



Social Rights Judgments and the Politics of Compliance: Making it Stick

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BOOK REVIEW

Social Rights Judgments and the Politics of Compliance: Making it Stick, edited by M Langford, C Rodriguez-Garavito and J Rossi, Cambridge University Press, 2017, £110 (hardback), ISBN 9 781 10716 021 7

Since the late 1990s – and 2000s in particular – socioeconomic rights (ESCR) have gained rapid momentum, breaking dynamic new ground in expanding the field of human rights theory and practice. Not least, the rapid global proliferation of ESCR judgments has skewered staid arguments over justiciability, doctrine and normative approaches. These judgments have been accumulating simultaneously as there has been growing general awareness of the need to develop a robust, evidence base upon which to gauge the effectiveness and impact of human rights interventions. Now, human rights analysis has increasingly turned to the ‘after-life’ of these judgments to gauge what effects they have had in terms of policy changes and implementation. All of which makes *Social Rights Judgments and the Politics of Compliance* an extremely timely and important contribution through which to take stock of the ‘post-judgmental phase’ (1), or, the hitherto ‘blind spot’ of the impact of court rulings (77), which has received much less attention and is ‘often a greater challenge than winning a judgement’ (499).

The objective, and indeed the book’s major contribution, is to improve understandings of compliance with ESCR, including both its causes as well as the immense variation. A conceptual framework ably assists the inquiry, laid out in a solid and even-handed introductory chapter around three guiding questions. First, *empirically* – what is the current level of enforcement; second, *explanatory* – what is the reason for compliance; third, *strategically* – what therefore helps to promote it? Different theoretical approaches, notably, instrumentalist (and realist versions) and norms-based (ideational) are presented, along with suggested independent variables, all of which are intended to lead to inductive reasoning and explanation. The rigorous, yet flexible, research design appears appropriate to the task. Variables include: the nature of remedies (whether being complex or more straightforward, more interventionist or dialogical etc.); the nature of the right in question (whether ESCR or civil and political, which the authors say is not discernibly different); the ‘size’ of the case (i.e. whether structural or individual); degree of social mobilisation; and status of the affected group.

Ten case studies, most from the global south, attempt to answer the compliance puzzle. Among some of the chapters highlighted, Rodriguez-Garavito, for example, usefully broadens the issue of compliance to that of impact, dissecting it as both ‘direct’ and ‘indirect’ in evaluation of key judgments in the Columbian Constitutional Court. It is a rather critical distinction because focus is so often only upon the direct material outcomes, whereas Rodriguez-Garavito indicates the significance also of indirect symbolic and political effects, all of which add up to identifying broader impact. A key explanation given in terms of outcomes relates to what he terms ‘dialogical activism’, which gives room for manoeuvre and hence, a relatively moderate remedy, but backed by strong rights and strong monitoring, correlating to greater impact.

Similarly, Chitalkar and Gauri also find evidence of enhanced compliance regarding the right to food in India, reflecting also a collaborative approach, more robust monitoring and, indeed, activist courts. Enhanced public awareness in India, especially the frame-shifting role played by media in showing that there were experiences of mass hunger in an era of unprecedented economic growth, were also supporting factors. In contrast, cases of reproductive rights highlighted by Cabal and Phillips suggests that efforts to achieve similar impact

would require such broader shifts in the social, cultural and political environment though complimentary advocacy initiatives.

The chapter from Argentina (Sigal, Rossi and Morales) also highlights the key role of committed courts, particularly in influencing public officials, in combination with: the weight provided by social alliances; whether the case is 'collective' or 'structural'; and other additional variables, such as the media. In contrast, in Brazil (Farraz) collective cases *per se* are deemed 'unenforceable', illustrating the limits of the court in determining more distributive outcomes, a point returned to below.

