

The Road To A Remedy:
Current Issues in the Litigation of
Economic, Social and Cultural Rights

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Australian Human Rights Centre
The University of New South Wales
in collaboration with
Centre on Housing Rights and Evictions

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The Australian Human Rights Centre

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1. Introduction: The Road to a Remedy

Malcolm Langford¹ and Bret Thiele²

The catalytic force behind historical movements calling for the legal recognition of economic, social and cultural (ESC) rights has usually been instances of injustice, whether experienced or witnessed. When faced with human indignity, the human rights that protect socio-economic interests resonate more deeply, and can be conceptualised more clearly. Some detractors of ESC rights argue that the elevation of these rights into international treaties was the product of economic optimism in the 1960s, but the inclusion of a substantive selection of ESC rights in the 1948 Universal Declaration of Human Rights, which emanated from bleaker economic times, demonstrates anything but a naïve wish for ever continuing economic growth. While the Soviet Union had embraced ESC rights in its 1919 Constitution, it was the United States, reeling from the mass unemployment of the 1930s depression that first proposed the inclusion of economic and social rights in an international instrument. Their insertion in the Universal Declaration was buttressed by the emerging revelations of the systematic discrimination practised against minorities by Fascist regimes before and during World War II, as well as the cumulative weight of labour and women's movements of the 19th and 20th centuries.³

But the road to a remedy for victims whose ESC rights have been violated has often been a long one. While Article 8 of the Universal Declaration recognised a right to a remedy for violations of all human rights, the establishment of adjudication procedures at the national and international levels which permitted the specific invocation of ESC rights has, until recent times, been relatively slow. Some notable exceptions include the supervisory system of the International Labour Organisation, which stretches back to the early 1920s, and the emergence of a more activist judiciary in India during the emergency period of the 1970s, the latter briefly covered by Gonsalves in this volume.

Equally difficult has been the more 'philosophical' objections to providing victims with redress. The argument that courts have no democratic legitimacy or

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³ For a useful overview of the inclusion of ESC rights in the Universal Declaration see Asbjørn Eide 'Economic, Social and Cultural Rights as Human Rights' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff Publishers, 2001).

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institutional capacity to adjudicate complaints that touch upon social policy or budget priorities has often been used as an axiomatic trump card by some commentators and members of the judiciary. Others have focused on the supposed 'vagueness' of ESC rights formulations or the difficulty in judicialising the progressive obligations laid down in instruments like the International Covenant on Economic, Social or Cultural Rights (ICESCR). These arguments were partly the reason why some Western states were successful in the 1950s and 1960s in limiting the establishment of an international individual complaints mechanism to the International Covenant on Civil and Political Rights.⁴ Indeed, the official process for replicating this procedure under the ICESCR has only recently commenced.⁵

In addition to these obstacles, victims and their advocates face numerous practical problems since they are often forced to litigate against the most powerful forces in their country. It is no surprise that many of the seminal cases in the areas of ESC rights jurisprudence, like civil and political rights, were not only subject to drawn out litigious processes, but that an almost equal amount of time was needed to implement the decision. By way of example from the field of equality rights and education, racial segregation in US education system was first challenged, unsuccessfully, as unconstitutional by African-American parents in the courts of Massachusetts as early as 1848,⁶ and in eight separate cases in Kansas between 1881 and 1929.⁷ But it was not until the 1930s that the National Association for the Advancement of Colored People (NAACP) actively commenced developing legal strategies on educational segregation, which culminated in the landmark 1954 test case of *Brown v Board of Education*⁸ where the judicial doctrine of 'separate but equal' schooling was swept away as unconstitutional. Despite a remedial decision a year later ordering desegregation

⁴ It is notable, however, that the human rights contained in the International Covenant on Civil and Political Rights are still not justiciable in every country, for example, Australia or the United States of America, although their inherent justiciability is almost universally accepted at meetings of States parties such as the Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

⁵ An Open Ended Working Group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights was created by the UN Commission on Human Rights in 2003. It has met twice and will provide a report to the Commission on the various options in 2006. It is to be hoped that the Working Group will then be granted the mandate to commence drafting an optional protocol for a complaints and inquiry procedure.

⁶ See *Roberts v The City of Boston*, November Term, 1849, 59 Mass. 198, 5 Cush. 198.

⁷ See *The Board of Education of Ottawa v Elijah Tinnon*, 26 Kan. 1 (1881); *Knox v Board of Education, Independence*, 45 Kan. 152 (1891); *Reynolds v Board of Education, Topeka*, 66 Kan. 672 (1903); *Cartwright v Board of Education, Coffeyville*, 73 Kan. 32 (1906); *Rowles v Board of Education, Wichita*, 76 Kan. 361 (1907); *Williams v Board of Education, Parsons*, 79 Kan. 202 (1908); *Thurman-Watts v Board of Education, Coffeyville*, 115 Kan. 328 (1924); *Wright v Board of Education, Topeka*, 129 Kan. 852 (1929).

⁸ *Brown v Board of Education*, 347 U.S. 483 (1954).

‘with all deliberate speed’⁹ a series of court cases was launched throughout the 1960s and 1970s, with a number of innovative remedies, from the redrawing of school district boundaries to the bussing of students, in order to ensure implementation of the original decision.¹⁰

The road to a remedy is nevertheless more travelled than some commentators are willing to acknowledge. The post-Cold War boom in the number of legal instruments – whether legislative, constitutional or international – that clothe ESC rights with a judicial character has certainly opened up the number of avenues for adjudication. The triumphant rise of neo-liberalism over the last two decades – and its use of law, both at the international and national level, to reshape economic and social structures – has created a stronger interest amongst social advocates in the legal nature of these rights and corresponding legal enforcement mechanisms, some long dormant.¹¹ The legal character of the rights has also been used as a weapon to challenge corrupt, inefficient or discriminatory delivery of social goods and services. Awareness of international human rights law has correspondingly grown amongst the judiciary,¹² while the ‘development sector’ has gradually recognised the importance of incorporating human rights principles in development processes and the need for donors to support access to justice programmes, although the continuing disparity between the resources available for legal costs of victims and violators remains disturbing.

The debate over the justiciability of ESC rights continues but it is certainly more muted, as Scheinin points out in the following chapter. The well-reasoned *Grootboom* judgment of the Constitutional Court of South Africa – often referred to in this volume as the South African Constitutional Court – has perhaps contributed the most to a growing international awareness of the means by which the ESC rights can be rendered justiciable.¹³ As exemplified by the chapters in this volume, advocates in a significant number of jurisdictions are engaged with the more mundane questions of the precise parameters of justiciability, the crafting of remedial requests and the development of strategies that ensure court orders are implemented, all challenges which are shared with civil and political rights litigation. As the South African judge, Justice Yacoob, stated, ‘The question is

⁹ *Brown v Board of Education* II 349 U.S. 294 (1955).

¹⁰ See Molly McUsic, ‘The Future of *Brown v Board of Education*: Economic Integration of the Public Schools’, 117 *Harvard Law Review* [2004] 1334 at 1338.

¹¹ For example, the African Commission on Human and Peoples’ Rights.

¹² See Michael Kirby, *Role of International Standards in Australian Courts*, speech delivered at The University of New South Wales Faculty of Law, 10 May 1995. Available at www.lawfoundation.net.au/resources/kirby/papers.

¹³ See *South Africa v Grootboom*, 2001 (1) SA 46 (CC).

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therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.¹⁴

Even in countries traditionally hostile to the notion of the justiciability of ESC rights, a shift is evident. In a recent article by officials from the US Department of State, renowned for its more shrill and ideological rejections of ESC rights, the authors stated that they ‘do not reject out of hand the notion that some economic and social rights may be domestically justiciable’,¹⁵ and instead refocused their attack – albeit with a selective use of evidence – on practical and procedural objections. The Joint Committee on Human Rights in the United Kingdom also cautiously endorsed in a recent report the judicialisation of some aspects of the ICESCR, stating:

In our view, the case for incorporating guarantees of the Covenant rights in UK law, either by incorporating the terms of the Covenant itself, or by developing domestic formulations of the Covenant rights as part of a UK Bill of Rights, merits further attention. Any such measure should recognise the limits of the courts’ institutional competence in relation to rights that are progressively realised, and should limit judicial scrutiny to grounds of reasonableness and non-discrimination. Providing the Covenant rights with legal status in UK law would broaden and strengthen the developing culture of respect for human rights in the UK, and make clear that human rights address essential human needs, and help to ensure that provision is made for the most vulnerable people in our society.¹⁶

Moreover, as Scheinin points out in the following chapter, it is certainly easy to show a slew of cases that demonstrate the inherent justiciability of ESC rights,¹⁷ as indicated by the numerous examples given throughout this publication. However, as Scheinin notes, it is still too early to develop a universal theory of justiciability, and some authors warn against an overly universalistic approach that puts theory too far ahead of practice.

The practical burdens of litigation continue to be used at times to discredit the call to utilise legal remedies for victims. The long delays in obtaining or implementing judgments, the restricted nature of the discourse, the dominance, and sometimes cost of lawyers, leads some to despair over this type of advocacy strategy. Nevertheless, a recent comparative survey by the Centre on Housing Rights and

¹⁴ *Ibid.*, at para. 20.

¹⁵ Michael Dennis and David Stewart, ‘Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ 98 AJIL (2004) 462 at 515.

¹⁶ House of Lords and House of Commons Joint Committee on Human Rights, *The International Covenant on Economic, Social and Cultural Rights*, Twenty-first Report of Session 2003-4, 2 November 2003, at para. 73.

¹⁷ See for example the publications available at www.cohre.org/litigation and the case law database of the International Network on Economic, Social and Cultural Rights (www.escr-net.org).

Evictions (COHRE) found that in terms of an immediate tangible impact, there was sufficient evidence that legal action could have a positive and sustainable impact on the achievement of these rights.¹⁸ It concluded:

An increased observance of social and economic rights was evident in many case studies. Social programmes for food and nutrition have been reactivated in India and Argentina.... The implementation of medicine programmes has proceeded at a significantly more rapid pace.... Evictions have been prevented in the Dominican Republic and compensated in Serbia-Montenegro.... Indigenous livelihoods have been protected from forestry and mining in Finland.... Child labour laws have been amended in Portugal.... Compensation has been paid by multinational companies to workers with cancer

At the same time, an equal number of cases have made no direct impact. Evictions proceeded. Retrogressive measures were allowed. Social programmes were not progressively improved. The pollution of water sources continued. Compensation was not paid.¹⁹

While going on to discuss assessment by advocates of the various obstacles that prevented success, and the legal and non-legal strategies that may have lead to different results, the comparative survey also revealed a number of paradoxes. Unsuccessful or undecided cases had sometimes led to changes in policies during the process of litigation. Most recently, the Government of Greece amended a law that explicitly authorised the forced removal and resettlement of Roma a few months after the European Roma Rights Centre filed a collective complaint with the European Committee on Social Rights.²⁰ On the other hand, successful, but unimplemented, cases often had strong precedential value, thus laying the foundation for highly effective future decisions.

¹⁸ Centre on Housing Rights & Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, (Geneva: COHRE, 2003). Available at www.cohre.org/litigation. Based on research and interviews, the study aimed not only to understand the nature of the legal and judicial reasoning better, but to shed light on the practicalities of litigation, in particular the impact of successful, or even unsuccessful, legal action, the obstacles faced and lessons learned with respect to design of litigation strategies. The results of the inquiry indicated that in a significant number of countries, and in the context of international treaty regimes, victims of violations of economic, social and cultural rights violations had to varying degrees obtained decisions requiring abstention or action by governments or other actors with respect to economic, social and cultural rights. Advocates were also able to identify the various strategies – both legal and general – that had proved successful, or would have proved successful, in obtaining such decisions and ensuring that the intended beneficiaries benefited from the judicial or quasi-judicial intervention.

¹⁹ *Ibid.*, at 18.

²⁰ See Collective Complaint No.15, *ERRC v Greece*, European Committee on Social Rights. The European Committee of Social Rights transmitted its decision on the merits of the complaint to the Committee of Ministers on 7 February 2005. The decision will be made public by 8 June 2005 and will be available at www.coe.int/T/E/Human_Rights/Esc/

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However, beyond the question of ‘effectiveness’ – the fashionable but generally understandable measurement for value – Porter, in his chapter in this volume, notes the importance of the right to a remedy as a human right in itself: ‘At the centre of every ESC rights claim is a central, foundational claim to adjudicative space, to a hearing and to participation in the human rights project.’ The human right to a remedy is, therefore, not only an instrumental means for realising the rights of an individual or redressing systemic violations, it is an integral part of the human rights emphasis on participation.

During the research process for the COHRE report mentioned above, it became clear that there were a number of issues which many practitioners were grappling with. These related not to any abstract notion of justiciability but rather to the judicial enforcement of the rights in practice. They include:

- Crafting of legal argument for immediately enforceable rights;
- Judicialisation of the principle of maximum available resources;
- Different remedial options for positive obligations;
- Right to alternative accommodation in cases of forced evictions;
- The disconnect between some ESC rights theory and litigation practice;
- Litigation against non-state actors;
- Implementation of judgments;
- Absence of sufficient resources, training and networking for ESC rights litigation.

In order to explore these areas further, it was decided to hold a workshop designed to include the particular input of human rights lawyers working in South Africa, Canada, India and Argentina, and at the international and transnational level. Although nearly all the participants in the workshop had been involved in litigation at some point, a number of academic experts working in the areas identified above were invited to participate in the project to stimulate further discussion.. As a result, the *Economic, Social and Cultural Rights Litigation Strategy Workshop* was held on 16-18 November 2003 in Céligny, Switzerland. The key themes that emerged during the workshop are summarised in the report written by Nolan for this volume.

The chapters in this volume were developed from papers presented at the workshop. The material has been updated in light of more recent developments, and where appropriate, postscripts have been added to the originals. What is clear from all the contributions is a deep respect for a dialectic of theory and practice in ESC rights litigation, and that the experiences of suffering and injustice of victims

should not be divorced from the development of legal concepts and legal strategies. Further, that lessons learned and obstacles encountered during litigation, particularly at the national level, should inform others working on ESC rights, particularly at the international level.

Craven's chapter provides a critical re-examination of the evolving modalities with respect to the justiciability of ESC rights. Craven addresses the false dichotomies in the traditional arguments regarding the role of the judiciary vis-à-vis the legislative and executive branches, for example, the power to allocate resources. He challenges some of the conceptual thinking of scholars on ESC rights in startling ways, even though he does not always take a definitive stand on the issues himself.

Craven – and Porter in the following chapter – cautions against an overly universalistic approach to the interpretation of ESC rights, a methodology that leads to unintended consequences. The over-emphasis upon the minimum core obligations to achieve a minimum essential level of the right – as derived by the Committee on Economic, Social and Cultural Rights in its General Comment No. 3 – could ignore the victims who find themselves living in undignified conditions in wealthier countries. Similarly, the idea that the obligation of non-discrimination is immediate and unhindered by the resource constraints may denude this obligation of its substantive equality aspects.

Craven also questions the rigidity of some legal concepts and points out the dangers of always squeezing victims into pre-defined legal categories for the sake of strategy. While he concedes that the ICESCR to some extent divides the poor into the deserving (those who suffered a legally defined violation of their rights) and the undeserving (those who cannot point to a violation), he argues that legal scholars should not exacerbate this tendency. For example, by dividing the obligations into 'respect', 'protect' and (progressively) 'fulfil', the victims are also divided. Craven acknowledges that this framework was particularly attractive since it demonstrated that ESC rights can be conceptualised in the same manner as civil and political rights; this made it more accessible to the wider legal community and public. A number of participants at the workshop found this important in terms of communicating the concepts to the judiciary. However, he asks, for example, should homeless persons who suffered forced eviction be granted stronger rights – via the obligation to *respect* existing rights – as against those who suffered no 'forced eviction' and are forced to rely on the weaker obligation of *fulfil* or progressive realisation? This difficult dichotomy is picked up in later chapters by Budlender and Langford who point out the willingness of courts to make stronger orders in the former case, while Liebenberg mounts a persuasive case for strengthening the *fulfil* obligation in the latter case. Craven underscores the importance of taking care that legal concepts do not immediately embrace the

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existing economic and social structures, and that poverty caused by more invisible processes – such as unreasonable cuts in social benefits, lack of work programmes, unequal access to education, and excessive protection of property rights – is not viewed as less destructive than visible processes, such as forced evictions.

This leads Craven, and a number of participants in the workshop, to suggest a way of thinking about ESC rights that is perhaps more consistent with the fundamental principle of human dignity and overcomes the awkwardness of the separation of rights and obligations, as, for example, in the ICESCR.²¹ That way of thinking could potentially be captured as follows: deprivation should as far as possible be viewed as a *prima facie* violation of ESC and equality rights. The burden of proof is then shifted onto the respective State to demonstrate that it has taken the necessary steps to realise the rights within available resources. The reasoning is not dissimilar to that in the field of disability discrimination, where governments or employers, for example, can plead lack of resources as a defence. While this approach cannot be immediately grafted onto the Covenant, which explicitly separates unqualified rights and qualified obligations, it could inform legal strategy and future standard-setting. This type of reasoning has recently been employed by regional human rights bodies adjudicating ESC rights, though perhaps in a paradoxical manner: the European Committee on Social Rights and the African Commission on Human and Peoples' Rights²² have both implied the defence of 'unavailable resources' into their respective legal instruments, which are more rights-focused than the ICESCR.

Porter's chapter draws on a deep and long experience of litigating ESC rights in a country often known for its wealth, not its poverty. After noting the familiar challenges of litigating ESC rights – difficulties not dissimilar to civil and political rights advocacy – he calls attention to a crisis that has been already alluded to, the divorce of claimants and concepts, and notes the worrying trend of over-emphasis of the minimum core concepts in countries like Canada which are fully bound by

²¹ Put simply, Part III of the Covenant recognises various economic, social and cultural rights while Part II sets out the respective general obligations of States, which are a mix of immediate and progressive obligations. Article 2 in Part II of the Covenant reads:

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

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

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.

²² See the chapter by Langford in this volume.

the substantive provisions of the ICESCR. These refer to full realisation of the rights, even if it is to be done progressively. He also calls upon the Committee on Economic, Social and Cultural Rights, as well as the Canadian Supreme Court which appears to have recently stepped backwards on the issue, to take the notion of substantive equality seriously, an approach that has been adopted by the Human Rights Committee. Instead of seeing the norm of non-discrimination as immediate and resource-independent – as the Committee has done – he posits that the content of the right to equality and non-discrimination will change as resources of a country grow. Porter acknowledges that in addition to equality rights, recognition of individual ESC rights, which are not expressly included in the Canadian Charter of Rights and Freedoms, is equally important. The combination of the two approaches provides a powerful weapon in addressing the claims of the poor. This procedure, he points out, is evident in the South African case of *Grootboom*.

Liebenberg's chapter builds on the rapidly developing jurisprudence in South Africa to articulate a reasonableness model for a range of positive obligations. With a particular focus on the *Grootboom* and the *Treatment Action Campaign* cases, Liebenberg provides an in-depth analysis of the reasonableness review standard as developed by the Constitutional Court of South Africa. This standard has come to be considered by many as a key approach for adjudicating the positive duties imposed by socio-economic rights. Liebenberg, however, goes one step further and articulates a higher standard, in the form of a reversal of burden of proof that could be used in certain cases, particularly those dealing with vulnerable groups that are deprived of basic essential levels of social goods and services. She also argues that this approach could be strengthened by specifically requiring governments which plead this argument to demonstrate a lack of resources. She also suggests an innovative use of proportionality analysis to test government assertions that it cannot fulfil the rights for a larger number of those in need.

Langford's chapter on positive obligations is more positivistic in nature. After pointing out the paradox that the predicted flood of costly ESC rights cases has not materialised in those jurisdictions where the rights are fully justiciable – but far from being realised – he undertakes a comparative and international review of the jurisprudence to determine what standards are used by adjudicators in deciding cases that have resource implications for government, including a number of cases dealing with civil and political rights. He comes to the conclusion that four common principles can be identified which can be grouped broadly under the heading of 'reasonableness'. While Langford does not necessarily provide an absolute endorsement of these criteria, he points out that the greater acceptance of ESC rights in the judiciary will change the way in which these criteria are viewed. For example, one of the criteria identified was that courts are more willing to make stronger orders with respect to resources if the government

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is clearly implicated in the acts or, to a lesser extent, omissions leading to the deprivation of the right. He argues, however, that a deeper understanding of government obligations to fulfil ESC rights, and remove obstacles to their realisation, would increasingly influence the way a court examines the State's culpability.

By focussing on Canada, Roach, in his chapter, reviews the experiences of various jurisdictions, particularly where courts have used crafted, innovative remedies for economic and social rights violations. The chapter discusses several remedies, including declaratory and injunctive relief, and how such remedies affect both individual and collective complainants. Importantly, Roach posits balanced approaches such as those that appropriately combine systemic and individual relief while allowing individuals facing hardship during a period of court-tolerated delay to apply to the court for interim and emergency relief. In his response at the workshop, Budlender sketched out what he considered to be a guideline to the ways in which courts tended to approach remedies which required positive steps. Drawing on experiences in the US he argued that the degree of a court's interventionism increased relative to demonstrations of bad faith by government or an inability of the State to carry out the order. A paper on this theory will shortly be published with Kent Roach in the *South African Journal of Human Rights*.

Fairstein, in her chapter, looks specifically at the lessons learned from the Argentinean case of *Vieco*, where the courts were willing to deploy a wide range of remedies in order to ensure the production of life-saving drugs, including holding the ministers personally responsible for the production of the drug. She argues that the Argentinean model of collective complaints should be adopted elsewhere, in addition to individual complaints mechanisms, since it can allow for more effective adjudication of violations affecting large and vulnerable groups.

Budlender draws on his experience of litigation to examine the extent to which courts have been willing to make remedial orders for alternative accommodation in cases of forced evictions. In particular, he refers to a large number of cases concerning informal settlements in South Africa, even if there is no immediate right to a minimum level of shelter. After examining the types of evictions in which such a claim could be justified, he examines the potential breadth of the remedy in light of recent judgments concerning cases of government-initiated eviction and, with more difficulty, the regulation of private actors where property rights and housing rights come into inevitable conflict.

The next three chapters draw upon lessons learned from litigating ESC rights in three countries. Odindo examines the many legal and practical obstacles in litigating the obligations to respect, protect and fulfil the right to housing in Kenya. Despite a series of largely negative rulings, he looks at the current

constitutional review process and identifies opportunities for strengthening security of tenure and the prohibition on forced eviction by directly incorporating ESC rights protections into domestic law, and notes recent cases where threatened evictions were ruled as violations of constitutional rights.

Drawing on the Argentine experience, Abramovich examines the role of the judiciary in relation to policy questions, and takes issue with and critiques some of the more conservative approaches taken by courts regarding the role of the judicial branch with respect to the political branches of government. Firstly, he provides a conceptual framework of four categories for the way in which positive obligations can, and have been, made justiciable in Argentina. He then goes on to examine how judicial strategies can be used to complement political strategies, and notes the under-appreciated importance of procedural litigation, focusing on rights to participation and information that bolster the ability of civil society to create political space for dialogue on ESC rights.

By way of contrast, Gonsalves notes the somewhat unique role the Indian judiciary has developed, namely that of the impartial guarantor of constitutional rights in a political system that has otherwise failed to protect the rights of Indian citizens. In cases across the spectrum of ESC rights, Indian courts have not only been willing to intervene, but to develop more flexible rules of standing, and provide innovative remedies tailored to the circumstances of the case. While Gonsalves points to some cases that have significant impact, particularly spurring civil society monitoring of government food programmes, not all cases taken to the Supreme Court have been successful, particularly in the area of housing rights.

Scheinin's chapter, found much earlier in this volume, also deals with the development of appropriate legal strategies in the context of cases relying upon civil and political rights before international human rights bodies. It provides practical guidance on a range of issues, from margin of appreciation doctrines to exhaustion of domestic remedies.

Meeran raises the importance of emerging litigation strategies in addressing the increasing influence of non-state actors on ESC rights. In his chapter, he analyses the various deficiencies in national and international legal systems for holding multinational corporations accountable and the options that are available to victims. He then discusses a number of legal case studies. These include: The *Thor* case, where a corporation moved its facilities from the United Kingdom to South Africa in an attempt to escape the United Kingdom's more stringent worker safety regulations, with the result that South African workers were harmed by exposure to high levels of mercury; The *Connelly v RTZ* case involving the conditions of a uranium plant in Namibia which increased production at the cost of worker safety; The *Cape PLC* case involving asbestos mining; and a recent case against Anglo American regarding workers who contracted silicosis and phthisis.

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These cases were all brought in the United Kingdom. They demonstrate the evidentiary challenges of establishing linkages between South Africa, where the injuries at issue occurred, and the parent company based in the United Kingdom as well as the creative confrontation of the doctrine of *forum non conveniens*, which has often been used to bar victims from bringing cases in the jurisdiction of the parent company.

Thiele and Gómez examine the issue of litigation against international financial institutions (IFIs). They refer to a specific, and novel, case now before the Inter-American Commission on Human Rights to illustrate strategies for holding the World Bank and the Inter-American Development Bank accountable for human rights violations that occurred in the context of the planning and construction of the Chixoy Dam in Guatemala. Their chapter examines the legal nature of specialized agencies of the United Nations, methods for holding individual member-States of IFIs accountable for their respective human rights obligations, as well as litigation strategies for the adjudication of ESC rights before the Inter-American Commission on Human Rights.

The final chapter by Nolan provides a report on the lively discussions that arose when the papers that make up the chapters in this volume were originally delivered at the ESC Rights Litigation Strategy Workshop. Perhaps the most interesting aspect of the discussions is the way in which various practitioners responded to the conceptual challenges with a range of legal strategies, both in terms of procedure and substance.

Returning to the case of *Brown v Board of Education* mentioned above, the US Supreme Court in a follow-up remedial decision said the following:

The remedy for such segregation may be administratively awkward, inconvenient, and even bizarre in some situations and may impose burdens on some; but all awkwardness and inconvenience cannot be avoided in the interim period when remedial adjustments are being made to eliminate the dual school systems.²³

While remedies for violations of ESC rights will not ordinarily require substantial innovation or 'awkwardness', the importance of providing effective remedies for violations of ESC rights will always require attention to the development of new forms of ESC rights litigation practice and the end goal of validating the claims of genuine victims of violations. The clear recognition of a right to a remedy for ESC rights violations at the United Nations still awaits the passage of a protocol for a specific international complaints mechanism through the labyrinth of the United Nations political mechanisms. The chapters in this volume demonstrate the possibility for deepening and extending ESC rights litigation practice at the

²³ *Swann v Charlotte-Mecklenburg Board of Education, et al.* 402 U.S. 1 at 28 (1971).

national, regional and international levels, a practice, however, that requires support.

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I. Assessment of Progress

2. Justiciability and the Indivisibility of Human Rights

Martin Scheinin¹

1. Introduction

It is by no means new that economic, social and cultural (ESC) rights may be justiciable on the domestic or international level. The old counter-argument related to the alleged ‘different nature’ of these rights, as compared to more traditional human rights generally described as civil and political rights, is perhaps not yet dead and buried but nevertheless appears today as a quiet echo from the past. The shift towards a general recognition of the principle of the justiciability of ESC rights – which is something far less than asserting that ESC rights are generally justiciable – is related to the ease of proving the existence of something: finding one living swallow is enough to prove that they exist as a species of birds. There is ample evidence, as this volume demonstrates, both from various domestic jurisdictions and from international judicial or quasi-judicial fora that certain ESC rights have been applied as legal rights in individual cases. Hence, the existence of the phenomenon of the justiciability of ESC rights is already proven.

With reference to the swallow analogy, what is more difficult to prove: that swallows migrate north when summer starts in the northern hemisphere, or that all swallows migrate north in May? Not to mention proving true a hypothesis about why swallows migrate. Even a sceptic, however, must accept that doubt about the evidence to support these observations is not sufficient to deny the existence of swallows.

Similarly, proving through real-life examples that at least one ESC right may, at least in one case, be justiciable has been an important step in the evolution of the international understanding of the nature and substance of human rights. Taking this step has been quite easy when compared to the task of proving something about the justiciability of all ESC rights, or the justiciability of some ESC rights in all cases, or the reasons for when and why ESC rights prove in practice to be justiciable.

No general theory of the justiciability of ESC rights will be presented in this chapter. Rather, an effort is made to formulate the question of justiciability in a

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way that would make it easier to move towards such a theory. Through a conceptual discussion the author comes to emphasise the principle of interdependence and indivisibility of all human rights in understanding the justiciability of ESC rights. At the end of the chapter, some conclusions are drawn in respect of effective litigation strategies.

2. Observations on the Concept of Justiciability

The notion of 'justiciability' is widely used in the international human rights discourse, especially in the context of discussions on whether ESC rights are capable of being enforced through judicial or quasi-judicial procedures. It is worth noting, however, that the word does not appear in some authoritative general dictionaries of the English language, such as the Oxford Advanced Learner's Dictionary.² Hence, already the use of the notion of justiciability may imply one's participation in a specific discourse that might be foreign to politicians or other policy-makers even when such persons feel themselves comfortable discussing issues of law, justice and human rights. Human rights advocates speaking for broader justiciability of ESC rights should therefore show patience in making themselves understood by those who have not picked up their specific jargon.

In order to address the easy question of the existence of the phenomenon of the justiciability of ESC rights, it is sufficient to use the notion as a part of a discourse, referring to one or more domestic or international judicial decisions where reference has been made to an ESC right provision in an international treaty or in a domestic constitution. In such a context it is sufficient to refer to 'justiciability' as a generic term covering all instances of such judicial, or even quasi-judicial, application of ESC rights. In order to address the more demanding questions referred to above, in the introductory section of this chapter, however, one needs to address the notion of justiciability.

Among other definitions, the following characterisations of the phenomenon of justiciability of ESC rights could plausibly be presented:

(a) *Sources.* Justiciability relates to sources of law, that is, to certain ESC rights provisions in an international treaty or a domestic constitution.

² Oxford Advanced Learner's Dictionary of Current English, Fourth Edition (Oxford University Press, 1989). Black's Law Dictionary (Fifth Edition, West Publishing, 1979) includes a short entry for 'justiciability': 'Matter appropriate for court review', as well as a more elaborate one for 'justiciable controversy'. Webster's Encyclopedic Unabridged Dictionary of the English Language (Gramercy Books, 1996), in turn, defines the adjective 'justiciable' somewhat problematically as 'capable of being settled by law or by the action of a court'.

(b) *Substance*. Justiciability relates to the substance of certain ESC rights, possibly inferred in a concrete case from a multitude of sources, such as international treaties, the domestic constitution and statutory law.

(c) *Composite*. Rather than to one given source, such as a treaty provision, justiciability relates to a process through which various sources of law are brought together and made use of, as normative fragments, in order to construe a composite norm that is enforceable through a judicial or quasi-judicial procedure.

(d) *Elements*. Justiciability relates to an aspect of an ESC right, so that within a broader and perhaps even indeterminate scope of a given right (rights provision) it is possible to identify one or more aspect or dimension, or one 'core' within which the right is justiciable.

(e) *Remedy*. Justiciability relates to the identification of a judicial or quasi-judicial remedy for a violation of an ESC right, that is, to finding a proper procedure through which the substantive right is made or proven justiciable.

(f) *Obligations*. The justiciability of ESC rights is to be addressed through the prism of state obligations, primarily the three-part typology of respecting, protecting and fulfilling ESC rights.

(g) *Integrated*. Justiciability of ESC rights is built through their links with civil and political rights, such as non-discrimination and the right to a fair trial, representing a so-called integrated approach.

It is asserted that the 'essentialist' approach of (a) should be rejected, as it does not allow the complex situations in which the question of justiciability in practice arises to be addressed but rather leads to eternal debates on the classification of an international treaty as justiciable or not.

Statement (b) – *substantive approach* – is much more correct but nevertheless insufficient as it does not allow for moving beyond the easy question of proving the existence of justiciability. Along the same lines, approaches (c) and (g) – *composite* and *integrated approaches* – are correct and even useful but still pertain to the step of proving the existence of swallows.

Statement (d) – *elements* – has strong intuitive pull but might appear problematic because it seems to be in conflict or at least in tension with the standard approach of (f) – *obligations*. It is however asserted here that this observation should not lead to the rejection of statement (d) but, in contrast, to realizing that statement (f) is incorrect and misleading.

Although the standard typology of respect-protect-fulfil in the analysis of modes of operation of ESC rights remains useful in other spheres, it should be understood that it was not developed in or for the context of judicial or quasi-

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judicial application of ESC rights but, rather, as an effort to explain, using terms of law, *other* than judicial instances of application.

Through the recognition of the correctness of statement (d) and the rejection – in the context of judicial application – of statement (f) one is drawn to the conclusion that in the sphere of international law, it is approach (d) that is at the heart of the justiciability discussion. In the application of international treaties on ESC rights through judicial or quasi-judicial procedures that exist on the international level, the question of justiciability is about the identification and development of such dimensions of ESC rights that allows for the evolution of institutionalised practices of interpretation in a manner that meets the requirements of foreseeability and coherence. In a broader context, *justiciability on the international level is about substantive interpretation of treaty provisions on ESC rights.*

One should, however, notice one fundamental difference in the role of justiciability on the international level, as compared to justiciability in the sphere of domestic law. On the level of international law, justiciability is about substantive interpretation of a treaty norm through a treaty-based mechanism. Both the body before which justiciability is argued and the applicable procedure are clear as fixed parameters for the operation of substantive interpretation.

On the level of domestic law the situation is quite different. Here, one needs to turn from statement (d) – *elements* – to statement (e) – *remedy* – as it is an important precondition for any substantive interpretation of ESC rights that a procedure is first identified which allows for the determination of the claim. It is asserted that *on the level of domestic law the essence of justiciability is in the search of a proper procedure that is capable of providing an adequate remedy for the grievance suffered in respect of an ESC right.*

Statements (d) and (e) allow for moving beyond the easy task of proving the existence of swallows, by forming a sustainable starting-point for a discussion on *which* ESC rights are justiciable, as well as *when* and *why*.

3. Interdependence of Human Rights

Although statement (g) in the previous section was, as such, considered insufficient, emphasis on the interdependence of ESC rights and other human rights is of more general strategic importance in the pursuit for effective litigation strategies. Statements (d) and (e), which were considered the most fruitful, respectively regarding the international and the domestic level, both point to the need not to look at ESC rights in an essentialist manner as ‘black boxes’, but to stress the details of their internal, normative structures and the close interconnectedness between elements of ESC rights and other sources of law.

Since the Vienna World Conference on Human Rights in 1993, it has become a commonplace to emphasise – at least on the level of *policy* – the indivisible, interdependent and interrelated nature of all human rights.³ However, the potential for applying this approach as a principle of *law* has not been fully realised.

When arguing in detail what concrete conclusions of substance should be drawn from a relatively vague formulation of an ESC rights provision in an existing international treaty, or when trying to convince a domestic court that the litigant is pursuing an existing remedy, the granting of which is in the jurisdiction of the court, it is essential to be able to apply in a concrete fashion the principle of interdependence. The present author, among many others, has elsewhere provided illustration of the use of arguments related to the right to a fair trial⁴ or to non-discrimination,⁵ or within specific substantive areas, such as indigenous peoples' land rights.⁶ Nevertheless, much more systematic work remains to be done, inter alia, in respect of the right to private and family life, the right to property, and the prohibition against inhuman and degrading treatment.

Here it suffices to give some illustrative examples of experiences discussed elsewhere. The right to equality before the law and the right not to be discriminated against is clearly a human right that does not allow for its compartmentalisation as a 'civil', 'social' – or some other – right. Most human rights treaties – whether they otherwise pertain to civil and political rights or economic and social rights – include a non-discrimination clause. Some, but not all, treaties deal with non-discrimination as an accessory, rather than an independent, human right. Hence, for instance, in Article 14, the European Convention on Human Rights prohibits discrimination only on the enjoyment of

³ Vienna Declaration and Programme of Action, paragraph 5 of Part I: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' World Conference on Human Rights in Vienna on 25 June 1993, U.N. Doc. A/CONF.157/24.

⁴ Martin Scheinin, 'Economic and Social Rights as Legal Rights', 29-54 in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd Revised Edition, Martinus Nijhoff Publishers, 2001).

⁵ *Ibid.*, and Catarina Krause and Martin Scheinin, 'The Right Not to Be Discriminated against: The Case of Social Security', 253-286 in Theodore S. Orlin, Allan Rosas and Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Åbo Akademi University Institute for Human Rights, 2000).

⁶ Martin Scheinin, 'The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land', 159-222 in Theodore S. Orlin, Allan Rosas and Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach* (Åbo Akademi University Institute for Human Rights, 2000).

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those human rights that are otherwise protected by the same Convention.⁷ In contrast, some other human rights treaties such as the Covenant on Civil and Political Rights include a free-standing provision on equality before the law and non-discrimination (Article 26), making freedom from discrimination a human right on its own – irrespective of in what field of life the discrimination occurs. Despite the clear wording of Article 26 to this effect, it was not clear to the world that the ICCPR outlawed discrimination in the field of economic and social rights before the Human Rights Committee, in 1987, decided its first cases on gender-based discrimination in respect to unemployment benefit entitlements.⁸ Through these and subsequent cases it was established that non-discrimination is a justiciable element of the right to social security, enforceable through the individual complaints procedure under the ICCPR. The interdependence between different categories of human rights was demonstrated through the capacity of a treaty on civil and political rights to afford protection to certain aspects of economic and social rights.

But the interdependence lesson does not stop here. The case law by the Human Rights Committee under ICCPR Article 26 informed the international human rights discourse of what the substantive content of the norm of non-discrimination is. Consequently, some years later it was possible for the European Court of Human Rights to overcome the inherent weakness of the accessory character of ECHR Article 14, and to effectively extend the reach of the right of non-discrimination – also under the ECHR – to social security entitlements.⁹

A second illustrative example of the power of interdependence is provided by the minority rights clause in Article 27 of the ICCPR. By including the notion of ‘culture’, this provision already on its face crosses the borderline between ‘civil and political’, and ‘economic, social and cultural’ rights. What is more important is that the Human Rights Committee, when seized by claims from indigenous communities, has adopted a broad and interdependence-based understanding of what ‘culture’ means in the context of the Covenant on Civil and Political Rights. Traditional or otherwise typical forms of economic life have been recognised by the Committee as constituting ‘culture’ and calling for protection under the ICCPR and its monitoring mechanisms.¹⁰ As a consequence, economic rights

⁷ This shortcoming of the European Convention system has of 1 April 2005 been remedied in respect of those states that have ratified Protocol No. 12 to the Convention.

⁸ See *Zwaan – de Vries v the Netherlands* (Communication No. 182/1984), *Broeks v the Netherlands* (Communication No. 172/1984).

⁹ See, in particular, the cases of *Schuler-Zgraggen v Switzerland* [1993] IIHRL 48 (24 June 1993) and *Gaygusuz v Austria* (1996), application no. 17371/90, judgment dated 16 September 1996, where the link to another right protected by the ECHR, as required under Article 14, was rather thin.

¹⁰ *Ominiyak (Lubicon Lake Band) v Canada* (Communication No. 167/1984), *Lämsman et al. v Finland* (Communication No 511/1992), *Mahuika et al. v New Zealand* (Communication No 547/1993).

such as rights related to lands, natural resources, hunting and fishing, or reindeer husbandry have been affirmed as internationally justiciable human rights. Again, this body of case law by the Human Rights Committee has informed the broader human rights discourse of the substantive content of internationally protected indigenous peoples' rights so that in 2001 the Inter-American Court of Human Rights affirmed the justiciability of indigenous land and resource rights through certain traditional civil rights enshrined in the American Convention on Human Rights.¹¹

These and other examples demonstrate how the interdependence of all human rights provides a stepping-stone for pursuing the justiciability of economic and social rights. The use of the interdependence approach does not mean reducing economic and social rights to a particular aspect of civil and political rights. Rather, it assists in releasing the potential justiciability of economic, social and cultural rights themselves, the effects of which are then visible more broadly than merely in the area which served as the opening.

4. Conclusion: Some Reflections on Litigation Strategies

Just as the existence of swallows as a species of bird has now been proven, so, by analogy, it is asserted that any litigation strategy primarily aiming at 'proving' the justiciability of ESC rights will fail. Such strategies tend to sacrifice the real substance of a case by giving preference to abstract issues of principle. This does not go unnoticed by the judicial or quasi-judicial decision-maker, and is also unethical in respect to one's client who has a right to expect genuine representation of his or her best interest, instead of being used as a means in the 'strategic' pursuance of an abstract principle.

Instead, the starting-point for strategically-minded advocates of ESC rights must be that of winning the case in a way that is compatible with human rights. Proving the justiciability should be seen as a means, not as an end. When other arguments – such as those related to non-discrimination or due process – are more likely to produce results, they must receive due attention, even when this might provide the decision-maker with an alternative ground on which to base a positive result. Of course, the ESC rights justiciability argument may also be pursued, but not at the expense of other arguments likely to produce a positive result.

Another conclusion related to strategic choices is that although justiciability means quite different things on the domestic and on the international levels, strategy-conscious litigation must think about both levels from the very

¹¹ *Awás Tingni v Nicaragua*, establishing violations of Articles 21 (right to property) and 25 (right to judicial protection) of the American Convention on Human Rights.

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beginning. On the domestic level the main strategic issue often is the identification and choice of a particular procedure, a choice that may later affect the possibility of resorting to international complaints procedures – at least when the requirement of exhausting domestic remedies applies. The domestic procedure chosen must be such as to allow the substantive issue that will later – if the domestic case is not successful – form the starting-point for the international case to be raised.

Further, in pursuing ESC rights as justiciable in international complaints procedures, it is crucial to understand and address the in-built limitations of available international procedures. For instance, the European Court of Human Rights applies a doctrine of ‘a margin of appreciation’ which results in a deferential standard when drawing the line beyond which interference with a human right amounts to a violation of that right. When pursuing ESC rights through that avenue, one must be aware of the fact that the European Court may be tempted to pronounce that the margin of appreciation left by the court to national authorities is particularly wide in issues of resource allocation.¹² In order to get around this type of deference it may often be indispensable for winning a case to be able to combine the ESC rights issue with more traditional European Convention issues such as fair trial (Article 6), private and family life (Article 8) or non-discrimination (Article 14 and Protocol No. 12). Similarly, litigants taking their case to the Human Rights Committee must be aware that although the Committee does not refer to a margin of appreciation enjoyed by states¹³, it is very likely to leave any matters pertaining to the assessment of facts and evidence in the hands of domestic courts – perhaps particularly in countries where the ICCPR is part of the domestic law and the courts make reference to it.¹⁴ Consequently, it is often counterproductive to contest before the Human Rights

¹² See, for instance the Judgment of 18 January 2001 by the European Court of Human Rights in *Chapman v the United Kingdom* (Application no. 27238/95), para. 104: ‘The evaluation of the suitability of alternative accommodation will involve a consideration of, on the one hand, the particular needs of the person concerned – his or her family requirements and financial resources – and, on the other hand, the rights of the local community to environmental protection. This is a task in respect of which it is appropriate to give a wide margin of appreciation to national authorities, who are evidently better placed to make the requisite assessment.’

¹³ See, the Views of the Human Rights Committee, 26 October 1994, in *Ilmari Lämsman et al. v Finland* (Communication 511/1992), paragraph 9.4: ‘A State may understandably wish to encourage development or allow economic activity by enterprises. The scope of its freedom to do so is not to be assessed by reference to a margin of appreciation, but by reference to the obligations it has undertaken in Article 27.’

¹⁴ See, the Views of the Human Rights Committee, 30 October 1996, in *Jouni E. Lämsman et al. v Finland* (Communication 671/1995), paragraph 10.5: ‘The domestic courts considered specifically whether the proposed activities constituted a denial of Article 27 rights. The Committee is not in a position to conclude, on the evidence before it, that the impact of logging plans would be such as to amount to a denial of the authors’ rights under Article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied Article 27 of the Covenant in the light of the facts before it.’

Committee the factual assessment made by domestic courts. Rather, a litigation strategy should be built either on demonstrating that an issue of law under the ICCPR remains even after the factual assessment made by domestic courts, or that the assessment made by domestic courts was tainted by a violation of the right to a fair trial.¹⁵

Finally, advocates thinking strategically about the justiciability of ESC rights should pay due attention to the value of the Advisory Opinion by the International Court of Justice in the issue of the construction of a Wall by Israel within the Palestinian territories.¹⁶ The World Court – which is not known for any activist role in referring to ESC rights or even human rights in general – found the ICESCR applicable in relation to Israel's conduct in the Palestinian territories, referred specifically to a number of substantive ESC rights provisions in the ICESCR,¹⁷ and did not hesitate to pronounce that Israel was in breach of those provisions, notably the right to work, the right to health, the right to education and the right to an adequate standard of living.¹⁸ Hence, it was acknowledged by the most authoritative judicial body in international law that the ICESCR, and in particular the rights just mentioned, as enshrined in that Covenant, are justiciable on the level of international law.

¹⁵ In this sense, the case of *Anni Äärelä and Jouni Näkkäläjärvi v Finland* (Communication 779/1997) represents a lesson which the indigenous Sami brought to their litigation strategy. While the earlier *Länsman* cases focused solely on the Article 27 issue (which in substance was an ESC rights claim), this approach was in *Äärelä* coupled with a more traditional fair trial issue of equality of arms before the Appeal Court. That this strategy was successful in overcoming the threshold that is inherent in the Committee's approach in relation to Article 27 claims, that facts and evidence are best assessed by domestic courts, is proven by the Committee's pronouncement on the remedy, after a finding a violation of Article 14 (fair trial): 'As to the violation of Article 14, paragraph 1, arising from the process applied by the Court of Appeal in handling the brief submitted late by the Forestry Service (para. 7.4), the Committee considers that, *as the decision of the Court of Appeal was tainted by a substantive violation of fair trial provisions, the State party is under an obligation to reconsider the authors' claims.*' Views of the Human Rights Committee, 24 October 2001, paragraph 8.2 (emphasis added).

¹⁶ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2003-2004), Advisory Opinion by the International Court of Justice, 9 July 2004 (General List No. 131).

¹⁷ *Ibid.*, at para. 130: 'As regards the International Covenant on Economic, Social and Cultural Rights, that instrument includes a number of relevant provisions, namely: the right to work (Articles 6 and 7); protection and assistance accorded to the family and to children and young persons (Article 10); the right to an adequate standard of living, including adequate food, clothing and housing, and the right "to be free from hunger" (Article 11); the right to health (Article 12); the right to education (Articles 13 and 14).'

¹⁸ *Ibid.*, at para. 134: 'To sum up, the Court is of the opinion that the construction of the wall and its associated régime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights. They also impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child....'

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Swallows exist as a species of birds. Although one swallow does not make a summer, we can see enough of them in order to conclude that the summer is here and it is time to plan what to do with it.

3. Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights

Matthew Craven¹

1. Introduction

When thinking about the adjudication of economic, social and cultural (ESC) rights, two particular sets of concerns would appear to stand out. The first is associated with the general role of adjudication in the advancement of objectives underlying rights talk. How central is the possibility of adjudication to any particular claim to goods, benefits or resources? What are the potential problems associated with the translation of social claims or demands into legal rights, and thence subjecting them to an adjudicative process which will frame those claims in a particular way? What other forms of political engagement in this domain might be possible? Secondly, and assuming that adjudication retains certain marginal benefits – at least, perhaps, for the claimants – what might one expect of a court or tribunal in terms of legitimating claims relating to economic, social and cultural rights? How might courts be encouraged to set aside problems of resource availability and distribution? What are the constraints that might operate to narrow, or close off, adjudicative activity?

By and large, those engaged in one way or another with ESC rights, have tended to address themselves to the second set of concerns, but not to the first. The reason, one may suppose, has less to do with any unalloyed faith in the adjudicative process, or in any naïve belief that the enduring problems of homelessness, malnutrition, poverty or illiteracy might be eradicated by such means. Rather, it seems to be responsive to the concern that the rights debate has already been captured by an ideology that is content to narrow the possibilities of strategic action in relation to particular types of social claims and, perhaps unconsciously, to naturalise, or legitimate, the forms of deprivation to which they relate.² Advancing the possibilities of adjudication, therefore, serves at once to provide a strategic outlet for the advancement of such claims – with the expectation that any accrued benefits might actually be quite limited – whilst

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² See, for example, Statement of UN Committee on Economic, Social and Cultural Rights to the Vienna World Conference, 1993 ('despite the rhetoric, violations of civil and political rights continue to be treated as though they were far more serious, and more patently intolerable, than massive and direct denials of economic, social and cultural rights'). UN doc. E/1993/22, Annex III, at para. 5.

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seeking more broadly to reconfigure an existing orthodoxy of rights discourse in which the concerns underlying ESC rights have been assigned a limited place.³

Cast in these terms, the problem would appear to be one that is simultaneously practical and theoretical. On the one hand, the assumption instilled in the maxim *ubi ius ibi remedium* (where there is a right, there is a remedy) seems to drive advocates of ESC rights to ever increasingly complex ways of trying to demonstrate and develop the possibilities of adjudication. Finding a remedy, it would seem, is a necessary corollary of talking about rights – it simply follows from a desire for their realisation or enforcement. By the same token, the absence of institutional fora in which potential victims are able to claim ESC rights as ‘rights’ seems, in some ways, related to their evident marginalisation in wider political contexts: the absence of a remedy being much more than merely the loss of a strategic outlet for certain types of claims, and something that runs to the heart of being able to justify the validity of those claims in the first place (without a remedy there is no right). To the extent that advocates seem to have been working in a context where adjudication is not only a pragmatic or institutional outlet for certain types of claims, but also a self-referential mode of justification for those claims, the obvious response has been to undermine the certainty of any categorical conviction as to the non-justiciable nature of ESC rights, and to seek out new adjudicative avenues by which those claims may be given force.

I do not suggest that such initiatives are necessarily wrong-headed, nor that the engrained predispositions of those resistant to recognising ESC rights as fully justified claims are easy to shift. Rather, I simply want to call attention to the fact that if one is to leave aside the perplexing assumption that the availability of judicial remedies is somehow related to the legitimacy of rights claims *ab initio*, rather than, for example, something that might follow from the strength of those claims, one might be inclined to be more critical as to what those remedies might offer. If, in other words, we are to view adjudication as merely a strategic option rather than something that is innate in the language of rights, just as one might say that resort to rights discourse itself is a strategy of some sort, we should be as equally attuned to its potential limits as we are to its assumed importance. There should, at least, be some level of consciousness of how we choose to speak about rights, and how the corresponding processes of adjudication might have a less than propitious effect in terms of what one may think to be the general objectives to be achieved.

I do not intend to provide an exhaustive account of the problems associated with an invocation of the rhetoric of human rights,⁴ nor do I wish to focus upon the

³ For the view that this is, in fact, a mistaken assumption see Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University, 2003) at 190.

obvious problems or limitations associated with adjudication in a general way.⁵ I think it can be taken as read that the invocation of rights-rhetoric, whilst having certain evident advantages, also comes at a certain cost: shaping claims and identities in particular ways; promising too much, delivering too little; failing to manage conflicting interests; treating symptoms not causes; and so on. I think it can also be taken that problems of indeterminacy and judicial discretion are omnipresent, and that any faith in the functional independence of judges from the political context in which they are asked to operate is extremely hard to maintain. Indeed, there is a sense in which most people engaged with the ESC rights project are already intuitively aware of this, the endless battle being to disturb or shake out assumptions that typically inform the unwillingness of judges to deal effectively with problems of poverty, illiteracy or disempowerment, and to identify new techniques for exploiting the emancipatory potential of judicial decision-making. One may remark, in that respect, that the endeavour seems strangely at odds with itself. It is almost as if it is believed that judges and courts can be induced to act in ways largely alien to them, and that the voice of reason or the demands of justice will eventually hold sway.

Leaving aside such background concerns, the more immediate point I would like to take up is how the articulation of arguments concerning the nature of ESC rights – frequently advanced for the purpose of making them more amenable to adjudication – may actually have a disempowering effect. The sense of what I mean by this is captured by Lyotard's argument that in the context of disputes, particular idiomatic frameworks naturally serve to create a 'differend' in which parties are thereby refused access to the 'game of the just', and are no longer able to present themselves actively as 'plaintiffs' but only as passive 'victims'.⁶ This is most overtly to occur in any case in which social claims are reduced to matters of definition, such as what constitutes 'torture' or the scope of one's 'private life'. In such a context, certain types of claims are, by reason of their non-inclusion, deprived of their validity; the claimants thereby being obliged to articulate their claims outside the domain of justice as it has come to be articulated in law. When presented as a struggle over definitions, this is all perfectly evident. For Lyotard, however, the matter goes further, striking at the incongruence between the terms of personal experience and the idiomatic frames of reference within which that experience is constrained to express itself. The silencing of the victim may occur, in other words, even in contexts in which the dispute is overtly amenable to judicial determination, but in which the victim is forced to represent their claim in

⁴ For an effective critique see, David Kennedy, 'The International Human Rights Movement: Part of the Problem,' 3 E.H.R.L.R. (2001) 245 ('Kennedy, International Human Rights Movement').

⁵ See on this question, Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, 1997).

⁶ Jean François Lyotard, *The Differend: Phrases in Dispute* (University of Minnesota Press, 1988) at 1-13.

a language that either distorts or denies the substance of their claim. For present purposes, I am concerned less with definitional arguments than with those conventional idioms – or perhaps, more specifically, conceptual frameworks – that have been deployed for purposes of assisting moves towards the adjudication of ESC rights (allowing the ‘poor to claim’), may themselves create gaps or silences to which we should address our attention.

With that objective in mind, it is worth briefly reviewing the various stages through which arguments concerning ESC rights have moved. The problem at the outset was one of addressing the somewhat overextended claim that ESC rights were, in their very nature, non-justiciable rights, that they were programmatic goals, incapable of enforcement by means of adjudication. That initial claim came to be addressed in several different ways, all of which are now very familiar: (a) by recourse to an analysis of corresponding duties; (b) by reference to the principle of non-discrimination; and (c) by the articulation of the idea of a minimum core content.

2. The Typology of Obligations

At the first stage, scepticism as to the nature of ESC rights was addressed in the form of an argument that the propounded understanding was generally too narrow, that even if one was disposed to arguing that the right to housing, for example, required the distribution of governmental resources to make housing available to those who were homeless, that did not itself exhaust what the right might, or should, mean. The right to housing also meant, amongst other things, the right to the respect or protection of one’s existing home, whether from arbitrary interference on the part of governmental agencies or predatory private actors. Just as civil and political rights had been interpreted to encompass, in certain contexts, obligations of positive action, so there was nothing to suppose that ESC rights could not encompass negative obligations.

On its own, an argument that the rights to work, housing, or food, for example, are primarily constituted in the form of negative injunctions of non-interference would appear to be both counter-intuitive and counter-productive. This is surely not, it might be responded, what the drafters of the Universal Declaration of Human rights or the International Covenant on Economic, Social and Cultural Rights (ICESCR) actually meant when seeking to frame those rights, nor indeed how they are popularly understood. When one speaks about the right to housing, or health, or food, one generally has in mind the problem of need, not of actual possession. To reduce them to the latter would merely legitimate present conditions of homelessness, ill-health and malnutrition. If the cost of adjudication

were to be the de-radicalisation of ESC rights in this way – a simultaneous normalisation and subversion – would it be worthwhile?

Of course, it has rarely, if ever, been argued that ESC rights should be understood primarily, or simply, as negative injunctions.⁷ Rather, the starting-point has been, following Henry Shue,⁸ that ESC rights – like their civil and political counterparts – impose a range of obligations both positive and negative upon various actors. The most common classification, in this respect, is the tripartite one under the headings the obligation to respect, the obligation to protect and the obligation to fulfil – a classification which has now been fully embraced by the UN Committee on Economic, Social and Cultural Rights (henceforth referred to as the Committee) and is cited and recited in almost canonical fashion.⁹

The identification of such multiple obligations may be seen to have served two functions. On the one hand it usefully affirmed the ultimate structural similitude of all categories of rights by emphasising the common requirements of both ‘negative’ obligations of constraint, and ‘positive’ obligations of action in order for those rights to be meaningful. It gave expression, then, to a more integrated understanding of human rights as a singular project rather than one that was cut through by rival socialist and liberal ideologies, and gave life to the United Nations’ recurrent assertion that all rights must be viewed as indivisible, interrelated and interdependent.¹⁰ Furthermore, it undermined assertions to the effect that ESC rights were innately programmatic or non-justiciable in nature.

The second function it served was to provide a conceptual template for an analysis of the variety of claims that might be made in respect of human rights. Just as it suggested that ESC rights had ‘negative dimensions’ – demanding respect for the enjoyment of current levels of enjoyment – so also, civil and political rights could also be seen to impose positive obligations such as those required to ensure a trial is ‘fair,’ or to ensure that public agencies are acting in accordance with their public duties. The latter was undoubtedly important insofar as the recognition and enforcement of positive obligations in cases of civil and political rights – led, for example, by the judgment of the Inter-American Court of

⁷ But see Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002) at 64-7 who, whilst maintaining that duties are limited to the prevention of harm, also maintains that responsibility extends beyond mere interaction to the institutions that are productive of poverty.

⁸ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, 1980).

⁹ See, for example, General Comment No. 12 (‘The Right to Adequate Food’ (Article 11)), in which the tripartite classification is used as the primary normative structure. UN doc. E/C.12/1999/5, para. 15.

¹⁰ See, for example, Vienna Declaration and Programme of Action, para. 5, UN Doc. A/CONF.157/23 (12 July 1993).

Human Rights in the *Velásquez-Rodríguez* case,¹¹ or the European Court of Human Rights in the *Airey* case¹² – undercut the overt reluctance to think about ESC rights as being open to adjudication.

Important as these arguments might be, it has to be noted that they do not wholly answer the problem. They suggest, in the main, that there is no reason not to regard economic, social and cultural rights as giving rise to the same types of claims as those encountered by courts dealing with civil and political rights. By the same token, however, they do not deal with the obvious objection that fully realising ESC rights *does* require significant resources, and that the involvement of judicial, or quasi-judicial, supervisory bodies in their implementation would place constraints upon the liberty of governments to determine their own spending priorities and expose the political underbelly of judicial decision-making in a painfully obvious way. Such problems cannot be wished away either by pointing to the fact that these are not the only type of obligations imposed, or that civil and political rights also incur resource expenditure on a similar scale.¹³

Notwithstanding the evasiveness of the general argument, there are two further potential difficulties associated with employing Shue's typology unreflectively. The first concerns the assumed correlation between rights-claims and obligations in the analysis, and the second, the potential mutability of classification in any particular context.

2.1 *Disjunctions between Rights Claims and Obligations*

The tripartite/quadripartite typology of obligations tends to assume a neat nexus between the content of state obligations, on the one hand, and rights on the other. State obligations, in other words, are assumed to exhaust the content of the right in question and *vice versa*: where there is no obligation there is no right, where no right, no obligation. Despite the logical attractiveness of this account – informed no doubt by a broadly Hohfeldian analysis of rights discourse – it is apparent that in the field of ESC rights, such an assumption leads to curious results.

At various junctures it has been noted that the relationship between non-compliance with obligations, on the one hand, and the violation of a right on the

¹¹ Report no. 40/00, Case 10.588 *Isabela Velásquez and Francisco Velásquez*, Case 10.608 *Ronal Homero Mota et al.*, Case 10.796 *Eleodoro Polanco Arévalo*, Case 10.856 *Adolfo René and Luis Pacheco del Cid*, Case 10.921 *Nicolás Matoj et al. v Guatemala* (13 April 2000).

¹² *Airey v Ireland*, 2 EHRR 305. 1979.

¹³ See, for example, Stephen Holmes and Cass Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton & Co, 1999) at 1.

other, may be slightly strained. As Arambulo points out, in her discussion of the Utrecht meeting at which an unofficial Optional Protocol to the ICESCR was drafted by a panel of experts, the general view was maintained that ‘the term “violation” would give rise to considerable problems in the context of the typology of obligations to respect, protect and fulfil, particularly the obligations with a more programmatic character.’¹⁴ As a result, the draft spoke of individuals enjoying *locus standi* where they claim ‘to have suffered detriment as a result of an act or omission on the part of a State Party ... amounting to a non-observance of its obligations to respect, to protect or to fulfil any of the rights recognized.’ This contrasts with the original UN Committee draft (of 1994) in which individuals were deemed to have power to submit a communication where they claimed to be ‘a victim of a violation of any of the rights recognized in the Covenant.’¹⁵ How then might non-compliance with an obligation differ from the violation of a right?

