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ABSTRACT

Viewed in historical perspective, the recent rise of economic, social and cultural (ESC) rights in comparative legal jurisprudence and litigation strategy is remarkable. From a small number of jurisdictions to countries in all regions and legal systems of the world, there has been both a broadening and deepening of domestic judicial enforcement of these rights. While this enterprise casts some doubt on traditional presumptions concerning the non-justiciability of ESC, there remain a number of conceptual, instrumental and empirical questions. This paper seeks to provide an overview of the underlying causes of this socio-legal development, the nature and content of the emerging jurisprudence, the empirical evidence and debates around impact, lessons learned in effective litigation strategy and concludes with some thoughts on how the field could be developed.

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Social rights – Justiciability – Impact – Litigation strategy

DOMESTIC ADJUDICATION AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A SOCIO-LEGAL REVIEW

Malcolm Langford

1 Introduction: The rise of domestic adjudication of ESC rights

Viewed in historical perspective, the rise of economic, social and cultural (ESC) rights in comparative legal jurisprudence and litigation strategy is remarkable. For most of the 20th Century we must strain to find such judgments and decisions although statutory and administrative law has fostered a range of enforceable social entitlements (ANNAN, 1988; KING, 2008). We can only point to particular international bodies such as the International Labour Organization (ILO) Committee on Freedom of Association (FENWICK, 2008) or scattered decisions in national jurisdictions such as Germany, United States and Argentina (ALBISA; SCHULTZ, 2008; ACKERMAN, 2004; COURTIS, 2008). For example, the Federal Constitutional Court of Germany ruled that there was an entitlement to a basic minimum standard of living (*Existenzminimum*) and that universities had to use their maximum available resources in offering places to applicants to medical studies (GERMANY, Numerus *Clausus I Case*, 1972).

The last two decades have witnessed a sea change. ESC rights appeared to have been partly rescued from controversies over legitimacy, legality and justiciability and in many jurisdictions have been accorded a more prominent place in advocacy, discourse and jurisprudence (LANGFORD, 2008b). If we were to speculate on the total number of decisions that have invoked constitutional and international ESC rights, a figure of at least one to two hundred thousand might be in order. Hoffman and Bentes (2008) track more than 10,000 cases in Brazil alone and similar patterns can be seen in Colombia and Costa Rica (SEPÚLVEDA, 2008; WILSON, 2009). The trend is likely to continue with the adoption by the United Nations (UN) General Assembly in 2008 of a complaints and inquiry procedure under the International Covenant on Economic, Social and Cultural Rights (ICESCR). This

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Optional Protocol could prompt greater national litigation and constitutional reform by virtue of its requirement that domestic remedies first be exhausted and its role in promoting awareness of the potential justiciability of ESC rights (MAHON, 2008; LANGFORD, 2009).

India is often credited with being the first jurisdiction to develop what we might call a relatively mature ESC rights jurisprudence. Following the emergence in the 1970s of public interest litigation on civil and political rights, the right to life was interpreted broadly to include a range of economic and social rights (DESAI; MURALIDHAR, 2000; INDIA, *Bandhua Mukti Morcha vs. Union of India*, 1984). In its first social rights case in 1980, the Indian Supreme Court ordered a municipality to fulfil its statutory duties to provide water, sanitation and drainage systems (INDIA, *Municipal Council Ratlam vs. Vardhichand and others*, 1980). However, the Supreme Court's decisions and orders have at times been markedly conservative, particularly as regards labour, housing and land rights, creating a certain level of ambivalence over the Indian experience (MURALIDHAR, 2008; SHANKA; MEHTA, 2008).

Later judgments from South Africa's Constitutional Court have captured international attention due to the clarity of the judicial reasoning and reliance on explicit constitutional rights. In the pioneer case of *Grootboom,* a group of residents who were living on the edge of a sportsfield filed a claim that their right to housing was being violated. The Court found that the government authorities had failed take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realisation of the right to housing as its programmes neglected to provide emergency relief for those without access to basic shelter (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000). In subsequent decisions, this Court alone has ordered the roll-out of a programme to prevent mother-to-child transmission of HIV/AIDS (SOUTH AFRICA, *Minister of Health and Others vs. Treatment Action Campaign and Others*, 2002), found the exclusion of migrants from social security benefits unconstitutional (SOUTH AFRICA, *Mahlaule vs. Minister of Social Development*, *Khosa vs. Minister of Social Development*, 2004a) and, surpassing the timid Indian jurisprudence on urban evictions, made relatively concrete orders in six different cases to prevent urban displacement or access to resettlement (SOUTH AFRICA, *Port Elizabeth vs. Various Occupiers*, 2004b; *Jaftha vs. Schoeman and others*, 2005b; *President of RSA and Another vs. Modderklip Boerdery (Pty) Ltd and Others*, 2005c; *Van Rooyen vs. Stoltz and others*, 2005a; *Occupiers of 51 Olivia Road, Berea Township And Or. vs. City of Johannesburg and Others*, 2008). At the same time, a number of decisions such as *Mazibuko* on the right to water (SOUTH AFRICA, *City of Johannesburg and Others vs. Lindiwe Mazibuko and Others Case*, 2009) give support to critics who say the Court's reasonableness approach is too thin on positive obligations and excessively deferential to the State (PIETERSE, 2007).

These Indian and South African experiences are symbolic of a wider and contemporary trend with the acceleration of litigation in Latin America and South Asia and to a lesser degree in Europe, North America, the Philippines and some African countries (COOMANS, 2006; GARGARELLA; DOMINGO; ROUX, 2006; LANGFORD, 2008b; ICJ, 2007; ODINDO, 2005; MUBANGIZI, 2006).

To pick out one of these jurisdictions, the Constitutional Court in Colombia has used the *tutela* procedure to issue thousands of decisions to ensure immediate access to medicines for people living with HIV/AIDS, social security for indigent persons and food subsidies for poor and unemployed pregnant women (SEPÚLVEDA, 2008). The Court also developed the doctrine of an 'unconstitutional state of affairs' to address systemic violations of economic and social rights, such as those involving internally displaced persons or a dysfunctional health system (YAMIN; PARRA-VERA, 2000).

While the focus of this paper is on domestic adjudication, the international dimension should not be ignored. International and regional mechanisms have been utilised in this field and the jurisprudence of these bodies has shaped domestic interpretation of ESC rights (BADERIN, 2007; LANGFORD, 2008b). For example, the decision of the European Committee on Social Rights on exploitative child labour in *International Commission of Jurists vs. Portugal* has had a significant impact on Portuguese law and practice (EUROPEAN COMMITTEE ON SOCIAL RIGHTS, *ICJ vs. Portugal*, 1999). The findings in *SERAC vs. Nigeria* by the African Commission on Human and Peoples Rights are notable for their articulation of African States' obligations concerning ESC rights and, while largely unimplemented, it has provided a key guiding standard for the continent and follow-up litigation in Nigeria (AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS, *Purohit and Moore vs. The Gambia*, 2003)[1]. Even the International Court of Justice has entered the arena, holding that the State of Israel had violated the ICESCR and the Convention on the Rights of the Child (CRC) by the construction of the 'security' fence and its associated regime (INTERNATIONAL COURT OF JUSTICE, 2004). Beyond international human rights mechanisms, there has been growing civil society intervention in international investment arbitration disputes together with a use of the World Bank Inspection Panel and OECD multinational enterprises complaints procedures despite their limited powers (PETERSON, 2009; CLARK; FOX; TREAKLE, 2003; CERNIC, 2008).