Another chapter analyses six housing-related cases in South Africa. A key early case, *Grootboom*,¹ was an initial disappointment for those who were expecting the courts to play a more transformative role concerning the applicability of ESCR to housing in SA. Langford and Kahanovitz demonstrate, however, that although the *Grootboom* case did not have an immediate effect, it has influenced policymaking over the longer term in ways not easily visible at first glance. Social mobilisation, they add, may not be the only determinant in enforcement and 'any descriptive or explanatory narrative requires nuance' (346). Nonetheless, as reflected in the introductory chapter '[W]ell organised communities, with strong leadership and staying power, and alliances with social movements or elites (i.e. academics, public interest lawyers, and politicians) secured the greatest benefits from their wins in the courtroom' (25) across these housing rulings.

The book is to be commended for its interdisciplinary approach, mapping out some openings between law, politics and policy, which is very useful for reflecting upon judgments in the bigger picture of change. As the editors suggest, for example: '[P]aradoxically, some authors express the concern that full compliance does not always lead to transformative and redistributive effects' (35). Rather than judicial remedies framed as existing entitlements, some contributors caution against individual models of litigation, because of middle-class bias that may fuel inequity.

Indeed, when it comes to the question of direct impact on a socioeconomic sector or people affected, it is here where evidence of substantive impact is scantier (i.e. Rodriguez-Garavito's chapter, and Sigal, Rossi and Morales' chapter where there is evidence of slow or poor implementation). It is the chapter by Porter that expertly brings to the fore some of the transformative limitations of litigation. Porter questions whether judicial and litigator preference for more traditional paradigms leaves key structural violations unchallenged. In order to win cases and for better chances of compliance, this author asks whether the litigant bar is set too low for any more transformative aims. Ending homelessness, for example, requires implementation of new strategies, meaningful engagement and so on. However, to correct such a system failure would, Porter suggests, involve much more fundamental changes, such as: subsidies; social housing production; income assistance; land and property rights; housing laws; land use planning; social programmes; wage protections; social security; regulation of private actors, without which, and 'in its cumulative effect, left certain groups without access to adequate housing' (236–37). Single benefit cases, in other words, are far more likely to succeed than complex requests for a 'myriad of laws, policies, and programs that have a systematic pattern of exclusion, inadequate housing, and homelessness among particular groups' (237). The book's analysis of the limitations of litigation in achieving broader social change might therefore be expanded. With compliance as the overall focus, there is little opportunity created in the book to consider whether techniques of legal and rights-adjudication can have downsides, including negative effects. When might it risk becoming a more technical exercise that may demobilise social movements; and/or also does it squeeze out political

¹*Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169.

alternatives and reproduce unequal systems? Litigation also reifies individual rights that may undermine transformative potential because cases have a fragmentary effect, working as they do across so many distinct sectors, and with rights at times in competition with, or contradictory to, one another.

It would appear essential, also, to dissect the ambiguous role and function of the state in the implementation of rights. Following Gready and Vandenhole, for instance, is it that states are merely 'wicked' or perhaps they are 'weak' in their failure to implement; and what does this imply for the role of litigation alongside other strategies in policy implementation?² It is with the concluding chapter that the 'state' as an actor tantalisingly starts to be prised open. There's an important discussion of the different motivations ('costs') different state targets may have – whether a 'faceless' bureaucrat as opposed to an elected official – as well as the different outcomes depending upon the particular sector (pensions, or health, for example) and, of course, different types of beneficiaries. Brinks' chapter is therefore very useful in providing a 'compliance calculus', and one in which the author sees actors weighing up the (financial, normative, political) costs of compliance with those of non-compliance. Actors therefore need to calculate strategically as to how and where to reduce or increase either cost. Indeed, the last chapter highlights organisational capacity of proponents as the single characteristic variable across almost all of the case studies in the book.

Social Rights Judgments and the Politics of Compliance is highly recommended. It opens up important new terrain and its findings confirm that a cutting legal thrust – though at times also a double-edged one – can lend itself to prising open state accountability regarding ESCR. The imbrication of litigation in social change, however, raises many more questions for further multi-disciplinary inquiry.

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²P Gready and W Vandenhole, *Human Rights and Development in the New Millennium: Towards a Theory of Change* (Routledge 2014).