Rights, that the obligations of a state extend only to the maximum of their available resources is often invoked to excuse non-compliance.

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<sup>17</sup> Philip Alston, *Extreme inequality as the antithesis of human rights*, OPENGLOBALRIGHTS (Aug. 27, 2015), available at <https://www.openglobalrights.org/extreme-inequality-as-the-antithesis-of-human-rights/>.

<sup>18</sup> STEPHEN HOLMES & CASS R. SUNSTEIN, *EL COSTO DE LOS DERECHOS. POR QUÉ LA LIBERTAD DEPENDE DE LOS IMPUESTOS* 33 (Siglo Veintiuno Editores, 2011).

<sup>19</sup> Alston, *supra* note 17

Indeed, the problem of resources is critical because human rights depend on them; civil, political, economic, social, and cultural. In other words, fiscal policy on both sides of the equation: allocation of resources and taxation, is closely linked to the effectiveness of human rights. Fiscal policy is human rights policy. Thus, the report on poverty and human rights in the Americas highlights that fiscal policy is a public policy, and as such, is subject to the human rights obligations of the States. Human rights principles constitute a framework that underpins the key functions of fiscal policy and taxation: mobilization of resources to finance social progress to the maximum of available resources; redistribution of economic gains to reduce socio-economic inequality; accountability between the State and citizens; and the correction of market failures which drive violations of rights.<sup>20</sup>

To finish this section, it is important to remember that decisions in tax and budgeting matters determine, to a large extent, the level of effective enjoyment of human rights. In contexts of austerity and crisis, the management or administration of resources for the protection of rights becomes more important.

### III. STATE OBLIGATIONS UNDER THE ICESCR

Although this article refers to state obligations that derive from the ICESCR, the obligations mentioned are also internal law obligations, and violations of such obligations imply violations of the first article of the Mexican Constitution. The article asserts that in México, all people will enjoy the human rights recognized in the constitution and in international treaties of which México is part; and that norms related to human rights shall be interpreted in accordance with the constitution and with international treaties, favoring the most extended protection of people at all times.

Granting one can distinguish between civil and political rights, and economic, social, and cultural rights (ESCR) theoretically, in practice, this distinction is blurred by the interrelation between the different sets of rights. For example, the right to freedom of expression is important to claim economic, social, and cultural rights; but also, without the right to education, it is difficult to understand and practice civil rights. Now, regarding the cost of rights without a good justice system, which of course, implies economic resources, it is difficult to talk about the realization of civil and political rights.<sup>21</sup> However, since it is at the level of economic, social, and cultural rights where doctrine about the link between fiscal policy and human rights has been developed, the focus of this work is on economic, social and cultural rights.

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<sup>20</sup> Asociación Civil por la Igualdad y la Justicia, *et al.*, *Política Fiscal y Derechos Humanos en las Américas* (2015), available at [https://www.cesr.org/sites/default/files/cidh\\_fiscalidad\\_ddhh\\_oct2015.pdf](https://www.cesr.org/sites/default/files/cidh_fiscalidad_ddhh_oct2015.pdf) (last visited Oct. 15, 2020).

<sup>21</sup> See, *supra* note 18.

After the acceptance of the Universal Declaration of Human Rights in 1948, came the need to transform human rights into legally binding obligations for States. The result was two Covenants adopted and opened for signature, ratification, and accession in 1966, which entered into force in 1976: The International Covenant on Civil and Political Rights (ICCPR)<sup>22</sup> and the International Covenant of Economic, Social and Cultural Rights (ICESCR).<sup>23</sup> In the first case, the covenant establishes that:

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.<sup>24</sup>

From the abovementioned, the obligation of the States parties to respect and guarantee civil and political rights without regard to cost is established. But when costs of rights are not considered, it can lead to the defense of empty formulas insofar as resources are not unlimited, and an entire administrative and judicial apparatus is needed to guarantee them.

In the second case, the ICESCR, establishes that:

1. Each State Party to the present Covenant undertakes to make efforts, individually and through international assistance and co-operation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.<sup>25</sup>

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<sup>22</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>23</sup> International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

<sup>24</sup> International Covenant on Civil and Political Rights art. 2, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>25</sup> International Covenant on Economic, Social and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3.

From the abovementioned, a series of obligations for the States Parties stand out:

- Take appropriate measures through the mobilization of the maximum resources available for the effective implementation of ESCR.
- Prohibition to discriminate.
- Ensure the minimum content of the rights enshrined in the Covenant.
- Progressive and non-regressive realization of ESCR.

