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Freedom from Poverty as a Human Right

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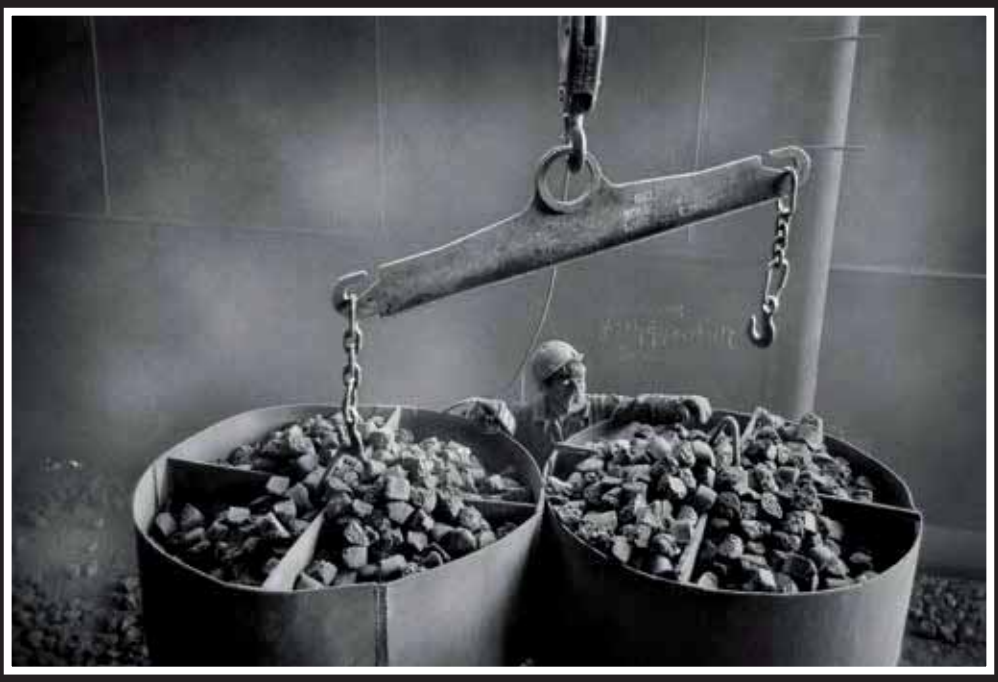

Law's Duty to the Poor

Edited by Geraldine Van Bueren

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The Philosopher's Library series

Freedom from Poverty as a Human Right
Law's Duty to the Poor

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To James with everlasting love

Foreword

The present publication is a selection of papers commissioned as part of a UNESCO project on poverty and human rights launched in 2002.* The project focuses on conceptual analyses of poverty understood as a human rights issue.

The first phase of the project aimed to understand poverty and clarify its relationship to human rights and corresponding duties from the perspective of a philosophical analysis. Scholars within and beyond the philosophical community were invited to analyse the key concepts pertaining to poverty and human rights. One of the main challenges here was – and remains – to investigate how UNESCO could stimulate the commitment of the world community by addressing the moral obligation to take action to eradicate poverty and to contribute to the full realization of the fundamental basic rights of all peoples without discrimination.

In this context, UNESCO has published the collection *Freedom from Poverty as a Human Right*, composed of four volumes, each addressing the issue within a particular scope. A philosophical approach was developed in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor*, edited by Thomas Pogge; a legal approach was taken in *Freedom from Poverty as a Human Right: Law's Duty to the Poor*, edited by Geraldine Van Bueren; a political science perspective was elaborated in *Freedom from Poverty as a Human Right: Theory and Politics*, edited by Thomas Pogge; and the economics point of view was developed in *Freedom from Poverty as a Human Right: Economic Perspectives*, edited by Arjun Sengupta, Stephen Marks and Bård Andreassen.

The present volume, reflecting contributions from eminent lawyers, is an appropriate and refreshing collection of ideas and proposals that analyse current conceptual trends regarding poverty and its elimination. It encompasses crucial notions such as social transformation, democracy, judicial enforceability and human rights as a current legal practice. It also envisages how the right *not* to be poor could be included within a wider right to equality, and how clarifying the scope of state obligations relating to human rights creates new opportunities to tackle systemic poverty.

This volume addresses concepts such as the interdependency and interrelatedness of all human rights; justiciability as well as the progressive realization of economic, social and cultural rights in order to eradicate poverty, the role of courts and constitutions in the enforcement of economic and social rights, and the call for advancing public policies in compliance with legal norms and standards. It examines these issues in the light of case studies drawn from countries such as India, South Africa, Argentina and Brazil, among others,

* Project originally entitled: 'Ethical and Human Rights Dimensions of Poverty: Towards a New Paradigm in the Fight against Poverty'.

focusing on the right to adequate food, clean and sufficient water, the right to health, the right to education and the right to work.

One of the main virtues of this volume is that it is not purely conceptual or analytical, but also deals with putting theories of justice and human rights into practice and translating them into concrete actions. The authors of this volume call for balancing the normative content of human rights with institutional considerations in order to strengthen the administration of appropriate remedies and to re-conceive the role of the judiciary in the area of human rights and global governance. Thus, while paying true attention to a justice-based human rights paradigm as the normative foundation for international relations, they also take into account the modus vivendi in the world. The opening part of the book focuses on the conceptual foundations of human rights and provides clarifications on the nature of economic, social and cultural rights and civil and political rights. It also looks at national law models to evaluate situations of deprivation and to conclude on the existence of a violation of human rights. It offers a theoretical grounding for the general topic and presents good examples of applied legal comparative approaches in the field of human rights, providing an interesting mix of theory and practice.

To be effective, the right *not* to be poor must become a part of a moral consensus within society, which means that rights have to become inherent to our societies and that we accept that responsibility concerns us all. One of the crucial questions here concerns the source of the moral judgment regarding poverty, particularly global poverty, and how to deal with the latter worldwide: what kind of actions should be pursued? By whom? Which actors should be involved and how? To what level of responsibility? Are aid and debt parts of these actions? Should one go beyond them?

We also have to look deeply at the reshaping of many legal systems around the developing world, in particular under the social pressure of civil society actors. The role and actions of the latter must also be studied and evaluated since it is fundamental to know how and to what extent they help to foster the efficiency of the legal structures in favour of the poorest, bringing them into the light and allowing them to be treated and to live as citizens rather than as stigmatized persons.

Constitutional rights are of utmost importance, but struggling with efficacy against poverty also means planning in order to schedule and implement reforms. Here it is a matter of changing mentalities and behaviours. Democracy can never be understood as an everlasting good, nor taken for granted. One has always to fight to keep it alive and efficient for each and every citizen, regardless of colour, belief or economic status. Given that each citizen is above all a human being, he or she has to be treated and considered as such by all institutional, state, judicial and economic structures.

Global justice is precisely an issue in political philosophy that stems from the fact that the world is not a fair one for all. Billions of people are extremely poor, while a few are tremendously rich; the former often lack the protection of the law, while the latter are sometimes above the law. Many people still live under hard regimes. Many are exposed to extreme violence, disease and starvation.

Many die prematurely. How should we understand and respond to these facts? What do the inhabitants of the world owe one another? What institutions and what ethical standards should we recognize and apply worldwide? What could be the foundations for a sustainable respect of socioeconomic rights? Who should be accountable for it?

Three related questions, concerning the extent of justice, justice in the distribution of wealth, and the institutions accountable for justice, are central to the discussion on global justice.

Today, 3 billion people are living below the poverty line established by the World Bank at US$2 a day. Can we be satisfied when faced with this data? Is this *allocation* a fair one? Do the wealthy have a duty to assist the poor, and is aid purely an issue of charity, not morally required? What institutions would be most relevant to realize the ideal of global justice?

The international community has set, as a priority for the millennium, the Millennium Development Goals (MDGs), the first of which is to 'eradicate extreme poverty and hunger'. The quantitative target, by which success in poverty eradication will be measured, is to reduce by half, by 2015, the proportion of people living in extreme poverty.

But this approach does not exhaust the issue. For one thing, the intended target will not easily be reached. And even if it were successfully achieved, the basic question would still remain untouched: can persistent poverty be tolerated at all?

The problem has to be tackled from another angle. As long as we consider poverty as a quantitative, natural deficit to be made up, the political will to reduce it will not be energized. Poverty will only cease when it is recognized as a violation of human rights and, as such, abolished.

Of the five families of human rights – civil, political, cultural, economic and social – proclaimed by the Universal Declaration of Human Rights, poverty violates the fifth, always; the fourth, generally; often the third; sometimes the second; and even the first. As was recognized at the World Conference on Human Rights held in Vienna in 1993, there is an organic link between poverty and the violation of human rights.

Because when we talk about poverty we talk about lack of access, lack of resources, deprivation of capabilities and lack of power for some, in societies where others do have access, resources, capabilities and power. We are therefore talking about inequalities. Inequality is a human rights issue.

When we talk about poverty, we do not talk about groups or classes in society. We talk about masses, about figures, about people who are voiceless and hence invisible, in other words people who are denied their individual dignity. Now the preamble of the Universal Declaration of Human Rights starts by recognizing that dignity is inherent to all members of the human family. When you take that away you exclude those people from the human family; here again we are talking about human rights.

The preamble further states that the highest aspiration of humankind is the attainment of a world free from terror and misery. That aspiration is blatantly defiled by the persistence of poverty. Here again we are talking of human rights.

The issue for me therefore is not poverty. The issue is human rights – all human rights, political and social. It is about achieving universality in the regime of implementation so that no one is excluded (Art. 7 of the Universal Declaration of Human Rights). It is about monitoring and combating violations so that everyone can obtain protection and redress under a regime of law (Art. 8). It is about exercising reason and conscience and acting towards one another in a spirit of brotherhood (Art. 1). It is about creating a social and international order that makes possible the enjoyment of all the rights contained in the Declaration (Art. 28). It is about effective implementation of Art. 30, which stipulates that nothing in the Declaration can be interpreted as giving a right to anyone to take an action aimed at the destruction of the rights and freedoms contained in the Declaration. Such violations must be abolished; poverty therefore must stop. The claim sounds naïve, and may even bring a smile to many lips.

Condescension would be misguided, however, as well as inappropriate. There is nothing to smile at in distress, misery, dereliction and death, which march in grim parade with poverty. We should, indeed, be ashamed. But the issue is also substantive: the abolition of poverty is the only fulcrum that offers the leverage to defeat poverty.

Leverage, in this case, comes from investments, national and international reforms, and policies to remedy the deficiencies of all kinds that are the backdrop to poverty. Fortunately, humanity now has the means to answer the challenge: never have we been so rich, so technically competent and so well informed. But in the absence of a fulcrum these forces cannot act as effectively as they might, and without this fulcrum political will cannot be galvanized to organize redistribution on a global scale.

If, however, poverty were declared to be abolished, as it should with regard to its status as a massive, systematic and continuous violation of human rights, its persistence would no longer be a regrettable feature of the nature of things. It would become a denial of justice. The burden of proof would shift. The poor, once they have been recognized as the injured party, would acquire a right to reparation for which governments, the international community and, ultimately, each citizen would be jointly liable. A strong interest would thus be established in eliminating, as a matter of urgency, the grounds of liability, which might be expected to unleash much stronger forces than those that compassion, charity, or even concern for one's own security, are likely to mobilize for the benefit of others.

The violations of human rights here are the policies, legislations and actions (or lack thereof) that constitute breaches of the state's obligations encapsulated in the international human rights treaties it has ratified. I am speaking here of any policy, legislation or public action (national or international) that plunges whole categories of people into situations of poverty, maintains them in that state or prevents them from overcoming that condition.

By endowing the poor with the rights they are entitled to, the abolition of poverty would obviously not cause poverty to disappear overnight. It would, however, create the conditions for the cause of poverty to be enshrined as the highest of priorities and as the common interest of all – not just as a secondary

concern for the enlightened or merely charitable. No more than the abolition of slavery caused the crime to vanish or the abolition of political apartheid ended racism and discrimination, no more than the abolition of domestic violence or genocide have eliminated such violations of the human conscience, will the legal abolition of poverty make poverty disappear. But it will place poverty in the conscience of humankind at the same level as those past injustices, the present survival of which challenges, shocks, and calls us to action.

The principle of justice thus implemented and the force of law mobilized in its service are of enormous power. This, after all, is how slavery, colonialism and apartheid were ended. But while there has been an active struggle against colonialism and apartheid, poverty dehumanizes half the planet to a chorus of utter indifference. It is, undoubtedly, the most acute moral question of the new century to understand how such massive and systematic violations, day in, day out, do not trouble the conscience of the good people who look down upon them. While equality of rights is proclaimed, growing inequalities in the distribution of goods persist and are entrenched by unjust economic and social policies at national and global levels.

To deal with poverty as a violation of human rights means going beyond the idea of international justice – which is concerned with relations between states and nations – towards the creation of global justice and global development, which applies to relations between human beings living in a global society and enjoying absolute and inalienable rights – such as the right to life – that are guaranteed by the international community. Such rights do not belong to the citizens of states but, universally, to human beings as such, for whom they are the necessary condition of life on the planet. The principle of global justice thus establishes the conditions for a fairer distribution of the planet's resources between its inhabitants in the light of certain absolute rights, thus making global development possible.

What we must note is that today nearly 3 billion people receive only about 1.2 per cent of world income, while 1 billion people in the rich countries receive 80 per cent. An annual income transfer of 1 per cent from one group to the other would suffice to eliminate extreme poverty. Yet in fact, the transfer continues to operate in the opposite direction, despite efforts towards debt reduction and development aid.

At the end of the day, there is a simple choice. Not between a 'pragmatic' approach, based on aid granted by the rich to the poor, and the alternative sketched here. The real choice is between the abolition of poverty and the only other way for the poor to obtain rights, which is for them to take them by force. Needless to say, the latter solution usually causes misery for all: social strife, rampant crime, fundamentalism, mass uncontrolled migration, smuggling and trafficking are the only things to flourish. But what moral basis do we have to demand moral behaviour from people to whom we deny any opportunity to live a healthy life? What rights have we to demand that they respect our rights? The sombre option will become increasingly probable if nothing is done – or too little, as tends to be the case with pragmatism, however deserving.

And what are the *threats* of this sombre perspective? We are all familiar with them: security states established to control migrations and migrants, with those controls eventually extended to citizens; security laws to confront 'terrorists' that eventually curtail the freedoms of all; mounting xenophobia, political alignment with blood, race and religion, which eventually undermine democracy; and 'preventive' wars to grab and control natural resources, leading to chaos, lawlessness and insecurity for all. Such a global world is obviously undesirable for the majority of the world population.

The options thus come down to a single choice, which is the only one compatible with the categorical imperative to respect human rights: to abolish poverty in order to eradicate it and to draw from this principle all the consequences that free acceptance of it implies. The proclaimed abolition must, first, create rights and obligations, and thereby mobilize the true forces that can correct the state of a world plagued by poverty and injustice. By simply setting an effective and binding priority, abolition changes the ground rules and contributes to the creation of a new world. Such is the price to pay to give globalization a human face; such is also the greatest opportunity for global development that we can hope to grasp.

Ultimately, the way is to mobilize public opinion and the global citizenry for a universal human rights regime that is within our reach. Its emergence has been lengthy – very lengthy. From the Universal Declaration of Human Rights to the Rome Conference that established the International Criminal Court, the emergence of universal justice has been defiled by acts of barbarity that have grossly infringed human dignity. Now, however, the legal instruments are there, and, step by step, experiments and initiatives give hope. It remains to energize political will through unceasing mobilization, true thinking, the contributions of experts and support for the victims.

What promises does such global justice bear? Let me quote Nobel Laureate Jose Saramago: 'Were such justice to exist, there would no longer be a single human being dying of hunger or of diseases that are curable for some but not for others. Were such justice to exist, life would no longer be, for half of humanity, the dreadful sentence it has hitherto been. And for such justice, we already have a practical code that has been laid down sixty years ago in the Universal Declaration of Human Rights, a declaration that might profitably replace, as far as rightness of principles and clarity of objectives are concerned, the manifestos of all the political parties of the world.'

Indeed, all too often we care only for victims of our own creed, of our own political persuasion. All too often we tend to explain away violations visited on the other side. The challenge for the Human Rights movement at this historical juncture and as we celebrate the sixtieth anniversary of the Universal Declaration of Human Rights, is clearly to stand up against the dehumanization of the other.

From its side, UNESCO does not want merely to inject a human rights approach into poverty eradication strategies, but, conversely, to bring poverty into the realm of human rights. The advantage of defining poverty as a human rights issue means that the response to such questions is political will and the mobilization of public opinion to galvanize it.

Another relevant aim for UNESCO is to make sure that the poor are really seen as victims, and not as ignorant people who do not know their rights, and who would, above all, have to be educated. In this case, the response to poverty is education. But the poor lack capacity, so empowerment is a paramount answer. They know perfectly well that when police officers are beating them, their rights are being violated. They know that they should not be in prison without unbiased judgment. People know intuitively when their rights are being violated.

In this regard, it suffices to read the reports of the World Bank,** where we can see clearly that the poor themselves have identified the reasons for the continuous state of inequality: lack of participation, their treatment by the police, etc. The issue is not so much one of telling them about their rights.

Another goal is to identify the perpetrators. If we say that a right has been violated, that there is a victim, then there is somebody who has violated that right. And there we need to go beyond governments and try to identify those individuals who have taken the decision. 'Who took the decision in my country to introduce school fees in primary education that I cannot afford to pay?' Those who signed the decrees introducing school fees in primary education, and therefore excluded poor people from primary education, are perpetrators of a human rights violation.

Finally, we must succeed in unifying the different actors. UNESCO cannot work directly at the community level, but it has to work with governments, NGOs, and the academic community. UNESCO does not work in villages; NGOs are better placed to work there. These are the key stakeholders that can develop campaigns that will change the approach to poverty.

There is an imperative work of awareness-raising on the reality of poverty, which one often does not know as well as one thinks. It is necessary to think 'outside the box', e.g. to understand that although the persistence of poverty does depend on local factors, it is also linked to the history of inequality among nations (slavery, colonialism, forced work, apartheid, etc.). Poverty and inequality are correlated, and current injustices reflect past injustices. We have to remember that we have a moral responsibility and a legal obligation regarding poverty and the poor.

Several statements have been encouraging in this very endeavour. I would like to mention a recent Note by the United Nations Department of Economic and Social Affairs (UNDESA) on the International Day for the Eradication of Poverty and the sixtieth anniversary of the Universal Declaration of Human Rights, where it is explicitly mentioned that 'the international community has acknowledged that poverty is a violation of human rights and that promoting human rights can reduce poverty.'*** It is also worth recalling the Report of the Secretary-General of the United Nations on the Eradication of Poverty, in which it was said: 'The fact that poverty persists in many parts of the world points not only to an inequitable

** Narayan, D. 2000. *Voices of the Poor*. Washington, DC, World Bank.
*** http://www.un.org/esa/socdev/social/intldays/IntlDay/2008intlday.html

distribution of economic, social and political opportunities, but also to a violation of human rights.'[****]

Let us hope that these statements will be closely followed by concrete actions.

We must never fail to remember, as pointed out during the celebrations of the sixtieth anniversary of the Universal Declaration of Human Rights, that poverty is never just a matter of being deprived of food. It is much more than this and fully implies all human rights, as well as global ethical governance.

Pierre Sané

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[****] Observance of the International Day for the Eradication of Poverty. Report of the Secretary-General, 5 September 2006 (A/61/308).

Preface

Amongst the memories of my childhood during the Second World War in South Africa, two stand out. The first is a picture above the desk of my father, a trade union leader who had little love for the rulers of capitalist society, of Franklin Delano Roosevelt, the American President. The second is of being told to finish all the food on my plate, because I had to think of the poor starving children of Europe. Roosevelt's idea of promoting the freedom from want intertwined itself fully in my mind with the need to bring an end to Nazi tyranny. And when a few years later the Universal Declaration of Human Rights was adopted it seemed quite natural for the right to freedom of opinion and expression and the right to social security to have equal status.

And then came the Cold War. What the United Nations itself had joined together, the United Nations put asunder. The universality of the Declaration of Human Rights gave way to two separate international treaties, the International Covenant on Civil and Political Rights, largely supported by the West, and the International Covenant on Economic, Social, and Cultural rights, in the main backed by the Eastern bloc and what were then called Third World countries. The ideological conflicts were profound and to this day continue to have a major influence on thinking about human rights. The fact is that while the West had strong legal mechanisms but feeble social and economic rights, the East had strong social and economic rights but virtually non-existent legal mechanisms for their enforcement. Today we are heirs to decades of judicial silence on the question of society's fundamental duties to the poor. Only in recent years has the silence begun to be broken, primarily but not only in countries loosely referred to as the South.

A number of eminent new voices are represented in this book. They are largely scholar/activists from all continents who have been grappling with similar problems in very different conditions. This book is a treasure-chest of scholarly experience and reflection. I feel honoured to have been invited to throw a few coins of my own into the chest. And to say years ago we used to speak about the importance for early learning in school of the three Rs – Reading, Writing and 'Rithmetic. I suggest that now that we are learning to reconfigure the law, we have to look at new ways of looking at Rights, at Relationships and Roles.

Reconfiguring rights – To say that civil and political rights on the one hand, and social and economic rights on the other, are indivisible, is not to say that they are the same. Though all are based on promoting respect for human dignity, their mode of enjoyment is quite different. In principle, civil and political rights are not rationed while, in principle, social and economic rights are. Freedom of speech is based on the right to be left alone. The right to shelter is grounded in a claim not to be abandoned. There are never enough resources to meet all the social and economic needs of society. Expectations grow by what they feed on. The wealthy as well as the poor demand better health services for themselves.

Even in the most well-off societies governments are finding that the provision of expensive medical procedures is unsustainable. Rationing is built in to the very nature of the supply of public goods. Thus, while in principle free speech and the right to vote are not rationed, access to public health care or housing or education will never be unlimited. Rationing does not represent a limitation on the right to enjoy social and economic rights. Rather, it is the precondition for the enjoyment of these rights. What matters is that the rationing be conducted in a fair, rational, principled and non-discriminatory way. This is consistent with the concept of progressive realization of economic and social rights within available resources. While classical civil individual rights are viewed as being autonomous and complete in themselves, social and economic rights, however, are by their nature shared, often competitively with other holders of the right.

Reconfiguring relationships – Supporters of autonomizing civil and political rights and seeing them as constituting the only fundamental rights worthy of constitutional protection are concerned that judicial entanglement with economic and social rights will lead to dilution of respect for fundamental civil and political rights. There is unfortunate historical experience to support their anxiety. In the name of national development and social progress, many states have trampled upon fundamental democratic rights. On the other hand, hard-line supporters of economic and social rights claim that what they refer to as so-called freedom rights are illusory for the mass of the desperately poor, who are so overwhelmed by the struggle for survival that their freedom of speech or the right to vote are meaningless for them. To my mind, the answer is to be found not in defending schematic positions on either side, but in seeking accommodatory solutions that acknowledge the possibilities and dangers of both sides. In South Africa our slogan was 'freedom in our lifetime!' but we never dissociated the fight for freedom from the fight to provide schools, clinics, water and homes. While the quest for freedom never involved abandoning the search for bread, the demand for bread never obscured the right to be free. And Amartya Sen has shown that far from freedom rights and bread rights being incompatible they are mutually supportive – you do not get famine in open and democratic societies, while millions will starve to death in authoritarian societies where a wealthy elite hoard whatever grain there is.

The fact is that the human mind and the human body are inseparable. All human beings are embodied in their physical self, their families, their neighbourhoods and their communities. The indivisibility of human rights recognizes the manner in which the different aspects of the human personality are integrated. When a court responds to a claim of fundamental rights in relation to housing or health or education or water, it is doing more than simply ensuring that material means are supplied to a programme of poverty relief. It is helping to rescue human beings from despair. It is animating people with hope, and encouraging them to explore new ways and means of developing their potential. It is declaring that everyone matters. And it is saying something profound about the nature of the society in which all live.

It is been said that the role of the law is to convert misfortune into injustice. Nowhere is this more evident than in relation to the acknowledgement of the duties of society to the poor. Whether we are entering a new Rooseveltian age remains to be seen. And those children of Europe in respect of whom I was urged to finish my potatoes are today more likely to die from eating too much rather than too little. But that sense of intense respect for human dignity that infused my childhood imagination with hope remains as a constant. And this book is a testament to the vitality of that hope.

Reconfiguring roles – Because of the different ways in which the different clusters of rights need to be affirmed today, the moments and styles of intervention by the courts will be different. Progressive realization of social and economic rights presupposes court orders looking to the future and taking effect over a period of time. This requires supervision by the court, usually accompanied by a requirement that designated public officials formally report back. The pioneering example of this was the decision of the US Supreme Court in *Brown v Board of Education*[*]. Although the right to education was never accepted as a constitutionally protected right, the fact that the patterns of segregation being challenged related to public education was central to the decision. The state authorities were ordered to desegregate with all deliberate speed, with the courts being given a supervisory role. Two decades later the Indian Supreme Court made further judicial breakthroughs. It called upon executive authorities in particular areas to undertake measures to protect the work environment of employees whose right to dignity was being severely assailed. That Court also led the way in reconfiguring procedures to make it possible for class actions to be brought and for informal petitions to be heard.

Recent experience of the South African Constitutional Court indicates that the traditional role of the courts can be further transformed in yet other ways. While hearing cases involving eviction proceedings brought by local authorities against homeless people occupying properties required for development, the Court developed the concept of requiring engagement between the parties. This engagement had to take place before and not after the Court made its decision. This proactive role goes beyond seeing the court simply as the authority that determined what was lawful and what was unlawful. The court has the further function in situations like these to find constitutionally appropriate ways of managing stressful social situations.

Some legal problems just do not lend themselves to having a clearly right and a clearly wrong answer. All that can be right is to have an ongoing process in which the competing interests are given a chance to engage with each other. Provided the negotiations are conducted in a fair and open way, this process is far more likely to produce a just outcome than a determination by the court of who as a matter of law should be the winner and who the loser.

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[*] 347 US 483 (1954).

Requiring engagement in this way goes beyond achieving mutually satisfactory solutions. It gives a direct voice to the homeless. It ensures that they cease to be seen as an anonymous mass on whose behalf socially/progressive minded professional people speak. Local authority officials, knowing that they will have to account to the court, become intensely aware of their constitutional and statutory duties to pay attention to the basic need of everyone living within the city boundaries. For their part, the homeless are made to realize that instead of locking themselves into intransigently defensive positions, they are called upon to use the extraordinary energy and creativity they manifest for survival, to seek to find proactive and reasonable solutions. They cease to be seen or to see themselves as victims or passive recipients of state delivery programmes. Rather, they become active participants in the process of progressively realizing their social and economic rights.

One of the features of development in recent years has been the growth of strong civil society organizations and advocacy groups. Frequently, they ally themselves with community organizations with a view to advancing the rights of the poor. Their role in developing new ways of looking at the rights of the poor cannot be underestimated. Ideally, they should be a little ahead of the courts in their thinking, promoting new ways of looking at the manner in which the law affects the poor. Feminist legal thinkers pioneered jurisprudential transformations in many areas as did supporters of the environment. This book represents thinking that is undoubtedly ahead of where most judicial offices find themselves today. I will not be surprised if it proves itself to be as influential as some of the early feminist and environmental law books turned out to be in their respective areas.

Albie Sachs

Constitutional Court of South Africa

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Finally I wish to thank my husband, to whom this book is dedicated.

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List of Abbreviations

AAAQ	Availability, accessibility, acceptability and quality
ACHPR	African Committee on Human and Peoples' Rights
AIDS	Acquired Immune Deficiency Syndrome
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Centre for Economic and Social Rights
CMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
COHRE	Centre on Housing Rights and Evictions
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
CSO	Civil society organization
DFID	Department for International Development (UK)
DISHA	Developing Initiatives for Social and Human Action (India)
EASPD	European Association of Service Providers for Persons with Disabilities
ECHR	European Convention on Human Rights
ECOSOC	UN Economic and Social Council
ECOWAS	Economic Community of West African States
ES	Economic and social (rights)
ESCR	Economic, social and cultural rights
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FCTC	Framework Convention on Tobacco Control
FEANTSA	Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abri (European Federation of National Organisations Working with the Homeless)
FEBEM	Fundação Estadual do Bem Estar do Menor (State Foundation for the Well-Being of Minors, Brazil)
FGM	Female genital mutilation
FIAN	FoodFirst Information and Action Network
FIDH	Fédération Internationale des Ligues des Droits de l'Homme (International Federation for Human Rights)
FOI	Freedom of information
FTAP	Fair and Transparent Arbitration Process
GC	General Comment
GDP	Gross domestic product
GTI	Global Transparency Initiative

HIPC	Highly-indebted poor country
HIV	Human Immunodeficiency Virus
HLP	Housing, land and property rights
HRC	Human Rights Council
HRP	Human right not to be subjected to severe poverty
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
ICFTU	International Confederation of Free Trade Unions
ICIDH	International Classification of Impairments, Disabilities and Handicaps
IDP	Internally displaced person
IFAI	Instituto Federal de Acceso a la Información Pública (Federal Access to Information Institute, Mexico)
IFI	International financial institution
ILO	International Labour Organization
IMF	International Monetary Fund
MDG	Millennium Development Goal
MDRI	Mental Disability Rights International
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organization
NSS	National Sample Survey
OAS	Organization of American States
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
OSI	Open Society Institute
OWCP	Office of Workers' Compensation Programs
PPP	Public-private partnership
PUCL	People's Union for Civil Liberties
RTI	Right to information
SEWA	Self Employed Women's Association
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
UNIFEM	United Nations Development Fund for Women
USA	United States of America
WHO	World Health Organization
WTO	World Trade Organization

1

Fulfilling Law's Duty to the Poor

Geraldine Van Bueren

1.1. WHAT IS LAW'S DUTY TO THE POOR?

The words 'the law' should not just be an anagram for 'wealth'. Poverty is both a symptom of the violation of human rights and the cause.[1] Yet the idea that law owes a duty to the poor rather than being a discretionary function of government is comparatively new. In the twenty-first century, overcoming extreme and relative poverty is no longer a charitable gesture, but an obligation of international human rights law and for an increasing number of states an obligation of national constitutional law.[2] Equally new is the concept that there is an important role for the courts as well as legislatures in ensuring that states fulfil this legal duty. International human rights law places an obligation on states to intervene both to prevent citizens falling into poverty and where they are already living in poverty, relative or extreme, to provide social and economic safety nets. It is a duty that extends to short-, medium- and long-term protection of the human rights of the poor.[3]

Poverty exists at different levels; extreme, moderate and relative, but all, albeit to very different degrees, shorten life expectancy (Marmot 2004) and render choices either impossible or very difficult (Sen 1999). Sen defines poverty as the 'failure of basic capabilities to reach certain minimally acceptable levels' (Sen 1992: 109) and refers to the freedom to attain well-being including access to adequate food, safe water, shelter, health care and basic education paralleling the rights enshrined in international human rights law. In legal terms, before a state becomes party to a treaty on socioeconomic rights[4] it has to ensure there are sufficient

1. UN Doc A/59/2005/Add 3, para. 10.
2. For a discussion of obligations in terms of positive rights and duties see Fredman (2008); for an analysis of the trends see Langford (2008).
3. See further *Government of the Republic of South Africa and Others v Grootboom and Others*, Judgment of the Constitutional Court of South Africa 2000 11 BCLR 1211.'
4. The terms 'socioeconomic rights', 'social justice' and 'social, economic and cultural rights' are used interchangeably in this volume and refer to the wide range in this sphere recognized by international human rights law.

resources to implement a socioeconomic rights treaty progressively.[5] Hence the political decisions on how resources are to be expended have already been taken. The legal responsibility is to ensure that they have been expended according to the maximum available resources and progressively.[6] In essence governments have exercised their political powers and the law makes this exercise of power accountable. This is what is meant by 'law's duty to the poor'.

Definitions of poverty, focusing on resources and social capital,[7] rarely include the poverty of the legal imagination. Yet one of the great obstacles to the full implementation of socioeconomic rights is not always lack of resources; the great enemy is the passive acceptance of a feeling of hopelessness and inevitability, a viewpoint reflected in extremis in a 1933 opinion of the British House of Lords, when it observed that 'poverty is a misfortune for which the law cannot take any responsibility'. Although law has moved on from such an extreme view, there is still much reluctance by some to countenance a legal duty to the poor and, in particular, an implementation through the incorporation of socioeconomic rights into justiciable Bills of Rights.[8] Such a rejectionist approach clings to three myths. Firstly, that poverty is presumed to be an inescapable social tragedy (Ross 1991: 1499); secondly, and consequentially, that lawyers are helpless to remedy poverty in any strategic way; and finally, that the strategic alleviation of poverty lies beyond the courts and belongs exclusively in the political arena.

Although, for much of human history, social justice has been advocated by mass political and economic action, new developments in law locate a clear responsibility of the law and of lawyers to contribute strategically to the eradication of poverty. Democracy for the twenty-first century is slowly evolving, showing that it is possible to embrace a substantive core of social justice values. [9] This is reflected in a the small but growing number of democratic states that have moved

5. This is the principle of pacta sunt servanda, see for example McNair (1961: 493); see also Article 26, Vienna Convention on the Law of Treaties, 1969, 8 ILM 679.
6. See Chapter 15 of this volume, McCorquodale and Baderin, 'The International Covenant on Economic, Social and Cultural Rights – Progress and Future Challenges'.
7. One of the earliest definitions of 'social capital' in reference to social cohesion and personal investment in the community is by Hanifan (1916), who in 1916 contrasted social capital with material goods by defining social capital as, '…that in life which tends to make these tangible substances count for most in the daily lives of people: namely good will, fellowship, sympathy, and social intercourse among the individuals and families who make up a social unit… The individual is helpless socially, if left to himself… If he comes into contact with his neighbor, and they with other neighbors, there will be accumulation of social capital, which may immediately satisfy his social needs and which may bear a social potentiality sufficient to the substantial improvement of living conditions in the whole community. The community as a whole will benefit by the cooperation of all its parts, while the individual will find in his associations the advantages of the help, the sympathy, and the fellowship of his neighbors'. More recently, see Putnam (2000).
8. This is not to argue that states such as the United Kingdom are hostile to socioeconomic rights per se as the creation of the welfare state clearly indicates, see further Whelan and Donnelly (2007: 908). However, this is different from justiciablity, see further below.
9. The Millennium Development Goals reflect this democratic concern although they are weakened by their lack of binding legal force and by the lack of remedies for individuals and groups. However, see (Alston 2005*a*: 755).

from adopting protectionist bills of rights where the role of the courts has been to protect individuals from the state, to nascent provisionist constitutions, where bills of rights provide avenues for individuals and communities to enforce both their civil and political rights and their economic, social rights and cultural rights. Such a development is not geographically limited to one continent. Increasingly modern constitutions and bills of rights, directly and indirectly through the operation of international law, are embracing economic and social rights, including Argentina, Brazil, Chile, Columbia, India, South Africa and Venezuela. This is because there is a growing rejection of the belief that it is possible to possess a right without any means of being heard or enforcement. Such an outdated belief undermines the core rationale for human rights, and reassigns rights holders to objects rather than subjects of law. Socioeconomic rights establish a culture of continuing justification for areas that had previously been relegated to a largely unfettered political arena, which in many countries has proven to be a failing safeguard as the inequalities in national wealth widen.[10]

Socioeconomic rights-based approaches focus on identifying the strategic obstacles that obstruct people's ability to access opportunity and improve their own lives for themselves. Socioeconomic litigation creates a public forum for the voices of the marginalized and most vulnerable to challenge, and for this justification to be held in public. In so doing the judges enhance and enrich the democratic process rather than undermine democracy.

Law's Duty to the Poor does not seek to claim that socioeconomic rights ought to be the only focus of combating poverty, but that access to the courts by the most vulnerable in society can play a significant and important role within a broader eradication of poverty strategy.[11] Ineffective law enforcement, lack of transparency,[12] lack of awareness of legal procedures,[13] and a familiarity with the daily injustices which occur despite constitutional guarantees discourage interest in using law and litigation to help combat poverty. However, litigation at international, regional and national levels can, as this volume demonstrates, play an important role alongside grass-roots mobilization and empowerment and use of legislatures. The new Optional Protocol[14] to the principal socioeconomic rights global treaty, the International Covenant on Economic, Social and Cultural Rights 1966, establishes a trust fund to provide expert and technical assistance to contribute to building national capacities in socioeconomic rights,[15] and demonstrates that litigation ought to exist alongside and is part of nation building. Capacity building at all levels is particularly important because, as de Albuquerque observes '[a]

10. For example in the United Kingdom (see Palmer 2006).
11. This would include ombudsmen and commissioners, welfare legislation, social benefits etc.
12. See Chapter 11 of this volume, Michael, 'Alleviating Poverty through Transparency and Rights of Access to Information'.
13. See Chapter 12 of this volume, Byrne, 'Access to Justice and the Alleviation of Poverty'.
14. At the time of writing currently open for signature.
15. Art 14(3) Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

marked characteristic of virtually all communities living in extreme poverty is that they do not have access … to the institutions and services of Government'. [16]

There is, however, no single right that protects against poverty, because poverty alleviation requires holistic solutions. Yet as attractive and necessary as the holistic approach is, in relation to combating poverty, specific groups such as children[17] and those living with disabilities,[18] or focusing a test case strategy on a particular right or facet of a right,[19] may be a sound place to begin. Although as with any pioneering new approach, the pace has been slow and uneven, the setbacks[20] do not undermine the evidence that there is a growing trend that the rule of law has a core social justice component which is capable of being protected by the courts. This trend, however uneven, provides a voice for the poor and reduces their invisibility and low prioritization.[21]

The challenge is to develop a creative and substantive socioeconomic rights jurisprudence within the institutional and constitutional abilities of the judiciary, whilst ensuring that socioeconomic rights have teeth.[22] This is being accomplished by breaking down poverty into components capable of court adjudication, such as the right to adequate nutrition[23] and to the highest standard of health.[24] Each of the rights in the widely ratified International Covenant on Economic, Social and Cultural Rights[25] and in the European Social Charter[26] correlates to a part of the experience of the poor living in poverty. Thus although such claims appear at first sight to encompass overwhelmingly complex and polycentric issues, the structure of social justice rights adjudication provides a more precise and defined context (King 2008: 101).

This realization that social justice is an essential component of the modern state requires more than an application of the principle of equality. Equality before the law alone represents only a restraint on government power, and does not serve

16. UN Doc A/59/2005/Add 3, para 10.
17. See Chapter 10 of this volume, Nolan, 'Rising to the Challenge of Child Poverty: the Role of the Courts'; Van Bueren (1999: 680).
18. See Chapter 9 of this volume, Quinn and Courtis, 'Poverty, Invisibility and Disability - the Liberating Potential of Economic, Social and Cultural Rights'.
19. See Chapter 6 of this volume, Leckie, 'Transforming Security of Tenure into an Enforceable Housing Right'.
20. See, for example the criticisms of the Supreme Court of Canada in Wiseman (2001: 453).
21. See in this volume Chirwa, 'Privatization and Freedom from Poverty'.
22. See further in this volume Bilchitz, 'Taking Socio-Economic Rights Seriously: The Substantive and Procedural Implications'.
23. See further in this volume Cahill and Skogly, 'The Human Right to Adequate Food and to Clean and Sufficient Water'.
24. See in this volume Nygren-Krug, 'A human rights based approach to health as a means to poverty eradication'.
25. As of 29 August 2009 the Covenant has 160 state parties and 69 signatures. See official UN treaty collection at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
26. For a discussion of the Charter see in this volume Feria Tinta, 'Litigation in Regional Human Rights Systems on Economic, Social and Cultural Rights against Poverty'.

to address substantive inequality. It may even, as the Supreme Court of Canada acknowledged, lead to 'equality with a vengeance'.[27]

The many violations of social justice rights are as serious and undermining to human dignity as violations of civil and political rights. The development of socioeconomic jurisprudence relies on a greater appreciation of human dignity,[28] which has intersecting individual and community dimensions transforming a vision of humanity from a collection of competing individuals to one whose interests are intertwined. This even extends, as in the Philippine case of Minor Oposa, to the rights of generations yet unborn.[29] The important relational facet of socioeconomic entitlement is reflected in the number of jointly written chapters in *Law's Duty to the Poor*.

It is not, as is often assumed, problematic that the enforcement of socioeconomic rights involves expenditure, but that 'they call for a decision about how to spend' (Mureinik 1992: 464, 466). The awareness of how much it would cost to implement fully the socioeconomic rights of citizens appears almost to overwhelm some governments; however, the appropriate question is 'what is the cost to the state of not implementing these rights?' This is a question that economists have begun belatedly to address. As Lewis observes, 'fiscal limitations are not simply facts of nature' (Williams 2005: 438).

Furthermore, it is a duty that is not diluted by the global financial crisis;[30] indeed the global financial crisis provides an opportunity to move beyond the re-structuring of the global financial and monetary systems and to improve social protection systems using socioeconomic rights-based approaches, because evidence from previous crises indicates that ensuring universal access to social protection is a sound economic decision (Ravallion 2008). Consequently, aside from legal obligations, states ought to take socioeconomic entitlement seriously because socioeconomic rights serve to protect the most vulnerable from falling further into poverty. The United Nations Rapporteur on Extreme Poverty has observed that socioeconomic rights act as economic stabilizers, limiting the contraction of aggregate demand and in turn curtailing the potential depth of a recession. By creating both a safety net and a sense of communal belonging,

27. The phrase is from *Schachter v Canada* 1992 2 SCR 679, at 702 where the Supreme Court of Canada noted that 'nullification of benefits to single mothers … clearly amounts to "inequality with a vengeance"'. See also Brodsky and Day (2002: 205).
28. Henkin, analyses the U.S. Constitution in light of human dignity arguing that such an approach demands protection of a right to food, health care services, and housing. See Henkin 1992: 210. This is an approach which the Italian Constitutional Court has also utilized in relation to the right to housing as has the South African Constitutional Court in relation to social grants (see *Khosa v Minister of Social Development* 2004 6 SA 505 CC).
29. *Minors Oposa et al. v Fulgencio S. Factoran, Jr. et al.* G.R. No. 101083 Judgement of 30 July 1993.
30. More than 125 million people have already been pushed into poverty as a result of the food price crisis and estimates project that the current crisis may push 55 to 90 million more into extreme poverty in 2009 (World Bank 2009: 1-2).

they assist in building social cohesion, which can reduce the likelihood of social unrest.[31]

In addition to law's duty to the poor, the key questions are where is the duty located and how did it evolve; what are the obstacles to implementing law's duty to the poor and what are the consequences for democracy and of such a duty?

1.2. WHERE IS LAW'S DUTY TO THE POOR LOCATED AND HOW DID IT EVOLVE?

International human rights law correctly regards the move from government treaty ratification and acceptance of obligations on the international level to government incorporation into the domestic level in some form, as desirable, important and often inevitable. However, this has not occurred as widely as with civil and political rights, despite the increasing number of states whose courts conceptualize socioeconomic rights as essential to underpin democracy. With the reluctance and sometimes hostility of many in the Anglo-American world to countenance an incorporation of socioeconomic rights into justiciable bills of rights, it is necessary to explore the potential of another approach, which complements that of classical international human rights law and so offers a more evolutionary historical basis for socioeconomic rights, rather than the more common political approach. Social contract theory provides additional support for the incorporation of socioeconomic rights, locating the argument within a theoretical and historical context. This may prove more fruitful than the well-rehearsed arguments that states are party to socioeconomic rights treaties and that they ought to be incorporated into their domestic laws.

Social contract is based upon the theory that government authority is only legitimate if it is based upon the voluntary, express or implied consent of the people. The ambit of the agreement may encompass the basic constitutional structure of a state, including fundamental rights and duties of both the state and the people. This has been reinforced by the expansion of social contract as a national theory into one capable of universal application as it does not depend upon any particular political theory.[32] If it is accepted that the state's legitimacy stems from all people bound by it, and further that everyone's interests should have equal weight, then social contract theory provides space for questioning whether this is reflected in all the institutions of government, including the courts.

The emergence of the social contract was only possible because of the decline in the religious authority for secular government. However, for three centuries, from the seventeenth until the nineteenth century, the terms of the social contract only included the implementation of civil and political rights to secure popular

31. UN Doc. A/64/279 at para. 16, 2009.
32. On the international social contract with global duties see Pogge (2002); Freeman (2007), particularly chapter 8; Pogge (1989: 211-281); Teraya (2007: 299-316).

consent.[33] The historical social contract was a foundation stone for democracy, but as democracy has evolved, so the social contract to be legitimate needs to evolve with it, including taking account of the needs of poorer and marginalized groups in society. Historically the evolution of social contract theory was focused on protecting individuals from the authority of the state, with the state viewed as a threat to freedom. Hence the social contract sought to limit state power, emphasizing freedom from interference including unregulated markets and unregulated private spheres. The social contract is relevant to poverty as it can be used to question the legitimacy and adequacy of safeguarding only civil and political rights, by asking marginalized communities whether they would regard the incorporation of socioeconomic rights as a precondition for a just democratic society. Rights generally are of little value if market forces, power structures or social classes hinder their fulfilment, and this is true for both civil and political and socioeconomic rights. If it is accepted that civil and political rights are included in the social contract so that everyone can choose their direction and goal in life and ensure everyone's autonomy, then the inclusion of socioeconomic rights seems inevitable.

Although it may at first appear strange to apply a theory that has been described as non-factual, 'historically and sociologically implausible' (Waldron 1994: 54-55),[34] and not a historical event but an intellectual experiment, social contract theory is, as Lessnoff argues, 'intuitively attractive', as it holds the promise of equal protection to the possibly conflicting interests of all, and therefore, he argues, it ought to be of universal application (Lessnoff 1986). It is, however, the inclusion of international human rights law which transforms social contract theory into a theory of universal application. International human rights treaties are politically neutral but not morally neutral. The values incorporated in the treaties are capable of applying to a range of political parties and political philosophies, secular and religious. The impact of international human rights law is that it transforms the social contract approach by recognizing that in incorporating socioeconomic rights, the social contract can assist in overcoming some of the justifiable objections of disadvantaged and formerly disadvantaged groups to a social contract.[35] Unlike the historical social contract, through the involvement of civil society in the previously exclusive state arena of drafting international, regional and national bills of rights,[36] the voices of those who rarely take central

33. Marshall (1950) ascribed civil rights to the eighteenth century, political rights to the nineteenth century and social rights to the twentieth century.
34. Waldron regards the social contract as a process evolving over time rather than any one specific event to which all have to consent because 'No society can …be a scheme of cooperation which men enter voluntarily in a literal sense: each finds himself placed at birth in some particular position in some particular society.'
35. See for example Pateman (1988), who persuasively argues that contemporary subordination is created through contract.
36. See the involvement of civil society in the drafting of the UN Convention on the Rights of the Child 1989, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 1999 and the UN Convention on the Rights of Persons with Disabilities 2006.

stage are heard. The essence of socioeconomic rights is the protection of individual rights through creating a sense of community,[37] as successful socioeconomic rights litigation is rarely action taken by isolated individuals[38] but more frequently group actions that benefit both individuals and the community as a whole (Van Bueren 2002*a*: 473). This replaces the outdated – and some would argue male – emphasis on rights based upon separateness and opposition. Hence through the operation of international human rights law the social conversation in the twenty-first century preceding the social contract is stripped of its claimed impartiality and neutrality. Socioeconomic rights themselves are of little value if the exercise of rights is ineffective due to an absence or imbalance of autonomy and power[39] stemming from a lack of access to resources.[40] The new social contract does not abstract away from social context, but is defined by it and this context includes poorer members of the community.

Placed within its context, the advantage of a social contract approach is that it assists in enforcing the 'ought': the social contract provides the parties with a 'special source of reassurance that obligations owed to them will be discharged' (Kimel 2003: 57), and in so doing it can assist in strengthening the relationship between human rights and combating poverty. The impact of international human rights law upon the social contract is that it assists in translating moral and social demands into legal entitlements, and moves socioeconomic rights from the relatively unhampered political discretion to a transparent and accountable process, where decisions must be justified in mutually acceptable legal language and weighting. Sen's critique that social contract is concerned with the perfect just society is thus tempered by the impact of international human rights law with its emphasis on the progressive and the utilization of the maximum of the state's resources (Sen 2009: 6-27). Human rights are premised on present knowledge of what it is to be human and humane.[41]

This is the reason why, looking beyond the lens of Anglo-American jurisprudence, progress in socioeconomic jurisprudence, despite its infancy, has been so swift. The latter half of the twentieth century witnessed the development of the equality aspect of social contract, not only guaranteeing the traditional liberties recast as rights, but also including socioeconomic rights. Even the

37. Socioeconomic rights overcome Marx's concern that labour isolates the worker from the community (Marx 1986: 17).
38. See the unsuccessful attempt in *South Africa Soobramoney v Minister of Health* (Kwazulu-Natal) (CCT32/97) [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 ; On a very different level in India see State of *Himachal Pradesh v Parents of a Student of Medical College, Simla* 1985 3 SCC169.
39. An example of seeking to change this is the Convention on the Elimination of All Forms of Discrimination against Women, which in Article 5 obligates states parties 'to modify social and cultural patterns of conduct of men and women' based on the idea of the superiority or inferiority of either gender.
40. Marshall (1950) recognized that the market undermined the individual's ability to exercise civil rights to the full.
41. This is recognized by Samford (1986: 196) 'Human rights (…) amount to rights to the kind of organization that will make it possible to enjoy them.'

traditional liberties, the exclusive link between civil and political as being only negative, obligating states not to interfere, have developed, with the concept that civil and political rights are capable of creating positive obligations on a state.[42] This in turn has advanced the recognition of socioeconomic rights, which in the main are largely positive, although not exclusively so.[43]

In less than a quarter of a century, at the international, regional and national levels there has been extraordinary progress in socioeconomic jurisprudence. At the global level under the International Covenant on Economic, Social and Cultural Rights 1966 there has been the development of a substantive body of general comments setting out for courts[44] and governments the ambit of governmental obligations on socioeconomic rights. The Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities enshrine both sets of rights within each treaty, thereby emphasizing their interrelatedness and equal value. This has been expanded by the opening for signature of the Optional Protocol to the United Nations Covenant on Economic, Social and Cultural Rights 1966, which would allow individuals and groups to petition an international body against governmental socioeconomic rights violation. This has already occurred with the adoption of the Optional Protocol to the United Nations Convention on the Elimination of All Forms of Discrimination against Women, allowing both girls and women to petition, inter alia, to protect against violations of their socioeconomic rights, and with the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

At the regional level there has been the revision and improvement, substantively and procedurally, of the Council of Europe's Social Charter 1996,

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42. In relation to Asia see in this volume Goonesekere, 'Civil and Political Rights and Poverty Eradication'. Under the International Covenant on Civil and Political Rights see for example, Zwaan-de Vries v the Netherlands Communication No 182/ 1984 and Broeks v the Netherlands Communication No 172/1984 applying the non-discrimination clause in article to Dutch legislation, which only granted unemployment benefits to unmarried women; see also *Gueye et al. v France Communication* No 196/ 1985 applying Article 26 because lower pensions were paid to retired Senegalese soldiers of the French army than to the French. In relation to the European Convention see for example *Deumland v Germany*, 29 May 1986, in which proceedings concerning pension rights lasted 11 years and were held to violate Article 6(1) because of length of proceedings; *Schuler-Zgraggen v Switzerland* 24 June 1993 in which the European Court said 'today the general rule is that Article 6(1) does apply in the field of social insurance including even welfare assistance'; Protocol l of the European Convention, which does enshrine a social right, the right to education, although conceptualized in the negative; see the judgement of the *Grand Chamber of the Court in D.H. v Czech Republic,* which held that the system of Roma schools violated the right to education, read in conjunction with the prohibition of discrimination, judgement of the European Court of Human Rights 13 November 2007; in relation to positive obligations and children see Van Bueren (2008).

43. It is beyond the focus of this chapter to make the normative case for socioeconomic rights however, see Plant (2003: 1).

44. Even though South Africa was not party to the International Covenant on Economic, Social and Cultural Rights, the Constitutional Court used the General Comments to shape its decision in Grootboom. See Van Bueren (2002*a*).

the adoption of the African Charter on the Rights and Welfare of the Child 1990,[45] enabling children to petition on socioeconomic rights and extending the ambit of socioeconomic protection from times of peace to situations of armed conflict, and the adoption of the Protocol of San Salvador 1988, which is an additional protocol to the American Convention on Human Rights. The extent of the acceptance that socioeconomic rights are an essential component of contemporary democracies governed by the rule of law is evidenced by their inclusion in the Charter of Fundamental Rights of the European Union 2007.[46]

1.3. THE EVOLUTION OF A SOCIAL CONTRACT FOR THE TWENTY-FIRST CENTURY

'Classical social contract thinking was at its most influential arguably just at the point when the modern nation state was emerging' (Williams 1994: 135). Kant, however, sought to conceive of the idea of the social contract at an international level but in a very limited way through a loose international alliance to protect from attacks outside of the state, which could be 'renounced at any time' (Gregor 1992: 151). A treaty is an international contract between states, and the founding treaty of the League of Nations was focused solely on states and governments. The emphasis has, however, changed from the League of Nations to the United Nations. In sharp contrast the United Nations Charter begins with the proclamation of 'We the peoples'. The powerful opening words of the Preamble were initially proposed by the United States, and the purpose was to emphasize that the charter was 'an expression of the wills of the peoples of the world' (Goodrich, Hambro and Simons 1969: 21; see also Russell 1958: 910-919), thus advancing the charter beyond the exclusive bilateral relationships of states and towards the obligations and entitlements of peoples in general. The preambular 'We the Peoples' is clearly a direct echo of the one time revolutionary cry of the Constitution of the United States 'We the People'. It is a symbol of the birth of a contract directly between the peoples and the United Nations, although signed by states.

There is however a fundamental distinction between an international social promise and an international social contract, and it is not only in the Preamble that people emerge as parties to the international social contract. The United Nations Charter recognizes the importance of the democratic participation of civil society and non-governmental organizations and the necessity of human rights protection. This in turn is reinforced by Articles 55 and 56 of the United Nations Charter, and of the human rights treaties negotiated in accordance with

45. This is also occurring with the African Commission on Human and Peoples' Rights with the latest draft of the African Commission on Human and Peoples' Rights Guidelines on Economic, Social and Cultural Rights. http://www.achpr.org/english/other/Draft_guideline_ESCR/Draft_Pcpl%20&%20Guidelines.pdf

46. The governments of the United Kingdom and Poland have attempted to exclude the charter's application domestically; however such an attempt at excluding legal enforceability does not necessarily mean that the European Court of Justice will uphold the attempt.

these provisions.[47] Although international human rights law emerged from the context of public international law and was for too long constrained by all of its theories,[48] the declaratory words of the United Nations Charter were followed through in Articles 55, 56 and 71, creating the necessary space for the Universal Declaration of Human Rights and a series of human rights treaties. It is under the umbrella of the United Nations Charter that the universal human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, have been negotiated. The Universal Declaration of Human Rights 1948 provides in its preamble that 'human being shall enjoy … freedom from fear and want'[49] encapsulating both civil, political and socioeconomic rights, without dividing them or creating any hierarchical distinctions, instead providing that they 'should be protected by the rule of law.'[50] Although the rights in the Universal Declaration were in turn divided into two treaties, the preambles to both the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural rights emphasize that 'in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights'.[51] Further the equality of value and status was reiterated by the member states of the United Nations in the Vienna Declaration from 1993.[52]

Hence from the inception of the United Nations, the concept of equal rights embraced both socioeconomic rights and civil and political rights as rights having an equal value and importance. The Universal Declaration and the human rights treaties have been incorporated into modern progressive democratic constitutions. It is clear that economic and social entitlement is part of this new contract, because the preamble to the United Nations Charter calls for the employment of international machinery for the promotion of the economic and social advancement of all peoples and 'All Members pledge themselves to take joint

47. Article 55
With a view to the creation of conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based for respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
(a) higher standards of living, full employment, and conditions of economic and social progress and development; (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
Article 56
All members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.
48. Two constraints are the status of the individual and the bilaterality of reservations.
49. Para. 2 of the preamble.
50. Para. 3 of the preamble.
51. Para. 3 in the preambles of both treaties.
52. Vienna Declaration and Programme of Action, A/CONF.157/23, adopted by the World Conference on Human Rights on 25 June 1993, part I pt 5.

and separate action in co-operation'.[53] All people are entitled to rights proclaimed by the United Nations not because they are members of particular state-based communities, but because they are human. In a post United-Nations-Charter-world, mutual respect of dignity is the fundamental criterion.

States at the United Nations or in regional inter-governmental organizations, when drafting international and regional human rights instruments, are clearly guided by both state self-interest and a more general global compassion. Arguably the only international instrument that might come closest to Rawl's veil of ignorance (Rawls 1972/1999) is the drafting of the immediate post-war Universal Declaration of Human Rights, 1948, but perhaps this was because, in part, the declaration was originally conceived as enshrining only non-binding goals rather than binding legal entitlements. However, even with the Universal Declaration there was sufficient state awareness of their positions as is evidenced by the state abstentions in the voting in the General Assembly.[54]

International law regards both sets of rights as equal and indivisible, and in this sense would disagree with awarding the priority to liberties and lesser protection to socioeconomic rights,[55] as both sets of rights enshrine positive duties for states and both entail expenditure of resources and polycentric contexts. There is, as in international law, no trade-off between civil and political rights on the one hand and socioeconomic rights on the other. Expression of unity is the holistic grundnorm of international human rights law, which conceives of the responsibilities of the state in a fundamentally different light to Nozick (1974: 132).[56]

The Charter of the United Nations and its subsequent human rights treaties are important, because in the development of globalization the provisions of human rights treaties have become part of the terms of the new social contract. The two international covenants, the International Covenant on Economic, Social and Cultural Rights, 1966, and the International Covenant on Civil and Political Rights, 1966, together form the terms of the new international social contract refined by the later human rights treaties.

Although it may seem a leap to argue that the evolution of the social contract requires justiciable socioeconomic rights, if it is accepted that socioeconomic rights are part of the new social contract and that international human rights law is holistic and indivisible, then the same appropriate tools are required to enforce

53. Article 56, Charter of the United Nations.
54. Canada at one point in the drafting even considered voting against because of a concern over federalism.
55. It is beyond the scope of this chapter to discuss the theories of Rawls and his critics, although see Miller arguing that Rawls's theory is not distributive since it 'contains no principles directly describing an allocation of benefits and burdens to persons' (Miller 1976: 50). However, even in Rawls's 1993 he accords no individual claims to socioeconomic rights and still prioritizes civil and political rights (see in particular Rawls (1993: 227-230)).
56. For Locke the authority of the state is founded upon the consent of all its citizens, whereas for Nozick it is private agencies that commercially offer state-like functions of protection and that need not have anything to do with contract.

the socioeconomic provisions of the social contract as the civil and political provisions.

1.4. THE OBSTACLES TO IMPLEMENTING LAW'S DUTY TO THE POOR

Social contract conceptualizes rights from the agreed interests of all people, rich and poor. The right to adequate housing may produce new challenges for each of the three branches of government. These are not insurmountable obstacles, but challenges that the state must meet to continue to justify its legitimacy.

States that have incorporated socioeconomic rights regard socioeconomic rights as rights in their own terms and not solely as instrumental to the achievement of civil and political rights. Indeed, as will be seen below, civil and political rights have been used as instrumental to the achievement of socioeconomic rights. However, it is necessary to develop a general culture of economic and social entitlement, which helps overcome the conceptual mythologies obstructing the full implementation of law's duty to the poor. These myths include the potential of civil and political rights to protect socioeconomic entitlement; the separation of powers; the institutional capacity of courts to protect economic and social rights; and the imprecision in language of the codification of socioeconomic rights.

Civil and political rights have the potential to contribute to combating poverty both in relation to omissions and commissions of the state, by using access to information and by developing the prohibition on degrading treatment and facets of civil and political rights, including facets of the right to life and to live in dignity and security. Thus in the first Indian public interest litigation, *Municipal Council, Ratlam v Shri Vardhichand & Others*, the Supreme Court of India found that the municipal failure to provide toilets for informal settlements violated decency and dignity.[57] This development owes as much to legal will as distinct from political will. It is notable, however, that in many states that have long and rich heritages protecting civil and political rights, including some where poverty is relative rather than extreme, there is reluctance to do so based, inter alia, on older notions of the separation of powers and on limiting theoretical assumptions about the institutional capacities of the judiciary. This same reluctance extends to the incorporation of socioeconomic rights.

The reluctance to incorporate socioeconomic rights is sometimes based on fallacious arguments that such incorporation would inherently violate the separation of powers upon which democracy is built. The classical paradigm of the separation of powers argues that democratic legislatures and executives have primary responsibility for the expenditure of resources, because where resources are not distributed in ways that are acceptable to the majority, then the democratically elected party may not be re-elected, hence the courts become the

57. 1981 SCR 1 97 also reported at http://www.judis.nic/supremecourt/qrydisp.aspx?filename=4495

'least dangerous' branch of government, because they possess neither the power of 'the purse' (legislative power) nor of the 'the sword' (executive power) (Hamilton 1788). De Montesquieu argued that governmental powers should be separated and balanced to guarantee individual rights, but the Baron did not state precisely where the dividing line should run between the judiciary on the one hand and the legislature and the executive on the other.[58] However, the doctrine of the separation of powers, owing in part to its history in the need to avoid tyranny, has continued to focus more on the prevention of institutional trespass and protection against the state, and has failed to respond adequately to the provisionist legal duties of the benevolent state. In this, the separation of powers in democracies has become an inherently conservative force rather than an instrument to promote social equality and dignity. Habermas's identification of the separation of powers as a symbolic substitute for the deliberative democratic power of concerted citizen action[59] and the need not only for legitimating procedures, but also for just outcomes, is but one expression of dissatisfaction with the lack of evolution of separation of powers concepts.

Habermas argues for the necessity of communities distancing themselves from their taken-for-granted beliefs and traditions so that they bring universal justice principles into the life of communities (Habermas 1996). This has begun to occur through the operation of comparative human rights jurisprudence. Comparative human rights jurisprudence represents the human face of globalization. It opens legal cultures up to different ways of remedying problems that had previously been regarded as intractable by the courts. In the past comparative human rights jurisprudence has been drawn in the main from North American and European sources. In a twenty-first century globalized world, in this era of what Slaughter describes as transjudicialism – the increasing contact through real and cyberspace between judges (Slaughter l994: 99) and lawyers – there is no excuse for merely looking northwards concerning the development of separation of powers concepts in democracies – the south, particularly in the alleviation of poverty litigation, has much to offer.

This is not to argue against the separation of powers, but the line can be drawn, as the South African Constitutional Court recognized, in a different position. In the Certification of the Constitution case, the South African Constitutional Court observed that the separation of powers is 'not a fixed or rigid constitutional doctrine'[60] and that in relation to social justice entitlements the Constitutional Court observed that,

58. Baron de Montesquieu, to give him his correct title, was not just a jurist and disinterested political philosopher; he was also a counsellor and Deputy President of the Bordeaux Parliament before he wrote *The Spirit of the Laws* in 1748.

59. Habermas 1996: 'Democratic will-formation draws its legitimating force…, from the communicative presuppositions that allow better arguments to come into play in various forms of deliberation and from procedures that secure fair bargaining processes.'

60. Ex p. Chairperson of the Constitutional Assembly: in Re-Certification of the Constitution of the Republic of South Africa 1996 4 SAA CC para. 111.

> it cannot be said that … a task is conferred upon the courts so different from that ordinarily conferred upon them by bills of rights, that it results in a breach of separation of powers.[61]

As the court correctly and perceptively noted, there were no bright lines drawn between the legislature, executive and the courts (Van Bueren 2002*c*). The shape and content of the measures to fulfil a right are primarily a matter for the legislature, but the difference between 'primarily' and 'exclusively' creates space for courts to consider more profoundly contextual questions of socioeconomic entitlement framed by constitutional, regional and international laws. It is outdated constitutionalism to maintain that social justice rights are merely programmatic and therefore intrude across the separation of powers.

Despite the theoretical underpinnings of international human rights law that all human rights, civil, political, economic, social and cultural are equal and indivisible, the simple but unpalatable truth is that economic, social and cultural inequalities are perceived as less urgent than civil and political inequality, and this also impacts upon the courts' role. There still continues to be in some states an ideological unease with the court's role in social entitlement litigation. According to Craven, the degree to which courts implement economic and social rights depends on the role that courts have traditionally performed in the constitutional system (Craven 1993: 367). This raises more profound issues than simply those of procedural tradition. There is as a 'tendency to deny the inherently political nature of the judicial function, to accept as 'normal' or 'neutral' the institutional arrangements' (Craven 1993: 367). Stone argues that this 'judicialization of politics' is endemic in the dynamic of judging itself, and that both the institution of a priori judicial review and the presence of lengthy bills of rights have accelerated this development (Stone-Sweet 2000). There is also some truth in Evans's suggestion that in relation to general human rights, legal regimes reject rights that are 'regarded as contrary to market interests' (Evans 2005) An increase in the role of the judiciary means that the judiciary becomes more and not less connected to a democracy's politics. Enshrining social justice rights in bills of rights also means that they become politically enforceable as well, so that they carry a more persuasive force in political debates on the budget and other questions of resource (Schwartz 2002: 989). Hence the traditional self-denying role of the courts in economic and social rights jurisprudence stems from a tradition that refuses to acknowledge that the problems lie less with constitutional and institutional capacity and more with legal culture, and the very questionable assumption that unlike every other form of culture, legal culture is somehow immutable.

Once it is accepted that the powers have to be balanced and checked, the point at issue is only where they should be separated. This involves not an analysis of the separation, but a rational enquiry into the inherent capacity of the courts.

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61. Ex p. Chairperson of the Constitutional Assembly: in Re-Certification of the Constitution of the Republic of South Africa 1996 4 SAA CC para. 111.

There is as much danger for democracy in too little judicial activism as in too much. As Langa observes, 'judges should approach human rights adjudication so as to uplift the underprivileged and thereby to re-orientate the social contract in a way that is fair to all' (Langa 2008).

Russell perceptively notes that, '[t]he traditional legal scholarship that has dominated the literature on judicial independence tends to be doctrinal and parochial, deriving its ideas from the precedents and practices of particular legal traditions' (Russell 2001: 2). However, the institutional capacity of the courts is not a static doctrine. The institutional capacity of the courts is contextual, and has evolved over a period of time (Scott and Macklem 1992: 27), and has now evolved to the point where courts somewhere in the world are regularly ruling on socioeconomic entitlement.

The Indian Supreme Court observed in *Morcha v the Union of India*, that for the more vulnerable sections of society 'it is necessary to … forge new tools, devise new methods and adopt new strategies.' [62] One such strategy is the evolution of institutional conversations,[63] sometimes referred to as institutional dialogues (Fisher 1988; Tremblay 2005),[64] about how each of the three branches of government is to meet the constitutional goals of a state.[65] The judiciary ought to respect a democratic legislature and executive in ruling on the protection of socioeconomic rights, and a democratic legislature and executive ought to respect the judiciary, but institutional conversations reflect a move towards equality in institutional power. The term institutional conversations implies a fluid conversation between institutions of equal value so avoiding Tushnet's criticism[66] of Hogg and Bushell[67] that dialogue is Socratic 'with one side saying everything important and the other nodding in agreement'. Institutional conversations are also not located in one particular jurisdiction and are relevant regardless of the democratic constitutional theory upon which a particular state is based. Courts are respectfully fulfilling their judicial role in interpreting and upholding the constitutional goals of the state. As Roach observes, one of the justifications for institutional conversations is that the courts' expertise in rights focuses 'the attention of the legislature to fundamental values that are likely to be ignored or finessed in the legislative process' (Roach 2001: 481, 530-531). Hence social justice litigation does not inherently involve a power struggle between the judiciary, the legislature and the executive any more than civil and political rights litigation. It is rather that institutional conversations provide an opportunity for socioeconomic rights litigation to become a part of

62. *Bandhua Mukti Morcha v Union of India* 1984 3 SCC 161.
63. Cf. Tremblay's analysis of institutional conversations in Tremblay 2005: 617-648.
64. The term 'institutional conversations' is preferable to avoid any connotation of hierarchy, see for example Baxi (1993: 7) where he refers within the Indian context to the dialogue of the pupil (the executive) and the pedagogue (the Supreme Court). See also the discussion of constitutional conversations and separation of powers in Van Bueren (2002c: 462).
65. For an overview of the different theories of institutional dialogue see Roach (2001: 481, 490-501).
66. Reviewing Hiebert (2004: 734-735).
67. The Charter Dialogue between the Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing Afterall), 35 Osgoode Hall L. 1997, J., 75.

a wider public accountability and transparency. Without transparency, citizen participation is less well informed and less effective. Without accountability, those in positions of power can safely ignore the will of the people. The enshrinement of socioeconomic rights in a bill of rights provides a vehicle for such transparency. Government is obliged to justify the legitimacy of its actions through the courts. Hence, institutional conversations benefit from the comparative strengths of both the judiciary and the government (Hiebert 1999: 22-23). 'Arguably, institutional conversation offers a more balanced system of checks and balance' (Hiebert 1999: 25) as it realigns powers, not through sacrificing independence, but through a conversation of different but equals.[68]

The institutional conversations are not boundless. They have as their framework the tests of maximum available resources, progressive and the test of reasonableness.[69] Progressive and maximum available resources demand focusing on the reports of auditors-general, parliamentary accounts committees, general accounting offices, and anti-corruption agencies. Civil society organizations have also developed new forms of citizen oversight over public finances, including new measuring tests such as human rights impact assessments, the use of indicators and benchmarks and budget analysis, particularly human rights budgeting,[70] disaggregating how much is spent of a national budget on maternal health education or on the provision of clean drinking water and calculating in later years whether the budget has increased or been used more efficiently to extend to more beneficiaries. In the process they are making governments more accountable. They are also empowering citizens to engage in more effective forms of advocacy and thereby making governments more responsive. The reasonableness test places a familiar task on the court, which is evaluative, scrutinizing the reasonableness of an action or omission, and the state must in turn account for the use or non-allocation of resources towards particular individuals or groups in the community.

Institutional conversations also reflect what is happening in regional and international fora. There is a global tradition of institutional conversations, particularly on social justice rights, at regional[71] and international levels, with governments submitting reports to United Nations committees, including the UN Committee on Economic, Social and Cultural Rights, on the progress made in implementing each of the rights in the treaties,[72] and the committees in turn focusing on issues of concern and resolution. This tradition is also in the interests of governments, because it creates a forum for government to share in detail the

68. 'This dialogue between and accountability of each of the branches have the effect of enhancing the democratic process, not denying it.' *Vriend v Alberta per Justice Iacobucci* 1998 1 S.C.R. 493, para. 139.
69. See further Bilchitz in this volume.
70. UN Doc E/2009/90. In relation to the right to food see *Budget work to advance the Right to Food*, 'Many a slip…' Food and Agricultural Organization, 2009. Much pioneering research has also been done by the International Budget Partnership.
71. See for example the Revised European Social Charter 1996.
72. Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights 1966.

difficulties and obstacles in realizing economic, social and cultural rights, and permits bodies to suggest, but not order, a range of alternative measures from which the government may choose.[73] This public dialogue and sharing of information enables a better understanding by citizens of the problems facing government, and allows the courts to assist the government in fulfilling the states' national and international legal duties. Hence conflict resolution approaches also have a place in the separation of powers debate.

It is also argued that the language of socioeconomic entitlement is too imprecise for judicial rulings. However, the Chief Justice of Canada, in Gosselin, a case which challenged the granting of lower levels of social benefits to those under the age of 30, accepted that Article 11 of the International Covenant on Economic, Social and Cultural Rights, which recognizes the 'right to everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions' 'unambiguously and directly defines the rights to which individuals are entitled.'[74] Arguments concerning the lack of precision of rights provisions were frequently raised in the middle of the last century in relation to civil and political rights, but now appropriately have been silenced. Therefore in modern democratic states, judges regard themselves as perfectly competent to decide upon economic, social and cultural rights. This is the reason why the United Nations Basic Principles on the Role of Lawyers 1985 provides that it is the responsibility of lawyers in 'promoting the cause of justice' [75] and does not limit the concept of 'justice' to civil and political justice. If it were intended for the courts only to resolve linguistic ambiguities in legislation, then lexicographers would be employed rather than lawyers and judges. As the United States Supreme Court Justice Harlan trumpeted, 'It is not the words of the law but the internal sense of it that makes the law: the letter of the law is nobody: the sense and reason of the law is the soul.' [76]

1.5. THE CONSEQUENCES FOR DEMOCRACIES OF LAW'S DUTY TO THE POOR

The cultural identity of a compassionate and democratic society will in part be determined by the accessibility and responsiveness of the courts. Every state to

73. See for example the institutional conversation between the Court and the Ministry of Health in *Cruz Bermudez et al. v Ministerio de Sanidad y Assistance Social*, Supreme Court of Venezuela, 17 July l999.
74. *Gosselin v Quebec* (Attorney General) 2002 SCC 84 para. 93. She adds the rider that '(even though they may not be actionable)'.
75. The Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.
76. Justice John Harlan dissented in the Civil Rights Case l883 where the majority struck down the key provisions of the Civil Rights Act l875. Harlan argued that segregation in public accommodation was a 'badge of slavery' that Congress could prohibit under the Thirteenth Amendment.

different degrees has it own marginalized communities who have lesser bargaining power in concluding social contracts. Social justice rights have a particular relevance to marginalized and disadvantaged groups. By not incorporating these rights the law risks increasing the social marginalization of the vulnerable by adding a layer of legal exclusion.

According to Ewing, 'a constitution is what a people choose to make it; it is about how they wish to be governed; and it is for them how they wish to empower and constrain their representatives in government. As people's expectations change, so may their expectations of a constitution change accordingly, for there is no limit to the purpose which a constitution may serve' (Ewing 1999: 112). This accords with a social contract approach. In light of the comparative experience evidenced in this volume, there is at least an arguable case that constitutions and bills of rights that do not include the participation of disadvantaged groups may, at one level, lack a democratic legitimacy. Even if socioeconomic rights 'cannot be implemented in the same way or by the same means' (Opsahl 1995:16) as civil and political rights, a transparent and accountable process is fruitful, and should not be met with hostility.

One of the principal advantages of socioeconomic rights litigation is that it is a peaceful means of securing social change. Even in this early stage of their juridificaton, socioeconomic rights have already guaranteed a higher legal protection in states with a variety of political ideologies, different histories and religious backgrounds. Socioeconomic jurisprudence may also enhance democracy by acting, as occurred with the Treatment Action Campaign case,[77] as the catalyst for other sections of society, including civil society and politicians to organize debates and legitimate protests again increasing democratic participation. This in turn increases participation in the political system, and thus enhances the democratic process.

Socioeconomic rights jurisprudence also opens up the courts to a more participatory form of justice. In *Occupiers of 51 Olivia Road, Berea Township and Another v City of Johannesburg and Others,* before the Constitutional Court gave judgement it ordered the parties to address the possibilities of short-term steps to the improve the living conditions and the alternative accommodation for those who would be rendered homeless.[78] The parties were ordered to 'engage with each other meaningfully' in light of the values of the Constitution.[79] The Constitutional Court applied the principles of deliberative democracy in ordering the parties to take into account the very real relative weak and strong positions of the parties.[80] The parties reached consensus that the city would not eject the occupiers, that it would upgrade the buildings and that it would provide temporary accommodation.

77. See further Nygren-Krug in this volume.
78. *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 SACC 1.
79. Para. 1.
80. Ray, *Occupiers of 51 Oliver Road v City of Johannesburg*: Enforcing the Right to Adequate Housing through 'Engagement', *Human Rights Law Review*, 8, 710.

In addition, the parties agreed to meet and discuss permanent housing solutions. An agreement was reached by the parties and made an order by the court. Thus the parties' own agreement was made into hard law by the court. Such an approach is consistent with 'deliberative democracy' and with Habermas's call for a renewed democratization of public institutions and spaces (Habermas 1962). Habermas's approach is also consistent with traditional African communal dispute resolution and its established oral traditions based on consensus building. It is a development of institutional conversations, being not only conversations between the courts and the government, but in the nature of the evolution of the social contract, of a genuine participatory conversation between democratic government, the courts and the people.

Human rights are born not from assessing whether all people are demanding them at all times, but from the recognition of the inhumanity of their denial. If it were accepted that the human rights framework better reflects the social and moral demands for legitimate governance today, the incorporation of socioeconomic rights as important responsibilities of the state would widen the role of courts within our society as a guardian of those rights. Law is beyond justiciablity. Law is in a different moment. Those who agree with what human rights law is doing call it transformation; those who dislike the result call it social engineering. Yet in both cases the law is performing the same task.

2

Taking Socioeconomic Rights Seriously: The Substantive and Procedural Implications

David Bilchitz

Socioeconomic rights are not simply utopian ideas: they are binding norms both in international law and many national legal systems. At the level of international law, they are codified in a number of conventions but, most importantly, within the International Covenant on Economic, Social and Cultural Rights ('the Covenant').[81] At a domestic level, they have now been included within the national constitutions of many countries, including South Africa and much of Eastern Europe[82] and South America[83]. Whilst these entitlements have binding legal force in theory, ensuring that social and economic rights are meaningful in practice requires an engagement with two questions: first, the justification and content of these legal entitlements (the 'content question'); and secondly, developing adequate institutional mechanisms for enforcing these rights (the 'enforcement question'). Recent developments in new democracies have seen the judiciary being tasked with the interpretation and enforcement of these rights in much the same way as they are given powers of judicial review over civil rights.[84] The wholesale breach

81. http://www.unhchr.ch/html/menu3/b/a_cescr.htm

82. I rely here on Sadurski (2002). Sadurski details the range and differences between the various constitutions in the region and categorizes them as follows: '(1) the nine most "generous" constitutions which list comprehensive social security, education, health-care, work protection rights and other socioeconomic rights (Belarus, Croatia, Czech Republic, Moldova, Poland, Romania, Russia, Slovakia and Ukraine); (2) seven constitutions which have limited social security, education, and health-care rights, but good work protection guarantees, and many other socioeconomic rights (Bulgaria, Hungary, Macedonia, Slovenia, Yugoslavia, Montenegro and Serbia); (3) three constitutions which provide for good social security, education, and healthcare rights, but only a limited number of the other rights (Estonia, Latvia and Lithuania); and two constitutions with very few socioeconomic rights (Bosnia and Herzegovina and Georgia)'. See also Sajó (2006) and Adler (1996).

83. See, for instance, Chapter II, Title 1 and VIII of the 1988 Brazilian Constitution where a host of socioeconomic rights are elaborated. From El Salvador, Columbia to Argentina, most South American countries now include social rights in their Constitutions.

84. Brazil and South Africa are examples of countries in which judges are relatively expressly provided with this task. India is an example of where the judges have assumed a role of protecting socioeconomic rights. This paper engages with some of the jurisprudence in South Africa and India. For an overview of some of the developments and cases in Brazil, see Lopes (2006). I am also indebted to Octavio Ferraz for sending me the appendix to his PhD thesis on the content of socioeconomic rights which includes a comparative analysis of cases relating

of socioeconomic rights evident in many of these countries suggests that granting judges review powers over these rights does not alone provide any guarantee that they will be realized. If judicial review is to contribute towards the realization of these rights, it is necessary to address the manner in which judges should exercise their powers in this area.[85]

This chapter will thus be concerned with exploring various facets of the judicial role in the enforcement of socioeconomic rights.[86] In Section 2.1, I present various institutional objections that have been raised against the judiciary having any significant involvement in matters concerning socioeconomic rights. These objections have led some judges to adopt restrained legal doctrines that effectively prevent proper consideration being given to the content of such rights. I argue that institutional concerns should not be used to determine content and the conflation of these two questions only serves to weaken the protection of socioeconomic rights. I provide illustrations of two approaches to content - the 'reasonableness approach' and the 'equality approach' – that both suffer from this defect.

Section 2.2 of this chapter provides a substantive conception of the content of socioeconomic rights that is rooted in the most urgent interests of individuals. I argue that any society committed to the equal importance of individuals must protect socioeconomic rights. As such, these rights are foundational to any democratic order and in fact, without their protection, political systems lack legitimacy.

The problem lies not only, however, in making sense of these rights but with translating them into reality. Since rights are higher norms, they require *special* procedures to give effect to them. It is argued that judicial oversight of such rights – the subject of this chapter – is perhaps one of the most important mechanisms that exist for ensuring that the activities of other branches of government conform to these higher norms. I argue in Section 2.3 that the nature of judicial interventions should be decided by a three-pronged enquiry: first, an understanding of the importance and urgency of the interests protected by a right in a particular case; secondly, the institutional reasons for judicial intervention; and finally the limits of judicial capacity. These three elements provide the basis for determining in a more concrete way the manner in which we should conceptualize the judicial role in socioeconomic rights cases. The institutional

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to socioeconomic rights in Brazil and South Africa. The Brazilian courts have, in particular, taken the right to health-care very seriously and have, for instance, required the government to provide anti-retroviral drugs to persons infected with HIV (see the case of Dina Rosa Vieira against the Municipality of Porto Alegre, Supremo Tribunal Federal, RE-27 1286).

85. I do not seek to assert that judicial review alone can serve to ensure the realization of these rights, but it is one important element in an institutional structure that can serve to enforce these rights. Other elements such as civil society activism and commitment by other branches of government of course also play a critical role in this regard.

86. The broad class of socioeconomic rights embraces a wide range of rights, including *economic* rights, such as the right to work and to property, and *cultural* rights, such as the right to take part in cultural life. I shall be concerned in this chapter with a sub-class of these rights, the *social* or *subsistence* rights: rights to adequate food, water, housing, clothing, and health-care. I follow the classification of these rights as outlined by Eide (2001).

concerns identified in Section 2.1 thus should not come into determining the content of these rights but are of importance in determining appropriate judicial remedies. The judicial role, I shall argue, should be conceived of widely, and embraces five key elements: the determination of content; the compliance of policy with human rights standards; the mediation of competing interests and encouraging of participation by the vulnerable; the arbitration of disputes that cannot be settled through mediation; and the supervision over implementation. These points are developed through considering two novel remedies recently imposed by courts in India and South Africa. These remedies ultimately indicate the importance both of socioeconomic rights and the judicial involvement in their enforcement. They also demonstrate how, far from undermining democracy, judicial interventions can in fact reinforce it.

2.1. COLLAPSING CONTENT AND ENFORCEMENT

In attempting to translate socioeconomic rights from conventions and constitutions into real life consequences for the poor, a central question has been whether the judiciary should have a role in enforcing these rights.[87] Moreover, if the judiciary has such a role, in what way should it be conceived? Several concerns have been articulated that relate to judicial involvement in this area and, in order to attempt to answer these questions, it is first necessary to disentangle a range of different strands in the objections to judicial involvement in enforcing socioeconomic rights.

The first strand relates to 'institutional concerns' as to the appropriate mechanisms for enforcing socioeconomic rights. Two major 'institutional' concerns have been articulated.[88] First, there is the *legitimacy* concern: this involves the idea that the judiciary, being an unelected body, should not prescribe economic policy and budgetary allocations to a democratically elected polity.[89] Where socioeconomic rights impose positive obligations, these appear often to have large budgetary implications that impact on a range of areas of governance and are thus what are often termed 'polycentric' issues.[90] To allow the judiciary to decide on such matters would essentially be to 'compromise, or to pre-empt, democratic deliberation on crucial issues'.[91] Secondly, there is the *competency* concern: since judges do not have particular expertise in economic and policy

87. For instance, see Sunstein (2001*b*), Van Bueren (in this volume), Villalobos (in this volume), Quinn and Courtis (in this volume), and Goonesekere (in this volume).
88. See generally for an outline of these concerns and responses to them, Pieterse (2004).
89. See Davis (1992).
90. Fuller famously argued that legal adjudication cannot successfully deal with 'polycentric' tasks: see Fuller (1978). However, most legal disputes that involve any budgetary expenditure involve some degree of polycentricity. Moreover, it is possible to conceive of the judicial role in wider terms than Fuller does, which would require the development of such innovative remedies as are suggested later in this chapter in cases where polycentric concerns are present. For a critique of Fuller's approach, see Allison (1994).
91. Sunstein, (2001*b*: 224) and Scott and Macklem (1992).

matters, it is claimed that they are ill-suited to making determinations on these issues[92] and, where they do so, they are likely to make flawed judgments.[93]

The second strand of objections relates to the problem of determining the content of these rights. This may be referred as the '*indeterminacy* concern': it is argued that these rights are 'inherently vague and indeterminate, and that they do not, therefore, lend themselves to judicial enforcement'.[94] The first part of this challenge in fact relates to the very nature of these rights and our ability to understand what they in fact entail. The fact that these rights have only recently been placed in constitutions in many countries, that there is only a short history of judicial decision-making in this area, and limited theorizing concerning their content, has led to the charge of greater indeterminacy in respect of socioeconomic rights than in relation to civil and political rights.[95] The charge relating to content, however, has implications, it is claimed, that relate to the two institutional concerns articulated above. To render the rights more determinate and concrete would involve rendering the duties and obligations they impose more explicit. It is feared that this would lead the judiciary to usurp the powers of other more democratically legitimate branches of government and to go beyond the core of their competences. Thus, where judges are given powers to interpret such rights, it has been argued that they should do so in a restrained manner that does not remove the indeterminacy of these rights: that will enable judges to retain the flexibility necessary to avoid cases where the two institutional concerns suggest that the judiciary should not interfere.[96]

Judges, when faced with determining socioeconomic rights cases, have thus often sought to avoid determining the content of such rights, and, where they have done so, institutional concerns have often guided the approach they have adopted.[97] This process of conflating institutional considerations with content is

92. See *Minister of Health v Treatment Action Campaign* 2002(5) SA 721 (CC) at [38]. See also Scott and Macklem (1992).
93. The United States courts have used problems of judicial competence to avoid deciding matters that involve direct budgetary implications: see *San Antonio Independent School District v Rodriguez* 411 US 1, 31 (1973) where it stated that the Court 'did not possess the expertise and familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues'. (at 41). See Kende (2003); Mureinik (1992); and, generally, Pieterse (2004: 392-396); Sachs (1999).
94. See Mureinik (1992: 467). See also Scott and Macklem (1992: 44-45).
95. Scott and Macklem (1992). Some, however, regard the criticism as an inherent philosophical problem with socioeconomic rights: for one of the older classical expressions of this critique, see Cranston (1967). For some thoughtful and convincing replies, see Plant (2003).
96. See, for instance, Steinberg (2006: 264) who argues that '[d]efining the content of socio-economic rights… necessarily and inevitably draws the court into formulating, rather than evaluating, policy'. This indeterminacy is of course a double-edged sword as is elaborated upon in the critique of the reasonableness approach below.
97. This problem goes beyond the socioeconomic rights context alone and institutional considerations appear often to have impacted upon the content the court gives to rights themselves: for instance, in the majority judgment in *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), separation of powers impacts upon the standard of review against which national legislation is evaluated in determining whether an infringement of the right to vote has taken place. At times, the court appears to

clearly in evidence in the approach to socioeconomic rights adopted by the South African Constitutional Court. In the *Grootboom* case,[98] a group of individuals who were living on a field with only plastic sheeting to cover them came before the Court. It was argued on their behalf that they had a right to adequate housing according to the South African Constitution that entitled them at least to shelter that would have to be provided by the government. The Court had to decide in this case in what manner it was going to approach the content of socioeconomic rights and it adopted what may be referred to as its 'reasonableness approach'. The approach essentially involves a court having to evaluate a government's policy and conduct in relation to socioeconomic rights against the standard of 'reasonableness'.[99] In *Grootboom*, the housing programme of the South African government was declared to be unreasonable as it did not make any provision for short-term relief for those in desperate need of housing.[100] This approach of the court was confirmed in the later case of *Treatment Action Campaign*,[101] in which the government's policy of restricting the availability of an anti-retroviral drug (nevirapine) to a limited number of research and training sites was declared unconstitutional as a result of being unreasonable.

