1

The Justiciability of Social Rights: From Practice to Theory

Malcolm Langford*

1. INTRODUCTION

In the space of two decades, social rights[1] have emerged from the shadows and margins of human rights discourse and jurisprudence to claim an increasingly central place. In a significant number of jurisdictions, adjudicatory bodies have intervened to protect a wide range of social rights from intrusion and inaction by the State, and increasingly by non-State actors. The breadth of the decisions is vast. Courts have ordered the reconnection of water supplies, the halting of forced evictions, the provision of medical treatments, the reinstatement of social security benefits, the enrolment of poor children and minorities in schools, and the development and improvement of State programmes to address homelessness, endemic diseases and starvation. These are just a few examples of the almost two thousand judicial and quasi-judicial decisions from twenty-nine national and international jurisdictions which are described and critically analysed in this book.[2]

What is novel is not the adjudication of social interests. Domestic legislation in many countries provides a measure of judicially enforceable labour and social rights.[3] What is significant is that the more durable human rights dimensions of these social values or interests, whether captured in constitutions or international law, are being adjudicated. This is not to downplay the role of legislation from either a principled or pragmatic perspective. It is often more precise and contextualised and has the direct authoritative and democratic imprimatur of the legislature. But legislative rights are not always sufficient to protect human rights, and they are subject to amendment by a simple majority of the population.

The result is that we are now in a position to trace a pattern of judgments and decisions on social rights across the world. While social rights jurisprudence[4] is nascent, it cuts across common and civil law systems, developed and developing countries and regional groupings. The decisions

* Research Fellow, Norwegian Centre on Human Rights, University of Oslo. He would like to thank Andreas Føllesdal, Jeff A. King and Thorsten Kiefer for comments on this chapter.

[1] The term 'social rights' is principally used in this book since the overall focus is on human rights such as social security, health, education, housing, water and food. In some Chapters, authors analyse economic (i.e., labour rights) as well as cultural rights. Terminology also varies between the authors, where phrases such as socio-economic rights, social welfare rights or economic, social and cultural rights are sometimes preferred, particularly where this is the prevalent or relevant usage in the jurisdiction.

[2] The book is certainly not the first to deal with the area but is perhaps the most comprehensive. See also F. Coomans and F. van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (25–28 January 1995, Utrecht, SIM Special No. 18, Utrecht); F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia and Maastrict Centre for Human Rights, 2006); and R. Gargarella, P. Domingo and T. Roux (eds.); *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006). The incomplete nature of scholarship is perhaps most marked in N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002). While purporting to cover all human rights, a mere fraction of the publication is devoted to economic, social and cultural rights and major cases are absent from the discussion.

[3] Jeff King in his chapter on United Kingdom analyzes in some detail the case law emanating from legislative rights noting both strengths and weaknesses.

[4] For the purposes of this book, the phrase 'social rights jurisprudence' means jurisprudence that draws on human rights in international treaties or constitutions for the protection of social rights. In some cases, adjudication bodies have invoked civil or political rights but a social right also covers the interest protected.

have been made under the umbrella of both express social rights as well as 'traditional' civil and political rights. As an example of the latter, the European Court of Human Rights has determined that the civil right to respect for family life obliges governments to guarantee protection from industrial pollution,[5] prohibitively expensive divorce proceedings[6] and, in certain instances, homelessness.[7] Even a veteran civil and political right, the prohibition on cruel and degrading treatment, was read by the UN Committee Against Torture to proscribe the demolition of housing[8] and by a US court to prohibit arrest of homeless men for sleeping in public places.[9]

This burgeoning case law provides an opportunity for determining the progress (and quality) of the jurisprudence and the potential for future development and application of the law. The case law also has consequences for the long-standing philosophical debates over economic, social and cultural rights. It is arguable that one debate has been resolved, namely whether economic, social and cultural rights can be denied the status of human rights on the basis that they are not judicially enforceable[10] – there is now too much evidence to the contrary. Equally importantly, they provide some answer to the critique that adjudicatory bodies lack the democratic legitimacy and institutional capacity to enforce such rights. As we shall see, the cases indicate that a significant number of adjudicatory bodies have been able to craft legal principles and develop legal tools that navigate the contours of philosophical concerns, such as pronouncing on the allocation of budgetary resources or making direct 'policy'.

The focus in this book is on a large but not exhaustive bundle of social rights, particularly social security, housing, health care, education, food and water – whether generally or as relevant to women or a particular excluded group. However, the number of cases on right to food and water is comparatively less, which is partly explainable by the fact that food-related cases tend to be litigated under social security, land and labour rights while the right to water is comparatively new in recognition. A significant number of authors also address labour rights although fewer discuss cultural rights. Many of the chapters address emerging issues such as direct human rights obligations of private actors and access to legal aid for social rights as well as the influence of international law on the jurisprudence. The impact of the case law on poverty and discrimination and the challenges in using litigation as a tool to address social rights violations are also taken up.

The principal criterion for the selection of the jurisdictions was that a reasonably mature jurisprudence must exist. In some of the sixteen national jurisdictions, the judgments were not predominantly 'progressive' – apex courts in United States, France and Ireland have frequently been hostile to social rights. Obviously, more jurisdictions could have been added, particularly from Europe (e.g., Poland, Russia and Germany) and South-East Asia (the Philippines and Indonesia), but it was particularly difficult to include African jurisdictions beyond South Africa using the criteria for selection. Scattered decisions can be found on housing, land, education, health and labour rights in different African countries,[11] but a mature jurisprudence is some time away as the appropriate conditions for successful and sustained social

[5] *López Ostra v. Spain* (1995) 20 EHHR 277.
[6] *Airey v. Ireland* (1979) 2 EHRR 305.
[7] *Botta v. Italy* (1998) 26 EHHR 241.
[8] See UN Committee Against Torture, *Hijirizi et al v. Yugoslavia*, Communication No.161 (2000) and the following cases of the European Court of Human Rights: *Mentes and Others v. Turkey*, 58/1996/677/867 and *Selcuk and Asker v. Turkey*, 12/1997/796/998-999. The Court had earlier stated that the prohibition on torture, inhuman or degrading treatment or punishment included 'the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault': see *Ireland v. United Kingdom*, Report of 5 November 1969, Yearbook XII.
[9] *Pottinger & Ors v. City of Miami*, 810 F. Supp. 1551 (1992) (United States District Court for the Southern District of Florida).
[10] See generally on economic, social and cultural rights: P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9 (1987), pp. 156–229; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995); M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2002); and A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (The Hague, Martinus Nijhoff, 1995).
[11] See for example, International Commission of Jurists, Kenyan and Swedish Sections, *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa*, Vol. 1 (Nairobi: AHRAJ Case Book

rights litigation (discussed in the next Section) are only beginning to emerge in a number of African countries.

Adopting the same criteria, thirteen regional and international mechanisms were included which covers ten human rights courts and committees as well as the European Court of Justice, International Labour Organisation and World Bank Panel. The analysis covers individual and collective complaints as well as softer, but often influential jurisprudence, such as general comments and concluding observations on periodic State reports.[12] This jurisdictional analysis is complemented by specific chapters on cross-cutting topics, namely remedies, the right to legal aid in social rights litigation and multinational corporations.

This opening essay is devoted to four questions which seek to investigate the practice from historical, legal, philosophical and sociological perspectives. How do we explain the rapid and sudden increase in 'social rights jurisprudence'? What are the trends in the jurisprudence and are common judicial approaches emerging across jurisdictions? What are the consequences of the case law for the more philosophical debate on the justiciability of social rights and to what extent has it settled the debate or opened up new lines of inquiry? Lastly, do these cases indicate that litigation has the potential to concretely ensure the achievement of social rights? After addressing these questions in Sections 2–5, the Chapter concludes by drawing together the common themes and briefly analyses some of the opportunities and challenges in social rights litigation.

Series, 2007); O. Odindo, 'Litigation and Housing Rights in Kenya', in J. Squires, M. Langford, and B. Thiele (eds.), *Road to a Remedy: Current Issues in Litigation of Economic, Social and Cultural Rights* (Sydney, Australian Human Rights Centre and University of NSW Press, 2005), pp. 155–166; J. Mubangizi, 'The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation', *African Journal of Legal Studies*, Vol. 2, No. 1 (2006), pp. 1–19.

[12] Indeed, a significant amount of jurisprudence has emanated from bodies which do not possess full judicial status (that is, the authority to make and enforce binding judgments) but are cloaked with various other attributes of legal adjudication, for example the right to hear individual complaints, entertain evidence and make decisions by applying law to fact. This is particularly true at the international level.

2. THE EVOLUTION OF THE SOCIAL RIGHTS ADJUDICATION

The rapid trajectory of social rights jurisprudence is surprising given its scattered antecedents for most of the twentieth Century. Such instances include the International Labour Organisation (ILO)'s Committee of Experts, established in 1927 to review the implementation of the initial labour conventions by member States.[13] This was followed in 1951 by the creation of a more judicial-like mechanism, the Committee on Freedom of Association which was empowered to address breaches of ILO conventions concerning freedom of association and the right to organise and bargain collectively. Fenwick notes in this book that the Committee has been remarkable for its workload, with over 2300 cases to date, and the development of considerable jurisprudence, including in the area of the right to strike.[14] Since the 1970s, greater use has also been made by worker's organisations of the constitutional complaint procedure where a State has failed to observe one of the many ILO conventions.

Early international cases on discrimination also spoke to the social arena. The founding document of the League of Nations included minority rights and, in 1935, its Permanent Court of International Justice brushed aside Albania's claim that the closure of Greek-speaking schools was consistent with the right to equality for minorities. According to the Court, equality must not only exist in law but in fact, and it went on to articulate the essentialist role of education for minorities declaring that 'there 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'.[15]

In the United States, the US Supreme Court struck down separate schooling for African Americans as 'inherently unequal' in the well-known case

[13] At that time, this covered hours of work in industry, unemployment, maternity protection, night work for women, minimum age and night work for young persons in industry. See *ILO History*, available at <http://www.ilo.org/public/english/about/history.htm>.

[14] See Chapter 28, Sections 2.3 and 3.1.

[15] *Minority Schools in Albania*, PCIJ Reports 1935, Series A/B, No. 64.

of *Brown v. Board of Education*.[16] In seeking to move beyond earlier and formalistic constructions of the constitutional right to equal protection of the law (the doctrine of 'separate but equal')[17], the Warren Court similarly recognised the fundamental value of education in contemporary America, finding that any racial bias in the manner of its delivery would frustrate the attainment of optimal educational outcomes.[18] The 1960s subsequently witnessed a growing movement to enforce social rights through the constitutional bill of rights. In this volume, Albisa and Schultz describe the nascent pro-poor jurisprudence of the US Supreme Court, which held that indigent defendants were constitutionally entitled to free legal representation on their first appeal,[19] a California law was unconstitutional for requiring new residents from other states to wait six months before receiving welfare benefits,[20] and 'property' interests covered under the US Constitution's due process clause included welfare payments.[21] However, these progressive developments were abruptly halted in 1972 by a re-constituted Court under President Nixon. The Court ruled that the Government had no obligation to provide minimum sustenance and that the right to housing, at least of a certain quality, was not protected by the Constitution, although it did order the improvement of prison conditions.[22]

Efforts were slightly more successful elsewhere. In 1972, the German Federal Constitutional Court held that the right to free choice of occupation obliged universities to demonstrate they had effectively deployed all available resources to maximise the number of places available.[23] From 1978, the Indian Supreme Court, and some state courts, went further and embarked on a process of deriving a broad range of social rights from the right to life in light of the directive principles in the Constitution.[24] This stance was justified on the basis that the right to life was the 'most precious human right' and 'must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may . . . enhance the dignity of the individual and the worth of the human person'.[25] In its first clear social rights case in 1980, the Indian Supreme Court ordered a municipality to fulfil its statutory duties to provide water, sanitation and drainage systems.[26] The Court also relaxed rules of standing and remedies in order to facilitate both the filing of petitions and flexible remedial orders. However, Muralidhar argues in this volume that the practice of Indian courts is not as consistent or progressive as is frequently imagined. Courtis also illustrates also that labour, and to a lesser extent, social security rights have a long history of constitutional litigation in Argentina, although most early cases drew on statute law or arose in intra-federal constitutional disputes.[27]

At the regional level, the European Commission on Human Rights initially declined to offer expansive interpretations of civil rights. In 1972, it stated that it 'is true that Article 8(1) provides that the state shall respect an individual's home and not interfere with this right. However, the Commission considers that Article 8 in no way imposes on a State a positive obligation to provide a home'.[28] Five years later, the European Court of Human Rights cautiously opened the door to a different approach in its seminal case of *Airey v. Ireland* saying, 'the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention'.[29] The Court has subsequently applied the Convention in the field of social rights but has been rather cautious about doing so as Clements and Simmons point out in Chapter 20. Since 1965, States parties to the European Social

[16] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[17] Separate schools were justified as long as both sets of schools had substantially equal facilities: *Plessy v. Ferguson*, 163 U.S. 537 (1896).
[18] Racial segregation of schools generated a 'feeling of inferiority' depriving 'children of the minority group of equal educational opportunities': *Brown v. Board of Education*, 347 U.S. 483 (1954) at 493–494.
[19] *Douglas v. California*, 372 U.S. 353, 357–58 (1963).
[20] *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[21] *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).
[22] See respectively *Lindsey v. Normet* 405 U.S. 56, 74 (1972); *Estelle v. Gamble*, 429 U.S. 97 (1976).
[23] *Numerus Clausus I Case* (1972), 33 BverfGE 303.
[24] *Sunil Batra v. Delhi Administration case*, 1978 SC 1675.
[25] See *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802. This included rights to 'adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and co-mingling with fellow human beings'.
[26] *Municipal Council Ratlam v. Vardhichand and ors*, AIR 1980 SC 1622.
[27] See Courtis, Chapter 8, Sections 4.1 and 4.2.
[28] Case 4560/70. See also Case 5727/72.
[29] *Airey v. Ireland* (1979) 2 EHRR 305.

Charter have also been required to present periodic reports on performance.[30] In their Chapter, Khalfan and Churchill draw out the development of the rich content of jurisprudence that has developed from this procedure.

From the late 1980s, the volume of social rights jurisprudence has mushroomed. This activity is particularly discernible in the countries that witnessed democratic revolutions at this time (Latin America, Eastern Europe and South Africa) as well as countries that became directly influenced by the Indian experience, particularly other South Asian countries. A number of Western countries – Canada, United Kingdom and Hungary – have witnessed a stream of somewhat mixed jurisprudence, though for different reasons. Inter-American, African, European and UN human rights treaty committees and even the International Court of Justice have now adjudicated cases concerning social rights.[31]

Pointing out the trajectory of the jurisprudence is one thing, explaining its rise is quite another. On one hand, it is undeniable that the space for the judicialisation of social rights has been significantly enlarged. The post-World War II human rights architecture gave short shrift to the enforcement of social rights. The Universal Declaration of Human Rights (UDHR) contained an almost exhaustive catalogue of human rights[32] but individual complaints could only be made concerning violations of the rights in the International Covenant on Civil and Political Rights.[33] Its sister treaty, the International Covenant on Economic, Social and Cultural Rights (ICESCR) remains deprived of such a mechanism,[34] although the Human Rights Council is close to addressing this historical imbalance.[35]

This same division between the two sets of human rights was mirrored in Western European constitutions, a number of Latin American constitutions and many post-colonial constitutions in Africa and Asia. If included, social rights were often relegated to directive principles. Similarly, at the European level, the committee overseeing the European Social Charter lacked the judicial powers of the European Court of Human Rights. In many countries though, human rights litigation was largely impossible because of colonial or one-party rule, although it was successful in some instances in publicly highlighting injustices.[36]

[30] See *European Social Charter: Collected Texts* (Council of Europe Publishing, 200, 2nd Edition) at chapter IX.

[31] In the *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* (2004) ICJ Reports 136, the majority of the International Court of Justice opined on various activities of Israel that were said to impede and restrict the rights of Palestinian persons under the International Covenant on Economic, Social and Cultural Rights, concluding that construction of the fence and its associated regime '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'. (p. 192.) However, the lingering misunderstandings of social rights can be witnessed in the separate concurring opinion of Rosalyn Higgins (p. 213).

[32] The UDHR includes the following rights: life; freedom from slavery; freedom from torture; recognition before the law; non-discrimination; right to an effective remedy; freedom from arbitrary arrest or exile; fair trial; presumption of innocence in criminal trials; freedom of movement and residence; asylum; a nationality; marriage; own property; freedom of conscience and religion; freedom of opinion; peaceful assembly and association; take part in government and vote; social security; work; just and favourable conditions of work; form and join trade unions; rest and leisure; adequate standard of living for health; education; and participation in cultural life (Articles 3–27).

[33] An individual complaints procedure under the First Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 302, *entered into force* March 23, 1976, was opened for signature on the same day as the substantive treaty.

[34] It should be noted that the so-called '1503 procedure' was set up by the UN Human Rights Commission in 1970 to hear complaints about massive violations of all rights in the Universal Declaration of Human Rights. However, the procedure is confidential and it is therefore difficult to assess the claims that have been determined in relation to social rights.

[35] See discussion in Chapter 23, Section 6. Craven, amongst others, partly attributes the differences in the treaties to apprehensions by some States around the justiciability of social rights. 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 ICESCR: see Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p.136. However, it is important not to oversimplify the causes behind the lack of a complaints mechanism for the ICESCR. Socialist states, namely China and USSR, were hostile to any form of international supervision for human rights and even blocked attempts by Italy and USA to create an expert committee to oversee the ICESCR.

[36] For example, residents of the province of Bougainville in the Australian colony of Papua New Guinea challenged, in Australian courts, the colonial government's decision to proceed with copper mining and disregard the property and land claims of indigenous landowners. The case was unsuccessful but drew some attention to the plight of

To some extent, this division reflected the schismatic understanding of human rights amongst scholars at the time. Human rights were frequently allocated between the two categories of negative and positive liberties as set out in the philosopher Isaiah Berlin's lecture of 1958.[37] As Sy Rubin put it, '[W]hen one discusses civil and political rights, one is generally talking about *restraints* on governmental action, not *prescriptions* for such action . . . [It] is easier to tell governments that they shall not throw persons in jail without a fair trial than they shall guarantee even a minimal but sufficient standard of living'.[38] The 1960s were also partly characterised by the economic doctrines of Keynesianism in the West and centralised socialism in the East that assumed that benign policy intervention would cure a range of social ills.