There are, of course, two ways in which a dyadic relationship between rights and obligations may be thought to be incomplete: either by way of obligations extending beyond the scope of rights, or *vice versa*. In case of the former, one might envisage a case in which a State guarantees high levels of enjoyment of a particular right in the form of a non-means tested benefit but subsequently seeks to rationalise public spending by way of introducing means testing as a condition for receipt of that benefit. In theory this may be regarded as inconsistent with the obligation of progressive realisation insofar as retrogressive steps are regarded as *prima facie* incompatible with the terms of Article 2(1) of the ICESCR (*qua* General Comment No. 3).¹⁶ But it is surely to strain the idea of what the Covenant is about to suggest that a violation of the right to the benefit in question – social security, housing – has occurred if the individuals concerned retain sufficient means to enable them to acquire those goods and services independent of any governmental support. Here, one might possibly speak about the State not fulfilling its obligations in circumstances in which the right itself has not been violated. Doing so, however, suggests that the Covenant is concerned with the way in which States deal with particular issues independently of any concern as to their effect on the lives of individuals. If, furthermore, any diminution of benefits enjoyed by affluent sectors of society were to be categorically protected, one also suspects the ability of any government to target more effectively the dispossessed would be ultimately impeded.

A second, more significant, way in which the relationship between rights and obligations may appear disjunctive is the way social discourse tends to

¹⁴ Kitty Arambulo, *Strengthening the Supervision of the International Covenant: Theoretical and Procedural Aspects* (Intersentia Publishers, 1999) at 250.

¹⁵ E/C.12/1994/12. See also the 1997 version: E/CN.4/1997/105.

¹⁶ General Comment No. 3 (1990), para. . UN doc. E/C.12/1991/23, Annex III.

conceptualise violations of economic and social rights as being more extensive than the particular legal obligations assumed in relation to them.¹⁷ The existence of widespread malnutrition, poverty or disease, for example, tends to be regarded intuitively, or pre-legally, as 'violations' of ESC rights, irrespective of the fact that those conditions do not necessarily flow from acts or omissions for which the State may be held internationally responsible under the terms of the ICESCR. The obligations as articulated in Article 2(1), tied as they are to the 'maximum of available resources', and addressed to states individually, constrain one to speak about violations in this specific sense as distinct from violations that may be adduced from the very fact of poverty and destitution itself. In that respect, the ICESCR, while holding the view that certain conditions of existence are intolerable or inhumane, redefines the rights in the form of obligations in a way that excludes from view those conditions which a state may believe itself powerless to address. The poor are thereby divided, at the outset, into two groups: those who may legitimately refer to themselves as victims of a violation, and those who may not, and may be entitled merely to 'consideration' in the development of particular social programmes. This is perhaps tolerable only if one imagines that there is no permanent stratification here: that the conditions of deprivation are both capable of systematic remedy, and that they do not concretise themselves into permanent social forms. But again, perhaps even that is too much to expect.

2.2 The Mutability of Classification

A second disadvantage of the reliance upon the tripartite or quadripartite typology of obligations is that it appears to be only coherent in the context of a static temporal frame in which pre-existent entitlements are naturalised and claims to particular resources radicalised. It is often pointed out that the belief that the right to a fair trial merely involves state restraint – absence of interference – is only credible if one presumes the existence of a developed judicial system and its correlative institutional matrix of courts, judges, interpreters and legal advisors. By the same token, the belief that the fact of homelessness or poverty invokes an obligation to provide housing or food, and is therefore subject only to progressive achievement, obscures the possibility of any responsibility for the structures and processes that were themselves productive of those conditions.¹⁸ The point seems to be that any particular circumstance of deprivation may be described either as falling within the scope of the obligation to respect, or as a breach of the

¹⁷ Another way of putting this is to speak of rights 'inside' and 'outside' a legal order, see Kennedy, *International Human Rights Movement*, *supra*, at 306-8.

¹⁸ *Cf.* Pogge, *supra*, at 64.

obligation to fulfil, depending upon how broadly one is prepared to construe the terms of responsibility, and how far down the chain of causality one is prepared to enquire. The condition of deprivation may, furthermore, move from one point to another depending upon the moment at which one is examining the problem: what appears at one moment to be a failure in the obligation to respect or protect (for example, in a case of forced eviction), may later present itself as a question of provision (how to house the homeless). Precisely such a shift appeared to take place in the *Grootboom* case¹⁹ when, having been evicted from their original settlement pursuant to a court order, the community were treated as claiming a right to be housed and thereby set alongside all other claimants on state resources.

There is a very real danger, in such circumstances, that when an issue comes to the attention of a court or tribunal the conditions giving rise to the harm in question will be naturalised within a background environment with the effect that the problem will always be presented as one of distribution, rather than one of deprivation. Unless the fact of deprivation is tangibly linked to an act of a public authority (and not, by that token, merely an omission) the problem will more often than not be regarded as distributional. The tripartite categorisation tends to encourage this: where deprivation stems from an act of a public official, it gives rise to an immediate claim to restitution (under the duty to respect); where no public official is involved, the claim may be substantiated only within a particular resource framework (the duty to fulfil). It constructs a world, once again, in which the impoverished or destitute are divided into two categories: the deserving and the undeserving; the victims and the potential victims; those entitled to restitution and those entitled merely to be 'taken into consideration' in public policy-making. The terms of this division, furthermore, are elaborated less by reference to aggregate social cost and more by reference to the public or private character of the deprivation.

The difficulty that has to be addressed, but which is merely reinforced by the typology, is the extent to which the current structures of entitlement within societies may themselves be productive of destitution. As Amartya Sen has consistently argued, poverty and destitution are largely a function of an individual's lack of command over resources (his or her 'capabilities'), rather than being natural 'Malthusian' phenomena, and in that sense the conditions underpinning legal entitlement (exchange) may be directly implicated. With Jean Drèze, Sen has pointed out for example that:

The point is not so much that there is no law against dying of hunger. That is, of course, true and obvious. It is more that the legally guaranteed rights of

¹⁹ See, e.g., *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

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ownership, exchange and transaction delineate economic systems that can go hand in hand with some people failing to acquire enough food for survival.²⁰

To the extent, then, that the typology of obligations leaves untouched the basic question as to whether society is structured in a way that allows the continued production and reproduction of impoverishment, it is surely rather limited. It may be the case that such considerations cannot be effectively interrogated in the context of adjudication, but at least we need to be clear about the basis upon which the endeavour is proceeding. Without some broader engagement with the structural causes of poverty that permeate the private realm of exchange, an emphasis upon public law remedies will do little other than merely legitimate existing distributions of wealth, status and power throughout society, and render more difficult any action which seeks to reconfigure them.

3. Non-Discrimination

The second form of argument has flowed along similar lines – that even if ESC rights did involve questions of resource distribution, there was nevertheless a context in which courts might rightly involve themselves – namely where those distributional decisions constituted discrimination contrary to Article 2(2) of the ICESCR. In the hands of the UN Committee this has become quite an important exception to the general principle of progressive development. As the Committee comments in its General Comment No. 13:

The prohibition against discrimination enshrined in Article 2(2) of the Covenant is subject to neither progressive realisation nor the availability of resources; it applies fully and immediately ... and encompasses all internationally prohibited grounds of discrimination.²¹

At face value, there are both textual and policy-level arguments in favour of this position. At a textual level, Article 2(2) of the Covenant is not, itself, rendered in terms of progressive implementation; rather it requires States to ‘guarantee’ the enjoyment of rights without discrimination. At a policy level the arguments are obvious: there is little reason to suppose, for example, that, in providing benefits to the disadvantaged, a State should be entitled to discriminate to the effect, for example, of providing those benefits only to men, or members of particular ethnic groups.

The general problems associated with the principle of non-discrimination are well known: its characterisation of all claims of disadvantage in terms of deviations

²⁰ Jean Drèze and Amartya Sen, *Hunger and Public Action* (Clarendon Press, 1989) at 20.

²¹ General Comment No. 13, UN doc. E/C.12/1999/10, para. 31.

from a standard norm (the experience of the heterosexual white male perhaps), its conflation of all types of disadvantage within a singular framework (gender inequality being structurally the *same* as racial inequality), its apparent focus upon process rather than outcome (formal not substantive equality), to name but a few. Apart from noting that the extent to which non-discrimination may be seen as a beneficial tool in the armoury of ESC advocates will be dependent upon how amenable the court or tribunal in question is to engage with broader, rather than narrower, conceptions of the principle, another more specific concern stands out.

In a general sense, it is evident that ESC rights are, as a whole, concerned with the promotion of equality. It is hard not to think of them in terms of redistributive activities of one kind or another (welfare provision, social insurance, etc.), and one may suppose that the rights to food, housing, or health, for example, find their rationale in the elimination of structural conditions that serve to deprive people of such entitlements. Indeed, it is precisely for this reason that the principle of non-discrimination seems to have so much potential: once the idea of non-discrimination is separated from a particular field of rights – as, for example, in the form of Article 26 of the ICCPR – and then coupled not only with an open-ended concept of ‘suspect criteria’, but also with a notion of indirect (effects based) discrimination, it is hard to differentiate such an agenda from that associated with the promotion of ESC rights as a whole. Virtually any instance of deprivation may, once the causal patterns are laid out, be articulated in terms of discrimination, barring, of course, the possibility that the entire population is in the same position.

That non-discrimination is capable of occupying the entire domain of ESC rights, leaves the argument that it represents an *exception* to the more general policy of progressive realisation hard to sustain. It either suggests that there is no room for the latter, all legitimate cases of disadvantage being a product of either direct or indirect discrimination, or that non-discrimination must be understood more narrowly, perhaps restricted to direct, formal discrimination in which overt motive is significant. In case of the former, there is the ever present danger that the concept of non-discrimination might ultimately be used merely as a more ideologically-neutered surrogate for talking about ESC rights directly. If it is thought to serve the same ends, the temptation may well be there to refuse to speak directly of ESC rights in their own terms, but only of housing, education and health as domains within which the idea of non-discrimination might play a role. Leaving aside the obvious concern that this may leave a little too much to depend upon how the courts concerned construe the idea of non-discrimination, it would mean giving up on the idea that ESC rights form some form of substantive entitlement. Any claim to a particular entitlement would be relativised by reference to the position of others living within the same social framework. Furthermore, if that social framework were to be that pertaining within the

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boundaries of each State party, the possibility of their being utilised to challenge international, rather than merely national, structures of deprivation, would largely disappear.

In case of the second option – which one may suppose broadly characterises the Committee's approach to the question – the prohibition of non-discrimination would have to be, in some respects, more narrowly conceived. One way, of course, might be to suggest that it is concerned with formal, public, forms of discrimination – discrimination in the letter of the law – rather than with substantive equivalents. If so, however, that would obviously leave open the problems of both context and outcome. It would preclude speaking about systemic, effects-based, discrimination, and would open up the possibility that proactive measures might be eroded.

To give an example of the potential problems, one finds in the UN Committee's General Comment No. 12 the bold statement that:

[Any] discrimination in access to food, as well as to means and entitlements for its procurement, on the grounds [identified in Article 2(2) of the Covenant] ... constitutes a violation of the Covenant.

One example of this might be an overt policy of discrimination against a particular ethnic group in the provision of humanitarian food aid, or the restriction of supply to a particular region. But how much further might it go? Could one argue, for example, that the fact that there is a higher incidence of malnutrition, or deaths associated with poverty, amongst women, is the product of indirect forms of discrimination associated with patriarchal patterns of exchange or inheritance? If the answer is 'yes', one suspects there would be few forms of deprivation that would not constitute a violation of the Covenant. Not only could one barely argue that the principle is thereby 'exceptional,' but the prospect of any serious engagement with the problem of resources would be lost. If the answer is 'no', one then has to defend a particularly narrow idea of discrimination, obliterating any real understanding of how prejudicial attitudes may disseminate themselves through society or emerge through the application of neutral rules. With that in mind, the deployment of this particular argument in the context of adjudication may well be ultimately self-defeating, one either damages the idea of ESC rights as justified substantive claims, or the idea of non-discrimination as a means of interrogating structural impediments that serve to disempower or impoverish. The two lines of thought – non-discrimination; substantive rights – are neither identical nor separable.

4. Minimum Content (or Obligation) or Minimum Threshold

The third form of argument – the one which is probably most contentious – concerns the articulation of a minimum core content, or minimum threshold. To some extent, this idea has always been dogged by a certain lack of clarity: are we talking about minimum core obligations, or the minimum content of rights? Does this relate to what might be called a ‘justiciable core’, to a universal minimum standard, or perhaps a set of national-specific benchmarks? Or is it something else entirely? However understood, it seems that one particular feature stands out when one is thinking about the concept from the perspective of adjudication – namely the possibility of it providing some basis for a claim in circumstances which otherwise would be characterised as being qualified by the existence of resources.

Of the various notions associated with this concept, three in particular stand out. The first is the idea of a minimum threshold: that every right contains within it a core element associated with survival which should be guaranteed to all in every circumstance. The second is the idea of a minimum core obligation which broadly describes those actions and omissions which may reasonably be required of a State in any circumstance, and hence limited to those actions and omissions that are not contingent upon resource availability. The third is the idea of a minimum core content of rights, frequently associated with what is termed their *raison d’être*, and which is articulated as being incapable of limitation without violation. Of these, only the first appears to be analytically distinct from other conceptual mappings of the terrain – for example, adding something new rather than merely reorganising the existing terms of debate – and it is this idea which appears to have been endorsed by the UN Committee.

In essence, the Committee’s notion of a minimum core content embraces a relatively simple idea: that the minimum core content of each right represents a quantitative or qualitative threshold of enjoyment. The minimum core content, for example, of the right to food is a right to be free from hunger; that of the right to housing is a right to have a roof over one’s head; that of the right to education is the right to have effective access to primary education, and so on. As expressed by the UN Committee in 1990, despite the generally progressive overtones of article 2(1) of the Covenant, there existed a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.’²² Apart from the rather curious way in which this appeared to distinguish between minimal and less than minimal obligations, the obvious difficulty evident to the Committee was that even this basic minimum might be asking too much in certain cases. There were two obvious ways round this. One was to contextualise

²² General Comment No. 3, para. 10 (1990).

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the minimum by insisting upon the development of national benchmarks to which States might commit themselves. The other was to reintroduce some consideration for resource availability.

In regards to the first option, the very justification for a minimum core content would appear to be its appeal to immutable standards. This would be immediately undercut, however, by an insistence that the standards be national rather than international, and the obligation in relation to them largely procedural, that is, to articulate the standards and then police them. Too much would be taken away from the Committee itself. This, almost by default, recommended the second solution to the Committee. Rather than run with the idea of a minimum level of enjoyment, the UN Committee has therefore started to talk about minimum core obligations in terms of resource prioritisation and evidentiary burdens.²³ Thus, in General Comment No. 12, the Committee suggests that ‘violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger.’²⁴ It goes on to say, however, that:

[S]hould a State party argue that resource constraints make it impossible to provide access to food to those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.²⁵

The minimum core content, here, becomes merely the point at which the burden of proof is shifted; it is no longer a resource independent evaluation, but one which continues to be negotiated. Significantly, however, resource constraints become a matter of excuse, rather than conditions precluding wrongfulness. The question this obviously prompts is: how does this actually differ from what is normally understood by the terms of Article 2(1)? Is one to suppose, thereby, that no violation of rights may be presumed in relation to non-core elements – for example, perhaps, when one considers the condition of housing or the quality of food – unless one is able to demonstrate the availability of resources to ameliorate those conditions? Who might have ready access to the range of information required for such purposes? The sense of what is understood as falling within the minimum core content becomes, as a consequence, radically important: it is only in those circumstances in which the deprived may regard themselves as plaintiffs with a voice rather than those whose claim has yet to be validated. Only

²³ This was arguably always evident in the way in which the idea was originally expressed. See the discussion in Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford University Press, 1995) at 141-144.

²⁴ General Comment No. 12, UN Doc. E/C.12/1999/5, para. 17 (1999).

²⁵ *Ibid.*

in those circumstances would an instance of deprivation qualify in its own right as a violation of a right without some further analysis of whether resources had been adequately distributed.

That the idea of a minimum core content may have its attractions in the context of adjudication is clear. It seems to provide a way of displacing, even if only momentarily, the problem of resources in dealing with instances of vulnerability or destitution. It seems to allow, in the context of possible adjudication, for a basic level of judicial control over spending priorities, even if one were to accede to a broad measure of governmental discretion. At the same time, it has its dangers. Might it not foster the normalisation of disadvantage beyond the level of subsistence? Does it not encourage selective appraisal – focusing attention on poorer, rather than wealthier countries? Does it not, furthermore, push activism in the direction of greatest resistance, towards seeking local remedies for problems that are far from local? What prospect is there for interrogating global disparities of wealth and resource distribution before the bench of a national judge?

5. By Way of Conclusion: A Change of Perspective

In a context in which we are concerned with the possibility of litigating ESC rights, it would seem appropriate to consider briefly what seems to lie behind such an endeavour. At one level, and most obviously, we are speaking about an attempt to realise ESC rights – realise them in the sense of ‘making them real’ for people, bringing them into fruition by way of activating courts to intercede in decision-making in that domain. In some senses, it is evident that courts are already fully involved in the field of ESC rights; decisions concerning housing, education, health, labour or cultural property are made on a daily basis, as they are in respect to almost every other domain of social life. The argument, therefore, is not one of encouraging courts to tread in areas of life in which they are not already involved, but of encouraging them to deal with those areas of life in a particular way, and more specifically, by insisting upon moulding decision-making by reference to individual, or collective, rights.

The main argument, of course, is not that courts are unable to deal with particular subject-matters, but that they should not involve themselves in distributive decision-making: that function is one assigned to governments or legislatures. If one sets aside, for one moment, the character of resources in question when matters of property, contract or tort come before courts, it is immediately apparent that there is no obvious bar on the involvement of courts in distributional activities. They are constantly assigning property to one person or another, distributing debt or liabilities between litigants, deciding where loss

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should lie, and much of that activity would extend to property overtly of a public nature, such as licences, concessions, and so on.²⁶ That one is encouraged to believe that such activity is neither distributional nor public (that is 'political') necessarily pushes one in the direction of believing that destitution is similarly neither public nor a consequence of existing structures of distribution. The point would be not so much whether adjudicating upon ESC rights would radically alter the political or distributive nature of their activities, but rather whether the type of politics it would bring into play is actually consistent with the emancipatory goals we have in mind.

²⁶ See Charles Reich, 'The New Property', 73 *Yale Law Review* (1964) at 733, 785.

4. The Crisis of ESC Rights and Strategies for Addressing It

Bruce Porter¹

1. Introduction

As practitioners working in economic, social and cultural (ESC) rights we are frequently invited to workshops and panels to provide evidence that ESC rights are justiciable; to encourage governments and international institutions to improve adjudication and enforcement of ESC rights; to encourage lawyers and human rights advocates to do more work in this area; to inspire various constituencies to claim ESC rights; or to encourage judges to give ESC rights a fair hearing. In these contexts, we are accustomed to focusing on the positive developments in ESC rights practice. We explain that ESC rights have long been recognised as equal in importance and status to civil and political rights, that ESC jurisprudence has developed exponentially in the last decade and that ESC rights are now recognised as justiciable in domestic, regional and international fora. We provide training on the legal framework that has been developed by the Committee on Economic, Social and Cultural Rights (CESCR) and in domestic jurisprudence to show that significant progress is being made in a long neglected area of human rights practice.

Preoccupied with defending ESC rights litigation in response to simplistic attacks on the very idea of using courts, we have rarely had the opportunity to reflect together on the more difficult questions that arise from our work and to allow our emerging experience to generate new understandings and collaborative approaches. At this workshop, the first of its kind, at least for me, we have been invited to engage in a more circumspect reflection on where we have come from and where we are heading, on the obstacles we face, and strategies for addressing them. This kind of collaborative reflection on the nature of our practice is long overdue in a field that has largely been defined by a kind of siege mentality. Among ourselves, at least, we can temporarily set aside the pragmatic optimism and defensive solidarity to discuss some of the issues that may be a greater challenge to consensus.

Many of the obstacles we confront in ESC rights advocacy, sometimes identified as reasons to question its value, are common to human rights practice generally.

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All forms of human rights practice have faced judicial bias, timidity or incompetence, absence of the rule of law, misplaced assertions of domestic or legislative sovereignty, barriers to access to justice, inadequate legal and constitutional provisions, and problems in fashioning effective remedies. All human rights practitioners must address concerns about the problematic relationship between legal discourse and social movements. These are challenges which must be addressed in specific contexts, but do not constitute serious challenges to the legitimacy of the enterprise of ESC rights litigation.

There are also predictable challenges associated with a nascent practice in a new area of human rights. These too are not unique to ESC rights. Like others working in new areas of rights practice, we take novel claims forward, even when institutional capacity may be lacking, in the hope that such capacity will emerge in response to new claims. We advance new types of legal claims using old legal constructs. There is invariably a gap between the existing framework of law and the nature of the claims we are advancing, but these are the kinds of challenges one expects in a new area of human rights practice. The disconnect between dominant legal frameworks and ESC rights claims is a constant challenge, and is often the basis for our most significant losses in courts. But this should generally be seen as a challenge to overcome in a new and evolving area of legal practice, not as a challenge to the validity of the enterprise in which we are engaged.

2. The Crisis in ESC Rights

Beyond the challenges of human rights practice in general, and of new fields of practice in particular, we are confronting, in ESC rights practice, a more serious challenge, more in the order of what I would call a foundational 'crisis'. While a disconnect between the legal framework in which we advance ESC rights claims and the nature of the claims themselves may be understandable in light of the relative novelty of ESC rights practice, what is more troubling is the absence of shared methodology or commitment to challenging this disconnect. A fully elaborated legal framework is certainly not the pre-condition of ESC rights practice. It is better to allow such a framework to emerge from the practice of rights itself rather than attempting to work it out in advance of such claims. But one would expect ESC rights practice to be founded upon a shared commitment to the possibility and the value of an adequate legal framework for these rights to be claimed and adjudicated. Instead, what we see in ESC rights jurisprudence and practice is a perpetual uncertainty about the legitimacy of such a framework and a chronic ambivalence about the value of asserting ESC rights advocacy as a form of legal practice. The project of elaborating an over-arching framework for the adjudication of ESC rights claims is too often marginal, tentative and incoherent.

The fact that ESC rights is in a state of crisis has been evidenced in recent discussions at the Open Ended Working Group mandated by the UN Commission on Human Rights to consider options for the elaboration of an Optional Protocol to the ICESCR. Rather than proceeding on the assumption that at the core of ESC rights, as with all rights, is a notion of individual dignity and citizenship which relies, in part, on rights holders having access to adjudication of rights, discussions about claiming ESC rights seem to begin from an entirely different premise. The value of rights claiming is a question rather than an assumption. It is seen by many states as being dependent on identifying components of ESC rights, by way of predefined legal frameworks, which may properly be the subject of claims and adjudication. It is difficult to answer questions about the value of a complaints procedure raised in this context because the value of participation of rights claimers, the hearing of claims and the adjudication and enforcement of rights is more of a presupposition of human rights practice than something which can be justified or proven. It reminds me of a recent hearing before a human rights tribunal into alleged discrimination against a woman on social assistance whom I had been representing. When the claimant became ill, the lawyer for another party asserted that 'We don't need to hear from her'. It was difficult to come up with an answer to a question which is so close to the heart of the entire exercise.

As practitioners, however, we too have ambivalence about the value of a legal framework for ESC rights. We share a sense that we are entering foreign territory when we litigate ESC rights in court, where we invariably face a preliminary challenge about the legitimacy of the legal project in which we are engaged, not only from the court and from opposing parties, but also from allies in social movements: 'Why, we are asked, would you rely on judges and the legal discourse of courtrooms to resolve critical issues of social and economic justice? These are the product of historical social movements, not of legal argument. That is where you should be working.' On some occasions we defiantly throw the question back at the challenger: 'Why shouldn't we be in courts? ESC rights are equal in status to civil and political rights and our clients are equally entitled to adjudication and remedies of violations of their rights. Move over and make room for us.' At other times, however, we respond much more apologetically, as mere visitors to the courtroom. 'We recognise that the primary locus for claiming ESC rights is outside of courts, in social movements and historical struggles. Where the law can be of instrumental value we help clients use it to pursue particular ends, but we have no illusions about the law providing an all-encompassing framework for ESC rights.'

There is good reason for some healthy scepticism about the role of law and courts in ESC rights practice, of course. We have all had the experience of seeing claimants sitting voiceless in court, while lawyers and judges debate their fate,

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using concepts and terms which have little resonance with their lived experiences. We see how claimants often must relinquish their voice at the critical moment at which their claim receives a hearing, so that lawyers and judges may control the dialogue in which dignity and security are defined and what constitutes a violation of a right is decided. And we also see how this silencing and displacement of the act of claiming rights often distorts the outcome of adjudication, so that the social realities and perspectives of rights claiming constituencies are displaced by judicial deference to the assumed reasonableness of the decision-making apparatus of the state or the market. This structural displacement of the claimant from the interpretation of rights, which often seems to be the precondition of adjudication of legal rights claims, is at the heart of our ambivalence about the project of ESC rights as a legal practice.

When I suggest that the chronic ambivalence about the legal project within ESC rights advocacy constitutes a 'crisis', I am not, therefore, suggesting that our misgivings about the problems of rights claiming in a judicial context are misguided or that we ought to ignore them in order to claim incremental benefits from legal practice. On the contrary, I believe that ESC rights practice, and the legal frameworks that are proposed for ESC rights adjudication, ought to give central place to these concerns and to ensure that the active, rights claiming constituencies and the historical struggles that inform social rights values are not displaced from the legal analysis. Concerns about the centrality of the rights claim are particularly important in ESC rights practice because so much ESC rights jurisprudence, particularly at the CESC, has been developed in the absence of claimants and adjudication. There has, as a result, been a tendency to develop and rely on legal frameworks that seek out a foundation for adjudication *without* the claimant's voice, free of subjective values and historical context identifying categories of state obligations and violations of the rights which do not require reference to unique situations of particular claimants or constituencies. Now that we have an emerging practice of ESC rights claiming, there is an opportunity to enhance our understanding of legal frameworks through the central act of claiming rights. This will mean allowing history and social context to become central to the legal framework, rather than continuing to try to read it out.

I am drawn, by way of analogy, to the use of the term 'crisis' by the German philosopher Edmund Husserl in his last work, *The Crisis of the European Sciences*.² In that work, Husserl attempted to define and address what he and others saw as a crisis created by the gulf between two increasingly irreconcilable paradigms of science and knowledge in Europe in the 1930s. On the one hand, there was a

² Edmund Husserl, *The Crisis of European Sciences and Transcendental Phenomenology* (translated by D. Carr) Northwestern University Press, 1970. (Originally published in German in 1937.)

more traditional notion of absolute or universal truth that had been discredited for having ignored the subjective and historical nature of knowledge and scientific practice. On the other hand, were assertions that subjectivism and historical relativity made the very idea of objective knowledge illusory. The way forward, in Husserl's view, was a more rigorous understanding of the 'practice' of knowing: how human beings as subjects collaboratively create the possibility of knowledge through an active relationship with the material world. It seems to me that we are in need of a similar grounding of the conceptual basis for ESC rights in a more rigorous understanding of ESC rights as 'practice', as a collaborative project linking social and economic policy to human rights norms and values, grounded in the act of rights claiming, rather than in predefined legal constructs.

ESC rights practice brings to the fore methodological issues that may be more hidden in other forms of human rights practice. Subjective values and historical relativism are certainly components of civil and political rights as well, but ESC rights often demand more rigorous understanding of rights as 'relational', tied to collaborative historical action, linked to the assertion of social values and collective aspirations, and embedded in material aspects of life. ESC rights thus place at the centre of the legal project the question of how to ground objectivity and adjudication in areas of social life in which collaborative action, social and historical context, and material and social wellbeing are central. They constantly challenge us to reconcile the notion of objective adjudication with the subjective aspects of rights claiming as a form of historical agency.

Just as Husserl and others in the mid-war period struggled with the legitimacy of science as a project or collective accomplishment, capable of recognising its subjective and historical aspects without entirely abandoning the notion of objective knowledge, the human rights movement is challenged, in dealing with ESC rights claims, to place the subjective act of claiming rights within a legal framework for adjudicating them. Confronted with the effects of globalisation and historic assaults on the role of the state in safeguarding social values against the effects of market forces, we seek out a normative framework of legal rights in the field of social and economic life as a collaborative humanitarian project which affirms, rather than subverts, historical agency. We worry, however, that if we frame ESC rights in traditional legal terms, we will reinforce a discourse of rights that is hostile to the subjective voice and historical projects of the constituencies we represent. We resist the idea of forcing the experience of rights claimants into predefined legal categories or conceptual frameworks that may disempower claimants as active agents of historical change.

At the same time, however, we have gravitated to social rights practice in response to a critical need for a framework of values or norms applicable to social and economic policy and decision-making. That need is not met by simply affirming

the role of historical actors and social movements in the struggle for social justice. It raises a question of a different order. It demands a more rigorous consideration of whether, in addition to political struggles and social movements, it is possible for a framework of substantive rights governing social and economic life, informed by but not defined by political movements, to emerge from new forms of rights practice. It raises the possibility of new understandings of law in relation to social citizenship and democratic governance.

3. The Misguided Search for Universal, Transcendental Components of ESC Rights

While it has been affirmed in documents such as the Maastricht Guidelines³ that not only ESC rights but also civil and political rights, are progressively realised and resource-dependent, ESC rights jurisprudence, in seeking out a basis for objective adjudication of claims and violations modelled on civil and political rights, has tended to seek conformity with a more rigid, ahistorical model of legal rights. Since explicit acknowledgement of progressive realisation is unique to the ICESCR among human rights treaties, it has been assumed that legal enforcement of ESC rights may rely on identifying those components which are immune from progressive realisation. The project of creating a legal framework for ESC rights has thus been confused with a quest for ahistorical universals and absolutes. The CESCR, the Maastricht group and others have sought to identify components of ESC rights in which universal standards can be assessed independently of historical realisation, individual circumstances, subjective values of claimants, resources available to the state and competing rights of other groups.

ESC rights jurisprudence has thus associated legal enforceability with a project of disaggregating rights into components, analysing 'obligations' of states independent of particular relationships with rights claiming constituencies or contextual adjudication of particular claims. Rather than affirming the general principle that claims need to be heard and adjudicated addressing all aspects of ESC rights, just as adjudication ranges across all aspects of civil and political rights, the general comments of the CESCR sometimes suggest that only 'certain components' of ESC rights may be legally enforceable.⁴

³ See, for example, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, Maastricht, January 22-26, 1997, para. 8, in which it is stated that civil and political rights are also subject to progressive realisation.

⁴ See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) ('General Comment No. 14') at para. 1 and f.n. 1, referring to 'certain components' of the right to health with are legally enforceable, and giving the example of the right to non-discrimination in access to health services,

The notion of ‘minimum core’ content of ESC rights is often linked to this enterprise of extracting absolutes from the content of ESC rights. Minimum core is posited as a quantifiable or objectively ascertainable standard that can be applied universally, either as a basis for a *prima facie* finding of a violation⁵, or more radically, as a standard for identifying violations of ESC rights that is entirely independent of historical development, unique circumstances or available resources.⁶ The concept of a universal minimum, which has little resonance in civil and political rights jurisprudence, has thus risen to the fore in ESC rights jurisprudence in response to a concern that historical relativity is a particular ‘problem’ for a legal rights framework in ESC rights. It is called forth in debates about the justiciability of ESC rights to refute arguments that ESC rights are too subjective, vague, value laden and historically relative to be subject to objective adjudication. This defensiveness about progressive realisation has come to dominate the thinking of the CESCR even in its promotional role, so that in its more recent general comments it suggests that the Covenant ought to be incorporated into domestic law, so that the minimum core content of the rights will be enforceable by courts.⁷

Attempts to ground a legal framework for ESC rights in non-historical, universal minimum standards, however, can only increase the discordance between the legal framework of ESC rights and rights practice linked with constituency-based advocacy and democratic values. The notion of transcendent universal components of ESC rights, independent of progressive realisation may have provided some reassurance that at least some components of ESC rights conform to traditional ideas of rights as universally enforceable, objective rules, but this approach now tends to deprive ESC rights jurisprudence of the benefits of a

goods and facilities as an enforceable component. This seems an extremely restricted notion of a legal framework for the enforcement of ESC rights.

⁵ Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties’ obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), (‘General Comment No. 3’), at para. 10.

⁶ While General Comment No. 3 does not suggest that minimum core is independent of available resources, later General Comments do. See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health*, (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) para. 47. The Maastricht Guidelines also state that ‘minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties.’ (*supra*, at para. 9)

⁷ See, for example, Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999) (‘General Comment No. 12’) at para. 34. ‘The incorporation in the domestic legal order of international instruments recognizing the right to food, or recognition of their applicability, can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases. Courts would then be empowered to adjudicate violations of the core content of the right to food by direct reference to obligations under the Covenant.’ Also, in General Comment 14, *supra*, para. 60: ‘Incorporation enables courts to adjudicate violations of the right to health, or at least its core obligations, by direct reference to the Covenant.’

more modern conception of human rights, not as transcendent rules but rather as historically grounded values linked with active social citizenship and necessary to participatory governance. Paradoxically, civil and political rights jurisprudence, because it has been more grounded in rights practice, is now often friendlier to the historical and subjective aspects of rights claiming than the rigid notions of limited justiciability that appear in some ESC rights jurisprudence. It is well established in civil and political rights jurisprudence that rights must be adjudicated in historical contexts and must incorporate an understanding of the subjective component of dignity related interests. There is an emerging understanding that the dialectical tension between subjective claiming and impartial adjudication of claims is central to human rights as both social movements and law. The fact that human rights are both a historically constituted value system and an emerging form of legal practice is no longer seen as a contradiction or a problem, but rather as the essence of the rule of law defined by human rights as a collaborative, ongoing accomplishment.

In its early Charter jurisprudence, the Supreme Court of Canada seemed to affirm this modern view of rights when it rejected what it labelled 'rigid formalism' in favour of a 'flexible and nuanced' framework that permits historical evolution of understanding of constitutional rights. The court has recognised that the analysis of the dignity interest in equality claims must adopt the perspective of the claimant, and that this analysis must have both subjective and objective components, incorporating both the individual circumstances and traits of the claimant and the history of the constituency to which the rights claimant belongs.⁸ It is well established that courts will consider both positive and negative obligations associated with the right to equality, and will determine positive measures in light of available resources.⁹ Thus, within the evolving understanding of the idea of justiciability as it is understood in the contexts of human rights more broadly, there is simply no need to attempt to identify components of rights which are independent of historical relativity or subjective values. Far from restricting adjudication to components of rights that are free of any historical relativity or subjective dimensions, modern adjudication of substantive rights claims focuses on these dimensions as critical to a proper understanding and application of human rights norms and values.

Within this framework advocates in Canada have not generally found it helpful in advancing the justiciability of ESC rights in litigation to suggest that adjudication of these rights is in any way premised on an ability to define their minimum core content. It seems entirely counter-productive as a litigation strategy, in fact, to

⁸ *Law v Canada* (Minister of Employment and Immigration) [1999] 1 S.C.R. 497 at paras. 3, 59.

⁹ See, for example, *Eldridge v British Columbia* (Attorney General), [1997] 3 S.C.R. 624.

suggest to a court that it must first determine what everyone is entitled to, in all contexts and at all times, in order to determine whether an individual circumstance that is before the court constitutes a violation of a right. A requirement that universally applicable entitlements must be determined in advance of the adjudication of particular claims places an insuperable obstacle upon claimants of ESC rights and greatly favours respondents. It is a common strategy of respondents, therefore, to argue that courts must resolve the universal questions in order to adjudicate the particular, and on this basis to submit that courts are not competent to adjudicate ESC rights claims. In claims related to the right to an adequate standard of living in Canada, for example, governments have routinely argued that the inability of experts to agree on a clearly defined poverty line of universal application is proof that courts should not wade into this area of policy.¹⁰ Similarly, in cases on the right to health under the Canadian Charter, governments have argued that adjudicating such a right would require courts to ‘micromanage’ the healthcare system by determining in precise detail which health services are constitutionally required and in what circumstances – a task which is beyond the competence and resources of a single court to accomplish.¹¹ We argue on behalf of claimants, however, that there is no need for courts to define what is constitutionally required in every circumstance in order to adjudicate a particular claim. The cases that have been before the courts have been clear enough for the courts to make findings in those particular circumstances. From these findings emerge principles which it is up to governments to apply in the development of policies of more universal application. The ‘value added’ of adjudication is not to assign to the court the task of designing universal minimal entitlements but rather to review particular claims in light of human rights values and principles. The values and principles which develop through the hearing of claims then feeds back into governmental decision-making and policy development. Courts do not need to rely on a standard that applies universally in relation to poverty or healthcare any more than they need to rely on universal

¹⁰ This has always been a primary strategy of government lawyers when they have cross examined me in cases in which I have filed an expert affidavit on poverty as a ground of discrimination or on the inadequacy of government responses to poverty or homelessness. I am almost always asked in cross-examination to agree that there is no universally agreed upon measure of what constitutes poverty or the minimal requirements of an adequate income. Lawyers for respondents to ESC rights claims, of course, have a strategic interest in shifting the focus from qualitative and contextual aspects of compelling cases of violation of dignity and security to the more abstract questions of absolute statistical measures and indicators. The effect of the ‘universalising’ discourse is to displace the focus on what has occurred to a particular claimant or constituency, in a particular context, which no expert would have difficulty agreeing to be a violation of dignity and human rights.

¹¹ These arguments have been advanced by governments in cases such as *Eldridge v British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, [2004] 3 S.C.R. 657; and *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35.

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minimum entitlements in relation to accommodation of disability, freedom of association, liberty, or other rights. Rights adjudication must begin with the individual context of each claim and the underlying interests that are meant to be protected, not with an overly expansive attempt to develop minimum standards of universal application.

Ironically, restricting the justiciable component of ESC rights to minimum core aspects of the right, advanced as a strategy to avoid questions of allocation of resources and competing demands, is more likely, rather than less likely, to push courts beyond their perceived competence. Courts and other adjudicative bodies correctly perceive their competence within a framework of adjudication: of hearing and adjudicating rights claims in particular social and historical contexts; reviewing decisions and policy against the rights of a particular claimant or constituency that is before it. They shy away from determining issues in the abstract, such as the minimum entitlements which would apply to others who are not party to a claim. Effective ESC rights advocacy appeals to this area of judicial competence by promoting the idea of adjudication of ESC rights claims as contextual and oriented to understanding the relationship between a rights claiming constituency and the state in the context of social, historical and economic forces or patterns.

By contrast, a minimum core approach to justiciability tends to divorce rights claims from individual circumstances and unique interests that may be at stake. It shifts the focus of a claim from the particular relationship between a rights claiming community and government to a more abstract debate about quantifiable universal entitlements and minimum obligations of governments to all citizens, in which a court is understandably reluctant to engage. The South African Constitutional Court's suggestion that determining minimum core was beyond that court's competence in adjudicating the right to housing in the *Grootboom* case or the right to health in the *Treatment Action Campaign (TAC)*,¹² and its greater comfort with a contextualised reasonableness standard applied to progressive realisation is representative of a healthy judicial resistance to the idea of adjudication based on a minimum core content of ESC rights. The court's reluctance to move beyond its perceived competence, in fact, expanded the scope of adjudication to all aspects of ESC rights, including those which are historically relative and subject to available resources. In this sense, the court's resistance to the idea of minimum core might better have been described as a legitimate resistance to the very idea of disaggregating ESC rights and narrowing the scope

¹² *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C); *Minister of Health and Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC).

of enforcement and remedy in any way to a universally applicable minimum standard.

The concept of minimum core, of course, need not be equated with the notion of 'justiciable components' of ESC rights. Liebenberg argues in this volume that minimum core, at least in the South African context, can be used to identify a particular category of justiciable ESC rights violations which are *prima facie* violations. In these cases, she suggests, the burden is on the state to show that the violation was reasonable and the onus of proof a more rigorous one, based on a presumption of unreasonableness. She notes that this approach is consistent with the original framing of the concept of minimum core in General Comment No. 3 of the CESCR, where the CESCR affirmed that states will be required to show that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, its minimum core obligations to provide essential levels of the rights.'¹³

While this approach is certainly preferable to one in which justiciability itself is limited to the minimum core content of rights, I would hesitate to accept that the onus should ever be placed on rights claimants to establish unreasonableness of governmental policy decisions, particularly in the context of the obligation to allocate resources among competing demands. While there is invariably some back and forth in the development and filing of evidence in these kinds of claims, it is the government, in the final analysis, which has access to the necessary evidence and must bear the onus of justifying a decision to have allocated resources in a particular manner. Placing the onus on the government to demonstrate reasonableness in light of available resources is consistent with the adjudication of positive rights claims under human rights legislation, such as those related to the accommodation of disabilities, where it has always been clear that the onus is on the respondent to establish a defence of reasonableness or undue hardship in light of available resources.¹⁴ This structure has been carried through in claims under the Canadian Charter of Rights and Freedoms, where the onus remains on respondent governments to justify reasonable limitations on rights, including limitations based on scarce resources or competing demands.¹⁵ The allocation of burden of proof in such cases does not and ought not rely on any reference to minimum core content or essential components of a right.

¹³ General Comment No. 3, *supra*, at para. 10.

¹⁴ On a practical level, there is some leakage in this framework in equality rights adjudication. An allegation that a right has been violated by failure to take necessary positive measures to accommodate a disability may be informed by a preliminary assessment on the part of the claimant that such measures would have been reasonable. Still, it is important to ensure that in the final analysis, the burden of legal proof remains on the respondent to show reasonableness.

¹⁵ See, for example, *Eldridge*, *supra*, note 11; *Newfoundland (Treasury Board) v N.A.P.E.* [2004] 3 S.C.R. 381 at paras. 63-76 and 74-75.

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It is important, in my view, that at this early stage of ESC rights jurisprudence, we argue consistently that in all ESC rights claims related to progressive realisation or the allocation of resources, the onus must be on the state to establish that available resources have been allocated in a manner that is consistent with the right of the claimant. The allocation of burden of proof in relation to limiting the fulfilment of rights on account of scarcity of resources ought to be the same in all cases, not to rely on a preliminary finding by a court as to whether the alleged violation falls within the 'minimum core' content of the right. A presumption of unreasonableness must always apply to governmental failure to respect, protect or fulfil a human right.

I share the concern expressed by Liebenberg and other advocates in South Africa, however, that ESC rights must affirm more than an entitlement to a reasonable policy.¹⁶ As noted in the intervention of the Community Law Centre and the Institute for Democracy in South Africa in the Treatment Action Campaign, conflating right and duty such that the right is limited to the demand that the state discharge a particular duty imposed upon it may displace the appropriate focus on the rights at stake for claimants and the remedies to which they are entitled¹⁷. Reasonableness review ought not to shift the focus of the adjudication of ESC rights claims from the rights of claimants and the interests at stake in particular circumstances onto the decision-making of governments. Most rights claims will involve a review of governmental decision-making, but the framework in which such decision-making is reviewed must be a human rights framework. This entails making sure the perspective of the claimant and the rights that are at stake is the over-arching one, rather than the perspective of governments, or the way their decisions – as the decision makers – may appear reasonable.

The South African Constitutional Court has attempted to ensure that reasonableness review will include consideration of the dignity interests of claimants and the nature of the interest at stake. It remains to be seen, however, whether reasonableness review in South Africa may nevertheless tend to displace the unique circumstances of claimants and their entitlement to a remedy from the central place these considerations ought to occupy in the adjudication of ESC rights claims. Certainly in the context of social rights claims advanced in Canada as substantive equality claims, we encounter the problem of an unspoken judicial 'presumption of reasonableness' in assessing resource allocation decisions, which tends to undermine the central place which the court has stated is to be accorded the rights claimant and the interest that is meant to be protected in the

¹⁶ See, for example, Chapter 5 in this volume.

¹⁷ See, for example, the Submissions of The CLC AND IDASA in *Minister Of Health And Others v Treatment Action Campaign And Others* (Constitutional Court Of South Africa, Case Cct8/02) online at www.communitylawcentre.org.za/ser/docs_2002/TAC_MTCT_Case_Heads_of_Arguments.doc

adjudication of Charter rights. These ongoing tensions and struggles remain critical to the evolution of ESC rights practice in many different legal contexts.

It is critical, in this sense, to ensure that the analysis of violations of ESC rights begins with the situation of the claimant and affected constituencies, assesses issues such as dignity from the perspective of the claimant, and ensures that the analysis of reasonableness is framed around the interest that the right is meant to protect. However, I do not see how the notion of minimum core content would accomplish this. There remains a serious risk, evident in the High Court decision in *Grootboom*¹⁸ and by ongoing discussions regarding the Optional Protocol to the ICESCR, that the notion of minimum core content, if accepted as viable, will become the focus of adjudication of ESC rights, and that justiciability will be largely reduced to these minimalist or absolute aspects, extracted from social context, available resources and historical agency.

4. The Typology of State Obligations

In addition to the idea of a minimum core component of ESC rights, the other conceptual framework which is often linked to the adjudication of ESC rights claims is the typology of state obligations – the ‘respect, protect, fulfil’ typology, and its variations. While these categories certainly have utility in explaining the various dimensions of obligations of governments in relation to rights, a predominant focus on state obligations that has become unique to ESC rights jurisprudence also has serious drawbacks in terms of ESC rights practice. Like minimum core content, the obligations typology demonstrates a tendency to displace the rights claimant from the understanding and application of ESC rights. Rather than emphasising the central role of rights claiming in our evolving understanding of rights and obligations and the importance of the perspective of the claimant in assessing whether the state has met its obligations, the obligations typology tends to shift the focus onto the perspective of the state.

Shifting the focus of legal analysis from the nature of claimants’ rights to the nature of state obligations may often serve to cover up systemic patterns of injustice which are only apparent from the claimant’s perspective. In the field of disability rights, for example, the obligations typology would tend to place the obligation of the state to install wheelchair ramps and elevators in public buildings as an obligation to provide. People with disabilities, however, will point out that this ‘provision’ is only made necessary by the fact that buildings were designed as if people with disabilities did not exist. Defining the right only in terms of the nature of the state obligation to provide does not challenge the pattern of social

¹⁸ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277(C).

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exclusion that lies behind the need for positive measures to provide. The understanding of the nature of the interest at stake, the reasonableness of a policy, and the appropriate remedy, can only be properly ascertained from the perspective of the claimant of the right and an understanding of the underlying interest protected by the right.

It is for this reason that the typology of state obligations seems somewhat discordant with the domestic practice of rights, at least in the Canadian context. In domestic advocacy, we emphasise that courts ought to take as their starting point the nature of the interest meant to be protected by a particular right, and to interpret and apply the right in a manner that is sensitive to the social and historical context in which the claim is advanced. We promote a holistic, rather than a disaggregating approach to rights, so as to encourage an approach that is informed by the values behind fundamental human rights and the recognition of the inter-dependence of rights.

Formal categories or typologies of state obligations often work against a more contextual and value-informed approach to interpretation and application of ESC rights. Clearly, government decision-making and obligations must become a critical issue in the adjudication of ESC rights, but it is important that the nature of the obligations and the reasonableness of the decision-making is viewed through the lens of the rights claims, understood from the standpoint of particular claimants in particular circumstances and through a purposive approach to the right that is to be protected. This is the critical difference between a rights based approach and a mere review of government policy in relation to agreed upon obligations and commitments.

While the obligations typology clearly identifies positive components of state obligations, the jurisprudence to date provides little guidance to domestic courts as to how they ought to adjudicate and enforce these positive components of social rights. When the CESCR suggests that only certain 'components' of ESC rights will be subject to legal remedy, it is natural that those debating an Optional Protocol to the ICESCR may turn to the prevailing typologies for guidance as to what those components might be. The incoherence of existing jurisprudence on the critical issue of access to legal remedies raises the alarming possibility that obligations of fulfilment, for example, may somehow be excluded from a complaints procedure. In this sense, the obligations typology may be used to restrict admissibility of critical rights claims, regardless of the interest at stake for claimants.

While some ESC rights practitioners find the obligations typology useful, my own experience is that applying these disaggregations of rights to concrete claims is largely a matter of trying to put Humpty Dumpty together again. It is unclear to me, for example, how our courts might have situated some of the central social

rights claims such as the challenge to the refusal to fund interpreter services for the deaf and hard of hearing in *Eldridge*, the challenge to the discriminatory denial of adequate social assistance to those under thirty years of age in *Gosselin*, or the challenge to a decision not to pay out on a pay equity award in *N.A.P.E.*¹⁹ These claims, like most substantive social rights claims, tend to bridge different categories of obligations. As such, it is difficult to see how the typology of obligations is of much assistance in developing a framework for their adjudication.

Where it is clearer which category of obligation particular claims invoke, judicial bias in favour of enforcing certain types of state obligations over others, particularly the preference for enforcing the obligation to respect rights over the obligation to provide for the fulfilment of rights, tends to lead to the most discriminatory and absurd consequences in the adjudication of ESC rights claims. This was demonstrated recently in the perverse decision of the Supreme Court of Canada in the *Chaoulli* case²⁰. Here the court ruled on an allegation that unreasonable waiting times in the public health system for necessary health services in Quebec violated the right to life where the state prohibited private health insurance whereby those able to pay might have access to alternative, private services in less time. After finding that governments are not obliged to provide adequate healthcare to anyone, the majority nevertheless found that the right to life and security of the person under Quebec's Charter of Human Rights and Freedoms is violated by unreasonable waiting times in the public healthcare system. Astonishingly, the court did not address this violation by ordering that timely services be provided to everyone. Instead, it found that the prohibition of private health insurance was contrary to the Charter. Those unable to pay for private healthcare were simply left to have their right to life and security of the person violated, without any remedy. A focus on the nature of the state obligation involved rather than the interest protected, and a bias in favour of judicial enforcement of a negatively oriented obligation of the state not to interfere with the ability of the rich to access healthcare over a positively oriented obligation to provide services necessary to the right to life and security of the person, led to the absurd result of the Supreme Court of Canada leaving the poor to suffer the violation of their right to life while ordering a remedy for the rich only.

As noted by Justices' Binnie and Lebel in a dissent:

Those who seek private health insurance are those who can afford it and can qualify for it. They will be the more advantaged members of society. They are differentiated from the general population, not by their health problems, which are

¹⁹ These cases are discussed below.

²⁰ *Supra*, note 14.

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found in every group in society, but by their income status. We share the view of Dickson C.J. that the *Charter* should not become an instrument to be used by the wealthy to “roll back” the benefits of a legislative scheme that helps the poorer members of society.²¹

If the typology of obligations were similarly applied to restrict access to a complaints procedure under the ICESCR to claims invoking particular types of obligations, the result would be similarly catastrophic for a coherent, inclusive approach to ESC rights, but also virtually unworkable. I cannot imagine, for example, how the CESCR would determine as an admissibility issue, whether the *Gosselin* case fell in the category of minimum core content of the right to an adequate standard of living, or if it related to the obligation to respect, protect or fulfil. At any rate, it is entirely offensive to the dignity interest at the heart of human rights to suggest that access to a remedy for hunger or homelessness could depend on how the necessary remedy is categorised. Conceptual typologies that, at best, illustrate the various dimensions of rights and obligations, must not be permitted to restrict access to adjudication and remedies or prevent the development of ESC rights jurisprudence based on the value of hearing rights claims in relation to all aspects and dimensions of rights.

5. Equality Rights and ESC Rights: Toward Convergence

An important aspect in CESCR jurisprudence which does recognise the importance of social context and the situation of rights claiming constituencies is the Committee’s consistent focus on the situation of vulnerable and marginalised groups as a lens through which to assess state obligations. This line of CESCR jurisprudence is consistent with a similar focus on the situation of those in most desperate need and whose rights are most at risk in reasonableness review in ESC rights claims in South Africa. It suggests the value of a convergent approach to legal frameworks governing ESC rights with those that have developed in substantive equality jurisprudence. Both frameworks affirm the idea that the obligations of governments must be assessed in light of the specific circumstances and histories of disadvantaged or marginalised groups, recognizing the role of rights claiming constituencies as active agents for democratic governance and the rule of law. Where these voices are not heard, legal principles and rights are not applied coherently or consistently, so as to undermine not only values of justice and equality, but also the rule of law.

The CESCR’s elaboration of obligations in relation to non-discrimination and equality are supportive of a convergent approach to equality and ESC rights.

²¹ *Chaoulli, supra*, note 12, at para. 274, per Binnie and LeBel, JJ.

General Comment No. 5 on the rights of persons with disabilities, for example, recognises that positive measures are required to 'achieve the objectives of full participation and equality within society for all persons with disabilities' and that this 'almost invariably means that additional resources will need to be made available for this purpose.'²² Similarly, General Comment No. 14, on the Right to Health describes the obligation to eliminate discrimination against women as requiring significant positive measures involving allocations of resources and strategies pursued over time:

To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive services. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.²³

In these and similar passages, the CESCR adopts an expansive approach to the right to non-discrimination which subsumes the substantive enjoyment of ESC rights and places positive obligations on governments, including those which would fall within the category of progressive realisation.

However, while General Comments from the CESCR have strongly affirmed these substantive obligations in relation to non-discrimination and equality as 'programmatic', there remains a curious resistance in CESCR jurisprudence to affirming substantive equality as a legal norm through which these sorts of positive obligations would be subject to adjudication and enforcement. The CESCR has described the right to non-discrimination as 'subject to neither progressive realisation nor the availability of resources'²⁴ and has placed it in the

²² Committee on Economic, Social and Cultural Rights, *General Comment No. 5, Persons with disabilities*, (Eleventh session, 1994), U.N. Doc E/1995/22 at 19 (1995) at para. 9.

²³ General Comment No 14, at para. 21.

²⁴ Committee on Economic, Social and Cultural Rights, *General Comment 13, The right to education* (Twenty-first session, 1999), U.N. Doc. E/C.12/1999/10 (1999): 'The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.'

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category of ‘minimum core’ obligations.²⁵ The legal right to non-discrimination in respect of the right to health, despite the programmatic obligations described in General Comment No. 14 with respect to equality for women and other groups, is described as being of immediate effect.²⁶ The CESCR thus seems to suggest a distinction between equality as a legal norm that is subject to immediate effect and social and economic equality as a programmatic obligation of states, which may be subject to progressive realisation.

Perhaps this tension in the jurisprudence can be resolved by distinguishing between legal protection from discrimination, which must be of immediate effect, and the provision of remedies, which may be subject to available resources. Ensuring that disadvantaged groups have access to adjudication and to legal remedies to non-discrimination would thus be an obligation of immediate effect, even though the adjudication of claims and the determination of appropriate remedies would be subject to available resources and may involve remedial action over periods of time. Such a distinction, however, would require a more coherent approach in CESCR jurisprudence to the obligation to provide effective remedies to substantive ESC rights. The CESCR would need to abandon the notion that the types of remedies that are subject to legal enforcement are those that are independent of resources and linked to minimum core content of rights.²⁷

In Canada, where we do not have the benefit of explicit constitutional protection of ESC rights, a primary vehicle for the protection of ESC rights has been through our understanding of the right to substantive equality as a social right. When equality seeking groups fought for a framework of ‘equality rights’ in the Canadian Charter, as opposed to a more formal right to non-discrimination, they frequently made explicit references to ESC rights as critical components to the right to equality.²⁸ Substantive equality thus tends to rely on the support of ESC rights to give courts the necessary direction as to the central interests that must be protected in the adjudication of positive rights claims. While courts in Canada have frequently failed to honour the expectations of equality seeking groups that fought for a substantive right to equality in the Charter, it is clear that in the

²⁵ See, for example, General Comment No 15 at para. 37(b) where ensuring the non-discriminatory right of access to water for disadvantaged and marginalised groups is defined as part of the minimum core obligations which are of immediate effect: Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (Twenty-ninth session, 2003), U.N. Doc. E/C.12/2002/11 (2003).

²⁶ General Comment No. 14, *supra*, at para. 30.

²⁷ The Committee suggests both that non-discrimination is part of the core content of rights and also that there is particular obligation to prevent discrimination with respect to the core obligations associated with the right. See, for example, General Comment No. 12, *supra*, at para. 19.

²⁸ Bruce Porter, *Twenty Years of Equality Rights: Reclaiming Expectations*. Unpublished paper prepared for the Equality Advisory Committee of the Court Challenges Program, presented at the Equality Rights Review Consultation on October 1-2, 2004, at the Four Points Sheraton Hotel, Hull, Quebec

Canadian context, a convergence of equality rights and ESC rights is really at the heart of the notion of substantive equality as a legally enforceable right.

My sense of the emerging jurisprudence in South Africa, where ESC rights are constitutionally protected as justiciable rights, is that a similar convergence has occurred from the opposite direction. In the *Grootboom* and *TAC* cases²⁹, an equality framework focused on the requirements of decision-making in relation to the needs of disadvantaged and marginalised groups whose rights are at greatest risk was incorporated into reasonableness review. This framework provided a lens through which to elaborate the content of ESC rights and the role of courts in reviewing government programmes and resource allocation decisions in relation to the progressive realisation of the rights. In other countries, a substantive approach to the right to life may similarly converge with notions of equality, dignity and social rights and thereby engage similar issues of reasonable resource allocation and historical fulfilment of rights. The starting point or the precise constitutional provisions may not actually be critical as long as there is a general convergence of approaches recognising the interdependence of rights and the role of courts in overseeing the relationship between the rights of marginalised groups and governmental decision-making in the area of social and economic policy.

Equality rights analysis must find its starting point in particular rights claiming constituencies and their historical and social situation. It cannot start from the standpoint of the state's obligations or a requirement of a reasonable programme considered outside of the context of the rights of groups protected from discrimination. This may be a benefit which a substantive equality framework brings to ESC rights adjudication. If, for example, the *Grootboom* claim in South Africa had been advanced as an equality claim, the fact that the community affected was made up predominantly of Black women and their children, was politically powerless, and had a history of oppression and struggle for security and dignity would be directly at issue in establishing the basis for a rights claim. In that sense, the fact that at the centre of the adjudication is a constituency acting as an historical agent for social justice and equality actually provides constitutional legitimacy to the claim. A claim to the right to adequate housing per se, if it were not viewed through an implicit equality lens, might invoke no similar requirement to frame the legal analysis around the characteristics or the historic struggles of the group. The fact that the group is homeless or denied some entitlement that is a component of the right would be enough to establish a claim of a violation of the right to housing. By way of reasonableness review, however, the Constitutional Court has read into the ESC rights framework consideration of the marginal social and historical position of the affected group. The reasonableness

²⁹ See *supra*, note 15.

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of government's efforts to progressively realise the right to housing is assessed in relation to the dignity interests of the group claiming the right and in light of the needs of those whose rights are most at risk. This convergence of review of progressive realisation and reasonable allocation of resources with an implicit equality analysis, rooted in historical struggles, ensures that within ESC rights legal frameworks, the historical and social context of the rights claimants and the social movements that are linked to them can be centrally placed in the adjudication of ESC rights.

There are, of course, perils associated with reducing ESC rights to an equality framework. Equality analysis, where it is not properly informed by the recognition of ESC rights as components of equality, may tend to formalise the relationship between individuals and groups in terms of immutable characteristics, lose sight of the historical and social context of relationships between individuals, groups and social movements, and lose sight of the broader patterns of injustice and social exclusion linked with systemic violations of ESC rights. The central issue of socio-economic disadvantage or oppression and its link with dignity interests may be displaced by a focus on issues related to prejudice and stereotyping. These dangers, unfortunately, have been manifested in some recent decisions in social rights/equality cases in Canada.

The long-awaited decision in the first explicit ESC rights claim under the Canadian Charter, the *Gosselin*³⁰ case, was particularly disappointing in relation to the court's unwillingness to link equality and ESC rights. Louise Gosselin challenged grossly inadequate welfare rates in Québec which were imposed only on employable recipients under the age of thirty who were not enrolled in workfare or training programmes. A contested question in the evidence was whether in fact there was any realistic access to workfare or training programmes where the regular rate of assistance applied. Though only a third of social assistance recipients under 30 participated in these programmes, the five judge majority of the court, unlike the four dissenting Justices, found no evidence of anyone being denied access to the workfare or training programmes. Gosselin argued that treating younger recipients differently from others, subjecting them to the indignity of destitution, hunger and homelessness, violated the right to equality in section 15 of the Canadian Charter and further, that the deprivation of necessary assistance violated the right to 'security of the person' under section 7 of the Charter.