The reasonableness approach has been described as an 'administrative law model of socioeconomic rights'.[102] Administrative law involves courts in evaluating the decisions of other branches of government whilst retaining a sense that there is a margin of appreciation, allowed to such an entity to take the decision in question. As one writer puts it, 'a special attraction of this position is that it protects against arbitrariness while it also recognises the democratic pedigree of the agency and the simple fact of limited resources' Sunstein (2001a). The approach thus seeks to resist a culture in which authority is to be respected for its own sake and promotes an environment in which all decisions, even those of the legislature, must be justified.[103] An emphasis on justification, in turn, has certain salutary effects on laws and policies: it requires a high degree of accountability and thus provides incentives for public servants to consider carefully their reasons for making decisions, thus helping to expose any weaknesses thereof (see Mureinik 1992: 473). The reasonableness approach, it is claimed, is also flexible and allows

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recognize the need to separate out rights analysis from institutional considerations (see for instance TAC at para 99) though the doctrine it applies in that very case arises from a conflation of these two issues (as I argue above).

98. 2001(1) SA 46 (CC).
99. 2001(1) SA 46 (CC) [33]. The court has also outlined certain characteristics (between [39]-[44]) that a 'reasonable' programme would exhibit which include the following: a reasonable programme must (1) ensure that 'the appropriate financial and human resources are available'; (2) 'must be capable of facilitating the realisation of the right'; (3) must be reasonable 'both in its conception and their implementation'; (4) must be flexible; (5) must attend to 'crises'; (6) must not exclude 'a significant segment' of the affected population; and (7) must balance short, medium and long-term needs.
100. 2001(1) SA 46 (CC) [66].
101. See Fuller (1978).
102. Sunstein (2001*a*); and Bilchitz (2002).
103. See the argument for constitutionalism made by Mureinik (1994).

judges to tailor their interventions to cases where they have both the legitimacy and competence to intervene Steinberg (2006: 276-283).

Yet, ultimately, in my view, the reasonableness approach uses legal doctrine effectively to deprive socioeconomic rights of their unique content and thus much of their importance.[104] The distinctive role of socioeconomic rights is not simply to draw attention to a failure in the justification of government policy. It is a particular *type* of failure that we are concerned with: a failure to address adequately certain vital interests that people have in such resources as food, housing and water. One of the main theoretical defects of the approach to adjudicating socioeconomic rights that has been adopted by the Constitutional Court is its failure to place the fundamental interests of individuals at the centre of its enquiry in such cases. Instead, it has attempted to focus the enquiry on a more abstract and procedural notion ('reasonableness") which can obscure the vulnerabilities of individuals in particular cases.[105] The legal doctrine becomes removed from the very reasons we have for recognizing such rights: these involve guaranteeing individuals at least a basic minimum of resources.

Secondly, one of the chief virtues of the reasonableness approach is meant to be its contextual nature.[106] However, the very context-bound nature of this approach requires that it involves at least some general standards that can be used to appraise state action in a variety of contexts. A contextual determination of reasonableness thus presupposes certain a-contextual standards that guide our appraisal in different contexts. If we analyse what is required by the reasonableness approach more closely, it involves evaluating the justifiability of the links between policies that are adopted and ends that are constitutionally endorsed. However, in any such enquiry, it must be possible to specify the ends that are being aimed at in a way that is general and not specifically related to the particular context: otherwise, there is no basis upon which to evaluate the particular policy in a specific context. These ends are the socioeconomic rights that require reasonable measures to give effect to them. An approach that rejects the need to determine the content of these rights thus leaves the reasonableness approach ungrounded and without any clear consequences. It also reduces rights to a broad overarching enquiry concerning reasonableness without paying attention to the specific protections they offer.

Moreover, the very vagueness of the Constitutional Court's approach brings about what we may term 'translation problems' as to how to ensure that these rights are realized in practice. Without a clear understanding as to the entitlements these rights provide, courts may fail to intervene when they should, and may also fail to craft adequate remedies for these rights (see Bilchitz 2003). In *Grootboom*, for instance, the court only made a declaratory order and did not put in place

104. A more expansive version of this critique of the reasonableness approach appears in my book (Bilchitz, 2007: chapter 5).
105. Brand (2003: 33-56). Brand argues that the Constitutional Court has through its procedural approach 'succeeded in removing itself from "the concrete and particular realities of hunger, homelessness, disease and illiteracy that socio-economic rights are meant to deal with"'.
106. Steinberg (2006: 277-278).

any mechanism to ensure its order was enforced.[107] The order was also initially misunderstood by the government and it took four years to develop a policy that responded to the judgment. Failing to provide content to socioeconomic rights may thus result in weak and relatively ineffectual remedies.

Moreover, inadequate specification of rights will mean that courts fail to provide guidance to other branches of the State concerning the content of these rights.[108] Currently, they are left with an amorphous standard by which to judge their conduct. This indeterminacy of the judicial approach may also cause some of the institutional problems that it was designed to avoid as courts will lack a principled basis upon which to found decisions in socioeconomic rights cases.[109] Without clear guidance as to the role of the courts in these cases, the Constitutional Court (and other courts) may stray beyond their areas of competence and overstep their legitimate role in this area by ruling on matters that should be left to other branches of government.

The inadequacies of such an 'administrative law' approach to socioeconomic rights have led to the suggestion that a better approach to determining their content would be to construe them as a form of 'equality right'. As such, socioeconomic rights would be designed to ensure that the state does not exclude a significant sector of society from social programmes, and, in particular, they would be designed to ensure the inclusion of groups that are poor or otherwise vulnerable.[110] Socioeconomic rights cases are thus analogized to cases based on unfair discrimination and focus on whether a claimant group has an equal or better claim to inclusion in social programmes relative to other groups that have been catered to (Roux, 2003: 97).

The non-discrimination provisions of a constitution or law function in an essentially comparative manner: we compare the benefits and burdens of groups in society with one another. This means that the 'equality' approach would require a court to defer to already existing schemes of entitlements determined by the legislature or executive and to ascertain whether such entitlements are equally distributed.[111] Remedies would focus on expanding (or reducing) existing

107. See Pillay (2003) and Bilchitz (2002: 500-501).

108. Pieterse (2004: 407) states that the 'interpretative task should be viewed as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive.' I elaborate upon this below.

109. For a more general articulation of this problem with the court's recent jurisprudence, see Woolman (2007: 762).

110. See Wesson (2004) who sees this as a viable normative model for determining the content of socioeconomic rights and Roux (2003: 97) who sees this as purely a descriptive account of the South African Constitutional Court's jurisprudence. See also the contrast between 'equality' and 'minimum welfare' in Michelman (1969-70).

111. Non-discrimination in relation to existing entitlements has been recognised by the UN Committee on Economic, Social and Cultural Rights as a violation of a number of socioeconomic rights in its General Comments: see, for instance, para 18 of General Comment 12 on the right to adequate food and para 18, 19, and 43 (a) of General Comment 13 on the right to the highest attainable standard of health.

benefits such that each individual is provided with these entitlements equally.[112] No remedy would lie, for instance, where there is no government programme catering to anyone's needs in a particular area, no matter how serious the omission. This approach appears to be attractive to those motivated by the institutional concerns outlined above as it allows judges merely to extend existing schemes, rather than having to pronounce on the nature of the entitlements provided by the other branches of government. However, such an approach takes account of these institutional concerns at the cost of depriving socioeconomic rights of their distinctive role.

Equality and non-discrimination rights already exist to ensure that existing benefits and burdens are not distributed unequally. If socioeconomic rights are to have any particular function, then they cannot be essentially comparative: it is necessary to understand what guarantees they in fact provide to individuals. Moreover, they cannot be primarily about the *scope* of the beneficiaries of these rights but must provide an understanding as to *what* these beneficiaries are entitled to. This means that a judiciary would here be tasked with ascertaining whether legislative or executive action in fact realizes the standard of provision guaranteed in a constitution (or international covenant) through its inclusion of these rights. Equality rights tell us that any distribution – whatever it is - must be equal: but it does not explain *what* must be distributed. Socioeconomic rights, if they are to fulfil any distinctive function, must provide an understanding that is not wholly indeterminate, as to the nature of the interests that they protect and the resources or goods that they entitle individuals to claim.

An examination of the reasonableness approach and the equality approach is designed to show the perils of conflating content and institutional concerns. Where content is determined through institutional fears, it is not possible to ascertain with any clarity what protections these rights offer and they are consequently significantly weakened through such a judicial strategy.[113] Institutional solutions to socioeconomic rights enforcement can only be developed if it is understood what they are designed to achieve.[114] It is thus necessary to have a conception of the content of socioeconomic rights independently of these institutional

112. The indeterminacy of equality without any specification as to 'what' is to be equalized is evident here as equality can be achieved not only through expanding existing entitlements but also reducing such entitlements to none share these: the latter is known as the 'leveling down' objection. See Parfit (1997: 211).

113. Fiss (1979: 55) states that judges, in striving to give remedies that they believe to be efficacious and appropriate to their role may 'tailor the right to fit the remedy'. The approaches outlined above provide evidence of this trend which in the process weakens socioeconomic rights protections.

114. In the context of the manner in which the separation of powers is designed, Barber (2001) recognizes that '[s]eparation of powers is a theory of the ordering of collective action; it must be prefaced by a political theory if it is to possess any normative force' (p. 63) and '[t]houghts about the proper aims of collective action influence the type of institution that should exist and the tasks assigned to it' (p. 67). Institutional design thus requires a sense of the ends sought to be realized by those institutions and one of the most important of these ends in the realization of fundamental rights.

considerations. A clearer understanding of content – a matter I deal with in the next section - will then have implications for the appropriate judicial role in this area.

2.2. SOCIOECONOMIC RIGHTS AS CONSTITUTIONAL NORMS: DEVELOPING A CONCEPTION OF CONTENT

One of the purposes of placing fundamental rights in a constitution is to assert that they are not norms like any other. Enshrining fundamental rights in a constitution involves an assertion that such rights are higher-level norms with which other parts of the law and policy must conform.[115] This in turn implies that such rights must have a particular *importance* for the individual or society such that they are enshrined above other norms. Which norms can then be said to have a sufficient level of importance such that they deserve to have a special status in a constitutional order?

Some writers suggest that these higher norms are those that are necessary for having a democratic polity at all. Civil and political rights have often been construed in this way; for instance, freedom of speech and conscience would be necessary for free political activity to exist. Similarly, some writers understand socioeconomic rights as necessary preconditions for democratic participation.[116] The argument is effectively that poor and hungry people cannot really effectuate their rights to social participation without protection for their basic interests.[117] Civil and political rights are thus primary in this argument: yet, socioeconomic rights are necessary conditions for being able to enjoy these other rights.[118]

Whilst there is some force to this argument, and fundamental rights are crucial to protecting the preconditions for democracy, I believe it only partially captures the reasons we have for recognizing fundamental rights - and socioeconomic rights in particular - as higher norms. First, there are instances where in fact the lack of socioeconomic resources of the poor provides a spur for political action and mobilization. It is thus not entirely clear that such rights are always necessary preconditions for democratic politics.[119] Secondly, the argument assumes the value of democracy without recognizing that its very value rests upon

115. This is what may be termed a dualist regime that 'distinguishes…the higher law of the people from the ordinary law of legislative bodies' (Rawls 1993: 233). See also Michelman (2004: 1412).
116. Schwartz (1995: 1243) advocates this position as follows: "[d]estitute, hungry people don't vote, and idle, hungry people have no patience for the slow, often tedious haggling among often sharply differing groups that democracy requires".
117. See Michelman (2003: 25); and Liebenberg (2005*a*).
118. Dreze and Sen (1991) have famously argued that democratic institutions as well as civil and political rights play an important role in guaranteeing socioeconomic rights.
119. This is of course a matter of degree as extreme deprivation will not render it possible for persons to participate but, at times, such deprivation within a democracy (and sometimes even under tyrannies) will have political consequences and can have a mobilizing effect. See Jones and Stokke (2005: 16) where the authors observe that in South Africa, 'it can be observed that

other more foundational values. Democracy enables individuals to have a say about the political community in which they live. It may thus be said to be the most legitimate form of government as a result of its respect for the equal importance of every individual.[120] If we wish to provide an argument for fundamental rights as a deep feature of democracy, we therefore need to appeal to this principle of equal importance. Finally, the 'democratic argument' for fundamental rights as higher norms suggests that individuals are primarily concerned with political participation and that this is the central value in terms of which other rights should be justified. Yet, political participation may be only one feature of what individuals value and, even then perhaps, not their most important value. Some individuals may also not have the capacity to participate in democratic politics (through age, or disability) and yet we may consider that they have fundamental rights (including socioeconomic rights) which ought to be respected. [121] Consequently, a justification for fundamental rights as higher norms is better developed in relation to the entire spectrum of individual interests rather than a particular sub-set that may fail to capture the full importance of these rights to all individuals.

These deficiencies with a purely 'democratic justification for fundamental rights' suggest that an alternative course would be to proceed directly from the principle of equal importance of each individual life to an argument for fundamental rights.[122] This principle requires us to have a conception as to what constitutes some of the sources of value in individual lives: in what does the 'importance' of an individual life consist? Whilst there is no doubt strong disagreement as to what constitutes a good life for individuals, it is perhaps possible to develop a 'thin theory of the good'.[123] Such an account does not seek to specify the details of what a good life consists in but rather proceeds from the point of departure that there are certain conditions and resources that are necessary for all individuals to live a good life, no matter how they perceive what this life consists in. There are, for instance, certain resources that are necessary for sustaining life itself without which no value can be achieved in any life: for human beings,[124] these include shelter, food, water and life-saving health-care (where needed). At the most basic level then, individuals can be said to have an interest in life itself and the general conditions necessary to protect such life.

However, it is not only life per se that is important: an individual life may be extremely miserable. There is therefore an important individual interest in living a life that has certain positive qualities. The quality of life is notoriously difficult

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consultation forums have been established to ensure that people can voice and opinion, even amidst severe resource deprivation and inequality'.

120. For a defence of democracy based upon a principe of equal importance see Christiano 2002: 31 ff.) and Dworkin (1996: 17).
121. I make these points in Bilchitz (2007: 109-10).
122. This section draws upon my account of the justification of socioeconomic rights in my book (Bilchitz 2007) where a more detailed philosophical argument is developed and its implications for legal doctrine explored.
123. Rawls (1999 [1972]: 348 ff.).
124. This justification for fundamental rights does not confine itself to the human species (there is no principled reason to do so) but the focus of this paper will be on human individuals.

to define (Sen 1987) and it is a matter of degree: individuals may live better or worse lives. Having barely the minimum resources necessary to survive may well keep people alive yet with an extremely poor quality of life. If life is to be valuable to those living it, they must be able to achieve certain sources of value to them. Despite widespread disagreement as to the specifics of what makes life valuable, presumably individuals must have some sources of pleasure and fulfilment of their goals and desires if their life is to be valued by them. All individuals require certain common resources in order to be (or become) healthy, functioning adults that can realize these sources of value in their lives.[125] We can quantify broadly the amount of such common resources as food, housing, and water that would enable people to be placed in a position such that they are able to realize sources of value in their lives. This account also places emphasis on freedom as individuals are provided with these resources in order to allow them to realize their own sources of value. Thus, individuals can be said to have interests in both 'freedom' and 'resources' such that they are able to achieve what they perceive to be valuable lives.[126]

A society committed to the principle of treating each individual life with equal importance must provide guarantees to individuals that their most basic interests in such 'freedom' and 'resources' are met. Without the resources to be free from starvation or malnourishment, for instance, no being can live a valuable life: it makes no sense to suggest that one can treat an individual with any degree of 'importance' without providing some protections against falling below this level of deprivation. However, a being may not be malnourished yet have so little food that he feels continually hungry. In order to treat individual lives as truly having worth, they must be guaranteed access to a higher level of provision that can in fact ensure that individuals have some quality of life: for instance, this would entail having well-balanced nutritional food that is sufficient for an individual to be physically strong. Similar points can be made in the case of human beings in relation to housing, clothing and the need for liberty.[127]

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125. Nussbaum (2000) also provides a similar account based upon the idea of two thresholds necessary to achieve certain valuable 'functionings and capabilities'. The first threshold marks out those functionings that are particularly central in human life (those unable to reason, think, move around would fall below this threshold). The second threshold marks out those functionings that characterize a flourishing human life that is 'worthy of a human being' (p. 73). Based upon these ideas, Nussbaum develops a list of central human functionings and capabilities that determine what is of importance to human beings and how well-off they are. The list is drawn up on the basis of a discussion amongst human beings and an analysis of narratives and myths in different cultures that give content to the notion of what it is to live a `truly human life'. Through this method of discussion and analysis that is tentative and open-ended, Nussbaum believes that human beings will arrive at an overlapping consensus concerning what it is to live a human life, and a flourishing human life (p. 76). I provide a critique of some of elements of her account in Bilchitz (2007: 10-17).
126. Alan Gewirth (1978: 63) refers to 'freedom' and 'well-being' as collectively the 'most general and proximate necessary conditions for an agent's purposive action'.
127. There are a range of good normative reasons for thinking that institutions cannot be responsible for guaranteeing that individuals live well by their own lights but should be responsible for creating the enabling conditions for individuals to be able to achieve a 'good life' for themselves. Rights do not guarantee the fulfilment of one's dreams; they do not prevent the forces of chance

Thus, a society committed to the principle of equal importance must guarantee to each individual the necessary prerequisites for realizing a life of value. For a society to provide protection for such enabling conditions would require that individuals are guaranteed the basic freedoms – including those of speech, religion and political participation – as well as sufficient resources – including adequate food, housing and water – to enable them to achieve some of the sources of value in their lives. Consequently, a society committed to the principle of equal importance should enshrine as the most basic norms governing such a society both an array of civil and political rights as well as socioeconomic rights which provide protections for these interests. [128]

Understanding that the justification of socioeconomic rights is rooted in the principle of equal importance[129] helps us to understand that the failure to realize such rights in fact implicates the very *legitimacy* of the legal system itself. 'To call such a system legitimate is to say that the moral justification exists to enforce whatever laws may issue from the system against everyone alike.'[130] There is no reason why individuals should regard themselves as being bound by the laws of a society unless their most fundamental interests are taken into account by such laws in an equal manner: a political system that fails to take account of the interests of a particular group of individuals – such as blacks in apartheid South Africa – loses its moral authority to exercise legal control over such a group. This leads Ronald Dworkin to conclude that for a legal system to have legitimacy, it 'must treat all those over whom it claims dominion not just with a measure of concern but with *equal* concern' (Dworkin 2006: 97). Since socioeconomic rights are derived directly from the principle of equal importance, the failure to realize such rights places in question the very legitimacy of a social and legal system. Consequently, socioeconomic rights are deserving of the highest degree of protection and a constitution must provide for institutional mechanisms that will be likely to ensure that such rights are realized.

This account of the underlying justification of socioeconomic rights also helps to provide a response to the charge that these rights are wholly 'indeterminate'. The account I have provided identifies two types of human interests, one more 'urgent' than the other, that such rights seek to protect. These rights require that each individual be provided with, at the very least, the minimum basic resources

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from having an impact on one's life; they cannot guarantee happiness. See Bilchitz (2007: 63-64).

128. Rawls (1993: 228-230) refers to these as 'constitutional essentials': 'freedom of movement, free choice of occupation and a social minimum covering citizen's basic needs count as constitutional essentials'. See also Michelman (2004).

129. Other justifications are possible but are also rooted in such a principle: one interesting alternative account could be based in a theory of property rights. Since individuals are equally important, the appropriation of property may only be allowed on condition that 'as much and as good' must be left for others. Socioeconomic rights can be seen as entitlements guaranteeing individuals at least a basic bouquet of goods that attempts to comply with this requirement in a world that is largely owned. See Jonathan Wolff's critique of Nozick's entitlement theory of justice in Nozick (1996: 102-115); and, generally, Waldron (1988).

130. Michelman (2004: 1410).

necessary to avert acute threats to survival.[131] This is the standard I shall term the first threshold of provision or the 'minimum core'.[132]

Yet, as has been mentioned, the protections offered amount to very little if they guarantee the level of resources necessary to live a life of misery. They must at least put individuals in a position where they can enable them to realize some of the sources of value in their lives. In my view, the standard of provision that socioeconomic rights should aim at is to guarantee that one is provided with the general necessary conditions to be in a position to realize one's purposes. This is what I shall term the second level of provision or the 'sufficiency threshold'. That would involve being provided with sufficient food, water, housing and health-care so as to be a healthy, active functioning adult. Such a threshold is by no means wholly indeterminate nor any less capable of application than most civil and political rights. It is important to recognize that this account of the content of fundamental rights does not necessarily determine the exact nature of the policies that must be adopted in order to realize these rights; rather, such rights must provide general guidelines that can function as a *standard* against which such policies can be evaluated.[133] The rights set out ultimately the terms in relation to which these policies and legislative programmes can be judged.

As with all rights, socioeconomic rights are not absolute and the recognition of two thresholds enables a meaningful approach to be developed that is sensitive to the availability of resources as well as other normative and practical considerations involved in translating these rights into reality.[134] In the international covenants and certain national constitutions, these considerations are taken into account through the recognition of the obligation that states are obliged to achieve the 'progressive realization' of socioeconomic rights. This notion has come in for particular

131. That may be a very low level and there may be better and worse ways of guaranteeing survival: yet, at the outer limit, a person deprived of food and water will not survive. Naturally, survival cannot be guaranteed indefinitely and requires an understanding of average life expectancy. Moreover, different conditions will be conductive to longer-term survival whilst others will merely guarantee survival in the short-term. Similarly, individuals may need differing amounts of food and water to survive. Despite these complexities, it nevertheless seems possible to determine a general standard as to the minimum resources required to ensure human beings are not subject to acute threats to survival.

132. This term is taken from General Comment 3 para. 10 and the approach referred to here may overall be referred to as a 'minimum core approach' to socioeconomic rights. Such an approach helps provide 'economic and social rights with a determinacy and certainty' (Van Bueren, 1999*a*: 57).

133. Arguably, this captures the function of fundamental rights which allows the space for engagement to occur between differing institutions as to how exactly best to realize these rights. See Dorf and Friedman (2000: 82-83). In Bilchitz (2007: 197), I distinguish between 'the invariant universal standard that must be met in order for an obligation to be fulfilled, and the numerous particular methods that can be adopted in order to meet this standard and thus comply with a constitutional obligation'. As is argued further below, courts should not abdicate their responsibilities to develop the content of the standards required by fundamental rights but it is desirable for them to engage with other institutions and parties concerning the best manner in which to realize these standards.

134. In Chapter 3 of Bilchitz (2007), I attempt to deal with some of the competing factors that may modify the practical implications of enshrining socioeconomic rights in Constitution.

criticism as to its indeterminacy and the charge is that it effectively weakens these rights considerably.[135] In my view, the understanding I have presented above provides a method of capturing what is meant by progressive realization whilst still ensuring that socioeconomic rights have meaningful consequences for the poor. At the outset, it is important to recognize a fundamental ambiguity in the notion of progressive realization.[136] One way of understanding this notion could be in relation to the fact that it imposes an obligation upon governments to make a particular resource such as housing accessible to a greater number of people over time. Progressive realization thus involves simply more people gaining housing over time.

There are several problems with this interpretation. First, rights that are to be progressively realized generally vest immediately in everyone. The failure, for instance, to offer temporary alleviation of homelessness would result in some never being able to enjoy the 'full realization' of their right (as some people would succumb to the elements). For these people, their right of access to adequate housing would be effectively negated. Secondly, this interpretation is unable to capture the important point that some are at a greater relative disadvantage than others in society. Consider a situation in which a government focused its housing programme on those who could afford to repay loans that it granted for the purpose of building houses.[137] It seems that such a programme would constitute 'progressive realization', on the above interpretation thereof, even though it completely ignored those who are most significantly deprived – who cannot afford the loan repayments. Such a case would demonstrate the failure to recognize the priority that some interests must take over others. Such priority must be based on the 'urgency' of the interests protected by the right.

An alternative interpretation of progressive realization, however, exists. It involves understanding the notion to comprise two components: the first component is a 'minimum core obligation' to realize the levels of housing required to meet minimal needs; the second component is a duty on the state to take steps to improve the adequacy of the housing. In other words, progressive realization means the movement from the realization of the basic interest in housing to the realization of the sufficiency threshold. Progressive realization does not mean that some receive housing now, and others receive it later; rather, it means that each is entitled as a matter of priority to basic housing provision, which the government

135. Even at the time of the drafting of the ICESCR covenant, concerns were expressed that this notion would 'allow States to postpone the realisation of the rights indefinitely, or entirely avoid their … ' (see Craven 1995: 130-131).

136. These thoughts are developed further in Bilchitz (2007: 193-4).

137. In relation to land reform, the government in South Africa has shifted resources away from the poorest of rural workers to those who are relatively well-off. Roux (2002: 41) argues that the *Grootboom* decision is deficient in that it would not provide a remedy for the worst off in such cases.

is required to improve gradually over time.[138] The obligation to improve access to these resources can be assessed through whether government policy sets targets for improvement and its success in meeting these targets. Such an interpretation makes sense of the idea that socioeconomic rights have an aspirational dimension but, like other rights, deserve this title as they impose short-term peremptory obligations for the provision of certain goods. With this understanding of the justification and content of socioeconomic rights, it is now important to consider the implications of this account for the institutional mechanisms necessary for their enforcement.

2.3. TOWARDS A REVISED JUDICIAL ROLE IN SOCIOECONOMIC RIGHTS CASES

The enshrining of socioeconomic rights as higher norms, as I have argued, suggests that the interests protected by such rights have a particular importance. However, the mere placement of these rights in a constitution does not mean that such rights will actually be translated into reality. The high-minded ideals of the International Covenant and many constitutions are largely abrogated in practice and it is consequently critical to consider the enforcement mechanisms for such rights. Their placement as higher norms, at the very least, has implications not only for the substantive content of these rights but also for the procedures through which such rights are given effect to. Indeed, implicit in the notion that such rights are higher norms is the idea that there is a need for *special* procedures to be adopted to guarantee the enforcement of such rights.[139] Without such procedures, it is unclear in what sense these norms are 'higher' in that they do not place any particular constraints on the development of other features of a society. There must consequently be a mechanism whereby legislation and policies, for instance, are considered in light of these higher norms to ensure conformity with them.[140]

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138. What is critical here is an understanding of the notion of 'priority'. 'Lexical priority' would require that a government have to devote all its attention to realizing the minimum core and only then could it turn to matters beyond this threshold. I prefer an alternative notion of priority that lacks this absolute and rigid nature which I refer to as 'weighted priority'. This notion involves two components: first, it involves the idea that those interests which have priority are those we have particularly strong reasons to value and require strong countervailing considerations to outweigh them; secondly, special consideration should be given to the interests of the worse off and benefits to them given more weight in any consideration of what course of action should be pursued. Two important implications flow from this reasoning: first, rights protecting the first threshold are not absolute; and secondly, there will have to be a justification provided for not realising these minimal interests, and that justification must meet stringent standards. For a fuller discussion of these differing notions of priority, see Bilchitz (2007: 208-215).
139. It should be evident that socioeconomic rights are not unique in this regard and that all features of a higher law such as Constitution will require special procedures to ensure that their provisions are complied with.
140. See Michelman (2004: 1411): '[L]egitimacy, Rawls says, depends on ascertainable compliance by all ordinary lawmaking with (morally adequate) constitutional law'.

It is possible to design such mechanisms in different ways: a special parliamentary committee could be set up, for instance, to evaluate compliance.[141] The difficulty with such a procedure, however, is to provide adequate institutional guarantees that would ensure that the body concerned is not simply a 'rubber stamp' for decisions made by the ordinary legislative or executive bodies that fails to protect the higher norms properly. Such institutional guarantees would seem to require some level of structural independence, impartiality in judgment and expertise on the interpretation of fundamental rights. Placing politicians in charge of such a body may have a number of disadvantages: they may lack the expertise to deal substantively with matters of fundamental rights and their focus may be on making judgments that maximize their chances for re-election rather than for any principled reasons rooted in rights-based concerns.[142] The focus on re-election may also entail that appointees to such a committee seek to replicate the wishes of those interest groups likely to keep them in power, thus preventing minorities and other groups from having their rights properly considered.[143]

For these and other reasons, many countries have thought it preferable to give powers of review to judges to ensure that these higher norms are complied with by other branches of government.[144] The judiciary is believed to have the requisite structural independence, as well as training, to interpret fundamental rights.[145] It has also been seen as better placed to exercise judgments concerning fundamental rights in a manner that is not subject simply to the representation of particular interest groups.[146] The interests of the poor have also been particularly badly protected in democracies: in some cases this arises through middle-class majorities primarily being catered to, the lack of mobilization of the poor and

141. The United Kingdom, for instance, has a Joint Parliamentary Committee on Human Rights whose duty it is, amongst other things, to evaluate compliance of the United Kingdom domestic legislation and policies with international human rights instruments.

142. Pitkin (1967: 219) states that '[t]he modern representative acts within an elaborate network of pressures, demands and obligations'.

143. I do not seek to deny the possibility that some such procedure may work efficiently to guarantee higher norms but rather to suggest the difficulties that face the design of such a procedure. For a critique of a proposal to place such review powers within special administrative agencies, see Fiss (1979: 33-35).

144. See Ackerman (2000: 665) where he states that 'without the institution of judicial review, the reigning parliamentary majority will have overwhelming incentives to ignore prior acts of popular sovereignty whenever it is convenient'.

145. I do not seek to provide a comprehensive justification for judicial review of fundamental rights here; the focus of this chapter rather assumes judicial review can be justified and seeks to determine the appropriate conception as to how judges should execute their role in this regard. Of course, the latter conception requires some understanding of the reasons for judicial interventions and such reasons as will be seen play an important role in deciding upon appropriate remedies in socioeconomic rights cases.

146. I have defended judicial review in Chapter 4 of Bilchitz (2007) based upon epistemological advantages that judicial decision-making has over legislative and executive decision-making in relation to fundamental rights. See also Fiss (1979: 13) who regards the advantages of the judicial role as involving the participation in a dialogue and independence as well as Chayes (1976: 1307-1308).

the failure of politicians adequately to protect the needs of the poor.[147] Judicial review of fundamental rights in many countries offers a particularly strong mechanism for enforcement where judges are granted the powers to strike down legislation, programmes or policies that do not conform with these rights and to place positive obligations upon the government to realize them.[148] Nevertheless, particularly in the context of socioeconomic rights, the institutional concerns raised in Section 2.1 have been used to provide support for the contention that even where judges are provided with strong review powers, they should exercise such powers with restraint (Lenta 2004: 568). That notion of restraint alone fails to provide any proper guidance as to when judicial decision-making is appropriate in this area and, a general deferential attitude, could in fact lead judges to fail to realize the very role that has been provided to them: to uphold the higher norms of a society. In so doing, misplaced fears about the legitimacy of judicial action in this area may in fact lead to a deficit in the very legitimacy of a country's social ordering. Consequently, the legitimacy of judicial decision-making in this area must be determined largely in terms of whether its interventions are focused upon realizing the fundamental rights in a constitution.[149]

Thus, the nature and scope of the judicial role in this area, in my view, should be determined by its purpose: to ensure that other structures of government comply and give effect to the higher norms of the society (see Mbazira 2007: 21). Since the judiciary is charged with protecting the very legitimacy of the very democratic system itself, this fact provides an argument for strong effective measures to be taken where these are necessary to ensure the realization of such rights.

2.3.1. Content and Institutional Concerns: The Factors Determining Judicial Interventions

These conceptual considerations can assist in determining in a more concrete manner the nature of the role that a judge should assume in socioeconomic rights

147. Ackerman (2000: 724) notes in the context of the United States that 'most politicians will usually maximise their reelection chances by giving greater weight to the interests of the rich and educated'. He notes the 'uncanny ability of elected legislatures to tolerate the entrenched injustices of the status quo' and that some advocate 'some new uses of the separation of powers as a potential remedy'. This chapter can be seen as an attempt to explore how the judicial function can be developed so as to provide effective remedies for such injustices (contra Ackerman's own scepticism of the role of the judiciary in this regard) .

148. This can be contrasted to 'weak form' judicial review that allows judges merely to scrutinise such legislation or policies for compliance but the effect of such scrutiny does not result in binding orders to remedy a defect, should one be found. As Waldron (2006: 1354-1355) points out, there are varying degrees of strength of judicial review, though I simplify for the purposes of this argument.

149. 'In my view, judicial action only achieves such legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society' (see Chayes 1976: 1316). However, others see the substantive justification for judicial review as insufficient and require that judicial remedies incorporate certain elements that also enable such a process to have procedural legitimacy (see Sturm 1991: 1403).

matters.[150] First, a central task of the judiciary is to provide *content* to these rights.[151] This is an area where the judiciary as an institutional mechanism has a particular advantage. The judicial role is often taken to involve the interpretation of rights, and lawyers are trained at law school to engage with questions of fundamental rights. Legislators are not particularly well-qualified to expound upon fundamental rights and are often motivated by political considerations in the positions they adopt. Judges, particularly in constitutional courts, often have time to consider these matters and are insulated against having to win elections and represent the interests of particular groups in society. They are also well-versed in using public reasons to develop conceptions of the foundational commitments of a society that the legislature and executive often lack.[152]

The account of content I have provided, however, suggests that judges, in developing the interpretations to be afforded to these rights, need to articulate standards against which government action can be evaluated. They need not, however, determine the exact manner in which these standards are to be realized in practice. Whilst the very content of socioeconomic rights standards has been underdeveloped, it is also vital to ensure that these standards translate into concrete results for the poor. I have argued that one of the strengths of the judiciary lies in being able to set the standards of provision required by these rights: but, once such a determination has happened, how are these standards to be translated into more concrete remedies in such a way that is effective and still respects institutional constraints?

In order to answer this question, it is important to consider the various ways in which violations of socioeconomic rights may take place. The first area where such matters arise is in the design of a law, policy or programme. Such

150. The considerations outlined in the context of socioeconomic rights may also apply in the context of remedies given in other areas of the law and in particular in the public law sphere in general: for a detailed theory of the appropriate judicial role and remedies in the context of public law, see Sturm (1991).

151. Indeed, Fiss (1979: 29) sees the very function of courts as being 'to give meaning to our public values not to resolve disputes'.

152. Rawls (1993: 231-240) states that whilst citizens and legislators need not justify why they vote as they do and fit them into a coherent series of reasons, 'the role of justices is to do precisely that and in doing it they have not other reason and no other values than the political'. As such, a Constitutional Court can be see as an 'exemplar of public reason'. This reasoning helps explain why the 'reasonableness approach' to judicial review discussed in Section 2.1 fails to achieve the very advantages that giving review powers to judges in fact provides. First, creating a highly flexible standard with minimal content fails to provide a standard against which the legislature and executive can clearly measure itself. Thus, it prevents the legislature and executive from designing their programmes so as to realize these rights as they have no clear conception provided as to what they mean. Secondly, without making explicit an understanding of what these rights entail, the judiciary fails to show why indeed it has advantages over the legislature in this area: that in fact, it has a conception of the content of these rights which it has the expertise to expand upon. Finally, where a relatively clear conception of their content is provided, the judiciary places constraints upon itself as to when it may intervene or not: this allows for a space beyond rights-based review where the judiciary may not intervene. Where the rights themselves lack content, then any determination will lack a principled basis, one of the key advantages of giving the judiciary control over socioeconomic rights.

a programme or policy may fail to help ensure that individuals are guaranteed the level of resources necessary to meet the minimum core or the sufficiency threshold. The role of the judiciary here is to evaluate such a law, programme or policy against these standards and, if it is not in compliance, to declare that the government is in breach of its human rights obligations. Declaratory relief has the benefit of highlighting non-compliance and providing an indication as to what can be required in order to remedy non-compliance. However, such relief alone may be ineffective by failing to require action to remedy such non-compliance.[153] Given the importance of the interests involved, mandatory orders will often be required for the effective enforcement of such rights:[154] if so, what form should such orders take?

It is important to recognize that such orders may have consequences for individuals that go beyond the litigants in a particular case.[155] In order to prevent unequal access to social resources, orders to realize socioeconomic rights will often need to ensure that provision is made in terms of a co-ordinated programme or policy. Individuals must benefit from the litigation but such benefits need to be arranged in such a way that all other individuals equally benefit. Moreover, the objections against judicial involvement in socioeconomic rights cases have been focused often upon the fact that 'an economic right can be realised in more than one way, and that judges lack the expertise and the accountability which would qualify them to choose among the alternatives' (Mureinik 1992: 468). Even if we accept the validity of this objection, it is nevertheless possible to envisage effective judicial remedies that respect the relative institutional competences of different branches of government. Thus, for instance, since there may be a range of possible methods through which to conduct a programme to ensure adequate nutrition for all, the judiciary could identify the violation and then refer the matter back to the executive (or legislature) requiring this branch of government to remedy the defect in an existing programme. The executive could then bring in experts to design the most effective nutrition programme. A report-back or oversight procedure could then allow the judiciary to ensure that whatever programme is designed, it meets the standards required by the socioeconomic rights in the constitution.

A programme or policy may also fail to be applied fairly or equally. The judiciary is well-placed to consider challenges in this regard and to ensure on the basis of administrative law or equality considerations that these failures are

153. This would mean that the judges would abdicate responsibility for the efficacy of their orders and ensuring the protection of fundamental rights. Such a concern for efficacy 'need not be seen as an assertion of will, but as a willingness of the judge to assume responsibility for practical reality and its consonance with the Constitution' (Fiss 1979: 58).

154. See *Fose v Minister of Safety and Security* 1997(3) SA 786 (CC) at para. 69 where the South African Constitutional Court held that an 'appropriate remedy must be an effective remedy for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld or enhanced… Courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal'.

155. This is a general consequence of structural orders: see Fiss (1979: 17-28).

remedied.[156] In the face of a recalcitrant administration, the judiciary may well need to adopt a stringent, interventionist remedy to ensure that the policy or programme is indeed applied fairly or equally.

Finally, a programme or policy may in fact be in accordance with the socioeconomic rights in a constitution but may not be implemented. This may arise for a range of reasons, including a lack of qualified staff to implement the programmes, a lack of administrative will, or resource constraints. The latter ground would presumably be taken into account in determining the kind of programme and priorities that a state can afford and in determining what obligations a state is required to realize, even if this falls short at present of the full realization of the right. [157] The capacity and administrative problems suggest that the executive may not be fully capable of ensuring the implementation of the rights. The judiciary, tasked with ensuring that these rights are realized, may well have a role to play in unblocking these obstacles to implementation through, for instance, appointing managers or commissioners to supervise the realization of those rights.[158]

What is clear from this analysis is that the institutional concerns outlined in Section 2.1 do not provide reasons for the judiciary to refrain from providing effective remedies in socioeconomic rights matters. The institutional concerns do, however, place certain limitations on the nature of the remedies that the judiciary should impose for the enforcement of positive obligations on the part of a state. These considerations suggest that in defining the appropriate intervention of the judiciary in a particular case, the following three factors should be considered: first, the content of such rights and the importance of the interests being protected; secondly, the institutional reasons for judicial intervention in a particular case and why such rights are not being protected by other structures; and finally, the limits of judicial capacity and reasons for involvement of other branches of government (or sectors of society) in realizing these rights.[159] In order to render the discussion more concrete, I shall now consider the remedies imposed in two important socioeconomic rights cases – one in India and the other in South Africa – in light of these three factors. This will provide an understanding of how this model is to operate as well as suggesting certain ways in which we need to revise our conception of the judicial role in order to render socioeconomic rights more effective.

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156. An example of such an equality challenge in the context of socioeconomic rights claims would be the case of *Khosa v The Minister of Social Development* 2004 (6) SA 505 (CC).
157. The court would need to consider whether or not the standards set by socioeconomic rights could be met within the available resources of a state or whether they in fact would require, for instance, prioritization of the minimum core.
158. In the United States in cases, for instance, relating to school desegregation, a 'special master' has been appointed and ensure effective relief is provided (see Fiss 1979: 56); in India, expert commissioners have been appointed (see the PUCL case discussion below).
159. See Bollyky (2002: 165) who also outlines a paradigm for considering judicial remedies of socioeconomic rights violations. Whilst there are certain similarities in our accounts, Bollyky importantly does not place emphasis on the second factor I have outlined which recognizes that there are often institutional reasons why the judiciary should intervene in particular circumstances that need to be considered when developing a remedial approach.

2.3.2. Innovative Judicial Remedies

(i) PUCL

An important and unprecedented case concerning the right to food was launched before the Indian Supreme Court by the People's Union for Civil Liberties (PUCL).[160] Through a broad interpretation of the right to life, the Indian Supreme Court has effectively recognized a number of justiciable socioeconomic rights.[161] The PUCL petition sought to argue that the right to food of India's citizens entailed that the country's massive food stocks, that were being hoarded with no possibility of being sold, should be used without delay to prevent starvation and hunger. Initially, the petition was focused on emergency measures to alleviate the hunger caused by the drought in Rajasthan but, over time, it was extended to require the government to put in place permanent arrangements to avoid hunger and starvation.

Whilst the Supreme Court has not issued a final judgment in this matter, it made its jurisprudential stance clear in the following statement on 23 July 2001: 'in our opinion, what is of utmost importance is to see that food is provided to the aged, infirm, disabled, destitute women, destitute men who are in danger of starvation, pregnant and lactating women and destitute children, especially in cases where they or members of their family do not have sufficient funds to provide food for them'.[162] This finding expresses the court's view that the content of the right must at least be determined so as to provide food for individuals that are starving. In light of this finding, between July 2001 and January 2008 the court issued a number of interim orders that have been of major importance in giving effect to the right to food in India.[163]

First, the court ordered the government to introduce a midday prepared meal at all government or government-assisted primary schools with a minimum content of 300 calories and 8-12 grams of protein per day for a minimum of 200 days in the year. The meal, it provided, must not simply consist of dry food but must be freshly cooked. Secondly, it ordered the extension of food security benefits (through a card system) that effectively guarantees food benefits to all those who are below the threshold including the aged, the infirm, the disabled, and destitute men and women, including pregnant and lactating destitute women. Thirdly, it ordered the full implementation of another six nation-wide food security schemes. These included the provision of a minimum amount of grain per family per month and ensuring the proper functioning of social security schemes such as old age pensions. The court also ordered the implementation of a programme

160. *PUCL v Union of India* (Writ Petition [Civil] No 196 of 2001). The final judgment has not been given in this case though several interim orders have been made. Details of those orders can be found at http://www.righttofoodindia.org/orders/interimorders.html

161. *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180 and *Shantistar Builders v Narayan Khimalal Totame* AIR 1990 SC 630.

162. See the summary of the finding of the court at http://www.righttofoodindia.org/orders/interimorders.html

163. Only some of the Supreme Court's findings will be summarized here.

to guarantee pregnant mothers and children below school-going age minimum levels of calories and protein. Fourthly, it directed the government to increase its budgetary allocations to schemes that sought to guarantee employment (and thus provide people with the means to acquire food). Finally, it appointed two Commissioners to monitor the implementation of the court's orders and to report back to the courts. It also provided that states would appoint assistants to the commissioners and that certain officials would be held responsible for starvation deaths in their states.

The remedy in this case is of great importance in order to understand what the judicial role in socioeconomic rights cases will entail. First, the Court has released a series of interim orders (see Mahabal 2004). It has considered various aspects of state policy, and over a period of time evaluated the impact and problems with a number of these policies. The interim nature of the orders has essentially meant that there is no final determination but a continued engagement between the courts and other branches of government. Orders have been made once the court is satisfied that a particular course of action is mandated in order to protect the right to food.[164] Secondly, the Court has not merely left implementation up to the government. It has appointed Commissioners to monitor implementation to ensure that the orders are given effect to. It has thus adopted a *managerial* role to ensure that these rights are implemented. In a number of states, the midday meal programme, for instance, was not implemented, and further orders had to be made to ensure the fulfilment of the court's directives. Such monitoring also allows the court to become aware of problems with its orders, to make them more specific and to identify and remove obstacles to implementation. The court also recognized the importance of Commissioners working together with NGOs and other actors in this area.

164. The interim orders in the PUCL case should be distinguished from the orders made in the *Grootboom* case (2001(1) SA 46 (CC)) which were not in fact interim but final orders. In the latter case, the Court made two orders. The one order sought to deal specifically with the plight of the community in Wallacedene, and essentially rendered a settlement agreement between the parties an order of court after the government failed to implement this agreement. See *Grootboom v Government of the Republic of South Africa* CCT 38/00. As far as the author is aware, no continued oversight was exercised by the court in relation to progress in implementing this order. The second order was made at the end of the judgment in *Grootboom* and represents the main order of court arrived at as a result of considering the government's constitutional obligations in terms of the right to have access to adequate housing. This order also did not provide for the court to have oversight over the implementation thereof, preferring to place this responsibility on the South African Human Rights Commission thought the reports of this body lack any binding quality. The lack of a strong supervisory component to the order impacted upon the interpretation placed by the government on the judgment as well as the implementation thereof (see Pillay 2003: 255). It took four years for the government to produce what appears to be a policy response to the judgment and, even then, that response is deeply flawed: see McLean (2007: 55-21) and Bilchitz (2007: 254-257). The problems with the *Grootboom* orders suggest the need in socioeconomic rights cases for continued supervision by a body with the power to order binding changes in the implementation of the orders. The Indian interim orders allow for the continued intervention and monitoring of the court which is more likely to lead to improvements in enforcement than a once-off order without any supervisory component.

As a result of the Court orders in the *PUCL* case, over 100 million primary school children in India now have at least one meal a day.[165] Many destitute people will receive food allowances.[166] The court's approach and role can be evaluated in relation to the three factors outlined above. First, the importance of the issue meant that the court could not abstain and allow the government simply to ignore the severe malnutrition in the country. The court can, however, be criticized for failing to release a judgment on this issue clarifying the content of the right in question. Essentially, it has chosen to develop such content through the orders it has provided but this fails to provide clear guidance as to the standards that state nutritional programmes are required to meet. Secondly, the fact that no proper food programme had been implemented in India and that there was a lack of public discourse surrounding hunger prior to the case (see Dreze 2003) meant that there was a dire need for the higher norms of the society to be enforced. The involvement of the judiciary was necessary to ensure that the interests of starving individuals were realized: such an intervention, however, also helped mobilize individuals around the issue and to ensure discussion happened within the democratic space. Finally, the limits on judicial capacity and expertise in this area meant that there was a need to engage other branches of government in determining the concrete implications of the court orders. Moreover, the court sought to engage expert commissioners to preside over the implementation of the orders. An understanding of the limits of its own capacity thus helped develop an innovative process that could lead to the more effective implementation of these rights.

(ii) Rand Properties

A second case illustrates the possibilities for novel remedies to improve the participation of vulnerable individuals in policy decision-making that impacts upon their lives. The judicial process here helps bridge the divide in cases of social conflict whilst ensuring that the government is not able to adopt a heavy-handed approach when dealing with the most basic interests of individuals. The case concerned a group of people living in the inner city of Johannesburg in buildings that the local authority declared unsafe. The condition of the buildings was

165. Jean Dreze (quoted in Zaidi 2005) states that 'It is hard to imagine how mid-day meals could have been extended to 100 million children within three years without the firm intervention of the Supreme Court'. See also the report on this programme written by A. De, C. Noronha and M. Samson found at http://www.srtt.org/downloads/CORDMiddayMealsProjectReport.pdf concerning the implementation of the midday meal programme. The authors indicate that in Delhi alone, 950,000 schoolchildren in 1,863 schools are provided with a freshly cooked meal each day.

166. I do not wish to suggest that the litigation has solved the problem of malnutrition in India. However, both in terms of the political sphere, public discourse and actual provisioning, the PUCL case has had an impact upon food insecurity in India. For a fuller discussion of the position in India relating to the implementation of the right to food, see the report of the Special Rapporteur on the Right to Food (Jean Ziegler) on his mission to India found at http://www.righttofoood.org/India%20PDF.pdf

described by the court as 'appalling, abysmal and at times disgraceful'[167] and there were fire and safety hazards in all buildings. In relation to one of the buildings (and similar findings applied to the other), inspectors from the city found the following conditions: 'all the floors were flooded with sewer water and that water ran through the building and spilled out of the parking level onto the pavement. The team also found that the building was a fire hazard because there were no fire extinguishers, the fire hydrants were unusable, there was no water supply, smoke and draught doors had been broken and unsafe electrical wiring abounded. In the event of a fire, the occupants would not be able to escape or be rescued. The team concluded, in short, that the building was a fire trap.'[168] In response to these findings, the city issued eviction notices to the occupiers of these buildings (a few hundred persons). However, these people had lived in these conditions for a substantial period and were extremely poor. The little income many of them managed to accumulate arose from informal sources in the inner city. These individuals argued that the local authority was required to consult them prior to the issuing of any eviction notices. Moreover, in terms of their right to have access to adequate housing given in the South African Constitution, they claimed that they were entitled to alternative accommodation being provided, and that such accommodation should be in the inner city, accessible to their current sources of income, job opportunities and social services.

The case was a difficult one as the conditions of the buildings were dire and represented possible threats to the survival of the individuals living there. On the other hand, to remove the individuals without providing alternative accommodation was to place these individuals in a worse position where they were without any shelter or home and thus to create an actual threat to their survival. After differing decisions were reached in the lower courts[169], the matter reached the Constitutional Court. Having ventilated the issues during a hearing, the court decided, prior to issuing a judgment on the matter, to issue an interim order. The court in this order directed that the parties are required to engage meaningfully with one another to resolve the issues arising in the case in light of constitutional values and duties.[170] Moreover, they were required specifically to discuss the alleviation of the plight of the residents living in the building so far as was reasonably practicable.[171] The court

167. *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) at para 2.
168. *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA) at para 8.
169. The High Court decision can be found at 2007(1) SA 78 (W) and the Supreme Court of Appeal decision was unreported at the time of writing but can be found at http://www.law.wits.ac.za/cals/Rand%20Properties/innercityjudgment_SCA.pdf
170. Such an order recognizes the value of participation by stakeholders in matters affecting their most basic interests (see Mbazira 2007: 16-18).
171. Interim Order *Various Occupiers v City of Johannesburg* (case CCT 24/07). The court's order is very terse and under-developed: it does not, for instance, provide guidelines to ensure that the individuals who interests were affected would be able to have an equal say in any outcome and to ensure that the lawyers were accurately representing the desires of the individuals concerned. These problems are replicated in the final judgment discussed below. As Sturm notes (1991: 1414-1416), the bargaining model for remedies needs to ensure the participation of all those affected by the outcome as well as the accountability of representatives (legal or otherwise) to

also placed a deadline for these negotiations to be completed. [172] After roughly two months of negotiation, a settlement was reached by the parties on certain of the issues which had the following main components: the city agreed to take interim measures to improve the conditions of the existing properties to make them more habitable (these included, for instance, the provision of potable water, portable toilets and fire extinguishers); within three months, the existing residents of these buildings would agree to move to accommodation that the city had identified for them within the inner city area; and a process of consultation and engagement would exist surrounding the relocation.[173]

This case is instructive on many levels and again shows the usefulness of the three factors outlined above in determining effective judicial interventions in socioeconomic rights cases. First, it was evident that the very basic interests of the residents of these buildings were affected and thus that this was a matter of great importance, implicating the fundamental interests protected by socioeconomic rights. The city (if we take them to have been acting in good faith) sought to prevent harm from coming to these people: yet, it acted in such a manner that would have worsened their already difficult plight. Part of the problem with the court's interim order is its failure to provide any adequate guidance concerning the standards that any settlement between the parties had to conform with. Apart from very terse references to Constitutional values and the plight of the individuals, the court places no constraints on the outcome of such negotiations. This is deeply problematic in that the framework for any such negotiation should be the realization of the fundamental rights of the individuals concerned. Where negotiation occurs without such clear guidelines, then it is possible for vulnerable individuals, who are often in a weak bargaining position, to agree to solutions that effectively deprive them of some of their fundamental entitlements. A court thus seeking such an innovative order must not abdicate its standard-setting function. Through setting fundamental rights constraints upon a negotiation process, the court will in fact aid in the development of a just outcome.[174]

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those affected. The court also provides very little guidance as to the standards with which such an agreement must comply.

172. Sturm (1991) has developed a range of models to categorize novel remedies in public law matters. The interim order in *Rand Properties* model would be an instance of the 'bargaining model' (pp. 1368-1370) in terms of which courts seek to induce bargaining to produce agreement on a remedy.

173. Settlement agreement (29 October 2007) between parties which was endorsed by the Constitutional Court and made an order of court on 5 November 2007.

174. In its final judgment on the matter, the Constitutional Court speaks about the objectives of engagement between the parties (paras 14-18). However, the constraints it places upon the parties (particularly the government) are extremely vague and do not go much beyond the exhortation that the government has a duty to be reasonable. The flawed nature of the Court's approach to socioeconomic rights (discussed in Section 2.1 above) thus has a negative impact upon the meaningfulness of the guidance it can provide to those engaged in negotiations relating to the realization of these rights. See *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* (Case CCT 24/07). It can be found at http://www.constitutionalcourt.org.za/Archimages/11581.02.08.PDF

Secondly, the local elected government had acted in a manner that was paternalistic and sought to protect the interests of individuals without consulting such individuals about their own plight. The existence of justiciable socioeconomic rights in the South African constitution allowed the residents in fact to have a say concerning their future and to articulate their complaint against the actions of the local authority in court. These vulnerable people whose most fundamental interests were placed in jeopardy had no outlet in other democratic institutions and consequently required judges to protect them against possibly fatal harms. Finally, the judges decided that an imposed solution in this instance would not necessarily be optimal: by ordering that the people could stay in the buildings, the problem concerning the unsafe conditions therein would remain; by ordering that the people could be evicted, the court would only exacerbate the already desperate plight of these individuals. Since there were several possibilities to resolve the dispute, the Court decided that an optimal solution could be reached by the parties themselves. Thus, the judges compelled the parties to discuss the issues, effectively forcing the city to encompass the opinions and participation of those impacted upon by its desired course of action. That engagement in turn, with reference to a framework of constitutional values, allowed an agreement to be reached that sought to resolve the dilemma the litigation had created and provide a solution that both sides could agree to. Should they not have reached such an agreement, the court would have had to step in and make a decision (as the lower courts had): nevertheless, the threat of judicial intervention provided an impetus for a mediated settlement.

2.3.3. Towards a Revised Conception of the Judicial Role in Socioeconomic Rights cases

An analysis of these cases suggests some more general conclusions that we can reach concerning the nature of the judicial role in enforcing socioeconomic rights.[175] First, instead of conceiving of judicial review in a conflictual manner, the remedies that are developed can be collaborative in nature (see Davis 2006: 323-324): the judiciary should not merely conceive of itself as ordering the other branches of government to perform; nor should judicial intervention be conceived of as interference with other 'more legitimate' branches of government. Rather, each branch is required to perform different tasks aimed at the realization of the rights: the judiciary gives content to the standards that programmes are required to meet and applies them in particular instances; the executive is tasked with

175. That role bears similarities to other cases of remedial decision-making in public law matters and may be one suitable in general where the positive obligations of the state are at issue: see Sturm (1991). There has been much interest in academic writing relating to the so-called structural interdict in such cases: see, for instance, Budlender and Roach (2005: 325ff.), Pieterse (2004) and Mbazira (2007).

ensuring that it acquires the expertise to ensure that such standards are met.[176] This allows, for instance, for the judiciary to send a matter back to the executive where an initial programme does not conform to the socioeconomic rights provisions. The executive in turn then revises the programme and can re-submit this to the judiciary for approval that it meets the standards. If it does not, it can be sent back and the process repeated such that an improved programme is designed that has the benefit both of technical expertise as well a determination as to its consistency with fundamental rights.[177] Such an order is often referred to as a structural injunction in that the order seeks to 'remove the condition that threatens constitutional values' (Fiss 1979: 28) and requires a 'long, continuous relationship between the judge and the institution: it is concerned not with the enforcement of a remedy already given, but with the giving or shaping the remedy itself' (Fiss 1979: 27).

Secondly, the judiciary should not be afraid to go beyond its traditional role as an umpire adjudicating a dispute between parties; rather it should conceive of its role in this area, in appropriate circumstances, as supervising the enforcement of rights. As such, it may need to include within its purview certain facets that allow it to adopt a '*managerial*' role in the process of enforcing rights. This could occur for instance by the appointment of special personnel to monitor the progress of its orders in a certain respect and the adoption of more inquisitorial rather than accusatorial procedures.

Finally, aware of the institutional concerns relating to the judicial function, courts may, at times, remove themselves from the prime decision-making role effectively to encourage more optimal solutions to be reached between parties themselves.[178] These optimal solutions must however occur within the constraints of what the constitution requires and protection for fundamental interests. A conception of the standards of provision required by such rights is thus important so as to guide parties engaging in such negotiations. In crafting remedies, however, institutional solutions may well involve the judiciary adopting a *'mediating'* role

176. This process may be seen as an instance of what certain authors refer to as 'shared constitutional interpretation'. See Dorf and Friedman (2000: 106) who argue that the famous case of *Miranda v Arizona* 384 US 436 (1966) establishes a '*constitutional* right to procedures that are adequate to inform a suspect of his right to remain silent in the face of custodial interrogation and a *constitutional* right to procedures that provide a continuous opportunity to exercise the right to remain silent throughout custodial interrogation'. However, they argue that the legislature or states are given the space in which to develop the exact nature of these procedures and how they are given effect to and the space here is opened for constitutional experimentation that may lead to ever better ways of protecting these basic rights.

177. See Allison (1994: 382) for a discussion of adjudication which is conceived of as 'collaborative expert investigation'.

178. See *Port Elizabeth Municipality v Various Occupiers* 2005(1) SA 217 (CC) at para 39 where the court stated that '[w]herever possible, respectful face-to-face engagement or mediation through a third party should replace arm's length combat by intransigent opponents'.
See also in this volume Chapter 8, Vernor Muñoz Villalobos, 'Improving the Right to Education', on the judicial role; and Chapter 9, Gerard Quinn and Christian Courtis, 'Poverty, Invisibility and Disability - the Liberating Potential of Economic, Social and Cultural Rights'.

rather than an *'arbitrating'* one.[179] Nevertheless, it is important for such mediation to work such that the judiciary retains the ability to make a final binding judgment. Moreover, its imposition of time limits on the mediation assists in the speedy resolution of such disputes.

Perhaps this can analogized to certain other processes in law where there are unequal power relations between the parties. An interesting instance of this is in labour law: in South Africa, for instance, labour disputes between an employer and employee are in most instances first required to go through a process of mediation and only then, where such a resolution is not possible, is an arbitrated solution arrived at where a binding decision is provided.[180] The context of employment law is one where there is often severe inequality between employer and employee (particularly in a situation of high unemployment) with often little incentive on the part of the employer to negotiate with the employee. The threat of a binding judgment that may find against the employer can provide an impetus for reaching a more consensual agreement between the two.

A similar process can be said to be at play in relation to the judicial review of fundamental rights and, particularly in this context, socioeconomic rights. The poor and vulnerable often have little to no bargaining power with the government and may just be subject to its actions, however misconceived. Socioeconomic rights essentially protect those in society who are vulnerable as a result of lacking adequate resources to live a decent life. In many countries, such individuals will be in the minority and they may not be electorally significant. In such an instance, a government may well design policies to meet the needs of the better off rather than those of the poor. Of course, in other countries, there may be large numbers of individuals who are in dire need. Some individuals in this group will be extremely vulnerable with very little ability to participate in politics. Others may participate in politics but often the interests of their representatives may, to an extent, be at odds with their own. The interests of the poor may thus not be effectively translated into social policy and programmes or, alternatively, be only weakly taken account of in this process.

Providing justiciable socioeconomic rights allows such individuals to turn to another institution with a different make-up, structure and expertise to request a judgment that their interests have not properly been accounted for.[181] The courts here can help restore the power imbalance of the poor by providing them with a

179. See Lopes (2006: 193) on the mediating role of courts: unlike Lopes, in my view, the mediating function does not exclude an arbitrating function and in fact the latter may help ensure that the mediation process is taken seriously.

180. Section 133, 135 and 136 of the Labour Relations Act 66 of 1995 provide that there must be an attempt first to mediate the dispute through a conciliation process and, only if it cannot be resolved, is the dispute referred to arbitration. These processes take place through the Commission for Conciliation, Mediation and Arbitration (CCMA). For a brief account of these procedures, see Grogan (2007: 438-448).

181. Davis (2004: 62) sees socioeconomic rights as imposing a duty of accountability on other branches of government to preserve and promote the very basic cornerstones of the society.

remedy against actions that run counter to their interests. [182]Interestingly, *Rand Properties* suggests the possibility that such socioeconomic rights claims can also help enhance the participation of the poor in decisions that impact upon their lives. The courts may thus at times abstain from imposing a solution, and require the parties to negotiate with the possibility of reaching a more optimal resolution to the conflict than would occur if a solution were imposed. Of course, the threat of a binding judgment without the party's consent must be real, in order to motivate the parties to reach a better solution than perhaps a judicially imposed resolution could achieve. The case thus highlights the powerful possibilities that exist for the judicial branch – often seen as counter-democracy – in fact to enhance democratic processes and ensure that people are indeed able to participate in decisions that affect their most fundamental interests (Van Bueren 1999: 57).

2.4. CONCLUSION: MAKING SOCIOECONOMIC RIGHTS EFFECTIVE

Questions surrounding the appropriateness of the judicial role in socioeconomic rights cases have often hampered the development both of the content of these rights as well as innovative remedial approaches. In this chapter, I have argued that institutional concerns should not be involved in determining the content of these rights: to do so will ultimately deprive these rights of their meaning and ultimately lose sight as to why we recognize them at all. A clear conception of content is necessary to understand why these rights are important and such an understanding helps us determine the appropriate institutional mechanisms for enforcing these rights. I proposed a theory of content that is rooted in the fundamental interests of individuals, the theory recognizing the existence of a more urgent 'minimum threshold' that once realized must be built upon ultimately to achieve a 'sufficiency threshold'. The urgency and importance of these interests provides support for strong enforcement mechanisms for these rights, one of which, judicial review, is the focus of this paper.

Determining the manner in which the judiciary should execute its role in this regard, I argue, involves reference to three factors: the content of the rights, the reasons for judicial involvement and the limitations of judicial capacity. These factors that balance normative content and institutional considerations provide the basis for developing an account as to the appropriate judicial remedies that should be given in a particular case.[183] Through an analysis of two important cases in India and South Africa, I sought to show how the innovative remedies

182. Courts here can be conceived of as a source of 'countervailing power' that seek to protect individuals against other institutional sources of power that often abrogate their rights (see Fiss 1979: 43-44).

183. Of course, these will differ with the particular case and context but this chapter seeks to try and consider more general considerations as to how we should conceive the judicial role in this area.

developed in these cases can suggest a manner of re-conceiving the judicial role in this area. Five elements of such a role were identified: the judiciary should be conceived of as an *interpreter* of rights, as a *feedback mechanism* on the conformity of policy with fundamental rights,[184] as a *mediator* between competing interests, as an *arbitrator* of disputes and as a *supervisor or manager* over implementation. The judiciary may legitimately exercise any of these roles although the exact nature of its role in a particular case will depend upon the circumstances. These elements of the judicial role are not in fact unique to socioeconomic rights and arise in many areas of public law where positive action is required. This expansion of the judicial role is necessary if socioeconomic rights are truly to be treated as higher norms and if we wish to achieve the gains in individual welfare that civil and political rights have brought about. In many parts of the world, individuals still suffer from severe deprivation of basic socioeconomic goods. Socioeconomic rights are designed to correct these injustices: given that they impact upon the very *legitimacy* of our political systems, it is time we took the care to develop strong institutional mechanisms that can serve to ensure that the very guarantees these rights provide are realized.

184. The notion of a feedback mechanism is developed by Woolman (n/d: 202 ff.).

3

Civil and Political Rights and Poverty Eradication

Savitri Goonesekere

3.1. INTRODUCTION

The most recent consensus document of the United Nations, the Millennium Development Goals (MDGs), consolidates over a decade's efforts by the international community to address poverty issues in development. Poverty reduction or poverty alleviation has been included for several years as a dimension of the 'safety net' to be provided for people below the national 'poverty line' in developing countries that have engaged in the process of economic transformation and globalization. An alternative development discourse has also emerged, advocating a human rights-based approach in addressing poverty. These discussions have invariably focused on the dimension of socioeconomic rights. This paper will examine experiences in recognizing poverty as an infringement of civil and political rights, focusing on legal strategies to respect, protect and fulfill these rights, and combat poverty.

3.2. EVOLVING LEGAL APPROACHES TO POVERTY

Poverty is a pervasive problem that must be addressed in low-income countries with poor economic growth. However, developed countries continue to have pockets of poor people, and laws and legal controls are as relevant to address their problems (UNDP 2000: 34). The approach to poverty in the legal systems of developed countries in the European Union has had a profound impact on approaches to law and social policy in many former colonies that are today the developing countries of the world. The perceptions on poverty in European and Anglo-American jurisprudence have also influenced approaches to poverty in the international development agenda, and human rights.

3.2.1. The Welfare Approach to Combating Poverty

Many legal systems continue to perceive poverty exclusively as income poverty of individuals. This perception is embedded in the legal approach to poverty as a phenomenon that should be addressed by minimalist social welfare initiatives targeted towards the poor. The concept of the poor having a right to improve their situation was alien to the approach to poverty in early English Common law. Elizabethan poor laws introduced the concept of criminal liability for failing to provide basic and minimal support to defined family members to prevent the poor becoming a 'charge' or a burden to the Parish (Stone 1977: 14-15, 75-79). The concept of criminalizing poverty as vagrancy was the foundation of Vagrancy Ordinances in British colonies. Begging or street prostitution by the poor came within the definition of vagrancy. Colonial poor laws provided for minimal allowances as poverty relief, and also for institutions for the 'treatment' of the poor.[185] These laws are used even today by the police in former colonies, with such legislation to place street people and sex workers in remand. The Indian Criminal Procedure Code and maintenance statutes in some former British colonies (Goonesekere 1997: 33) to date reflect the approach of the early English law.

There are however other approaches to poverty and destitution. For instance the civil law system's Roman Dutch law, derived from Roman law and Germanic custom, recognized the right to family support obligations from duty bearers in the family. The people's access to national resources was incorporated in the Roman Law concepts of 'Res Communes' and 'Res Publicae' – rights in property that belongs to all. Islamic law too recognized such rights and obligations in the family, as well as the concept of Zakat, or a tithe to be paid by everyone to the poor.[186] Asian and African customary laws recognized the concept of rights and obligations in the family and community through rights of enjoyment and access to communal property, inheritance rights, and family support based on care and assistance provided within the family. 'The enlightenment' is a phrase used with reference to Western liberal thought. Yet 'enlightenment' was a concept as familiar to Asian Buddhist and Hindu philosophy. It referred to the capacity for insight into the human condition, and notions of good governance that made rulers accountable to use resources for the welfare of the people. A similar concept of 'social trust' representing community solidarity and accountable management of resources is found in African cultures. This concept of 'public' or 'social' trust is broader than the notion of public trust in relation to abuse of power in the administrative law of Anglo-American jurisprudence (Goonesekere 1990: 93; Kameri Mbote 2002; Banda 2001: 475; Kamchedzera 1978: 303; Weeramantry 1984: 75-77; Amerasinghe 1999: 135-188). Countries with a socialist model of governance, or East Asian countries, have adopted laws and policies that recognize

185. For example, the Vagrants Ordinance (1843) and the Poor Law (1939), Sri Lanka; Stone (1977), as cited; Goonesekere (1990).
186. Sprio (1985: 30); Pearl (1987: 67-75); *Mulla's Principles of Mohomedan Law* (1977: 142).

access to basic needs for the population as an issue of socioeconomic rights linked to human resource development (UNDP 2000*a*: 34).

Later developments in law and social policy in Europe as well as in the United Kingdom and developed countries in the Commonwealth have resulted in state intervention to provide access to health, education, and social security, and impose broad obligations of family support. This is despite the perception that individual civil liberties must receive priority as the most important aspect of democracy and good governance. There is a continuing critique of some of these policies as giving handouts to low-income populations, and nurturing a culture of welfare dependency. Recognizing basic needs as socioeconomic rights is not considered acceptable (Rawls 1972; Lewis 1998; and Chomsky 1998: 77, 24).

The rejection of basic needs as socioeconomic rights has been most prominent in law and policy in the United States, where social welfare continues to be perceived as benefits and hand-outs to alleviate poverty. There is a negative attitude to what is described as 'paternalistic' state intrusion with individual liberty and private initiative. This has encouraged a perception that poverty and destitution are a manifestation of failure and incapacity to use the opportunities that are available to all (Chomsky 1998).

The causes and manifestations of poverty in the world have been extensively analysed, debated and discussed in recent development literature and in many fora. The reality of global poverty leaves no one in doubt that the poor are the people most exposed to violence and abuse of power at all levels, whether by the state, or in their own communities or families. The lack of personal security and exposure to violence, and an invariable denial of basic needs such as food security, shelter, health care and education, impact on their livelihood opportunities and access to gainful employment. In parliamentary democracies, the poor may have the privilege of exercising their vote and electing their governments. However, this assures a limited right of political participation. Fraud and corruption have made electoral politics an exercise in tokenism, especially when governments consistently renege on election promises on poverty eradication and development. In general it is the section of the population living in poverty that has no voice or the opportunity to participate in decision-making on critical matters that affect their lives. The poor have very little or no access to legal aid to enforce their rights in formal institutions like courts. Rhetoric on people's participation at the local level hardly translates into giving the poor a voice in these fora. Local or indigenous tribunals themselves that are meant to engage in non-formal dispute settlement either fail to respond to their concerns or further institutionalize caste, gender and class-based oppression.

These realities are the basis for arguments that 'rights talk' is irrelevant for low-income developing countries. Solutions to poverty are advocated in terms of market economic policies that foster economic growth with 'safety nets' and poverty alleviation programmes targeted specifically to the 'absolute' poor. The state in developed countries is described as a 'failed state' that lacks the capacity to govern. Civil society organizations and the NGO sector are encouraged to engage in service delivery to alleviate poverty. Yet there is also evidence that market policies

combined with a welfarist approach have not impacted on poverty reduction or improved social indicators. They have not increased human capabilities or provided the resources and opportunities to help the poor move out of poverty.

The concept of 'social trust' in governance that has been familiar to Asian and African traditions has been ignored by successive governments that have not been able to prevent large-scale corruption and mismanagement of national resources. Poverty alleviation programmes continue to reflect the welfarist approach to providing minimal benefits and financial handouts to the poor. The same approach is also reflected in state approaches to disaster management in countries affected by the tsunami (UNDP 2000*a*; Haq 2000; UNIFEM 2005: 6-12; Thomson 1998: 161).

The Poverty Reduction Strategies and the Millenium Development Goals (MDGs) of recent years, which also reflect the approach of the International Financial Institutions, articulate the rhetoric of human resource development, but are embedded in the same traditional social welfare and disbursement of benefits approach. Inevitably many of the MDGs are minimalist in scope. Most of them are meant to combat poverty. For instance the first goal is to 'Eradicate Extreme Poverty and Hunger'; the second to 'Achieve Universal Primary Education'; the third, 'the Achievement of the Empowerment of Women'. These goals are however spelled out in very minimal targets on primary education and employment of women in the formal sector, and also relate only to the income poverty of women.[187] It is therefore important to consider the relevance of the alternative rights-based approach to combating and eradicating poverty.

3.2.2. The Human Rights-Based Approach to Poverty Eradication

The concept of human rights as a foundation for not merely alleviating but eradicating poverty is based on a recognition that poverty negates the core human rights norm in Article 1 of the Universal Declaration of Human Rights: 'All human beings are born free and equal in dignity and rights'. The link between poverty, human dignity, and denial of life chances has been made by Sen in his seminal work on integrating human capability and opportunity into development initiatives to eradicate poverty (Sen 2000: 366).

The recognition that the poor have an identity as human beings is revolutionary in a context where laws and social policies are based on the traditional patronizing and paternalistic view that they are 'faceless' or 'invisible'. The 'invisibility' of street children and exploited child workers or women has less to do with their physical invisibility in communities than with their powerlessness and non-recognition as rights-holders. A rights-based approach recognizes that the poor have an identity,

187. UN General Assembly 2000 United Nations Millennium Declaration UN Doc. A/60.

and that they become 'non-persons' not because of their own weakness, but due to discrimination and denial of life chances imposed on them.

A human rights based approach does not focus exclusively on the recognition of basic needs as rights. It recognizes the significance of socioeconomic rights, but is based on the idea that the core civil liberties, the right to personal security, freedom of conscience, speech and expression, political participation and freedom of association, equality, non-discrimination and due process of law, set the vital context for sustainable development and moving people out of poverty. When poverty eradication focuses on democratization, equal access and people's empowerment for sustainable economic growth, human rights issues must be considered. 'The recognition of entitlements', it has been said, 'is itself an act of empowerment' (Dodson 1995: 3).

The United Nations has in the last decade moved from 'targeting' the poor in development, towards development planning and programming as well as international co-operation that integrates an approach based on human rights. The relevance of the human rights approach based on the UN Charter and the Universal Declaration of Human Rights has been recognized in the UNDP's Human Development Report 2000. It has been endorsed in the programme of UN reform initiated by former UN Secretary General Kofi Annan, 1997-2002, and the UN Inter-Agency Common Understanding of a Human Rights-Based Approach to Development Co-operation 2003 (Goonesekere de Silva: 2-3).

A human rights-based approach to development as outlined in these documents incorporates concepts of international human rights that have been progressively clarified since the UN World Conference in Vienna in 1993. The universality of human rights and the close interrelatedness and indivisibility of traditional civil liberties and the right to basic socioeconomic needs were the foundations of the Vienna consensus on human rights. This ideology had already been articulated in the UN Convention on Elimination of All Forms of Discrimination against Women (CEDAW) (1979), and the UN Convention on the Rights of the Child (CRC) (1989), two of the most widely ratified human rights treaties. It has been reaffirmed in the interpretations of the two International Covenants by their respective treaty bodies. The Inter-American system on human rights and the African system reflect this perspective, indicating progress from an earlier relativist approach that gave a more significant focus to civil and political rights. Despite the adoption of a Social Charter by the Council of Europe in 1961, the European Convention on Human Rights and the recent UK Human Rights Act 1998 continue to focus more on civil and political rights and interventions by the state to prevent violations.[188] Academic scholarship in the West critiques the concept of universality and indivisibility, though there are some articulate advocates of this approach.[189]

188. Lyon (2000: 47-51); The African Charter on Human and Peoples' Rights 1981, The African Charter on the Rights and Welfare of the Child 1990; cf. The African Protocol on the Rights of Women in Africa 2003, incorporating both sets of rights.
189. Evans (1998); Perry (1998); Van Genugten and Perez (2001).

The consensus on the indivisibility of human rights that has emerged in the work of the treaty bodies of the International Covenants, CEDAW, and CRC, makes it much more difficult for state parties as members of the international community to reject the universality and indivisibility of civil and political and socioeconomic rights. Both sets of rights require not merely negative interventions of protecting rights violations, but positive measures to realize and fulfil these rights.[190]

The families and communities of governments that exercise power or of individuals who interact with the state have duties and responsibilities. Human rights instruments and constitutions reflect this approach and undermine the common critique that the human rights discourse focuses only on individual rights and ignores the concept of duty and obligation.[191] International human rights recognize the central importance of rights because human experience across the globe demonstrates that an overemphasis on duty has helped to rationalize and even perpetuate abuse of rights and power by the state, the community and the family. The international human rights project therefore redresses the balance by setting down firmly norms and standards on rights. Human rights become the preliminary and essential phase in creating a society based on respect for human duties and responsibilities.

International human rights envisage that there will be duty bearers and rights holders in respect of both civil and political rights and socioeconomic rights. The duty bearers must conform to standards that may be binding peremptory norms of international customary law, or treaty-based. Treaty-based obligations qualify the norm of state sovereignty in the domestic affairs of a state. The concept of 'pacta sunt servanda' in relation to treaties means that a state that has voluntarily ratified a treaty is accountable to implement these norms in good faith, irrespective of whether the legal system adopts a monist or dualist approach to international law.

Despite the continued pressure to de-link poverty, human rights and development, perhaps best demonstrated in the MDGs, the rights-based approach is an important alternative approach to combating poverty in development. Discussions on the rights-based approach tend to explore the need to integrate the non-traditional socioeconomic rights in development. Nevertheless, country experiences demonstrate how civil and political rights have created a context for implementing socioeconomic rights, and also provide the central core of standards that nourish development theory and its implementation in law, social policy, and programming.

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190. General Comment 6(16) para 5, Report of the Human Rights Committee UN GA 30th session Supp. 40 A/37/40 1982 Annex V; General Comment No. 3 (1990) Committee on Economic Social and Cultural Rights, Eco. Soc. 5th Session 1991 Supp. 3 (E/1991/23-E/C.12/1990/8) Annex 111; General Comments of the Committee on the Rights of the Child, Florence, UNICEF Innocenti Research Centre 2006; CEDAW General Recommendation 19, on Violence Against Women CEDAW 11th Session (1992).

191. For example, the Convention on the Rights of the Child Arts 3, 18-29; African Charter on Human and Peoples' Rights Ch. II; Constitution of South Africa Art. 36 (limitations); Constitution of India Part IV A (Fundamental Duties).

3.3. LEGAL APPROACHES TO POVERTY: INCORPORATING CIVIL AND POLITICAL RIGHTS

Law and social policy formulation by the legislature and the executive are an important initiative in combating poverty, even if implementation and enforcement are inadequate. Laws have normative value. When the law is not in place, non-recognition of rights and their violation is legitimized. The legal system itself institutionalizes disadvantage by creating limitations. This reinforces the vulnerability and disadvantage of poverty and promotes a culture of abuse of power. Legislation and social policies linked to legislation that affirm civil and political rights can empower the poor. Some examples of such legislation emerge when global trends are examined.

3.3.1. Legislation[192]

The global movement for gender equality strengthened by wide ratification of CEDAW and CRC has helped promote legislative reform in several important areas that impact on low-income women workers in the formal sector, migrants and other women living in poverty.

The standard of gender equality and civil and political rights has been incorporated in extensive reform of laws and policies governing cross-border trafficking in women and children. These laws, which also facilitate regional co-operation and bilateral agreements, focus on support for the reintegration and recovery of trafficked persons and their civil rights, including the right of residence and personal security and freedom from arbitrary detention. International human rights standards on civil liberties, particularly the right to life and personal security, freedom from violence, torture and degrading treatment and equality have been used by women's groups to lobby for legislation on domestic violence and reform the criminal law relating to sexual violence.[193] It is the human rights perspective on life and personal security that has helped countries to put in place legislation, despite conservative and fundamentalist religious lobbies that reject the values of gender equality. The idea that protection of civil liberties is not connected with resource allocation has been questioned by this legislation which incorporates institutional arrangements for effective implementation. Domestic violence legislation now deals with delivery of services to victims, rehabilitation, and prevention measures.

The right to life, equality and non-discrimination have provided a basis for improving the working environment in Free Trade Export Promotion Zones. The phenomenon of feminization of poverty is reflected in the large numbers of

192. IWRAW (2005: 1-187); Center for Reproductive Rights (2004: 1-242); Caoette (1998: 1-56); Goonesekere (1998: 213-223); Neera (1995: 1-285).
193. IWRAW 2005; Center for Reproductive Rights (2004); Women's Environment and Development Organization (1999: 1-241).

low-income women and girls working within export promotion zones or home-based production linked to industry. The core framework of law and national policy on minimum wages, occupational health and personal security, have been derived from the civil and political rights norms on gender equality and non-discrimination, the right to personal liberty and freedom from harassment, and forced labour.

Excluding low-income children from work and regulating home-based and domestic labour are issues on which it has been more difficult to obtain political consensus. The idea that poor women and children and their families need any work for family survival often provides a rationale for a non-interventionist approach to regulating these sectors. In the post-CRC period the international and regional campaign against child labour has helped to keep a focus on the child's right to health and development in legislative reform. The right to live in dignity with access to life chances and opportunities underpins some legislative initiatives on child labour.

Affirmative action policies that provide free education for girls up to secondary school grades, and compulsory education regulations enacted and enforced in the post-CRC era, recognize the concept of state duty and a low-income child's equal right to access the resources for survival and development. The right to equality and non-discrimination, bodily security, individual liberty, and freedom of choice provide the foundation of legislative reform to prohibit child and forced marriage, harmful traditional practices such as female genital mutilation (FGM), honour crimes, and exploitation of adults and children in customary caste-based occupations like scavenging.[194] Access to health care, education, and livelihood opportunities are addressed in interventions on child marriage and harmful traditional practices. However, law-making and policy has been facilitated by the focus on denial of life chances and infringement of the state's obligation to provide protection from physical violence and discrimination.

Famine and denial of access to adequate food and basic nutrition are the common deprivations of the poor. They impact on the right to life in its broad interpretation. Laws and regulations that put in place public distribution systems on food subsidies for the poor and social security laws have impacted to improve health and nutrition levels (Gonsalves et al. 2005: 1-520). Maintaining a link to the denial of the right to life has made it more difficult for governments to backtrack on food schemes as discretionary benefits that can be withdrawn on the rationale of changing policy approaches.

The right to personal (private) property, a traditional civil right, is not recognized as a human right in the international covenants. It is rarely included in constitutional guarantees on fundamental rights. This is because of the possibility that recognizing this right can limit the state's capacity to work for the equitable

194. Center for Reproductive Rights (2004); Women's Environment and Development Organization (1999); UNIFEM (2005); UNICEF Innocenti Research Centre (2001: 1-28); Goonesekere (1998); Burra (1995); Pakistan Honour Crimes Act 2005; India Employment of Manual Scavengers Act 1993.

distribution of this valuable economic asset. Even where the right to personal property is recognized, the state's right to acquire private property for public purposes, subject to due process and payment of compensation, are accepted as legal values. Land acquisition for urban and industrial growth can result in eviction and dispossession of the poor. However, land reform laws and policies that result in giving the poor equitable access to land can be viewed as affirmative action to ensure distributive justice. Recent legislative reforms on equality in inheritance rights give women equal access to private land.[195]

3.3.2. The Contribution of Human Rights Institutions

Law-making authorities put the law relevant to poverty in place, but institutions such as courts and other complaints and monitoring mechanisms are essential for effective implementation. They can emerge as agencies that create accountability for violations and provide individual relief. They can also facilitate policy formulation as well as law enforcement that is sensitive to distributive justice. Legislative reform is often rejected as a token exercise because it is taken for granted that law enforcement is not a priority in developing countries. However, country experience demonstrates that judicial commitment and activism in particular is a strong support for a human rights-based approach to development and poverty eradication.

3.3.2.1. The Contribution of Courts in Interpreting Civil and Political Rights

The jurisprudence developed by the courts in particular areas of civil and political rights indicates the important role they can play in the traditional area of law enforcement, as well as in monitoring and promoting policy formulation and resource allocation that gives priority to combating poverty.