The first three are obligations of immediate fulfillment that are not conditioned or limited to any other condition. The obligation to not discriminate implies *a)* non-discriminatory budgets; *b)* removal of inequalities; and, *c)* adoption of positive measures and their financing to end structural disadvantages in order to achieve the full participation of certain groups in society.<sup>26</sup> Taking appropriate action involves deliberate, concrete actions that are oriented as clearly as possible towards the satisfaction of obligations recognized in the Covenant.<sup>27</sup> It includes legislative measures, judicial and administrative remedies, financial, educational, and social measures, as well as international and technical assistance, among others, in view of the circumstances of each State.

On the financial or budgetary side, the idea of taking appropriate measures includes the allocation of sufficient resources to rights and implies that States must design their budgets in accordance with the rights enshrined in the covenant. It also includes analyzing and evaluating budgets, especially how many resources are destined to each ESCR and to other state purposes not linked to rights.<sup>28</sup> We should remember that the ultimate objective of fiscal policy, budgetary and tax, is the fulfillment of rights. Economic growth and economic stability should be seen as a means for human development and not as an end in itself.<sup>29</sup> This involves making decisions about rights, prioritizing rights and in parallel, assigning the appropriate public resources.

As for securing the minimum content of ECSR, each State has the obligation to guarantee at least the essential levels of each ESCR.<sup>30</sup> Nonetheless, to assess a State's compliance with its obligation to guarantee the minimum content of the rights, the resources of the State in question must be considered.<sup>31</sup> Since States have the obligation to take the necessary measures up to the maxi-

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<sup>26</sup> Horacio Corti, *La política fiscal en el derecho internacional de los derechos humanos: presupuestos públicos, tributos y máximos recursos disponibles*, 17 REVISTA INSTITUCIONAL DE LA DEFENSA PÚBLICA 192 (2019).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> CRC, *Day of General Discussion on "Resources for The Rights of The Child – Responsibility of States"* (Sep. 26, 2007).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

imum of resources available, for a State to attribute its failure to meet the minimum obligations due to a lack of resources, they must first demonstrate that every effort to use all the resources that are at its disposal in an effort to satisfy with priority those minimum obligations have been made.<sup>32</sup> This effort includes that the State is collecting the correct amount of taxes.

Once the minimum content is assured, the obligation to progressive realization implies moving towards the full effectiveness of rights and not moving in retrogression. The progressivity of ESCR implies two dimensions: a positive one that refers to the obligatory nature of gradual advancement towards the full satisfaction of rights to all people; whereas the negative dimension refers to the prohibition of a return to previous conditions, that is, retrogression in the protection and guarantee of ESCR.<sup>33</sup> This means that the general rule is progressiveness, however, exceptionally, regression may be allowed without non-compliance of the ICESCR.

#### IV. AUSTERITY POLICIES AND HUMAN RIGHTS FINANCING

Redistributive fiscal policy seeks to impact on poverty and inequality, to assure the effective protection of human rights of all people. The management of financial resources becomes more important in contexts of crisis or growth reduction. It is in such contexts that human rights are most neglected, especially ESCR. Regressive measures acquire all their value in times of austerity, where generally austerity policies in response to crisis scenarios or reduced growth have an impact on the reduction in the allocation of resources to ESCR. For example, in Mexico, according to González, budget cuts for 2015 and 2016 contributed to the increase in poverty and extreme inequality in the country.<sup>34</sup>

Austerity policy is based on the reduction or contraction of the public budget and consequently, of public spending. Usually, these policies seek to reduce fiscal deficits or meet debt obligations. Despite the term austerity used by Mexican government, if we accept, as the Secretariat of Civil Service points out, that republican austerity is not a contraction of government spending, but a reorientation of public spending towards the people who

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<sup>32</sup> CRC, “Day of general discussion on resources for the rights of the child – responsibility of states. Recommendations from the Committee on the Rights of the Child” (21 September 2007), 46th session of the CRC, para. 26.

<sup>33</sup> Toribio Toledo, *El principio de progresividad y no regresividad en materia laboral*, 23 DERECHO Y CAMBIO SOCIAL (2011).