At trial a decade earlier, Ms Gosselin's claim had been dismissed on the basis that social and economic rights are progressively realised 'policy objectives' that are

³⁰ *Gosselin v Quebec (Attorney General)*[2002] 4 S.C.R. 429.

not justiciable.³¹ The court's characterisation of social and economic rights was criticised by the CESCR in its 1993 review of Canada.³² Fortunately, in finding against Ms Gosselin, the majority of the Supreme Court of Canada refrained from making any similar pronouncements on the status of social and economic rights under the Charter. Indeed, a minority decision, written by Justice Louise Arbour and supported by Justice L'Heureux Dubé, affirmed that the right to security of the person places positive obligations on government to ensure access to an adequate level of social assistance, while the majority left open the possibility that such a 'novel' interpretation of section 7 of the Charter might be adopted in a future case. This was a significant victory.

The majority decision on the equality claim in *Gosselin*, written by Chief Justice McLachlin, however, sends a very negative message for the future of substantive equality claims that converge with ESC rights. The majority adopts what Martha Jackman refers to as a presumption of 'reasonableness' or 'innocence' in relation to governmental policy choices in social and economic policy. This effectively displaces the claimant's voice and any appreciation of social and historical context in which the claim is advanced.³³ The Chief Justice's reasoning revolves around an assumption that Ms Gosselin's non-participation in training and work programmes was 'because of her own personal problems and personality traits' and that the government 'did not force the appellant to do something that demeaned her dignity or human worth' since the policy was designed to encourage young people to participate in work. The assessment of evidence was thus coloured by assumptions about reasonable policy-making by governments and the notion that 'falling through the cracks' because of personal problems or character traits does not engage basic human rights or the protection of dignity.³⁴ Unless the policy seems unreasonable from the standpoint of governmental decision-makers, it cannot, in the view of the majority, affect the claimant's dignity. Thus, the court comes to the absurd conclusion that being forced to rummage through garbage, to turn to prostitution to survive, or to live in an unheated apartment in Montreal's cold winter does not demean a person's 'dignity'.

According to the majority in *Gosselin*, the mere denial of critical benefits such as social assistance does not engage the dignity interest if the denial is not linked with stereotype and prejudice of the sort that non-discrimination provisions, in

³¹ *Gosselin v Québec* (Procureur Général), 1992, at 1676–1677.

³² Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* UN Doc E/C.12/1993/5 (10 June 1993).

³³ Martha Jackman 'Reality Checks: Presuming Innocence and Proving Guilt in Charter Welfare Cases' in S. Boyd, G. Brodsky, S. Day and M. Young (eds.) *Poverty: Rights, Social Citizenship, and Governance* (Vancouver: University of British Columbia Press, forthcoming).

³⁴ *Ibid.*, at para. 52.

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the view of the court, are meant to address. Thus, while the majority appeared to accept the justiciability of social rights claims under the Charter, it restricted the scope of the dignity interest under equality rights analysis in a manner which tends to sever the right to equality from substantive ESC rights. Poverty, according to the majority decision in *Gosselin*, does not count per se as an assault on dignity.

In a more recent decision, *Newfoundland (Treasury Board) v N.A.P.E.*³⁵, the Supreme Court found that the decision of the Newfoundland government to renege on a significant pay equity award of \$24 million owed to public sector healthcare workers under a collective agreement discriminated on the ground of sex and thus violated the equality guarantee in section 15. While, in contrast to *Gosselin*, the court found that in this context the failure to follow through on positive measures to redress systemic pay inequality of women violated the guarantee of equality and represented an assault on the dignity of the claimants, it nevertheless found that the discrimination was justified as reasonable in the context of the government's alleged fiscal crisis. The court granted the government a 'wide margin of appreciation' in relation to decisions about fiscal management, even to the point of justifying a denial of equal pay for work of equal value. Judicial deference to governmental decision-making about resource allocation thus trumped the dignity interests of the claimants, even in relation to a denial of equal pay for work of equal value.

In *Auton*,³⁶ another recent case, the Supreme Court rejected claims advanced by parents on behalf of children with autism. The parents alleged that the denial of coverage of the cost of intensive behavioural therapy for autistic children violated the right to equality under section 15 of the Charter. The court held that the claimants had failed to identify a similarly situated comparator group to ground a claim of discrimination and hence the claim failed to establish a violation of the right to equality. The court found that to establish a claim of discrimination, the claimants were required to identify a group that does not have a mental disability, is seeking or receiving therapy that is important for present and future health, is emergent, and has only recently begun to be recognised as medically required. In contrast to the earlier decision in *Eldridge*, the court's reasoning in *Auton* regresses to the kind of formal equality comparison which had been explicitly rejected when the wording of the right to equality in the Canadian Charter was being debated.³⁷ When it comes to dealing with substantive equality claims intersecting with ESC rights, with significant implications for resource allocation, the court now seems

³⁵ 2004 SCC 66. I have added reference to this case, which was released subsequent to the Geneva workshop.

³⁶ *Auton (Guardian ad litem of) v British Columbia (Attorney General)* 2004 SCC 78.

³⁷ *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 170. See Bruce Porter 'Twenty Years of Equality: Reclaiming Expectations', *supra*.

willing to revert to a rigid formal equality paradigm. The court in *Auton* entirely avoided the issue of dignity and the contextual analysis of the interest at stake. By dismissing the claim to differential treatment on the basis of the absence of a formal comparator group, something which is essentially irrelevant to the interest at stake or the dignity of the claimants, the court essentially reproduced and reinforced the historical marginalisation of autistic children that it is constitutionally mandated with remedying.³⁸

These three recent social rights claims considered by the Supreme Court of Canada share a common disturbing theme. Government decision-making in the social and economic field is accorded a presumption of reasonableness which largely displaces the claimant and the right at issue from the analysis. In *Gosselin*, this meant that dignity interests of those denied adequate social assistance were found not to be engaged, since a reasonable policy cannot demean dignity. In *N.A.P.E.* the decision to address a serious budgetary deficit was seen as a reasonable basis to violate even the right to equal pay for equal value. In *Auton*, a decision to provide no service at all to autistic children was found to be immune from an allegation of discrimination because there was no similarly situated group to act as a comparator. The connection between the meaning of rights and the social context in which the claims are advanced by rights claiming constituencies, which ought to be at the centre of Canadian equality jurisprudence, has been largely displaced. Rather than providing a critical forum for the hearing of rights claims from those who have been marginalized from governance and decision-making, the Supreme Court of Canada has simply reinforced systemic patterns of discriminatory silencing.

6. Strategies for Constructing a More Coherent Legal Framework for ESC Rights Practice

As I rode in a cab recently in Geneva past the Palais des Nations, I was recalling my first trip here in 1993 with Sarah Sharpe, a low income mother from Newfoundland and the President, at the time, of the National Anti-Poverty Organization. Sarah made her first trip across the ocean to lead off the first oral presentation by a domestic NGO to a treaty monitoring body in the context of a periodic review.

We had a fairly clear vision at that time of how the CESCR could provide important support for domestic ESC rights litigation in Canada. We had decided to focus on two critical issues. First, we emphasised that progressive realisation was a reviewable standard on the basis of which affluent countries like Canada

³⁸ *Auton*, *supra*, at paras. 62-63.

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could be held to account for failures to apply available resources to address unnecessary poverty and homelessness. Second, we focused our submissions on the issue of legal remedies. We showed slides of low income Canadians who had gone to courts and human rights tribunals to challenge infringements of their rights to an adequate standard of living and their right to housing. We summarised and appended copies of government pleadings and court decisions in response to ESC rights claims. We sought, from the CESCR, a legal framework for the right to effective remedies for ESC rights claims in Canada that would provide a framework for emerging domestic litigation.

In the context of that review, the CESCR issued concerns and recommendations with respect to the obligations of governments involved in court cases to plead consistently with obligations under the ICESCR; the obligations of courts to interpret the Canadian Charter of Rights and human rights legislation, so as to provide remedies to violations of ESC rights; the obligation of human rights commissions to address ESC rights, and of governments to include ESC rights in human rights legislation; and recommendations for enhanced legal recognition of ESC rights in Canadian law. All of these recommendations, and similar ones which followed in a subsequent review of Canada, addressed the needs of on-the-ground ESC rights advocacy, and the issues that were being challenged in courts and tribunals.

If we are to begin to construct a more coherent legal framework for ESC rights at the international level, I think we need to relinquish a tendency to construct abstract typologies of ESC rights and focus more attention on the inherent value and necessity of rights claiming. This would entail a more rigorous attention to the necessity of domestic procedures for claiming and adjudicating ESC rights, and the requirement of effective domestic remedies. We need a legal framework for the understanding of ESC rights which is centred more on ensuring that the practice of rights claiming can develop and thrive, rather than one which seems to bring the basis and value of rights claiming and subjective agency into question.

The CESCR's General Comment No. 9 on the Domestic Implementation of the Covenant provides, in my view, the critical foundation for the emergence of more rigorous and consistent affirmation of the role of legal remedies and the right of access to adjudicative space for ESC rights. It situates rights claiming and the participation of rights holders at the centre of the legal framework by placing the onus on the state to justify any denial of judicial remedies and to demonstrate the availability and effectiveness of alternative administrative remedies. It establishes that any administrative decision-making must be informed by and consistent with ESC rights. It envisions an inclusive framework for the claiming of ESC rights, emphasising the importance of the rule of law, the application of consistent interpretive principles respecting ESC rights, and the convergence of ESC rights

adjudication with the right to substantive equality. It thus lays the foundation for an affirmation of the central importance of rights claiming and a more coherent integration of ESC rights into our understanding of law and the process of adjudication of rights.

The CESCR has, to its credit, begun in the last few years to ask more pointed questions of States parties about the availability of remedies to ESC rights in domestic law. An increased focus on issues of access to domestic adjudication and effective remedies in its reviews of State party compliance will hopefully assist in establishing a better link between understandings of state obligations under the ICESCR and ongoing domestic ESC rights practice within countries being reviewed. After identifying possible violations of ESC rights in the context of periodic reviews of States parties, the CESCR may wish to review and address in a more systematic fashion the necessity of providing domestic remedies to such violations.

A more coherent focus on the requirement of effective remedies for ESC rights and the exercise of judicial and adjudicative functions consistently with ESC rights, as described in General Comment No. 9, would also provide an important framework for challenging trade and investment regimes. General Comment No. 9 emphasises that consideration of ESC rights in all adjudication and decision-making is a critical pillar of the rule of law. In a recent challenge to the investor-state dispute procedures in the North American Free Trade Agreement, we have advanced the argument that conferring adjudicative authority over new treaty-made, quasi-constitutional investor rights on tribunals that lack the competency or authority to consider the impact of such adjudication on fundamental human rights violates the rule of law and the Charter rights to equality and security of the person.³⁹ These kinds of arguments with respect to the guarantee of rights-informed adjudication could be reinforced in jurisprudence emanating from the CESCR, affirming that governments not only have an obligation to consider the effect of trade and investment agreements on ESC rights, but also to ensure that any adjudication of provisions of trade and investment agreements respects the primacy of fundamental human rights over investor rights.⁴⁰

³⁹ The factum in this case is available at www.dfa-it-maeci.gc.ca/tna-nac/documents/FactumoftheApplicants.pdf.

⁴⁰ In its list of issues sent to Canada in advance of Canada's Fifth Periodic Report, the CESCR asks: "Please explain how the State party ensures that its obligations under the Covenant take primary consideration in the adjudication of North American Free Trade Agreement (NAFTA) disputes." (Committee on Economic, Social and Cultural Rights, Pre-Sessional Working Group, (17-20 May 2005) List of issues to be taken up in connection with the consideration of the fourth periodic report of Canada concerning the rights referred to in articles 1-15 of the International Covenant on Economic, Social and Cultural Rights (E/C.12/4/Add.14) E/C.12/Q/CAN/220 May 2005, para. 19.

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Finally, as has been noted above, evolving legal frameworks for ESC rights practice should affirm a more coherent convergence in international and domestic jurisprudence between substantive equality as a legal norm, and ESC rights adjudication. Such a convergence is critical to ensuring that ESC rights jurisprudence develops in active dialogue with equality concerns of constituencies such as women, Aboriginal people, and people with disabilities. An equality framework for ESC rights also acts as a safeguard from misapplication of ESC rights to protect the economic rights of more advantaged constituencies at the expense of those who are disadvantaged.⁴¹ It assures a legal framework through which we can resist the tendency in legal discourse and biased judicial reasoning to displace the claimant of rights and the historical, subjective dimension of rights claiming.

7. Conclusion

None of us will ever be likely to entirely overcome our chronic ambivalence about the use of courts to advance ESC rights, nor should we. The dynamic of displacement and silencing of claimants, the tendency toward legal formalism, a bias in favour of assumptions of reasonableness of government decision-making, and a discriminatory preference for negatively framed prohibitions of government action rather than positively framed remedies will remain ongoing challenges in ESC rights practice. We will constantly be reminded of the limits of legal advocacy and of the judicial institutions we rely on, as we have been by recent decisions from the Supreme Court of Canada. The courts may never be entirely friendly venues for ESC rights claimants, and certainly legal remedies will constitute only a small part of successful ESC rights advocacy.

The fact that litigation must remain only a small part of ESC rights advocacy, however, does not mean that we should not aspire to an inclusive, rather than partial, legal framework for ESC rights claiming. Affirming the value of an inclusive and flexible legal framework for ESC rights claims, consistent with the

⁴¹ The first claim to a right to healthcare as a Charter protected social right in Canada was advanced by more affluent interests in the *Chaoulli* case, described above. The trial judge and the Quebec Court of Appeal found that the right to security of the person does protect the right of access to healthcare and that it may potentially be infringed by current waiting lists in the public system, but that the infringement is justified under section 1 of our Charter because protecting a universal public health system is necessary to the protection of the rights of those with low incomes. The court made explicit reference to the value of equality in considering whether decisions governing access to health care conform with the principles of fundamental justice. The majority judgment of Chief Justice McLachlan at the Supreme Court, however, made no reference to the paramountcy of equality rights under either the Quebec Charter or the Canadian Charter. Arguments by the Charter Committee on Poverty Issues and the Canadian Health Coalition for an inclusive, equality-informed approach to the right to health were entirely ignored by the majority. The CCPI/CHC factum is available at www.healthcoalition.ca/chaoulli.html

principle of the rule of law, and the principle that rights must have remedies and all rights claimants deserve a hearing, in no way suggests that legal practice will displace broader strategies of political advocacy or the role of social movements. No one would suggest that the struggle for civil and political rights could in any way be reduced to legal advocacy. Clearly, social movements and political struggles have been a far more important avenue for realising civil and political rights than have courts. On the other hand, legal advocacy for civil and political rights, in an inclusive framework of access to remedies, has generally been viewed as complementary to and supportive of other forms of advocacy. Civil and political rights have found their legal legitimacy through active rights claiming rather than through pre-defined categories or obligations that somehow aspire to be independent of historical claims. Surely the same can be true of ESC rights.

The point is not to develop legal practice in ESC rights which replaces historical social movements and other forms of rights claiming, but rather to develop a practice which complements them, which cedes a place, in the legal analysis, for recognition of the historical, subjective and collaborative aspect of rights claiming. As we emerge from a siege mentality in ESC rights advocacy, we need to move beyond antiquarian notions of law and adjudication premised on absolutes or universals that claim to be above history, and to affirm, instead, the legitimacy of a practice grounded in historical struggles, subjective claims and, embedded in social relations, collective values and collaborative projects. As we begin to establish the legitimate role of ESC rights practice and the inherent value of hearing claims, we may begin to envision a more coherent legal framework for ESC rights. We may look forward to evolving understandings of ESC rights as a coherent framework of law that will emerge out of ESC rights claims, advanced in a multitude of ways, in many different venues, even as we continue to treat law and legal practice with a healthy degree of scepticism.

The Road to a Remedy



II. Positive Obligations

5. Enforcing Positive Socio-Economic Rights Claims: The South African Model of Reasonableness Review

Sandra Liebenberg¹

If life on earth were such that people could easily provide for their needs and develop and protect their capacities, perhaps disputes about how to live and how to organise society could emphasise the heights to be attained and ignore the depths of misery to be avoided, but in our world, minimal standards are indispensable.²

1. Introduction

The 1996 South African Constitution³ is renowned internationally for its holistic, inclusive Bill of Rights. In addition to traditional civil and political rights, the Bill of Rights includes a comprehensive set of social, economic and cultural rights. All these rights are enforceable by the courts,⁴ and the courts have a wide discretion to grant 'just and equitable' remedies.⁵ The Constitution places an overarching obligation on the state to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.⁶ This establishes that all the rights in the Bill of Rights impose a combination of negative and positive duties on the state.⁷

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² James Nickel, *Making Sense of Human Rights: Philosophical Reflections on the Universal Declaration of Human Rights* (University of California Press, 1987) at 51.

³ Act 108 of 1996.

⁴ Under section 38 of the Constitution, broad standing is conferred on a range of actors to approach a competent court for 'appropriate relief' where a right in the Bill of Rights has been infringed or threatened. Standing is also allowed for public interest and class actions under this section. The leading case in South Africa on class actions in the context of socio-economic rights claims is *Permanent Secretary, Depart Welfare, E Cape Provincial Government and Another v Nguzza and Others* 2001 (10) BCLR 1039 (CC). This case concerned an application for the reinstatement of the disability grants of tens of thousands of social grant recipients that had been unlawfully terminated by the Eastern Cape provincial government.

⁵ Under section 172(1) of the Constitution, a court must declare law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency, and may make 'any order that is just and equitable.'

⁶ Section 7(2). This typology is based on the analysis by Henry Shue of the obligations imposed on states by human rights: *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980) at 5. See Memorandum by Technical Committee to Theme Committee 4 (Bill of Rights) of the Constitutional Assembly (8 March 1996). It is also used by the UN Committee on Economic, Social and Cultural Rights (CESCR) to analyse the duties imposed by various rights in the International Covenant on Economic, Social and Cultural Rights (ICESCR): see, for example, Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999) at para. 15; Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000) at paras. 33–37; Committee on Economic, Social and Cultural Rights, *General Comment 15, The right to water* (Twenty-ninth session, 2003),

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At the outset, the court rejected challenges to the inclusion of socio-economic rights as justiciable rights in the Constitution on grounds that their enforcement would breach the separation of powers doctrine by requiring courts to intrude in the sphere of socio-economic policy and budgetary matters. The court reasoned as follows:

It is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers.⁸

It is now 10 years into the new democracy and there is a burgeoning jurisprudence on socio-economic rights in the High Courts,⁹ the Supreme Court of Appeal,¹⁰ and the Constitutional Court. The landmark cases that established the foundations of the Constitutional Court's jurisprudence on the positive duties imposed by the socio-economic rights provisions are the *Sobramoney*,¹¹

U.N. Doc. E/C.12/2002/11 (2003) at paras. 20–29. For a recent exposition of these duties, see *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm. No. 155/96, October 2001, African Commission on Human and Peoples' Rights.

⁷ As Justice Kriegler of the Constitutional Court observed: 'We do not operate under a Constitution in which the avowed purpose of the drafters was to place limits on governmental control. Our Constitution aims at establishing freedom and equality in a grossly disparate society.' *Du Plessis v De Klerk* 1996 (5) BCLR 658 (CC) at para. 147.

⁸ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 1996 (10) BCLR 1253 (CC) at para. 77.

⁹ For example, *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 (6) BCLR 625 (W) ('Residents of Bon Vista Mansions') (disconnection of water services); *City of Cape Town v Rudolph & others* 2003 (11) BCLR 1236 (C) (evictions).

¹⁰ The most recent is a landmark judgment on the State's responsibilities in relation to the execution of an eviction order obtained against a large community settled on private land: *Modder East Squatters and Another v Modderklip Boedery (Pty) Ltd; President of the RSA and Others v Modderklip Boedery (Pty) Ltd* 2004 (8) BCLR 821 (SCA). This judgement was appealed by the State to the Constitutional Court (judgment is awaited at the time of writing).

¹¹ *Sobramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696; *Sobramoney* was the first major Constitutional Court case to consider the enforceability of socio-economic rights. The applicant, an unemployed man in the final stages of chronic renal failure, sought a positive order from the courts directing a provincial hospital to provide him with ongoing dialysis treatment, and interdicting the provincial Minister of Health from refusing him admission to the renal unit of the hospital. Without this treatment the applicant would die, as he could not afford to obtain the treatment from a private clinic. He relied primarily on section 11 (the right to life), and section 27(3) (right to emergency medical treatment). The application was dismissed in the High Court and was taken on appeal to the Constitutional Court. The Constitutional Court also considered the applicability of sections 27(1) and (2) (the qualified right of access to health care services). It found no breach of any of the aforementioned sections, dismissing the appeal.

Grootboom,¹² and *Treatment Action Campaign*¹³ (hereafter *TAC*) cases. These cases revolve around the core cluster of socio-economic rights in the Constitution in sections 26 and 27 that entrench the right of everyone to have access to adequate housing, health care services (including reproductive health care), sufficient food and water, and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.¹⁴ The rights are qualified by a second subsection, which requires the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.'¹⁵ Furthermore, section 26(3) prohibits the arbitrary eviction of people from their homes, and section 27(3) provides that 'No one may be refused emergency medical treatment.' In addition to these provisions, the Constitution also entrenches a set of 'basic' rights consisting of children's socio-economic rights,¹⁶ the right of everyone to basic education, including adult basic education,¹⁷ and the socio-economic rights of detained persons, including sentenced prisoners.¹⁸ Like all the other rights in the Bill of

¹² *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) ('*Grootboom*'). *Grootboom* concerned a group of adults and children who had moved onto private land from an informal settlement owing to the 'appalling conditions' in which they lived (*supra*, at para. 3). They were evicted from the private land. Following the eviction, they camped on a sports field in the area. However, they could not erect adequate shelters as most of their building materials had been destroyed during the eviction. Accordingly, they found themselves in a precarious position where they had neither security of tenure, nor adequate shelter from the elements. They applied to the Cape High Court on an urgent basis for an order against all three spheres of government to be provided with temporary shelter or housing until they obtained permanent accommodation. The High Court held that there was no violation of section 26 (the right of everyone to have access to housing), but found a violation of section 28(1)(c) (the right of children to shelter). See *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C). On appeal, the Constitutional Court declared that the State's housing programme fell short of compliance with section 26 (1) and (2) (the qualified right of everyone to have access to adequate housing), but found no violation of the right of children to shelter under s 28(1) (c).

¹³ *Minister of Health and Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC). *TAC* involved a challenge to the limited nature of the measures introduced by the state to prevent mother-to-child transmission (MTCT) of HIV. Firstly, it was contended that the state unreasonably prohibited the administration of the antiretroviral drug, Nevirapine at public hospitals and clinics outside a limited number of research and training sites. This drug was of proven efficacy in reducing *intrapartum* MTCT of HIV. Secondly, the state failed to produce and implement a comprehensive national programme for the prevention of MTCT of HIV. Both the High Court and the Constitutional Court (on appeal) held that the state's programme to prevent MTCT of HIV did not comply with its obligations in terms of sections 27 (1) and (2) (the qualified right of everyone to have access to health care services). The Constitutional Court made both declaratory and mandatory orders against the Government.

¹⁴ Sections 26(1) and 27(1).

¹⁵ Sections 26(2) and 27(2). The influence of Article 2 of the International Covenant on Economic, Social and Cultural Rights is evident in the drafting of these provisions.

¹⁶ Section 28 (1)(c) gives every child the right to 'basic nutrition, shelter, basic health care services and social services.' A child is defined in s 28(3) as a person under the age of 18 years.

¹⁷ Section 29(1)(a).

¹⁸ Section 35 (2)(e) confers the right 'to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'

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Rights, the socio-economic rights are subject to the general limitations clause in section 36.

The South African jurisprudence illustrates how the courts can meaningfully enforce the positive duties imposed by socio-economic rights while maintaining respect for the roles and institutional competencies of the other branches of government. This chapter describes and critically evaluates the model of review adopted by the court in such cases.

2. The Model of Reasonableness Review

In the first place, the Constitutional Court has affirmed that sections 26(1) and 27(1) impose a negative duty on the state (duty to respect) to 'desist from preventing or impairing' access to the relevant rights.¹⁹ In its recent decision of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*²⁰ (*Jaftha*), the court illustrated the high degree of protection it would afford people against negative violations of their socio-economic rights. *Jaftha* concerned the constitutionality of provisions of the Magistrates' Court Act, which permitted the sale in execution of people's homes in order to satisfy (sometimes trifling) debts. The court accepted the appellants' arguments that measures that allow a person to be deprived of their existing access to housing constitute a negative violation of the right of access to housing. This negative violation is not subject to the qualifications of 'reasonable measures', 'progressive realisation', and the availability of resources in section 26(2). Instead, any justification offered by the State for the violation has to be determined in terms of the general limitations clause (section 36).²¹ Having found no justification for the overbroad provisions of the Magistrate's Court Act²², the court 'read in' provisions to the Act requiring judicial oversight of executions against the immovable property of debtors taking into consideration 'all relevant circumstances'.²³ The court did not find it necessary to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution.²⁴ Given that the State will have to comply with the stringent requirements of the general limitations clause²⁵ in order

¹⁹ *Grootboom*, *supra*, at para. 34; *TAC*, *supra*, at para. 46. See also the discussion by Budlender in this volume.

²⁰ 2005 (1) BCLR 78 (CC).

²¹ *Jaftha*, *supra*, at paras. 31–34.

²² *Jaftha*, *supra*, at paras. 35–51.

²³ *Jaftha*, *supra*, at paras. 52–67.

²⁴ *Jaftha*, *supra*, at para. 34.

²⁵ In terms of section 36, limitations may only be imposed in terms of 'law of general application'.

Furthermore it must meet the proportionality requirements inherent in the factors which must be taken into account in determining whether a limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.' (see section 36(a) – (e)).

to justify a negative violation of socio-economic rights, it can be predicted that litigants will attempt to frame their claims as breaches of the negative duties imposed by these provisions.

Another recent decision of the Constitutional Court, *Port Elizabeth Municipality v Various Occupiers*²⁶ (PE Municipality) illustrates how negative and positive duties can be closely intertwined in the context of socio-economic rights claims. The case concerned the interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (PIE) in relation to an eviction application by the Port Elizabeth Municipality against some 68 people who were occupying shacks erected on privately owned land within the jurisdiction of the Municipality. PIE was enacted to give effect both to the protection of property rights in section 25 of the Constitution, and to protect people against arbitrary forced evictions and demolitions of their homes in terms of section 26 (3).²⁷ Before granting an eviction order a court must be satisfied that 'it is just and equitable to do so, after considering all relevant circumstances.'²⁸ In deciding whether it is 'just and equitable' to grant an order for eviction, the court must, in the case of eviction at the instance of an organ of state, have regard to, amongst other factors, the availability of suitable alternative accommodation or land for the unlawful occupier.²⁹ The Constitutional Court held that the availability of a suitable alternative place to go to is not an inflexible or absolute requirement. However, it went on to affirm that generally 'a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.'³⁰ Thus in order to satisfy a court that it is 'just and equitable' to evict people from their homes, organs of state will have to show that serious consideration was given to the possibility of providing alternative, albeit temporary, accommodation to the occupiers. The court also indicated that, in the absence of special circumstances, 'it would not ordinarily be just and equitable to order eviction if proper discussions, and where appropriate, mediation, have not been attempted.'³¹

²⁶ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC)

²⁷ See Preamble of PIE. Section 26(3) reads as follows: 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

²⁸ Section 6(1), PIE.

²⁹ Section 6(3)(c).

³⁰ *PE Municipality, supra*, at paras. 28 and 29.

³¹ *PE Municipality, supra*, at para. 43. For the court's reasoning on the importance of mediation in eviction proceedings, see paras. 39-47. See further K. Pillay 'Property v housing rights: Balancing the interests in evictions cases' (2004) 5 *ESR Review* 16.

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In *Soobramoney*, *Grootboom* and *TAC* the court was squarely confronted with the challenge of developing a model for the enforcement of the positive duties imposed by sections 26 and 27. The court rejected the notion that these provisions impose a direct, unqualified obligation on the state to provide social goods and services to people on demand. It did so in the context of arguments raised by the *amici curiae* (friend of the court) interventions in the *Grootboom* and *TAC* cases. The *amici* sought to persuade the court to adopt the notion of minimum core obligations as developed by the United Nations Committee on Economic, Social and Cultural Rights.³² The court rejected an interpretation of socio-economic rights that would 'give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2).'³³ The latter, as noted above, refers to the qualifications relating to reasonable measures, progressive realisation and the availability of resources. The court voiced a number of concerns regarding the concept of minimum core obligations. These included practical issues concerning the definition of the rights in the context of varying social needs,³⁴ the impossibility, according to the court, of giving everyone access even to a 'core' service immediately,³⁵ and its incompatibility with the institutional competencies and role of the courts.³⁶ The court, however, did indicate that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether the measures adopted by the State are *reasonable*.³⁷

The court proceeded to develop a model of 'reasonableness review' for adjudicating positive claims to the provision of social services and resources.

³² In its General Comment No 3, the Committee stated that it 'is of the view that a minimum core obligation to ensure the satisfaction of at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.... In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'

Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of States parties' obligations*, (Fifth session, 1990), U.N. Doc. E/1991/23, annex III at 86 (1991), at para. 10. For an application of this concept in the context of the specific rights protected in the Covenant, see General Comment No. 12 *supra*, para. 17; General Comment No. 14, *supra*, at paras. 43, 47; General Comment No 15, *supra*, at paras. 37–38.

³³ *TAC*, *supra*, at para. 39.

³⁴ *Grootboom*, *supra*, at paras. 32 and 33.

³⁵ *TAC*, *supra*, at para. 35.

³⁶ Thus the court observed that 'courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum core standards' should be. (*TAC*, *supra*, at para. 37). It went on to say: 'Courts are ill-suited to adjudicate upon issues where court order could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts....' (at para. 38).

³⁷ *Grootboom*, *supra*, at para. 33; *TAC*, *supra*, at para. 34.

In reviewing the positive duties imposed by the socio-economic rights provisions on the State, the central question that the court asks is whether the means chosen are reasonably capable of facilitating the realisation of the socio-economic rights in question.³⁸ In the words of the court:

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.³⁹

The assessment of the reasonableness of government programmes is influenced by two factors. First, the internal limitations of section 26(2) require that the rights may be progressively realised,⁴⁰ and that the availability of resources is 'an important factor in determining what is reasonable.'⁴¹ This is a consequence of the court's interpretation that the positive duties imposed by the socio-economic rights provisions are both defined and limited by the second subsection of sections 26 and 27.⁴² Second, reasonableness is judged in the light of the social, economic and historical context, and consideration is given to the capacity of institutions responsible for implementing the programme.⁴³

The standard of scrutiny employed by the court is more substantive than simply enquiring whether the policy was rationally conceived and applied in good faith.⁴⁴

³⁸ See *Grootboom, supra*, at para. 41. This constitutes a means-end justificatory model in which the court asks itself the basic question whether a particular policy or programme can be justified. It will be justified if it is reasonably related to the constitutionally prescribed goal of providing access to 'the relevant socio-economic rights. See Danie Brand 'The Proceduralisation of South African Socio-Economic Rights Jurisprudence, or 'What are Socio-Economic Rights For?' in Henk Botha, André van der Walt and Johan van der Walt (eds.) *Rights and Democracy in a Transformative Constitution* (Sun Press, 2004), 33 – 56 at 39 – 43.

³⁹ *Grootboom, supra*, at para. 41.

⁴⁰ According to the court in *Grootboom, supra*: 'The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the State must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.' (at para. 45). The court furthermore endorsed the views of the UN Committee on Economic, Social and Cultural Rights that 'deliberately retrogressive measures' require justification (General Comment No 3, *supra*, at para. 9).

⁴¹ *Grootboom, supra*, at para. 46.

⁴² *Soobramoney, supra*, at paras. 11, 28; *Grootboom, supra*, at para. 38; *TAC, supra*, at para. 39.

⁴³ *Soobramoney, supra*, at para. 16; *Grootboom, supra*, at para. 43.

⁴⁴ Initially it appeared that the court would endorse this thin standard of rationality review. Thus, in *Soobramoney, supra*, it stated: 'A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.' (at para. 29).

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Thus, in the *Grootboom* and the *TAC* cases the court set the following standards for a reasonable government programme to realise socio-economic rights:

- The programme must be comprehensive, coherent, coordinated;⁴⁵
- It must be balanced and flexible, and make appropriate provision for short, medium and long-term needs;⁴⁶
- It must be reasonably conceived and implemented;⁴⁷ and
- It must be transparent, and its contents must be made known effectively to the public.⁴⁸

The element of the reasonableness test that comes closest to a threshold requirement, however, is that a reasonable government programme must cater for those in urgent need:

To be reasonable, measures cannot leave out of account, the degree and extent of the denial of the right they endeavour to realise. Those whose needs are most urgent and whose ability to enjoy all rights is therefore most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.⁴⁹

This requirement of the reasonableness test is justified particularly in terms of the value of human dignity.⁵⁰

In *Grootboom*, the otherwise rational, comprehensive housing programme was faulted for its failure 'to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.' ⁵¹ Thus the programme was held to be in breach of section 26 of the Constitution. In *TAC* the court held that the failure to take measures without delay to permit and facilitate the use of the anti-retroviral drug Nevirapine throughout public health care facilities in South Africa for the purpose of

⁴⁵ *Grootboom*, *supra*, at paras. 39 and 40.

⁴⁶ *Grootboom*, *supra*, at para. 43.

⁴⁷ *Grootboom*, *supra*, at paras. 40–43.

⁴⁸ *TAC*, *supra*, at para. 123.

⁴⁹ *Grootboom*, *supra*, at para. 44.

⁵⁰ Thus in *Grootboom*, *supra*, the court held: 'It is fundamental to an evaluation of the reasonableness of State action that account be taken of the inherent dignity of human beings.... In short, I emphasise that human beings are required to be treated as human beings.' (at para. 83). See S. Liebenberg 'The value of human dignity in interpreting socio-economic rights' (2005), 21 *South African Journal of Human Rights* 1.

⁵¹ *Grootboom*, *supra*, at para. 99.

preventing mother-to-child transmission (MTCT) of HIV was unreasonable. These omissions violated the right of access to health care services entrenched in section 27.

The government had responded to the challenge by raising a range of concerns, including limitations of resources and capacity to rollout a comprehensive programme to prevent MTCT of HIV throughout the public health sector. This programme would require not only the administration of the drug – a relatively simple procedure and facilitated by a free offer of the drug by the manufacturers to South Africa for 5 years – but also the HIV-testing and counselling facilities that are an essential pre-requisite for the administration of the drug.

With regard to the first leg of the challenge – the restriction placed on doctors from prescribing Nevirapine in facilities where testing and counselling facilities already exist – the court held that ‘this aspect of the claim and the orders made will not attract any significant additional costs.’⁵² With regard to the second leg – the extension of testing and counselling facilities to clinics that currently lack capacity to administer Nevirapine – the court noted that the government had committed ‘substantial additional funds’ for the treatment of HIV, including the reduction of MTCT.⁵³ As far as the capacity arguments of government were concerned, particularly in relation to training for counselling on the use of Nevirapine, the court held that this was ‘not a complex task and it should not be difficult to equip existing counsellors with the necessary additional knowledge.’⁵⁴ Thus the costs and capacity arguments did not have sufficient cogency to outweigh the impact on a particularly vulnerable group of the denial of a basic life-saving medical intervention.

3. Critically Evaluating Reasonable Review

This model of reasonableness review gives the court a relatively flexible and context-sensitive tool in relation to socio-economic rights claims. On the one hand, it allows government the space to design and formulate appropriate policies to meet its socio-economic rights obligations. On the other hand, it subjects government choices to the requirements of rationality, inclusiveness and particularly the threshold requirement that all programmes must provide reasonable measures of relief for those whose circumstances are urgent and

⁵² *TAC, supra*, at para. 71. As the court observed: ‘Where counselling and testing facilities exist, the administration of Nevirapine is well within the available resources of the State and, in such circumstances, the provision of a single dose of Nevirapine to mother and child where medically indicated is a simple, cheap and potentially lifesaving medical intervention.’ (para. 73).

⁵³ *TAC, supra*, at paras. 118–120.

⁵⁴ *TAC, supra*, at para. 95.

intolerable. Government has the latitude to demonstrate that the measures it has adopted are reasonable in the light of its resource and capacity constraints and the overall claims on its resources. The court has made clear that although its orders in enforcing socio-economic rights claims may have budgetary implications, they are not 'in themselves directed at rearranging budgets.'⁵⁵

The important point is that government justifications will be subject to scrutiny by the court, and they will have to present convincing reasons why particularly vulnerable sectors of society are excluded from accessing basic socio-economic services. In this regard, the court has acknowledged the poor as a vulnerable group in society, whose needs require special attention.⁵⁶ Requiring the government to justify its socio-economic priority-setting promotes 'a culture of justification',⁵⁷ one of the underlying purposes of constitutional review.

But does the court's jurisprudence do enough to protect vulnerable groups who face an absolute deprivation of minimum essential levels of basic socio-economic goods and services? This category of claimants is in danger of suffering irreparable harm to their lives, health and sense of human dignity if they do not receive urgent assistance. In addition, if their urgent needs are not met there is no foundation for that dimension of socio-economic rights duties that requires the progressive improvement in living standards. David Bilchitz has argued that we should distinguish in this context between two interests protected by socio-economic rights. The first is the more basic interest in survival and non-impaired functioning. The second is a more extensive interest (which includes the minimal one) in 'being able to live well.'⁵⁸ This latter interest extends beyond mere survival and meeting of basic needs. The distinction allows us to recognise that there are differences between the two interests, 'and that the minimal interest has an urgency and must be prioritized in a way that the maximal interest does not':

The minimal interest reflects the respect in which people are most vulnerable and needy. It is the respect in which they most strongly need the protection of a right. Whilst the realisation of the maximal second interest is a medium-to long-term goal, the realisation of the first interest has an urgency that most strongly justifies a peremptory demand in the form of a right. The provision for such needs is also

⁵⁵ *TAC, supra*, at para. 38.

⁵⁶ See *Grootboom, supra*, at para. 36; *TAC, supra*, at para. 79;

⁵⁷ This phrase was coined by a South African constitutional lawyer, Etienne Mureinik: 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31 at 31–32.

⁵⁸ 'Human beings have an interest in living in an environment that is conducive to their flourishing and development on physical emotional and mental levels.' David Bilchitz 'Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance' (2002) 118 *South African Law Journal* 484 at 490. See also David Bilchitz, 'Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence' (2003) 19 *South African Journal of Human Rights* 1 at 11–14.

most strongly indicated by the core constitutional values of freedom, equality and dignity.⁵⁹

The court's model of reasonableness review has been criticised for not catering adequately to this group of claimants.⁶⁰ The court has indicated that not everyone who is deprived of basic services will have an entitlement to claim immediate relief from the State.⁶¹

There are various ways in which the court's review standard could be strengthened to offer greater protection to this group of claimants. First, vulnerable litigants seeking access to basic socio-economic services could benefit from having the burden of proving the reasonableness of government programmes placed on the State. Thus, in situations where a vulnerable group is excluded from accessing basic social services, the obligation would be on the State to justify why the exclusion is reasonable in the given circumstances. In terms of practical litigation, individual litigants bear a difficult burden of proof to illustrate that government programmes are unreasonable. They are required to review the whole panoply of government programmes and assess their reasonableness in the light of the resources available to the State and the latitude of progressive realisation that it enjoys. The alternative I propose will give individuals the benefit of a presumption of unreasonableness in circumstances where they cannot gain access to core survival needs.

Second, the review standard for basic needs could be strengthened by requiring a compelling government purpose for failure to ensure that vulnerable groups have access to basic needs. Government should be required to show that its resources are 'demonstrably inadequate'⁶² for meeting basic needs in the light of other compelling government purposes. In General Comment No 3, the State is required to demonstrate that 'every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, its minimum core obligations to provide essential levels of the rights.'⁶³ It is not sufficient, as the court did in *TAC*, to simply assert that '[i]t is impossible to give everyone access even to a "core" service immediately.'⁶⁴ The State should be required to show that it has a good reason for failing to ensure that vulnerable groups in the society have access to basic socio-economic needs. Such circumstances should place a burden on them of adducing both evidence and argument to the court

⁵⁹ David Bilchitz, *South African Law Journal*, *supra*, at 491.

⁶⁰ David Bilchitz, *supra*. See also Sandra Liebenberg 'South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty' (2002) 6 *Law, Democracy & Development*, 159.

⁶¹ See *Grootboom*, *supra*, at paras. 68, 95; *TAC*, *supra*, at paras. 39 and 125.

⁶² General Comment No 3, *supra*, at para. 11.

⁶³ *Ibid.*, at para. 10.

⁶⁴ *TAC*, *supra*, at para. 35.

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regarding its purposes and the inadequacy of its available resources to meet its legitimate purposes without restricting access to the relevant right.⁶⁵ The court would be required to scrutinise this evidence and arguments closely, with a view to assessing whether it presents a compelling justification for failing to provide basic needs.

The final element that should strengthen the court's review standards in respect of basic needs is the inclusion of a more vigorous proportionality analysis. The court comes close to including such an analysis by its threshold requirement that a government programme will not be assessed to be reasonable if it does not make provision for those in desperate need. The court, however, has also indicated that this analysis does not necessarily imply that all in desperate need should receive relief immediately, but 'a significant number'.⁶⁶ The inclusion of a stronger proportionality analysis would require government to show that there are no less restrictive means of achieving its purposes than limiting access to essential levels of the socio-economic rights, and that other less restrictive measures have been considered. Thus, even if the State can make a compelling case that it is not possible to provide everyone with a basic level of service immediately, it should also be required to show that other 'lesser' forms of provision have been considered.⁶⁷ In addition, it must show that it is monitoring the deprivation of

⁶⁵ In an early paper on socio-economic rights Kate O'Regan J argued: '... there must be *good reason* for the State not to respect, protect, promote and fulfil a right. For example, in the case of *Sobramoney v Minister of Health, Kwa-Zulu-Natal*, the Constitutional Court held that the government is under an obligation to show that it acted *bona fide* and rationally in the circumstances. This carries an *evidentiary burden*. State officials are required to place evidence before the Court of *their policy* regarding the rationing of scarce dialysis equipment and *their budgets*.' [emphasis added, references omitted] 'Introducing Socio-Economic Rights' (1999) 1 *ESR Review* 2. In the context of the right to food protected in article 11 of the Covenant, the Committee has stated as follows: 'Should a State party argue that resource constraints *make it impossible* to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations.... A State claiming that it is unable to carry out its obligations for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.' (General Comment No 12, *supra*, at para. 17).

⁶⁶ *Grootboom, supra*, at para. 69.

⁶⁷ General Comment No 3, *supra*, of the UN Committee on Economic, Social and Cultural Rights can be read to support such a proportionality analysis: 'The Committee wishes to emphasise, however, that even where the available resources are demonstrably inadequate, the obligation remains for a State party to strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.' (at para. 11). And: 'Similarly, the Committee underlines the fact that even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.' (at para. 12).

basic needs, and devising programmes and strategies for remedying the situation.⁶⁸

It is beyond the scope of this chapter to discuss the question of remedies.⁶⁹ Suffice it to say that the nature of the remedies handed down by courts in these types of cases should be informed by the urgent nature of the interests at stake, and the danger of claimants suffering irreparable harm if they do not receive immediate relief. The courts should be willing to grant orders of interim individual relief to claimants pending government's adoption of a comprehensive programme for ensuring access to the various socio-economic rights. In addition, in cases of this nature, the courts should be willing to exercise a supervisory jurisdiction to ensure that adequate progress is made in designing effective remedial programmes.⁷⁰ As the court has written in a different context:

Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if need be, to achieve this goal.⁷¹

Finally, the decision of the Constitutional Court in *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development*⁷² (*Khosa*) illustrates how equality rights and socio-economic rights can mutually reinforce each other to support a finding that a government programme unreasonably excludes a particular group.⁷³ The effect of such a finding is that the programme must be expanded to include the excluded group. Thus the court held that the provisions of the Social Assistance Act 59 of 1992 breached both section 9 (right to equality) and section 27(1)(c) (right of access to social assistance) by excluding destitute permanent residents from eligibility for social grants. The court granted a remedy reading permanent residents into the eligibility requirements of the statute.⁷⁴

⁶⁸ The UN Committee on Economic, Social and Cultural Rights is of the view that the State's duties to monitor and adopt remedial plans and programmes in relation to minimum core obligations 'are not in any way eliminated as a result of resource constraints.' General Comment No. 3, *supra*, at para. 11. See also General Comment No 14, *supra*, at para. 43 (f).

⁶⁹ See Roach in this volume.

⁷⁰ For a discussion of supervisory remedies and other suitable remedies in socio-economic rights cases, see Wim Trengove 'Judicial Remedies for Violations of Socio-Economic Rights' (1999) 1 *ESR Review*, 8. See also the discussion in *TAC*, *supra*, on remedies at paras 96 – 114, and 124 – 133.

⁷¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para. 69 (footnotes omitted).

⁷² 2004 (6) BCLR 569 (CC).

⁷³ *Ibid.*, See particularly the discussion at paras. 79–85.

⁷⁴ *Ibid.*, at paras. 86–98.

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It can be argued that the approach I have developed in this chapter sets up a two-tier standard of review which inappropriately distinguishes between basic needs claims and other claims. In his chapter, Porter argues that it is inappropriate to ever place the onus on the rights claimant to establish the unreasonableness of governmental policy decisions, particularly in the context of the obligation to allocate resources among competing demands. In the context of the South African model of reasonableness review, the primary burden currently falls on the claimant to show the unreasonableness of government policy and resource allocation decisions. While the State is undoubtedly required to place rebutting evidence and argument before the court, at the end of the day it is the applicants who have to persuade the court that the government's acts or omissions were unreasonable.⁷⁵ Thus in the *TAC* case, the claimants marshalled together an enormous volume of medical, financial and other evidence to persuade the government's mother-to-child prevention programme was unreasonable. In many cases, this would be beyond the capacity of individuals and even groups of claimants living in remote rural areas and not enjoying the support of a highly effective organisation, such as the *TAC*. In claims involving a deprivation of basic needs, it will promote the practical justiciability of socio-economic rights for claimants to have the benefit of a presumption of unreasonableness. It should also be noted that the South African Constitutional Court has not dismissed the notion of basic standards of provision, but hints that their potential may lie in informing the reasonableness standard of review.⁷⁶ It is this idea that I have sought to develop further in this chapter.

At a more general level, I share Porter's misgivings relating to minimum core obligations if they are conceptualised as universal, abstract and a-contextual standards of State provision. Conceived in this way, minimum core obligations will certainly be unjust to a range of groups which do not fit the background norms which inform the setting of these standards: for example, women in rural areas, people living with disabilities, children, etc. However, one does not need to ascribe to this notion, to recognise the value of achieving a strong degree of judicial protection in cases where claimants lack access to the preconditions for human survival, development and participation in society. Lucy Williams⁷⁷ has

⁷⁵ Thus, for example, in *TAC*, *supra*, the court stated: 'The question is whether *the applicants have shown* that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.' (para. 25) [footnotes omitted, emphasis added]

⁷⁶ *Grootboom*, *supra*, at para. 33; *TAC*, *supra*, at para. 34.

⁷⁷ Lucy A. Williams 'Issues and Challenges in Addressing Poverty and Legal Rights: A Comparative United States/South African Analysis', paper presented at CROP VI workshop organised by CROP committee of International Social Science Council (ISSC) and Centre for International and Comparative Labour and Social Security Law (CICLASS) at Rand Afrikaans University/University of Johannesburg, Johannesburg, South Africa, 26-28 January, 2005 (on file with author)

highlighted three important benefits of the recognition of individual entitlements to basic welfare benefits in the context of the civil rights and welfare rights movements in the United States. First and foremost, individually enforceable rights 'put food on the table'. Second, the protection of basic entitlements to welfare supported organising strategies in that they gave individuals the confidence to participate in collective action without fear of losing subsistence benefits. Finally, the establishment of an individually enforceable right to social welfare benefits helped expose the socially constructed nature of property rights and 'disrupted the nineteenth-century formulation of individual autonomy as effort and exchange within an unregulated market.'

4. Conclusion

The South African Constitutional Court has developed a model of reasonableness review for adjudicating the positive duties imposed by socio-economic rights. Of particular importance is the element of the reasonableness test that inquires whether the State has made short-term provision for vulnerable groups in desperate need and living in intolerable conditions. Applying this model it, has found that government programmes on housing, the reduction of mother-to-child transmission of HIV and, most recently, social assistance to be unconstitutional. I have sought to illustrate that this model of review enables the court to respect the role and competencies of the other branches of government – the democratically elected legislature and the executive – while not abdicating its responsibilities to enforce the positive duties imposed by socio-economic rights.

I have also argued, however, that the justificatory elements of the reasonableness test should be tightened when dealing with situations where vulnerable groups are deprived of basic essential levels of social goods and services. A high standard of justification is warranted in this category given the urgency of the interests at stake. Members of groups who are deprived of basic socio-economic needs face severe threats to their life, health and future development. Moreover, without these basic needs being catered for, there is no foundation for the progressive realisation of the quality of socio-economic rights over time. When a society has the resources to provide basic levels of socio-economic rights, it constitutes a serious denial of human dignity to neglect to do so. It also undermines society's efforts to build an inclusive, caring political community. As expressed by Justice Mokgoro in the case of *Khosa, Mahluli and Others v Minister of Social Development and Others*:

Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions

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about the allocation of public benefits represent the extent to which poor people are treated as equal members of society.⁷⁸

⁷⁸ *Khosa, supra.*, at para. 74 (footnotes omitted).

6. Judging Resource Availability

Malcolm Langford¹

[T]he court saw precision and cost implications as matters of degree.

Scott and Macklem commenting on *Schachter v Canada*²

1. Introduction

When a simple Gini coefficient test reveals substantial income inequity in almost every country,³ it might be reasonable to ponder the relative scarcity of cases raising issues of distributive justice directly, particularly in those jurisdictions where economic, social and cultural (ESC) rights are fully actionable. Indeed, the revolutionary flood of litigation predicted by critics of ESC rights appears, at first glance,⁴ to be a mere trickle.

Potential explanations for this paradox range from the theoretical to the practical. Some may triumphantly interpret it as evidence that the resource-dimension of ESC rights lacks sufficient precision for litigation, such that courts have been unable to formulate relevant and reasonable legal standards to hold governments accountable to their obligation to devote maximum available resources to the realisation of the rights. Or, with equal exultance, that the relevant stakeholders in ESC rights litigation – the judiciary, the legal profession and the victims – have acknowledged the lack of judicial capacity or legitimacy⁵ to adjudicate claims that

¹ Senior Legal Officer, ESC Rights Litigation Programme, Centre on Housing Rights & Evictions (COHRE). My thanks to Carolina Fairstein and Ashfaq Khalfan for helping me access Colombian and Canadian jurisprudence.

² Craig Scott and Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees?' 141 U. Pa. L. Rev 1 at 66.

³ A country's Gini rating is between 0 and 100, with 0 indicating perfect income equality and 100 indicating absolute income inequality. In 2002, the most equal country – Slovak Republic – had a coefficient of 19.5 while Sierra Leone had a figure of 62.9, whereby the richest 20 per cent of the population had 63.4 per cent of the income and the lowest 20 per cent had 1.1 per cent of income. Only 24 countries had a Gini coefficient below 40. See *World Development Index 2002*, The World Bank. What is perhaps startling is that many countries with very high Gini coefficients – for example Brazil and South Africa – have progressive legal instruments with respect to the justiciability of ESC rights.

⁴ Cf. section 2 of this chapter.

⁵ Craig Scott and Patrick Macklem, *supra*, at 43, summarise well this traditional critique of justiciability: 'The concern with the supposed positive nature of social rights is not simply a legitimacy concern that the courts will usurp the power of the legislature to initiate social change through law and determine the terms on which such initiation takes place. There is also a concern that their perceived positive nature entails the expenditure of state resources and that courts are ill positioned to make the kind of complex fiscal decisions necessary to create and implement the structures necessary to realize social rights.'

raise significant resource questions.⁶ Or is the explanation more mundane? Is there a relative lack of awareness of the potential justiciability of ESC rights resulting in fewer cases? Or do judiciaries simply respond to such claims in a conservative manner? Or are cases involving significant allocation of resources more likely to be resolved through collective complaints, which almost by definition will mean fewer cases of this nature? One commentator on the proposed Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (ICESCR) envisages, for example, that the majority of the Committee's case-load would be dominated by cases raising negative obligations – the requirement that States refrain from interfering with self-help mechanisms.⁷

If the causes are the latter ones, then the issue is merely one of education and awareness-raising, at least for those concerned with the advocacy of such rights, or the mathematical acknowledgment that the median of the case-load will be cases concerning negative obligations. If the explanation relates to the nature of the rights themselves, however, then re-analysis of whether ESC rights are fully justiciable may be required.

With these issues in mind, the preparation of this chapter involved a desk review of the various human rights judgments or decisions that raised the issue of resources directly. The surprising result of the analysis was not only the well-worn proposition that the judiciary faces the prospect of making orders with budgetary consequences in all areas of human rights – even if they are more pronounced in some rights than others – but that the reasoning, whether explicit or implicit, employed by decision-makers is remarkably consistent. The latter part of this chapter seeks to draw these common factors together – which interestingly could all be grouped under the heading of the principle of 'reasonableness' – as articulated in the previous chapter by Liebenberg – and postulates that the number of successful cases will increase as societies, particularly the legal profession, acknowledge explicitly or implicitly the fundamental value of the interests that ESC rights seek to protect. In some ESC rights cases, however, some innovative or more deferential approaches will be called for. This chapter, like others in this volume, examines how adjudicative authorities can utilise standard legal principles to solve the seeming complexity of some difficult cases.

⁶ One leading ESC rights advocate has noted the difficulty, for example, of judicialising the obligation of non-retrogression. See interview with Victor Abramovich in Centre on Housing Rights and Evictions, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, (Geneva: COHRE, 2003) at 60-65. The decision not to litigate, however, appears more strongly motivated by the potential conservative response since the lawyers involved were able to formulate judicial tests that would protect the relevant public nutrition program from extinction.

⁷ See Ann Bayefsky, 'An Optional Protocol to the International Covenant on Economic, Social and Cultural Rights', Paper presented at Expert Meeting, Office of the High Commissioner for Human Rights, Geneva, January 2001.

2. Cases Concerning Resources

The review mentioned above divided the various human rights decisions or judgments that raised the issue of resources directly into four categories: (1) civil and political rights decisions that concern social issues; (2) non-discrimination or associated equality rights; (3) negative obligations to respect ESC rights; and (4) various positive obligations to protect and fulfil ESC rights. These are discussed below.

2.1 Civil and political rights

As many authors have pointed out, the realisation of civil and political rights carries a financial cost⁸ in addition to court-ordered remedies, such as compensation.⁹ These costs are inevitable since the effective respect and protection of human rights requires some level of intervention by the State – whether to regulate itself or others – and any intervention ordinarily carries a price. As the positive-obligation dimension of civil and political rights has been gradually tested, courts have been called upon to make decisions with budgetary consequences. Of course, any judgment that denies an individual a course of action may have *economic* consequences – protection of cultural rights in ancestral land may for example forestall development – but the focus of this chapter will be on *budgetary* costs as opposed to what economists call *opportunity* costs.

Perhaps the best illustration of the fiscal dimensions of civil and political rights is the jurisprudence of the European Court of Human Rights. Another potent example is judicial reform of prisons and mental hospitals in the US.¹⁰ In the well-known 1979 case of *Airey v Ireland*,¹¹ the court determined that the complexity of divorce proceedings in Ireland necessitated the provision of legal aid, noting that: 'Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature'.¹² Since it was 'most improbable that a person in Mrs. Airey's position [could] effectively present his or her own case' a violation was found of the right to fair hearing in the

⁸ In North America, judges have tended to take traditional common law private entitlements as the essential components of a largely unarticulated normative baseline. What goes unsaid in the invocation of such a baseline is the fact that property and the right to contract require extensive positive state action to be effective legal institutions, and can in fact be seen as the state structure upon which modern industrial society emerged.' Scott and Macklem, *supra*, at 46-47.

⁹ It should of course be noted that while it is commonly accepted that compensation is payable upon violation of a right the State is disbursing moneys outside a yearly budget plan, simply on account of human rights obligations it is has accepted, whether in legislation, a constitution or international treaty.

¹⁰ See generally, Donald Horowitz, *The Courts and Social Policy* (The Brookings Institution, 1977).

¹¹ *Airey v Ireland* 32 (1979): [1979] 2 E.H.R.R. 305.

¹² *Ibid.*, at para. 26.

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determination of a person's civil rights and obligations. In addition, a violation of the right to privacy and family life was also identified. This conclusion was achieved by reference to positive obligations that flow from the right:

[A]lthough the object of Article 8 ... is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life....¹³

Subsequent to the judgment, Ireland enacted a means-tested legal aid system for civil proceedings.¹⁴

The European Court of Human Rights has derived a number of other positive obligations in specific cases from various Convention rights, for example, the duty to protect residents from industrial pollution,¹⁵ prevent loss of life and property from potentially explosive gases,¹⁶ and the requirement to 'facilitate a gypsy way of life'.¹⁷ In a decision concerning an applicant suffering metabolic myopathy, the court indicated, in language remarkably similar to that of *Airey v Ireland*, that respect for privacy may necessitate the provision of housing to those with serious disabilities or illnesses:¹⁸

[A]lthough Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual.

In the later jurisprudence, however, the court has clarified that there must be a 'direct and immediate link between the measures sought by an applicant and the latter's private life'¹⁹ which indicates that the court is conscious of the potential breadth of the various positive obligations. Indeed, it is difficult to conclude that the jurisprudence is voluminous, or even necessarily consistent, in this regard. Nonetheless, it appears relatively clear that where there is a clear relationship, in

¹³ *Ibid.*, at para. 32.

¹⁴ Communication with Mr Brendan Walsh, Solicitor for Mrs Airey.

¹⁵ *López Ostra v Spain*; (1995) 20 EHHR 277.

¹⁶ *Önerüldü v Turkey* (No. 48939/99), European Court of Human Rights, 18 June 2002.

¹⁷ '[T]he eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.' *Connors v United Kingdom*, (European Court of Human Rights, Application no. 66746/01, 27 May 2004) at para. 95.

¹⁸ (1999) 28 EHRR CD 175.

¹⁹ *Ibid.*, See also *Botta v Italy* (1998) 26 EHHR 241 at paras. 33-34.

practice, between effective access to a right and a particular government response, the court views itself as responsible for ordering a remedy, despite budgetary consequences.

2.2 Equality and Non-Discrimination

A second group of cases concerns those raising claims of non-discrimination. For example, the Human Rights Committee declared that unemployment benefit legislation that excluded married women – on the assumption that their husbands would provide for their needs – discriminated on the basis of marital status and sex.²⁰

However, when a complaint concerns denial of a right of access to an existing government scheme on the basis of a prohibited ground of non-discrimination such as race or sex, vindication of that claim does not automatically entail a corresponding rise in government expenditure. ‘Equalising down’ is an option for government if the positive, or substantive, dimension of the right to non-discrimination is not recognised, or there is no other human right – in particular an ESC right – or legal provision that prevents retrogressive action. In other words, the government may simply respond to an unfavourable judgment by decreasing the relevant benefit for the group that currently enjoys access in order to provide the good or service to a wider group. Alternatively, and more commonly perhaps, a government may accept the ruling but delay implementation.²¹

Nonetheless, the standard ‘equality rights’ language adopted in many legal instruments²² has frequently been interpreted – beginning with the Permanent

²⁰ [A]lthough Article 26 [right to equality and non-discrimination] requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State’s sovereign power, then such legislation must comply with Article 26 of the Covenant.’ See the following decisions of the UN Human Rights Committee: *Zwaan-de Vries v the Netherlands*, Communication No. 182/1984, (9 April 1987) at para. 12.4.

²¹ For example, in *Taylor v United Kingdom* Case-382/98, 16 December 1999, the European Court of Justice ruled that the lower-age threshold for a winter fuel benefit discriminated against elderly men. The government subsequently reduced the age level for men to the same age as women but opposition parties criticised the government for failing to publicise the new entitlement: see *The Independent*, 2 January 2002, at 2.