This sketch is not meant to paint a simple and rosy picture. A significant number of States, many from South-East Asia, Middle East and the West, have declined to constitutionalise the rights with justiciable effect. This is despite the UN Committee on Economic, Social and Cultural Rights (CESCR) boldly urging all States in this direction in its General Comment No. 9 and making specific recommendations to States, such as Canada, United Kingdom and China, in the course of periodic review (UNITED NATIONS, 1998; 2002; 2005; 2006). In other jurisdictions, philosophical objections to the justiciability of ESC rights persist even when justiciable rights are set out in a constitution. Ireland is a good example (NOLAN, 2008). In the *O'Reilly* case, later approved by the Irish Supreme Court, Justice Costello stated that "no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due" if it is to involve a distribution of public resources for the common good (IRELAND, *O'Reilly*, 1989). Eastern European courts have also displayed similar levels of conservatism or what could be seen as neo-judicial activism. I don't mean to suggest that democratic and institutional concerns over the role of the courts should be disregarded. In some cases or jurisdictions, the pendulum may have swung too far. Doctrines such as

separation of powers should set limits for courts but the question for many is where such lines should be drawn and whether jurisprudential, procedural and remedial innovations can assuage these apprehensions in practice.

This paper sets out to provide a largely socio-legal overview or state of play of ESC rights in domestic adjudication by asking a number of questions concerning its origins, content, impact and strategy. The paper partly takes a point of departure in issues that may be of particular relevance for legal practitioners and social movements and does not dwell at length on questions of legal or political theory. Section 2 seeks to identify some of the reasons behind the rise of the jurisprudence and what obstacles continue to confront advocates in many national jurisdictions. In Section 3, the trends in legal jurisprudence are categorically analysed while in Section 4 the emerging evidence of the impact of litigation is briefly discussed. Section 5 outlines some key lessons on litigation strategy, particularly as reported by advocates, and the last section of the paper casts an eye over some strategies that could be effective for movements and organisations in this field.

2 Explaining the rise of ESC rights adjudication

A common legal assumption is that the volume of adjudication is a function of the *legal landscape*. The ascendance of the jurisprudence is clearly correlated with the rise in the constitutionalization of ESC rights (SIMMONS, 2009), particularly in Latin America, Eastern Europe, Africa and to a lesser extent in the West. However, ESC rights jurisprudence has not always emerged evenly in these jurisdictions and it has also flowered in jurisdictions with a more restrictive approach to justiciability, for example South Asia.

A second articulation of a single theory is Charles Epp (1998, p. 2-3) who argued that the rise of court-based 'rights revolutions' (for all rights) was predicated on *civil society configuration*. He writes that "sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above". He points to the "deliberate, strategic organizing by rights advocates" which became possible because of the "support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers... and sources of financing." It is clear in the field of ESC rights that most precedent-setting and large-scale cases have been instigated by social movements, indigenous communities, women's and human rights organisations and groups working on the rights of children, migrants, minorities, persons with disabilities and people living with HIV/AIDS with a considerable degree of coordination and support. These new non-state actors have augmented the traditional trade union movement and have been generally more willing to use courts as a vehicle for social change. In some cases this movement is made up of 'leftists' moving towards more 'reformist rights-based models' (GARGARELLA; DOMINGO; ROUX, 2006) but it is equally populated by traditional civil and political rights organisations which have increasingly embraced social rights.

However, the explanatory power of this thesis is cast into doubt by cases such as Costa Rica. Litigation has mushroomed in the absence of any significant support structure for legal mobilisation (WILSON, 2009). In Latin America and South Asia,

numerous cases have been filed directly by individuals and small communities outside any legal mobilisation support structure. Thus, the use of adjudication to address violations of human rights, including ESC rights, cannot be explained by reference to a single factor. States with similar justiciable guarantees have experienced different trajectories (LANGFORD, 2008b) and Gauri and Brinks (2008, p. 14) point to the strategic calculation by the relevant actors: "Potential litigants, for example, evaluate their legal capabilities and the likely benefit of pressing a demand in the political arena instead (or indeed, of going to the market)".

For those who wish to identify the means by which social rights adjudication can be encouraged, it is important to understand the multiple drivers which have led to its success and failure. Obviously, ensuring the inclusion of constitutional and enforceable rights and a well-funded and organised civil society will heighten its likelihood but it is not decisive and the following two factors appear to be of equal importance.

The first is the *institutional configuration* of the legal system, particularly the availability of courts, their processes, the orientation of adjudicators and the existence of jurisprudence on civil and political rights. Many victims of violations have significant difficulties in simply accessing a court. This is particularly an acute problem in peri-urban areas and rural areas. A South African study found that only 1 per cent of farm dweller evictions cases involved a judicial procedure despite the constitutional provision that all evictions require a court order (SOCIAL SURVEYS AFRICA; NKUZI DEVELOPMENT ASSOCIATION, 2005). This access gap is compounded by a lack of affordable legal and dedicated legal assistance[2] and judicial corruption. In Cambodia, many have pointed out the futility of court-based strategies due to systemic corruption within the judiciary. Although it is notable that advocates are now experimenting with litigation in that country in the seeming absence of any other alternative remedies or strategies.

Other jurisdictions are characterised by complex and inflexible court processes, with high burden of proof requirements for applicants, an aversion to collective or public interest mechanisms or innovative fact-gathering or remedial procedures (ICJ, 2008). Some of these problems have been addressed. Courts in India, Pakistan, Bangladesh, Sri Lanka and Nepal as well as the Costa Rica and Colombia have developed public interest litigation procedures that more easily facilitate individual and collective claims; e.g., cases can be triggered with a simple application (even a postcard) and courts play a more active procedural role. Constitutions in Argentina, Hungary, Nigeria and elsewhere permit collective complaints while the Colombian Constitutional Court has developed a practice of drawing together similar cases if they believe there is an unconstitutional state of affairs. However, these courts have varied in their ability to cope with the increased workload. Colombian and Costa Rican courts have fared better than their Indian counterparts in processing tens of thousands of cases while the Pakistan Supreme Court tightened its admissibility procedures as a result. The International Commission of Jurists (2008) also note that in civil law systems, the State has procedural advantages over individual complainants. Others argue that traditional civil law systems may be better equipped than common law systems at providing individual applicants with urgent and basic relief. However, orders for immediate relief can allow courts to ignore other potential beneficiaries and resource constraints potentially creating broader

ethical, legal and institutional dilemmas (HOFFMAN; BENTES, 2008) unless done in a sophisticated manner (ROACH, 2008).