<sup>34</sup> CESCR, *Política Fiscal y Derechos Humanos en Tiempos de Austeridad Diálogo auspiciado por la Comisión Interamericana de Derechos Humanos (CIDH) en el marco del 157 periodo de sesiones* (2016), available at <https://www.cesr.org/politica-fiscal-y-derechos-humanos-en-tiempos-de-austeridad> (last visited Oct. 01, 2020).

have less,<sup>35</sup> we may think more of a redistributive policy seeking to generate savings by reducing the cost of government to finance other programs or policies than of an austerity policy based on a contraction in public spending. Thus, without assessing its effectiveness, the republican austerity policy that began in December 2018 in Mexico is a policy instrument that seeks the financial viability of the Mexican government to finance social programs that aim at the redistribution of wealth.<sup>36</sup> This implies the reallocation of budget so, necessarily some programs or budget items will stop receiving or will receive fewer resources and the resources allocated to other programs or budget items will increase. It is in this scenario that disagreements with the form of allocation of resources may occur.

Be as it may, with the health and economic crisis due to COVID-19, the scenario changes. Resources allocated to different areas of public spending must be used for the health emergency. On the other hand, the economic crisis entails less economic activity, less money to spend and poorer people. According to the National Institute of Statistics and Geography (INEGI), there was a decrease of (-) 17.1% in real terms in the period comprising April to June 2020 compared to the previous quarter year. Also, in its annual comparison, the Gross Domestic Product (GDP) declined (-) 18.7% in the same time period.<sup>37</sup> Regarding poverty, according to the National Council for the Evaluation of Social Development Policy (CONEVAL), by 2020, income poverty could increase between 7.2 and 7.9 percentage points, that is, between 8.9 and 9.8 million people. Extreme income poverty may also increase between 4.9 and 8.5 percentage points: between 6.1 and 10.7 million people. Furthermore, it estimated an increase in the unemployment rate from 3.3 to 5.3 percent and from 37.3 to 45.8 percent in working poverty in the second quarter of 2020.<sup>38</sup>

The Committee on ESCR has reflected on tax policies in times of crisis and has indicated that a flexibility device is required that reflects the realities of the real world and the difficulties that it implies for each country to ensure the full effectiveness of ESCR. It also indicated that States have the obligation to proceed as expeditiously and efficiently as possible with a view to achieve

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<sup>35</sup> HRC, *Report of the Independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, U.N. Doc. A/HRC/17/34 (Mar. 17, 2011).

<sup>36</sup> Jesús Rivero Casas, *La política de austeridad como instrumento para el bienestar y el crecimiento económico en el gobierno de la "cuarta transformación": lógica y problemas de implementación*, 27 BUEN GOBIERNO (2019), available at <https://www.redalyc.org/jatsRepo/5696/569660565002/569660565002.pdf>.

<sup>37</sup> Instituto Nacional de Estadística y Geografía, *Producto interno bruto de México durante el segundo trimestre de 2020* (Ago. 26, 2020), available at [https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/pib\\_pconst/pib\\_pconst2020\\_08.pdf](https://www.inegi.org.mx/contenidos/saladeprensa/boletines/2020/pib_pconst/pib_pconst2020_08.pdf).

<sup>38</sup> CONSEJO NACIONAL DE EVALUACIÓN DE LA POLÍTICA DE DESARROLLO SOCIAL (CONEVAL), *LA POLÍTICA SOCIAL EN EL CONTEXTO DE LA PANDEMIA POR EL VIRUS SARS-CoV-2 (COVID-19) EN MÉXICO 12* (CONEVAL) (2020), available at [https://www.coneval.org.mx/Evaluacion/IEPSM/Documents/Politica\\_Social\\_COVID-19.pdf](https://www.coneval.org.mx/Evaluacion/IEPSM/Documents/Politica_Social_COVID-19.pdf).

that objective, and that all deliberately retroactive or regressive measures require careful consideration and should be fully justified by reference to all of the rights provided for in the Covenant and in the context of making full use of the maximum available resources.<sup>39</sup>

In other words, the Committee on ESCR accepts that, exceptionally, there may be retrogression of ESCR without non-compliance with the ICESCR, but it must be justified. General Comment 19 further explains justification of retrogression of ESCR and provides a six points criterion for the justification of retrogression:

- A reasonable justification for the measures.
- That possible alternatives are thoroughly studied.
- An examination of the measures and alternatives must be carried out with the true participation of the affected groups.
- The measures must not be directly or indirectly discriminatory.
- The measures should not have a sustained impact on the exercise of the right or an unjustified effect on the rights acquired or deprive any person or group of the minimum level indispensable of the right.
- There should be an independent review of the measures at the national level.<sup>40</sup>

The aforementioned refers to a general criterion, applicable in an environment of everyday life but maintained applicability even in moments of austerity or economic crisis. Thus, while recognizing the need for adjustments due to crisis or austerity, the Committee on ESCR was punctual in suggesting that the protection of ESCR is more urgent and not less urgent in times of austerity and crisis. In other words, in times of crisis, it is more important that States pay attention to ESCR.<sup>41</sup> Thus, the doctrine on retrogression or non-retrogression did not allow a change for times of crisis or austerity.