²² Article 26 of the International Covenant on Civil and Political Rights reads, ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

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Court of Justice in 1935²³ – to go beyond preventing mere *formal*, or procedural, non-discrimination in law to the duty to eliminate discrimination ‘in fact’. This not only often creates significant positive obligations to address the needs of marginalised and vulnerable groups, but would also appear to forestall retrogressive action in many cases. The Human Rights Committee has commented:

[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population.²⁴

In Canada, this position has been accepted.²⁵ In the *Eldridge* case – discussed in more detail by Roach in this volume – the Canadian Supreme Court rejected the British Columbian provincial government’s arguments that the budgetary implications of providing interpretive services to the deaf justified the denial of such services. The court held that there was no reasonable basis for concluding that a total denial of such services was a justified limitation on their right to equal protection and equal benefit of the law. While the court examined the cost of providing sign language interpretation within the province, it was not persuaded that there was any significant burden for the government: only \$150,000 or approximately 0.0025% of the provincial health budget at the time was needed.²⁶

In the *Auton* case, British Columbia’s provincial government argued that increased health costs justified its decision to not fund certain autism treatments. However, the British Columbia Supreme Court rejected this argument on the basis that this decision violated the equality rights of those suffering from autism. In reaching this decision, the court held that the savings achieved by assisting the children to develop their educational and social potential might offset the costs of

²³ *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No. 64: ‘[T]here may be no true equality between a majority and a minority if the latter were deprived of its institutions (schools in our case) and were consequently compelled to renounce what constitutes the very essence of it being a minority.’

²⁴ Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989) at para. 10.

²⁵ Section 15(1) of the Canadian Charter on Rights and Freedoms reads: ‘Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.’ The courts have subsequently declared that: ‘The principle that discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field.’ *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R. at para. 78.

²⁶ *Eldridge v British Columbia (Attorney General)* [1997] 3 S.C.R. at para. 87.

treatment.²⁷ This novel judicial approach assessed cost restraints from a long-term perspective. This judgment might imply that a lack of 'available resources' is not an excuse for refraining from funding a particular treatment if it would be cost-effective in the longer term. Another criterion used by the court in *Auton* was to assess the government's policy choices on health with regard to practice in other jurisdictions.²⁸ The fact that many other provinces funded similar treatments implicitly undermined British Columbia's arguments that the scientific value of the treatment did not justify the expenditure.

2.3 ESC Rights: Negative Obligations

Cases concerning a government's duty to refrain from interfering with resources used by individuals and communities for self-help will in some circumstances require outlays of resources by the government. While the resource implications of a violation of the obligation to respect – as defined in ESC rights literature – could be viewed simply as the costs of providing a remedy, in a manner similar to civil and political rights, it is not always possible to draw such a simple delineation, as the analysis of civil and political rights above demonstrates. Financial or natural resources may be needed to meet one aspect of the respective obligation or the consequential remedy, however defined. For example, to ensure that an eviction is not rendered 'forcible', and thereby 'illegal', the Committee on Economic, Social and Cultural Rights has commented that:

Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.²⁹

A perusal of eviction cases that have been prosecuted under various civil and political rights, as well economic and social rights, demonstrates that although courts seek to tread carefully with respect to ordering the State to provide alternative accommodation, such orders have been made. In the early Indian jurisprudence, the Supreme Court was notably cautious about enshrining the right to alternative accommodation as part of the protection against evictions it derived from the right to life. This can be partly explained, however, by the fact that the

²⁷ *Auton (Guardian ad idem of) v British Columbia (Minister of Health)* (2000) 78 B.C.L.R. (3d) 55 (B.C.S.C.), at para. 148. This case has been appealed to the Canadian Supreme Court as of 2003. See Roach in this volume.

²⁸ *Ibid.*, at paras. 67-83.

²⁹ Committee on Economic, Social and Cultural Rights, *General Comment No. 7: Right to Housing: Forced Evictions* (1997) at para. 16.

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right to protection from forced evictions in India is located in the more circumscribed right to life, as opposed to the fully-fledged right to housing. The court found in *Olga Tellis* that the government was in breach of its duty to provide due process before carrying out the eviction, but declined to make a binding order on alternative shelter for those evicted, holding that alternative sites *should* be provided to long-term residents, and high priority *should* be given to resettlement of all dwellers.³⁰ The precedent of this leniently-worded order has been adopted in neighbouring Bangladesh which possesses a similar constitution. The apex court of that country ruled that the government should develop master guidelines, or pilot projects, for the resettlement of the slum dwellers.³¹ However, the Indian Supreme Court has shown some signs of making more strongly worded orders on resettlement.³²

The South African cases on evictions, however, reveal a judiciary more willing to impose binding obligations on authorities for the adequate resettlement of evicted squatters, which is not surprising given the constitutional prohibition on evictions not sanctioned by a court. Although they have not entrenched an absolute right to alternative accommodation, however, the presumption is certainly there:

There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme.³³

2.4 ESC Rights: Positive Obligations

It is commonly assumed that positive obligations to realise ESC rights will impose the greatest burden on a government budget.³⁴ Craven attributes the division of

³⁰ *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51.

³¹ *ASK [Ain O Salish Kendra] v Bangladesh* (Supreme Court of Bangladesh, 1999).

³² In *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan & Ors* (1997) 11 SCC 121, the Supreme Court said that: 'It is the duty of the State to construct houses at reasonable rates and make them easily accessible to the poor. The state has the constitutional duty to provide shelter to make the right to life meaningful.' Further, 'the mere fact that encroachers have approached this court would be no ground to dismiss their cases. Where the poor have resided in an area for a long time, the state ought to frame schemes and allocate land and resources for rehabilitating the urban poor.' See generally Colin Gonsalves, 'Right to Housing – Preserve of the Rich' 1 *Housing & ESC Rights Quarterly* 2 (2004) at 1.

³³ *Port Elizabeth Municipality v Various Occupiers* Case CCT 53/03, judgment delivered 1 October 2004 at para. 28.

³⁴ For example, the Canadian government representative in a United Nations Working Group established to examine the creation of an international complaints mechanism for enforcement of such rights, said that she accepted that if social benefits are already provided, there must be equal access, but questioned whether someone should have the right to bring a complaint for an increase in social benefits.

the Universal Declaration of Human Rights into separate treaties for civil and political rights – with an individual petitions mechanism – on one hand, and economic social and cultural rights on the other, to this very apprehension.³⁵ Two decades of legal inquiry, however, have illustrated that the duty to use, or defence of, ‘maximum available resources’ under the International Covenant on Economic, Social and Cultural Rights is susceptible to a degree of precise interpretation that would alleviate many of the fears of the detractors of the concept of ESC rights.³⁶ The question is to what extent this has been translatable into judicial practice.

2.4.1 Obligation to Protect

Ensuring private actors respect human rights will ordinarily require more than the passage of legislation. Some form of regulatory system with inspection, prosecution and other forms of monitoring is necessary in order for the State to demonstrate that it is taking all necessary steps to restrain individuals, corporations and other entities from violating ESC rights. For example, the European Committee on Social Rights not only found fault with Portugal’s laws concerning the prohibition of child labour, but was also critical of the number of labour inspectors employed by the State.³⁷ In *FK Hussain v Union of India*³⁸ the Indian High Court of Kerala found that the extraction and pumping of groundwater on the Lakshadweep Islands must not threaten water needed for drinking. Holding that the ‘right to sweet water’ was an attribute of the right to life, the court ordered that the authorities must submit their plans for pumping groundwater to the Ministries for the Environment and Science for approval. If the pumping was to proceed, an agency should be established to monitor the project to make sure it complied. While the cost of an effective regulatory system

³⁵ It was the ‘primary justification both for allowing States to implement the [ESC] rights in a progressive manner and for having a reporting [as opposed to a petitions] system as the means of supervision’ under the International Covenant on Economic, Social and Cultural Rights (ICESCR): see Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (Oxford University Press, 1995) at 136. The attempt of States parties to partially denude the ESC rights in the Covenant of their potential judicial character – by denying it a complaints mechanisms and not *explicitly* requiring States to make the rights domestically enforceable – now seems myopic.

³⁶ Indeed, many of the checks and balances are already built into the Covenant, in particular the obligation to progressively realise the rights and obviously provide a measure of comfort to poorer states. Further, State parties are granted the right to decide on the requisite policies for realising the rights, providing such measures are ‘appropriate’. Article 2(1) of the Covenant states: ‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

³⁷ *ICJ v Portugal*, Complaint No.1/1998 (European Committee of Social Rights).

³⁸ OP 2741/1988 (26 February 1990).

presumably has some definable limit, it should be noted that independent studies on proposed water privatisation schemes have indicated that most developing countries lack the capacity to effectively regulate the pricing and other activities of multinational water companies.³⁹

As Budlender has also outlined in this volume, in the case of forced evictions, the Supreme Court of Appeal of South Africa has gone as far as to order the State to purchase the private land upon which 40,000 squatters were residing in order to avoid the forced eviction of the residents.⁴⁰ The order, based on the duty to protect the right to housing, was predicated on two critical factors. First, the relevant authorities had failed to develop a housing program that was designed to progressively realise the right to housing of the residents in accordance with the Constitution. Second, no other land appeared to be available for the settlement of the residents.

2.4.2 Failure to provide the 'Minimum Essential Level'

The minimum core obligations of States – or its various mutations – have been discussed in more detail elsewhere in this volume by Craven, Porter and Liebenberg. The Committee of Economic, Social and Cultural Rights in General Comment No. 3 originally defined the minimum core obligation as the threshold which all States must meet immediately, stating that 'the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.'⁴¹ In later General Comments the concept essentially embraces all immediate obligations of States parties to the Covenant. However, an escape clause, although rather tightly defined, is provided for States deprived of the requisite resources.⁴²

The South African Constitutional Court interestingly has rejected this approach, principally out of concern that it could not secure the necessary information to make an order or resolve how that minimum core should be satisfied in

³⁹ Dr. Peter H. Gleick, Gary Wolff, Elizabeth Chalecki and Rachel Reyes, *The New Economy of Water: The Risks and Benefits of Globalization and Privatization of Fresh Water* (Pacific Institute, 2002).

⁴⁰ *Modderklip Squatters v Modderklip Boerdery (Pty Ltd)*; *President of the RSA v Modderklip Boerdery (Pty) Ltd* Supreme Court of Appeal case no 187/03 and 213/03, judgment delivered 27 May 2004.

⁴¹ Committee on Economic, Social and Cultural Rights, *General Comment No 3: The nature of States' parties obligations (article 2(1) of the Covenant)*, UN doc. E/1991/23 (1990) at para. 10.

⁴² 'In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.' *Ibid.*, at para. 11.

programmatic terms.⁴³ However, there are a myriad of ways that the court could have addressed the minimum core obligation, at the very minimum asking whether the government has a method of identifying and securing immediate and essential needs. Liebenberg, in this volume, challenges the conclusion of the court and argues that the court's existing reasonable test could be adapted to cover 'survival interests'. For example, there could be a presumption that government programs do not meet the test of reasonableness if the minimum is not met. Alternatively, the government could be required to demonstrate that its resources are inadequate when survival interests are threatened, or the court could adopt a proportionality analysis that questions whether the government has taken, or considered taking, sufficient steps to immediately realise the minimal interest. Indeed, it is arguable that the distinction in practice between a minimum core obligation, and that of progressive realisation, may be difficult to identify in practice. The only difference may be the degree of scrutiny.

It is notable that courts in some other jurisdictions have felt less reluctance about their ability to identify the minimum core – explicitly or impliedly – if called upon:

- The Swiss Federal Court determined that there was an implied constitutional right to basic necessities, which can be invoked by both Swiss citizens and foreigners. The court acknowledged its lack of legal competence to determine resource allocation but said it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights.⁴⁴
- The Supreme Court of India – faced with complaints of starvation deaths – made extensive orders concerning increased resources for the poorly functioning famine relief scheme, the opening times of ration shops, the provision of grain at the set price to families below the poverty line (BPL), the publication of information concerning the rights of BPL families, the granting of a card for free grain to all individuals without means of support and the progressive introduction of midday meal schemes in schools.⁴⁵ The court refused to hear arguments on lack of resources given the seriousness of the case, noting that the government should 'cut the flab somewhere else'.
- In Colombia, the Constitutional Court, in a series of cases since 1992, covering unemployment subsidies or water supply for those living in refuges, has recognised a fundamental right to what it called the '*minimo vital*'. According to this jurisprudence, the government is obliged to take all those

⁴³ *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC) at paras. 32-33.

⁴⁴ *V v Einwohnergemeine X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Federal Court of Switzerland, of 27 October 1995). See also Constitutional Court of Hungary, Case No. 42/2000 (XL.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany);

⁴⁵ *People's Union for Civil Liberties v Union of India*, No.196 of 2001, Interim Order of 2 May 2003.

positive and negative measures in order to prevent individuals from being deprived of the most basic conditions that allow her or him to carry on a decorous existence.⁴⁶

- An Argentinean Provincial Court of Appeals affirmed a lower court decision that within two days of the decision, 250 litres of drinking water per person per day was to be temporarily delivered to inhabitants until the government resolved the contamination of a community's water supply by heavy metals. Both courts based their decisions on the fact that the government had not taken any reasonable measure to tackle the pollution problem that seriously affected the health of the Paynemil even though it was well informed about the situation. The Court of Appeals stated that: 'even though the government has performed some activities as to the pollution situation, in fact there has been a failure in adopting timely measures according with the gravity of the problem.'⁴⁷

2.4.3 Denial of Access to a Vulnerable Group or Individual

In some cases, access to a government provided service will be denied to a group for reasons unconnected with traditional prohibited grounds for discrimination. In many cases, the explicit reason for exclusion may be seemingly innocuous but actually represents a proxy for wealth and income, or geographical region. While this ground potentially falls within the ground of 'other status' that is included in some legal provisions on equality, Craven notes that there may be some difficulties in including these grounds within the traditional conceptualisation of discrimination.⁴⁸

Where the categories of discrimination cannot be stretched,⁴⁹ economic and social rights can be invoked. For example, in Colombia a local quota system for education resulted in a female student being placed in a school outside her neighbourhood, even though her mother was unable to afford the transport fees. The Constitutional Court of Colombia found a violation of the right to education due to the lack of effective access to education.⁵⁰ Analogously perhaps, the Campaign for Fiscal Equity alleged that the State of New York's education financing scheme failed to provide public school students with an opportunity to

⁴⁶ Sentencia T 426 of June 24, 1992, Sala Segunda de Revisión de la Corte Constitucional.

⁴⁷ *Menores Comunidad Paynemil s/ acción de amparo*, Expte. 311-CA-1997. Sala II. Cámara de Apelaciones en lo Civil, Neuquen, 19 May 1997.

⁴⁸ See Craven, *supra*, at 175.

⁴⁹ Cf. *Kearney & Ors v Bramlea Ltd & Ors*, Board of Inquiry, Ontario Human Rights Code, Canada.

⁵⁰ Decision T-170/03 [*Mora v Bogota District Education Secretary & Ors*], Colombian Constitutional Court, February 28, 2003.

obtain a sound basic education. The court found that the State had failed in its constitutional duty 'to provide for the maintenance and support of a system ... wherein all children may be educated.'⁵¹

At times, however, courts will be required to fix the parameters of the relevant group. The Colombian Constitution provides that all persons will be guaranteed access to services to promote, protect and restore health, and that the law will designate the terms in which basic health care for all inhabitants will be free and obligatory.⁵² The court, however, has made the provision of health care subordinate to the existence of economic resources, although available resources should be used in a rational and equitable fashion in cases in which the restoration of health is actually possible. The court applied this reasoning to a situation in which a girl had been treated in a hospital, and was in a stable but irreversible condition. The hospital wished to discharge the girl against the wishes of her parents, on the basis that there was nothing more it could do. The court approved the hospital's action on the basis that hospital beds and room should not be occupied by persons whose state of health was not expected to improve, so as to deprive other persons of care.⁵³

2.4.4 Removal of Access: Retrogressive Measures

Retrogressive measures, such as cuts in social benefits, removal of programs, increases in the prices of government goods and services, or removal of legislative protections, have been a regular feature of the political-economic landscape, particularly with the advent of neo-liberalism. As a corollary of the obligation of progressive realisation, the UN Committee on Economic, Social and Cultural Rights noted the potential violation of ESC rights:

[A]ny deliberately retrogressive measures ... would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.⁵⁴

The parameters of this obligation still remain somewhat unresolved, as is evident from the cases. What are, for example, the acceptable and non-acceptable justifications for the introduction of retrogressive measures with budgetary implications? In some cases, the inquiry is made relatively simple by express constitutional provisions. For instance, in Ecuador the constitution provides that

⁵¹ *Campaign for Fiscal Equity v The State of New York* No. 74 (NY Sup. Ct. June 26, 2003).

⁵² Articles 49 (1) and (3).

⁵³ Constitutional Court, Judgement No. T-484 of 11 August 1992, *Revista Mensual, Jurisprudencia y Doctrina*, 1992, Vol. 21, PP. 1008-1109.

⁵⁴ Committee on Economic, Social and Cultural Rights, General Comment No. 3, *supra*, at para. 9.

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the health care budget must rise at the same rate as GDP.⁵⁵ In most jurisdictions, however, such an explicit baseline is not always available. The judiciary could either use the existing system of provision as a 'baseline' for measuring retrogression or refer to the actual rights themselves.⁵⁶ The problem with the latter approach is that in wealthier countries significant and therefore potentially harmful retrogression may be permissible, particularly if the content of the right is narrowly defined. This dilemma arose before the Hungarian Constitutional Court when confronted with the elimination of a wide range of maternity, children's and educational benefits. Instead of solely relying on a standard 'minimum' entitlement analysis, earlier enshrined in the jurisprudence, the court opted for a doctrine of legal certainty, noting that families and individuals had made decisions based on the availability of the benefits, a form of the doctrine of legitimate expectations that has developed in some common law jurisprudence.⁵⁷ Otherwise, most of the benefits would be lost for a large sector of the population.

Such judicial manoeuvring, however, left the court open to some criticism.⁵⁸ While the argument of legal certainty has a certain legitimacy, there is a question mark over how long the benefits must be maintained and whether all socio-economic classes of society should be entitled to them. However, if a less minimalist position is adopted – for example, relying on the rights as expressed in the ICESCR which are often framed in terms of adequacy or highest possible attainment – then the principle may have more relevance. The principle of equality may have also protected some of the benefits: some groups would be disadvantaged by the cuts in comparison to others.

While these arguments are certainly feasible, there is of course the question of resource constraints or the margin of discretion that may be allowable for policy change and development. But this presents a formidable hurdle for applicants if they have to demonstrate that funds should be cut from elsewhere. Moreover, it is unlikely that the judiciary would feel comfortable conducting such an exercise. However, if the cut would cause significant harm to the realisation of ESC rights, or is particularly and unjustifiably sudden, as has been noted in some cases above,

⁵⁵ However, the Ecuadorian courts have so far failed to enforce this constitutional provision and a case is currently before the Inter-American Commission.

⁵⁶ Scott and Macklem states: 'Whatever the justificatory burdens and criteria, a *sine qua non* for permitting justified downward movement could be that individuals not find themselves lacking core minimum entitlements as a result of such change': *supra*, at 81.

⁵⁷ *Hungarian Benefits Case*, Decision No. 43/1995 (VI. 30); ABH, 1995, 188. Reprinted in *East European Case Reporter*, 1997, Vol. 4, No. 1, pages 64-81. See also Barnabas Gero, 'The Role of the Hungarian Constitutional Court', Conference Proceedings, Columbia International Affairs Online, pages 11-16. Available at www.ciaonet.org/conf/ece01/ece01geb.html

⁵⁸ For a strong critique of the decision, see Andras Sajó, 'How the Rule of Law Killed Hungarian Welfare Reform', *East European Constitutional Review*, Winter 1996, at 31-41.

courts may be less reluctant to step in and halt or moderate the retrogressive action. It is most likely a matter of degree.

There are two other approaches that could be employed in non-retrogression cases. The first is to place the burden of justification upon the government once an applicant has demonstrated a *prima facie* case. Liebenberg, in this volume, essentially advocates a similar approach for the minimum core. The second type of legal approach to retrogressive measures is to rely upon various rights to information and participation as described by Abramovich, also in this volume.

2.4.5 Failure to Fulfil or Take Steps to Ensure Progressive Realisation

Interestingly, there is an emerging and significant case law on the obligation to fulfil or, as expressed in many instruments, an obligation to take steps to progressively realise the rights within maximum available resources. One notable case arose in Finland. There, ESC rights are mostly justiciable, and decisions have been made faulting local authorities for failing to take sufficient steps to secure employment for a job seeker, speedily find a child-care placement for a family, and provide suitable shoes for a woman with a physical disability.⁵⁹ Indeed, in the case of Finland, it is evident from some of the cases that the obligation is neither progressive nor resource-contingent.

Even where adjudicatory bodies are constrained – explicitly or implicitly⁶⁰ – by these exceptions, violations have been found. For example, the European Committee on Social Rights, after acknowledging the difficulties of providing education to persons with autism, held that:

[N]otwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required, and even after the enactment of the Disabled Persons Policy Act of 30 June 1975, France has

⁵⁹ See respectively KKO 1997: 141 (Employment Act Case) Yearbook of the Supreme Court 1997 No. 141 (Supreme Court of Finland), Case No. S 98/225 (Child-Care Services Case) Helsinki Court of Appeals 28 October 1999; Case. No. 3118 (Medical Aids Case) Supreme Administrative Court, 27 November 2000, No. 3118. For English summaries of a wide range of cases see: www.nordichumanrights.net/tema/tema3/caselaw/

⁶⁰ The European Committee on Social Rights recently stated: 'Where the achievement of one of the right is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum available resources.' See *Autism-Europe v France*, Complaint No 13/2002, Decision on the Merits. A similar approach was adopted by the African Commission on Human and Peoples' Rights: *Purohit and Moore v Gambia*, African Commission on Human and Peoples, Communication 241/200. Decided at 33rd Ordinary Session of the African Commission (15–29 May, 2003) (*Purohit and Moore v Gambia*). The lack of legal reasoning is critiqued in a comment on the case by Mawuse Anyidoho, Right to Health, 1 *Housing & ESC Rights Quarterly* 1 (2004).

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failed to achieve sufficient progress in advancing the provision of education of persons with autism.⁶¹

Similarly, the African Commission on Human and Peoples' Rights, after reading into the African Charter the requirement only to use maximum available resources, recommended that the Gambian Government provide adequate medical supplies to patients detained under the Lunatics Detention Act.⁶² This conclusion was admittedly bolstered by an admission from the government that it had sufficient drug supplies.

Perhaps the most interesting illustration of this obligation is found in the three leading cases of the Constitutional Court of South Africa. In *Soobramoney v Ministry of Health*, the applicant suffered *chronic* renal failure but was denied access to a renal dialysis machine that would have prolonged his life.⁶³ The court, however, found that the case did not fall within the envelope of the constitutional provisions that 'no one may be refused emergency medical treatment' and 'everyone has the right to life'.⁶⁴ Even though the applicant accepted 'that there are no funds available to provide patients such as the applicant with the necessary treatment',⁶⁵ the court rejected his application that existing dialysis machines and nurses be utilised to provide patients such as himself with ongoing treatment. The decision was based on a number of grounds. The court rejected the view that any such treatment constituted 'emergency treatment' on the basis that the condition was chronic, but considered the case under the general provisions on the right to health.⁶⁶ It considered, however, that the machines were already over-utilised, and that 'if everyone in the same condition as the appellant was to be admitted the carefully tailored programme would collapse and no one would benefit from that'.⁶⁷ The court considered the cost of the programme and noted its reluctance to interfere with 'rational decisions taken in good faith by the political organs and medical authorities', and concluded that:

The hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources; he is not and has to look to the state to provide him with treatment. But the state's resources are limited

⁶¹ *Autism-Europe v France*, *supra*, at para. 54.

⁶² *Probit and Moore v Gambia*, *supra*.

⁶³ *Soobramoney v Minister of Health (KwaZulu-Natal)* (CCT32/97) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696; [1997] ZACC 17 (27 November 1997).

⁶⁴ Articles 27(3) and 11 respectively of the Constitution of South Africa.

⁶⁵ *Soobramoney v Minister of Health*, *supra*, at para. 25.

⁶⁶ Section 27(1) of the Constitution reads in part: 'Everyone has the right to have access to- (a) health care services, including reproductive health care'; and section 27(3) provides that: 'The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights'.

⁶⁷ *Ibid.*, at para. 27.

and the appellant does not meet the criteria for admission to the renal dialysis programme. Unfortunately, this is true not only of the appellant but of many others who need access to renal dialysis units or to other health services. There are also those who need access to housing, food and water, employment opportunities, and social security.

The conclusion as to whether the applicant's condition constituted an emergency will not be taken up here – the applicant died shortly after the judgment – but the court's decision can be correctly faulted for failing to address the obligations the Government does have towards those patients suffering from chronic renal failure. Madala, in a separate but concurring judgment, speculates that a 'solution might be to embark upon a massive education campaign to inform the citizens generally about the causes of renal failure.'⁶⁸ While this comment points in the right direction, the precise duties to progressively realise the health rights of these patients was overlooked, even if resources were not currently available for renal dialysis immediately. This omission was, however, largely corrected in the subsequent *Grootboom* case where the court found the respective government authorities had failed to develop housing programmes directed towards providing emergency relief for those without access to basic shelter.⁶⁹

The third case in the trifecta addressed both the *Soobramoney* and *Grootboom* cases in an interesting way. The case of *TAC*⁷⁰ concerned denial of access to an available medical treatment. Doctors were prevented from supplying to pregnant women with HIV the drug nevirapine, a medicine which substantially reduces the risk of mother-to-child-transmission of the virus. The Court condemned the denial of access and, unlike in *Sobroomany*, noted that resources were available:

Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government in so far as it confines the use of nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution.⁷¹

The Court also held that there was *Grootboom*-style obligation to extend the nevirapine program throughout the entire country:

⁶⁸ *Soobramoney v Minister of Health*, KwaZulu-Natal 1997 (12) BCLR 1696 at para. 47.

⁶⁹ *South Africa v Grootboom*, 2001 (1) SA 46 (CC).

⁷⁰ *Minister of Health and Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC)

⁷¹ *Ibid.*, at para. 80.

[The] government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.⁷²

3. Common factors?

This review of a number of jurisdictions and ESC rights-related obligations demonstrates a number of things. First, as many commentators have pointed out, adjudicators regularly issue human rights decisions that carry a financial cost. Second, the degree and extent to which judicial or quasi-judicial authorities will place a financial burden upon states is likely to be affected by a number of factors, in particular:

- The *seriousness* of effects of the violation of the right;
- The *precision* of the government duty;
- The *contribution* of the government to the violation; and
- The *manageability* of the order for the government in terms of resources.

However, as Lewis Carroll might have remarked today: perception is everything. The weight of each factor is surely determined by judicial perspectives and prejudices. For example, determining the seriousness of the effects of a violation is partly dependent on the view that the judiciary take of ESC rights. If the prohibition of hunger is viewed as of significantly less consequence than the prohibition on torture, a judge is likely to be less moved by the removal of a famine scheme than a change in prison guidelines on torture, and vice-versa.

Nonetheless, I will make some brief comments on the presence of each of these factors in the ESC rights jurisprudence, remarks which may also indicate the way forward in litigation strategy in the sometimes difficult terrain of litigating resource availability. First, and perhaps tritely, it is clear from the reasoning in the judgments discussed above that courts were more prone to make more ambitious decisions where the human rights impact of government inaction or action was considerable. It is notable, for example, that many of the progressive decisions in Latin America and elsewhere concern access to medicines, in particular for HIV/AIDS. The South African court described it as the ‘greatest threat to public health in our country’ in justifying its decision to order progressive access to nevirapine.⁷³ Likewise, the decisions of the European Court of Human Rights

⁷² *Ibid.*, at para. 95.

⁷³ *Ibid.*, at para. 93.

indicate that the Court was prepared to declare positive obligations where the applicant was clearly unable to realise their civil and political rights.

Second, while it is clear that precise and legally binding duties were identified in many of the cases, lawyers and judges sometimes had to be innovative in both substantive and procedural analysis to ensure that obligations were clear, reasonable and capable of being implemented. Thus, despite some apparent difficulties with the concept of minimum threshold, some courts have nonetheless gone on to find violations of various ESC rights where litigants clearly had no access to basic food, shelter, water or medicines. Likewise, jurisprudence has developed around the seemingly difficult concept of 'progressive realisation'; States can be held to a range of minimum standards, such as non-retrogression and developing and implementing strategies and plans. The degree to which the obligation can be identified in practice, however, will determine the nature of the order and remedy: the more precise the duty, the more likely a court will order that a certain right be guaranteed in a particular way. If the obligations are less precise and the availability of resources is not clear, then the courts still have remedies at their disposal; for example, sending the question back to the government for the state to demonstrate that it has a plan, or it has insufficient resources.

Third, a government's contribution to a violation of ESC rights is partly a question of how their original obligations are viewed. For example, where there has been past active intervention with negative consequences, such as pollution or an earlier eviction, judges are likely to feel more comfortable ordering access to water or housing, even when the latter remedy is not directly linked to the earlier violation. Similarly, the judiciary often feel comfortable when the state has clearly been given significant time to address the problem, as is abundantly clear by the collective complaint *Autism-Europe v France* discussed above. There are dangers in giving too much weight to this factor, however. While historical circumstances should definitely be considered – as they are in much affirmative action litigation – ESC rights speak particularly powerfully to the deprivation suffered by individuals and communities in the present day context.

Fourth, the question of whether a resource burden is manageable seems to be mired in politics, since the size of government is – or was – a dividing marker in left-right politics. Manageability in the cases discussed above, however, seems to be more a function of the current expenditure versus the current budget, although judges in booming economies seem to take implicit judicial notice of the growing wealth of a country. In a number of the cases discussed above, courts did not shy away from using rough indicators, such as examining the exact cost of a program and its relative share of the budget of the relevant government authority or of the

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State as a whole. As I have discussed elsewhere,⁷⁴ in some cases the answer of the evidential question of resource availability is abundantly clear. In other cases some judicial legwork was required. However, what is clear from the judgments is that the judiciary are able to rationally examine the issues. Contrast for example the *Soobramoney* and *TAC* cases. In the former case, the court felt comfortable finding that resources are not available for the proposed remedy, while in the latter case it deemed that the provision of the medicine was affordable for the State.

4. Conclusion

The four factors discussed above must obviously be considered in context and in the correct theoretical framework. While they are not intended to be guiding principles for adjudicative bodies, they do provide an answer to the principal question posed at the beginning of this chapter: Is the relative paucity of cases raising redistribution or reallocation of resources caused by a conceptual problem with ESC rights theory? The answer is two-fold. First, that a number of factors need to be present before courts demonstrate a willingness to intervene in questions concerning the allocation of State resources. These factors, however, should be viewed on scale, and not in any binary fashion. The greater their strength, the more likely the order is to be made. Second, the perception by the legal profession of these factors needs to undergo a shift. When ESC rights are taken seriously, both theoretically and morally, these factors gain more weight in the judicial decision-making process.

⁷⁴ See Malcolm Langford, 'The Question of Resources' 1 *Housing & ESC Rights Law Quarterly* 3 (2004) at 1.

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III. Remedies

7. Crafting Remedies for Violations of Economic, Social and Cultural Rights

Kent Roach¹

1. Introduction

The state often has to take positive action and spend monies in order to respect political and civil rights, such as the right to a fair trial. At the same time, such rights are often enforced by negative judicial remedies, such as stays of proceedings and release from custody. Judicial remedies for economic, social, and cultural (ESC) rights will similarly require negative remedies; for example, in cases of unfair dismissal, restrictions on trade unions, pollution of food or water sources, or discrimination in access to health services. Yet, litigation that challenges the government to ensure the full realisation of these rights will more often require complex remedies such as declarations or orders that require positive action from the government. The emphasis may be more on securing compliance with constitutional or human rights obligations in the future than on repairing the constitutional wrongs or human rights violations of the past. Judicial involvement in the remedial process may also have to be ongoing. It may contemplate and perhaps supervise some period of delay while the government takes positive remedial steps. There may also be tensions with respect to providing individual and immediate relief for litigants and the development of more systemic or programmatic remedies for a larger group. The challenge of enforcing ESC rights may require some re-thinking of the traditional idea that remedies must be immediate and track the contours of the right and the violation, and that the courts can order one shot remedies that achieve corrective justice. Hence, it is very important that the traditional principle that rights are not meaningful unless accompanied by remedies is thought through and adapted for the ESC rights context. Rights, whatever their categorization, must be accompanied by meaningful and effective remedies.

Although the Canadian Charter of Rights and Freedoms enacted in 1982 does not contain explicit social and economic rights, it does require cultural rights, namely

¹ Professor of Law, University of Toronto. I thank the Centre on Housing Rights and Evictions (COHRE) and the organisers of its workshop on economic, social and cultural rights for inviting me to present a preliminary version of this chapter at their litigation workshop in Geneva in November of 2003. This chapter has benefited from the excellent discussions at that workshop and I thank all the participants in the workshop for their valuable insights.

minority language rights, which explicitly require positive action from the government. The remedial experience under the Canadian Charter may be relevant to issues surrounding the enforcement of social and economic rights. In addition, brief reference will be made in this chapter to the remedial experience of courts in India, South Africa and the United States with respect to complex remedies.

2. The Structure of Constitutional Remedial Provisions

The Canadian Constitution has two main remedial provisions. Section 24(1) of the Charter of Rights and Freedoms contemplates that courts of competent jurisdiction can grant whatever remedy is appropriate and just in the circumstances. The remedies awarded under this section include damages, costs, declarations and injunctions. This section gives judges considerable remedial authority as well as a mandate to develop innovative remedies. The analogue to section 24(1) in the Canadian Charter are sections 38 and 172(1)(b) of the South African Constitution, which contemplate the discretionary award of appropriate, just and equitable relief. Article 32 of the Constitution of India also provides that the Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, which may be appropriate for the enforcement of any of the rights conferred by this Part.² The Constitution of the United States does not specifically grant courts remedial powers, but Article III provides that 'the judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish' and that 'the Judicial Power shall extend to all cases, in Law and Equity, arising under the Constitution...' and has been interpreted as giving courts broad equitable remedial powers in constitutional cases.

The second remedial provision is section 52(1) of the Constitution Act of 1982 which is a traditional supremacy clause which declares that the Constitution is the supreme law and any law that is inconsistent with the Constitution is of no force and effect to the extent of its inconsistency. During the first twenty years of the Charter, however, the Supreme Court of Canada has added some important glosses to the supremacy clause. The first is an assertion of the ability of courts to read in or add words to an under-inclusive statute when necessary to cure its unconstitutionality and supported by the purposes of both the constitution and the impugned statute.² The second development has been the assertion of the

² *Schachter v Canada* [1992] 2 S.C.R. 679. All Supreme Court of Canada cases in the Charter era are readily available on line at www.lexum.montreal.ca/csc-scc/

judicial power to delay or suspend the declaration of invalidity for a finite period of time in order to provide the government an opportunity to select among constitutional options and enact new laws that will displace the legal vacuum created by an immediate declaration of invalidity.³ Article 13 of the Indian Constitution contains a supremacy clause stating in part that ‘the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.’ Similarly, in the United States, the courts have long asserted the power to strike down laws that are inconsistent with the constitution.⁴ Section 172 of the South African Constitution also requires a mandatory declaration that law is invalid to the extent of its inconsistency with the Constitution, but following Canadian practice, explicitly contemplates a discretionary order ‘suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect’.⁵ A suspended or delayed declaration of invalidity under either constitution may also involve the court retaining jurisdiction over a matter, if only to consider requests that the period of suspension be extended or curtailed.

3. Declarations and Injunctions

A crucial decision for both litigators and judges is whether to rely on declaratory relief or injunctions to enforce ESC rights. Declarations proceed on the assumption that governments will take prompt and competent steps to comply with a court’s declaration of constitutional entitlement and that continued supervision and subsequent intervention by the court will not be necessary to ensure compliance with the constitution. A declaration of constitutional entitlement will often be made in general terms, allowing governments considerable flexibility in selecting the precise means to be used. In contrast, injunctions generally contemplate the possibility of continued judicial involvement. Because they are ultimately enforceable through contempt proceedings that can result in fines or even the jailing of governmental officials, injunctions are generally more specifically worded than declarations. Some injunctions, sometimes called structural injunctions, require the government to report back to the court at regular intervals about the steps taken to comply with the constitution.

³ *Manitoba Language Reference* [1985] 1 S.C.R. 721.

⁴ *Marbury v Madison* 1 Cranch 137 (1803).

⁵ Constitution of South Africa, §172 (2)(b) (ii).

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In the 1980s, there were some experiments by lower Canadian courts in minority language cases with structural injunctions⁶ used in school desegregation and prison cases in the United States as well as a broad range of cases in India. US courts, stressing their traditional equitable powers, have issued detailed injunctions and retained jurisdiction in order to desegregate school systems through busing and other remedies to reform prison conditions. The US courts had stressed that 'remedial judicial authority does not put judges automatically in the shoes of school authorities ... judicial authority enters only when local authority defaults';⁷ that courts should not order remedies that exceed the violations; and that they should balance the competing interests. In those cases, the courts often retained jurisdiction over many years. The Supreme Court of India also embraced a similar approach and explained: 'As the relief is positive and implies affirmative action, the decisions are not "one-shot" determinations but have on-going implications.'⁸ The courts in both countries required specific reports on compliance back to the court or to a court-appointed assistant.

The Supreme Court of Canada, in its first minority language education rights case, struck a different note, one that stressed the advantages of general declarations as opposed to injunctive relief and expressed a belief that Canadian governments would comply in good faith with general declarations of constitutional entitlement. For instance, as Chief Justice Dickson explained:

I think it best if the court restricts itself in this appeal to making a declaration in respect of the concrete rights which are due to the minority language parents in Edmonton under §23 [of the Canadian Charter of Rights]. Such a declaration will ensure that the appellants' rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is suited to the circumstances. As the Attorney General for Ontario submits, the government should have the widest possible discretion in selecting the institutional means by which its §23 obligations are to be met; the courts should be loathe to interfere and impose what will be necessarily procrustean standards, unless that discretion is not exercised at all, or is exercised in such a way as to deny a constitutional right.... Once the court has declared what is required in Edmonton, then the Government can and must

⁶ These cases are discussed in Kent Roach, *Constitutional Remedies in Canada* (Canada Law Book, as updated) at 13.600 ff; Nora Gillespie "'Charter Remedies: The Structural Injunction'" (1988/90) 11 *Advocates Quarterly* 190; Christopher Manfredi "'Appropriate and Just in the Circumstances': Public Policy and the Enforcement of Rights under the Canadian Charter of Rights and Freedoms" (1994) 27 *Canadian Journal of Political Science* 435.

⁷ *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 at 16 (1971).

⁸ *Sheela Barse v Union of India* (1988) AIR 2211 at 2215 (S.C.).

do whatever is necessary to ensure that these appellants, and other parents in their situation, receive what they are due under §23.⁹

Although section 23 of the Charter, by its explicit requirement for the positive services of instruction and facilities where numbers warranted, seemed particularly amenable to injunctive relief, the court in *Mabe*, and again three years later in the *Reference re Manitoba's Public Schools Act*,¹⁰ expressed a distinct preference for general declarations as opposed to injunctions as a means to enforce section 23 of the Charter. The Court expressed a concern that too specific a declaration 'would unduly fetter the discretion of the province to choose the "modalities" by which to provide for the management and control of French-language education.' General declarations were the preferred remedy because they would 'ensure the appellant's rights are realized while, at the same time, leaving the government with the flexibility necessary to fashion a response which is well suited to the circumstances.'¹¹

Given the Canadian Court's expressed preference for the use of general declarations in these cases, it is not surprising that even the slow trickle of cases contemplating injunctive relief in the 1980s stopped in the 1990s, and that the Court expressed a preference for general declarations outside of the minority language rights context. The Supreme Court's fullest statement of its preference for declaratory as opposed to injunctive relief came in the 1997 equality rights case of *Eldridge v British Columbia*,¹² which involved the rights of people who are deaf or hearing impaired to sign language interpretation services in hospitals. Justice La Forest stated for an unanimous Court that a 'declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.' In addition, this declaration did not take effect for six months, and there are some indications that implementation problems persist in some provinces to this day.

Declarations assume that governments will make prompt and good faith efforts at compliance with the general standards articulated by the courts. Unfortunately, there is some evidence that some provinces other than British Columbia have failed to implement the requirement for translation services in *Eldridge*¹³ in the

⁹ *Mabe v Alberta* (1990) 68 D.L.R.(4th) 69 at 106 (S.C.C.).

¹⁰ (1993) 100 D.L.R.(4th) 723 at 737-8 (S.C.C.).

¹¹ *Ibid.*, at 740.

¹² (1997) 151 D.L.R.(4th) 577 at para. 96 (S.C.C.).

¹³ See generally my 'Remedial Consensus and Dialogue under the Charter: General Declarations and Delayed Declarations of Invalidity' (2002) 35 *University of British Columbia Law Review* 211 on which this section is drawn.

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years that have elapsed since that case was decided. This lack of compliance is extremely disappointing and suggests that it may not be safe to assume that governments which are not direct parties to a dispute will promptly, voluntarily and in good faith comply with the Supreme Court's declarations in Charter cases. It is not clear, however, that the problem presented by failures to respond to *Eldridge* would be solved by the use of stronger injunctive relief. Even if the trial judge and eventually the Supreme Court had granted an injunction articulating what sign language interpretation services were required, the injunction could only apply in one province because of the territorial limits on the jurisdiction of the trial court in Canada's federal system. Even at the Supreme Court, requirements of fair notice and hearing would likely prevent that court from issuing an injunction that would bind every government in Canada in the sense that it could be enforced through contempt proceedings.

The limits of declaratory relief have also been exposed in another Canadian case involving the practice of customs officials seizing material imported by a gay and lesbian bookstore. The majority of the Supreme Court relied upon a declaration that the authorities had breached freedom of expression and equality rights in the past by unfairly targeting imports destined for the bookstore. Justice Binnie concluded 'with some hesitation, that it is not practicable' to order 'a more structured section 24(1) remedy'¹⁴ in part because of an absence of information about the steps taken by the officials to comply with the Constitution. He also expressed concern that to be enforceable, any injunction would have to be clear and relatively precise. After the court's declaration, the bookstore has commenced new litigation because of its continued dissatisfaction with its treatment by customs officials. Justice Iacobucci in his dissent anticipated this shortcoming of declaratory relief. In a helpful analysis that was not explicitly rejected by the majority of the court, he stated that 'declarations are often preferable to injunctive relief because they are more flexible, require less supervision, and are more deferential to the other branches of government.' At the same time, however, he added that 'declarations can suffer from vagueness, insufficient remedial specificity, an inability to monitor compliance, and an ensuing need for subsequent litigation to ensure compliance.' He stressed that a declaration will be inadequate and place an unfair burden on successful litigants in cases of grave systemic problems and when administrators 'have proven themselves unworthy of trust.'¹⁵ In the particular case, however, Justice Iacobucci would not have ordered a structural injunction, but rather would have struck down the entire regulatory scheme as inconsistent with the Charter, requiring the government to reformulate

¹⁴ (2001) S.C.R. at para. 157.

¹⁵ *Ibid.*, at paras. 258-261.

its policies and procedures concerning the import of material that might be obscene.

The Supreme Court of Canada's most recent case on the issue suggests a greater tolerance for continuing injunctive relief. The case dealt with minority school rights in five different regions of a province. The trial judge ordered that the French language minority be provided with homogenous educational facilities in specific regions for specific grades by specific times. He also ordered that the government officials use their best efforts to comply with this order and that the Court would retain jurisdiction to hear reports from the government on compliance with the order. Two such reporting sessions were held during which the government submitted affidavits about their progress in achieving compliance and the applicants were permitted to adduce evidence, including rebuttal evidence about the compliance. This innovative order was overturned by the Nova Scotia Court of Appeal in a two to one decision that held that only a declaration had been issued, and that once this declaration was issued, the trial judge was *functus officio* and did not have jurisdiction to require the government to report to him on steps taken to comply with the order.¹⁶

On appeal, the Supreme Court of Canada characterised the trial judge's remedy as an injunction and upheld the retention of jurisdiction in a five to four decision. The majority stressed the need for effective and responsive remedies and the breadth of the trial judge's remedial discretion under section 24(1) of the Charter. Justices Iacobucci and Arbour stated that remedies would evolve and 'may require novel and creative features ... and that tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach must remain flexible and responsive to the needs of a given case.'¹⁷ They characterised the reporting requirements as a legitimate response to concerns about delay by the government and the assimilation of the francophone minority and one 'that reduced the risk that the minority language rights would be smothered in additional procedural delay.'¹⁸ Although the entire court recognised that injunctions could be ordered against the government and enforced through contempt proceedings, the majority of the court characterised the trial judge's remedy as one that 'vindicated the rights of the parents while leaving the detailed choices of means largely to the executive....'¹⁹ They characterised the reporting requirements as an integral part of the trial judge's remedy while suggesting that in future cases, trial judges might want to be more specific in their remedy including specifying an even more detailed timetable. The

¹⁶ *Doucet-Boudreau v Nova Scotia* (2001) 194 N.S.R.(2d) 323 (C.A.).

¹⁷ *Doucet-Boudreau v Nova Scotia* (2003) SCC 62 at para. 59.

¹⁸ *Ibid.*, at para. 67.

¹⁹ *Ibid.*, at para. 69.

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majority's remedy has been seen by some in Canada as heralding a new acceptance of remedial creativity and activism on the part of the judiciary.

The four judges in the minority concluded that the remedy was impermissibly vague and violated the separation of powers. Citing the statement quoted above from *Eldridge*, they argued that 'the judiciary is ill-equipped to make polycentric choices or to evaluate the wide-ranging consequences that flow from policy implementation.'²⁰ The reporting requirements, in their view, placed 'the trial judge in an inappropriate, ongoing supervisory and investigative role despite the availability of the equally effective, well-established, and minimally intrusive alternative of contempt relief.'²¹ The minority expressed concerns that the judge would exercise political as opposed to adjudicative power during the reporting sessions. Even under the minority's more restrictive remedial approach, the court's remedy could still be enforced, albeit not through reporting requirements, but through an application to hold the defendant in contempt of court for non-compliance. In the minority's view, judges could still order injunctions against the government, but the only continued involvement of the judiciary would be in the coercive form of a contempt hearing and not through the more flexible procedures of requiring the parties to report back to the judge.

The South African Constitutional Court, like the Supreme Court of Canada in *Doucet-Boudreau*, has recognised that courts may exercise a supervisory jurisdiction including requiring governments to report back and, if necessary, involving the court issuing ancillary remedies in order to ensure compliance with the constitution.²² In the *TAC* case, the court rejected the argument that the court was limited to declaratory relief. It stated that: 'Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure effective relief is granted.... Where necessary this may include both the issuing of a *mandamus* and the exercise of supervisory jurisdiction.'²³ At the same time, the South African Court, like the Canadian Court, has stressed that 'due regard must be paid to the roles of the legislature and the executive in a democracy.' Although the government must comply with the Constitution and the courts must ensure that it complies, it will often be appropriate to leave the government some margin of flexibility to select the exact means to comply with the constitution. In the *TAC* case, the court declared the existing policy with respect to drugs to prevent mother to child HIV transmission to be unconstitutional, and ordered that the government, without delay, should permit and facilitate the use of such drugs, as well as testing and counselling to determine when the drug was necessary. In

²⁰ *Ibid.*, at para. 120.

²¹ *Ibid.*, at para. 136.

²² *Pretoria City Council v Walker* 1998 2 SA 383 (CC) at para. 96.

²³ *Minister of Health and Others v Treatment Action Campaign & Others* 2002 (10) BCLR 1033 (CC) at para. 106.

another indication of its concern about giving the government some flexibility in determining the precise steps it took to comply with the constitution and the Court's declarations and orders, the court added that its orders did not 'preclude the government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother to child transmission of HIV.²⁴ The Constitutional Court in that case, however, did not require governments to report back to the court about the steps taken to comply with its declarations and orders. In a more recent case, however, the Constitutional Court has required the government of Limpopo to report back to it on why an outstanding costs order against the government has not been paid. It stressed that the Constitution binds the government and that 'if governments do not obey the court, they cannot expect citizens to do so. Nothing could be more demeaning of the dignity and effectiveness of the courts than to have government structures ignore their orders.²⁵

The Supreme Court of Canada may soon revisit the issue of declaratory as opposed to injunctive relief when it hears and decides the important case of *Auton v British Columbia*. This case involves an equality rights challenge to the decision of the Provincial Court of British Columbia not to provide intensive therapy for autistic children. The trial judge, relying in part on the preference for declaratory relief in *Eldridge v British Columbia*, refused to order a mandatory injunction requiring the government to provide the services.²⁶ Although the British Columbia Court of Appeal refused to order an injunction, it varied the remedy to make the therapy available to the four named Charter applicants, and it contemplated that the applicants could return to the court for further enforcement.²⁷ Although this remedy may not formally amount to an injunction, it has elements of specificity and retention of jurisdiction normally associated with injunctive as opposed to declaratory relief. One judge on the Court of Appeal, Lambert J.A., characterised the trial judge's remedy as a new form of remedy – a 'direction' – that was stronger than a simple declaration but did not amount to a *mandamus* against a specific public officer.²⁸

A judicial direction may indeed be a useful middle-ground between a declaration and a mandatory order, such as a *mandamus* or an injunction. Unlike an injunction or a *mandamus*, a contempt citation would not be used as an enforcement device for a direction. A specific person or office holder would have to be named and

²⁴ *Ibid.*, at para. 135.

²⁵ *Department of Education, Limpopo Province v Settlers Agricultural High School* Oct 2, 2003 (CCSA) at para. 14.

²⁶ *Auton v British Columbia* (2001) 197 D.L.R.(4th) 165 (B.C.S.C.).

²⁷ *Auton v British Columbia* (2002) 220 D.L.R.(4th) 411 at para. 84.

²⁸ *Ibid.*, at para. 128.

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given notice before such stronger remedies would be applied. Unlike a simple declaration, however, a direction would allow the courts to exercise a continuing and ongoing supervision of the case. It would be a mistake to see ongoing jurisdiction as a remedy that always would work to the advantage of the applicant and to the disadvantage of the government. The government may often have an interest in having a court approve a proposal as consistent with the judgment. Such a new remedy, explicitly contemplated by one judge in *Auton* and implicit in the trial judge's novel remedy in *Doucet-Boudreau*, could provide judges with a useful gradation of remedies for ensuring compliance with rights. The most deferential remedy would be a general declaration with no retained jurisdiction; a slightly more robust remedy would be a direction, accompanied by retention of jurisdiction and perhaps, as in *Doucet Boudreau*, a reporting requirement. This would allow the court's remedy to become more specific and provide timetables. Finally, the most intrusive remedy would be an injunction which would have to be detailed because it would be enforceable by a contempt citation that could result in a fine or even imprisonment. The court would retain discretion as to the strength of the remedy that was necessary but much would depend on the court's perception of the willingness and the competence of the relevant governmental actor. If the court assumed that the government had merely been inattentive to its constitutional obligations and had both the will and competence to do what was required to achieve constitutional compliance, a general declaration may often suffice. If there were some doubts about the government's ability to achieve compliance, directions perhaps with reports back to the court might well be appropriate. Finally, if the government appeared either unwilling to follow the Constitution or completely unable to do so, the courts might have to spell out precisely what was required in the form of an injunction that could be enforced, if necessary, by the contempt power.²⁹

4. Combining Individual and Systemic Relief

An important issue in the litigation of ESC rights is the respective emphasis placed on relief for individuals and the development of policies to achieve more systemic relief. In the *Grootboom* case,³⁰ the South African Constitutional Court emphasised systemic relief over individual relief by stressing that a housing policy must be developed rather than any particular individual being able to obtain a

²⁹ I am indebted to Geoff Budlender who, drawing on the work of Chris Hansen, brought the important distinctions between governments that were simply inattentive to constitutional norms and those who were intransigent or incompetent with respect to constitutional compliance. See Chris Hansen 'Inattentive, Intransigent and Incompetent' in Randall Humm, (ed.) *Child, Parent, and State: Law and Policy Reader* (Temple University Press, 1994).

³⁰ *Government of the Republic of South Africa v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

court order for housing. Such a remedial approach may stimulate government to develop a comprehensive programme, but it can also leave individual litigants without an immediate and tangible remedy. It may also be a means to express some reluctance or caution about the right itself. It is well known that concerns about remedies often shape the court's approach to rights, and that some misgivings about recognising rights may manifest themselves in the court's remedial decisions.

One possible way to combine individual and systemic relief is to try to obtain individual relief on an interlocutory or emergency basis while seeking more systemic relief after a trial on the merits. In some eviction cases in particular, courts might be persuaded to preserve the status quo and prevent irreparable damage by stopping the eviction on an interim basis while the ultimate relief after trial might be to develop an appropriate housing programme. In Canada, the test for granting interlocutory relief is relatively well settled. An applicant for interlocutory relief must demonstrate that there are serious constitutional issues that are not frivolous or vexatious; that the plaintiff will suffer irreparable harm; and that the balance of convenience, including consideration of the public interest, favours granting the relief requested. There is no presumption that legislation is constitutional, and the applicant may demonstrate that its claim is in the public interest.³¹ One observer has noted that in social action litigation in India, 'relief has been offered very often by way of interim orders, as interim orders are given before any preliminary examination of the merits of the case, they have been qualified as "remedies without rights". The reasons behind the frequent use of interim orders can be found in the urgent character of many cases, and in the ongoing nature of many violations of human rights.'³²

It may also be possible in some cases to combine both individual and systemic relief as part of the court's final remedy. In *Auton v British Columbia*, for instance, the trial judge declared the government's policy not to provide intensive therapy to autistic children to be unconstitutional, but also awarded 'symbolic' damages to the individual parents who challenged the policy and had been able to provide such therapy out of their own funds. The award of damages left the successful litigants with some remedy even though there was evidence that they would not be included in the policy that the government was preparing in response to the case because, by that time, their children would be too old to qualify under the government's programme. Nevertheless, while damages may be better than no

³¹ The leading cases on interlocutory or interim relief in Canada are *Metropolitan Stores v Manitoba Food and Commercial Workers* [1987] 1 S.C.R. 110 and *RJR Macdonald Inc. v Canada* [1994] 1 S.C.R. 311 discussed in my *Constitutional Remedies in Canada*, *supra*, ch.7.

³² Wouter Vanenhoe 'Human Rights Law, Development and Social Action Litigation in India' (2002) 2 *Asia-Pacific Journal on Human Rights and the Law* 136 at 159.

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individual remedy, they are directed at past harms and will not ensure that successful litigants receive the benefits of their rights in the future.

The British Columbian Court of Appeal varied the trial judge's remedy in a manner that may more effectively combine individual and systemic relief. The Court of Appeal altered the trial judge's remedy to require specific therapy for the four named Charter applicants and it made clear that, should inadequate treatment be provided, an 'application may be made to the Supreme Court of British Columbia for enforcement of the order.'³³ This part of the Court of Appeal's judgment was quite important because there was evidence that the government's programmatic response to the trial judge's declaration would be a policy that would not cover the successful applicants because they were too old to qualify under the government's new proposed policy. The Court of Appeal's remedy with respect to the successful Charter applicants also demonstrated a concern for specificity and enforceability that is usually associated with stronger forms of mandatory as opposed to declaratory relief. It combined systemic and individual relief in a way that is arguably more important for the disadvantaged than simply providing those who could afford to buy the therapy with some compensation for the funds that they were able to spend in the past. It contemplated that the government would develop comprehensive new policies to deal with autistic children, but also that the successful individuals would receive the benefit of that policy.

The *Auton* case has recently been decided by the Supreme Court and reversed on the merits with no guidance being provided as to the range of appropriate remedies.³⁴ The Supreme Court of Canada has already demonstrated some reluctance to combine damages under section 24(1) as an individual remedy with the more systemic remedy of a declaration of constitutional invalidity under section 52(1). The court's concern has been that governments should not have to pay damages for actions taken under laws that they presumed in good faith were constitutional.³⁵ It is thus possible that the court may not affirm the trial judge's award of symbolic damages to the Charter applicants. What may be more important is whether the Supreme Court will affirm the Court of Appeal's order that the named applicant be provided with therapy or whether, as in *Eldridge v British Columbia*, they simply declare that the government's existing policy is unconstitutional, leaving it up to the government to shape the precise contours of the new programme. Such a response would give the government considerable

³³ *Auton (Guardian ad Litem of) v British Columbia (Attorney General)* (2002) 220 D.L.R.(4th) 411 at paragraph 84

³⁴ *Auton v British Columbia* [2004] 3 S.C.R. 657.

³⁵ *Mackin v New Brunswick* [2002] 1 S.C.R. 405. See Debra McAllister 'Mackin: Of Sterile Rules and Real People' (2003) 21 S.C.L.R.(2d) 339 .

flexibility, but it could also result in a policy that would provide no tangible relief for the successful Charter applicants.

5. Suspended Declarations of Invalidity

A delayed or suspended declaration of invalidity was first used in Canada to prevent the threat to the rule of law and the emergency that might have been created by the invalidation of most of Manitoba's laws because they were enacted in only English and not French.³⁶ Subsequently, the court indicated that suspended declarations were exceptional and could only be justified by threats to the rule of law, public order or to allow recipients of an under-inclusive benefit to continue to receive a benefit when the court was not, because of concerns about legislative intent and costs, prepared to extend to another group.³⁷ Chief Justice Lamer also stated that the use of delayed declarations of invalidity should turn not on considerations of the appropriate role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.³⁸ This limited approach has, however, been abandoned in practice. The delayed declaration of invalidity has evolved in Canada into an instrument of remedial dialogue between courts and legislatures.³⁹ As with general declarations, the delayed declaration of invalidity was often seen as a means to provide governments with an opportunity to select the precise means with which to comply with the constitution. Commentators are divided on whether this is a positive development, with some arguing that delayed declarations can allow legislatures to engage in more comprehensive reform, provided courts retain jurisdiction and enforce the declaration of invalidity as the ultimate default remedy,⁴⁰ and others arguing that it is inappropriate to suspend constitutional rights without some very important reason, such as those originally contemplated by the court.⁴¹

The willingness to delay declarations of invalidity has created in Canada a certain judicial tolerance for delay in providing remedies. The court in *Eldridge v British Columbia* transferred a period of delay usually associated with delayed declarations

³⁶ *Manitoba Language Reference* (1985) 19 D.L.R.(4th) 1 (S.C.C.).

³⁷ *Schachter v Canada* (1992) 92 D.L.R.(4th) 1 (S.C.C.).

³⁸ *Schachter v Canada*, *supra*, at 27.

³⁹ See generally Kent Roach 'The Supreme Court on Trial: Judicial Activism or Democratic Dialogue', *Irwin Law*, 2001.

⁴⁰ Kent Roach 'Remedial Consensus and Dialogue under the Charter – General Declarations and Delayed Declarations of Invalidity' 35 (2002) *University of British Columbia Law Review* 211. See also Sujit Choudhry and Kent Roach 'Putting the Past Behind Us? Prospective Judicial and Legislative Constitutional Remedies' (2003) 21 *Supreme Court Law Review Second Series* 205.

⁴¹ Bruce Ryder 'Suspending the Charter' 21 (2003) *Supreme Court Law Review Second Series* 267.

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of invalidity to justify a six month delay before the entitlement to sign language interpretation services took effect. British Columbia worked to the six month deadline and implemented the toll free telephone services by that date. However, it took longer than the six months provided by the court to set up a system for on-site translation. Deadlines can be an effective pressure to stimulate governmental compliance. If the deadline is unrealistically short, however, there is a danger that the government will introduce a less than adequate programme simply to meet the deadline. If the deadline is too long, governments may not give the matter the priority that is due and an unconstitutional state of affairs may persist for longer than is necessary. It may be best for courts, as in *Eldridge*, to lean towards a shorter period of delay. The government can always, as has occurred in several cases, bring a motion to the court to extend a period of delay that has turned out to be too short. This procedure would also allow the court to be informed by both the government and the parties about the progress to date in implementing the court's judgment and what remains to be done. Periods of delay ordered by Canadian courts have ranged from six months to two years without any coherent rationale given by courts about when a shorter or a longer period of delay is appropriate and just.