The orientation or preferences of judges is also decisive. Some take a teleological approach to interpreting ESC rights or standards while others have been remained 'conservative', even in the face of explicit justiciable rights. And a third group of courts seem simply unaware of the existence of human rights standards and jurisprudence. These differences often apply at the intra-national level; judges outside urban areas tend to be less familiar with human rights and are often more conservative. This orientation is not static. In a groundbreaking housing rights case in one country, the applicant and lawyer delivered a number of books on the topic to the judge's home address in advance which seems to have had some impact on the final decision (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000). Moreover, the judiciary is often striving to maintain their legitimacy vis-a-vis the State which often has the power of appointment and ensure they make rulings capable of implementation. Thus decisions in some cases can only be understood as part of the wider and historical dance between the different organs of the State (ROUX, 2009). This variable of judicial culture is also affected by wider understandings of the nature and scope of human rights. In those countries where ESC rights were not part of the founding constitutional mythology (which particular affects pre-1980 constitutions), these broader social discourses appear to play out in the court room.

Another institutional factor appears to be the presence of civil and political rights jurisprudence. Courts that are comfortable with general human rights legal reasoning and application are more likely to extend it into the field of ESC rights. Well-protected civil and political rights also help create some of the underlying conditions for social rights litigation such as freedom of expression, effective court processes and some attention to the enforcement of remedies. However, the reverse has also been true. Morka (2003) has pointed out that ESC rights litigation in Nigeria during the years of dictatorship was more acceptable than civil and political rights cases (MORKA, 2003, p. 113) and a similar phenomenon is now observable in China (TANG, 2007).

A final set of explanatory variables relate to the *level of realisation of socio-economic rights* within a States' maximum available resources. Judicial receptivity to social rights claims, particularly of a positive nature, is usually conditioned by clear evidence of State or private failure. Inhumane suffering in the face of the State unwillingness to fulfil its own legislation and policy has sparked much of the ground-breaking jurisprudence in countries such as South Africa, United States, India and Colombia but may be one reason why litigation has been infrequent in a State such as Norway. As Gauri and Brinks paradoxically note, in the field of socio-economic rights courts often act as "pro-majoritarian actors" in the sense that "Their actions narrow the gap between widely shared social belief and incomplete or inchoate policy preferences on the part of government, or between the behaviour of private firms and expressed political commitments" (GAURI; BRINKS, 2008, p. 28). Therefore, litigation which tackles long-standing and systemic failure may be accorded a greater chance of success when there has been a clear political ineptitude. A different but

complementary explanation would be that countries with very high levels of structural social inequality makes the possibility of effective use of representative mechanisms very difficult for marginalised groups and individuals. Courts, if they retain a strong degree of independence, may be less likely to excessively defer to elitist or majoritarian executives and legislatures in such circumstances.

3 Substantive legal and remedial achievements and conceptual barriers

Turning to the jurisprudence itself, we might note that one of its first 'achievements' has been that its cumulative weight has helped overturn two long-standing philosophical objections to the justiciability of ESC rights. These objections are well expressed by Vierdag who claimed, in a somewhat circular fashion, that: (1) *ESC rights were not legal rights* since they were not inherently justiciable; and (2) *ESC rights were not justiciable* since they involved issues of *policy not law*. In setting out the thesis, he provided the typical and ubiquitous example: "implementation of these provisions [in the ICESCR] is a political matter, not a matter of law" since a Court must engage in prioritisation of resources by "putting a person either in or out of a job, a house or school" (VIERDAG, 1978, p. 69).

These conceptual criticisms now carry less weight. Commentators such as Dennis and Stewart (2004, p. 462) concede that justiciability is possible even if they are not personally enamoured of it. This is because many judges have dismissed the first argument on the basis that the inclusion of ESC rights in constitutional bills of rights and international law means, ipso facto, that the rights are legal: as one court stated, "Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only … and the courts are constitutionally bound to ensure that they are protected and fulfilled". In addressing the law and policy divide expressed in the second objection, many courts have move beyond more abstract considerations to adopt or adapt existing legal principles in particular cases. The South African Constitutional Court thus invoked a classic common law gradualist approach and stated in *Grootboom*, "The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case" (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000).

Two other philosophical and legal objections are more persistent and arguably provide the basis for determining the limits or the shape of ESC rights adjudication. The first is the contention that adjudication is *democratically illegitimate,* a claim not necessarily confined to socio-economic rights (WALDRON, 2006; BELLAMY, 2008). Judicial review of human rights, particularly the striking down of legislation, remains controversial in some quarters. ESC rights have traditionally been viewed as additionally problematic on account that it requires the legislature and executive to legislate, spend or adopt particular spending and policy priorities. This concern with the implications for the doctrine of separation of powers, one species of the democratic concern, led one court to state that "if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general,

and ranking some areas of policy in priority to others, they would step beyond their appointed role" (IRELAND, *Sinnot*, Justice Hardimann, para. 375-377, 2001) [3].

The idea that democracy is threatened by human rights adjudication has been much debated in political science and legal theory and some arguments against this objection can be found in FABRE, 2000; GARGARELLA, 2006; BILCHITZ, 2007. The arguments often draw on traditional democratic theory (e.g., that judicial review of social rights complements parliamentary democracy by taking account of minorities and enables citizens and residents to effectively participate in democratic process due to adequate access to education and nutrition etc.), press substantive arguments (e.g., ESC rights need to be protected as fundamental rights on par with civil and political rights) or seek to highlight the distinctly legal and deliberative role of the judiciary (its accountability not policy-making function and its ability to provide a forum for individuals to engage with the State on basic rights in a more considered fashion). These considerations often appear, although with different results, in the jurisprudence. The Swiss Federal Court partly justified its derivation of a right to minimum subsistence from a range of civil and political rights on democratic and substantive grounds: "The guaranteeing of elementary human needs like food, clothing and shelter is the condition for human existence and development as such. It is at the same time an indispensable component of a constitutional, democratic polity" (SWITZERLAND, *V. vs. Einwohnergemeinde X. und Regierungsrat des Kantons,* para. 2(b), 1995). And it drew its legal borders narrowly, stating that they will only intervene if the State has first demonstrably failed to provide a minimum level of social assistance for an adequate standard of living and all persons residing within its territory (SWITZERLAND, *V. vs. Einwohnergemeinde X. und Regierungsrat des Kantons,* para. 2(b), 1995).

The second persistent objection is *institutional*; that adjudicators are not suited to the task since not only do they lack the requisite expertise and information on economic and social questions but they are not in a position to resolve the competing policy considerations and consequences that would flow from their decisions. These are of course real constraints. But it is arguable that they are largely relative and not absolute. Every area of law requires some level of specialist expertise and adjudicatory institutions have responded to the challenge of information by using specialist bodies and expert witnesses as well as accepting submissions from *amicus curiae* interventions, a phenomenon that has been embraced in ESC rights adjudication. Scott and Macklem (1992) thus treat this problem in a positive light arguing that social rights adjudication plays a valuable function in bringing forth information into the public domain that may not be traditionally available to legislature – concrete violations of rights, particularly of marginalised groups. Horowitz (1977) argues that the force of this argument is partly blunted by the fact that courts tended to be backward-looking as well, in terms of using precedents as existing evidence.

The seemingly real challenge is the 'polycentric' dilemma as termed by Lon Fuller (1979), who argued that the judiciary cannot and should not deal with situations in which there are complex repercussions beyond the parties and factual situation before the court. Critics of social rights adjudication typically fear that a decision providing more funding to housing, for example, could imperil funding for health or the police

(VIERDAG, 1978). The problem with this argument is that almost every area of adjudication involves polycentric questions (KING, 2008). However, this objection has led to judicial innovation as opposed to either activism or resignation. The first is to keep close to clearly defined legal principles such as reasonableness or to adapt procedure and remedies (CHAYES, 1976; ROACH, 2008). For example, the order of the Canadian Supreme Court in *Eldridge vs. British Columbia*, which involved the provision of interpretive services to deaf patients in hospitals, provided 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.' (CANADA, *Eldridge vs. British Columbia*, 1997).