As Warwick notes,<sup>42</sup> the Committee on ESCR, when faced with economic crises, did not show much flexibility to national governments. This is noted in several concluding remarks. For example, in 1999, the Committee on ESCR takes into account the Solomon Islands situation and despite the fact that it indicates that due attention must be paid to the political, economic and social conditions prevailing in the country at that time, and that it recognized that

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<sup>39</sup> UN CESCR, *General Comment No 3: The nature of States Parties obligations (Art 2, para. 1)* (1990) UN Doc E/1991/23.

<sup>40</sup> UN CESCR, *General Comment No. 19: The right to social security (Art. 9 of the Covenant)* (2008) UN Doc E/C.12/GC/19.

<sup>41</sup> UN CESCR, *General Comment No. 2: International technical assistance measures (Art. 22 of the Covenant)* (1990) UN Doc E/1990/23.

<sup>42</sup> Ben T.C. Warwick, *Socio-economic rights during economic crises: A Changed Approach to non-retrogression*, 65, ICLQ, 249-265 (2016).



Solomon Islands were being severely affected by financial limitations caused by the economic crisis, the Committee on ESCR expresses concern about the lack of guarantee of different ESCR such as access to employment due to the reduction of the public sector and education due to absence of compulsory primary education.<sup>43</sup>

In the case of Mongolia in 2000, ICESCR Committee recognizes the situation in the country caused by the process of transition to a market economy, however, it regrets the decline in public spending on education and worries about school dropouts, especially among children belonging to families of shepherds who have to work. Furthermore, it urged the State to continue to urgently address the nutritional needs of its population and recommended to ensure that people living in remote areas have progressive access to essential health services.<sup>44</sup>

Regarding Mexico, in 1999, Committee on ESCR notes that the economic crisis experienced in 1995 had negative effects on the enjoyment of ESCR yet expressed concern about the insufficient efforts taken by the State to comply with the concluding observations and specific recommendations made after the examination of the country's previous report. It worries about the little progress of the State despite its fight against poverty, and that more people live in poverty or extreme poverty. It considered that, unless the structural causes of poverty be addressed properly, a more equitable distribution of wealth will not be achieved.<sup>45</sup>

As can be noticed from the examples mentioned, despite acknowledging the crisis situation of the States, the Committee on ESCR did not suggest a treatment of greater acceptance to the lack of protection of the minimum content of ESCR or retrogression. However, following Warwick, as of 2012, with the Letter addressed to the State Parties<sup>46</sup> by the president of the Committee on ESCR, there was a break in the approach of the Committee. Substantive adjustments were made to non-retrogression which, according to the

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<sup>43</sup> UN CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant- Non-Reporting States. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Right. Solomon Islands* (pars. 7, 9, 18 and 23) UN Doc. E/C.12/1/Add.33 (May. 14, 1999).

<sup>44</sup> UN CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant- Non-Reporting States. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Right. Solomon Islands* (pars. 9, 17, 24 and 25) UN Doc. E/C.12/1/Add.47 (Sep. 1, 2000).

<sup>45</sup> UN CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 of the Covenant- Non-Reporting States. Economic and Social Council, Concluding Observations of the Committee on Economic, Social and Cultural Rights. Mexico* (pars. 12, 15, 16 and 31) UN Doc. E/C.12/1/Add.41 (Dec. 8, 1999).

<sup>46</sup> *Letter addressed by the chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, UN Doc. HRC/ NONE/2012/76, Ref: CESCR/48th/SPMAB/SW (May. 16, 2012).

author, show a clear emergency character. The focus shifted from “business as usual” to an “accommodation to emergency situations”.<sup>47</sup>

Before 2012, States that wanted to adopt retrogressive measures had to adopt the criterion indicated in General Comment 19, which is a very onerous criterion, therefore, despite the existence of some flexibility, it was not easy to justify the lack of guarantee of the minimum contents of the DESC or retrogression.