Although delay may be necessary in some cases and it has the potential to allow for consultation with those affected by the remedy,⁴² it is not without problems. Delay allows an unconstitutional state of affairs to persist. In some cases, the court has indicated that the relevant Charter right is not suspended during the period of the delay, and that courts could intervene in appropriate cases.⁴³ In many cases, however, a delayed declaration of invalidity will amount to a temporary suspension of the relevant rights. This may be justified in some cases where immediate compliance with the right is truly impossible. In such cases, it may be preferable for courts to acknowledge and manage delay than to ignore it or allow concerns about delay to contract its interpretation of the right in question. Tolerating and managing delay may be a better alternative than simply refusing to recognise a right because of judicial concerns about enforcement.⁴⁴

Nonetheless, there is a danger that courts could become too willing to accept delay and incrementalism, particularly in the context of ESC rights. In all cases, courts should address not only whether delay is truly necessary, but also the

⁴² *Corbiere v Canada* [1999] 2 SCR 203 per L. Heureux-Dube J.

⁴³ The court has indicated that some judicial intervention during the period of a delayed or suspended declaration of invalidity may be appropriate in two criminal cases. See *R. v Swain* (1991) 63 CCC(3d) 481 at 542 (S.C.C.) and *R. v Bain* (1992) 69 CCC(3d) 481 at (S.C.C.). But see now *R. v Demers* [2004] 2 S.C.R. 489 holding that individual remedies under s.24(1) of the Charter cannot be combined with delayed declarations of invalidity under s.52(1).

⁴⁴ For an example of the court refusing to recognize a right in part because of concerns about its enforceability see *R. v Prosper* [1992] 3 S.C.R. 236.

position of those whose rights might be infringed during the period of court sanctioned delay. In *Eldridge*, this would have required consideration of the position of those people who are deaf or hearing impaired who would require interpretation services for medically essential services during the six months of delay. If delay is truly justified, it may simply be impossible to recognise the rights of adversely affected people during the period of delay, but this hard fact should at least be considered and acknowledged. It is significant that in the welfare rights case of *Gosselin*,⁴⁵ those who found a violation were prepared to suspend the declaration of invalidity for an 18-month period. In many cases, however, the court that issues a delayed remedy might be able to retain jurisdiction and to hear claims that emergency or interim remedies should be granted to prevent irreparable harm during the period of the court-ordered delay. Such requests for remedies could be decided under the same tests that apply to interim relief. This option could help ensure that rights with complex remedial issues are not treated as 'second class' rights and that courts would not turn a blind eye to emergencies and hardships that emerged during the period of delay.

6. Conclusion

The fashioning of remedies for violations of ESC rights provides particular challenges for both litigators and judges. One important issue is the remedial posture requested by the litigant and taken by the judge. In Canada, there has been frequent reliance on general declarations and suspended declarations to enforce a wide range of constitutional rights. A common assumption behind these two remedies is that governments are able and willing to act promptly to comply with the court's rulings. Both remedies create space for continued governmental and legislative policy-making without purporting to mandate either the details of the policy or the processes that will be used to formulate those policies. In many ways, the general declaration and the delayed declaration of invalidity are based on a faith and trust that governments will do the right thing. They are also based on an implicit rejection of the more confrontational American and Indian experience with remedies where mandatory injunctions enforced through the contempt sanction have been used instead of declarations and declarations of invalidity that have taken immediate effect.⁴⁶

⁴⁵ 2002 SCC 84.

⁴⁶ Chief Justice McLachlin has also observed that the Canadian approach to remedies may have started a 'tradition of cooperation instead of conflict, which, if we can follow it, promises a more harmonious relationship between the judiciary and other branches of government than that which has historically prevailed in the United States.' Beverley McLachlin 'The Charter: A New Role for the Judiciary?' (1991) 29 *Alberta Law Review* 540 at 553.

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At the same time, there are concerns about the effectiveness of relying on declaratory as opposed to injunctive relief and tolerating long periods of delay before governments comply with rights. One concern is that declarations may require disadvantaged groups to re-litigate issues from the beginning should they not be satisfied with how the government responds to the court's declaration. Another concern is that declarations that result in governments enacting new policies may fail to provide relief for the affected litigants. Double standards that treat ESC rights as second class, even if rejected at the rights stage, could re-surface in the remedial decisions of courts. The challenge is to ensure effective remedies for all rights. To this end, courts in both Canada and South Africa have recently made clear that courts can issue injunctions against governments and exercise continued supervisory jurisdiction to ensure that governments comply with the constitution. To be sure, such remedies will not always be appropriate, but it is important that they are available. Another challenge for courts is to strike the right balance between individual and systemic relief, and remedies that attempt to repair the harms of past violations and remedies that aim to achieve compliance with the constitution in the future. This challenge can be met by appropriately combining systemic and individual relief, and by allowing individuals facing hardship during a period of court-tolerated delay to apply to the court for interim and emergency relief.

8. The Right to Alternative Accommodation in Forced Evictions

Geoff Budlender¹

Section 26(1): Everyone has the right to have access to adequate housing.

Section 26(2): The state must take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of this right.

Section 26(3): No one may be evicted from their home without an order of court made after considering all the relevant circumstances ...

Constitution of the Republic of South Africa, 1996

1. Introduction: The Context

One of the continuing legacies of apartheid is that literally millions of South Africans are homeless or accommodated in intolerable conditions. This situation continues to exist despite a large-scale government housing programme. The result is fairly frequent unlawful occupation of vacant land. Most often, the land is owned by local councils (municipalities). Where eviction proceedings are brought, as they often are, the people concerned cannot prove a legal right to remain on that land.

The question which therefore arises is whether under these circumstances there is a right to alternative accommodation.

2. A Positive Right to Alternative Accommodation?

The South African Constitution does not entitle a homeless person to sue directly for housing to be provided for him or her. According to the Constitutional Court in the landmark *Grootboom* case 'neither section 26 nor section 28 [which deals with children's rights] entitles the respondents to claim shelter or housing

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immediately upon demand.² The reason for this is that although everyone has the right of access to adequate housing, the extent of the positive obligations of the state in this regard is defined by section 26(2), namely that the state must take 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the right. This places a duty on the government to adopt and implement a reasonable programme. For a programme to meet the standard of reasonableness, it 'must include reasonable measures ... to provide relief for people who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.'³ This does not, however, give an individual who is inadequately housed an enforceable right to the provision of housing or accommodation. Section 26(1) does not give rise to a self-standing and independent right enforceable irrespective of the considerations mentioned in section 26(2).⁴ If the state has adopted and implemented a reasonable programme to achieve the progressive realisation of the right, then it has met its constitutional obligations.

This conclusion flows from the view taken by the Constitutional Court that the section 26(1) right of access to adequate housing does not contain within it a minimum core obligation of the state, of the kind contained in the International Covenant on Economic, Social and Cultural Rights. In *Grootboom* the court left open the possibility that 'there may be cases where it may be possible and appropriate to have regard to the contents of a minimum core obligation to determine whether the measures taken by the state are reasonable.'⁵ While the door has therefore been left open for the introduction of a minimum core obligation through the interpretation of what constitute 'reasonable' measures, it is clear from the judgment that it will be difficult to establish the factual circumstances which will persuade the court to accept that there is a positive right to housing in this sense. Liebenberg, in her chapter in this volume, however, presents a methodology by which the court could enforce immediate obligations.

The result is that from a practical point of view, it is not possible in South Africa to speak of a positive right to alternative accommodation. Practice, however, has shown that there is another way to approach the problem, which in eviction cases achieves a result very similar to a right to alternative accommodation.

² *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) [*Grootboom*] at para. 95.

³ *Grootboom, supra*, at para. 99. People who are in crisis and 'in desperate need' include those whose homes are under threat of demolition: para. 52.

⁴ Compare *Minister of Health v Treatment Action Campaign* (no 2) 2002 (5) SA 721 (CC) at para. 39.

⁵ *Grootboom, supra*, at para. 33.

3. Alternative Accommodation in Eviction Cases

Most cases involving the right to housing arise in the context of evictions, as indeed *Grootboom* did. Once eviction is the issue, the legal landscape changes quite dramatically. This is because, following international jurisprudence, section 7(2) of the South African Constitution requires the state to ‘respect, protect, promote and fulfil’ the rights in the Bill of Rights.

The obligation to ‘respect’ the right requires the state not to take any measures that result in preventing access to the right, and to refrain from interfering directly or indirectly with the enjoyment of the right.⁶ In South Africa, most eviction proceedings are brought by local government. They are part of the state, and they are therefore bearers of the obligation to ‘respect’ the right to housing. Further reflection demonstrates that the state is implicated in evictions even where they are carried out at the instance of private parties. The state is implicated in a ‘private’ eviction through its responsibility for the law under which the eviction takes place, through the court which orders the eviction, and through the state agencies – the sheriff of the court and police services – which implement the order of the court. The state is therefore directly implicated in evictions: our Constitution has avoided the contortions of the ‘state action’ debate in the United States by providing in section 8(1) that the Bill of Rights ‘binds the legislature, the executive, the judiciary and all organs of state’.

This negative duty on the state has been recognised by the Constitutional Court: ‘Although the subsection [section 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.’⁷

The implication of the state in a ‘private’ eviction thus brings directly into play the state’s obligation to ‘respect’ the right to housing. If a person who had housing or shelter is left homeless or without access to housing or shelter as a result of state action, then the state has failed to ‘respect’ the right to housing.

A further breach may arise in the case of evictions by third parties. The state is under a duty to ‘protect’ the right of access to housing. This means a duty to protect the right against invasion by third parties. The state must take measures that prevent third parties from interfering with the right.⁸ Where a person who

⁶ Committee on Economic, Social and Cultural Rights, *General Comment 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999) at para. 33.

⁷ *Grootboom*, *supra*, at para. 34.

⁸ Committee on Economic, Social and Cultural Rights, *General Comment 14, The right to the highest attainable standard of health* (Twenty-second session, 2000), U.N. Doc. E/C.12/2000/4 (2000). at para. 33; Matthew

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has access to housing or shelter is under threat of deprivation of that housing or shelter by a third party, the state is under a duty to 'protect' the right against the third party. This is also a duty which rests on the courts, which are bound by the Bill of Rights, and which therefore governs how they must exercise their powers.

To advance these propositions is not to say that there are no circumstances under which a person may be evicted, even if the consequences of that eviction may be homelessness. No right is absolute. All rights must be balanced with other rights, such as, for example, the property rights of the owner. The South African Constitution, like the Canadian Charter, creates an explicit proportionality and balancing mechanism for the limitation of rights. The question is one of justification. The critical point is that once a *prima facie* breach of the Bill of Rights has been proved, the onus rests on the state to justify its failure to 'respect' or 'protect' the right.⁹

The need for justification is also demonstrated by a recent case in the European Court of Human Rights.¹⁰ The applicant and his family were gypsies who had been evicted from a council-owned site on which they had been living. The family was, in effect, rendered homeless. This amounted to a serious interference with their rights under article 8 of the Convention, namely, a severe lack of respect for their private and family life and their home. The approach of the court was that this required 'particularly weighty reasons of public interest by way of justification.'¹¹ The court found that:

[T]he eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued.¹²

There had, accordingly, been a violation of the Convention.

It is not difficult to think of circumstances in which the state may be able to justify its conduct in relation to an eviction, even though homelessness may result. Three sorts of cases emerge from recent decisions by South African courts.

In *Grootboom* the court said, very pointedly, that its judgment

must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis

Craven *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon, 1995) at 112; *X & Y v The Netherlands* 8 EHRR 235 at para. 23; *City of Cape Town v Rudolph* 2004 (5) SA 642 (C) at para. 21.

⁹ *S v Zuma* 1995 (2) SA 642 (CC) at para. 21; *R v Oakes* (1086) 26 DLR (4th) 200.

¹⁰ *Connors v United Kingdom* Application no 66746/01, judgment delivered on 27 May 2004 [*'Connors'*].

¹¹ *Ibid.*, at para. 85.

¹² *Ibid.*, at para. 95.

to those who participate in any exercise of this kind. Land invasion is inimical to the systematic provision of adequate housing on a planned basis. It may well be that the decision of a State structure, faced with the difficulty of repeated land invasions, not to provide housing in response to those invasions would be reasonable.¹³

One can conclude that if the trigger for the eviction is a land invasion which was designed to coerce the state into providing housing on a preferential basis, then the state may be able to discharge the burden of justifying actions which give rise to a *prima facie* breach of the right to housing.

A second type of case arises where the state is taking steps to provide housing to needy people who have been identified as beneficiaries, and another group occupies the land which is intended for other needy beneficiaries. In those circumstances, the state and the court are driven to making a hard choice between two groups of people, each of which will be left homeless or living in intolerable circumstances if the other is permitted to occupy the land. Under those circumstances, it may well be reasonable for the court to give preference to those to whom the land and housing have been allocated under lawful and reasonable administrative processes.¹⁴

A third type of case is where the presence of the occupiers on the land creates a genuine, immediate and urgently pressing danger to themselves or other people. An example of this is where people were living in close proximity to a shallow underground fuel line, and were digging holes and trenches which created a high danger of perforation of the fuel line, with a high risk of explosions being caused.¹⁵ Generalised considerations of public health will, however, not be sufficient.¹⁶

These should be understood as examples of justification which illuminate a general rule that the state may not, without special justification, take action which results in homelessness, or deprivation of access to housing and shelter. Where appropriate alternative accommodation is available, an eviction will of course not lead to homelessness, and will therefore not result in a breach of the right of access to housing. The principle is therefore that in the absence of special justification, an eviction which would otherwise result in homelessness or deprivation of access to housing and shelter is not permitted by the Constitution *unless alternative accommodation is available*.

¹³ *Grootboom, supra*, at para. 92.

¹⁴ *City of Cape Town v Persons who are presently unlawfully occupying Erf 188, Capricorn: Vrygrond Development* 2003 (6) SA 140 (C); *City of Cape Town and another v The occupiers of Erf 4832 Philippi* CPD case no 5746/2000, unreported judgment of Brand J, at page 12.

¹⁵ *Groengrass Eiendomme (Pty) Ltd v Elandsfontein Unlawful Occupants* 2002 (1) SA 125 (T).

¹⁶ *City of Cape Town v Rudolph* 2004 (5) SA 642 (C).

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While the rule has not been articulated in this form by our courts, a number of recent cases point strongly in this direction.

In *Sheffield Road*,¹⁷ the City sought the eviction of people who were living on land which had been set aside as a road reserve. The land was not needed for road or other purposes at that time. A magistrate's court ordered the eviction of the occupiers conditional upon the City's first finding another place where the evictees could settle. The City appealed to the High Court against the condition. The High Court found that contrary to its constitutional obligations, the City had not made provision for people in desperate circumstances. The respondents could not find a place where they could lawfully live. The court held that under the circumstances, a more appropriate order would have been simply to dismiss the application for an eviction order. The City's appeal against the condition imposed by the magistrate was dismissed.

In *Baartman*,¹⁸ the local council applied for the eviction of people who were unlawfully living on privately owned land. The question was whether the applicant met a statutory requirement of demonstrating that eviction was just and equitable.¹⁹ The people concerned had been living there for a substantial period. The City did not identify any place where these people, who would be in desperate circumstances if evicted, could find secure tenure. The High Court ordered the eviction. On appeal by the occupiers, the Supreme Court of Appeal²⁰ held that the eviction order should not have been made because:

... although it is not a precondition for the granting of an eviction order but rather one of the factors to be considered by a court ... the availability of suitable alternative land becomes *the* important factor in the instant case. This is because of the length of time the appellants have resided on the property and, perhaps more importantly, because the eviction order is not sought by the owners of the property, but by an organ of state. The State is obliged, in terms of section 26 of the Constitution, to take legislative and other measures, within its available resources, to achieve the progressive realisation of the right which everyone has, namely to have access to adequate housing.

Baartman deals with a specific statute, and the reasoning of the court is somewhat sparse. It does seem that the underlying premise was that it would not easily allow

¹⁷ *City of Cape Town v The Various Occupiers of the Road Reserve of Appellant parallel to Sheffield Road in Philippi* High Court of South Africa, Cape of Good Hope Provincial Division, case no A 5/2003, judgment delivered 30 September 2003.

¹⁸ *Baartman v Port Elizabeth Municipality* Supreme Court of Appeal case no 464/2002, judgment delivered 26 September 2003.

¹⁹ The statute was the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

²⁰ The Supreme Court of Appeal is the highest court in non-constitutional cases. It also hears constitutional cases, but its judgments in those cases are subject to appeal to the Constitutional Court.

the state to evict people where the result would be homelessness. The implication, however, was that the view of the court might have been different if it had been the private landowner which was seeking the eviction order.²¹

4. Alternative Accommodation and Private Owners

It is not surprising to find courts more willing to grant eviction orders when it is a private landowner who seeks the order. Private individuals do not usually bear any constitutional obligation to provide housing to homeless people.²² In the absence of special circumstances creating this obligation, there is no apparent basis on which it can be said that a private owner's property rights should be forfeited because homeless people have occupied his or her property, and have nowhere else to go. Until recently, it was therefore asserted with confidence that eviction orders will generally be granted to private owners once they have proved that the land is theirs, and that the occupier is on it without their consent, regardless of the availability of alternative accommodation.²³ However, a recent case in the Supreme Court of Appeal,²⁴ decided after the COHRE workshop, demonstrates that this assertion is anything but axiomatic.

In that case, the applicant (Modderklip) was the owner of farmland situated on the fringes of an urban area. A group of people who had been evicted from municipal land erected structures on part of the farm, in what became known as the Gabon settlement. The land was not otherwise occupied, and had been used for cultivating hay. After some buck-passing between the owner and the local council, the owner instituted eviction proceedings. By the time those proceedings succeeded, the number of people on the land had grown to 40,000. The sheriff of the court – a private person who has an appointment from the state – required the owner to pay a deposit of about US\$300,000 before she would execute the eviction order, as she would have to hire a private security firm to carry out the work. The owner then sued the government, alleging that the government was under a duty to pay the cost of carrying out the eviction. When the case came before the Supreme Court of Appeal, the court was faced by three contesting

²¹ The decision has been appealed to the Constitutional Court. Judgment is awaited at time of writing. See Postscript below.

²² But note that the right of access to housing does place a negative duty on non-state parties: *Grootboom, supra*, at para. 34. In *Modderklip Squatters v Modderklip Boerdery (Pty Ltd); President of the RSA v Modderklip Boerdery (Pty) Ltd* Supreme Court of Appeal case no 187/03 and 213/03, judgment delivered 27 May 2004 [*Modderklip*], the court said at para. 31 that circumstances could be envisaged where the right of access to adequate housing would be enforceable horizontally, but that legislation had not transferred 'the obligation' (which seems in the context to refer to the obligation to *provide* housing) to an individual landowner.

²³ *Ndlorvu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA) para. 19; *Brisley v Drottsky* 2002 (4) SA 1 (SCA) para. 45.

²⁴ *Modderklip, supra*, at note 22.

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parties and several amici. The owner asserted its right to use its land. The occupiers pointed out that – as was common cause – they would be left homeless if they were evicted, as there was nowhere for them to go. The government said that it was not its responsibility to pay the cost of carrying out court orders: its job was to create the institutional machinery for adjudication and for enforcement of court orders. The occupiers, said the government, would have to wait their turn for housing.

The outcome of the appeal surprised many. The court pointed to the fact that the problem lay on two fronts:

On the one hand there is the infringement of the rights of Modderklip. On the other hand there is the fact that enforcement of its rights will impinge on the rights of the occupiers. Moving or removing them is no answer and they will have to stay where they are until other measures can be devised. Requiring of Modderklip to bear the constitutional duty of the state with no recompense to provide land for some 40,000 people is also not acceptable.²⁵

The obvious question is what the right of the occupiers was, which would be infringed by their eviction. On the basis of *Grootboom*, they did not have an enforceable right to 'housing on demand' from the state. Although the court referred to the breach of 'the duty to provide the Gabon residents with land ... (t)he state was in breach of its obligation to the residents',²⁶ it seems clear from the judgment that it was the consequences of their *eviction* which would trigger the breach of their rights. The court drew attention to the finding in *Grootboom* that the government has an obligation to ensure, at the very least, that evictions are executed humanely: 'As must be abundantly clear by now, the order can not be executed – humanely or otherwise – unless the state provides some land.'²⁷

The consequence was that the state 'failed in its constitutional duty to protect the rights of Modderklip: it did not provide the occupiers with land which would have enabled Modderklip, had it been able, to enforce the eviction order.'²⁸ The court thus held that: 'The finding ... that the state was in breach of its obligation to the residents, leads ineluctably to the conclusion that the state simultaneously breached its section 25(1) obligations towards Modderklip'.²⁹

²⁵ *Ibid.*, at para. 41.

²⁶ *Ibid.*, at para. 28.

²⁷ *Ibid.*, at para. 26.

²⁸ *Ibid.*, at para. 27.

²⁹ *Ibid.*, at para. 28. This is itself an illustration of the nature of the obligations created by the Constitution. Section 25(1) provides that 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.' The state did not deprive Modderklip of its property. In the view of the court, the section 25(1) breach appears to have consisted of its failure to *protect* Modderklip's right to property against breaches by third parties, namely the occupiers. It

It seems that, absent an eviction, there would not be an infringement of the rights of the occupiers. The right which was infringed, or which would be infringed by their eviction, must therefore have been the right not to be rendered homeless. Their right was the correlative of the obligation on the state not to render people homeless, or put differently the correlative of the state's obligation to respect and protect the right of access to housing.

The court was therefore faced with the conundrum of rights in conflict with each other – the right of the occupiers not to be rendered homeless, and the right of Modderklip not to be deprived of its property. The court stated that: 'Courts should not be overawed by practical problems. They should "attempt to synchronise the real world with the ideal construct of a constitutional world" and they have a duty to mould an order that will provide effective relief to those affected by a constitutional breach.'³⁰ The courts are required to forge new tools and shape innovative remedies, if needs be, to ensure that constitutional rights are effectively vindicated.³¹

The court came up with an innovative and even ingenious solution. It declared that 'the state, by failing to provide land for occupation by the residents of the Gabon Informal Settlement, infringed the rights of Modderklip Boerdery (Pty) Ltd which are entrenched in sections 7(2), 9(1) and (2), and 25(1), and also the rights of the residents which are entrenched in section 26(1) of the Constitution'. The court declared that Modderklip was entitled to payment of damages by the state in respect of the land occupied by the settlement. Those damages were to be calculated in terms of the Expropriation Act, which provides for expropriation of the right to use property. The court also declared that the residents were entitled to occupy the land 'until alternative land has been made available to them by the state or the provincial or local authority.'³²

The decision in *Modderklip* provides a more textured explanation of the outcome of *Baartman*. It supports the proposition that in the absence of special circumstances an eviction which would otherwise lead to homelessness is not permitted, unless alternative accommodation is made available. This is consistent with the principle established by the UN Committee on Economic, Social and Cultural Rights: 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State Party must take all appropriate measures, to the maximum of its available resources, to ensure that

is, however, far from clear that it is correct to hold that the occupation of the land constituted a breach of the constitutional property right by the occupiers.

³⁰ *Modderklip, ibid.*, at para. 42, citing *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para. 94.

³¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) at para. 19.

³² *Modderklip, supra*, at para. 52. This case, too, is currently on appeal to the Constitutional Court.

adequate alternative housing, resettlement or access to productive land, as the case may be, is available.³³

5. The Evolution of a Right to Alternative Accommodation

It is an actual or threatened eviction which usually brings the issue of the right to housing before a court. I am not aware of any South African case in which a poor person has initiated litigation asserting a right to housing, without either having been recently evicted or being under the threat of litigation. A right to alternative accommodation has emerged in eviction cases where the consequence of the eviction would be homelessness. This right is not unqualified. There are situations in which an eviction may be ordered despite the fact that it will result in homelessness. These cases, however, are properly understood as the exceptions, not the rule. Recent South African jurisprudence demonstrates that the duty to 'respect' and 'protect' the right of access to housing necessarily implies a right to alternative accommodation on eviction, where the evictee is not able to obtain this through his or her own efforts. This is consistent with the international understanding of the obligation of a state to respect and protect human rights.

Postscript

On 1 October 2004 the Constitutional Court upheld the decision of the Supreme Court of Appeal, setting aside the eviction order in the *Baartman* case.³⁴ The court held that:

It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflict-ridden. [para. 18]

Section 6(3) states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement.³⁵ There is therefore no unqualified constitutional duty on local authorities to ensure that in

³³ Committee on Economic, Social and Cultural Rights, *General Comment 7, Forced evictions, and the right to adequate housing*, (Sixteenth session, 1997), U.N. Doc. E/1998/22, annex IV at 113 (1997), at para. 17.

³⁴ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) [the *Baartman* case].

³⁵ of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which gives effect to section 26(3) of the Constitution.

no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme. [para .28]

On 8 October 2004 the Constitutional Court handed down judgment in the *Jaftha* case.³⁶ The appellants were poor people who owed small debts. Judgment creditors forced the sale in execution of their homes, which they had received under a government housing programme, even though the debts were trifling and the consequence for the appellants would be homelessness. The governing statute did not provide for the exercise of any judicial discretion before the sale in execution was ordered. The court held that:

Section 26 ... emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified. [para. 29]

It is not necessary in this case to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution. However, in the light of the conception of adequate housing described above I conclude that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in section 26(1). Such a measure may, however, be justified under section 36 of the Constitution. [para. 34]

On 13 May 2005 the Constitutional Court dismissed the government's appeal in the *Modderklip* case.³⁷ The court decided the case principally on the basis of rule of law issues arising from the government's failure to provide an effective mechanism to give effect to the eviction order. That failure arose from the fact that the government had not provided any other place where the occupiers could live, and had thereby made it practically impossible for Modderklip to enforce its eviction order. The court ordered the government to pay Modderklip constitutional damages arising from the occupation of its land. Most significantly for the purposes of this chapter, the court declared that the residents were entitled to occupy the land until alternative land had been made available to them by the State or the provincial or local authority.

³⁶ *Jaftha v Schoeman* 2005 (2) SA 140 (CC); *Van Rooyen v Stoltz and others* Case CCT 74/03, judgment delivered 8 October 2004.

³⁷ *President of RSA v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC).

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The effect of this judgment is to confirm the core argument made in this chapter, namely that although there is not a positive right to alternative accommodation, the unavailability of alternative accommodation will often be a bar to the granting of an eviction order. What this amounts to is a defensive or negative right to alternative accommodation where the evictee is not able to obtain this through his or her own efforts.

It is now clear that an eviction resulting in homelessness is a *prima facie* breach of the right of access to adequate housing. It requires special justification. Courts should not readily grant eviction orders where no alternative accommodation is available. The effect of this is to turn the tables in eviction cases. Previously, a court was inclined to ask only one question of the occupier: Why should we permit you to remain here? Now, a court has to ask two questions of the person seeking the eviction order: Is there somewhere else where these people may live? And if not, Why should we order that they be made homeless?

9. Positive Remedies: The Argentinean Experience

Carolina Fairstein¹

1. Introduction

The full protection and implementation of economic, social and cultural rights (ESC) rights ordinarily requires the adoption of public policies, the establishment and operation of various services or goods delivery systems, and a range of administrative actions that are designed to benefit a group of individuals or the whole population, and for which different levels of government may carry differing levels of responsibility. Implementation of ESC rights in many cases may be more complex than the implementation of civil and political (CP) rights. Nevertheless, although the more complex nature of ESC rights implementation has been used to deny their justiciability, and assuming that they do not pose specific problems for adjudication, this chapter will consider whether the complexity of ESC rights has implications for remedial orders.²

This chapter will analyse the seminal Argentinean case of *Viceconte* where appeal courts, on the basis of the collective right to health, developed flexible remedies

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² It is not the purpose of this chapter to enter the debate on the justiciability of ESC rights, or the appropriateness of the conceptual distinction between the two categories of rights. My point of departure is that ESC rights are fully enforceable and applicable by the judiciary. For a deeper description of the debate and refutation of the theories that deny justiciability to ESC rights, see among others: Martin Sheinin, 'Direct Applicability of Economic, Social and Cultural Rights: A Critique of the Doctrine of Self – Executing Treaties', in K. Drewicki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights: A European Challenge* (Turku, 1994) at 73-78; Cecile Fabre, 'Constitutionalising Social Rights' 6 *J. Polit. Phil.* (1998) 263 at 280-83, in Philip Alston and Henry Steiner, *International Human Rights in Context: Law, Politics and Morals* (Oxford University Press, 2000) at 278-280; Mathew Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights' XL *Netherlands International Law Review* (1993) at 389, quoted by Malcolm Langford, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, (COHRE, 2003) at 11; and Victor Abramovich and Christian Courtis, 'Hacia la exigibilidad de los derechos económicos, sociales y culturales. Estándares internacionales y criterios de aplicación ante los tribunales locales' ('Towards the enforceability of Economic, Social and Cultural Rights: International Standards and Criteria of Application Before Local Tribunals') in Martin Abregu and Christian Courtis (eds), *La Aplicación de los tratados sobre derechos humanos por los tribunales locales (The application of human rights treaties by local tribunals)* (Editores del Puerto, 1997), 283-350 at 299-304 ('Victor Abramovich and Christian Courtis, 'Towards the enforceability of Economic, Social and Cultural Rights') and Victor Abramovich and Christian Courtis, *Los Derechos Sociales como Derechos Exigibles*, (Ed. Trotta, 2002) at 19-54.

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to ensure that the Argentinean Government produced a vaccine for three and a half million vulnerable people.³ On the basis of this analysis, the chapter will attempt to demonstrate that granting adequate protection to ESC rights demands innovative remedies and effective judicial procedures, particularly where the relevant claim has a collective nature. This is particularly important in those countries that have yet to develop sophisticated systems of judicial review or class actions – for example, for tort and environmental law. Taking into consideration the existence within Argentina of constitutional rules that permit affected individuals and groups to enforce collective rights,⁴ and the recent originality of the course of action taken by the courts, this case might serve as a source of inspiration for other judges, policy makers and advocacy groups. Furthermore, I will suggest that an obligation to provide the necessary procedural and remedial mechanisms can be derived from the obligation to take steps contained in article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The chapter is in two parts. The first part outlines the antecedents, litigation process and outcomes of the *Viceconte* case. It also comments upon the case's theoretical and practical significance for discussions on the role of the judiciary in the field of ESC rights litigation. The second part argues that the possibilities for obtaining adequate remedies for ESC rights violations through litigation are limited if appropriate procedural mechanisms for dealing with cases that present a collective dimension are absent. In this regard, and taking into consideration the prevailing civil law tradition in the Latin American region, the case might serve as a point of reference from which to further define the obligations of States parties to the International Covenant on Economic, Social and Cultural Rights to ensure access to judicial remedies.

2. Viceconte M. c/Estado Nacional

2.1 Background

In early 1996, the Argentinean media reported that the endemic disease Argentine Hemorrhagic Fever (FHA) was rapidly spreading, and calls were made for the Government to provide a vaccine. Transmitted by rodents, the fever causes severe damage to the overall vascular system, and primarily affects people who live or

³ *Maria Vicenconte, Mariela v National State-Ministry of Health and Social ac/ amparo*, Federal Court of Appeals in Administrative Matters, Room IV, case, June, 1998, La Ley, Supplement of constitutional law, November 5, 1998. The case can be consulted in the IIHR investigation: *Los derechos económicos, sociales y culturales* (Economic, social and cultural rights) at 81.

⁴ I am referring to a writ called 'acción de amparo' that was enacted by the 1994 amendment to Argentina's constitution. I return to this instrument later in the chapter.

work in rural areas, although it now also extends to urban zones.⁵ The most affected area is the Pampas Zone of Argentina with a population of over 3,500,000 inhabitants. Since a rapid diagnosis of the disease is difficult, and since it affects a group with poor access to preventive medical care, the most effective health measure to combat the disease is the Candid 1 vaccine. However, while the vaccine has an efficiency rate of approximately 95 per cent and the endorsement of the World Health Organisation, its production has been proved unprofitable because the disease is peculiar to Argentina.

The history of the development of the vaccine formed a critical part of the case. It was developed as a result of decades of intensive research that initially commenced at Pergamino – a town in the Province of Buenos Aires, and one of the affected areas – under the direction of an Argentinean physician, Julio Maiztegui. It was later refined through further investigations in the United States. By the end of the 1970s, efforts to develop the vaccine were intensified with a joint project between the Argentinean Government, the United Nations Development Programme (UNDP), the Pan American Health Organization, and the US Government (through the US Army Medical Research Institute for Infectious Diseases). As part of that project, the Argentinean Ministry of Health established the National Institute of Hemorrhagic Virosis (INEVH), located at Pergamino, where the vaccine was to be produced and the necessary staff were to be trained.

Since local production of the drug would take time, a private institute of the United States, the Salk Institute, produced the first vaccine doses, 200,000 of which were acquired by the Argentinean Ministry of Health for an experimental programme. In the period 1991 to 1995, a total of 140,000 vaccines were administered to inhabitants in the FHA endemic zone that had the highest risk of contracting the illness. Nevertheless, the Argentinean Government could not initiate massive vaccination campaigns: the remaining number of doses clearly did not satisfy the demand.

In 1996, the Salk Institute publicly announced that production of the vaccine would be halted on the grounds of profitability. Consequently, the availability of the vaccine depended upon the Candid 1 production project in the laboratories of the INEVH. Despite the INEVH staff being trained, the media and INEVH authorities reported that local production had been paralysed for several years because of lack of funds and political will.

2.2 Decision to litigate

⁵ If not treated properly, the disease has a 30 per cent rate of mortality.

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The vaccine supply crisis caught the attention of lawyers at the Center on Social and Legal Studies (CELS), an Argentinean human rights NGO with a then incipient programme on ESC rights litigation. Students at the Human Rights Clinic of the University of Buenos Aires Law School, based at CELS, began researching the issue in order to ascertain its potential for litigation. Media coverage was compiled, together with available information on the disease from the Medical School and other specialised centres. Contact was also made with leading scientific authorities on the subject. At the same time, students tried to communicate with inhabitants of the affected zones. Staff at INEVH also provided official information on the disease, statistics regarding diagnosed cases and the potentially affected population, as well as information on the Candid 1 vaccine.

The information that was gathered convinced CELS lawyers of the possibility of successfully litigating this case. The information from the INEVH was helpful since it recognised the danger of the situation and clearly articulated what measures should be taken. Scientific opinion was unanimous that administration of the Candid 1 vaccine to the affected population was the only adequate health measure to combat the disease. Further, as noted above, the State had taken many steps that demonstrated its recognition of the need for the vaccine. For example, it had voluntarily become involved in a research project with the goal of producing the vaccine, acquired 200,000 doses of the vaccine from the Salk Institute, trained public agents with the technology required for its manufacture and supply, and had commenced establishing the infrastructure in order that INEVH produce the vaccine. The steps taken previously by the State considerably reduced the need to debate the technical issues or the most appropriate methods of intervention. They also restricted the debate over the rational usage of public resources. All these factors minimised the possibility of a dismissal on the basis of lack of judicial authority to involve itself in policy decision-making. Besides these factors, the specific features of this case also presented certain issues that would make it easier to overcome common procedural obstacles that would arise in the litigation of such a case. I will refer to these later in the chapter.

One of the students in the Human Rights Clinic, Mariela Viceconte, lived in the village of Azul, one of the affected areas, and expressed interest in undertaking a judicial action. She became the plaintiff in the case. In September 1996, Mariela Viceconte, represented by CELS' lawyers, filed an 'Amparo' writ to protect the health of the persons threatened by FHA. The plaintiff claimed that the state was obligated to manufacture the vaccine by a fixed time and to develop adequate measures to restore the ecosystem of the affected areas. Destruction of the ecosystem was believed to facilitate the spread of the disease.

2.3 Court of First Instance

The court of first instance rejected the complaint, employing arguments that correspond to the commonly heard conservative conceptions of the role of the judiciary in dealing with social matters.⁶ This court accepted the government's defence that: (a) the action was moot because the 1997 National Budget allocated enough funds to allow the INEVH to manufacture the vaccine; (b) the claim seeking an order for the vaccine to be supplied to the affected population exceeded the jurisdiction of the court; and (c) the claim for the restoration of the ecosystem exceeded the scope of the 'amparo' process, given the complex evidentiary support required to litigate such a claim. The plaintiffs appealed.

2.4 The Court of Appeals' innovative approach

In June 1998, judges of the Fourth Chamber of the Federal Court of Appeals with jurisdiction in administrative law matters issued a decision rejecting the lower court's position with respect to the vaccine production, but supported it on the question of environmental restoration. The court ordered the State to manufacture the vaccine.

Before proceeding with the decision, one of the judges of the Court of Appeals made a visit to the INEVH in order to witness the state of affairs. He interrogated the Director of the Institute and the person in charge of the laboratory construction (which was still pending) and arrived at the conclusion that the production of the vaccine would not be completed by the end of 1997, contrary to the claims of the government and the INEVH authorities.

Unlike the lower court, the Court of Appeals deemed that the mere announcement by the State that the vaccine would be produced did not close the questions raised by the appellant. Since the schedule presented by the authorities of the INEVH was subject to political, budgetary and administrative decisions by the national authorities, particularly the Ministries of Health and the Economy, the court found that it was necessary to establish the legal duty of the State to comply with the schedule. However, the court refrained from ordering that the vaccine be immediately provided to the population since the legal process of validation and certification of the medicine by the relevant medical authorities must occur first.

⁶ For example, the dogmatic insistence that the judiciary lacks the authority to order the adoption of certain public policies and are unable to adequately demand that the political branches effectively implement social budget allocations and policies. For a more detailed description and refutation of these conceptions, see the literature quoted in note 2, *supra*.

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In this way, the State's obligation to produce the vaccine was legally established and a time frame was set to comply with this obligation, as requested in the lawsuit. The judges based this obligation on the right to health as contained in the American Declaration of Rights and Duties, the Universal Declaration of Human Rights and the International Covenant of Economic, Social and Cultural Rights (ICESCR), all of which are international treaties incorporated in domestic law with constitutional hierarchy, and had been invoked by CELS' lawyers in the presentation. The relevant provision of ICESCR – Article 12 – also expressly contains the duty of State parties to prevent and treat epidemic and endemic diseases.⁷ The court's decision states that when, for reasons of economic or commercial interest, private institutions do not care for the health of the population, there is no other conclusion than that the State, in the position of guarantor, must find the necessary resources to do so.

It is also important to point out that the standing of the plaintiff was recognised as representing all inhabitants of the affected area for both the requirement of the restoration of the environment and the production of the vaccine. This recognition was grounded in the text of the new Article 43 of the National Constitution that – as briefly mentioned above – recognises the right of affected individuals and organisations to resort to the judiciary for the protection of 'collective rights or interests' by the promotion of an special writ, the 'collective amparo'. Merely by being a resident of the affected zone, and therefore potentially at-risk of contracting the disease, the plaintiff was found by the court to be an 'affected' party under Article 43.⁸

Lastly, it should be noted that the judicial order placed personal responsibility for compliance on the respective government ministries, and the decision was to be made known to the President of the Nation and the Chief of the Cabinet of Ministries. In addition, the court ordered the National Ombudsman⁹ to monitor and inform the court every three months on the fulfilment of the obligations contained in the decision.

⁷ Article 12(2) states that: 'The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases.'

⁸ Article 43 of the 1994 Constitution states that: 'Any person shall file a prompt and summary proceeding regarding constitutional guarantees, provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognised by this Constitution, treaties or laws, with open arbitrariness or illegality. In such cases, the judge may declare that the act or omission is based on an unconstitutional rule. This summary proceeding against any form of discrimination and about rights protecting the environment, competition, users and consumers, as well as about rights of general public interest, shall be filed by the damaged party, the ombudsman and the associations which foster such ends registered according to a law determining their requirements and organization forms.' (Unofficial translation from Spanish to English).

⁹ See note 19 below.

2.5 The implementation and monitoring of the decision

According to the schedule set out in the decision, the vaccine was to be produced and administered to the affected population by the end of 1999. However, CELS verified that by July 2000, the Government had not complied with that obligation. Doctors from the INEVH advised that the cause of delay was the lack of resources, namely raw materials and technical staff to produce the substantial number of vaccine doses. Therefore, in October 2000, CELS filed a new petition asking a judge on the lower court to fix a new reasonable deadline for production of the doses and to impose a fine for non-compliance with the new deadline.

The judge then ordered that the Ministry of Health and the Ministry of Economy were to complete the production of the vaccine within ten days. As was perhaps expected, the new deadline was again not honoured and the judge ordered that the budgeted funds allocated for the production of the vaccine be frozen in an attempt to prevent the government from spending the money on other activities.

The government appealed, and a new chapter in the case commenced. The justices of the Appeal Court decided not only to monitor government compliance with the different steps necessary to produce the vaccine, but also to ensure that enough public resources were allocated and spent accordingly. Once again, the appeal judges became actively involved in the process of getting the vaccine produced and delivered.

It is worth noting that among the steps taken by the Court, it held a hearing with all the public officials that had any role in producing the vaccine.¹⁰ In that hearing the judges asked the officials what had caused the delay and when they reasonably thought the vaccine could be ready. When the different agents of the government could not reach an agreement at the hearing, the court made a decision without precedent: they called the Minister of Health in person to provide an explanation to the court. The court asked the Minister about the obstacles that were slowing down the production process.

As a result of the hearing, the Minister was asked to submit a new and reasonable schedule detailing all the steps to be taken and the funds that were necessary to fulfil the judicial order. The judges also required that the Ombudsman supervise the fulfilment of those steps. In addition, they ordered the *Sindicatura General de la Nacion*¹¹ to audit the budget and supervise the financial and administrative

¹⁰ This is an unusually active role for an Argentine court to play.

¹¹ The 'Sindicatura General de la Nacion' is an independent administrative agency that controls the budget implementation process for the federal public administration.

aspects involved in the compliance of the judicial order. In December 2001, and during the planning of the 2002 budget, these orders were followed by an additional court order demanding that the Chief of the Cabinet report whether sufficient resources were being allocated for the production of the vaccine.

While the vaccine has not yet been delivered to the population, it is clear that as at December 2003 – the date the paper on which this chapter is based was originally given – an array of governmental authorities and individuals is working towards that end under the close scrutiny of the court.¹²

2.6 Implications and lessons

In addition to the effective impact that this decision will ultimately have upon the health status of the affected population, this case is especially important because of its direct implications for ESC rights litigation in Argentina, and hopefully South America.¹³ With its determined resolution to guarantee the right to health of the population, the Court of Appeal has reaffirmed the understanding of those rights as ‘fully’ justiciable rights. Confronted with new and unfamiliar terrain, the court, instead of endorsing traditional conceptions of the role of the judiciary¹⁴ and simply rejecting its authority to act, adopted an affirmative and creative stance with respect to redressing and finding remedies for the alleged right violation without encroaching on the competence of other governmental branches. The court did not lay down any new law or policy, but compelled unwilling authorities to discharge their duties and obligations regarding the right to health. Being aware of the danger of dilution of responsibilities that characterise public undertakings such as the production of a vaccine where many actors are involved, the court also adopted an original approach whereby a participatory and interdisciplinary mechanism was set in place to assure the implementation of its judgment. In effect, many officials and organs at different levels of the public administration

¹² It is important to note that during 2003 the remaining doses of the vaccine – produced by the Salk Institute – were provided to those persons with higher risks of contracting the virus.

¹³ Even though the case provides interesting lessons for both lawyers and organisations litigating ESC rights and for judges dealing with those issues, in the following pages I will restrict my analysis to the latter only. The analysis of the value and weaknesses of this case in terms of ESC rights litigation strategies and ESC rights enforcement promotion, as well other critical considerations about it can be found in Julieta Rossi, ‘Strategies for Enforcing ESC Rights through Domestic Legal Systems’, in IHRIP and Forum Asia, *Circle of Rights: Economic, Social and Cultural Rights Activism, a Training Resource*, Module 22, available at www1.umn.edu/humanrts/edumat/IHRIP/circle/modules/module22.htm; Langford, *supra*, at 60-65; and Victor Abramovich and Courtis Christian, *Los derechos sociales como derechos exigibles*, (*Social rights as enforceable rights*), (Trotta, 2002), at 146-154.

¹⁴ A conception according to which courts of justice play a passive role that is limited to the settlement of points of law and fact directly related to a dispute between two parties.

are being constantly consulted and bound to ensure that the court decision is respected.

This case also underscores the judicial process as a method for enabling ordinary citizens to challenge state agencies on the merit of environmental and health policies, and it indicates the importance of adequate judicial mechanisms for the resolution of some collective problems.¹⁵

In all these respects, the course of action adopted by the Court of Appeal demonstrates that the intervention of the judiciary when authorities fail to act can not only respect basic democratic principles and the political processes, but has the potential to improve the functioning, dialogue and interaction of the democratic bodies. In other words, the case illustrates the extent to which judicial involvement in new and challenging social justice claims can help make and remake, constitute and reconstitute, legal relations and dialogue among individuals, groups and various social actors, and thereby contribute to the enhancement and strengthening of democratic institutions.

3. The need for proper procedural mechanisms

3.1 Obstacles for successfully litigating ESC rights

The majority of the claims concerning ESC rights, like the original problem in this case, have a collective dimension that requires remedies – such as the restoration of the environment and the massive production of the vaccine – that go beyond the particular interest and domain of single individuals. In other words, litigating ESC rights can sometimes require something other than an individual solution to disputes between two parties; that is, remedies which reach an extended group of people. This type of broad result can be achieved either by establishing something akin to the principle of *stare decisis* (giving precedential value of one case over later ones),¹⁶ and/or by conceiving the possibility that the decision of a particular case affects all people to which the issue of litigation is of concern, regardless of their participation in the procedure, or their having of a particular injured interest.

In this regard, one significant obstacle for the development of ESC rights litigation in many countries¹⁷ is the existence of a dominant conceptual

¹⁵ I will return to this point in section 3 of this chapter.

¹⁶ Nonetheless, I would query whether the '*stare decisis*' principle is really a proper mechanism to achieve the expanded result required by ESC rights litigation. The generalisation of the remedy will mainly depend on the willingness of the defendant to apply the result of individual cases to other similar situations. Otherwise, those who could take advantage of the decision will have to learn about the original case and then file a lawsuit for its application for their case.

¹⁷ At least Latin American states.

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framework of law and legal action that is closely linked with the classical notion of subjective law as individual interest, within the framework of property rights and the model of the liberal state. This limits the possibility of obtaining through the courts the types of remedies discussed above.¹⁸

According to this conceptual framework, courts are generally prevented from issuing decisions with broad application. This is the result of different, interrelated factors, including: (a) a narrow conception of what constitute a case or controversy over which courts have jurisdiction; (b) the presence of the traditional rule of standing, which stipulates that only a person who has suffered a specific legal injury to his legal rights or interests can bring an action for judicial redress; and (c) the judicial rejection of their authority to entertain and adjudicate cases related to technical or political issues that are deemed the competence of the legislative or executive branch. Under that traditional scheme, the following kinds of cases will often remain out of the scope of the judiciary: (a) cases in which the interest at stake is an indivisible good that is only collectively enjoyable; and (b) cases in which both a collective and an individual interest are at stake.

The problem with the first type of case is that courts usually reject them because no singular individual is considered entitled to bring the lawsuit. Since nobody could claim harm in his particular and exclusive interest or property, the case exceeds the boundaries of a 'case or controversy' under the traditional model. In the second type of case, since relief could be individually tailored, courts would refuse to provide a comprehensive solution, and would provide remedy only to the individual who brought the case, limiting in that way the impact of the lawsuit.

Returning to the *Viceconte* case, if the case had proceeded under the traditional model of litigation prevailing in Argentina, the outcome of the case might have been totally different. Demanding the restoration of the environment would have probably been denied the plaintiff since she could not claim that her individual interests or property were harmed. On the vaccine question, the judges could have ordered the government to vaccinate her with some of the remaining doses acquired from the Salk Institute, settling the case in that way without providing protection for the whole affected population. But as was mentioned above, the *Viceconte* case was litigated using an special writ, the 'collective amparo writ', which is included in the new Constitution, on the basis of which the plaintiff, in prosecuting both claims, was considered as representing all inhabitants of the affected area.

3.2 The Argentinean mechanism for protecting collective rights

¹⁸ See Victor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles*, *supra*, at 40.

The constitutional amendment that took place in Argentina in 1994 meant an important improvement in the possibilities of protecting and litigating cases that require collective remedies. Besides granting constitutional authority to numerous international human rights treaties, and recognising other collective or diffuse rights, such as the right to a healthy environment and the rights of consumers, the new Constitution also improved the mechanisms for the enforcement of people's fundamental rights. It authorised not only individuals but also organisations and the ombudsman¹⁹ to bring cases to address the violation of 'collective rights'.

This constitutional amendment was the result of important judicial precedents, especially in the field of environmental law, in which the judges had recognised the right of one person to bring an action that affected a broad group of people. The constitutional amendment made those kinds of actions legally binding, and made it possible to bring many new cases to court that were unthinkable in the past.

The collective or diffuse characteristics of the rights protected imply that the relief awarded for its protection would necessarily extend its effect to all who are in a particular situation with respect to such rights. As a consequence, courts can no longer dismiss a case by alleging that the interest at stake and its redress cannot be attributed to single individuals, and organisations that promote the protection of human or diffuse rights can, by filing an 'amparo colectivo', obtain from the courts decrees with broad and collective application.

Although the 'amparo colectivo' mechanism still contains many weak aspects for the effective protection of social rights, it is important to point out that its recognition became an essential step without which the possibility of obtaining adequate remedies for their violation would have continued to be an exception. Many groups and social sectors have gradually begun to use this action as a tool to advance their particular agendas, including the enforcement of ESC rights, with fairly successful results.²⁰ In this regard, although this mechanism is far from ideal and requires further improvements²¹, it presents a simple way of overcoming

¹⁹ The ombudsman is also a creation of the new Constitution. Article 86 states that the 'Defensor del Pueblo' is an independent organism in the jurisdiction of the National Congress with authority to defend and promote the human rights, other rights, guarantees and interests 'provided' by the Constitution or laws, from the actions and omissions of the public officials. The Constitution provides the Ombudsman with authority to monitor and control the proper performance of the public administration, and with capacity to litigate and to request any kind of information from the government.

²⁰ See Abramovich in this volume.

²¹ Of course the question of having appropriate procedural mechanisms and flexible rules of standing is one important and crucial element for allowing ESC rights litigation but many other things are necessary as well. It would be wrong to limit our claims for the recognition of the full enforceability of ESC rights to the level of procedure without also taking into consideration the conservative education of lawyers and judges, societal inequality, and other obstacles for accessing to courts such as geographical distribution, costs and corruption.

some of the obstacles to litigating ESC rights within countries with a continental law tradition.²²

3.3 The obligation to provide appropriate judicial remedies

Finally, it is important to recall that States parties to the ICESCR are obligated to provide judicial and other effective mechanisms for the protection of the Covenant rights. While the ICESCR does not expressly include this obligation, as the International Covenant on Civil and Political Rights (ICCPR) does in Article 2.3, the UN Committee on Economic, Social and Cultural Rights (Committee) have indicated through its General Comments that States parties bear the onus of demonstrating why such remedies should not be provided as part of their duty to take steps by all appropriate means, including through legislation, to achieve the full realisation of the rights contained in Article 2.1.

Initially, in General Comment No 3²³ the Committee limited the obligation to provide judicial remedies to those rights that may be considered justiciable in accordance with the national legal system.²⁴ In General Comment No 9, however, the Committee stressed that 'there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions'.²⁵ Further, the Committee reinforced the obligation to provide judicial remedies for the protection of the Covenant rights whenever any other measures provided by the States for such purpose could be rendered ineffective if they are not reinforced or complemented by judicial remedies.²⁶

²² Interesting mechanisms allowing the judicial protection of collective or diffuse rights also exist among other countries in Colombia, Venezuela, and Brazil.

²³ Committee on Economic, Social And Cultural Rights., *General Comment 3: The Nature of States Parties Obligations* (1990), E/1991/23, annex III.

²⁴ *Ibid.*, at para. 5.

²⁵ Committee on Economic, Social And Cultural Rights, *General Comment 9: The Domestic Application of the Covenant*, (1998) E/C.12/1998/24, CESCR.

²⁶ *Ibid.* In General Comment 9, the Committee states in the first place that States parties have an obligation to make available for aggrieved individuals or groups appropriate means of redress or remedies (para. 2). The Committee also says that even though the Covenant does not contain a direct provision requiring the existence of judicial remedies for redressing violations of economic, social and cultural rights, the lack of such judicial mechanisms would only be justified if the State party can show 'either that such remedies are not "appropriate means" within the terms of article 2, paragraph 1 of the Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary'. A possibility that the Committee considers unlikely (para. 3). Finally the Committee adds that 'whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary' (para. 9). For a deeper analysis of this comment and its implications for the justiciability of ESC rights, see Carolina Fairstein and Julieta Rossi, 'Comentario a la Observación General No 9 del Comité de Derechos Económicos, Sociales y Culturales' (Comment on the General Comment 9 of the UN Committee on Economic, Social and Cultural Rights), *Revista Argentina de Derechos Humanos* (2001) at 319-341.

Under this conceptualisation, it is possible to argue that the absence of suitable judicial mechanisms for providing adequate remedies for violations of ESC rights constitutes a violation, or at least a *prima facie* violation, of the Covenant that the States parties are obliged to rectify. This means that the mere availability of judicial mechanisms for the protection of other type of rights might not be enough to comply with the Covenant's obligations when the characteristics of such mechanisms do not grant effective protection to ESC rights.²⁷ According to what has been said above regarding the close link between the dominant conceptual framework on law and legal action and the classical notion of subjective law as individual interest, General Comment No 9 provides strong support for human rights activists fighting for the adoption of new procedural tools and remedies in their respective jurisdictions. These tools and remedies should be designed in such a way that they can deal with the challenges that the collective dimension of ESC rights poses to their judicial enforcement.

Apart from the 'collective amparo writ', there are other tools that have been developed in other countries that might also serve as inspiration and examples for governments and activists. These include the possibility of bringing constitutional challenges, the development of 'declaratory judgments', the regulation of class action suits, the development of injunction orders, the authorisation of the Public Prosecutor's Office and the Ombudsman to represent collective interest.²⁸

²⁷ See Victor Abramovich and Christian Courtis, *Los derechos sociales como derechos exigibles*, *supra*, at 85-87.

²⁸ See Victor Abramovich and Christian Courtis, 'Towards the enforceability of Economic, Social and Cultural Rights', *supra*, at 303.

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IV Comparative Experiences

10. Litigation and Housing Rights in Kenya

*Odindo Opiata*¹

1. Introduction

Kenya has been independent for the last 40 years. Part of the independence 'deal' was the adoption of a constitutional order. A major objective of this exercise was the entrenchment of fundamental rights and freedoms.² Although the Bill of Rights in the Constitution of Kenya incorporated many conventional political and civil rights, it was conspicuously silent on economic, social and cultural (ESC) rights. Indeed there is no evidence to suggest that there was even any debate regarding the inclusion of these rights. In any case, since there was no popular participation in the constitution-making process, what emerged as the Constitution of the newly independent state was more of an arrangement between the departing colonial authority and the leaders of the freedom movement.

The colonial authorities were naturally anxious to put in place a political and constitutional order that would safeguard their interests. At the constitutional level, this safeguard was achieved by guaranteeing fundamental rights and freedoms, while at the same time providing a watertight protection for private property.³ The Constitution made no attempt to address the social injustices that had been the hallmark of colonial rule. Instead it made every effort to legitimise the status quo in so far as ESC rights were concerned. The situation has remained unchanged to date. Even after ratifying a number of international human rights

¹ Director, Hakijamii (Economic and Social Rights Centre), Kenya.

² Chapter 5 of the Constitution of Kenya.

³ Section 75 which has been described as the most comprehensively worded in the Bill of Rights provides: 'No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:

- a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town, and county planning or development or utilisation of property so as to promote the public benefit; and
- b) The necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and
- c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.'

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instruments requiring the Government to respect, protect and fulfil economic and social rights,⁴ no comprehensive measures to domesticate them have been taken.

In the last few years, however, there have been commendable attempts to enact specific laws to give effect to a number of the Covenants. Kenya, for example, now has in place the Environmental Coordination and Management Act as well as the Children Act, both of which have given substantial and critical legislative underpinnings to economic and social rights in their respective sectors. The implications of these laws will be discussed in due course.

The current constitutional review process, although proceeding far too slowly – and mired in controversy over Presidential powers – provides a most significant step in the quest for the realisation of ESC rights in Kenya. Forty articles in the Draft Constitution are devoted to the Bill of Rights,⁵ and virtually all internationally recognised economic and social rights have been incorporated.

Economic and social rights litigation strategies have therefore been determined and informed by two interrelated factors, namely, the absence of appropriate municipal, constitutional and legislative provisions and a conservatively-inclined judiciary that misses no opportunity to abdicate its responsibility to uphold human rights. In order to overcome these obstacles, advocates for socio-economic rights have been forced to resort principally to conventional administrative law principles and at times ordinary common law.

Nonetheless, partly as a response to the judiciary's conservative jurisprudence, a vibrant social movement, especially amongst the urban poor, has emerged as a very important player in human rights advocacy, including economic human rights.

Following are a few example of how these achievements have been realised, as well as a few remarks on what advocates see as emerging opportunities.

2. National Legislation

The Constitution of Kenya, as noted above, does not affirmatively provide for ESC rights. Advocacy groups have therefore been forced to turn to other legal sources in seeking redress for violations of these rights. One area that has attracted a lot of attention is that of housing rights. Part of the reason is that housing issues appear in the numerous cases of eviction of slum dwellers. These

⁴ To date Kenya is a signatory to the following key Covenants: CESC, CCPR, CEDAW, CRC, CRCOPAC and CROPSC.

⁵ Articles 17 to 63 of the Constitution of the Republic of Kenya (Draft) 26th August 2002, Government Gazette No xx.

evictions have characterised the government's response to the increased numbers of people seeking shelter in the informal settlements, and have caused untold suffering to thousands of urban poor. Another reason is that, for a long time, a number of civil society actors working in the areas of economic and social rights considered their roles as being basically 'developmental,' eschewing any notion that their work concerned human rights, an area which was seen as political. This dichotomy between 'development' and 'human rights' NGOs has made it difficult to consolidate a coordinated approach to the promotion of economic and social rights. Litigation on environmental and children's rights, however, has also gathered quite a bit of momentum, perhaps as a result of the advancement in legislative protection.

2.1 Obligation to respect and protect

During the early 1990s, a large number of informal residents found themselves faced with imminent threats of forcible evictions.⁶ In almost all the cases the evictions were being carried out or threatened by central or local government officials. Most of the settlements were on government land while a few were on private land. Although the residents did not have title deeds to the land and were thus technically squatters, there was still a clear requirement under the law that any eviction had to be sanctioned by a court of law.⁷

Since no legislation specifically provides for the right to adequate housing, advocates have sought it in judicial review of eviction cases using administrative law. For instance, all the cases filed by Kituo Cha Sheria (Legal Advice Centre) and Kenyan public interest law organisations⁸ argued that the entities that carried out or threatened the evictions were acting *ultra vires*, in so far as they had no authority under any law to order evictions. Although courts were quite willing to grant leave to file applications for prerogative orders, they showed a marked reluctance to allow their orders to operate as a stay of execution of any contemplated eviction. Such results rendered the applications ineffective, as evictions usually were already carried out by the time the courts considered the merits of the applications. The courts were often of the view that the complainants, being squatters, had no right to the land they were occupying and,

⁶ For an overview, see Christine Bodewes and N. Kwinga, 'The Kenya Perspective on Housing Rights', in Scott Leckie, (ed) *National Perspectives on Housing Rights* (Kluwer Law, 2003) at 221-240.

⁷ Under Section 130 of the Government Lands Act it is, for example, clearly provided that it is only the Commissioner of Lands who can go to court to seek an eviction order against people staying illegally on government land. In all cases handled by Kituo Cha Sheria, neither the Provincial Administration nor the local authorities that carried out the evictions had the legal authority to do so.

⁸ By the time the practice of evictions or threat of evictions had substantially reduced we had filed over 20 suits relying on the prerogative orders.

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as such, had no basis for injunctive relief. Indeed, the courts have been unwilling to adopt a more purposive interpretation of the law and instead opted to confine themselves to the narrow textual interpretations as to whether or not authorities were acting within their powers. Unfortunately, courts have not historically taken into account the irreparable harm caused by eviction, and that potential evictees have due process protections that must be exhausted before allowing such irreparable harm.

With respect to private land, the courts have adopted an even narrower approach. In practically all the cases involving private land, courts have usually taken the inflexible position that a title deed is sacrosanct and the so-called squatters have absolutely no locus standi to challenge the registered owner's title.⁹ Attempts to obtain injunctive relief have invariably met with stiff resistance from the courts on the ground that the occupants have no arguable case.¹⁰

Although the suits have not been decided conclusively, the negative publicity that accompanied them finally forced the Government to issue an administrative decree declaring a moratorium on forcible evictions. This action was followed by a marked reduction in the cases of forcible evictions even though there are still a number of such cases.¹¹ Unfortunately, the victims of previous evictions have yet to receive compensation.