The Right to Life and Access to Basic Needs

Constitutions in some countries state fundamental rights as aspirational values, but do not provide a method of enforcement. However, others have integrated civil and political rights and socioeconomic rights as justiciable fundamental rights. South Asian constitutions adopt a different model. They recognize the justiciability of only those rights that constitute civil and political rights. They have followed the Indian framework, inspired by the Irish Constitution, and distinguished between non-enforceable directive principles of state policy and justiciable

195. Constitutions India, Bangladesh, Sri Lanka. Nepal; cf. South Africa Art 25 (right to property); UNIFEM (2005: 1-91); Nepal 11th Amendment to Code Muluki Ain (2001); India Amendment to Hindu Succession Act (2005); Sri Lanka Land Reform Act 1972.

fundamental rights. Reflecting the traditional hierarchy of rights, socioeconomic needs of people are placed in the chapter on non-enforceable directive principles of state policy, while civil and political concerns are integrated in the chapter on enforceable fundamental rights. The right to life, when it is recognized as a specific right in these constitutions, is formulated in the traditional manner as a right not to be denied life arbitrarily, without due process of law. The concept of respect promotion protection and fulfilment of both sets of rights that is found in a constitution like that of South Africa, which encourages holistic poverty eradication, is not incorporated in South Asian constitutions. Issues of access to basic needs and services that are particularly relevant for the poor thus remain in the realm of discretionary state policy, rather than claims that the state is obliged to satisfy, subject to the limitation incorporated in the Constitution (Goonesekere 1997*b*: 23-29).[196]

Nevertheless South Asian courts have used the legal values on 'human dignity' as well as the directive principles of state policy to expand the meaning, scope and enforceability of the constitutionally guaranteed right to life. Basic needs have thus become enforceable rights as an integral dimension of the right to life. This interpretation harmonizes and also develops the jurisprudence of the Human Rights Committee of the International Covenant on Civil and Political Rights. A General Comment interpreting Article 6 of the Covenant calls upon states parties to 'take all possible measures to reduce infant mortality and increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'[197]

The Indian Supreme Court has, over several decades, interpreted the right to life in Article 21 as a right to live with access to life chances, and an adequate standard of living that goes beyond satisfaction of minimum survival needs. This jurisprudence commencing from cases decided in the 1960s borrows an interpretation of the civil and political right to life in the US Constitution. In *Munn v Illinois* (1877) Field said that 'the term life … meant something more than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed'.[198] The Indian Supreme Court has consistently used this dictum to address the specific issue of torture, which surfaced in the Munn case. However, in *Francis Coralie Mullin v Administrator*

196. Cf. Constitutions of South Africa, Ecuador, Uganda; for explicit socioeconomic rights, Ecuador Constitution 1998 Art. 23 (20) 42, 246, 249; South Africa Constitution 1996 Art 26 to 29; Uganda Constitution 1995 Art. XIV; *Grootboom v Oostenberg Municipality* 2003 BCLR 277; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 703 (CC); *Soobramany v Minister of Health Kwa Zulu Natal* 1998 1 SA 430, citing Indian case, *Samity and Others v State of West Bengal.*

197. See General Comment 6(16) para. 5, Report of the Human Rights Committee UN GA 30th session Supp. 40 A/37/40 1982 Annex V; General Comment No. 3 (1990) Committee on Economic Social and Cultural Rights, Eco. Soc. 5th Session 1991 Supp. 3 (E/1991/23-E/C.12/1990/8) Annex 111; UNICEF Innocenti Research Centre (2006); CEDAW General Recommendation 19, on Violence Against Women, CEDAW 11th Session (1992).

198. 1877 94 US 113 as quoted by Bhagwathi in *Francis Coralie Mullin v Administrator Union Territory of India* 1981 2 SCR, p. 528.

Union Territory of India (1981) Justice Bhagwathi, as he then was, cited the Munn dictum in a case on the rights of a detenue, to adopt an expanded concept of the right to life. His lordship stated that 'the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessaries of life such as adequate nutrition, clothing and shelter … facilities for reading, writing and expressing oneself freely, moving about and mixing and commingling with fellow human beings (*Francis Coralie Mullin v Administrator Union Territory of India* 1981).'

The judgment incorporates in the definition the civil and political rights of freedom of speech, expression and association, which are recognized as explicit rights in the Indian Constitution. The Indian Constitution does not include an explicit guarantee on freedom from torture, and the right to life is also interpreted to recognize the rights of a detenue to proper treatment in custody. What is of particular interest however is that the Bhagwathi dictum in the detenue's case has been cited frequently, and similar language has been incorporated in later Indian cases to interpret Article 21 of the Constitution and recognize socioeconomic rights. The Indian Supreme Court has refused to take the view that 'because the language (in Article 21) is couched in a negative language positive rights to life and liberty are not conferred'.[199] They have in fact expanded the right to life by linking it to the commitments of the state in the chapter on the non-enforceable directive principles of state policy. The integration of the directive principles of state policy in interpreting the fundamental right to life has been justified by Bhagwathi on the argument that the guidelines on state policy were meant to nourish and fertilize the scope and ambit of the fundamental rights.[200]

Justice Bhagwathi's obiter dictum in the *Francis Coralie Mullin Case* referred to the right to the bare necessaries of life, reflecting an approach in harmony with Rawls' concept of a right to minimum economic security. However, Bhagwathi's dictum and a long line of Indian precedents have expanded the canvas to include the full range of socioeconomic rights of international human rights jurisprudence. Many decisions on children's right to freedom from exploitation in child labour rely on Article 21 on the right to life, even though a specific Article 24 refers to the right of a child under 14 years to be protected from exploitation in child labour. A fundamental right of access to education, and the state's obligation to make education compulsory and accessible to children under 14 years was recognized by the supreme court in later decisions by interpreting the right to life in Article 21. Those decisions eventually led to the government incorporating a right of access to education up to the age of 14 years explicitly, in the year 2003, through an amendment to the Constitution, which introduced a new Article 21(a) that follows Article 21 in the Constitution.[201]

199. *Unni Krishnan v State of Andhra Pradesh* 1993 1 SCC 625 per Mohan J, p. 668.
200. *Bandua Mukti Morcha v Union of India* 1984 3 SC 161.
201. Rawls 1999: 65; *Bandua Mukti Morcha v Union of India*; *MC Mehta v State of Tamil Nadu* 1996 SCR Supp. 9 726; *Mohini Jain v State of Karnataka* 1992 3 SCC 666; *Unni Krishnan v State of*

Many leading cases of the supreme court of India have recognized a justiciable right to shelter, food security, nutrition and water. The broader concept of right to life has enabled the courts to recognize a justiciable right to basic health care. Health rights are also protected in cases on the right to protection from occupational and other health hazards caused by poor working conditions or water pollution through industrial waste and chemicals. These cases incorporate the directive principle of state policy in the Indian Constitution, which places an obligation on the state to use, protect and preserve national resources in the public interest. Article 39(b) in the chapter on directive principles requires the state to ensure (by policy) that the ownership and control of material resources of the community are distributed so as to subserve the common good. The Indian cases thus link the concept of public trust and collective good in management of national resources with the individual right to life.[202]

The Supreme Court of Pakistan has similarly interpreted the right to life in the Pakistan Constitution, which is drafted in the same language similarly, and linked it to socioeconomic rights and the concept of human dignity in the case of *Shehla Zia v WAPDA* (1994).[203] The case concerned a petition for the removal of a grid station located in an area where a large number of children and elderly from low-income families resided. The court cited with approval the Indian cases of *M.C. Mehta v Union of India* on river pollution that created health hazards and environmental degradation, recognizing that relief could be granted if there was a potential violation of the right to life. The court stated that life covers 'more than mere existence' and included 'all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legality and constitutionality'.

After some controversy the right to pursue a lawful livelihood has been incorporated by the Indian Supreme Court within the meaning of right to life.[204] In Sri Lanka the Constitution does not recognize an explicit right to life, but does recognize the civil right to engage in a legal occupation in association with others. The Supreme Court interpreted this right and decided that a project to mine phosphates that deprived paddy and dairy farmers of their lawful livelihood violated this fundamental right. Justice Amerasinghe referred to Indian jurisprudence and stated in an obiter dictum that natural resources were held 'in trust' for the people, and that exercise of the executive power in management of these resources was

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Andhra Pradesh 1993 1 SCC 625; Art 21(a) Constitution Amendment India 2003; Guneratne (2003-2004: 41-53); *Francis Coralie Mullin*. For Mehta see also in this book Chapter 10.

202. *Shanthisar Builders v Narayan* 1990 1 SCC 520; *Olga Tellis v Bombay Municipal Corporation* 1985 3 SCC 545; *Chamali Singh v State of Ulfar Pradesh* 1996 2 SCC 549 (food security and shelter); *Narmada Bachao Andalan v Union of India* 2000 10 SCC 664 (water pollution); Gonsalves et al. (2005); Muralidhar (2006); *Samity and Others v State of West Bengal* 1996 AIR SC 24 (emergency health care); *Vincent v Union of India* 1987 2 SCC 165 (distribution of injurious drugs); *MC Mehta v Union of India* 1987 1 SCC 395 (gas leakage); *Bandua Mukti Morcha v Union of India* (child labour); *M.C. Mehta v Union of India* 1988 SC 1115 AIR 1988 SC 1037, 1997 2 SC 411 (river pollution).

203. *Shehla Zia v WAPDA PLD* 1994 SC 693.

204. *Olga Tellis v Bombay Municipal Corporation 1985 3 SCC 545*; *Delhi Transport Corp v DTC Mazdoor Congress* 1991 Supp (1) SCC 600.

subject to judicial review. He also decided that the individual petitioners had a claim, even though these rights are also linked to the wider collective rights of the people.[205] What is defined as a civil right thus emerges as a right that can be defined as a socioeconomic right in relation to pursuit of a lawful livelihood.

The jurisprudence developed in the South Asian Courts has thus linked the traditional civil and political right to life conceptually with an expanded concept of socioeconomic right. This has given them a legal status on par with the justiciable civil and political rights defined in the Constitution. The path to recognition of socioeconomic rights has come through judicial activism and an interpretation of the right to life and justiciable civil liberties. In the process the courts have contributed to a development similar to that in countries in Latin America and a few countries in Africa, where socioeconomic rights have been incorporated into the constitution, and are justiciable. The jurisprudence also strengthens capacity for enforcement of rights, encouraging governments to adopt a human rights and capabilities approach to poverty eradication, viewing poverty through the lens of indivisibility. Explicitly incorporating socioeconomic rights in constitutions can prevent courts or a government rolling back progress in this area. Jurisprudence is perhaps a more fragile legal development. However, comparative case law can be useful for countries that have not made socioeconomic rights justiciable.

Comparative jurisprudence in India has sometimes been cited in South Africa. There is now much greater opportunity for traveling jurisprudence to impact and make the linkage to international treaty standards on socioeconomic rights.[206]

Equality and Poverty

Provisions on fundamental rights in national constitutions invariably contain clauses that guarantee equality and equal protection of the law, thus reinforcing international human rights standards. Sometimes national constitutions develop this right further by prohibiting specific forms of discrimination against poor communities. For instance the Indian Constitution guarantees that the state shall not discriminate against any citizen on grounds of caste. This provision is expanded in another which explicitly includes caste discrimination by private non-state actors, placing an obligation on the state to prevent discrimination in 'access to public places of entertainment, and wells tanks, bathing ghats, and roads' maintained out of state funds.[207] National constitutions also provide for

205. *Bulankulama and Others v Secretary Ministry of Industrial Development* (Eppawela Case) 2000 3 Sri LR 243; *Minors Oposa v Secretary of the Department of Environment* (DNR) 38 ILM 178 (1994).

206. Ecuador Constitution 1998 Art. 23 (20) 42, 246, 249; South Africa Constitution 1996 Art 26 to 29; Uganda Constitution 1995 Art. XIV; *Grootboom v Oostenberg Municipality* 2003 BCLR 277; *Minister of Health and Others v Treatment Action Campaign and Others* 2002 5 SA 703 (CC); *Soobramany v Minister of Health Kwa Zulu Natal* 1998 1 SA 430, citing Indian case, *Samity and Others v State of West Bengal*.

207. Indian Constitution Article 15(2)(b); Goonesekere (1997*a*: 13).

affirmative action or temporary special measures in favour of disadvantaged persons to achieve equality in outcome, or substantive rather than mere formal equality. Poor communities invariably suffer multiple discrimination and disadvantage on the basis of several factors such as poverty, ethnicity and gender. Affirmative action provisions in constitutions that provide for the advancement of these categories promote distributive justice and equality of access to resources and opportunities.

Affirmative action provisions that give free education for girls, or reserve quotas in university for students from disadvantaged districts in Sri Lanka and Bangladesh have contributed to improved social indicators on school participation. The introduction of quotas for women in panchayats or the smallest unit of local government in several countries in South Asia has had a significant impact on the political participation of poor women from rural communities in community governance. This access to decision-making has been particularly important in helping them to articulate a voice in relation to large-scale development projects as well as other aspects of globalization that can impact on these communities.[208]

Where judicial review of legislation is possible, equality clauses in constitutions have been used to challenge discriminatory legislation on the family, including inheritance laws that deny women and girls access to land. This jurisprudence has sometimes motivated legislative reform, to eliminate the constraints.[209] A flexible interpretation of violation of the right to equality to include any arbitrary and clearly unfair state administrative action without explicit evidence of discrimination in relation to another, has made it possible for individuals to obtain relief and challenge executive and administrative action in a wide range of situations. According to this broad view, 'equality is a dynamic concept with many aspects and dimensions, and it cannot be cribbed, cabined and confined'.[210] This flexible interpretation of the right to equality makes it possible to challenge arbitrary administrative decisions of state actors in giving access to resources, and government poverty alleviation programmes. Equality guarantees can also be used to question apathy and corruption and promote state accountability for law enforcement.

In the Vishaka Case in India[211] the equality clause in the Constitution was used in deciding that sexual harassment in a state workplace amounted to gender-based discrimination against women. The supreme court decided that the state must take positive steps to eliminate sexual harassment in the workplace, which

208. Seventy-third and seventy-fourth Amendment to Indian Constitution 1993 (33% quote in Panchayat); for other South Asian Countries, see UNIFEM (2005); Muralidhar (2006).
209. Nepal, Meera Dhugana Case Writ 3392 (1996), Muluki Ain Amendment 2001; Goonesekere 1997*b*: 46: Case law Sri Lanka, Citizenship Amendment Act Sri Lanka 2003.
210. *Royappa v State of Tamil Nadu* 1994 AIR 555 SC at 583 per Bhagwathi J. discussed with Sri Lankan cases in Udagama 2003: 297; cf. for South Africa, Currie 2001: 347-354; *Humaira Mahmood v Sho Nath Canit Lahore High Court of Pakistan*, 18 Feb 1999 (arrest of women complaining of forced marriage); *Sushila Goshala v State of Rajasthan AIR* 1995 Raj 90 (not enforcing child marriage law).
211. 1997 6 SCC 241.

results in a hostile working environment. Inevitably the court linked the norm of equality and non-discrimination on the ground of sex to a woman's right to life and human dignity. A line of judicial decisions in India has interpreted the right to life as creating a right to obtain free legal aid.[212] These cases link the concept of equality rights and equal protection of the law to a broader standard on access to justice. Interpretation of equality in this manner reinforces the capabilities approach to combating poverty, increasing opportunities for empowerment.

Some Other Rights Relevant for Poverty Eradication

Judicial interpretation of the right to freedom from torture in various jurisdictions, and the jurisprudence on disappearances are important aspects of civil and political rights. Judicial activism in the interpretation of these rights as well as the right of free speech and expression and the right to information, promotes accountability in governance. They reinforce other rights such as those of political participation and freedom of association. A culture of respect for personal security and the exercise of these democratic rights have relevance for the poor, since they are the sectors most vulnerable to abuse of power. Individuals who suffer violence in custodial situations often belong to poor communities. Besides, torture can also result in physical and mental trauma that leads to loss of livelihood. Respect and fulfilment of these rights and protection against infringements are important to enable people to participate in the process of development and strengthen their own capacity to move out of poverty.

India's Constitution does not have an explicit provision on freedom from torture, but the courts have interpreted the constitutional guarantee on the right to life to recognize a right to freedom from torture and inhuman degrading treatment in custodial situations. The failure to include an explicit provision on torture reinforces the policy in the Indian Armed Forces Special Provisions Act, which gives impunity to members of these forces. The issue of impunity has been raised by non-governmental organizations in shadow reports and documents made available to treaty bodies. Concluding comments of treaty bodies have addressed the need to bring the law in harmony with India's treaty obligations and government has engaged in a review of the act (Goonesekere 1997*b*: 30-33; Bakshi 1991: 29). Constitutional jurisprudence in other countries recognizes the accountability of members of the armed forces for infringing an explicit guarantee on torture. Recent case law in Sri Lanka and South Africa recognizes the use of corporal punishment in state schools and whipping juveniles as torture. Rape and homosexual or heterosexual sexual abuse in custodial situations has been considered torture by Sri Lankan courts, focusing on the dimension of violation of bodily integrity. This is perceived as 'state action', with state accountability to compensate the victim. However, the individual official is also held accountable to compensate the victims. Case law in Sri Lanka has accepted the concept of

212. *Ranchod v State of Gujarat AIR* 1974 SC 1143; *Hussenara v State of Bihar AIR* 1979 SC 1369.

command responsibility for torture, where a superior law enforcement officer is accountable for 'culpable inaction' in preventing torture. Courts in India and Sri Lanka order significant sums of compensation to be paid to the victim by the perpetrator, in addition to compensation paid by the state, to promote the idea of individual accountability for torture in custodial situations.[213]

The right to freedom from torture sometimes interfaces with socioeconomic rights, when degrading treatment takes the form of deprivation of food in custodial situations. The denial of food results in multiple violations, infringing the civil right to life, the right to freedom from torture and inhuman degrading treatment, and the right to food. In a pending Sri Lankan case, alleged cruel treatment of a low-income patient in a state hospital is being challenged in a fundamental rights application.[214] Torture and degrading treatment can infringe the right to pursue a legal occupation when it takes place in a work environment. In the Vishaka Case[215] in India, the woman concerned was a community worker campaigning against child marriage when she was gang-raped in a workplace managed by the state. While the criminal prosecution against the offenders was proceeding, a fundamental rights action was initiated against the state as employer on the basis of the state's responsibility to protect a worker from sexual harassment in the work place. The case was filed as a fundamental rights violation because in India rape by private persons may not have been considered torture or an infringement of the right to life while in the custody of the state. The concept of the state's failure to prevent the violence was not considered, though this approach had been taken in other cases.[216]

The jurisprudence in the Vishaka case has created an environment in which rape in a situation where the state has control can be perceived as torture and abuse of state authority. Recent judicial trends in Sri Lanka have taken that view, recognizing that rape and sexual violence by officials in a custodial situation can be considered torture. Sri Lanka's Constitution does not explicitly recognize a right to life or the locus standi of a person other than the victim or an attorney to bring a fundamental rights action. In this context the courts have been willing to interpret the Constitutional guarantee on torture as a right to life and personal security in

213. Goonesekere (1997*b*: 30-33); *Lal v OIC Seeduwa Police Sri Lanka* 2005 1 Sri LR 40 (command responsibility); *Bandara v Wickramasinge* 1995 2 Sri LR 167; Cases in Zimbabwe (Zimbabwe Constitutional Amendment No. 11 of 1990 amending sections 15(1), overturning decision of the Supreme Court in *S v Neube* 1987 2 ZLR 246 and *Juvenile v State* 1989 2 ZLR 61 that a sentence of corporal punishment was inhuman degrading treatment) and *S v William's* 1995 3 SA 632 (corporal punishment). Amerasinghe ARB 1995, Chapter II; Bakshi 1991: 29; *Peoples Union for Democratic Rights v State of Bihar AIR* 1987 SC 355 (compensation, India).

214. *Francis Coralie Mullin*; Case filed against the Sri Lankan de Soysa Maternity Hospital for Women by woman patient (pending, personal communication to author).

215. 1997 6 SCC 241.

216. *Saheli Women's Resource Centre v Commissioner of Police Delhi AIR* 1990 SC 513; *Padmini v State of Tamil Nadu* 1993 Cr LJ 2964 (Mad) (India); similarly *Upaliratna v Tikiri Banda* 1995 1 Sri LR 165, Faiz Mohomed a Attorney General 1995 1 Sri LR 372 (Sri Lanka).

the limited situation where the victim dies from torture. This interpretation has expanded the scope of state liability for torture.[217]

This jurisprudence on torture has been reinforced by decided cases on the writ of habeas corpus in situations of illegal detention. Following the approach in the Inter-American Court case of *Veslasques Rodriguez v Honduras*[218] on state accountability for inaction, national courts have held that state authorities cannot deny knowledge of a person who disappears while in custody. They are required to explain the circumstances in which the disappearances took place, and their own efforts in investigation, to satisfy the standard of accountability. This jurisprudence has helped to promote a concept of state liability for failure to prevent physical and mental abuse and illegal detention by non-state actors.

Case law on the right to freedom of speech and the right to information creates an environment supportive of public interest litigation by civil society organizations, media freedom, information dissemination and legitimate political protest. The right to vote and political participation have proved important in many countries in Asia and Africa, where internationally and nationally monitored elections, free of rigging and corruption, have enabled a broad constituency to vote for economic reforms and accountability in governance. However, even authoritarian regimes sometimes recognize and provide facilities for communication, information sharing and media freedom.

Judicial scrutiny of intrusions on press freedom and access to information as part of the right of free speech guaranteed in constitutions has provided space for promoting accountability in formulating economic growth strategies and development policies. This is clear from jurisprudence in several countries on access to adult education programmes to water, and protection of natural resources and the environment, particularly when constitutions do not guarantee them as justiciable individual or collective rights. Development policies and decisions have on occasion been changed, and legislation has been subject to judicial review.[219]

Cases that have recognized the individual right to receive information and articulate views help to create an environment of transparency based on access to information. Human rights education, legal literacy and education programmes

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217. *Sriyani Silva v Iddamalgoda* 2003 2 Sri LR 63 (Sri Lanka).
218. Inter-American Court of Human Rights, 29 July 1988 cited in *Leeda Violet and Others v Vidanapathirana* 1994 3 Sri LR 377 at p. 378; *Sabastian Hongary v Union of India 1 AIR* 1984 SC 1026 cited and followed in Leeda Violet (Sri Lanka).
219. See for example *Shanthisar Builders v Narayan* 1990 1 SCC 520; *Olga Tellis v Bombay Municipal Corporation* 1985 3 SCC 545; *Chamali Singh v State of Ulfar Pradesh* 1996 2 SCC 549; *Narmada Bachao Andalan v Union of India* 2000 10 SCC 664; *Bulankulama and Others v Secretary Ministry of Industrial Development* (Eppawela Case) 2000 3 Sri LR 243; *Minors Oposa v Secretary of the Department of Environment* (DNR) 38 ILM 178 (1994); *Shehla Zia v WAPDA PLD* 1994 SC 693; Muralidhar (2006); Geneva Centre on Housing Rights and Eviction (2004: 110); Bakshi (1991: 22) (freedom of the press and right to information as interpretation of right to freedom of speech and expressions; *Fernando v Sri Lanka Broadcasting Corporation* 1996 1 SLR 157, *Wanigasuriya v SI Pieris SC* (FR) 199/87 SCM 22.9.88 (education programmes) Land Ownership Bill Determination S D No 26/2003 10.12.2003. Water Resources Bill Determination. S.C. (S.D.) 24/2003 13.11.203 (Sri Lanka).

through multimedia are particularly important to reach and empower poor rural communities. Land reform and development initiatives on poverty fail because poor people lack access to agricultural technology and non-formal education. Legislative reform does not impact and weak law enforcement is legitimized in areas such as family relations, domestic violence, and employment conditions because there is inadequate communication on the content and values promoted by of these reforms. Judicial interpretations that support a free media environment are, therefore, critical for political, social and economic changes in developing countries. Successful public awareness campaigns in areas such as HIV and AIDS, child labour and domestic violence have impacted on the incidence of these problems. These are all problems that affect poor communities more adversely. Successful national efforts to create a culture of respect for these rights should be consistently recognized in development work, as part of a rights-based strategy, in combating poverty.

3.4. ENFORCING CIVIL AND POLITICAL RIGHTS

Successful litigation that realizes civil and political rights gives individual remedies and relief. However, it also impacts on collective and group rights of the poor.

Not only does individual relief in the form of compensation and reparation for infringement provide solatium to the individual who suffers the violation, an effective litigation strategy reinforces legal values and norms, and contributes to a public perception that there is no impunity for violation. Leading cases decided in the courts receive publicity and are used in targeted training programmes for the public and private sectors. Individual litigation has also contributed to legislative reform, as well as policy changes by the government. This is clear particularly in areas that relate to gender equality, and equality rights that interface with environmental protection in jurisdictions in developing countries in Asia, Latin America and Africa.[220]

Constitutional remedies for infringement of rights provide more speedy relief than the usually prolonged civil or criminal litigation in ordinary courts of law, which are invariably inaccessible to the poor. Constitutional jurisprudence on dignity and the right to bodily security and equality are also integrated and influence judicial decisions in areas of civil litigation like employment conditions, contract law, civil damages, domestic violence, and even criminal procedure.[221]

220. See previous note; Nepal, Meera Dhugana Case Writ 3392 (1996), Muluki Ain Amendment 2001; Goonesekere (2004: 46); Case law Sri Lanka, Citizenship Amendment Act Sri Lanka 2003; *Attorney-General of Botswana v Unity Down Court of Appeal Botswana* 3 July (1992); Piccolotti (2003).

221. Vishaka (1997 6 SCC 241), followed in *Apparel Export v Chopra* 1999 Civil Appeal No 13099-15100 (termination of employment in the private sector and sexual harassment); Currie et al. 2001: 328 (restraint of trade South Africa); *Bodhisatva Gautam v Subra Chakraborthy AIR* 1983 SC 759 (domestic violence); *Balela v State Court of Appeal Fiji*, 2004, Pacific Human Rights Law Digest Vol. I p. 5 (corroboration requirement in rape case rejected because of

Rights jurisprudence thus has a much wider impact than routine individual litigation, and strengthens the administration of justice.

The Indian Supreme Court has also connected judicial decision-making in constitutional cases to a new and additional procedure by which the court itself monitors the implementation of its orders. Constitutional issues are considered public interest concerns.[222] The court has used its jurisdiction to obtain expert advice and information on public interest concerns raised by the case through the process of appointing expert panels, commissions and task forces. The court then sets in motion a procedure that can help it to monitor the implementation of its orders. Directions are given to the respondent, usually the government, and the implementation of these directions are subject to the scrutiny of the court. This is why constitutional jurisprudence based on public interest litigation that has emerged from the supreme court of India is sometimes called 'social action' litigation.

Court orders have been most effectively implemented in India in the areas of environmental protection and sexual harassment in the workplace, where leading cases have impacted to prevent environmental pollution and improve working standards. Public interest litigation in the area of child labour also shows the manner in which court orders become more demanding on the state in situations where infringements continue. Early orders recognized the government's obligation to improve working conditions of children under the minimum age. Subsequently, the court pronounced stronger directions aimed at removing children from the workplace and ensuring access to education. The present Prime Minister has publicly campaigned against child labour, calling for measures to enforce the law strictly, not only in hazardous occupations but in the informal sector. This has been combined with a programme to give access to schooling to realize the constitutional guarantee that evolved from the Unni Krishnan case.[223] The Public defender procedure in civil law jurisdictions in Latin American countries that provides for an independent intervention by this official to obtain an amparo (injunction) protection order against the government serves a similar function in the enforcement of rights. The defender calls for positive actions to prevent continuing infringement of human rights in the special expedited procedure called an acción de amparo.[224]

The enforcement environment on rights has also been strengthened in many developing countries in Asia and Africa by the adoption of other complaints procedures like Ombudspersons and Human Rights Commissions. These procedures enable some cases involving infringements of civil and political rights to be channelled for the purpose of providing individual relief through

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Constitutional guarantee on discrimination against women); *Saman v Leeladasa 1983* 2 Sri LR 46 (civil damages and torture Sri Lanka); *Minister of Justice v Hofmeyer* 1993 3 SA 131 civil damages for ill treatment of detenus in South Africa).

222. Bakshi PM Public Interact Litigation, New Delhi Ashoka Law House 1998: 1-453; *M.C. Mehta v State of Tamil Nadu* 1996, cf, *M.C. Mehta v State of Tamil Nadu* 1991 1 SCC 283.

223. *Unni Krishnan v State of Andhra Pradesh* 1993 1 SCC 625.

224. COHRE (2003: 110).

dispute settlement outside the courts. These procedures are more accessible to the people. They reinforce constitutionally guaranteed rights and values and create accountability on the part of the state to review administrative policies and action.[225]

Constitutional jurisprudence in national courts has also contributed to the integration of international and regional human rights standards in domestic jurisdictions. Norms are then incorporated, even in the absence of legislation to harmonize these standards. The ratification of Optional Protocols to the Covenant on Civil and Political Rights and CEDAW also provide an opportunity for a treaty body to make recommendations in their views and communications on an individual complaint. Such pronouncements on equality and domestic violence have supported local groups advocating for strengthened law enforcement and fundamental rights. Protocol procedures and regional complaints mechanisms can also help to sensitize the judiciary and parliament on harmonizing domestic law with international law.[226]

Commonwealth Judicial Colloquia[227] have emphasized the importance of domestic jurisprudence in integrating international law, particularly in countries that follow a dualist approach to international law and require domestic harmonization for the application of treaties. Cases on equality, torture, freedom of speech and access to information, and interpretation of the right to life have cited international human rights treaties and documents. The willingness of the judiciary to make these linkages has strengthened rights jurisprudence in domestic jurisdictions. However, there are also instances where parliaments have enacted legislation to mitigate the impact of case law reaffirming rights, or a superior court in a dualist legal system has, in a reversal of positive trends, questioned the application of treaties.[228] These negative trends are arrested when an active civil society and media can respond within the laws of contempt and engage in public debate on such developments.

Rights enforcement at the domestic level therefore requires the active participation of civil society. Though international law has primarily focused on states as duty bearers, international treaties like CRC and procedures developed

225. Study on Implementation of the Convention on the Rights of the Child, Florence UNICEF Innocenti Research Centre 2004 p. 9; Human Rights Commission India, Sri Lanka, Maldives, Indonesia, Ghana.

226. Report of Regional Thematic Meeting on Violence against Women; Emerton et al. 2005: 1, 779; *AT v Hungary UN/CEDAW* Communication No 2/2003. Views adopted 26 January 2005 (No action by State to Protect AT and her children from violence by common law husband).

227. Declarations of Colloquiums organized by the Commonwealth Secretariat London, held in Bangalore (1988) Zimbabwe (1994).

228. For example, Muslim Women's (Protection of Rights of Divorce) Act 1986 India, reversing S.C. decision *Mohamed Ahamed Kahn v Shah Bano Begum AIR* 1985 SC 945; Zimbabwe Constitutional Amendment No. 11 of 1990 amending sections 15(1), overturning decision of the Supreme Court in *S v Neube* 1987 2 ZLR 246 and *Juvenile v State* 1989 2 ZLR 61 that a sentence of corporal punishment was inhuman degrading treatment; *Singarasa v Att. Gen. Sri Lanka S. C. Spl* (LA) No. 182/99 15.9.2006 (questioning application of Optional Protocol to ICCPR).

by treaty bodies have in recent years have recognized that a solidarity approach among a range of actors is necessary for respecting, promoting, protecting and fulfilling human rights. NGOs have increasing access to participate in public sessions of the international treaty bodies, and this has given legitimacy to their concern and interest. The Optional Protocol to CEDAW, reflecting the influence of domestic law on widened locus standi, permits individual communications (complaints) to be filed in exceptional circumstances on behalf of a victim, without the consent of the victim. Regional bodies set up under regional charters also pronounce decisions on individual communications on rights violations, filed on behalf of victims by organizations.[229]

A parallel development can be seen in domestic jurisdictions in class action suits, filing of amicus briefs and a range of procedures for broadening locus standi and permitting public interest litigation, even without an identified individual victim of infringement. The term 'agency' is often used in rights jurisprudence to focus on the need to empower disadvantaged and vulnerable groups. However, in legal terminology an agent represents a principal, and his/her interest determines the parameters of the agent's actions. Often NGOs and civil society organizations working on human rights and environmental issues are criticized for acting according to their own interest rather than the constituency they represent. In the Narmada Dam Project case in India, for instance Justice Kirpal cautioned that 'public interest litigation was an innovation essentially to safeguard and protect the human rights of people who were unable to protect themselves … public interest litigation should not be allowed to degenerate into publicity interest litigation or private inquisitiveness legislation.'[230]

Widened locus standi has helped litigation procedures to move beyond the concept that only an individual victim can approach courts for redress. The reality of disadvantage in poverty situations prevents poor litigants from accessing the judicial system. Public interest litigation fills the gap and enables collective interests to be realized through individual claims. It has worked best in situations where civil society groups act with integrity to promote the interests of disadvantaged groups and acquire legitimacy because of the quality of their work. That professionalism and community acceptance provides some protection against state or other efforts to discredit them and limit their capacity to work as human rights defenders. In countries where the legal system is open to public interest litigation, disadvantaged groups like poor communities have benefited, and poverty issues have attracted the attention of government and the corporate sector. The activism of these groups has also contributed to greater awareness of human rights and the accountability of duty bearers under these norms. Public interest litigation has thus become useful for monitoring human rights.

229. Optional Protocol to CEDAW (1999) Art. 2; Interights Bulletin UK (2005: 3-15) on the African and Inter-American Human Rights System and decisions.
230. *Narmada Bachao Andalan v Union of India* 2000 10 SCC 664, p. 762.

3.5. LIMITATIONS IN USING CIVIL AND POLITICAL RIGHTS: FUTURE CHALLENGES

3.5.1. The liability of the state and non-state actors.[231]

International law developed traditionally as norms governing relations between states. International human rights law has over the years incorporated the idea of state accountability to individuals for infringement and realization of human rights. Nevertheless, the optional protocol procedures that permit individual complaints have limited impact, since there is no legal procedure for enforcement if the state fails to act in good faith and respond to the recommendations of the treaty bodies. This gap in enforcement continues to encourage states to disregard treaty standards by raising arguments of state sovereignty to justify their actions under domestic rather than international legal regimes. It is in this context that the independence of the judiciary in developing constitutional law becomes especially important. Effective implementation of human rights continues to depend on an appropriate framework of domestic law to hold a state accountable.

With economic transformation and globalization, the state is withdrawing from many areas of activity that are now taken over by private corporations and non-state actors. International financial institutions have over the last few decades expanded their influence in shaping macro-economic policies in developing countries. The private sector is increasingly taking over key areas of service delivery. This has led to privatization of health, education and water. Development activities that were traditionally the responsibility of the state are also being undertaken by non-state actors.

The accountability of these financial institutions as well as private non-state actors to respect and abide by human rights norms remains unclear because of a gap in the international legal regime and current conceptual thinking on human rights. This encourages a laissez faire approach in regard to non-state action, even as new international instruments set more human rights standards for states. The linkage between human rights and trade liberalization is increasingly becoming part of the human rights discourse. Progress in this area must inevitably be integrated into responses on poverty and development. The case law on environmental issues, as well as equality, personal security, and the right to water and shelter (as dimensions of the right to life), demonstrate that the conduct of non-state actors impact on the human rights of poor communities.

Goal 8 of the Millennium Development Goals refers to the 'Development of Partnerships in Development'. This clearly reaffirms the concept of solidarity in realizing human rights, and the importance of government, civil society non-state actors and people in communities contributing to development and poverty

231. Obando 2004: 2-23; *Business and Human Rights*, 1999: 9-10; Oloka–Onyango and Udagama 2001: pp. 3-45.

eradication. Corporation and businesses have introduced a concept of corporate responsibility into their business operations. This has resulted in voluntary codes of conduct that integrate ILO and international labour and environmental protection standards and transparent financial management. The private sector within countries has also developed the idea of corporate philanthropy supporting local initiatives in disaster responses and community development projects in areas such as education. Child labour and child abuse have attracted interest, and the private and corporate sector has supported state and civil society organizations to develop programmes to address these problems in developing countries. However the challenge is to ensure a balance in public and private sector participation in development, so that the state remains responsible as the major player in safeguarding human rights. The concept of a 'failed state' is often advocated as a rationale for NGOs and civil society and the community assuming responsibilities for poverty alleviation and community development, supported by the private sector and international and bilateral agencies. However the protection and realization of human rights requires that the state be held accountable as a major player, since it is the government that continues to access national resources, interact at the international and regional level and exercise state power.

The state has always regulated the conduct of non-state actors and corporation through labour laws, environmental protection laws, and criminal and civil law. These areas must continue to be developed so that non-state actors cannot claim impunity for human rights infringements and corruption that contribute to national impoverishment. They must become accountable to compensate and provide reparation where human rights have been violated. It is equally important to ensure that this responsibility includes support for rehabilitation and reintegration of victims through devices such as voluntary trust funds. Impunity of both officials and non-state actors should not be institutionalized either by apathy in law enforcement, gaps in legislation, or laws that explicitly provide for impunity.

National and international law continue to endorse the idea that corporations are entities that cannot be held liable in criminal law. The possibility of expanding the scope of direct accountability of corporations for human rights violations and corruption need to be explored and expanded in line with some international and regional standards that already cover the liability of non-state actors.[232] The concept of 'command responsibility' of officials recognized in jurisprudence on human rights and the Rome Statute of the International Criminal Court can also be developed to expand the liability of non-state actors under human rights law.[233]

232. UN Declaration on the Elimination of Violence against Women (1993); Art 4 (c); American Convention on Human Rights; and Velasquez Rodriguez case (Inter-American Court of Human Rights, 29 July 1988, cited Leeda Violet); Convention of Belem do Para. Inter-American System.

233. Goonesekere (2004); Rome Statute Art. 125(3).

The obligations of a state to act with due diligence as a duty bearer[234] also provide a basis for holding non-state actors liable. Cases on domestic violence, disappearance and water rights in national courts and international fora indicate how the conduct of private non-state actors come within the scrutiny of courts and human rights oversight bodies. The state becomes liable for a violation because of a failure to prevent a violation by a non-state actor, or for total failure in enforcing existing laws. This jurisprudence has contributed to linking the traditional limitation on bringing non-state actors within the scope and application of human rights law. Case law also demonstrates how a standard set in constitutional law on the state's liability to prevent an infringement can be integrated into civil law obligations of non-state actors.[235] Constitutional jurisprudence and values on personal security and equality can thus fertilize other branches of civil law such as family law and tort and criminal law so as to also cover the conduct of non-state actors.

3.5.2. Competing Civil and Political Rights and Development

As in many other areas of law, human rights implementation can pose problems of balancing conflicting rights and interests protected by these rights. Norms on gender equality and personal security can conflict with standards on the right to freedom of religion. When the right to life is interpreted to include socioeconomic rights, the right to water and shelter of one low-income community can conflict with the right to livelihood of another group, creating a situation of displacement. The right to life and use of national resources in the public interest can conflict with the utilitarian and immediate pressure for quick economic growth and development. Similarly the right to freedom of association and industrial action can conflict with the demand for economic stability and sustainable industrial investment and production. It is sometimes argued that legislative bodies and parliaments rather than courts should resolve these issues through law reform and policy formulation.

International human rights law and national constitutions have built in strategies for limiting human rights according to specified and explicit rationales. Public interest and public security have traditionally provided a basis for limiting many rights. It is exceptional that a right such as freedom from torture or freedom of conscience is considered a peremptory norm that is not subject to limitation. Courts of law are constantly required to balance conflicting

234. CEDAW Art; 2 (e); UN Declaration on the Elimination of Violence against Women and regional standards; Velasquez Rodriguez, Inter American Court of Human Rights, 29 July 1988, cited Leeda Violet; *Saheli Women's Resource Centre v Commissioner of Police Delhi AIR* 1990 SC 513; *Padmini v State of Tamil Nadu* 1993 Cr LJ 2964 (Mad) (India); similarly *Upaliratna v Tikiri Banda* 1995 1 Sri LR 165, *Faiz Mohomed v Attorney General* 1995 1 Sri LR 372 (Sri Lanka).

235. *Apparel Export v Chopra* 1999 Civil Appeal No 13099-15100.

interests in the process of judicial decision-making, and this is particularly clear in common law systems where there is a body of common law unregulated by legislation. Constitutional jurisprudence indicates that the courts have developed doctrines such as that of 'purposive interpretation' to balance competing rights. The standard of 'reasonableness' has been used through many decades in national courts to balance conflicting interests. In the area of human rights it provides a basis for scrutinizing limitations on rights to ensure that the core values on human rights are not undermined through the process of limitation. The doctrine of parliamentary sovereignty and the separation of powers in jurisdictions that recognize these standards are themselves balanced, so as to enable the court to act as an oversight authority in the realization of human rights.

The jurisprudence on the right to life that encompasses the right to basic needs brings to light special problems of balancing the needs of different communities of poor people. The right to basic needs can conflict with government plans and proposals for economic development. Even in these areas national courts have shown the capacity for self-restraint so as not to usurp the role of the legislature and the executive. The Indian courts in particular have sometimes been criticized for assuming the role of the legislature and intervening in areas of administration and policy formulation that are properly left to parliament, which is accountable to the voters. The traditional view is that 'the Supreme Court is supreme, but the supremacy ends when the supremacy of parliament begins.'[236] The Indian Supreme Court has responded to executive apathy, through its power of judicial review, using the concept of public interest litigation to scrutinize law enforcement and policy implementation. Sometimes this has resulted in standard setting to fill gaps in legislation, as seen in the developments in India on sexual harassment after the Vishaka Case.[237] However, the legislature has responded positively to the directions of the court and has not seen this judicial activism as an intrusion on parliamentary sovereignty. This is perhaps because there are equally important judicial precedents in leading cases, which emphasize that public interest litigation must not overstep its parameters.

For instance in the controversial Narmada Dam Case, Justice Kirpal, in upholding the decision of government on the construction of the dam, stated that

> the conception and the decision to undertake a project is to be regarded as a policy decision… It is for the government to decide how to do the job. When it has put a system in place for the execution of a project, and such a system cannot be said to be arbitrary, the only role which a court may have to play is to see that the system works in the manner it was envisaged. It is now well settled that the Courts in the exercise of this jurisdiction will not transgress into the field of policy. … It is only where there has been a failure on the

236. Nayar Kuldip, 'Independence and Limitations of the judiciary,' 'The Leader' Sri Lanka, Colombo 8 December 2006. p. 6.
237. 1997 6 SCC 241.

> part of any authority in acting according to law or non-action or acting in violation of the law that the court has stepped in.'[238]

This approach has also been taken in a recent case where the Indian Supreme Court held that trade union rights were not unqualified and could be limited by 'appropriate industrial legislation.[239]

The precedent is relevant for a pending Sri Lankan case where the supreme court issued a stay order on a petition brought by the Joint Apparel Forum, an organization of garment manufacturers and exporters, to prevent a strike for wages by port workers. The workers supported by a global union of garment factory workers have now lodged a complaint against the Government of Sri Lanka under ILO procedures on the basis of the stay order. The Government of Sri Lanka has always exercised a right to regulate trade union action in areas such as health by declaring a service as essential in the public interest. The Sri Lankan case has created a situation where a service user is requesting the courts to give a similar order against a service provider on the basis of infringement of their right to livelihood (Samaraweera 2006: 6). Closure of factories due to industrial unrest can result in large-scale job losses among low-income workers.

The balancing of conflicting interests so as to realize human rights and not impair development and respect parliamentary sovereignty is a challenge for the courts. They are called upon to make decisions that are perceived by the public and the government as reasonable, objective, and based on depoliticized interpretations of the constitution. Where they fail and do not exercise self-restraint to achieve objective decision-making, they risk making critical decisions on political or development issues in an adversarial litigation environment without the benefit of the kind of expert opinion available for policy formulation. The legislature itself can intervene to erode their independence or pass legislation that overturns a judgment. The Indian Supreme Court's strategy of commissioning expert reports when development issues are subject to scrutiny in public interest litigation provides an effective strategy for legitimizing court decisions and maintaining the balance between human rights protection and economic development. Recent unreported decisions of the Sri Lanka Supreme Court on demerger of two provinces in conflict areas and declaring unconstitutional legislation regulating ownership in state land and regulating water resources have been the subject of controversy and criticism as in conflict with the role and responsibility of the judiciary.[240]

The current focus on the MDGs in development and partnership in development should address the need for ensuring broad-based understanding and respect for human rights among state institutions and the corporate sector. Failure to integrate a rights-based approach into the MDGs will not merely

238. *Narmada Bachao Andalan v Union of India* 2000 10 SCC 664 per Kirpal J at 761-763.
239. *Dharam Dhutt v Union of India* 2004 1 SCC 713.
240. Demerger of North and East, unreported case SC F.R. No 243/06 16.10.2006; Land Ownership Bill Determination Sri Lanka S D No 26/2003 10.12.2003.

undermine the human rights project but create tension and conflict between the courts, government and the corporate sector.

3.6. CONCLUSION

The harsh reality of deprivation creates a perception that norms on human rights are irrelevant for the poor. This paper argues that human rights are concerned with accountability in governance, and it is the human rights-based approach to development that can promote accountability to the poor.

Civil society can be a partner in pro-poor development but cannot promote the holistic responses required to combat poverty. In an environment of globalization, partnerships of civil society, the corporate sector and people with the government have become critical. The concept of the failed state only encourages non-accountability in governments with the power and access to national resources. Integrating a civil and political rights-based approach into development recognizes the government and private sector as duty bearers, and the poor as rights holders with identity, entitlements and capabilities to have a voice and be partners in the development process.

Law and social policy are not the only strategy, but are central to accountable good governance and poverty eradication in development. There is evidence that legislation and institutions such as courts can, through a focus on civil and political rights, contribute to good governance, containing abuse of power and promoting people-centred development that increases opportunities and access for the poor. The spaces provided for civil society activism also contribute to responsible articulation of opinion and monitoring development in the interests of the poor. Respect for the independence of the judiciary is critical to prevent conflict between parliament and the courts, and various interest groups.

Civil and political rights underpin important legislation, and have been an influence in raising socioeconomic needs to rights in legal systems where these are not guaranteed as enforceable rights. The jurisprudence and policy focus on civil and political rights have thus contributed to a reaffirmation of the indivisibility of all human rights. Some challenges, such as expanding the accountability of the private sector and resolving conflicting human rights, need to be addressed in integrating human rights and development so as to impact more on poverty eradication.

The trends examined in this paper suggest that the two strands of freedom incorporated originally in the theory of civil and political rights – individual freedom and collective freedom to participate in the political process (Novak 2000: 69-70) – have come together in some jurisdictions. This has provided an opportunity to link values on civil and political rights and development in a manner that is meaningful to non-Western societies. It is important that the new development agenda and the Millennium Development Goals integrate this holistic interpretation of rights based on international and national commitments on human rights. The MDGs should not reverse the movement in countries

towards replacing the poverty alleviation and welfare focus in development with the richer resource of human rights including civil and political rights. These are best practices that should be shared and strengthened.

4

Work Rights: A Human Rights-Based Response to Poverty

Margaret Bedggood and Diane Frey[241]

> Productive and decent work and poverty eradication are essential to ensuring the exercise of the fundamental human rights and freedoms enshrined in the Universal Declaration of Human Rights … and to meeting the Millennium Development Goals
> (UN General Assembly 2007, para. 131).

4.1. INTRODUCTION

Decent work and work rights are key to creating sustainable livelihoods and eradicating poverty. Yet, judging by the prevalent discourse on poverty, neither has been a central concern in international development policy. As the United Nations Millennium Development Goals (MDGs) confirm, there has been longstanding acceptance of the importance of food, health, education, gender equality, and environmental sustainability to poverty reduction.[242] Each of these goals parallels a legally protected human right.[243] In comparison, the MDG framework has only

241. The authors wish to thank Gillian MacNaughton and Edwina Hughes for their research and invaluable assistance in reviewing and commenting on drafts of this chapter.

242. UN Millennium Development Goals, available at http://www.un.org/millenniumgoals/. A multi-dimensional definition of poverty recognizes these elements as constituent of poverty. See for example Report of the World Summit for Social Development, Programme of Action, UN Doc A/CONF.166/9, 1995 para. 19 (poverty has various manifestations including lack of income, hunger, ill health, lack of access to education, inadequate housing, unsafe environment and social exclusion).

243. See for example International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3arts 11 (right to food), 12 (right to health), 13 (right to education), 3 (gender equality); Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, art. 24(2)(c) (state obligation to provide adequate clean drinking water and consider danger of environmental pollution); International Labour Organization (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, entered into force 5 September 1991, art. 7 (4) (protection and preservation of the environment).

recently included decent work and full employment for all as a development target, and indeed, work rights have often been viewed as antithetical rather than essential to economic growth, development and poverty eradication.[244]

This is not surprising in light of the neo-liberal approaches to economic growth that have gained hegemonic power, particularly over the last thirty years (Rittich 2007: 112-115).[245] The very notion and legitimacy of work rights is paradoxical. On the one hand, from a strictly market-oriented perspective, they are contested as detrimental to economic growth and foreign direct investment (UN General Assembly 2007, para. 30, 34, 98). On the other hand, from a social justice perspective, such as that of the International Labour Organization (ILO), they are viewed as a means to fair globalization (ILO 2007*a*: vi; ILO 2004: ix). While these two perspectives are frequently at odds in debates on globalization and labour, a third perspective – a human rights-based approach – offers the best avenue for poverty eradication through work rights. From this perspective, work rights are equal to and interdependent with the other human rights that parallel the MDGs.

This chapter explores this paradox[246] and its implications for eradicating poverty through realizing work rights, including the rights to be free from slavery and servitude,[247] the right to work,[248] the right to just and favourable working conditions,[249] the right of individuals to form trade unions, as well as the collective rights of trade unions,[250] and the right to social security, including social insurance.[251] In the course of discussing these work-related rights, this chapter also considers the right to be free of discrimination.[252] Recent UN reports indicate that these work rights, including full employment and decent work, are being rediscovered as important components of development and poverty eradication.[253] Indeed, the

244. See Summary World Social Situation 2007, UN Doc A/62/168, 30 July 2007, para. 4 (governments around the world have increased worker insecurity in desire to become economically competitive). Prior to 2007 the MDG framework included only a decent work target for youth (Target 16).
245. Social rights, entrenched in Europe by the mid-1960s, have subsequently eroded.
246. Rittich (2007: 110-111) explains the paradox surrounding social rights as the discontinuity between the discursive commitment to human rights, including social rights, in contrast to the concurrent dismantling of mechanisms for their protection.
247. International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art. 8.
248. ICESCR art. 6.
249. ICESCR art. 7.
250. ICESCR art. 8.
251. ICESCR art. 9.
252. See for example ICESCR art. 2(2) (prohibiting discrimination on the basis of 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status').
253. UN General Assembly, 2005 World Summit Outcome, res. A/RES/60/1 (24 October 2005) para. 47 ('We strongly support fair globalization and resolve to make the goals of full and productive employment and decent work for all, including women and young people, a central objective of our relevant national and international policies as well as our national development strategies, including poverty reduction strategies, as part of our efforts to achieve the Millennium Development Goals.').

Secretary-General's proposal to incorporate full employment and decent work for all as a new target for the MDGs was accepted in late 2007.[254] The link between decent work and human rights is, however, still tenuous.

The central argument in this chapter is that work rights are key to eradicating poverty, but in the past thirty years have been generally overlooked, if not rejected outright, in poverty eradication policy-making at the international level. Following this introduction, Section 4.2 briefly explains the links between poverty and work. Section 4.3 outlines the uniqueness of work rights and the two legal regimes for addressing them: (1) the Conventions of the International Labour Organization (ILO), and (2) the international human rights treaties. This part also presents examples of regional and domestic case law that have drawn upon both ILO decisions and the work of the international human rights treaty bodies. Section 4.4 examines the dominant discourses in international poverty reduction, including market-based, decent work and human rights-based approaches. It concludes that a human rights-based approach, incorporating work rights, is the most coherent and therefore effective approach to eradicating poverty.

4.2. WORK AND POVERTY

Work is important as a source of income, as an act of self-expression and self-fulfilment, as a source of identity and dignity, as well as a venue for socialization (Mundlak 2007: 342). As a means of generating income, work is primarily instrumental, providing economic independence and the means to satisfy rights to other basic capabilities, for example, food, housing, health care and education (Mundlak 2007: 343; OHCHR 2006, para.7). Work is, however, also inherently valuable (OHCHR 2006, supra note 19, para. 7).[255] It impacts on one's self-worth; it allows one to externalize one's capacity; it also provides opportunities for individuals to contribute to and link with their communities (Mundlak 2007: 344; Collins 2003: 25). Indeed, unemployment contributes to social exclusion, loss of self-confidence and poor psychological and physical health (Sen 1999: 21). Unemployment also has devastating effects extending beyond the individual to family and community in the form of higher crime rates and higher divorce rates, for example (Lofaso 2007: 1). Nonetheless, work without work rights may have little to do with individual dignity and social inclusion. It may simply be low paying, dangerous, boring and demeaning (Mundlak 2007: 347; Chen et al. 2005:

254. UN General Assembly Report of the Secretary-General on the Work of the Organization, Official Records, Sixty-second Session, Supplement No. 1, UN Doc A/62/1, 2007, New York, United Nations, Annex II: 66, Goal 1(Proposed Target: Achieve full and productive employment and decent work for all, including women and young people); UN General Assembly Report of the Secretary-General on the work of the Organization, Official Records, Sixty-first Session, Supplement No. 1, UN Doc A/61/1, 2006, New York, United Nations, para. 24, (recommending new target under MDG 1 on decent work for all); ILO 2008: 12.

255. Value of work to obtain income is different from its value in itself.

19).[256] Work may not even pay for basic necessities, leaving those who work and their families in poverty.

Yet poverty is more than 'insufficient income' to pay for basic necessities (CESCR 2001: para. 7). Today, poverty is generally understood as a multi-dimensional phenomenon, with broad features such as 'hunger, poor education, discrimination, vulnerability and social exclusion' (CESCR 2001: para. 7). Drawing on the work of Sen, numerous UN development programmes and agencies now consider poverty to be the lack of basic capabilities to live in dignity (see for example UNDP 2000: Chapter 1). From a human rights perspective, 'poverty may be defined as a human condition characterized by sustained or chronic deprivation of resources, capabilities, choices, security, and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights' (CESCR 2001: para. 8). This multi-dimensional view of poverty corresponds to numerous human rights in poverty eradication. As the Committee on Economic, Social and Cultural Rights (CESCR) has stated, '[t]he rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the covenant, have a direct and immediate bearing upon the eradication of poverty' (CESCR 2001: para. 1). In this respect, poverty is a denial of human rights (CESCR 2001: para. 1).

Poverty is inextricably linked to work. In 2006, 1.4 billion people – 47.4 per cent of the total number of people employed – worked for less than US$2 per day, and 507 million of these people – 17.6 per cent of the total employed – worked for less than US$1 per day (UN Department of Economic and Social Affairs 2007: 5). In developed countries, poverty is measured relative to nationally established poverty lines substantially higher than US$1 or US$2 per day. Poverty, however, has the same characteristics in developed countries as in developing countries, including hunger, homelessness, lack of education, vulnerability and social exclusion. In 2006, the United States Census found that 12.3 per cent of the population – 36.5 million people – were living in poverty.[257] In the European Union, 16 per cent of the total population (72 million people) were living in poverty in 2005 (Eurostat 2005: 1). It is important to note that the majority of people living in poverty work.

Working in poverty has distinctive features, some of which are context-dependent (ILO 2003*b*: 110). Developed and developing countries share some forms of poverty work considered 'atypical', including part-time work, self-employment and temporary agency work. Atypical work accounts for 30 per cent of total employment in 15 European countries and 25 per cent of total employment in the United States (ILO 2002: 26). In the developing world, poverty work usually entails informal employment, self-employment, non-paid family work contributing to family-based economic activity, employment in subsistence production, vendors and home-based outworkers (ILO 2002: 7). Regardless of societal or geographical

256. Labour markets can serve to perpetuate poverty and disadvantage.
257. US Census Bureau, Poverty 2006 Highlights, http://www.census.gov/hhes/www/poverty/poverty06/pov06hi.html

context, all of the above forms of work lack formal labour and social protections (ILO 2002: 9).

Poverty is also intuitively linked to unemployment and an insufficient quantity of jobs.[258] The ILO estimates that world unemployment has hovered in the 6 per cent range since 1996 (ILO 2007*b*). Between 1996 and 2006, the number of unemployed worldwide increased by 34 million to 195 million despite average annual economic growth of 3.8 per cent (UN General Assembly 2007: para. 5). Yet, with respect to poverty, this is a problematic measure. Higher unemployment rates in developed economies, such as 6.9 per cent in the European Union compared to 5.3 per cent in South Asia in 2005, for example, do not take into account the relative levels of social protection in each of these regions (ILO 2007*b*: indicator No. 8). In fact, the lack of social protection, in developing countries in particular, is a factor pushing people to accept any work they can find, for any amount of pay and hours, no matter how precarious (UN Department of Economic and Social Affairs 2007: 2). This problem is illustrated by the case of Mexico, which reported only a 3.5 per cent unemployment rate in 2005. People in Mexico, however, cannot afford to be unemployed because there is no social protection, and therefore accept underemployment in informal jobs (ILO 2007*b*: indicator No. 8). Worldwide, there is very low coverage of access to social security during times of unemployment. Among the 80 per cent of the world's population unprotected by social security, approximately 20 per cent live in extreme poverty.[259]

Discrimination against people from marginalized and vulnerable groups in access to work and in working conditions contributes to their exclusion and exacerbates poverty. Not surprisingly, women earn less than men in every country in the world (UNDP 2005: 303-306), are overrepresented in informal jobs (UNICEF 2006: 37-50; Chen et al. 2005), and comprise the majority of poor people.[260] Similarly, young people are among the working poor with an estimated 515 million earning US$2 per day and 200 million earning less than US$1 per day (UN Department of Economic and Social Affairs 2007: 5). There are 470 million working-age persons with disabilities who are more likely to be unemployed, underemployed and living in poverty than able bodied persons (UN Department of Economic and Social Affairs 2007: 5-6). Indigenous peoples are disproportionately poor, making up 5 per cent of the world's population but 15 per cent of the world's poorest (UN Department of Economic and Social Affairs 2007: 6). There are also stark regional disparities in extreme poverty. Sub-Saharan Africa (55.4 per cent) and South Asia (34.4 per cent) have the greatest shares of

258. World Bank. Poverty Overview, Understanding Poverty, 'Poverty is not having a job' http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/0,,contentMDK:20153855~menuPK:373757~pagePK:148956~piPK:216618~theSitePK:336992,00.html (accessed 8 January 2008).

259. CESCR General Comment 19, The Right to Social Security: Article 9 of the International Covenant on Economic, Social and Cultural Rights (adopted on 23 November 2007), E/C.12/GC/19, 23, November 2007, para. 7.

260. UNIFEM World Poverty Day 2007: Investing in Women – Solving the Poverty Puzzle Facts & Figures (7 out of 10 of world's hungry are women and girls).

total people employed and earning less than US$1 per day (UN Department of Economic and Social Affairs 2007: 13).

One hundred years ago, the links between poverty and the inadequate quantity and quality of paid work were well recognized. Shelton notes that the dangers of denying a decent living were apparent when revolution came to Mexico, Russia and Ireland, and riots occurred in Germany, Austria and Italy (Shelton 2007: 10). In response, the international community established the ILO and began adopting international labour rights standards. In recent decades, the links between work, poverty and human rights have been largely ignored in the international agenda due in large part to the hegemonic ascendancy of neo-liberal ideology and policies (Bedggood and Humphries 2002: 1). It is time to bring work rights back to the forefront of international development and security policy and practice.

4.3. LEGAL FRAMEWORKS FOR WORK RIGHTS

4.3.1. The Uniqueness of Work Rights

The protection of work rights has had a separate history from that of other economic, social and cultural rights, or indeed from civil and political rights (Valticos 1998). Although there are obvious links with the anti-slavery movement, and later with the broader civil right to freedom of association, it was the deprivations associated with the industrial revolution that spurred the development of work rights (Shelton 2007: 10). The burgeoning numbers of exploited workers in urban areas, including children, provoked reform movements at both local and international level, including the trade union movement (Shelton 2007: 10). Recognition of the need to identify and protect work rights was coupled with the development of mechanisms for that protection. These protections were consolidated in the formation of the ILO.

Eventually, work rights, as an aspect of industrial relations, became governed by complex domestic legal regimes, which varied markedly according to historical and societal differences, as to, for example, the role of the state, the position of trade unions with respect to membership and collective bargaining, and the structure of the legal framework, including specialist tribunals to address industrial issues. One notable feature of these mechanisms, both at international and local level, is the tripartite model of negotiation and agreement, with states, trade unions and employer organizations, that is these three key interested players, all equally involved ('Tripartism is our strength and our unique contribution', ILO 2003: vi). Although these industrial relations regimes varied from country to country, they have nevertheless retained this unique framework. For the most part, despite the complicated nexus of law, policy and politics in industrial relations regimes, they have been constituted within legal frameworks and protections.

One of the drawbacks of the ILO and most domestic systems has been the difficulty of extending rules and protections beyond organized labour to the

informal sector, and to unpaid household and subsistence work, sectors that in many countries account for a large proportion of people living in poverty. This difficulty stems largely from the origin of work-related rights in the industrialized sector. In the local context, this limitation is exacerbated by a combination of factors. While workers in trade unions may have substantial protections, those without union membership may have no protection at all. The recent crisis of the trade union movement, due to the growth of market-oriented approaches, has therefore resulted in a shift to more work without union protections. Contrary to predictions in the 1950s and 1960s, the informal sector has grown rather than formalizing.[261]

Despite this gap in protection, work rights share with other economic, social and cultural rights, and indeed with all human rights, a focus on protecting the most vulnerable groups in society. Both ILO and human rights conventions, reports and general comments target, for example, the work-related needs of women, children, migrants, people with disabilities, racial and ethnic minorities and indigenous peoples.[262] Similarly, at local levels, legislation and processes may protect the rights of women to equal pay and in pregnancy, for example, and general non-discrimination statutes may also apply to recruitment and promotion procedures. The grounds enumerated under these non-discrimination laws vary considerably across jurisdictions.

In sum, complex frameworks and mechanisms are developed at both local and international level for protecting a variety of work-related rights, without these being recognized in many – or any – contexts as part of a human rights regime. As a result, work rights and the ILO remained separate for many years from the human rights movement. In this chapter, we use the term 'work rights', as opposed to labour or employment rights, in order to encompass a wide range of work-related rights enumerated in international human rights instruments. In particular, we want to stress the importance of including trade union rights, especially the right to collective bargaining and the right to strike, as necessary, to ensure and defend decent work and reasonable conditions. This broader sense of work rights also includes the right to social security when work is unavailable or when people are unable to work due to sickness, old age, employment injury, maternity, disability, or other reason beyond their control.[263]

Work rights are now protected at international, regional and domestic level. At international level, there are two primary frameworks for legal protection of work rights: the ILO Conventions and international human rights treaties. This section gives an overview of these two legal regimes and their relationship with

261. More recently there has been increased attention given to the informal sector at the international level and increased activity, such as the formation of unions for the protection of informal workers. See, for example, ILO 2002; CESCR General Comment 18, paras. 10, 46; Chen et al. 2005: 79-81.

262. See infra section IIIB generally on ILO conventions and IIIC on international human rights treaties protecting specific vulnerable groups.

263. CESCR, General Comment 19, paras. 14, 15, 17, 19, 20; Universal Declaration of Human Rights (UDHR), arts. 22, 25(1).

each other. It then briefly looks at the regional systems and documents case law at regional and domestic level incorporating ILO and international human rights standards.

4.3.2. International Labour Organization

'In many ways, the ILO was a pioneer of international action against poverty' (ILO 2001). The ILO was founded as part of the League of Nations at the end of the First World War (Leary 1997: 210). Its purpose is to adopt international standards to cope with the problems of labour conditions involving 'injustice, hardship and privation'.[264] At the end of the Second World War, the ILO became one of the United Nations Specialized Agencies, and in the Declaration of Philadelphia its standard-setting mandate was formally broadened to include more general but related social policy and human rights matters (Leary 1997: 11). Today, the ILO has 181 members,[265] and it is unique among international governance institutions in its tripartite structure with employer and worker representatives, as well as state parties participating and voting on standard-setting (Helfer 2006: 649-726, 651-652). From the beginning, the ILO was built upon the fundamental belief that there can be no world peace without social peace within each member state.[266] At the time of its founding, social peace was also recognized as a key means of preventing socialist revolution such as that which occurred in Russia (Helfer 2006: 679). Also, the ILO maintained that the prosperity of richer countries was threatened by poverty in poorer countries.[267]

The ILO establishes work rights through its role of legislating, supervising and monitoring labour rights conventions, by administering complaint procedures (Leary 1997: 220) and by providing member states with technical assistance (Leary 1997: 211). Conventions as well as non-binding recommendations are adopted at the ILO's annual International Labour Conference. When a convention is adopted, member states are not required to ratify it but are expected to examine and explain their non-ratification. After a member state formally ratifies a convention, it becomes legally obligated to comply by ensuring its domestic laws and practices conform to the convention and by submitting reports on a regular basis for purposes of supervision (Helfer 2006: 683, 687). Supervision and monitoring of compliance with conventions is carried out by the ILO committees such as the Committee of Experts on the Application of Conventions and Recommendations, the Conference Committee on the Application of Standards and the Committee on Freedom of Association (Swepston 1999). In the process of monitoring and supervising, these committees further elaborate the content of the rights contained

264. ILO Constitution, preamble available at: www.ilo.org/ilolex/english/constq.htm.
265. ILO, Alphabetical List of ILO member countries (181 countries): www.ilo.org/public/english/standards/relm/country.htm, accessed 18 January 2008.
266. See ILO Constitution, preamble.
267. ILO Constitution, preamble available at: www.ilo.org/ilolex/english/constq.htm.

in ILO conventions in light of various employment practices (Swepston 1999). The ILO's enforcement approach relies almost entirely on 'naming and shaming'. The few other enforcement mechanisms are rarely used (see for example, Tapiola 2007: 33).

To date, the ILO has adopted 188 conventions, although 30 of these have been either withdrawn or shelved because they are outdated.[268] ILO conventions address the right to work, the right to just and favourable conditions of work, trade union rights and the right to social security.[269] For example, Convention 122[270] obligates state parties to 'create conditions for full employment', and Convention 158[271] establishes valid and lawful grounds for dismissal from employment and worker rights to legal redress in cases of unjustified dismissal. Protection of the right to freely choose work is established in Conventions 29[272] and 105[273] abolishing forced labour. Convention 142 calls upon states to establish on-going general, technical and vocational training.[274]

Some conventions protect the rights of specific vulnerable groups, such as Convention 169[275] on indigenous and tribal peoples, Conventions 3[276] and 183[277]

268. ILO Conventions and Ratifications, www.ilo.org/ilolex/english/condisp1.htm, accessed 19 January 2008.
269. These rights parallel provisions of the International Covenant on Economic, Social and Cultural Rights (arts. 6, 7, 8, 9). The Committee on Economic, Social and Cultural Rights (CESCR), responsible for monitoring state compliance with the ICESCR has issued general comments on two of these rights: General Comment No. 18 on the right to work and General Comment 19 on the right to social security. General Comment 18 specifically refers to the ILO Conventions and points out that protecting the right to work is a 'key function of the International Labour Organization' CESCR General Comment 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/GC18, 6 February 2006, para. 53. Similarly, General Comment 19 refers to the ILO Conventions relevant to the right to social security. CESCR General Comment 19, para. 12, 19, 24, 26, 31, 33.
270. Convention concerning Employment Policy, ILO Convention No. 122 Employment Policy Convention (adopted 9 July 1964, entered into force 15 July 1966).
271. Convention concerning Termination of Employment at the Initiative of the Employer, ILO Convention No. 158 Termination of Employment Convention (adopted 22 June 1982, entered into force 23 November 1985).
272. Convention concerning Forced or Compulsory Labour, ILO Convention No. 29 Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932).
273. Convention concerning the Abolition of Forced Labour, ILO Convention No. 105 Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959).
274. Convention concerning Vocational Guidance and Vocational Training in the Development of Human Resources, ILO Convention No. 142 Human Resources Development Convention (adopted 23 June 1975, entered into force 19 July 1977).
275. Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169 Indigenous and Tribal Peoples Convention (adopted 27 June 1989, entered into force 5 September 1991).
276. Convention concerning the Employment of Women before and after Childbirth, ILO Convention No. 3 Maternity Protection Convention (adopted 28 November 1919, entered into force 13 June 1921, revised by Convention No. 103 in 1952).
277. Convention concerning the revision of the Maternity Protection Convention (Revised), ILO Convention No. 183 Maternity Protection Convention (adopted 15 June 2000, entered into force 7 February 2002).

on women and maternity protection and Conventions 138[278] and 182[279] on the abolition of child labour, especially its worst forms. Convention 159 on vocational rehabilitation and employment (disabled persons) obliges states to formulate, implement and periodically review vocational rehabilitation and employment policy for disabled persons.[280] Conventions 100[281] and 111[282] guarantee equal access and treatment at work and the elimination of discrimination in employment.

Examples of conventions related to working conditions include Convention 26[283] on minimum wages, Conventions 52[284] and 132[285] on holidays and holiday pay, Convention 155[286] on occupational safety and health, Conventions 1,[287] 30[288] and 47[289] on hours of work, and Convention 14[290] and 106[291] on weekly rest. Conventions relevant to freedom of association, trade union and collective bargaining rights

278. Convention concerning Minimum Age for Admission to Employment, ILO Convention No. 138 Minimum Age Convention (adopted 26 June 1973, entered into force 19 June 1976).
279. Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182 Worst Forms of Child Labour Convention (adopted 17 June 1999, entered into force 19 November 2000).
280. Convention concerning Vocational Rehabilitation and Employment (Disabled Persons), ILO Convention No. 159 Vocational Rehabilitation and Employment (Disabled Persons) Convention (adopted 20 June 1983, entered into force 20 June 1985).
281. Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, ILO Convention No. 100 Equal Remuneration Convention (adopted 29 June 1951, entered into force 23 May 1953).
282. Convention concerning Discrimination in Respect of Employment and Occupation, ILO Convention No. 111 Discrimination (Employment and Occupation) Convention (adopted 25 June 1958, entered into force 15 June 1960).
283. Convention concerning the Creation of Minimum Wage-Fixing Machinery, ILO Convention No. 26 Minimum Wage-Fixing Machinery Convention (adopted 16 June 1928, entered into force 14 June 1930).
284. Convention concerning Annual Holidays with Pay, ILO Convention No. 52 Holidays with Pay Convention (adopted 24 June 1936, entered into force 22 September 1939, revised by Convention No. 132 in 1970 and no longer open to ratification).
285. Convention concerning Annual Holidays with Pay (Revised), ILO Convention No. 132 Holidays with Pay Convention (Revised) (adopted 24 June 1970, entered into force 30 June 1973).
286. Convention concerning Occupational Safety and Health and the Working Environment, ILO Convention No. 155 Occupational Safety and Health Convention (adopted 22 June 1981, entered into force 11 August 1983).
287. Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, ILO Convention No. 1 Hours of Work (Industry) Convention (adopted 28 November 1919, entered into force 13 June 1921).
288. Convention concerning the Regulation of Hours of Work in Commerce and Offices, ILO Convention No. 30 Hours of Work (Commerce and Offices) Convention (adopted 28 June 1930, entered into force 29 August 1933).
289. Convention concerning the Reduction of Hours of Work to Forty a Week, ILO Convention No. 47 Forty-Hour Week Convention (adopted 22 June 1935, entered into force 23 June 1957).
290. Convention concerning the Application of the Weekly Rest in Industrial Undertakings, ILO Convention No. 14 Weekly Rest (Industry) Convention (adopted 17 November 1921, entered into force 19 June 1923).
291. Convention concerning Weekly Rest in Commerce and Offices, ILO Convention No. 106 Weekly Rest (Commerce and Offices) Convention (adopted 26 June 1957, entered into force 4 March 1959).

include Conventions 11,[292] 84,[293] 87[294] and 98.[295] Finally, conventions also deal with welfare policy and social insurance protection including Convention 102,[296] on social security (minimum standards) and Convention 168,[297] on employment promotion and protection against unemployment.

ILO conventions have received widely varied numbers of ratifications (Leary 1997: 212). For example, 172 countries have ratified Convention 29 on forced labour,[298] while only 43 countries have ratified Convention 102 on social security (minimum standards),[299] and only seven countries have ratified Convention 168 on employment promotion and protection against unemployment.[300] Despite varied levels of ratification, ILO supervision of conventions by its quasi-judicial expert committees, such as the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, elaborate the content of the norms in various conventions by documenting discrepancies between a convention and a state party's law and practice (Leary 1997: 220-221). Moreover, the human rights treaty bodies, as well as regional and domestic courts, have often adopted the ILO committee interpretations of work rights.[301]

For example, the Committee on Freedom of Association made numerous requests to Canada, following complaints alleging violations of freedom of association and collective bargaining rights, to reform its legislation.[302] In 2007, the

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292. Convention concerning the Rights of Association and Combination of Agricultural Workers, ILO Convention No. 11 Right of Association (Agriculture) Convention (adopted 12 November 1921, entered into force 11 May 1923).
293. Convention concerning the Right of Association and the Settlement of Labour Disputes in Non-Metropolitan Territories, ILO Convention No. 84 Right of Association (Non-Metropolitan Territories) Convention (adopted 11 July 1947, entered into force 1 July 1953).
294. Convention concerning Freedom of Association and Protection of the Right to Organize, ILO Convention No. 87 Freedom of Association and Protection of the Right to Organize Convention (adopted 9 July 1948, entered into force 4 July 1950).
295. Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, ILO Convention No. 98 Right to Organize and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951).
296. Convention concerning Minimum Standards of Social Security, ILO Convention No. 102 Social Security (Minimum Standards) Convention (adopted 28 June 1952, entered into force 27 July 1955).
297. Convention concerning Employment Promotion and Protection against Unemployment, ILO Convention No. 168 Employment Promotion and Protection against Unemployment Convention (adopted 21 June 1988, entered into force 17 October 1991).
298. ILO Convention No. 29 Forced Labour Convention, ratifications available at: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C029 (accessed 22 March 2008).
299. ILO Convention No. 102 Social Security (Minimum Standards) Convention, ratifications available at: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C102 (accessed 22 March 2008).
300. ILO Convention No. 168 Employment Promotion and Protection against Unemployment Convention, ratifications available at: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C168 (accessed 22 March 2008). ILO Convention Ratifications, http://www.ilo.org/ilolex/english/condisp1.htm (accessed 19 January 2008).
301. For a discussion of similarities and differences between ILO Conventions and ICESCR provisions, see generally Craven 1995: 194-225 (the right to work): 226-247 (just and favourable condition of work): 248-286 (the right to form and join trade unions); ILO 1969. Comparative Analysis of the International Covenants on Human Rights and International Labour Conventions and Recommendations. *Official Bulletin,* Geneva, Vol. LII, No. 2: 181-216.
302. Biffl and Isaac 2005: 425-426.

Canadian Supreme Court ruled that its long-standing exclusion of the procedural right to collective bargaining as a part of freedom of association within the Canadian Charter of Rights, did not 'withstand principled scrutiny and should be rejected'.[303] Part of the Supreme Court's reasoning was based on its 'adherence to international documents recognizing a right to collective bargaining'.[304] The Court ruled, '[t]he Charter should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified'.[305] Finally, the court explicitly invoked 'numerous interpretations' by the ILO committees, which, 'while not binding', were relied upon by the Court to shed light on the scope of the right to collective bargaining under the Canadian Constitution.[306]

ILO conventions have also been influential with respect to the right to social security.[307] In 2005, the Supreme Court of Venezuela issued an opinion concerning the new Social Security System Law, which failed to provide benefits to employees who were suspended or fired and who had been covered under the previous social security law.[308] The Court ruled that the new law violated 'the fundamental right to social security under article 86 of the Venezuelan Constitution' and the legislation also 'implied a violation of international conventions (duly executed by Venezuela) that reflected the right to social security and its essential elements, such as ILO Convention No. 102 related to "Minimum Social Security Standards"'.[309] Domestic and international claims were both possible because article 86 of Venezuela's Constitution provided the basis for the domestic claim while article 23 of Venezuela's Constitution allowed a direct claim under international human rights treaties.[310]

Not all ILO expert opinions successfully bring about compliance. For example, during the 1980s, the Committee on Freedom of Association upheld numerous complaints against the UK Government for non-compliance with Conventions 87 and 98 on freedom of association and collective bargaining, but the Committee's repeated requests for legislative changes to bring UK law into compliance were ignored, raising the Committee's 'deep concern' (Biffl and Isaac 2005: 427). Nonetheless, decisions of the ILO committees, in general, have had considerable impact; the Committee of Experts on the Application of Conventions

303. Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27, para. 22.
304. Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27, para. 70.
305. Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27, para. 70.
306. Facilities Subsector Bargaining Assn. v British Columbia, 2007 SCC 27, paras 76, 77.
307. *Demanda de inconstitucionalidad por omisión de la Asamblea Nacional al promulgar la Ley Orgánica de Seguridad Social*: Summarized in English at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=412549&country=13659. Accessed 19/01/2008.
308. Demanda de inconstitucionalidad por omisión de la Asamblea Nacional al promulgar la Ley Orgánica de Seguridad Social.
309. Demanda de inconstitucionalidad por omisión de la Asamblea Nacional al promulgar la Ley Orgánica de Seguridad Social.
310. Constitution of the Bolivarian Republic of Venezuela, article 23, Asamblea Nacional Constituyente, Caracas, 1999, www.mci.gob.ve. The CESCR welcomed the adoption of Article 23 as part of the 1999 Constitution, CESCR Concluding Observations, Venezuela, UN doc, E/C.12/1/Add.56, 21 May 2001 para. 3.

and Recommendations noted 2,200 cases between 1964 and 1998 in which governments took the measures requested of them (Swepston 1999: 87). Further, their decisions have immeasurable impact by their integration into international human rights, regional and domestic legal regimes.[311]

4.3.3. International Human Rights Treaties

The second international legal regime on work rights was established by the United Nations following the Second World War. The Universal Declaration of Human Rights (UDHR), adopted in 1948 by the UN General Assembly, is the foundation of the international human rights legal regime. The UDHR recognizes numerous work rights[312] and is implemented in two international treaties: the Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Compliance with both the ICCPR and ICESCR is monitored by committees, which, like the ILO committees, are responsible for examining reports periodically submitted by state parties and engaging state parties in dialogue about implementation of the rights. The committees also issue comments clarifying the normative content of rights, including work rights, and the obligations of state parties. The Human Rights Committee, responsible for monitoring the ICCPR, also receives and considers 'communications from individuals subject to its jurisdiction who claim to be victims of a violation' of any of the rights in the Covenant.[313] A similar procedure for the Committee on Economic, Social and Cultural Rights (CESCR), responsible for monitoring the ICESCR, is currently under consideration.[314]

Many of the work rights enumerated in the ICCPR and in the ICESCR overlap with rights protected by ILO conventions. They include, in the ICCPR, the right to be free from slavery, forced labour and servitude,[315] the right of peaceful assembly,[316] the right to freedom of association including the right to form and

311. Indeed, the *travaux préparatoires* indicate that during drafting of the ICESCR, 'it was argued that it was better to state the principle of the right to work in general terms leaving the specifics of implementation to the ILO' (Craven 2002: 200).
312. UDHR art 4 (prohibition of slavery and servitude), art. 7 (prohibition against discrimination), art. 20 (right to freedom of peaceful assembly and association), art. 22 (right to social security), art. 23 (rights to work, free choice of employment, just and favourable conditions of work, protection against unemployment, equal pay for equal work, to form and to join trade unions), art. 24 (right to rest and to reasonable working hours and periodic holidays with pay), art. 25 (right to adequate standard of living).
313. First Optional Protocol to the International Covenant on Civil and Political Rights, 1966.
314. In June 2008 the UN Human Rights Council adopted an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and recommended it to the General Assembly, A/HRC/RES/8/2; see http://www2.ohchr.org/english/bodies/hrconcil/8session/resolutions.htm. For a full history and continuing updates see http://www.bayefsky.com/tree.php/id/10332 Amendments to the Treaties, New Treaties – Drafting Stage.
315. ICCPR art. 8.
316. ICCPR art. 21.

join trade unions,[317] and, in the ICESCR, the right to work,[318] the right to just and favourable conditions of work,[319] trade union and collective bargaining rights[320] and the right to social security.[321] Other international human rights treaties protect work rights of specific marginalized groups. These include the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[322] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[323] the Convention on the Rights of the Child (CRC),[324] the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW)[325] and the Convention on the Rights of Persons with Disabilities (CRPD) adopted in 2006, opened for signatures in March of 2007 and entered into force 3 May 2008.[326] Each of these core human rights treaties has a committee that is responsible for monitoring implementation and compliance. Further, the CESCR has issued general comments addressing the work rights of specific vulnerable groups including older persons,[327] persons with disabilities[328] and the equal rights of men and women.[329]

This chapter focuses specifically on the work rights in the ICESCR because it is the most comprehensive – covering the right to work, working conditions, union rights and the right to social security – and the most widely applicable, having been ratified by 157 countries as of 11 October 2007 and applying to all people in those countries.[330] Article 6 protects the right to work, which is the right of 'everyone to the opportunity to gain his living by work which he freely chooses

317. ICCPR art. 22.
318. ICESCR art. 6.
319. ICESCR art. 7.
320. ICESCR art. 8.
321. ICESCR art. 9.
322. Convention on the Elimination of All Forms of Racial Discrimination (CERD) (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195, art. 5.
323. Convention on the Elimination of Discrimination Against Women (CEDAW) (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13, arts. 11, 13, 14.
324. Convention on the Rights of the Child (CRC) (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts. 15, 27, 32, 34.
325. International Convention on the Protection of the Rights of all Migrant Workers and Members of their Family (CMW) (adopted 18 December 1990, entered into force 1 July 2003), UN Doc.A/45/49(1990), generally and specifically arts. 7, 11, 25, 26, 27, 32, 40, 47, 51, 52, 53 54, 55, 56 etc.
326. Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, opened for signature 30 March 2007, entered into force 3 May 2008).
327. Committee on Economic, Social and Cultural Rights (CESCR). The Economic, Social and Cultural Rights of Older Persons: CESCR General Comment 6, 08/12/95, Thirteenth Session, 1995 pp. 1-10.
328. Committee on Economic, Social and Cultural Rights (CESCR). Persons with Disabilities: CESCR General Comment 5, 09/12/94 pp. 1-11.
329. Committee on Economic, Social and Cultural Rights (CESCR). Substantive Issues Arising in the Implementation of The International Covenant on Economic, Social and Cultural Rights, General Comment No. 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights, Article 3 of the International Covenant on Economic, Social and Cultural Rights, E/C.12/2005/4.
330. OHCHR, Ratifications of the International Covenant on Economic, Social and Cultural Rights, http://www2.ohchr.org/english/bodies/ratification/3.htm, accessed 19 January 2008.

or accepts', and state parties to the treaty are obligated to 'take appropriate steps to safeguard this right'.[331] Recognition of the right to work in the ICESCR is followed by a 'non-exhaustive' list of steps that states parties are obligated to take.[332] These include 'technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual'.[333]

The CESCR has issued General Comment 18 on article 6, which details the normative content of the right to work, explains the state parties' obligations, provides examples of violations and discusses implementation at the national level.[334] For example, the Comment states that the right 'to decide freely to accept or choose work' implies 'not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment'.[335] According to the Comment, the right to work 'also implies the right not to be unfairly deprived of employment'.[336] Work must be decent work, which respects the fundamental rights of the person as well as the rights of workers in terms of conditions and remuneration.[337] It must provide an income allowing workers to support themselves and their families.[338] Notably, the comment declares that Articles 6, 7 and 8 of the Covenant are closely related and interdependent.[339]

Article 7 establishes that everyone has a right to just and favourable working conditions, 'fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men'.[340] Further, work must provide 'a decent living' for the worker and his or her family, including 'safe and healthy working conditions',[341] 'equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence'[342] and the right to 'rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'.[343]

Article 8 protects the right of everyone to form and join trade unions of their choice.[344] It also protects the right of trade unions to function freely, including the

331. ICESCR art. 6.1.
332. CESCR General Comment 18, para. 6.
333. ICESCR art. 6.2.
334. CESCR General Comment 18.
335. CESCR General Comment 18, para. 6.
336. CESCR General Comment 18, para. 6.
337. CESCR General Comment 18, para. 7.
338. CESCR General Comment 18, para. 7.
339. CESCR General Comment 18, para. 8.
340. ICESCR art. 7(a)(i).
341. ICESCR art. 7(b).
342. ICESCR art. 7(c).
343. ICESCR art. 7(d).
344. ICESCR art. 8(1)(a).

right to strike.[345] Limitations on the rights of trade unions are permitted where prescribed by law and 'necessary in a democratic society in the interest of national security or public order or for the protection of the rights and freedoms of others'.[346] There are also other limitations on the rights enumerated in Article 8, including recognition of lawful restrictions on the exercise of these rights by members of the armed forces and police.[347] The Committee has not yet issued general comments on Articles 7 or 8.