However, the post-Cold War wave of democratisation and constitutionalisation took a different direction and led to the cataloguing of many justiciable economic, social and cultural rights in many constitutions.[39] In some jurisdictions, the right to bring *collective* actions (for example, with a public interest organisation acting as claimant) clearly assisted the initial development of the jurisprudence (for example, in South Africa, Argentina and Venezuela) while in Brazil, Piovesan notes that a strategic decision was made in HIV/AIDS litigation not to use this option.[40] Some of the landmark decisions include the *Grootboom* decision in South Africa, where the Court ruled that the government's housing policy breached the constitutional obligation to progressively realise the right to housing due to inattention to emergency relief; the *Campodónico de Beviacqua* case[41] where the Argentine Supreme Court ordered the State to continue provision of medication to a child with a disability in accordance with the right to health; and the *Eldridge* decision in Canada where the right to equality was interpreted to include the right of deaf patients to receive interpretive assistance in a province's health care facilities.[42]

Simultaneously, the number of avenues for social rights litigation at the regional and international level expanded with the newly established Inter-American Court on Human Rights (1987) and the African Commission on Human and Peoples' Rights (1987) while the European Committee on Social Rights was able to entertain collective complaints from 1999. The UN Committee on Elimination of Racial Discrimination addressed racial discrimination in the workplace in its 1988 decision *A. YlimazDogman v The Netherlands*,[43] while in 1987 the Human Rights Committee struck down social security legislation that discriminated on the basis of sex and marital status.[44] In 1987, the UN Committee on Economic, Social and Cultural Rights ('CESCR Committee') was established to monitor and guide the interpretation of ICESCR, and this gave significant impetus to efforts to move forward a coherent legal vision of economic, social and cultural rights[45] – an increasing number of judgments refer to its general comments.

This is not to overstate the case. A comparative and international patchwork of laws and legal remedies for economic, social and cultural rights remains. But the more corpulent space for social rights has allowed claimants and adjudicators to overcome one of the key hurdles raised by opponents of the justiciability of social rights. In 1975, for example, Vierdag argued that social rights were

the customary landowners: see M. Langford, *Bougainville and the Right to Self-Determination* (Unpublished Bachelor of Laws Thesis, University of New South Wales, 1995).

[37] I. Berlin, *Two Concepts of Liberty: Inaugural Lecture as Chichele Professor of Social and Political Theory* (Oxford: Clarendon Press, 1958).

[38] S. Rubin, *Economic and Social Rights and the New International Economic Order*, Address Before the American Society of International Law (on file with the American University International Law and Policy) quoted in H. Schwarz, 'Do Economic and Social Rights Belong in a Constitution?' *American University Journal of International Law and Policy*, Vol. 10, Summer (1995) pp. 1233–1244, at 1233 (emphasis in original).

[39] To take just a few examples of countries who inserted a full range, see the constitutions of Brazil (1988), articles 6 and 193–232, Bulgaria 1991, Burkina Faso (1991) articles 47–55; Congo (1992), articles 30–55; Colombia (1991), articles 42–82; Estonia (1992), articles 28–39, 32, 37–9, Hungary (as amended) articles 70/B-70/K; Macedonia (1991), articles 30–49; Poland (1992), articles 67–81; South Africa (1994), articles 23–31; Turkey (1987), articles 41–64. For a full list, see Jayawickrama, (n. 2 above), p. 117.

[40] See Chapter 9, Section 5.

[41] *Campodónico de Beviacqua, Ana Carina v. Ministerio de Salud y Banco de Drogas Neoplásicas*, Supreme Court of Argentina, 24 October 2000.

[42] *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R.

[43] Communication No. 1/1984

[44] *Zwaan-de Vries v. the Netherlands*, Communication No. 182/1984, (9 April 1987).

[45] See P. Alston, 'The Committee on Economic, Social and Cultural Rights' in P. Alston (ed.), *The United Nations and Human Rights* (Oxford: Oxford University Press, 1992), pp. 473–508.

not imbued with legal content because they were not inherently justiciable on the basis that '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'.[46] The South African Constitutional Court, amongst others for instance, dismissed this traditional, and somewhat circular, notion stating that 'Socio-economic rights are expressly included in the Bill of Rights' and the 'question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case'.[47] This reasoning directly accords with the counter-arguments of many scholars who had argued that suppositions over the justiciability of a particular right are irrelevant for determining its legal authority. Van Hoof argued in his response to Vierdag that if a social right is included in a legal instrument, whether treaty law or constitution, it is by definition legally binding and potentially capable of enforcement.[48]

On the other hand, this explanation for the evolution of social rights adjudication is not entirely satisfactory. How do we understand the large differences in judicial outcomes in countries with almost identical constitutional and justiciable protections of social rights? What explains the insipid judgments of many Eastern European judiciaries with the vanguard judgments of South Africa and Latin America? Why have some courts greatly extended the reach of civil and political rights to protect social interests, such as in India and the Inter-American human rights system, while others have displayed more caution, such as in Canada, or been quite hostile at times, such as in Ireland and the US Supreme Court.[49]

Therefore, the prominence and authority of social rights in any legal jurisdiction must be tied to an intricate interplay of factors.[50] We can point to at least four. The first concerns the level and nature of social organisation. A clear driver of the litigation has been human rights advocates, social movements and lawyers but their potency, focus and willingness to use litigation strategies varies from jurisdiction to jurisdiction. The last decade has witnessed the rise of a broad but distinctive movement for economic, social and cultural rights which has not only sought to use courts but been active in sharing information on comparative experiences.[51] This movement has augmented the traditional trade union movement, which has been more focused on labour rights. In the case of Latin America, Couso argues that these new social rights movements are the result of the

[46] E.W. Vierdag, 'The legal nature of the rights granted by the international Covenant on Economic, Social and Cultural Rights', *Netherlands Yearbook of International Law*, Vol. IX (1978), pp. 69–105, at 103.

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

[48] ''While it cannot be denied that the international law-making process is extremely cumbersome and that it's outcome is often characterized by uncertainties, it is at the same time generally accepted that treaties, because of their formalized nature, constitute the most unambiguous and reliable source of international law.'' G.J.H. van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views', in P. Alston and K. Tomasevski (eds.), *The Right to Food* (The Hague, Martinnus Nijhoff, 1984), pp. 97–100, at 99.

[49] A number of US States have incorporated social rights within their constitutions leading to some significant judicial interventions. See Albisa and Schultz, Chapter 12, in this volume.

[50] Similarly, Alston concludes that the creation of the United Nations human rights regime in the post-World War II period was largely driven by political pragmatism and not principle: '[I]ts expansion has depended upon the effective exploitation of the opportunities which have arisen in any given situation from the prevailing mix of public pressures, the cohesiveness or disarray of the key geopolitical blocks, the power and number of the offending states and the international standing of their governments, and a variety of other, often rather specific and ephemeral, factors'. P. Alston, 'Critical Appraisal of the UN Human Rights Regime, in P. Alston (ed.) *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992), pp. 1–21, at p. 2. The causal complexity is also manifest in the inter-war period. The birth of the International Labour Organisation (ILO) in the aftermath of the first World War is largely attributable to the founding States' fear of the successes of Bolshevism and socialism. A response that sought to address the aspirations and struggles of workers was therefore necessary. But the ostensible idealism of the States was partially nipped in the bud when the ILO began to denounce their own labour practices. See Virginia Leary, 'Lessons from the Experience of the International Labour Organisation' in Alston, *The United Nations and Human Rights*, ibid. pp. 580–619.

[51] For instance, advocates that had laboured in Canada with social rights claims under equality rights norms, participated in the debate over including socio-economic rights in the South African constitution and the formulation of the arguments in the key *Grootboom* case (n. 47 above), a case which is well known among many Latin American organisations despite the barriers of language and legal system.

political left accepting the 'stark reality of failed socialist states' and moving towards more reformist rights-based models, which saw law as a vehicle for social change.[52] This explanation carries some weight, but leftist critique of litigation continues (see Section 5 below). Moreover, a movement from the other direction is equally discernible. Mainstream human rights organisations have increasingly embraced social rights and quite a number of the leading cases were in fact brought by organisations that had traditionally focused on civil and political rights.[53]

The second is the degree of the political achievement of social rights. Judicial receptivity to social rights claims 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 groundbreaking jurisprudence from South Africa to the United States to India to Colombia. As Gauri and Brinks note, 'courts remain pro-majoritarian actors. 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'.[54]

The third is the judicial culture itself and the degree of judicialisation of human rights. The establishment of a culture of litigation for human rights within a jurisdiction makes the induction of 'newer' rights much easier. Social rights jurisprudence is almost always significant in those jurisdictions that have developed robust judicial or quasi-judicial review for civil and political rights. This creates both the underlying conditions for social rights litigation (in terms of effective court processes, freedom of expression, relative enforcement of remedies), and the acceptability of human rights legal reasoning. It is no great leap to go from assessing the proportionality of restrictions on the rights of dissidents or media proprietors to free speech to evaluating forcible evictions or denial of access by non-nationals to social security schemes. Some courts have increasingly spelt out the positive obligations surrounding civil and political rights, providing them with a new terminology that helps them overcome traditional classifications of human rights, which squirrel away civil and political rights as 'negative rights' and ESC rights as 'positive rights'. As will be discussed in Section 3, the degree of judicial openness to comparative and international law is also positively correlated with more progressive decisions.

Beyond law, social/legal movements, and judicial practice, there is perhaps a deeper keel that aids or obstructs attempts to introduce social rights within human rights practice. It is the way in which human rights are understood, valued and embedded within a particular society, a factor we might describe as culture. The permeation of human rights ideals into a particular context is closely associated with societal repulsion at, or experience of, particular manifestations of human indignity.[55] It is perhaps no different for adjudicatory bodies. The graphic presentation of forced evictions to the UN Committee on Economic, Social and Cultural Rights in 1991 helped pave the way for more vigorous concluding observations by the Committee.[56] The growing number of court orders concerning lack of state provision of HIV/AIDS medicines[57] is partly attributable to the 'shock value' that these bodies experience when confronted with clear

[52] See R. Gargarella, P. Domingo and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot: Ashgate, 2006), p. 255.

[53] For example, cases taken by CELS in Argentina: see interview with Victor Abramovich in M. Langford, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: Centre on Housing Rights & Evictions, 2003), pp. 60–65. In some cases, this movement has been bottom-up with demands from victims while in other cases it has been propelled by calls for human rights organisations to apply the indivisibility of human rights in practice.

[54] V. Gauri and D. Brinks. (ed.). *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (New York: Cambridge University Press, 2008).

[55] The horrors and deprivations of the Second World War helped propel the drafting of the Universal Declaration of Human Rights; agitation by urban labour, social and liberal movements in nineteenth Century ignited a measure of public and official recognition of social rights; the European revolutions of 1848 included demands for bills of rights, that included social rights, but this was only successful in one German state, although a number of countries later included social rights in their constitutions in the early twentieth Century; and the injustices of colonialism led to the rapid drafting of the International Convention on the Elimination of All Forms of Racial Discrimination.

[56] See interview with Scott Leckie in Langford, *Litigating Economic, Social and Cultural Rights* (n. 53 above) at p.157.

[57] See, for example, *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC).

evidence of governmental complicity or appalling apathy. This is not to say that such a practice is principled: many worthy cases go unnoticed for years. It is rather a sociological phenomenon demonstrating the manner in which human rights violations capture official attention. Indeed, social rights advocates advise initially presenting cases that show serious violations of social rights and are not significantly dissimilar with traditional civil and political rights cases.[58]

This understanding of culture works in the other direction too. Some cultures, including judicial culture, may be more resistant to social rights claims. Cass Sunstein sets out this argument in the case of the United States, noting the supposed value base of the United States, which strongly favours individual enterprise over government intervention, and a concern that increased social rights would mostly benefit racial minorities.[59] This cultural bias has perhaps effectively inhibited what he calls 'socialist movements' (essentially European social democratic movements) taking forward claims, ensuring passage of more progressive legislation and recognition of constitutional social rights. But Sunstein ultimately pours cold water on the thesis since it assumes cultures are 'static or homogeneous'.[60] He points to the radical changes in cultural mores on gender, race and homosexuality concluding that there is nothing in America that irrevocably inhibits a 'second bill of rights' containing social rights.

The adaptability of cultures to new values and rights is certainly undeniable but culture plays perhaps a different role than Sunstein suggests. A comparative review of jurisprudence indicates the crucial role of history, in particular the national and international mythologies surrounding the adoption of constitutional documents at a particular point in time. Although Sunstein later distinguishes between the US and South African Constitutions on the basis that the latter was clearly transformative (p. 216–17). Advocates seeking to advance the recognition and enforcement of social rights seem to fare better in countries whose constitutional and democratic revolutions were partly aimed at overcoming social injustice (e.g. Latin America, South Africa and India) as opposed to those revolutions that were more focused on civil and political freedoms (e.g. United States and Eastern Europe). The current attempt at constitutional reform in United Kingdom may be a pertinent example of the latter. The current focus is not on asking what human rights need to be recognised today but what has been recognised in the twelfth century Magna Carta, seventeenth century English Bill of Rights and some timid advances in common law. The result at the time of writing is the meagre proposal that 'no person shall be *denied* the right to education'[61] and that 'no person shall be *denied* the right to a minimum standard of healthcare and subsistence *as set out in statutory provisions* to be enacted from time to time' (emphasis added).[62] In other instances, economic, social and cultural rights were made justiciable almost accidentally (constitutions were copied from other jurisdictions[63]) or international treaties were incorporated in the constitutional order with no public pressure.[64]

3. ASSESSING THE JURISPRUDENCE

As there is no one reason for explaining the rise of social rights jurisprudence, it is neither possible to develop any grand or universal theory from the existing jurisprudence. Indeed, it is questionable whether one should. Mark Tushnet cautions on the use of comparative law to universalise on the ideal legal doctrine lest it lead to excessive abstraction:[65]

> [C]onstitutional law is deeply embedded in the institutional, doctrinal, social and cultural

[58] See particular interview with Geoff Budlender in Langford, *Litigating Economic, Social and Cultural Rights* (n. 53 above), pp. 96–99.

[59] C. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York, Basic Books, 2004), pp. 127–138.

[60] Ibid. p. 137.

[61] The State is also to respect in education systems the 'religious and philosophical convictions' of parents.

[62] See The Smith Institute, *The constitution of the UK as of 1 January 2007*, printed in C. Bryant (ed.), *Towards a new constitutional settlement* (London: Smith Institute, 2007), appendix.

[63] Jayawickrama, *The Judicial Application of Human Rights Law* (n. 2 above).

[64] J. Levit, 'The Constitutionalisation of Human Rights in Argentina: Problem or Promise?', *Colombia Journal of Transnational Law*, Vol. 37.

[65] See M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2007), p. 9.

> contexts of each nation, and . . . we are likely to go wrong if we try to think about any specific doctrine or institution without appreciating the way it is tightly linked to all the contexts within which it exists.[66]

Some social rights advocates themselves have cautioned against a general attempt to 'search for universal, transcendental components' of economic, social and cultural rights.[67] According to Porter, the legitimate 'quest for ahistorical universals and absolutes' does not automatically require creating a universalist *legal* framework'.[68] In his view, the development of social rights jurisprudence should follow the 'grounded' path of civil and political rights, which he argues have been 'adjudicated in historical contexts and must incorporate understanding of the subjective component of the dignity related interests'.[69]

These cautionary perspectives conform with our attempt above to explain differences between jurisprudence in similar-situated jurisdictions. Different historical and cultural conditions play a significant role. But a comparative and international analysis of the jurisprudence can still be useful. From a positivist standpoint, it is important to understand the current trends in adjudication of social rights, to identify the common and divergent threads, the manner of legal reasoning, and the extent to which international and comparative law is shaping or not shaping the developments. Taking a more normative standpoint, it is arguable that opening up the domestic window to comparative experience allows one, whether judge or advocate, government or scholar, to better reflect on whether the prevailing views in a particular jurisdiction may be appropriate. In this field, such transnational perspective and normative reflection is sorely needed. Entrenched assumptions about the nature of economic, social and cultural rights have often prevailed despite contrary comparative evidence. Indeed, cross-jurisdictional learning has been one of the key drivers of successful social rights litigation. Scott and Alston have also called for greater transnational 'judicial dialogue' that would lead towards clearer consensus, particularly the interpretation of international human rights.[70]

Of course, the extent to which judges and others can, and wish to, draw on comparative and international jurisprudence greatly varies. The South African Constitutional Court and Colombian Courts exhibit a fair degree of comparative curiosity;[71] the Philippine Constitutional Court looks primarily to the US Supreme Court; while the European Court of Human Rights was in uproar over the citation of *Brown v Board of Education* from the very same US Supreme Court.[72] International law and jurisprudence is equally relevant and some jurisdictions have taken seriously both international human rights law and jurisprudence particularly Argentina, South Africa, Nepal, Bangladesh, Colombia and the Inter-American and African human rights systems.

For ease of convenience, the analysis of the cases in this Section is divided according to the taxonomy of obligations developed by the UN Committee on Economic, Social and Cultural Rights[73] namely the obligations to *respect*, *protect* and *fulfil* human rights as well as obligations stemming from equality rights. Discussion of the direct social rights obligations of private actors will also be made in the sub-section dealing with obligation to protect. A final sub-section then briefly

[66] Ibid. p. 10.
[67] B. Porter, 'The Crisis of ESC Rights and Strategies for Addressing It', in Squires, Langford, and Thiele, *Road to a Remedy* (n. 11 above), pp. 48–55, at 48.
[68] Ibid.
[69] Ibid. p. 50.
[70] C. Scott and P. Alston, 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney*'s Legacy and *Grootboom*'s Promise', *South African Journal on Human Rights*, Vol. 16 (2000), pp. 206–268. See also A. M. Slaughter, 'A Typology of Transjudicial Communication', *University of Richmond Law Review*, Vol. 29, No. 1 (1994–5), pp. 99–137.
[71] Perhaps the most notable example is the Constitutional Court of South Africa's citing of precedents from 109 different countries in a case on the death penalty: see *The State v. Makwanyane* 1995 (3) SALR 391 (CC).
[72] Personal communication from Andi Dobrushi concerning the hearing of *D.H. and Others v. the Czech Republic* by the Grand Chamber of the European Court of Human Rights.
[73] See Committee on Economic, Social and Cultural Rights, *General Comment No. 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 15. It was endorsed by the African Commission on Human and Peoples' Rights in *SERAC v. Nigeria*, Communication No. 155/96, Ref ACHPR/COMM/A044/1 (27 May 2002), paras. 44–47 and also included in the South African Constitution.

examines conflicts between human rights in the socio-economic arena.

This is not to endorse this particular taxonomy as the authoritative understanding of obligations. In Chapter 23, King and myself critically ask whether this categorical approach appropriately captures the concrete nature of State duties in practice and does it really take us that much further than the traditional divide of negative and positive obligations? Indeed, like Ida Koch,[74] I suspect that our internationalist and comparative understanding of State obligations will continually develop as cased-based jurisprudence develops, which may open up new types of categories or common principles. The cases in this book demonstrate that different jurisdictions provide some signs of the way ahead. But for present purposes, this taxonomy provides a useful way of arranging the discussion but comments are made on how the jurisprudence is pointing towards more concrete principles.