3.1 Removal and restrictions of rights

In some jurisdictions, many ESC rights cases have generally mirrored traditional civil and political rights claims. This has been the case in long-standing labour rights claims around union freedoms and unfair dismissals although courts have increasingly reviewed legislation in this area. In *Aquino*, the Supreme Court of Argentina struck down a 1995 law which severely circumscribed compensation for employment injury on the basis that it would violate a wide range of international standards, including the ICESCR (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 2004). More recently, there has been a significant increase in cases concerning denial of access to health care, education and social security, forced evictions and removal of basic services or interference with the exercise of cultural rights, particularly of indigenous peoples (see overview in LANGFORD, 2008b). In many cases courts are requiring both substantive justification and procedural due process before vital social and economic interests are affected. For example, the Colombian Constitutional Court halted exploitation of natural resources on indigenous territories on the basis of violations of rights of indigenous peoples to ancestral territories as well as rights to ethnic and cultural diversity and cultural identity (SEPÚLVEDA, 2008, p. 158). Some cases have involved a direct overlap with civil and political rights. The Supreme Court of Bangladesh (BANGLADESH, *Bangladesh Society for the Enforcement of Human Rights and Others vs. Government of Bangladesh and Others*, 2000) has ruled that the forced eviction of a large number of sex workers and their children violated their right to life, which included the right to livelihood and their right to be protected against forcible search and seizure of their home.

While these cases may appear conceptually straightforward, it is notable that they challenge powerful interests in terms of state authority and economic expectation. The result is that the jurisprudence is not always consistent. The *Narmada Dam* case in India is a good example of court being reluctant to enforce its own order for the provision of compensation or alternative likelihoods to those who have been displaced (INDIA, *Narmada Bachao Andolan vs. Union of India*, 2000). The jurisprudence also seems to be affected by two other factors. The first is the character of the complainants. If violations affect groups that are considered illegal under national law – for example, people living and working in the informal economy – then the

response of the judiciary in some countries can sometimes be less sympathetic while in other countries it may be the reverse if this group is viewed by the courts and society as being in greater need of protection. Second, and relatedly, it is noticeable that where ESC rights are explicitly incorporated in the constitution, the nature of orders are sometimes more firm. In South Asian jurisprudence, alternative accommodation in the case of forced eviction has often been framed as a remedial recommendation (INDIA, *Olga Tellis vs. Bombay Municipal Corporation*, 1985) but in a series of cases in South Africa, where the right to housing and protection against forced eviction are constitutionally recognised, courts have required higher levels of justification for eviction and creation of homelessness (SOUTH AFRICA, *Port Elizabeth vs. Various Occupiers*, 2004b): "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" Therefore, litigation strategy will need to take account of the balance of power, law and prevailing moral norms which can significantly sway middle class and conservative judiciaries.

These substantive and procedural tests are being adopted to protect not only the assets, resources, positions and organising space of individuals, communities and associations but the maintenance of government programmes and services. At the international level, this type of case is commonly categorised as a 'retrogressive measure' and requires explicit consideration of the available resources of a state in addition to other substantial and procedural considerations (UNITED NATIONS. 1990). In Portugal, the government decision to remove the National Health Service and increase the qualifying age of a minimum income benefit was found to be retrogressive, violating the right to health and social security respectively (PORTUGAL, *Decision (Acórdão) nº39/84*, 1984a; *Decision (Acórdão) nº 509/2002*, 1984b). However, such cases are not numerous and it is important to explore why this is the case: is it the problem of having 'ample proof' in a short and often politically charged time period? Is it that courts are more likely to provide governments significant deference if claims are made that a country has entered recession for example or needs to try a new economic model? Or is it that advocates are only beginning to move into this area? Witness the recent creative argument in the South African case of *Florence Mahlangu vs. The Minister For Social Development* where advocates argued that the failure to extend a child grant to 15-18 year olds violated the principle of progressive realisation.

3.2 Restraining the power of private actors

ESC rights litigation has increasingly tackled the actions of non-State actors, from multinational corporations[4] to new service providers under public-private partnerships through to family members and traditional leaders. The human rights legal framework is obviously heavily State-centric but some constitutions and laws provide for complaints to be made directly against private actors while some adjudicatory bodies have focused on the State's role of protection. In relation to the former, many cases concern the right to work where the role of private actors is significant in

market economies. The Colombian Constitutional Court found that this right was violated by an employer who dismissed an employee after being tested HIV-positive and payment of compensation was ordered (COLOMBIA, *SU-256*, 1996). In *Slaight Communications*, the Canadian Supreme Court held that the decision of a private labour arbitrator must be in conformity with the Canadian Charter, which is to be interpreted as far as possible with rights contained in the ICESCR (CANADA, *Slaight Communications Inc. vs. Davidson*, 1989). In *Vishaka vs. State of Rajasthan,* a case concerning sexual harassment at the work place, the Indian judiciary drew on CEDAW to develop binding guidelines which would remain in force till such time the Parliament enacted an appropriate law (INDIA, *Vishaka and others vs. State of Rajasthan and others*, 1997).

With regard to the latter form, the obligation to protect, we can find examples such as the first complaint decided by the Committee on the Elimination of Discrimination Against Women. In *A.T. v Hungary* (UNITED NATIONS, 2003), the Committee made extensive recommendations in a case concerning domestic violence including reform of legislation and provision of social and housing support services. In *Maya Indigenous Communities*, the Inter-American Commission (IACHR) found Belize had violated the equality and property rights of Maya people by granting logging and mining concessions without their consent and any consultation process (IACHR, *Maya Indigenous Communities of the Toledo District vs. Belize*, 2005). In *Tatad vs. Secretary of the Department of Energy*, the Philippines Supreme Court struck down a deregulation law that would have permitted the three major oil companies to avoid seeking permission of the regulator to increase prices. Citing the right to electricity, the Court warned that higher oil prices threaten to "multiply the number of our people with bent backs and begging bowls", with the Court declaring that it could not "shirk its duty of striking down a law that offends the constitution" despite the law constituting an "economic decision of Congress" (PHILIPPINES, *Tatad vs. Secretary of the Department of Energy*, 1997). The Court pointed out though the way in which the Government could achieve the same result through legislative amendment, which it promptly did.

However, numerous obstacles exist in this area. First, horizontal-based litigation tends to be contractual and tort-based, which may be sufficient, but only occasionally are constitutional or statutory ESC rights norms (e.g., discrimination law) used to ensure that such laws or principles always protect human rights. Second, privatisation processes seemed to be challenged less frequently than imagined although one can now point to additional cases in Egypt and Sri Lanka, where privatisation of health and water services has been halted partly on account of litigation (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 2004). This may be explained by the speed and secrecy with which these processes move and the difficulties in raising substantive arguments. Since human rights are generally viewed as neutral as to choice of economic system, one requires evidence that privatisation will harm economic and social rights, and this is usually only available after the event has happened. However, some movements and even governments have used more creative arguments loosely based on the obligation to protect to forestall privatisation through litigating for minimum standards that would make for-profit

provision difficult (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 2004) or challenging the process on participation and other procedural grounds (SOUTH AFRICA, *Nkonkobe Municipality vs. Water Services South Africa (PTY) Ltd & Ors*, 2001b).