Finally, Article 9 recognizes 'the right of everyone to social security, including social insurance'.[348] The CESCR General Comment 19 outlines the normative content of the right to social security under Article 9, explains the state parties' obligations, provides examples of violations and discusses implementation at the national level.[349] In particular, the Comment notes that '[s]ocial security through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and in promoting social inclusion'.[350] Recognizing the relationship of poverty to work, the Comment further states, 'The right to social security encompasses the right to access and maintain benefits without discrimination in order to secure protection, inter alia, from (a) *lack of work-related income* caused by sickness, disability, maternity, employment injury, unemployment, disability, old age, or death of a family member, (b) *unaffordable access to health care* (c) *insufficient family support*, particularly for children and adult dependents'.[351]

The Comment further recognizes that '[t]he right to social security is of central importance in guaranteeing human dignity for all persons' deprived of their capacity to otherwise fully realize their human rights.[352]

While some work rights, like other economic and social rights, are to be progressively realized, the CESCR in General Comment 18 also states that most work rights impose immediate obligations on state parties. These rights include the guarantee against discrimination of any kind,[353] the right to be free from slavery, forced labour and servitude,[354] the right of peaceful assembly,[355] the right to freedom of association with others,[356] the right to form and join trade unions,[357] the equal rights of men and women,[358] the right to just and favourable working

345. ICESCR art. 8(1)(b) and (c).
346. ICESCR art. 8.
347. ICESCR art. 8(2).
348. ICESCR art. 9.
349. CESCR General Comment 19.
350. CESCR General Comment 19, para. 3.
351. CESCR General Comment 19, para. 2.
352. CESCR General Comment 19, para. 1.
353. CESCR General Comment 18, para. 19.
354. ICCPR art. 8.
355. ICCPR art. 21.
356. ICCPR art. 22(1).
357. ICCPR art. 22(1); CESCR General Comment No. 9: The Domestic Application of the Covenant, E/C.12/1988/24, 3 December 1998, para. 10 (listing articles of ICESCR of immediate application, including art. 8).
358. CESCR General Comment No. 9, para. 10 (art. 3 is immediate obligation).

conditions, including fair wages and equal remuneration for work of equal value,[359] the right of trade unions to function freely,[360] and the right to strike.[361]

The CESCR also clarifies the content of work rights and the obligations of state parties in concluding observations to state party reporting. For example, in 2007, the Committee's Concluding Observation on Costa Rica indicated concern 'about the persisting wage gap between men and women and the high unemployment rate among women'.[362] The Committee also indicated concern about working conditions of domestic workers – mostly migrant women – who are paid the lowest minimum wage and work over eight hours a day with inadequate rest, pensions and vacations.[363] Other areas of concern included: (1) the high rate of workers in the informal sector, particularly immigrants, refugees, ethnic minorities and persons with disabilities; (2) poor working conditions in rural and remote areas; (3) 'harassment, blacklisting and dismissal of trade unionists, in particular in the banana industry, where dismissals of unionized workers in large numbers have been reported'; (4) the incompatibility with Article 8 of the restrictions on the participation of foreigners in trade unions; and (5) the continuing insufficiency of the social pension system coverage.[364]

Similarly, the Committee's Concluding Observations on the Ukraine noted concern that job vacancy announcements frequently indicate preference for employing men in managerial positions and discriminate on the basis of age and physical appearance of female candidates.[365] In addition, women are disproportionately affected by unemployment and increasingly employed in low-paid jobs and only few Roma can find regular employment.[366] The Committee also noted (1) that the minimum wage does not provide an adequate standard of living for workers and their families, and that 6.6 per cent of workers receive less than the minimum wage; (2) the high number of industrial accidents, including fatal accidents; (3) employer obstruction of independent trade unions, pressure to resign trade union membership and intimidation of trade union leaders; and (4) that unemployment benefits amount to only 50 per cent of the minimum subsistence level, and social assistance is also inadequate to ensure an adequate standard of living.[367]

359. CESCR General Comment No. 9, para. 10 (art. 7 (a) (i) is immediate obligation).
360. CESCR General Comment No. 9, para. 10 (art. 8 (1) (c) is immediate obligation).
361. CESCR General Comment No. 9, para. 10 (art. 8 (1) (d) is immediate obligation).
362. CESCR Concluding Observations, Costa Rica, UN doc, E/C.12/CRI/CO/4, 23, November 2007, para. 15.
363. CESCR Concluding Observations, Costa Rica, UN doc, E/C.12/CRI/CO/4, 23, November 2007, para. 15.
364. CESCR Concluding Observations, Costa Rica, UN doc, E/C.12/CRI/CO/4, 23, November 2007, para. 16, 17, 18.
365. CESCR Concluding Observations, Ukraine, UN doc, E/C.12/UKR/CO/5, 23, November 2007, para. 13.
366. CESCR Concluding Observations, Ukraine, UN doc, E/C.12/UKR/CO/5, 23, November 2007, para. 13, 14.
367. CESCR Concluding Observations, Ukraine, UN doc, E/C.12/UKR/CO/5, 23, November 2007, para. 15, 16, 17, 18.

Obstacles to the exercise of work rights exist not only in developing and transitioning countries, but also in developed countries. The CESCR Committee's 2007 Concluding Observations on Belgium, for example, notes that de facto discrimination against foreigners, ethnic minorities, migrant workers, Muslim and Roma peoples is widespread in employment.[368] Moreover, the Committee indicated concern about high unemployment rates among women, persistent wage differentials for men and women and the low percentage of women in high-ranking posts, including in public administration and universities.[369] Similarly, employment opportunities for young people, people over 55 and foreign residents continue to be considerably higher than in the European Union on average.[370] Finally, the Committee noted significant obstructions to the exercise of the right to strike, particularly the possibility that workers may be dismissed for participating in a strike.[371]

The ICCPR, the ICESCR and the Committees' General Comments and Concluding Observations also guide courts at regional and domestic level on the normative content of work rights enumerated in both the international treaties and in domestic laws. For example, in 2006, the Constitutional Court of Latvia found that its domestic law was inconsistent with the right to social security as established by ICESCR Articles 9 (social security) and 11 (adequate standard of living), as well as the CESCR General Comments. The Court ruled that Latvian law and its enforcement did not protect employees from employers who failed in their obligation to contribute social insurance premiums on their employees' behalf. While the manner of implementation of the norms to guarantee the right to social security is at the discretion of the state, the state 'must develop an efficient mechanism … in order to guarantee the right'.[372] Courts may also refer to both international human rights treaties and ILO conventions in deciding on alleged violations of work rights.[373]

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368. CESCR Concluding Observations, Belgium, UN doc, E/C.12/BEL/CO/3, 23, November 2007, para. 14.
369. CESCR Concluding Observations, Belgium, UN doc, E/C.12/BEL/CO/3, 23, November 2007, para. 15.
370. CESCR Concluding Observations, Belgium, UN doc, E/C.12/BEL/CO/3, 23, November 2007, para. 16.
371. CESCR Concluding Observations, Belgium, UN doc, E/C.12/BEL/CO/3, 23, November 2007, para. 17.
372. Case No. 2000-08-0109 Constitutional Court of Latvia ('On Compliance of Item 1 of the Transitional Provisions of the Law "On Social Insurance" with Articles 1 and 109 of the Satversme (Constitution) of the Republic of Latvia and Articles 9 and 11 (the First Part) of the December 16, 1966 International Covenant on Economic, Social and Cultural Rights'), Riga, 13, 9 May 2006, summarized in English at: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=400782&country=13565, accessed19 January 2008.
373. 'A review of jurisprudence shows that courts and tribunals in all parts of the world have proven to be innovative in using international labour instruments.' (Thomas, Oelz and Beaudonnet 2004: 284). This article also gives examples of cases drawing on ILO Conventions in conjunction with CEDAW, ICCPR and ICESCR (Thomas, Oelz, and Beaudonnet 2004: 270-271, 275-276). See for example *Facilities Subsector Bargaining Assn. v British Columbia,* 2007 SCC 27, para. 71, 72, 73, 74 (relying on ICESCR article 8, ICCPR article 22 and ILO Convention No 87 for holding that right of association includes right to collective bargaining).

4.3.4. Regional and Domestic Work Rights

The work rights protected in ICCPR Articles 8, 21 and 22, as well as in ICESCR Articles 6, 7, 8 and 9, are also protected to varying degrees in regional human rights regimes, including the Inter-American,[374] European[375] and African systems.[376] The courts in each of these systems also look to international human rights and ILO law to interpret work rights provisions in regional human rights conventions. For example, in *Baena Ricardo v Panama*, the Inter-American Court of Human Rights relied upon an ILO Freedom of Association expert decision in overturning the Government of Panama's dismissal of 270 union activists.[377]

In Baena, the government fired public sector employees, including union leaders, for participating in a peaceful rally and a work stoppage to protest government policies such as privatization.[378] Coincidently, the work stoppage occurred on the same day that a military leader escaped from prison and led a partial takeover of the national police offices.[379] Although the union suspended its action to prevent it being associated with the escape and takeover,[380] the government alleged that the union's actions were a form of subversive support for the military takeover attempt, and consequently it dismissed the employees.[381] The government later enacted Law 25, which retroactively dismissed all public servants who had participated in the union actions.[382] Law 25 also retroactively replaced the due process rights of the dismissed state employees to appeal to

374. American Convention on Human Rights, entered into force 18 July 1978, 1144UNTS 123 arts. 6 (freedom from slavery), 15 (right of assembly), 16 (freedom of association); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, signed 17 November 1988 arts. 3 (obligation of nondiscrimination), 6 (right to work), 7 (just, equitable and satisfactory conditions of work), 8 (trade union rights), 9 (right to social security).

375. European Convention for the Protection of Human Rights and Fundamental Freedoms entered into force 3 September 1953, arts. 4 (prohibition of slavery and forced labour), 11 (freedom of assembly and association); European Social Charter, adopted 1961 and revised 1996, arts. 1 (right to work), 2 (right to just conditions of work), 3 (right to safe and healthy working conditions), 4 (right a fair remuneration), 5 (right to organize), 6 (right to bargaining collectively), 7 (right of children and young persons to protection), 8 (right of employed women to protection), 12 (right to social security), 13 (right to social and medical assistance), 14 (right to benefit from social welfare services).

376. African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986, arts. 5 (prohibition of slavery), 15 (right to work, satisfactory conditions, equal pay for equal work), 10 (right to association), 11 (right assemble freely with others).

377. *Baena Ricardo v Panama,* Inter-American Court of Human Rights, Series C No. 72, 2 February 2001, para. 162, 163, 164, 165.

378. *Baena Ricardo v Panama,* Inter-American Court of Human Rights, Series C No. 72, 2 February 2001, para 88 (a), (b), (c).

379. *Baena Ricardo v Panama,* Inter-American Court of Human Rights, Series C No. 72, 2 February 2001, para 88 (d).

380. *Baena Ricardo v Panama,* Inter-American Court of Human Rights, Series C No. 72, 2 February 2001, para 88 (e).

381. *Baena Ricardo v Panama,* Inter-American Court of Human Rights, Series C No. 72, 2 February 2001, para 88 (i), (j).

382. *Baena Ricardo v Panama,* Inter-American Court of Human Rights, Series C No. 72, 2 February 2001, para 88 (i).

labour courts,[383] by allowing appeals only to courts dealing with administrative matters.[384] Panamanian Courts upheld the dismissals.[385]

In addition to challenging the dismissals in domestic courts, workers and their trade unions initiated complaints with the ILO Committee on Freedom of Association,[386] and the non-governmental organization (NGO) Comité Panameño por los Derechos Humanos initiated a complaint on their behalf with the Inter-American Commission on Human Rights.[387] The ILO Committee on Freedom of Association concluded that that the government's mass dismissal of public sector trade union members and leaders 'was a serious violation of ILO Convention 98'[388] and reiterated requests made earlier by the Committee of Experts on the Application of Conventions and Recommendations to repeal Law 25.[389] The Inter-American Commission on Human Rights referred a complaint based on the NGO's petition to the Inter-American Court of Human Rights on 16 January 1998. The complaint alleged arbitrary dismissal of the government employees who had participated in the demonstration for labour rights and who were accused of complicity for perpetrating a military coup as well as violations of the dismissed employee's rights to due process and judicial protection.[390]

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383. Law 25 superseded Law 8, which set out due process procedures such as the right to appeal dismissals to a tripartite labour court and the requirement of prior authorization from the labour courts in order to dismiss union leaders, para. 88 (m).
384. Appeals were exhausted after reconsideration before the same authority that issued the dismissal and appeal before the authority superior to the issuing authority and an administrative Third Section of the Supreme Court, para. 88 (m), (v).
385. Indeed, labour courts refused to hear the appeals on the dismissals and workers challenged the constitutionality of Law 25. On 23 May 1991, the Panamanian Supreme Court declared Law 25 unconstitutional but upheld the dismissals, arguing it could only make pronouncements on the law itself and not on the specific circumstances of the dismissed workers, nor could it apply its ruling of unconstitutionality retroactively. Most of the 270 dismissed state employees filed appeals under the provisions of Law 25, and the administrative Third Section of the Supreme Court declared the dismissals legal. See paras (z), (y), (aa).
386. Complaints against the Government of Panama presented by the International Confederation of Free Trade Unions (ICFTU), the Trade Union of Water and Electricity Board Workers (SITIRHE) and the Trade Union of National Telecommunication Board Workers (SITINTEL) Report No. 281, ILO Committee on Freedom of Association, Case No. 1569, Document: (Vol. LXXV, 1992, Series B, No. 1).
387. Inter-American Commission on Human Rights Petition Number 11.325, received by the Secretariat of the Commission on 22 February 1994, Baena, para 1.
388. The Committee on Freedom of Association based its conclusion on its findings that (1) Panamanian Law denies public employees the right to establish trade unions, (2) employees participating in the strike were not exempt from 'the right to strike' as part of essential services and (3) legal procedures and guarantees governing dismissal of public employees were not applied. Complaints against the Government of Panama presented by the International Confederation of Free Trade Unions (ICFTU), the Trade Union of Water and Electricity Board Workers (SITIRHE) and the Trade Union of National Telecommunication Board Workers (SITINTEL) Report No. 281, ILO Committee on Freedom of Association, Case No. 1569, Document: (Vol. LXXV, 1992, Series B, No. 1), para. 143 (3), (4), (6).
389. See also: Committee of Experts on the Application of Conventions and Recommendations, Individual Observation concerning Convention No. 87, Freedom of Association and Protection of the Right to Organize, 1948 Panama (ratification 1958) Published 1991, Document No. (ilolex): 061991PAN087.
390. Baena, para. 1.

The Inter-American Court accepted as evidence the decisions of the ILO Committee on Freedom of Association as well as the ILO Committee of Experts on the Application of Agreements and Recommendations.[391] The Court ruled that the Government of Panama had violated the employees' freedom of association rights.[392] It also ruled that the government violated principles of non-retroactivity[393] and the right to judicial guarantees and judicial protection.[394] The Court ordered the government to pay the unpaid salaries of the 270 employees, reinstate each employee to the same or a similar position of employment as held prior to dismissal, pay moral damages of USD $3,000 to each employee, and pay the group as a whole a total of USD$120,000 as reimbursement for expenses generated during proceedings to challenge their dismissals.[395]

In *Wilson, National Union of Journalists and Others v United Kingdom*, the European Court of Human Rights noted that UK domestic law had been subject to criticism by the European Social Charter's Committee of Independent Experts[396] as well as the ILO Committee on Freedom of Association,[397] in ruling that financial inducements offered by a UK employer to its employees in exchange for relinquishing the right to union representation violated Article 11 (freedom of assembly and association) of the European Convention for the Protection of Human Rights.[398] In *Hoffmann v South African Airways*,[399] the Constitutional Court of South Africa, relying upon the South African Constitution, the African Charter on Human and Peoples' Rights and ILO Convention 111,[400] ruled that the airline unconstitutionally discriminated when it denied employment based solely on HIV status determined as part of pre-employment screening.[401]

Of course, regional and domestic courts also rely on regional instruments and state constitutional and statutory provisions in deciding on violations of work rights. At the regional level, in *Marangopoulos Foundation for Human Rights*

391. Baena, paras 162, 163, 164.
392. Baena, para. 214 (4) (right to freedom of association enshrined in Article 16 of the American Convention of Human Rights).
393. Baena, para. 214 (1) (government violated the principles of legality and non-retroactivity enshrined in Article 9 of the American Convention on Human Rights).
394. Baena, para. 214 (2) (government violated rights to judicial guarantees and judicial protection provided for in Articles 8(1), 8(2) and 25 of the American Convention of Human Rights).
395. Baena, paras 214 (6), (7), (8), (9).
396. Wilson, *National Union of Journalists and Others v The United Kingdom,* European Court of Human Rights, Applications nos. 30668/96, 30671/96 and 30678/96, para 32.
397. Wilson, *National Union of Journalists and Others v The United Kingdom,* European Court of Human Rights, Applications nos. 30668/96, 30671/96 and 30678/96, paras 37, 48.
398. Wilson, *National Union of Journalists and Others v The United Kingdom,* European Court of Human Rights, Applications nos. 30668/96, 30671/96 and 30678/96, para 48.
399. *Hoffmann v South African Airways* (CCT 17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235, 28 September 2000.
400. *Hoffmann v South African Airways* (CCT 17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235, 28 September 2000, para. 51.
401. *Hoffmann v South African Airways* (CCT 17/00) [2000] ZACC 17; 2001 (1) SA 1; 2000 (11) BCLR 1235, 28 September 2000, para. 5, 29.

(MFHR) v Greece,[402] the European Committee on Social Rights, relying upon the European Social Charter, found that the right to protection of health,[403] the right to safe and healthy working conditions[404] and the right to just conditions of work[405] were violated when the government issued safety and health regulations but did not effectively enforce them.[406] Also at the regional level, and following a United States Supreme Court decision denying monetary damages to an undocumented worker fired for union activity, the Inter-American Court of Human Rights ruled in *Advisory Opinion OC-18/03*,[407] that states have the obligation to guarantee labour rights of all human beings, regardless of migratory status. Further, the Court held that 'undocumented migrant workers possess the same rights as other workers in the state where they are employed'.[408]

At the domestic level, the Constitutional Court of South Africa ruled in *Khosa & Ors v Minister of Social Development & Ors*[409] that the right to social security belongs to everyone and that the government's denial of social security benefits to non-citizen, permanent residents violated their dignity and equality in material respects in violation of the Constitution.[410] Also at the domestic level, the Supreme Court of India, in *Olga Tellis & Ors. v Bombay Municipal Council*,[411] ruled that the forced eviction of pavement and slum dwellers interfered with their home-based livelihoods in violation of India's Constitutional right to life, construed to encompass a right to the 'means of livelihood'.[412] The Court ruled that the right to livelihood, while not absolute, could not be deprived without a 'just and fair procedure undertaken according to the law'.[413]

402. *Marangopoulos Foundation for Human Rights (MFHR) v Greece,* Complaint No. 20/2005, European Committee of Social Rights, 6 December 2006.
403. European Social Charter, art. 11.
404. European Social Charter, art. 3.
405. European Social Charter, art. 2.
406. *Marangopoulos Foundation for Human Rights (MFHR) v Greece*, para 228, 229, 230, 231. For a full explanation of the collective complaints mechanism of the European Social Charter, including an overview of the collective complaints to date, see Churchill and Khaliq (2007: 195-240).
407. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, 17 September 2003, requested by the United Mexican States. For a full explanation of the protection of economic, social and cultural rights in the Inter-American System see Gomez (2007: 167-194).
408. Inter-American Court of Human Rights, Advisory Opinion OC-18/03, 17 September 2003 para. 173 (10).
409. *Khosa & Ors v Minister of Social Development & Ors,* 2004(6) BCLR 569 (CC), 4 March 2004.
410. *Khosa & Ors v Minister of Social Development & Ors,* 2004(6) BCLR 569 (CC), 4 March 2004, para. 85.
411. *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51, summarized at ESCR Net: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401006&country=13549.=
412. *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51.
413. *Olga Tellis & Ors v Bombay Municipal Council* [1985] 2 Supp SCR 51. See also *People's Union for Democratic Rights & ORS v Union of India & ORS* [1982] INSC 67, 18 September 1982 (payment below minimum wage amounts to forced labour and therefore violates Constitution and international law).

Many cases rely upon a combination of domestic, regional and international law in deciding upon work rights.[414] For example, the Inter-American Court 'has turned to domestic law, customary law, and a series of ratified ILO Conventions, often in conjunction with the Protocol of San Salvador, to determine the content and scope of the [Inter-American] Convention's guarantee of… the right to association in labor contexts' (Melish 2008: 11). In *Pedro Huilca Tesce v Peru*, the Inter-American Court of Human Rights relied upon ILO Convention 87 and decisions of the ILO Committee on Freedom of Association, as well as decisions of the European Court of Human Rights, in ruling that the extrajudicial execution of Peruvian trade union leader Pedro Huilca Tecse violated Article 4(1) on the right to life and Article 16 on freedom of association under the Inter-American Convention on Human Rights.[415] The Court found that Peru's failure to prevent and respond to the execution restricted not only the freedom of association of the individual, but also the right and liberty of a determined group to associate freely without fear.[416]

Not all court cases result in the protection of work rights. For example, in *Gosselin v Quebec (Attorney General)*,[417] the Supreme Court of Canada upheld the constitutionality of a Quebec law providing those who were single, unemployed and under thirty years of age with social assistance amounting to just one-third of the amount allowed for others, although it was clear that this amount required the plaintiff to choose between food and housing. The Court ruled that the law was not a violation of Article 15(1) on equality provisions of the Canadian Charter because the purpose of the law was to create incentives for young people to participate in employment programmes.

Work rights, even with favourable court decisions, may not, however, be sufficient to result in full employment, to improve the conditions of work, and to ensure the rights of trade unions and their members or eradicate poverty. The dominance of neo-liberal ideology and policy has created substantial structural obstacles and hostility towards work rights. In addition to laws and authoritative interpretations of these laws, it is also necessary to have a policy environment receptive to the notion of social justice and the legitimacy of work rights as a necessary means of ensuring decent work and dignity for all people. Progress on poverty eradication and work rights requires the internalization of values of human rights and the reorientation of policy to respect, protect and fulfil human rights. The next section discusses three different policy approaches to poverty and work rights.

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414. For a discussion of the increasing use of foreign authority in human rights cases see for example McCrudden (2000: 499-532) and McCrudden (2007: 371-398).
415. *Pedro Huilca Tecse v Peru,* Inter-American Court of Human Rights (Ser C) No. 121, March 2005, paras. 74-75 and p. 36.
416. *Pedro Huilca Tecse v Peru,* Inter-American Court of Human Rights (Ser C) No. 121, March 2005, para. 69.
417. *Gosselin v Quebec* (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84.

4.4. THREE APPROACHES TO ERADICATING POVERTY

The ILO and human rights legal frameworks provide a basis for ensuring work rights and eliminating poverty. Over the last thirty years, however, the primary focus of the international development community has been on market-based approaches.[418] These approaches devalue work rights as a means of eliminating poverty. This section begins with an overview of this dominant perspective, and then explains the developing ILO and human rights-based approaches.

4.4.1. Market-Oriented Approach

From a market-based perspective, the market itself will, over time, alleviate poverty. The key to poverty reduction, in this approach, is simply economic growth. The absence of work rights, as well as other social rights, makes sense from a market-oriented approach because these rights are seen to restrain growth. Indeed, embedded in the approach is the assumption that free markets are the only mechanism to guarantee growth and full employment (Sengenberger 2001: 42). From a market-oriented approach, entrepreneurs can achieve economic growth once they are free of state interference (Elson 2002: 80-81; See also Harvey 2002). Market-oriented policies include freeing markets from regulation, and maintaining entrepreneur-friendly economic and trade policies (Sengenberger 2001: 42). Market-oriented policy prescriptions have been voluntarily embraced, as well as supported with incentives and coercion such as international financial institutions conditioning lending on a country's willingness to implement market-friendly policies (Elson 2002: 81).

> To provide this enabling environment for entrepreneur-led growth, states should withdraw from social issues and transfer responsibility for these issues to private enterprises and the market (Rittich 2007: 116). As the state withdraws, private market-based relations replace social relations (Elson 2002: 84). Market-relations then efficiently allocate services such as education, health and water based on consumer fees and the 'laws' of supply and demand (Elson 2002: 84). Similarly, social security, protecting consumers from health- and age-related infirmities, is provided as a commodity in which the consumer weighs its price against his or her preference to be free of risk (Elson 2002: 84). Access to a livelihood is also privatized, with public employees becoming private employees resulting in efficient, flexible pay and benefits (Elson 2002: 84).

418. For a discussion of the political economy of globalization, neo-liberalism and its effects on labour see Munck (2007).

Withdrawal and transfer from state responsibility to private markets also applies in relation to the state's role as regulator of private markets. Liberalized markets should be free of limiting regulations, enabling efficiency and growth, and facilitating foreign direct investment (UN General Assembly 2007: para. 30). There is no obligation on the state to maintain full employment or to ensure justice and fairness in conditions of work (Rittich 2007: 115). Even if regulatory responsibility cannot be repudiated, regulatory mechanisms are questioned, discredited (Rittich 2007: 115) and dismantled to create labour market flexibility (UN General Assembly 2007: para. 34).

Creating an enabling environment for entrepreneurial-led economic growth also requires market-oriented macroeconomic and trade policies. Examples of such interventions include shifting tax burdens and subsidies to the benefit of capital (UN General Assembly 2007: para. 32), and maintaining restrictive monetary, fiscal and wage policies to keep inflation and trade deficits low and foreign direct investment high (UN General Assembly 2007: para. 31). In this latter case, such government policies are also constrained by private financial institutions buying and selling government bonds (Elson 2002: 84).

Since the 1980s, however, evidence has accumulated to disprove the claim that economic growth will alleviate poverty (see for example Ravallion and Chen 2007: 1).[419] In fact, market-oriented policies, in both developed and developing worlds, have resulted in growing inequality.[420] 'High levels of income inequality are bad for growth, and they weaken the rate at which growth is converted into poverty reduction' (UNDP 2005: 6). Market-oriented policies have also eroded work rights protection of individuals and organizations.[421] Traditional collective actors, such as trade unions and employer organizations, have weakened as their participation in decision-making has been replaced by market activity as 'arbiters of policy' (Elson 2002: 84). As a result, over the last decade, inter-governmental institutions and domestic governments have been developing alternative approaches to poverty in light of the mounting evidence of the failure of the neo-liberal agenda to reduce poverty.

4.4.2. ILO Decent Work

By 1999, ILO Director-General Juan Somavia noted, 'the world and the ILO are going through times of turbulence' (ILO 1999: 3). The turbulence was caused by market-oriented policies that displaced traditional social processes such as state intervention, legal rules and interactions among social actors (ILO 1999: 3). These changes profoundly impacted the ILO's traditional constituents of organized

419. The developing world outside China has seen little or no sustained progress in reducing the number of poor, with rising poverty counts in some regions.
420. UNDP 2005: 6 ('Income inequality is increasing in countries that account for more than 80 per cent of the world's population.')
421. Biffl and Isaac 2005: 405; *Summary World Social Situation 2007*, para. 35.

labour and employers (ILO 1999: 3). Market-oriented reforms also shifted risk and disadvantage onto workers relative to capital (ILO 1999: 3). The Director-General argued that globalization had created growth and prosperity but had also increased inequality and insecurity requiring a strong social framework to underpin markets (ILO 1999: 3). The ILO's response was the Decent Work Agenda designed to address the new challenges faced by workers and to (re)invent its own relevance (ILO 1999: 5).

The Decent Work Agenda was intended to be a key to reducing poverty, creating sustainable development and making globalization more equitable and inclusive (ILO 2007*a*: vi). It was meant to be both the goal and the means to development (Sengenberger 2001: 42-43). It marks the high road to economic and social development (ILO 1999: 13), a road in which employment, income and social protection can be achieved without compromising workers' rights and social standards (ILO 1999: 13-14). Decent work means productive work in which rights are protected, and which generates adequate income with adequate social protection (ILO 1999: 14). It also means sufficient work, in the sense that all should have full access to income-earning opportunities (ILO 1999: 14). The traditional ILO themes of tripartism and social dialogue are also present in the Decent Work Agenda as objectives in their own right, guaranteeing participation and democratic processes, and also as a means of achieving other strategic objectives (ILO 1999: 14). The Decent Work Agenda addresses employment in the informal as well as the formal sector of the economy, and is also directed at wealthy industrial countries where there is also a lack of decent work (Sengenberger 2001: 42-43).

There are four pillars of the Decent Work Agenda: (1) human rights at work (ILO 1999: 14-21); (2) employment and incomes; (3) strengthening social protection and social security (ILO 1999: 31-39); and (4) strengthening social dialogue (ILO 1999: 39-45). The first pillar, human rights at work, refers to respect for the Core Labour Standards established in the 1998 ILO Declaration of Fundamental Principles and Rights at Work, in which the status of eight ILO conventions was elevated such that all ILO member states became obligated to uphold the principles enumerated in these conventions even if they had not ratified them.[422] These conventions are:

- Prohibition of Forced Labour (Conventions 29, 105);
- Freedom of Association and Right to Collective Bargaining (Conventions 87, 98);

422. The Declaration was controversial. The discussion and voting on its adoption was tripartite with governments, employer and worker representatives participating. The final vote was 273 in favour, none opposed and 43 abstentions. Some of the contentious issues included whether the Declaration could be used for protectionist purposes, whether it established new or enhanced obligations on States that had not ratified the Conventions, and whether it provided meaningfully improved protection of labour rights. For a full discussion see Report of the Committee on the Declaration of Principles, Submission, discussion and adoption, 86th Session Geneva, June 1998, available at http://www.ilo.org/public/english/standards/relm/ilc/ilc86/com-decd.htm, last accessed 25 March 2008. For debates since adoption of the Declaration, see Alston (2005*b*), Langille (2005) and Maupin (2005).

- Elimination of Discrimination in Employment (Conventions 100, 111);
- Elimination of Child Labour (Conventions 138, 182).[423]

The second pillar, employment and incomes, directs national economic and social policies to focus on the goal of full employment, such that all people who want to work have the opportunity to work, and that paid work is 'appropriately' paid as a key means for ending poverty and creating social cohesion (ILO 1999: 21-31; Sengenberger 2001: 40). The third pillar, strengthening social protection and social security, includes prevention of work-related accidents and occupational injuries, protection from oppressive working conditions and over-taxing work hours, provisions for breaks and holidays, and protection in the form of social security in cases of illness, pregnancy, old age and in cases of dismissal or redundancy (ILO 1999: 31-39; Sengenberger 2001: 40).

Finally, the Decent Work Agenda includes strengthening social dialogue, which means that information, consultation and negotiation occur at the national level between free and independent worker and employer organizations along with government participation (ILO 1999: 39-45; Sengenberger 2001: 40). In this way, conflicts are peacefully resolved, and social and labour policies are created and enforced within an economic as well as political democracy. At the level of the workplace, social dialogue includes wage negotiations and co-determination as a 'goal unto itself' as well as a 'means to enforce labour and social policy' (Sengenberger 2001: 40).

The Decent Work Agenda is a departure from traditional ILO conventions and labour standards, which were seen as decreasingly effective. In 1999, the General Director noted that between 1983 and 1998 a total of 15 conventions were adopted by the annual labour conference but only three had received twenty or more ratifications (ILO 1999: 18). Rather than rely on its traditional mechanisms of legislating labour standards through adoption and ratification of conventions, the Decent Work Agenda is based on a 'soft law', promotional approach similar to the 1998 ILO Declaration of Fundamental Principles and Rights at Work (ILO 2007: para. 13, 14). The Decent Work Agenda is implemented through (ILO 1999: 8):

- seeking to mobilize international support, particularly focusing on other international and regional organizations such as the United Nations Economic and Social Council (ECOSOC), the European Union, etc.;
- creating and delivering portfolios of policies covering employment, social protection and institutional development, which are appropriate to different regional situations;
- reorganizing all ILO functions, budgets and initiatives around the Decent Work Agenda;
- developing measures and indicators of decent work such as the Toolkit, through which decent work outcomes are integrated into policy-making;

423. ILO Declaration of Fundamental Principles and Rights at Work, 1998, available at: http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT

- developing Decent Work Country Programs (DWCP) helping countries to diagnose deficits in decent work (ILO 1999: 8, 56-74; ILO 2007*c*).

Much of the ILO approach to the Decent Work Agenda is to convince states that decent work is not counter to market efficiency and growth and that in fact 'decent work' pays off (Sengenberger 2001: 44-46). For example, one claim is that social protection is a positive alternative to protectionism insofar as high levels of pay and longer periods of social protection are found in the least protectionist countries with economies most open to trade (Sengenberger 2001: 45). Further, the ILO argues against the position that the goals of growth and expansion conflict with qualitative improvement in work (ILO 1999: 26). Instead, it maintains that decent work is an indispensable part of development and that social security is an essential prerequisite for efficiency, development and participation in world markets (ILO 1999: 31; Sengenberger 2001: 46).

4.4.3. Human Rights-Based Approach

Human rights-based approaches to work rights and poverty eradication are considerably different from the ILO Decent Work Agenda, despite common historical antecedents and the overlap of normative content of work rights found in international treaties and ILO conventions. Whereas the ILO Decent Work Agenda includes only a narrow concept of human rights at work – the four core labour standards – a human rights-based approach to poverty eradication includes a wide range of work rights and connects these rights to human rights more broadly. Moreover, the international human rights framework provides both the goals and the guiding principles for human rights-based approaches to poverty eradication.[424] The key role of the international human rights framework distinguishes the rights-based approach from other approaches to poverty reduction, including the ILO Decent Work Agenda and the MDGs. Indeed, the MDGs, while paralleling human rights to food, health, education and gender equality, are notable for their lack of rights language (Alston 2005: 760).[425]

There are many human rights-based approaches developed by various inter-governmental organizations (Frankovits 2006: 106), national governments (see for example Piron and Watkins (2004)) and NGOs.[426] Human rights-based approaches, however, have some common features. Primarily, in a rights-based approach, the goals are explicitly stated in terms of international human rights

424. UN Interagency Workshop on a Human Rights-Based Approach, The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies, 3-5 May 2003. www.undp.org/governance/docs/HR_Guides_CommonUnderstanding.pdf (accessed 1 February 2008).

425. 'References to human rights are relatively fleeting,' and 'rarely rely on any precise formulations' (Alston 2005: 760).

426. See for example Oxfam Novib: How an RBA Works in Practice: Exploring how Oxfam Novib and its Counterparts apply an RBA.

commitments, which also provide the framework for all policy-making and programming (Robinson 2005: 38). Critically, from a rights perspective, poverty 'signifies the non-realization of human rights' and its eradication is not just 'desirable but obligatory' (OHCHR 2006: para. 19). Indeed, the CESCR 'holds the firm view that poverty constitutes a denial of human rights' (CESCR 2001: para. 1).

In addition to express linkages to international treaties, human rights-based approaches require adherence to several core human rights principles: (1) participation; (2) empowerment; (3) accountability; and (4) non-discrimination (Robinson 2005: 38; see also Twomey 2007: 49-50; OHCHR 2006: para. 20). First, active and informed participation by poor people is necessary in the formulation, implementation and monitoring of poverty reduction strategies (OHCHR 2006: para. 23). This requires specific mechanisms at various decision-making levels that effectively anticipate the impediments that poor and marginalized people face in playing a part in the life of their community (OHCHR 2006: para. 23). Participation is important not just for its instrumental value, ensuring that pro-poor policies actually address the needs of poor people, but is itself a fundamental human right (OHCHR 2006: para. 23).

The principle of empowerment highlights the recognition that poverty eradication is not possible without the empowerment of poor people (OHCHR 2006: para. 18), and empowerment occurs in part through introducing the 'concept of rights' in general and in applying the concept of rights to policy–making (OHCHR 2006: para. 19). This is markedly different than charity-based efforts to alleviate unmet needs (Twomey 2007: 52). Empowerment also signifies the need for duty holders and bearers to 'share a common understanding' of the goals and duties to respect, protect and fulfil human rights (Twomey 2007: 52). In this way, human rights are about 'peacefully redistributing unequal power' (Van Bueren 1999*b*: 680).

The principle of accountability means that policy-makers and other duty bearers are responsible and answerable for the impact of their decisions, actions and inactions with respect to human rights (OHCHR 2006: para. 24). It also requires that accountability mechanisms are built into poverty reduction strategies and made 'accessible, transparent and effective' (OHCHR 2006: para. 24). Finally, the non-discrimination principle requires that non-discrimination and protection of vulnerable groups are prioritized within poverty reduction strategies (Twomey 2007: 54). This highlights the reality that 'a great deal of poverty originates from discrimination' and therefore, instead of focusing on 'narrow economic issues', human rights-based approaches call for a broader strategy that includes addressing the institutions which sustain discrimination (OHCHR 2006: para. 21).

In sum, a human rights-based approach to poverty and work rights requires that policy choices and processes are linked to and guided by explicit human rights frameworks (OHCHR 2006: para. 16). It also recognizes the interdependence of human rights, so that, for example, civil and political rights, as well as economic, social and cultural rights, are considered 'integral components of poverty reduction strategies' and are neither 'luxuries' nor 'merely aspirations' (OHCHR

2006: para. 27). Nevertheless, the United Nations High Commissioner for Human Rights set out specific human rights of particular relevance to poverty (OHCHR 2006: para. 8). These are rights to: (1) work; (2) adequate food; (3) adequate housing; (4) health; (5) education; (6) personal security and privacy; (7) equal access to justice; and (8) political rights and freedoms (OHCHR 2006: v).

Notably, the right to work is the first right listed. Moreover, unlike the promotional approach of the ILO Decent Work Agenda, the OHCHR states that the right to work is a right to decent work, and it links this right to several specific provisions in international human rights law (OHCHR 2006: para. 112, 113, 114, 115, 116). The OHCHR defines the scope and content of the right to work to include ICESCR Articles 6 (right to work), 7 (right to just and favourable conditions of work) and 9 (right to social security), ICCPR Article 8 (prohibition against slavery, servitude and forced or compulsory labour), CEDAW Articles 6 (suppression of trafficking in women) and 11 (non-discrimination), CRC Articles 32 (protection from economic exploitation), 34 (protection from sexual exploitation), 35 (prevention of abduction, sale and trafficking) and 36 (protection from other forms of exploitation) and ILO Conventions 138 (minimum age), 182 (child labour), 29 (forced labour) and 105 (forced labour). In addition to treaty provisions and ILO conventions, the OHCHR also references CESCR General Comment 18, the ILO Declaration on Fundamental Principles and Rights at Work and an ILO reference manual for ILO staff and constituents on Decent Work (ILO 2005). Finally, the OHCHR refers to the World Summit for Social Development as relevant to human rights-based poverty strategies.[427]

Remarkably, the OHCHR's *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies*, while briefly mentioning the rights to organize and to collective bargaining, do not link the right to decent work explicitly to the treaty provisions, including ICESCR Article 8 (right of individuals to join unions, collective rights of unions to function freely, right to strike) (OHCHR 2006: para. 115).[428] Nor are the ILO conventions related to freedom of association and collective bargaining listed. This is surprising in light of the CESCR's comment that '[t]rade unions play a fundamental role in ensuring respect for the right to work',[429] and the OHCHR observation that poor people suffer from 'mistreatment by employers with no form of redress' (OHCHR 2006: para. 109). It must be stressed that the right to work entails both individual and collective rights[430] and both are essential in eradicating poverty.[431]

427. World Summit for Social Development Copenhagen, 1995, available at http://www.un.org/esa/socdev/wssd/
428. The rights to assembly, freedom of association and to form and join trade unions are also recognized in the ICCPR Articles 21 and 22.
429. CESCR General Comment 18, para. 54.
430. CESCR General Comment 18, para. 6.
431. Indeed, labour unions have played essential roles in ameliorating work conditions and otherwise improving human rights situations in for example, Latin America and South Africa. See for example Munck (2007: 11-12), discussion of strikes in protest of neo-liberal reforms in Argentina, South Africa, South Korea, India, Uruguay and Nigeria.

In sum, despite the striking omission by OHCHR (2006) there are notable distinctions between rights-based approaches and the ILO Decent Work Agenda. Primarily, in a human rights-based approach, work rights are broadly defined to correspond to the work-related rights enumerated in international human rights law and ILO conventions. In contrast, the ILO is increasingly dependent on promotional processes (Siegel 2002: 48), and central dimensions of its decent work platform are left vague and unconnected to explicit rights (Vosko 2002: 26; ILO 2007*c*: ii).[432] In addition, human rights-based approaches contribute (1) legitimacy, (2) coherence, (3) accountability, and (4) empowerment to poverty eradication strategies that are absent from both market-oriented and soft law or promotional approaches.[433]

The legitimacy of human rights-based approaches arises from their grounding in international treaties that have been ratified voluntarily by states (Twomey 2007: 67). Legitimacy is further gained from authoritative interpretations of these international instruments by international and regional treaty bodies, ILO expert committees, international, regional and domestic courts and other human rights mechanisms, defining the content of each right (Twomey 2007: 67). International human rights law, therefore, provides a universal and legitimate framework for development processes and plans, including decent work for all and eradication of poverty (Twomey 2007: p. 67).

Human rights-based approaches also provide greater coherence. International instruments and their authoritative interpretations provide a common template to guide state actions and decision-making across policy areas. This prevents fragmentation of policy-making, ensuring the same factors are considered in all departments of the government (Twomey 2007: 67; MacNaughton and Hunt 2006: 14). Coherence in policy-making is particularly important to eradicating poverty given its multi-dimensional nature.

Human rights-based approaches also require accountability for the impact of policy choices and actions. Indeed, 'the most defining attribute of human rights in development is its focus on accountability' (Robinson 2005: 39). Work rights arise out of international treaties and domestic laws, and therefore impose legal obligations on the international community and national governments. Thus, monitoring and accountability mechanisms, that are accessible, transparent and effective, are necessary to ensure that people can hold their governments accountable (MacNaughton and Hunt 2006: 324; Twomey 2007: 67). These mechanisms to protect work rights, as illustrated above, have been operating for almost a century. As the neo-liberal paradigm fades, new space opens for governments and NGOs to make better use of these decisions.

As a result of their legitimacy, coherence and accountability, human rights-based approaches empower poor people and are more effective in eradicating

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432. Conceptual approach and definitions, 'Decent work is a clearly defined universal and indivisible objective'.

433. For discussions of the value added of human rights-based approaches, see generally Robinson (2005: 38); Twomey (2007: 67-68).

poverty.[434] Workers and trade unions in many parts of the world have seen the power of human rights and are joining together with human rights NGOs in solidarity to promote and realize an integrated approach to work rights and poverty eradication (Cook 2006: 117). After decades of market-oriented policy-making and prolonged efforts to marginalize work rights, neo-liberal approaches to poverty eradication are now bankrupt and discredited.[435] Work rights are re-emerging as a critical dimension to combating poverty.

4.5. CONCLUSION

Work rights were among the first legally recognized international human rights intended to free people from poverty (Shelton 2007). Moreover the ILO was responsible for some of the first monitoring and accountability mechanisms to hold governments accountable for respecting, protecting and fulfilling work rights. The ILO deeply influenced the content of work rights as they were incorporated into the International Bill of Rights including specific provisions of the ICESCR (Craven 2005; Siegel 2002; Valticos 1998).

Nonetheless, work rights and the ILO have remained essentially separate from the human rights movement for many years. Moreover, at the domestic level, employment regimes evolved separately from human rights regimes. For example in many countries, work rights are reviewed in separate labour tribunals. As a result, work rights have not been viewed, or taught, as part of a human rights framework. For their part, trade unions have not been generally described as human rights NGOs, although they might combine in common cause (Hyman 1999: 10).[436]

Similarly, work rights have not been readily incorporated into the human rights agenda. For example, work rights are absent from the economic and social rights enumerated in the South African Constitution, with the exception of social security, and are oddly categorized apart from human rights in the Global Compact. In addition, work rights have not featured prominently in the promotion of the rights-based approach to poverty eradication, in the MDGs for example, or in the work of aid agencies in general. They have been easily vulnerable to the market-oriented policy agenda because work rights can be classed as but another part of those political, legal and social structures, which require adjustment.

Nevertheless, in the last few years there have been encouraging signs of a rapprochement between these two regimes. The ILO Decent Work Agenda is laudable in many respects. As Sen points out, the new ILO vision broadens its agenda

434. CESCR Statement on Poverty, 2001, para. 13 ('anti-poverty policies are more likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty, if they are based upon international human rights').
435. See UN General Assembly 2007: paras 27, 28, 29, 30, 31, 32, 33, 34, 35.
436. To survive and thrive, unions have to reassert the rights of labour in ways which allow them to recapture the advantage in the battle of ideas; see also Adams (2006).

in three distinct respects. First, the Decent Work Agenda takes a comprehensive approach, including *all* workers (Sen 2000*b*: 120). This includes unregulated wage-workers, the self-employed, homeworkers and unemployed persons (Sen 2000*b*: 120). Second, unlike the 1998 Declaration on Fundamental Freedoms and Rights at Work, the Decent Work Agenda encompasses work-related issues more broadly, including expanding job opportunities and ensuring decent conditions of work (Sen 2000*b*: 120). Third, the Decent Work Agenda situates work within a broader economic, political and social framework (Sen 2000*b*: 125). For example, decent work requires not only labour legislation, but also an open society and the promotion of social dialogue (Sen 2000*b*: 125). Therefore, in many ways, the Decent Work Agenda is approaching a human rights-based perspective.

Equally, in human rights circles, there has been increased recognition of the importance of work and work rights. For example, one of four new targets for the MDGs is full employment and decent work for all. In addition, the OHCHR *Principles and Guidelines* places work and work rights in the framework of decent work for all. Further, the CESCR's two most recent General Comments clarified the right to work and the right to social security. Finally, international human rights NGOs that have expanded their mandate to embrace economic and social rights have included work rights in their new programmes.[437] All these developments are helping to bring the issue of work rights to the forefront of efforts to eradicate poverty.

It is unfortunate, however, that the ILO Decent Work Agenda does not fully embrace a human rights-based approach.[438] For example, it relies primarily on persuasion and soft methods, oddly, just as economic and social rights are gaining a prominent place in international and domestic hard law. Just as the CESCR invokes ILO conventions in defining the content of the right to work, the right to just and favourable conditions of work, the right to freedom of association and the right to social security, so could the ILO invoke the ICESCR and CESCR comments more frequently to explicitly embed the Decent Work Agenda in human rights. The ILO is correct in that promotion of decent work is essential, but promotion should be based on the right to decent work, not just on its instrumental value to economic growth.

Human rights based-approaches go beyond listing the rights and duties found in treaties and providing a unified conceptual framework by which the substantive

437. See Amnesty International (AI) Killings, Arbitrary Detentions and Death Threats: The Reality of Trade Unionism in Columbia. AMR 23/001/2007, 2007: 59, available at: http://www.amnesty.org/en/library/info/AMR23/001/2007; Exploitation and Abuse: The Plight of Women Domestic Workers ASA 21/001/2007, 2007: 45, available at: http://www.amnesty.org/en/library/info/ASA21/001/2007; International Labour Organization: 91st Session of ILC 3-19 June 2003, IOR 42/003/2003, 2003: 20, available at: http://www.amnesty.org/en/library/info/IOR42/003/2003; UN Committee on Migrant Workers-Written Submission to the CMW Day of General Discussion on Protecting the Rights of All Migrant Workers as a Tool to Enhance Development. IOR 40/028/2005, 2005, available at: http://www.amnesty.org/en/library/info/IOR40/028/2005. All last accessed 2 February 2008.

438. See for example the ILO Toolkit (ILO 2007: ii) ("Decent work is a clearly defined universal and indivisible objective, based on fundamental values and principles").

content of human rights principles can be operationalized and integrated into policy, plans and practice (Marks 2003). Human rights-based approaches directly confront the complex social structures that sustain poverty through 'interrelated and mutually reinforcing deprivations' (OHCHR 2006: para. 15). Finally, human rights-based approaches recognize that responsibility for poverty and its eradication is shared and that while the 'State is primarily responsible, so are other states and non-state actors' who should 'at least not violate human rights' (OHCHR 2006: para. 26).

The ILO recently noted 'the common sense observation that the best way to avoid a life of poverty is to find decent work' (ILO 2001). Decent work for all will require realizing the full panorama of work rights, as well as all other inter-related and inter-dependent human rights.

5

The Human Right to Adequate Food and to Clean and Sufficient Water

Amanda Cahill and Sigrun Skogly

5.1. INTRODUCTION

In 2002, the then High Commissioner for Human Rights, Mary Robinson, held that poverty in its true light, is 'a denial of a whole range of rights pertaining to the human being, based on each individual's dignity and worth'.[439] This statement contains at least two essential elements in any approach to eradicate poverty, and particularly a 'rights-based' poverty eradication strategy. First, the multi-dimensional rights violations situation that poor people experience, and second, that life in poverty is a violation of the most fundamental component of all human rights – the violation of an individual's dignity.

The following year, the UN Committee on Economic, Social and Cultural Rights[440] defined poverty in light of the International Bill of Rights as 'a human condition characterized by the sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights'.[441] These statements underscore the complexity of the 'condition' labelled 'poverty which reflects the indivisible and interdependent nature of all human rights'.[442] While these statements may seem self-evident, there is another dimension to the human rights connection to poverty, and in particular poverty eradication, that is less frequently recognized. In the words of the Committee

439. UN Commission on Human Rights, Summary Records, 41st meeting, 'Economic, Social and Cultural Rights', E/CN.4/2000/SR.41 1 May 2000, para. 2.
440. Hereinafter 'the Committee'.
441. UN Committee on Economic, Social and Cultural Rights, 'Poverty and the International Covenant on Economic, Social and Cultural Rights', Statement adopted on 4 May 2001 (unedited version) para. 8.
442. UN Committee on Economic, Social and Cultural Rights 'Poverty and the International Covenant on Economic, Social and Cultural Rights', Statement adopted on 4 May 2001 (unedited version) para. 8.

> While the common theme underlying poor people's experiences is one of powerlessness, human rights can empower individuals and communities. The challenge is to connect the powerless with the empowering potential of human rights.[443]

In this statement, the committee implicitly addresses another key element to poverty eradiation, namely the 'empowering potential' of human rights, or what could also be labelled the 'capability potential' of human rights. As opposed to other approaches to poverty eradication, a strategy based on human rights will focus on the building of capacity of individuals[444] and communities to dramatically alter the conditions that result in a 'poverty trap'. Human rights represent legal entitlements with corresponding obligations, which make this approach qualitatively different from a needs or charity-based approach.

On this basis, the present chapter will address two areas of human rights that are key components in a fight against poverty, the protection of the right to adequate food and the right to clean and sufficient water. It is the view of the authors that these need to be seen as components of a wider approach that would include other substantive aspects of the right to an adequate standard of living, including clothing, housing, and health, which must be implemented alongside principles of non-discrimination, participation and capability as well as other civil and political rights.

The importance of the realization of the right to adequate food and the right to water for poverty alleviation and eradication is self-evident. Water is essential for life, for health and for food production, for hygiene and for work.[445] Furthermore, 'The human right to water is indispensable for leading a life in human dignity … The continuing contamination, depletion and unequal distribution of water is exacerbating existing poverty.'[446] Ninety per cent of the world's hungry suffer from chronic malnutrition (FIAN 2006: 4). The majority of these live in extremely marginal conditions, in remote areas without secure access to productive resources, credit and markets and without any formal support by way of extension services (FIAN 2006: 4). Without adequate clean water and access to adequate food, there can be no human security. As such, realizing the right of the poor to access clean and sufficient water as well as nutritious and adequate food must be a priority for any policy and practice in eradicating the terrible living conditions that poor people endure. Once those living in poverty have such access, this in turn can raise their capability to participate in many other basic everyday activities allowing them to move out of poverty.

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443. UN Committee on Economic, Social and Cultural Rights 'Poverty and the International Covenant on Economic, Social and Cultural Rights', Statement adopted on 4 May 2001 (unedited version) para. 6.
444. For further developments of the theory of capabilities as a means to enable individuals to move out of poverty, see Sen (1999: 89).
445. See GC15, para.6.
446. GC15, para.1.

5.2. THE RIGHT TO ADEQUATE FOOD

The right to adequate food is provided in the Universal Declaration on Human Rights (UDHR) (1948), Article 25, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966),[447] Article 11, which holds that 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food…'. Article 11(2), recognizes the 'fundamental right of everyone to be free from hunger'. On the basis of the significant problems of implementation of these right for 'everyone', the content of this right and the corresponding obligations have received significant attention from the UN, academics and civil society. Notwithstanding what was said above concerning the multi-dimensional nature of poverty, it is clear that one of the main problems for many poor people is to access food that is adequate both in quantity and quality.

5.2.1. Definition

When determining the normative content of the right to adequate food, the committee held that 'the right to adequate food is realized when every man, woman and child, alone or in community with others, has physical and economic access at all times to adequate food or means for its procurement. The *right to adequate food* shall therefore not be interpreted in a narrow or restrictive sense which equates it with a minimum package of calories, proteins and other specific nutrients'.[448] Furthermore, the committee considers the core content of the right to adequate food as

> The availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture; [449]
>
> and,
>
> The accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.[450]

The committee has accepted that the right to adequate food inevitably will have to be implemented progressively,[451] but that states need to show that they are using

447. Adopted 1966, 153 state parties as of 16th June 2006.
448. UN Committee on Economic, Social and Cultural Rights, General Comment no. 12 – the Right to Adequate Food; UN Doc. E/C.12/1999/5, 12 May 1999 (hereinafter: GC12), para. 6. (emphasis in original).
449. GC12, para. 8.
450. GC12, para. 8.
451. GC12, para. 6

all resources available to fulfil this right, and in particular with regards to the minimum essential levels necessary to be free from hunger.[452]

The above clarification of the content of the right to adequate food clearly shows that the right to food is more than having access to a set number of calories or nutrients. It is considered as a comprehensive approach to sufficient and adequate nutrition for healthy human development, both physically and mentally, with human dignity at the core of its implementation. There have been debates, particularly among nutritionists, whether the right to food is the same as the right to nutrition (Jonsson 1984: 24). The worry among nutritionists is that the concept of the right to food can be misunderstood to only imply access to food, without the qualitative specifications of a complete and nutritious diet. They hold that food is a necessary, but not in itself a sufficient, component of nutrition. Or in other words, 'nutrition' is a higher goal than 'food', as more than food is needed for a healthy state of nutrition. The important point is that it is the individual that should achieve a healthy state of nutrition, rather than the food being nutritious.[453] The emphasis of the current chapter is that the concept of 'adequate food' would be understood broadly, and that this should include the nutritional quality and quantity necessary to achieve a nutritious healthy state for all individuals.

5.2.2. Specific Problems Faced by the Poor in Securing their Right to Adequate Food

The violation of the right to adequate food is prevalent among people living in poverty. For the rural poor, there are a number of specific problems faced. Lack of access to sufficient land to grow their own food, and to produce surplus to sell at the local market, are common problems (Suarez 2006: 1). In particular, lack of land security, either through individual titles to land or recognized communal land, often results in evictions without compensation and forced removal with the resulting lack of access to food (Suarez 2006: 4). Furthermore, poor people in rural areas are unable to access the capital and know-how necessary for improving agricultural methods to increase food production (FIAN 2006: 4). Their land is often poor, and they are more susceptible to the negative effects of drought and flooding, without access to compensation in such situations.

In urban areas, the poor face significant difficulties in accessing sufficient food, both in quality and quantity. Much of the capacities and productive energy of poor people in urban areas will be taken up by trying to secure the next meal (Narayan 2000: 37). The insecurity and unsustainability of this situation result in

452. GC12, para. 17

453. The Convention on the Rights of the Child (hereinafter the CRC), Article 24, talks about the 'provision of adequate nutritious food and clean drinking water'. According to the debate reflected above, the goal should be defined as nutrition of the child, rather than nutritious food.

these people being unable to access or take advantage of other services aimed at improving their situation, such as education or health facilities.

Violation of the right to food is therefore often a result of poverty. What is less recognized is that the violation of the right to food is also a major *cause* of poverty (Kracht 2005: 124). This has been documented in a report by the UN Food Agencies, in which they demonstrate *inter alia* that malnutrition and hunger may reduce the capacity for physical activity. This in turn lowers the productive potential of the labour of those who suffer from hunger; and impairs the ability to develop physically and mentally. This can consequently retard child growth, reduce cognitive ability, and seriously inhibit school attendance and performance (FAO, IFAD, and WFP 2002: 10). Furthermore, hunger and malnutrition may cause serious long-term damage to health, linked to higher rates of disease and premature death; and it also contributes to social and political instability which further undermines government capacity to reduce poverty (FAO, IFAD, and WFP 2002: 10). Thus, when trying to achieve respect for their right to food (based on the definition by the committee of the core content of the right as indicated above[454]) there are a variety of problems that those living in poverty face

5.2.3. Availability and Accessibility

While certain parts of the world and certain segments of the population in all parts of the world have no difficulties accessing food, this is not the case for people living in poverty. Shortage of food availability is not frequently a problem for people able to pay for it.[455] There may, in crisis situations, be food shortages; however the vast number of people suffering from hunger are not in emergency situations, but suffer from chronic hunger due to lack of resources to access available food (FIAN 2006: 2). Yet in certain circumstances, the availability may be a problem. As recognized by the South African Human Rights Commission: 'South Africa is a country self sufficient in the amount of food available, but distribution still remains a problem'.[456] For instance, the rural poor may not be able to get to markets where food is being sold due to long distances (FIAN 2006: 3), lack of transportation or roads (FIAN 2006: 3), or because other crucial tasks take precedence – such as collecting water (OHCHR 2002: 12). This may lead to lack of food in quantity, but also a problem of a balanced diet that does not provide for complete nutritional

454. UN Committee on Economic, Social and Cultural Rights, General Comment no. 12 – the Right to Adequate Food; UN Doc. E/C.12/1999/5, 12 May 1999 and Section 5.2.1 above.

455. Medicins Sans Frontières (2005) confirms that 'it is in fact the poorest families who have been affected as they have no means of paying for food … when their children need it. They're not in a position to cope with the increase in prices brought on by market deregulation and speculation'.

456. South African Human Rights Commission, 3rd Report on Economic, Social and Cultural Rights, 1999-2000: 143. Available at: http://www.sahrc.org.za/chapter_4.PDF (accessed 16 November 2006).

quality. Therefore, it is necessary to address distribution systems of foods, to ensure that all people, even in remote areas have sufficient access food available.

The importance of accessibility of food has been recognized by the committee, which holds that accessibility refers both to physical and economic access.[457] Physical accessibility may partly be dealt with through availability of adequate land to grow food for one's own consumption, or partly access to markets and shops, as indicated above. Economic access is generally problematic with regard to the poor. People in poverty will commonly lack the financial resources to buy the necessary food. This may lead to too little food eaten, and/or that the food accessed is of poor quality or not sufficiently nutritionally balanced (Jonsson 1984: 24). While the lack of sufficient quantities of food is a common problem among the poor in developing countries, the problem of nutritional balance is prevalent among the poor in industrialized countries (Caraher and Dowler 2005). Therefore unemployment or underemployment (seasonal employment), as well as very low salaries, are direct reasons for the lack of fulfilment of the right to food for people in poverty (University of California, 2001).

Accessibility may also be a problem for specifically vulnerable groups within poor populations. In many cultures, the men will eat before the children, while the women eat last (Mechlem 2004: 635). When the amount of food available is limited, women may often suffer significantly, and this is particularly serious for pregnant and breast-feeding women.

5.2.4. Free from Adverse Substances

Another common problem regarding the fulfilment of the right to food for poor people is the quality of the food that they can access. In many situations, the quality of the food is poor due to unsafe food treatment, bad storage, or lack of cooling/freezing facilities (FIAN and Brot für die Welt 2006: 17). Furthermore, food may be contaminated if too old, if it has been produced in unsafe environments, if unsafe chemicals have been used in the production process, or if post-production conditions involve unsafe practices. These problems are more prevalent in cheap food, food accessed after its sell-by date, and food that is not meant for human consumption but is still used due to lack of safe alternative sources.

5.2.5. Acceptable in a Given Culture

The problem of culturally acceptable food is particularly important with regard to situations of food aid. While food aid is often problematic in terms of destroying local markets and creating dependency, it is at times necessary in significant crisis situations created by natural or man-made disasters (FIAN 2006: 5). In such

457. GC12, para. 6.

situations, it is imperative that the food offered through food aid fulfil the quality requirements as discussed above, but also that the food is culturally acceptable. There are different traditions, beliefs and religious customs connected to food consumption, and if individuals are made to eat – either through food aid or through food provided in detention centres, refugee camps, etc. – food that is not acceptable within that individual's culture, this is a violation of the right to food, and an infringement of that person's dignity.

5.2.6. Sustainability Without Infringing on Other Human Rights

The final aspect of the core content of the right to food as defined by the committee is the requirement that the right to food be respected and fulfilled in a manner that is sustainable and that does not infringe on other human rights.[458] The issue of sustainability is particularly crucial for people in poverty. Living in poverty is often characterized by significant insecurity – both physical and psychological (Narayan 2000: 40). The problem with not knowing where the next meal is coming from makes it very hard for individuals to plan their lives and improve the situation in other ways. If all resources go toward satisfying the very basic and fundamental needs of food, little capacity is left to take part in development and improvement of the community. This is clearly demonstrated through Sen's 'capabilities' theory, in which he clarifies that

> Capability is … a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles). For example, an affluent person who fasts may have the same functioning achievement in terms of eating or nourishment as a destitute person who is forced to starve, but the first person does have a different 'capability set' than the second (the first *can* choose to eat well and be well nourished in a way the second cannot) (Sen 1999: 75).

If we see this example in light of the 'capability' theory, the affluent person does not have a problem with the sustainability of food; s/he has just chosen not to eat. The poor or destitute person does not have such a choice, and therefore the sustainability of the food supply is threatened, which leads to lack of capability for change. Therefore in terms of the right to food, lack of sustainability with regard to available and accessible food will clearly represent a violation, which is an obstacle to moving out of poverty.

It is also significant that the core content of the right to food includes a reference to the interference with the enjoyment of other human rights. It is clearly possible that people living in poverty will, through tremendous efforts, manage to

458. UN Committee on Economic, Social and Cultural Rights, GC12, para. 8

satisfy their nutritional needs. However, for many people this will involve giving up the satisfaction of a number of other human rights. For instance, many children have to work rather than going to school; therefore their right to education is violated (Dachi and Garrett n/d). Furthermore, the quality of the food available may be so poor that this impinges on the individual's right to highest attainable standard of health (Kracht 2005: 122). Likewise, efforts put into securing the next meal or food for the next few days may be so all-consuming that there is little or no time or energy to participate in the local community to try to improve the situation (Narayan 2000: 64).

5.3. THE RIGHT TO WATER

The human right to water has long been considered an integral part of the right to food, as well as an element of the related rights to health and housing. However, in recent years the right to water has been viewed as not only an integral part of these economic and social rights but also as an independent human right.[459] This opinion culminated in the drafting and adoption of the UN Committee on Economic, Social, and Cultural Rights General Comment 15 (GC15) in November 2002, which identifies the normative content of the right and the corresponding obligations that realization entails.[460] This action by the committee was taken as a response to the continuing violations of the human right to water evident in the state reports presented to the committee under the monitoring system for the ICESCR.

The legal basis for the said human right is found in several international human rights treaties, although implicitly in most cases. For example, the fundamental basis for the right is under Article 11 of the ICESCR (1966), the right to an adequate standard of living. This provision is taken to include the human right to water, although not explicitly stated, as the committee notes that the list of rights included within the provision is not intended to be exhaustive, rather simply illustrative of the 'catalogue of guarantees essential for securing an adequate standard of living.'[461]

Furthermore, the right to water can be seen as an element of the right to life as contained within the International Covenant on Civil and Political Rights (1966).[462]

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459. Although it is accepted that the right to water is an independent right as well as a derivative right, its status is problematic due to its current codification within international human rights law. For an analysis of this issue see Cahill (2005: 389-410).
460. UN Committee on Economic, Social and Cultural Rights (hereafter referred to as UNCESCR), General Comment No.15 20/01/03 (29th Session, Nov 2002) The Right to Water (Arts 11 and 12 of the Covenant), E/C.12/2002/11. Adopted Tuesday 26 Nov 2002. Hereafter referred to as GC15.
461. GC15, para.3.
462. Adopted 1966, 156 state parties as of 16 June 2006.

In addition to the implicit provisions for the right, there are two international instruments that contain explicit provisions: The CRC provides for a right to 'clean drinking-water' under Article 24, paragraph 2,[463] and under Article 14 paragraph (2) of CEDAW women have the right to 'adequate living conditions, particularly in relation to … water supply'.[464]

These treaties can be viewed as the main international human rights provisions concerning the right to water. Furthermore, there are regional and national provisions, as well as provisions under international humanitarian law and international law.[465]

5.3.1. Definition

The normative content of the right has been outlined in some detail within the GC15 and is based around a substantive framework with three key elements: Accessibility, Availability and Quality.[466] Each of these three elements has a core content and correlative core obligations that must be realized immediately, rather than progressively, as with the wider scope of the right. It is this core content that is especially relevant to realizing the right in the context of the poor, as it is the core content that provides for the essential components of the right, i.e. the part of the right to water necessary for survival and basic needs.[467]

5.3.2. Specific Problems Faced by the Poor in Securing their Right to Water

The problems experienced by those living in poverty in relation to water are both specific to water, but also to more general problems faced by those marginalized in society, such as discrimination and social exclusion. As the World Health Organization notes:

'Among those most directly affected by unsafe water are the poor in both rural and urban areas. Not only are the poor less likely to have access to safe water and sanitation, but they are also less likely to have the financial and human resources to manage the impact of this deprivation' (WHO 2003: 22).

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463. UN International Convention on the Rights of the Child 1989, Article 24. Adopted 20 November 1989, 192 state parties as of 16 June 2006.
464. UN Convention on the Elimination of all forms of Discrimination against Women 1979 (hereinafter the CEDAW), Article 14. Adopted 18 December 1979, 183 state parties as of 16 June 2006.
465. For a comprehensive list of the regional and national provisions and provisions under international humanitarian law and international law concerning water see COHRE (2003).
466. GC15, para. 12(a), (b) and (c).
467. The core content of the right to water is not identified explicitly within GC15, as it was within for example GC12 on the right to adequate food. However, the core obligations are explicitly stated. For further discussion see Cahill (2005: 399-401).

Furthermore, the problem is not due to resource scarcity, 'the problem is that some people – notably the poor – are systematically excluded from access by their poverty, by their limited legal rights or by public policies that limit access to the infrastructures that provide water for life and for livelihoods' (UNDP 2006: 3).

5.3.3. Violations of the Right to Water

Lack of Physical Access to Water

The specific water problems affecting the poor can be viewed through the normative framework of the human right to water as outlined in GC15. The most widespread problems are due to a lack of physical access to water. Denial of basic access to clean water is a reality for 1.1 billion people around the world, and for millions more access is difficult and limited (UNDP 2006: 2). The poor are disproportionately affected as they often live in remote rural areas or urban shantytowns where amenities and connection to mains water are non-existent or poor. Most will not have a mains supply within their homes.[468] Water is collected from sources great distances away, and often these sources are not clean. Moreover, many of the world's poor live in geographical regions affected by scare water supply due to being arid or semi-arid zones, and this means that many of these sources are seasonal (for example see CESR 2003, p.31; UNDP 2006: 35).

In urban areas, refugee camps and some villages, access may be centred on central filling points within the communities. However, these may be some distance away from the home or workplace and entail long journeys to collect water. Moreover, in rural areas the service level lags even further behind urban services, and sanitation coverage is half that in urban settings (WHO and UNICEF 2000: 1). The central filling point may be substituted for a well or other sources such as rivers, springs or harvested rainwater. In all cases, the lack of access in the home can lead to a limited supply of water, as a person can only carry a limited amount of water. Furthermore, lack of access leads people to use water of poor quality. For example, water that has to be transported is open to contamination, whether from the containers it is carried in or from poor quality sources and dirty communal filling points, often shared with animals (UNDP 2006: 33; Oxfam International 2002: 28-29; WHO 2003: 6; Center for Economic and Social Rights 2003: 28, 32).

In addition, in traditional communities, lack of access to water increases the work of women and girls, as it is often their job to collect the water needed for personal and domestic use. Time spent collecting water can be time taken away from girls' education, or taken away from women in the other chores expected of them. Moreover, travelling long distances to collect water exposes women to bad

468. This is significant as access to water within the home provides increased water security which will contribute to a reduction in poverty (see Bartram and Howard 2003: 25).

weather, health hazards and other risks (UNICEF 2006: 6; WHO 2003: 25; UNDP 2006: 47-48).

Lack of Economic Access to Water

Lack of physical access to clean water is compounded by lack of economic access and capability. As UNDP notes, some of the world's poorest people pay the world's highest prices for water, more than high-income residents in the same areas and more than people in rich countries (UNDP 2006: 52). Therefore, even if they do have physical access, water supply can be priced at a level too high for them to afford, and this can result in insufficient supply or total lack of water.[469]

Furthermore, if physical access is difficult or non-existent, the poor have no way of financing other means of purchasing water and have no means to improve the conditions with which they are faced.

The privatization of water services is also a relevant issue. In several cases it has had a negative impact on the realization of the right to water, especially for the poor. [470] The possible detrimental effects of the privatization of water services include inflation, making it unaffordable to the public and thus favouring water supply to wealthy areas; supply of contaminated water to poor areas either through non-maintenance of the mains systems or through neglect of purification processes; or inequitable supply on discriminatory grounds, by the service provider or by the state (Filmer-Wilson 2005: 229; see also Gleick, Wolff, Chalecki, and Reyes 2002).

Moreover, privatization of water services is often related to policies and conditions of international financial institutions such as the World Bank and the International Monetary Fund (IMF). The activities of these bodies must be taken into account and appropriate actions taken to ensure that the poor do have economic as well as physical access to clean water.[471]

The consequential effects of lack of economic access are far-reaching: lack of water can prevent food production and preparation, and therefore prevent capital being earned. Without wages, people have no money with which to access water and improve their living conditions. Hence they are trapped in an endless cycle of poverty.

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469. See GC15, para. 27 on economic access and the obligation to provide low-cost programmes or, in the worst cases, free water for the poor. See Oxfam International (2002: 27-29) for examples of lack of economic access.

470. One example of the negative effects of privatization of water services on the right to water can be seen in the case of Cochabamba, Bolivia, where discriminatory investment in water services (where the state-owned water service was sold to a private company in response to conditions imposed by the World Bank in order to guarantee a loan to refinance water services), resulted in a rise in cost to the population that proved impossible for the poor of the city to afford. See Barlow and Clarke (2002: 154-155). See also the case of Nepal in WHO (2003: 30).

471. For the obligations regarding the right to water and international financial institutions see GC15 para. 36. Also, GC15, para. 35, regarding trade liberalization and water services. See Skogly (2001: 157), regarding their obligations in relation to the right to food.

Poor Quality Water

Furthermore, even if those in poverty do have access to water, it is often of poor quality and in many cases actually contaminated with parasites or other pollutants.[472] More than 1.7 million people die from infection and disease due to poor water supply, sanitation and hygiene every year, with the most vulnerable being children (Bartram and Howard 2003: 1). Few mechanisms for water purification are available to those living in the poorest areas, and due to lack of other viable sources people will consume and use the water, even knowing that it is unclean. Bartram notes that it is a combination of lack of access to water and use of unsafe water that is the cause of most problems for those in poverty, rather than the limited supply of water. Even if one has a limited supply of easily accessible clean water, there is much less risk of contamination and subsequent illness (Bartram and Howard 2003: 23, 27-28).

Poor Sanitation

The quality of water available is often made worse by the lack of sanitary living conditions faced by those in poverty. Often people have to use open countryside, plastic bags, open pits or latrines, where the waste is then dumped into open sewers.[473] This lack of adequate sanitation is inextricably linked to the realization of the right to adequate and clean water.[474] The right to water cannot be realized without adequate sanitation. Consequently, the realization of both adequate sanitation and adequate clean water constitute parallel objectives to be realized in conjunction with each other.

Insufficient Water

As noted, limited access to water can ensure that insufficient water is available for domestic and personal use. Not only does this result in thirst and dehydration and subsequent health problems, but it also affects individuals' or families' enjoyment of the right to food. Even if there is sufficient water for drinking and washing, there may be insufficient supply for food production and preparation (subsistence farming). Water for agricultural uses is a prerequisite for the realization of the right to food.[475] Thus, without water to sustain food production, little progress can

472. For example, in India, villagers received sufficient amounts of water but the water itself was contaminated with arsenic. This led to arsenic poisoning amongst 200,000 people in Bengal and 70 million in Bangladesh. See Shiva (2002: 114). See also Nath, Oral Submission to the UN CESCR Day of General Discussion on the General Comment on the Right to Water, 22 November 2002, Geneva; and Smith et al. (2000: 1093-1103).

473. For example in Balar Math Slum in Dhaka, the capital city of Bangladesh, the 5,000 inhabitants have to use hanging latrines that feed straight into a rubbish-filled ditch in the middle of the slum. This causes many health problems including extreme diarrhoea (see WHO 2003: 24; UNDP 2006: 38).

474. GC15, para. 29 and para. 37, core obligations (i).

475. GC15 para. 7.

be made in terms of alleviating poverty, and the prospects of eradicating it remain slim.

Moreover, access to sustainable water sources is imperative not only for water for food but for the realization of the right to water overall. Sustainable use of water is required to ensure sufficient water for present and future generations.[476] For example, in an emergency situation, delivery of water aid in the manner of tankered water or bottled water is an essential survival mechanism. However, this dependency on delivered water is not a sustainable source for the long-term relief of poverty.

5.3.4. Discrimination and Particularly Vulnerable Groups

Other violations of the right to water faced by those living in poverty are those of discrimination and social exclusion. The poor are the marginalized in societies worldwide. This is due to a combination of existing disadvantage due to economic status and/or social exclusion,[477] coupled with the deliberate policy choices of governments. In regard to water, both state policy and the actions of third party service providers have been known to discriminate against the poor by favouring water plans that are only affordable to a minority of the population.[478] Moreover, privatization of water services can have a negative effect on the access of the poor to clean water, through both the increase of prices and inequitable supply to human settlements based upon discrimination.[479]

Those living in poverty also often face the reality of 'double discrimination', i.e. through being poor and through being a part of a vulnerable group within society, such as a racial, ethnic or religious minority (UNDP 2006: 54). It is evident from concluding observations of the UNCESCR[480] as well as the reports of special rapporteurs, UN agencies and NGOs[481] that access to clean water is often denied to the most vulnerable in society, for example, the homeless and refugees.

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476. See GC15, para. 11, 28.
477. For example social exclusion due to, inter alia, race, religion, minority or ethnic group and gender.
478. See GC15, para. 14.
479. GC15, para. 27 provides that whether water services are public or privately owned, payment for such services should be based on the principle of equity. It does not equate privatization with necessarily negative impact on the right to water. However, others have argued that privatization of water services will always have a negative impact on water supply to the poor and marginalized. For example see Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloon Kothari, E/CN.4/2002/59, 1 March 2002:22, para. 56. See also Section 5.3.3.
480. For example, between 1994 and 2001 the CESCR concluded that 30 states had problems concerning the enjoyment of the right to water. See COHRE (2003: 98-107).
481. For example see, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate Standard of living, Mr. Miloon Kothari, E/CN.4/2001/51, 25 January 2001, para. 59, para. 70; Report of the Special Rapporteur on adequate housing as a component of the right to an adequate Standard of living, Mr. Miloon Kothari, E/CN.4/2005/48, 3 March 2005, para. 51; WHO/UNICEF 2000: 35.

As mentioned previously, the collection of water is a disproportionate burden upon women as they are often solely responsible for ensuring there is enough water for personal and household hygiene and domestic use, such as cooking and food preparation. Furthermore, it is women who are usually responsible for teaching children how to use water efficiently and how to maintain household and personal hygiene. Thus it is the women who struggle when they cannot access water or have a limited supply. It is also women who have to nurse sick children or family members if they are ill due to lack of water or through consumption of unclean water or due to unsanitary conditions (WHO/UNICEF 2000: 35).

Children are especially vulnerable to disease and ill health, as their immune systems are not fully developed. As noted above, children are often involved in, if not solely responsible for, the collection of water in many societies. This leaves them susceptible to infection from dirty water and dirty collection points, which are shared by many people (WHO/UNICEF 2000: 35). Furthermore, because of water collection many children lack education as their time is spent travelling to and from the water point, rather than attending school (UNDP 2006, p.47; FIAN 2005: 9). The lack of adequate sanitation in schools is also responsible for the non-attendance of many female children, as they have nowhere to go to the toilet with dignity.

In addition the lack of adequate sanitation in many countries, especially for the poor, ensures that ill health and disease are commonplace for the world's poorest children. UNICEF estimates that more than 1.5 million children die every year from diarrhoeal disease (UNICEF 2006: 1). That is the equivalent of one child dying every fifteen seconds or twenty jumbo jets crashing every day (WHO/UNICEF 2000: Box 1.2). These deaths are due to consumption of dirty water, poor sanitation and unsanitary environmental conditions and poor hygiene due to lack of access to water. [482]

5.4. IMPLEMENTING A HUMAN RIGHTS APPROACH TO ADEQUATE FOOD AND ACCESS TO CLEAN AND SUFFICIENT WATER – WHAT CAN BE DONE?

In sum, lack of access to clean water can lead to poor hygiene, poor sanitation and poor health, resulting in dehydration, illness and disease, and, in extreme cases, death. In addition, the impact of insufficient water on the production and preparation of food is significant in exacerbation of existing situations of poverty. The question is how can the rights to water and food be implemented on the ground, to assist in the eradication of poverty?

It is essential that states ensure the realization of the minimum threshold of the right to water and the right to food. They must comply with the correlative core

482. Other diseases caused include worm-related illnesses, skin disease, infectious diseases and pneumonia (see UNICEF 2006: 4).

obligations as interpreted by the GC15,[483] and obligations as provided in GC12.[484] Specifically, this means that states must ensure basic physical and economic access to clean water for personal and domestic use, and especially provide for marginalized groups such as those in poverty.[485] This core obligation cannot be realized progressively under any circumstances, and states have an obligation to seek international assistance if they cannot fulfil this obligation independently.[486]

This core obligation under the human right to water framework is especially important in the fight to eradicate poverty, in that it offers enhanced protection for the most vulnerable in society, including the poor, and, as such, prioritizes the needs of poor women, children and other marginalized groups such as indigenous peoples and minorities.[487]

Likewise, it is imperative that at least the minimum essential level required to be free from hunger is satisfied.[488] As confirmed by the Committee, 'Fundamentally, the roots of the problem of hunger and malnutrition are not lack of food but lack of *access to* available food, *inter alia* because of poverty, by large segments of the world's population'.[489] Therefore, fulfilling the right to be free from hunger for vulnerable groups will be imperative in any strategy to alleviate poverty.

Significantly, although the GC15 does not contain detailed provisions regarding sanitation, it does note that ensuring access to adequate sanitation is a core obligation for states[490] in the context of alleviating disease. Furthermore, adequate sanitation is imperative to the realization of the right to water itself, as without satisfactory sanitation, water sources will always be under threat of contamination. Basic sanitation is essential for the eradication of disease and death caused by dirty water and unsanitary living conditions, and thus a crucial element of any right to water framework for incorporation into poverty eradication strategies. Again, the specific needs of women and children must take priority as the most vulnerable groups of the poor.[491] Furthermore, adequate sanitation is a key component for ensuring that available food is safe, and therefore imperative for the fulfilment of the right to food as well.[492]

In order to implement these core obligations and realize the essential minimum threshold of the right, particularly in relation to those living in poverty,

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483. GC15, para. 37.
484. GC12, paras 14-20.
485. GC15, para. 37(f) and 37(h) and paras 15 and 16.
486. See GC15 para. 30.
487. See GC15, para. 16 (a) Women; 16 (b) Children; 16 (c) Rural and deprived urban areas and 16 (h) Groups facing difficulties with physical access to water including those living in arid and semi-arid areas.
488. GC12, para. 17.
489. GC12, para. 5.
490. See GC15, para. 37 (i) and para. 29.
491. See GC15, para. 29.
492. FAO - *Voluntary Guidelines To Support The Progressive Realization Of The Right To Adequate Food In The Context Of National Food Security*, adopted by the FAO Council, November 2004. Guideline 3.6 (Hereinafter: 'Voluntary Guidelines').

states must have a national plan for water and food security.[493] This obligation includes 'ensuring that water is affordable for everyone; and facilitating improved and sustainable access to water, particularly in rural and deprived urban areas.'[494] Furthermore, food security requires national policies that ensure the sustained availability and accessibility of food for all, and is therefore a step in the implementation of the right to food. Additionally, the rights concept adds further 'dimensions of dignity, rights acknowledgement, transparency, accountability and empowerment' (Mechlem 2004: 648) as necessary components for the implementation.

These plans should be an integral part of their poverty eradication strategies. As part of the monitoring of the effectiveness of such strategies, the core obligations of the rights can indicate the minimum threshold, below which the level of access, quality and sufficiency of water supply and food availability must not fall. As such, by using the core content of the rights to water and food to identify violations, the policy can be monitored and evaluated, and serve as an indicator to show progress in alleviating poverty and realizing the full scope of the rights.

Furthermore, such water and food policies should include the participation of the communities living in poverty, both in the planning and delivery of water services and in the means of accessing food and in the evaluation of the implementation of both rights in practice.[495] For example, any benchmarks and indicators illustrating the implementation of the rights should include statistics, but also public forums for the poor to discuss their views, ideas and experiences, and to air their grievances. Water policy should also include an element of information access[496] and education to enhance the capability of the poor in relation to the right to water. In food security analysis, a participatory approach of individuals and communities is an essential component to ensure the correct strategies are adopted. In this way, the poor can then seek to remedy any violations that do occur.

The key to effective implementation of the legal right to water and food, both generally and particularly in order to empower the poorest persons, is the domestic codification of these rights.[497] By enshrining the rights within national law, whether under constitutional law or other domestic law, the poor gain access to remedies under a judicial system and states are held accountable for their actions or omissions. A number of states have already provided for explicit rights to food and to water under their constitutional law,[498] and several

493. GC12 , para. 21; Voluntary Guidelines, Guideline 3.1.
494. GC15, para. 26. See also GC15, para.27, 47 and 48.
495. GC15 para. 48, 37(f).
496. GC15 para. 48.
497. See GC15, para. 26: 'The obligation to fulfil requires States parties to adopt the necessary measures directed towards the full realization of the right to water. The obligation includes, inter alia, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation.'
498. Seventeen states to date have constitutions that include provisions for one or more element of the right to water, some being comprehensive. For a detailed list of these provisions see COHRE (2003: 45-51). Twenty-two constitutions contain provisions making direct reference to the right to food applicable to the whole of the population, while 17 constitutions provide for such

have subsequently enshrined these obligations under national legislation.[499] For example, South Africa has explicitly and comprehensively enshrined the right to water within Articles 27(1 (b) of their constitution and have enacted legislation under constitutional provision Article 27(2) to enforce these provisions in the South Africa Water Services Act 108 (1997) and Act 19 (1998), and the South Africa National Water Act 36 (1998). The Water Services Act 19 provides for a right to a limited amount of free water, the regulation stating: 'The minimum standard for basic water supply services is … a minimum quantity of potable water of 25 litres per person or 6 kilolitres per household per month at a minimum flow rate of not less than 10 litres per minute; within 200 metres of a household; and with an effectiveness such that no consumer is without a supply for more than seven full days in any year.'[500] The state is not obliged to provide every inhabitant of South Africa with free water supply but must provide the minimum supply of water to all, including those who prove that they are unable to pay for basic services.

Similarly in the United Kingdom (UK), although not based on constitutional provision, under domestic law the Water Industry Act 1999 (Schedule 4A) makes it illegal for any water company in England or Wales to disconnect the water supply to 'any dwelling occupied by a person as their only or principal home' for reasons of non-payment of charges/bills (Ofwat 2007: 2; UK Crown 1999). In addition, the UK has legal provision for special measures to assist vulnerable groups who may have difficulty accessing water. Under the Water Act 2003,[501] the Water Services Regulation Authority (Ofwat) has a duty to take account of the interests of those who are disabled, chronically sick or of pensionable age, of low income and those living in rural areas.[502] In terms of practical application, mechanisms for assistance for vulnerable groups are contained within further legislation, for example, certain metered household customers are protected from paying large water bills under government regulations introduced on 1 April 2000 and further amended in 2005 to extend eligibility for assistance.[503] These provisions protect the existing

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protection for specific groups. For further details, see FAO Recognition of the Right to Food at the National Level, Intergovernmental Working Group for the Elaboration of a Set of Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security, Information Paper, Rome FAO (no date available, but information is updated to end of December 2003). http://www.fao.org/DOCREP/MEETING/007/J0574E.HTM (hereinafter 'FAO Information Paper').

499. Venezuela and South Africa have codified the right to water following sources in their Constitutions and 7 states have directly legislated for a right to water without Constitutional sources. European Directive 2000/60/EC also has the legal effect of national law and provides for protection of water sources. For full details see COHRE (2003: 52-80).
500. Water Services Act 19 (1998), Government Gazette 22355, 8 June 2001, Government Notice R509, Regulation 3.
501. The Water Bill was introduced in the House of Lords on 19 February 2003 and published on 20 February 2003. The Bill finished its Lords stages on 9 July 2003, and was introduced into the House of Commons on 11 July 2003. The Bill received Royal Assent on 20 November 2003, becoming the Water Act 2003. The Act was published on 28 November 2003.
502. Water Act 2003, Section 39, para. 2C (in relation to 2A(a)).
503. The Water Industry (Charges) (Vulnerable Groups) Regulations 1999 SI 1999/3441, amended by SI2000/519, 2003/552 and The Water Industry (Charges) (Vulnerable Groups) Regulations 2005/59).

supply and provide help to people who might otherwise have limited water supply, possibly compromising their own health and public health due to lack of economic access. 'Eligible customers pay no more than the average household bill for their region even if they use more than the average amount of water.'[504]

Furthermore, in addition to legal provisions, there is jurisprudence concerning the right to water and cases have been brought before South African national courts under constitutional and national law, with positive outcomes. For example in relation to economic access to water, two cases have been tabled concerning unlawful disconnections of water supply. In *Residents of Bon Vista Mansions v Southern Metropolitan Local Council*, the applicant (a resident), on behalf of all the residents, sought interim relief following disconnection from the water supply to their block of flats by the local council. The court case relied on the provisions in the Constitution, but also referred to the Water Services Act in relation to the state's obligation to give notice of any impending disconnection and the requirement to provide redress mechanisms and opportunities for representations (Water Services Act 108, Section 4 (3)). The Court ruled that none of these fair and equitable procedures prior to disconnection had been followed, and accordingly the council had violated its obligation to respect the residents' right of access to water through unlawfully depriving them of their existing water supply. The council was ordered to restore the water supply to the Bon Vista Mansions.[505]

In *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others*, a resident representing a voluntary association of residents from the Lebohang Township brought a case against the local council, local council leaders and the Minister of Health alleging that the disconnection of the water supply would cause irreparable harm to the applicants if the supply was not reconnected. On balance the court ruled that 'any pecuniary losses that the respondent might suffer cannot outweigh human need (and possibly even human suffering) which will probably occur due to lack of fresh water…'[506] Interim relief was granted and the water supply was reinstated with immediate effect.[507]

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504. Note these regulations 'only apply to appointed water companies operating wholly or mainly in England. However, the two Welsh companies, Dŵr Cymru and Dee Valley Water, also offer the same assistance on a voluntary basis.' See Ofwat, Consumer Issues, Ofwat Key Work Areas, '*Customers applying for help under the Vulnerable Groups' Regulations – 2004-05 and 2005-06*', 20/11/06, at http://www.ofwat.gov.uk

505. See *Residents of Bon Vista Mansions v Southern Metropolitan Local Council,* High Court of South Africa (Witswatersrand Local Division), Case No: 01/12312, 2001. Also, COHRE (2003: 121-124); Kok and Langford (2005: 203); WaterAid, The Right to Water, Legal Redress, Enforcing the Right to Water: South Africa, at www.righttowater.org.uk

506. *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council and Others,* Transvaal Provincial Division, Case No. 28521/2001, 17 May 2002, para. 33. Also, COHRE (2003: 125-126).