There is insufficient space, however, to examine the consequences of the jurisprudence upon our understanding of the 'normative content' of each particular social right. However, many of the authors divide their review according to the different rights or bundles of rights and some efforts have been made elsewhere to commence that process of reflection.[75] It is instructive to note that adjudicatory bodies vary in the way they approach the content of the right. In some instances, they develop, quite explicitly, different tests for different social rights. In Colombia, the test on positive obligations for immediate access to social benefits is slightly stricter than it is for HIV/AIDS medicines.[76] Other courts have so far declined to pronounce on the normative content of the rights (e.g. South Africa) while others have been willing to go into some detail. The Supreme Court of Kentucky in *Rose v Council for Better Education* is an example of the latter, specifying that the duty to provide an efficient system of education means providing each and every child with at least the seven particular capacities.[77]

The Committee on Economic, Social and Cultural Rights has attempted to develop some form of template for understanding the normative content of the rights but wide variances remain between their General Comments on different rights. Such unevenness is arguably a good thing since each right does vary in conception and possible forms of implementation. However, it is clear from the Committee that each right carries bundles of claims relating to:

- *accessibility* (e.g., in the case of housing, accessibility includes security of tenure, physical accessibility, affordability and appropriate location, or, in the case of social security, coverage, fair eligibility requirements etc),
- *availability* of either the subject of the right (e.g., food, education) or the requisite facilities or systems (e.g. hospitals or social security system); and
- some level of *adequacy, quality or cultural appropriateness* whether it be the safety of the water, the level of social benefits or the cultural dimensions of education.

Cases discussed in this book can obviously be placed in many of these categories. However, more

[74] I.E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?', *Human Rights Law Review*, Vol. 5, (2005), pp. 81–103.

[75] See, for example, M. Langford and A. Nolan, *Litigating Economic, Social and Cultural Rights: Legal Practitioners Dossier* (Geneva: COHRE, 2006) and B. Toebes, 'The Right to Health as a Human Right in International Law' (Amsterdam: Hart/Intersentia, 1999).

[76] See discussion in Section 4.3 below.

[77] Those include:

(1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;

(2) sufficient knowledge of economic, social and political systems to enable the student to make informed choices;

(3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state and nation;

(4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;

(5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;

(6) sufficient training or preparation for advancing training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and

(7) sufficient levels of academic or vocational skills to enable public school students to compete favourably with their counterparts in surrounding states, in academics and the job market.

790 S.W.2d 186 (Ky. 1989), at 212–13. See discussion by Albisa and Schultz in Chapter 12, Section 4.1.

cases can be found in the first category which is possibly because existing legislation tends to focus more on the latter issues, particularly the element of quality. A significant number of cases also cross these categories. For example, in *Viceconte*, the claim was for *access* to a medicine to treat a peculiar Argentina disease that required the Government to make *available* the drug by constructing the production facilities but the process was partly delayed on account of testing the drug to ensure *quality*. It might therefore be said that large-scale or systematic violations simultaneously raise many elements of the right since they require a significant State response to gross inaction or action. Nonetheless, while the Committee's jurisprudence was partly developed in response to case law (e.g. General Comment Nos. 4 and 19), it may be useful to test their developing understanding of the rights against the jurisprudence.

3.1 Obligations to Respect

The obligation to respect in the three-fold taxonomy generally refers to State duty to abstain from interference with human rights. (Although, in the case of European Court of Human Rights the obligation to respect is interpreted much more broadly to include positive obligations). Since the 1980s, many commentators have been anxious to point out that the realisation of economic, social and cultural rights, like many aspects of civil and political rights, requires not only action but restraint by the Government.[78] Such violations by States are frequently the subject of reports by non-governmental organisations and some predict that they will from the majority of cases under the proposed complaints procedure for the International Covenant on Economic, Social and Cultural Rights.

The authors in this volume detail a significant number of such cases that could be ascribed to this category. In Argentina, Courtis describes a long arc of constitutional jurisprudence on labour rights, such as unfair dismissal, the right to strike and worker's compensation. For example, in the landmark *Aquino* case in 2004, the Supreme Court struck down a 1995 law which severely circumscribed worker's compensation on the basis that it would violate a wide range of international standards, including the International Covenant on Economic, Social and Cultural Rights.[79] Watson notes how the European Court of Justice has imbued the rather civil right to free movement of persons within the European Union with socio-economic character, striking down restrictions on access to social goods and services of non-nationals from EU member states, particularly in the area of education.[80] Byrne and Hossain describe how the Supreme Court of Bangladesh has gradually developed jurisprudence on evictions beginning with slum dwellers and more recently sex workers finding that '[T]he forcible taking away of sex workers and putting them into the . . . vagrant home . . . have been done without any lawful authority in derogation of their right to life or livelihood and contrary to the dignity or worth of the human person'.[81]

What is noticeable across these cases is the slow convergence of criteria that adjudicatory bodies apply in determining if an interference with a social right (or interest) by the State amounts to a human rights violation. Let us take the case of forced evictions. The criteria were explicitly set out in General Comment No. 7 on Forced Evictions by the UN Committee on Economic, Social and Cultural Rights, and can be summarised as follows:

- Any interference with a person's home requires both substantive justification, regardless of the legality of the occupation.
- Due process must be observed, which the committee described as including consultation on alternatives to eviction, adequate notice, information and access to legal remedies (including legal aid)

[78] See generally A. Eide, 'The Right to an Adequate Standard of Living Including the Right to Food' in A. Eide, C. Krause, A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff, 1995), pp. 89–105 and P. Alston, 'International Law and the Human Right to Food' in P. Alston and K. Tomaševski (eds.), *The Right to Food* (The Hague, Martinus Nijhoff, 1984), pp. 9–68.

[79] *Aquino, Isacio v. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 21 September 2004. See discussion in Chapter 8, Section 4.1.

[80] See, for example, *Chen* Case C-200/02 [2004] ECR I-9925 and *Baumbast* Case C-413/99 (2002) ECJ – 17 Sep 2002.

[81] *Bangladesh Society for the Enforcement of Human Rights and Ors v. Government of Bangladesh and Ors* 53 DLR 1 later affirmed by the Appellate Division.

- At a minimum no one is rendered homeless, adequate compensation is paid for losses and that adequate and alternative accommodation is provided within the maximum available resources of the State.
- There must be no discrimination on prohibited grounds in the substantive and procedural aspects of the eviction process.

Some adjudicatory bodies have explicitly adopted or referred to this general comment, including the African Commission on Human and People's Rights[82] and courts in Argentina[83] as well as the political bodies of the Council of Europe.[84] Others have taken similar approaches. The South African Constitutional Court and the European Committee on Social Rights have found that evictions will contravene the right to housing if there is lack of justification and an absence of adequate alternatives.[85] The European Court of Human Rights in *Connors v United Kingdom* ruled that the eviction of a Gypsy family from a local authority site violated the civil right to respect of home, family and privacy on the basis that it 'was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with [the complainants] rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued'.[86] Compensation of 14,000 euros was awarded for emotional distress.[87] The Human Rights Committee almost echoes the CESCR Committee in its concluding observations on Kenya concerning the civil right to respect for the home: 'The State party should develop transparent policies and procedures for dealing with evictions and ensure that evictions from settlements do not occur unless those affected have been consulted and appropriate resettlement arrangements have been made'.[88]

But a certain unevenness in these eviction cases remains. In India, Muralidhar describes the failure of the Supreme Court to order or properly supervise mass resettlement schemes in eviction of pavement or other informal dwellers, for example in the well-known *Olga Tellis* case and more recent decisions. Clements and Simmons criticise the stance of the European Court of Human Rights for its refusal to protect Gypsies from the application of certain planning standards to the location of caravans on land they had purchased. One might posture that the reason for this unevenness is that both courts lack an explicit mandate to protect social rights and must initially invoke civil and political rights. But in Venezuela where the right to adequate housing is also enshrined in the constitution, Gonzalez notes that there is no consistency on the principle of alternative resettlement. This suggests that an element of chance is involved or that it can take time to build up precedents or judicial consensus in the area. In South Africa, the cases indicate the advantage of having explicit constitutional mention of the issues and specific legislation. After quoting provision of the constitution that prohibits evictions without a court order, the South African Constitutional Court goes on to say that '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'.[89]

[82] See Chirwa, Chapter 17 in this volume, Section 4.5

[83] Buenos Aires Supreme Court, *Comisión Municipal de la Vivienda v. Saavedra, Felisa Alicia y otros s/Desalojo s/Recurso de Inconstitucionalidad Concedido*, 7 October 2002. See Courtis, Chapter 8, Section 4.4.

[84] See Recommendation Rec(2004)14 of the Committee of Ministers to member states on the movement and encampment of Travellers in Europe (Adopted by the Committee of Ministers on 1 December 2004, at the 907th meeting of the Ministers' Deputies) and Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe (Adopted by the Committee of Ministers on 23 February 2005 at the 916th meeting of the Ministers' Deputies).

[85] See Liebenberg (Chapter 4) on *Port Elizabeth Municipality v. Various Occupiers* 2004 (12) BCLR 1268 (CC) and Khaliq and Churchill (Chapter 21) on Complaint No. 15/2003, *European Roma Rights Center v. Greece*. In the latter case, the legislation was also criticised by the adjudicatory body.

[86] *Connors v. United Kingdom*, (European Court of Human Rights, Application no. 66746/01, 27 May 2004), para. 95. See discussion of case in Clements and Simmons, Chapter 20, Section 4.1

[87] The Court has also been somewhat consistently concerned with the existence and quality of alternative accommodation in the case of eviction. See *Marzari v. Italy* (1999) 28 EHRR CD 175 where the Court attached particular importance to the local authority's efforts in this regard.

[88] *Concluding Observations of the Human Rights Committee: Kenya*, 28 March 2005, CCPR/CO/83/KEN.

[89] *Port Elizabeth Municipality* (n. 85 above), para. 28.

We should, however, disentangle what we mean by interference of the State. This concept has developed in the context of philosophical theory but its application in modern and developing welfare states requires deeper thought. State 'action' can be grouped into four categories:

- Interference with *self-organising efforts* or *key resources* of individuals or associations, for example, restrictions on trade unions, eviction of customary or informal occupiers, closure of private or religious schools or health care services or pollution of natural resources.
- Denial of access by an *individual* to an *existing government programme or employment opportunity*, whether on the general grounds of arbitrariness or unreasonableness or on prohibited grounds of discrimination. For example, in *Goldberg v Kelly*, the US Supreme Court found that the denial of a welfare benefit to an individual violated the right to due process.[90] In Colombia, the Court granted protection in the case of a poor elderly man who had not received a State subsidy because he had acquired erroneous information from the relevant administrative entity on the procedures necessary to obtain the subsidy.[91]
- The removal of *legislative protections* that require the Government to respect social rights. In *Dunmore v Ontario*, agricultural workers in Canada successfully challenged the repeal of legislation that contained certain guarantees for freedom of association.[92]
- The removal of a *government programme* that enables individuals or groups to realise their social rights. In Portugal, government decisions to remove the National Health Service and increase the qualifying age of a minimum income benefit were found to be retrogressive steps violating the right to health and social security respectively.[93] With regard to Slovakia, Prouvez describes the decision in *L. R. et al v. Slovakia*,[94] where the UN Committee on the Elimination of Racial Discrimination found that a council resolution annulling an earlier resolution providing for low-cost housing for Roma constituted racial discrimination.

This continuum of State interference has been differently understood by scholars and adjudicatory bodies, and there is an inconsistency on this even within the CESCR Committee's practice. The latter two categories are often not theoretically included within the obligation to respect and instead placed under deliberate retrogressive measures violating the more positive duties of protect and fulfil, since it ostensibly involves the weakening of *former* and *collective* action. But conceptually separating the violations in practice is obviously more difficult.

On one hand, trying to separate them is partly justified as the resource implications of the latter are possibly more profound. The Committee explicitly qualifies the prohibition on deliberately retrogressive measures: any such measure must 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'.[95] This concern over restricting a Government's ability to reconfigure and reduce the levels of social rights protections, particularly in the context of an economic crisis, has meant that the number of cases on this topic is not overly significant. Some Courts, for example the Hungarian Constitutional Court, relied on civil and political rights in justifying their striking down cuts to social security and other government benefits.[96]

On the other hand, there is a growing convergence in how adjudicatory bodies will adjudicate all forms of State action that interfere with the enjoyment of social rights. In the case of retrogressive measures, the Committee's language is beginning to mirror its requirements on forced evictions. It has become concerned with not only justification for such steps, but due process in terms of participation, the absence of non-discrimination, ensuring that the minimum essential levels of the rights are not reduced and that the measure is temporal

[90] 397 U.S. 254, 264 (1970).
[91] T-149/02. The Court ordered the relevant authority to re-examine the case and to provide the man with assistance throughout the proceeding.
[92] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016.
[93] See Portuguese Constitutional Tribunal (Tribunal Constitucional), Decision (Acórdão) N°39/84, April 11, 1984 And Portuguese Constitutional Tribunal, Decision (Acórdão) N° 509/2002, December 19, 2002 quoted in International Commission of Jurists, *Global Report on Justiciability of Economic, Social and Cultural Rights* (Forthcoming).
[94] Communication No. 31/2003, *L.R. v. Slovakia*.
[95] *General Comment 3, The nature of State parties obligations* (Art. 2, para.1 of the Covenant) (1991).
[96] For a critique of the courts failure to use social rights and international jurisprudence, see Chapter 13.

as far as possible.[97] From a human rights perspective, such convergence is important. The decision to evict 7000 individuals, remove planning permissions or reduce rental subsidies can have precisely the same impact in practice on the right to housing. Indeed, Matthew Craven raises the concern that the division of economic, social and cultural rights into obligations to respect and fulfil results in favouring the victims of the former over the latter and notes that the South African jurisprudence has veered in this direction with stronger rights to housing for victims of forced eviction than homeless persons.[98] This does not necessarily imply that the protections against forced evictions should be weakened, and we have already noted the patchiness in protection. Rather, such guarantees against forced eviction provide a strong disincentive for the State to create further homelessness and one might need to revisit the judicial review of positive obligations such as fulfilment.

3.2 Obligation to Protect and Horizontal Obligations of Private Actors

The genesis of the contemporary movement for economic, social and cultural rights is partly rooted in the concern over the enhanced role of private actors in social rights violations. The concerns have ranged from the commodification of what were formerly public goods and services, to pollution and interference with access to natural resources to the actions by international institutions such as the World Bank and IMF. Translating these concerns into a human rights and legal framework differs according to the issue but there is a noticeable increase in the number of cases that can be categorised either under the State *obligation to protect* individuals and communities from violations of their social rights *or* the direct *horizontal obligation* of such actors to, at a minimum, respect the social rights of others.

Obligation to Protect

The UN Committee on Economic, Social and Cultural Rights conceptualises the obligation to protect as 'measures by the State to ensure that enterprises or individuals do not deprive individuals of their access' to the relevant right.[99] The Inter-American Court of Human Rights has adopted wording which is more influenced by civil and political rights, but arguably more precise. In her chapter on the Court, Melish notes that they speak of pro-active State duties to prevent, sanction, investigate, repair violations by both government and private actors as well as fulfil human rights.[100]

There is a significant number of cases in this volume where governments have been faulted for inaction or lack of due diligence in effectively regulating the behaviour of private actors. The African Commission found that Nigeria had failed to ensure that the Shell oil company in the Delta region refrained from polluting natural resources, such as water, air and land that were used to realise various social rights.[101] Latin American courts have strongly monitored the arbitrary or discriminatory denial of access to social benefits or health care.[102] The UN Human Rights Committee has closely reviewed logging and mining activity in Sami land (with respect to the Sami's cultural rights as a minority under the ICCPR)[103] while the Inter-American Commission found Belize had violated the rights of Maya people by granting logging and mining concessions without their consent and any consultation process (under their rights to equality and property).[104] Restrictions on labour rights such as unfair dismissal from private workplaces and restrictions on collective action

[97] See for example, *An evaluation of the obligation to the take steps to the 'maximum of available resources' under an Optional Protocol*, Statement, UN Doc. E/C.12/2007/1 (2007) and *General Comment 20: The Right to Social Security (Article 9)*, (Thirty-sixth session, 2006), E/C. 12/GC/20/CRP. 1, 16 February 2006, para. 31.

[98] See M. Craven 'Assessment of the Progress on Adjudication of Economic, Social and Cultural Rights', in Squires, Langford and Thiele (eds.), *The Road to a Remedy* (n. 11 above), pp. 27–42, at 30–36

[99] See *General Comment No. 12* (n. 73 above), para. 15.

[100] *Velásquez Rodríguez Case*, Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, para. 175.

[101] *SERAC v. Nigeria* (n. 73 above).

[102] See discussion in Chapters 7 to 10. In some cases, they have ordered treatments be included in health insurance plans but private provider were then able to get a state refund.

[103] For example, see discussion by Martin Scheinin in Chapter 25, Section 2.9, of Sami cases such as *Länsman v. Finland (No. 2)* (Communication No. 671/1995) and *Ilmari Länsman et al. v. Finland* (Communication No. 511/1992), Views of 26 October 1994.

[104] *Maya Indigenous Communities of the Toledo District v. Belize*, Report No. 40/04, Case 12.053, OEA/Ser.L/V/II.122, doc. 5 rev 1 (2005).

dismissal are also addressed by some authors in their book.[105] In *Vishaka v State of Rajasthan*, a case concerning sexual harassment at the work place, the Indian judiciary drew on the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) to develop binding guidelines which would remain in force till such time the Parliament enacted an appropriate law.[106]

Farha notes that the first complaint decided by the Committee on Elimination of Discrimination Against Women (*A.T. v Hungary*, 2/2003) concerned 'economic and social rights violations that occurred in the private realm (the home)'.[107] The Committee found that the legal and social protections available to the complainant, a victim of domestic violence, were grossly inadequate and took a particularly wide view of the steps expected from the State. It repeated its concerns over entrenched stereotypes concerning men and women, earlier expressed in concluding observations, and instructed the State party to ensure that women would be free from all forms of domestic violence, which included that the complainant be given a safe home in which to live with her children, child support, legal assistance and reparations for the violations of her rights. The remedy was also to include the introduction of a specific law on the subject, which prohibited domestic violence, provided for protection and exclusion orders and support services and shelters.

The link between domestic violence and the need for corresponding civil *and* social rights protections, such as shelter, support services and education campaigns, has not generated as much litigation as perhaps might be expected. This may be partly a legal issue. In the Americas, Melish notes that only Article 7 of the Convention on Violence Against Women is justiciable before the Inter-American Commission on Human Rights and it is mostly concerned with civil and political rights of women facing violence. In *Maria da Penha v Brazil*,[108] which concerned a woman whose husband attempted to murder her but was never prosecuted, the Commission's recommendations are mostly focused on the State's failure to guarantee civil rights and only briefly notes that provision of shelters and education campaigns are also required under Article 7. The relative silence on the issue may also stem from the fact that domestic violence is not seen or classified as a social rights issue and indicates that we may have some way to go in understanding the indivisibility of human rights, particularly when rooted in the experiences of women.

What is also noticeable in this volume is the absence of a large number of cases directly concerned with the process of privatising social services. (The term privatisation is subject to many definitions and I take it in its broadest sense of giving the private sector a greater role in provision of social goods and services, which would include management contracts and public-private partnerships). Privatisation of public services has been the subject of, and the driving energy behind, many advocacy campaigns and the UN Committee on Economic, Social and Cultural Rights has regularly been concerned in its concluding observations on the impacts of such processes on the poor.[109] Yet, while privatisation processes have been particularly widespread in Latin America and Eastern European where the advice and conditions of the World Bank have been most influential,[110] both regions have well entrenched social rights.