Third, remedial orders can be more difficult to craft. In South Africa, evictions by landlords and property owners are increasingly being challenged on the basis that rights to housing are being violated but private actors complain that their right to property is not being respected and that housing rights obligations should fall on the State. The solution in a growing number of cases is to join the Government as a third party so that it is forced to explain progress in its housing programme and provide alternative accommodation in the event of an eviction (SOUTH AFRICA, *Blue Moonlight Properties 39 Pty (Ltd) vs. The Occupiers of Saratoga Avenue and the City of Johannesburg*, 2008) or, in one case, pay compensation to the property owner (SOUTH AFRICA, *President of RSA and Another vs. Modderklip Boerdery (Pty) Ltd and Other*, 2005c). Fourth, human rights protection is not always extended if the laws restrict duties to public actors. For example, the test for whether a private provider is a public authority in the United Kingdom, and hence falls under the Human Rights Act, has been conservatively interpreted (ENGLAND, *Donoghue vs. Poplar Housing and Regeneration Community Association Ltd*, 2002a). However, in the Canadian case of *Eldridge*, the Court found that hospitals, although non–governmental, were providing publicly funded healthcare services and delivering a comprehensive healthcare program on behalf of the Government, and were thus constrained by equality rights set out in the Canadian Charter (CANADA, *Eldridge vs. British Columbia*, 1997).

3.3 Compelling State action to fulfil the rights

As discussed, the idea of a court ordering States or other actors to take positive action has been at the heart of the controversy over the justiciability of ESC rights. The emerging legal jurisprudence has provided a range of practical responses to these dilemmas, largely mirroring a move within civil and political rights to embrace positive obligations (EUROPEAN COURT OF HUMAN RIGHTS, *Airey vs. Ireland*, 1979). In broad brush terms, many adjudicators have tended to enforce some or all of the two key State obligations identified by the CESCR in General Comment No. 3 (UNITED NATIONS, 1990) [5]. These are the duty to *take adequate steps* towards the progressive realisation of the rights within available resources and the duty to immediately achieve of a *minimum level* of the right, with the state bearing the burden of proof if it claims the latter cannot be achieved on account of deficient resources.

Colombia is an example of a jurisdiction that has adopted and enforced both. The Constitutional Court has recognised that obligations concerning ESC rights are progressive in character (COLOMBIA, *SU-111/97*, 1997) but has stressed that the State at the very least 'must devise and adopt a plan of action for the implementation of the rights' (COLOMBIA, *T-595/02*, 2002; *T-025/04*, 2004). Equally, and far more often, the Court together with lower courts makes orders under its *tutela* procedure for immediate enforcement of 'minimum conditions for dignified life' for an individual, which is based on the right to life, dignity and security and increasingly in connection

with ESC rights. This dualistic approach is evident in Finland, where authorities have been faulted for failing to *take sufficient steps* to secure employment for a job seeker and *immediately provide* child-care for a family (FINLAND, *Employment Act Case*, 1997; *Child-Care Services Case*, 1999; *Medical Aids Case*, 2000)[6]. The New York state courts have both struck down the design of school financing on the grounds that it fails to provide adequate education and found 'a positive duty upon the state' to provide welfare payments to anyone considered indigent under the state's 'need standard' (UNITED STATES OF AMERICA, *Tucker vs. Toia*, 1997).

Other courts have taken only one of these paths. The South African Constitutional Court has opted only for the former, in the form of a reasonableness test, and rejected the idea of immediate enforcement of a minimum core (BILCHITZ, 2002, p. 484; BILCHITZ, 2003, p. 1; LIEBENBERG, 2005, p. 73). The apex courts of Hungary and Switzerland have taken the reverse position. They have largely declined to accept any role in examining whether the Government has sufficiently taken steps to realise constitutional social rights – the former merely requiring that such a law or programme exist (HUNGARY, *Decision 772/B/1990/AB*, 1991) - and they instead only look to whether a minimum of the right is met (HUNGARY, *Decision 32/1998 (VI.25) AB*; *Decision No. 42/2000*). Interestingly, this minimum core approach is particularly evident in jurisdictions where social interests are judicially protected through civil rights and have thus drawn on the German doctrine of a *Existenzminimum* (HUNGARY, *Case No. 42/2000 (XI.8)*, 2000; GERMANY, *BverfGE 40, 121 (133)*, 1975; IACHR COURT, *Five Pensioners' Case vs. Peru*, 2003; SWITZERLAND, *V. vs. Einwohrnergemeine X und Regierunsgrat des Kantons Bern*, 1995).

In most jurisdictions, concerns over democratic legitimacy and institutional competency appear to shape many judgments. In some cases, courts use these markers to develop a seemingly coherent doctrine that can be applied in different cases – the Colombian and South African courts providing different sets of criteria for their respective tests. At the same time, one can also observe the arbitrary use of these concerns by courts to dismiss difficult cases and avoid a proper accounting of the relevant obligations and how they apply in a particular case (COURTIS, 2008, p. 175). It is thus difficult to predict sometimes where a court will draw line, particularly in cases which involve allocation of resources. However, the jurisprudence suggests that Courts are more likely to intrude in such cases according to the (1) *seriousness* of the effects of the violation; (2) *precision* of the government duty; (3) *contribution* of the government to the violation; and (4) *manageability* of the order for the government in terms of resources (LANGFORD, 2005, p. 89).

It is also important to recognise that some of the required action may simply involve recognition of underlying rights, such as requiring States to recognise and protect land tenure or labour rights (EIDE, 1995, p. 89). The Inter-American Court of Human Rights (IACHR COURT) found that Nicaragua had violated the right to judicial protection under Article 25 of the Inter-American Convention on Human Rights by failing to legislate and ensure that the lands of Indigenous peoples were demarcated and titled (IACHR COURT, *The Mayagna (Sumo) Indigenous Community of Awas Tinga v. Nicaragua,* 2001; EUROPEAN COMITTEE ON

SOCIAL RIGHTS, *ICJ v. Portugal*, 1999; CANADA, *Dunmore vs. Ontario (Attorney General)*, 2001a). In the *Vishaka* case discussed above, the Indian Supreme Court issued binding guidelines on sexual harassment (INDIA, *Vishaka and others vs. State of Rajasthan and others*, 1997). However, broad-ranging orders for positive recognition of underlying rights from domestic courts tend to be rare given the concern that they may be intruding on the policy domain of the legislature. In many cases, the positive recognition tends to be more context specific – for example recognising tenure rights of marginalised communities. Even a Court like the Hungarian Constitutional Court which has the explicit power to find a 'failure to legislate' has not used it. However, courts in India and Colombia have not been shy in making sweeping orders where they have found systematic violations.