507. A further case has been heard concerning access to sufficient water as an element of the right to housing and discusses the interrelationship between the rights to food, water, health and housing*: Government of the Republic of South Africa and others v Grootboom and others*, 2001 (1) SA 46 (CC), South African Constitutional Court. See COHRE (2003: 117-121); Kok and Langford (2005: 206).

Other cases have been heard in Argentina and Brazil under inter alia constitutional sources, although neither constitution contains an explicit provision for the right to water. For example, in *Quevedo Miguel Angel y otros v Aguas Cordobesas S.A. Amparo*, the Civil and Commercial First Instance Court of Argentina ruled that disconnection of the water supply to a group of low-income families due to non-payment was illegal as it violated both provincial law regulations to provide 50 litres of water per day regardless of payment, and Section 42 of the Argentinean Constitution concerning consumer rights to health and safety. Furthermore, the Court held that the minimum supply of 50 litres was insufficient to meet the health and hygiene requirements of the families and ordered the company to provide a minimum of 200 litres per household.[508]

In *Defensoría de Menores N° 3 v Poder Ejecutivo Municipal*, the Children's Public Defender of the Province of Nuequen filed a case on behalf of children living in the Valentina Norte rural colony whose drinking water supply was contaminated with hydrocarbons. The Superior Justice Court upheld a previous decision of the Court of Appeal requiring the government to provide 100 litres of drinkable water per day to each individual in the colony, as well as means to store it safely until the definite decontamination of the water supply had been implemented. The case relied upon the Constitution but also based its arguments on the provisions for a right to water as part of the right to health under the CRC.[509]

In the Brazilian case, again concerning illegal disconnection of water supply, the vulnerability of the petitioners was central to the outcome of the case. One of the residents of the household was sick and the Court held that this situation was the primary concern in deciding whether disconnection was illegal or not. Under the Brazilian Consumers' Defence Code, exposure of the user to humiliating decisions is forbidden. Therefore, under this national regulation, as well as under constitutional provision, the decision was found in favour of the residents, the water supply was reinstated and compensation awarded.[510]

With regard to the right to food, there is limited, but growing, jurisprudence.[511] There are, nevertheless, a few cases in which the right to food has been specifically invoked by the courts. One such case is from Switzerland, which does not explicitly recognize a right to food in the constitution, but rather a right to receive assistance in situation of distress (social security). The case, which was heard by the Swiss Federal Court in 1996,[512] concerned a complaint by three brothers that were refugees from the Czech Republic. The brothers had no money and no food,

508. *Quevedo Miguel Angel y otros v Aguas Cordobesas S.A. Amparo* Cordoba City, Juez Sustituta de Primara Instancia y 51 Nominacion en lo Civil y Comercial de la Ciudad de Cordoba (the Civil and Commercial First Instance Court of Argentina), 8 April 2002. See COHRE (2006a: 27).

509. *Valentina Norte Colony, Defensoría de Menores N° 3 v Poder Ejecutivo Municipal* s/acción de amparo. Expte. 46-99. Acuerdo 5 del Tribunal Superior de Justicia. Neuquen, Argentina, 2 March 1999. See COHRE (2006a: 27-28).

510. Bill of Review 0208625-3, Special Jurisdiction Appellate Court, Paraná, Brazil, August 2002. See COHRE (2006*a*: 29-30; 2003: 115).

511. FAO Information Paper, para. 34

512. Tribunal Fédéral Suisse, reference ATF 121 I 367, 371, 373 V. = 1996, 389. Cited in UN Commission on Human Rights, Right to Food Report submitted by the Special Rapporteur

and were unable to work because they could not get a work permit, and could not leave Switzerland because they had no papers. The Court recognized the right to minimum basic conditions, including 'the guarantee of all basic human needs, such as food, clothing and housing' to prevent a situation where people are '[r]educed to beggars, a condition unworthy of being called human' (Zigeler 2001: para. 58).

Significantly, cases concerning the right to water and the right to food have also been brought under the right to life, as contained in Article 21 of the Indian Constitution.[513] In these cases the Supreme Court has held that sufficient clean and safe water supply is essential for preserving public health[514] and that the right to life must include the 'right of enjoyment of pollution free water'.[515] More specifically regarding the right to food, the Indian Supreme Court held that Article 21 of the Constitution 'protects for every citizen a right to live with human dignity'.[516] The case, which was brought by the People's Union for Civil Liberties (PUCL) (Rajasthan), related to a situation where after three years of drought, the PUCL held that the state governments failed to meet their responsibilities towards drought-affected citizens, as laid out in their 'famine codes' or 'scarcity manuals',[517] which was particularly serious taken the country's large food stocks that were not made available to the suffering population. In response to this situation, the Court asked 'Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families?'[518] To conclude, the Court made reference to Article 47 of the Constitution which confirms the duty of the State to raise the level of nutrition and the standard of living of its people. The Court therefore recognized formally a right to food, and ordered the central and state governments to take a number of different measures to improve the situation.[519]

In the Argentinean case *Menores Comunidad Paynemil s/acción de amparo*, the Court of Appeals decided that the pollution of an indigenous community's water supply by an oil company constituted a violation of the people's right to health

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on the Right to Food, Mr. Jean Ziegler, 2001, UN Doc E/CN.4/2002/58, para. 58 (hereinafter, Ziegler 2001).

513. Regarding the broad interpretation of the right to life under Indian jurisprudence see Muralidhar (2006: 237-267).

514. *Municipal Council Ratlam v Vardhichand et al.,* AIR 1980 SC 1622, Supreme Court of India. Summary in COHRE (2003: 115).

515. *Subhash Kumar v State of Bihar,* AIR 1991 SC420, Supreme Court of India. Summary in COHRE (2003: 115).

516. *PUCL v Union of India and Others.* Write Petition (CIVIL) No. 196 of 2001, quoted in FAO Information Paper, para. 41. See also PUCL case in this volume, Chapter 2, Taking Socioeconomic Rights Seriously: The Substantive and Procedural Implications, David Bilchitz; Chapter 10, Rising to the Challenge of Child Poverty: The Role of the Courts, Aoife Nolan; Chapter 12, Access to Justice and the Alleviation of Poverty, Iain Byrne.

517. FAO Information paper, para. 39.

518. FAO Information paper, para. 41.

519. FAO Information paper, para. 42. See also Muralidhar (2006*b*: 246).

and a safe environment. The Court found that the government had not fulfilled their obligation to protect the health of the population under the Constitution.[520]

Regional systems also have a role to play and several cases have been tabled before both the African Commission and the Inter-American system. In the case of *World Organisation Against Torture (OMCT) et al. v Zaire*, the petitioners claimed inter alia that the government had failed to provide basic services including safe drinking water. The African Commission found that the government had indeed failed to provide basic services necessary for a minimum standard of health and as such had violated the right to health as provided for under Article 16 of the African People's Charter.[521] The African Commission has also confirmed the right to food, in spite of the African Charter on Human and Peoples' Rights' lack of a specific provision guaranteeing this right. In the case brought by the Social and Economic Action Center and the Center for Economic and Social Rights against Nigeria for the Nigerian Government's involvement in the oil production and the contamination of the environment among the Ogoni people,[522] the commission held that 'the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation'.[523] On the basis of the facts of the case, the Court found that '[t]he government's treatment of the Ogonis has violated all three minimum duties of the right to food. The government has destroyed food sources through its security forces and State Oil Company; has allowed private oil companies to destroy food sources; and, through terror, has created significant obstacles to Ogoni communities trying to feed themselves.'[524]

The Inter-American Court of Human Rights has implicitly addressed the right to food in the case of the Sawhoyamaxa indigenous community against Paraguay.[525] In this case the community had over a long period of time become marginalized, lost its right to land, and been forced out of its traditional areas. Since 1991 community members were forced to live on the border of the road, without adequate food, sanitation, housing and medical case. The miserable living conditions led to the death of more than 18 members of the community, most of them children and elderly people. In this case, the Court held that 'the right to life … does not only prohibit arbitrary deprivation of life. It also implies state obligations to create the conditions necessary – by adopting both negative and

520. *Menores Comunidad Paynemil s/acción de amparo,* Expte. 311-CA-1997. Sala II. Cámara de Apelaciones en lo Civil, Neuquen, Argentina, 19 May, 1997. See COHRE, 2003: 111-114; Picolotti 2005: 1-5, for details of other Argentinean cases.

521. See *OMCT et al. v Zaïre,* Communications 25/89, 47/90, 56/91 and 100/93; See also *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria,* Communication 155/96, both before the African Commission on Human Rights. Summary in COHRE (2003: 108-110).

522. African Commission on Human and Peoples' Rights, case 155./96, para. 1.

523. African Commission on Human and Peoples' Rights, Communication no. 155/96, para. 65.

524. African Commission on Human and Peoples' Rights, Communication no. 155/96, para. 66.

525. Corte IDH. *Caso Comunidad Indigena Sawhoyamaxa v Paraguay.* Decision of 29 March 2006, Series C. No. 146. See summary in FIAN: 2007.

positive measures – to protect and preserve the right of all those living in the state's territory'.[526]

The above decisions appear 'consistent with international jurisprudence' on the right to water and the right to food (Kok and Langford 2005: 204).[527] The development of jurisprudence concerning these rights is in its infancy but is evolving. Most cases on the right to water to date deal with illegal disconnections and many highlight the importance of special protections for the poor in terms of economic access to water. In addition, there are several cases concerning pollution of water sources. Significantly, in all the cases listed there has been a positive outcome. This illustrates the importance of strong domestic legislation in realizing the rights in practice and consequently in helping to eradicate conditions of poverty and empowering those living in such situations.

In addition, these cases highlight the interdependence of human rights, as several of the cases have been brought under provisions that do not explicitly guarantee a right to water or the right to food, but incorporate such rights as an element of related rights, such as the right to an adequate standard of living, health, housing and a healthy environment. This interdependence allows for greater breadth and flexibility in application of protections, but conversely can leave gaps in provision or weakness in proving a case. As such, explicit recognition of these rights in domestic and constitutional legislation offers optimum protection. Likewise, the strengthening of provisions and remedies under regional mechanisms and international instruments should continue.[528]

However, legal codification is little use unless the rights to water and food provided for are an entitlement to be realized on the ground. It should be noted that the poor are often de facto barred from accessing the justice system and other state institutions. Narayan (2000) states that '[d]ysfunctional institutions do not just fail to deliver services – they disempower, and even silence, the poor through patterns of humiliation, exclusion and corruption. Legal and other formal barriers that prevent the poor from gaining access to benefits or trading further compound the problems' (Narayan 2000: 109). Therefore, other means need to be applied to ensure the implementation of the rights and relevant accountability and remedy mechanisms when failures occur. In terms of practice and policy to implement such legal enforcement, at an international level, development and emergency relief organizations, as well as international state agencies, should promote an explicit human rights framework as part of their poverty eradication policies. This framework should be incorporated at policy level and most significantly should be

526. Sawhoyamaza Decision, para. 150.
527. See CESCR General Comment 15, para. 56.
528. For example, with the adoption of a complaints mechanism under the ICESCR Optional Protocol, see Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its Third session, E/CN.4/2006/47, 14 March 2006; Arambulo 1999.
Specifically in relation to the right to water, there has been a movement for an international water treaty covering all aspects of the right to water under international human rights law, international law and humanitarian law. See Green Cross International (2005).

'operationalized' at project level in the field. Incorporating these rights into policy is meaningless if those living in poverty do not have the education and information to impart knowledge of the right and subsequently seek remedies if they are threatened or violated. In order to optimize this approach, 'complementarity' between development and relief NGOs and appropriate state departments with human rights NGOs and relevant government departments is imperative. This combination of experience should then result in gibing added weight to the lobbying of governments and private actors, and also ensure the highest level of advocacy and optimum strategies for empowering the poor.

At the present time, despite acknowledgement by development NGOs of the human rights to water and food, very few actually implement a specific rights-based approach to tackle lack of access to clean water or adequate food in their poverty eradication strategies or in their work in general.[529] Despite discourse concerning a rights-based approach on paper and websites, overall, little information from projects in the field regarding the inclusion of human rights assessments, implementation and education is available. Although several development organizations have moved to integrate human rights principles into their programmes, there is no consensus on an operational methodology, and variations in approach continue (Filmer-Wilson 2005: 221.). For example, the UK Department for International Development (DFID) has produced an excellent report detailing policy on human rights integration in their policy on tackling poverty (DFID 2000), but this does not necessarily ensure that substantive economic and social rights, such as the rights to water and food, are explicitly targeted at local operational level. Moreover some NGOs consider 'synergistic projects which aim to engage across an array of rights' as more beneficial than targeting specific rights (CARE 2001: 12). However, this may result in a limited scope of understanding about a certain right. For example, in a CARE project in India a new water system was installed following negotiations involving the community and local authorities. Once the system was in operation it became clear that the volume of supply was insufficient to meet the requirements for basic needs. If a 'right to water' approach had been taken, the community could have ensured that their negotiations with the authorities would have included an entitlement to an adequate amount of water per person per day to meet personal and domestic needs, in line with international legal guidelines.[530]

The fact that the Millennium Development Goals regarding water, sanitation, and hunger reduction do not even explicitly refer to the relevant human rights is telling. At the very least an awareness of the legal provisions for the relevant specific rights should be integral to the poverty eradication project, for those devising and

529. One promising example can be seen in the work and policy of Oxfam International which has adopted a strategic plan based upon a rights approach, singling out in particular economic and social rights. See Oxfam International (2001; 2004). However, to what extent these NGOs work with human rights NGOs in partnership is undocumented.

530. Filmer-Wilson (2005: 230) notes that a rights-based approach should have been used but does not indicate whether this should include specific rights assessment or an integrated approach. See also Rand (2002: 55).

planning the scheme and as part of the education and capacity-building element for the local community involved. In addition, a grassroots-up approach is beneficial.[531] However, until there is much greater co-ordination between human rights bodies and development agencies, the implementation of such an approach on the ground seems unlikely.

Furthermore poverty eradication projects must consider access and sustainability of water and food sources even if the project is not directly concerned with these aspects of poverty eradication. This is because development projects can often impact upon water or food supplies or can require water or food in order to enable them to commence and be sustainable.[532] Therefore the participation of the local community or individuals affected is essential, as nothing substitutes local knowledge. This will ensure effectiveness of the project, enhance and foster the capability of the local population, and maintain their dignity as human beings, rather than victims and recipients of aid (although in extreme cases aid for survival is of priority).

5.5. CONCLUDING REMARKS

What is crucial and often overlooked by both law-makers and those in the human rights, development, relief agency and NGO communities is the need to work together so that all those involved in poverty eradication at state and local level (including grassroots organizations and local civil society) have an understanding of poverty as a violation of fundamental human rights. Then it becomes possible to operationalize this understanding by incorporating a human rights normative framework into their strategies and practice. In this way realization of substantive human rights, such as the right to food and water, can contribute to the wider goal of poverty eradication.

While the rights to clean and sufficient water and to adequate food are imperative in any strategy for poverty alleviation, the attention to the problems described in this chapter are not sufficient for sustainable poverty eradication, but rather significant and necessary components of such a strategy. As the jurisprudence in this area shows, there is a recognized interdependence among a variety of rights, and the realization of the rights to water and to food are necessary precon-

531. For example, WaterAid has incorporated a human rights approach into certain specific projects, such as the Citizens Action Programme for access to water and sanitation, which has rights-based projects at grassroots levels in Ghana, India, Nepal and Uganda, Ethiopia, Bangladesh, Mozambique, Nigeria, Burkina Faso and Mali with others to follow. For details see WaterAid.

532. One such example can be seen in the case of a grain-store building project in Arusha, Tanzania. Here, despite donor aid money and delivery of building materials, the project failed because no one had taken into account how the local people were going to get water to the site to use in the making of the mortar for the bricks. Hence the bricks had rotted before the store could be erected. Had the development NGO consulted the local population they would have known that they required buckets to transport the water. Moreover, once the problem was identified the project had no foreign exchange provision to buy any buckets in Tanzania and they had to be imported (Clarke 1991: 83-85).

ditions for the realization of other rights in many circumstances. This demonstrates the complexity in addressing poverty eradication through a human rights approach, and is evidence of the need for comprehensive and inclusive methods to tackle poverty issues.

6

Transforming Security of Tenure into an Enforceable Housing Right

Scott Leckie

> Man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.
> (Justice Oliver Wendell Holmes)

6.1. INTRODUCTION

If there is one issue that forms the nucleus of the bundle of rights commonly referred to as 'housing rights', it is undoubtedly the question of security of tenure. When in place, security of tenure – or the level of control exercised over one's home and the degree to which a household is protected against forced, arbitrary, unlawful or otherwise illegal evictions – acts both as a source of residential stability and as a formal (and sometimes informal) basis of protection against potential abuse or harassment. The level of 'security' possessed under the many various forms of tenure can often mean the difference between violent forced eviction and the ability to feel safe and respected within one's home. Security of tenure forms the basis for effective land administration and regulation systems and provides a framework for ensuring that the manner by which land, housing and property is arranged within societies is carried out in consistence with and in support of basic human rights norms.

Much has been achieved in the housing rights arena since the emergence of the economic and social rights movement in recent years, yet there nonetheless remains a considerable disconnect between the efforts of those within the human rights community and those working within the housing or human settlements fields. While groups such as the Centre on Housing Rights and Evictions (COHRE),[533] Amnesty International (e.g. 2003) and Human Rights Watch (e.g. 2004) are now actively engaged in a wide range of efforts opposing

533. See: www.cohre.org.

housing rights violations such as forced evictions, all too rarely have human rights practitioners taken on the far more difficult challenge of actually developing ways and means for resolving the structural causes of forced eviction and enhancing tenure rights. Indeed, even on those rare occasions that tenure issues are even addressed by the human rights community, it is still common for human rights advocates to favour largely legalistic or procedural approaches to eviction prevention and residential stability, which may not necessarily be sufficient if the objective is strengthening security of tenure for all. Human rights practitioners are generally far more comfortable with opposing illegal or abusive practices than proposing new, innovative, culturally appropriate policies and remedies which get to the cause of the violation concerned and prevent its reoccurrence. Those with legal training often wish for nothing more than legal clarity, precision and clearly drawn distinctions separating rights from obligations. Yet, the issues surrounding the provision of security of tenure are very often not particularly clear, exact or indisputable, and thus legally-based approaches alone are not always the most pertinent when applied to the fluid and diffuse situations that often arise in the context of security of tenure initiatives.

On the other hand, those working on the development-side of the tenure question tend to support what are essentially political approaches to the conferral of tenure, but without any considerable reliance upon laws, legal procedures or judicial support. Those involved in politically-driven struggles to protect the rights of those living in informal settlements tend to focus on community organizing and often fear and even consciously disavow any element of law, believing that popular processes and contacts with the 'political powers that be' are of infinitely greater relevance than reliance on legal provisions and institutions that appear to be tools used by evictors and developers and not the source of true empowerment of the poor. And yet, pretending that the law has no relevance to security of tenure struggles is both naïve and a strategy all too often built on patronage and connections which may provide temporary forms of protection against eviction, but which provide very few long-term legal rights to the poor.

It is clear that both legalistic and political approaches to these questions have clear merits and can be mutually beneficial to the other's success. However, they all too rarely overlap, and this chapter will briefly explore some of the conceptual issues that may need to be addressed with a view to facilitating a greater degree of convergence between these two approaches. What is proposed here is essentially a human rights approach to tenure security, which can be embraced by both those favouring more legalistic approaches *and* those whose energies are more directed towards empowering poor communities to improve their own homes and neighbourhoods. Due to the very nature of security of tenure and the de facto tenure situation throughout the world, such an integral approach will surely present daunting challenges and, initially at least, result in a degree of discomfort to both the legal and the political camps. Nevertheless, it is clear that an entirely new approach to the question of security of tenure that combines the best of what the legal world can offer and the best of what can be offered by the community-

organizing side of the equation is required if the objective of security of tenure for all is to be achieved.

6.2. THE GLOBAL SECURITY OF TENURE CRISIS

> [L]aws are unjust when the poverty of the majority of people makes it impossible for them to comply with them. If for most urban citizens, the basic tasks of daily life – building or renting a shelter, earning an income, obtaining food and water – are illegal, it would be wise for governments to change the legislation or simply to eliminate unrealistic laws. Urban legislation should be more flexible in adapting to the great variety of circumstance and the rate at which these can change (Hardoy and Satterthwaite 1989: 35).

In all likelihood the year 2006 will go down as the year in which planet Earth became more urban than rural, with city dwellers outnumbering those living in the countryside for the first time since the dawn of humanity (Davis (M.) 2006). While the resource, environmental, social and economic consequences associated with our urbanizing world are well known (see, for instance: Diamond 2005; Gore 2006; Catton 1982; Sassen 1991), the security of tenure crisis that the growth of cities has already generated, and which will grow exponentially in years to come, is far less appreciated. If Davis' calculations are true – i.e. that there are some 200,000 or more slums and nearly 80 per cent of urbanites in the least-developed countries are residents of these slums – then questions of tenure insecurity are daily concerns affecting well over one-third of humanity (Davis 2006: 23, 26). These informal settlements exist and continue to expand not for the alleged 'free ride' that the current and new urban poor can have, but because the formal (legal) housing, land and property sectors are simply inaccessible for lower-income and middle-income groups. Nor is this urban reality simply a result of the global property price boom of recent years. Rather it is the outcome of many decades of overall governmental neglect of the housing sector and an increasing reliance on market-based solutions to the housing needs of the poor. This is despite well over a century of evidence that the market alone has never – and will never – provide adequate, affordable, accessible and secure housing to lower-income groups. In many respects, state-driven housing provision programmes have not always necessarily fared better, even though this needs to be seen in light of the fact that few governments ever really made a truly concerted effort to build or subsidize the building of adequate supplies of low-income housing and then maintain it at a standard consistent with internationally recognized norms of adequacy. While many exceptions abound, this general failure of both state- and private sector-led approaches to provide a sufficient number of homes that the poor can afford, is a key reason why so many of the world's citizens are slum residents today. What the future predictions of urban growth tell us, then, is that there is already a sadly anticipatory presumption by the political mainstream that the poor will still be

forced to find their own housing solutions, even though these will continue to be built outside the law, informally, in often inadequate conditions, and all too rarely will these dwellings be bestowed with security of tenure. This depressing perspective is even formalized within the UN's Millennium Development Goals, which speak of improving the lives of 100 million slum dwellers by 2020, while presumptively ignoring the improvements required by the other 2 billion slum dwellers expected to be living in informal settlements by that time. When we combine this growing scale of insecurity in the world's cities with the insecure tenure conditions facing women and vulnerable and disadvantaged groups, refugees and displaced persons, residents of countries engaged in post-conflict peace-building and those displaced due to disaster, it is not difficult to grasp just how serious a problem we face.

To put it perhaps most graphically in human rights terms, if we treat security of tenure as a right, then today perhaps no other right is denied to larger numbers of people than this one. Very few of the world's 1 billion or more slum dwellers enjoy any formal types of security of tenure, and of the perhaps 2 *billion* or more tenants and those living under customary tenure arrangements throughout the world, equally few have formally recognized security of tenure rights. As a result, millions upon millions could, in theory, be forcibly evicted from their homes, very few of whom would have any judicial or other recourse to resist the prospect of eviction. When the world's cities reach the staggering level of 5 billion people in 2025, as the UN predicts, the scale and severity of the tenure crisis will likely reach a seriously destabilizing fever pitch (UNEP 2000: 11). Already, many millions of people are forcibly displaced from their homes every year, and there is little to indicate that these numbers will decline in any meaningful manner in coming years (e.g. COHRE 2006*b*; www.cohre.org).

While the squatter invasions of unused public land (and to a lesser degree, private land), so commonplace in the 1960s and 1970s, have largely ceased due to the lack of empty and available land around cities, informal settlements continue to grow and in Mumbai more than 11 million people live in slums and even businessmen cannot afford market prices for housing.[534] In response, Mumbai's new housing policy will provide stimuli for the rental sector, infrastructure improvements in the slums and promote the development of new satellite towns. Mumbai still routinely carries out mass forced evictions, however, and of those millions residing in this city's informal settlements, very few have formal, legal rights to be there, even while political connections may provide a considerable degree of informal tenure security. Yet the struggles of the Mumbai Municipal Corporation to govern effectively while respecting the rights of the majority, and the daily battles by millions of the urban poor to house themselves and achieve some measure of dignity, are realities being played out day after day, in city after city, throughout the world.

534. See: http://news.bbc.co.uk/2/hi/south_asia/6132846.stm

Indeed, Mumbai is indicative of a wider global trend, which spans all points of the political spectrum, that increasingly sees secure tenure as a multi-functional tool that can assist in poverty alleviation, in the protection of human rights and in the generation of assets and capital. Indeed, there is an emerging consensus that programmes in support of security of tenure can be vital ways of integrating the urban poor into the city and in recognizing what is often referred to now as the 'right to the city'. In recognition of this, governments, UN agencies and civil society groups have undertaken a wide range of policies to redress problems of tenure insecurity and to remedy the often horrendous living conditions found in the world's informal settlements. These range from slum upgrading and regularization efforts, title-based approaches to tenure and asset generation, innovative security of tenure initiatives that rely more on local wisdom and tested outcomes rather than on dogma and the growing number of initiatives that actually formally link security of tenure with the human rights of those concerned.[535]

6.3. SECURITY OF TENURE AND ITS MANY FACETS

Tenure is a universal and ubiquitous status relevant to everyone, everywhere, every day. Every person – from the poorest of the poor to the richest of the rich, and everyone reading this article! – has some degree of tenure security or insecurity every day and night of their lives.[536] Formal tenure takes a variety of forms. These

535. Two of the more interesting overviews of the security of tenure issue are: Durand-Lasserve and Royston (2002); Fernandes and Varley (1998).

536. The Global Campaign for Secure Tenure describes security of tenure in the following manner: 'Security of tenure describes an agreement between an individual or group to land and residential property which is governed and regulated by a legal (formal or customary) and administrative framework. The security derives from the fact that that right of access to and use of the land and property is underwritten by a known set of rules, and that this right is justiciable. The tenure can be affected in a variety of ways, depending on constitutional and legal frameworks, social norms, cultural values and, to some extent, individual preference. In summary, a person or household can be said to have secure tenure when they are protected from involuntary removal from their land or residence, except in exceptional circumstances, and then only by means of a known and agreed legal procedure, which must itself be objective, equally applicable, contestable and independent. Such exceptional circumstances might include situations where the very physical safety of life and property is threatened, or where the persons to be evicted have themselves taken occupation of the property by force or intimidation.' (Global Campaign for Secure Tenure, Concept Paper, UN Habitat, 1999: 9-10). Similarly, the FAO describes security of tenure in terms of degrees of certainty that rights will be respected, but at the same time recognizing that security of tenure is often as much about one's perception of it, as the formal legal status involved: 'Security of tenure is the certainty that a person's rights to land will be recognized by others and protected in cases of specific challenges. People with insecure tenure face the risk that their rights to land will be threatened by competing claims, and even lost as a result of eviction. Security of tenure cannot be measured directly and, to a large extent, it is what people perceive it to be. The attributes of security of tenure may change from one context to another. For example, a person may have a right to use a parcel of land for a six month growing season, and if that person is safe from eviction during the season, the tenure is secure. However, a person with use rights for six months will not plant trees, invest in irrigation works or take measures to prevent soil erosion as the time is too short for that person

include: rent, leasehold, freehold, conditional freehold, collective and communal tenure arrangements.[537] Informal (or extra-legal) tenure – which in global terms may be a tenure status held by more people than those holding formal forms of

to benefit from the investment. The tenure is insecure for long-term investments even it is secure for short-term ones.' (FAO 2005).

537. See, for instance, the definition of tenure offered by the UN's Global Campaign for Secure Tenure, (Source: Concept Note, UN Habitat, Nairobi, 1999: 11-12): 'Rent - Rent is a form of leasehold, in terms of which access to a property and the use thereof is governed by the legal agreement of fixed duration. Agreements are normally governed by law. Rental agreements operate either in the private domain, as contract between private citizens and bodies corporate or companies, or in the public domain, wherein the rental is provided by a public body, such as a local authority, as part of a social housing policy. It is common, in formal rental agreements, for the lessor to assume some responsibility for the maintenance of the property. It is the form of secure tenure least likely to lead to capital investment by the lessee (and, some may argue, by the lessor). However, for low-income families, rental – which is the most used form of tenure – is seldom formal or regulated in many countries. Agreements are arrived at informally, with little or no recourse to legal advice, and the agreements are enforced in a non-legal manner. Indeed, a major part of the campaign will have to address the urban-poor segment of the rental sector, and the tension that exists between secure tenure for tenants and sub-tenants, and the property rights of the owners. Both in percentage and in policy terms, addressing the informal rental sector will be one the most significant challenges for the campaign, and one which will have the most impact for the urban poor; Leasehold – Leasehold conveys the right of beneficial occupation to land or property, but such occupation is circumscribed both by a finite period of time, as well as the specific conditions of the lease. The lessor retains ultimate control over the property, through the stipulated time limit and conditions. Upon expiry of the lease, the lessor may automatically reassume occupation, reallocate the lease to another person or body, or extend the lease of the occupant. For a period of the lease, which may be very long (e.g. 99 years), and subject to compliance with the terms of the lease, the occupant does enjoy secure tenure; Freehold – Freehold is the form of tenure which confers on the title-holder the maximum control and discretion over the land, normally only circumscribed by law and/or planning and zoning restrictions. It provides for the land (and improvements) to be used as collateral and mortgaged, it may be transferred or bequeathed in the discretion of the title-holder, and is free from any time restrictions – it is title in perpetuity. It is the form of tenure most associated with investment and, indeed, speculation. Ideologically, it is most favoured by the proponents of the free-market and individualist conceptions of society; Conditional Freehold – 'Rent to Buy' – A hybrid of leasehold and freehold, this is effectively a lease that may be converted to freehold upon the fulfilment of stipulated conditions, which ordinarily would include the payment of the lease (or 'rent') for a period of time. Another form of this approach is found in the term 'contract-for-deed'. However, it is all too often the case that the equity does not accrue in terms of the contract, and that even one or two months missed payments – not unusual for this segment of the market – can lead to all previous payments being forfeited, and the renter being forced to start the repayment process from the beginning again; Collective forms of tenure – There are a variety of methods of enjoying full security of tenure within a collective framework. The principle relates to the sharing of access to a property on the basis of an agreement, which specifies the terms and conditions of such access. This may take the form of the creation of a body corporate, such as a condominium or a private company, or a housing association or co-operative. What all of these forms of tenure share is the need for a relatively high level of common interest, and the skill and capacity to administer the arrangement, which generally requires a high level of organisational ability and commitment; Communal tenure – One of the defining features of communal tenure is that it is common for the community to have a long and common history and cultural identity, such as a tribe or clan. Access to such land may be governed by custom, and include the right to use and to occupy, but not to transfer or alienate, which decision would be determined by the community as a whole. Under Islamic tenurial systems, musha refers to a collective land holding, whereas Waqf is a category of land held in perpetuity by a religious institution, and is effectively removed from market mechanisms.'

tenure – includes the types of tenure that most people would commonly associate with slums or squatter settlements. A 'slum typology' developed by Davis divides cities and the various tenure states into the following categories: In each city there is a metro core comprised of both formal and informal neighbourhoods where the poor reside. The *formal* neighbourhoods are comprised of (a) tenements ((i) hand-me-downs and (ii) built for the poor), (b) public housing and (c) hostels, flophouses. The *informal* areas are comprised of (a) squatters ((i) authorized and (ii) unauthorized) and (b) pavement dwellers. Secondly, each city has a periphery, also comprised of formal and informal tenure situations. In the *formal* areas, there is (a) private rental housing and (b) public housing, while the *informal* areas are made up of (a) pirate subdivisions ((i) owner-occupied and (ii) rental) and (b) squatters)(i) authorized (including site-and-service) and (ii) unauthorized). Finally, in some cities *refugee camps* for displaced persons complete the tenure picture (Davis 2006: 30). If we take the case of the Cambodian capital, Phnom Penh, as a typical example, a wide variety of tenure types are visible. Ranging from the least to the most secure, tenure of the following types can be found in Phnom Penh (and, to one degree or another, in most developing world cities): (i) pavement or mobile dwellers; (ii) unauthorized occupation of state public land; (iii) unauthorized occupation of state private land; (iv) unauthorized occupation of private land; (v) family registration books; (vi) court orders after dispute; (vii) government concessions; (viii) certificates of possession; (ix) certificates of ownership (Payne 2001*a*). Each type of tenure, then, provides a certain degree of security. The spectrum ranges from one extreme of no de facto or de jure security (recent squatters on private land, pavement dwellers, etc.), to the other end of the continuum where those with legal and actual secure tenure can live happily without any real threat of eviction, particularly if they are wealthy or well connected with the political elite (owner-occupiers, holders of freehold title, etc.).

This sketch of some of the various tenure types reveals the basis of the battles for security of tenure that are played out in city after city throughout both the developing and increasingly the developed world. The various proportions of each tenure type will certainly vary, but the essence of our multi-tenured world is clear. And unless the multi-layered and multi-dimensional nature of tenure is fully grasped, developing effective laws and policy in support of tenure rights as part of broader human rights initiatives will fail. But to understand the question of tenure properly, we need also to realize not simply that tenure exists in a multitude of forms, each of which provides a measure of tenure security, but also that an individual dweller or household may dwell within a personal/family tenure continuum where some elements of their housing are formally legal and secure, while others are extra-legal and may possess more limited degrees of security or perhaps none at all. When we consider the additional fact that various forms of customary land tenure may also be in place and overlap in some areas while not in others with formal tenure rights, the clarity our human rights lawyers may seek is blurred yet further. Indeed, the role of customary law in the regulation of tenure and secure tenure rights is far more widespread than is generally understood. This is particularly true in the African context where non-customary tenure

arrangements generally cover less than 10 per cent of land, with customary land tenure systems governing land rights in 90 per cent (or more) of areas.[538] Rights are determined by community leaders, generally according to need rather than payment.[539] Customary tenure systems are evolving all the time, and have proved themselves remarkably adaptable to changing circumstances (Kanji and Cotula 2005: 3).

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Attention to security of tenure is clearly on the rise, with a range of initiatives underway at the international level, including the UN's Global Campaign for Secure Tenure,[540] the International Advisory Group on Forced Evictions (AGFE)[541] and the efforts of the Cities Alliance.[542] While many positive, pro-poor and pro-human rights efforts supporting tenure security are in place, none have received the attention of the media, however, more than the approaches touted in Hernando de Soto's book, the *Mystery of Capital*. The *Mystery of Capital* puts forth the seemingly simple argument that the provision of property titles (eg. security of tenure derived from legal title or 'property rights') to the world's slum dwellers and those living 'illegally' will not only give them rights and access to credit that they have never before had access to, but these processes will also release literally *trillions* of dollars of new assets into the global markets. De Soto argues that this capital is now effectively 'dead' because of the extreme difficulties associated with registering property rights in many of the countries in the developing world.[543]

538. 'In Africa, for example, formal tenure covers only between 2 and 10 per cent of the land. To avoid leaving the occupants of these lands effectively outside the rule of law, many African countries have recently given legal recognition to customary tenure as well as to the institutions administering it; however, implementing these laws remains a major challenge.' (World Bank 2003: xxi)

539. 'In many countries these tenure systems continue unchallenged in the rural areas. After independence, however, migrants swelled urban populations causing them to spread into areas of customary tenure. This led to ambiguity and conflict over the role of local chiefs, who traditionally allocate land to members of their community under well established and officially recognised arrangements. People living in such areas understandably object to being considered illegal occupants of their land, even though they lack statutory titles to prove ownership. The inability of the state and the unwillingness of the formal market to increase the supply of planned residential land at prices which the poor can afford, has perpetuated dependence on these traditional practices and introduced new ones.' (Payne 2001*b*: 51)

540. See the description of the Campaign in Williams (2001: 25-34).

541. See http://www.unhabitat.org/content.asp?typeid=19&catid=24&cid=3480

542. See www.citiesalliance.org

543. 'Imagine a country where nobody can identify who owns what, addresses cannot be easily verified, people cannot be made to pay their debts, resources cannot conveniently be turned into money, ownership cannot be divided into shares, descriptions of assets are not standardized and cannot be easily compared, and the rules that govern property vary from neighbourhood to neighbourhood or even from street to street. You have just put yourself into the life of a developing country or former communist nation; more precisely, you have imagined life for 80 percent of its population, which is marked off as sharply from its Westernised elite as black and white South Africans were once separated by apartheid.' (de Soto 2002: 14-15); 'Dead capital, virtual mountains of it, lines the streets of every developing and ex-community country.

De Soto's seductive, but highly controversial views, have reached the corridors of power in developed and developing countries alike, with his policy prescriptions presented as models of virtually guaranteed success by institutions such as the High Level Commission on the Legal Empowerment of the Poor[544] and various national governments (e.g. de Soto and Cheneval 2006).

As enticing as de Soto's arguments may appear on the surface, however, a growing movement of experts and organizations in the housing, human settlements, human rights and many other fields, are increasingly vocal in their criticism of de Soto's lofty claims.[545] Beyond the fact that terms such as 'security of tenure', 'housing rights' and 'forced evictions' are virtually absent within the book, it is clear that the criticisms levied at de Soto's approach have considerable merit and, as a result, are clearly gaining increased support.[546] A common thread running through virtually

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In the Philippines, by our calculation, 57 per cent of city-dwellers and 67 per cent of people in the countryside live in housing that is dead capital. In Peru 53 per cent of city-dwellers and 81 per cent of people in the countryside live in extralegal dwellings. The figures are even more dramatic in Haiti and Egypt. In Haiti, also according to our surveys, 68 per cent of city-dwellers and 97 per cent of people in the countryside live in housing to which nobody has clear title. In Egypt dead-capital housing is home for 92 per cent of city-dwellers and 83 per cent of people in the countryside.' (de Soto 2002: 30)

544. High Level Commission on Legal Empowerment of the Poor (2006) Overview Paper (available from http://legalempowerment.undp.org/).

545. On this issue, generally, see, for instance, Fitzpatrick (2006). 'Numerous accounts of failures in Third World land-titling programs support the conclusion that state programs can interact with social norms to produce open access rather than secure property rights. Land-titling programs commonly involve formalization and registration of rights to land through systematic adjudication, surveying and (if necessary) consolidation of boundaries. While these titling programs are useful in certain contexts – particularly in urban and peri-urban areas – they often fail to increase certainty and reduce conflict. In some cases, these program failures have resulted from the distributional consequences of land titling itself. Long-term conflict has resulted because poor or otherwise vulnerable land occupiers have been dispossessed by wealthier and more powerful groups; yet the new titleholders and state enforcement mechanisms have been unable to prevent encroachment by the former occupiers. This state of grievance and incomplete exclusion then tends to become cyclical in environments of political instability. When a regime changes in circumstances of historical grievance, old claims often reassert themselves through acts of violence, land invasion, or state-sanctioned evictions. This phenomenon challenges the economic conception that once property rights are established there is relatively little likelihood of reversion to open access. In other cases, titling programs provoke long-term conflict due to the fluid nature of non-state systems of land tenure. In these systems, multiple overlapping rights often coexist in an uneasy balance, and programs to define and regularize these rights have caused dormant internal disputes to emerge in the form of open conflict' (pp. 1013-1014).

546. For instance, examine the sentiments of the following commentators on de Soto's efforts: 'A John Turner of the 1990s, de Soto asserts that Third World cities are not so much starved of investment and jobs as suffering an artificial shortage of property rights. By waving the magic wand of land-titling, de Soto claims, his Institute for Liberty and Democracy could conjure vast pools of capital out of the slums themselves. The poor, he argues, are actually rich, but they are unable to access their wealth (improved real estate in the informal sector) or turn it into liquid capital because they do not possess formal deeds or property titles. Titling, he claims, would instantly create massive equity with little or not cost to government; part of this new wealth, in turn, would supply capital to credit-starved microentrepreneurs to create new jobs in the slums, and shantytowns would then become "acres of diamonds". He speaks of "trillions of dollars", all ready to put to use if only we can unravel the mystery of how assets are transformed into live capital'. (Davis (M.) 2006: 79-80). John Gravois: 'Mindful of the fact

that "the single most important source of funds for new businesses in the United States is a mortgage on the entrepreneur's house", de Soto's plan is, quite simply, to make homeowners out of the world's poor squatters. Neighbourhood by neighbourhood, slum by slum, he wants to formalize the vast extralegal world by dotting it with individual property titles. Once that's done, he promises, the poor will have access to credit, loans, and investment, as their dead assets are transformed - voilà! - into live capital… From the field, the verdicts are rolling in: In some corners of the world, the land-titling programs inspired by de Soto's work are proving merely ineffective. In other places, they are showing themselves to be downright harmful to the poor people they set out to help… It turns outs that titling is more useful to elite and middle-income groups who can afford to bother with financial leverage, risk, and real estate markets. For very poor squatters in the inner city - who care most about day-to-day survival, direct access to livelihood, and keeping costs down - titles make comparatively little sense. These poorer groups either fall prey to eviction or they sell out, assuming they'll find some other affordable pocket of informality that they can settle into. The problem is, with titling programs on the march, such informal pockets are disappearing fast. So, the poor sell cheap or evicted, then can't find a decent new place to settle, losing the crucial geographic advantage they once had in the labour market. Geoffrey Payne … recommends temporarily insulating slums from the commercial land market by granting informal neighbourhoods groups land rights for some period of time. During that period, he says, the neighbourhood can be upgraded and basic services brought in, allowing land values to inch up toward parity with the surrounding real estate market. Then, after a number of years, the neighbourhood gets a full, group land title, which can then be subdivided into individual titles if people are willing to take on the costs. By taking these incremental steps, he says, you shelter the poor from the shock of a titling gold rush'. (Gravois 2006). '[I]t is highly dangerous to place all one's eggs in one basket, especially at the present time, when land registries are so incomplete and inaccurate that moves to provide titles in urban or peri-urban areas may encourage or intensify disputes over who has the primary claim' (Payne 2001c: 23). Robert Neuwirth: 'No doubt, some squatters would be able to access more money if they had title deeds. But the folks I met in Brazil, Kenya, India and Turkey didn't go through the tremendous struggles of building and improving their homes to liberate their dead capital. They went through incredible privation and deprivation for one simple reason: because they needed a secure, stable, decent, and inexpensive home - one they could possibly expand in the future as their families grow and their needs change. And title deeds - so natural to those of us who live in the developed world - can actually jeopardize this sense of security by bringing in speculators, planners, tax men, and lots of red tape and regulations…. When squatters feel secure in their homes, they build, invest, and prosper - and they don't need a title deed to do so. Squatters in Brazil and Turkey have erected permanent buildings without title deeds. Squatters in India have created whole neighbourhoods knowing that the land is not theirs. They have accepted the unofficial lines that divide one person's home from another's. They buy and sell and rent their buildings. They negotiate with each other over future plans for their homes' (Neuwirth 2005: 20-21). Daniel W. Bromley: 'The gathering momentum concerning the 'formalization' of rights in housing and other assets is grounded on a set of presumptions and predictions suggesting that titles constitute an important - even essential - component of eradicating poverty in the developing countries. This formalization, it is alleged, can be accomplished through the simple step of issuing titles to individuals (or families) who now hold (possess) housing and other assets in some allegedly tenuous and quite insecure state. This claimed insecurity of tenure is blamed for stifling investment in the assets now possessed. Titles, it is said, will solve this insecurity. Titles are also said to permit individuals to gain access to official sources of credit - banks, credit unions, lending societies - using their new title as collateral for loans to accomplish several desirable outcomes: (1) start a business; (2) upgrade a dwelling; or (3) undertake investments so that agricultural production will be augmented. All of these outcomes are seen as means whereby the poor can help themselves without the need for grants and various anti-poverty programs from the international donor community, or even the aid of national governments. It is simple, cheap, and effective. Eradicating poverty is the goal, new agricultural investments, new businesses, and upgraded dwellings are the means whereby this will happen, tenure security is the necessary condition, and formal titles are the sufficient instrument. Titles are the means to eradicating poverty. It sounds too good to be true. And it is…. [This] discussion illustrates the utopian and naïve nature of claims that issuing

all of these critiques of de Soto and others who assert that the provision of freehold (or even leasehold) titles is effectively the only way to guarantee that the poor can be empowered and thus be raised from the depths of their poverty, is the simple fact that one-size-fits-all solutions to the global tenure crisis (which the de Soto model essentially is) will invariably fail to achieve their objectives. Beyond the fact that the provision of titles in the absence of corresponding measures to improve the infrastructure and services available to informal settlements would cover only a portion of the entitlements linked to housing rights (e.g. access to basic services such as water, electricity, refuse removal, drainage, etc., are not necessarily advanced when individual dwellers gain title), security of tenure is so non-uniform and multi-dimensional in nature, often varying widely between countries and within countries, cities and even neighbourhoods and streets, that a single approach may work in some environments, but certainly not in all.[547] As noted, security of tenure is complex, multi-faceted and difficult to define purely in terms of formality or informality, legality vs. illegality, or modern vs. customary law.

Ultimately, at the core of this debate lies the issue of whether 'property rights' provide the best means of providing tenure security to all or, rather, whether an approach grounded more broadly in what I have called 'housing, land and property rights' (or HLP rights) may be the best way of achieving security of tenure for everyone. Most would agree that security of tenure rights *can* be enjoyed in full without the housing, land or property in question being privately owned by those who reside there (Duchrow and Hinkelammt 2004). Moreover, some point out that it is possible – as has been realized in India, Indonesia and Peru – to redefine the objectives of slum regularization (or legalization), since guaranteeing security of tenure does not necessarily require the formal provision of individual land titles (Durand-Lasserve 1998: 244). Indeed, neither freehold nor leasehold titles are the only means by which security of tenure can be obtained. Gilbert, for instance, states that tenure 'can be achieved through other procedures and arrangements. Protection against forced evictions is a prerequisite for the integration of irregular settlements into the city. For households living in irregular settlements, security of tenure offers a response to their immediate problem of forced removal or eviction.

"formal titles" to those who are now mere possessors - squatters, slum dwellers - will bring forth salutary effects. For dysfunctional governments to issue titles to large numbers of slum dwellers or rural squatters is similar to governments issuing counterfeit currency. A title is no assurance at all that the issuing entity will act on the promissory note. In the absence of that assurance, a title is symbol of official government deceit and fraud' (Bromley 2005: 1, 4-5).

547. According to Payne: 'The widespread existence of various non-statutory tenure systems in areas is partly a response to the failure of statutory tenure systems to meet the needs of lower income groups which invariably represent the majority of urban populations. It may also reflect the persistence of traditional practices for obtaining and developing land that are not officially recognised. These alternative forms may, however, reflect the needs of the affordable or available. Where official mechanisms deny the poor legal access to land and shelter, such alternatives can claim to provide a degree of social and moral legitimacy. The larger the proportion of people unable to confirm to official norms and procedures, the more they are undermined, risking a reduction in respect for the law in general'. (Payne 2001*b*, Note 18, 7).

It means they cannot be evicted by an administrative or court decision simply because they are not the owner of the land or house they occupy, or because they have not entered into a formal agreement with the owner, or do not comply with planning and building laws and regulations. It also means recognizing and legitimizing the existing forms of tenure that prevail among poor communities, and creating space for the poorest populations to improve their quality of life. Security of tenure can be considered the main component of the right to housing, and an essential prerequisite for access to citizenship' (Gilbert 2002). Similar views are held by many of the international commentators on housing issues. For instance, Cousins et al. assert that title-based approaches are often off the mark (Cousins et al. 2005: 2). Payne points out that 'Of course, tenure has invariably proved to be an important factor in stimulating investment and it may serve as the foundation for developing credit mechanisms, mortgage markets, and revenues for urban development. However, there is an increasing body of empirical evidence to show that full, formal tenure is not essential – or even sufficient, on its own – to achieve increased levels of tenure security, investment in house improvements or even increased property tax revenues. In a study of legislation intended to enable low-income tenants to purchase their dwellings in Colombo, Sri Lanka, it was found that residents were simply too poor to afford improvements without outside financial aid, regardless of the level of tenure security' (Payne 1997: 26).

And yet, the most common single approach adopted by a range of institutions and many governments, and backed by de Soto and others, involves providing settlers with title and transforming them into owners of the land and housing on which and in which they reside. Under these procedures, rights are formally recognized and title deeds are provided to the dwellers concerned. These are in turn registered in a local land registry or cadastre, and thus begins what those who support this approach believe to be the generation of assets and capital. Titling is seen as the strongest legal form that the registration of tenure rights can take, with titles usually guaranteed by the state. It is also, however, the most expensive form of registration to carry out, requiring formal surveys and checking of all rival claims to the property. Less strong, but simpler and cheaper, forms of registration are also possible, such as title deeds registration, and documentation of secondary use rights and other claims to land and natural resources. These may not have the same degree of state backing but are less complex to undertake and maintain, and be sufficient to protect rights at the local level (Payne 1997: 4). While the debate between those supporting title-only approaches and those who support a range of other methods towards achieving these aims continues, it appears that one major lesson learned from all of the various tenure initiatives taken in preceding decades is simply that flexible and innovative approaches to the provision of security of tenure are more advisable than approaches grounded in ideology and the generation of capital. Such a view is by all means not isolated to civil society actors of a progressive slant; even institutions such as the World Bank, which has long advocated title-based approaches, are now in the process of taking more nuanced approaches:

> Tenure security, one of the key goals of public land policies, can be achieved under different modalities of land ownership. Instead of an often ideological stance in favor of full private ownership rights, long-term secure tenure and transferable leases will convey many of the same benefits to owners and may be preferable where full ownership rights and titles would be too politically controversial or too costly. Also, in the past land policy interventions often paid too little attention to protecting the rights of women and the vulnerable. Failure to do so can have negative economic and social consequences. Rather than striving to 'modernize' the institutions that manage land rights at the local level, building on, and where needed adapting, existing ones is often more effective and efficient. (World Bank 2003: 186)

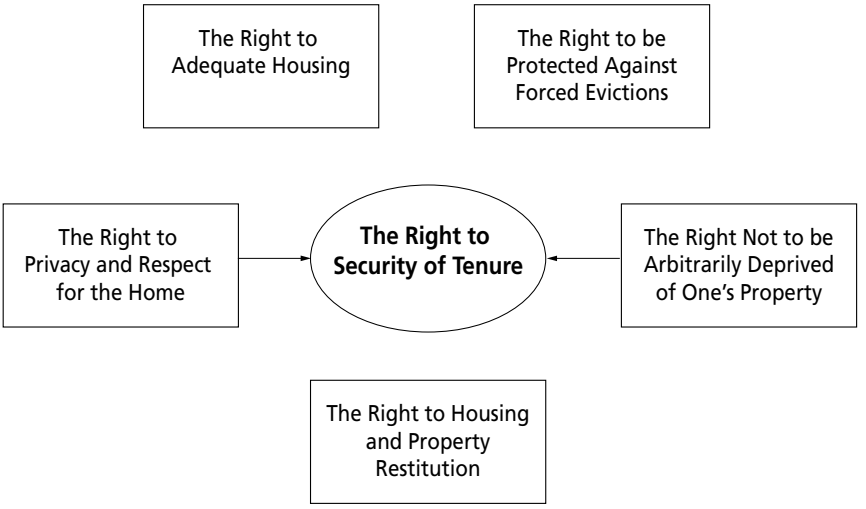
A successful initiative to provide greater degrees of tenure security, therefore, will need to be based on a recognition that innovation is required for many reasons, not the least of which is the fact that given the many diverse types of tenure and the varying degrees of legality and de facto and de jure protection associated with both.[548] Can, therefore, a creative combination of the principles of human rights and HLP rights, with those relating to the best practices in the provision of security tenure, assist in achieving greater enjoyment of tenure rights? Can we link innovation in the tenure field with a broad reading of human rights law in such a way that security of tenure can be increasingly seen as a basic human right?

6.4. SECURITY OF TENURE RIGHTS AS HUMAN RIGHTS

As a human rights issue, addressing security of tenure is somewhat more challenging than most because local conditions must always be taken into account in determining both the diagnosis and the remedy to prevailing conditions of tenure insecurity. In this regard, what is relevant and appropriate in one setting may be entirely irrelevant or inappropriate in another. While to an extent true of all rights, the importance of strong political support for security of tenure, within all housing sectors, is vital to ensuring that everyone has fully enforceable security of tenure rights. If we wish to treat security of tenure as a right, it is clear that a range of existing human rights, viewed as an integral whole, can be seen to form the legal and normative basis for the existence of this right. While numerous rights

548. 'The reality is that tenure systems exist within a continuum in which even pavement dwellers can enjoy a degree of legal protection and there may be many gradations or sub-markets between those with the lowest level of recognition and the fortunate minority at the top. The vast majority in between live in a gray area whereby they can claim some degree of de facto rights through adverse possession, legal ownership of the land, if not the buildings on it, or the acquisition and development of land in areas not recognized by the authorities. The classical alternative to legal ownership through squatting is now rare in most cities, as even marginal areas attract a commercial value high enough to find a place in the land market … The actual legal status may not even be clear to those involved - what matters is the perception of risk involved' (Payne 2001*c*: 8).

form the foundation upon which the right to security of tenure rests, it is perhaps the right to adequate housing, the right to be protected against forced evictions, the right not to be arbitrarily deprived of one's property, the right to privacy and respect for the home, and the right to housing and property restitution that are most fundamental:



6.4.1. The Right to Adequate Housing

The right to adequate housing was first recognized within Article 25(1) of the Universal Declaration on Human Rights in 1948,[549] and subsequently promulgated

549. Article 25(1) of the Universal Declaration on Human Rights reads as follows: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. It is important to recall that between April 1995 and June 1996, the United States sought intensively to ensure that the widely recognized human right to adequate housing would not be reaffirmed within Habitat II and that UN Habitat would not proceed with the implementation of a Housing Rights Strategy (UN doc. HS/C/15/INF.7 ('Towards a Housing Rights Strategy: Practical Contributions by UNCHS (Habitat) on Promoting, Ensuring and Protecting the Full Realization of the Human Rights to Adequate Housing'). Popular pressure and widespread support from within various UN human rights bodies, combined ultimately with near unanimous governmental support for the right to adequate housing, in particular by the European Union and G-77, ensured the eventual inclusion of this right within the Habitat Agenda and Plan of Action. For a description of this period, see: Alston 1996. See also on housing rights in this volume, Chapter 1, Van Bueren, 'Fulfilling Law's Duty to the poor'; Chapter 2, Bilchitz, 'Taking Socioeconomic Rights Seriously: The Substantive and Procedural Implications'; and Chapter 4, Bedgood and Frey, 'Work Rights: A Human Rights-Based Response to Poverty'.

in various international legal standards, most notably the International Covenant on Economic, Social and Cultural Rights (CESCR). While international human rights law widely recognizes various manifestations of housing rights, Article 11(1) of the CESCR contains perhaps the most significant international legal source of the right to adequate housing: 'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international cooperation based on free consent'.[550] In General Comment No. 4 on the Right to Adequate Housing[551] approved in 1991 by the UN Committee on Economic, Social and Cultural Rights, security of tenure is given particular prominence. In defining the nature of adequate housing under the CESCR, legal security of tenure is addressed in the following manner:

> Tenure takes a variety of forms, including rental (public and private) accommodation, co-operative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups. (para. 8(a))

Similar perspectives have been included within a wide cross-section of UN resolutions, many of which urge governments to confer immediately the right to security of tenure to all persons currently lacking this protection. For instance, UN Commission on Human Rights Resolution 1993/77 encourages governments to 'confer legal security of tenure to all persons currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced evictions, based upon effective participation, consultation and negotiation with affected persons or groups'.[552] Among other things, those entitled to this right are legally assured to housing that is adequate. Under General Comment No. 4, adequacy has specifically been defined to include: security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability;

550. Beyond the Universal Declaration and the Covenant, rights are found in the Convention on the Elimination of All Forms of Racial Discrimination (art. 5(e)(iii)), the Convention on the Rights of the Child (art. 27(3)); the Convention on the Elimination of All Forms of Discrimination Against Women (art. 14(2)), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (art. 43(1)(d)), ILO Recommendation No. 115 on Workers' Housing and many other standards.
551. UN doc. E/1992/23.
552. Adopted 10 March 1993.

accessibility; location; and cultural adequacy.[553] Governmental obligations derived from this right include duties to take measures to confer security of tenure (and consequent protection against arbitrary or forced eviction and/or arbitrary confiscation or expropriation of housing); to prevent discrimination in the housing sphere; to ensure equality of treatment and access vis-à-vis housing; to protect against racial discrimination; to guarantee housing affordability; and many others.[554] There is a duty incumbent upon those exercising powers of governance to promote access to and provision of housing resources suited to the needs of the disabled, the chronically ill, migrant workers, the elderly and refugees and internally displaced persons.[555]

All states have domestic legislation in place recognizing at least some of the requirements associated with the right to adequate housing, including dozens of the world's constitutions (UN Habitat and OHCHR 2002). To cite just one example at the national level, Brazil has attempted to legislate in support of housing and tenure rights to a greater degree than most other nations. The 1988 Constitution, for a start, recognizes a series of rights linked to the provision of tenure security. For instance, Article 183 establishes rights for squatters in an urban area of up to 250 square meters, who have lived on the land concerned for a continuous period of at least five years, and who have no other home to access tenure security rights. In addition, the Constitution also requires all municipalities of more than 20,000 residents to formulate master plans incorporating the constitutional principles linked to the 'right to the city'. These norms were significantly bolstered by the adoption in 2001 of the innovative City Statute. In essence, the City Statute empowers local governments, through laws, urban planning and management tools, to determine how best to balance individual and collective interests in urban land. The statute seeks to deter speculation and non-use of urban land so that land can be freed to provide housing space for the urban poor (Polis 2002). Several articles of the City Statute provide the basis for perhaps the first legislative recognition in any country of the essential 'right to the city', as a basic element of citizenship and human rights.[556] Of the many unique elements of the City

553. General Comment No. 4 on the Right to Adequate Housing (1991), para. 8.
554. General Comment No. 4 on the Right to Adequate Housing (1991), para. 8.
555. The obligation of governments to prioritize attention to securing the housing rights of the most disadvantaged groups in society is also addressed in General Comment No. 4: 'States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others' (para. 11).
556. Article 2 - The purpose of the urban policy is to give order to the full development of the social functions of the city and of urban property, through the following general guidelines: 1. guarantee the right to sustainable cities, understood as the right to urban land, housing, environmental sanitation, urban infrastructure, transportation and public services, to work and leisure for current and future generations … Article 8 entitles local governments to expropriate un-used urban land after a period of five years if the obligation of the owner of the land to sub-divide, build or use the property is not met; Article 9 - Someone who has possession of an urban area or building of up to 250 square meters, for five years, uninterruptedly and without contestation, who uses it for their residence or that of their family, can establish their dominion, as long as they are not the owner of any other urban or real estate. 1. The title of dominion will be conferred to the

Statute, the envisaged use of adverse possession rights (*usucapião* is defined as the right of tenure acquired by the possession of property, without any opposition, during a period established by law) as a constructive means of establishing secure tenure and enforcing the social function of urban property, is clearly one of the most interesting (Imparto 2002: 134). Formalizing adverse possession rights in this manner has thus become an important means by which tenure rights can be achieved in Brazil, and may serve as a model for other jurisdictions hoping to reduce price speculation in land by making the conferral of adverse possession rights easier and less controversial. This is just one example of how housing rights can be transformed from vague concepts into enforceable tenure rights at the local level.

6.4.2. The Right to be Protected against Forced Evictions

Building on the legal foundations of the right to adequate housing and other related rights, international standards increasingly assert that forced evictions constitute 'a gross violation of human rights, in particular the right to adequate housing'.[557] A 2004 UN Commission on Human Rights resolution on the Prohibition of Forced Evictions,[558] for instance, rather unequivocally reaffirms 'that the practice of forced eviction that is contrary to laws that are in conformity with international human rights standards constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing', and which also urged governments 'to undertake immediately measures, at all levels, aimed at eliminating the practice of forced eviction by, *inter alia*, repealing existing plans involving forced evictions as well as any legislation allowing for forced evictions, and by adopting and implementing legislation ensuring the right to security of tenure for all residents, [and to] protect all persons who are currently threatened with forced eviction and to adopt all necessary measures giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups'. The 1998 UN Guiding Principles on Internal Displacement adopt a similar perspective and state clearly in Principle 6 that 'Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence'. General Comment No. 7 on Forced Evictions (1997)[559] issued by the UN Committee on Economic, Social and

man or woman, or both, whether or not they are married or single; 2. The rights granted in this Article will not be recognized to the same possessor more than once; 3. For the purposes of this Article, the legitimate heir, continues to have full rights to the possession of their predecessor as long as they reside in the property at the time it was left open to succession.

557. For instance, within the development context, the 1992 Agenda 21, which emerged from the UN World Conference on Environment and Development, stated that 'people should be protected by law against unfair eviction from their homes or land'. For a comprehensive listing of all international standards, see COHRE (1999).

558. Commission on Human Rights Resolution 2004/28 (10 April 2004).

559. General Comment No. 7 (1997) – The right to adequate housing (Art. 11 (1) of the Covenant): forced evictions (UN doc. E/C.12/1997/4), adopted 16 May 1997 by the UN Committee on

Cultural Rights, is perhaps the most detailed statement interpreting the view of international law on this practice, re-affirming the sentiments of the 1991 General Comment No. 4 that: '[t]he Committee considers that instances of forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law (para. 18).'[560] General Comment No. 7 goes one step further in demanding that 'the state itself must refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions'. The comment requires countries to 'ensure that legislative and other measures are adequate to prevent and, if appropriate, punish forced evictions carried out, without appropriate safeguards by private persons or bodies'. In addition to governments, therefore, private landlords, developers and international institutions such as the World Bank and any other third parties are subject to the relevant legal obligations and can anticipate the enforcement of laws against them if they 'carry out forced evictions'. The rules plainly require governments to ensure that protective laws are in place domestically and that they punish persons responsible for forced evictions carried out without proper safeguards. In one of the more precedent-setting provisions of General Comment No. 7, the rules break new ground by declaring that 'evictions should not result in rendering individuals homeless or vulnerable to the violation of other human rights'. While activists may take such perspectives for granted, the General Comment makes it incumbent on governments to guarantee that people who are evicted – whether illegally or in accordance with the law – are to be ensured of some form of alternative housing and, thus, a measure of security of tenure. This would be consistent with other provisions in the comment that 'all individuals have a right to adequate compensation for any property, both personal and real, which is affected'. The rules add that 'legal remedies … should be provided to those who are affected by eviction orders'. When forced evictions are carried out as a last resort and in full accordance with the Comment, affected persons must, in addition to being assured that homelessness will not occur and that all of the criteria just noted are complied with in full, also be afforded the following eight prerequisites prior to any eviction taking place: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are

Economic, Social and Cultural Rights at its 16th session, held in Geneva.

560. For a comprehensive overview of existing international agreements and pronouncements on forced evictions and human rights, see COHRE (1999) and www.cohre.org

in need of it to seek redress from the courts. The more recently adopted Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles), approved by the UN Sub-Commission on the Protection and Promotion of Human Rights in 2005 is even clearer in establishing rights against displacement.[561] In addition, rights such as the right to freedom of movement and the corresponding right to choose one's residence, the right to be free from degrading or inhuman treatment and others are being increasingly interpreted to protect people against forced evictions.[562]

Beyond these increasingly refined international principles, a series of additional national efforts at transforming security of tenure into enforceable rights are underway in a variety of countries. In South Africa, for instance, evictions are explicitly addressed in Article 26(3) of the Constitution, which asserts that 'No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions'. Subsequent implementing legislation, including the Extension of Security of Tenure Act (Act No. 62, 1997) represents an innovative effort to ensure that basic security of tenure rights are accorded to all South Africans. In a welcome departure from the rather mundane housing law in many countries, the Extension of Security of Tenure Act very clearly emphasizes the duty of the responsible minister to actively grant subsidies to 'enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land'. The Act also explicitly outlines the rights and duties of occupiers and owners, emphasizing that all relevant persons shall have the right to human dignity, freedom and security of the person, privacy, freedom of religion, belief and opinion and of expression, freedom of association and freedom of movement (Sec. 5). Sec. 6 provides explicit rights to security of tenure and the right not to be denied or deprived of access to water or access to educational or health services. A growing body of domestic housing rights jurisprudence has

561. For instance, Principle 5 asserts: 5.1 Everyone has the right to be protected against being arbitrarily displaced from his or her home, land or place of habitual residence; 5.2 States should incorporate protections against displacement into domestic legislation, consistent with international human rights and humanitarian law and related standards, and should extend these protections to everyone within their legal jurisdiction or effective control; 5.3 States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war; and 5.4 States shall take steps to ensure that no one is subjected to displacement by either State or non-State actors. States shall also ensure that individuals, corporations, and other entities within their legal jurisdiction or effective control refrain from carrying out or otherwise participating in displacement. Final Report of the Special Rapporteur on Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons (E/CN.4/Sub.2/2005/17 and E/CN.4/Sub.2/2005/17/Add.1). This document contains the official UN text of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, as approved by Sub-Commission Resolution 2005/21 of 11 August 2005.

562. For instance, the UN Human Rights Committee has stated that with respect to the right to freely choose one's residence: 'the right to reside in a place of one's choice within the territory includes protection against all forms of forced internal displacement. It also precludes preventing the entry or stay of persons in a defined part of the territory'. Human Rights Committee, General Comment No. 27: Freedom of movement (Article 12) (1999), para. 7.

also emerged in South Africa in recent years, many cases of which have a direct bearing on questions of security of tenure. In the well-known Grootboom[563] case, the first case under the South African Constitution to address the complex questions of forced eviction, relocation and security of tenure, the Constitutional Court made the following points in this closely analysed judgment: (1) The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state's obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations; (2) In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short-, medium- and long-term needs. A programme that excludes a significant segment of society cannot be said to be reasonable. Conditions do not remain static and therefore the programme will require continuous review; and (3) Effective implementation requires at least adequate budgetary support by national government. This, in turn, requires recognition of the obligation to meet immediate needs in the nationwide housing programme. Recognition of such needs in the nationwide housing programme requires it to plan, budget and monitor the fulfilment of immediate needs and the management of crises. This must ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately. Such planning too will require proper co-operation between the different spheres of government.

In Modderklip[564], the Supreme Court of Appeal held that the state breached its constitutional obligations to both the landowner and the unlawful occupiers by failing to provide alternative land to the occupiers upon eviction. In effect, therefore, the court consolidated the protection extended to vulnerable occupiers in the Grootboom case, by determining that they were entitled to remain on the land until alternative accommodation was made available to them, and in effect providing a measure of security of tenure (Christmas 2004). In the Port Elizabeth Municipality case, the South African Constitutional Court ruled that:

563. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC). See also in this volume, Chapter 2, Taking Socioeconomic Rights Seriously: The Substantive and Procedural Implications, Bilchitz.

564. *Modder East Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd,* (SCA 187/03); *President of the Republic of South Africa, the Minister of Safety and Security, the Minister of Agriculture and Land Affairs, the National Commissioner of Police v Modderklip Boerdery (Pty) Ltd,* (SCA 213/03)(both referred to as Modderklip).

> It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence. Hence the need for special judicial control of a process that is both socially stressful and potentially conflictual. [para 18]… Section 6(3) [of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, which gives effect to sec 26(3) of the Constitution] states that the availability of a suitable alternative place to go to is something to which regard must be had, not an inflexible requirement. There is therefore no unqualified constitutional duty on local authorities to ensure that in no circumstances should a home be destroyed unless alternative accommodation or land is made available. In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme, and that tenure protections are equally in place.[565]

6.4.3. The Right not to be Arbitrarily Deprived of One's Property

Closely related to the security of tenure question, the right not to be arbitrarily deprived of one's property is widely addressed throughout human rights law, although 'property rights' as such are – perhaps surprisingly for many readers – not found within the two main human rights covenants. It is important to point out that the property rights provisions found in the Universal Declaration on Human Rights in Article 17 (which guarantees everyone the right to own property alone as well as in association with others, and prohibits the arbitrary deprivation of property) were not included in either of the subsequent (legally binding) International Covenants on Human Rights, approved in 1966 and which became law in those states which have ratified them as from 1976. While some have argued that this omission was essentially a technical mistake, the vote of the drafting body of seven 'against' to six 'for', with five abstentions, of whether or not to include a specific article on property within the Covenant on Economic, Social and Cultural Rights, clearly shows that unanimity on this question was not apparent at the time of the drafting of these cornerstone international human rights treaties (Schabas 1991: 135-170). In identifying the reasons for the exclusion of property rights from these texts, it appears that questions of definition, scope

565. *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

and issues surrounding interference with property, the circumstances under which the right of the state to expropriate property could be legitimately exercised and the question of compensation each contributed to preventing widespread agreement (Schabas 1991: 169). At the same time, of course, to one degree or another all states and all legal systems maintain laws, both formal and customary, regulating the ownership, control over and use of property, and all states retain rights to expropriate or compulsorily acquire private property, land or housing, subject to certain conditions. Typically, these rights of state are phrased in terms of limitations on the use of property. For instance, the Malaysian Constitution (1957) states: Art. 13 – (1) No person shall be deprived of property save in accordance with law; (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.[566] This essential conflict between right

566. A different, more nuanced approach was taken in the first post-apartheid interim Constitution of South Africa. The property rights provisions were found in Article 28, and initially formulated in the following terms: '1. Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights; 2. No deprivation of any rights in property shall be permitted otherwise than in accordance with a law; 3. Where any rights in property are expropriated pursuant to a law referred to in Subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.' Interim Article 28 was subjected to extensive debate and discussion throughout the country. After considerable controversy and consideration by all interest groups involved in the constitutional development process, what became Article 25 in the final 1996 Constitution is formulated as follows: 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application - (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including - (a) the current use of the property (b) the history of the acquisition and use of the property (c) the market value of the property (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purposes of this section - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress; (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). (9) Parliament must enact the legislation referred to in subsection (6). This very carefully worded constitutional provision is indicative of how human rights principles have taken on added significance within the context

of the state to expropriate and to control the use of property and housing, land and property rights, including security of tenure, remains a vitally important issue (Allen 2000). For it is in determining the scope of both the rights of individuals and those of the state that we can determine which measures resulting in eviction are truly justifiable and which are not. While expropriation is not in and of itself a prohibited act, under human rights law it is subject to increasingly strict criteria against which all such measures must be judged to determine whether or not they are lawful. The power of states to expropriate carries with it two fundamental pre-conditions, namely when housing, land or property rights are limited, this can only be done: 1) subject to law and due process; 2) subject to the general principles of international law; 3) be in the interest of society and not for the benefit of another private party;[567] 4) be proportionate, reasonable and subject to a fair balance test between the cost and the aim sought; and 5) be subject to the provision of just and satisfactory compensation.

6.4.4. The Right to Privacy and Respect for the Home

The widely recognized rights to privacy and respect for the home are fundamental human rights protections that can also be linked directly to security of tenure rights. The most frequently adjudicated safeguards against the arbitrary and unlawful interference with the home are based on Article 8 of the European Convention on Human Rights (ECHR) (Baker, Carter and Hunter 2001). According to jurisprudence both owner-occupied and rental housing falls under the protections offered by the right to privacy provisions under the ECHR, but also one's 'home' can be a place that a person neither owns, nor rents, but nonetheless resides in (Buyse 2006: 294-307). Although there is no general right to a home as such[568] under the ECHR, several cases have dealt with the questions of forced eviction and security of tenure. In one of the first pronouncements in this regard, the inter-state complaint case of *Cyprus v Turkey* of 1976 addressed evictions as a violation of Article 8. The opinion of the European Commission on Human Rights held

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of the recognition of property rights. … The term 'rights in property' was included to ensure that those holding customary rights would enjoy protection, while reference to the 'history of its acquisition' was enshrined to ensure that land restitution rights emerging from apartheid-era racist land confiscations would not be ignored.

567. Concerning the private benefit and compulsory acquisition – the presumption on this question is that the legislature does not intend to allow the expropriation of property for private benefit alone; there must also be a public benefit involved. The transfer of property from one private person to another through the process of expropriation would not satisfy the public purpose test.

568. *Chapman v UK* (2001) 10 BHRC 48 – 'It is important to recall that article 8 does not in terms give a right to be provided with a home. Nor does any of the jurisprudence of the court acknowledge such a right. While it is clearly desirable that every human being has a place to where he or she can live in dignity and which he or she can call home, there are unfortunately in the contracting states many persons who have no home. Whether the state provides funds to enable everyone to have a home is a matter of political not judicial decision' (p. 15).

that: 'The evictions of Greek Cypriots from houses, including their own homes, which are imputable to Turkey under the Convention, amount to an interference with rights guaranteed under article 8(1) of the Convention, namely the right of these persons to respect for their home, and/or their right to respect for private life….The Commission concludes … that … Turkey has committed acts not in conformity with the right to respect for the home guaranteed in article 8 of the Convention'.[569]

Similarly, in *Akdivar and others v Turkey*, the issue of the alleged burning of houses by security forces in Southeast Turkey was considered. In the judgment, the court decided that it was 'of the opinion that there can be no doubt that the deliberate burning of the applicants' homes and their contents constitutes at the same time a serious interference with the right to respect for their family lives and homes and with the peaceful enjoyment of possessions. No justification for these interferences having been proffered by the respondent Government – which confined their response to denying involvement of the security forces in the incident –, the Court must conclude that there has been a violation of both Article 8 of the Convention and Article 1 of Protocol No. 1. It does not consider that the evidence established by the Commission enables it to reach any conclusion concerning the allegation of the existence of an administrative practice in breach of these provisions.'[570] In the case of *Spadea and Scalabrino v Italy*, the European Commission on Human Rights found that the refusal of the public authorities to evict elderly tenants from the homes owned by the applicants was not a violation of the right to peaceful enjoyment of possessions; in effect protecting the security of tenure rights of the tenants to remain in the accommodation. In the case of *James and Others v the United Kingdom*, the court held that: '[m]odern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one.'[571] As such, legislation aimed at securing greater social justice in the sphere of people's homes was justified, even when it 'interferes with existing contractual relations between private parties and confers no direct benefit on the State or the community at large'.[572] In *Phocas v France*,[573] the court held that there had been no violation of Article 1 of Protocol No. 1 in the case where the applicant's full enjoyment of his property had been subjected to various interferences due to the implementation of urban development schemes, since the said interference

569. Application 6780/74 and 6950/75, *Cyprus v Turkey,* Report of the Commission, paras. 208-210, European Human Rights Reports, vol. 4: 482.
570. *Akdivar and Others v Turkey* (99/1995/605/693), Judgment 16 September 1996, para. 88 (Judgment).
571. *James and Others v United Kingdom* (case 3/1984/75/119, CEDH series A, vol. 98).
572. *James and Others v United Kingdom* (case 3/1984/75/119, CEDH series A, vol. 98).
573. Judgment 23 April 1996.

complied with the requirements of the general interest. In *Zubani v Italy*, a case concerning expropriation, the court held that there had been a violation of Article 1 of Protocol No. 1 as no fair balance had been struck between the interest of protecting the right to property and the demands of the general interest as a result of the length of the proceedings, the difficulties encountered by the applicants to obtain full payment of the compensation awarded and the deterioration of the plots eventually returned to them.[574] Finally, in *Connors v United Kingdom* the Court found a violation of Article 8 due to an eviction not following the requisite procedural safeguards: '[T]he eviction of the applicant and his family from the local authority site was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights and consequently cannot be regarded as justified by a "pressing social need" or proportionate to the legitimate aim being pursued. There has, accordingly, been a violation of Article 8 of the Convention.'[575]

6.4.5. The right to housing and property restitution

Over the past decade, inter-governmental agencies, government officials, United Nations and NGO field staff and others working in protection or support capacities with refugees and internally displaced persons (IDPs) have become increasingly involved in efforts to secure durable, rights-based solutions to all forms of displacement based on the principle of voluntary repatriation. In more recent years, the idea of voluntary repatriation and return have expanded into concepts involving not simply the return to one's country for refugees or one's city or region for IDPs, but the return to and re-assertion of control over one's original home, land or property; the process of housing and property restitution. As a result of these developments, since the early 1990s several million refugees and IDPs have recovered and re-inhabited their original homes, lands and properties through restitution processes, while smaller numbers have accepted compensation in lieu of return. These efforts have been played out from Bosnia-Herzegovina, Afghanistan to South Africa and from Tajikistan to Guatemala, Mozambique and beyond. This historic change in emphasis from what were essentially humanitarian-driven responses to voluntary repatriation to more rights-based approaches to return are increasingly grounded in the principle of restorative justice and of restitution as a legal remedy which can support refugees and IDPs in their choice of a durable solution (whether return, resettlement or local integration). As noted, the recently approved Principles on Housing and Property Restitution for Refugees and Displaced Persons (Pinheiro Principles), which were endorsed by the United Nations Sub-Commission on the Promotion and Protection of Human Rights on 11 August 2005, expand and clarify the rights of all refugees and displaced persons

574. *Zubani v Italy* Application 14025/88, Judgment 7 August 1996.
575. *Connors v United Kingdom* (European Court of Human Rights, Application no. 66746/01, 27 May 2004) at para. 95.

(including evictees) 'to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived'.[576]

6.5. MOVING FROM TENURE AS A GOAL TO SECURITY OF TENURE AS A RIGHT

If we group these various rights together and view them as an integrated bundle of rights from which the right to security of tenure itself can be derived, then security of tenure can be viewed as a self-standing, independent right of everyone. Indeed, it is difficult to discern how the full enjoyment of these and other rights can be possible in the absence of some measure of tenure security. Yet, as a right, security of tenure remains extremely frail for hundreds of millions of rights-holders throughout the world. As always, human rights law alone will never achieve its aims without popular pressure to do so, coupled with policy prescriptions that are clear, affordable and effective. Popular pressure for security of tenure may grow in coming years as the poor and middle classes in countries from China to the US, India to South Africa and beyond find it increasingly difficult to access the legal housing market, and signs of this discontent are there today for all to see. Human rights practitioners can surely help to build such movements and it is hoped that they will. Where most will surely feel more comfortable, however, is in performing another crucial service that is developing ever clearer and integral approaches to the security of tenure question, set within a human rights framework. All human rights lawyers and many non-lawyer human rights advocates, even if not yet well-versed in the intricacies of working for social and economic rights, are already

576. See, for instance, the following two principles: Principle 2. The right to housing and property restitution: 2.1 All refugees and displaced persons have the right to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal; 2.2 States shall demonstrably prioritise the right to restitution as the preferred remedy for displacement and as a key element of restorative justice. The right to restitution exists as a distinct right, and is prejudiced neither by the actual return nor non-return of refugees and displaced persons entitled to housing, land and property restitution… Principle 10. The right to voluntary return in safety and dignity: 10.1 All refugees and displaced persons have the right to return voluntarily to their former homes, lands or places of habitual residence, in safety and dignity. Voluntary return in safety and dignity must be based on a free, informed, individual choice. Refugees and displaced persons should be provided with complete, objective, up-to-date, and accurate information, including on physical, material and legal safety issues in countries or places of origin; 10.2 States shall allow refugees and displaced persons who wish to return voluntarily to their former homes, lands or places of habitual residence to do so. This right cannot be abridged under conditions of State succession, nor can it be subject to arbitrary or unlawful time limitations; 10.3 Refugees and displaced persons shall not be forced, or otherwise coerced, either directly or indirectly, to return to their former homes, lands or places of habitual residence. Refugees and displaced persons should be able to effectively pursue durable solutions to displacement other than return, if they so wish, without prejudicing their right to the restitution of their housing, land and property; and 10.4 States should, when necessary, request from other States or international organisations the financial and/or technical assistance required to facilitate the effective voluntary return, in safety and dignity, of refugees and displaced persons.

cognizant of many concepts of direct relevance to the provision of security of tenure. Expropriation, compulsory purchase, adverse possession, tenants' rights, contracts, inheritance rights and many areas of law are familiar to those working in the human rights field, and these need to be seen more for the roles – both negative and positive – that each can play in spreading the enjoyment of tenure rights.

At the same time, those who see the vital importance of security of tenure and who wish to promote this principle as a human right will require an understanding of issues that are not generally part of human rights discourse, training or education. We are speaking here, of course, of issues such as the question of land registration and administration (the precise ways by which security of tenure regulations are applied and made operational), cadastres and property registry systems (the official records delineating who has formal rights over which pieces of land), planning and zoning laws (which can have a major bearing on creating equitable, rights-based urban environments), slum upgrading and regularization measures (the government- or donor-led efforts designed to improve housing and living conditions in informal settlements), and the issues surrounding evictions caused by market forces, gentrification, efforts of city beautification, private development and other forces not generally treated as detrimental to the enjoyment of human rights by all.

Finally, if we are to contemplate future directions that human rights law might take in support of security of tenure, we might consider the following areas of activity. Firstly, the question of terminology needs to be thoroughly addressed. As we have seen, the rights that are directly relevant to one's residential status are many and varied. It is exceptionally difficult to encapsulate all of these concerns into the term 'housing rights', and even less so within the terms 'property rights' or 'land rights'. While housing, land and property rights are each unique legal and human rights concepts, they are at the same time closely related to one another and to a certain degree overlap with one another. In general terms, housing rights are those rights of 'everyone' to have access to a safe, secure, affordable and habitable home. Land rights refer to both rural and urban areas and cover those rights related directly to the land itself, as distinct from purely the structure built on the land in question, while property rights concern the exclusive user and ownership rights over a particular dwelling or land parcel. Each of these terms is important, but none of them capture completely the full spectrum of rights associated with the right to a place to live in peace and dignity, including the right to security of tenure. For the purposes of the security of tenure process, therefore, and because historical, political, cultural and other distinctions between countries with respect to what have also more broadly been called 'residential' rights are so extensive, increasingly the term 'housing, land and property rights' or HLP rights, is used to describe the numerous residential dimensions of these questions from the perspective of human rights law. What people in one country label as 'land rights' may be precisely the same thing as what citizens of another country call 'housing rights'. 'Property rights' in one area may greatly assist in protecting the rights of tenants, while in another place are used to justify mass forced evictions. Many

more examples could be given, but the important point here is simply that the composite term 'housing, land and property rights' probably captures the notion of 'home' or 'place of habitual residence' better than other possible terms. If we change the language to more accurately reflect the nature of the issues concerned, we change the nature of the discussion from one all too often based on ideology to one based more on facts on the ground.

Secondly, greater consideration needs to be given to the use of international humanitarian and criminal law to prevent and redress forced evictions and to protect security of tenure rights. The statutes of the International Criminal Court, the International Tribunals for the Former Yugoslavia and Rwanda each provide the legal basis necessary to prosecute persons responsible not just for crimes such as 'destruction or appropriation of property', 'destruction of cities', 'inhumane acts', or 'ordering the displacement of the civilian population'. The Rome Statute of the International Criminal Court characterizes forcible transfer as a crime against humanity. Deportation or forcible transfer of population is defined as 'forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law' and the Assembly of States Parties to the Statute has set out a five-element definition of the crime.[577] In 2005, following the mass forced evictions in Zimbabwe, many calls were made for the indictment of the President Mugabe before the International Criminal Court.[578] In some cases before these tribunals, individuals have been prosecuted for conducting forced removals.[579] As such, HLP rights violations carried out during armed conflicts or those generally subject to the jurisdiction of the various mechanisms developed to prosecute war criminals, can now act as one of the grounds on which to base complaints for housing justice, and when appropriate recourse should be sought to protect security of tenure rights at this level.

Third, because the process of providing secure tenure – in appropriate, human rights-consistent forms – to the billions of urban and rural dwellers currently living without such protections will be a rather long-term endeavour, arguments in support of a global moratorium on forced evictions need to be made. The proclamation of the UN and Member States of (an initial) five-year global moratorium on forced evictions is possible and would present a strong

577. 1. The perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another State or location, by expulsion or other coercive acts. 2. Such person or persons were lawfully present in the area from which they were so deported or transferred. 3. The perpetrator was aware of the factual circumstances that established the lawfulness of such presence. 4. The conduct was committed as part of a widespread or systematic attack directed against a civilian population. 5. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

578. See 'Augustine Mukaro, 'EU/UN slam govt', Zimbabwe Independent, 10 June 2005, available at http://www.theindependent.co.zw/news/2005/June/Friday9/2514.html

579. See Tadic case, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-T (Oct. 2, 1995) and Nikolic, Decision of Trial Chamber I – Review of Indictment Pursuant to Rule 61. IT-95-2-R61 (Oct. 20, 1995).

signal to the world that security of tenure really mattered. During the moratorium, a concerted series of steps to confer security of tenure on all of the world's communities currently without such protections could be undertaken. This initial five-year period could see National Security of Tenure Action Plans developed in all 192 Member States of the UN. These plans could be co-ordinated by initiatives such as the UN Global Campaign for Secure Tenure and would involve more positive and suitable approaches to security of tenure to emerge, combined with renewed commitments and resources dedicated to the improvement of existing homes and communities.

These are just three of perhaps hundreds of measures that could be instigated today to strengthen ongoing processes in support of treating security of tenure as a self-standing and enforceable human right. These actions may appear simplistic to some, and utterly terrifying to others, but it is hoped that ordinary people, in all corners of our one world, will see the merit in ensuring that everyone is able to live out their lives secure in the knowledge that when they decide to move homes it will be they, the dwellers themselves, that decide and not some other coercive power that has little of their rights or interests in mind.