Part of the answer perhaps lies in the generally accepted non-ideological nature of social rights and the reticence of Courts to pronounce on specific policy choices.[111] As early as 1991,

[105] See for example Chapters 7, 8, 10 and 8 of this volume.
[106] (1997) 6 SCC 241.
[107] See Chapter 26, Section 2.5.
[108] *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. Comm.H.R., OEA/Ser.L/V/II.111 Doc. 20 rev at 704 (2000).
[109] See Section 4 of Chapter 23 of this volume.
[110] For an excellent overview of this origins and impact of this trend with regard to social security, see Katharina Müller, *Privatising Old-Age Security: Latin America and Eastern Europe Compared* (Edward Elgar Publishing, 2003).
[111] One interesting exception is the early ILO standards on social security, which require mandatory government contributions to social insurance and that social security entities were not-for-profit. Chile was a still a member of these ILO standards after privatising its social security system and trade unions successfully obtained decisions from the ILO CEACR Committee that Chile was in breach. See ILO, *Report of the Committee set up to examine the representation submitted by the National Trade Union Co-ordinating Council (CNS) of Chile under Article 24 of the ILO Constitution, alleging non-observance by Chile of International Labour Conventions Nos. 1, 2, 24,*

the Committee on Economic, Social and Cultural Rights noted that the:

> [U]ndertaking [in Article 2(1) of ICCPR] "to take steps . . . by all appropriate means including particularly the adoption of legislative measures" neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected.

Indeed, the drafters of a clause to place the right to water in the Uruguayan constitution, successfully passed in a 2004 referendum, were careful to add a proviso that water services were to be in public hands. It will obviously provide more explicit grounds for such litigation.

However, litigation has occasionally focused on the processes associated with privatisation. The Philippines case of *Tatad v Secretary of the Department of Energy* is an example where the loosening of regulation of three oil companies was challenged on the basis of social rights.[112] The 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'. The Court declared 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'.[113] In *Nkonkobe Municipality v Water Services South Africa (PTY) Ltd & Ors*,[114] the focus was on the lack of participation. A municipality was successful in nullifying a 6 year-old water privatisation contract, not because they claimed they could no longer afford the high management fees of R400000 per month being charged by the private contractor, but because the municipality itself had not earlier complied with the necessary consultation and public participation requirements, though in this case it was a matter of legislation.

However, as evidence grows of the problems of privatisation in particular contexts, it is not unlikely that courts will intervene at an earlier stage if they foresee particular dangers to social rights to which they feel the Government has paid insufficient attention. In the main, however, it appears that privatisation processes will be challenged on human rights grounds in three more indirect ways. First, *ante facto*, where the regime established for privatisation essentially allows the private actor to essentially lower the quality of the service in order to make the venture profitable. For example, in the *Aquino* case, the workers compensation legislation, which established a system for private provision of worker's compensation, was successfully challenged on the basis that it removed the option of worker's seeking full compensation through the courts and they were subsequently restricted to a no-fault, tabulated compensation regime, with a lower standard of proof as the only option.[115] There may also be challenges to the procedural rights in the process, for example, a lack of information or faulty consultation procedures, as was done in the *Nkonkobe Municipality* case.

Second, *post facto*, when private providers have failed to provide social services in accordance with social rights standards. The difficult question is of course who bears the responsibility. In some cases, the Government may be challenged for failing to regulate.[116] In other jurisdictions, the actions and omissions of private actors can be directly challenged if they are assuming the *responsibilities of a public authority*. In the United Kingdom for example, King notes that actions under the Human Rights Act can only be taken against a 'public authority' but the courts will examine whether the function 'is an exercise of statutory powers, takes the place of a central or local government function, or provides a public service'.[117] In one case, a housing association was deemed

29, 30, 35, 37, 38 and 111 (Geneva: ILO, 1988) and discussion by Fenwick in Chapter 28, Section 5.2.

112 G. R. No. 124360 (5 November 1997).

113 Ibid. pp. 37–38. Cookie Diakno explains though that the Court also explained how the decision could be amended to allow more free floating prices, which was what eventually happened. See interview with her in Langford, *Litigating Economic, Social and Cultural Rights* (n. 53 above), pp. 48–50.

114 Case No. 1277/2001 (unreported)

115 *Aquino, Isacio v. Cargo Servicios Industriales S. A. s/accidentes ley 9688*, 21 September 2004. See discussion in Chapter 8, Section 4.1.

116 See, for example, *Tatad case* (n. 112 above).

117 King in Chapter 15, Section 4.1.

to be a public authority after taking over council apartments while in another a private association was not, despite the fact that it had taken over, and then closed, homes with long-term patients who had been placed there by the local authority.[118] 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.[119] In other cases, and as will be discussed in more detail below, private entities can be directly challenged as such. In Colombia, for example, the Constitutional Court has 'ensured that private entities guarantee equal treatment to persons with disabilities'.[120]

Horizontal Application

Some of the jurisprudence concerns cases brought by private actors directly against other private actors. In a number of domestic jurisdictions such action is facilitated by the constitution as well as anti-discrimination and tort laws. In Colombia, the Constitutional Court found that the constitutional right to work was violated by an employer who dismissed an employee after being tested HIV-positive.[121] The private institution was ordered to pay the applicant compensation for the damage caused. The Court also referred to the wider State obligations to protect persons with HIV, and reaffirmed the prohibition against obliging potential or current employees to take a HIV test in order to gain or maintain employment. In the *Slaight Communications* case in Canada, the Supreme Court held that the decision of a private labour arbitrator must be in conformity with the Charter which is to be interpreted as far as possible with the right to work in the ICESCR.[122] In Ireland in *Meskell* v. *CIE*, an employee was successful in defending their constitutional right to association against an employer in a case where the employer had contractually required the employee to join a trade union.[123] Liebenberg notes that the South African Bill of Rights explicitly applies both vertically and horizontally, and the South African Constitutional Court has clearly stated, for example, that the obligation to abstain from forced evictions falls on both State and non-State actors.[124]

At the international level, Clark describes the functioning of the World Bank Inspection Panel, which allows persons directly affected by Bank projects to make complaints about the compliance of the Bank with its operational procedures. The Panel has made a significant number of decisions in the area of evictions, environmental harm and indigenous peoples. But Clark is critical of the lack of explicit human rights standards in the Panel's mandates and effective enforcement powers as many decisions go unimplemented. Litigating against corporations is more difficult at the international level.

Joseph points to the stalled negotiations over the UN Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights. Complaints can and have been made though under the earlier declaration, the OECD Guidelines on Multinational Enterprises. While National Contact Points, which receive complaints, have no power to enforce these Guidelines, there is the capacity for NGOs to use the proceedings 'to publicise and mobilise campaigns against companies, to enter into meaningful dialogue with companies, and to conciliate settlements with companies'.[125] Human rights have also been raised more defensively in international investment tribunals cases where, for example, the ICSID tribunal accepted amicus submissions from NGOs in the *Suez/Vivendi case*

[118] See *Poplar Housing and Regeneration Community Association Ltd. v. Donoghue*, [2002] QB 48 (CA). R*(H) v. Leonard Cheshire Foundation (A Charity)* [2002] EWCA Civ 266.

[119] *Eldridge* (n. 42 above). See discussion by Jackman and Porter in Chapter 11, Section 2.3.

[120] See Chapter 7, Section 5.1.

[121] SU-256/96. See discussion in Chapter 7 by Sepúlveda.

[122] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038. See discussion in Chapter 11, Section 3 of this volume.

[123] [1973] IR 121. See discussion in Chapter 16, Section 2.2.

[124] *Grootboom* (n. 47 above). In *Port Elizabeth* (n. 83 above) it stated that the Bill of Rights 'counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home'.

[125] See for example, the Adidas case where The India Committee of the Netherlands lodged a complaint with the Dutch NCP claiming that Adidas had failed to ensure that its suppliers were in compliance with the OECD Guidelines on Multinational Enterprises, particularly in relation to minimum wages, unionization and child labour. A public settlement was reached in July 2003 whereby the parties agreed on common labour standards and the need for external monitoring.

on the basis that the case raised human rights issues concerning water.[126]

Joseph also charts the many attempts to use laws in national jurisdictions for the same purpose, such as tort law or the US Alien Torts Claim Act. She concludes that 'While plaintiffs have had to withstand a barrage of preliminary challenges in the salient transnational cases, some cases have been settled leading to the delivery of a measure of redress to victims, and other cases are ongoing, with possibilities for further redress and vindication'.[127]

This of course raises the question whether there is a clear State obligation to ensure that social rights can be horizontally applied, regardless of whether this right is included under a national Constitution.[128] Most UN human rights treaty bodes have focused on emphasising the State obligation to *protect* as well as *provide* adequate remedies for violations without necessarily specifying that this should allow victims to litigate against non-State actors. However, the Committee on the Elimination on Racial Discrimination seems to imply this when it notified States parties:

> [T]hat, in its opinion, the right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.[129]

At the national level there are some more clear and interesting trends. Jackman and Porter note that in *Vriend*,[130] the Canadian Supreme Court held that a failure to include sexual orientation as a prohibited ground of discrimination under provincial human rights legislation governing the actions of private employers, service and housing providers, violated Charter equality rights.[131]

3.3 Obligations to Fulfil

The idea that courts could involve themselves in questions concerning the fulfilment of social rights has been the most controversial question from a philosophical standpoint, a point taken up in Section 4 of this Chapter. These concerns feature in a number of judgments, where Courts have addressed doctrines of separation of powers when dismissing cases, explaining an order or defining the boundaries of their powers.

In some jurisdictions, these concerns have been rather fatal for the jurisprudence. Nolan notes in her chapter how the Irish Supreme Court has sought to ground itself in 'Aristotelian distinction between commutative and distributive justice [which] marks out the dividing line between the judicial and legislative spheres of operation'.[132] In the *O'Reilly* case, later approved by the Supreme Court, Justice Costello stated courts can only purportedly deal with the former while the distribution of public resources:

> [C]an only be made by reference to the common good and by those charged with furthering the common good (the Government); [distribution of public resources] cannot be made by any individual who may claim a share in the common stock and 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.[133]

Other adjudicators have moved forward differently (and Nolan notes that Justice Costello himself later recanted his view).[134] They have carved out for themselves a role in adjudicating the more positive obligations. No one uniform approach emerges, which can be mostly ascribed to differing legal regimes, the socio-cultural factors discussed in Section 1 above and to the developing nature of this field.

[126] Chapter 29, Section 2.3.
[127] Chapter 29, Section 4.
[128] For a good overview of the general issues in this area, see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006).
[129] *General Recommendation 26, The right to seek just and adequate reparation or satisfaction* (Fifty-sixth session, 2000), U.N. Doc. A/55/18, annex V at 153 (2000).
[130] *Vriend v. Alberta*, [1998] 1 SCR 493.
[131] Ibid. paras. 65–66.
[132] Chapter 16, Section 3.
[133] *O'Reilly* [1989] I.L.R.M. 181, p. 194.
[134] See Chapter 16, Section 4.1, particularly discussion in footnote 81.

In broad-brush terms, many adjudicators tend to enforce one or both of the two key State obligations identified by the Committee on Economic, Social and Cultural Rights: First, the explicit duty to take adequate steps towards the progressive realisation of the rights within available resources and, secondly, the implicit obligation to immediately achieve a minimum level of realisation. (The positive obligations to guarantee non-discrimination and equality will be discussed in the next sub-section). The articulation of these two obligations, 'taking steps' and 'minimum core', is essentially a response to the concern that adequate resources may not be available to meet social rights. States are thus expected to achieve some sort of minimum and plan for and move towards the progressive realisation for the full realisation of the rights.

The seeming logic of this approach has driven both the European Committee on Social Rights and African Commission on Human Rights to imply the defence of lack of resources into their constituent instruments – the State obligations were largely unqualified in this regard.[135] However, it should be strongly emphasised that many cases concerning positive obligations are not monetary in orientation. For example, the Inter-American Court of Human Rights found that the State responsible, Nicaragua, had failed to legislate and ensure that the lands of Indigenous peoples were demarcated and titled.[136]

Colombia is an example of a jurisdiction that has adopted and enforced both approaches. The Constitutional Court recognises that obligations concerning economic, social and cultural rights are progressive in character[137] but has drawn on General Comment No. 3 to stress that, at a minimum, the State 'must devise and adopt a plan of action for the implementation of the rights'.[138] It has intervened to immediately enforce such rights by broadly interpreting the right to life, dignity and security and enforcing a 'minimum conditions for dignified life' (borrowing directly from the German jurisprudence on *Existenzminimum)* although it has a fairly enlarged vision of the minimum core. It has gone further and developed another arm of jurisprudence in circumstances where it finds an 'unconstitutional state of affairs'. This requires systematic and widespread violations of a number of constitutional rights which cannot be attributed to only one State authority and the Court has stepped in to make wide-ranging orders affecting policies and programs.

In some other jurisdictions one can also find a mix of cases in both categories. In Finland, local authorities have been faulted for failing to take *sufficient steps* to secure employment for a job seeker and immediatly secure child-care for a family.[139] Albisa and Schultz note that US state courts in Texas, Kentucky and New York have struck school financing systems on the grounds of failing to provide adequate or efficient education while the New York court has found 'a positive duty upon the state' to provide welfare payments to anyone considered indigent under the state's 'need standard', even if the individual could not present papers proving that he or she received no support from relatives.[140]

The South African Constitutional Court has opted for only the former approach, rejecting for the moment the idea of immediate enforcement of a minimum core obligation. In *Grootboom*, the Court found that the government authorities had failed to develop an adequate housing programme which was directed towards providing emergency relief for those without access to basic shelter.[141] This violated its duty to take reasonable legislative and other measures, within its available resources,

[135] See *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Comm. No. 241/2001 (2003) and Complaint No. 13/2002, *Autism-Europe v. France*, Decision on the Merits.

[136] *The Mayagna (Sumo) Indigenous Community of Awas Tinga v. Nicaragua*, Judgment of 31 Aug. 2001, Inter-Am.Ct.H.R. (Ser.C) No.79. See also *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016 and European Committee on Social Rights, *ICJ v. Portugal*, Decision No. 1/1999.

[137] See, e.g., SU-111/97.

[138] See discussion in Chapter 7, Section 3, by Sepúlveda and cases T-595/02 and T-025/04.

[139] 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 199; 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/>. The different approaches in Finland are partly related to the State obligations, particularly the more graduated obligation in the case of the constitutional right to work.

[140] *Tucker v. Toia*, 43 N.Y.2d 1, 7 (1977).

[141] *Grootboom* (n. 47 above).

to achieve the progressive realisation of the constitutional right to access adequate housing.[142] In language not dissimilar to General Comment No. 3, the Court expressed the obligation in the following terms:

> The measures [by government] must establish a coherent public housing program directed towards the progressive realisation of the right of access to adequate housing within the State's available means. The program must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable.[143]

Liebenberg notes that the Court has introduced numerous criteria for determining such reasonableness. These include whether the programme is 'comprehensive, coherent, coordinate, with appropriate allocation of 'financial and human resources', is 'balanced and flexible' with provision for 'short, medium and long-term needs', 'reasonably conceived and implemented', 'transparent' and made 'known effectively to the public'.[144]

The South African Constitutional Court rejected the minimum core obligation on the basis that in the case of the right to housing it could not determine the minimum due to the diversity of the needs and groups[145] and raised concerns about whether the minimum could be realised immediately in the South African context. This decision is certainly not without critique. Sandra Liebenberg argues that the Court's reasonableness test, which it applies to the progressive realisation of the right, could also be adapted to cover 'survival interests'. There could be a presumption that government programs do not meet the test of reasonableness if certain minimums are not met.[146]

The Constitutional Court of Hungary takes the reverse position of its South African counterpart. It has consistently declined any role in examining whether the Government has sufficiently taken steps to realise constitutional social rights – it merely requires that such a law or programme exist.[147] Instead it turned to the German idea of *Existenzminimum*, requiring that social benefits, for example, may not be 'reduced below a minimal level'. Although in practice, the Court has been somewhat reluctant to review whether social security or housing schemes meet the minimum requirements.[148] As I argue in Chapter 13, this approach to only enforcing the minimum level is partly explainable by the Court's use of jurisprudence from jurisdictions where social rights are derived from civil and political rights and are thus more limited in scope. It may also be attributable to the possible middle class bias of the Court (it was more willing to strike down cuts in social insurance benefits than examine the adequacy of minimum safety net) and the defensive nature of the post-Communist constitutional transition. Social rights were seemingly retained and developed in the Constitutions to appease the populace frightened of market reforms rather than being part of the broader transformative democratic package as they were in Latin America and South Africa.

Melish is similarly critical of the Inter-American Court of Human Rights for only enforcing minimum (though rather enlarged) social rights protections under civil and political rights.[149] This is despite explicit obligations concerning economic, social and cultural rights being set out in Article 26 of the American Convention on Human Rights. They declined to do so on the basis that judging the level coverage of these rights 'over the entire population'[150] under article 26 conflicts with the standing requirements that an *individualised* impairment in the enjoyment or exercise of rights must be shown. Melish argues instead that the conduct-oriented duties to take steps to ensure these rights can be suitably raised

[142] S.26(2) of the Constitution of the Republic of South Africa.
[143] *Grootboom* (n. 47 above), para. 41.
[144] Liebenberg, Chapter 4, Section 3.1.
[145] *Grootboom* (n. 47 above), para. 33.
[146] See Sandra Liebenberg, 'Enforcing Positive Social and Economic Rights Claims: The South African Model of Reasonableness Review', in Squires, Langford and Thiele, *Road to a Remedy* (n. 11 above), pp. 73–88. Note also recent judgment in *Mazibuko & Ors v. City of Johannesburg & Ors* (Unreported, 30 April 2008) where the High Court argues the constitutional court had not categorically ruled at minimum core approach.
[147] See Constitutional Court of Hungary, Decision 772/B/1990/AB: ABH 1991, 519 at 520.
[148] See Decision 32/1998 (VI.25) AB and Decision No. 42/2000 and discussion by myself in Chapter 13, Sections 4.2 and 4.3.
[149] See *Five Pensioners' Case v. Peru*, Judgment of Feb. 28, 2003, Inter-Am. Ct. H.R. (Ser. C) No. 98 (2003).
[150] Ibid. para. 147.

by individuals who can show the appropriate damage.

This minimum core approach is particularly evident in jurisdictions where social interests are judicially protected through civil rights. For example, the Swiss Federal Court derived an implied constitutional right to basic necessities and said that while it lacked the competence to determine resource allocation, that it would set aside legislation if the outcome failed to meet the minimum claim required by constitutional rights.[151] The European Court of Human Rights and courts in the United Kingdom have been willing to enforce access to housing or social benefits for vulnerable groups in severe and very exceptional situations under civil rights to protection from cruel and degrading treatment and right to home, family life and privacy. The South Asian courts, however, have felt less restricted. They broadly interpret the right to life to include a range of social rights. However, they are somewhat selective in their degree of enforcement (strong deterence to the state shown with rights to housing and work) and in some cases the invocation of constitutional rights appears to represent a means to enforce unimplemented legislation.