The emergence of a strong social movement among the urban poor in Nairobi and Mombassa, the two major cities in Kenya, has created a powerful force in the struggle for the promotion and protection of economic and social rights in general and the right to adequate housing in particular. In the case of *Ole Kennaia and Juma v Constitution of Kenya Review Constitution*, for instance, members of

⁹ This position has been repeatedly restated in a series of cases. These include *Nairobi Permanent Markets Society and Eleven Others vs Salima Enterprises and Two Others* C.A Case Number 187(unreported); *Mary Mukami and Others vs Archdiocese of Nairobi Registered Trustees* High Court Civil Case Number 488 of 1998 and *Classic Jua Kali vs National Council Of Churches of Kenya*. In all these cases the plaintiffs, who were occupants of the suit premises, were challenging the rights of a titleholder and in all the cases the courts dismissed their pleas essentially on the ground that they did not have locus standi, as the title was indefeasible. In two of the cases (*Mary Mukami* and *Classic Jua Kali*) there was credible evidence of a trust in favour of the applicants, but the courts were unwilling to inquire further into this, being merely satisfied with evidence of a certificate of title.

¹⁰ In another case, *Sabina Wanjiku vs Kamwe Mathare Developers* HCCC No.292 of 1998, the court flatly refused to issue an injunction to transfer the land to the subject of the suit on the ground that the Applicants had not established that the registered owners intended to alienate the land. When the owners proceeded to do just that and the matter came before the same judge, he could not hide his guilt!

¹¹ In December 2001, local authorities in Mombasa, the second largest city in Kenya, razed a slum community and many were rendered homeless. No action was taken against the perpetrators. In June 2003 a number of temporary business premises were demolished in Nairobi, allegedly because they were on a road reserve. No notice was given to the owners and a huge public outcry ensued. The matter turned comical when no government department was willing to take responsibility for this inhuman act. Again, the perpetrators were never prosecuted.

Muungano wa Wanaviji demonstrated their newfound assertiveness when they successfully applied to be enjoined as interested parties in a suit that had been brought by a group of sitting judges attempting to prevent the Commission from discussing the issue involving the judiciary.¹² At the time the slum dwellers intervened in the case, there were clear signs that the forces opposed to the review process were poised to use the judicial process to halt the review. However, the refusal of the Review Commission to defend the action appeared to be a blessing in disguise for them. The arrival of hundreds of slum dwellers in the court precincts changed all this. By the time the application for joinder was disposed of, the general elections were due. The defeat of the then ruling party – which was fiercely opposed to the review process – convinced the judges that their cause was lost and they abandoned the case.¹³

The case of *Korogocho Owners Welfare Association v The Provincial Commissioner and Another* (High Court Miscellaneous Civil Case Number 621 of 2001) is another key example of litigation being used successfully as an advocacy tool.

Korogocho is one of the most well-known slum areas in Nairobi. The land in question is government land. Sometime in the year 2000, the then President announced that the land should be allocated to the residents. It was, however, a purely populist statement devoid of any legal substance. The residents naturally took the statement very seriously but, given their conflicting interests, gave a completely different meaning to it.

The structure owners adopted the position that they would be the exclusive beneficiaries of the allocation. To the tenants it meant that at long last they would achieve their dream of obtaining security of tenure. As the stalemate continued, the structure owners decided to take the government to court. In their suit they are, among other things, seeking an order of mandamus compelling the Government to allocate the land to them and issue them with title deeds.¹⁴ In

¹² This case was important for another reason. The lawyers for the judges had put up a spirited objection to the slum dwellers being joined as parties in the suit calling them busybodies. In a landmark decision the two-man bench rejected this argument stating that: 'We think in this instance and as the matter affects the reform of the Constitution views and opinions should be aired before the courts with least restraint provided that there no (sic) prejudice occasioned to any one in the process.' This case also demonstrated how to bring a class action even in jurisdictions that do not explicitly provide for it. Equally significant is the fact that the decision further reaffirmed the emerging trend of liberally interpreting the application of the doctrine of locus standi.

¹³ In a form of poetic justice, the two judges who had spearheaded the case found themselves on the wrong side of justice when they were named among the corrupt judges and are currently under suspension as they await trial before a Tribunal.

¹⁴ The legal basis of this claim is fairly tenuous. The order of mandamus is predicated on the proof that the Government is under a legal duty to do a certain act and that it has failed to do so. In this case the Applicants would have to demonstrate that the Government has a legal obligation to allocate land to them, something that is outside the realm of probability. Moreover, by relying on the obviously illegal Presidential

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filing the case against the Government, the structure owners excluded the tenants, the most important and directly affected stakeholders.¹⁵

In order to safeguard their interests, the tenants and a few structure owners quickly mobilised and about 5,000 signed up to be joined as interested and affected parties, a request that was allowed by the court. The court went even further and ordered that all similarly situated persons were free to join the case. The inclusion of such a large number of tenants substantially changed the tenor of the proceedings and gave it a vital political dimension. It is, therefore, not surprising that the structure owners have lost their initial enthusiasm in the matter and are now constantly seeking adjournments.

2.2 *Obligation to Fulfil*

The greatest challenge faced by human rights advocates in litigating economic and social rights in Kenya is the absence of constitutional or legislative provisions recognising such rights. This challenge has obviously forced such groups to turn to other legal sources. In the field of housing rights, for example, one option that is currently being resorted to is the doctrine of adverse possession. One such test case, *Sabina Wanjiku and others v Kamwe Mathare* (High Court Civil Case Number 291 of 1998), is currently before the High Court of Kenya.

The facts of this case are as follows. From the early 1960s, people began to occupy a village known as Mathare 3 B within the larger Mathare Valley area in Nairobi. When they settled the area, the land was vacant; with time, more and more people moved into the area. Presently, over 5,000 people live there. During this time, nobody claimed ownership of the land and the community continued to reside there without interruption until 1996, when a limited liability company informed the community that the land belonged to it and requested everyone to move out.

On seeking legal advice, it was discovered that the land had instead always belonged to private persons, though none of them had taken any steps to obtain possession. It was therefore decided that this was an ideal case for adverse possession, even though no precedent existed in which a court has allocated land to urban slum dwellers on the basis of adverse possession.

decree as the basis of their claim, the Applicants clearly have demonstrated their disdain for the rule of law. The matter is still pending in court and somewhat sub judice, so it may not be possible to discuss it in great detail.

¹⁵ It is instructive to note that structure owners number only 2,500 while the tenants are well over 50,000. What this means is that if the land is allocated to the structure owners the livelihoods of well over 100,000 will be at stake as the structure owners will obviously pull down the existing structures and put up new ones whose rents will be way above what the present tenants would be able to afford.

The law of adverse possession is nonetheless extremely limited in its scope. First, it cannot be used to stake a claim on government land. This requirement is very significant because most of the slums in Kenya are on government land and, as such, the majority of the slum dwellers are unlikely to benefit from this doctrine, even if a court gives a ruling in favour of the applicants in the case. Second, another potential obstacle lies with the very jurisprudence of the court itself. In one case, the court dismissed a similar claim on the dubious ground that the applicants were unable to clearly identify the area they were claiming.¹⁶ Given the fact that most of the slum areas are heavily overcrowded, with the residents staying in small single rooms, it is practically impossible to expect the residents to demarcate the areas they occupy with precision, as the court seemed to implicitly require in this case. Fortunately, there are other decisions that have rejected the principle laid down in this case and have instead adopted a more liberal interpretation.¹⁷

Advocates are optimistic that this is the approach the court will follow in the *Mathare* case.

3. Emerging Opportunities

The Draft Constitution has provided a comprehensive framework for the respect for, and protection and fulfilment of, economic and social rights. All the currently recognised economic and social rights have been adequately provided for and an effective enforcement mechanism has also been put in place. A general consensus appears to have emerged amongst the delegates to the National Constitutional Conference to the proposed Bill of Rights. Consequently, optimism exists that the potential for litigating economic and social rights will be greatly improved in the not too distant future.

The enactment of the Environmental Management Coordination Act and the Children Act has also provided new litigation avenues. The Environmental Act has in fact extended the right to sue to anyone; an applicant does not have to establish that she has suffered any loss. This change is an extremely significant development as it enables every citizen to take action to protect the right to a

¹⁶ In the case of *Mary Mumbi & others vs Stanley Githunguri* (High Court Civil Case Number 228 (O. S)), the court, in dismissing the residents' application for a temporary injunction, based on their claim for adverse possession, ruled that: 'Without knowing the identity of the land in dispute, it would be difficult to grant injunction order....'

¹⁷ For example, in the case of *Peter Njau Kairu vs Stephen Ndungu Njenga and others* (Court Of Appeal Civil Appeal Number 57 of 1997 [unreported]) the court had this to say: 'Once adverse possession is proved, a purchaser for value cannot acquire title from the registered owner as the registered owner's title stands extinguished after 12 years of adverse possession.'

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clean environment.¹⁸ The Children Act has virtually domesticated all the provisions of the Covenant on the Rights of the Child. Indeed, the right to free basic education has already been implemented by the government, although few children living in informal settlements have access to publicly funded schools. It is clear that litigating children's rights has become more effective because of this legislation.

The on-going reform in the judiciary is another development that may positively contribute to the promotion of economic and social rights. It is hoped that the commitment to human rights by the Government and the enhanced vigilance of the greater population will have a fundamental effect on jurisprudence. Moreover, the proposed stringent appointment procedures for judges is also likely to ensure that those future judges are subjected to closer scrutiny, especially with regard to their legal philosophy.

Finally, the increase in the number of human rights advocates with the capacity to use international human rights standards and institutions will certainly strengthen human rights litigation.

4. Conclusion

There is no doubt that economic and social rights litigation remains undeveloped in Kenya compared to many other countries. The major obstacle has been the lack of incorporation of these rights in the domestic legal system. As the few cases that have been brought have demonstrated, however, the judiciary has also significantly contributed to this state of affairs by being unduly conservative in their application of the law. It is also a fact that human rights advocates have been too slow in using international human rights standards and institutions in order to open new litigation avenues.

The situation is steadily changing for the better as litigation on labour rights using the constitutional framework is gaining momentum. Indeed, there are currently two cases involving the dismissal of hundreds of workers. In one case where the employees are invoking their constitutional right against inhuman and cruel treatment, the High Court declined to grant the orders sought on the ground that labour rights are strictly governed by the contract between the employer and

¹⁸ Unfortunately, our courts still find it very difficult to get out of the strict positivist jurisprudence. In the case of *Peter Kinuthia Mwaniki & others vs Limuru Butchers Union and others* High Court Civil Case number 313 of 2000 (still pending), probably the first case brought under the new law, the court refused to grant the order of injunction on the ground that the institutions that were supposed to enforce the provisions under the Act had not been established. The court declined to consider the fact that the Act was already operational and that the establishment of the institutions in question was more of an administrative function that should be permitted to interfere with such a fundamental right.

employee. The matter is now before the Court of Appeal and, due to its far-reaching ramifications for labour and other rights in the country, many are anxiously awaiting the outcome.¹⁹

It is hoped, however, that with the on-going reform initiatives, all the actors will become more pro-active and human rights will finally assume the high profile they deserve.

Postscript

Recent Cases

Since the paper on which this chapter is based was first presented, two cases touching on economic and social rights have been decided by the High Court with interesting, if not conflicting, results. Both cases involved eviction threats by a state corporation (Kenya Railways). In the first case²⁰ the aggrieved represented thousands of residents of a slum settlement known as Kibera within Nairobi city. They occupied and still occupy a piece of land that is considered by the railway authorities to be reserve land. Sometime in the month of February 2004, the railway authorities issued a notice through the daily newspapers giving such occupants thirty days within which to move from the land, failing which they would be forcibly removed.

No consultations took place prior to or even after the issuance of the notice. The applicants were obviously gripped with anxiety as they had nowhere to go and the authorities were offering no alternative settlement. As the expiry of the notice period grew closer the residents became more desperate and as a last resort decided to go to court to, at least temporarily, stop the looming eviction. On the last working day before the notice expired, a suit was filed in the High Court at Nairobi seeking, among other things, a temporary injunction to stop the evictions.²¹

The court, having listened to the ex parte application, proceeded to make the following curious orders:

¹⁹ The case involves workers of Haco Industries, a local firm having the franchise, among others, to produce Bic ballpoints. It dismissed hundreds of its workers, allegedly without following the laid down channels and without paying them their dues. It is also alleged that it subjected its workers to inhuman treatment. The second case involves workers of Kenya Breweries, the largest brewery in the country. The employees are also seeking the establishment of a Constitutional Court to hear their matter. The two cases are the first of their kind where constitutional rights have been raised in labour disputes.

²⁰ *Maina Ngare and 87 others vs Kenya Railways Corporation Ltd* HCCC number 189 of 2004.

²¹ The writer was the counsel for the applicants in the matter.

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The Applicants have no (sic) *pima facie* established any right of occupation that this court would predicate any orders of injunction.

However in the interest of justice, I shall grant a temporary injunction for a period of 10 days only.

The import of the above orders is that in practical terms there was an injunction for ten days but jurisprudentially the judge effectively ruled that the applicants had no case. The talk about the 'interest of justice' is hollow and smacks of an attempt to infuse morality and sympathy in what was otherwise a serious legal issue namely whether the railway authorities were entitled to arbitrarily evict thousands of slum dwellers who had stayed on the parcel of land for years without any consultation and without any relocation plans. Although the matter was eventually amicably settled through negotiations and the government also backtracked on its eviction threats, it is nevertheless significant that the court, once again, failed to direct its mind to the more critical jurisprudential questions that the case raised. It was typically satisfied by merely looking at one side of the coin, namely who has the 'legal' title to the parcel of land in question.

Fortunately the filing of this case prompted another group of people also resident on the railway reserve land to file a similar case although in a high court outside Nairobi.²² The circumstances and facts of this case were similar, but the judge reached a completely different conclusion. On the issue of the way in which the decision was reached, the court made the following observation:

It is always a well understood principle of law that the executive government or its corporations or any of its officers should not possess arbitrary power over the interest of the individual. Every action of the executive government must be informed with reasons and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement.

On the issue of the right to be heard, the court stated:

The Managing Director of the defendant should have heard the plaintiffs before issuing the notice. It should be noted that human compassion must soften the rough edges of justice in all situations. The eviction of squatters not only means their removal from their houses but the destruction of the houses themselves. The humbler the dwelling, the greater the suffering and more intense the sense of loss. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done.

On the issue of rights of those who have stayed on a given piece of land for a very long time, the judge stated:

²² *Samoei Kirwa and others vs Kenya Railways Corporation* HCCC No. 65 OF 2004 (Eldoret)

I am of the view that squatters who settled and have been in existence for a long time, say for twenty years or more, and who have improved and developed the land on which they stand is required for a public purpose, in which case, alternative site or accommodation should be considered. Of course the land which the plaintiffs occupy is owned by the defendant. It is required by the Respondent for the use provided for under the Kenya Railways Corporation Act.

It is significant that the court cited with approval the principle laid down in the Indian *Olga Tellis v BMC* case²³. Within the Kenyan context this decision is quite significant in the sense that for the first time a court openly conceded that those commonly referred to as squatters do have rights.

It may of course be too early to open the champagne, especially having regard to the fact that the Railway authorities were not represented during the arguments, but it is nevertheless still a landmark decision that economic and social rights must build on. Indeed this writer, with the support of the Centre on Housing Rights and Evictions (COHRE), has already filed a case that will stretch the legal arguments further by placing the international human rights instruments squarely at the centre.²⁴

On 16 August 2004, a claim was filed on behalf of the 'Bulla Fot' clan in the Eastern province of Garissa.²⁵ The homes of 18 families in Garissa – which included over 100 children – were brutally demolished a year before by police under the directives of the District Commissioner of Garissa District. Not one of the families was permitted to salvage their personal belongings, and they were forced to endure seven days in the cold before local government authorities moved them to some land about six kilometres from the town. The community has now built makeshift shelters in the new location, which has no water and is far from the schools the children attended. Their situation has been further exacerbated by fresh threats of eviction from the land on which they currently live.

In the complaint filed with the High Court of Kenya, the community requests a declaration that the eviction was a violation of constitutional rights and international human rights treaties as well as the payment of compensatory and exemplary damages. The constitutional provisions cited included the right to livelihood, non-discrimination and privacy, and reference is made to international treaties ratified by Kenya, including the International Covenant on Economic,

²³ *Olga Tellis v Bombay Municipal Corporation* [1985] 2 Supp SCR 51. See the chapter by Gonsalves in this volume, especially his footnote 14.

²⁴ This is the case of Ibrahim Muhumed Dagane and other vs The Attorney General HCCC No 881 of 2004.

²⁵ The case was originally filed by Kituo Cha Sheria (Legal Advice Centre) and is now with the newly established Hakijamii (Centre for Economic, Social and Cultural Rights, Kenya).

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Social and Cultural Rights. There has already been media interest in the case and it is hoped that the case will set a useful precedent in Kenya, or at the Africa Commission on Human and Peoples' Rights if Kenyan courts fail to order redress for the community. Kenyan media have already taken an interest in the case.²⁶

²⁶ See John Mbaria, 'Property Rights vs Human Rights', *The East African*, 31 August 2004.

11. Fostering Dialogue: the Role of the Judiciary and Litigation

*Víctor Abramovich*¹

1. Introduction

Litigation strategies can be successfully utilised in order to complement political strategies. Historical analysis demonstrates that the level of legal activism in the field of human rights is often in close and direct relation to the presence of political factors that grant public legitimacy to the judiciary to cover new issues – issues previously restricted to the political branches of government. When democratic institutions remain weak – in terms of representation and restricted space for social and political participation – collective conflicts are often transferred to the courts. This was traditionally the case for civil and political rights. However, the same situation has arisen in the case of economic, social and cultural (ESC) rights since citizens are limited in their ability to effectively participate in policy decisions on social matters. This has brought back the timeworn discussion on the scope of action that judicial mechanisms have *vis-à-vis* political mechanisms.

To some extent, the recognition of directly justiciable rights does limit or restrict the action of political bodies. While analysis of this issue exceeds the conceptual framework of this chapter, we know, for instance, that this question cannot simply be answered in the abstract. Adequate attention must be given to the social and institutional context in which the judiciary is called to participate.² It is clear,

¹ Executive Director, Centro de Estudios Legales y Sociales, Buenos Aires, Argentina.

² See Christian Courtis, 'Naked Kings: Some characterisation axes of the courts political activity', (unpublished and on file with author). The author states that the question of the judicial legitimacy cannot be approached in the abstract, merely taking into account one or two normative variables, such as the role of the courts in a democracy or the non-elective origin of judges. The question of legitimacy requires empirical information on the operation of the political system and concrete knowledge of the historical context in which the judges perform. In this sense, judicial legitimacy analysis supposes the necessary comparison to the legitimacy of the other branches of government. Thus, he mentions, the non-reflexive import of the 'counter-majority' argument in Latin America has sometimes had the effect of legitimating norms or practices imposed during authoritarian regimes without electoral legitimacy. Something similar can be said in relation to the norms transmitted by the many levels of public administration, yet such officials with this political responsibility are not invested with electoral legitimacy. Simply extending the representative powers of the President or the Prime Minister – head of the Administration – to any administrative act, by delegation, 'spilling' or acquiescence, means extending the notion of representation far beyond the permissible.

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nonetheless, that judicial intervention in these fields, in order to preserve its legitimacy, must be strongly founded on legal standards. The judiciary must analyse the issues in question in the light of constitutional or legal rules; for example, through standards of 'reasonableness,' 'adequacy' or 'equality', or the analysis of minimum core content.

Therefore, the judiciary is not a place for the design of public policies, but for the confrontation between political policies and applicable legal standards. In case of divergence, the judiciary has the obligation to send the issue back to the corresponding political branch of government. When constitutional or legal rules set guidelines for the design of public policies on which the enforcement of ESC rights depend, and the political powers have not adopted any such measure, the judiciary will have to reproach that omission and return the issue to those powers with the direction to create what is required by law. This dimension of legal proceeding can be conceptualised as the participation in a 'dialogue' between the different branches of government for the implementation of a legal-political program established by the Constitution or human rights treaties.³ Only in exceptional circumstances, when the magnitude of the violation justifies it or when there is a complete lack of cooperation by the political branches of government, have courts gone forward in the concrete determination of the measures to be adopted.⁴

These various judicial responses are taken up in the first part of the chapter. The second part is devoted to how advocates can incorporate litigation on ESC rights

³ On constitutional court legitimacy in a social democracy governed by the rule of law, judicial protection of procedural conditions of the democratic laws genesis, which includes the fundamental social rights' guarantee that assure the insertion into the political process: See Jürgen Habermas, 'Justice and Legislation: about the role and legitimacy of constitutional case law', in *Facticidad y Validez* (Trotta, 1994) at 311 and following. The author states: 'The discussion about the activism or self-restraint of the constitutional court cannot be made in abstract. If we understand the constitution as interpretation and configuration of a system of rights through which the internal connection of public and private autonomy is enforced, an offensive constitutional case law not only will not be harmful in the cases that the democratic procedure and the deliberative form of opinion and political will creation are to be enforced, but also are normatively demanded.' (At 354) On the role of judges in a constitutional and social democracy governed by the rule of law, see also, L. Ferrajoli (Ed), 'El derecho como sistema de garantías' [The right as a system of guarantees] in *Derechos y Garantías. La ley del más débil* (Madrid: Trotta, 1999) at 23-28. Other authors have supported strong judicial intervention in order to protect the rights of underprivileged social groups from the majorities: see Owen Fiss, "Grupos y Cláusula de Igual Protección" [Groups and Clauses for Equal Protection], in R. Gargarella (ed.), *Derecho y Grupos Desaventajados* (Barcelona: Gedisa, 1999, at 137-159.

⁴ This has happened in the litigation on structural reform. It is useful to highlight in reply to the objections stated about the incapacity of courts to solve technical issues, or the limitations of the judicial process to address complex matters or multiple actors, that many analysts have appreciated the judicial role in advancing the design of policies and the change of institutional practices facing the Government or Congress, and the latter have shown a predisposition to recognise and modify their illegal policies and actions when the question was addressed and resolved by a neutral and independent court. For example, see William Wayne, 'Two Faces of Judicial Activism', *George Washington Law Review* 1 (1992) at 61.

within human rights activism. Special attention is given to the role of procedural litigation, whereby court processes are used as a way of opening up dialogue with government.

2. The Court's Role: Four Scenarios

Some tentative guidelines can be drawn up to characterise typical situations in which the judiciary has assumed the task of verifying the compliance of legal standards in the design and enforcement of public policies. These situations usually involve one of four types of cases.

The first type of case consists of those judicial interventions that aim to legitimate public policy measures assumed by the State without considering the assessment of the public policy itself. In other words, these cases are concerned with the transformation of measures formulated by the State within its discretionary framework into legal obligations, and therefore, into measures of legal sanction in case of non-compliance. In this analysis, the court accepts the measure designed by the political powers of the State, but changes its nature from one of mere discretion to one of legal obligation. Thus, the judiciary becomes the guarantor of the enforcement of that measure. In many of these cases, the measure that the State has formulated corresponds exactly with the one claimed by the complainants; the only difference being that they have acquired a mandatory status and their enforcement is not solely subject to the will of the political body that formulated it.

The *Viceconte* case⁵ provides an example of this type of case. The Argentinean Government took the political decision to produce a vaccine for an endemic and epidemic disease, and even drafted a schedule to produce it. In that case, the court limited its role to transforming that measure into a legal obligation. The court thereby forced the State to observe the terms of the schedule and threatened sanctions in case of non-compliance.

It should be pointed out that the discussion about judicial legitimacy in those cases where courts must pronounce on the discharge of laws or social rules by the executive branch of government carries particular features. On this point, it is helpful to note that discussion of the problems of the legitimacy of the judiciary in these types of class actions, or cases involving collective or structural impact, has

⁵ *Maria Viceconte, Mariela v National State-Ministry of Health and Social Action ac/ amparo*, Federal Court of Appeals in Administrative Matters, Room IV, case, June 2, 1998, La Ley, Supplement of constitutional law, November 5, 1998. The case can be consulted in the IIHR investigation: *Los derechos económicos, sociales y culturales* (Economic, social and cultural rights) at 81. For further discussion on this case see Fairstein's chapter in this volume.

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particular 'limits' in those cases where one must decide exclusively on the administration's compliance with obligations that are clearly established by laws and regulations in the social field. In these cases, a tribunal is not called upon to fix the level of conduct or policies, but rather to require the compliance with and execution of what is already established by law.

In these situations, it is not the court that establishes the rights or policies, but merely enforces what the law or policy already requires. In some HIV/AIDS cases,⁶ for example, the laws clearly articulate the services that must be provided to affected persons. Likewise, regulations set out the duties of the Ministry of Health as it pertains to HIV/AIDS services. The issue in these cases is not whether or not a legal obligation exists, but simply whether or not the Ministry in question is abiding by that legal obligation. Even though judicial interpretation of the law can, to some extent, be considered a creation of law itself, the legal proceeding follows the rules and parameters set by the legislative branch. Such delineation is indeed the classical theory of the division of powers and protects the interests expressed by the political will of the majority.⁷ These majority interests, however, cannot trump rights, and thus the role of the judiciary is to ensure that those rights are respected, protected and fulfilled. Similarly, the judicial branch must also enforce regulations or actions that derive directly from the administrative bodies associated with the executive branch, and to ensure that such regulations or actions do not violate rights.

A second type of situation is illustrated by those cases in which the court examines the compatibility between public policy, the applicable legal standard and the relevant human right. In these cases, if the court considers that a policy, or an aspect of that policy, is not compatible with the human rights standard, the policy has to be sent back to the political branches for reformulation. Examples of standards that courts use to analyse a public policy are those of reasonableness,

⁶ For example, "Asociación Benghalensis y otros v Ministerio de Salud y Acción social - Estado Nacional s/ Amparo, ley 16986" Supreme National Court of Justice, 01/06/2000.

⁷ In these cases, the discussion of justiciable rights and the free action of political instances is limited because politics previously acts through the Congress. In any case, it limits itself when setting legal obligations in the matter of social politics. Regarding the typical discussion about the tension between democracy and rights, in reference to justiciable social rights, see Gerardo Pisarello, 'Los derechos sociales en el constitucionalismo moderno: por una articulación compleja de la relaciones entre política y derecho' [Social rights in modern constitutionalism: for a complex articulation of the relations between politics and law], in M. Carbonell, J.A. Cruz Parceró and R. Vázquez (eds.), *Derechos sociales y derechos de las minorías*, (Mexico: Porrúa-UNAM, 2001) at 113-138. See also E. Rivera Ramos, 'Los derechos y la democracia: Conflicto o complementariedad?' [Rights and democracy: Conflict or complementarity?], in AAVV, *Los derechos fundamentales*, (SELA, 2001). For a more general overview of the debate aroused in the United Kingdom with the incorporation of the human rights law and the consequent granting of new powers to the judiciary to the detriment of the Parliament, see M. Loughlin 'Rights, Democracy, and Law', in T. Campbell, K. D. Ewing and A. Tomkins (eds.), *Skeptical essays on human rights* (Oxford: Oxford University Press, 2001) at 41-60.

non-discrimination, progressive/non-regressive applicability, transparency et cetera.⁸

Thus, for instance, in the *Grootboom* case,⁹ the Constitutional Court of South Africa held that the housing policy developed by the South African Government was unreasonable since it did not include provision of emergency relief to those sectors of the population with urgent housing needs. In such cases, the court reached the conclusion that an aspect of the policy was contrary to the reasonableness standard, but did not question the entire policy. In general, the judicial branch leaves the political branches of government a broad margin of discretion in the design of public policies. If the latter's policies comply with the legal standard, the judiciary does not determine whether an alternative policy should have been adopted. The margin, however, depends on the standard. The standard of 'reasonableness' adopted by the South African courts is less strict, for example, than the notion of 'appropriate measure' as defined in the International Covenant on Economic, Social and Cultural Rights.

A point that is important to consider in these types of cases is that legal intervention in the enforcement stage does not consist of the compulsory imposition of a sanction, understood as a detailed and self-sufficient order,¹⁰ but of the follow up of a fixed instruction in general terms, in which concrete content is built throughout the 'dialogue' between the court and the public authority. Therefore, the decision, far from constituting the end of the process, is an inflexion point that modifies the sense of the jurisdictional intervention. After the court's pronouncement, the State is tasked to design the means by which the judicial decision will be complied with, and the court simply ensures that this charge is carried out in compliance with its order.

There is a third type of case, in which the judiciary is forced to assess for itself the type of measure that should be adopted. Faced with inaction by the political branches to correct a violation of an economic or social right, the court will sometimes need to endorse an adequate public policy measure. That is, if the court finds that there are no alternative means by which to satisfy the right in

⁸ We can refer to those cases in which a legal norm imposes the obligation of establishing processes for information flows and consultation – for example, with the beneficiaries – in the design or assessment of a social policy. Thus, in the case of *Ombudsman Office of the City of Buenos Aires v INSSJP*, Court of Appeals in Administrative Matters, Capital Federal, Room IV, case, February 10th, 1999, La Ley 1999-D at 377, the criterion applied for the invalidation of the privatisation process was precisely the lack of access to information on the system users. Similarly, in other cases, the Argentine administrative justice courts revoked a public services charge adjustment due to the absence of public hearing – considered as an opportunity to consult users – before adopting the decision.

⁹ South African Constitutional Court, case CCT 11/00, *The Government of the Republic of South Africa and Others v Irene Grootboom and Others*.

¹⁰ For example, the order to pay a net and payable amount.

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question, it must issue clear orders for enforcement of the right. An example of this is provided by the *Beriacqua* case, in which the preservation of the life and health of a child who suffered from a serious bone-marrow illness could only be attained through the delivery of specific medication that the parents could not afford.¹¹ In such cases, the judiciary assumes the role of crafting the measure to be adopted as well as the decision on the appropriate means of policy implementation.

Finally, there is a fourth type of legal intervention whereby the court limits itself to simply declaring that the State's omission is illegitimate and abstains from ordering any specific remedial measure. Even in those cases where a court's order is not directly enforceable, a valuable alternative can be a declaratory action in which the judiciary says that the State is unreasonably tardy or deficient in its performance of its obligations in the area of ESC rights. The rulings obtained may constitute significant vehicles to direct the public agenda and thereby create the environment where the political branches take human rights into consideration because they are treated as carrying legal obligations.

3. Litigation Strategies

As we can see, litigation strategies complement other advocacy strategies such as monitoring social policies, lobbying of political branches of governments, social mobilisation, and public awareness campaigns. Indeed, it is wrong to think that legal strategies exclude other political advocacy strategies. Human rights issues, particularly those cases that involve collective complaints, possess strong political components. A key to a successful litigation strategy may be the promotion of a public discourse, ensuring that the judiciary itself contributes to that discourse. Therefore, it may be useful to accompany litigation strategies with social mobilisation and political activism. Additionally, legal victories may help to make political victories effective, by holding the political branches of government to their agreed-upon obligations.¹² Indeed, in some weak democracies, the adoption of legislation itself does not ensure that rights are actually respected, protected

¹¹ CSJN, *Campodónico de Beriacqua, Ana Carina vs. Ministry of Health and Social Action-Secretariat of Health Programs and Bank of Neoplastic Drugs*, October 24, 2000.

¹² In the *Asociación Benghalensis* case, a group of organisations that defended the rights of persons with HIV/AIDS promoted a collective *amparo* action that was taken to the Argentine Supreme Court of Justice. The resulting decision obliged the executive branch to enforce the AIDS law that established the obligation to supply medication. This law had been passed as a result of a strong political campaign, partly fostered by the same groups and actors that were later forced to resort to legal action to enforce it. We can also mention the cases in which women's organisations resorted to the courts to request the implementation and enforcement of the reproductive health law, for which they had fought in the Congress.

and fulfilled. Such situations require judicial intervention as well as political mobilisation in order to ensure that the legislation is meaningful.

The adoption of constitutions and the ratification of international treaties create rights and corresponding obligations. To make these rights and obligations meaningful, it is necessary for governments to establish mechanisms to make themselves accountable if they fail to meet these obligations. The judiciary has a particularly important role in this regard, as it is the branch of government that, at least in theory, is designed to be independent and impartial and is ordinarily entrusted with the task of monitoring the other branches of government. Indeed, the general rule under international law of 'exhaustion of domestic remedies' would be unrealistic if the judiciary did not effectively perform this role. In other words, it is important for the State to develop independent, impartial and effective domestic mechanisms to remedy violations of rights in order to minimise the need to resort to international fora.

We have seen how the role of the judiciary can vary considerably. The scope of judicial intervention can range from defining public policies as legal obligations, to enforcing legislation or administrative regulations, to determining the framework in which the executive branch must design and implement concrete actions, to declaring the State in violation of its legal obligations, with or without imposing a specific remedy.

Effective litigation strategies must clearly articulate what they want the judiciary to accomplish, and then craft legal and political strategies to bring this end to fruition. Strategists must also determine what weight to give legal strategies in comparison with political strategies in order to achieve the desirable result.

These two complementary strategies require further examination. Occasionally, litigation should only be pursued as a way to support other rights enforcement strategies. Such situations often involve complementary legal strategies that begin from a 'procedural approach' in situations that do not involve the direct denial of the 'substance' of the right. What is pursued, however, are the conditions that enable the adoption of appropriate legislation. In these situations, the claimants do not intend that the judiciary directly recognises the substantive claim and thus guarantee a social right, but only complements the corresponding political advocacy. Thus, for example, the creation of institutional spaces for dialogue is claimed before the courts, as well as the establishment of legal frameworks and procedures including full participation, on equal footing, of the potentially affected actors. Claimants can also use such litigation in order to access information dealing with previous policy decisions as well as the execution and enforcement of any agreements between individuals or social organisations and the government.

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In some countries in Latin America, consumer advocacy groups have successfully developed such actions. They have been used, for instance, to force public hearings on the negotiation of utility rates including electricity, water and gas. Similarly, they have been used in many other negotiations, including those with companies that submitted concession contracts to provide basic services, again often requesting access to public information crucial for the enforcement of their rights.

Environmental organisations have also developed legal advocacy strategies with the aim of claiming space that guarantees full participation and access to information about the design and adoption of measures or policies that may prove harmful to the environment. Similarly, legal actions by and on behalf of indigenous peoples, which are designed to obtain mechanisms of consultation and participation in decision-making processes concerning their cultural lands, are also framed in this type of legal strategy.

The human rights movement has a lot to learn from these strategies. When the executive and legislature provide space for civil society participation in the discussion and analysis of certain measures or policies – such as public hearings in the parliament or in administrative bodies, mechanisms for participatory elaboration of norms, participatory budget systems, strategic planning in the cities – it is more likely that the resultant standards and norms will respect, protect and fulfil the right to those concerned. While we might formally refer to a ‘right to civic participation’ in such analysis, the social rights involved may determine the scope of this participation and thus limit that participation to those groups directly affected by the discussion. Thus, for instance, the Ecuadorian case of the *Independent Federation of Subar Population in Ecuador against Arco* which concern pollution by an oil company was possible through a legal *amparo* action. This action required Arco to negotiate with the legitimate political authorities of the indigenous people rather than with other entities that did not represent indigenous interests. This case, similar to those involving more traditional labour – management conflicts in collective negotiation processes – sought to create a negotiation process that allowed full participation by all relevant actors.¹³

At other times, litigation may be required solely to enforce an agreement attained as a way to negotiate with the State. Agreements for the relocation of the people facing eviction provide one example. Although in these cases it is a matter of enforcing the government’s decision, the characteristics of the social rights involved, such as the right to housing, may require that the judiciary intervene to

¹³ See ‘*Tarimat*’, *Firmes en nuestro territorio. FIPSE vs. Arco*, CDES, Quito, 2001.

ensure that any agreement does not violate government obligations to respect and protect the right to housing.¹⁴

Those ‘procedural’ litigation strategies, which aim to create spaces for access to information, are also quite relevant as litigation tools.¹⁵ Indeed, the right to information constitutes a component of economic and social rights and has proved to be a fundamental tool to enforce public participation and control of public policies in the economic and social spheres. They also tend to contribute to public monitoring of the government itself regarding the effectiveness of ESC rights. In such circumstances, the State must display the necessary means to guarantee access to public information on equal terms. Specifically, in the field of ESC rights, as a minimum, the State must produce for, and provide to the public information regarding: (a) the condition of the various sectors of the population as it relates to the various aspects of the rights, especially when its description requires measurement with indicators; and (b) the content of public policies, developed or proposed, expressly mentioning reasons, objectives, terms of performance and resources involved. These legal actions usually act as legal channels that support the monitoring of social policies and the documentation of ESC rights violations.¹⁶

¹⁴ In a case relating to an agreement between evicted families and the Government of the City of Buenos Aires, the applicants requested compliance by the state with obligations under the agreement, which consisted of building houses and the temporary solution of the group’s housing needs, while the work was done. In this action, mainly relating to performance of the agreement, constitutional and international standards on the right to housing were used to interpret the scope of the government’s obligations to provide temporary housing of certain characteristics, which was requested in a precautionary measure. The court ruled in favour of the request and ordered that the families be accommodated in suitably located hotels in the city. Even though the agreement was the result of a negotiation and the political pressure on the government, the litigation concerned the legal scope of the obligations assumed by the state. See *Aguero Aurelio Edwigio and others vs. GCB/A*, Expte: Exp. 4437/0. Resolution February 26, 2002.

¹⁵ When adopting the International Covenant on Economic, Social and Cultural Rights (ICESCR), the State commits itself to gathering information and formulating a plan, as stipulated by the Committee on Economic, Social and Cultural Rights. In some matters – such as the right to adequate housing – it is expressly recognised that the State obligation of immediately implementing an efficient surveillance of the housing situation in its jurisdiction, for which it must study the problem and the groups in a vulnerable or unfavourable situation, people without a home and their families, people living under inappropriate housing conditions, people without access to basic facilities, people who live in illegal towns, people subject to forced evictions and low income groups (*General Comment No.14: Right to Adequate Housing* (1991) at para. 13). In relation to the right to free primary education, those States that have not implemented it up to the moment of ratification assume the responsibility of elaborating and adopting, within a two-year term, a detailed plan of action for its progressive implementation (Article 14, ICESCR). These monitoring obligations, collection of information, and preparation of a plan of action for a progressive implementation, are extensible, as immediate measures, to the rest of the rights entitled in the Covenant (*General Comment No. 1: Reporting by States Parties* (1989) at paras. 3 and 4).

¹⁶ See Victor Abramovich and Christian Courtis, ‘El acceso a la información como derecho’ (The access to information as a right), in E. L. Duhalde (ed.), *Anuario de Derecho a la Información*, (Buenos Aires, Madrid) 1 (2000).

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These indirect or complementary actions demonstrate that judicial channels are far from becoming the centre of the struggle for ESC rights. Instead, they help support the rest of the political actions that are taken to channel the rights claim in the framework of a collective complaint. These actions deal either with direct claims to the government administration, or with the development of negotiation paths, or even with lobbying civil servants, the legislative branch or private companies. Again, it is clear that there are no exclusive options, but there are litigation strategies that can improve the work of political advocacy.

12. Reflections on the Indian Experience

Colin Gonsalves¹

1. Introduction

The use of the Constitution to defend and further the rights of the poor has taken a unique turn in India. Unlike many courts in Europe or the United States,² the Indian courts are empowered to directly incorporate international treaties as part of municipal law and to enforce them as such. Thus, international treaties are not only used to interpret ambiguous provisions of law but are also, by themselves, capable of being acted upon in Indian courts. This very positive interpretation of the Constitution was utilised as far back as 1969 in the case of *Maganbbhai v Union of India*³ where the Supreme Court held that international conventions that add to the rights of citizens are automatically enforceable without the need for amendment of domestic legislation, while international conventions that take away existing rights require such implementation to become enforceable.

The second important divergence of Indian law from European and US law is with respect to lawmaking by judges. The notion or 'fiction' that judges only interpret the law has long since been discarded. It is now well settled that judges do in fact make the law, often through progressive and creative interpretation. The progressive teleological interpretations of the European Court of Human Rights and European Court of Justice are a case in point. The Indian courts have, however, gone one step further.⁴ The Supreme Court has candidly admitted that

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² While most European states adopt a dualist system with respect to incorporation of international law, former countries from the Soviet bloc have been much more willing to directly incorporate human rights treaties, international customary law and general principles of international law within their constitutions and thereby permit judicial application. See, for example, the constitutions of Latvia and Estonia. A similar trend is evident in Latin America.

³ *Maganbbhai v Union of India*, AIR 1969 SC 783 (1969). The Supreme Court stated: 'A treaty really concerns the political rather than the judicial wing of the State. When a treaty or an award after arbitration comes into existence, it has to be implemented and this can only be if all the three branches of Government to wit the Legislature, the Executive and the Judiciary, or any of them, possess the power to implement it. If there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some jurisdictions the treaty or the compromise read with the Award acquires full effect automatically in the Municipal Law, the other body of Municipal Law notwithstanding. Such treaties and awards are 'self-executing'. Legislation may nevertheless be passed in aid of implementation but is usually not necessary' (para. 24).

⁴ See, for example, Article 35 of the Federal Constitutional Court Act which reads: 'In its decision the Federal Constitutional Court may state by whom it is to be executed; in individual instances it may also

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judges do in fact make law, particularly in circumstances where there is a gap in the law or where legislative coverage in respect of a fundamental right has been lacking for a considerable time. It is interesting to note that some Western courts have moved in the same teleological direction have sometimes been compelled to issue detailed orders or even re-write legislation.

As the decisions of the Supreme Court stand on par with statutes, a combination of this lawmaking propensity together with the incorporation of international standards in Indian law makes for a very potent force. This was seen in the case of *Vishakha v State of Rajasthan*,⁵ where, due to the lack of a law relating to sexual harassment in the country, the Supreme Court incorporated the provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and laid down the *Vishakha* Guidelines in respect of the prevention of sexual harassment and punishment for that crime. These guidelines are now law and are enforceable throughout the country.

The third important development in Indian constitutional law relating to the poor is in respect of standing to sue. Western-inspired law traditionally requires a direct connection between litigant and the subject matter of the litigation. In India, however, innovative developments began over two decades ago when the Supreme Court held that it was permissible for any person acting bona fide in the interest of the poor, illiterate or the oppressed to file writ petitions either in the high courts or the Supreme Court for the enforcement of a fundamental right.⁶ This innovation illustrated that the judicial system could be used for more than merely a system of justice for the rich. The poor in India rarely understand concepts of human rights and even more rarely litigation, thus, as things stand today, any doctor, lawyer, social worker, academic, indeed any person can file a case in a proper court for the enforcement of the rights of millions of persons without needing to demonstrate any direct nexus with the relief sought in the litigation.

specify the method of execution.’ In the *Second Abortion Case*, a detailed interim law was written by the court and was to remain in place until new legislation came into force.

⁵ The court stated: ‘In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.’ *Vishakha v State of Rajasthan*, 1997 (5) Scale 453 (1997) at para. 7. Available at www.supremecourtonline.com/cases/2447.html

⁶ See, for example, *S.P. Gupta vs. Union of India & Another* [1981] (Supplementary) SCC 87; (AIR) 1982 SC (149).

The liberal standing requirements, however, raise the question of how a poor public interest litigant is to gather the evidence necessary for a national level case relating to large numbers of unfortunate persons? The Supreme Court answered that question by saying that once the public interest petitioner brought the issue to the court he is viewed as having done not only the court but also the country a service. Thereafter it is the duty of the court through the appointment of commissioners to gather the evidence necessary to establish the facts for the prosecution of the case. In other words, the evidentiary burden shifts on to the court and it becomes the public duty of the court to continue with the matter.

2. Implementation and Resource Questions

Another issue, then, is how to ensure that the orders of the court are obeyed? Is it adequate for the court merely to make an order and then sit back and wait for the petitioner or some aggrieved party to file a case for contempt when the order is disobeyed? An interesting innovation took place on this point after the judiciary noticed that orders of even the superior courts were routinely disobeyed in India. The court developed the practice of issuing the 'continuing mandamus', whereby after the orders are issued, courts continued to retain jurisdiction over the matter and periodically review the progress of the implementation of the respective court order.

As for the issue of resources, the Indian Supreme Court considered the question of how courts should respond to the often routine objections of states that they do not have adequate funds to ensure that persons have their basic fundamental rights enforced. In the *Ratlam Municipality* case,⁷ the Supreme Court held that when it comes to the enforcement of a human right the court would not entertain an inquiry into the 'perverse expenditure logic' of the state departments.

There have been hundreds of cases relating to the enforcement of a fundamental right through the medium of public interest litigations. For instance, in the *People's Union for Civil Liberties* case,⁸ which is a petition that has affected millions of people throughout India, the Supreme Court directed a midday meal for school children, the giving of highly subsidised grain to the poor, and an employment

⁷ *Ratlam Municipality vs. Vardichand and Others*, 67 AIR, (1980). Residents within part of Ratlam Municipality, lacked sanitation and brought legal action against the Municipality requesting that drain pipes be constructed. The Municipality claimed a lack of funds. The Magistrate gave orders that the Municipality had to draft a plan within six months. After the High Court approved the order, the Municipality appealed to the Supreme Court. The Supreme Court upheld the order and directed the Municipality to take immediate action within its statutory powers. This included construction of sufficient public latrines and drains and provision of water supply.

⁸ *People's Union for Civil Liberties (PUCL) v Union of India* (2001) 7 SCALE 484 (2001).

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scheme for the unemployed. Similarly, in the *Unikerishnan*⁹ case, the Supreme Court said that education was a fundamental right and it was the duty of the state to provide free and compulsory education for all children.

The Supreme Court has held in the asbestos case that the right to health is an integral part of Article 21, which is the right to life, and in the *Shantistar Builder's* case,¹⁰ the Supreme Court held that housing is a fundamental right. Then in 1997, in the *Nawab Khan* case,¹¹ the Supreme Court held that 'it is the duty of the State to construct houses at reasonable rates and make them easily accessible to the poor. The state has the constitutional duty to provide shelter to make the right to life meaningful.' Likewise, in the *M.C. Mehta* case,¹² the Supreme Court held that everyone has a right to a clean and healthy environment and clarified that the right to life did not mean 'mere animal existence'.

However, not all decisions of the Supreme Court have been satisfactory from a human rights point of view. The partially ambiguous and recommendatory nature of the decision of the Court in *Olga Tellis v BMC*,¹³ resulted in mass evictions of pavement dwellers in 1985. It is certainly not clear that Indian jurisprudence complies with international standards on forced evictions.¹⁴ However, the

⁹ *J.P. Unikerishnan v State of Andhra Pradesh* 1993 (1) SCC 645.

¹⁰ *Shantistar Builders v Narayan Khimalal Tatome and Others* AIR 1990 SC 630.

¹¹ *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan*, AIR 1997 SC 152.

¹² *M.C. Mehta v Union of India and Ors.*, [1999] ICHRL 58 (29 April 1999)

¹³ *Olga Tellis v Bombay Municipal Corporation* [1985] 2 Supp SCR 51. The Supreme Court stated '[W]e hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or ear-marked for a public purpose like, for example, a garden or a playground; that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case; and that, the Kamraj Nagar Basti [an informal settlement] is situated on an accessory road leading to the Western Express Highway. We have referred to the assurances given by the State Government in its pleadings here which, we repeat, must be made good. Stated briefly, pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purposes, in which case, alternate sites or accommodation will be provided to them, the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and, the Slum Upgradation Programme (SUP) under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimise the hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31, 1985 and, thereafter, only in accordance with this judgment. If any slum is required to be removed before that date, parties may apply to this court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz. October 31, 1985.'

¹⁴ India has ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR), which 'commits all State parties to the present Covenant to recognise the right to an adequate standard of living ... including housing'. The Covenant has been interpreted to ground a prohibition on forced eviction that

Supreme Court, in the earlier mentioned case of *Nawab Khan*, has indicated that it may take a stronger position on resettlement for those living in informal settlements or by the roadside:

[T]he mere fact that encroachers have approached this court would be no ground to dismiss their cases. Where the poor have resided in an area for a long time, the State ought to frame schemes and allocate land and resources for rehabilitating the urban poor.

One of the main concerns of housing rights groups in India is the ease with which middle class groups have been able to secure eviction orders against poor urban and rural dwellers.

3. Litigation Strategy

There are many important public interest petitions coming up now before the Supreme Court with which the Human Rights Law Network is actively associated. A case demanding the provision of antiretroviral (ARV) drugs to persons infected with HIV is pending. Lawyers in India look to South Africa and many South American countries for precedents in this regard.¹⁵ An important case relating to the right to housing for slum dwellers is also pending before the Supreme Court. A third case relates to the rights of indigenous people who are currently being evicted from forest areas. Here once again, we look to the decisions in South America and also the case law developing in Canada, New Zealand, the United Kingdom and elsewhere relating to the customary rights of tribal communities to continue to reside in forest areas notwithstanding their lack of formal title to land.

The approach of the Human Rights Law Network is to always undertake cases in collaboration with people's movements so that the lawyers learn from them and the orders of the courts are ultimately monitored by the people's movements themselves. The Human Rights Law network will rarely take on a case without

provides for the right to alternative accommodation in the case of forced evictions, although some allowance is made for a country's resources: 'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.' See Committee on Economic, Social and Cultural Rights, *General comment No. 7: The right to adequate housing (Article 11.1): forced evictions* (1997) at para. 16. In its 1993 resolution on forced evictions, the UN Commission on Human Rights emphasised that 'the practice of forced eviction constitutes a gross violation of human rights, in particular, the right to housing'. See also the chapter by Budlender in this volume.

¹⁵ See 'Global Treatment Access: Legal Developments and Strategies', Paper prepared for *Putting Third First: Vaccines, Access to Treatment & the Law*, A satellite meeting of the 14th International AIDS Conference Barcelona, 5 July 2002. Available at www.aidslaw.ca/barcelona2002/treatmentpapers.doc

support of NGO's and other groups involved with the issue. The right to food judgment, for example, precipitated an Indian-wide movement to monitor implementation of government food programs.

4. Conclusion

There are some who criticise the activist nature of the courts and say that ultimately an activist judiciary encroaches on the executive branch of government. While this may be true, the situation in India must be understood. The executive branch is riddled with corruption and has long ceased to function properly, particularly with respect to its duties towards the poor. Has the Supreme Court encroached upon this realm? Yes, it has. But it has done so on behalf of the poor, and to that extent people feel that the judiciary has done something good. In the long term, it is not a healthy trend to have the judiciary constantly pulling up the government. Accountability and responsibility of the government must be restored. Today in India, however, the situation is that the judiciary remains the only democratic institution whose integrity is, to a substantial extent, intact.

Lawmaking by the judiciary has also impacted positively on the appointment of judges. Whereas earlier judges were appointed largely by the executive, in a subsequent constitutional bench decision, the apex court held that the appointment would be done by collective of judges in consultation with the executive. It is said that this is not entirely satisfactory and that the executive must be given a more prominent role. Be that as it may, independence of the judiciary has been enhanced by judges appointing judges rather than the executive appointing judges.

13. Multinational Litigation as a Weapon in Protecting Economic and Social Rights

*Richard Meeran*¹

1. Relevance of corporations to economic and social rights

The role and responsibilities of states are quite properly the focus of any debate in relation to economic and social rights. Nevertheless, the corollary of the ever-growing global power and influence of business, relative to governments,² is a corresponding increase in the impact of corporations, particularly on these categories of rights.³ Whilst democratically elected governments may be held accountable to their citizens for their actions, the primary legal duty of corporations is to act in the interests of their shareholders,⁴ rather than the interests of their other stakeholders, such as their workers and communities or consumers affected by their businesses. Developing countries, desperate for investment, have been and remain the most vulnerable in this respect, bearing the brunt of the impact of multinational corporations that have frequently sought to reap maximum profits from the application of 'double standards',⁵ with scant regard for the consequences of their operations.

States obviously have the key role to play in regulating the conduct of corporations. Indeed, corporations often complain that they are being held morally accountable for circumstances that are beyond their control and which ought to be the responsibility of governments. Thus, Shell claims that it bears no responsibility for the execution by the Nigerian military dictatorship of Ogoni leader, Ken Saro Wiwa and his co-accused;⁶ BP claims that it bears no responsibility for the assassinations of opponents to the pipeline in Columbia by paramilitaries;⁷ Rio Tinto claims that it bears no responsibility for any of the civil

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² According to the Institute for Policy Studies, in 2000, multinational corporations comprised 51 of the top 100 economies in the world.

³ Recent history is replete with worldwide examples of the infringement of the rights relating to health, work and environment by the mining, oil and pharmaceutical industries.

⁴ Subject to compliance with the laws and regulations of the states in which they operate.

⁵ That is, standards of health and safety, environmental and consumer protection, that would not have been tolerated in developed countries.

⁶ *Wiwa v Royal Dutch Petroleum* 226 F 3d 88 (2d Cir.2000).

⁷ BP hands 'tarred in pipeline dirty war' *The Guardian* 17 October 1998.

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unrest in Bougainville.⁸ Be that as it may, the fact is that grave civil rights violations arose from, or were at least associated with, protests by communities against the operations of these multinationals that were violating their environmental rights.

The contention by multinational corporations, such as Cape PLC,⁹ that the mistreatment and exploitation of their workers did not constitute an infringement of local laws, is far less compelling when, as for example in apartheid South Africa, the governing regime had been declared illegal under international law.¹⁰

Corporations, however, increasingly claim to recognise their own responsibilities as 'corporate citizens'. As noted by Sir Geoffrey Chandler, former Chair of Amnesty International UK Business Group:

... [T]here is an emerging consensus within society that companies should be held responsible for the impact on their stakeholders of the operations over which they can exercise legitimate influence.

In fact, as long ago as 1954, the founder of the Anglo American Corporation, Ernest Oppenheimer, stated:

The aim of the group is, and will remain, to make profits for our shareholders, but to do it in such a way as to make a lasting contribution to the communities in which we operate.

Surprisingly, this policy does not appear to have been applied to the corporation's South African gold mining workforce.¹¹

A priori, the widespread incidence of corporate misconduct that has occurred despite the theoretical ability of states to legislate to control the conduct of corporations, and the good intentions expressed by the corporations themselves, is the result of significant deficiencies in existing mechanisms for holding corporations legally accountable.

2. Tackling deficiencies in corporate legal accountability mechanisms

Key management personnel of multinationals exercise a closely held power which is neither restricted by national boundaries nor effectively controlled by international law. The complex corporate structure of the multinational, with networks of subsidiaries and divisions, makes it exceedingly difficult to pinpoint responsibility for the damage caused by the enterprise to

⁸ Tailings and chemicals from the operations of Rio Tinto subsidiary, Bougainville Copper Limited, between 1970 and 1989, are alleged to have destroyed thousands of acres of agricultural land.

⁹ See Section 3.3 below.

¹⁰ 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid

¹¹ See section 3.5 below.

*discrete corporate units or individuals. In reality, there is but one entity, the monolithic multinational, which is responsible for the design, development and dissemination of information and technology worldwide, acting through a forged network of interlocking directors, common operating systems, financial and other controls. In this matter, the multinational carries out its global distribution and marketing systems, financial and other controls... The multinational must necessarily assume ... responsibility [for harm caused]. For it alone has the resources to discover and guard against hazards and to provide warnings of potential hazards.*¹²

The following are probably the key deficiencies, particularly in relation to multinational operations in developing countries:

(1) *Inadequate*¹³ and *inadequately enforced*¹⁴ local laws by regulators.

(2) *Inadequate and ineffective criminal sanctions.*¹⁵

(3) *No real access to justice for ordinary citizens:* This may be the result of corruption or lengthy delay in the legal process, persecution of claimants, or quite simply the inability to fund what would invariably be complex and protracted litigation.¹⁶

(4) *The corporate veil:* A typical multinational corporate structure is illustrated by the Rio Tinto tree.¹⁷ The corporation has at its head a parent company which orchestrates and coordinates the operations of a host of subsidiary companies that conduct operations on the ground. The parent, based in the multinational home state, has a controlling shareholding, directly, or indirectly through other subsidiaries, in the operating subsidiaries, whose profits ultimately flow back to the parent company and its shareholders.

For those adversely affected, whether as workers, local communities, or consumers, the obvious and most direct target for legal action is a local subsidiary. Experience in developing countries, however, has revealed that local subsidiaries frequently have limited assets, or are insolvent and uninsured.¹⁸ By contrast, parent corporations generally have substantial assets.

¹² Extract from the plea of the Government of India in *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in Dec 1984* 634 F Supp 842 (SDNY 1986) 867.

¹³ According to Oxfam, Anglo American was permitted to apply less stringent dust limits than those stipulated by governmental regulations at its Zambian copper mines.

¹⁴ See section 3.2 below – *Thor Chemicals*. Mercury contamination of the workplace and workforce went unnoticed by Department of Manpower Inspectors for several years.

¹⁵ See section 3.2 below – *Thor Chemicals*.

¹⁶ See sections 3.1 and 3.3 below – *Connelly v Rio Tinto; Cape PLC*.

¹⁷ See Appendix A.

¹⁸ In addition, in South Africa and Namibia, workmen's compensation legislation, barring claims against employers, has precluded claims by workers against local subsidiary company employers.

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It is, however, a global tenet of commercial law that shareholders cannot be liable for the conduct of the (subsidiary) corporations in which they invest. Consequently, as legally distinct entities, the liabilities of the subsidiaries do not attach to the parent, save in exceptional circumstances, for instance where the subsidiary is shown to be a 'sham' or the agent of the parent.¹⁹ Thus the 'corporate veil' has been effectively utilised by multinationals to distance parent companies from the focus of wrongdoing, in order to avoid liability and to deny justice to their victims.

The legal approach adopted on behalf of the claimants in the cases against Cape PLC and Thor Chemicals sought to circumvent the corporate veil obstacle by focusing on the direct responsibility of the parent companies in question, for their own conduct – as opposed to the conduct of their subsidiaries²⁰ – and gave rise to the expression 'foreign direct liability'.²¹ The concept seeks to apply existing principles of tort law so as to impose a legal duty of care on the parent company towards those whom it is reasonably foreseeable could suffer injury or loss as a result of the operations.²² The same approach was subsequently emulated in the cases against Gencor²³ and most recently, Anglo American.²⁴

(5) *Contracting Out*: In recent years, considerable attention has been focused on human rights violations at the end of 'supply chains' involving brand name clothing retailers such as Nike and Gap, the primary concerns being those relating to pay, working conditions, and child labour in Far East factories that produce and supply clothes to these multinationals. The absence of a parent-subsidiary relationship in the supply chain scenario might not prevent the application of the foreign direct liability approach to the multinational, if it could be shown that its conduct was a cause of damage to factory workers.²⁵

In a novel approach, activist Marc Kasky successfully sued Nike for false advertising under California consumer protection laws. He alleged that Nike's

¹⁹ *Adams v Cape* [1991] 1 All ER 929.

²⁰ See sections 3.2 and 3.3 below.

²¹ Halina Ward, *Corporate accountability in search of a treaty? Some insights from foreign direct liability*. The Royal Institute of International Affairs, Sustainable Development Programme: Briefing Paper No. 4 May 2002.

²² Some human rights campaigners and academics have expressed concern that characterising human rights violations in the language of negligence trivialises the gravity of the situation. However the approach taken represents a practical, rather than principled, response to the goal of obtaining money for clients who are invariably impoverished. First, a negligence claim is more likely to succeed at trial. Second, if satisfaction of a judgment is dependent on insurance, allegations of negligence are less likely than human rights violations to negate insurance cover.

²³ See section 3.4 below.

²⁴ See section 3.5 below.

²⁵ E.g., if the multinational knew that the low prices it was paying the supplier were resulting in wages that were so low that workers had to work excessively long shifts on dangerous machinery, then it is conceivable that such a worker injured by machinery might have a valid claim against the multinational.

campaign misled the public about working conditions inside its supplier factories in Asia. In response, Nike argued that its statements concerned labour practices, not products, and therefore should be considered protected political speech. The issue was the distinction between political and commercial speech. In June 2003, the US Supreme Court held that political speech, even when inaccurate, enjoys First Amendment protections. But that was not the case with advertising and other forms of commercial speech that are intended to boost sales and profits. Those are subject to state consumer protection laws, which require corporations to prove the accuracy of their statements.²⁶

(6) *Liability for corporate wrongdoing does not generally extend to its directors*, unless they have ‘assumed personal responsibility’ for the relevant activities.²⁷ The involvement of the Managing Director of Thor Chemicals, the second defendant in the action, was considered to provide such an example.²⁸ Unfortunately, individuals who are alleged to have directed wrongdoing seem to have an uncanny habit of avoiding justice through ill health.²⁹

(7) *Forum non conveniens*:³⁰ Difficulties in obtaining practical access to justice in local developing country courts has led to claims being brought in the home courts of multinationals in the UK,³¹ Australia,³² Canada³³ and the United States,³⁴ all of

²⁶ *Kasky v Nike* 27 Cal 4th 939 (2002).