7

A Human Rights-Based Approach to Health as a Means towards Poverty Eradication[580]

Helena Nygren-Krug[581]

7.1. INTRODUCTION

In recent years, poverty has been recognized to be much more than a lack of money. Increasingly, poverty is being viewed from a human rights perspective as the lack of power to enjoy a wide range of human rights – civil, cultural, economic, political and social.[582] As such, poverty is deeply intertwined with disempowerment, marginalization and exclusion. One of the strongest messages to emerge from the World Bank study *Voices of the Poor*, which gathered the views of more than 60,000 people living in poverty across the globe, is that poor people feel frustrated at their exclusion.[583] A WHO analysis of the World Bank study further revealed how people living in poverty everywhere valued good health and saw health as a means out of poverty.[584] A healthy body enables adults to work and children to learn, whereas a sick, weak body is a liability, to both individuals and those who must support them.

580. Thanks to WHO Health and Human Rights interns, Emma Camp and Lee Kouvousis who provided important research and support in writing this article.

581. The author is a staff member of the World Health Organization. The author alone is responsible for the views expressed in this publication and they do not necessarily represent the decisions, policy or views of the World Health Organization.

582. In 2001, the UN Committee on Economic, Social and Cultural Rights defined poverty as: 'a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights', United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights 2001 (E/C.12/2001/10). http://www.unhchr.ch/tbs/doc.nsf/0/518e88bfb89822c9c1256a4e004df048?opendocument

583. *Voices of the Poor* consists of three books: Narayan, Deepa with Raj Patel, Kai Schafft, Anne Rademacher and Sarah Koch-Schulte. 2000. *Voices of the Poor: Can Anyone Hear Us?* New York, N.Y.: published for the World Bank, Oxford University Press. Narayan, Deepa, Robert Chambers, Meera Kaul Shah, and Patti Petesch. 2000. *Voices of the Poor: Crying Out for Change*. New York, N.Y: published for the World Bank, Oxford University Press. Narayan, Deepa and Patti Petesch. 2002. *Voices of the Poor: From Many Lands*. New York, N.Y: published for the World Bank, Oxford University Press.

584. *Dying for Change: Poor People's Experience of Health and Ill Health*. http://www.who.int/hdp/publications/dying_change.pdf

Health is a fundamental human right indispensable for the exercise of other human rights, including the right to work and the right to education.[585] Yet health is more often considered, and responded to, as a basic need rather than as a human right. Needs are rooted in the optional realm of charity; they do not imply obligations on the part of anyone, even if they are life-sustaining. If we are serious about addressing ill health and poverty, the framework of human rights should be used systematically and rigorously. Yet, to achieve its full potential, this framework, as applicable to health, needs to be further elaborated and solidified.

7.2. THE EVOLUTION OF HEALTH AS A HUMAN RIGHT

The WHO Constitution (1946) was visionary in its understanding both of health and of health as a human right.[586] It recognized health as a complete state of physical, mental and social well-being and not merely the absence of disease or infirmity.[587] Moreover, it was the first international legal instrument to recognize 'the enjoyment of the highest attainable standard of health' as 'one of the fundamental rights of every human being without distinction of race, religion, and political belief, economic or social condition.'[588] The WHO constitutional provisions defining health, and health as a human right, are more explicit than the international human rights treaties. Firstly, they extend the grounds for non-discrimination to 'economic condition', which does not feature explicitly in the UN human rights treaties. Secondly, the understanding of health in WHO's Constitution is broader than that of the UN human rights treaties; the latter refer to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Despite its visionary constitution, however, which includes powers to develop norms and standards, the WHO has not further articulated the content and scope of the right to health. The adoption of the Alma-Ata Declaration[589] upheld the right to health as a social goal and, in many countries around the world, health activists advocated for Health for All by the Year 2000. In 1998, the World Health Assembly again reiterated its commitment to the right to health in the World Health Declaration.[590] However, the right to health served more as an advocacy slogan than as a guiding framework, given its lack of normative clarity. It is only in recent years that the process of articulating the normative content of the right

585. General Comment 14 on The Right to the Highest Attainable Standard of Health, E/CN.4/2000/4 paragraph 1.
586. Constitution of the World Health Organization, 22 July 1946 (entered into force on 7 April 1948). Available at http://www.who.int/governance/eb/who_constitution_en.pdf
587. Preamble, Constitution of the World Health Organization: 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.
588. Preamble, Constitution of the World Health Organization, 1946.
589. The International Conference on Primary Health Care, meeting in Alma-Ata September 1978, expressed the need for urgent action by all governments, all health and development workers, and the world community to protect and promote the health of all the people of the world.
590. WHA51.7 Health-for-All Policy for the Twenty-First Century, 16 May 1998.

has begun and this process is taking place primarily within the UN human rights system.[591]

An important reason why the right to health did not evolve for decades was because of the Cold War, which polarized human rights, as set out in the Universal Declaration of Human Rights 1948 (UDHR), into two separate categories. The West argued that civil and political rights had priority and that economic and social rights were mere aspirations. The Eastern bloc argued the contrary; that rights to food, health and education were paramount and civil and political rights secondary. Hence two separate treaties were created in 1966: the International Covenant on Economic, Social and Cultural Rights (ICESCR); and the International Covenant on Civil and Political Rights (ICCPR).

International human rights NGOs were established and centred their work on civil and political rights, such as the right to a fair trial, the right to vote and freedom of expression, and the right to freedom from torture. Effective strategies of naming, shaming, documenting and reporting drew attention to abuses of these types of rights. As a result, the public at large is sensitized to civil and political rights. In fact, still today, many people understand the term 'human rights' to encompass only such rights.

Since the end of the Cold War, the international community has endorsed the interdependence of all human rights and pledged to treat them on an equal footing.[592] Nevertheless, decades of neglect of economic and social rights have resulted in these rights, in particular the right to health, remaining 'immature'. An additional obstacle, although not insurmountable, is the complexity of the right to health. In essence, the right to health is a claim to a set of arrangements, laws, institutions, policies and practices that generate an enabling environment that can best secure good health.[593]

The right to health can be compared to another complex right: the right to a fair trial.[594] The latter has been more widely endorsed, as it belongs to the category of civil and political rights. In reality the right to a fair trial requires a set

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591. In recent years, however, WHO has worked closely with the relevant mechanisms (UN human rights treaty bodies and UN special rapporteurs) to ensure that the norms, standards and principles articulated under the right to health reflect good public health practice.
592. Vienna Declaration and Programme of Action, 25 June 1993, A/CONF.157/23, para. 5. 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.' Available at: www.ohchr.org/english/law/vienna.htm
593. WHO/OHCHR Fact Sheet on the Right to Health, Fact Sheet no. 323, August 2007: 'The right to health means that governments must generate conditions in which everyone can be as healthy as possible. Such conditions range from ensuring availability of health services, healthy and safe working conditions, adequate housing and nutritious food.' https://www.who.int/hhr/Right_to_health-factsheet.pdf
594. International Covenant on Civil and Political Rights 1966 (GA Res. 2200A (XX1) of December §6, 1966), Art. 14, 15.

of arrangements to ensure its effective enjoyment, many of which require heavy investment of government resources, such as an independent judiciary, courts and tribunals, defence for the indigent, rule of law, etc. As outlined below, the right to health analogously requires a range of components such as a health workforce, essential medicines, infrastructure, and effective coverage for both those who can and cannot afford to pay for health services.

The distinction between economic, social and cultural rights, on the one hand, and civil and political rights, on the other, is in practice entirely artificial – both require the state to enact laws and policies and invest resources to ensure their effective realization. To break the dichotomy, which still prevails between civil and political rights on the one hand, and economic, social and cultural rights on the other, the framework to respect, protect and fulfil should be adopted and applied across all human rights. This framework recognizes that all rights generate three levels of obligations. The obligation to *respect* requires states to refrain from interfering directly or indirectly with the enjoyment of the right to health. A current example in the health context where the state may fall short of its goals can be seen when HIV prevention strategies, such as the ABC strategy (Abstinence, Be Faithful, use Condoms), become subverted into abstinence-only campaigns for unmarried young people (Human Rights Watch 2005). The obligation of the state to *protect* human rights is particularly relevant in the health context where a proliferating number of actors are involved. This obligation requires states to take measures that prevent third parties from interfering with the enjoyment of the right to health. In other words, governments must regulate non-state actors to ensure that they conform to human rights standards by adopting appropriate legislation and policies. Non-state actors include those that have an obvious impact upon the enjoyment of the right to health, such as health insurance companies, which need to be regulated to ensure coverage of poor populations. Yet it also includes the whole range of actors in the business sector whose effects on health may be more or less obvious, such as the car manufacturing, tobacco, alcohol, and food industries. As regards the latter, for example, it would be important to ensure that the food industry is adequately regulated to be able to address overweight and obesity, both of which are on the rise in all countries. Regulations would include measures to reduce the fat, sugar and salt content of processed foods and portion sizes, to increase the introduction of innovative, healthy, and nutritious choices, and to review current marketing practices.[595] Finally, the obligation to fulfil requires states 'to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right to health.'[596]

595. WHO Fact Sheet on Obesity and Overweight, Fact sheet No. 331, September 2006. http://www.who.int/mediacentre/factsheets/fs311/en/index.html

596. General Comment 14, E/CN.4/2000/4 States parties' obligations, paragraph 33.

7.3. THE SCOPE AND CONTENT OF THE RIGHT TO HEALTH

First enshrined in WHO's Constitution, the right to health has now been enshrined in numerous international and regional human rights treaties as well as national constitutions all over the world.[597]

The most authoritative interpretation of the right to health is outlined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) in Article 12. It states that states parties to the Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[598] A non-exhaustive catalogue of examples provides guidance in defining the action to be taken by states, as follows: the right to maternal, child and reproductive health; the right to healthy natural and workplace environments; the right to prevention, treatment and control of diseases; and the right to health facilities, goods and services.

To update and operationalize the above provisions, the UN Committee on Economic, Social and Cultural Rights, which monitors compliance with the ICESCR, adopted a General Comment on the Right to Health in 2000 (hereinafter referred to as 'General Comment 14').[599] This General Comment 14 also serves to further clarify the scope and content of the right to health. The World Health Organization (WHO) worked closely with the Committee in the development of this General Comment. A particular challenge encountered in this context was the fact that WHO's definition of health is broader than that of the international human rights treaties, including the ICESCR. In addition, a public health approach focuses on addressing risk factors to human health and addressing those broad

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597. The human right to health is now recognized in numerous international instruments. Article 25(1) of the Universal Declaration of Human Rights affirms that 'everyone has a right to a standard of living adequate for the health of himself and his family, including food, clothing, housing, and medical care and necessary social services'. The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. According to article 12(1) of the Covenant, States Parties recognize 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health', while article 12(2) enumerates, by way of illustration, a number of 'steps to be taken by the States Parties … to achieve the full realization of this right'. Additionally, the right to health is recognized, *inter alia*, in the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, in the Convention on the Rights of the Child of 1989 and in Article 25 of the Convention on the Rights of Persons with Disabilities of 2006. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised, the African Charter on Human and Peoples' Rights of 1981 and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (the Protocol entered into force in 1999). Similarly, the right to health has been proclaimed by the Commission on Human Rights and further elaborated in the Vienna Declaration and Programme of Action of 1993 and other international instruments. In addition, there are numerous national constitutions that enshrine the right to health. See Section 7.5 for more information.

598. International Covenant on Economic, Social and Cultural Rights, 1966, Article 12(1).

599. See paragraph 33.

societal conditions that enable people to lead healthy lives. Many of the risk factors to human health implicate a broad range of government sectors. For example, many are nutrition-related,[600] which means that the right to adequate food must be realized to ensure positive health outcomes. Unsafe sex is another key risk factor in both high- and low-income countries, which is closely related to gender equality and the rights to information and education. In other words, when considering the determinants of health, it is obvious that a wide range of human rights are directly relevant. The rights to adequate housing, safe and nutritious food, gender equality and freedom from discrimination, access to information and education are all examples in this regard. As a result, General Comment 14 (paragraph 3) recognized that 'the right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.' Moreover, General Comment 14 interpreted the right to health as an *inclusive* right extending not only to accessible, affordable, culturally acceptable and good quality health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, and access to health-related education and information, including sexual and reproductive health.

General Comment 14 also set out four criteria by which to evaluate the right to health:

- ***Availability,*** meaning that functioning public health and health care facilities, goods and services, as well as programmes have to be available in sufficient quantity.
- ***Accessibility,*** meaning that health facilities, goods and services have to be accessible to everyone, within the jurisdiction of state party, and must follow the four overlapping dimensions, which include non-discrimination, physical accessibility, economical accessibility (affordability), and information accessibility.
- ***Acceptability,*** meaning that all health facilities, goods and services must be respectful of medical ethics and be culturally appropriate, as well as designed to respect the confidentiality of those concerned.
- ***Quality***, meaning that health facilities, goods and services must be scientifically and medically appropriate and of good quality.

States Parties to the ICESCR have a 'core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant, including essential primary health care' (paragraph 43). According to the General Comment 14 (paragraph 43), 'read in conjunction with more contemporary instruments, such as the Programme of Action of the International

600. *World Health Report: Reducing Risks, Promoting Healthy Life* (WHO 2002*c*).

Conference on Population and Development, the Alma-Ata Declaration[601] provides compelling guidance on the core obligations arising from article 12.' Accordingly, in the Committee's view, these core obligations include the obligations to ensure reproductive, maternal (pre-natal as well as post-natal) and child health care as well as immunizations; to ensure access to the minimum essential food that is nutritionally adequate and safe; to ensure access to basic shelter, housing and sanitation, and an adequate supply of safe and potable water; to take measures to prevent, treat and control epidemic and endemic diseases, including through education and access to information; to provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs; to ensure equitable distribution of all health facilities, goods and services, including trained health personnel; and to adopt and implement a national public health strategy and plan of action.

The core obligation to adopt and implement a national public health strategy and plan of action ties the elements of the right to health, outlined above, including 'the AAAQ' and the core obligations together. According to General Comment 14 (paragraph 43), this strategy and plan of action must address the health concerns of the whole population; be devised and periodically reviewed on the basis of a participatory and transparent process; contain indicators and benchmarks by which progress can be closely monitored; and give particular attention to all vulnerable and marginalized groups.

In relation to the core obligations, the Committee has emphasized that it is particularly incumbent on states parties and other actors in a position to assist to provide international assistance and co-operation, especially economic and technical, to enable low-income countries to fulfil these obligations (General Comment 14, paragraph 45).

States parties reporting to the UN human rights treaty bodies must demonstrate steps forward in conformity with the principle of progressive realization. This imposes an obligation to move forward as expeditiously and effectively as possible, while acknowledging the constraints due to limits of available resources. Furthermore, even when governments are capable of generating positive change, the lack of political will remains a major obstacle. In this context, it is important to distinguish the inability from the unwillingness of a state party to comply with its right to health obligations.

601. The Alma-Ata conference defined primary health as '… essential health care based on practical, scientifically sound and socially acceptable methods and technology made universally accessible to individuals and families in the community through their full participation and at a cost that the community and the country can afford to maintain at every stage of their development in the spirit of self-determination' (paragraph vi). Available at: http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf

7.4. A HUMAN RIGHTS-BASED APPROACH TO HEALTH

In addition to being used as a method to enhance accountability by means of litigation, the human rights framework has become increasingly recognized as a useful programming tool to support, strengthen and enhance development work and humanitarian action. This recognition has led to the emergence of a human rights-based approach, within the UN system and beyond, forming part of a continuum of development approaches, from the basic needs approach which dominated the 1970s to the more recent human development approach. The latter goes beyond the conventional basic needs approach by focusing on enlarging people's choices by enhancing their capabilities, for example, to be healthy.[602] Since the late 1990s, the development and human rights agendas have converged closer together to embrace the paradigm of 'a human rights-based approach to development.' Underpinning this approach are the values, standards and principles enshrined in the UN Charter,[603] the UDHR and subsequent legally binding instruments. It constitutes *an approach* and, as such, has not been generated or endorsed by governments. It goes beyond the 'black letter law' of human rights in blending human rights norms and standards, e.g. freedom from discrimination, with general principles of international human rights law, e.g. accountability and rule of law. As a result, human rights-based programming has generated creative and new ways of analysing and addressing development challenges, including the root causes of poverty and ill health.

Many of the UN agencies, funds and programmes have been developing their own definitions, tools and approaches to human rights 'mainstreaming' over the past few years. The Office of the High Commissioner for Human Rights, which serves as the UN's human rights focal point and co-ordinator, understands a rights-based approach to development as 'a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights.'[604] It further clarifies that there is no single, universally agreed rights-based approach, although there may be an emerging consensus on the basic constituent elements.[605]

602. The UNDP defines human development as 'a process of enlarging people's choices. Enlarging people's choices is achieved by expanding human capabilities and functionings. At all levels of development the three essential capabilities for human development are for people to lead long and healthy lives, to be knowledgeable and to have a decent standard of living. If these basic capabilities are not achieved, many choices are simply not available and many opportunities remain inaccessible. But the realm of human development goes further: essential areas of choice, highly valued by people, range from political, economic and social opportunities for being creative and productive to enjoying self-respect, empowerment and a sense of belonging to a community. The concept of human development is a holistic one putting people at the centre of all aspects of the development process. It has often been misconstrued and confused with the following concepts and approaches to development.' http://hdr.undp.org/en/humandev/glossary/#h
603. Charter of the United Nations 1945. http://www.un.org/aboutun/charter/
604. http://www.unhchr.ch/development/approaches.html
605. http://www.unhchr.ch/development/approaches-05.html

In 2003, a common understanding of a human rights-based approach to development co-operation was agreed upon and adopted by UN agencies as containing the following attributes: the main objective of development should be to fulfil human rights, human rights standards and principles, guide the development process, and development should build the capacities of 'duty-bearers' to meet their obligations and of 'rights-holders' to claim their rights.

Human rights principles identified by the UN agencies as integral to the process include: universality and inalienability; indivisibility; inter-dependence and inter-relatedness; non-discrimination and equality; participation and inclusion; and accountability and the rule of law.[606]

As applied to health, a human rights-based approach means being explicit about the realization of the right to health and/or other health-related human rights as the goal or outcome of a policy, programme or legislation and being systematic in seeking to maximize the positive impact on *all* human rights in the process of realizing the goal/outcome.

Today, every one of WHO's 193 Member States is party to at least one UN human rights treaty that recognizes the right to the highest attainable standard of health or other health-related human rights. Many are also party to regional human rights treaties and enshrine health-related human rights in their national constitutions.[607]

In recent years, WHO programmes have increasingly operationalized human rights norms, standards, principles and approaches. The linkages between the promotion and protection of health and the promotion and protection of human rights are complex.[608] Violations or lack of attention to human rights can have serious health consequences (e.g. harmful traditional practices, slavery, torture and inhuman and degrading treatment, violence against women and children). Health policies and programmes can promote or violate human rights in their design or implementation (e.g. freedom from stigma and discrimination, rights to participation, privacy and information). Vulnerability to ill health can be reduced by taking steps to respect, protect and fulfil human rights (e.g. freedom from discrimination on account of ethnicity, disability, sex and gender roles, rights to health, food and nutrition, education, information and adequate housing).

WHO's current human rights work supports its commitment to tackle the complex relationship between poverty and ill health. Within countries, human rights principles, such as freedom from discrimination and the right to participation, focus attention on vulnerable population groups. Equality and freedom from discrimination are central principles to human rights law and

606. http://www.undg.org/archive_docs/6959-The_Human_Rights_Based_Approach_to_Development_Cooperation_Towards_a_Common_Understanding_among_UN.pdf

607. This point was underlined by the Commission on Human Rights in 2004, when it urged 'all international organizations with mandates bearing upon the right of everyone to the enjoyment of the highest attainable standard of physical and mental health to take into account their members' national and international obligations related to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (E/CN.4/RES/2004/27).

608. WHO 2002*d*. See http://www.who.int/hhr/activities/publications/en/

are integral to the realization of the right to health. Public health practice has been considered to be heavily burdened with inadvertent discrimination (Mann 1997: 9). Users of health services, moreover, often perceive themselves to be treated in a discriminatory way by health service providers because of their lack of money and low social class.[609] Gro Harlem Brundtland, as former Director-General of WHO, addressed the UN Commission on Human Rights in 2003, and recommended in her speech that all governments review their laws, policies and practices to see whether they contribute to stigma and discrimination. 'Tackling stigma and discrimination in society is a good starting point for any government committed to ensuring a healthy and productive population', she contended.[610]

Development targets, such as the Millennium Development Goals, generally focus on raising average indicator levels. A human rights approach, with its aim to ensure inclusiveness, has a particular preoccupation with the most disadvantaged. The principle of equality demands that disadvantaged and vulnerable groups are included in any actions taken to improve the health of the overall population (UNDP 2007: 4-30). An important implication for both public health practice and broader efforts to tackle poverty is to identify the various population groups that hide behind the anonymous label of 'the poor' from the very outset. A human rights-based approach requires 'peeling off the anonymous label of the poor' and revealing the various identities of different groups excluded or otherwise marginalized. For public health practice this necessitates a higher level of disaggregation in measuring results and affirmative action (or positive discrimination) and empowerment measures to ensure de facto equality.[611] Women, for example, are in many societies ascribed an inferior status and their contributions consistently devalued. They are disproportionately represented among the 1.3 billion people living in extreme poverty. Yet all over the world, millions of women accept poor health status as their lot in life and bring up their daughters to do the same, generation after generation. No matter how much they will be targeted with health interventions such as increased access to skilled birth attendants and affordable medicines, the vicious cycle of ill health will continue unless women are empowered to claim their rights within the family, the community and the broader society.

A human rights-based approach places great emphasis on ensuring that root causes are identified from the outset. Indigenous communities constitute a population group frequently overlooked when data is not sufficiently disaggregated. Moreover, they often express dismay at being labeled 'poor' because of its negative

609. WHO's work on health systems responsiveness aims to develop the technical tools to assess, monitor and raise awareness of how people are treated and the environment in which they are treated when seeking health care. The concept of responsiveness was developed as part of WHO's broader conceptual framework on health systems developed in 2000, which identified three focuses for health system goals: health, responsiveness and financing fairness (*World Health Report* 2000). For more information see http://www.who.int/responsiveness/en/.http://www.who.int/responsiveness/en/

610. Gro Harlem Brundtland speech to the UN Commission on HR. http://www.who.int/dg/brundtland/speeches/2003/conference_european_healthministers/en/index.html

611. UN Human Rights Treaties often refer to this as 'special measures' see e.g. Convention on the Elimination of Racial Discrimination 1965 Art 1 (4).

connotations. On the contrary, they are rich in resources, culture, unique knowledge and know-how. However, they often feel impoverished as a result of processes that are out of their control and sometimes irreversible. These processes have dispossessed them of their traditional lands, restricted or prohibited their access to natural resources, resulted in the breakdown of their communities and the degradation of their environment, often resulting in deleterious effects on their health as well as of their physical and cultural survival.

A noteworthy case that was decided by the African Commission on Human and Peoples' Rights in favour of a neglected indigenous community is *SERAC and CESR v Nigeria*. In this petition, several NGOs reacted to the widespread contamination of the environment, which led to deterioration in the health of the Ogoni people. This was a result of decades of oil extraction that was run by both the Shell oil company and the Nigerian Government. The Commission concluded that the right to health and the right to a clean environment had been contravened. Although the government had the authority to extract oil, it was obliged to take ecological and community factors into account as well.[612]

A human rights-based situational analysis of poverty and health allows specific obstacles that duty bearers (primarily governments) face in fulfilling their obligations and rights-holders face in claiming their rights to be identified. The national strategy for health should then respond to and address these causes and form the roadmap for the realization of the right to health. This will inevitably be sector-wide and must then be reflected in all other government strategies, such as the national poverty reduction strategy. Any actions taken by the government must be consistent with this national plan for health, and tools must be used to mitigate against any adverse impacts made by other sectors on the right to health.

An important implication of a human rights-based approach is thus to ensure that public health action goes beyond treating diseases to addressing risks of contracting these diseases further 'upstream'. This means that root causes for poverty and ill health must systematically be identified and addressed. In practice, this requires co-ordinated action among government sectors, as root causes may be associated with poor governance, including lack of government accountability and respect for a range of health-related human rights such as the right to healthy living and working conditions, nutritious food and education.

7.5. THE VALUE-ADDED OF A HUMAN RIGHTS-BASED APPROACH TO HEALTH

Accountability describes the rights and responsibilities that exist between people and the institutions that affect their lives, including governments, civil society and market actors (Newell and Wheeler 2006). Health as a human right grounds

612. *Social and Economic Rights Action Centre and Center for Economic and Social Rights v Nigeria*. 1996, African Commission of Human and Peoples' Rights. 5 February 2008. http://cesr.org/filestore2/download/578

accountability in a framework of defined entitlements and corresponding legal obligations. Monitoring and scrutiny of government performance is legitimate and systematized under international human rights law through mechanisms and processes at the international, regional and national levels. These include courts and treaty bodies, as well as inter-governmental mechanisms and special rapporteurs that have been established to engage in dialogue with states, making them answerable for their actions.

An important mechanism in this context is the United Nations Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.[613] Established in 2002 by the UN Commission on Human Rights, this is an independent expert tasked with monitoring and reporting on the enjoyment of the right to health globally. Poverty and discrimination were selected from the outset as his two themes, through which he has addressed both country situations and specific health challenges.[614]

At the international level, moreover, the UN human rights treaty bodies serve as important monitoring mechanisms. The International Covenant on Economic, Social and Cultural Rights (ICESCR), which is monitored by the UN Committee on Economic, Social and Cultural Rights (CESCR), obligates governments to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the right to health.[615] This means taking deliberate, concrete and targeted steps and demonstrating, when reporting to international human rights monitoring mechanisms, how governments are moving as expeditiously and effectively as possible towards the realization of the right to health.

The right to health has been enshrined in approximately 110 national constitutions (Kinney 2001: 1465). As a result, along with the maturing of the right of health, litigation on the right to health is increasing. Individuals or public interest groups file complaints and bring lawsuits against governments or other health institutions in all parts of the world for not fulfilling the right to health. For example, the inclusion of access to essential medicines as part of the core obligations recognized in General Comment 14 and in Commission on Human Rights resolutions has generated increased attention to access to medicines as part of a government's core obligation under the right to health. A noteworthy case in this context is *Minister of Health of South Africa & Others v Treatment Action Campaign and Others*, Constitutional Court of South Africa, 5 July 2002. In a joint claim against the Ministry of Health, national health advocacy NGOs and individuals challenged a government restriction on the supply of nevirapine to prevent mother-to-child transmission of HIV to eighteen public hospitals

613. The right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Commission on Human Rights resolution 2002/31. http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5f07e25ce34edd01c1256ba60056deff?Opendocument
614. http://daccessdds.un.org/doc/UNDOC/GEN/G05/101/64/PDF/G0510164.pdf?OpenElement
615. International Covenant on Economic, Social and Cultural Rights, 1966, Article 2.

conducting a pilot study. In July 2002, the Constitutional Court upheld earlier rulings that this restriction was unconstitutional and ordered the government to assure the general availability of this medicine.[616] The court relied on the fact that the South African Constitution specifically refers to economic and social rights. Furthermore, it suggested that the right of access to health could not be fulfilled unless both the right to emergency medical treatment and the right to life are safeguarded. In ruling the way it did, the South African Constitutional Court further strengthened the notion that economic and social rights are justiciable and that governments should be held accountable for properly adopting and fully implementing policies that are consistent with their obligations.

General Comment 14 also included, as an obligation of comparable priority, 'to provide immunization against the major infectious diseases occurring in the communities.'[617] In *Mariela Viceconte v Argentinean Ministry of Health and Social Welfare*, the plaintiffs (a local group) claimed that their right to health was being violated and asked the court to intervene and coerce the government to manufacture a vaccine against Argentine hemorrhagic fever, which was threatening the lives and well-being of approximately 5 million people living in the affected areas. Due to a lack in quantity, the state had previously been unable to carry out a thorough vaccination programme. In addition, commercial laboratories did not want to produce the vaccine either since it was not profitable. In 1998, the Argentinean Federal Administrative Court of Appeals ordered the government to produce the vaccine and established a deadline for doing so. The court's decision was based both on the UDHR and the International Covenant on Economic, Social and Cultural Rights.[618]

The legal foundation for health action grounded in national, regional and international treaty obligations provides a solid platform for government in effectively addressing the health of poor people. Even when governments change in countries, the roadmap towards realizing the right to health remains intact with the minimum core content as the basis. This can help ministries of health stay on track when pushed by donors or national political constituencies. Moreover, it reinforces good development practice, which today endorses direct budget support, and long-term and sustainable efforts to improve health as set out in the national health sector plan and mirrored further in the country's poverty reduction strategy. [619]

A key human right, central to the realization of the right to health, is the right to participation. Free, effective and meaningful participation must form a

616. South Africa, Const. Bill of Rights Art. 27, § 1, 2, Art. 28, § 1. See also in this volume for the TAC case the following chapters: Chapter 2, Bilchitz 'Taking Socioeconomic Rights Seriously: The Substantive and Procedural Implications'; Chapter 8, Muñoz Villalobos 'Improving the Right to Education'; and Chapter 12, Byrne, 'Access to Justice and the Alleviation of Poverty'.

617. General Comment 14, E/CN.4/2000/4 Core Obligations paragraph 44.

618. *Viceconte, M. v Estado Nacional*. ESCR-Net. International Network for Economic, Social and Cultural Rights. 6 February 2008. http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=419811

619. Paris Declaration on Aid Effectiveness, 2005. http://www.oecd.org/dataoecd/11/41/34428351.pdf

central element to determine the contents of the national health plan and strategy. This will serve to ensure that the plan is responsive to local and national needs and that the process of priority setting is democratic and transparent. Importantly, moreover, the *Voices of the Poor* study demonstrated that people living in poverty understand why they were ill and why they were poor, and often have ideas about what can be done, yet they are ignored by those with power, including health service authorities (see Narayan et al. 2000, 2002).

Addressing health as a human rights issue, moreover, helps to put health higher on the national and international political agendas and strengthens the centrality of the state. Indeed, human rights have been endorsed by the international community as the first responsibility of governments.[620] The obligation to *protect* the right to health means that the government must regulate non-state actors to ensure that they act in conformity with the right to heath, enhancing the government's stewardship role. The fact that the right to health constitutes an obligation of governments as a whole, including ministries of trade, finance and planning, means that all ministries are responsible for the realization of the right to health. Health as a human right thus requires policy coherence across government sectors. In practice, this will mean that the potential implications of actions considered by government sectors need to be assessed in relation to their impact on the right to health. Human rights thus provide a framework for identification of the inter-sectoral linkages, including the impacts of macro-economic policy on the realization of the right to health.

All health systems around the world are imbued with a set of values, whether explicitly or implicitly. Human rights, including the right to health, are universal and provide an explicit and common value system. As such, the norms, standards and principles generated under international human rights law provide a unified guide for health systems in all countries. This can support public health practice, which has been strong on measurement tools and epidemiological analysis, though often weak on rigorous and sound definitions, legal frameworks, and effective accountability mechanisms to support and underpin its work.

The right to health forms part of the international human rights framework, which provides an explicit and common value system for all WHO Member States and underpins and guides the work of the entire UN system. The universality of the right to health means that it applies to all countries, rich and poor alike, and that it should guide international assistance and co-operation in the health context.

Advocating for health as a human right facilitates alliances with civil society movements, which have used the human rights paradigm to effect positive social change in societies. The human rights movement brings with it a set of unique skills that can bring to bear social change as well as a set of accountability mechanisms at the international, regional and national levels. In addition to the traditional methods, such as 'naming and shaming', the movement is also

620. Vienna Declaration and Programme of Action adopted at the World Conference on Human Rights, 1993. http://www.unhchr.ch/html/menu5/wchr.htm

developing novel approaches and skills such as indicators, benchmarks, impact assessments and budgetary analysis (Hunt 2007). Human rights standards are also a powerful advocacy tool to garner increased attention to an issue. In this context, for example, WHO together with the UN Special Rapporteur on the Right to Health are seeking to generate increased attention to, and public awareness of, the issue of neglected diseases.[621]

7.6. WAYS FORWARD

The human rights framework has great potential for addressing health in the context of poverty. Increased efforts are needed, however, both to further strengthen the normative content of the right to health as well as to further operationalize a human rights-based approach to health. As regards the first effort required, although the contours and content of the right to health have evolved both at the international level through the UN human rights system's various mechanisms, and at the national level through the courts, when adjudicating people's demands to uphold national constitutional provisions that enshrine the right to health, the right to heath remains vague.

The global heath community, including health professionals, need to be engaged both in further defining what the right to health means and in guiding its effective implementation. This will ensure that the right to health evolves consistently with good public health practice and thus serves as an effective tool and 'ally' for health professionals. Unfortunately, some health professionals view the human rights framework as rigid and legal and as such not applicable to the concrete areas in which they work. In many countries, moreover, the medical profession is a powerful actor that tends more towards self-protection than self-policing (Brinkerhoff 2004: 373). In this context, human rights principles, and the movement behind them, may appear threatening, undermining existing power structures and questioning authority. As Louise Arbour, the former UN High Commissioner for Human Rights, has articulated: 'the realization of economic and social rights is inherently a political undertaking…'[622]

Member States of the UN also need to be engaged in generating a further common understanding of what the right to health means and how it can be implemented. This will enable ministries of health to take ownership of, and exercise stewardship for, the right to health so that it can be incorporated into health policy and practice to the benefit of the people on the ground. Crucial in this context is the principle of progressive realization, which imposes an obligation to

621. For an understanding of what is meant by neglected diseases, see WHO (2002: 96).

622. Louise Arbour, United Nations High Commissioner for Human Rigths, LaFontaine-Baldwin lecture 2005. 'Freedom from want' – from charity to entitlement (Libérer du besoin: de la charité à la justice), 3 March 2005. The realization of economic and social rights is inherently a political undertaking, involving negotiation, disagreement, trade-offs and compromise. See http://www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument

move forward as expeditiously and effectively as possible, individually and through international assistance and co-operation, to the maximum of available resources. It needs to be 'unpacked' in terms of the core obligations (e.g. primary health care) and translated into pragmatic guidance to support countries in moving forward (e.g. indicators to monitor health systems performance, right to health impact assessment tools).

Advocacy campaigns and effective coalitions with civil society, national human rights institutions, ministries of education and parliaments need to be forged in countries to address the long-term challenge of enabling people, including those living at the margins of society, to claim health as a human right. One of the greatest impediments to tackling poverty is the lack of capacity to demand the realization of rights of the poor themselves. Simple, clear and empowering messages need to be generated at the international, regional, national, local and grassroots levels. History shows that once people are aware of their rights, power balances shift and societies change. In this context, in recent years, there have been some exciting new initiatives within civil society in the field of health rights. For example, the People's Health Movement has launched a campaign for the right to health care.[623] This entails monitoring government obligations and campaigning and advocating for this right, generating demand from the people affected by the lack of enjoyment of this right themselves. Another civil society group, the Mexican NGO Fundar (Centro de Análisis e Investigación) in the health and human rights field, has developed tools to monitor the allocation of government budgetary resources to effectively realize the right to health.[624] Nevertheless, a stronger civil society movement is necessary to take forward the right to health in the terms of its overall application to health development, including the strengthening of health systems. The right to food has had Foodfirst Information and Action Network (FIAN)[625] as a driving force, and the housing rights movement has benefited greatly from NGOs such as the Centre on Housing Rights and Evictions (COHRE).[626]

Other ways forward are not so clear. The need for a binding instrument on the right to health is debatable. Over the years, the public health community has generated a myriad of guidelines applicable to specific diseases and health interventions. It has, however, limited experience with generating legally binding health instruments[627] and in providing clear normative guidance on how to

623. See Peoples' Health Movement India (www.phm-india.org)
624. See WHO Report Consultation on Indicators for the Right to Health, p. 12. http://www.who.int/hhr/activities/Report%20indicatorsmtg04%20FINAL.pdf
625. http://www.fian.at/
626. http://www.cohre.org/
627. The first ever treaty negotiated under the auspices of the World Health Organization was WHO's Framework Convention on Tobacco Control (the FCTC). The other international and legally binding instrument, generated under the auspices of the WHO, is the International Health Regulations. The purpose and scope of the IHR (2005) are to prevent, protect against, control and provide a public health response to the international spread of disease.

address health in a broad societal context.[628] In the development of international law, the standard-setting process is usually an evolutionary one, starting initially with the development of a non-binding instrument in the form of a declaration. Such a declaration will inspire actions, which in turn concretize into customary international law. The declaration of Alma-Ata on primary health care, although 'in and out of fashion' over the years, has provided a steadfast framework for countries in designing their health systems. It may be appropriate now to review whether the time is ripe to consider developing a legally binding instrument on the right to health with primary health care at its heart. The principles of progressive realization and universality of human rights mean that all countries – rich and poor alike – would be required to move forward and show steady progress. Protocols could be added over time to update as well as address specific issues including health research, development and benefit-sharing. Periodic monitoring through state party reporting by an independent committee or a peer review mechanism whereby governments review and support each other's progress could oversee its implementation.[629]

For some countries, the core content, with the bare minimum basket of essential primary health care at the forefront, would be a priority whereas for others it would be a focus on ensuring that all people within the country have access to good quality health services, including those living in the pockets of poverty in rich countries. The framework of 'AAAQ', which focuses on ensuring the availability, accessibility, acceptability and quality of health facilities, goods and services, provides a universal guide to all health systems and the strengthening necessary to ensure not only the core content but also more advanced levels of health care as well as underlying determinants.

The human rights obligation 'to take steps, not only individually but also through international assistance and co-operation, especially economic and technical', would mean considering the economic and technical implications, particularly for low-income countries to ensure 'the core content' of the right to health. The idea of a world health insurance to ensure this minimum core has been proposed in this context (Ooms, Derderian and Melody 2006: 2171-2176).

Any monitoring efforts by government to progress in the realization of the right to health should be accompanied by a solid toolbox for governments backed by technical support provided by the WHO and other relevant stakeholders. This 'box' would include tools to assess the potential impact on the enjoyment of the right to health of actions within and beyond the health sector, indicators for health systems' performance monitoring, guidance on institutional mechanisms and structures for participatory health planning and assessments; tools to self-monitor

628. In 2005 WHO set up a Commission on the Social Determinants, tasked with providing evidence on policies that improve health by addressing the social conditions in which people live and work. http://www.who.int/social_determinants/about/en/

629. Such an idea would be in line with the new UN Human Rights Council's universal periodic reporting system, which entails peer review among member states of their human rights performance.

budgetary allocations for health as well as guides on how to ensure a sector-wide approach to health and to ensure that the right to health forms a central part of poverty reduction strategies.

Needless to say, the idea of a legally binding treaty on the right to health may not be palatable to member states nor particularly strategic at this time when international relations are heavily dominated by an overriding preoccupation with security and anti-terrorism rather than justice and development. Moreover, the UN human rights treaty body system, already in place to monitor human rights, including the right to health, has not been provided with sufficient resources or support to ensure its effective functioning. On the other hand, there may be advantages to advancing the right to health with WHO as the base as there are skills and technical competency available to support its operationalization as well as direct linkages with ministries of health. The right to work has flourished in terms of its normative content, scope and application having crystallized through the International Labour Organization (ILO) tripartite system of developing and monitoring labour standards.[630] Although there are severe and egregious violations of labour standards, at least there is easy access to the standards that *should* apply. Within the field of health, a lack of clear norms and standards to guide the assessment of a health systems' performance hampers progress and, in particular, means that the most vulnerable and marginalized groups do not readily have standards against which to hold their governments accountable. There is no reason why WHO could not 'nurture' the right to health so that it develops similarly to the way the right to work has in the context of the ILO.

At the very least, it is time that new and creative ideas, evidence and good practices be brought together and put on the table together with the solid legal norms, standards and principles underpinning the right to health to form a common agenda to address the pressing health challenges of people living in poverty. At a minimum, efforts should be made to ensure that the various efforts to address health are synergistic and that existing mechanisms to advance health as a human right and integrate a human rights-based approach to health are strengthened.

Today's major challenge to effectively address poverty is 'to weaken the web of powerlessness and to enhance the capabilities of poor women and men so that they can take more control of their lives' (World Bank 2000: 235). This challenge is larger and more complex than any global institution and requires rigorous interdisciplinary and co-ordinated action.

Rather than shying away from human rights as being potentially political and legalistic, it should be considered as an essential strategy for addressing the link between ill health and poverty. Inequalities in health are today widening between countries and between population groups within countries. It is high time that those committed to public health, development and human rights forged a common agenda around the Right to Health.

630. http://www.ilo.org/global/lang--en/index.htm

8

Improving the Right to Education

Vernor Muñoz Villalobos

Katarina Tomasevski
In memoriam

8.1. INTRODUCTION

My invitation to contribute to this volume was accompanied by an explanation of its purpose: to explore new possible and effective legal approaches to combating poverty. I emphasize at the outset my belief that a lack of education is neither necessarily dependent upon, nor necessarily the cause of, poverty. These two themes recur, implicitly and explicitly, in much of my work in my role as Special Rapporteur.

> [The] child's right to education … is … a requirement of human dignity. It is unacceptable that in this world of ours, possessing a store of scientific and technical knowledge unprecedented in history there should be, side by side with privileged people commanding access to the resource of knowledge, hundreds of millions, not only of boys and girls, but also men and women, who are denied the possibility of simply learning to read and to write (M'Bow 1979: 14-15).

This 'requirement' of human dignity has gained increasing international and domestic recognition over the past three decades. Such recognition led rather belatedly to, inter alia, resolution 1998/33 of the Commission on Human Rights. This resolution established the mandate of the Special Rapporteur on the right to education, initially for a period of three years but renewed twice thereafter.

The initial mandate included a request that the Special Rapporteur report on the status of the progressive realization of the 'right to education', including access to free compulsory primary education, and the difficulties encountered in its implementation. In 2004 the mandate was renewed for a further period

of three years[631] and the Special Rapporteur requested to intensify efforts aimed at identifying ways and means to overcome obstacles and difficulties in the realization of the right to education. I was appointed as Special Rapporteur to fulfil that mandate.

I saw my role as building upon the valuable work of my predecessor, Katarina Tomasevski. Although it is inappropriate to reiterate her comments here,[632] it is useful to briefly refer to some, but by no means all, of the principle issues she addressed. Her starting point was that education must first and foremost be viewed as a human right and applicable to all ages.[633] Education should not be viewed as a public service. Further, as a human right it is subject to violation. As no right can exist without remedies, those subject to its violation must have corresponding standing to claim those rights and demand remedies. I endorse her view.

As noted by numerous commentators, states first recognized the human right to education internationally in the 1948 Universal Declaration of Human Rights (UDHR), and in 1960 UNESCO adopted its Convention against Discrimination in Education. Several binding instruments relevant to education followed, the most pertinent for this report being the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR).[634] Article 13 of ICESCR gave further detail to the UDHR by formally acknowledging the right of everyone to free and compulsory primary education as well as, progressively, to free secondary and tertiary education. This acknowledgment was reiterated in Article 28 of the Convention on the Rights of the Child (CRC) some twenty-three years later. The right to education without discrimination on the basis of equal opportunity was recognized in Article 10 of the 1979 Convention on the Elimination of all forms of Discrimination against Women, and in Article 24 of the recently adopted (2006) Convention on the Rights of Persons with Disabilities.[635]

Briefly stated, and in general, ratification of these instruments imposes three broad obligations upon states: they must not interfere with the enjoyment of the right to education; they must protect against discrimination and ensure its equal fulfilment between men and women;[636] and they must take immediate steps, to the maximum of available resources, with a view to achieving its full realization.[637]

631. Resolution 2004/25.
632. See further http://www.right-to-education.org
633. Although this chapter focuses in general on the education of children, the majority of the issues considered and recommendations made apply equally to adults, albeit with appropriate adjustments.
634. The right to education does of course also implicate political and civil rights.
635. Programmatic frameworks include: the 1990 Jomtien World Conference which set out the goal of 'Education for All'; the 1993 Standard Rules on the Equalization of Persons with Disabilities; UNESCO's Salamanca Statement of Principles, Policy and Practice in Special Education; and the 2000 World Education Forum in Dakar.
636. International Covenant on Economic, Social and Cultural Rights, Articles 2 (2) and 3; International Convention on the Right of Persons with Disabilities, Article 4 (1).
637. International Covenant on Economic, Social and Cultural Rights, Article 2(1), International Convention on the Right of Persons with Disabilities, Article 2.

Despite these assertions of a right to education and, upon ratification, these broad obligations upon states, there is little textual guidance as to the normative content of the right. To assist the international and national communities to better understand the normative content therefore, my predecessor suggested a common language, while proposing an analytical framework to evaluate its respect, protection and realization. This framework encompassed a review of the obstacles to its full enjoyment, and led to her practical 4-A scheme (availability, accessibility, acceptability and adaptability)[638] to measure the advancement of the right. Whilst inappropriate to detail this scheme here, I take the opportunity to formally endorse it, as indeed has the Committee on Economic, Social and Cultural Rights, in its General Comment 13 on the right to education.[639]

The Special Rapporteur entered into dialogue with the World Bank, seeking to encourage the mainstreaming of human rights in its policies. I reiterate that encouragement. Her focus was on the promotion and guarantee of free compulsory primary education. Primary education is the foundation of the entire education system. If its adequacy and equality can be improved, we will have a strong basis to ensure adequate and equal continuation to secondary and tertiary levels. For this reason, but whilst acknowledging the importance of adult education, I have maintained her focus on primary education in my work. Linked to her dialogue with the World Bank was the Special Rapporteur's examination of the impact of international trade and macroeconomic policies and laws on education, and the consequent risks for access and the quality of education of the increasing privatization of schools. I endorse her findings and consequent recommendations.

Discrimination pervades most human rights themes and education has not escaped its destructive force. The Special Rapporteur illustrated clearly the extent of this force and discrimination when considering, for instance, the right to education with respect to race, indigenous persons, asylum seekers and refugees, girls, and those persons, adults and children alike, with disabilities. Whilst possibly trite, it is nonetheless necessary to reiterate that the international and domestic communities must now openly acknowledge, accept responsibility for, face and work towards overcoming such discrimination and its effects. In order to assist in this respect I have chosen to comment in depth on two specific issues: the education of girls and the education of persons with disabilities, the latter in recognition of the recent adoption of the UN Convention on the Rights of Persons with Disabilities. The thrust of these comments are given below, their combined aim being not only to illustrate the specific issues facing these communities, but also to link and provide illustrative working examples of a number of recurrent themes in the chapter.

638. See further http://www.right-to-education.org
639. General Comment No. 3. E/C.12/1999/10. See also in this volume, Chapter 15, McCorquodale and Baderin, 'The International Covenant on Economic, Social and Cultural Rights – Progress and Future Challenges'.

Before moving to the specifics, I wish at this point to take a quick look *generally* at the original title offered: the use of law to improve education. The first rather obvious point here is that the very assertion of education as a human right clearly grounds the issue in international human rights law. Debates on the adequacy and efficacy of international law abound, but cannot be entered into here. What I, like many others before me, can do is to exhort a rights-based approach to education. If, as is unfortunately not the norm, international human rights law has a direct effect in a state, it is more likely to influence constitutional, legislative, and policy initiatives of that state. States are consequently exhorted, yet again, to ratify all human rights treaties, and to take steps to ensure their direct effect and the prompt implementation of their normative content. So too are states that have failed to entrench the right to education, and particularly to free primary education, in their constitutions exhorted to take this step without delay.

The negative consequences of the failure to entrench education provision in human rights were apparent during my recent mission to Botswana.[640] Although laudable positive and successful steps have been taken to increase access to basic education, there remains a disturbing disparity in educational achievement, particularly in relation to vulnerable groups. A human rights-based approach to the education of these groups, which include those living in rural areas, indigenous populations, girls and women, whilst not in itself sufficient to fully compensate for their vulnerabilities, would certainly ameliorate the disparity in their achievement. Of possibly greater significance, from a rights-based perspective, however, is the expressed decision to re-introduce school fees at junior secondary level. These proposed measures undermine Botswana's achievements with regard to education, and, as I have suggested elsewhere,[641] would not be introduced were education considered a human right as opposed to a public service.

As Botswana is not alone in relying on school fees to partly fund its education system, it is imperative to work with states generally to find alternative strategies, and ensure education is given greater weight in national funding priorities. Equally importantly, it should not be viewed as, in the illustrative case of Botswana, a service or simply as a tool to be utilized to eliminate poverty. There is now, of course, abundant evidence that poverty and lack of education are inextricably linked. In focusing too much on this link, however, there is a risk of losing sight of the aims and intrinsic value of education per se and, further, that a lack of education is neither necessarily pendent upon, nor necessarily the cause of, poverty.

It is known that the continuing debate concerning the aims of education preceded the adoption of international human rights law. Nonetheless, for the purposes of this chapter, and indeed of my role of Special Rapporteur, my point of reference is international human rights law and related materials. These point to the development of an individual's personality, talents and abilities, the strengthening of respect for human rights and fundamental freedoms, effective and

640. See further Mission to Botswana (26 September to 4 October 2005) report: E/CN.4/2006/45/Add.1.

641. E/CN.4/20006/45/Add.1.

full participation in society, and the promotion of understanding, tolerance and friendship as among the principle aims of education. Clearly, economic benefits from education must be acknowledged, sought and welcomed; nonetheless, they are not its sole aim.

A final general point on the use of law to improve education relates to its justiciability – the furthering of which, as I am acutely aware, requires strengthened and continuous international, domestic and civil society efforts.

Although it has been demonstrated that civil and political rights and economic, social and cultural rights all impact the right to education, there remains a firmly held view that education is an economic, social and cultural right. While states have repeatedly affirmed the indivisibility of all human rights, economic, social and cultural rights have consistently enjoyed a lower level of legal protection than civil and political rights. Protection afforded to education is clearly implicated by this lesser protection.

Nevertheless, two major developments are worthy of note. First, General Comment 3 (1990)[642] of the Committee on Economic, Social and Cultural Rights sets out clear state obligations under the ICESCR. These include: an immediate obligation upon states to 'take steps' towards fulfilment of the rights contained therein; the obligation to realize economic, social and cultural rights progressively using the maximum of available resources; and the provision of judicial remedies following violation. The second development is the setting up of an open-ended working group to consider the content of an optional protocol providing for a formal complaints procedure. In the context of the debate in this working group and on this issue in general, I see the growing jurisprudence – international, regional and domestic – as an encouraging sign,[643] clarifying the nature and scope of the right to education and the corresponding governmental obligations for its fulfilment.[644] To relevant jurisprudence identified by my predecessor, [645] I add just three further examples.

The campaign of *Fiscal Equity et al. v the State of New York et al.* [646] concerned alleged discrimination within New York State school funding. The challenge related to the discriminatory effect of the funding of New York's public schools on children from minority groups. Adequate funding was claimed to be measured by the securing of a 'sound basic education'. In clarifying the meaning of a 'sound basic education' the Supreme Court of New York held that the funding duties of the state included: (i) a sufficient number of qualified teachers and other personnel; (ii) appropriate class sizes; (iii) adequate and accessible school buildings; (iv) sufficient

642. General Comment No. 3, E/1991/23
643. Preliminary research has identified relevant cases in numerous jurisdictions, including Argentina, Australia, Canada, Colombia, Costa Rica, India, Ireland, Israel, the United States and the United Kingdom.
644. A distinction must be made here between educational jurisprudence where education is viewed and has been guaranteed as a public service and educational jurisprudence where education is viewed as a right.
645. http://www.right-to-eductaion.org/content/unreports/unreport5prt3.html. para. 72.
646. 719 NYS 2d 475 (2001).

up-to-date books and technology; (v) suitable curricula; (vi) adequate resources for students with special needs; and (vii) a safe, orderly environment.

Dilicia Yean and Violeta Bosica[647], a case brought before the Inter-American Commission on Human Rights, illustrated clearly the potential use of judicial or quasi-judicial mechanisms for challenges alleging discrimination in the provision of education. Here the Dominican Republic argued that the plaintiff's claim of violation of the right to nationality and to education was inadmissible on the grounds of failure to exhaust domestic remedies. The Commission countered by asserting that as effective domestic remedies did not exist in the Dominican Republic, the challenge was admissible.

In *Autism Europe v France*[648] the European Committee of Social Rights identified a number of positive obligations on states in the fulfilment of the right to education within the European Social Charter. Here the Committee specifically recalled the prohibition of direct and all forms of indirect discrimination.

Finally, in the case of people with disabilities, of particular relevance is the role of courts and quasi-judicial tribunals in providing remedies for breaches of the right to education. Preliminary research has identified relevant cases in numerous jurisdictions, including Argentina, Australia, Canada, Colombia, Costa Rica, India, Ireland, Israel and the United States of America: *Purvis v New South Wales (Department of Education and Training)* [2003] HCA 62; *Eaton v Brant County Board of Education* [1997] 1 SCR 241 at 272-273 [67]; *Olmstead v L.C.* (98-536) 527 US 581 (1999) 138 F.3d 893; *Yated - Non-Profit Organization for Parents of Children with Down Syndrome v the Ministry of Education,* HCJ 2599/00, Supreme Court of Israel sitting as the High Court of Justice; *Mater J. Rajkumar Minor rep. by his father and natural guardian Mr. D. Joseph v the Secretary, Educational Department, Government of Tamil Nadu Secretariat, the Director of Medical Education, Directorate of Medical Education and the Secretary, Selection Committee, Directorate of Medical Education.* Also see in this volume for autism, *Europe v France* in Chapter 9, and Chapter 14. See also Constitutional Court of Columbia: No. T-429/92, T-036/93, T-298/94, T-329/97, T-513/99, C-559/01, T-339/05; Cámara de lo Contencioso Administrativo de Tucumán, Argentina: No. 62/04; United States Supreme Court: No. 86-728, 80-1002; Sala Constitucional de la Corte Suprema de Justicia de Costa Rica: No. 14904-06, 9087-06, 2901-06.[649]

This growing jurisprudence demonstrates clearly that although the content of the 'right to education', as opposed to education as a public service, lacks adequate clarification, it is justiciable. Indeed the very act of bringing claims, combined with concomitant jurisprudence, can serve only to allow a better understanding of its content. In this respect the role of judicial and quasi-judicial decision-making, at the international, regional and national levels, in informing, reflecting and changing values in the community, must not be underestimated. Further, it implicates the

647. Case No. 12.189.
648. Complaint No. 13/2002.
649. Muñoz, V. Report of the Special Rapporteur on the Right to Education. A/HRC/4/29, 19 February 2007.

need for the development and strengthening of adequate and effective national legal protection schemes and the active and effective participation of civil society in these schemes.

As noted above, I have chosen to comment in depth on two specific issues: the education of girls and the education of persons with disabilities. The aim is to illustrate the specific issues facing these communities, and also to link and provide illustrative working examples of a number of recurrent themes in the chapter. I now therefore turn from the general to the specific and open with the right to education for girls.

8.2. THE RIGHT TO EDUCATION FOR GIRLS

I begin this section with a few statistics and then very briefly address the socio-cultural context of these statistics. Failure to take full cognizance of this context will lead to failure in entrenching improvements in education for girls. So too, of course, will a failure by international and domestic actors to take full cognizance of the need to entrench any such improvements in human rights. Until entrenched in human rights, inadequate resourcing of education and inadequate relevant legislation, policy and jurisprudence, which are so apparent worldwide, will continue. I end this section with a non-exhaustive list of recommendations aimed at governments, in the hope that they have sufficient political will to take steps to ensure their prompt implementation.

At least 55 million girls do not attend school. At least twenty-three states risk failing to achieve universal primary education by 2015, as proposed in the Millennium Development Goals (UNESCO 2006). Despite substantial progress in sub-Saharan Africa and Southern and Western Asia, those states are found in precisely the regions where girls most lack educational opportunities: in Southern Asia 23.5 million girls do not attend school, and in Central and West Africa virtually half of all girls are excluded. To this depressing prospect must be added the 25 per cent of illiterate adults over fifteen years old in Central America, for the most part indigenous girls and women living in rural areas (UNDP 2003: 31).

Whilst these figures reflect the general exclusion from education, exclusion is the experience of a disproportionate number of girls and women. Parity in education therefore remains elusive. Eighty-six states are unlikely to achieve parity by 2015, and seventy-six have failed to achieve parity even in primary education (UNESCO 2006). In percentage terms this translates into 56 per cent of the world school-age population living in states that have failed to achieve gender parity in primary education; in the case of secondary education the figure rises to 87 per cent (UIS 2005).

It is deeply disturbing that no state has succeeded in eliminating the gender gap in all aspects of social life. Although this is not the place to launch into a discussion as to the various causes, its context is nonetheless briefly considered below. Here, I simply make three points. The first is that although gender inequality in education is subject to specific local and regional features, some characteristics

are common to many states. Poverty is one such characteristic. Second, ample documentation of gender inequality in education in North America and Europe suggests that poverty is not, however, its single and automatic cause.[650] Finally, parity implies the quantification of registration for school. It does not reflect the concept of 'gender equality' as contemplated in the 1995 Beijing Declaration and Platform of Action. If the aim of 'parity' is to influence policy and legislation, so therefore must a broader view of gender equality.

The causes of this inequality are various and partially reflect the long running debate as to the appropriate aims of education, to which passing comment has been made above. The earliest aims of education systems were to ensure the availability of trained industrial commercial labour. Education was consequently viewed as an instrument subordinate to the market and answering the interests of the economy before those of individuals. It was[651] provided as a service rather than as a right and despite the rise and fall of varying educational trends, their legacy, which reflected and validated stereotypes, prejudices and gender inequalities of the time, remains (UN Millennium Project 2005: 24).

These stereotypes, prejudices and gender inequalities are grounded in what I have referred to elsewhere as patriarchalism[652] – a social framework of asymmetries and disparities. One basis for this asymmetry is the imposition of supremacy of men over women, which, in addition to entrenching gender inequality, impedes social mobility,[653] remaining an obstacle to egalitarian relations between men and women. The consequences of this asymmetry are reflected in the statistics given above with more illustrative examples provided below.

Patriarchy, for instance, reinforces the view that the ultimate objective for girls and women is matrimony (World Vision 2004: 7). This view is propagated in the school environment and exacerbated by the psychological disempowerment that girls suffer in their primary relations, so feeding the belief the education is not a viable option for them. A number of states validate this structure of subjection by authorizing early marriage. Indeed recent studies show that is some states more than 50 per cent of girls/women marry before they are eighteen years old.[654] Early and/or unwanted marriage, pregnancies and motherhood combine to ensure that formal education becomes unlikely, and domestic work their principle role.

Indeed, the obligation of unpaid domestic work is the norm for many girls; hours are often long, up to seven hours a day (Ritchie, Lloyd and Grant 2004: 4-9), aggression and violence common. These 'obligations' are rooted in customs and traditions that directly afford boys and men preferential treatment. They provoke

650. European Women's Lobby, Gender Equality Road Map for the European Community, 2006-2010
651. And unfortunately, in many states, remains.
652. Girls' right to education, Report submitted by the Special Rapporteur on the right to education E/CN.4/2006/45.
653. See further PDHRE, Transforming the patriarchal order into a human rights system toward economic and social justice for all. Available at: http://www.pdhre.org/patriarchy.html
654. http://www.oxfam.org.uk/what_we_do/issues/gender/links/1105yemen.htm

school dropout among girls at earlier ages than boys and are often reinforced by stereotypes in textbooks and in the school environment.

Some practical examples of the consequences of patriarchy in the school environment itself are:

- sparse recruitment of female teachers;
- limited attention paid to girls with special education needs;
- absence of thorough, continual gender awareness-raising and training for teachers;
- insufficient interest in retaining pregnant teenagers and encouraging the return of adolescent mothers;
- lack of sex education;
- lack of safe transport to and from school;
- the disproportionate effect on girls of the cost of registration, uniforms, food, textbooks and teaching materials that families must defray;
- parental unwillingness to invest in or take an interest in girls' education;
- restriction of girls' freedom of movement and expression (Bentauoey Kattan and Burnett 2004: 12).

As is evident from Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, the elimination of prejudices and all practices based on the idea of inferiority or superiority of either of the sexes or on stereotyped roles for men and women poses the main challenge to the identification of new educational and human development policies. Unless international and domestic policies and law are fully cognizant of past and existing economic, social and cultural inequalities experienced by women, such laws will fail to address, and indeed may perpetuate, those inequalities.[655] Indeed, to break with this system of asymmetry calls for a complete overhaul of societies and cultures in order to encourage men and women to live together on an equal footing (Lagarde and de los Rios 1990: 345).

The myth that patriarchalism is inevitable has been discredited by studies showing that young people are more flexible in their expectations of gender roles than often believed.[656] They can therefore prove ready to fashion relationships of respect, equality and co-operation should alternative models of upbringing be available. States should therefore take immediate steps to minimize stereotyping and prejudices that have consigned women to a position of inferiority.[657] The Council of Europe has taken such steps by proposing a strategy to this end; a strategy that encompasses a broad spectrum of organizations, institutions and individuals, all of which are implicated in education. With appropriate cultural adjustments, such a strategy could be emulated elsewhere. Nonetheless, as such strategies will involve altered and increased resource allocation, the required, but often absent, political commitment to take these steps must be encouraged and

655. General Comment, 16 Committee on the Elimination of Discrimination against Women.
656. Barker, cited in Grieg, Kimmel and Lang (2000: 8).
657. See UN Press release WOM/1519 at www.un.org/News?Press?docs/2005/wom1519.doc.htm

strengthened. The international community, including the World Bank, has a part to play in this.

With sufficient political will, new decisive strategies (which must fully integrate human rights) in response to patriarchal attitudes can be found. If sufficiently robust, the international and domestic efforts – currently often absent – made to implement these strategies will reduce the exclusion of girls and women in twenty-first century education. To this end I make a number of practical recommendations illustrative of the steps governments should now take to make this a reality. Directed to all states and adopting my predecessor's 4-A scheme, these recommendations, limited in number, are as follows:

Availability

1. Increase education budgets to at least 6 per cent of gross national product, in accordance with international standards.
2. Guarantee a significant and growing budget to bolster programmes for the construction and improvement of school infrastructures. Such infrastructures must be sited within communities and include a drinking water supply and separate, private, safe sanitation services for girls.
3. Offer special incentives to universities and teacher-training institutions for improving gender-parity in teacher graduation and incorporating a gender perspective in syllabuses for trained teachers of both sexes, and develop gender-training programmes serving teachers – both female and male.
4. Design and implement effective programmes to guarantee successful schooling of pregnant teenagers and adolescent mothers; consideration should also be given to the possibility of providing food and childcare services during school hours.
5. Promote the recruitment of female teachers.
6. Increase economic aid to developing countries to enable the Fast Track Initiative to be extended to states focused on eliminating unequal education, and finance the studies and strategies necessary for others to be ready to do so.

Accessibility

1. Establish educational policies and teaching practices that ensure inclusion of young teenage girls with disabilities and learning difficulties.
2. Take legal and administrative steps necessary to guarantee that admission and enrolment criteria for girls are applied in the same way as for boys.
3. Conduct teaching exercises with children and adolescents to analyse gender stereotypes in classroom activities and combat their prevalence in textbooks, teaching materials and all other school activities.
4. Ensure all working girls, including those engaged in domestic work, have equal opportunities to enjoy the right to education. To that end, alternative projects should be designed to provide solutions to family needs that are traditionally met by such girls.

5. Develop and apply qualitative and quantitative human rights indicators that make it possible to accurately identify and quantify the causes of exclusion, discrimination, segregation and any other constraint on girls' enjoyment of their right to education.

Acceptability

1. Form local and regional commissions to identify which aspects of customs, traditions and any other socio-cultural factors impede egalitarian treatment of girls in educational institutions, and recommend measures to eradicate them.
2. Develop and implement, in formal and non-formal education, syllabuses on sexuality that promote respect for girls' and women's rights and fashion a sensitive, responsible male sex.
3. Appoint specific committees of male and female experts to eliminate the stereotypes existing in textbooks and recommend alternative texts.
4. Issue clear directives that no practice that discriminates against girls in education systems will be tolerated.
5. Conduct research to evaluate the level of implementation of human rights in specific classroom activities and, based on the results, take appropriate corrective action.

Adaptability

1. Conduct specific experiments, projects and programmes to ensure that girls play an active part in identifying their educational, social and cultural needs, so that they can propose solutions based on their own knowledge and experience.
2. Establish educational policies and specific plans to developing intercultural education.
3. Guarantee sufficient physical space for girls' play, sports and recreation, on an equal footing with boys.
4. Promote programmes offering economic compensation for poor families so that their daughters, like their sons, can be sent to school.
5. Design and publicize simple, appropriate, practical mechanisms enabling girls to report, in complete security and confidentiality, any acts of violence towards them in or near educational institutions.

This section has focused on the exclusion of girls and women from education and identified seemingly entrenched discriminatory practices to which they are too frequently subjected. Women do not, however, have the monopoly on discrimination. Race, religion, language, age and disability all attract discrimination, and women in any of these groupings attract multiple discrimination. Whilst fully

acknowledging the frequent negative impact of all these issues[658] on the fulfilment of the right to education and the importance of working towards the elimination of that impact, space constraints allow a detailed look at just one issue. In view of the recent adoption of the UN Convention on the Right of Persons with Disabilities, I have chosen to focus on the right to education for persons with disabilities.

8.3. THE RIGHT TO EDUCATION FOR PERSONS WITH DISABILITIES

The preceding section opened with statistics that are available with little effort to the public. Although the quality and quantity of these statistics are open to substantial improvement, they give at least some indication of the extent of exclusion of girls from education. Unfortunately the same cannot be said for persons with disabilities. Inadequate and inconsistent state monitoring of their education has led to such an absence of reliable statistics that it is not possible to state with any certainty their level of exclusion. This must be remedied, and promptly.

Nonetheless, the statistics that do exist indicate a simply unacceptable extent and breadth, spanning all age ranges and covering both sexes and, indeed, within the disability 'community' itself. Two simple examples will suffice to illustrate this point. First, while the net enrolment rate in primary education in the developing world has now increased to 86 per cent over all regions (United Nations 2006: 6), estimates of the number of children with disabilities attending school in developing countries range from less than 1 per cent to 5 per cent (Peters 2004; UNESCO 2005*b*: 11). Second, literacy rates for disabled women stand at 1 per cent as compared to an estimate of about 3 per cent for people with disabilities as a whole (Groce cited by Rousso 2005: 3).

As the estimate of persons with disabilities is between 500 and 600 million (of which between 120 and 150 million are children, 80-90 per cent of whom reside in conditions of poverty in developing countries) and some 15-20 per cent of all students have been estimated as having special needs at some point of their educational careers (Jonsson, Ture, Wiman and Ronald 2001: 11), the current and potential future impact of this denial is cause of considerable concern.

As with girls, the social context of the education of persons with disabilities must be acknowledged and faced before improvements can be made, through the use of law or otherwise. Quite simply they face historic but deeply embedded social stigmatization. Stereotypical images of their uneducability and their being considered a burden on mainstream education – often combined with hostility and traditional paternalistic attitudes that are shown towards them – remain, even today, and are prevalent among teachers, school authorities, local authorities, communities and families. Such images can serve only to reinforce exclusion.

658. The devastating effect of armed conflict on education must be mentioned at this point, albeit not strictly relevant to the focus here on discrimination.

Indeed, this is recognized in the UN Convention on the Rights of Persons with Disabilities, which formally records that it is not 'disability' that hinders full and effective participation in society (which includes education) but rather 'attitudinal and environment barriers' within that society.

These barriers have led, for example, to: segregated education in 'special schools', contributing to marginalization from society; inadequate training and therefore inadequate skills amongst teachers and administrators; inattention to appropriate physical structures, with consequent limited physical access to and within buildings; inadequate consideration of alternative communication mediums, with consequent limited access to learning materials; inadequate resources; inadequate attention to the special education needs of learners in mainstream education, with consequent inadequate/inappropriate education when within mainstream education; and inattention to the specific needs of women with disabilities.

Compounding these obstacles is the clear emphasis on outcomes in national and international educative assessments. The consequence is that mainstream 'schools are pushing out those scores that do not measure up to performance goals, resulting in a reluctance to include students with disabilities' and expulsion of students who are difficult to teach (Peters, Johnstone and Ferguson 2005: 140). Of course, and in addition, the practice of separating students with disabilities can lead to even greater marginalization from society than that persons with disabilities face generally, thus entrenching discrimination. In contrast the increasingly endorsed and practised educative paradigm, generally known as 'inclusive education' has shown to limit marginalization, misconceived stereotyping, prejudice and thus discrimination (Linsay 2003).

Inclusive education is based on the principle that all children should learn together, wherever possible, regardless of difference.[659] It acknowledges that every child has unique characteristics, interest, abilities and learning needs, and that those learners with special education needs must have access to and be accommodated in the general education system through a child-centred pedagogy. Inclusive education, by taking into account the diversity amongst learners, seeks to combat discriminatory attitudes, create welcoming communities, achieve education for all, as well as improve the quality and effectiveness of mainstream education.[660] Further, it challenges the appropriateness of segregated education both on grounds of effectiveness and from the perspective of respect for human rights. As for financial effectiveness, current research suggests that, within the realm of education, states are increasingly realizing the inefficiency of multiple administration systems, organizational structures and services, and specifically the lack of financial viability of special schools.[661]

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659. Declaración de Salamanca sobre políticas y prácticas en necesidades educativas especiales, para. 3.
660. Declaración de Salamanca sobre políticas y prácticas en necesidades educativas especiales, para. 2.
661. Peters 2004; OECD 1994; OECD 1999; OECD 2000, O'Toole and McConkey 1995; EURYDICE, 2003.

Inclusive education should however not be seen as a one-system-fits-all solution. First and foremost – when considering the education of child learners – it must take into account 'the best interests of the child'. In so doing, the focus must move away from disability – an approach typical of the medical model – towards the individual education needs of all children, whether they are learners with or without disabilities. Such considerations must be taken fully into account within the overall framework of an inclusive general education system.

As parties to human rights treaties, it is of course the states that have the primary legal obligation to respect, protect and fulfil the right to education under those treaties. However, in practice the active, non-discriminatory involvement of a wide range of additional actors is essential if inclusive education is to be realized. Indeed, inclusion encompasses not only the right of marginalized learners but also more broadly, as with girls, the expedition of cultural and value shifts both in the education system and in the wider community generally.

Pertinent in this respect is the acknowledgment that responsibility for, and realization of, inclusive education is inevitably dependent upon parents, communities and teachers. UNICEF states that all three are the 'key to supporting all aspects of society' and indeed all three have the responsibility to promote and protect the right to inclusive education. However, prevalent misconceptions about disability generally, the belief that children with disabilities must either 'adapt' to mainstream schools and/or that segregated schools are appropriate are currently held by all three groups. It is vital that these misconceptions be broken down, and swiftly. To this end states should consider programmes to provide information and raise awareness amongst the community generally on the importance of inclusive education. More specifically, if indeed 'teacher attitudes and tolerance are the vehicles for the construction of an inclusive and participatory society' (UNESCO 2005: 17) as convincingly asserted by UNICEF, focused pre- and in-service training to teachers is imperative, as is the establishment of training programmes for school administrators, educational planners and policy-makers.

Below I offer a brief review of minimum requirements of state legislative, policy and financial frameworks for inclusive education.[662] These complement, endorse, and are equally pertinent to the fulfilment of the right to education for girls and education generally. In considering these requirements the following should be borne in mind. First, the success of inclusive education can depend on empowering local authorities (or their equivalent) to make decisions on accessibility and inclusion and holding them accountable for those decisions. Second, at central government level, responsibility for the right to education of persons with disabilities is often spread among different institutions, increasing the potential for incoherent policy and legislation and their implementation. A single government institution should therefore have the responsibility of ensuring the fulfilment of the right of inclusive education for all.

662. More detailed recommendations aimed at the fulfilment of these requirements can be found in my report on the education of persons with disabilities (A/HRC/4/29).

8.3.1. Policy, Legislative, and Financial Frameworks

Effective domestic policy, legislative and financial frameworks are a pre-requisite to states meeting their obligations in relation to the right to education generally and inclusive education specifically. States should consequently ensure adequate, focused and effective legislative, policy and financial frameworks. It is important here to emphasize that legislation is not an end in itself. The impact of legislative frameworks depends on the level of implementation, the sustainability of funding, effective monitoring and evaluation, as well as more detailed policy frameworks that ensure that legal norms are translatable into practical terms and programmes. At a minimum and with the above points in mind, these frameworks should (adapted from Peters 2004: 32-46):

1. ***Recognize inclusive education as a right***: States should recognize inclusive education as an inherent component of the right to education. Both to give guidance to the meaning of legislation and to entrench it, states should make specific reference to any relevant treaty obligations under international human rights law.
2. ***Identify minimum standards in relation to the right to education***: States should formally identify standards of education to ensure that persons with disabilities can enjoy available, accessible, acceptable and adaptable education on an equal basis with others. These standards should cover at a minimum: physical access, communication access (sign language and Braille), social access (to peers), economic access (affordability) of schooling; early identification of special education needs and early childhood intervention; the promotion of curriculum development that is common to all learners and fosters human rights education and learning; the guarantee of mandatory pre-service and in-service training of teachers and school administrators; the provisions of individualized student support where necessary; the linking of all areas of education reform to ensure consistency throughout with the right to education and inclusive education.
3. ***Identify minimum standards in relation to the underlying determinants of the right to education***: States should both view and ensure the family, community and civil society as active participants in inclusive education and education generally. Policy and legislation should seek to ensure such participation of the community, including, of course, girls and those learners with disabilities, in decision-making. They should do so by building capacity, combating habitual and discriminatory attitudes and misconceptions, ensuring the liberty of parents to choose educational institutions for their children.
4. ***Identify duty bearers and their responsibilities***: States must identify the responsibilities of relevant actors and devolve responsibilities – central, provincial and local government, ministries of education, school administrators, teachers, and others such as community organizations, where relevant.

5. ***Provide resources***: States should guarantee adequate minimum and sustainable resource allocations, and seek international assistance where resources or knowledge are lacking.
6. ***Establish monitoring and evaluation mechanisms***: States should establish effective and transparent monitoring and evaluation procedures, including thorough provision for statistical and data collection and analysis. They should also make provision for an effective individual remedy, including judicial remedies, and ensure an active role for national human rights commissions and disability ombudsmen.

8.4. CONCLUSION

Individual and state poverty has many causes and many consequences. The lack of education is just one cause and one consequence, important to both nonetheless. This in itself is sufficient to intensify efforts to improve education. I urge all those involved in these efforts, however, to bear in mind that education is a human right; it is not a public service. The human right to education must, on the basis of equality and non-discrimination, serve as the guiding principle in all policy, legislative, and judicial initiatives at all levels, international, regional, state and individual.

9

Poverty, Invisibility and Disability – the Liberating Potential of Economic, Social and Cultural Rights

Gerard Quinn and Christian Courtis

9.1. INTRODUCTION

A revolution is taking place in the field of disability throughout the world. It is primarily a revolution of ideas. It entails a completely different way of looking at disability based on respect for human rights (Fleischer and Zames 2001). And it stands in stark contrast to the past – even the recent past – when persons with disabilities were looked upon more as 'objects' to be managed rather than as human 'subjects' with equal rights. Treating persons with disabilities as if they were 'objects' denied them their humanity and led to social exclusion and chronic poverty. The move to the rights-based framework creates new opportunities to tackle systemic poverty.

The advent of the rights revolution in the context of disability is now placing traditional policy responses to disability on the defensive. Social supports in particular are undergoing change in order to ensure that they can support a life of choice, independence and inclusion and thus break the cycle of poverty. This revolution was first reflected in comparative law from the early 1990s onwards.[663] It is now manifesting itself in international law: the first United Nations human rights treaty of the twenty-first century is the newly adopted Convention on the Rights of Persons with Disabilities (2007) – an instrument that creatively blends together both civil and political rights as well as economic, social and cultural rights in the specific context of disability.[664]

663. A good survey of comparative law is provided in Breslin and Yee (2002).

664. The text of the Convention as well as its drafting history and current status is available at: http://www.un.org/disabilities/. See generally, Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities and its Optional Protocol - From Exclusion to Equality, Realising the Rights of Persons with Disabilities, Inter Parliamentary Union and the Office of the UN High Commissioner for Human Rights; text available at http://www.un.org/disabilities/default.asp?id=212

This paper is about that revolution. In a way it celebrates the 'coming home' of disability from the margins and into the mainstream of human rights discourse.

The stakes are indeed high. Persons with disabilities have been described by the United Nations as the world's 'largest minority'.[665] It is estimated that at least 10 per cent of any given population has a disability. This makes nearly 650 million persons with a disability in the world. According to the United Nations Development Programme (UNDP), most of these people (nearly 500 million) live in developing countries. It was further estimated by the United Nations that 20 per cent of the poorest in the world are disabled.

The causes of disability are various but include social and economic deprivation, malnutrition, violence and warfare. That is, human rights violations can lead to disability. Conversely, having a disability exposes one to a high risk of further human rights violations. The impacts of disability are enormous and include chronic under-education, higher rates of physical violence and rape, multiple discrimination (especially in the case of gender), higher rates of mortality and severe unemployment. UNESCO has noted the near invisibility of children with disabilities in educational statistics. It surmised – based on the statistical work of others – that 'about 35 per cent of all out-of-school children have disabilities … and that fewer than 2 per cent of children with a disability are enrolled in school. In Africa, more than 90 per cent of all disabled children have never gone to school' (UNESCO 2006: 179). The heightened physical vulnerability of persons with disabilities is especially true of persons with intellectual disabilities who suffer great stigma in many parts of the world (see Herr, Gostin, and Honju Koh 2003). The International Labour Organization estimates that the unemployment rate of persons with disabilities is as high as 80 per cent in some countries. One commentator suggests that up to $2.23 trillion in global GDP is lost annually through the absence of persons with disabilities in the workforce.[666] That represents a lot of foregone economic activity as well as government revenue.

Poverty is a genuinely vicious cycle for most persons with disabilities.[667] And the loss is not all personal. Family members are also impacted by disability – especially mothers who stay at home to care for children with disabilities or for the elderly with disabilities. Their opportunity costs can be quite high. Thus, disability tends to have a negative ripple effect on others and especially on families and carers (see Seligman and Darlking 2007). This adds considerably to the number of persons *affected* by disability.

Importantly, the rising tide of economic development does not tend to elevate the status of persons with disabilities. Transitioning to a market economy tends to leave persons with disabilities behind. One recent World Bank study notes

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665. Some Facts about Persons with Disabilities, United Nations, 2007. Available at www.un.org. Convention/facts

666. Roseangela Berman Beiler, Inter-American Institute on Disability & Inclusive Development, comments made at World Congress on Communication for Development, Rome, October 2006.

667. Mainstreaming Disability in the Development Agenda: Note by the Secretariat, Commission for Social Development, E/CN.5/2008/1, November 2007, at para 3.

the extreme difficulty for the disabled poor (and their families) to emerge from poverty in such countries (Cem 2008). Persons with disabilities tend to fall behind in good times as well as in bad. Something more is needed besides an exclusive reliance on economic growth to raise the status of persons with disabilities.

All in all, these statistics are very bleak. They add to the urgency of the general fight against poverty, since poverty is such a potent cause of disability. And they reveal the human misery experienced by disabled people in poverty. Disability should not automatically lead to poverty. The link – though strong – is not inevitable and can be rolled back. It is the absence of appropriate policy responses to disability that lead to poverty and not the disability in itself. And the move to the human rights framework of analysis in the disability context is significant as it can help plot a path out of poverty.

9.2. THE RIGHTS REVOLUTION IN THE CONTEXT OF DISABILITY

It is important to appreciate that the notion of persons with disabilities as 'objects' has had a huge negative influence on traditional policy responses to disability. Such policy responses tended to accentuate helplessness and passivity. Segregationist practices that effectively excluded persons with disabilities from the mainstream were considered somehow 'natural'. This tended to impact on the design of social programmes, which seem to have been put in place to 'compensate' for the absence of persons with disabilities from the mainstream. All of this helped cement into place a cycle of social and economic exclusion that virtually guaranteed a life of poverty.

Migrating to different frameworks of reference in the disability field is important. It represents a true 'paradigm shift'. Such frameworks help one to 'see' reality and issues that one might not otherwise be conscious of. For example, segregated education is not an issue if persons with disabilities are simply objectified. But it becomes one if one is serious about the universal right to education for *all* children.[668] Secondly, a framework provides benchmarks according to which we can 'judge' this reality. Not only can segregated education on the ground of disability be 'seen' as an issue, it can also be put on the defensive in the absence of compelling reasons why it should take place. And lastly, such frameworks help orient us toward an agenda for change – a prescriptive policy mix that will, for example, actually deliver equal educational opportunity for all.

It seems as if the discounting of the humanity of persons took place not merely in state policies and programmes but also in the very human rights norms according to which they were to be judged. For example, the *protective role* of the state did not typically extend to robustly protect persons with disabilities living in

668. The Right to Education of Persons with Disabilities: Report of the Special Rapporteur on the Right to Education, Vernor Muñoz Villalobos, A/HRC/4/29, 19 February 2007.

vulnerable situations and especially in institutional settings. Such institutions were simply forgotten about and the plight of their inmates was not generally seen in the past as a human rights issue.[669] The nurturing role of human rights – especially the right to education – was not generally brought to bear in the context of disability. And equality guarantees under constitutional law, which could normally be relied upon to enable persons with disabilities and other to challenge discrimination, proved generally unavailing. Segregated treatment could easily be rationalized as being in the interests of persons with disabilities.

Moving to the human rights framework means treating the person as a subject with rights. It means de-problematizing the person and locating the 'problem' elsewhere, and primarily in the absence of an appropriate policy response to human difference. This shift is reflected best in modern trends toward the definition of disability. The World Health Organization (WHO) had traditionally adopted a medicalized approached in its International Classification of Impairments, Disabilities and Handicaps (ICIDH). Reacting, in part, to criticism from civil society for its excessive reliance on a medicalized approach, it switched track.[670] Its recently-adopted International Classification of Functioning (ICF) accentuates the social dimension of the definition of disability without abandoning what is useful within a medical focus.[671] WHO explains the 'social model' as follows:

> *The social model of disability*… sees disability as a socially created problem and not at all an attribute of an individual. On the social model, disability demands a political response, since the problem is created by an unaccommodating physical environment brought about by attitudes and other features of the social environment. (WHO 2002: 10)

The main point of the foregoing analysis is to underscore one powerful effect of the shift to the rights-based perspective, which is to uncloak the person behind the disability and to focus on how the person is *treated* by others and by the state. That was the essential first step in assessing the role of social and economic rights in the context of disability.

669. The pioneering work of Mental Disability Rights International (MDRI) is particularly noteworthy in this regard. MDRI investigates abuses against the inmates of residential mental facilities throughout the world and exposes wrongdoing. Its most recent report is entitled *Ruined Lives: Segregation from Society in Argentina's Psychiatric Asylums, 2007*. See http://www.mdri.org/

670. Throughout the 1990s the Council of Europe held a series of joint events with the WHO on the use and usefulness of the ICIDH. The resulting publications were highly instrumental in moving WHO to refine its classification. These publications are available at http://www.coe.int/t/e/social_cohesion/soc-sp/integration/06_publications/presentation.asp#TopOfPage

671. WHO, International Classification of Functioning: text and related documentation is available at http://www.who.int/classifications/icf/site/icftemplate.cfm

9.3. THE ROLE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF DISABILITY

9.3.1. Philosophy: Economic, Social and Cultural Rights in the Context of Disability – Enabling Independence and Alleviating Poverty

Even where social programmes existed for persons with disabilities they were generally crafted with the effect (if not the intention) of segregating people (Hales 1996; Swain, Finkelstein, French and Oliver 1994). Treating persons with disabilities as 'objects' meant managing them through social care programmes. It was as if the natural policy impulse was either one of revulsion (which led to segregation) or pity (which led to charity). The net effect was that state largesse – where it existed – was used to 'purchase the absence of the other'. Uncloaking the person behind the disability has placed an onus on reversing the legacy of exclusion and priming social and economic rights to ensure a life of independence and inclusion.

Set against the backdrop of using rights to restore power to people, economic, social and cultural rights should be used to challenge directly the traditional role of social policy of merely maintaining people. Their rights have a crucial *enabling* function – they provide a bridge whereby persons with disabilities can take their place as valued and often highly productive citizens in society. That is, such rights are not defendable (or not merely defendable) because they represent the least a state can do for the welfare of the individual. They are defendable because they actively facilitate freedom – because they enable people to take charge of their own lives. It is in this sense that economic, social and cultural rights enhance freedom and have such a crucial role to play in the context of disability. This is what the Vienna Declaration of 1993 rather inelegantly tried to express in the phrase 'the place of disabled people is everywhere.'[672]

Three socioeconomic rights look particularly promising in breaking the cycle of poverty for persons with disabilities, the right to education (without which one would have few marketable skills), the right to employment (without which one is driven to rely on largesse), the right to health care, and associated rights such as the right to rehabilitation (to enable the highest level of functioning).

The main challenge in the context of disability is to reverse the invisibility of persons with disabilities with respect to the enjoyment of social and economic rights. This means reducing instances where traditional economic and social supports have only served to perpetuate isolation and foster dependency. It means seeking instead to use such supports to underpin social inclusion and provide the material means by which individuals can make and effectuate their own life. This,

672. Vienna Declaration and Programme of Action, A/CONF/157/23 (1993), para. 64.

in turn, means tailoring economic, social and cultural rights to the situation of persons with disabilities.

9.3.2. Political Weakness of Persons with Disabilities – a Case for Heightened Judicial Scrutiny

One reason why the issue of enforceability of economic and social rights is so important in the context of disability has to do with the relative absence and invisibility of persons with disabilities in the political process. An injunction against the enforceability of social rights has a highly disadvantageous impact on persons with disabilities by essentially allowing outdated social programmes that rest on notions of passivity and dependence to continue. Non-enforceable social rights in the context of disability simply allow invisibility and paternalism to persist.