However, the distinction between the more conduct-oriented duty to *take steps* and the result-oriented duty to *immediately realise* some aspect of the right is not always apparent in practice. This is particularly so when it is clear that sufficient resources are available or adjudicators believe that the State has had sufficient time to address the problem. In *Purohit v Moore*, the African Commission on Human and Peoples' Rights ordered Gambia to provide certain treatments to detained mentally ill patients once it had ascertained resources were available. In *TAC*, The South African courts ordered the Government to provide the fairly cheap drug neviropane for prevention of mother-to-child transmission of HIV. In *Autism-Europe v France* the European Committee on Social Rights stated:

> [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 failed to achieve sufficient progress in advancing the provision of education of persons with autism.[152]

3.4 Equality Rights

In quite a number of cases, both the State's negative and positive obligations towards social rights have been addressed through the judicial application of equality norms in relation to the needs of disadvantaged groups. These cases concern some of the more traditionally recognised prohibited grounds of discrimination, but they also increasingly reveal a host of other arbitrary classifications that adjudicatory bodies have viewed suspiciously.

The question of whether equality rights or guarantees possess substantive character and contain positive obligations to eliminate discrimination has exercised the attention of a number of adjudicatory bodies. In the case of Pakistan, the Supreme Court has enunciated the principle quite boldly during a flowering of public interest litigation. In *Fazal Jan v 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.[153]

In the case of the UN Human rights committee, they have moved ahead cautiously. In *Zwaan-de Vries v the Netherlands*, they construed equality rights to essentially prevent discriminatory backsliding. According to the Committee, the prohibition on discrimination in Article 26 of the International Covenant on Civil and Political Rights does not require a State to 'enact legislation to provide for social security'; only that social security legislation, once enacted, does not discriminate.[154] However, it seemingly later expanded this position in a General Comment by stating that 'the principle of equality sometimes

[151] *V v. Einwohrnergemeine X und Regierunsgrat 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 (XI.8); BverfGE 40, 121 (133) (Federal Constitutional Court of Germany).

[152] Ibid. para. 54.

[153] PLD 1990 SC 661.

[154] *Zwaan-de Vries v. the Netherlands*, (Communication No. 182/1984), views of 9 April 1987, para. 12.4.

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'.[155] This may mean that a State might have to justify the absence of action to provide social security if it impinged on equality.

In Canada, this broader position was clearly articulated in the *Eldridge* case, in which the Supreme Court dismissed 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 disadvantage of particular groups such as the deaf and hard of hearing.[156] The Court rejected this 'thin and impoverished vision of equality' and held that the government's failure to fund or provide sign language services in the provision of healthcare to the deaf was discriminatory. However, Porter and Jackman note a certain retreat by the Court in some recent cases: in *Auton (Guardian ad litem of) v British Columbia (Attorney General)*, for instance, the Court declined to require the funding of treatment of a new treatment for autism.[157]

The Committee on Economic, Social and Cultural Rights has explicitly encouraged a more progressive approach stating that ''Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights'.[158] Farha notes the substantive vision of equality of the Committee on Elimination of Discrimination Against Women, which has recognised 'that inequality exists when . . . differential disadvantage of women is not addressed by laws, policies, or practices'.[159] For example, the Committee urged Cuba to introduce temporary special measures to address the high levels of unemployment found amongst women,[160] and Romania to 'improve the availability, acceptability, and use of modern means of birth control to avoid the use of abortion as a method of family planning' including provision of 'sex education systematically in schools'.[161] Conventions on the right of children, migrants and persons with disabilities also demonstrate an emphasis on their substantive social rights which may also require differential modes of realisation.

The positive dimension of State obligations is particularly influential at the remedial stage. It may prevent an adjudicatory body 'equalising down' in order to achieve equality in respect of the social interest or right. In Canada, the Supreme Court has issued many positive remedial orders (extending or increasing parental, social assistance and pension benefits and extending legislative protections under security of tenure and human rights legislation). Nonetheless, it has not ruled out the possibility that it can equalise down.[162] In *Khosa v Minister of Social Development*,[163] the Constitutional Court of South Africa clearly adopted a formula of equalising up. After finding that the legislative exclusion of 'permanent residents' from a social assistance scheme violated the constitutional prohibition on unfair discrimination, the remedial order was to 'read into' the relevant legislation, the rights of permanent residents to receive the social benefits.[164] However, the Court did note that the right to social security of residents was a key factor in considering the reasonableness of the exclusion of permanent residents, and outweighed any competing financial and immigration considerations of the State.

Indirect discrimination is also raised in some cases. In *Kearney* v. *Bramlea Ltd*, use of income criteria to assess tenant applicants was found to be unjustified (on the basis that it took no account

[155] Human Rights Committee, *General Comment No. 18: Non-discrimination* (1989), para. 10.
[156] *Eldridge (n. 42 above)*, para. 87.
[157] [2004] 3 S.C.R. 657.
[158] *General Comment No. 9, The domestic application of the Covenant* (Nineteenth session, 1998), U.N. Doc. E/C.12/1998/24 (1998), para 15.
[159] Section 2.3, Chapter 26. The Convention on Elimination of Discrimination Against Women expressly obliges States to take steps to eliminate discrimination against women and permits temporary special measures to accelerate de facto equality.
[160] *CEDAW Committee, Concluding Comments on Cuba*, UN Doc. Supplement No. A/55/38, para. 270. (2000).
[161] *CEDAW Committee, Concluding Comments on Romania*, UN Doc. Supplement No. A/55/38, para. 315, (2000).
[162] See discussion by Jackman and Porter in Chapter 10, Section 6.
[163] *Khosa v. Minister of Social Development; Mahlaule v. Minister of Social Development*, 2004 (6) BCLR 569 (CC).
[164] See Chapter 4, Section 3.3. The Court also found that the legislation violated the right to social security but the judgment does not appear to suggest that a different outcome would be reached had the right to social security not also been violated.

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 affect those groups.[165] In *Rupert Althammer et al v Austria*, the Human Rights Committee found that a violation of Article 26 of the ICCPR can 'result from the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate' but declined in that case to find that the removal of a household benefits in favour of better benefits for children with employees was indirect discrimnation.[166] This was on the basis that active employees without chilren would also be negatively affected and that Austria had provided reasonable and objective justification for the decision. However, in *Derksen and Bakker v The Netherlands* they found that legislation which failed to retroactively grant survivor's benefits to children of unmarried parents was indirectly discriminatory.[167]

Adjudicatory bodies have addressed many of the express grounds of prohibited grounds in International Covenant on Economic, Social and Cultural Rights, namely race and colour,[168] sex,[169] language,[170] religion,[171] national or social origin,[172] property and birth.[173] However, both national and international adjudicators have regularly found other suspect classifications in the field of human rights (including social rights), whether under the prohibited ground of 'other status', general and non-specific non-discrimination provisions or by expanding the definition of the express grounds. The Committee on Economic, Social and Cultural Rights is an example of the former[174] although it is yet to provide any 'all-embracing rationale'.[175] The Human Rights Committee also seems to hint that the underlying rationale is not so much the search for specific suspect grounds but rather the arbitrariness of the classification. In the case of *Des Fours Wald erode*, which concerned a law that with retroactive effect frustrated ongoing restitution proceedings, the Committee said: 'This raises an issue of arbitrariness and, consequently, of a breach of the right to equality before the law, equal protection of the law and non-discrimination under article 26 of the Covenant'.[176]

One can thus find cases where the prohibited grounds of non-discrimination include disability,[177] age,[178] marital status,[179] sexual

[165] (1998) 34 CHRR D/1 and upheld in *Shelter Corporation* v *Ontario Human Rights Commission* (2001) 143 OAC 54. See B. Porter, "Homelessness, Human Rights, Litigation and Law Reform: A View from Canada", in P. Lynch and D. Otto (eds.), Homelessness and Human Rights, *Australian Journal for Human Rights*, Vol. 10, No. 2 (2004) available at <http://www.austlii.edu.au/au/journals/AJHR/2004/7.html>.

[166] (Communication No. 998/2001), Views of 8 August 2003. See discussion by Scheinin in Chapter 25, Section 2.1.

[167] (Communication No. 976/2001), Views of 1 April 2004.

[168] See particularly cases discussed in Chapter 24 on the Committee on Elimination of Racial Discrimination. Other cases concerning race and colour can be traced through the index to this book.

[169] See for example discussion of Colombian cases concerning moment right to work, social security and food on pages 149 or 156–157, and South Asian cases from pages 131–133 of this book.

[170] *Belgian Linguistics Case (No 2)* 1 EHRR 252; Application nos. 1474/62; 1677/62; 1769/63; 1994/63; 2126/64 (French speaking children were prevented, solely on the basis of the residence of their parents from having access to French language')

[171] *Jehovah's Witnesses v. Argentina*, Case No. 2137, Inter-Am. Comm. H.R., OEA/Ser.L/V/II.47, doc. 13 rev 1 (1979).

[172] See *Yean and Bosico v. Dominican Republic*, Judgment of Sept. 8, 2005, Inter-Am. Ct. H.R. (Ser. C) No. 130 (2005). (State's refusal to register the births of children of Haitian descent, which denied them access to schooling.)

[173] See for example discussion of CERD's treatment and concluding observations on descent-based discrimination in Chapter 24.

[174] See discussion in Chapter 23, Section 3.4.

[175] Craven, *The International Covenant on Economic, Social and Cultural Rights* (n. 10 above), p. 169.

[176] *Karel Des Fours Walderode v the Czech Republic* (Communication No. 747/1997), Views of 30 October 2001, paragraph 8.3. See discussion of this and other cases in Chapter 25, Section 2.8.

[177] *Purohit and Moore v. The Gambia*, African Commission on Human and Peoples' Rights, Communication No. 241/2001 (2003).

[178] 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: CA Versailles, March 11, 1985, *Recueil Dalloz* (1985), 421. Cf. *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, where a slender majority of the Canadian Supreme Court found that a Quebec social assistance regulation that reduced by two-thirds the amount paid to single employable persons under the age of thirty not enrolled in a workfare program was not discriminatory.

[179] *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, (1993) 119 NSR (2d) 91 (NS CA). (A Black single mother of two children challenged security of tenure provisions that excluded public housing tenants'.)

orientation,[180] social status/condition,[181] receipt of public assistance,[182] nationality,[183] and refugee or migrant status.[184] Increasingly, some of these grounds are being expressly included in legal instruments, particularly disability,[185] sexual orientation[186] and 'receipt of public assistance' and 'social condition'.[187]

Van Beuren also raises the challenging question as to whether children as beneficiaries of social rights may also have greater or immediate demands on resources in comparison to adults on the basis of the principle of the best interests of the child. Article 3(1) of the UN Convention on the Rights of the Child as, 'in all actions concerning children ... the best interests of the child shall be a primary consideration'. She notes that its implications beyond civil rights have not been properly explored. However, in the case of the Brazil, Piovesan describes how the this principle was applied by the Courts and the logic would lead to some startling consequences:

> The constitutional right to the absolute priority of children and adolescents in the exercise of the right to health is established by constitutional norm which is emphasised by articles 7 and 11 from Statute of Children and Adolescents. ... 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, essential in a democratic society provided by the Constitution, putting also into risk the clause in defense of human dignity. (Resp 577836)

3.5 Conflicts Between Rights

One particular under-treated area in the field of economic, social and cultural rights is potential and actual conflicts between the various rights in practice. The constitutional court in Hungary came to a different conclusion on legislation allowing summary eviction, finding the best interests of child was not paramount in their case.[188] Obviously, there can be direct clashes between civil and political rights and economic, social and cultural rights. It is interesting to note that France and Bangladesh were willing to sacrifice freedom of expression to permit a law on tobacco advertising while Canada was not[189] although in a more recent case, restrictions on tobacco advertising passed constitutional muster.[190] But of particular interest is where there is a clash within the social arena, which can occur in a number of ways.

The first is where social interests derived from civil and political rights may clash with express economic, social and cultural rights. For instance, in the *Chaoulli* case[191] claimants successfully challenged a ban on private health insurance and funding in Quebec because it otherwise made private health services uneconomical and forced

[180] See discussion in Chapter 25 of Human Rights Committee, *Edward Young v. Australia* (Communication No. 941/2000), Views of 6 August 2003 although the Committee places 'sexual orientation' under the ground of 'sex'. The Committee on Economic, Social and Cultural Rights, *General Comment No. 12, Right to adequate food* (Twentieth session, 1999), U.N. Doc. E/C.12/1999/5 (1999), para. 18. See also *Vriend v. Alberta* (n. 130 above) imalier it under other state.

[181] Quebec *Commission des droits de la personne v. Gauthier* (1993) 19 CHRR D/312. (Complainant refused social assistance by the respondent on the alleged grounds of the latter assuming that the complainant, a welfare recipient, would be incapable of paying rent.) Note that 'social condition' is expressly included as prohibited ground in Quebec legislation.

[182] *Kearney* v *Bramlea Ltd* (n. 248 below).

[183] See Human Rights Committee in *Gueye et al. v. France* (Communication No. 196/1985), Views of 3 April 1989. (''There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of Article 26. ... A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided'. (Para 9.5).

[184] See *Khosa v. Minister of Social Development* (n. 163 above) – residency as prohibited ground.

[185] Canada was the first among constitutional democracies to include disability as a constitutionally prohibited ground of discrimination. See now the newly adopted UN Convention on the Rights of Persons with Disabilities as well as African Charter and Revised European Social Charter.

[186] See, for example, Article 23 of Constitution of Ecuador and Treaty of Amsterdam, Article 13 EC.

[187] See for example Article 14 of Spanish Constitution.

[188] See Chapter 13, page 264.

[189] See pages 136, 220 and 271 of this book.

[190] *Canada (Attorney-General) v. J.T.I. MacDonald Corp* [2007] S.C.J. No. 30.

[191] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791.

them into long waiting queues in the public system. The majority of the Court agreed that the prohibition violated rights to life and to security of the person.[192] A minority raised concerns over the use of the Charter to benefit the wealthy and agreed with the State that such a ban was necessary to protect the publicly funded system. King argues that if the right to health had been constitutionally enshrined then the Court could have perhaps better balanced the arguments.[193] Indeed, in *Kyalami Ridge*, the Constitutional Court of South Africa relied on the government's duty to fulfil the right to housing in turning down a civil rights challenge by an environmental association to making nearby land to flood victims housing.[194]

Secondly, there may be conflicts between various express economic, social and cultural rights. Muralidhar examines the way in which courts in a series of cases put greater emphasis on the right to water and environmental rights over rights to housing and settlement. In *Narmada Bachao Andolan v. Union of India*,[195] the Court acknowledged that 'conflicting rights had to be considered. If for one set of people namely those of Gujarat, there was only one solution, namely, construction of a dam, the same would have an adverse effect on another set of people whose houses and agricultural land would be submerged in water'.[196] However, the majority of the Court pleaded 'separation of powers' and deferred to the governments right to make policy decisions.[197]

The dissenting judge in *Narmada Bachao Andolan* adopted a more rigorous approach finding that there was in fact no environmental clearance for the project as required by the law and many interim orders in the case concerning relief and rehabilitation of those evicted had not been followed.[198] In a similar case of *N.D. Jayal v Union of India*,[199] the dissenting justice articulated some principles that may help guide such balancing of rights when there is power or wealth imbalance:

> When such social conflicts arise between the poor and more needy on one side and rich or affluent or less needy on the other, prior attention has to be paid to the former group which is both financially and politically weak. Such less-advantaged group is expected to be given prior attention by a welfare state like ours which is committed and obliged by the Constitution, particularly by its provisions contained in the preamble, fundamental rights, fundamental duties and directive principles, to take care of such deprived sections of people who are likely to lose their home and source of livelihood.[200]

Clements and Simmons are similarly critical of the European Court of Human Rights decision at first instance in *Blecic v Croatia*,[201] where Croatia had terminated the tenancy/occupant rights of Serb Croat refugees who wished to return to their homes in favour of the new occupants. The Court found the termination pursued a legitimate aim and noted that where there are 'competing interests of different groups in society' in a situation of 'scarce resources,' – Croatia had argued there was a housing crisis – then the 'reasonable assessment' of which party will benefit and which will suffer is within a State's 'margin of appreciation'. Yet, in this case Mrs Blecic had occupied the home since 1953, was homeless, the dispossession was systematically tilted against Serb Croats and the Court did not consider the possibility of alternative solutions, such as allowing the present occupants temporary possession or finding alternative shelter for the refugees who were in desperate circumstances.

These dissents and critiques offer a more compelling way forward and are more consistent with some of the principles developed by judicial and quasi-judicial bodies to adjudicate economic,

[192] In her ruling for the four-judge majority in the case, Justice Deschamps held that the prohibition on private insurance violated the right to 'life', 'personal security' and 'inviolability' under section 1 of the Quebec Charter of Human Rights and Freedoms. The Court split 3–3 on the issue of whether the ban also violated section 7 of the Canadian Charter.

[193] 'Constitutional Rights and Social Welfare: A Comment on the Canadian Chaoulli Health Care Decision', *Modern Law Review* Vol. 69 (2006), pp. 631–643.

[194] 2001 (7) BCLR 652 (CC), para 51.

[195] (2000) 10 SCC 664. See also *T.N.Godavarman Tirumulkpad v. Union of India* (1997) 2 SCC 267 and *T.N.Godavarman Tirumulkpad v. Union of India* (2000) 6 SCC 413 concerning eviction of forest dwellers.

[196] Ibid. p. 764.

[197] Ibid.

[198] Ibid. p. 784.

[199] (2004) 9 SCC 362.

[200] Ibid. p. 418. The dissenting judge noticed that out of a total of 9239 rural affected families, cash compensation had not been paid to 1948 families.

[201] Application No.59532/00, judgment dated 29 July 2004.

social and cultural rights. This involves addressing the seriousness of the harm involved on each side of the conflict, the historical nature of the claims, the presence of discrimination of violation of a minimum core obligation and the presence of alternatives. Such principles are not unknown to civil and political rights and other fields of law.[202]

4. THE JUSTICIABILITY DEBATE REVISITED

What then of the justiciability debate? What does the emerging practice of social rights adjudication mean for the contested positions over whether economic, social and cultural rights are *legal* rights and whether courts have the *legitimacy and capacity* to adjudicate them?

The growing jurisprudence has certainly influenced the debate. One dramatic shift was that of Cass Sunstein. In 1993, in an essay 'Against Positive Rights', he argued that the inclusion of social rights in the new constitutions of post-communist European States 'was a large mistake, possibly a disaster'. For him, many social rights were 'absurd', 'Governments should not be compelled to interfere with free markets' and many 'positive rights are unenforceable by courts' since they lack the bureaucratic and policy tools'.[203] After the *Grootboom* decision in South Africa in 2000, Sunstein took a seemingly opposite view:

> The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met. The approach of the Constitutional Court stands as a powerful rejoinder to those who have contended that socio-economic rights do not belong in a constitution.[204]

Similar movement in attitude can be seen beyond academia. The deliberations of the Human Rights Council working group, and its predecessors, on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights for complaints concerning violations of the covenant have been substantially affected by presentations on the experiences of justiciability.[205] The debate shifted from largely philosophical concerns[206] to the modalities and scope of the proposed procedure.

The sheer weight of the jurisprudence makes it difficult to argue against the *possibility* of social rights justiciability. Even Dennis and Stewart, in their clarion call to States not to adopt an Optional Protocol, acknowledge this fact, stating that they 'do not reject out of hand the notion that some social and economic rights may be domestically justiciable'.[207] But the scholarship and jurisprudence itself indicates that the philosophical debate still rumbles with a certain degree of intensity.[208] Debate is now more focused on the degree of justiciability. Should courts engage in weak and strong forms of review? What are appropriate remedies? How do you reconcile individual and collective interests, and the relationship between theories of democratic deliberation and judicial review?