With the 2012 letter, there was a change and, although the letter states that all State parties must always avoid decisions that lead to the denial or contempt of ESCR,<sup>48</sup> it also admits that State parties have a margin of appreciation to design policies that respect the ESCR and comply with the ICESCR,<sup>49</sup> and that economic or financial crises, as well as lack of growth impede the progressive realization of ESCR and can lead to the retrogression of the enjoyment of rights and, therefore, certain adjustments in the implementation of Covenant rights may be necessary.<sup>50</sup> The letter establishes a four points criterion that States must meet in times of crisis or austerity before regression of ESCR:

- The policy should be a temporary measure and only cover the period of crisis.
- The policy must be necessary and proportionate in the sense that the adoption of any other policy, or lack of action would be more detrimental for ESCR.
- The policy is not discriminatory.
- The policy identifies the minimum basic content of the rights and guarantees their protection.<sup>51</sup>

As can be seen, the requirements are less onerous than those established in General Comment 19. Furthermore, two of the criteria, the last two, are long-standing general criteria and immediate obligations, so the standard for non-retrogression actually comes down to just the first two criteria.<sup>52</sup> In this sense, in times of economic, financial and health crises, natural phenomena, austerity, in accordance with this doctrine of non-retrogression that arises in 2012, regressive measures can be implemented complying with the following general criteria: non-discriminatory and ensuring the minimum content of the right; and specific criteria: the measures must be temporary, necessary and proportional.

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<sup>47</sup> Ben T.C. Warwick, *supra* note 42.

<sup>48</sup> *Letter addressed by the chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights*, U N Doc. HRC/ NONE/2012/76, Ref: CESCR/48th/SPMAB/SW (para. 3) (May 16, 2012).

<sup>49</sup> *Ibid.* at para. 4.

<sup>50</sup> *Ibid.* at para. 45.

<sup>51</sup> *Ibid.* at para. 6.

<sup>52</sup> Ben T.C. Warwick, *supra* note 42, at 259.

This new criterion can be seen in Concluding Observations to state parties after 2012. Thus, for example, in 2015, the Committee on ESCR recommended that Italy examine, based on a human rights impact assessment, all the measures adopted in response to the financial crisis in force, in order to guarantee the enjoyment of ESCR. It also highlighted that: sizable cuts in social spending and essential services made during the financial crisis disproportionately affected disadvantaged and marginalized individuals and groups.<sup>53</sup>

That is, the evaluation is carried out according to the criterion established in the open letter of 2012. In the case of Ireland, after recalling the requirements indicated in its open letter to the States of 2012, the Committee on ESCR recommended the country to ensure that austerity measures be phased out gradually and the effective protection of the rights recognized in the ICESCR be strengthened in line with the progress achieved in the period of recovery of the economy after the crisis.<sup>54</sup> In this case, there is emphasis put on the first criteria.

Now, while it is true that international treaties such as the ICESCR are legally binding and interpretation criteria such as those contained in the General Comments or Consideration Reports are not, they are soft law and show a particular institutional position which grants some legal significance to be used in jurisdictional forums and become later common practice. In the case of the 2012 Letter addressed by the chairperson of the Committee on ESCR to States parties, according to Nolan,<sup>55</sup> doesn't even have the status of soft law. Still, as was noted, Concluding Observations to States do take them into account and thus, the criteria in the letter makes its way into soft law and therefore should be taken seriously; it shows an institutionalized interpretation criterion and institutionalized interpretations are used frequently in the international arena for compulsion. Besides, in the evolving dynamics of international law, soft law and hard law are now substantively comparable in their effectiveness.

#### V. TAX POLICIES, MAXIMUM AVAILABLE RESOURCES AND HUMAN RIGHTS

State parties of the ICESCR have the obligation to enforce ESCR progressively up to the maximum of the resources available. To assign the maximum

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<sup>53</sup> UN CRC, *Concluding observations on the fifth periodic report of Italy* (pars. 9 and 34) (Oct. 28, 2015) UN Doc. E/C.12/ITA/CO/5.

<sup>54</sup> UN CRC, *Concluding observations on the third periodic report of Ireland* (par. 11 a) and b) (Jul. 08, 2015) UN Doc. E/C.12/IRL/CO/3.

<sup>55</sup> Aoife Nolan, *Putting ESR-Based Budget Analysis into practice: Addressing the conceptual challenges*, in HUMAN RIGHTS AND PUBLIC FINANCE: BUDGETS AND THE PROMOTION OF ECONOMIC AND SOCIAL RIGHTS 50 (Hart, 2014).

of available resources means to allocate sufficient resources with respect to minimum content, progressive development, and stable maintenance of the full content of ESCR. Maximum available resources mean those resources that a certain society has as a whole and can be legitimately captured through taxation and other means, not just those resources that the State allocate to a particular ESCR in its budget, or the resources available in budgets, or those actually collected.<sup>56</sup> To capture maximum available resources leads to just taxation and involves going beyond budgetary decisions to mobilizing resources available from the society to form public revenue, especially through taxes. Meaning, to meet the obligation to assign maximum available resources to ESCR a prior step is to mobilize socially available resources or wealth. For the mobilization or use of the maximum available resources it is necessary to examine not only the allocation of resources but also the collection mechanisms of State parties, that is, taxation or fiscal policy and public debt.