3.4 Equality rights

The invocation of equality rights in the field of ESC rights has a long pedigree in cases such as *Brown vs. Board of Education* (UNITED STATES OF AMERICA, *Brown vs. Board of Educati*on, 1954) and anti-discrimination legislation. In other jurisdictions, the phenomenon is more recent. The jurisprudence covers a wide range of prohibited grounds to include not only the express characteristics mentioned in international instruments (i.e., race and colour, sex, language, religion, national or social origin, property, birth) to include others such as age, disability, nationality, sexual orientation[7]. For example, the Court of Appeal of Versailles, France, annulled a provision of a collective agreement between labour and management on the grounds that it prohibited the recruitment of people after the age of thirty five (FRANCE, *Recueil Dalloz*, 1985). There is of course a danger, as the UN Human Rights Committee implicitly suggests, in placing too much emphasis on finding the specific suspect grounds as opposed to looking for the arbitrariness of the classification (UNITED NATIONS HUMAN RIGHTS COMMITTEE, *Karel Des Fours Walderode vs. the Czech Republic*, 2001). The use of 'comparators' in many national courts may not always be appropriate in the case of ESC rights, and they can be particularly difficult to find in cases of structural-based segregration of different groups or discrimination against women on the basis of pregnancy.

Most cases have involved direct discrimination but there are a number where indirect discrimination on the basis of prohibited grounds has been found (JAYAWICKRAMA, 2002). Bulgarian courts, for instance, have held that the predominant placement of Romani children in schools for children with disabilities amounted to racial discrimination (EUROPEAN ROMA RIGHTS CENTRE, 2005) and the European Court of Human Rights held the same against Czech Republic (EUROPEAN COURT OF HUMAN RIGHTS, *D.H. and Others vs. Czech Republic*, 2008). In *Kearney vs. Bramlea Ltd,* the use of income criteria to assess tenant applicants was found to be unjustified (on the basis that it took no account of a person's real willingness and ability to pay) and constituted discrimination on a number of grounds, including race, sex, marital status, age and receipt of public assistance since it disproportionately affected those groups (CANADA, *Shelter Corporation vs. Ontario Human Rights Commission,* 2001b).

The question of whether equality rights or guarantees possess a substantive character and contain positive obligations to eliminate discrimination has exercised the attention of some courts. In Pakistan, the Supreme Court has enunciated the principle quite boldly during a flowering of public interest litigation. In *Fazal Jan vs. Roshua Din*, they held that the constitutional right to equality imposed positive obligations on all State organs to take active measures to safeguard the interests of women and children (PAKISTAN, *Fazal Jan vs. Roshua Din*, 1990). In Canada, the Supreme Court rejected the British Columbian provincial government's arguments that the right to equality did not require governments to allocate resources in healthcare in order to address pre-existing disadvantages of particular groups such as the deaf and hard of hearing (CANADA, *Eldridge vs. British Columbia*, 1997, para. 87). Brazilian courts have held that the right to health of children requires a higher level of prioritisation and that to "submit a child or adolescent in a waiting list in order to attend others is the same as to legalise the most violent aggression of the principle of equality" (BRAZIL, *Resp 577836*, 2003). However, other courts, for example in South Africa and Hungary, have been cooler to the idea of prioritising children's rights in the socio-economic arena.

One continuing quandary is whether adjudicatory bodies can 'equalise down' in order to achieve equality in respect of a social interest or right. In Canada, the Supreme Court has issued positive remedial orders in equality rights cases, extending or increasing social assistance, pension benefits and security of tenure. But it has not ruled out the possibility that it can equalise down. In *Khosa vs. Minister of Social Development* (SOUTH AFRICA, 2004a), the Constitutional Court of South Africa adopted a formula of equalising up and including permanent residents in social assistance schemes. However, the Court noted that the presence of the right to social security in the constitution was a factor in considering the unreasonableness of the exclusion of permanent residents, a factor not present in all constitutions.

3.5 Remedial achievements

A significant accomplishment in the field has been to open up the remedial perspective beyond traditional private law remedies such as compensation, restitution and declarations of invalidity or wrongdoing. A number of trends can be observed. First, some courts have issued orders requiring States to follow a course of action in remedying a wrong, occasionally with supervisory jurisdiction. In Argentina, courts were deeply involved in ensuring that the authorities complied with their plan and budget to provide a vaccine against "Argentine Hemorrhagic Fever" which threatened 3.5 million residents (FAIRSTEIN, 2005; ARGENTINA, *Viceconte, Mariela vs. Estado nacional - Ministerio de Salud y Acción Social s/amparo ley 16.986,* 1998). Surveying the emerging jurisprudence, Roach and Budlender (2005) argue that courts tend to take this course of action when authorities or other defendants are *unwilling* or *unable* to implement orders. In many ways, the US Supreme Court's innovative remedial orders in *Brown vs. Board of Education II*, which concerned desegregation of schooling, (UNITED STATES OF AMERICA, 1955) have been recognised as a forerunner of this new remedial space (CHAYES, 1976, p. 1281).

Second, there has been the development of more 'dialogic' and 'interim' remedies. One example is the increased use of a *delayed* declaration of invalidity where courts find a violation but delay the effect of the order so as to allow the government time to find a method to remedy the legislative or policy defect (CANADA, *Eldridge vs. British Columbia,* 1997). The Nepal Supreme Court in *Mira Dhungana vs. Ministry of Law* declined to declare unconstitutional a law which gave a son a share of his father's property from birth but not a daughter (at least until she was 35 and remained unmarried) and instead required the State within one year to review the legislation after consulting with interested parties, including women's organisations. This dialogic aspect is also evident in the increased use by courts (and much earlier by international bodies) of the adjudicatory space as a place for dialogue with parties, including urging them to find solutions before a judgment is given (SOUTH AFRICA, *Occupiers of 51 Olivia Road, Berea Township And Or. vs. City of Johannesburg and Others*, 2008). Another strategy is recommendations. For instance, Indian and Bangladeshi courts have sometimes adopted this approach instead of making orders for alternative accommodation in the case of forced evictions, but this has been criticised for depriving applicants of any relief in practice (BANGLADESH, *Ain o Salish Kendra and others (ASK) vs. Government and Bangladesh and others*, 2001). More dexterous approaches can be seen by those adjudicatory bodies that have used two-track remedies. The Indian Supreme Court in cases on environmental health and food rights have issued continuing series of interim orders before they come to any final order. For instance, authorities were forced to report back on orders that the court made for extending and efficiently implementing food ration schemes (INDIA, *People's Union for Civil Liberties vs. Union of India,* 2001; INDIA, *People's Union for Civil Liberties vs. Union of India,* 2004). Careful use of interim orders can be one way to avoid critique that more systematic orders of courts provide nothing for victims in the short-term (ROACH, 2008, p. 46).

Third, advocates have been creative in securing follow-up orders for ensuring remedies are implemented. In Argentina, India and South Africa, advocates have used criminal and contempt proceedings to ensure compliance with decisions (HEYWOOD, 2003, p. 7; SWART, 2005, p. 215). In one South African case, a judge ordered that a Minister be arrested if the police did not restore an informal settlement within 24 hours after earlier demolishing it. In India, the Supreme Court threatened contempt of court proceedings if a schedule for conversion of motor vehicles to cleaner fuels was not complied with (INDIA, *M.C. Mehta vs. Union of India,* 1998).