The debate on judicial review is not solely confined to economic, social and cultural rights – some commentators remain hesitant about the idea of judicial review of human rights at all. It is a debate with a long pedigree. Jeremy Bentham excoriated his eighteen century contemporary Justice Mansfield for developing the English common law in defiance of 'popular assemblies' and squandering legal certainty as 'amendment from the judgment seat is confusion'.[209] Two centuries

[202] See also discussion of pages 36–37 below.

[203] C. Sunstein, 'Against Positive Rights: Why social and economic rights *don't* belong in the new constitutions of post-communist Europe', *East European Constitutional Review*, Vol. 2, Winter (1993), pp. 35–38.

[204] C. Sunstein, 'Social and economic rights? Lessons from South Africa', *Public Law and Legal Theory Working Paper No. 12*, University of Chicago, later published in *Designing Democracy. What Constitutions Do* (Oxford: Oxford University Press, 2001), pp. 221–37.

[205] See discussion in Chapter 23, Section 5.

[206] A typical earlier intervention was that of the Canadian government representative. She 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.

[207] M. Dennis and D. 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?', *American Journal of International Law*, Vol. 98, (2004), pp. 462–515, at 515.

[208] Scheinin, 'Justiciability and Indivisibility of Human Rights' (n. 211 below).

[209] *Comment on the Commentaries* (Oxford: Clarendon Press, 1928), p. 214, quoted in W. Holdsworth, *Some Makers of English Law* (Cambridge: Cambridge University Press, 1938), p.173.

later, his namesake Jeremy Waldron has levelled arguments against judicial review of human rights on both democratic and instrumentalist grounds although he hedges his argument with a number of assumptions.[210] Addressing this more foundational debate of the appropriate role of Courts is beyond the scope of this introductory reflection but many of the arguments do arise in some form as we consider the legitimacy and capacity arguments concerning social rights adjudication.

4.1 Legal Nature of Social Rights

A bundle of arguments has traditionally been used to deny the legal, and by extension, justiciable nature of economic, social and cultural rights by distinguishing them from civil and political rights. The arguments include the claims that the rights are vague, inherently of a positive nature and resource dependent. The counter-arguments are well-rehearsed and some commentators have declared the debate almost over. A former member of the Human Rights Committee, Martin Scheinin, opined that, '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'.[211]

As to the abstract nature of economic, social and cultural rights, they are phrased no differently than civil and political rights; the right to freedom of speech is no more concrete in expression than the right to social security. Indeed, it is arguable that 'open-textured framing' of all human rights is to be favoured: 'courts are able to respond adequately to individual circumstances and historical developments in concretising their meaning over time'.[212] Through contextual claims and counter-claims, arguments and counter-arguments, we also develop a better understanding of the content of those rights and obligations, and the voluble rise in jurisprudence is helping this process.[213] The South African Constitutional Court has precisely understood its role in this way: '

> 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. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case.[214]

Beyond stylistic construction, the argument that the rights are somehow substantively different has withered. Scholars have long noted that economic, social and cultural rights require not only government action, but also restraint.[215] For the right to health, protecting existing access to community health care and clean air and water can be as important as State provision of health care facilities. The nature and degree of the State obligations and financial burden to realise economic, social and cultural rights will thus vary according to context. Likewise, the assumption that civil and political rights are concerned with protection of personal freedoms from State malevolence (at no cost to the taxpayer) has been shown conceptually problematic. The right to a fair trial is largely a positive right requiring significant expenditure of state resources on courts, prison systems and legal aid. As Menéndez puts it, 'All rights, and not only social rights, are public goods rendered

[210] See J. Waldron, 'The core of the Case Against Judicial Review', *The Yale Law Journal*, Vol. 115 (2006), pp. 1346–1406. Responses include D. Kyritsis, 'Representation and Waldron's Objection to Judicial Review', *Oxford Journal of Legal Studies*, Vol. 26, No. 4 (2006), pp. 733–751. A. Kavanagh, 'Participation and Judicial Review: A Reply To Jeremy Waldron', *Law and Philosophy*, Vol. 22, No. 5, September (2003), pp. 451–486.

[211] M. Scheinin, 'Justiciability and Indivisibility of Human Rights', in Squires, Langford and Thiele (eds.), *The Road to a Remedy* (n. 11 above), pp. 17–26, at 17.

[212] A. Nolan, B. Porter and M. Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal*, published by Center for Human Rights and Global Justice Working Paper Series, New York University, No. 14, 2007 and the Committee on the Administration of Justice, Northern Ireland, 2007, p. 11.

[213] Defenders of social rights traditionally defended the lack of clarity of the rights on the basis 'of their exclusion from processes of adjudication' but this argumentation is not as crucial now. See this argument in S. Liebenberg, 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa', S*outh African Journal of Human Rights*, Vol. 11 (1995), pp. 359–378, at 362.

[214] *Grootboom* (n. 47 above), para. 20.

[215] See A. Eide, 'State obligations revisited' in W.B. Eide and U. Kracht (eds.) *Food and Human Rights in Development, Vol. II: Evolving issues and emerging applications* (Antwerp: Intersentia, forthcoming) pp.137–160, for a discussion.

possible by public institutions'.[216] The necessity for positive State action to realise civil and political rights has actually generated a growing jurisprudence on positive obligations within this field.[217]

The meaningless of such divisions between the two sets of rights has not escaped judicial notice. The South African Constitutional Court remarked that 'many of the civil and political rights entrenched in the text will give rise to similar budgetary implications without compromising their justiciability' and the 'fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability'.[218] Other courts have downplayed the general positive/negative dichotomy. In *R v Secretary of State for the Home Department, ex p Limbuela*, Lord Brown emphatically stated:

> I repeat, it seems to me generally unhelpful to attempt to analyse obligations arising under article 3 [Right not to be subjected to inhumane or degrading treatment] as negative or positive, and the state's conduct as active or passive. Time and again these are shown to be false dichotomies. The real issue in all these cases is whether the state is properly to be regarded as responsible for the harm inflicted (or threatened) upon the victim.[219]

Of course, it is possible to contend that economic, social and cultural rights require greater public investment than civil and political rights but it is a matter of degree rather than substance. We discuss below the way in which courts have handled the resource dimensions of both sets of rights. Moreover, effective social policies and investments in the short-term may mean lower governmental expenditures are needed in the long-run, 'ensuring the provision of adequate education, and training or eliminating obstacles to access to land, housing or employment may significantly reduce state expenditures related to social security, unemployment, or homelessness'.[220] In some countries, public expenditures for social security are dwarfed by funds allocated to protect personal security, such as police and defence.

4.2 Legitimacy

A more persistent argument is that social rights adjudication is anti-democratic in nature; that the role of nationally elected representatives is usurped when courts pass judgment on matters of social policy and resource allocation. More specialised versions of this argument are manifest in the claim that the principle of separation of powers amongst the various branches of government is violated since in relation to law, the legislature is to make it, the executive is to implement it and the judiciary is to apply it – to interpret and particularise it. Matters of policy, whether they involve levels of social benefits or the appropriate economic policy for reducing unemployment, are the domain of the executive and the legislature. Since policy is political, it should be addressed by the more directly accountable branches of governments, by those representatives who can be easily removed by popular vote not by 'unelected' courts.

As Nolan notes in her Chapter on Ireland, this view has largely prevailed within the judiciary of that country. In *Sinnott*, Justice Hardiman declared that:

> Central to this view [of the separation of powers] is a recognition that there is a proper sphere for both elected representatives of the people and the executive elected or endorsed by them in the taking of social and economic and legislative decisions, as well as another sphere where the judiciary is solely competent[221] . . . [I]f 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.[222]

Reviewing the jurisprudence, one finds that courts often use this argument in order to avoid (whether reasonably or unreasonably), the 'hard' cases. For

[216] A. Menéndez, *New Foundations for Social Rights: A deliberative democratic approach*, ARENA Working Papers WP 02/32, University of Oslo, 2005, p. 10.
[217] See for example, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004).
[218] *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC), para. 78.
[219] [2005] UKHL 66 para.92.
[220] Nolan, Porter and Langford, *The Justiciability of Social and Economic Rights* (n. 212 above), p. 10.
[221] [2001] 2 IR 545, para. 375.
[222] Ibid. para. 377.

example, in the Argentinean case of *Ramos*,[223] an indigent woman with eight children sought a court order for federal and local authorities to provide her with a monthly allowance to cover her family's basic needs, medical coverage to address her daughter's heart disease and a guarantee of her children's right to attend classes. The Court dismissed the case partly on the basis that the claim was not suitable for judicial review and should be directed to the government authorities since they could not exercise discretion concerning the allocation of budgetary resources. While this opinion is partly inconsistent with other decisions of the Court, Courtis notes that it may be explained by the lack of proper legal argument and that it was filed shortly after Argentina's worst economic crisis. The Court 'probably weighed the potential "snowball effect" of granting court relief in such a delicate economic and political context'.[224] It is nonetheless arguable that the Court could have rationally proceeded to such a result by examining the reasonableness of the government's response without needing to rely on the separation of powers argument.

But the argument on separation of powers is typically overstated. If courts have been constitutionally empowered to judicially review the realisation of social rights then they are simply doing their constitutional job, fulfilling the task of their branch. We have already noted judicial statements to this effect. As far back as 1970, the Constitutional Court of Germany began to cautiously indicate the conceptual problem of the distinction:

> [T]his principle does demand a strict separation of powers, but in exceptional cases permits legislative functions to be exercised by governmental and administrative bodies, or government and administration to be exercised by legislative bodies. In exceptional cases, the principle of separation of powers also permits legal protection against acts of the executive to be furnished not by courts, but by independent institutions . . . The essential point is that the rationale for separation of powers namely reciprocal restriction and control of state power, is still fulfilled.[225]

Indeed, the neat functional division between the branches of government (like between positive and negative obligations) is more an exercise in abstraction than reality in mature and modern democracies.[226] In the modern democratic state, where there is substantial law-making and adjudication by agencies, accountability in the form of tribunals, ombudspersons, legislative committees, and elaborate judicial remedies such as structural injunctions and supervisory jurisdiction,[227] the notion of a strict separation of powers is no longer tenable. The term functions more as a conclusory label for what courts feel is outside their competence than a guiding concept informing them what side of the line a particular instance of legislative or executive action falls.[228]

A second rejoinder turns on what we mean by 'democracy'. On some views, social rights are positively required by the concept of a democratic society. Judicial enforcement of social rights is thus not contrary to the will of elected representatives. The argument goes in two directions. Some argue that social rights are a prerequisite for democracy. According to Miller, 'Protective and welfare rights provide a secure basis upon which the citizen can launch into his [sic] political role'.[229] The Swiss Federal Court partly justified its derivation of a right to minimum subsistence

[223] Supreme Court of Argentina, *Ramos, Marta Roxana y otros v. Buenos Aires, Provincia de y otros s/amparo*, 12 March 2002. See also discussion by Piovesan of right to health cases in Chapter 9, Section 3.

[224] Courtis, Chapter 8, Section 4.3 of this volume.

[225] See *Klauss* case (30 BverfGE I, 1970).

[226] See E. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton: Princeton University Press, 2005) for an extensive critique of the separation of powers doctrine.

[227] A. Chayes, 'The Role of the Judge in Public Law Litigation', *Harvard Law Review*, Vol. 89 (1976), pp. 1281–1316 and discussion in next Chapter.

[228] The UN Committee on Economic, Social and Cultural Rights has commented that, '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'. Committee on Economic, Social and Cultural Rights, *General Comment 3, The nature of State parties obligations* (Art. 2, para.1 of the Covenant) (1991).

[229] D. Miller, *Market, State and Community* (Oxford: Clarendon Press, 1989), p. 249, quoted in C. Fabre, *Social Rights under the Constitution* (Oxford: Oxford University Press, 200), p. 123.

from a range of civil and political rights on this basis:

> 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.[230]

This contention may hold well with the theory of democratic deliberation where only a minimum number of substantial values are externally enforced.[231] One problem with this view is that it may prioritise the instrumental over the intrinsic importance of economic, social and cultural rights, making the key focus the idea of political participation.[232] We are also left with the result that some social rights 'may be more equal than others', and Fabre argues that we may only end up with the right to education if we take this course.[233] A bias towards the right to education and a very basic or subsistence level of health care or standard of living is discernible in countries which have a strong constitutional tilt towards civil and political rights, such as the United States[234] and United Kingdom.[235] The logic is additionally questionable since it is arguable that civil and political rights are derivable from economic, social and cultural rights since the former provides institutional protections necessary to ensure the better realisation of the latter.

Therefore, a separate path to tread is to recognise the indivisibility of human rights and accept economic, social and cultural rights in the pantheon; acknowledging that they protect fundamental interests, intrinsic to human dignity and autonomy, and that governments and majoritarian democracies do not always succeed in ensuring their protection. This 'democratic failure' may result from majoritarian democracies paying insufficient attention to minority groups. In some cases, the 'minority' might actually constitute the numerical majority – many political systems are dominated by a certain gender or political or social class, corruption and entrenched systems of political patronage. These defects of elective democracy are fairly patent. Complementary accountability mechanisms are needed to ensure that the effective exclusion from elective processes does not result in a denial of human rights. Adjudication provides an alternative and important forum in which such individuals and groups can have their voice heard.[236] Indeed, one can discern greater judicial activity in those jurisdictions where the systematic failure by State to address social disadvantage is perhaps most extreme, India, Colombia and Brazil being obvious examples.

It is arguable that judicial processes, *to the extent they are accessible*, are characterised by a high degree of 'participation,' at least at the individual or group level. Claimants are entitled to officially plead their case, information must be supplied by all parties and a systematic evaluation of the issues and evidence is undertaken. Other commentators have suggested that litigation provides an opportunity for welcome and constructive dialogue between the branches of government over effective policy-making.[237]

A final response is legal, and based on the role that courts play. The idea that courts will be 'making up' policy is very much a caricatured version of a reasonable approach of a court to these issues. Indeed, courts are perhaps the branch of government most reluctant to take the role, the so called 'least dangerous branch of government'.[238] The majority of decisions in the area of social rights have been marked by a high degree of judicial cautiousness – 'judges are not alone'[239] – and it

[230] *V. v. Einwohnergemeinde X. und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367), para. 2(b).

[231] R Gargarella ' Should Deliberative Democrats Defend the Judicial Enforcement of Social Rights?', in S. Besson, J. L. Marti and V. Seiler, *Deliberative Democracy and Its Discontents* (Aldershot: Ashgate, 2006), pp. 233–252. Nonetheless, a number of deliberative democrats tend to see basic subsistence entitlements as an essential component of the deliberative conception of democracy.

[232] This is the approach of Jurgen Habermas in *Between Facts and Norms* (MIT Press, 1996), p. 123.

[233] Fabre, *Social Rights under the Constitution* (n. 229 above).

[234] See Chapter by Albisa and Schwarz in this volume.

[235] See Chapter by King in this volume.

[236] Venezuela's constitution is also interesting in attempting to formally go further in creating a fourth branch of government with a range citizen's institutions. See Chapter 10.

[237] See further, C. Scott, 'Social Rights: Towards a Principled, Pragmatic Judicial Role', *SER Review*, Vol. 1, No. 4 (1999).

[238] See Alexander Bickel, *The Least Dangerous Branch* (Indianapolis: Bobbs-Merrill).

[239] A. Menéndez, *New Foundations for Social Rights* (n. 216 above).

has taken remarkable persistence by advocates to push courts to take a robust role in the area. The essential argument is that courts are not being asked to *make* law or policy but *review* it against a set of criteria, in this case human rights. It is at the margins that that questions arise as to whether all aspects are capable of immediate implementation or that courts will somehow tend to interfere with the separation of powers between the various branches of government.

Indeed, concerns over separation of powers tend to be manifest when courts find themselves at the borders of their powers, and it is here the debate should focus. A number of adjudicatory bodies have developed their own tests to determine the limits of their powers and these were particularly highlighted in the preceding Section on the jurisprudence. The approach has been to first apply some sort of reasonableness standard to assess a particular act or omission and/or demand some minimum level of behaviour. Secondly, remedial flexibility has been experimented with by courts as is more fully discussed in the following chapter by Roach. For example, a declaration of invalidity may be made by the Court with the government given a certain time to devise an appropriate policy response. Indeed Budlender and Roach have argued elsewhere that in the history of human rights cases, courts are most interventionist at the remedial level when governments have a demonstrable lack of *political will* or *capacity* to implement an order.[240]

What is perhaps interesting to note is that in 1953, when many scholars held rather conservative views on social rights, the philosopher W.M. Sibley essentially outlined a model for reasonableness review. Taking the hypothetical example of *A* depriving *B* of a sales commission they had jointly procured, he notes that A's behaviour might be rational but not reasonable. However, conduct can only be 'deemed reasonable by someone taking the standpoint of moral judgment' and this often requires the intervention of a third party:

> To be reasonable here is to see the matter – as we commonly put it – from the other person's point of view, to discover how each will be affected by the possible alternative actions; and, moreover, not 'merely' to see this (for any merely prudent person would do as much) but also be prepared to be disinterestedly *influenced*, in reaching a decision, by the estimate of these possible results.[241]

The above discussion has largely concentrated on the role of adjudicatory bodies within national democracies. A similar debate arises, albeit in a different form, with regard to international adjudication of States. The objection is formally based on the idea of State sovereignty but encapsulates the idea that national democratic processes are better suited to matters of social policy etc. A response follows broadly similar lines to that enunciated above. First, States have accepted human rights obligations in international human rights treaties and customary law and submitted to the jurisdiction of such bodies. Second, some international human treaties have given States a wide degree of latitude. As Van Hoof notes, the European Court of Human Rights has given States significant margin of appreciation meaning that 'the content of given to a particular right or freedom protected by the Convention may deviate markedly from one contracting State to the other'.[242] The UN Committee of Economic, Social and Cultural Rights speaks of a 'margin of discretion' when it comes to policy choices.[243] Third, the cases in the second half of this book show that the regional and international supervisory bodies place strong emphasis on their role in examining the justification for a particular act or omission as opposed to a general deliberation on the ideal measure for such a situation. As the European Committee on Social Rights stated:

> [W]hen the achievement of one of the rights in question 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 use of available resources. States parties must be particularly mindful of the impact their choices will have for groups with heightened

[240] K. Roach and G. Budlender, 'Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable', *South African Law Journal*, Vol. 122 (2005), pp. 325–351.

[241] 'The Rational Versus the Reasonable', *The Philosophical Review*, Vol. 62, No. 4 (Oct. 1953), pp. 554–560.

[242] Van Hoof, 'The Legal Nature of Economic, Social and Cultural Rights' (n. 48 above), p. 103.

[243] See further Chapter 23.

> vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.[244]

4.3 Capacity

A third concern is whether judicial bodies are suitably situated (particularly in terms of information and expertise) to ascertain and understand the relevant facts of a case, navigate the minefield of potential competing policy choices and resource demands and craft appropriate and functional remedies. This concern has been raised in theoretical discussions but has also been subjected to some empirical testing. In a well-known 1977 major study of four human rights cases in the United States, Horowitz argued that courts struggled to obtain unbiased and sufficient evidence on the policy issues they faced and that the 'judicial process was a poor format for the weighing of alternatives and the calculation of costs'.[245] He acknowledged however that some problematic aspects of the decisions were ironed out over time and that legislators and policymakers are often subject to the same lack of capacity.[246]

Ensuring that relevant and unbiased evidence is placed before adjudicators is a major challenge, particularly in those cases that require higher levels of State action or require an understanding of complex social process in action, for example those concerning indirect discrimination.[247] Some of the major cases in this book[248] have required intensive litigation. Although the volume of evidence and time of trial pales in comparison to cases in the areas of corporations, anti-trust or property law. The challenges of obtaining evidence also varies among jurisdictions. In more adversarial common law jurisdictions, the issue may be how to ensure that the evidence and experts from opposing parties are unbiased. In jurisdictions where adjudicators play a more active role, there may be insufficient financial and temporal capacity to track down all the information and ensure it is appropriately subjected to critique.

Scott and Macklem treat this capacity issue in a positive light.[249] They contend 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. This confirms in many ways Roscoe Pound's old observation that:

> Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle. Legislation, when more than declaratory, when it does more than restate authoritatively what judicial experience has indicated, involves the difficulties and the perils of prophecy.[250]

Horowitz 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. Nevertheless, if some form of dialogical and incremental process emerges from the litigation over time (Pounds' 'trial and error') then the futuristic dimensions can be built into the judicial process – although, the same can be said for the legislative process.

Turning to expertise, can adjudicators address supposedly complex social and financial matters? The expertise needed of courts is, however, partly determined by what we ask of courts. If their role is not to decide policy and resource allocation but rather to assess whether the State (or other actors) have adequately compiled with their legal obligations, then they need not be 'policy wonks'. What is required is essentially the exercise of 'traditional' judicial competences: 'hearing from the rights claimant, and other witnesses about the particular situation at issue, considering evidence

[244] *Autism-Europe v. France* (n. 135 above), Decision on the Merits, para. 53.
[245] D. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977).
[246] Ibid. p. 293.
[247] See Chapter by Muralidhar in this volume.
[248] See for example, *Kearney & Ors v. Bramlea Ltd & Ors*, Board of Inquiry, Ontario Human Rights Code (2001) (Canada) and *TAC v. Ministers of Health*, 2002 (10) BCLR 1033 (CC) (South Africa).
[249] C. Scott and P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution', *University of Pennsylvania Law Review*, Vol. 141, No. 1 (1992), pp.1–148.
[250] Roscoe Pound, *The Formative Era of American Law*, at p.51, quoted in D. Horowitz, *The Courts and Social Policy* (Washington, DC: The Brookings Institution, 1977) at p.3.

from expert witnesses about the broader policy issues, hearing arguments from the parties and, finally, applying the law to the facts in a fair and impartial manner'.[251]

Of course, litigants may increasingly demand more concrete rulings, particularly where authorities have failed to develop or implement concrete plans. One can certainly discern in jurisdictions like Colombia, and to some extent India, a greater willingness to make more concretised orders in the face of government intransigence or incompetence. Of course, every area of law also benefits from greater expertise. Many courts formally or informally divide the workload amongst judges and other adjudicators according to specialty. Some courts also have the power to seek out external expertise. In India, courts have used special commissions of inquiry to examine factual or policy evidence while in the United States, courts have appointed individuals and bodies including special masters, advisory juries and court-appointed experts.[252]

But it is the 'polycentric' dilemma that, on its face, is the most difficult and the one of the most enduring arguments in the capacity debate. In his famous 1978 essay, Lon Fuller 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.[253] Or as Vierdag puts it, how can a court make the seemingly political decision of 'putting a person either in or out of a job, a house or school'? The choice of one particular policy choice may have unforeseen consequences that the court cannot take into account; or the order to spend more on health may be detrimental for allocations on health.

But the 'polycentricity' debate is comparable to the legitimacy debate. There is an oversimplification of the problem, a devaluing of social rights and a misunderstanding of the adjudication role and potential remedies. The oversimplification comes through the caricature of social rights claims as polycentric in comparison to other areas of law. In a potent rejoinder to Lon Fuller, Jeff King argues that polycentricity is 'a pervasive feature of adjudication' which requires a refinement or rejection of the idea of polycentricity as the bright line for justiciability. He demonstrates, for example, how English courts are silent on the polycentric consequences of their mostly pro-taxpayer oriented decisions, but more willingly invoke polycentric concerns to explain away their reluctance to interfere in the allocation of resources for social welfare.[254]

This is not to deny the importance of polycentric concerns – in some cases they are particularly present, the 'elephant in the room'. But the process of social rights adjudication is not necessarily ill-equipped to address them. If we understand social rights adjudication as protecting fundamental rights, setting the processes and standards by which these rights will be measured, placing the burden on government to justify its current lack of action or realisation of the rights and using remedial discretion to find the contextually appropriate ways to enforce a duty-bearer's obligations, then polycentric concerns can be addressed.

The cases in this book demonstrate that many adjudicators are acutely aware of polycentricity and have developed legal tests in response. Let us take two examples: the allocation of budgetary resources and collective ramifications of individual complaints. In relation to the former, Sepulveda describes how the Constitutional Court of Colombia has explicitly developed a range of tests (which can vary according to the relevant right) before it orders the *immediate* minimum enforcement of a right. In the case of the right to social security, the individual must be in a situation of manifest vulnerability, having no possibility to personally remedy the problem, the State has such capacity and its inaction or omission will affect the individuals ability to enjoy 'minimum conditions of a dignified life.[255] In the case of HIV/AIDS, the Court is less concerned with the budgetary issue if the 'life and integrity' of the patient is at risk and it also applies the test to both public

[251] Nolan, Porter and Langford, *The Justiciability of Social and Economic Rights* (n. 212 above), p. 17.

[252] See D. Horowitz, *The Courts and Social Policy* (The Brookings Institution, 1977).

[253] L. Fuller, 'The Forms and Limits of Adjudication', *Harvard Law Review* Vol. 92 (1978–1979), pp. 353–409.

[254] 'The Pervasiveness of Polycentricity', *Public Law*, forthcoming 2008. Available at <http://papers.ssrn.com/sol3/papers.cfm?abstract˙id=1027625>.

[255] T-533/92. See discussion by Sepúlveda in Chapter 7, Section 4.2.

and private health providers.[256] This test also takes account of the fact that different medical treatments could be offered and requires that the treatment be prescribed by a physician connected to the relevant institution. The Canadian Supreme Court has similarly required government authorities to demonstrate the unavailability of resources when equality rights are being violated.[257] In a Texas Supreme Court case, the state was ordered to develop a new financing model that could ensure schools in poorer districts had adequate education (see pages 240 and 241 of book).

These tests are not dissimilar from the criteria I found in an earlier comparative survey of the judicial reasoning in human rights cases that carried budgetary implications. The review covered economic, social and cultural rights as well as many civil and political rights cases and found that the extent to which an adjudicator would make such an order was determined by four factors: (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.[258] This study also concluded that each of these criteria carries a large degree of subjectivity. The extent to which an adjudicator viewed, or was able to view, economic and social interests as fundamental or truly legal rights tended to affect their reasoning on all of these criteria.

A polycentric dilemma may also arise when a particular policy solution may be applicable in the case of an individual but not to a wider group. For instance, the South African Constitutional Court justified its rejection of an immediate minimum core obligation on this basis, citing in the case of the right to housing that the needs will vary widely according to different factors: e.g. 'there are those who need land; others need both land and houses; yet others need financial assistance'.[259] In a later case on HIV/AIDS, they reiterated their position although their eventual order concentrated strongly on the design and implementation of a plan to deliver a single medicine. But these obstacles could have been addressed. While expertise or special commissions could have been ordered, procedural innovation might have been the best way forward. For example, putting the burden on the government to develop a policy on ensuring minimum entitlements for all persons. The Court could then review the reasonableness of such an entitlement package. In Colombia, the Court took a pro-active role using its test of an 'unconstitutional state of affairs' to transform individual cases into a collective case.[260] One hundred and nine separate writs of protection submitted by 1,150 IDP families were joined and the Court found that the living conditions of the IDPs constituted a massive, widespread and systematic violation of their constitutional rights.[261]

The individual or collective issue could also be addressed at the remedial stage. Kent Roach in his chapter on remedies in this book draws on the work of Abram Chayes to show that a contemporary, though certainly not new, understanding of litigation (featuring multiple parties and a more active judiciary) means that issues such as polycentricity can be incorporated within the remedial process.[262] This could involve a declaration of delayed invalidity (such as has been used by courts in Canada and Nepal) while the Government develops a plan or interim remedies that may address the emergency needs of the applicants while it takes time to develop an order for more systemic relief. The remedial orders of Venezuelan and Argentine courts sometimes allow for this.

5. IMPACT OF SOCIAL RIGHTS JURISPRUDENCE AND THE ROLE OF LITIGATION

If the philosophical debate on justiciability is the rock of Scylla (courts are, or must not be, too powerful) the question of whether litigation is an *effective* strategy is perhaps Charbydis (courts are not

[256] See, e.g., T-236/98, SU-480/97, T-560/98, T-505/92, T-271/95 and T-328/98 and discussion by Sepúlveda in Chapter 7, Section 5.3.

[257] In Eldridge (n. 42 above) they found the provincial government had sufficient resources while in *Newfoundland (Treasury Board) v. NAPE*, [2004] 3 SCR 381 they found that a fiscal crisis justified the delayed payment of a $14 million retroactive pay equity award.

[258] M. Langford, 'Judging Resource Availability', in Squires, Langford and Thiele (eds.), *The Road to a Remedy* (n. 11 above), pp. 89–108.

[259] *Grootboom* (n. 47 above), paras. 32–33.

[260] See section 3.3.

[261] T-025/04.

[262] See Chapter 2, Section 4.

powerful enough). The potential role of adjudication as a vehicle for social change is put into question. While this subject is not at the centre of this particular book, many of the authors take up the issue.

The critique runs that litigation strategies frequently fail to make concrete inroads in ensuring the realisation of human rights, including economic, social and cultural rights.[263] The adjudication process is often long and tortured, the eventual decision may not be favourable and, particularly, orders may not be enforced. Others add that pursuit of litigation is counter-productive. Use of legal mechanisms disempowers the poor, the marginalised and wider social movements by delegating crucial social issues to gatekeeping lawyers, conservative judges and distant international courts and committees. Litigation can distract attention and divert resources away from the development of wider social struggles and the use of policymaking forums.[264]

A particular concern is that middle classes may better capture the Courts in comparison to the poor. The *Chaoulli* decision in Canada is perhaps an example of this and one notices a greater prevalence of stronger positive orders in cases that affect the middle class. This is particularly so in the area of health and education where universal systems are more common as compared to housing, food or work. Even within such a right as housing, we can see some divergence. Cases that concern post-eviction resettlement of informal occupiers, better conditions for tenants and nomadic groups and programmes for the homeless tend to receive a more mixed responses from adjudicators. Those affecting the affordability of mortgage schemes affecting the middle class draw much stronger orders. In Argentina, the Court found that the calculation of interest for private mortgages led to a system of unserviceable debt,[265] while in Hungary the Constitutional Court struck down an increase to 25 per cent for the subsidised mortgage interest rate after earlier permitting an increase to 15 per cent.[266] In Colombia, the Constitutional Court made extensive orders to ensure *social* housing schemes were affordable, which perhaps explains why that decision attracted comparatively more controversy.[267]

The literature on the topic is vast[268] although not always current. The debate is not necessarily confined to social rights but often covers all human rights and public interest litigation. A number of the cases discussed in this book are at the forefront of the discussion. In the United States, discussion continues on whether the well known *Brown v Board of Education* decisions of the Supreme Court were effective in addressing educational desegregation and whether the decisions were crucial for the positive progress.[269] In South Africa, relatively few dispute the effectiveness of the *TAC* decision in pushing forward a reluctant State to address the HIV/AIDS pandemic. But, as Liebenberg notes in this book, the *Grootboom* decision had less impact in addressing the needs of the homeless applicants although she notes new policy and budgetary development

[263] On international procedures, see Dennis and Stewart, Justiciability of Economic, Social, and Cultural Rights (n. 207 above), p. 55 and Letter from Ministry of Foreign Affairs, Sweden, to United Nations Office of the High Commissioner for Human Rights dated 28 March 2003 (copy of letter on file with author).

[264] See, for example, G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991). For a review of the critiques from the field of critical legal studies see M. Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited,' *Human Rights Quarterly*, Vol. 29, No. 3 (2007), pp. 796–822.

[265] Supreme Tribunal of Justice, Constitutional Court, Sentence No. 85, 24 January 2002, Exp. 01–1274.

[266] Decision 66/1995 (XI. 24), ABH, 1995, 333.

[267] C-383/99, C-700/99 and C-743/99.

[268] See for example in the United States, D. Horowitz, *Courts and Social Policy* (Washington D.C.: The Brookings Institution, 1977); S. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change* (Ann Arbor: the University of Michigan Press, 1974); J. Handler, *Social movements and the Legal system* (New York: Academic Press, 1978); and M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Mobilization* (Chicago: University of Chicago Press, 1994). In South Africa, see M. Heywood, 'Shaping, making and breaking the law in the campaign for a national HIV/Treatment Plan', in P. Jones and K. Stokke (eds.), *Democratising Development: The Politics of Socio-Economic Rights in South Africa* (Leiden: Martinus Nijhoff Publishers, 2005), pp. 181–212; T. Roux, *Understanding* Grootboom*: A Response to Cass R. Sunstein*, 12(2) *Constitutional Forum*, Vol. 12, No. 2 (2002), pp. 41-51; M. Swart, *Left Out in the Cold? Crafting Constitutional Remedies for the Poorest of the Poor*, *South African Journal of Human Rights*, Vol. 21, (2005), pp. 215; M. Pieterse, Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited, *Human Rights Quarterly*, Vol. 29, No. 3 (2007), pp. 796–822; K. Pillay, 'Implementation of *Grootboom*: Implications for the enforcement of socio-economic rights', *Law Democracy and Development*, Vol. 6 (2002), pp. 255–277. For the scholarly debate in Canada, see chapter 12 of this book.

[269] See Rosenberg, *The Hollow Hope* (n. 264 above).

and the confusion amongst commentators on the decision itself. Leading decisions on the right to food[270] and education[271] have had some impact in India, according to Muralidhar, but not in other areas such as the Bhopal case.[272] The reluctance of Indian courts to issue strong or binding orders in the area of housing rights has contributed to the poor implementation of their recommendations has contributed mendations for resettlement.[273]

This debate is characterised by both simplicity and nuance. Earlier critics and sometimes more recent entrants tend to conceive of litigation in the abstract and invest it with almost messianic expectations. The impact of a decision is simply measured by whether it concretely achieved a particular social right or, more rarely, had a significant wider conscious-raising effect. The objectives and context of the litigation strategy does not appear to enter the calculus. It seems pointless to expect litigation to be the magic bullet if the litigants did not have the same expectation or other avenues for social progress were unavailable. Yet, as Malcolm Feeley rightly points out, lawyers themselves may be partly to blame for this state of affairs.[274] Having trumped up the rights discourse and the value of public interest litigation, they become fair targets when the litigation fails to deliver.[275]

More recent scholarship reveals that litigation strategies often contain greater sophistication upon closer inspection. Scheingold, in the 2004 preface to the second edition of his 1974 *Politics of Rights*,[276] concludes in the US context that the:

> [O]verall message of the research on collective mobilization is that . . . under the appropriate conditions . . . rights can be deployed to promote collective political mobilization on behalf of an egalitarian agenda. By lending their discursive and institutional support, courts can make an important contribution to this process – as they did with respect to civil rights.[277]

In addition, he partially revises his findings of the role of lawyers. Evidence suggested that many were embedded in wider social movements and were strategic in their use of litigation: 'In sum, cause lawyers do not necessarily see political and legal strategies as mutually exclusive, as I originally suggested – and thus, often willingly engage in the strategic calculations that are essential to a successful politics of rights'.[278]

These reflections accord with earlier empirical research for the Centre on Housing Rights and Evictions (COHRE).[279] In interviews with social rights advocates and lawyers working in twenty-five jurisdictions, many expressed their reluctance to litigate cases that were disconnected from a community or social movement. The likelihood of obtaining and implementing an order was otherwise significantly limited. In some cases, these lessons were based on failed cases, which suggests that evaluation of the impact of social rights adjudication usually requires an adequate time span. Advocates, courts, movements and the public continually develop and refine their approaches over time.[280]

[270] See *People's Union for Civil Liberties v. Union of India* (2001) 5 SCALE 303; *People's Union for Civil Liberties v. Union of India* (2001) 5 SCALE 303, and *People's Union for Civil Liberties v. Union of India* (2004) 8 SCALE 759.

[271] *Unnikrishnan J.P. v. State of Andhra Pradesh* (1993) 1 SCC 645.

[272] *Union Carbide Corporation v. Union of India* (1989) 3 SCC 38.

[273] See for example, *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545 and Unreported order dated 7.5.1997 in Writ Petition No.305 of 1995 (*Bombay Environmental Action Group v. A.R. Bharati*).

[274] M. Feeley, 'Hollow Hopes, Flypaper, and Metaphors, Review of 'The Hollow Hope: Can Courts Bring About Social Change? by Gerald N. Rosenberg', *Law & Social Inquiry*, Vol. 17, No. 4 (Autumn, 1992), pp. 745–760, particularly at 751.

[275] Rosenberg, *The Hollow Hope* (n. 264 above).

[276] S. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Social Change (*Ann Arbor: the University of Michigan Press, 2004).

[277] Ibid. p. xxxi.

[278] Ibid. p. xxxix.

[279] See Langford, *Litigating Economic, Social and Cultural Rights:* (n. 53 above).

[280] Ibid. In this sense, I am in very much agreement with Pieterse (n. 268 above) (although his case review is extremely limited) when he says:

> It is therefore tempting to conclude that the inclusion of justiciable socioeconomic rights in the 1996 Constitution amounted to nothing more than the rhetorical pacification of the millions of South Africans who continue to suffer the adverse socioeconomic consequences of apartheid. But such a conclusion would not only be premature (being based, after all, on an analysis of a handful of judgments), it would also ignore the significant indirect benefits that have resulted from the Constitutional Court's socioeconomic jurisprudence. If we view the socioeconomic rights narrative as ongoing, Gabel's challenge to progressive South African lawyers, and to socioeconomic advocates globally, is to uncover these entitlements by intervening in the narrative at the stage of the rights' initial articulation and definition.

How therefore should we measure the impact of social rights litigation? There are three crucial questions that should guide such an inquiry: (i) *What is the criterion for impact?* (ii) *What is the comparator?* and (iii) *What was the cause of the success or failure?* The first two questions require a strong dosage of social scientific methodology while the latter question, if ever properly answered, certainly requires a historians' sensitivity.

5.1 Criteria

In defining the *criteria*, we must firstly ask 'whose criteria'? Is it the court's or quasi-judicial bodies' expectation as embodied in the terms of the order? Or is it the more subjective and strategic expectations of the litigants? To my mind, both are important.