The arguments against judicial enforcement of economic, social and cultural rights are manifold and have been fully rehearsed elsewhere.[673] If deferred to, these arguments force a fall-back onto 'normal' democratic politics as the main way of vindicating economic, social and cultural rights. The traditional reluctance of courts to get embroiled in arguments over resource allocation has many wellsprings including an unwillingness to be seen to meddle in matters that are essentially 'political' rather than 'legal' and therefore best left to the 'normal' majoritarian process of democracy. But even if, *arguendo*, the 'counter-majoritarian difficulty' is taken as the initial departure point in debate over the enforceability of such rights, then there is still considerable room for some form of enforceability of social and economic rights in the specific context of disability.

Viewing democracy as an open-ended marketplace through which interest groups vie for resources[674] impacts on all vulnerable groups. But it tends to have a heightened effect on persons with disabilities who, because of their disability, encounter extremely high opportunity costs in engaging in 'normal' political agitation for change. Most persons with disabilities (and their families) are consumed by mere survival. And their plight tends to be experienced in isolation, which makes the formation of effective civil society groups difficult, especially in poorer countries. Furthermore, powerful blocking forces can potentially exercise either a veto over change, or slow the process of change, or perhaps worse yet, co-opt the language of change to rationalize the status quo ante. These forces can exert much political influence, especially in developed countries where the disability service sector is relatively large.[675] In the absence of sufficient political

673. See, generally, International Commission of Jurists (2008).
674. Of course this is not the only possible notion of democracy, but it exerts a very powerful influence. It animates much of the critique of judicial activism by Bork (2003; 2005). For other conceptions of democracy, see generally Held (1997) and Tribe (1980).
675. This is not to deny that the service sector cannot itself also be a proactive agent for change. A remarkable example is the commitment of the European level service providers to bring about change based on the United Nations Convention on the Rights of Persons with Disabilities and

clout to effectuate change, the lack of enforceability is likely to leave intact and unquestioned social programmes that isolate and segregate people with disabilities.

The 'political marketplace' tends to favour those with most voice – or whose issues connect with either the passing priorities of the day or with the permanent priority of maintaining the economic viability of the nation. But what of those whose voice is feeble? What of those whose issues do not connect with the permanent priority of economic viability or with other passing policy priorities? They lack 'purchase power' in the 'political marketplace'. They have demands but there is little supply to meet those demands.

In its 1938 decision in the famous *United States v Carolene Products* case, the United States Supreme Court announced a new theory of judicial review.[676] It foreswore reliance on ethereal and extra-textual concepts of natural law as being fundamentally undemocratic. Henceforth it pledged to rely exclusively on the text of the Constitution and its fair entailments. However, footnote 4 of the judgment pointed to the possibility of increased judicial scrutiny in cases where a 'discrete and insular minority' could not safely rely on the 'normal' political process to adequately address their interests. At that point in time the court had in mind racial minorities who were still effectively excluded from political participation by a variety of laws in the southern states.

John Hart Ely (1975) famously used footnote 4 to expound his conception of 'representation reinforcement' as a legitimate judicial goal. That is, he uses footnote 4 as the basis for developing a much broader theory of when courts can and should intervene, even in the absence of firm textual moorings, in the interest of reinforcing the political influence that an excluded or otherwise disadvantaged group might otherwise be expected to wield. Building on the logic of footnote 4, others have tried to portray different marginalized groups as similarly 'insular and discrete', thus warranting heightened judicial scrutiny.[677]

On rare occasions, the US Congress will itself deem a particular group to be a 'discrete and insular minority', especially when justifying using its power to enforce the Fourteenth Amendment guarantee of equality by enacting far-reaching civil rights statutes. The intention is to try to get the courts to defer to Congress's finding and thus allow somewhat more room for experimental legislation. Indeed, the US Congress explicitly named persons with disabilities as constituting a 'discrete and insular minority under the Americans with Disabilities Act'.

In reflecting on the substance of the footnote 4 insight in the disability context it is instructive to take on board the insights of Ackerman (1985: 713), who takes issue with footnote 4's conflation of discreteness (meaning the group can be easily and readily identified among others) and insularity (meaning that the group has a deep collective life of its own) with the lack of political influence.

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in the interests of their clients. See European Association of Service Providers for Persons with Disabilities (EASPD): available at www.easpd.eu

676. 304 US 144.

677. See, for example, Michelman (1969-1970).

He does not abandon the key insight behind footnote 4, which is that courts should be more solicitous to groups that lack effective political influence. Rather he suggests the classic formulation should be re-stated to focus on groups who are anonymous (such as the gay community) and geographically thinly spread and not in possession of a rich communal life. It is these groups who, in his view, lack effective political clout and therefore deserve increased judicial attention.

Something similar could be said in the context of disability. Disability is a classic case of an anonymous (not always easily identifiable) and diffuse (spread thinly) group. There are genuinely high opportunity costs to political participation. For example, in addition to the daily struggle for existence, persons with disabilities must constantly bear in mind that open agitation against services might well lead to a reduction or a diversion of services or other forms of retaliation. And, perhaps most significantly, left to its own devices, the political system may easily revert to type within the disability sector. That is to say, it is much easier to fall back on social programmes that perpetuate helplessness than it is to consciously craft social systems that liberate individuals. Without the prod provided by some modicum of enforceability to test the design and implementation of such programmes, they are likely to persist.

There is then a standing danger that the high principle will be subtly but effectively discounted in the context of disability and that market failure in the political marketplace will substantially disadvantage persons with disabilities. Putting the person back in the frame is crucial to correcting these historic tendencies. This is why it is imperative to give persons with disabilities legal standing to challenge the status quo, and that is nowhere more important than enabling them to challenge the way social programmes have been constructed and delivered.

Some modicum of enforcement can therefore be seen as a corrective to the 'normal' democratic process which, if left to its own devices, will tend to internalize aspects of the 'medical model' as 'normal' and therefore construct social programmes that segregate and exclude.

An interesting case in point arose in Ireland in 2001: *Sinnott v Minister for Education*.[678] At issue was the enforceability of a remedy for a young man with autism who had (due to his disability and the traditional lack of services) received no more than two years of formal education in his whole life. The remedy sought was the present and prospective provision of primary education even though he had now moved into adulthood. The right to education in the Irish Constitution (Article 42) was drafted primarily to cement into place a historic compromise whereby the state would fund education and religious orders would actually deliver it. Nevertheless, in a series of cases going back to the early 1990s, the courts had begun to extrapolate a substantive right to education from it which benefited individual children. The Supreme Court did issue a declaration holding that his

678. [2001] 2 IR 505. For analysis see Quinlivan and Keys (2002: 163).

right to education had been violated but it refused to issue an enforceable remedy largely on account of the doctrine of the 'separation of powers'.

Parenthetically, the High Court was prepared to be solicitous to him in part because of the lack of political effectiveness of persons in this category (and indeed their families). Justice Barr in the High Court stated:

> It is of course a fact of life that in times of economic difficulty the State may be obliged to rein back severely on expenditure, and many projects for which exchequer funding is sought may have to be postponed or curtailed through lack of resources at the particular time. In such circumstances, the need for Government … to exercise a balance of constitutional justice where appropriate in prioritising such claims is of particular importance…
>
> *Those entitled to State aid by constitutional right should not have to depend on numerical strength and/or political clout to achieve their just desserts.* Needs should be met as a matter of constitutional priority and savings, if necessary, should be made elsewhere [italics added].

The Supreme Court (a seven-judge panel) baulked. Chief Justice Keane held that the High Court had erred by 'usurping the exclusive roles of the Oireachtas (Parliament) and the executive in giving directions to [other organs of state] as to how monies should be expended in order to meet any special educational needs of the [plaintiff].'

The most forthcoming judgment on the issue of the (non-)enforceability of socioeconomic rights (even those specified in the Constitution) was delivered by Justice Hardiman. He stated:

> [the High Court below] has in effect taken [decisions about monies to be allocated to enforce the right to education], in lieu of any other body. Decisions of this sort are normally a matter for the legislative and executive arm of government. This is not merely a matter of demarcation or administrative convenience. It is a reflection of the constitutionally mandated division of the general powers of government set out in Article 6 of the Constitution. A system of the separation of powers of this sort is a part of the constitutional arrangements of all free societies.[679]

He referred approvingly to a 1989 decision of Costello J. in the High Court (*O'Reilly v Limerick Corporation*).[680] In that case Costello J. drew a distinction between distributive justice (non-enforceable through the courts) and commutative justice (justice as between private parties which are amenable to judicial enforcement). In adopting this distinction Justice Hardiman concluded that:

679. Hardiman J. [2001] 2 I.R. 505, at 699.
680. *O'Reilly v Limerick Corporation*, [1989] I.L.R.M., 181.

> the forgoing principles underlie the essential distinction between…issues which can be pursued … before the courts … and issues which, to comply with the Constitution, must be pursued through Leinster House [national Parliament] … I reiterate that it is an independent constitutional value, essential to the maintenance of parliamentary democracy, that the legislature and executive retain their proper independence in their respective spheres of action. In these spheres, the executive is answerable to Dail Eireann [lower House of Parliament] and the members of the legislative are answerable to the electorate.[681]

Most of the concurring judgments specifically endorsed the views of Hardiman J. on the separation of powers. Justice Geoghegan did leave one window open. He opined that 'I do think in very exceptional circumstances it might be open to a court to order allocation of funds where a constitutional right has been flouted without justification or reasonable excuse of any type'.[682] Likewise Justice Denham opined that 'I would not exclude the rare and exceptional case, where, to protect constitutional rights, the court may have a jurisdiction and even a duty to make a mandatory order'.[683] Neither judge speculated whether this was one of those exceptional cases.

To a certain extent the *Sinnott* case was a golden opportunity for the Irish Supreme Court to relax its traditional (and widely shared) suspicion of economic, social and cultural rights in order to do justice to a group lacking political potency.[684] It should have been possible to finesse the traditional conception of the 'separation of powers' to enable enforcement of the socioeconomic right to education especially in those limited instances (as in the instant case) where the plaintiff – and the class to which s/he belongs – does not enjoy effective access to the political process. It should have been possible to formulate a theory of when the enforceability of socioeconomic rights (at least in circumstances where political remedies are clearly unavailing) is possible consistent with an insistence of the 'separation of powers.' It is interesting to observe that the net outcome of the Supreme Court judgment is to deny a legal avenue for the vindication of a right (education) that is itself clearly provided for in the text of the Constitution – perhaps a case of 'negative activism'.[685] At least the lower court had shown an awareness of the political impotence of persons with disabilities and did factor this into its consideration of whether to issue a robust remedy.

681. Hardiman J., [2001] 2 I.R. 505, at 707, 708.
682. Geoghegan J., [2001] 2 I.R. 505, at 724.
683. Denham J., [2001] 2 I.R. 505, at 656.
684. For analysis see Whyte (2002).
685. See Campbell (2003).

9.3.3. The Non-Discrimination Norm as a Poverty Reduction Tool

The main challenge in the disability context is to secure the equal effective enjoyment of all human rights by persons with disabilities. That is to say, the primary window on the relevant issues from a human rights perspective has to do with accentuating the dignity and equal inherent self worth of each individual with a disability and ensuring the equal enjoyment of human rights.

It is certainly true to say that the equality approach – and especially the equal opportunities model of disability – is now in the ascendant throughout the world.[686] This has the advantage of making it easier to sell disability law reform, especially in market-driven economies. Using an equal opportunities philosophy to re-engineer the terms of access and participation in the mainstream can be characterized (and marketed) as a 'productive factor' in advanced market economies. There is a lot of force to this argument. Rational arrangements facilitate the effective functioning of markets, and ending the irrational exclusion of workers with disabilities from the workforce helps ensure efficiency. But it has to be continually emphasized that equality is also a 'civilizing factor' in any society that professes to treat all equally. This is of no small significance in the disability context, since the market logic for change has its limits and tends to apply, for example, with diminishing force as a person's economic productivity diminishes.

One component to the broader equal opportunities model is the anti-discrimination tool. The essence of the anti-discrimination tool is that it is unacceptable to treat certain individuals or groups less favourably than others in circumstances where they are similarly situated.[687] Of course, the main conceptual problem in the disability context is that persons with disabilities are often not similarly situated. Though often exaggerated through stereotypes, the difference of disability can be real (see Liachowitz 1988). However, this difference can be used – especially by courts – in two very different ways. Used negatively, it might be said that the differences are sufficient to justify rationing scarce resources, and if this leads to exclusion then the root cause of the differentiation resides in the 'natural' difference rather than in any culpable policy choice (Lawson 2005*a*: 265-282; Soifer 2003: 1285).

Used positively, it could be said that the difference of disability requires political authorities to respond affirmatively and in a way that underpins equal citizenship. Traditional non-discrimination law gives permission for 'positive action' but does not require it. Yet accommodating the difference of disability should mean more than merely abstaining from discrimination. Indeed, it is

686. The equal opportunities model is not confined to the West. See, for example, the Persons with Disabilities (Equal Opportunities, protection Of Rights and Full Participation) Act, India, 1995. The National Human Rights Commission (2005) of India has published a major reference work on disability rights.

687. An excellent general introduction is *Non-Discrimination in International Law - a Handbook for Practitioners* (Interights 2006). For a thoughtful analysis of the limits of non-discrimination law see Fredman (2002).

precisely because of these differences – and in order to respond affirmatively – that most comparative non-discrimination law in the context of disability takes one extra vital step in requiring 'reasonable accommodation' to the circumstances of the persons with a disability.[688] This is one of the defining features of American anti-discrimination law in the disability context and is indeed now a core feature of the new United Nations Convention on the Rights of Persons with Disabilities.

The non-discrimination norm – at least at the constitutional level – is a way of controlling the quality of state action. Yet, when applied to the relativities between different persons and groups in society (for example through equal opportunities legislation that reaches both private as well as public behaviour across a range of fields), it can have very substantive and redistributive effects.

The non-discrimination perspective proves important especially when trying to navigate around the reluctance of the courts to address resource issues directly. Sometimes, lawyers will frame arguments concerning social provision (or the lack thereof) in terms of non-discrimination precisely because they realize that it might be easier to persuade a court to reach a decision with resource implications through this route rather than dealing directly with the substantive social right at issue. This tactic has certainly proved availing under the Americans with Disabilities Act, as well as under the Collective Complaint system of the Revised European Social Charter.

Two decisions of the European Committee on Social Rights – one concerning a rich country (France) and the other concerning a mid-income country (Bulgaria) – demonstrate the potency of the non-discrimination tool in the context of disability and poverty.

The first was decided by the Committee in 2003: *International Association Autism Europe v France*.[689] The essence of the complaint was that France had not satisfactorily implemented Articles 15 ('the right of persons with disabilities to independence, social integration and participation in the life of the community') and 17 ('the right of young persons to social, legal and economic protection', which includes a specific right to education) and of Article E (general prohibition against discrimination') of the Revised European Social Charter due to the low rates of integration into the general education system of children and adults with autism.

Although the principle of 'progressive achievement' is not explicit in the Charter, the Committee does pay due deference to the progress actually made by states parties. So the net question presented was whether the respondent state

688. Some would situate the concept of 'reasonable accommodation' more towards the 'positive action' end of the non-discrimination continuum. Since most legislation is merely permissive toward 'positive action' (within limits) some would also argue that it has no place in traditional non-discrimination legislation. For an excellent treatment of the debate see Jolls (2001, 2000-01). See also Verkerke (2003: 1385). For an account of how the case law of the European Court of Human Rights (more or less) supports the concept of 'reasonable accommodation' see De Schuter (2004: 21-34).

689. Collective Complaint 13 (2004). http://www.coe.int/t/e/human_rights/esc/4_collective_complaints/list_of_collective_complaints/CC13Merits_en.pdf

had made sufficient progress to 'progressively achieve' its relevant obligations. The complainant argued that:

> on average 300 places have been created annually since 1995, which represents an annual increasing rate of 0.7 per cent in comparison with the official needs. At this pace, it will take one hundred years to absorb the deficit of places and this without taking account of the natural increase of the autistic population, which, on the basis of the official figures, it estimates will grow by 160 persons by year.[690]

In reply the government acknowledged that the catch-up plan of 1995-2000 had fallen short of real needs, but nevertheless insisted that their current efforts were adequate to comply with the requirements of the Charter.

The starting point for the Committee was an expansive view of the purpose of the relevant social rights in the disability context:

> The underlying vision of Article 15 is one of equal citizenship for persons with disabilities and, fittingly, the primary rights are those of 'independence, social integration and participation in the life of the community'.[691]

The inclusion of 'education' in the expanded Article 15.1 of the Revised Charter was specifically commented on by the Committee. It stated:

> Securing a right to education for children and others with disabilities plays an obviously important role in advancing these citizenship rights. This explains why education is now specifically mentioned in the revised Article 15 and why such an emphasis is placed on achieving that education 'in the framework of general schemes wherever possible'.[692]

So the Committee linked education to the broader agenda of securing independence and participation. With respect to Article 17 the Committee noted that the right to education is predicated on the need to ensure that children and young persons grow up in an environment that encourages the 'full development of their personality and of their physical and mental capacities'. It went on to say:

> This approach is just as important for children with disabilities as it is for others and arguably more so in circumstances where the effects of ineffective or untimely intervention are [n]ever likely to be undone.[693]

690. Collective Complaint 13 (2004), at para 22.
691. Collective Complaint 13 (2004), at para 48.
692. Collective Complaint 13 (2004), at para 48.
693. Collective Complaint 13 (2004), at para 49.

With respect to Article E ('non-discrimination') the Committee referred explicitly to the case law of the European Court of Human Rights to the effect that the non-discrimination ideal is also violated by failing to take positive steps to take due account of differences where they occur.[694] The Committee stated:

> Human difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.[695]

The Committee took a cue from the court but also developed a more expansive view of non-discrimination even before the landmark 2007 decision of the court in *DH v Czech Republic*, which broadens and deepens the court's understanding of non-discrimination (see below).[696]

By what yardstick did the Committee measure whether sufficient 'progress' had been made? In Collective Complaint No. 1 (1998) the Committee had already emphasized that the implementation 'of the Charter requires the States Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter.'[697] It took the opportunity to reiterate this point and added:

> When 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.[698]

In other words, if the relevant obligations were primarily obligations of conduct, then what was required were tangible steps in the direction of achieving results. Reckonable also was the variable impact of any given rate of progress on others. The Committee emphasized that:

> States Parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities as well as for other persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.[699]

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694. Collective Complaint 13 (2004), at para 52.
695. Collective Complaint 13 (2004), at para 52.
696. *D. H and Others v the Czech Republic* (Application no. 57325/00), Grand Chamber Judgement, 13 November 2007.
697. *International Commission of Jurists v Portugal*, Complaint no 1 (1998), Decision on the Merits, at para. 32.
698. Decision on the Merits of Collective Complaint 13 at para. 53.
699. Decision on the Merits of Collective Complaint 13 at para. 54.

This was relevant in the instant complaint since the majority of autistic children who could not be placed in school were left for their families to cope with (and ended up needlessly in mental institutions). The Committee then concluded:

> In the light of the afore-mentioned [considerations]…the Committee notes that in the case of autistic children and adults … France has failed to achieve sufficient progress in advancing the provision of education for persons with autism …. [The Committee] …considers that, as the authorities themselves acknowledge, and whether a broad or narrow definition of autism is adopted, that the proportion of children with autism being educated in … general or specialist schools is much lower than in the case of [other] children, whether or not disabled. It is also established that there is a chronic shortage of care and support facilities for autistic adults.[700]

The decision is instructive for several reasons.

Firstly it shows how the philosophy of independence and choice was used to bring Articles 15 and 17 to life. In other words, the relevant social rights were not simply important in themselves. Their true value was to be found in the fact that they served a higher instrumental purpose of securing citizenship, social inclusion and belonging to the mainstream. And it was in this light that they were expansively interpreted.

Secondly, it shows how the interaction of the non-discrimination idea with the substantive rights can bring about fruitful insights and results, especially for groups with little political impact.

Thirdly – and most importantly – it shows how progress can be measured dispassionately and objectively in order to determine whether sufficient 'progressive achievement' has been made. One element among others in this determination is the ripple effect felt by others. In this instance parents and family life was quite severely disrupted through inadequacies in the services.

In reaction, the Committee of Ministers of the Council of Europe adopted a resolution looking forward to a progress report from France in its next periodic report under the Charter.[701]

A similar decision has been made by the Committee with respect to a much poorer European country – Bulgaria: *Mental Disability Advocacy Centre v Bulgaria*.[702] The focus of the complaint was the alleged lack of any education for children with mild to severe intellectual disabilities living in homes for mentally disabled children. The issues raised concerned Articles 17 and E. Citing the decision of the Committee in *Autism Europe* the complainant submitted that:

700. Decision on the Merits of Collective Complaint 13 at para. 54.
701. Committee of Ministers, Resolution ResChS(2004)1, 10 March 2004.
702. Complaint no 41/2007.

> The Respondent Government cannot invoke the lack of resources or progressive realization of rights as a defence for discriminating against children with disabilities in their access to education.

The Bulgarian Government did not opt in to Article 15. This is a peculiarity of the Charter since – beyond a certain core of rights and obligations – states parties can choose from a list of others by which it will be bound (see Harris and Darcy, 2001). The government's memorial on the merits charts all of the positive steps taken in the specific field of education and disability. It stated that the government is 'developing practical measures with relevant timetables for implementation and financing and an appropriate legal framework.' The response of the applicant on the merits joins issue with the government, especially over the definition of discrimination as applied to disability, as well as on the facts of the case. In essence, the parties join issue over whether there has been sufficient 'progressive achievement' in securing the right to education for children with intellectual disabilities in Bulgaria.

The Decision of the Committee was issued in June 2008. It informed its analysis of Article 17 by reference to General Comment 13 on the right to education issued by the United Nations Committee on Economic, Social and Cultural Rights.[703] The latter requires education systems to possess the qualities of availability, accessibility, acceptability and adaptability. The Committee came to the conclusion that the education available to the children within the relevant institutions was neither accessible (since mainstream education was unavailable) nor adaptable (in the sense of not being adapted to the needs of the children). With respect to the rate of progress, the Committee reiterated the jurisprudence established in the *Autism* case to the effect that there (1) should be some measurable progress (2) within a reasonable time frame and (3) consistent with the maximum use of available resources. Since only 6.2 per cent of the children in the homes had any form of education, the Committee found insufficient progress had in fact been made. A violation of Article 17 was thus found.

With respect to Article E the Committee found that the disparities between the rates of education of the children in the homes as compared to others were so great as to warrant a finding of discrimination (Article E in conjunction with Article 17). Reversing the burden of proof, the Committee found that the government had not satisfactorily explained the disparity.

What is remarkable is how the Collective Complaint mechanism is being successfully used to challenge the 'progressivity' of change. Bulgaria could not simply plead poverty. It had to show concrete steps and measurable progress. The Charter experience is uplifting because it shows that this process of adjudication can work.

Of course, while invoking non-discrimination with respect to social rights might be useful in challenging the justification/s (or otherwise) of relativities

703. E/C.12/1999/10 of 8 December, 1999.

between individuals or groups with respect to social rights, it does not itself go directly to the actual substance of those rights (see Fredman 2005: 199-218; Waddington and Diller 2002: 241-282). The Council of Europe Committee has shown how it can breathe life into these substantive rights as well as animate them from the perspective of non-discrimination. This should provide a model of sorts of how the new United Nations Committee on the Rights of Persons with Disabilities should approach the relevant social rights contained in the Convention.

As mentioned previously, the European Court of Human Rights has recently begun to breathe fresh life into Article 14 of the European Convention on Human Rights (the relevant non-discrimination provision). And it has done so in the context of one of the most impoverished and excluded groups in Europe – the Roma. These developments have huge potential significance for persons with disabilities. The landmark 2007 judgment of the Grand Chamber of the European Court of Human Rights in *D.H. and Others v Czech Republic* case arose out of the disproportionately high rates of Roma children who were assigned places in segregated schools for children with intellectual disabilities in the Czech Republic.[704] It was alleged that this practice discriminated indirectly against Roma children who had normal, or even above normal, levels of intelligence.

A lower Chamber of the court had previously ruled in 2006 that, despite clear statistical evidence to the contrary, it could not find that there was indirect discrimination against Roma children. It effectively ignored a multitude of sources (some from within the Council of Europe itself) attesting to such discrimination. Indeed, in a little-noticed section in its judgment, it went on to say that the question of whether segregated education should exist for children with intellectual disabilities was solely a matter of 'expediency' and did not disclose issues of high principle or rights.[705] This remark was all the more remarkable as the point was not put in issue by the parties.

Significantly, until the *D.H.* decision, the court had no clear view on whether the European Convention on Human Rights protected against indirect discrimination. This usually arises when a law or practice has the effect of disproportionately disadvantaging a particular person or group. Furthermore, it equivocated on whether statistical evidence could be used to at least lay a prima facie case of indirect discrimination. And it had no clear case law on whether or how the burden of proof might shift to the would-be discriminator once a well founded prima facie case of discrimination had been established. The net effect of the old case law was that EU discrimination law was – and was increasingly seen to be – far ahead of the European Convention on Human Rights. This deficiency in the case law was a standing embarrassment to the Council of Europe, which still considers itself to be Europe's pre-eminent human rights organization.

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704. *D.H. and Others v Czech Republic*, application No 57325/00, judgment of the European Court of Human Rights (Grand Chamber), 13 November, 2007. The judgment of the lower Chamber was delivered on 7 February 2006.
705. *D.H. and Others v Czech Republic*, judgment of the Lower Chamber, 7 February 2006 at para. 47.

To say that the Grand Chamber decision revitalizes the notion of discrimination under the European Convention on Human Rights would be an understatement. The court did not accept the argument by the respondent government that the parents themselves (by signing inadequate consent forms) were responsible for the poor education of their own children. For the first time, the court clearly accepted the legitimacy of the notion of 'indirect discrimination'. Henceforth, there is no need to prove a 'discriminatory intent' on behalf of the respondent state to establish a 'disparate impact'. Furthermore, the court now requires the burden of proof to be reversed once a well grounded prima facie case of 'indirect discrimination' has been laid. It is then incumbent on the respondent state to show that the difference in the impact of the legislation was the result of objective factors unrelated to ethnic origin. The key here is whether the legislation pursues a 'legitimate aim' and whether the means used are 'proportionate'.

In this case the government sought to explain the difference in treatment between Roma and non-Roma children 'by the need to adapt the education system to the capacity of children with special needs'. [706] The judgment of the court was to the effect that the relevant psychological tests that determined placement in such schools were unreliable. Therefore, no 'objective' justification could be found for the difference in treatment.

Although the decision of the Grand Chamber is a great victory for Roma children and although it considerably expands the notion of discrimination under the European Convention, it does not decisively address the throw-away remark by the lower Chamber that suggests that the question of whether there should be (and the degree to which there should be) segregated education on the ground of disability is solely a matter of 'expediency' and not of principle.

If attention were given to current trends within the Council of Europe's member states, then this would have pointed the court in the direction of rejecting segregated education as the main option for children with disabilities. However, no reference was made in the judgment to the Council of Europe's own 2006 Action Plan on disability, which talks of the need to ensure mainstream education for children with disabilities.[707] No reference is made to the extensive case law of the European Committee on Social Rights on the need for integrated education for children with disabilities. And no mention is made of the relevant provisions in the United Nations Convention on the Rights of Persons with Disabilities (which similarly calls for inclusive education) and which many, if not most, of the Council of Europe States have signed. Perhaps this is not surprising given that the arguments of the parties focused mainly on the mis-placement of Roma children and not the underlying question of the legitimacy of segregated education.

706. *D.H. and Others v Czech Republic*, judgment of the Grand Chamber, 13 November, 2007, para. 197.

707. Council of Europe Action Plan to promote rights and full participation of people with disabilities in society: improvising the quality of life of people with disabilities in Europe 2006-1015: Recommendation Rec(2006)5.

However, at one point the court does come tantalizingly close to a view on segregated education by stating that it shares the disquiet expressed by other Council of Europe institutions concerning 'the more basic curriculum followed in these schools and, in particular, the segregation the system causes'.[708] This would seem to hint strongly against any philosophy of 'separate but equal' in the context of segregated schooling for children with disabilities. On the other hand, the court went on to conclude

> the [policy or legislative] choice between a single school [system] for everyone, highly specialised structures and unified structures with specialised sections is not an easy one. It entails a difficult balancing exercise between the competing interests. As to the setting and planning of the curriculum, this mainly involves questions of expediency on which it is not for the Court to rule.[709]

It is at least plausible to surmise that the Grand Chamber might well be inclined against segregated education on the grounds of disability but nevertheless leaves some room for argument that the separate provision is in fact objectively necessary, truly meets the educational needs of children with disabilities and is primed toward inclusion. This default would at least put unnecessary segregation on the defensive.

In sum, the European Court of Human Rights has rehabilitated itself as a source of clear, balanced and inspired thinking on the concept of discrimination. It has elevated its conceptual thinking on discrimination from the nineteenth century to the twenty-first century. It has a chance to become a normative partner with the European Court of Justice on discrimination issues, and it has done so in the context of one the most economically and socially excluded minority groups in Europe. And it has done so in a field – education – that is key to ending cycles of poverty and exclusion. It has not yet reached the obvious and underlying issue that is the very acceptability of segregated education on the grounds of disability. The tone and content of the judgment in *D.H.* provide grounds for optimism.

9.3.4. Judicial Enforcement Challenging Systemic Deficiencies in the Disability Field

There are added reasons why the enforceability of social rights is so important for persons with disabilities. Actually these reasons have to do with the needs of

708. Council of Europe Action Plan to promote rights and full participation of people with disabilities in society: improvising the quality of life of people with disabilities in Europe 2006-1015: Recommendation Rec(2006)5, at para 198.

709. Council of Europe Action Plan to promote rights and full participation of people with disabilities in society: improvising the quality of life of people with disabilities in Europe 2006-1015: Recommendation Rec(2006)5, at para 205.

social systems themselves in addition to the rights of persons with disabilities. The polemic that the judicial enforceability of economic and social rights *undermines* social systems needs to be demystified, especially in the disability context. Designed properly, enforceability should help systems identify and deal with wanton waste and systemic deficiencies.

Discounting disability has meant that there was no floor to social provision. The safety net grew big holes. Of course, each substantive social right possesses an irreducible 'core'. General Comment 3 of the Committee on Economic, Social and Cultural Rights is quite clear that there is a floor or 'core minimum obligation' to each of the rights protected under the UN Covenant. This core proves particularly important in the context of disability, since one effect of treating persons with disabilities as 'objects' is that a lower floor of social provision is often 'tolerated'.

Such a floor of provision is vitally important for many persons with disabilities since their very dignity depends on it. An illustrative example is provided in *R v East Sussex CC (ex parte A and B)*[710] – a case decided by the English courts in 2003 under the Human Rights Act (1998). At issue was an instruction to employees of a public health service against heavy lifting. It was issued ostensibly on health and safety grounds and against the backdrop of inadequate provision of mechanical hoists due to budgetary reasons. The result was that the plaintiffs in question – disabled sisters – could not engage in normal day-to-day activities important to them. This was held by Munby J. to violate their dignity and autonomy rights under Article 8 of the European Convention. The decision reached the resources issue indirectly in the sense that it was the lack of mechanical hoists combined with the ban that operated to confine the two sisters to their home.

This case – and others like it – is important because a floor of provision is vital to persons with disabilities. Without it the sisters became quite trapped even in their own homes (for analysis see Lawson 2005*b*). One can imagine similar situations in countless tower blocks around the world. The case shows, in a way, the deep connectedness between values such as dignity and autonomy (values that are obviously visible in the context of civil and political rights) and the provision of at least a certain minimal level of social services.

Secondly, there is a pressing need for the modernization of social programmes to generate more cost-effectiveness.[711] Put simply, they do not work as well as they should. In other words, the gaps between actual needs and idealized needs is simply too large – especially where distorted by stereotypes about disability. The proxies for individual needs tend to stray farther and farther from reality unless a reality check is built in from the start. Properly understood, therefore, enforceability is an aid to the ongoing process of reducing the gap and therefore helps to advance the modernization of social systems in the disability context. This focus on cost-effectiveness overlaps to a large degree with the associated task of ensuring that social supports are designed to enhance autonomy. That is to say,

710. High Court (Admin) CO/4843/2001, 18 February 2003.
711. See in this regard, for example, the pioneering work of Noonan, Sabel and Simon (2008), available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088020

while the quest for efficiencies and cost-effectiveness should ideally support some form of enforceability, it also has its own limits.

It follows that courts have a useful role to play in evaluating how money is actually spent and whether it could be more usefully deployed. A classic example might arise where the relevant programme operates to segregate people. That is to say, courts have a legitimate stake in ensuring that largesse is not misapplied to warehouse people and effectively treat them as 'objects'. An instructive case is the 1999 US Supreme Court decision in *Olmstead v L.C.*[712] At issue were inmates of a mental institution who were in fact quite capable of living in a community setting but who were kept in an institutional setting for convenience and for budgetary reasons. The US Supreme Court characterized their placement in the institution as 'discrimination' for the purposes of Title II of the Americans with Disabilities Act (which prohibits discrimination with respect to public services) and mandated their placement in a 'least restrictive environment', which effectively means community placement.

True, the court in *Olmstead* hedged the remedy somewhat by insisting that this should be done without inflicting undue damage to the fiscal integrity of state programmes. Nevertheless, the result was that Congress voted funds to assist states in moving such inmates to a community setting.[713] The decision was therefore a cue for the better use of existing resources and the raising of extra resources to close down expensive institutions. It shows that judicial remedies can be fashioned in such a way as to be respectful of fiscal programmes and yet get results for the people those programmes ostensibly serve. The case also illustrates the use (and limits) of the non-discrimination idea as a tool leveraging substantive provision for persons with disabilities.

Indeed, if there is a genuine concern for the individuals' tail wagging the dog of public resources, then there could be little objection to class actions or collective complaints that reveal widespread patterns of neglect or violations. Here, one would have thought, social systems should actively encourage such action to challenge the rationality or the very basis upon which such programmes are constructed. That is to say, the force of the arguments against enforceability diminishes if ways can be found of entertaining suits that point to systemic deficiencies that undermine the capacity of systems to deliver. That can only be in the systems' own best interests. This is not to say that individual suits are inherently impermissible. In point of fact, most individual suits that raise important points of general principle are generally dealt with by the courts as if they were representative. And even if they are not dealt with as representative, they generally serve a useful function in allowing for the ventilation of the raw edge of human experience which is a traditional concern of courts. The main point though is that suits can have the added value of enabling

712. 527 US 581 (1999). For analysis see Hogue (1999).

713. 72 Executive Order 13217 was issued by the US President to ensure swift implementation of the *Olmstead* decision. See New Freedom Initiative: A Progress Report, 2002, available at http://www.whitehouse.gov/infocus/newfreedom/nfiprogress.pdf

systemic deficiencies – which are in fact emblematic of the disability field – to be identified and rectified.

Furthermore, there can be little obstacle to courts intervening to 'enforce' targets set by the executive for itself. Here, enforceability means holding the executive to account to its own professed goals, and not to any glittering generalities imagined by the courts.

Finally, the characteristic modus operandi of courts – namely formal logic and rationality – is useful, to say the least, in a context (disability) that often seems to lack logic. Perhaps the primary effect of rendering social provision subjective is to put it on notice that the strictures of formal rationality apply. One would like to think that the possibility of testing systems according to rationality would suit the interests of modernizers within social delivery systems. The very likelihood that an entity is open to scrutiny will tend to have an effect on its operations. Often, no litigation is needed – only the possibility of litigation – in order to inject better fidelity to rationality and equity.

In sum, while the question of enforceability matters for all vulnerable groups, it takes on particular relevance in the context of disability. It is extremely difficult to dislodge the underlying – if often deeply implicit – predicates of helplessness and dependency that characterize the field of social provision and disability. It is often not credible to simply assume – absent the prod of judicial enforcement – that the democratic process can satisfactorily address the issues since the opportunity costs for political engagement can be extremely high when trying to live on the margin of survival. Remedies can be found that enable systemic deficiencies in particular to be identified, labeled and remedied. Even if the remedy must ultimately take a political shape, the fact that a court is there to prod the political process into action means that enforcement in this context both enables systemic problems to be dealt with and enriches – not undermines – the normal political process.

9.4. THE POTENTIAL OF INTERNATIONAL LAW AS AN AGENT OF CHANGE IN THE DISABILITY CONTEXT

9.4.1. The United Nations Convention on the Rights of Persons with Disabilities (2007) – a Catalyst for Change

To give a sense of the relatively recent invisibility of persons with disabilities under international law it bears emphasizing that, apart from the Convention on the Rights of the Child, the other United Nations Human Rights Conventions did not explicitly reference persons with disabilities. These instruments simply reflected the times they were drafted in.[714] Nor did disability figure prominently in

714. Indeed the prohibition against discrimination contained in the 1960 UNESCO Convention against Discrimination in Education (Article 1) did not explicitly include children with disabilities within its embrace.

the jurisprudence of the United Nations treaty monitoring bodies. This much was revealed in great detail in a 2002 study commissioned by the Office of the United Nations High Commissioner for Human Rights (Quinn and Degener 2002).

And to date, there are only two General Comments issued by the treaty monitoring bodies on human rights and disabilities: General Comment 5 of Committee on Economic, Social and Cultural Rights on Persons with Disabilities, 1994,[715] and General Comment 9 of the Committee on the Rights of the Child 2006, on the Rights of Children with Disabilities.[716]

General Comment 5 CESCR on disability is rightly famous and pioneering. It was adopted in response to a specific request put forward in a major report by Despouy (1993). It acknowledges the need to go beyond (traditional) anti-discrimination law to include positive action measures.

The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose and that a wide range of specially tailored measures will be required.[717]

Dealing with the obligation to eliminate discrimination in the specific context of disability, General Comment 5 interestingly states:

Despite some progress in terms of legislation over the past decade, the legal situation of persons with disabilities remains precarious. In order to remedy past and present discrimination, and to deter future discrimination, comprehensive anti-discrimination legislation in relation to disability would seem to be indispensable in virtually all States parties.

> Such legislation should not only provide persons with disabilities with judicial remedies as far as possible and appropriate, but also provide for social-policy programmes which enable persons with disabilities to live an integrated, self-determined and independent life.[718]

This seems to contemplate legislation that provides for enforceable remedies not merely with respect to non-discrimination but also with respect to such positive action measures. It is certainly significant to observe that the Committee, in its 2002 Concluding Observations on Ireland, specifically criticized a Bill that removed 'the rights of people with disabilities to seek judicial redress if any of the Bill's provisions are not carried out'.[719] This bill purported to provide a legal basis

715. E/1995/22; available at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/4b0c449a9ab4ff72c12563ed0054f17d?Opendocument
716. CRC/C/GC9; available at http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.GC.9.doc
717. General Comment 5, para. 9. See also in this volume Chapters 1 and 8.
718. General Comment 5, para. 16.
719. Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland (2002), E/C/12/1.Add.77.

for a variety of positive action measures for persons with disabilities, but in a way that excluded enforceable remedies.

By 2001 Mexico succeeded in getting the UN General Assembly to set up an Ad Hoc Committee to 'consider proposals for' a new thematic treaty on disability.[720] This Ad Hoc Committee met eight times and once as an expert Working Group to draft the Convention. Unusually, it allowed civil society groups to be present and to speak (although not to vote) throughout the proceedings. National Human Rights Institutions were also given a right of audience in the Ad Hoc Committee and in the Working Group.

The Convention on the Rights of Persons with Disabilities (CRPD) was adopted in December 2006 and formally opened for signature and ratification on 30 March 2007. Twenty ratifications are needed for it to enter into force. At the time of writing there are 41 ratifications. The Convention is accompanied by an Optional Protocol enabling the new treaty monitoring body (Committee on the Rights of Persons with Disabilities) to entertain individual or group complaints. At the time of writing the Optional Protocol has been ratified by twenty-five states.

The main purpose of the Convention is now succinctly stated in Article 1 to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities and to promote respect for their inherent dignity'.

Article 4 sets out general obligations of states parties to include the adoption of fresh legislation, the repeal of inconsistent legislation, mainstreaming disability into all policies and programmes and the elimination of discrimination, etc.

More particularly, paragraph 2 of Article 4 sets out the general obligations of states parties with respect to economic, social and cultural rights contained in the Convention. It states, echoing Article 2.1 of the International Covenant on Economic, Social and Cultural Rights:

> With regard to social, economic and cultural rights, each State Party undertakes to take such measures to the maximum of their available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law.

The intention was to demarcate between 'obligations of result' or immediate effect (like non-discrimination) and 'obligations of conduct', which were to be achieved progressively. However, the language adopted in Article 2(4) may well cause some interpretive problems in the future, since many of the rights contained in the Convention contain both 'obligations of immediate result' as well as 'obligations of conduct' and it is sometimes difficult to disentangle the two.

720. UN General Assembly Resolution A/RES/156/568, December 2001.

Several tensions arose during the drafting, which are relevant to the issue of the enforceability of obligations that will require resources. One such tension arose during the proceedings of the Working Group in January 2004. Recall that the non-discrimination norm is styled an 'obligation of result' under international law. Recall also that most comparative disability discrimination law takes one further step in requiring 'reasonable accommodation' to the situation of persons with a disability. To a certain (limited) extent this enables the non-discrimination tool to take on some modicum of positive action. It is of course distinguishable from positive action measures as such. But it nevertheless sweeps in some action going beyond merely abstaining from unjust disparate treatment.

It was this tentative bridge to some positive measures that impelled the EU Presidency during the Working Group to argue for a separation of the notion of 'reasonable accommodation' from the concept of discrimination.[721] In other words the view was apparently taken that if the notion of 'reasonable accommodation' were tied to the notion of non-discrimination then it could become a Trojan horse for the enforceability of more and more slices of social and economic rights. Therefore, it was pressed that while failure to achieve 'reasonable accommodation' was regrettable it did not trigger a finding of discrimination. This of course was unsustainable since most comparative law forges a direct link between 'reasonable accommodation' and non-discrimination. Yet it demonstrated a deep misgiving about the judicial or administrative enforceability of the more programmatic elements of the Convention. The move did not succeed. Discrimination is now defined as including a 'denial of reasonable accommodation' (Article 2).

The question of the definition of disability was also contentious and again – at least partly – for the reason of deflecting hard economic and social obligations. Consistent with its own domestic law, Canada and others argued that there should be no definition. After all, there is no definition of a woman, or a racial minority, in the relevant UN thematic human rights treaties. However, several developing countries argued strongly in favour of including a definition, in part to limit the extent of their obligations with respect to resource-intensive rights. The definition finally adopted is nevertheless quite open-ended and makes an effort to encapsulate a 'social' definition of disability.[722]

Of especial interest is the philosophy behind the relevant social rights in the Convention – a philosophy of inclusion and independence. For example, Article 24 on the right to education stresses the importance of education as something that enables persons with disabilities to participate effectively in society. It underscores the need for inclusion in the mainstream as well as 'reasonable accommodation' to learning needs. It finesses the issue of special education and allows such whenever

721. See the Report of the Working Group on draft Article 7 (non-discrimination); available at http://www.un.org/esa/socdev/enable/rights/ahcwgreporta7.htm

722. The definition of disability now reads 'Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

needed according to the nature of the disability (e.g., deaf-blind) provided that it is delivered in environments that maximize academic and social development. Similarly Article 27 on the right to work stresses the right to obtain work in an environment that is open, inclusive and accessible.

The Convention requires that a domestic focal point be in existence within governments to implement its requirements (Article 33.1) and it also requires the existence of a national monitoring body to keep compliance under review (Article 33.2). Significantly, it requires both states parties and national monitoring mechanisms to consult actively with persons with disabilities.

A new Committee on the Rights of Persons with Disabilities will be established to assess periodic state reports as well as entertain complaints, provided the relevant optional protocol has been ratified. It remains to be seen whether the new Committee can follow the model of the European Social Charter and make the social rights come alive, especially in the context of the relevant non-discrimination norm.

9.4.2. Integrating of Disability into the Development Agenda – Still Invisible

One other area where resource scarcity arose in the drafting of the CRPD was in the context of development aid. Plainly many countries will require assistance in meeting their obligations. Developed countries understood the argument but feared the insertion of language into the Convention that might lend recognition to a legal right to development. The net effect of Article 32 (International Cooperation) is that states parties have a duty to proof their development aid programmes from the perspective of the rights contained in the Convention. This does not necessarily mean that they will have to spend more or even have an earmarked part of their development budget for disability. But at a minimum it means that aid programmes should not compound the isolation of persons with disabilities (e.g., by building inaccessible schools) and should ideally create pathways to inclusion.

9.5. CONCLUSIONS

In conclusion, the invisibility of persons with disabilities is being steadily lifted.

Economic, social and cultural rights, which are important to all – are central to the very survival of persons with disabilities. Furthermore, they are a vital bridge to the mainstream without which persons with disabilities are liable to languish in isolation and even in segregated settings. The relative lack of political power of persons with disabilities and the gap that tends to exist between their real needs and their supposed needs makes the question of enforceability all the more important.

This paper put forward several instances where the enforceability of such rights would make a real difference in the context of disability; namely, where the level of provision falls beneath a floor protecting human dignity, where the mode of delivery accentuates segregation and isolation, where the level of provision bears no rational relationship to the numbers concerned and the political impact they could expect to have in normal circumstances, and where the remedies to be enforced rely on plans actually formulated by the executive. And this paper asserted that enforceable remedies can be and often are useful to social engineers in reducing the gap between *assessed need* and real need – a gap that plagues the disability field because of the continuance of stereotypes. Given the general lack of political responsiveness to persons with disabilities and the tendency of systems to revert to policies based on paternalism, the absence of some enforcement mechanism means that change will not happen as fast as it should.

The new UN Disability Convention melds together both civil and political rights as well as economic, social and cultural rights. It could not have been otherwise since it is obvious that material support will be needed to underpin personal freedom of persons with disabilities. It promises to provide not just a moral compass for change but also hard legal yardsticks by which to measure progress. It is too early yet to say how 'progressive realization' will be interpreted. Much will depend on the new Committee on the Rights of Persons with Disabilities. The setting up of a Conference of States Parties will at least provide an opportunity for states to share good practice. The Committee will also be in a position to assess the inclusion of disability into development programmes.

10

Rising to the Challenge of Child Poverty: The Role of the Courts

Aoife Nolan[723]

10.1. INTRODUCTION

The title of this collection speaks of fulfilling law's duty to the poor. In exploring that duty in the context of efforts to address child poverty,[724] I focus on two particular understandings of 'the law'. The first concerns the 'law' in the sense of rules or principles set out in legal instruments. The second centres on the 'law' as an agency or authority responsible for the enforcement of legal rules and principles. Both of these understandings are brought together in this chapter's central thesis: that the courts can and should play a key role in addressing child poverty through ensuring the enforcement of children's constitutional economic and social rights.[725]

Children are disproportionately represented amongst the poor (UNICEF 2000: 41), whether such poverty is defined in absolute or relative terms.[726] Furthermore, the increase in inequality between the rich and the poor in many countries over the past two decades has been accompanied by a rise in levels of child poverty.[727] It is well established that living in poverty does not simply impact on the child's experience during childhood but frequently serves to curtail the

723. The author would like to thank Mira Dutschke and Prof. Michael Rebell for assistance with regard to earlier drafts of this chapter. Thanks are also owed to Úna Breatnach for invaluable editorial assistance.

724. By 'poverty', I do not simply mean lack of income (as it has traditionally been defined). Rather, I regard poverty as a multidimensional phenomenon that 'encompasses deprivations in areas of health education, participation and security' (Jahan 2002, http://www.undp.org/poverty/docs/employment/HRPR.doc).

725. See also Nolan (forthcoming).

726. For instance, with regard to relative poverty, the European Commission (2006: para. 5) has highlighted that children in the EU face a higher risk of relative poverty than the population as a whole (20% for children aged 0-15 and 21% for those aged 16-24, compared to 16% for adults).

727. See with regard to income poverty in the context of developed countries, OECD (2008).

opportunities (life chances) available to her as an adult.[728] In addition to the moral case for eradicating child poverty, which is based on the immense human cost of allowing children to grow up suffering physical and psychological deprivations and unable to participate fully in society, society has a strong interest in eradicating child poverty (Hirsh 2008: 1). This is due to the societal costs (financial or otherwise) that result from it (Hirsh 2008: 1). Global concern with child poverty is reflected in the way in which efforts to address child disadvantage play a central role in relation to general anti-poverty strategies and efforts to advance human development. This is demonstrated by the fact that one Millennium Development Goal (MDG) is explicitly child-specific,[729] and that every single MDG is connected to the well-being of children (UNICEF 2006: 5).[730]

This chapter does not argue that the adjudication of children's socioeconomic rights can, in and of itself, provide a comprehensive solution to child poverty.[731] Like the realization of socioeconomic rights, the eradication of child poverty cannot be fully achieved without the committed participation of all branches of government – particularly those that have primary responsibility for law and policymaking and budgetary allocation.[732] Leaving aside the issues that would arise in terms of the separation of powers or the counter-majoritarian objection if the court were to assume *primary* responsibility for devising a response to child poverty, the generally reactive role of the courts and their well-rehearsed (if frequently exaggerated) institutional limitations leave them poorly positioned to take on (or be assigned) the leading role in addressing child poverty.[733]

Children's socioeconomic rights have been described as a concrete set of responses to specific facets of child poverty (Van Bueren 1999*a*: 681). However, any suggestion that child poverty can be remedied by judicial activity alone would be premised on an overly simplistic understanding of the causes of poverty as well as on an (almost certainly) exaggerated view of the ability of socioeconomic rights

728. According to the Innocenti Centre, evidence from many countries persistently demonstrates that children who grow up in poverty are more likely to be in poor health, to have learning and behavioural difficulties, to underachieve at school, to become pregnant at too early an age, to have lower skills and aspirations, to be underpaid, unemployed, and welfare dependent (Innocenti Research Centre 2007: 5).

729. See Millennium Development Goal 4 (reducing child mortality).

730. That is not to say, however, that the realization of the MDGs, based as they are on national averages, will serve to address the poverty experienced by all children. See UNICEF (2006: 3).

731. For a similar argument in relation to constitutional litigation, see Van Bueren (1999*a*: 53).

732. Socioeconomic rights tend to be formulated as being imposed on the 'state' generally. However, the reality that the elected branches have primary responsibility for giving effect to socioeconomic rights is recognized in the language of, for example, Article 2(1) of the International Covenant on Economic, Social and Cultural Rights, which refers to the obligation of states parties to 'take steps … with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, *including particularly the adoption of legislative measures*'.

733. For a celebrated discussion of the alleged limitations of the courts with regard to bringing about wide scale social change, see Horowitz (1977) and Rosenberg (2007). For a contradictory view based on the previous edition of Rosenberg's work, see Feeley (1992). For a refutation of claims about the alleged institutional shortcomings of courts in dealing with socioeconomic rights in particular, see Nolan, Porter and Langford (2007).

judicial decisions to effect wide-ranging social change.[734] More broadly, there is no doubt that child poverty will not be eliminated simply by legal reform: institutional reform at both the national and supranational levels is equally, if not more, essential. The causes of child poverty are numerous and complex, incorporating, as they do, macro-economic structures and policies, as well as phenomena such as HIV and AIDS and armed conflict. The law cannot serve as a panacea for all of these factors. There is, however, ample evidence that it can operate so as to at least mitigate or alleviate some of them, thereby proving itself a useful tool in combating socioeconomic disadvantage experienced by children.

This chapter centres on the role of constitutional socioeconomic rights adjudication in the battle against child poverty. My argumentation is premised on the key thesis that, where the adjudication of children's socioeconomic rights results in the advancement of the implementation of those rights, this will contribute to a reduction in the level of poverty being experienced not only by the child complainants in question but also a broader class of similarly-situated children. This is based on the assumption that if all children fully enjoyed their socioeconomic rights, then child poverty would have largely been eliminated.

I am well aware of the role that has been played by regional and international human rights bodies in relation to children's socioeconomic rights and child poverty.[735] However, due to space constraints, this chapter's ambit will be limited to constitutional socioeconomic rights adjudication. Furthermore, bearing in mind the far greater role that domestic courts have played in relation to the adjudication of child socioeconomic rights claims in comparison to their regional and international counterparts, it makes sense to centre on the role of domestic courts. The chapter is also limited to a discussion of the judicial enforcement of constitutional socioeconomic rights – not statutory socioeconomic rights. This is attributable to the fact that judicial enforcement of legislative socioeconomic rights-related entitlements has been the subject of far less controversy than the adjudication of constitutional socioeconomic rights. Finally, I acknowledge that there is a huge and ever-increasing body of domestic constitutional child socioeconomic rights case-law. This chapter does not pretend to cover all – or even most – of that jurisprudence. Rather, it focuses on a number of key cases that highlight the major questions that have arisen in relation to the courts' adjudication of socioeconomic rights in the context of child poverty.

Section 10.2 of this chapter considers why those interested in addressing child poverty should focus on socioeconomic rights. In Section 10.3, I analyse

734. There is considerable debate surrounding the extent to which judicial enforcement of socioeconomic rights will impact upon access to, and distribution of, socioeconomic rights-related goods and services (and hence contribute to social change). For an excellent collection of analyses of this issue based on a number of different national experiences, see Gauri and Brinks (2008). See also in this volume, Chapter 3, Goonesekere, Civil and Political Rights and Poverty Eradication; and Chapter 15, McCorquodale and Baderin, The International Covenant on Economic, Social and Cultural Rights - Progress and Future Challenges.

735. See, for example, the growing jurisprudence of the Inter-American Court of Human Rights and the European Court of Social Rights on children's socioeconomic rights.

the challenges and opportunities of a rights-based approach to challenge child poverty. The following section justifies why the courts can and should play a role in addressing child poverty through the enforcement of constitutional socioeconomic rights. Finally, Section 10.5 is a discussion of some key issues arising out of the courts' employment of socioeconomic rights in child poverty cases.

10.2. WHY LOOK TO ECONOMIC AND SOCIAL RIGHTS?

But why should we look to socioeconomic rights to tackle child poverty? The first response to this question is that there may not be anywhere better to turn. There is considerable debate as to whether a moral right to freedom from poverty does, or should, exist, and the nature of obligations imposed by such a right.[736] However, a legal right to 'freedom from poverty', in terms of a judicial enforceable claim, is not included in any of the key human rights instruments at the international or regional levels.[737] Nor am I aware of any justiciable domestic provisions setting out such a right.

Obviously, poverty is not simply a violation of socioeconomic rights. Another contribution to this volume ably demonstrates how civil and political rights have been employed to challenge particular poverty-related issues before the courts.[738] UNICEF has emphasized that reducing child poverty does not entail simply the fulfilment of children's rights to the goods and services necessary for their survival, normal growth and development. According to that organization, child poverty reduction 'also means improving the opportunities for disadvantaged children to participate in society' (UNICEF 2005).[739] Interestingly, the word 'poverty' is not once mentioned explicitly in the CRC – the instrument that UNICEF and other advocates employ as a framework for their anti-poverty activities. However, the instrument reflects a strong, underlying concern with child poverty and Van Bueren (1999*b*: 684-689) has previously highlighted the relationship between the 'provision, prevention, protection and participation rights' in the CRC and child poverty. I would agree that all categories of rights have a role to play in addressing child poverty. That said, the strong linkage between socioeconomic rights and poverty renders it logical for these rights to be the first port of call both for anti-poverty advocates bringing litigation and the courts themselves – hence this chapter's focus.

736. For a discussion of these issues by range of commentators, see Pogge (2007).
737. Indeed, the closest that any such instrument comes to the recognition of such a right is Article 30 of the Revised European Social Charter, which sets out 'the right to protection against poverty and social exclusion'.
738. See Chapter 3, Goonesekere, 'Civil and Political Rights and Poverty Eradication'.
739. Due to space constraints, this chapter does not focus in any depth on judicial approaches to the issue of child participation in the context of child poverty cases. It is notable, however, that while a significant number of national constitutions contain child socioeconomic rights provisions, the same is not true with regard to the child's right to participate.

The difference in purpose and focus between a multifaceted national constitution, which deals with a wide range of issues, and a specifically child-focused instrument means that the CRC necessarily enshrines children's poverty-related rights to a far greater degree than most domestic constitutions.[740] In recent years, however, there has been a marked increase in the number of constitutions including children's socioeconomic rights. This is consistent with the significant evidence of a growing global tendency towards the express delineation of children's rights in national constitutions.[741] This trend is undoubtedly attributable to the influence of the CRC and the growing awareness of children's rights at the domestic level that has followed that instrument's entry into force. Moreover, the increased presence of children's socioeconomic rights provisions is also a result of the significant rise in the number of domestic constitutions which include justiciable socioeconomic rights.

In addition to those constitutions which explicitly enshrine children's socioeconomic rights (or duties which correspond to such rights), [742] a large number of constitutions contain provisions that refer or relate to the child's right to special measures of protection or assistance or the child's right to development. These special measures may be interpreted to encompass some elements of socioeconomic rights. In fact, a number of 'protection/development' provisions explicitly require the state to take measures related to the child's socioeconomic rights.[743] Children's socioeconomic rights have also been recognized indirectly within domestic constitutional frameworks through explicit constitutional recognition that particular international human rights treaties, ratified by the relevant state, form part of, or take precedence over, domestic law.[744] For example, under a number of Latin American regimes, instruments enshrining the child's socioeconomic rights are accorded constitutional priority and the rights enshrined therein form part of the constitutional rights framework (frequently referred to as 'hierarchy').[745]

This increasing recognition, prominence, focus and scope of children's socioeconomic rights make them the most appropriate starting point for actors interested in challenging child poverty.

740. Some constitutions do, however, contain extensive sections on children's rights. See, e.g., Chapter 3, Section 5 of the 2008 Ecuadorean Constitution and Chapter 1, Section V of the 2009 Bolivian Constitution.
741. For more, see Tobin (2005).
742. See, e.g., South Africa (Section 28(1)(c)); Colombia (Article 44 and Article 50); Brazil (Article 227) and Honduras (Article 123).
743. See, e.g., Article 87(1) of the Cape Verde Constitution; Article 40 of the Cuban Constitution.
744. See, e.g., Article 22 of the constitution of the Republic of Kosovo; Section 75(22) of the Argentine Constitution and Article 56 of the Slovenian constitution.
745. For a slightly different approach, see Section 18 of the Timor-Leste Constitution. For a discussion of the different ways in which international human rights instruments form part of the constitutional frameworks of (Latin American) civil law jurisdictions, see García Méndez (2007: 118-119).

10.3. THE CHALLENGES AND OPPORTUNITIES IN USING A HUMAN RIGHTS-BASED APPROACH TO CHALLENGE CHILD POVERTY

There is considerable debate about the desirability, or the prospects of success, of a human rights-based approach to combating poverty – whether within the judicial context or outside it.[746] While UNICEF (2000) states that it pursues a human rights approach to poverty reduction specifically because 'it responds to poverty's multifaceted nature', there are a number of powerful critiques of the human rights-based approach. These include claims that the individual-focused, public sphere-centric, culturally biased orientation of the human rights framework results in the prioritization of the rights claims of some groups over those of others, while completely excluding the claims of some of the poorest.[747] Indeed, bearing in mind the relatively recent acceptance of the notion of the child as rights-bearer and the traditional privileging of civil and political rights over socioeconomic rights within the human rights framework, a human rights-based approach might seem to pose certain obstacles to addressing child poverty.[748] Furthermore, human rights, including socioeconomic rights obligations have traditionally been, and continue to be, primarily directed at states. This results in the human rights framework frequently failing to capture non-state actors whose activities may be at least as influential as those of states in contributing to or exacerbating child poverty (for instance, international financial institutions such as the International Monetary Fund and the World Trade Organization or powerful transnational corporations).[749]

The rights framework set out in the CRC has been accused of being Eurocentric,[750] individualistic and limited in terms of its recognition of the varying characteristics and experiences of different groups of children.[751] However, it does seem to address some of the concerns expressed with regard to the general human rights framework, particularly through its inclusion of both socioeconomic rights and civil and political rights (albeit that, to some degree, the categories of rights

746. When I talk about the adoption of a human rights-based approach in the judicial context, I refer to courts applying a human rights framework of analysis to the complaints brought before them. For an in-depth discussion of a rights-based approach to poverty reduction as it has been implemented by an influential, non-judicial actor, see Jahan (2002).

747. For instance, the individualist focus of the human rights framework often fails to take into account group or collective rights and does not properly acknowledge the strong link between the individual and the community in which they are based (Ensor 2005: 255). For a comprehensive analysis of objections about the Western orientation of international human rights law and a discussion of non-Western rights discourses, see Brems (2001: Part II).

748. It should be noted, however, that those arguing in favour of a rights-based approach to poverty emphasize that such an approach entails equal attention being accorded to ESR as to civil and political rights. See, for example, Fernandes (2007: 3).

749. For a discussion of the application of socioeconomic rights standards to non-state actors, see, for example, Senyononjo (2007: 109) and Alston (2005).

750. For a critique of the cultural bias of the UN CRC, see Pupavac (1998).

751. For a discussion of the limited image of 'the child' reflected in the CRC, see Freeman (2000: 282-285).

impose different obligations on states parties).[752] This feature of the CRC – and of constitutions with a similar approach to that instrument – would seem to make it a particularly suitable tool to use in combating child poverty. Furthermore, while the CRC does not impose binding legal obligations on non-state actors, its provisions explicitly recognize duties imposed on agents such as parents and others responsible for the child in ensuring that their socioeconomic rights needs are met.[753] This too is reflected in many constitutions. In some cases, such duties may be legally enforceable by domestic courts.[754] Finally, while the CRC has been criticized for its cultural bias and its propagation of a Western conception of childhood, domestic constitutions tend to be more reflective of the particular social, cultural and historical context in which they were drafted. Presuming that such constitutions provide adequate protection to children's socioeconomic rights, they seem likely to provide an appropriate framework to be employed in adjudication on child poverty cases in specific domestic contexts.

A crucial element of any adequate conceptualization of child poverty based on children's human rights is its treatment of the child as an independent agent in her own right, rather than merely as an appendage of her parents. This is highly significant as it entails the recognition of a number of facts that are essential for addressing child poverty. First, poor children face very specific challenges with regard to their socioeconomic rights due to both the biological and socially constructed characteristics of childhood. Second, children are particularly vulnerable to violations of their socioeconomic rights owing to their more limited ability vis-à-vis other groups to protect themselves from such violations and/or to take advantage of protections that are available. Finally, it is crucial that there be a move away from the traditional – and false – presumptions that (a) children's socioeconomic rights-related interests are identical to those of their parents, family unit or carers, and (b) children's socioeconomic rights-related needs will necessarily be met by their family/carers.[755] This latter point is all the more vital in light of the traditional tendency of the state to provide for children's socioeconomic rights through the unit of the family, for instance, through the channelling of child socioeconomic rights-related goods and services through the child's adult

752. See, for example, Article 4, CRC, which after a general statement about the obligation of states to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention' proceeds to set out a 'special regime with regard to economic, social and cultural rights, requiring states to "undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation" to give effect to socioeconomic rights'.

753. See, for example, Article 27, CRC.

754. See, for example, Article 42.1 of the Irish Constitution and *A.G.* v *Dowse & Anor* [2006] IEHC 64.

755. Such an approach ignores the fact that, '[t]he social reproduction of troubling attitudes and political commitments (such as misogyny or racism) can also occur within the family' (Macleod 2002: 213). The relatively disadvantaged position of some categories of child family members in terms of the distribution of socioeconomic rights-related resources is evidenced by, for example, the lesser amounts of health and education provided to many girl children in the family context.

carers. A failure to recognize the realities set out above will necessarily limit the role played by the law (both in terms of the legal framework and the courts) in addressing child poverty.

Finally, leaving behind problems surrounding the rights framework itself, Pogge has observed, with regard to the conceptualization of poverty as a human rights issue, that 'the change of language [from pity to rights] … is still only a new form of words, a rhetorical triumph: one in a long series of paper victories. The real task is to end severe poverty on this planet (Pogge 2007: 1-4).' The mere designation of a problem as a rights issue and its subjection to judicial scrutiny will not miraculously result in its being remedied. This is particularly true where a problem is as multifaceted and deeply entrenched as child poverty. Indeed, care must be taken that the construal of a particular cause as a 'rights' issue does not distract from, or is not confused with, the actual concrete advancement of that cause.

10.4. WHY LOOK TO THE COURTS?

I have already spoken of how the realization of constitutional socioeconomic rights and the elimination of poverty are primarily the responsibility of the elected branches of government that are tasked with the formulation and implementation of law and policy. Why then should we look to the courts? The answer to this question lies in the role of the courts as 'guardians' of the constitution, including the constitutional socioeconomic rights of the child. Cohen (2005: 221) has argued convincingly that, instead of full democratic citizenship, children hold an 'ill-defined partial membership'. The denial of one key element of democratic or political citizenship[756] – the right to vote – effectively prevents children from being able to directly influence governmental decision-making on issues related to their enjoyment of socioeconomic rights. Effective representation of the will of the majority by their representatives in representative democracies is guaranteed by political accountability. Where no such accountability exists with regard to particular groups, the interests of such groups are unlikely to occupy a large space on the agenda of elected law and policy-makers.

One might argue that the lack of direct accountability to children of the elected branches could be compensated for through the exertion by children of indirect influence on democratic decision-making processes. This might occur, for instance, through child lobbying activities or the ability of children to rely on voting 'proxies' to forward their interests. That is, through a form of 'virtual representation'.[757] There is no doubt, however, that the limited organizational capacities, as well as the developmental and economic deficit of many children,

756. This notion of 'political citizenship' is derived from Marshall's seminal analysis of citizenship in 'Citizenship and Social Class' (1963: 84).

757. The theory of virtual representation is most closely associated with Edmund Burke. For an in-depth consideration of Burke's concept of virtual representation, see Pitkin (1967: 172-180).

must severely reduce the ability of children as a group to exert indirect influence on political decision-making.[758] Furthermore, it has been argued elsewhere that children are unable to rely fully on others (whether elected representatives, parents, or adults in general) to ensure that their socioeconomic rights-related interests are forwarded adequately in the democratic process. In brief, this is due to (a) the lack of a comprehensive identity of interests between children and potential representatives, and (b) the inability of children to rely on 'proxies' where those proxies will not benefit from children's socioeconomic rights being afforded protection.[759] As a result, the principle of political accountability does not appear to operate effectively in relation to children.

As children cannot assume that the legislature and executive will protect their rights, it is arguable that the courts' role as 'guardians of the constitution' is of greater significance to them than to others in society who can make their voices heard through the democratic system. Chandler (2001: 83) has pointed out that, often, the lower the capacity of the human subject, the greater the need for some form of external assistance or grant of resources or regulatory power, in order to ensure that rights are guaranteed and implemented.[760] The lack of capacity of right-holders to ensure that rights are realized means that human rights advocates must focus on 'a beneficent agency, external to the political sphere, to achieve political ends' (Chandler 2001: 84). This is particularly true of children for whom there is a recognized duty to act in order to fulfil their socioeconomic rights, but no politically accountable institution that can be relied upon to do so. Considering the kind of powers that are required to ensure that children's socioeconomic rights are vindicated, it is arguable that a state institution is best suited to this purpose. Bearing in mind the limited opportunity afforded to children to input into, or control, the elected branches of government, their lack of capacity will render children more reliant on the courts to ensure that their rights are enforced by the elected branches of government than other bearers of constitutional socioeconomic rights.[761] This enhanced dependence may be regarded as imposing a correspondingly heightened duty on the courts in relation to children's rights.

That is not to suggest that the courts are the ideal bodies for addressing children's socioeconomic rights. First, courts are no more accountable to children than bodies of elected representatives are. Furthermore, there can be no presumption that judges will have any greater disposition towards being receptive or progressive with regard to children's socioeconomic rights than the legislature and executive (although unelected courts seem likely to be less susceptible to

758. Clearly this will not be the case for all children, as is demonstrated by, for example, the experiences of working children's organizations. For more, see Liebel (2003: 280).

759. For more, see Nolan (2007). For a useful extensive discussion of the shortcomings of the fiduciary model of parent-child relations in the context of political representation, see Cohen (2005: 228-9).

760. Chandler defines 'capacity' as 'autonomy'.

761. That is not to suggest that this will not be the case for other unenfranchised vulnerable groups (e.g., the mentally ill in some jurisdictions). However, this chapter is limited to a consideration of the position of *children* vis-à-vis democratic and judicial decision-making processes.

public pressure motivated by popular animosity towards particular groups of children). In addition, just as the representation of children's interests by external agents such as parents in democratic decision-making processes cannot be regarded as unproblematic, the same is true with regard to the representation of such interests in the legal context. There is, however, one key advantage to the courts serving as the forum for children's rights claims. Crucially, children's voices and interests are less likely to be 'drowned out' in the judicial process than they would be in the political one. This is due to the fact that, where a child brings a case seeking to vindicate his socioeconomic rights, his rights/interests are the focal point of the decision-making proceedings – something that is unlikely to occur in the broader political arena where there are numerous competing parties and interests. Furthermore, where children's rights are presented to a court, it would seem difficult for the court to avoid dealing with them, particularly if children's rights are the sole basis for the action.[762] This will not be the case where children's rights issues are raised in the context of law and policymaking, where they may be set aside or disregarded due to children's lack of political clout.

One of the arguments made against the courts enforcing children's socioeconomic rights is the fact that decisions involving public resources and policymaking are more appropriately taken by an accountable legislature and executive and that judicial involvement in these areas would be a breach of the separation of powers. In the case of a governmental failure in relation to distributive justice – including vindicating socioeconomic rights – the affected persons should present their petition to the elected branches of government rather than to the courts. However, as we have seen above, this option is not open to children.

From one perspective, judicial deference in the face of governmental refusal to give effect to constitutional socioeconomic rights violations constitutes a breach of the courts' duties to uphold rights enshrined in the constitution under the principle of constitutional supremacy. Where the court defers to the government in such circumstances on the grounds that the 'separation of powers' requires this, the court is striking a balance that effectively renders null and void the child's constitutional rights. In developing this argument, it is interesting to note the experiences of two specific jurisdictions: South Africa and Ireland.

Both the South African *Treatment Action Campaign* case[763] and the Irish TD case[764] involved courts considering how to enforce children's constitutional socioeconomic rights-related goods and services. Treatment Action Campaign centred on the right of everyone (including children) to have access to health services and the right of children to basic health care services.[765] TD focused on

762. See Section 10.5 below for further consideration of this point.
763. *Minister of Health v Treatment Action Campaign* (No.2) 2002 (5) SA 721 (CC) ('*TAC*').
764. *TD* v *Minister for Education* [2001] IESC 101
765. See Sections 27 and 28(1) (c) of the South African Constitution. Despite the fact that the High Court dealt with the matter exclusively in terms of Section 27, and the Constitutional Court also focused principally on the obligations imposed by that provision (to the extent that it phrased its order exclusively in relation to Section 27), *TAC* was undoubtedly primarily a *children's* rights case. The ultimate goal of the action was to ensure non-transmission of the HIV virus from the

the unenumerated personal right of children with various behavioural disorders to adequate services and facilities to cater for their special needs.

In the *Treatment Action Campaign* case, the South African Constitutional Court made it clear that, where the state fails to give effect to its constitutional obligations (including those related to children's socioeconomic rights), the court is obliged to say so.[766] The fact that the Court uses the words, '[i]n so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself',[767] would seem to indicate that the Court does regard such activity as (at least a potential) violation of the doctrine of the separation of powers.[768] In this case, the Court accorded greater weight to its duty to uphold constitutional rights and obligations (and to ensuring that the elected branches of government did likewise), than to the separation of powers doctrine. A useful contrasting example of a court according greater weight to the enforcement of a rigid, formal conception of separation of powers in the context of child socioeconomic rights arose in TD. The applicants in TD were a sample of a large group of non-offending children in the care of regional local authorities, whose special needs were not being met by the state. The Supreme Court decision in this case centred on the state's appeal against detailed mandatory orders that were handed down by the High Court. The High Court had granted the relief in question in the face of consistent failure on the part of the relevant state authorities to, first, give effect to declaratory orders granted in previous, similar cases, and, second, to comply with undertakings adopted by those authorities in response to the earlier orders, in a timely manner. The mandatory orders directed the defendant Minister for Education to take all steps necessary, and to do all things necessary, to facilitate the building and opening of secure and high support units in set locations with a set number of beds and in accordance with a fixed time-scale. In its appeal, the state argued that the mandatory orders granted by the High Court were, in effect, a transfer of overall policy to the courts from the executive and, consequently, were contrary to the separation of powers. A majority of the Irish Supreme Court in this case considered the Court's power to vindicate constitutional rights to be limited by the principle of the separation of powers.[769] Thus, they regarded their duty to uphold (a very rigid version of) the separation of powers doctrine and protect it from infringement as outweighing their duty to protect and vindicate the constitutional socioeconomic rights of the children at issue.

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mother to the born child and the 'health care service' being sought was one that would have a more direct impact on the health of the child, than on that of the mother.

766. Section 172(1)(a) of the South African Constitution.

767. *TAC* at para. 99 [emphasis added].

768. It is, of course, also arguable that the court's duty to protect constitutional rights is an inherent part of its judicial function under the separation of powers. From this perspective, the infringement on the spheres of authority of other governmental organs (resulting from the courts' enforcement of children's socioeconomic rights) is acceptable under the separation of powers where that is necessary to ensure that these rights are vindicated.

769. Murray J and Hardiman J stated this expressly, while the findings of the other judges indicate implicit agreement.

The crucial difference between the two courts' approaches was the balance struck between the courts' duty to uphold the separation of powers doctrine and their duty to protect constitutional rights. There is, however, an additional factor to be considered when striking such a balance in the context of children's socioeconomic rights that was not taken into account by either of the majorities in these cases. That is, the inability of children to rely on governmental organs other than the courts to protect and vindicate their rights.[770] If the courts take the marginalized position of children with regard to democratic decision-making processes into account, then the balance struck should be more likely to be in favour of the courts' obligation to protect children's constitutional socioeconomic rights rather than their obligation to uphold the separation of powers doctrine.[771] This is because of the implications that the exclusion of children from democracy will have for the reasoning underlying the separation of powers, particularly those that are founded on a view of the elected organs of government as accountable and responsive to all.

One significant example of a court taking into account the position of children 'outside democracy' when adjudicating children's socioeconomic rights is the Colombian case of *SU-225/98*,[772] which centred on the child's right to health. This was an action brought by the parents of 418 children living in a severely disadvantaged area of Bogotá against the national and district health authorities. The parents claimed that their children were in a high-risk situation due to the particular living conditions experienced by residents of the area and that they were unable to meet the cost of vaccines. It was alleged that by failing to provide the children with a vaccine to prevent meningitis free-of-charge, the defendants had violated the children's constitutional rights to life (article 11), health (articles 44 and 49) and social security (article 48). In its decision, the Colombian Constitutional Court stated that, in a rights-based social state, the political community owes preferential treatment to those who find themselves in circumstances of clear weakness and are impeded from participating, under equal conditions, in the adoption of public policies that are applicable to them. The Court held that the reason which justifies giving precedence to the application of the 'democratic principle' (which provides that the elected political organs are those responsible for tax policies and budgets) at the time of assigning positive rights is 'irrelevant in the case of the fundamental rights of minors'.[773] According to the court, the democratic principle cannot oppose the claim to essential entitlements of a group

770. Denham J in her minority judgment in *TD* did, however, emphasise the court's duty 'to ensure that the process enabled the children's rights be protected' at para 145(f).

771. The inability of children to forward their interests and ensure the vindication of their rights through democratic processes was not expressly considered at all by either the courts in *TD* or *TAC*. However, Kelly J in the High Court in *TD*, during one of the many cases involving trouble children that came before him prior to *TD*, alluded at least once to the fact that children could not vote and did not seem to be high on the Minister for Health and Children's agenda (Carolan: 2000).

772. SU-225/98, 20 May 1998.

773. SU-225/98, 20 May 1998.

of the population that is unable to participate in public debate and which, as a result, does not have its own voice in the adoption of political decisions that affect it. In doing so, the court essentially recognized that the counter-majoritarian objection to the judicial enforcement of socioeconomic rights does not hold water where those affected by the decisions/actions of the democratic majority do not have the opportunity to participate in democratic decision-making processes.

Judicial deference in the face of constitutional rights violations is particularly problematic where a court bases its inaction on the claim that certain spheres/functions are reserved to the elected branches of government – without having regard to the fact that the people whose constitutional rights are at issue have no way of exerting control over these organs. Where the vindication of constitutional rights requires action to be taken in relation to policymaking or public resource allocation, it seems unacceptable for the courts to refuse to become involved in activities having implications for those areas when it is clear that, in the absence of judicial intervention, such rights will almost certainly not be vindicated by the legislature or executive due to the latter entities' lack of dependence upon and indifference towards the right-holders in question. Indeed, when dealing with child poverty-related cases, the courts should be aware that a court order is one of the few means by which children's socioeconomic rights and child poverty issues can be firmly established on the agenda of the elected branches of government.

10.5. THE COURTS' EMPLOYMENT OF SOCIOECONOMIC RIGHTS IN CHILD POVERTY CASES – SOME ISSUES

While this chapter argues in favour of the courts playing a role in addressing child poverty through ensuring the enforcement of children's constitutional socioeconomic rights, I do not claim that such activity has always been as successful as children's rights advocates – and the courts themselves – might have hoped. Experiences vary greatly. For instance, an interim order granted in the right to food case of *PUCL v India* required state governments to introduce cooked midday meals in all government and government-assisted primary schools within six months.[774] Together with an organized public campaign, this and subsequent court orders[775] led to all state governments initiating midday meal programmes, resulting in more than 100 million children being covered.[776] In contrast, in *MC Mehta v Tamil Nadu,*[777] the Supreme Court handed down a thoughtful and wide-ranging decision that concentrated extensively on the need to address the causes of child labour, with an explicit focus on poverty as a motivation for such activity. However, despite the granting of a detailed order which addressed the position

774. Interim Order of 28 November 2001.
775. See, 'Legal Action: interim orders in the 'Right to Food' case'. http://www.righttofoodindia.org/orders/interimorders.html#box17
776. Source: Right to Food Campaign: http://www.righttofoodindia.org/mdm/mdm_intro.html.
777. *MC Mehta v Tamil Nadu* AIR 1997 SCC 417.

of the state, employers, working children and their families, the decision remains largely unimplemented.[778]

One of the most obvious barriers to the success of socioeconomic rights adjudication in mitigating child poverty is the non-implementation of court orders. The reasons for the implementation (or not) of orders in children's socioeconomic rights cases are generally similar to those for the non-enforcement of orders granted in non-child-specific socioeconomic rights cases. These include the nature of the remedy formulated by the court,[779] the existence (or not) of a social movement concerned with ensuring state compliance with the order,[780] the presence of an existing policy infrastructure with latent capacity (Brinks and Gauri 2008: 320), as well as political intransigence[781] or institutional incompetence[782] in the face of an order.[783] These have been ably discussed by other commentators and I will not go into them further here. Rather, I prefer to focus on those obstacles to addressing child poverty that result from the courts' attitude towards, and construal of, children's socioeconomic rights. These obstacles relate back to, and have implications for, the alleged advantages of the adoption of a rights-based approach to child poverty as outlined in Section 10.3. That is, the recognition of the particular challenges faced by children with regard to socioeconomic rights, children's especial vulnerability to socioeconomic rights violations, the consideration of children's interests as distinct from the interests of families/carers, and the acknowledgement that children's socioeconomic rights will not always be met by their families/carers.

778. For an account of this case, a critique of the Court's approach and a discussion of the (non-) implementation of the Court's decision, see Agarwal (2004).
779. See, for example, Roach (2008).
780. See, e.g., the *PUCL* right to food case discussed above.
781. See, for instance, the impact of the different attitudes of the Republican and Democrat administrations in New York with regard to giving effect to the court orders granted at different stages of the lengthy *Fiscal Equity* litigation. These orders required the state to take court-mandated measures with regard to public education reform, including the allocation of very large sums of money. The Republican governor (who was in office when the orders in question were granted) continuously delayed compliance and systematically appealed the orders granted by the lower courts. This was at least partially due to an ideological reluctance to fund social programmes. In contrast, the later Democrat incumbent proceeded to even go beyond the more restrictive approach adopted by the Court of Appeals in the most recent judicial decision. (Unfortunately, the Democratic administration's progress on this issue may be reversed to some extent as a result of school aid cuts set out in the Governor's 2009 executive budget proposal. These proposed cuts were allegedly put forward in response to the fiscal crisis being faced by New York state. Whether, and to what extent, they will be passed by the legislature remains to be seen, however). The *Fiscal Equity* case was not argued in terms of child poverty, rights or even welfare. However, the improved conditions experienced by children as a result of the ultimate implementation of the state's response to the Court orders will serve to address educational deprivation experienced by children in the school districts in question. It will thus contribute to a reduction in child poverty.
782. See, e.g., the discussion of the non-implementation of the Indian Supreme Court's order in *MC Mehta v Tamil Nadu* in Agarwal (2004).
783. For a useful discussion of these and other factors relating to judicial compliance with economic and social rights judgments, see Gloppen, (2006: 53-56).

I stated above that where children's socioeconomic rights are presented to a court in the context of litigation, it would seem difficult for the court to avoid dealing with them. This is certainly true where children's rights are the sole basis of an application to the courts. However, the situation may differ where children's rights are presented to the courts together with those of others (poor family members, for instance). In a number of such cases, the courts have displayed a preference for focusing on the rights of 'everyone' rather than on those of children in particular. This has been demonstrated in the South African Constitutional Court's case-law, most notably in its failure to premise its decision-making on the child-specific constitutional socioeconomic rights provisions in a number of key decisions, despite those provisions serving as a basis of the applications before it.[784] In doing so, the Constitutional Court has largely avoided outlining the scope and content of children's socioeconomic rights. In the *Grootboom* housing rights case, the Court stated that, '[t]he carefully constructed constitutional scheme for progressive realisation of socioeconomic rights would make little sense if it could be trumped in every case by the rights of children to get shelter from the state on demand'.[785] The Court also expressed concern that interpreting the relevant constitutional provision as imposing a 'right to shelter on demand'[786] presented the obvious danger' that '[c]hildren could become stepping stones to housing for their parents instead of being valued for who they are.'[787] Thus, in the Court's view, the recognition of children as discrete right-holders with claims versus the state that differ from those of their parents might pose the risk of children's rights being co-opted to provide benefits for children's caregivers, leading to the devaluation of the children themselves. Where courts consistently prefer to deal with rights of 'everyone', rather than those of children specifically – and this is subsequently reflected in the state's approach – this is likely to result in efforts to reduce child poverty being subsumed into general efforts to address poverty, even where this serves to disadvantage children by failing to accord adequate attention to their particular situation, vulnerability and interests. Judicial failure to acknowledge, and engage with, children's particular situations and rights claims may have an especially serious impact on those children who cannot rely on parents/carers to provide for their socioeconomic rights.[788]

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784. See Sections 27 and 28(1) (c) of the South African Constitution and the case of *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) at paras 74 and 92, which involved *inter alia,* children's housing rights. The only case in which the Court explicitly found a violation of the child's socioeconomic rights under Section 28(1 (c) was *Khosa & Ors v Minister of Social Development & Ors* 2004(6) BCLR 569 (CC). In this case, the Court failed to discuss Section 28(1)(c) in any detail, merely finding that the denial of certain benefits to the South African born children of non-national permanent residents 'trenches upon their rights under section 28(1)(c) of the Constitution'. At para 78.
785. *Grootboom* at para 71.
786. *Grootboom* at para 70.
787. *Grootboom* at para 70.
788. It should be noted that the courts in *Grootboom* and *TAC* made it clear that there might be some circumstances in which the state (rather than parents) would have primary responsibility for the fulfilment of children's rights. For instance, where implementation of the right to parental or

Another issue that has arisen in relation to the South African Constitutional Court's jurisprudence is that body's failure to interpret children's socioeconomic rights as imposing an immediate obligation on the state to fulfil children's socioeconomic rights in any case that has come before it thus far.[789] It has failed to do so either by construing Section 28(1)(c)[790] as giving rise to an immediate entitlement to direct material provision from the state or by identifying a minimum core inherent to the socioeconomic rights of everyone set out in Sections 26 and 27 of the South African constitution.[791] Other courts such as the Argentine Supreme Court have been prepared to adopt a more nuanced view, regarding children's socioeconomic rights as imposing a combination of both immediate and progressive obligations. One example, the *Beviacqua* decision, centred on the right to health of a child who had been born with a serious disability in his marrow that reduced his immunological defences.[792] The medicine necessary for the child's treatment was initially provided by the state. Later, however, the child's mother was informed that state delivery would be interrupted, with the state claiming that it had only ever provided the medicine on 'humanitarian' grounds (rather than on the basis of a legal duty). The mother of the child brought an amparo action, seeking to prevent the interruption of delivery on the basis that such state action would deprive her child of his rights to life and health guaranteed by the national constitution and under international human rights treaties. In its decision, the Court relied heavily on provisions of the international treaties that form part of the Argentine constitutional hierarchy, particularly the ICESCR and the CRC.[793] Amongst other things, it referred to the obligation of states parties under Article 2(1) ICESCR to progressively achieve the full realization of the rights set out in the Covenant to the maximum of their available resources. It further stated that the government was obliged to 'immediately' take appropriate measures, in conformity with its constitution and law,[794] to ensure that the competent authorities of the federal state

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family care is lacking through the child's removal from the family environment (*Grootboom* at para. 77) or in the case of parental inability to provide for the child's ESR (*TAC* at para 79). This has not, however, resulted in the Constitutional Court being prepared to conclude that children have a direct individual entitlement to socioeconomic rights-related goods or services in any of the cases that have come before it.

789. It should be noted, however, that there has been at least one instance in which a lower court has been prepared to recognize Article 28(1)(c) as imposing immediate duties to fulfil. See, *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) where Justice De Vos found that the State was 'under a direct duty to ensure basic socio-economic provision for children who lack family care as do unaccompanied foreign children'. At 5.