²⁷ *Williams & Others v Natural Life Health Foods* [1998] 1 WLR 830.

²⁸ See section 3.2 below.

²⁹ Thus Senator Pinochet avoided being handed over for trial in Spain; Guinness director, Ernest Saunders, convicted of fraud in relation to the takeover of Distillers, was released early from jail with Alzheimer’s Disease; a manslaughter prosecution in Turin of the Managing Director of Capamianto, the Italian asbestos manufacturing division of Cape PLC, had to be suspended when he developed Alzheimer’s Disease.

³⁰ The doctrine essentially enables a defendant to apply to the court to ‘stay’ legal proceedings on the grounds that the local courts are the more appropriate forum for the case. In determining such applications, courts undertake an assessment as to which state has the most substantial connection with alleged wrongdoing and where the case could be most conveniently tried, in terms of the location of the evidence and witnesses. The origin of the doctrine was purportedly based on a desire to ensure that the sovereignty of courts over issues which should properly fall within their jurisdiction was respected.

³¹ See sections 3.1 and 3.3.

³² In the ‘OK Tedi’ case, 30,000 Papua New Guinean landowners sued Australian mining company BHP in the Federal Court of Australia, for damage caused by tailings from BHP’s copper/tin mine. There was no *forum non conveniens* challenge, presumably because of the more stringent test imposed in Australia requiring a defendant to demonstrate that the Australian court is an ‘inappropriate forum’. The first case was settled in April 2000 for substantial compensation, including clean-up costs, and is widely regarded as one of the most successful cases of this type.

³³ In *Recherches Internationales Quebec v Cambior Inc.*, unreported judgment of Aug. 14, 1998 (Canada Superior Court, Quebec, no. 500-06-000034-971), the court dismissed proceedings brought by a public interest group against a Canadian mining company following the spill of cyanide-contaminated tailings at a subsidiary’s mine site. The judge found that neither the victims nor their action had any real connection with Québec and, as such, Guyana was the more appropriate forum for the action. The judge described the claimants’ case as indicating that: ‘Guyana is little more than a judicial backwater such that a refusal by the Court to exercise its jurisdiction by referring the case to the courts of Guyana would likely result in a

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which, in slightly varying forms, have applied the *forum non conveniens* doctrine. In the context of claims arising from damage caused in developing countries, the utility of the doctrine to defendants desperate to avoid facing justice in their home courts was significantly weakened by the House of Lords decision in the *Connelly v RTZ* case.³⁵ This established the principle that a stay should be refused – even if local courts were held to be the more appropriate venue – if the claimant could demonstrate that lack of funding to litigate meant that ‘substantial justice’ could not be done there.

Litigation of the Cape PLC case in England attracted some criticism on the grounds that it represented an indictment of the South African legal system³⁶ for the South African courts. However, no such criticism can be levelled against the gold miners’ silicosis litigation against Anglo American, which was in fact instituted in the South African courts.³⁷

Apart from certain state courts,³⁸ the US courts, both federal and state, have become increasingly antagonistic to what they regard as ‘forum shopping’, primarily due to concerns over the clogging of the US court system by foreign claims. This led to the US courts introducing a ‘public interest factor’, enabling them to decline jurisdiction on the grounds that the public interest of the US in hearing the case was not as great as that of the local state.³⁹ Although the UK Court of Appeal was persuaded to introduce this factor into English law and applied it in order to stay the proceedings brought by 5,000 South African asbestos miners against Cape PLC, the principle was unanimously rejected by the

violation of the victims’ human rights and denial of justice.’ However, the court held that there was no conclusive or objective evidence to substantiate this claim.

³⁴ *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in Dec 1984* 634 F Supp 842 (SDNY 1986) 867 in which a class action brought in New York, where Carbide is based, on behalf of thousands of victims of a gas explosion, involving a leakage of tonnes of deadly methylisocyanate into the atmosphere in Bhopal in 1984. Up to 10,000 people died and thousands more continue to be ill 20 years later. The case was dismissed on the grounds that the Indian Courts were the most appropriate forum for the trial. Importantly, having initially supported the claimants in their quest to secure justice in the US, the Indian government switched sides when it came to the appeal. Later, in a move which has been severely criticised, the Indian Supreme Court approved a settlement between the Indian Government and Carbide which provided for a legislated compensation scheme – the ‘Bhopal Gas Leak Disaster (Processing of Claims) Act’ 1985 – to distribute the sum of US\$470 million amongst the victims. To date, the majority of victims have received no payments and those that have, received an average of just US\$545: See ‘Clouds of Injustice – Bhopal disaster 20 years on’ (Amnesty International 2004).

³⁵ See Section 3.1 below.

³⁶ Andrew Henderson: ‘*Lubbe and Others v Cape PLC* a step forward or a slap in the face for South African justice’ De Rebus (Law Society of South Africa), November 2000.

³⁷ See Section 3.5 below.

³⁸ For example, Texas and Florida.

³⁹ See the US Supreme Court in *Piper v Reyno* [1981] 454 US 235. Applied in *Re Union Carbide Corporation Gas Plant Disaster at Bhopal, India in Dec 1984* 634 F Supp 842 (SDNY 1986) 867.

House of Lords.⁴⁰ Interestingly, by the time the case reached the House of Lords, the South African Government had intervened to oppose the finding of the Court of Appeal that the public interest of South Africa in trying the case was greater than that of the UK. The Australian courts have also rejected the public interest factor as being relevant to the issue of *forum non conveniens*.⁴¹

The severity of the *forum non conveniens* hurdle in the US has prompted a series of class actions in which claimants have sought to establish jurisdiction in the US – and avoid the impact of the doctrine – on the basis of the Alien Tort Claims Act⁴² (ACTA). The first example of its usage in a human rights context was in *Filartiga v Pena-Irala*⁴³ where the claimants successfully sued a former Paraguayan police inspector-general for torturing and killing a member of their family. The dependency on a violation of a fundamental human right in order to invoke ACTA was held not to have been satisfied in a case alleging egregious environmental damage arising from mining operations in Indonesia.⁴⁴ Neither was it held to have been met in a case involving alleged environmental damage arising from mining operations in Bougainville. The plaintiffs based their claims on the violation of the right to life arising from environmental damage, but the court held that a violation of a right arising from environmental harm was not an infringement of a fundamental right.⁴⁵ Consequently, the direct relevance of ACTA to claims relating to economic and social rights is doubtful. Where, as is frequently the position, such violations of fundamental rights are accompanied by violations of economic and social rights, ACTA claims may be relevant to the latter in an indirect sense. For instance, had it been successful, an ACTA reparations case against companies accused of complicity with the apartheid government in the commission of various human rights violations was, in reality, at least partially seeking redress for the violation of economic and social rights, in particular the exploitation of migrant labour.⁴⁶ Note, however, that the South African and US governments succeeded in seeking a dismissal of the claim on the grounds that issues arising under apartheid were matters more appropriately dealt with by the South African legal system.

⁴⁰ See Section 3.2 below.

⁴¹ Deane J. in *Oceanic Sun Line Special Shipping Company INC. v Fay* (1988) 165 CLR 197 F.C. 88/027.

⁴² Enacted in 1789 to combat crimes committed overseas that impinged on the US e.g. piracy. The Act converts international crimes involving violation of the law of nations, or a treaty of the US – e.g. genocide, torture or forced labour, but not socio-economic rights – into wrongs under US federal law that can be pursued in the US Federal Courts.

⁴³ 630 F 2d 876 (2d Cir 1980).

⁴⁴ *Beanal v Freeport Mc Moran* (197 F3d 161 5th Circuit 1999 in which international declarations including the 1992 Rio Declaration were cited.

⁴⁵ *Sarei v Rio Tinto* 221 F Supp 2d 1116 (CD Cal 2002).

⁴⁶ *Khuluanim and others v Barclays National Bank and others* Case CV 25952 EDNY 2002.

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Extension of ACTA to cases involving alleged human rights violations by corporations was confirmed in subsequent cases.⁴⁷ ACTA cases against Shell,⁴⁸ Unocal⁴⁹ and Talisman⁵⁰ have proceeded slowly through the US court system, confronting a series of jurisdictional objections. However, extension of ACTA to cases involving alleged human rights violations by corporations has been confirmed. ACTA cases against corporations have invariably proceeded on the basis of complicity between corporation and state.⁵¹ Moreover, US courts have held that since most human rights norms are directed against the state, a 'sufficient connection' must exist between state action and a corporation in order for a corporation to be liable in an ACTA claim.⁵²

At the same time as being widely applauded by human rights organisations, the ACTA cases have provoked fierce criticism on the grounds that they constitute an abuse of ACTA and an imperialist approach. An ACTA case against Rio Tinto on behalf of communities affected by extensive pollution from its mining operations in Bougainville was dismissed, following representations from the US Department of State.⁵³

Recently, the Bush Administration argued before the US Supreme Court in *Sosa v Alvarez-Machain* that no human rights claims should be actionable under ACTA. In July 2004, the Supreme Court rejected the Administration's position, holding that such claims involving fundamental human rights violations were indeed actionable.⁵⁴

⁴⁷ *Doe v Unocal Corp* 963 F Supp 880 (CD Cal 1997) being the first such example.

⁴⁸ In *Wina v Royal Dutch Petroleum* 226 F 3d 88 (2d Cir.2000) in which relatives of the executed Nigerian Ogoni activists are suing the Shell parent companies, Royal Dutch Shell (based in the Netherlands) and Shell Transport & Trading (based in the UK), on the basis that they caused or failed to stop the executions.

⁴⁹ *Doe v Unocal Corp* 963 F Supp 880: In which communities living in the vicinity of US-based Unocal's oil pipeline in Burma were allegedly subjected to murder, rape and forced labour by the Burmese military. The case was provisionally settled in December 2004.

⁵⁰ *Presbyterian Church of Sudan v Talisman* 244 F Supp 2d 289 (SDNY 2003), in which villagers and the Church are suing Canadian multinational, Talisman, for its alleged participation in the Sudanese Government's ethnic cleansing of Christian and other non-Muslim minorities in southern Sudan. Talisman is alleged to have aided and abetted the Government's military assaults on minority villages in order to help the Government clear the way for Talisman's oil exploration.

⁵¹ Thus Unocal was essentially alleged to have conspired with the military to cause human rights violations around a pipeline in Burma.

⁵² See *Sarei v Rio Tinto*, *supra*, note 45, where it was held that if it was proved that RTZ had threatened to reconsider its PNG investments if the local protests in Bougainville were not quelled, this would be a 'sufficient connection'. In *Doe v Unocal* (963 F Supp 162), it was held that Unocal could only be liable if it exercised control over decisions of the military to commit human rights violations. However, the court also held that in a case alleging forced labour, state action is not a pre-requisite to actionability.

⁵³ 'The continued adjudication' of the case against Rio Tinto would risk 'a potentially serious adverse impact' on the peace process in Bougainville, and thus on 'the conduct of our (American) foreign policy'.

⁵⁴ *Sosa V Alvarez-Machan* (03-339) 331 F.3d 604, reversed.

In December 2004, *Doe v Unocal* was settled in principle.⁵⁵ Although the terms are confidential, it is understood to involve a settlement that will compensate claimants and provide funds enabling them and their representatives to develop programs to improve living conditions, health care and education, and protect the rights of people living in the pipeline region.

It is important to note that the *forum non conveniens* doctrine is not applied by other European Union States due to Article 2 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments, which stipulates, inter alia, that a defendant 'shall' be sued in its domicile. Consequently, proceedings brought by foreign claimants, for instance against a French or German multinational in the courts of France or Germany, would not be declined by those courts. Of course, the UK is also a signatory to the Brussels Convention and, as was evident from the judgment of the House of Lords in the Cape PLC case⁵⁶ as a result of a ruling of the European Court of Justice,⁵⁷ there was considerable doubt as to whether the UK courts would in future be able to apply *forum non conveniens* to actions against UK-domiciled defendants.

On 1 March 2005, the European Court of Justice (ECJ) held that courts in the European Union had no jurisdiction to stay proceedings on *forum non conveniens* grounds, even when the alternative venue was a non-contracting state.⁵⁸ This was not a ruling 'out of the blue'. The likelihood that the ECJ would make such a determination had been clear since 1992⁵⁹. Although the issue was raised in the Connelly and Cape PLC cases from 1996, the litigation process effectively prevented its referral to the ECJ. Vast amounts of time and money were therefore wasted over venue disputes, during the course of which around one thousand of the Cape PLC asbestos victims died. In any event, as a result of the ECJ ruling, *forum non conveniens* will no longer be an issue in claims against defendants domiciled in the UK or anywhere in the European Union.

(8) *Corporate restructuring*. There are several recent examples of multinationals utilising their group structures to transfer assets beyond the reach of creditors, in particular workers and communities whose health and environment have been damaged and is at risk of future damage. Legal action, in the 'nick of time', prevented this strategy from succeeding in relation to *Thor Chemicals*⁶⁰ and *Gencor*.⁶¹

⁵⁵ The Bush Administration had wanted the case dismissed, arguing that aiding and abetting liability 'could deter' companies from 'economic engagement' with oppressive regimes.

⁵⁶ *Lubbe v Cape PLC* 2000 1 WLR 1545.

⁵⁷ *Group Josi Reinsurance Co SA v Universal General Insurance Co (UGIC)* [2000] All ER (EC) 653.

⁵⁸ *Owusu v Jackson* EUECJ C-281/02 (01 March 2005).

⁵⁹ See Opinion of the European Commission in *Ladenimor SA v Intercomfinanz SA*, case C314/92.

⁶⁰ See section 3.2 below.

⁶¹ See section 3.4 below.

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For many years, Australian asbestos mining company James Hardie had been routinely settling claims by asbestos victims injured by its products. In 2001, it allocated money to a trust fund it had established to compensate future asbestos victims, and then effectively transferred the bulk of its assets to a new parent company it had formed in the Netherlands.⁶² It subsequently emerged, in 2004, that the money allocated to the trust fund had virtually run dry, whereas asbestos victims of its operations were expected to occur for at least thirty years into the future. James Hardie refused to reverse the transfer, contending, irrespective of the moral position, that its restructuring had been lawful.

Hardie was subjected to a powerful, unrelenting and sustained combination of political pressure from Australian state governments, protests, demonstrations, the threat of boycotts by the international trade union movement, and the threat of legal action in the Netherlands and in the US under the 1970 Racketeer Influenced and Corrupt Organizations (RICO) Act.⁶³ In December 2004, in a landmark agreement between Hardie, trade unions, victims and the New South Wales Government, the corporation agreed, subject to shareholder consent, to ensure that the claims would be funded for a minimum of forty years, based on an estimated future liability of between A\$1.5 billion and A\$4.5 billion.⁶⁴

(9) Corporations are generally not subject to international law: The straddling of corporate entities and operations across national boundaries creates an additional layer of complication in terms of the regulatory effectiveness of national laws over multinationals. International law could in theory provide a mechanism for addressing this. A coalition of organisations including Amnesty International, Christian Aid, Catholic Agency for Overseas Aid (CAFOD), and Friends of the Earth, has called for a binding international convention on multinationals or a Corporate Responsibility Act in the UK.⁶⁵

Having said that, there have been several important, albeit not legally enforceable, initiatives to bring multinational operations within an international framework, with respect to the human rights impact of their operations. For instance, the 1977 International Labour Organisation (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy imposes an obligation on

⁶² See Appendix B.

⁶³ The 1970 Racketeer Influenced and Corrupt Organizations (RICO) Act was passed to eliminate the ill-effects of organised crime on the nation's economy, i.e. to destroy the Mafia. In the 1980's civil lawyers noticed that section 1964(c) of the RICO Act allowed civil claims to be brought by any person injured in their business or property by reason of a RICO violation and for 'treble damages' to be awarded, plus legal costs. The financial windfall available under RICO inspired the creativity of lawyers and by the late 1980's, RICO was possibly the most commonly asserted claim in the Federal Court.

⁶⁴ *The Sydney Morning Herald* 10 January 2005.

⁶⁵ The Corporate Responsibility (CORE) Bill.

governments to protect public health and safety and the environment in a manner consistent with the goal of sustainable development. The declaration states that:

Governments should ensure that both multinational and national ... multinationals should ensure the highest standards of health and safety....

Further, in a measure specifically directed at the prevention of increasing competitiveness by utilisation of 'double standards', the ILO Declaration on Fundamental Principles and Rights at Work provides that: 'Labour standards should not be used for protectionist trade purposes.' As indicated above, however, this standard is not legally enforceable, and is addressed towards states rather than directly at the multinationals themselves.

The Organisation for Economic Co-operation and Development (OECD) Guidelines on Multinational Enterprises, however, do address multinational corporations, although they are not legally enforceable. Paragraph 1.1 states that:

The Guidelines are recommendations jointly addressed by governments to multinational enterprises. They provide principles and standards of good practice consistent with applicable laws. Observance of the Guidelines by enterprises is voluntary and not legally enforceable.

It is recommended in paragraph 2.2 that enterprises should:

Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments.

A complaints system has been established for the Guidelines⁶⁶ although it is hampered by a lack of credibility (the body entrusted to deal with complaints is the staff of economic ministries in the host or receiving government) and transparency (since the procedure is largely confidential). Despite its significant limitations, some NGOs have used the process in a strategic manner.⁶⁷

In July 2000, UN Secretary-General Kofi Annan proposed the 'Global Compact', encouraging companies to build nine core human rights, labour and environmental principles into their business strategies for the developing world. Several multinationals, including Shell, BP and Rio Tinto, have signed up to the Compact.⁶⁸

Volkswagen in Brazil and Daimler/Chrysler in South Africa, who both signed up to the Compact, have introduced AIDS care programs. Volvo launched an awareness campaign to combat discrimination and promote diversity. Novartis

⁶⁶ Trade Union Advisory Committee, *A User's Guide for Trade Unionist to the OECD Guidelines to Multinational Enterprises*. Available at www.tuac.org/publicat/guidelines-EN.pdf

⁶⁷ See Clean Clothes Campaign 'Outcome of OECD complaint on adidas'. Available at www.cleanclothes.org/legal/02-12-27.htm

⁶⁸ See www.globalcompact.org

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incorporated the Compact principles into the job descriptions of their employees worldwide.

Most recently, the Draft Fundamental Human Rights Principles for Business Enterprises have been formulated by a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights.⁶⁹ These are based on the Universal Declaration of Human Rights, the cornerstone of international human rights law, and effectively seek to extend the international human rights obligations of countries to multinationals.

The draft Norms specifically refer to the provisions of the OECD Guidelines, and the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and Declaration on Fundamental Principles and Rights at Work, as well as the Global Compact. The Norms contain specific provisions relating to the rights of workers and environmental protection.

Since the UN Norms were unanimously adopted by the UN Sub-Commission, they have been subjected to intensive and concerted attacks, largely based on false or misleading information, by industry bodies such as the International Chamber of Commerce (ICC), International Organisation of Employers (IOE), and the US Confederation of Industry and Business (USCIB).⁷⁰

Despite this opposition, the Commission on Human Rights considered the UN Norms and adopted a resolution that clarifies the obligations and responsibilities of businesses with regard to human rights.

It is evident from the above that issues relating to economic and social rights involving corporations are being tackled using a variety of methods at both the international and national levels by attempting to utilise various forms of litigation and standard setting. Whilst binding and enforceable international regulations would be the most effective and balanced means of protecting the rights of individuals, it is unrealistic to expect such laws to come into existence in the near future.

In the meantime, pragmatic attempts to assert rights using national laws and the domestic courts of developing and developed countries will, as the following section demonstrates, undoubtedly continue to make a vital contribution, both in terms of compensating those whose rights have been violated and, just as importantly in the present context, by providing a strong financial deterrent against further violations.

⁶⁹ Available at [www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument)
Opendocument

⁷⁰ Despite the Bush Administration's stated support for higher ethical standards for business enforced by strict laws, the US delegation to the Commission worked aggressively to undermine the Norms.

3. Review of Some Cases

3.1 *The Rio Tinto Case*

A claim for compensation was brought in England by Edward Connelly, a laryngeal cancer victim employed at RTZ's Rossing uranium mine in Namibia⁷¹. It was alleged that key strategic technical and policy decisions relating to Rossing were taken by the English-based RTZ companies. For example, directors of their English companies were directly responsible on the ground for substantially increasing the output of uranium – and the consequent dust levels – without ensuring that effective precautions were taken to protect workers against the hazards of uranium dust exposure.

In March 1995, RTZ succeeded, initially, in persuading the Court that Namibia was the 'natural forum' for the case. Thereafter, the argument was limited to the relevance of Mr. Connelly's inability to obtain funding to bring a claim in Namibia, whereas in the United Kingdom funding was available, in the form of legal aid or lawyers willing to act on a 'no win, no fee' basis. The case went to the Court of Appeal twice before reaching the House of Lords.

On the first occasion, in August 1995, the Court of Appeal held that, in determining whether Namibia was an 'available forum,' section 31 of the 1988 Legal Aid Act precluded the court from having regard to the fact that the plaintiff was unable to obtain funding to litigate in Namibia, but had legal aid to litigate in England.⁷²

Mr. Connelly then applied to lift the stay on the grounds that the funding of his English action had switched to 'no win, no fee' conditional fee agreements – the UK variant of contingency fees – having been made lawful in August 1995. His application was rejected at first instance in October 1995. However, in May 1996 the Court of Appeal, referring specifically to Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights, allowed the appeal. Bingham MR stated that:

[F]aced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate, in which there never could, in my judgment, and interests of justice tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights.⁷³

⁷¹ In June 1997, the RTZ Corporation PLC became Rio Tinto PLC. (Ed.)

⁷² *Connelly v RTZ Corporation PLC* [1996] 2 WLR 251.

⁷³ *Connelly v RTZ Corporation PLC* [1997] 1 WLR 340.

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The House of Lords held, by a 4–1 majority, that Mr. Connelly's inability, in practice, to litigate in Namibia meant that the case should be allowed to proceed in England. In the lead judgment, Lord Goff stated that:

The question, however, remains whether the plaintiff can establish that substantial justice will not in the particular circumstances of the case be done if the plaintiff has to proceed in the appropriate forum where no financial assistance is available.⁷⁴

Unfortunately, in December 1998 the High Court struck out Mr. Connelly's claim on limitation grounds. Therefore, while his legal action would prove to be of value to others in the future, he personally has not benefited from it.

3.2 The Thor Case

During the 1980s, Thor manufactured mercury-based chemicals in Margate, South East England. Health and safety at the Margate factory came under considerable criticism over a prolonged period from the Health and Safety Executive due to elevated levels of mercury in the blood and urine of the workers. In 1986, the company terminated mercury based processes in Margate and shifted its Margate mercury operations – including key personnel and plant – to Cato Ridge, Natal, South Africa. In February 1992, mercury poisoning of South African workers came to light. Three workers died and many others were poisoned to varying degrees. An inquiry by the Department of Manpower followed by a criminal prosecution in the local (Pietermaritzburg) Magistrates' Court led to the equivalent of a £3,000 fine.

Compensation claims against the parent company and its chairman were commenced in the English High Court on behalf of 20 workers. The claims alleged that the English parent company was liable because of its negligent design, transfer, set-up, operation, supervision, and monitoring of an intrinsically hazardous process. Thor unsuccessfully applied to stay the action on *forum non conveniens* grounds and its appeal was struck out by the Court of Appeal.⁷⁵ This was the first recorded case of this type. In 1997, following a series of hearings concerning the acceptability of Thor's disclosure of documents and an unsuccessful strike-out application by Thor, the claim was settled for £1.3 million.

A further 21 claims were commenced by workers from the same factory. In July 1998, Thor's application to stay proceedings on *forum non conveniens* grounds was

⁷⁴ *Connelly v RTZ Corporation PLC* [1997] 3 WLR 373.

⁷⁵ *Ngebo v Thor Chemicals* Times Law Report 10 Nov 1995.

dismissed. In January 1999, the Court of Appeal granted Thor permission to continue with its defence of the proceedings.⁷⁶

It then emerged from company documents filed in December 1999 that Thor's parent company, TCL, had undertaken a demerger which involved transfer of subsidiaries valued at £19.55 million to a newly formed company, Tato Holdings Limited (Tato). Two weeks before the start of the three-month trial, an application to the court was then made, on behalf of the claimants, for a declaration under section 423 Companies Act 1986 that the dominant purpose of the demerger was to defraud creditors, such as the claimants, and it was thus void. Thor and its chairman disputed that this was the purpose, but the Court of Appeal held that, in the absence of information to the contrary, the inference that the demerger of Thor was connected with the present claims was irresistible.' The court ordered Thor to pay £400,000 into court within seven days and to disclose documents concerning the demerger. The case was settled on the first day of trial in October 2000.

3.3 Cape PLC⁷⁷

Cape PLC (Cape), an English registered company, was incorporated in 1893 as The Cape Asbestos Company Limited. Cape was formed to acquire asbestos deposits in South Africa and a factory in Italy to produce asbestos-related products from the asbestos mine in South Africa. By 1913, Cape was undertaking crocidolite mining in the Northern Cape and had a manufacturing plant at Barking in London. The Northern Cape operations were conducted directly by Cape until 1948, and thereafter through Cape's wholly owned subsidiaries until 1979. In 1925, Cape acquired amosite mining operations in Limpopo (formerly the Transvaal), which were operated through wholly owned subsidiaries until 1979. One of these was 'Egnep' (Penge spelled backwards). Cape also operated manufacturing plants in Turin, Italy, from about 1911 to 1968, and in Benoni, Johannesburg, from about 1940 until about 1986.

Associated with the mines were mills involved in the crushing of the asbestos rock to expose and extract the asbestos fibres. The most infamous mill was situated in Prieska (Northern Cape), in the middle of the town next to the old Prieska School. The mill ceased operating in about 1964, but the environmental hazard it had created in the form of general contamination and asbestos dumps persisted.

⁷⁶ *Sitbole v Thor Chemicals* Times Law Report 15 Feb 1999.

⁷⁷ See also Richard Meeran. 'Cape PLC: South African Mineworkers' Quest for Justice' 9 IJOEH 3 (2003) Jul/Sep at 218-229.

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Cape sold its South African mining operations in 1979. In 1981, Gefco, a subsidiary of Gencor, a wealthy South African mining company that was also involved in gold mining, purchased these operations. Up to 1979, Cape and Gefco were by far the largest asbestos producers in South Africa.

Asbestos that was mined in South Africa was converted into asbestos products at the factories in South Africa, Italy and England, and then sold around the world, particularly in the United States. Throughout this chain of production, asbestos-related diseases (ARD) occurred on a significant scale among numerous groups associated with it: miners and millers; workers involved in the transportation of asbestos to ports in South Africa; stevedores loading and unloading ships in South Africa and in the United Kingdom; ship workers; factory workers in South Africa and the United Kingdom; workers utilizing the products; and people living near mining, milling, and manufacturing operations.

Asbestos production in South Africa was driven by demand generated in Europe and the United States; Cape's technical department at the Barking factory designed asbestos products which it marketed worldwide, for example, through Cape's American subsidiary, North American Asbestos Company (NAAC).⁷⁸

When the demand for asbestos grew, the mining increased. When the demand waned, primarily due to pressure from US litigation and US consumers out of concern for their own well-being, rather than concern for the health of South African miners, the South African mining operations ceased.

Far from being a discrete independent business, the Cape South African mining operations were part of an integrated worldwide business.

Asbestos regulations were introduced in the United Kingdom in 1931, and the fact that serious lung diseases could be caused by asbestos exposure was well known to the industry before 1930.⁷⁹ Despite this, Cape actively and intensively lobbied to conceal the nature and extent of the health risks associated with asbestos exposure, in particular the risks associated with exposure to blue asbestos. This helped to ensure the continuation of demand for asbestos from its South African operations. As a direct result, implementation of measures necessary to protect those working with asbestos, such as the claimant, including the cessation of the defendant's South African operations, were delayed for many years. Cape closed down its UK factory in Barking in 1968 due to the level of asbestosis in the workforce, but continued to operate in South Africa until the 1980s.

⁷⁸ The Technical Director in the 1960s and 1970s also happened to be the Health and Safety Director of the group.

⁷⁹ See *Margereson & Hancock v JW Roberts Ltd* [1996] Env.LR.304.

Cape also accepted the apartheid system in order to increase the profitability of its business: the profits were channelled back to England. It knew that black women and children were a cheap source of labour, and despite the risks to their health and safety it continued to allow and condone their use. The company also relied on the system of racial discrimination within South Africa and extensively employed black workers, thereby allowing Cape's business to reduce wage costs, spend less on accommodation and safety precautions for its workers, and expend less on medical and other facilities. In 1947, Cape limited the building of a school to one for white children only.

Perhaps the most significant example of mistreatment of South African workers was recorded by government doctor Schefers when he inspected the Penge mine in 1949:

Exposures were crude and unchecked. I saw young children completely included within large shipping bags, trampling down fluffy amosite asbestos which all day long came cascading down over their heads. They were kept stepping lively by a burly supervisor with a hefty whip. I believe these children to have had the ultimate asbestos exposure. X-ray revealed several to have radiologic asbestosis with cor pulmonale before the age of 12.⁸⁰

Throughout the relevant period, no bonuses were paid to black workers, whereas Cape approved bonuses to its limited number of white workers. In the 1950s Cape decided to provide retirement benefits for its white staff, whereas none were provided for black workers until, on a very limited basis, the 1970s. In 1951 it was decided to compensate white only workers who had silicosis. Cape provided some, but not all, black workers with flannelette masks, less effective than those provided to white workers. African workers were allowed only micro-x-rays, whereas white workers had full x-rays.

In the litigation that ensued in England in the 1990s, a certain category of claimant emerged, those who had been employed as 'chissa boys'. These unfortunate workers had had the task of lighting the fuses after the engineers had planted the explosives. They had to run as fast as they could in order to avoid being blown apart.

A wealth of documentary evidence from government departments reveals high dust levels in the working and surrounding environments, with poor methods of exhaust ventilation and filtration systems in the absence of respiratory equipment. For instance, in Prieska, with the encouragement of Cape, asbestos tailings were used to gravel roads, to construct golf greens and sport fields, and to make bricks

⁸⁰ Marianne Felix, Jean-Patrick Leger, and Rodney Ehrlich, 'Three Minerals, Three Epidemics-Asbestos Mining and Disease in South Africa' in Myron Mehlman and Arthur Upton (ed.) *Identification and Control of Environmental and Occupational Diseases: Asbestos and Cancers* (Volume XXII E).

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and roofing materials used to build houses. According to Cape's Chief Medical Officer, Dr. W. J. Smither in his report in 1962:

At Prieska, the conditions around and about the mill are not good. The crusher is out of doors. Fibre comes in on the windward side of the mill and is crushed in the open. We saw this happening on several occasions and it was obvious that quite a cloud of dust was being produced and being blown away by a fairly strong wind towards the town ... the mixer was raised from the floor of the general warehouse area and had a very dusty platform. Men were working below in a rain of dust.

Given the circumstances of Cape's South African operations, any attempt to contest an allegation of negligence would have been untenable.

Due to the insolvency of Cape's South African subsidiaries, the only realistic target for legal action was the parent company, Cape. In February 1997, compensation claims for ARD were commenced in the English High Court on behalf of three workers at the Penge mine in the Northern Province who had also lived near the mine, and two Prieska claimants who had lived in the vicinity of Cape's mill in that town.

One of the claimants was the widow of a Prieska resident who had lived near the mill. He and his mother and brother had all died of mesothelioma. None of them had ever worked with asbestos. Multiple family deaths from mesothelioma were not uncommon in Prieska.

Claims were also lodged on behalf of four Italian workers employed at Cape's Turin manufacturing operation. Like the South African operations, the Turin factory was operated by a wholly owned subsidiary of Cape PLC, Capamianto. It too shared directors in common with the UK Company. Predictably also, a number of the Italian workers had developed ARD, including mesothelioma. A criminal prosecution for manslaughter was initiated by the Turin State Prosecutor in 1993 against Capamianto and its managing director, a Mr. Savoie. The prosecution was, however, suspended when Mr. Savoie was apparently diagnosed as having Alzheimer's disease.

Cape applied to stay the South African claims on *forum non conveniens* grounds, contending that the cases ought to be tried in South Africa. In January 1998, following an eight-day hearing spread over six months, their application was granted, but on appeal in July 1998, the Court of Appeal reversed this decision and noted in particular that the alleged negligence of the English parent company was central to the case.⁸¹

⁸¹ *Lubbe v Cape PLC* (1998 CLC 1559).

In January 1999, two further actions comprising almost 2,000 claims were commenced in England against Cape PLC by South African claimants exposed to asbestos in the same geographic regions of South Africa.

Cape re-applied to stay the 2,000 claims on *forum non conveniens* grounds, contending that the emergence of the group was a sufficiently material change to warrant a different conclusion from that of the Court of Appeal in the first five cases. Cape also sought a stay of the first five cases on the grounds that the Court of Appeal had been misled as to the true nature of the case. The court granted a stay of all the actions, including the initial five claims. The court concluded that South African legal aid was likely to be available to the claimants to litigate in South Africa.

Subsequently, legal aid was withdrawn in South Africa for all damages claims. Nevertheless, in November 1999, the Court of Appeal dismissed the claimants' appeal, deciding that South African lawyers would undertake the case on a 'no win, no fee basis.' It also decided – on the basis of principles developed in US cases, such as the Bhopal case – that the 'public interest' of South Africans in hearing the case was greater than that of England.⁸²

Despite the fact that the vast majority of the claimants did not speak English and many could not read or write, the court suggested that they would be able to gain access to the scientific, technical, and medical evidence necessary to pursue their case in South Africa. The claimants appealed to the House of Lords, and the South African Government was given permission to intervene on their behalf in relation to the issue of public interest. Among other things, its representations stated that:

The South African legal system, as with all South African public services, is under very great financial and administrative pressure, in seeking to right the wrongs of the apartheid regime, to pay its debts, to build the new South Africa. Under the old regime, the majority of South African people did not (in financial or geographical terms) have access to law or lawyers. The new South African Government has embarked on a proactive programme to establish courts in the countryside, particularly in the former black homelands where justice has been seriously neglected, and where people may have to travel over 1000km to the nearest High Court. These services are regarded as high priority, but many have had to be put on hold for lack of funds. The current budget of R 2,117 billion (£202 million) which is allocated to the Department of Justice is not sufficient to meet the Republic's goals and programs for access to justice. The South African legal aid scheme for claims sounding in damages was abolished in 1999.

⁸² *Lubbe and others v Cape PLC* (2000 1 Lloyd's Reports 139).

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The allegations against Cape did not take place in a legitimate legal system, and the new South African Government cannot afford to determine every wrong of the old regime through its judicial system. The discriminatory health and safety laws, which left South African workers unprotected, or significantly underrepresented against known risks as a matter of South African law, were against the common law of humanity. They should have no part to play in determining the scope of the negligence liability of a foreign multinational which operated under those laws.

In July 2000, in a landmark decision in favour of the claimants, all five Law Lords held that the case should be allowed to continue in the English High Court. Applying the principle it had developed exactly three years earlier in *Connelly v RTZ*,⁸³ the court held that a case of such magnitude required expert legal representation and experts on technical and medical issues, none of which could be funded in South Africa.⁸⁴

Prior to the November 1999 Court of Appeal ruling, Cape's lawyers had approached Professor David Unterhalter, director of a public interests law centre in Johannesburg, with an offer of £1 million to represent the claimants against Cape. Apart from being perplexed as to the ethical issues arising from this proposal, Professor Unterhalter informed them that the money was insufficient. Although the Court of Appeal had not seen fit to refer to this evidence, the House of Lords relied on it as independent evidence, commissioned by Cape, which supported their ruling.

Further claimants joined the case, so that by August 2001 about 7,500 were registered in the group. Notably, six percent of this group had worked on the asbestos mines when they were under the age of seven years.

It had been anticipated that Cape, having failed in its bid to halt the claims in the English courts, would wish to negotiate a settlement. However, the litigation continued with a series of hearings in which the argument revolved not around *where* the case should be heard but *how* and *in what form* it should be heard.

From the claimants' side, it was contended that the only real issue to be resolved was the question of the legal liability of Cape as the parent company. Cape, however, claimed that it wished to contest all issues, including negligence and the medical condition of the claimants. The existence of a workmen's compensation scheme meant that the Medical Bureau of Diseases (MBOD) held files for all workers who had passed through the scheme, including x-rays. But Cape would not accept the findings of the MBOD, and insisted instead on further medical evaluation of these files by a team of experts.

⁸³ See Appendix A.

⁸⁴ *Lubbe and others v Cape PLC* (2000 1 WLC 1545).

A review of a sample of 650 files by the team of experts indicated that the MBOD diagnosis had been correct in around 85% of cases. Rather than reviewing each and every file, it was contended on behalf of the claimants that this success rate was likely to be the same for all 7,500 cases. But Cape would not agree and suggested that the 650 cases had not been randomly selected. As a result the claimants were forced to participate in a very expensive and time-consuming exercise of reviewing 5,000 cases. The end result, as predicted, was a success rate of around 85%.

The group included about 400 mesothelioma victims. Literally hundreds of victims died between the commencement and settlement of the Cape case due to the indulgence by the courts of company litigation strategies that were designed to frustrate justice. Having insisted from the outset, in the words of Cape's senior Counsel, that it would 'never surrender', Cape announced in October 2001 that it was in financial difficulty and could not afford to pay substantial compensation.

The claimants were informed that they were in a 'lose-lose' situation: if they continued with the case to trial and lost, Cape would be 'in the clear'. At that stage, in October 2001, the case seemed to be headed on a downward spiral.

Negotiations occurred between the claimants and one of Cape's shareholders, however, with a view to producing a more respectable settlement, in the region of £20 million. On the basis of these negotiations, the shareholder, Montpellier Limited, took control of Cape and in December 2001 a settlement agreement was signed. At the same time, hoping simultaneously to end all its international liabilities, Cape settled the four Italian claims.

The December 2001 settlement agreement provided for payment of a total of £21 million through a trust which was to be established in South Africa (the Hendrik Afrika Trust, named after one of the Prieska asbestosis victims). The settlement terms represented a pragmatic solution to the financial reality of Cape's position rather than reflecting any relation to the true value of the case. The tariffs were to vary for different types of ARD, with mesothelioma/asbestos-related lung cancer attracting the highest awards of £5,250.

Although the evidence justified the claimants' confidence of winning the trial that had been set for April 2001, Cape's financial position was such that it would probably have gone into liquidation if it lost. During the litigation its share value plummeted from £1.50 to £0.11. In October 2001, TandN, another UK asbestos multinational, had filed for bankruptcy, leaving thousands of victims worldwide without redress.

If Cape had suffered a similar fate, the only achievement of a court victory might have been to set a precedent for claims against multinationals. Victims would receive only what was available on break-up of the company. The claimants could

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also have lost what was, after all, a cutting-edge case. Furthermore, judgment was at least seven months away and the process could be drawn out by appeals. About 300 claimants had died since 1999.

So there was a serious risk that an award would not have translated into real money. The challenge was thus to negotiate the best possible settlement based on what Cape could afford. It was made clear, however, that without a meaningful offer the claimants would take the case to trial and run the risk of recovering nothing rather than accepting a derisory amount and seeing Cape carry on in business. There was to be no repetition of the Union Carbide debacle, which left thousands of Indian victims of the Bhopal chemical explosion uncompensated, while the American multinational continued to flourish.

How much Cape could afford (or rather was prepared to borrow) was a nebulous concept, being a function of the company's contrasting perspective: a successful defence was the ideal outcome, whereas defeat would mean the end of business. Commercially, settlement was the sensible course, provided that it reflected Cape's assessment of the merits of its defence, and enabled it to continue to do business and recover its value. The latter was dependent on whether finality could be achieved, otherwise the settlement would simply be followed by waves of further claims, which would force Cape out of business.

This was why Cape stipulated that the settlement encompass all potential claimants. However, a balance had to be struck: by applying to the trust for compensation, a sufferer will forfeit the right to take court action. If sufferers are to be encouraged to use the trust rather than litigate, payments must be high enough.

The December 2001 settlement was generally hailed as a triumph. Substantial work was done on a pro bono basis to establish the trust machinery and to process the claims of the 7,500 victims in accordance with the settlement. Eminent trustees were appointed. Until August 2002, all the indications from Cape were that it fully expected to honour the settlement. It emerged in August, however, that Cape had encountered financial problems and that their bankers were not agreeable to the release of the set amount of money.

Consequently, in September 2002 the litigation recommenced - a devastating blow to claimants who at that point had expected to begin receiving their compensation payments. Due to Cape's precarious financial position, permission was also sought and obtained to join Gencor as a co-defendant to the English proceedings. Gencor subsidiary, Gefco, had been a major asbestos producer in South Africa from about the same time as Cape and had bought the Cape subsidiaries in 1981. Shortly before the collapse of the December 2001 Cape settlement, a claim against

Gencor on behalf of ARD victims from its South African operations had also begun in South Africa.⁸⁵

On March 2003, three settlement agreements were signed:

1. A main settlement with Gencor for about £35 million. Of this sum about £3 million has been earmarked for environmental rehabilitation expenses. This settlement is to be administered by Gencor Trust along the same lines as the previously doomed December 2001 Cape PLC Hendrik Afrika Trust.
2. A new settlement with Cape PLC for the 7,500 claimants with a one off payment of £7.5 million by Cape PLC.
3. A settlement between the 7,500 claimants and Gencor for approximately £3 million. All settlements were contingent on Gencor's completing its unbundling, the deadline for which was set at 30 June 2003. In fact, Gencor did unbundle on 18 June, 2003.

3.4 Gencor

As mentioned above, Gencor subsidiary, Gefco, had major asbestos operations in South Africa and, as with Cape PLC, the scale of asbestos-related diseases arising from its activities was also widespread. Unlike Cape PLC, however, neither Gencor nor Gefco were based outside South Africa and consequently there was no other realistic venue for litigation against them. In the wake of the Cape litigation a claim in South Africa against Gencor had become more viable. The form of the claim was very similar to that in the Cape PLC claim, in particular, in terms of the allegations of direct negligence against the parent company. Litigation against Gencor had substantial advantages over the Cape claim: first, there was no issue of jurisdiction; second, it was concluded on the claimants' side that it was now possible, under the new South African Constitution, to pursue US-style 'class actions' in South Africa. The disadvantage was the absence of legal aid, but this was less of an obstacle following the Cape litigation.

The greatest advantage by far, however, was Gencor's publicly confirmed intention to 'unbundle,' that is, to sell its assets and distribute the proceeds of sale as a dividend to its shareholders, without making any provision to compensate asbestos victims. This enabled the Gencor claimants to instigate a challenge in the Johannesburg High Court to the legality of the unbundling on the grounds that

⁸⁵ See *Gencor* case, section 3.4 below.

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no provision had been made for asbestos victims.⁸⁶ The Cape PLC claimants intervened in this challenge on the basis of their claim in England against Gencor.⁸⁷

In order to receive the benefits of unbundling and to avoid the risk of the court ruling that the proposal was unlawful, Gencor was prepared to settle the asbestos litigation. In March 2003, Gencor settled the main claim for R450 million, and the Cape PLC claimants claim for R42.5 million. The former was paid into the Asbestos Victims' Relief Trust that was established to devise a system for evaluating and processing claims. By contrast with the Cape PLC claim, where the vast majority of victims received payment within a matter of months, the Gencor case was compromised before any medical or factual investigation had been undertaken in respect of the vast majority of potential beneficiaries, even before they had been identified. It is therefore understandable that, even at the time of writing this chapter, only a small number of victims have so far been paid.

3.5 Silicosis test cases by South African gold miners against Anglo American

Test cases for ten former Free State gold miners and their families, who contracted silicosis and phthisis (silicosis combined with tuberculosis), were commenced in August 2004 in the Johannesburg High Court against Anglo American.⁸⁸

The cases raise similar moral and legal principles to earlier cases pursued by South African workers against Thor Chemicals, Cape PLC and Gencor, but the potential scale of the current litigation is much greater. There was no medical follow-up of black workers once they left employment, and experts are unable to estimate the numbers of silicosis victims of South African gold mines. However, there is a general consensus that there are at least tens of thousands of victims of gold mining living in South Africa and beyond, including in Lesotho, Botswana and Malawi.

⁸⁶ Section 90 Companies Act 61 of 1973 of South Africa precludes a company from making any payment to shareholders wherein doing so, the company would then be unable to meet its debts to creditors (such as asbestos victims).

⁸⁷ Many of the 7,500 Cape claimants had also been exposed to asbestos from Gencor-owned operations as a result of having worked at different Gencor-owned operations as a result of having worked at different Gencor-owned mines and also from continuing to work at operations that were owned by Cape until 1979 and purchased by Gencor's subsidiary, Gefco, in 1981.

⁸⁸ Silicosis prevalence and exposure response relationships in older black mine workers on a South African gold mine: Safety in Mines Research Advisory Committee Final report (2003).

Although Anglo American is now headquartered in London, the defendant is the Anglo American Corporation of South Africa, the former parent company of the Anglo group. This parent company was the technical adviser and consulting engineer to the whole group. It is alleged that it negligently failed in its duty to advise its operating companies on matters concerning occupational health and safety.

The ultimate purpose of the claims is two-fold: Firstly, to establish a fund for monitoring and treatment of silicosis and tuberculosis. The idea is not to create a new health system, but rather to enhance and develop the existing (under-resourced) state health systems. Secondly, to secure compensation for gold miners affected by silicosis and pthisis.

Silicosis is caused by inhalation of excessive levels of silica-containing dust. It is debilitating and may be fatal, especially in association with untreated tuberculosis. Exposure to silica dust increases the risk of contracting tuberculosis. All this has been well known for one hundred years, during which time the measures required to reduce inhalation of excessive dust have also been appreciated. Yet the industry appears to have displayed a somewhat cavalier attitude to the health of workers, placing profit as the clear priority, and taking advantage of the past regime. For instance: dust standards at the mines were specifically based on the assumption that fifteen percent of the workforce employed for twenty years would develop silicosis; showering and changing room facilities at the mine shaft, important for removal of dust from workers' clothes and bodies, were not provided for black workers. The 1995 report of the Leon Commission found that conditions at the mines had hardly improved in fifty years.

Silicosis can take thirty years to develop from the time of exposure. Miners cease working and return home, burdened with a lifetime risk of contracting silicosis and tuberculosis. If diagnosed and treated quickly and effectively, full recovery from tuberculosis is possible. Otherwise, the consequences may be fatal, especially when combined with silicosis. Workers with silicosis also have an increased risk of lung cancer. In order to diagnose and treat illness promptly and correctly, former miners need access to specialist occupational health services. Due to the understandable lack of resources in the state-funded health sector, this does not happen. Many sick miners are not diagnosed or treated properly at all and, although their health has been put at risk by their work, the gold mining industry has made no provision for medical care of its former workers. A key purpose of the present litigation is to increase the geographical coverage and resources of existing state occupational health services, so as to improve the diagnosis and treatment of occupational disease in gold miners.

Improved rates and accuracy of diagnosis will also result in an increase in the number of victims lodging claims for compensation to which they are entitled

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under legislation. The no-fault statutory compensation scheme provided for by the Occupational Diseases in Mines and Works Act is important, but it does not pay nearly enough: there are no damages for pain and suffering, a standard component of injury claims. Because the amount of compensation is based on loss of earnings, there are significant differences in levels of compensation paid to black and white workers with the same diseases.

The nature and circumstances of gold mining and silicosis is arguably as egregious as that of the asbestos industry. Therefore, since the right of asbestos victims to compensation has of course been recognised worldwide, it may seem remarkable that the gold mining industry has been 'let off the hook' until now. This can be attributed primarily to the practical difficulties in obtaining access to justice in South Africa, specifically funding to retain lawyers. Indeed, this was precisely why the claims against Cape PLC and Thor Chemicals were pursued in England. Experience indicates that litigation has a valuable contribution to make in focusing the mind of business. Legal action in South Africa has been made possible because Australian and UK public interest lawyers have joined forces to assist Johannesburg Legal Resources Centre and eminent South African counsel, with significant funding being provided by the South African Legal Aid Board.

Anglo American prides itself on a commitment to principles of good corporate citizenship, including a responsibility to contribute to the communities in which it operates. The company is to be applauded for its substantial donations towards alleviating hardships that it was not responsible for causing. It will be interesting to see whether it is prepared to deliver on this commitment to its former gold miners, for whose predicament it is responsible. With Anglo America's vast earnings up by fifty two percent in 2004, it can well afford to do so.

4. Perspectives

It is of the utmost relevance that the fundamental legal and commercial objective of a company is to further the financial interests of its shareholders. In the absence of meaningful legal or 'reputational' sanctions for expenditure on measures to protect worker safety or the environment, compliance with human rights by multinational corporations may not always make sound financial sense. Since a multinational cannot be imprisoned, deterrence is dependent on a sufficiently onerous fine, payment of substantial compensation, or damage to reputation. A multinational which faces the prospect of none of these is unaccountable to the outside world and effectively has free rein to do as it pleases.

The disparity between the level of the criminal fine imposed on Thor Chemicals in South Africa and the money paid to settle the UK legal action, illustrates the point.⁸⁹ Following the criminal fine, another multinational was prompted to ask, rhetorically, how it was supposed to justify to its shareholders the substantial expenditure it had made on installing proper health and safety systems, when the consequence of not doing so was such a paltry fine. By contrast, the settlement of the civil action would have left shareholders in no doubt that it would be better in the future to take steps to avoid injuring workers.

Following the House of Lords ruling in *Connelly v RTZ*, the commercial world expressed concern at the prospect of multinationals being held legally to account in their home courts in respect of their overseas operations,⁹⁰ and the UK Lord Chancellor was successfully lobbied to propose legislation to reverse the effect of the *Connelly* ruling,⁹¹ although this proposal was subsequently shelved.

The deterrent potential of civil action has been taken to the ultimate dimension in the US. There, juries have the power to impose 'punitive damages' to reflect particularly egregious conduct by a defendant, as well as normal compensation corresponding to a claimant's losses. It is this state of affairs in the US that prompted the following headline in the UK Sunday Observer on 15 July 2001:

The US has some of the harshest regulators any company will encounter. They're called lawyers.

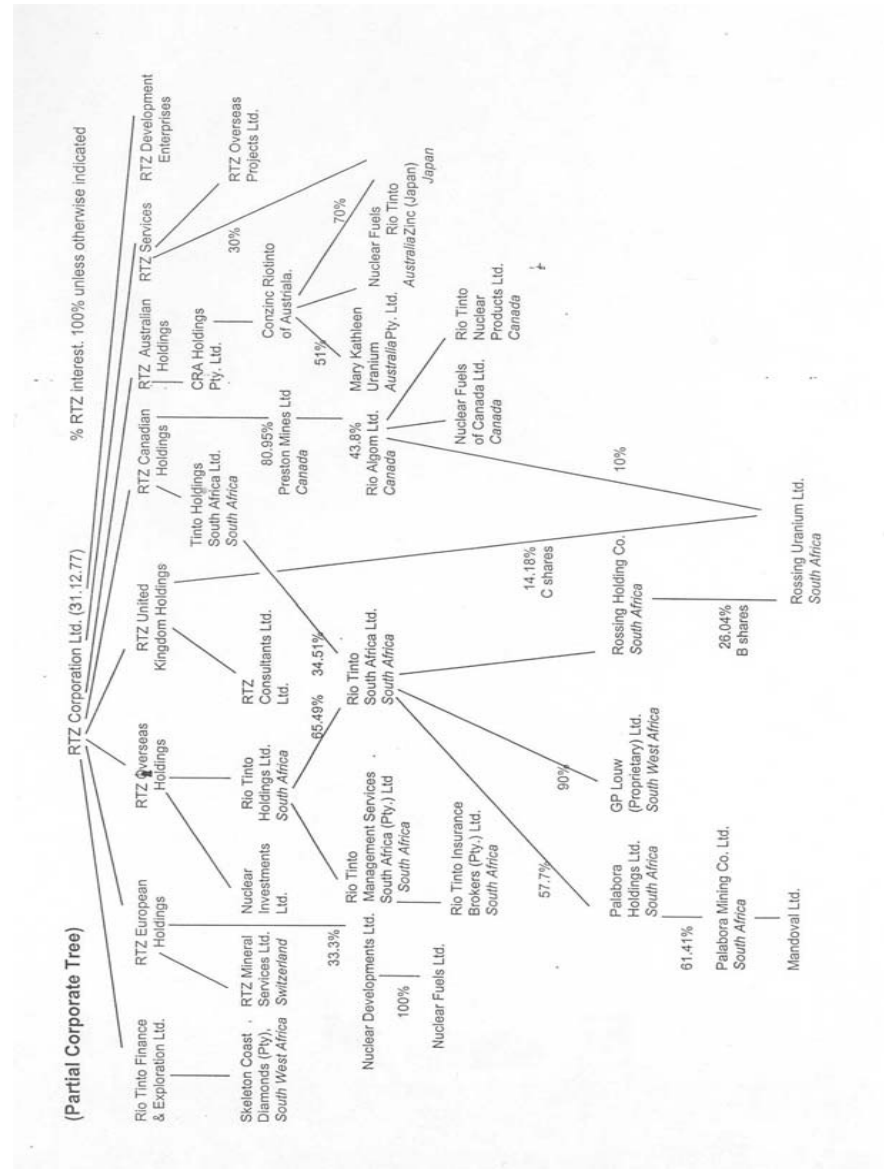
Whatever view one takes of the US litigation system and style, this potential should not be overlooked in the search for weapons to hold big business to account for human rights violations.

⁸⁹ See section 3.2 above.

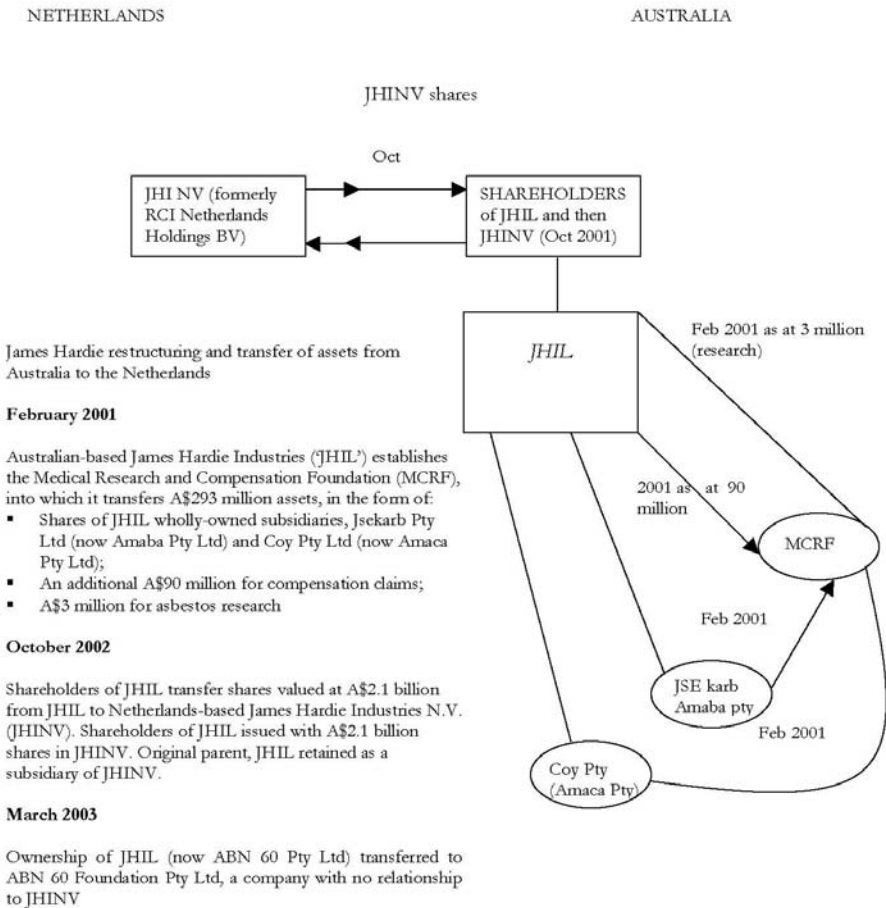
⁹⁰ RTZ ruling threatens other multinationals' *Financial Times* 25 July 1997.

⁹¹ Lord Chancellor's letter to the judiciary, Law Society and Bar Council dated 15 September 1998.

Appendix A: Rio Tinto: A Partial Corporate Tree



Appendix B: James Hardie Restructuring



14. Suing The World Bank: The Chixoy Dam Case

Bret Thiele¹ and Mayra Gómez²

International agencies should scrupulously avoid involvement in projects which, for example ... promote or reinforce discrimination against individuals or groups contrary to the provisions of the Covenant [on Economic, Social and Cultural Rights], or involve large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation. Every effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.

United Nations Committee on Economic, Social and Cultural Rights
General Comment No. 2

1. Historical and Factual Background

Guatemala began construction of the Pueblo Viejo-Quixal Hydroelectric Project (Chixoy Dam) in 1975, in what the Government called an effort to bring cheap and available electricity to the county. In the course of the project, the entire community of Río Negro was forcibly evicted from their homes and lands, and thus fell victim to violations of their rights to, inter alia, adequate housing, adequate food and the highest attainable standard of living. The residents of Río Negro also suffered serious civil and political rights violations, including their rights to life and to be free from torture, as the eviction was carried out through a series of brutal massacres and a campaign of intimidation.

Ironically, the Government claimed that an objective of the resettlement component of the project was to be 'an improvement of the living conditions of the population in the serviced area of the project.'³ The dam was raised along a stretch of land blocking the natural path of the Río Negro river in Baja Verapaz, in central Guatemala. The project was financed in part by the World Bank and the Inter-American Development Bank (IDB), which provided initial loans of US\$72

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³ Government of Guatemala, *Project Report: Chixoy River – Pueblo Viejo Hydroelectric Project* (December 1975). Furthermore, a footnote indicates that the World Bank contract with State-owned National Institute of Electrification (INDE) (Contract: BIRF-1605/GU) includes a clause obligating INDE to provide houses and services for the relocatees of better quality than those they enjoyed previously. For this reason, the loan contracts between Inter-American Development Bank and INDE did not include such a clause.

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million and US\$105 million, respectively.⁴ Indeed, the project would not have been undertaken but for the involvement of the World Bank and the IDB. The then State-owned National Institute of Electrification or INDE (*Instituto Nacional de Electrificación*) was responsible for the administration of the funds, the coordination of the project, and the building of the Chixoy Dam itself.

From the beginning of the project, INDE failed to consult the people who lived along the Río Negro for nearly two years, despite the fact that the construction of the dam would flood 31 miles of the river valley, leaving many of their communities and homes under water. It was only in 1977, almost *two years* after project construction began, that INDE officials flew by helicopter into the small village, also named Río Negro, to inform residents that they would need to abandon their homes and lands because they would soon to be flooded. At first, after INDE promised that they would be given new homes and lands in compensation for their loss, the villagers, under duress due to repeated threats from military units, reluctantly considered leaving their homes and lands at Río Negro. INDE's promises, however, would soon prove to be deceptive, as villagers learned shortly thereafter that the resettlement site which was to be provided them was in fact grossly inadequate, with conditions far worse than their already meagre living situation at Río Negro. By early 1980, the Maya Achi community of Río Negro actively resisted INDE's efforts to relocate them to the cramped, inadequate houses and poor land at the resettlement site, which is nothing more than an urban slum known as Pacux and established behind a military base on the edge of the town of Rabinal. Consequently, the Guatemalan army began to aggressively target the residents of Río Negro.

INDE officials requested the Río Negro community to turn over their land titles, promising to return them promptly.⁵ Months later, when the community requested that the titles be returned, INDE officials claimed they had never received them.⁶ In March 1980, members of the *Policia Militar Ambolante* (Mobile Military Police), based at the dam site and contracted by the project, shot seven people in Río Negro. The villagers chased the police away and one officer, according to the people of Río Negro, drowned in the Chixoy River. INDE and the Guatemalan army, however, accused the villagers of murdering the police officer and of being supporters of the country's guerrilla movement. Three months later, in July 1980, two representatives from the Río Negro community agreed to a request from INDE to come to the Chixoy Dam site to present their

⁴ Corruption and technical problems ultimately raised the cost of the 300-megawatt dam from \$340 million to almost \$1 billion.