In countries that are a part of the Organization for Economic Co-operation and Development (OECD), fiscal policy plays a significant role in reducing inequality. The GINI coefficient drops 36% after transfers and direct taxes compared to only an 8% drop in Mexico (2011 data).<sup>57</sup> This means that in Mexico there is an opportunity to improve the role of tax policy as a tool for wealth redistribution. This idea is reinforced if we consider that in Mexico, tax collection represented, on average, 16.1% of GDP, while in the countries that make up the OECD it represents 34.3% and for Latin American and Caribbean countries it represents 23.1% (data from 2018).<sup>58</sup> Likewise, losses in tax collection in Mexico range between 2.6 and 6.2% of GDP.<sup>59</sup> Tax evasion rate with respect to the collection potential is estimated at 16.1% (2016).<sup>60</sup>

It is necessary to identify the real ability to pay of the members of society so that taxation actually corresponds to ability to pay. Taxes, to be fair, must capture the real ability to pay and affect wealth through progressive taxation, but without having confiscatory effects. This perspective is held by the Inter-American Commission on Human Rights, who highlights that

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<sup>56</sup> Horacio Corti, *La política fiscal en el derecho internacional de los derechos humanos: presupuestos públicos, tributos y máximos recursos disponibles*, 17 REVISTA INSTITUCIONAL DE LA DEFENSA PÚBLICA 207, 208 (2019).

<sup>57</sup> Michael Hanni *et al.*, *El potencial redistributivo de la fiscalidad en América Latina*, 116 REVISTA CEPAL 12-13 (2015).

<sup>58</sup> OECD, BASE DE DATOS GLOBAL DE ESTADÍSTICAS TRIBUTARIAS, available at <http://www.oecd.org/tax/tax-policy/base-de-datos-global-de-estadisticas-tributarias.htm>.

<sup>59</sup> José Luis Clavellina Miller *et al.*, *Alternativas para reducir la evasión y elusión de impuestos de las Empresas "Factureras" o "Fantasmas"*, 60 INSTITUTO BELISARIO DOMÍNGUEZ 1 (2019).

<sup>60</sup> Juan Manuel San Martín Reyna *et al.*, *Evasión Global 2017* (UDLAP 2017) (Oct. 01, 2020), available at [http://omawww.sat.gob.mx/administracion\\_sat/estudios\\_evasion\\_fiscal/Documents/Evasion\\_global2017.pdf](http://omawww.sat.gob.mx/administracion_sat/estudios_evasion_fiscal/Documents/Evasion_global2017.pdf).

the low collection of public revenues hinders the ability to reduce social and regional inequalities. And that tax revenues have been insufficient due to the low tax burden and also to the regressive profile of some taxes. The Inter-American Commission on Human Rights has said that there are numerous tax deductions, exemptions, and loopholes, as well as tax evasion and avoidance and other similar practices. It noted that in several countries in the region, people living in poverty are not beneficiaries, but net payers of the social system.<sup>61</sup>

Since 2014, the Report of the Special Rapporteur on extreme poverty and human rights recommended, among others to: 1) Increase the tax revenue in a manner consistent with human rights obligations on non-discrimination and equality, and increase the allocation of revenues collected in budget areas that contribute to the enjoyment of the rights; 2) Increase the use of personal and direct taxes, and design all taxes in a way that reduce their regressive effect and gender bias; 3) Carefully analyze the income tax threshold to ensure that tax policies do not further impoverish people below or near the poverty threshold. The recommendations are to help States take advantage of the full potential of tax collection as a tool to generate income for the fulfillment of human rights obligations, among others.<sup>62</sup>