4 Achieving impact?

One of the strongest objections to ESC rights adjudication is that it cannot fulfil the expectations of delivering individual and transformative social justice. These instrumental critiques vary in nature and many are equally applicable to civil and political rights litigation. Some point to the weakness of courts in enforcing their judgments – and every jurisdiction seems to have at least one notable case that falls in this category. Other critiques are more political in nature – with claims that litigation can distract attention from building new coalitions for social change and that the middle

classes are more adept and successful at using the courts to enforce ESC rights than the poor (BELLAMY, 2008; ROSENBERG, 1991). Determining the actual impact of litigation in practice is a complex exercise as it is dependent on the selection of the benchmark for success, the isolation of different causes and comparison with alternative strategies. This methodological challenge has resulted in vastly differing conclusions for the same case. Rosenberg (1991) measured the impact of US Supreme Court judgments by determining whether they met the expectations expressed in the public statements of lawyers before a case, which Feeley (1992, p. 745) found to be unreasonable on the basis that the real expectations of the applicants may have been more modest.

In response to this critique, three things can be said. First, there is emerging evidence that many, but certainly not all, cases have had a direct and indirect impact, such as setting judicial precedents, influencing legal and policy developments, catalysing social movements and raising awareness and even in the event of a loss, demonstrating the lack of legal protection (LANGFORD, 2008b). In an quantitative study of five developing countries, Gauri and Brinks (2008) were "impressed by what courts have been able to achieve" summarising that "legalizing demand for SE [socioeconomic] rights might well have averted thousands of deaths" and "enriched the lives of millions of others". Cases can certainly be found which give credence to the critics. The recent *Chaoulli* decision in Canada on the right to access private health insurance. is perhaps one example of this and one notices a greater prevalence of stronger positive orders in cases that include the middle class as beneficiaries. However, it is possible to point to a large number of decisions which have been made in defiance of middle class property owners (SOUTH AFRICA, *Minister of Public Works vs. Kyalami Ridge Environmental Association*, 2001*;* SOUTH AFRICA, *Blue Moonlight Properties 39 Pty (Ltd) vs. The Occupiers of Saratoga Avenue and the City of Johannesburg,* 2008) or those which involve broad coalitions of different groups – often in the area of health and education where the need for or existence of universal policies assists the process of coalition-building.

It is important to point out that it is not always a judicial order that leads to impact – in some cases it is the threat of or the commencement of litigation that triggers a change in policy or the reaching of a settlement. Even if they don't appear on the formal record, these cases need to be brought into the equation. In the case of Nigeria where judgments can take decades to be delivered, Felix Morka (2003) records that social rights litigation was used as a community mobilisation tool and a platform for making initial contact and negotiating with Government and powerful non-State actors, such as multinational oil companies who have been otherwise impervious to dialogue.

Second, in considering impact, one needs to consider unintended consequences, both positive and negative. Initial high profile cases in Argentina and South Africa were only partly implemented but significantly advanced the law or legal culture, providing the building blocks for more successful litigation in the future. Other results can be negative and Rosenberg (1991) points to the complacency in policy advocacy that successful court decisions can bring while Williams (2005) and Scheingold (2004) note the increasing backlash by conservative groups in the United States to the use of progressive rights-claiming strategies. Too many losses for a government

can also make courts more vulnerable to both political pressure and pro-executive judicial appointments, as the Hungarian experience demonstrates.

Third, in thinking about impact, one should ask where does the fault lie where no substantive impact can be found. Was it litigation or the context? In other words, in critiquing litigation, one needs to consider whether alternative strategies were available, such as mobilisation, lobbying or negotiation, or whether adjudication was really just the last and final resort for the victims. Or can the blame for a poor judgment or implementation be really placed at the feet of the adjudicatory system if the litigants and advocates made key errors in their legal and non-legal strategies?

5 Lessons learned on litigation strategy

The rise of ESC rights litigation together with its practical successes and failures has led to a growing reflection on effective strategy (see ICJ, 2008; GARGARELLA; DOMINGO; ROUX, 2006; LANGFORD, 2003). We can summarise a number of them as follows:

5.1 Broader advocacy strategy - social movements and communities

Many view the presence of 'broader advocacy' as critical, particularly for cases that involve public interest or marginalised groups. Social mobilisation, community organisation, awareness and media campaigns, and political lobbying, are thus seen as indispensable for successful litigation. It provides ownership of the strategy, supports the preparation of evidence, provides wider legitimacy to the claim and helps ensure that orders or settlement agreements are implemented. There are a significant number of cases where large-scale movements were mobilised behind cases, such as the social benefits cases in Hungary the *TAC* case in South Africa and the right to education cases in Kentucky, Texas and New York. Although, some have been less successful even when hewing to this model, such as the Narmada dam case in India.

However, it is important to avoid dogmatism on this point. High-profile campaigns may be less helpful if the litigants have been victims of deeply held community prejudices. The quiet nature of court proceedings may allow such individuals to more effectively assert their rights and permit indecisive governments to defer to the courts in order to make unpopular decisions. In other cases, one can observe that social movements have been born out of successful judgments, such as the right to food movement in India (MURALIDHAR, 2008).

Successful litigation strategies also tend to assign an important role to the claimants or victims, which is crucial for empowerment, arguable a long-term impact indicator in itself. In Canada, the Charter Committee on Poverty Issues developed a model of accountable litigation, whereby low-income representatives sit on the committee's board. In India, one lawyer, after two decades of public interest litigation now refuses to take a case unless a community is directly involved. However, large-scale cases can raise particular difficulties in negotiating with clients. While legal firms in the USA, UK and Australia have developed management systems for such cases, the practice is comparatively rare.

5.2 Case and procedural selection

Many advocates advise incorporating long-term strategies in the selection of initial cases. For instance, it is suggested that it is better to begin with modest cases before moving to more ambitious ones. At the same time, under-ambitious cases can stultify the future development of the law. Three categories of case selection tend to be successful in the early stages: litigation that starts from claims resembling a traditional defence of civil and political rights, egregious violations or clear failures of governments to implement their own programmes; and modest claims that leave open the possibility for future development of jurisprudence. A second group of decisions revolve around the type of procedure to be used, particularly when there is a possibility of both individual and collective litigation. Some advocates and commentators legitimately warn against collective complaints since NGOs and lawyers may co-opt litigation strategy (PORTER, 2004) or it may remove the possibility of international remedies since individual remedies have not be exhausted (MELISH, 2006). However, collective procedures can be particularly useful when individual victims fear or are likely to be harassed for participating in the case or where victims are dispersed (FAIRSTEIN, 2005). One possible solution, which is used in some jurisdictions, is to include both individuals and organisations as litigants.

5.3 Legal, factual and remedial arguments

Successful cases are usually marked by close attention to quality legal arguments. However, the types of submissions tend to vary considerably between jurisdictions and it is obviously difficult to classify them precisely. For example, international human rights treaties and international and comparative jurisprudence have been particularly influential in some countries but less so elsewhere. Likewise, some cases have benefited from very narrow legal arguments while more expansive arguments have been crucial in others. Nonetheless, the fact that ESCR-Net's comparative case law database of a mere 100 cases registered 72,000 hits across the world within two years signals the strong and growing interest in comparative learning.