Litigation is often, but not always, initiated as a part of a wider political or developmental strategy. In some case, social movements and advocates actually expect to fail in court but have developed 'the art of losing a case', as Mark Heywood puts it.[281] The mere process of litigation is used to achieve a particular goal in a wider strategy. It might be to highlight a particular injustice or gap in the law, obtain otherwise unavailable documents or commence negotiations. In the case of Nigeria where judgments take decades to be delivered, Felix Morka 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 were otherwise impervious to dialogue during the authoritarian years.[282] Bruce Porter has also argued that litigation is a valid goal in and of itself. He notes that many claimants believe that the right to a hearing is as important as the remedy itself: 'When people see things and feel them and understand them as human rights issues, you claim them as rights'.[283]

However, if one develops indicators or qualitative markers to evaluate the success of such 'subjective' litigation strategies, care is needed in their selection. Malcolm Feeley rightly criticises Gerald Rosenberg for mounting his entire critique of using courts for social change on the public statements made by lawyers in those cases.[284] He points to other research which suggests that their real expectations and motivations were more strategic than their more 'naive' public utterances.

Turning to the objective criteria, evaluation methods will need to capture direct and indirect benefits. Therefore beyond direct impact on poverty and equality, we might also speak of *legal impact*, *policy impact*, *consciousness and awareness impact* and *mobilisation impact*.

In this book, authors demonstrate that many cases have had direct impact on social rights, whether the recognition of concrete legal right, improved access to a social good or prevention of retrogressive and negative social acts. In Brazil, 'judicial rulings on the free provision of medicine, coupled with well-coordinated and efficient litigation strategies have prompted changes in the law and the adoption of public policies that are considered exemplary'.[285] In Canada, a public employee's union was able to enforce a Supreme Court decision, which provided for equal pay for work of equal value when resources were available, after an improvement in the economic situation in the province of Newfoundland.[286] In France, the right to freedom of expression and property was made to yield to the right to health as restrictions on tobacco advertising were upheld by the Constitutional Council.[287] In the United States, the *Rose* case in Kentucky has led to increase resources for education or for the first time students in the State Matched or exceeded the national average in a skills assessment in 2001. In an in-depth and revealing empirical and quantitative study of five developing countries by the World Bank's Development Economics Group, Gauri and Brinks were 'impressed by what courts have been able to achieve' summarising that 'legalizing demand for

[281] See interview in Langford, *Litigating Economic, Social and Cultural Rights* (n. 53above), p. 113.
[282] Ibid. p. 113.
[283] Ibid. p. 79.

[284] M. Feeley, 'Hollow Hopes, Flypaper, and Metaphors, Review of 'The Hollow Hope: Can Courts Bring About Social Change? by Gerald N. Rosenberg', *Law & Social Inquiry*, Vol. 17, No. 4 (Autumn, 1992), pp. 745–760, particularly at 751.
[285] Piovesan in Chapter 9, Section 5.
[286] *Newfoundland (Treasury Board) v. NAPE*, [2004] 3 SCR 381. See discussion by Jackman and Porter in Chapter 11, Section 5.
[287] CC, January 8, 1191, No 99–283 DC. See discussion by Pech in Chapter 14, Section 4.

SE [socioeconomic] rights might well have averted thousands of deaths' and 'enriched the lives of millions of others'.[288]

At the regional and international level, implementation is more challenging as adjudicatory bodies usually lack effective enforcement powers. Most decisions of the African Commission have generally been poorly implemented. In the case of the European Court of Human Rights, Clements and Simmons describe the provision of compensation in a number of cases as well as 'Strasbourg-proofing' as various States reformed laws to comply with the court's rulings. Watson concludes that it 'would not be an exaggeration to state that the women of Europe are deeply indebted' to the European Court of Justice since much European legislation on gender equality has been 'case-led'.[289] The record of the European Committee on Social Rights is so far mixed – Portugal made sweeping legal and institutional changes to address child labour,[290] but Greece only partly implemented decisions on Roma by altering the wording of a discriminatory statute but denied it was legally obliged to take concrete steps to address evictions and lack of housing. In the case of international committees, the pattern is similar. Many of the concluding observations of the Committee on Economic, Social and Cultural Rights have not been observed by governments, but some have had a profound impact.[291]

Melish and Courtis make the point that impact is closely related to the nature of the remedial order. They illustrate that for the Inter-American Court of Human Rights and Argentinean courts, compensation and individual-based orders were quickly executed while wider structural and more complex orders often lagged in implementation.[292] Courtis attributes this to the institutional immaturity of the Argentinean system in dealing with more complex cases while Melish indicates that the Inter-American Court has now strengthened follow-up procedures in response to information on non-compliance. In the case of South Africa, Liebenberg notes that considerable follow-up effort through additional litigation (contempt of court proceedings and complaint to South African Human Rights Commission) and advocacy campaigns was necessary to ensure the mandatory orders for the roll-out of HIV/AIDS medicines were obeyed.[293]

Beyond direct impact, indirect indicators should be used when appropriate. McCann concludes that the indirect impact of litigation for equal pay for equal work surpassed direct effect:

> My primary finding is that the political advances in many contexts matched or exceeded the wage gains. One important advance was at the level of rights consciousness. Legal rights thus became increasingly meaningful both as a general moral discourse and as a strategic resource for ongoing challenges to the status quo power relations.[294]

Examples of such *consciousness, awareness or mobilization impact* are described in the chapter by Muralidhar where litigation on rights to food and housing precipitated larger movements who monitored access to food and education. In Argentina, Abramovich noted that while the flagship case of Viceconte has experienced significant delays in implementation, the discussion of the innovative findings amongst lawyers, judges and academics laid the ground for other cases to succeed, for example on HIV/AIDS medicines. One could also speak of *broader legal or policy impact* where a case sets a judicial precedent or instigates policy discussion and reform. The *Grootboom* case in South Africa laid much of the framework for other social and economic rights cases, from health care to forced evictions. A third category would be participatory impact where the forum is used to enable the voice of victims or achieve strategic advocacy aims. In Brazil, litigation on rights to information and health led to the granting of access to records on information on the halting of redevelopment of hospitals and suspension of medicine purchases.[295]

It may be important to consider a final category: unintended consequences. Like any other intervention, there can be unforeseen positive and

[288] Gauri and Brinks. *Courting Social Justice* (n. 54 above).
[289] See discussion by Watson in Chapter 22, Section 5.6.
[290] See European Committee of Social Rights, 1/1999, *ICJ v. Portugal*.
[291] See interview with Scott Leckie in Langford, *Litigating Economic, Social and Cultural Rights* (n. 53 above)
[292] See discussion by Courtis in Chapter 8, Section 5.
[293] See discussion by Liebenberg in Chapter 4, Section 8.
[294] Quoted in Scheingold, *The Politics of Right*s (n. 276 above).
[295] Superior Court of Justice, AgRg na STA 29 (2004). See discussion by Piovesan in Chapter 9, Section 3.4

negative results. Initial high profile cases in South Africa and Argentina were poorly implemented but significantly advanced the law or legal culture, which led to more successfully implemented strategies in future cases. Other results can be negative. Rosenberg points to the complacency successful court decisions can bring – implementation of judicial orders often does not materialise in a vacuum of inaction.[296] Williams and Scheingold respectively note the increasing backlash to the use of progressive rights-claiming strategies by conservative groups in the United States.[297] Such consequences need to be brought into the strategic equation even if addressing power relations should be at the core of rights-claiming strategies. It also highlights the importance of litigants and not their representatives making the key decisions in litigation strategies since it is the former who will most likely bear any fallout from the case.

5.2 What is the Alternative?

The critique of litigation as a vehicle for social change is only sustainable if there are viable alternatives or if litigation makes the situation worse in the absence of alternatives. Therefore, any critique of a decision to litigate must be placed in the strategic context. If other options such as active mobilisation, policy and law reform, negotiation, media advocacy etc were genuinely available to an individual, community or movement, then a choice to litigate should be closely scrutinised, particularly if it was the dominant and not a complementary strategy. In terms of impact and implementation, one must also look at whether a decision generated from another branch of government would be more effectively implemented.

Since this is an exercise in 'what-if,' it is of course difficult to develop significant indicators although one can engage in 'process tracing,' tracking alternatives in the absence of a controlled experiment. It is not an easy task. A senior member of the Public Union of Civil Liberties privately indicated that he thought his organisation should have turned to mobilisation not litigation to address starvation deaths and the right to food. But the Supreme Court decision has been subsequently used to inspire a movement for monitoring the decision. The difficult question then becomes whether a grassroots-inspired movement would have succeeded more than the Court-inspired movement?

However, if litigation was the last resort, as many claim it to be, then the threshold for success should be lowered considerably. In many of the cases discussed in this book, litigation was the only available option available. Indeed, many Courts, such as those in India and Colombia, tend to rise to the role of social rights protector after clear failure to act by the executive and legislative branches.

5.3 What was the Actual Cause of the Failure or Success?

The last question is what was the actual cause of the failure or success of the case? Was it the litigation strategy or other strategies or both? Was it the use of rights-claiming strategies or other types of strategies? Was it the result of the quality of the legal system and its ability to deliver speedy, sufficiently concrete judgments with effective orders and enforcement of those orders? Was it the failure of the applicants to follow-up the order or the decision to litigate itself? Untangling the cause-and-effect is not an easy task. Some authors such as Rosenberg find that courts contributed little to the positive social reform in the United States, for example in the area of education and abortion rights despite making major judgments in the area.[298] In response, Feeley noted that the decisions were quite modest and Rosenberg misunderstood their role in the wider movement.[299]

This of course raises the question of whether we are speaking of courts or of a wider litigation strategy. Pieterse criticises the *TAC* case for being largely a failure since the litigants had to obtain further orders and mobilise for enforcement.[300] Others such as Liebenberg in this volume see *TAC* as very much a success as it contained such a comprehensive litigation strategy that focused on

[296] Rosenberg, *The Hollow Hope* (n. 264 above).
[297] Scheingold, *The Politics of Rights* (2004) (n. 276 above), pp. xxxii-xxxvii and L. Williams, 'Issues and Challenges in Addressing Poverty and Legal Rights': A Comparative United States/South African Analysis', *South African Journal of Human Rights*, Vol. 21 (2005), pp. 436–472.
[298] Rosenberg, *The Hollow Hope* (n. 264 above).
[299] Feeley, 'Hollow Hopes, Flypaper, and Metaphors' (n. 269 above).
[300] Pieterse, 'Eating Socioeconomic Rights', (n. 250 above).

follow-up and was part of a wider mobilisation effort. Court decisions viewed in isolation are thus an easy target but they do not point to the critical question: Was the choice of litigation appropriate and was an appropriate strategy crafted. Does the failure lie with the legal approach or does it lie elsewhere?

6. CONCLUSIONS

The emergence of a comparative field of social rights jurisprudence provides a welcome opportunity to examine afresh a range of legal, philosophical and practical issues. By drawing from practice, even in its contradictions, theory is both enriched and challenged. It is certainly clear that the justiciability debate has had to adjust to the reality of social rights adjudication. Theoretical concerns over the court's role in litigation cannot be reasonably seen as an axiomatic trump card but rather a factor to be contextually weighed in the decision-making process. The key issue is not whether social rights are justiciable but rather how they can be consistently adjudicated with measure of integrity, respecting the institutional nature of adjudicatory bodies and the call for justice inherent in human rights.

Drawing together the trends identified in this Chapter, we can see that the considerable expansion of justiciable human rights norms has midwifed much of the growth of social rights jurisprudence. In some cases, it has developed through the invocation of civil and political rights while in others, direct economic, social and cultural rights have facilitated litigation. This can be partly ascribed to recent constitutional reform in the democratic transition of some States and the growth of international and regional human rights mechanisms. But the presence of legal opportunities is a necessary but not sufficient condition (and in some cases, not even necessary). Given the inherent conservative nature of courts, a certain threshold of State or private failure is usually necessary to trigger a court's decision to play a more active role. Decisions of social actors to select litigation strategies vary widely between jurisdictions and sustained and progressive litigation is largely conditioned on the maturity of civil and political rights jurisprudence and the strength of rule of law institutions and even democracy itself. Contextual and historical understandings of human rights all form part of the calculus in determining how social rights adjudication is manifested. Yet, these factors remain constantly in flux and with movements in all these areas, Justice Albie Sach's prognostication that the '21st-century jurisprudence will focus increasingly on socio-economic rights' carries a ring of truth.[301]

The volume and diversity of jurisprudence also provides an opportunity to enrich the dialogue on our current conceptions and debates around State obligations by providing a broader source of primary, and sometimes conflicting, material. One of the interesting aspects of the jurisprudence is that it provides differing examples of how State obligations, the content of rights and the possible remedial options can be categorised. While numerous conclusions can be drawn from the case law, one clear trend can be identified that reach across and beyond traditional categories of State obligations.

It is the tendency towards the creation of a culture of justification around social rights. Mirroring the approaches of civil and political rights, administrative and to some extent tort law, one can see that the focus of judicial and quasi-judicial inquiry is upon whether a human rights duty bearer can justify their substantive or procedural action or inaction. This convergence of approach is quite explicit in the reasoning of the South African Constitutional Court where they use the reasonableness test to assess both positive and negative obligations. Similarly, the European Court has broadly construed interference with a right to include inaction in some circumstances and Clements and Simmons note that 'the effect of this approach is to place on the State the burden of justifying its failure to act'.[302] This 'justificatory' approach is manifest in the ways in which the adjudicatory bodies have implied certain obligations and defences. For example, the State defence of resources has been accepted even when not explicit in the text of a legal instrument (i.e. in the case of the African Commission on Human Rights and European Committee on Social Rights) but States are also being placed under greater scrutiny to as to whether they are meeting various

[301] Albie Sachs, *Social and Economic Rights: Can they be Made Justiciable?* (Southern Methodist University School Of Law, 1999) p. 18.

[302] See Chapter, 20, Section 4.2.

obligations. This indicates that courts are emerging as *accountability* not *policy* mechanisms.

In some ways, the jurisprudence may be moving towards the approach in equality rights. Distinctions or exclusions must be justified and issues such as resources are conceived as a defence and not an inherent part of the obligation.[303] At the same time, equality rights jurisprudence is being stretched as lawyers and social rights movement seek to apply equally protections in the social arena. This continues to raise questions about how far courts will and should go to enforce substantive equality. It also affects the specification of prohibited grounds of discrimination or identification of indirect discrimination. Discrimination in the field of economic, social and cultural rights can sometimes take different and new forms.

However, there is also a clear *divergence* between jurisdictions in relation to the justification bar that a defendant is expected to jump over. This is particularly clear in cases involving major national development or environmental projects, the provision of goods and services or remedial orders for enforcement. Some adjudicators are less demanding than others. One discernible explanatory variable is the explicit recognition of economic, social and cultural rights. The findings and orders of the Colombian and South African Courts (where this exists) are often stronger than those courts where its not, for example, South Asia. But we also see major divergences in approaches between countries with almost identical provisions (e.g. cf. Argentina and South Africa with Hungary and Ireland). The latter courts justify their conservative stance on traditional philosophical objections to economic, social and cultural rights.

A second divergence is the manner in which the courts address fulfilment obligations. This is perhaps not a surprising conclusion since it is a partly unresolved debate amongst social rights advocates. Some courts such as the Colombian Constitutional Court have developed a remarkably comprehensive approach to the issue, which should provoke further and in-depth reflection. The Court has been willing to grant immediate *tutela orders* in individual cases where a minimum obligation has been raised while also addressing the broader reasonableness of policies and programs. Moreover, it has fused, at least in theory, the civil law preference for individual remedies and the collective impact of judgments in common law. It is not the only court with such power: it is possible in Hungary and South Africa for example. This is not to advocate the approach of one court. Context differs and there is a concern that applying 'minimum obligations' in wealthier countries can result in simply ensuring survivalism but not necessarily human dignity. But even the Colombian court appears to move beyond that reductionist position.

While the question of direct fulfilment or provision will continue to dominate scholarly pages, the majority of judicial pages will probably not. A large number of cases in this book involve State and private actions. One discernible trend is the growth in social rights claims against private agencies which might have traditionally been attempted only under contract or consumer law. Likewise, some courts are increasingly comfortable with policing the State's protective and regulatory role.

However, fewer cases have arisen in two particular areas and perhaps the most controversial areas of social welfare politics, namely the actual process of privatisation and cutbacks in social welfare. This is not to say that cases don't exist. Courts in the Philippines and Argentina have placed restrictions on privatisation in electricity and worker's compensation; Portugal and Hungary have struck down certain retrogressive rollbacks in social security and health care. Where these issues have been limited in focus (e.g., a single group of pensioners belonging to a pension fund), courts appear more willing to intervene. But when the issue assumes national importance, cases are much fewer. This may be because political strategies are preferred, the timeframe for such actions being extremely short. Or it may be that courts feel that their judicial role is being unduly stretched and that pure policy issues are beginning to intervene. Nonetheless, it remains to be seen whether courts will carve out a greater role in this area, imposing some

[303] For further discussion on this possibility, see M. Langford and B. Thiele, 'Introduction', in Squires, Langford and Thiele, *Road to a Remedy* (n. 11 above).

minimum standards on privatisation and rollbacks or whether this will be largely relegated to international supervision.

These conclusions obviously return us to the debate over the proper role of courts and quasi-judicial bodies in a democracy or international system. While this chapter has engaged the traditional debate over legitimacy and institutional capacity, it has sought to show that the actual practice forces a reconfiguration. Many of the adjudicatory bodies discussed in this book appear acutely aware of the constraints necessitated by their role but have fashioned a judicial role in reviewing but not leading the actual implementation of economic, social and cultural rights. As discussed, and taken up in greater detail in the following chapter, appropriate and flexible remedies may be the best means to meet these concerns but also ensure justice is done in the case.

Lastly, this book and others provide some answer to the commonly asked question of whether social rights adjudication will have impact. The answer is clearly, 'Yes, but'. *Yes*, there is evidence of cases exhibiting both direct impact on poverty and discrimination as well as indirect impact in the areas of policy, law, mobilisation and consciousness raising. *But* the impact is not even and appears to be highly dependent on a number of factors, including the nature of the order, the political and organisational power of the claimants and the institutional strength of the State. In some States, these factors are more absent. In South Asia, far-reaching decisions are often complemented by narrow orders and weak and truculent States. In Latin America and European states, implementation appears far more likely while South Africa represents perhaps a mixed case. Therefore, we can see that social rights adjudication is not without impact but should not be invested with either messianic expectations or carefree cynicism.

However, successful litigation and implementation in practices is a significant challenge. Practitioners regularly cite the burdens of lack of adequate standing provisions and procedural innovation, conservative judiciaries and powerful opponents, the lack of financial and legal resources and the challenges of trying to effectively connect claimant communities, social movements, and legal-oriented human rights advocates, and ensure decisions are implemented.[304] The financial barrier is particularly perennial and in her Chapter, Durbach sets out both the arguments for the right to legal aid in the field of socio-economic rights and some judicial recognition of such a right in both the developed and developing world. If the poor are able to have some form of financial equality of arms before adjudicators, it would certainly be likely that some of the negative dimensions of social rights adjudication could be ameliorated.

[304] See Langford, *Litigating Economic, Social and Cultural Rights* (n. 53 above), pp. 20–22 and discussion by Piovesan in Chapter 9, Section 5.