As can be seen, fiscal policy related to tax collection plays a critical role in complying with the obligation to allocate resources up to the maximum available in order to ensure ESCR. Indeed, appropriate redistributive measures through fiscal policies are essential to guarantee the full respect for human rights. Also, tax collection in times of crisis is of special importance. For example, issues such as the regressive or progressive nature of the tax structure, the groups which are granted tax exemptions and the purposes of such exemptions, deductions or any tax privileges, and the tools to combat tax evasion and avoidance, all determine how available resources are captured and allocated among the population. This affects inequality and the enjoyment of human rights. In its concluding observations to Ireland in 2015, the Committee on ESCR was emphatic when considering that the response of the state party to crisis focused disproportionately on the introduction of cuts in public spending in the areas of housing, social security, health care and education, without altering its fiscal regime. The Committee recommended that the State consider the possibility of reviewing its tax regime, in order to increase its income to establish the levels of public services and social benefits before the crisis.<sup>63</sup>

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<sup>61</sup> IACHR, *Report on Poverty and Human Rights in the Americas* (para. 495), OEA/Ser.L/V/II.164 Doc.147 (Sep. 7, 2017).

<sup>62</sup> UN, HRC, *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, UN Doc. A/HRC/26/28 (May 22, 2014).

<sup>63</sup> UN CRC, *Concluding observations on the third periodic report of Ireland* (para. 11) (Jul. 08, 2015) UN Doc. E/C.12/IRL/CO/3.E/C.12/IRL/CO/3.

#### IV. ADMISSIBILITY OF RETROGRESSION OF ESCR DUE TO AUSTERITY AND CRISIS IN MEXICO

Under the ICESCR and other international treaties on human rights, Mexico, like any other State party, has acquired a series of international legal obligations which prevents the establishment of arbitrary fiscal policies<sup>64</sup> however, this does not totally invalidate the possibility of decision-making by the State in the collection and resource allocation. State governments have a margin of appreciation and can make decisions about rights and prioritization of rights; therefore, they have a certain margin of maneuver around fiscal policy. Obligations related to human rights are fulfilled through the development and implementation of policies, programs, mobilization of the resources to finance them, and the allocation of sufficient budget to policies and programs. Of course, a latter and necessary step is the evaluation to determine whether the policies and programs applied are successful in making human rights progressively effective.

Budgetary and tax policies are important to make human rights a reality regardless of the recognition of human rights in international treaties and in the constitutions. If human rights are to be effectively guaranteed they cannot be alienated from political considerations and decisions about which budgetary items are assigned resources and how many resources are allocated. This is so because resources are not unlimited and thus, not sufficient to make fully effective the entire plethora of human rights recognized in international human rights instruments. Since allocation of resources in budgets and the protection of ESCR are to some extent political decisions, there is not only a single path to protect rights but several. In other words, there are a variety of possible alternatives on allocating and mobilizing resources effectively to guarantee human rights and on which rights are prioritized.

In times of austerity and crisis, this scenario can cause more conflicts, given that it implies certain interests will be dismissed. In effect, deciding implies the selection between multiple possible alternatives, which causes a course of action in a certain sense and with a view to specific consequences. However, political decisions determine which interests will be satisfied and which will not. The ICESCR Committee seems to have accepted with General Comment 19 and with the Letter to the States Parties of 2012 that in times of austerity and crisis resources are even scarcer than in other times. Although it is true that the State parties to the ICESCR cannot arbitrarily decide not to guarantee ESCR at any time, the Committee on ESCR has recognized that a flexibility device that reflects the realities of the real world and the difficulties for each country is required to ensure the full effectiveness of ESCR. It has even recognized the possibility of implementing deliberately retroactive mea-

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<sup>64</sup> HRC, *Report of the Independent expert on the question of human rights and extreme poverty*, Magdalena Sepúlveda Carmona, U.N. Doc. A/HRC/17/34 (Mar. 17, 2011).

asures or retrogression, although it has specified that when making decisions about the implementation of such measures careful consideration is required, in addition to full justification by reference to all the rights provided for in the ICESCR and in the context of making full use of the maximum available resources.<sup>65</sup> The opposite would be to unlink the effectiveness of the human rights from economic considerations; however, this could result in defending empty formulas.

In this sense, in times of economic, financial and health crises, natural phenomena, of austerity, according to the doctrine of non-regression, especially the doctrine that arises since 2012, regressive measures can be implemented, fulfilling the following criteria: the measures must be temporary, necessary, and proportional, non-discriminatory, and ensure the minimum content of the right.

In Mexico, there are problems with the lack of effectiveness of human rights, which is consistent with the high poverty rate; there are also redistribution problems and the country is now in a context of crisis caused by the COVID-19 pandemic. In this sense, to the question of whether the Mexican State can, based on austerity, redistribution or crisis make decisions that imply retrogression of certain ESCR without violating the obligation, assure progressive realization of the ICESCR, the answer is yes. By way of exception, there may be retrogression of ESCR without non-compliance of ICESCR obligations, but the indicated criterion of justification must be met. This implies that, in addition to establishing the measures as temporary, the State is obliged to justify its decisions.