⁵ See Witness for Peace, *A People Dammed: The Impact of the World Bank Chixoy Hydroelectric Project in Guatemala*. Washington DC: Witness for Peace (1996).

⁶ *Ibid.*

Libros de Actas, the community's only other documentation of the title to their land, as well as the resettlement and cash payment agreements it had signed with INDE. Their mutilated bodies were found a week later, and the documents have never been recovered.

It is important to recall that throughout this period, the World Bank and IDB had direct supervisory roles over the Chixoy Dam project. These roles included on-going site visits in order to ensure that the project was implemented in a sound manner.

In February 1982, after reaching an impasse in negotiations with INDE, 73 women and men from Río Negro were ordered by the local military commander to report to Xococ, a village upstream from the reservoir zone which had a history of land conflicts and hostility with Río Negro. Only one woman out of the 73 villagers returned to Río Negro. The rest were subjected to torture, including rape, and then they were murdered by Xococ's Civil Defence Patrol, or PAC, one of the notorious paramilitary units established by the Guatemalan military. On 13 March 1982, ten soldiers and 25 patrollers arrived in Río Negro, rounded up the remaining women and children and marched them to a hill above the village where many were victims of torture, including rape. Seventy of the women and 107 children were then brutally murdered, with most of the women dying of strangulation or being hacked to death with machetes. As for the children, the perpetrators smashed their heads against rocks or trees until they were dead. Only two women managed to escape. Eighteen of the children survived because they were taken back to Xococ where they were enslaved by the very patrollers who had murdered their families.

Two months later, on 14 May, 82 more people from Río Negro were massacred at the nearby village of Los Encuentros by Guatemalan soldiers and the *Policia Militar Ambolante*, both in the employ of the Chixoy Dam project. Fifteen of the victims were taken away by helicopter and never seen again. Eyewitness accounts note that a short time before the massacre, the assassins stopped at the INDE office in Pueblo Viejo, borrowed a truck owned by Codifa, a company under contract of INDE, then drove to Los Encuentros and committed the massacre.⁷

Finally, in September 1982, 35 orphaned children from Río Negro were among 92 people machine-gunned and burned to death in another village near the dam. Broken, terrorised and grieving, the survivors of the community were finally forcibly evicted from their homes, uprooted from their lands, and moved to the grossly inadequate resettlement site of Pacux. Filling of the reservoir began soon after this final massacre.

⁷ Testimony of Río Negro survivors presented to a COHRE fact-finding team in July 2003.

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Once such human rights violations began to occur, INDE, along with the World Bank and IDB in their respective supervisory roles, were effectively put on notice that paramilitary and government agents were actively carrying out atrocities in order to clear the way for the Chixoy Dam, often with funding and equipment from the project itself. Furthermore, all parties behind the project were unjustly enriched as a result of these atrocities.

Throughout this period, IDB lent Guatemala US\$105 million to build the Chixoy Dam in 1975, and a further US\$70 million in 1981. The World Bank lent US\$72 million for the dam in 1978 and another US\$45 million in 1985, with the second instalment paid *after* the massacres had occurred. At the very least, the gross negligence shown by the two banks in the Chixoy case highlights the role of international financial institutions in fostering a climate of impunity for human rights crimes committed in Guatemala, and underscores how powerful international actors in fact turned a blind eye to, and profited from, that country's brutal history of repression. To this day, many villagers believe INDE encouraged the violence so that their officials could pocket compensation payments due to the villagers. The two banks which financed and directly supervised the project had an obligation to show due diligence with regard to the implementation of the project, especially given Guatemala's well-known human rights record throughout the 1970s and 1980s. The facts of the Chixoy Dam case, as will be discussed in detail below, illustrate how the two banks violated their respective obligations.

The survivors of the Río Negro massacres have received only meagre compensation from the Guatemalan Government. Today they continue to live in extreme poverty, a situation exacerbated by the heavy burden of the trauma which they and their loved ones have endured. While both the IDB and the World Bank have acknowledged the tragedy of the Chixoy massacres, and while both are aware of the conditions in which the survivors continue to live, neither bank has assumed any responsibility for reparations to the survivors.

Under international human rights laws and principles, both the Inter-American Development Bank and the World Bank are obligated to provide reparations to the Río Negro survivors for the human rights abuses suffered by themselves and their families. As noted above, the World Bank and IDB both continued to provide loans for the Chixoy Dam throughout the displacement phase. Again, the World Bank's second loan instalment to the Government of Guatemala actually occurred in 1985 – *after* the massacres and forced displacement took place. Neither the World Bank nor the IDB were mere providers of funds, however, as both were responsible for planning and supervision throughout the project. Indeed, both banks worked with and through the Government of Guatemala throughout the planning and construction phases of the project and were directly responsible for supervising and ensuring that the project was undertaken in a

sound and lawful manner. Additionally, both banks benefited from, and indeed were unjustly enriched by, the on-going violence, as the massacres and forced displacement facilitated the construction of the dam and reduced relocations and rehabilitation costs. Finally, with respect to both banks, funding was continuously diverted by the Government of Guatemala to its genocidal so-called counter-insurgency campaign, yet the banks continued to provide funds.

In order to address the liability of these international financial institutions, we must address each separately, as each is structured in its own unique way.

2. Legal Liability of the Inter-American Development Bank

The Inter-American Development Bank (IDB) has established basic guidelines with regards to how all bank projects are implemented. According to the IDB,⁸ the actions performed by the bank during project execution are intended to:

- Ensure that projects are executed in such a way as to attain the planned objectives.
- Ensure that the approved financial resources are used in accordance with the covenants of the respective financing agreement and with the bank's policies, rules, and procedures.
- Verify compliance by borrowers/beneficiaries/executing agencies with the contractual covenants and general rules established by the bank.
- Advise borrowers/beneficiaries/executing agencies regarding the solution of problems that arise during project execution, so that projects will have the expected impact on national development.
- Maintain an effective and efficient information system on loan operations.

Additionally, under the current system, once a project is completed, the IDB's Evaluation Office is responsible for performing independent, systematic evaluations of completed projects and informing the bank and the borrowing country of its findings. The reports produced by the Evaluation Office replace the reports produced under the former evaluation system: operations evaluation reports, project performance reviews, and sector summaries. According to the IDB's own policies, the evaluation system is meant to be a 'participative process'

⁸ Inter-American Development Bank, *OP-304 Operational Policies* (2003), available online at: www.iadb.org/cont/poli/OP-304E.htm.

that must involve interested parties, so as to generate added value that meets the needs of the borrowers and the bank.⁹

In terms of its structure, the IDB is a multi-lateral lending agency, with voting power on the bank's Boards of Governors and Executive Directors based on a country's subscription to the IDB's ordinary capital. Currently, the division of subscriptions is approximately as follows: Latin America and the Caribbean, 50 percent;¹⁰ United States, 30 percent; Japan, 5 percent; Canada, 4 percent; and other non-borrowing members, 11 percent.

The highest authority of the bank is vested in the Board of Governors, composed of one Governor and an Alternate Governor appointed by each member country. Governors are usually Ministers of Finance, Presidents of Central Banks, or other officials. The Board holds an annual meeting to review the bank's operations and to make major policy decisions. The Board of Governors delegates many of its powers to the Board of Executive Directors. The IDB's 14-member Board of Executive Directors is responsible for conducting bank operations and for approving projects proposed by the President of the bank. The President of the IDB is elected by the Board of Governors for a five-year term and conducts the day-to-day business of the institution along with the Executive Vice-President.

The Charter of the IDB is, however, laced with immunity clauses¹¹ which attempt to make legal efforts holding the IDB accountable for its actions a virtual landmine of procedural obstacles. Article XI of the Charter (on status, immunities and privileges) states in section 3, however, that: 'Actions may be brought against the bank only in a court of competent jurisdiction in the territories of a member in which the bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.' This clause does not preclude legal action against the bank itself as an organisation. With regards to individual immunity, however, section 8 of Article XI of the Charter states that: 'All governors, executive directors, alternates, officers, and employees of the bank shall have the following privileges and immunities: (a) Immunity from legal process with respect to acts performed by them in their official capacity, except when the bank waives this immunity.'

It is crucial to note that section 1 on the scope of Article XI states that: *'To enable the Bank to fulfill its purpose and the functions with which it is entrusted, the status, immunities, and privileges set forth in this article shall be accorded to the Bank in*

⁹ Inter-American Development Bank, *OP-305 Ex-Post Evaluation of Operations* (2003), emphasis in original, available online at: www.iadb.org/cont/poli/OP-305E.htm.

¹⁰ The Bank's Charter ensures the position of majority stockholder for the borrowing member countries as a group. There are currently 26 borrowing member countries, all in Latin America and the Caribbean.

¹¹ IDB, *Agreement Establishing the Inter-American Development Bank*, available online at: www.iadb.org/leg/documents/convenio/english.pdf.

the territories of each member' (emphasis added). This particular wording, and indeed the inclusion of section 1 itself, serves to limit the scope of Article XI by implying that immunity shall be provided to the *extent necessary* to enable the bank to fulfil its stated objectives. Indeed, human rights violations *must* lie outside the scope of the purpose and function of the IDB. Article XI, therefore, cannot be interpreted to mean that the bank and its representatives can act with complete impunity. Indeed, because they are limited solely to the purposes and objectives of the agency, the privileges and immunities of international organisations are known as 'functional privileges and immunities,' and, though modelled after those of states, differ from them in some measure, both in conception and content.¹² Unlike states, international organisations are not 'sovereign' and draw on no history of sovereignty and no tradition of sovereign immunity.¹³ Furthermore, in any event, courts have consistently held that such broad immunity clauses are unconscionable and thus null and void.

The language of section 1 of Article XI, therefore, provides a means of redress to victims seeking to hold the IDB accountable for its role in human rights abuse. Based on the bank's own admission, the actions performed by the bank during project execution are intended, *inter alia*, to 'ensure that projects are executed in such a way as to attain the planned objectives.' Clearly, the project's 'planned objectives' would not include human rights violations. Even if these violations would somehow expedite the realisation of a project, the means by which to achieve this result would not be in keeping with the bank's own stated ethos. Therefore, section 1 of Article XI effectively limits the scope of the bank's immunity clauses so as *not to cover* gross negligence, recklessness, or intentional acts which result in human rights atrocities. Immunity, therefore, should only be applied in the narrow sense, that is, with regard to the bank's efforts to fulfil its own stated purposes. Since human rights violations fall outside of this framework, immunity does not apply. This interpretation is wholly consistent with standard legal norms on the application of legal immunity. For example, immunity cannot be used as a defence in situations where there is a demonstrable criminal intent, nor in situations of gross negligence or recklessness.¹⁴

Putting the immunity issues aside for the time being, the issue of legal liability remains. The IDB has not, to date, publicly acknowledged any responsibility for the massacres and other human rights violations at Río Negro. In fact, one is hard pressed to find any public statements or documents by the bank which have anything to do with the Chixoy Dam Project at all. The only admission they have

¹² Restatement of Foreign Relations Law, American Law Institute (1987).

¹³ *Ibid.*

¹⁴ In most cases, civil liability immunity protection can only be applied in cases that *do not* involve a criminal act, gross negligence, recklessness, or wilful or wanton misconduct.

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made related to the sedimentary build up which has impeded the dam's function, noting that the bank is now taking steps to prevent further erosion of the surrounding soil.¹⁵ By the bank's own admissions with regard to how they implement, or should implement, their development projects, however, the bank works to ensure that the project's goals are met and, in order to meet this goal, also takes on a supervisory role. The bank seeks information from partner organisations, such as INDE in the Chixoy case, and also 'advises[s] borrowers/beneficiaries/executing agencies regarding the solution of problems that arise during project execution.' Furthermore, the IDB undertook this role through, inter alia, periodic site visits to the area affected by the massacres and forced displacement.

In order to establish legal liability with respect to the IDB, we must address the following questions:

- Was there a *duty* to act, or refrain from acting, in a certain way on the part of the IDB?
- Was that duty *breached* by the IDB?
- Was someone *injured* in conjunction with that action or in-action?; and
- Was there *causation* between the act or omission and the injury?

Consistent with the IDB's own stated organisational policies, let alone international human rights obligations, the bank has a duty to implement its development projects in a way which does not result in the violation of human rights. While the bank's role is to 'fulfil its purpose and the functions with which it is entrusted', this purpose cannot be legitimately seen to be in any way concomitant with human rights abuses, such as forced eviction, extra-judicial execution and torture. Under customary international human rights law, the IDB, as an international agency made up of nation-states, has a duty to refrain from violating the right to life and the right to the security of the person in the course of its work, as these are considered to be jus cogens principles under international human rights law.

Based on the atrocities which occurred at Río Negro, it seems clear that the IDB was, at the least, grossly negligent in meeting its responsibility to ensure that the Chixoy project was carried out in a responsible manner. Black's Law Dictionary defines gross negligence as: 'The intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of

¹⁵ IDB, *Proyecto hídrico genera cambios* (2000), available online at: www.iadb.org/idbamerica/Archive/stories/2000/esp/c200j3.htm.

another.¹⁶ It defines gross neglect of duty as a 'type of nonfeasance or failure to attend one's duties, either public or private.'

Even in the best-case scenario, the IDB failed in its own organisational role of providing adequate supervision with regard to the Chixoy project. Such supervision, at a minimum, would entail consultation with the communities to be displaced as well as monitoring the methods used to relocate and rehabilitate the effected population. Again, the repression suffered by the Río Negro community did not arise suddenly in 1982 when the massacres occurred, but rather represents a pattern of engagement with the community which was established early on. As early as 1980, these abuses were documented by the Inter-American Commission on Human Rights,¹⁷ and were indeed generally known at the time.¹⁸ There is really no excuse for the IDB to be unaware of the abuses which were occurring in conjunction with the Chixoy Dam's construction. Yet, no evidence suggests that the bank intervened in any way on behalf of affected communities. This degree of gross negligence constitutes a breach of the bank's fundamental duty to ensure that its projects are carried out in a way which does not result in grave human rights violations.

The fact that the injuries suffered by the community were associated with the Chixoy Dam's construction was a point addressed in detail above. This leaves us with the issue of causation, directly linking the IDB's gross negligence and the injuries suffered by affected communities. It is important to note that the IDB has been largely unwilling to disclose its internal documents on the Chixoy project, information which would help clarify what exactly was known by bank officials at the time. Nonetheless, we can infer that the bank either knew, or should have known, about the violent repression of community members at Río Negro. Again, given the well-known human rights situation in Guatemala at the time, and the

¹⁶ Black's Law Dictionary, Abridged Sixth Edition, St. Paul: West Publishing Co., 1991.

¹⁷ See Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Republic of Guatemala*, OEA/Ser.L/V/II.53, doc. 21 rev 2 (13 October 1981), which expressly discusses massacres at Río Negro in the context of the construction of the Chixoy Hydro-electric Dam.

¹⁸ The United Nations, the media and non-governmental organisations such as Amnesty International were reporting widely on these gross violations of human rights in Guatemala during the late 1970s and early 1980s. For instance, Amnesty International was reporting on gross violations of human rights as early as 1977 and continued to do so throughout the 1980s. Additionally, the United Nations General Assembly and the United Nations Commission on Human Rights issued annual resolutions addressing the widespread human rights abuses in Guatemala. See, for example, UNGA Res. 37/184 adopted 17 December 1982 and CHR Res. 1982/31 adopted 11 March 1982, both of which expressed 'profound concern at the continuing deterioration in the situation of human rights and fundamental freedoms in Guatemala' as well as expressing 'deep concern at the serious violations of human rights reported to take place in Guatemala, particularly those reports of widespread repression, killing and massive displacement of rural and indigenous populations.' See also UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities Res. 1982/17 in which the Sub-Commission expressed 'alarm at reports of massive repression against and displacement of indigenous populations.'

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well-known patterns of abuse suffered by the Río Negro community and other similarly affected communities, it is not unreasonable to presume that bank officials should have known about what was going on with respect to the implementation of their project. Indeed, notes from a project manager disclose that IDB failed to comprehensively inspect the construction site and reservoir basin due to violence in the area. The bank, however, took no responsibility with regards to the violence associated with the project's implementation, and effectively turned a blind eye to the mounting vulnerability of the community. This gross negligence on the part of the IDB, whether purposeful or not, inevitably sent a message that the community could be 'dealt with' with impunity.

The IDB, even under its own stated procedures and policies, failed in its role to supervise the Chixoy project effectively. The IDB continues to refuse to learn from the Chixoy experience, and has not owned up in any way to its role in the atrocities suffered by the displaced communities. The bank has even failed to effectively evaluate the project. By the bank's own accounts, 'the evaluation system is meant to be a *participative process* that must involve interested parties.' Yet, no IDB official has consulted with the victims at Río Negro and no compensation has been offered to the survivors.

While funding agencies such as the IDB may not be behind the barrel of a gun, and may not have directly carried out the atrocities, the bank nonetheless had a duty to ensure that the implementation of projects does not result in human rights abuses. In the Chixoy case, the bank failed miserably to comply with this obligation. Had the bank taken a different approach, had the bank intervened, had the bank fulfilled its duty to supervise the project as its own policies demand, the massacres would likely have been averted, and the hand of death which passed over Río Negro would likely have never materialised.

Finally, the States that make up the IDB all have human rights obligations, both under the United Nations system and under the Organization of American States. These States cannot ignore, or indeed violate, these obligations simply by organising themselves into the IDB or by using it as an agent to carry out policies that violate their respective international human rights obligations. Therefore, each Member State of the IDB, and in particular those making up the Board of Executive Directors, has violated its human rights legal obligations to respect, ensure, protect and fulfil the human rights of the Río Negro community.

3. Legal Liability of the World Bank

[The Chixoy Dam project] wasn't supervised in a sound manner, but what can you do about that now?

Social Development Specialist, The World Bank (July 2003)

Among the stated values of the World Bank are honesty, integrity, and commitment'.¹⁹ The World Bank Group consists of five closely associated institutions, one of which, the International Bank for Reconstruction and Development (IBRD), was responsible for directly funding the Chixoy Hydroelectric Dam project.²⁰ The IBRD was established in 1945, and according to the IBRD's mission it 'aims to reduce poverty in middle-income and creditworthy poorer countries by promoting sustainable development, through loans, guarantees, and non-lending – including analytical and advisory – services.'²¹

In many ways, the arguments regarding the legal liability of the IBRD – and by extension the World Bank – in this case are very similar to those made above with regard to the Inter-American Development Bank (IDB). First, as a lending agency, the IBRD had a duty to ensure that the project was implemented in such a way that did not result in the violation of human rights. Indeed, this would seem to be entirely in keeping with the bank's own stated policy and mission. Second, the bank breached this duty by ignoring the human rights violations which occurred in the context of the dam's construction, as evidenced by unquestioning continued financial support for the Chixoy project, even when all evidence pointed to brutal and criminal implementation strategies. If anything, the role of the IBRD was even more troubling than that of the IDB in that this institution actually granted its second loan instalment to the Government of Guatemala in 1985 – *after* the massacres took place. This action effectively raises the threshold of legal liability, from gross negligence to reckless disregard. Certainly, not to have known at that time about the violence and repression at Río Negro would have required an extraordinary amount of dedicated ignorance on the part of IBRD

¹⁹ World Bank, *Mission Statement* (2003), available online at: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040565~menuPK:34563~pagePK:34542~piPK:36600~theSitePK:29708,00.html>.

²⁰ The term 'World Bank Group' encompasses all five of the following institutions: 1) The International Bank for Reconstruction and Development (IBRD); 2) The International Development Association (IDA); 3) The International Finance Corporation (IFC); 4) The Multilateral Investment Guarantee Agency (MIGA); and, 5) the International Centre for Settlement of Investment Disputes (ICSID). The term 'World Bank,' however, refers specifically to only two of the five agencies, the IBRD and IDA.

²¹ See: <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040580~menuPK:34588~pagePK:34542~piPK:36600~theSitePK:29708,00.html>.

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officials. In all likelihood, IBRD officials were, in fact, all too aware of the situation. Witness for Peace has aptly observed:

According to the individuals interviewed in the Chixoy region – priests, church workers, a journalist, and a construction worker who worked on the Chixoy project from 1977 to 1982 – everyone who worked on the project and virtually everyone in the region knew about the violence associated with the project, particularly the violence at Río Negro. World Bank documents indicate that bank personnel worked in supervisory capacities at the Chixoy site for up to three months each year from 1979 to 1991, including 1982. In 1984, the bank even hired an ‘expert on resettlement policy to assist in the supervision function’ of resettlement. In light of the testimonies, it is reasonable to assume that World Bank staff – especially project supervisors – knew about the violence against Río Negro as early as 1982.²²

Third, as we have already seen, residents of the Río Negro community, and other similarly situated communities, suffered gross human rights violations, violations which occurred within the context of the Chixoy Dam project. Fourth, the inaction of the World Bank was directly related to the violence which the community experienced over the course of *several years*. Had the World Bank intervened, it is likely that the outcome would have been much different. Such intervention could have clearly communicated the expectations of the bank, and could have sent a clear message to the Government of Guatemala that the violence associated with the implementation of the Chixoy Dam project was simply unacceptable. Certainly, jeopardising the bank’s funding is probably about the last thing that the Government of Guatemala would have wanted at the time. Yet, the World Bank did not step in, and by all accounts the intensity of violence only increased. The abuses committed by the PACs and the Guatemalan security forces began tentatively, with harassment. Later, these abusive tactics shifted to targeted ‘disappearance’ and killing. By 1982, the violence culminated in massacres in which dozens upon dozens of persons were tortured and killed. And what was the message the perpetrators received from all of the funding and administrative agencies involved in the Chixoy Dam project? Silence. As they gradually ratcheted up the violence, the complicity was deafening.

The Articles of Agreement of the IBRD provide many of the same immunity clauses as those discussed above in relation to the IDB, and the legal concept of ‘functional privileges and immunities’ applies equally to the IBRD. In fact, in most cases, the language is virtually identical. Article VII on Status, Immunities and Privileges, states in its section 1 (Purposes of the Article) that: ‘To enable the Bank to fulfil the functions with which it is entrusted, the status, immunities and

²² Witness for Peace, *supra*; see note 5.

privileges set forth in this Article shall be accorded to the Bank in the territories of **each** member' (emphasis in original). Section 8 (on 'Immunities and Privileges of Officers and Employees') provides that 'All governors, executive directors, alternates, officers and employees of the Bank (i) shall be immune from legal process with respect to acts performed by them in their official capacity except when the Bank waives this immunity....' However, section 3 (Position of the Bank with Regard to Judicial Process) notes that: 'Actions may be brought against the Bank only in a court of competent jurisdiction in the territories of a member in which the Bank has an office, has appointed an agent for the purpose of accepting service or notice of process, or has issued or guaranteed securities.' This final clause allows for legal action against the World Bank in the present case to be considered. Indeed, to do otherwise would create and maintain an environment of impunity for the World Bank and its Member States.

The recent Strategic Framework of the World Bank Group states that, 'Finally, an effort is underway to improve the Bank Group's organisational culture. Our internal culture needs to become more aligned with the poverty-focused, client-oriented, and accountable institution that we aspire to be.'²³ In order to reflect these goals in a meaningful way, which penetrates the conduct and not just the rhetoric of the World Bank, this institution must take responsibility for its failure to effectively administer and oversee the Chixoy project, and should take steps now to address the outstanding reparation issues associated with the massacres.

As to specific legal obligations, as a Specialised Agency of the United Nations, the World Bank is obligated not to defeat the purposes of the Charter of the United Nations. For instance, the World Bank must work to further the objectives of the Charter of the United Nations, and of course must not undermine those objectives.²⁴ This requirement is laid out in Article 59 of the Charter, which mandates that 'the creation of any new specialised agencies require[s] accomplishment of the purposes set forth in Article 55.'²⁵ The purposes and objectives articulated in Article 55 include, inter alia, the promotion of 'universal respect for, and observance of, human rights and fundamental freedoms for all.'²⁶ Furthermore, Article 103 of the UN Charter makes clear that 'in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement,

²³ World Bank Group, *World Bank Group Strategic Framework*, (24 January 2001), available online at: <http://siteresources.worldbank.org/EXTABOUTUS/Resources/strategic.pdf>.

²⁴ See, for example, Mac Darrow, *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law*, Oxford: Hart Publishing, 2003, at 127-133.

²⁵ *Ibid.*

²⁶ Charter of the United Nations, Art. 55(c), *adopted* 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945.

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their obligations under the present Charter shall prevail.²⁷ If it undertook its supervisory role in a proper manner, the World Bank knew or should have known that INDE, its partner in the Chixoy Dam project, was forcibly evicting the Río Negro community through the most brutal of means. By not intervening and by continuing its financial and technical support of INDE, the World Bank, along with its Member States, is complicit in those human rights violations and violated the legal obligations enshrined in, *inter alia*, the Charter of the United Nations to promote universal respect for, and observance of, human rights.

Finally, similar to the IDB discussed above, the States that make up the World Bank all have human rights obligations. These States cannot ignore, or indeed violate, these obligations simply by organising themselves into the World Bank or by using the bank as an agent to carry out policies that violate their respective international human rights obligations. Therefore, each Member State of the World Bank, and in particular those making up the Executive Directors, have violated their respective human rights legal obligations to respect, protect and fulfil the human rights of the Río Negro community.

Indeed, impunity for human rights violations would be the norm if States could simply violate their respective human rights obligations through the formation of corporations or inter-governmental organisations or agencies that are then used as agents of those States to implement policies that violate their respective international or domestic legal obligations. Furthermore, that impunity would be further entrenched if victims of those violations cannot avail themselves of remedies such as those provided by international and regional human rights fora such as the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, or the various United Nations treaty-monitoring bodies.

4. Conclusion: Litigation

States cannot abrogate their respective human rights obligations simply by acting collectively through inter-governmental organisations, including inter-governmental development banks. Human rights advocates, and indeed human rights mechanisms, such as those of the United Nations, the Organization of American States, the African Union and the Council of Europe, must hold such entities and their Member States accountable for human rights violations. To do otherwise will simply create and maintain impunity for some of the gravest violations of international law. Advocates must therefore work to develop

²⁷ Charter of the United Nations, Art. 103, *adopted* 26 June 1945, 59 Stat. 1031, T.S. 993, 3 Bevans 1153, *entered into force* 24 October 1945.

arguments to hold such actors accountable, and to force human rights mechanisms not to abrogate their respective obligations to provide judicial or quasi-judicial remedies to victims of such human rights violations. The Río Negro community is now considering taking legal action to the Inter-American Commission for violations of both their economic and social, and their civil and political rights. Action cannot be taken to the World Bank Inspection Panel since that Panel only hears complaints for projects that were undertaken since 1993, and even then the remedies available are insufficient for cases such as Río Negro.

Postscript

Complaint made to the Inter-American Commission

In September 2004, the COHRE Economic Social and Cultural Rights Litigation Programme filed a petition on behalf of the Río Negro survivors with the Inter-American Commission on Human Rights. The petition relied upon the principle of interdependence and interrelatedness of all human rights, considering the violations essentially to be a forced eviction from homes and lands that was carried out primarily through a series of massacres. The petition alleges joint and several liability of both the Government of Guatemala and the Member States of the banks who sit as directors.

With respect to the Government of Guatemala, this Petition asserted violations of the American Convention on Human Rights, which included *inter alia*, the right to be free from discrimination (Article 1), the right to life (Article 4), the right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), the right to privacy including protection from arbitrary or abusive interference with his or her home and the right to protection from such interference (Article 11), the right to property (Article 21), the right to equal protection (Article 24), the right to judicial protection (Article 25) and the economic, social and cultural rights implied by the standards in the Charter of the Organization of American States (OAS Charter), including the right to adequate housing, including the prohibition on forced eviction (Article 26 as read in concert with, *inter alia*, OAS Charter Article 34(k)).

Secondly, the petition joined the State parties to the American Convention on Human Rights who are Directors of the Inter-American Bank and the World Bank with disproportionate voting power. This included Mexico and Venezuela. The petition asserted violations of a similar range of rights in the American Convention.²⁸

²⁸ This included, *inter alia*, the right to be free from discrimination (Article 1), the right to life (Article 4), the

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For those Directors with disproportionate voting power that were not State parties to the American Convention on Human Rights at the time of the forced evictions, the petition asserted violations of the American Declaration on the Rights and Duties of Man, which is binding on all Member States of the OAS. These Directors were the United States, Brazil and Argentina. The provisions cited were the right to life (Article I), the right to equality before the law (Article II), the right to protection of the law against abusive attacks upon his or her private and family life (Article V), the right to protection for ones family (Article VI), the right to special protection for women during pregnancy and the nursing period and of all children (Article VII), the right to inviolability of his or her home (Article IX), the right to preservation of his or her health through sanitary and social measures relating to food, clothing, housing and medical care (Article XI), the right to resort to the courts to ensure respect for his or her legal rights (Article XVIII), the right to property (Article XXIII) and the right to submit respectful petitions to any competent authority (Article XXIV).

While the violations of civil and political rights were rather straight forward, the Article 26 argument, that the American Convention does indeed guarantee economic and social rights, is novel. The petition argues that the terms of the American Convention, particularly when read in light of its object and purpose of promoting and protecting human rights, guarantees the right to adequate housing.²⁹

Article 26 of the American Convention states:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational,

right to humane treatment (Article 5), the right to personal liberty (Article 7), the right to a fair trial (Article 8), the right to privacy including protection from arbitrary or abusive interference with his or her home and the right to protection from such interference (Article 11), the right to property (Article 21), the right to equal protection (Article 24), the right to judicial protection (Article 25) and the economic, social and cultural rights implied by the standards in the OAS Charter, including the right to adequate housing, including the prohibition on forced eviction (Article 26 as read in concert with, inter alia, OAS Charter Article 34(k)).

²⁹ The Vienna Convention on the Law of Treaties provides the authoritative guidance with respect to treaty interpretation. Article 31(1) of the Vienna Convention States that 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' Vienna Convention on the Law of Treaties, Art. 31(1), UN Doc. A/CONF.39/27, *adopted* 22 May 1969.

scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.³⁰

Therefore, it was argued, to determine the specific rights guaranteed by Article 26, the Commission should look to the Charter of the Organization of American States (Charter). Furthermore, the explicit reference in Article 26 to the Charter *as amended by the Protocol of Buenos Aires* was highlighted, as that amendment added to the Charter the new Section VII, including Article 31 (now Article 34).³¹

Many economic and social standards are enumerated in Article 34(k) of the Charter. Indeed, the right to adequate housing is clearly an implicit economic and social standard set forth in Article 34(k) of the Charter, which states:

The Member States agree that equality of opportunity, the elimination of extreme poverty, equitable distribution of wealth and income and the full participation of their peoples in decisions relating to their own development are, among others, basic objectives of integral development. To achieve them, they likewise agree to devote their utmost efforts to accomplishing the following basic goals: ... (k) Adequate housing for all sectors of the population.³²

The Charter has been interpreted as not containing specific *rights* in and of itself, but rather, as Article 26 of the American Convention recognizes, as articulating standards.³³ Article 26 of the Convention, however, legally establishes the *rights* implicit in those standards. Again, clearly, a *right* implicit in the standard of 'adequate housing' is the right to adequate housing. As such, Article 26 of the Convention, when properly read in concert with Article 34(k) of the Charter, should be effectively read to state:

The States Parties undertake to adopted measures ... with a view of achieving progressively ... the full realization of the *right* ... [to] adequate housing for all sectors of the population.

³⁰ American Convention on Human Rights, Article 26, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 *entered into force* 18 July 1978, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

³¹ The Charter as amended by the Protocol of Buenos Aires, as referred to in Article 26 of the American Convention, used the same language as the current version of the Charter with respect to the right to adequate housing. That language, however, was found in Article 31(k) rather than Article 34(k). The change in numbering is on account of subsequent amendments to the Charter.

³² Charter of the Organization of American States, Article 34(k), 119 U.N.T.S. 3, *entered into force* 13 December 1951; amended by Protocol of Buenos Aires, 721 U.N.T.S. 324, O.A.S. Treaty Series, No. 1-A, *entered into force* 27 February 1970; amended by Protocol of Cartagena, O.A.S. Treaty Series, No. 66, 25 I.L.M. 527, *entered into force* 16 November 1988; amended by Protocol of Washington, 1-E Rev OEA Documentos Oficiales OEA/Ser.A/2 Add. 3 (SEPF), 33 I.L.M. 1005, *entered into force* 25 September 1997; amended by Protocol of Managua, 1-F Rev OEA Documentos Oficiales OEA/Ser.A/2 Add.4 (SEPF), 33 I.L.M. 1009, *entered into force* 29 January 1996.

³³ See Inter-American Court of Human Rights, Advisory Opinion OC-10/90 (14 July 1989).

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Article 26 of the Convention thereby recognises the right to adequate housing, as well as other economic and social rights, in the Inter-American system for the protection of human rights. Additionally, however, the petition argued that the right to adequate housing is reinforced by and implicit in several other American Convention rights, including the right to life (Article 4), the right to humane treatment (Article 5), the right to a fair trial (Article 8), the right to be free from arbitrary or abusive interference with the home (Article 11), the rights of the family (Article 17), the rights of the child (Article 19), the right to property (Article 21), and the right to judicial protection (Article 25).

15. A Report of Discussions and Outcomes at the Economic, Social and Cultural Rights Litigation Strategy Workshop Céligny, Switzerland, 16-18 November 2003

Aoife Nolan¹

1. Introduction

The papers which form the basis of this book were originally given at the Economic, Social and Cultural Rights Litigation Strategy Workshop, held on 16-18 November 2003 in Céligny, Switzerland. The primary aims of the workshop were to examine the current state of economic, social and cultural (ESC) rights litigation; to evaluate theoretical and practical obstacles faced by those attempting to bring litigation involving ESC rights; and to consider ways to improve the quality and efficacy of such litigation.

The intention of the organisers of the workshop was to create a space for dialogue between academics and practitioners, and to enable practitioners to exchange information on previous and ongoing ESC rights litigation in which they were involved. It was hoped that the result of bringing participants from a broad range of backgrounds together to share ideas and experiences would be a strengthening of the nascent ESC rights global network.

Each session of the workshop concluded with discussions between presenters and participants. These discussions focussed primarily on the subject of particular sessions of the workshop, including positive obligations, allocation of resources, crafting of remedies, the accountability of corporations for human rights violations, and forced evictions and the right to alternative accommodation. A number of other issues also emerged during the discussions. The most important of these were practical litigation strategies, the role of the judiciary, the use of UN treaty-based mechanisms to advance ESC rights, the issue of minimum core obligations and the jurisprudence of the Committee on Economic, Social and Cultural Rights (CESCR). The following report of these discussions is arranged thematically rather than chronologically. It should be noted that the comments recorded in this report are not intended to represent a consensus reached by the workshop participants, nor are they necessarily the final views of any participant.

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The aim of the report is to provide an account of some of the discussions among participants in response to the papers and issues presented at the workshop.

2. Practical Litigation Strategies

ESC rights litigation strategies were a central theme of the workshop discussions. The use of the different procedures available under the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR) was frequently referred to during the workshop. The lengthiest of these discussions followed Scheinin's paper in which he highlighted, amongst other things, the ways in which procedures available under treaties on civil and political rights have been, and could be, used to protect ESC rights.

It was pointed out that, thus far, very few cases involving ESC rights have been dealt with by the Human Rights Committee (HRC) and that those that have been are not particularly good. One participant encouraged organisations to take cases of forced evictions before the HRC, combining Article 17 of the ICCPR with an element of discrimination (Article 26 of the ICCPR). A warning was given, however, that the use of Article 26 poses the risk of resulting in 'downgrading' in general.² It was emphasised that the likelihood of success in getting the HRC to focus on poverty issues in its concluding observations under the state reporting procedure would depend on how pressing these issues were in relation to other issues arising in the country in question.

With regard to India, whose periodic report to the Committee on Economic, Social and Cultural Rights (CESCR) is long overdue, the idea was posited that a case could be brought before a domestic Indian court seeking an order that the government submit a state report in accordance with its obligations under the ICESCR. The comment was made that, while the CESCR has granted 'default judgments' – or more precisely, concluding observations – in the case of failure by a state to submit a periodic report, such occurrences were rare and only occurred in the case of extreme delay.

Participants considered the appropriateness of using foreign jurisdictions for litigation of ESC rights claims, particularly those concerning multinational corporations. One participant expressed scepticism about whether foreign courts should accept arguments invoking the impossibility of bringing cases in certain other jurisdictions as these, and alien tort claims, were paternalistic decisions,

² See, however, Human Rights Committee, *General Comment 18, Non-discrimination* (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994).

reflecting an in-built presumption in some national legal systems that they are superior to others. It was stated in reply that, where the home state of a company refers a case to a host state which is not capable of hearing the case quickly and providing an effective remedy, this may result in the litigation providing no benefit to claimants. An example of just such an occurrence was the litigation arising out of the Union Carbide Bhopal disaster where, 15 years after the matter came to India, there had still not been adequate compensation for victims. Furthermore, it was pointed out that there are situations in which it is inappropriate for a host state to be held liable for compensation; for instance, where a state lacks the capacity to meet the claims, or where a new regime is being held liable for the crimes of an older one. Another participant argued that such claims are not paternalistic in the sense of seeking to hold Southern states to Northern standards, but rather seek to hold Northern states (and Northern corporations) to Northern espoused standards.

Reference was made to the Organisation for Economic Co-operation and Development (OECD) guidelines which permit actions to be filed against multinational corporations at various National Contact Points.³ The mechanism was criticised, however, because of the weakness of the procedure and the fact that the guidelines are not legally binding. It was suggested that the mechanism could be effective where the companies at issue are concerned with their reputation. It was also observed that those companies that are the subject of compensation claims are generally unconcerned with their public image.

The implementation of judicial orders was identified as a significant challenge and a matter that needs to be incorporated within litigation strategy. This led to the observation that litigation is just one strategy that must be used within a broader group of strategies. Indeed, the identification of the shortcomings of litigation is arguably an indication that broader strategies are required. Many participants acknowledged the importance of popular advocacy and of ensuring links between lawyers and local constituencies.

3. Role of Courts

While not the specific topic of any of the workshop sessions, the classic debate on the parameters of the appropriate judicial role with respect to ESC rights adjudication was considered at various times throughout the workshop, particularly in the context of the issues of resources and remedies. The

³ Trade Union Advisory Committee, *A User's Guide for Trade Unionists to the OECD Guidelines to Multinational Enterprises*. Available at www.tuac.org/publicat/cpublica.htm.

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approaches adopted by courts in different jurisdictions to cases involving ESC rights were also considered.

It was generally agreed that it would be difficult, if not impossible, to outline a uniform policy on the use of ESC rights litigation and the role of the courts or to find a unified theory of the judiciary and ESC rights litigation applicable in all contexts. Several participants asserted that the one real unifying aspect is the rights themselves. It was stated that, for comparative purposes, it is important to be aware of historical and contextual developments in each country. At the same time, however, it was clear from the presentations that there are strong parallels between judicial approaches in cases emerging from a number of jurisdictions.

A lively discussion of the role of the courts in ordering remedies for ESC rights litigation took place after Colin Gonsalves' presentation. It was asserted that while Indian courts have been proactive in forwarding ESC rights, this has been done through the exercise of a function that sometimes appears both judicial and executive. The judiciary has involved itself not only in assessing the constitutionality of programs and ordering appropriate measures, but also, where required, in the administration of the ordered measures. That the courts play such a broad role is possibly an indicator of the breakdown of some elements of the Indian executive and legislature and the judiciary is perceived by many as the only governmental institution with any integrity. For example, large numbers of deaths caused by starvation prompted the Supreme Court to order a series of remedies to reform the existing famine and food schemes which had been subject to maladministration and corruption. At the same time, it should be noted that Indian courts have made extremely conservative decisions on some ESC rights, and that it is difficult to generalise about the Indian experience.

It was recognised that, in a healthy, functioning democracy, the adoption of such a strong role by the courts would be less necessary as there would be less risk of executive and administrative paralysis. Where such paralysis exists, however, the judiciary is obliged to respond to it, a fact that can be used to reconcile such activity with democracy. This was later confirmed in the discussion on remedies where one participant pointed to an extensive US jurisprudence in which courts had administered and managed remedial orders in cases where governments demonstrated a clear *incapacity* to take the necessary steps to respect constitutional rights.

4. Minimum core, immediate obligations and ‘reasonableness’

Liebenberg’s paper led to a lengthy exchange on the principle of ‘minimum core’⁴ content and the standard of ‘reasonableness’⁵ with regard to government efforts to vindicate socio-economic rights. Her paper proposed a method of implementing the minimum core concept in South Africa, where it had been rejected by the Constitutional Court. The issue was examined more widely, both theoretically and in the context of litigation.

The approach of the CESCR to the minimum core was criticised by some participants, with several expressing the view that the Committee has departed from the original notion of the minimum core set out in General Comment No. 3. It was commented that the jurisprudence of the Committee – such as General Comment No. 14 which sets out the core obligations that must be met by states in relation to the right to health – has ignored the mix of obligations of conduct and result imposed by the ICESCR. One participant commented that the current Committee has put a lot of ‘conduct’ into the minimum core, which was originally results-focussed.

Concern was expressed that if the courts were to conduct context-specific inquiries in ESC rights cases in order to identify minimum core interests or benefits for individuals, in practice, this would result in a de facto series of thresholds, even where the context-specific nature of cases was stressed. It was suggested in response that the threshold issue is essentially unavoidable in ESC rights litigation. Even where the reasonableness standard is used, criteria are needed to see who qualifies for short-term relief. The proposed inquiry would be premised on an enlarged notion of dignity rather than simply on physical needs, as this would capture the needs of more affluent societies. In developed countries where basic needs are taken care of, this would move the focus to progressive realisation or improvement of conditions. One participant suggested that the ‘context’ considered under this test would be specific not just to a particular society, but to a particular time as well. It was observed that since every country is obliged to apply the maximum resources available, there will be different levels for different places.

⁴ In its General Comment 3 on the nature of States parties obligations (Article 2, para. 1), the Committee on Economic, Social and Cultural Rights stated that it was ‘of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.’ (para. 10)

⁵ Articles 26 and 27 of the South African Constitution, which enshrine the rights to adequate housing, health care, food, water and social security provide that: ‘The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.’ The Constitutional Court has stated that this qualification means that the Constitution recognises that: ‘the State is not obliged to go beyond available resources or to realise these rights immediately.’ (*Government of the Republic of South Africa & Ors. v Grootboom & Ors.* 2001(1) SA 46 (CC) at para. 94).

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The concept of the minimum core was criticised by one participant on the grounds that it is unascertainable and permits a levelling down. It was asserted that the language of 'minimum core' is not helpful, and that a textured approach to the reasonableness argument could work in the right case without mentioning the minimum core.

It was proposed by one participant that the issue of immediate individual relief could be dealt with by calling it 'emergency relief' and having it as a before-trial remedy. It could operate in a similar way to a Canadian interlocutory judgment, which is based on irreparable harm and the balance of convenience. This remedy would be temporary and allow the government to engage in a reasonableness review. Such 'emergency relief' would assimilate the immediate entitlement into the general landscape of the law and would fit in with the notion that there should not be two-tracked strategies. It was argued that the question of 'why this complainant? and not others in the same circumstances?', would not be an appropriate one for judges to ask since this question would not be asked in non-ESC rights cases. It would, however, raise an ethical question for lawyers as to who should be included in or excluded from the remedy. It was stated that such a remedy would also be available under the South African legal system.

One participant raised the 'sharp elbows' argument, stating that, where a large percentage of the population is effected by a whole series of poverty-related issues, there will inevitably be a situation where people who can access the courts will be able to enforce their rights. Where there is a finite amount of money, the courts will distribute ad hoc to people who can enforce their rights to the disadvantage of others who are in equal need but cannot bring their case before the courts. In response, it was pointed out that this argument is rarely raised in relation to people bringing cases involving violations of civil and political rights. It was also observed that individual cases can vividly highlight systemic failures.

The issue was raised whether it would be possible, in a South African context, to resurrect the claim for benefits to meet core needs after the Constitutional Court's judgments in *Grootboom*⁶ and the *TAC* case.⁷ It was suggested that the minimum core could be used in determining whether a program is 'reasonable'. One participant argued that the question of 'reasonableness' is not limited to whether a state has a reasonable program in place; the court must also determine whether it is reasonable to deny the complainant the benefit in the circumstances at issue. It was pointed out that, in Canadian cases involving adverse effect discrimination, the burden is on the government to prove reasonableness, and it was argued that individual litigants should have the benefit of the presumption of

⁶ *Grootboom v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C).

⁷ *Minister of Health and Others v Treatment Action Campaign and Others* No. CCT 8/02, 5 July 2002.

‘unreasonableness’ of government action where the vindication of their survival rights are at issue. According to one participant, this is not the case in South Africa at the moment, where the burden is on the plaintiff to prove unreasonableness.

The point was made that it may not be necessary to get bogged down in issues of minimum core, burden of proof or reasonableness, as the court will know these when they see them. In response, it was asserted that these issues must be dealt with as the courts will have to define what they regard as constituting reasonable grounds for violation. One would have to differentiate between the cases that were meritorious and those that were not, and identify the criteria for what constitutes a *prima facie* violation.

It was observed that the *TAC* decision, which involved a finding of unreasonableness of government action by the courts provided an individual remedy since, under the judgment, women who are pregnant can go to a hospital and demand a remedy.

5. Resources

Apart from being the specific subject of one of the sessions, the issue of courts and resource allocation arose at various points throughout the workshop. During the session on resources, discussants examined whether advocates needed to be bolder in addressing the budgetary decisions that affected ESC rights. It was queried whether it was advisable to avoid asking courts to take on the resources question, as one of the speakers had asserted. Differing views were expressed. One participant observed that lawyers are generally uncomfortable making any *ab initio* positive claims – not just resource claims – and that this sometimes backfires. It was asserted that resource questions are ones which experts can assess and give expert evidence on, and that it is time to demand this and challenge government arguments with regard to resources.

The question was raised whether the ‘resources issue’ should be dealt with as part of the ESC rights themselves, or at the remedies stage. Some support was expressed for the idea of pushing resource issues down to the remedial level in order to avoid rights being ‘resource-dominated’. It was suggested that it is preferable to leave the resources issue to the remedial stage in order to get the court to acknowledge that there is a right, rather than to ‘frontload’ by incorporating resource issues into the right itself, and as a result get nothing. In response, the point was made that the advantage of incorporating resource issues into rights is that, when governments are formulating policy, they would have to have regard for these obligations. Furthermore, where resources are relegated to the remedial stage, there is the risk that rights may be ‘softened’. The comment

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was also made that, in some cases, the declaration of a right, but the denial of a suitable remedy by the court on the basis of resource constraints, renders the whole litigation pointless. The following section considers a specific way of incorporating the resources issues into remedial orders while respecting the government's primary role in this domain.

With regard to retrogression and budgets, it was argued that there is a need for lawyers to analyse specific constitutional provisions in order to explain to courts why there is an obligation to provide resources to vindicate rights. Decisions on budgets themselves are constrained by budgetary norms, including constitutional norms or rights which must be taken into account by budget-makers, and the courts are in a position to correct mistakes. One participant asserted that, where retrogression occurs in relation to ESC rights, the government should be required to justify moving money from one area to another, thereby making the government accountable.

One participant asked whether the principle of progressive realisation could serve as an excuse for a delay in the allocation of resources by a government and if a government could use this principle as a basis for meeting the ESC rights of some and not others. It was suggested that this was an unlikely scenario. Where a group of people is ignored by the government when budgeting for ESC rights, it is generally a question of political priorities. When this occurs the court should have a role in evaluating whether the government's policy is adequate.

The issue of the obligations of one state to the citizens of another was also raised. It was pointed out that the ICESCR has no clause in it stating that the obligations contained therein extend only to the jurisdiction of each State party. This raises the issue of the resource distribution responsibilities of governments. It was commented that it has become harder to think of the resources issue as involving simply those resources that are available to a government at a particular time. There are resources made available externally from international sources, not just taxes. If this is not taken into account, a large aspect of the resource issue is ignored.

The link between participation in democracy and meeting survival needs – see discussion of Liebenberg's paper above – was highlighted by the suggestion of one participant that, while it might be argued that the distribution of public resources is a political issue, politics needs to be framed around a concept of citizenship. The point was made that where the government has to justify spending money in a particular way to the courts, it could be argued that the balance of power shifts from the government to the courts. In response to concerns over whether the courts should have such a role, one participant argued that simple judicial deference is often proffered as the 'be-all and end-all answer by people who rely on the presumption that government considers all relevant

factors when making decisions in relation to resources. In reality, however, that is often not how government works. A vital element of ESC rights litigation strategy is to find out who made a decision and how it was made. This is particularly important for litigators gathering evidence on the ‘reasonableness’ of government action.

6. Remedies

It was emphasised that it is extremely important for those whose rights are being affected to have a space – whether in court or elsewhere – to establish the priorities for the remedy, including whether a remedy should look to the past or to the future.

One participant expressed the view that, where remedies are limited to particular plaintiffs, it is to be hoped that there will be sufficient political pressure on the government to ensure that it will not supply the good or service solely to the individuals involved. It was queried whether, in a case that may affect the rights of a group other than the complainant, there are any mechanisms available in South Africa or Canada by which courts dealing with structural injunctions can take into account the interests of others who might be affected by the case. This is a major problem for judges when making detailed remedies and is often the reason that courts merely make a declaration on the nature and content of the right at issue and the nature of the breach, and order the government to come up with a program to meet the constitutional requirements. If the government was to come back with a solution tailor-made to the needs of individual claimants, it would still be open to others to bring claims.

The comment was made that where a case was brought on behalf of an individual claimant and the government met the individual’s needs prior to the case being heard, there was a risk of the suit being declared moot. One participant said that, in order to avoid the moot issue, he always joined a public interest litigant with an individual claimant. However, flexible standing laws are necessary for this to be possible.

The issue of the specificity of remedies was also raised. One participant queried whether the limited implementation of the order in the *Grootboom* case,⁸ for example, could be attributed to the order being so vague that the government did not know what to do in order to give effect to what it was asked. It was pointed out that, while specificity is useful, it is important that litigants negotiate it with the other parties to the litigation, as happened in the American Eighth

⁸ See note 5 *supra*.

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Amendment prison cases. Otherwise, the government can accuse ESC rights litigators of simply asking the courts to act as a manager. It is also vital to join all relevant parties, such as different government departments, to the case to ensure that remedies can be implemented effectively. One participant observed that, when seeking remedies, it is important to make use of institutional capacities – that is, national Human Rights Commissions – to monitor the implementation of orders or to advise governments. The more that different players can be built into orders, the more the litigation will assist in developing the democratic institutions necessary to ESC rights.

The binding nature of injunctions or remedies was discussed in the context of federalism and multi-tiered government structures. It was pointed out, for instance, that while an injunction against a provincial government in federal Canada is likely only to bind one province, the structure of the relationship between the national and provincial governments in South Africa means that all provincial governments would be bound by a judicial decision.

7. Forced evictions and the right to alternative accommodation

There were a number of papers dealing with laws and litigation on forced evictions and the right to alternative accommodation in different jurisdictions.

The issue of forced evictions in developed countries was considered in the discussion. It was pointed out by one participant that such evictions are extremely numerous though not concentrated in one community at a particular time. For instance, in the Canadian province of Ontario alone, more than 50,000 forced evictions are carried out each year. In these cases, the evictees are generally not illegal occupiers but people who owe their landlord money, often only a small amount. Upon eviction they have damaged credit ratings, will often be homeless, and will have to go to a shelter. Instead of landlords garnishing income, as would any other creditor, the State allows them to evict people. While it was arguable that evictions were granted because otherwise landlords would be obliged to provide a service that they were not being paid for, it was pointed out that when it comes to a necessary service that is also a right, the approach has to be different from that adopted in relation to other services.

A participant asked whether there are any circumstances under which an eviction can be authorised where the people concerned will be rendered homeless. One suggested scenario was where there was an unwillingness, rather than incapacity, to pay rent in a landlord-tenant relationship. It was argued that, where evictions are justified on the grounds of the health and safety of the evictees, their health and safety must be balanced against the effects they will suffer as a result of being homeless. Furthermore, where the government claims that an eviction is necessary

for social development, it must prove that this is the only option open to it. It was suggested that where an eviction does take place, in the absence of alternative accommodation, there must, at the very minimum, be a governmental program in place which aims to provide such accommodation in the future.

8. Outcomes

It was agreed that people working in different areas should be invited to future workshops. Particular interest was expressed in inviting people working on issues related to trade and indigenous peoples. It was also suggested that any future workshop should have a greater focus on gender issues.

Several proposals were made in relation to possible outcomes of the conference. The suggestion that the meeting be repeated at an appropriate time in the future was greeted with general enthusiasm. It was proposed that a one-week course be held in order to train lawyers in ESC litigation and related issues.⁹ It was suggested that any such training course should be accompanied by teaching materials that could be disseminated more widely. A proposal was also made that law schools, universities and human rights institutes should be canvassed to provide interns for organisations working on ESC rights, which would result in future lawyers being educated in ESC rights.

⁹ This proposal resulted in the organisation of the Intensive Course on Justiciability of Economic, Social and Cultural Rights held at 29 November – 4 December 2004, in Turku/Åbo, Finland, organised by the Institute for Human Rights at Åbo Akademi University and the Centre on Housing Rights and Evictions (COHRE).

Annex 1: Workshop Participants

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Annex 2: General Comment No. 9 (1998) The Domestic Application of the Covenant

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS,
General Comment No. 9 (1998) The domestic application of the Covenant^{*}

A. The duty to give effect to the Covenant in the domestic legal order

1. In its General Comment No. 3 (1990) on the nature of States parties' obligations (art. 2, para. 1, of the Covenant) ^{1/} the Committee addressed issues relating to the nature and scope of States parties' obligations. The present general comment seeks to elaborate further certain elements of the earlier statement. The central obligation in relation to the Covenant is for States parties to give effect to the rights recognized therein. By requiring Governments to do so "by all appropriate means", the Covenant adopts a broad and flexible approach which enables the particularities of the legal and administrative systems of each State, as well as other relevant considerations, to be taken into account.

2. But this flexibility coexists with the obligation upon each State party to use all the means at its disposal to give effect to the rights recognized in the Covenant. In this respect, the fundamental requirements of international human rights law must be borne in mind. Thus the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in article 27 of the Vienna Convention on the Law of Treaties, ^{2/} is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations. The second principle is reflected in article 8 of the Universal Declaration of Human Rights, according to which "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law". The International Covenant on Economic, Social and Cultural Rights contains no direct counterpart to article 2, paragraph 3 (b), of the International Covenant on Civil and Political Rights, which obligates States parties to, *inter alia*, "develop the possibilities of judicial remedy". Nevertheless, a

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State party seeking to justify its failure to provide any domestic legal remedies for violations of economic, social and cultural rights would need to show either that such remedies are not “appropriate means” within the terms of article 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights or that, in view of the other means used, they are unnecessary. It will be difficult to show this and the Committee considers that, in many cases, the other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies.

B. The status of the Covenant in the domestic legal order

4. In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.

5. The Covenant does not stipulate the specific means by which it is to be implemented in the national legal order. And there is no provision obligating its comprehensive incorporation or requiring it to be accorded any specific type of status in national law. Although the precise method by which Covenant rights are given effect in national law is a matter for each State party to decide, the means used should be appropriate in the sense of producing results which are consistent with the full discharge of its obligations by the State party. The means chosen are also subject to review as part of the Committee’s examination of the State party’s compliance with its obligations under the Covenant.

6. An analysis of State practice with respect to the Covenant shows that States have used a variety of approaches. Some States have failed to do anything specific at all. Of those that have taken measures, some States have transformed the Covenant into domestic law by supplementing or amending existing legislation, without invoking the specific terms of the Covenant. Others have adopted or incorporated it into domestic law, so that its terms are retained intact and given formal validity in the national legal order. This has often been done by means of constitutional provisions according priority to the provisions of international human rights treaties over any inconsistent domestic laws. The approach of States to the Covenant depends significantly upon the approach adopted to treaties in general in the domestic legal order.

7. But whatever the preferred methodology, several principles follow from the duty to give effect to the Covenant and must therefore be respected. First, the means of implementation chosen must be adequate to ensure fulfilment of the obligations under the Covenant. The need to ensure justiciability (see para. 10 below) is relevant when determining the best way to give domestic legal effect to the Covenant rights. Second, account should be taken of the means which have proved to be most effective in the country concerned in ensuring the protection of other human rights. Where the means used to give effect to the Covenant on Economic, Social and Cultural Rights differ significantly from those used in relation to other human rights treaties, there should be a compelling justification for this, taking account of the fact that the formulations used in the Covenant are, to a considerable extent, comparable to those used in treaties dealing with civil and political rights.

8. Third, while the Covenant does not formally oblige States to incorporate its provisions in domestic law, such an approach is desirable. Direct incorporation avoids problems that might arise in the translation of treaty obligations into national law, and provides a basis for the direct invocation of the Covenant rights by individuals in national courts. For these reasons, the Committee strongly encourages formal adoption or incorporation of the Covenant in national law.

C. The role of legal remedies

Legal or judicial remedies?

9. The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate. By the same token, there are some obligations, such as (but by no means limited to) those concerning non-discrimination, ^{3/} in relation to which the provision of some form of judicial remedy would seem indispensable in order to satisfy the requirements of the Covenant. In other words, whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.

Justiciability

10. In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic, social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions. The Committee has already made clear that it considers many of the provisions in the Covenant to be capable of immediate implementation. Thus, in General Comment No. 3 (1990) it cited, by way of example, articles 3; 7, paragraph (a) (i); 8; 10, paragraph 3; 13, paragraph 2 (a); 13, paragraph 3; 13, paragraph 4; and 15, paragraph 3. It is important in this regard to distinguish between justiciability (which refers to those matters which are appropriately resolved by the courts) and norms which are self-executing (capable of being applied by courts without further elaboration). While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.

Self-executing

11. The Covenant does not negate the possibility that the rights it contains may be considered self-executing in systems where that option is provided for. Indeed, when it was being drafted, attempts to include a specific provision in the Covenant to the effect that it be considered “non-self-executing” were strongly rejected. In most States, the determination of whether or not a treaty provision is self-executing will be a matter for the courts, not the executive or the legislature. In order to perform that function effectively, the relevant courts and tribunals must be made aware of the nature and implications of the Covenant and of the important role of judicial remedies in its implementation. Thus, for example, when Governments are involved in court proceedings, they should promote interpretations of domestic laws which give effect to their Covenant obligations.

Similarly, judicial training should take full account of the justiciability of the Covenant. It is especially important to avoid any a priori assumption that the norms should be considered to be non-self-executing. In fact, many of them are stated in terms which are at least as clear and specific as those in other human rights treaties, the provisions of which are regularly deemed by courts to be self-executing.

D. The treatment of the Covenant in domestic courts

12. In the Committee's guidelines for States' reports, States are requested to provide information as to whether the provisions of the Covenant "can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities". ^{4/} Some States have provided such information, but greater importance should be attached to this element in future reports. In particular, the Committee requests that States parties provide details of any significant jurisprudence from their domestic courts that makes use of the provisions of the Covenant.

13. On the basis of available information, it is clear that State practice is mixed. The Committee notes that some courts have applied the provisions of the Covenant either directly or as interpretive standards. Other courts are willing to acknowledge, in principle, the relevance of the Covenant for interpreting domestic law, but in practice, the impact of the Covenant on the reasoning or outcome of cases is very limited. Still other courts have refused to give any degree of legal effect to the Covenant in cases in which individuals have sought to rely on it. There remains extensive scope for the courts in most countries to place greater reliance upon the Covenant.

14. Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of Covenant rights where this is necessary to ensure that the State's conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.

15. It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State's international legal obligations. Thus, when a domestic decision maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter. Guarantees of equality and non-discrimination should be

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interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.

Notes

* Adopted at the 51st meeting on 1 December 1998 (nineteenth session).

1/ E/19991/23, annex III.

2/ United Nations, Treaty Series, vol. 1155, p. 331.

3/ Pursuant to article 2, paragraph 2, of the Covenant, States “undertake to guarantee” that the rights therein are exercised “without discrimination of any kind”.

4/ See E/1991/23, annex IV, chap. A, para. 1 (d) (iv).