Organisations and movements that carry a more long-term vision tend not to rely solely on human rights norms alone but also devote sufficient energy to developing legislation that would enhance legal strategies. For example, housing rights groups in the US campaigned for a new federal law that provides a range of specific and concrete rights for homeless persons. This was then followed up by litigation for enforcement when it went unimplemented[8]. However, while this approach is usually the ideal, including from a political perspective, it may not always be available, particularly when groups are highly marginalised or there is little political will to implement existing legislation.

Some ESC rights cases raise complex evidential issues. One notable example is the *Kearney* case in Canada, where advocates quantitatively demonstrated that the minimum income criteria for the rental market was based on flawed assumptions – most low-income tenants could actually afford higher rents and maintain a low default ratio even in the face of economic difficulty. Properly defined and measured

statistics have thus sometimes been the deciding factor in a case. But others are beginning to raise concerns that some courts are placing too much emphasis on the development of quantitative evidence.

Weak or inappropriate remedies are often cited by advocates as a key obstacle in securing implementation of successful decisions. While it may be stating the obvious, developing a careful strategy for remedies should accompany the decision to litigate, and inform wider campaigning and the way in which the case is shaped. While courts appear willing to provide remedies that match the violations, ensuring court supervision of the orders can be critical in guaranteeing the effectiveness of the orders. Decisions in environment cases in India and school segregation cases in the US have taken years to implement and have required constant recourse to the courts.

5.4 Preparing for enforcement

A seeming weakness in many legal strategies is that there is no preparation to enforce a successful settlement or adjudicatory decision. As noted above, a wider advocacy strategy and mobilisation can ensure there are financial, human and technical resources and a will 'beyond lawyers' to implement decisions. Advocates frequently note that implementation can take as much, if not more, work as obtaining an order in the first place. It may also take skills which are beyond the claimants and the parties, necessitating the deployment of mediating individuals or community workers. Claimants and advocates therefore need to plan the follow-up from the beginning and be supported by sufficient resources for this role.

6 Conclusion

This comparative survey of ESC rights adjudication reveals a field in flux between nascence and maturity. For many states in the world, ESC rights litigation remains a small and insignificant part of the landscapes of human rights, social justice campaigning and jurisprudence. However, in a context of poverty and social inequality, the combination of rights awareness, the spread of litigation strategies and the increasing independence of the judiciary has lead to ESC rights litigation in countries as diverse as China, Egypt, Namibia and the United States. In the not insignificant minority of jurisdictions, a certain level of maturity is being reached in both jurisprudence and debates over appropriate litigation strategy even if there is not uniformity amongst all actors involved particularly over legal doctrine or enforcement.

In historical perspective it is noteworthy that many of the traditional assumptions concerning ESC rights as non-legal and non-justiciable have been rendered doubtful in a short period of time. Domestic courts have made orders across the spectrum of obligations of States to realise ESC rights, from the prevention of harm, to the finding of discrimination to orders to ensure access to basic services and medicines. This jurisprudence does not dispense with objections that ESC rights adjudication is democratically illegitimate or institutionally fraught with complexity but it provides a more grounded context for these debates and their judicial resolution.

For those who wish to encourage the development of ESC rights adjudication as

a field of both law and practice, the key is to build on both the causes of jurisprudential developments and the lessons learned in ensuring successful litigation. It means ensuring there is awareness of many under-utilised justiciable avenues, undertaking the long struggle of improving them elsewhere, building national and transnational alliances with different human rights groups, social movements and communities and focusing on cases which are concrete, burning and reveal political failure. It demands wisdom in avoiding excessive or overly ambitious use of the courts that demobilise the possibilities of political action or gradual development of jurisprudence and at the same time robustly exercising the fundamental human right to a remedy and ensuring that ESC rights become embedded in legal jurisprudence and by extension the political and policy space of nation-States.

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NOTES

1. For example, in *Gbemre vs. Shell Petroelum and Others* (NIGERIA, 2005) the Nigerian High Court cited the earlier finding by the African Commission on Human and Peoples Rights in *SERAC vs. Nigeria* and ordered the halting of gas flaring by oil companies on the basis that it violated the Iwherekan community's right to life (including environmental health) and dignity.

2. While there has been an emerging recognition that legal aid is a human right in the field of ESC rights (GALOWITZ, 2006: DURBACH, 2008) securing it represents something of a lottery. Some countries have adopted legal aid policies that include non-criminal cases but re-allocation or increased funding does not always follow.

3. However, the Court's stance has more recently slightly softened (NOLAN, 2008).

4. Domestic challenges to the activities of large or transnational corporations have met with some success while attempts at transnational litigation (suing a multinational in their home state) have led to many settlements but no judgments (JOSEPH, 2008).

5. Although the difference between them is not always easy to discern (FINLAND, Child-Care Services Case, 1999).

6. For English summaries of a wide range of cases see <www.nordichumanrights.net/tema/tema3/caselaw/>.

7. This trend is also evident in international jurisprudence on the ground of 'other status' (UNITED NATIONS, 2009).

8. See http://www.nlchp.org/about_us.cfm. Last accessed on: 19 October, 2009.

RESUMOS

Do ponto de vista histórico, pode-se considerar notável a importância recentemente adquirida pelos direitos econômicos, sociais e culturais (ESC) na jurisprudência comparada e nas estratégias de litígio. Vislumbra-se hoje um processo, ao mesmo tempo, de ampliação e aprofundamento da exigibilidade destes direitos perante tribunais nacionais, o que, embora antes tenha se restringido a uma parcela pequena de jurisdições, hoje pode ser constatado em diversos países de todas as regiões e sistemas jurídicos do mundo. Embora esta tendência nos leve a duvidar de pressupostos tradicionais acerca da não-justiciabilidade dos direitos ESC, ainda restam certas questões conceituais, instrumentais e empíricas a serem respondidas. Este artigo procura apresentar uma visão geral sobre as causas para estas mudanças de cunho socio-jurídico, sobre a natureza e o conteúdo da crescente jurisprudência acerca deste tema, sobre evidências empíricas e discussões referentes ao impacto desta jurisprudência, bem como sobre lições aprendidas a partir de estratégias efetivas de litígio. Por fim, conclui com sugestões para que se possa avançar nesta seara futuramente.

PALAVRAS-CHAVE

Direitos sociais – Justiciabilidade – Impacto – Litígio estratégico

RESUMEN

Desde una perspectiva histórica, el avance de los derechos económicos, sociales y culturales (DESC) en la jurisprudencia comparada y estrategias de litigio resulta notable. Ha habido una ampliación y profundización de la exigibilidad de estos derechos por vía de los tribunales nacionales, comenzando por un número reducido de jurisdicciones y extendiéndose a países de todas las regiones y sistemas jurídicos del mundo. Si bien esta tendencia arroja dudas sobre las suposiciones tradicionales acerca de la no justiciabilidad de los DESC, sigue habiendo interrogantes conceptuales, instrumentales y empíricos. Este trabajo intenta ofrecer un panorama general que incluye las causas subyacentes de este desarrollo socio-jurídico, el carácter y contenido de la jurisprudencia emergente, las pruebas empíricas y debates en torno al impacto y lecciones aprendidas a partir de las estrategias efectivas de litigio. Como conclusión se ofrecen algunas ideas sobre cómo podría desarrollarse este campo.

PALABRAS CLAVE

Justiciabilidad – Derechos sociales – Impacto – Litigio estratégico