To assess whether measures such as the termination of trusts or the decrease or lack of allocation of budgetary resources to certain programs are being carried out in violation of the obligation to assure progressive realization contained in the ICESCR (without forgetting that they are political decisions with a certain margin of maneuver, but without the possibility of falling into arbitrariness), it is first necessary to establish the relationship of these programs with the ESCR and subsequently determine if the criterion in the aforementioned 2012 Letter is being met. This implies that the current government must carry out an extensive work of justification where it argues comprehensively that decisions of resource allocation, resource reduction, elimination of programs, or others, are necessary, proportional (another decision or lack of action will be more harmful for ESCR as a whole) and non-discriminatory measures. It would even have to explain and justify the allocation of resources to programs or projects that do not appear to be linked to the effectiveness of the human rights.

On the other hand, another requirement that is not found explicitly neither in General Comment 19 nor in the 2012 letter, but which derives of the

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<sup>65</sup> UN CESCR, *General Comment No 3: The nature of States Parties obligations (Art. 2, para. 1)* (1990) UN Doc E/1991/23.



obligations of the States contained in the ICESCR can be identified. This is a prerequisite to the adoption of any policy that may be regressive to ESCR. It is the obligation to take measures to muster the maximum of resources available for the progressive realization of human rights. This is the obligation of the Mexican State to mobilize resources available through its tax policy before establishing policies that imply retrogression of ESCR. In this regard, it is important to also analyze tax policy: the measures to avoid or reduce tax evasion and avoidance, the progressivity of taxes, among other measures that ensure tax justice. Of course, other issues that involve accountability and policies to prevent corruption are also important. They remain undiscussed because they are not part of the objective of this article.

So, the cuts (and regressive measures) need to be evaluated considering fiscal policy as a whole. Hence, reasonable alternatives to spending cuts (in times of austerity) can be found on the taxation side, designing reforms that increase the progressivity of the collection system and the collection of available resources in society; that is, taxes according to the actual taxable capacity. In times of austerity or economic crisis, it seems even more important to put emphasis on collection, on fair taxation in such a way that they mobilize all socially available resources for the protection of rights human rights, ensuring the effectiveness of the minimum of rights before deciding on regressive measures. If this is done, if there are measures for the mobilization of socially available resources and even with such measures there are not enough resources for ESCR, along with other justification, retrogression of ESCR would not mean non-compliance of ICESCR.

## VII. CONCLUSION

Fiscal policy as a set of revenue expenditure programs designed to meet established purposes serve not only for financial ends but also to achieve political, social, and economic goals related to human rights. Realization of all human rights come along with a financial burden thus fiscal policy, in the allocation of budgetary funds as well as in the collection of funds from society through taxes, is associated with the effectiveness of human rights.

Government channels resources and strategically allocates them to solve problems, including for the realization of different human rights. This allocation becomes especially relevant when there is need for redistribution or when economic resources are limited due to emergency or crisis situations.

State parties to the ICESCR, in accordance with their obligations derived from the Covenant, cannot arbitrarily decide their fiscal policy without considering human rights. Even so, they have room for maneuver in making decisions about their budget and tax policy. On the other hand, although one of their obligations is the progressive realization of human rights, the interpretations emanating from the ICESCR after 2012 (especially in General

Observation 19 issued by the Committee on ESCR in accordance with the letter addressed by the chairperson of the Committee on Economic, Social and Cultural Rights to States parties to the International Covenant on Economic, Social and Cultural Rights in 2012 that refers specifically to times of crisis, and Concluding Observations to state parties made by the Committee on ESCR), recognizes the need for flexibility in cases of austerity or crisis and allows, in crisis circumstances, certain retrogression of rights. Although these interpretations that conform the doctrine on retrogression or non-retrogression are not hard law, they are soft law that show an institutionalized position with sufficient legal significance to be held even in jurisdictional forums.

In light of such interpretations, in the case of Mexico, given that all effort are made to mobilize maximum available resources through tax policy, for a specified time that cover the period of crises, and only by meeting certain requirements: that measures be necessary and proportionate; that measures are not discriminatory, and that measures identify the minimum basic content of the rights and guarantees their protection; it is possible to justify the retrogression of rights without violating the obligation to progressive realization of rights contained in the ICESCR.