790. Section 28(1)(c) provides that every child has the right to basic nutrition, shelter, basic health care services and social services.

791. See, *Treatment Action Campaign* and the *Grootboom* cases. For a contrasting judicial approach, see the Colombian Constitutional Court decision in *SU – 225/98*. For an analysis of this case, see Nolan (2009).

792. *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neoplácias*, C. 823. XXXV, 24 Oct. 2000.

793. *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neoplácias*, C. 823. XXXV, 24 Oct. 2000 paras 17-18.

794. *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neoplácias*, C. 823. XXXV, 24 Oct. 2000 para. 19.

comply with the provisions of that Treaty.[795] The Colombian Constitutional Court has also been prepared to recognize that children's socioeconomic rights may give rise to an immediate entitlement to state provision. In the case of SU-225/98, the Constitutional Court made it clear that the socioeconomic rights of the child set out in article 44 of the Colombian Constitution have an essential content of immediate application.

Admittedly, commentators differ greatly on whether socioeconomic rights-holders should be provided with immediately enforceable individual claims against the state. On the one hand, it is argued that the provision of such a direct entitlement ensures that socioeconomic rights are substantive and not merely procedural in nature.[796] On the other hand, it is claimed that judicial recognition of direct entitlements runs the risk of a flood of litigation which might result in those children that do not sue being disadvantaged, as the state will have to put all its resources towards meeting court-enforced claims.[797] More broadly, one might argue that if the state were to be concerned solely with court-identified immediate demands, it would be impossible for it to develop a coherent and effective anti-poverty strategy. In refusing to interpret children's constitutional socioeconomic rights as imposing an immediate positive obligation on states, the South African Constitutional Court has left itself open to accusations of having failed to give effect to the constitution's intention to accord priority to children in light of their particular vulnerability and needs.[798] Where children are not entitled to directly claim socioeconomic rights-related goods and services, then their socioeconomic rights run the risk of being essentially meaningless or of no value to them, due to those rights' lack of concrete content and inability to result in the actual satisfaction of the child's material need. Ultimately, where rights are never interpreted to give rise to an immediate entitlement or to include a minimum content, they would seem likely to be of only limited use in tackling the more egregious manifestations of severe poverty. That is not to suggest that it will be appropriate for the courts to interpret socioeconomic rights as giving rise to a direct entitlement in every case. Rather, it is necessary for judges to strike a balance between ensuring that, first, the state has adequate space in which to formulate and implement anti-poverty strategies that will provide for children (and others) on a general level,

795. *Campodónico de Beviacqua, Ana Carina v Ministerio de Salud y Banco de Drogas Neoplácias*, C. 823. XXXV, 24 Oct. 2000 para. 20.

796. For a critique of the 'emptiness' of socioeconomic rights jurisprudence which denies that socioeconomic rights embody immediately enforceable individual claims, see Pieterse (2007).

797. This claim has been made in relation to the extensive litigation and adjudication of the directly applicable right to health in Brazil. For more, see Henriques (2008) cited in Maués (2008). However, Hoffman and Bentes have argued that the 'queue-jumping phenomenon' and ad hoc shifting of resources towards litigants as a result of the Brazilian right to health cases is aggravated by 'the prevailing judicial formalism and the resulting reticence on the part of the courts to engage in substantive determinations of need, adequacy and proportionality' (Hoffman and Bentes 2008: 142). It should be noted, in addition, that the very high level of right to health litigation in Brazil stands in sharp contrast to the far lower levels of litigation in many other jurisdictions with constitutional socioeconomic rights.

798. See, for example, Sloth-Nielsen (2001: 229).

and, second, that the basic needs of the most disadvantaged are met to the greatest extent possible.[799] There is no reason to assume that a court would be unable to formulate a general approach as part of which such a balance could be struck on a case-to-case basis.

The aforementioned unwillingness of the South African Constitutional Court to accord priority to children contrasts sharply with other courts. For instance, the Colombian Constitutional Court has been prepared to regard a number of children's socioeconomic rights as being 'fundamental' and hence subject to immediate application by the courts.[800] This contrasts with the socioeconomic rights of other groups, which generally only adopt a fundamental character in particular, limited circumstances.[801] The priority accorded to children under the Colombian constitutional framework and by the Colombian courts is reflected in a recent decision of the Colombian Constitutional Court.[802] This judgment was based on 22 joined *tutelas* which were selected in order to demonstrate systemic problems in the health system. The Court granted a range of orders aimed at restructuring the country's health system, including health benefit plans. Amongst other things, the Court ordered the legislatively established contributory and subsidized benefits regimes to be unified. This was to be done in the first case for children and youth, while, with regard to adults, it was to be done progressively taking into account sustainable funding. Similarly, the absolute priority of children with regard to socioeconomic rights, which is set out in Article 227 of the Brazilian constitution, has been recognized by both national superior courts in that jurisdiction.[803] While I would not claim that children are the only group that should be accorded priority in terms of socioeconomic rights enforcement,[804] judicial failure to acknowledge and give effect to such priority will inevitably impact on the role played by courts' decisions in reducing child poverty. Furthermore, where such a judicial approach seems to fly in the face of the specific wording of the constitution (as in the South African case),[805] this will have a detrimental effect upon public perceptions of the court as being concerned with child poverty.

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799. For a convincing explanation of why socioeconomic rights should be interpreted so as to give rise to minimum core obligations as well as suggestions as to the circumstances in which the state should be required to realize (or not) such core obligations, see Bilchitz (2007: Chapter 6).
800. See, e.g., the child's right to health case of T-200/93, 25 May 1993. See also, the children's right to education decision in Sentencia T-402/92, 3 June 1992. According to Yamin and Parra-Vera, other vulnerable groups whose right to health is immediately enforceable include pregnant women and the elderly. Furthermore, the Court has also deemed the right to health immediately enforceable where the health good or service at issue is included in the legislatively established contributory and subsidized benefits regimes, which the Court has taken to define a minimum core content of the right to health (Yamin and Parra-Vera 2009: 1-2).
801. For more, see Sepulveda (2008: 144-162).
802. T-760/2008, 31 July 2008.
803. See, e.g., Superior Court of Justice, Resp. 577836 cited in Piovesan (2008: 182-191).
804. Examples of other vulnerable groups that have a claim to priority include the disabled and the elderly.
805. The phrasing of section 28(1)(c) led many academic commentators to conclude that the rights therein imposed an immediate obligation on the state to fulfil them, thereby providing children with a direct immediate entitlement against the state. See, e.g. de Vos (1997: 87-8) and Viljoen (2002: 203-4).

This section highlights some of the key issues arising in relation to the courts' employment of socioeconomic rights in child poverty cases. It is important to note, however, that none of the points discussed here provide ammunition for those who would claim that the courts should limit themselves to playing a constrained role in challenging child poverty. Rather, they serve to suggest how the courts can maximize the effectiveness of future judicial efforts to mitigate child poverty. If the courts are to maximize the impact of their socioeconomic rights jurisprudence in terms of eradicating child poverty, then they must ensure that their decisions take account of the particular position of children (and particular groups of children) as socioeconomic rights-holders. A failure to do so will result in judicial attempts to address child poverty necessarily being inadequate and incomplete.

10.6. CONCLUSION

There is evidence that the number of poor children is growing. Indeed, bearing in mind the impact of the recent global economic crisis, an increase in the number of children living in both relative and absolute poverty in the foreseeable future seems inevitable. The high levels of deprivation experienced by children worldwide demonstrate that child poverty is not being effectively addressed by law- and policy-makers at either the international or the domestic level. In light of the apparent indifference and lack of responsiveness of the elected branches of government, advocates are increasingly focusing their efforts to secure the vindication of children's socioeconomic rights on the judiciary.

A recent, significant example is an application brought before the South African High Court seeking the extension of the child support grant to all qualifying children under the age of eighteen (the grant is currently only available to children under fourteen).[806] This legal action is supported by the Alliance for Children's Entitlement to Social Security, a NGO-Alliance which has run a long-term campaign aimed at ensuring that South African children have access to a comprehensive social security system that prioritizes them and ensures their survival and a standard of living adequate for their development. This case is one of three taken by civil society organizations to challenge flaws in the conceptualization and implementation of the child support grant. The launch of the other actions – on the non-adjustment of the income threshold in the means test to take account of inflation[807] and discrimination against children without identity documents[808] – both resulted in the desired governmental reforms.[809]

806. *Mahlangu* v *Minister for Social Development & Ors*, Case No. 25754/05 (South African High Court, Transvaal Provincial Division).
807. *Ncamile and the Children's Institute v The Minister of Social Development and Minister of Finance*
808. *ACESS v Minister of Social Development*, Case No. 5251/2005 (18 March 2008)
809. For more see Hall and Proudlock (2008). A court order was only granted in one case, however, as the second case was withdrawn after the state enacted reforms.

In their heads of argument,[810] the applicants rely, amongst other things, on the right of all children to have access to social security and the right to equal benefit of the law and prohibition of unfair discrimination (including between different age-groups of children) which are set out in the South African Constitution.[811] The case is supported by a number of affidavits demonstrating that children bear a disproportionate share of the burden of poverty and highlighting the vital role that the grant plays in alleviating poverty. The application also focuses on the particular vulnerabilities of children between 13 and 18, arguing that children of that age group are as vulnerable as younger children, albeit to different social problems (e.g., child labour, damage to the child's education).

Of course, a positive judicial decision on this legal action will not provide a comprehensive solution to the disadvantage experienced by South African children. However, if the Court finds for the applicants, a benefit that has a key role to play in mitigating child poverty will be extended to an extremely disadvantaged group of children in South African society, numbering around 2.6 million.[812]

The *Mahlangu* action, and the other cases discussed in this chapter, make it clear that there is a vital role for the courts – and the judicial enforcement of children's socioeconomic rights adjudication in particular – in challenging child poverty. The courts' institutional role as 'guardians of the constitution', the limited effectiveness of the alternative avenues available to those seeking to eradicate child poverty and the demonstrated success of judicial efforts in this area combine to demonstrate unequivocally that the courts can and should play a key part in addressing child poverty.

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810. For a copy of the applicants' heads of argument, please contact the author.
811. These rights are set out in Sections 27 and 9 respectively.
812. It is estimated that extending the grant to all eligible children under 18 would result in 2.6 million more children receiving the grant than did so at the time the litigation was launched (Hall and Proudlock 2008: 24). Arguments were heard by the High Court in March 2008. However, Judge Moses Mavundla reserved judgment. According to the advocates involved in the litigation: '[i]n the meantime, the Ministers of Finance and Social Development announced an extension of the age threshold from January 2009 to include children up to their fifteenth birthday. There has not yet been a legal commitment to continue extending the eligible age to include all children, despite the ruling party's resolution to do so at its national conference in December 2007, and the Social Development Minister's media briefings in early 2008, which indicated an intention to extend to under 18-year-olds.' (Hall and Proudlock 2008: 24).

11

Alleviating Poverty through Transparency and Rights of Access to Information

James Michael

11.1. INTRODUCTION

Transparency is every poverty campaigner's second issue. Whether it is getting better health care, food for the starving or shelter, the transparency of powerful government and private sector institutions is an important instrument. It is a key issue because transparency itself will not provide health care, food or shelter, but it can be an effective instrument in achieving those objectives.

That is why campaigns for transparency in most countries have been carried out by formal or informal coalitions of groups whose primary purposes are campaigning for other, different, objectives. Sometimes these objectives may conflict, and the campaigners can only agree on one thing: that transparency is important to all of them.

It is perhaps because transparency is an abstraction that it is not often seen as being immediately related to poverty. An enforceable right of access to information is not seen as being as immediately relevant to the alleviation of poverty as programmes providing food, shelter and medical assistance are. But its relevance is increasingly becoming recognized as non-governmental organizations and international bodies begin to connect the cost of corruption and inefficiency in delivering such services with the relative absence of transparency in many countries. In April 2006 freedominfo.org, which reports on and campaigns for 'access to information' laws, reported that 'Although the last decade has seen a steady increase in the number of FOI [freedom of information] laws, the rate of adoption of such laws in the least-developed countries is quite low.' Their survey concluded that out of the thirty-eight poorest countries classified by the World Bank as Highly Indebted Poor Countries (HIPC), none has an FOI law (McIntosh 2006).

It is not surprising that the relation between transparency and poverty is only now being recognized. Transparency itself, in the legal and constitutional sense, is almost entirely a creation of the latter half of the twentieth century. The exception is Sweden, which established its 'publicity principle', or *offentlighetsprincip*, in the constitution of 1766. This provision, although it

did not actually come into effect until 1809, established the basic elements of access to information laws. First, it established a legal right of access to official records without any 'need to know' or other reasons for wanting the documents. Second, it made the right subject to narrowly-drawn exceptions, for example in the interest of protecting against harm to defence, national security or personal privacy. Third, it made the right legally enforceable. Refusals could be appealed, either to the administrative courts or to the *justitieombudsman* (another early Swedish institution).

Those three elements were to be the core common to all of the access to information laws adopted in the twentieth century (see Michael 1982). One of the earliest countries to adopt a freedom of information act in the twentieth century was the United States, which passed a federal statute in 1966. Although there is no evidence that this was done because of any Scandinavian influence, it was preceded by many US state laws, going back to 1901, which established not only enforceable rights of access to public records, but which also required government meetings to be open to the public.

Many other countries also adopted similar legislation, including France, the Netherlands, the United Kingdom, Australia, Canada and New Zealand. There are now at least sixty-four countries that have adopted 'freedom of information' or 'access to administrative documents' laws. Some of these, predictably, are more effective at achieving transparency than others. Obstacles can include a narrow definition of 'document' or 'information', a broad definition of exemptions, lengthy delays and excessive charges, or ineffective methods of appeals. Some of the statutes, such as Zimbabwe's Access to Information and Protection of Privacy Act, are actually the opposite of their titles.

Although access to information is often thought to be as constitutionally important as the related freedom of expression, it is only given constitutional status in a few countries. Sweden was the first, and South Africa the most recent, but in most countries the laws are passed as ordinary legislation. This can be important, as governments unhappy with the results of access to information put into practice may be tempted to legislate to limit its effectiveness.

In the traditional classification of rights as being 'civil and political' or 'economic, social and cultural', 'freedom of information' is erroneously classified as civil because of its links with freedom of expression.[813] However, to use Hohfeld's distinction between 'liberties' (civil and political rights) and 'rights' (economic, social and cultural rights), there is a correlative government duty to 'freedom of information': it requires a government to do something. The government's duty under a system of access to information is to provide the information requested. The government correlative to 'liberties' is simply not to interfere with their exercise. To use the terms of a more common analysis, 'freedom of information' has resource implications. If this seems to be an abstract distinction, it was the

813. As in Article 19(2) of the International Covenant on Civil and Political Rights 1966. See further below.

reason why a committee of legal experts convened by Justice, the British Section of the International Commission of Jurists, to consider whether the United Kingdom should have a Freedom of Information Act, rejected the idea of such a law in 1978. 'Freedom of Information', they explained, was a misleading title for a law that would impose obligations on government.

This classification is arbitrary and in many ways inaccurate. Many of the rights classified as civil and political have huge resource implications. The right to a fair trial, for example, requires courts, judges and lawyers. To take the classical example of free speech, its exercise requires not just an absence of government interference, but often considerable government expense in protecting unpopular speakers. The classification also leads to the conclusion that some rights are more important than others. In any case, 'freedom of information' is not only a duty on government to provide information on request; it also requires that laws imposing penalties for the unauthorized disclosure of information be kept to a minimum.

11.1.1. Government and Private Sector Information

Another aspect of transparency is the relationship between government information and private sector information. Almost all FOI countries have laws that are primarily aimed at disclosure of public sector information rather than direct rights of access to private sector information, even though there is an increasing privatization of basic services in many developing and industrialized states.[814] Only one country (South Africa) expressly provides for a directly enforceable right of access to information held by the private sector if that information is necessary to exercise or protect a right.[815]

But much of the information held by governments is about the private sector, either obtained from companies in the course of regulation or the product of observation and investigation. Because of this, some of the most heavily litigated exemptions from the right of access to public sector information regard information said to be commercially confidential, or the disclosure of which is said to damage commercial interests. There frequently are 'reverse FOI' cases, in which companies go to court in attempts to prevent the government from disclosing requested information that concerns them. Some countries expressly provide a procedure for such cases in their law, while others have developed such procedures in the courts.

814. See Chapter 13 in this volume, Chirwa, 'Privatization and Freedom from Poverty'.
815. Promotion of Access to Information Act, Section 50, 'A requester must be given access to any record of a private body if (a) that record is required for the exercise or protection of any rights'.

11.2. TRANSPARENCY, POVERTY AND INTERNATIONAL LAW

The United Nations Development Programme declares that:

> Effective anti-poverty programmes require accurate information on problems hindering development to be in the public domain. Meaningful debates also need to take place on the policies designed to tackle the problems of poverty. Information can empower poor communities to battle the circumstances in which they find themselves and help balance the unequal power dynamic that exists between people marginalised through poverty and their governments.

In international law, no human rights treaty expressly proclaimed a right of access to information until 2009. However, in 1998 the United Nations Special Rapporteur on Freedom of Opinion and Expression declared that Article 19 of the International Covenant on Civil and Political Rights (ICCPR) imposes 'a positive obligation on states to ensure access to information, particularly with regard to information held by government in all types of storage and retrieval systems.'[816] The Covenant, in Article 19, proclaims the right to 'seek, impart and receive information'. The American Convention on Human Rights uses exactly the same language as the International Covenant, and in 2006 the Inter-American Court of Human Rights ruled, in *Reyes v Chile*,[817] that the refusal of the Chilean Government to disclose information about the environmental effects of a project violated the right under the American Convention. The European Convention on Human Rights does not include the word 'seek' in its Article 10 on the right to receive and impart information. Despite the absence of 'seek', the European Court of Human Rights ruled in 2009 that a refusal by the Hungarian Government to disclose information held by the Constitutional Court violated the right to receive and impart information under the European Convention.[818] This effectively reversed the interpretation of Article 10 by the court in previous cases, in which it had ruled that there was no violation by a government refusal to provide information, and that the article requires a willing provider of information for a violation.[819] The case is notable in that it concerned information held by a court, while the laws in most countries are only concerned with the executive branch of government and do not cover the judiciary.

The European Court of Human Rights may have been influenced, although it is not apparent from the opinion of the court in that case, by the activities of other

816. UN Commission on Human Rights, Right to Freedom of Opinion and Expression, Commission Resolution on Human Rights Resolution 1998/42 Res. E/CN.4/1998/42, para. 2.
817. *Claude-Reyes v Chile*, Inter-American Court of Human Rights (ser. C) No. 151, 19 September 2006.
818. *Hungarian Civil Liberties Union (Tarsasag a Szabadsagjogokert) v Hungary* (Application no. 37374/05), 14 April 2009.
819. *Leander v Sweden* (1987) 9 EHRR 433, *Gaskin v United Kingdom* (1989) 12 EHRR 36, *Guerra v Italy* (1998) 26 EHRR 357.

bodies in the Council of Europe. In 1970 the Parliamentary Assembly (then known as the Consultative Assembly) adopted a resolution urging member states to adopt access to information policies.[820] In 1981 the Council of Europe Committee of Ministers (the foreign ministers of member states) adopted a Recommendation on access to government information.[821] A Council of Europe Convention on Access to Official Documents (CETS No. 206) was opened for signature and ratification on 18 June 2009. As of 10 October 2009 it has been signed by twelve countries, of which one (Norway) has ratified it. The treaty is open to non-Council of Europe states, and will come into effect when there are ten ratifications.[822]

The European Union (EU) has adopted transparency rules for its own institutions, with appeals against refusals to disclose information either to the European Court of Justice or to the EU Ombudsman. This has produced a body of case law which has had the effect of requiring much greater transparency about the process by which interested industries lobby the EU institutions over regulations that affect them. Although it has been discussed, there is not likely to be a Directive of the EU that would require member states to adopt transparency laws. This is in part because the Scandinavian countries are suspicious that such a directive might actually decrease their transparency by establishing less stringent standards.

The EU has adopted a Directive on Disclosure of Environmental Information, which gives effect to the Aarhus Convention on Environmental Information. This has come into force in EU countries and has produced a body of case law alongside that of national access to information laws.

The Commonwealth has pursued a transparency initiative since 1999, when a meeting of experts in London produced a declaration that was adopted by the Commonwealth Law Officers meeting in Trinidad and Tobago in 1999.[823] In September 2005 the Commonwealth Human Rights Initiative described the relevance of access to information to development to a meeting of finance ministers in Barbados, in *Millennium Development Goals (MDGs) and the Right to Information*.

> The right to access information … gives practical meaning to the principles of participatory democracy to which the Commonwealth has been devoted for over thirty years. The Commonwealth has already repeatedly recognized that entrenching the right to information is essential to strengthening democracy and development, most recently at CHOGM [Commonwealth Heads of Government Meeting] 2003… Ensuring access to government information will empower civil society – not only NGOs, but academics, the

820. Res 428 (1970) 21st Ordinary Session (Third Part) 22-30 January 1970.
821. COE Rec No. R (81) 19 on Access to Information Held by Public Authorities (1981) (Adopted by the Committee of Ministers on 25 November 1981 at the 340th meeting of the Ministers' Deputies).
822. http://conventions.coe.int
823. Communiqué issued by the Commonwealth Law Ministers, Trinidad and Tobago, May 1999, para. 21.

> media and other key stakeholders – to access key data on progress towards the MDGs, which can then be used to encourage and assist governments to more effectively target support to priority sectors and constituencies.'
>
> People have a right to know why decisions are being made, on what advice and by whom. Similarly, once projects and loans are approved, the public should be able to access ongoing implementation information. Otherwise there is little scope for independent monitoring of loans and projects to ensure money is being properly utilised. A cost effective mechanism for achieving all of the above is by realising the right to access information. This strengthens development outcomes by gaining stakeholder input and ownership of development activities.

The Commonwealth Freedom of Information Principles, adopted by the Commonwealth Law Ministers in 1999, recognize the right to access information as a human right whose 'benefits include the facilitation of public participation in public affairs, enhancing the accountability of government, providing a powerful aid in the fight against corruption as well as being a key livelihood and development issue.' The Commonwealth Secretariat has drafted a Model Law on Freedom of Information.[824]

11.3. TRANSPARENCY AND POVERTY: CASES

In a *Foreign Policy* article in 2002, Thomas Blanton, Executive Director of the National Security Archive, George Washington University, wrote: 'During the last decade, 26 countries have enacted new legislation giving their citizens access to government information. Why? Because the concept of freedom of information is evolving from a moral indictment of secrecy to a tool for market regulation, more efficient government, and economic and technological growth.'

11.3.1. Thailand

Access to information laws in other countries were used against corruption and favouritism. In Thailand in 1998, a state elementary school told a mother that her daughter had failed the entrance examination. The mother made a request at the school for copies of the test sheets and grades for everyone who took the examination. The school refused, and the mother appealed to the Official Information Commission under the new Thai law. The Commission ruled that she could see only her own daughter's answer sheet, but this was overruled by an

824. Freedom of Information Act, Commonwealth Secretariat Doc. LMM(02)6, Annex, September 2002, and Commonwealth Human Rights Initiative (2008).

appeals tribunal. The school refused to comply, but the Thai Supreme Court upheld the decision of the tribunal. The documents revealed that another child, who came from a prominent family and who had the same score as the daughter, had been admitted to the school. The mother filed a complaint with the state council (which rules on constitutional issues) that the school had violated Article 30 of the Thai Constitution, which bans discrimination on the basis of race, nationality, place of birth, age, and social or economic status. The council upheld the complaint, and ordered the abolition in all state schools of special admissions criteria based on financial contributions, sponsorships, and kinship arrangements. School test scores are now public records (Blanton 2002). Although this case involved only one individual, it resulted in increased educational opportunities for all economically disadvantaged children.

At a conference organized by the Carter Centre in February 2008 in Atlanta, Georgia, USA, Mukelani Dimba argued that access to information is a tool for socioeconomic justice, in a paper for the South African Open Democracy Advice Centre (ODAC).

He argued that when only a few Scandinavian countries and the USA had FOI legislation, there was an understanding of FOI as merely a part of the right of freedom of expression, which was perceived as a right that only affected journalists and political or community activists. The Declaration on Principles of Freedom of Expression by the African Commission on Human and People's Rights in 2002[825] extended FOI to privately held information. The declaration envisaged the use of FOI for broader issues than just the advancement of civil and political rights.

The paper gave examples to show that 'there has been a major paradigmatic shift in the past decade. Freedom of Information or the Right to Know, properly implemented, is now regarded as a multi-dimensional human right that can make a huge difference to both people and their governments.' It argued that freedom of information:

1. is good for public administration because it forces officials to take records management and responsiveness to the public more seriously;
2. helps in the fight against corruption;
3. underpins people's 'right to know' and, thereby, their capacity for holding government to account (without meaningful information, it is hard for citizens to hold government to account);
4. is especially important for development, especially participatory poverty reduction policy-making, where a ready and meaningful conversation between policy-makers and beneficiaries is desirable. With information, people can help ensure that other human rights are realized, especially socioeconomic rights to clean water, adequate housing and health

825. African Commission on Human and Peoples' Rights, meeting at its 32nd Ordinary Session, in Banjul, The Gambia, from 17-23 October 2002. See also in this volume Chapter 13, Chirwa, 'Privatization and Freedom from Poverty', on water rights, and Chapter 5, Cahill and Skogly, 'The Human Right to Adequate Food and to Clean and Sufficient Water'.

care, and can help protect themselves from discrimination and unjust allocations.

11.3.2. Africa

As an example, he described a group of women in KwaZulu-Natal, one of South Africa's poorest provinces. Women in Emkhandlwini realized that other villages were getting water from municipal tankers, while their water came from a dirty river. The Open Democracy Advice Centre helped the villagers to use the Promotion of Access to Information Act to get the minutes of the council meetings where the municipality had decided on water provision, the municipality's Integrated Development Plan (henceforth referred to as IDP) and its budget. When the information was finally provided it showed that there were plans to provide water. The women started asking difficult questions. The villagers' use of the FOI law and their struggle for water were covered in the media. Almost a year after the FOI request was sent to the municipality, fixed water tanks, replenished twice a week, were installed in the village and mobile water tankers delivered water to the community.

In one study, World Bank researchers considered access to information to reduce the corrupt use of funds sent to local schools in Uganda. A paper by Reinikka and Svensson (2003) followed the publication in newspapers of data on local handling of a large school grant programme. The schools had received only about 20 per cent of the money, but once more information about the payments was published in the newspapers on a regular basis, the amounts of aid delivered to intended recipients jumped to 80 per cent. The paper concluded:

> Through a relatively inexpensive policy action – the provision of mass information – Uganda dramatically reduced district-level capture of a public program aimed at increasing primary education. Poor people who were less able than others to claim their entitlement from district officials before the campaign … benefited most. (World Bank Development Research Group 2002)

11.3.3. India

In India, community organizers have used laws and public pressure in the state of Rajasthan against corruption and inefficiency in local government in a campaign since the early 1990s. The *Mazdoor Kisan Shakti Sangathan* (MKSS) organization used the right to information to draw attention to the underpayment of daily wage earners and farmers on government projects and to expose corruption in government spending. MKSS lobbied the government to get information such as muster rolls (employment and payment records) and bills and vouchers relating to purchase and transportation of materials. This information was then crosschecked

at *Jan Sunwais* (public hearings) against the testimony of workers. The public hearings were successful in drawing attention to corruption and exposing leakages in the system. They were particularly significant because of their use of hard documentary evidence to support the claims of villagers.

The *Jan Sunwais* attracted attention on the importance of the right to information, and the difficulties in getting access to information led to a campaign for a general right to information law in Rajasthan. In April 1995 the Chief Minister of Rajasthan announced in the Assembly that his government would be the first in India to provide access to information on all local developmental works. When no action was taken the MKSS started an indefinite *Dharna* (protest demonstration), demanding that the state government pass executive orders to provide a limited right to information in relation to local development spending. The government responded by issuing orders to inspect relevant documents on payment of fees, but the orders did not allow taking photocopies of documents.

When the *Dharna* was extended to the state capital in May 1996, the government responded by announcing the establishment of a committee to investigate a right to information, and MKSS called off the *Dharna*. When the government took no further action, in May 1997 another series of *Dharnas* began. The government then announced that it had already provided a right to receive photocopies on local government functions six months earlier.

During state elections in 1998 the opposition party promised in its election manifesto to enact a law on right to information if it came to power. Following their election, the party appointed a committee to draft a bill on the right to information, and members of MKSS and the National Campaign for People's Right to Information were invited to assist in drafting the bill. After consultations, a draft Right to Information Bill was prepared, which was then submitted to the Committee.

The Rajasthan Right to Information Act 2000 was passed on 11 May 2000 and came into force on 26 January 2001. Critics say that the law is stronger than laws in some other states, such as Tamil Nadu, but weaker than laws in Goa, Karnataka and Delhi.

The Indian Government has a food subsidy scheme under which food rations are distributed through shopkeepers called ration-dealers. A person presents a ration card to the local ration-dealer to collect food, and the dealer claims payment from the government for the food distributed. Some ration dealers were abusing the scheme by telling people that the dealers had run out of food subsidy stock, and offering to sell food from the dealer's ordinary stock. In the records of the ration-dealer such sales are recorded as distributions under the food subsidy scheme and money was claimed from the government. Such ration-dealers got paid twice.

This was exposed in Rajasthani villages when the villagers used the state's FOI law to access the claim documents the ration-dealers had sent to the government. Discrepancies were discovered when a claim document described food items given to a villager on a specific date, when the villager's ration card had no entry for that date.

In May 2005 the Indian national Right to Information Act 2005 (henceforth referred to as RTI) was passed by Parliament. The RTI Act 2005 received presidential assent on 15 June and came fully into force on 12 October 2005. The RTI Act 2005 covers all central, state and local government bodies and will apply to public authorities in Rajasthan. The government also issued the Rajasthan Right to Information Rules in 2005.[826]

There are other examples of the use of FOI laws in India documented by the *Parivartan* group.[827] For example, a village group found that fourteen hand pumps had been purchased for the cost of twenty-nine. A doctor used government information to demonstrate that the government paid more than three times the amount necessary for first-aid kits for schools, and that the kits were substandard. A video about the use of access to information laws by poverty campaigners in India has been produced by UNESCO.[828]

11.3.4. Mexico

In Mexico the Federal Access to Information Law has been used to affect policies in local communities and to expose corruption. Transparency advocates have used two features of Mexico's access-to-information law. The electronic system for sending information requests to federal agencies, Infomex, also allows citizens to review all public requests and responses to these requests. The Federal Access to Information Institute (IFAI) acts as an information ombudsman's office, reviewing appeals for information. Over 300,000 requests have been made since the law was implemented in 2004.

In 2006, *Maderas del Pueblo del Sureste*, a non-governmental environmental organization supporting indigenous people and rural communities in Chiapas, filed access to information requests using the federal transparency law, seeking information about a sewage project in Cintalapa, a community located inside the natural reserve of Montes Azules. The sewage system affected Lacanja Tseltal, which was receiving waste from a neighbouring town and had no access to clean water. Information released in response to these requests showed that the water treatment system was not properly designed and needed a filter system that had not been installed. Chlorine had to be poured manually into the water that flowed back into the river. As a result, the Cintalapa sewage project was halted, and authorities publicly acknowledged that changes had to be made to ensure water was properly treated before it reached the people of Lacantun.

826. http://www.humanrightsinitiative.org/programs/ai/rti/india/states/rajasthan/rajasthan_rti_rules_2005.pdf
827. http://www.parivartan.com/success_stories.asp
828. http://www.unesco-ci.org/cgi-bin/media/page.cgi?g=Detailed%2F124.html;d=1

11.4. INTERNATIONAL INITIATIVES

Apart from developments in international law, through litigation at the Inter-American and European Courts of Human Rights, and by legislation, as in the Council of Europe Convention on Access to Official Documents, there have been transparency initiatives at the international level, both through non-governmental organizations, such as Transparency International, the Global Transparency Initiative, and the Justice Initiative on Freedom of Information and Expression, and international financial organizations such as the World Bank and the International Monetary Fund.

11.4.1. Transparency International

Transparency International, founded in Germany in 1993, is an international non-governmental organization, best known for its annual Corruption Perceptions Index – a comparative listing of corruption worldwide. It is organized as a group of 100 national chapters, with an international secretariat in Berlin. Transparency International says: 'Transparency International is the global civil society organisation leading the fight against corruption. It brings people together in a powerful worldwide coalition to end the devastating impact of corruption on men, women and children around the world. Transparency International's mission is to create change towards a world free of corruption.'[829]

Transparency International does not undertake investigations on single cases of corruption, but develops tools for fighting corruption and works with other civil society organizations, companies and governments to implement them. Their biggest success has been to put the topic of corruption on the world's agenda. International institutions such as the World Bank and the International Monetary Fund now view corruption as one of the main obstacles for development. They played a role in the introduction of the United Nations Convention against Corruption in 2003 and the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.[830] The Corruption Perceptions Index, besides the World Bank corruption index, is the most commonly used measure for corruption in countries worldwide. To form this index, Transparency International compiles surveys that ask business people and analysts, both in and outside the countries being analyzed, for their perceptions of how corrupt a country is. Relying on the number of actual corruption cases would not work, it says, because laws and enforcement of laws differ significantly from country to country.

Transparency International does resort to publications about transparency and development in particular countries. Transparency International published

829. http://www.transparency.org/about_us
830. www.oecd.org/daf/nocorruption/convention

a report in 2008 on the 3.25 billion dollar Joint Needs Assessment (JNA) for the state of Georgia. The original report was compiled by a joint assessment mission of the World Bank, the European Commission and the United Nations that visited Georgia during two weeks in September 2008. The JNA examined the impact of the August 2008 war, assessed resulting needs, and presented a plan for recovery priced at 3.25 billion dollars. It formed the basis for the international donor conference on Georgia held in Brussels on 22 October 2008, at which donors pledged 4.55 billion dollars in support. Only an abridged and edited version of the JNA was made public, and TI published its own report based on the full version, 'which TI Georgia has obtained through unofficial channels'.

The Transparency International report commented under the heading 'transparency' that the Paris Declaration[831] called on donors to make aid more transparent.

> In contrast, the monitoring and evaluation system proposed in the JNA focuses almost exclusively on interactions between donor agencies and the Georgian government…There is no suggestion that these [aid] meetings will be open to members of the opposition, civic groups or the media, or that the Georgian government will be compelled to report on aid implementation to parliament or to the wider public. Monitoring and evaluation done behind closed doors by parties with vested interests in issuing positive findings seems unlikely to ensure that aid is transparently or effectively used. Alternative reviews by parliament, the political opposition or Georgian civic groups and think tanks are not considered in the JNA. The JNA does not contain any freedom of information provisions compelling donors, governmental bodies, private contractors or non-governmental grant recipients to open their books to public scrutiny.

11.4.2. The Open Society Justice Initiative on Freedom of Information and Expression

This initiative, part of the international Soros Open Society network, is concerned with both the public right of access to information held by public authorities, and freedom of expression and the right to impart and receive information and ideas. The initiative supports the adoption, implementation, and improvement of freedom of information laws, and uses those laws to gain the release of information about corruption and government contracts and programmes. The initiative is 'working to create a legal environment that blocks the theft of public assets, bribery, and money laundering in countries with abundant natural resources'.

831. The Paris Declaration on Aid Effectiveness, stating that aid should be 'predictable, harmonized, aligned with national priorities and use the country's own institutions and systems', was adopted in 2005 by representatives of the United States, Canada, major European donor countries, and multilateral agencies including the World Bank and IMF.

In 2006 the initiative published *Transparency and Silence: a Survey of Access to Information Laws and Practices in 14 Countries* (OSI 2006). The comparative study on access to information in fourteen countries found that transitional democracies outperformed established ones in providing information about government activities. Bulgaria, Romania, Armenia, Mexico, and Peru did better in answering citizens' requests for information than France and Spain. The book analysed over 1,900 requests for information filed in fourteen countries, and found that countries with access to information laws performed better than those with no law or with administrative provisions instead of a law.[832]

11.4.3. Global Transparency Initiative

The Global Transparency Initiative (GTI) is an international coalition of ten organizations, funded by the Ford Foundation and Oxfam-Novib. It promotes transparency in International Financial Institutions (IFIs), such as the World Bank, the International Monetary Fund, the European Investment Bank and Regional Development Banks. It believes that 'transparency can help reduce corruption; identify potential social, environmental and economic risks and benefits; and avoid damaging communities and sensitive ecosystems. …GTI aims to strengthen IFIs' accountability to the public interest and to expand political space to debate development models.'[833]

The GTI brings together two communities of activists and experts from around the world – one, those groups campaigning for full accountability in the use of public power vested in the IFIs; the other, groups that have been campaigning for the right to access to information at the nation-state level. Projects led by the GTI and its member organizations include:

- drafting a transparency charter setting out the standards and norms to govern IFI disclosure policy;
- developing a comprehensive IFI transparency resource comparing transparency standards of ten IFIs;
- case studies and transparency audits;
- comparative legal studies looking at specific exceptions to transparency;
- co-ordinated requests for information from IFIs using domestic freedom of information legislation;
- advocacy around ongoing IFI disclosure policy reviews;
- providing grants to individuals and organizations to contribute to such projects.

832. See the Open Society Justice Initiative website at www.justiceinitiative.org
833. See further www.ifitransparency.org/

11.4.4. freedominfo.org

freedominfo.org – its name is its website – is a one-stop portal that 'describes best practices, consolidates lessons learned, explains campaign strategies and tactics, and links the efforts of freedom of information advocates around the world. It contains crucial information on freedom of information laws and how they were drafted and implemented, including how various provisions have worked in practice.'[834]

An example of their work is a paper by Toby McIntosh (2006) that discussed the relationship between access to information and development. He considered FOI legislation as a condition of aid, and noted that pressure on international financial institutions to emphasize adoption of FOI laws has been limited. Some development campaigners were more concerned about transparency at international financial institutions themselves, arguing that more transparency there would help people in recipient countries. Some transparency groups support the idea of financial institutions putting pressure on countries to adopt FOI laws, but others are reluctant, seeing 'conditionality' as too much like other social and economic conditions that have failed. However, Toby Mendel (quoted in McIntosh 2006), at the human rights organization Article 19, pointed out that 'It's one thing for the [World] Bank to aim conditionality at social spending, which has often hurt the poorest of the poor, and quite another for it to use its leverage to pressure countries to respect basic human rights, including the right to know.' FOI supporters say that a law on the books at least is a start, and that weak administration is a problem in most countries with FOI laws. David Banisar of Privacy International has said, 'in a lot of places, it's really just a ticking of a box and no serious implementation is then done. There does need to be a civil society there that wants to use it and force the government to implement it. Where there is not, it can just sit there dead. But that is the experience in countries like France also.' (quoted in McIntosh 2006)

11.4.5. World Bank Initiatives

When he was President of the World Bank, Paul Wolfowitz said at an awards ceremony for journalists in Washington, DC on 9 November 2005, 'In the World Bank, people have begun to realize that you can't really talk about development without talking about accountability and transparency.' He said that World Bank research 'shows that freedom of the press is associated with better control of corruption, and where civil liberties are better safeguarded, the effectiveness of World Bank funded projects is higher'.

In 2003, the World Bank launched a worldwide effort to enhance dissemination of information and promote dialogue, discussion and feedback. The Bank

834. www.freedominfo.org

runs public information services in nearly 100 countries and offers direct access to information in more than 230 information centres, often run in partnership with local institutions and development partners as well as through various websites in Arabic, French, Mandarin, Spanish, Russian, and other languages.

To support this effort, the Public Information Services unit was created to co-ordinate and promote proactive and transparent information disclosure programmes and practices in countries where the Bank operates. The basic premise of the unit is to provide strategic leadership and guidance to public information service professionals and in-country staff. Specifically, the unit is responsible for:

1. providing guidelines and advice to countries to ensure the widest access to information;
2. training to ensure public information staff maintain a high level of proficiency and knowledge related to transparency and disclosure as well as the operations of the Bank;
3. maintaining and monitoring the release of disclosed documents to the public;
4. *ensuring public access to all public documents* [emphasis added].

11.4.6. Examples of FOI Conditionality

FOI-related conditions have been encouraged by the World Bank in Bolivia, Honduras, Ghana, and Nicaragua. The Honduran Government, as part of its 2004 Poverty Reduction Support Credit Program, was 'planning to submit in 2005 a new law to Congress on the disclosure of public information … by providing citizens with the right to information.' According to a World Bank document on the Honduran Poverty Reduction Strategy Program, a consultant was contracted to draft a law on disclosure of public information. On 8 November 2004 a World Bank Development Policy Review reported on 'important advances', including the drafting of a law on public access to information. But adoption of an FOI law in Honduras never became an official condition of lending, and Honduras did not adopt an FOI law. A pro-FOI coalition, Allianza 72, was formed.

In Nicaragua, a 2003 World Bank technical assistance project included a component to 'improve technical assistance, equipment and training to build up the administration's capacity to co-ordinate its own information flows.' A World Bank document further stated that one part of this effort would be 'promoting open access to information'.

In Ghana the 2003 Poverty Reduction Strategy, developed by the Ghanaian Government to fulfil a World Bank/International Monetary Fund planning requirement, established a goal of adopting a FOI law by 2004. The strategy stated that 'Access to government information is inhibited by entrenched attitudes and exacerbated by official secrets legislation dating back to the colonial era…. The

need for a Freedom of Information law is paramount' (World Bank 2008: 122). Adoption, however, was not achieved. An open letter to Ghana's president from supporters of an FOI law, of 11 October 2005, said, 'Sadly, but perhaps due to a desire by some members to perpetuate a culture of secrecy for self interest, the bill has developed cold feet.' [835] A FOI bill was resubmitted to the Cabinet in 2005.

11.4.7. Other Transparency-Related Activities

The International Monetary Fund has a code of fiscal transparency concerning disclosure of economic data. The Publish-What-You-Pay campaign persuaded the G-8 group of countries and the World Bank to require countries to disclose revenues from extractive industries. On 27 February 2006 the World Bank imposed oil revenue accounting requirements on the Republic of Congo as a condition for it to obtain debt relief.

A 2003 paper by World Bank researcher Roumeen Islam was entitled *Do More Transparent Governments Govern Better?* (Roumeen 2003). She noted that high levels of transparency are 'strongly correlated' with good governance, even after taking into account relative wealth. 'More transparent governments govern better for a wide number of governance indicators such as government effectiveness, regulatory burden, corruption … voice and accountability, the rule of law, bureaucratic efficiency, contract repudiation, expropriation risk and a composite ICRG [good governance] indicator.' She concluded that 'there is a close relationship between better information and how fast economies grow.

In co-operation with the Carter Center, the World Bank conducted video conferences on FOI in Bolivia, the Dominican Republic, Honduras, Nicaragua, and Guatemala.[836] In April 2006 there was a training programme for government information officers in Bangladesh.[837]

The World Bank Institute published a report in 2005, entitled *Parliament and Access to Information: Working for Transparent Governance*, by Toby Mendel, of Article 19.[838] The World Bank conducted a study on Social Accountability in Mongolia, which called for the adoption of FOI legislation.

In an internal article in 2003, a World Bank official who trained journalists in the extensive use of FOI laws by business, Roderick Macdonell, wrote that 'a case can be made that the heightened transparency that leads to better prices for government procurement, translates into better value for taxpayers' money' (World Bank 2003).

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835. http://www.ghanaleadership.com/democracy.htm
836. World Bank, Regional Dialogue on Access to Information, Transparency and Good Governance in Bolivia, Honduras, and Nicaragua: Description.
837. Course Description: Media, Information and Governance in Bangladesh 1, World Bank, 2006. World Bank, Regional Dialogue on Access to Information, Transparency and Good Governance in Bolivia, Honduras, and Nicaragua: Description.
838. http://freedominfo.org/features/20060322.htm-5#5

In a 2004 paper entitled *Combating Corruption: Look Before You Leap*, Shah and Schacter wrote 'The more influence donors can exert on strengthening citizens' right to know and on governments to release timely, complete, and accurate information about government operations, the better the prospects for reducing corruption.' An October 2004 internal World Bank publication[839] said there was a 'growing consensus that the right to information is a crucial element of democratic, accountable, responsive government'. The article described drafting and implementing FOI laws. It concluded that, 'Most recent laws have been driven by civil society advocacy, international pressure, and official commitment to openness. Once a public campaign begins, it is difficult for even undemocratic governments to resist passing such laws – showing the power of the idea.'

In September 2005 a World Bank paper, *Transparenting Transparency* (Bellver and Kaufmann 2005, quoted in McIntosh 2006), concluded that 'Despite their potential to promote accountability of public institutions and improve government efficiency in the provision of public services, transparency reforms have been insufficiently appreciated and integrated into institutional reform programs.' The authors, Bellver and Kaufmann, Director of World Bank Institute Global Programs, considered an aggregate index of transparency in 194 counties based on more than twenty independent sources. They commented that transparency 'appears to be significant in reducing corruption,' but added that it was necessary for there to be demand for information and pressure for transparency. They included FOI adoption as a small part of their index, which was divided into economic/institutional transparency and political transparency, but cautioned about the complications and limitations of such an index.

According to the authors, 'transparency is not a question of resources', and donors can help in places where commitment to transparency is manifest. They reviewed a number of pro-transparency experiences, including a study on the positive effects of financial disclosure by public officials in Chile.

11.5. ACHIEVING TRANSPARENCY

The World Bank comment that 'Once a public campaign begins, it is difficult for even undemocratic governments to resist passing such laws – showing the power of the idea' is optimistic. Secrecy is a reflex of power, and few organizations wielding power, whether in the public or private sector, are eager to give up control over information about how it is exercised. In the United Kingdom, to take just one example, the notion of an access to information law along Swedish or US lines, was first suggested modestly by an academic lawyer to the Franks Committee in section 2 of the Official Secrets Act 1911 in 1972. The Committee rejected the idea as being beyond their brief, which was to consider possible modification of

839. 'PREMnotes' (no. 93).

a law, which imposed criminal penalties for any unauthorized disclosure of any government information.[840] A private member's bill to introduce a freedom of information act was introduced in 1978, and failed when the government fell in 1979. A Freedom of Information Act was finally passed in 2000, and went into effect on 1 January 2005.

So a period of twenty to thirty years in campaigning for an access to information law is possible, although perhaps less likely now. Many of the more recent laws have been passed after much shorter periods of campaigning.

As noted in the introduction, campaigns for freedom of information laws almost always involve coalitions of interest groups, some of which may have nothing in common except for supporting transparency. Classically, campaigns have involved academics and journalists, consumer and environmental groups. Now that the connection between transparency and poverty is becoming more widely recognized, such coalitions are widening to include anti-poverty campaigners.

The goals of such groups are often two-track: campaigning for an omnibus access to information law, covering all institutions of government and sometimes private sector bodies, while also pressing for sectoral laws giving rights of access to certain classes of information when opportunities for such legislation arise.

The tactics involve lobbying government, and also persuading opposition parties to promise such legislation if elected. This can also involve international co-operation, both in litigation before international courts, as in the Inter-American and European Courts of Human Rights,[841] and in 'legislation' such as the Council of Europe Convention on Access to Official Documents 2009.[842] A tactic now often used is to obtain information under the access laws of another country, which is still kept secret in the campaigners' country. A related tactic in federal systems is to use the access laws of one state or province to persuade authorities to adopt similar legislation at the federal level, as in India. A Freedom of Information Act is only, however, an intermediate goal. Transparency is an instrument for achieving other ends, and an access to information law itself is only an instrument that can be useful in achieving a degree of transparency. An access to information law, even one that seems fairly effective on paper, is only as effective as it is used by civil society. Lawyers and civil society involved in protecting and incorporating socioeconomic rights need to make greater use of existing transparency provisions. Campaigns for greater transparency are equally important as substantive socioeconomic rights in combating poverty.

840. Departmental Committee on Section 2 of the Official Secrets Act 1911, Chairman Lord Franks, HMSO 1972 (Cmnd. 6104).
841. See above
842. See above.

12

The Role of Access to Justice in Alleviating Poverty

Iain Byrne

> Access to justice is … a crucial concept. It is essential for a dignified and civilised existence. It is a very basic and fundamental right, because in the absence of it, the enjoyment of other rights … becomes illusory … Such is a prerequisite of civilized governance and an important State obligation. The State and its organs and the judiciary cannot avoid it. (Justice Sheikh Riaz Ahmed) [843]

12.1. INTRODUCTION

It has been estimated that 4 billion people (or two-thirds of the world's population) live outside the rule of law (Commission on Legal Empowerment of the Poor 2008: 75). Many live in a permanent state of illegality in relation to the land they live on and/or the economic activity they undertake.[844] This reinforces the disconnection between the poor and the legal system.

Access is justice, and is crucial in helping to alleviate poverty. Yet it can only do so effectively if, as a concept, it is properly understood. This chapter begins by offering an expansive definition of access to justice that goes beyond formal legal protection to embrace legal empowerment and the ability to hold those in power to account. After describing how the concept has been guaranteed at national, regional and international level, the chapter goes on to examine the main challenges the poor face in trying to secure justice and then some of the innovative procedures – both formal and informal – that have been introduced to assist them. Finally, the chapter provides some examples of notable legal successes whilst also

843. Concluding remarks of Honourable Mr Justice Sheikh Riaz Ahmed, Chief Justice of Pakistan Judicial Exchange on Access to Justice, New Delhi, 1-3 November 2002 at http://www.humanrightsinitiative.org/jc/papers/jc_2002/judges_papers/sheikh_riaz_ahmed.pdf

844. It is estimated that up to 70 per cent of housing in the developing world is built illegally. See Leckie (2001: 156).

placing litigation in the context of the broader struggle for economic and social justice.

12.2. DEFINING ACCESS TO JUSTICE – GOING BEYOND FORMAL LEGAL PROTECTION

'Justice does not take place in a social or political vacuum. It is deeply affected by the difficulties of daily survival, seeing that desperation strategies may be adopted by people who have run out of legal options. (Poverty and food security create the environment for social conflict and crime.)' (Scharf et al. 2002: Executive Summary)

Traditionally, access to justice initiatives focused on the formal legal structures of the courts through the provision of legal aid and the reform of institutions. However, there has been an increasing realization that access to justice must also embrace fair laws, procedures and affordable, implementable and appropriate remedies (Scharf et al. 2002: Executive Summary). In addition, particularly for those living in marginalized communities, it must also support informal procedures for adjudicating disputes.

Yet even this approach risks putting too much focus on improving procedural access at the expense of delivering wider substantive justice. The result is frequently too much of a top-down focus on law, lawyers and state institutions rather than the poor themselves and the role of civil society (Golub 2003: 1).

During the last decade the notion of legal empowerment has gained increasing currency, culminating in the recent work of the United Nations Development Programme (UNDP) sponsored Commission on Legal Empowerment (see further below). Legal empowerment goes beyond merely ensuring formal compliance with rule of law. Instead, lawyers support the poor as partners; the disadvantaged play a role in setting priorities that are frequently addressed through non-judicial strategies transcending narrow notions of legal systems, justice sectors and institution-building. In so doing law is placed in context with respect to other development activities to empower the poor (Commission on Legal Empowerment of the Poor 2006: 12).[845]

Such an approach is also consistent with the emphasis placed by the UN Economic, Social and Cultural Rights Committee on popular participation in relation to securing the full enjoyment of economic, social and cultural rights.

One of the underlying purposes of access to justice has always been to assist the poor to better enforce their legal rights. At the same time, as Anderson (2003: 2-5) points out, a lawless society breeds poverty, reinforces unbridled power and hinders economic and social development. An inability to use the law to hold corrupt officials or businesses to account usually has a disproportionate impact on the poor in terms of their ability to access goods and services.

845. See also Norwegian Ministry of Foreign Affairs (2007).

If the legal empowerment approach is adopted, the importance of access to justice in addressing poverty, as a driver of social change and ultimately as a critical factor in helping everyone to enjoy the full range of economic, social and cultural rights, becomes even more apparent. Yet true legal empowerment threatens vested interests. Hence, states are under positive obligations not to place barriers in the way of the poor, but also to take appropriate measures to redress this power imbalance:

> States not only have a negative obligation not to obstruct access to those remedies but, in particular, a positive duty to organize their institutional apparatus so that all individuals can access those remedies.[846]

In order to be truly effective, access to justice must have both a preventive and a remedial role. In other words, where policies are developed within a human rights framework based on genuine participation from all sections of society, including the poor and marginalized, it is more likely that any corresponding laws will protect and fulfil human rights and therefore reduce the need to have recourse to the courts.

12.3. GUARANTEEING ACCESS TO JUSTICE UNDER THE LAW

12.3.1. National Level

At the national level, most constitutions contain some form of access to justice guarantee, either explicitly framed justice[847] or as equality to all before the law, often including a right to legal representation or assistance. Such constitutional guarantees are frequently buttressed by legislation outlining the provision of legal aid and other procedures.[848]

At the same time many constitutions, particularly in the developing world, also contain a number of economic, social and cultural rights. The irony is that those countries that often have the most comprehensive set of economic and social constitutional guarantees rank very low in actually securing those rights for their people (Gargarella 2008).

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846. *Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System* (2007) OEA/Ser.L/V/II.129 para. 1. Available at: http://www.unhcr.org/refworld/docid/477e3d062.html
847. For example see Article 37 Constitution of Ethiopia on Right of Access to Justice and Article 34, South African Constitution on Access to Courts.
848. For example, the constitutional right to legal aid guaranteed under s 35(3)(g) of the South African Constitution is given statutory recognition and elaboration by the Legal Aid Amendment Act 1996.

A further challenge is that economic, social and cultural rights might not always be elaborated as fundamental rights but as Directive Principles of State Policy,[849] making it difficult in theory for the courts to strike down unjust laws. However, through judicial activism, as in the case of India and other jurisdictions (see further below), the traditional divide can be overcome.

12.3.2. International and Regional Framework

International

The international and regional framework reinforces access to justice both in terms of the specific guarantees underpinning it and the availability of supranational mechanisms once domestic remedies have been exhausted. The most significant provisions in relation to remedies and fair trial are, respectively, Articles 8[850] and 10 of the Universal Declaration of Human Rights and Articles 2(3)(b)[851] and 14 of the International Covenant on Civil and Political Rights.

Although the International Covenant on Economic, Social and Cultural Rights does not contain specific access to justice provision, General Comment 9 of the UN Committee on Economic, Social and Cultural Rights states that there is a duty on all state parties to give effect to Covenant in the domestic legal order[852] and this has been reinforced by the Committee's jurisprudence.[853]

The commitment to access to justice for economic, social and cultural rights at the international level has been further underlined by the recent development of dedicated international complaints mechanisms. In addition to the recently established Optional Protocol to the Convention on the Elimination of All Forms

849. DPSP are not enforceable by courts but are to be used by the central and local governments when framing laws and policies. See also Chapter 1, Van Bueren, Fulfilling Law's Duty to the Poor; Chapter 4, Bedggood and Frey, A Human Rights-Based Response to Poverty; Chapter 10, Nolan, Rising to the Challenge of Child Poverty: the Role of the Courts.

850. Article 8 provides: '[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' Note that the remedy must be effective and that it applies to all constitutional and statutory fundamental rights – therefore both economic, social and cultural rights and civil and political rights.

851. Article 2(3)(b) provides: 'Each State Party to the present Covenant undertakes to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.'

852. Para 2 of GC9 provides that: '[T]he Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.'

853. For example, see the 1998 Concluding Observation on the UK (CESCR/E/1998/22) para. 293: 'The Committee also finds disturbing the position of the State party that provisions of the Covenant, with certain minor exceptions, constitute principles and programme objectives rather than legal obligations, and that consequently the provisions of the Covenant cannot be given legislative effect.'

of Discrimination Against Women, which allows women to bring complaints on issues such as discriminatory lack of access to property inheritance, education or health care, there will soon be a similar complaints mechanism under the International Covenant on Economic, Social and Cultural Rights following its adoption by the General Assembly on the sixtieth anniversary of the Universal Declaration of Human Rights.[854] This will not only have the potential to further clarify the Covenant's standards but will have huge symbolic importance in reinforcing that economic, social and cultural rights victims (both individuals and groups) can obtain redress for violations.[855]

There have also been specific declarations elaborating the link between access to justice and poverty. The most significant of these are paragraphs 17[856] and 39-41[857] of the draft guiding principles on *Extreme Poverty and Human Rights: The Rights of the Poor* adopted by the UN Sub-Commission on the Promotion and Protection of Human Rights in August 2006, almost twenty years after it was first proposed. These emphasize that '[a]ll who live in extreme poverty have the same right of access to justice as other citizens' and should not be subject to any discrimination in that respect. However, the focus is very much on judges making proceedings accessible, pro-poor judicial training and public awareness[858] as compared to supporting informal mechanisms. There is no mention of legal empowerment.

Regional

Each of the three main regional human rights protection systems has addressed access to justice. At the same time they have each, to a greater or lesser extent,

854. Text at http://www2.ohchr.org/english/law/docs/A.RES.63.117_en.pdf. Adopted by the United Nations General Assembly on 10 December 2008, the OP will be open for signature in 2009 requiring 10 ratifications before it becomes operative.

855. However, note the requirement in Article 4 for 'clear disadvantage' unless the Committee considers the matter to raise a serious issue of general importance.

856. Para. 17 provides: 'Persons living in extreme poverty must enjoy the same rights as other persons and have access to justice free of discrimination.'

857. Paras 39-41 provide: '39. All who live in extreme poverty have the same right of access to justice as other citizens. The State and the judicial system must take care to uphold equality before the law and ensure the administration of justice without discriminating on grounds of physical appearance, residence or any other consideration stemming from extreme poverty. 40. The State and judicial administration must provide free, high-quality legal assistance for the protection of people living in extreme poverty. Judges must explain charges and proceedings in a clear, comprehensible manner and, when dealing with individuals who do not speak the language officially used in a particular court, must call in specialist translators and interpreters free of charge. 41. The State should set up educational and public-information programmes to help the poor learn about their rights and the legal and judicial proceedings which they are entitled to bring. The State and judiciary should also set up training programmes for judges, defence counsel and judiciary officials with a view to ensuring that the justice system works for the poor.'

858. Global consultations carried out in five countries in 2007 on the Draft Guidelines found that in relation to access to justice that dissemination of information needed to be improved.

adjudicated some economic, social and cultural rights claims, some notable examples of which are featured in the final section of this chapter.

Article 7(1)[859] of the African Charter on Human and Peoples' Rights has been given further meaning by the African Commission's fair trial and legal assistance guidelines,[860] including specific reference to a right to an effective remedy.

However, in terms of practical measures to expand legal assistance to the millions of poor Africans, one of the most significant instruments is the November 2004 *Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* agreed by a meeting of lawyers, NGOs and service providers in Malawi.[861] The declaration, which has no formal binding legal status but provides strong moral force and guidance for both state and non-state actors, recognizes in its preamble that the vast majority of people affected by the criminal justice system are poor and have no resources to protect their rights, calls for an expansion of the very limited availability of legal aid during all stages of the criminal process and diversification of legal aid delivery systems and providers, encourages legal literacy and highlights the need to provide redress for human rights violations.

Articles 8 and 25[862] of the American Convention on Human Rights guarantee the right to a fair hearing and judicial protection and remedy respectively. However, in line with the progressive and frequently innovative approach that the Convention's organs have adopted in relation to securing justice for victims (see Laplante 2008: 347-388), the Inter American Commission, in collaboration with UC Berkley Law School, has established its own access to justice project culminating in 2007 with the publication of *Access to Justice as a Guarantee of Economic, Social and Cultural Rights. A Review of the Standards Adopted by the Inter-American System.*[863] In so doing, the commission emphasized the positive obligations that states are under to ensure effective access to justice, including overcoming structural inequalities that militate against legal empowerment of the poor. Another significant point highlighted by the report is the need for effective due process in not just judicial proceedings but also administrative hearings in relation to economic and social rights, since the latter account for the vast majority of cases in this field.

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859. Article 7(1) provides: 'Every individual shall have the right to have his cause heard'.
860. See http://www.achpr.org/english/_doc_target/documentation.html?../declarations/Guidelines_Trial_en.html
861. For more information on the Lilongwe Declaration and the context that led to its drafting, see Access to Justice in Africa and Beyond: Making the Rule of Law a Reality (PRI 2007) at http://www.penalreform.org/resources/rep-2007-access-africa-and-beyond-en.pdf
862. Article 25 provides: '1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: 1. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; 2. to develop the possibilities of judicial remedy; and 3. to ensure that the competent authorities shall enforce such remedies when granted.'
863. Available at http://democraciaparticipativa.net/documentos/Access%20to%20Justice%20as%20a%20guarantee%20of.pdf

The right to a fair hearing (Article 6) and to an effective remedy (Article 13) are well established under the European Convention on Human Rights. Yet, like its American counterpart (with a couple of notable exceptions – education and property), it is largely a civil and political rights instrument. This has not prevented the European Court of Human Rights from applying due process rights to social rights disputes.[864] Yet it remains difficult for individuals to assert their economic and social rights at the regional level.[865] Moreover, the huge caseload of the European Court means that victims are finding it increasingly difficult to use the mechanism to secure redress.[866]

Despite these inherent weaknesses in its own institutions, the Council of Europe, recognizing that in many of the relatively new member states there is no effective access to justice for millions of citizens, has made the issue a priority. In addition to numerous resolutions on the issue, the council has agreed an action plan[867] on legal assistance systems focusing on practical measures and the provision of information on legal aid on websites.

12.4. BARRIERS TO ACCESSING AND SECURING JUSTICE

> 'The more vulnerable you are, the less likely you are to get access to justice. Children have no voice so nobody cares' (Hina Jilani)[868]

> 'The poor rarely appear in court except as defendants in criminal prosecutions.' (Anderson 2003)

The barriers to effective access to justice – both structural and institutional, internal to the legal institutions themselves and external – are significant and numerous. Indeed, as Anderson (2003) explains, there are obstacles in the way of the aggrieved victim at each stage of the litigation process from the initial grievance to enforcement.[869]

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864. For example *Deumeland v Germany* (1986) 8 EHRR 425 and *Feldbrugge v Netherlands* (1986) 8 EHRR 425 developed further in *Salesi v Italy* (1993) 26 EHRR 187 and *Schuler-Zgraggen v Switzerland* (1995) 21 EHRR 404.
865. The only option being the decade old collective complaints mechanism under the European Social Charter which, as its name suggests, does not address individual complaints but cases of alleged systematic abuses brought by NGOs, trade unions or employers federations. See Van Bueren (2002) on the challenges of bringing cases under the ECHR for socioeconomic rights.
866. Large numbers of cases are routinely declared inadmissible by the Court as being 'manifestly ill founded' without any reasons being given.
867. See http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Access_to_justice_and_legal_aid/
868. Pakistani human rights lawyer and former UN Special Rapporteur on Human Rights Defenders on BBC World Service, *Call that Justice* at http://www.bbc.co.uk/worldservice/specials/1156_wag_gen_next/page4.shtml
869. Anderson (2003: 17) constructs the following schema: grievance-naming-blaming-claiming-winning and enforcing.

For the poor, and in particular the vulnerable and marginalized – women, children, ethnic, religious and other minorities, those living in rural areas, indigenous people, non-citizens and asylum seekers – the problems are greatly exacerbated. Unsurprisingly, surveys have consistently found that poor and vulnerable communities are less likely to take action to address legal problems when they arise (for example, Asia Foundation 2001: 61). Conversely, the majority of litigation tends to reflect the dominant economic interests, e.g. in the case of India, these have traditionally been agrarian landholders, the urban salaried middle class and industrialists (Sudarshan in Anderson 2003: 9).

Many groups are themselves frequently targeted by directly and indirectly discriminatory laws that breach their right to equality before the law. Women are particularly badly affected. According to UN Habitat, about 25 per cent of developing countries have laws that prevent or restrict women from owning and/or inheriting land and property. In Africa inheritance laws have meant that thousands of AIDS widows are landless and homeless.

Clearly one of the most insurmountable barriers and usually the main disincentive to undertaking litigation is the cost.[870] As the former Indian Supreme Court Chief Justice Bhagwati, who did more than any other jurist to promote access to justice in that country and consequently across South Asia, '[t]he poor are priced out of the legal system; they are functional outlaws'.[871] Even if the poor person is granted some form of legal aid, there are often many incidental costs not covered, such as travel and accommodation during the proceedings if they have to come from rural areas, and administration such as the copying of documents. Lack of information about legal aid schemes frequently means that the poor do not know how to access them (Lobo 2003).

Legal aid does not always guarantee effective representation, since many of the best lawyers are reluctant to undertake such relatively poorly remunerated work. In the words of Dr. Justice D.Y. Chandrachud, a Judge at Bombay High Court: 'lawyers who appear for the poor are more often than not poor themselves, at least relatively speaking in the hierarchy of the legal profession' (Chandrachud 2002). However, this should not detract from the fact that there are many highly skilled and courageous lawyers undertaking legal aid work for little reward who have secured many significant victories (see below).

Underpinning the fundamental doctrine of the separation of powers is the notion that the judiciary fights injustice by holding the executive and legislature to account through judicial review of legislation or administrative action. Yet, in reality, the judiciary can be a reactive, unrepresentative and elite institution,

870. In a survey conducted by the Inter-American Bank in 2000 of seven Latin American countries, economics was identified as the prime factor as to whether people take issues to court or not.

871. Quoted by Justice Shah in *The Need for a Judicial Dialogue on Access to Justice* Judicial Exchange on Access to Justice Mumbai, 14-16 November 2003 at http://www.humanrightsinitiative.org/jc/papers/jc_2003/judges_papers/shah_inaugural_speech.pdf

far removed from the people, particularly the poor, undermining rather than enhancing their efforts to secure justice.[872]

At the same time, as Anderson (2003) notes, the judiciary are creatures of the dominant societal forces – both state and non-state:

> Thus we arrive at an irony, for while the courts are organs par excellence of the state, and often symbolise the beneficient neutrality of blind justice, they are designed to be operated by social and market forces, and thus inevitably reflect the agenda of those forces in their decisions (Anderson 2003: 2-5).

For some a judiciary drawn from a narrow social class – white, well-off, privately educated men – may well be a price worth paying in order to ensure judicial independence and lack of over politicization. This is based on the traditional thesis dating back to Montesquieu and others[873] that the judiciary must be separate from the people and not be subject to the whims of the masses.

However, failing to build pluralism into the court system and ensuring adequate representation of minorities ultimately fails to deliver real justice, since 'impartiality requires a proper understanding of the interested parties and the legitimacy of their claims' (Gargarella 2008: 8). Although some strides have been made in many jurisdictions during the last two decades to ensure greater representation of women[874] and ethnic minorities,[875] the judiciary for the most part remains unrepresentative of the societies in which they dispense justice.

Connected to the perception of the judiciary as an unrepresentative elite, more interested in supporting powerful interests than dispensing equal justice, is the view (often borne out by concrete evidence) that it is subject to widespread corruption.[876] The more unequal the society, the more likely this is.

Yet reforming the judiciary offers only a partial solution to the need for wider institutional reform. Even progressive judges may often have to apply unjust laws, many dating from a colonial period. Such laws tend to favour the rich and

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872. Gargarella (2008), in his critique of access to justice for the poor in Latin America concerning economic, social and cultural rights describes a generally conservative judiciary tending to react rather than be socially active (although in so doing he omits to mention a number of progressive rulings such as those concerning economic, social and cultural rights discussed further in the Latin American cases in Section 12.7.3).

873. Montesquieu's *The Spirit of the Laws* (1748) had a strong influence on the drafters of the American Constitution, most notably James Madison, which was reflected in the entrenchment of the three branches of government in Articles 1-3.

874. Despite women making up the majority of world's poor, undertaking three quarters of the world's work (but receiving only one-tenth of the global income and one-hundredth of the property), there is a clear inbuilt bias against women having adequate representation amongst the judiciary across the vast majority of jurisdictions (see Martin (2003: Appendix A) and Awan n/d: 9)).

875. The bias of judicial institutions in relation to race and lack of cultural sensitivity to indigenous people, their language and traditions (e.g. a preference for alternative dispute resolution compared to adversarial) has been criticized (Lobo 2003).

876. See Garagerella (2008): there is a widespread perception amongst the poor in Latin America that the judiciary is corrupt and that money is needed to obtain a just decision.

powerful, such as India's Land Acquisition Act which gives the state extensive powers to seize property.[877] This often results in legal dualism – the application of laws that are in clear contravention of modern human rights standards but which were explicitly protected from judicial review at independence.[878] Such laws, as products of their time, tend also to fall back on criminal sanctions as a means of regulation rather than participatory consultation.[879]

The overall lack of trust in the judiciary by the poor is frequently manifested in their reluctance to approach courts.[880] A contributory factor in this reluctance or inability to access the justice system can be physical geography. Courts – not just the higher institutions but also at the lower level – tend to be located in the major urban areas. People in remote rural areas will often be vast distances away from their nearest court, thereby undermining the concept of bringing justice closer to the people (Lobo 2003). Many of the poorest countries simply lack sufficient human resources to administer the justice system.[881]

Litigants frequently have to deal with excessive legal formalism and bureaucracy (Lobo 2003). Many jurisdictions simply lack clear and simple information about how to access legal institutions and what rights people enjoy. This is particularly acute in countries with high levels of illiteracy and lack of access to media which, again, is exacerbated for the poor.

After cost, the issue of delay can be a major impediment in securing justice. In some jurisdictions many cases can take decades to complete: 'Delay in the delivery of justice destroys lives, expectations and hopes' (Chandrachud 2002). India, in particular, is known for the excessive length of proceedings.[882] Some public interest litigation cases dealing with forcible displacement can take more than thirty years, such that a whole generation of internally displaced people can never hope to have any redress. Even high profile cases such as the Bhopal litigation have failed to provide the necessary compensation and medical relief to affected communities

877. The Act provides for minimal compensation and is frequently used to expropriate land from farmers for housing. Those who squat or work the land are not given any compensation.
878. Many Caribbean states' constitutions explicitly prevent review of pre-constitutional laws including those authorizing the mandatory imposition of the death penalty.
879. An example is India's environmental legislation (see Anderson 2003).
880. For example, tribal people in India have often been unwilling to use the legal system to try to prevent mass displacement, based on the (sometimes erroneous) belief that in most cases the courts have not acted to prevent abuses, e.g. as in the case of the Narmada dam (see Lobo 2003).
881. E.g. in Chad where approximately 100 judges and seven practicing lawyers were estimated to serve a population of 6 million (Anderson 2003: 19). This problem is exacerbated in some jurisdictions where only the higher courts can directly protect and enforce fundamental rights, e.g. in India where constitutional petitions have to be filed either in one of the main urban High Courts or the Supreme Court, involving a great deal of time and expense. This compares unfavourably to jurisdictions such as South Africa, where even subordinate courts are empowered to enforce some fundamental rights.
882. A 1986 study of tort litigation in the state of Maharashtra found the average completion time for cases to be 17.4 years (Anderson 2003: 20). One leading public interest lawyer notes that the average waiting time both in civil and criminal courts can be several years, e.g. criminal appeals in one High Court can be pending for more than a decade which *'virtually negates the concept of fair justice'* (Muralidhar 2003).

more than two decades after the incident. However, this is not always the case. In contrast, the relative success of the right to food litigation pioneered by the People's Union for Civil Liberties demonstrates that an appropriate strategy and a receptive judiciary can achieve concrete results (see below).

One of the main causes of delay is the lack of judicial capacity in the face of a huge caseload – 7 million pending civil cases and 13 million pending criminal matters in India.[883] A leading human rights judge sitting on the Bombay High Court talks of judges having to often deal with 100 cases in five hours with the result that he or she only has about five minutes to dispense justice in each case (Chandrachud 2002).

When cases are heard there may be judicial resistance to the notion that economic and social rights are enforceable or even justiciable. However, some of this resistance has diminished during the last two decades due to increased realization by both supranational and national adjudication bodies that there is less of a dividing line between the two traditional sets of rights pioneered by courts in jurisdictions such as India (see further below; see also Yamin (2005: 1201)).

Even when a favourable outcome is delivered there is often no guarantee that redress will be obtained. The biggest challenge that remains for many litigants – both individual and those acting in the public interest – is implementation. Unless the litigants have either the benefit of support from a well organized media and public campaign, as in the Treatment Action Campaign case[884] in South Africa or the People's Union for Civil Liberties campaign on Right to Food in India, and/or a judiciary prepared to continue to engage with a case after passing judgment, as in India, the prospects may be slim of ever obtaining redress. This is particularly (but not solely) the case where a decision has significant resource implications or requires controversial policy changes (Lobo 2003: 4-5).[885]

All of the aforementioned challenges faced by the poor in accessing the formal legal system have led some to question the relevance of the latter in providing effective pro-poor justice and instead to focus on alternative informal mechanisms. In particular, advocates who have experience of seeking to obtain redress for victims of mass economic, social and cultural rights violations have concluded that formal legal systems invariably reject such claims as policy matters and therefore legitimize state action such as mass evictions and forced displacement (Muralidhar 2003).

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883. An estimated 10 million cases filed and 10 million disposed of p.a. means that there is no net drop in the 20 million pending petitions.
884. See *Minister of Health & Ors v Treatment Action Campaign* 2002 (5) SA 703 and at http://www.tac.org.za/community/directory/90
885. See also criticism by Prof Sathe in his paper on the Indian courts: *Implementation of Judgments on Human Rights* (Mumbai 2003). Available online at: http://www.humanrightsinitiative.org/jc/papers/jc_2003/judges_papers/sathe_transcript.pdf

12.5. SOME KEY FEATURES OF EFFECTIVE ACCESS TO JUSTICE SYSTEMS

Access to a justice system that seeks to really legally empower the poor needs to both reform formal mechanisms and introduce innovative informal ones.

The link between access to justice and poverty alleviation has been recognized by all of the major development institutions, including the World Bank,[886] leading them to sponsor a wide range of projects. Acknowledging that the Universal Declaration of Human Rights provides basic guiding principles for all legal and judicial systems, the Bank has supported at least thirty-five major legal reform projects focusing on (a) improving administrative justice, making administrative decisions accountable and affordable to ordinary citizens; (b) promoting judicial independence and accountability; (c) improving legal education; (d) improving poor people's cultural, physical, and financial access to justice; and (e) public outreach and education.[887]

Arguably the most significant international initiative during the last decade in promoting access to justice for the poor is the United Nations Development Programmme's Commission on Legal Empowerment of the Poor. Launched in 2005 by a group of developed and developing countries[888] with the aim of making 'legal protection and economic opportunity not the privilege of the few but the right of all', its membership is largely drawn from former presidents and cabinet ministers including Mary Robinson, Fernando Cardoso and Shirin Ebadi. From extensive global consultations the Commission's co-chairs, former US Secretary of State Madeleine Albright and Peruvian economist Hernando de Soto, writing in *Time* magazine, identified systemic barriers, such as unnecessary bureaucracy and inaccessibility of colonial laws not translated into local languages, as significant impediments to economic and social advancement.[889]

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886. In June 2000 the World Bank sponsored a major conference with the IMF: 'Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century' Washington DC 5-7 June 2000. The main conclusions included: going to court is rarely the preferred method of resolving disputes; securing a voice for the weakest members of society is a fundamental part of a rule of law framework with the possibility of winning against the strong, even against the state itself; accountability in the supervision of government and administration is very important; and, at the same time, in many areas of the world there has been a great loss of public trust in the judiciary (see Van Puymbroeck 2001).

887. Examples include a project in Guatemala training judges and other court personnel in local languages and cultures. Projects in Colombia, Guatemala, and Peru are experimenting with decentralized court services as well as services offered by traveling judges and public defenders. NGOs are providing low-cost services in Ecuador even though costs of transportation may still be too high for poor people in remote areas. To reduce costs as well as provide speedy hearings, some countries including El Salvador use alternative dispute resolution mechanisms. In El Salvador, the Procuraduría General offers counseling, mediation, and other services to women with family problems that can often be resolved without resorting to courts.

888. Canada, Denmark, Egypt, Finland, Guatemala, Iceland, India, Norway, Sweden, South Africa, Tanzania and UK. Note that the membership is very Eurocentric and is dominated by Scandinavian countries. There is no representation from South America, the Far East or Southeast Asia-Pacific.

889. Albright and de Soto cite the example of 500 days to establish a bakery in Egypt complying with 315 laws and a study by the Inter-American Development Bank of 12 Latin American

The Commission completed its work on 31 July 2008. In its main report, *Making the Law Work for Everyone*, whilst finding that the causes of legal exclusion are numerous and varied – often being country-specific – the Commission concluded that, generally, legal empowerment is impossible when poor people are denied access to a well-functioning justice system. Consequently, successful implementation requires a shift away from the traditional formal top-down approach to bottom-up and pro-poor, and must be affordable, realistic, liberating and risk aware (UNDP 2008: 77).

The Commission went on to make five main practical recommendations: (a) improved identity registration systems, without user fees; (b) effective, affordable and accessible systems of alternative dispute resolution; (c) legal simplification and standardization together with legal literacy campaigns targeting the poor; (d) stronger legal aid systems and expanded legal services involving paralegals and law students; and (e) structural reform enabling community-based groups to pool legal risks (UNDP 2008: 77).[890]

The UNDP is now charged with implementing the recommendations. However, unless sufficient and sustained resources are devoted at the national level, it is doubtful how much of the Commission's benign intentions will be translated into concrete action.

12.6. EXAMPLES OF PARTICULAR INNOVATIVE PROCEDURES – FORMAL AND INFORMAL

Clearly, expanding access to justice, particularly in reaching out to those who require the most assistance in asserting their rights, requires a mixed strategy focusing on both formal and informal mechanisms, often utilizing pro bono assistance from law professionals to make small but valuable incremental improvements such as:

- introducing paralegals to provide legal information and training to communities and officials, to ensure that prisons run smoothly and prisoners awaiting trial get to court at the right time, and to educate residents about their rights (Malawi, Africa);
- judges and law academics making themselves available for arbitration matters on weekends (India, South Africa);
- local government structures and NGOs running dispute resolution structures (Bangladesh);
- small claims courts presided over by law professionals in their spare time, or as volunteers (South Africa);

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countries where only 8 per cent of all businesses are registered legally, with another 23 million operating illegally, meaning that they cannot obtain loans or enforce contracts (Out from the Underground: How giving the world's poor their basic legal rights can help break the cycle of despair, *Time* 16 July 2007).

890. Other recommendations included developing a 'global forum and virtual arena' and global and regional compacts on legal empowerment, the appointment of 'defenders of the poor' and the provision of knowledge clearinghouses.

- developing primary justice forums (Malawi) in which local communities' problems are resolved without resorting to the formal justice system;
- encouraging NGOs, either specialist or generalist, to develop access to justice training for the appropriate communities (Malawi, South Africa, Uganda) (Scharf 2003).

Beyond this, access to justice should be part of a wider economic, social and cultural rights package designed to alleviate poverty and improve quality of life through employment creation and the development of urban services and infrastructure (Emiel, Wegelin and Borgman 1995) in order to ultimately empower people economically and socially.

12.6.1. The Formal Response – the State and the Courts

> A judicial system which seeks to have a tangible impact upon poverty must design flexible solutions in which the role of the judge must be regarded as much as a facilitator of solutions, as an arbiter of disputes…Courts must… be an intrinsic part of the process of development, if justice to the poor is to mean effective access to justice'.… Economic and social justice has never been achieved in any society except with successful judicial mechanisms. (Chandrachud 2002: 2, 6).

12.6.2. The State

Many developing countries have implemented or are implementing large-scale access to justice programmes invariably supported by international donors. Some have concentred solely on reform of the formal legal systems, e.g. Indonesia[891] and Pakistan.[892] Others have adopted a more mixed approach such as a UNDP-sponsored project in Pakistan[893] and a World Bank-funded initiative in

891. The country's *Framework for Strengthening Access to Justice in Indonesia* has five elements: (a) a normative legal framework to promote access to justice; (b) legal awareness; (c) access to appropriate forums; (d) effective administrative of justice and (e) monitoring and oversight to promote transparency and accountability in the above. http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf

892. In Pakistan a ten-year access to justice program funded by the Asian Development Bank and implemented in three phases between 1998-2008 has concentrated on reform of the court system, including the construction of literally hundreds of new court complexes, together with legal aid and literacy in order, one assumes, to bring justice closer to the people (see Zia Ahmed Awan (n/d: 31-32). http://siteresources.worldbank.org/PAKISTANEXTN/Resources/293051-1146639350561/CGA-Companion-Paper-1.pdf

893. Following a 2005 Access to Justice report entitled *Pathways to Justice,* the Ministries of the Interior and Justice have implemented the formation of justice centres at district level, strengthened dispute resolutions at commune levels, promoted access to justice for women, and supported traditional indigenous conflict resolution mechanisms.

Guatemala.[894] In the World Bank's words, the Guatemala project demonstrated that '…broad stakeholder consultation can help identify critical areas for judicial reform and start a process to regain public confidence in the judicial system.'[895]

Other initiatives have focused on securing rights through legislative reform, such as in Peru where, within two years by the year 2000, institutional reforms supported by the World Bank had enabled 7 million Peruvians to secure land rights with, for the first time, women having equal property rights under the law.[896]

12.6.3. The Courts

Clearly there are measures, often at no or low cost so that traditional courts can endeavour to widen access (although such measures may sometimes risk being ad hoc and not address systemic failings) (Muralidhar 2003). Most notably the Indian courts, and in particular the Supreme Court under former Chief Justice Bhagwati, during the last three decades have been in the vanguard of seeking to promote pro-poor justice.

The relaxation of standing and promotion of public interest litigation initiated in the case of *Morcha v Union of India*[897] in order to assist the economically or socially disadvantaged with undertaking litigation, which they would otherwise be unable to do, has allowed numerous cases to be filed by individuals or organizations acting on their behalf in public interest. Based on a liberal interpretation of Article 32[898]

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894. With economic, social and cultural rights seen as a participatory process where citizens as users of judicial services were able to identify major problems, it resulted in increased recruitment of women judges, the establishment of more regional courts and language training for the judiciary and interpreters for indigenous people with the aim of bringing 'law closer to the people'. At the same time a Supreme Court Public Information Centre incorporating a website was established, together with an independent Public Defenders office. In addition, justices of the peace were introduced in areas where no judges were present (amounting to some 50 per cent of the country) and ADR centres were established. More information at http://go.worldbank.org/11ZPZ4X8F1

895. http://siteresources.worldbank.org/INTEMPOWERMENT/Resources/486312-1098123240580/tool14.pdf

896. The urban property rights project oversaw a massive shift in the late 1990s away from a majority of urban poor having no property rights being reduced to squatters on publicly owned land to formalization of property rights. The key was the simplification of procedures for registering and obtaining title over land with an accompanying reduction in the cost from $2000 to $50 and in time from 15 years to 6 weeks or less.

897. AIR 1984SC 802. The case concerned efforts by an organization acting in the public interest to secure the release of a large number of bonded labourers. The Court defined PIL as 'Where a person or class of persons to whom legal injury is caused by reason of violation of a fundamental right is unable to approach the court of judicial redress on account of poverty or disability or socially or economically disadvantaged position, any member of the public acting *bona fide* can move the court for relief under Article 32 and *a fortiori* also under Article 226, so that the fundamental rights may be meaningful not only for the rich and the well to do who have the means to approach the court but also for the large masses of people who are living a life of want and destitution and who are by reason of lack of awareness, assertiveness and resources unable to seek judicial redress'. (p. 813.)

898. Article 32 provides: 'Remedies for enforcement of rights conferred by this Part. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights

of the Constitution, and seeking to overcome the legal formalism and bureaucracy that had hitherto plagued Indian courts, the Supreme Court permitted petitions to be activated by a letter or even a postcard.

Combined with the relaxation of standing rules there has been a willingness to be flexible on evidence. The Supreme Court has ruled that even in cases where the claim is not supported by documents, an inquiry committee established by Court may make an appropriate enquiry, receive evidence and then come to accept the claim.[899]

At the same time this high watermark of judicial activism witnessed a concerted effort to recognize many economic and social rights originally conceived as directive principles of state policy, such as livelihood, health, housing, education and a pollution-free environment, as fundamental rights, through an expansive interpretation of Article 21 guaranteeing the right to life.[900] This innovation had significant consequences not just for the development of economic, social and cultural rights in India and the South Asia region (where the approach was adopted by other courts) (see Byrne and Hossein 2009) but also more generally in promoting notions of indivisibility and interdependence of all rights. However, beyond jurisprudential developments there have been some real pro-poor gains:

> At a purely doctrinal level, the incorporation of the constitutional guarantees to socio economic justice into guarantees that were originally construed to be guarantees of political freedom is one of the most significant developments in ensuring justice to the poor. (Chandrachud 2002: 6)

This expansive approach has also been endorsed by international[901] and regional bodies.[902]

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conferred by this Part is guaranteed. (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part. (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2). (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.'

899. Order 28/10/91 in *Prabhu & Ors v Maharashtra* (WP 1778/1986 unrep) See (Lobo 2003: 6) for examples.

900. For a more detailed history and analysis of this phenomenon see Muralidhar (2000) and Justice Srikrishna *Innovations by the Supreme Court of India to Improve Access to Justice* (Judicial Exchange on Access to Justice, Mumbai 2003: 5) and Chandrachud (2002: 6).

901. The Human Rights Committee has stated that the right to life, as guaranteed by Article 6 of the ICCPR, 'cannot properly be understood in a restrictive manner and the protection of this right requires that states adopt positive measures', going on to give examples in the field of combating infant mortality, malnutrition and epidemics (The Right to Life, General Comment No. 6, UN CCPR, 16th Sess, para 5, UN Doc. A/37/40 (1982))

902. The Inter-American Court of Human Rights, in a landmark judgment regarding the unlawful killing of street children in Guatemala, concluded that the right to life 'includes, not only the right of every human being not to be deprived of life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.' (*Villagran Morales et al. case*, Inter-American Court of Human Rights (ser C) No 63 (19 Nov 1999) para. 144)

Judicial activism using the directive principles has seen the South Asian courts tackling inheritance rights for women,[903] affirmative action programmes for so-called 'backward' classes, measures to alleviate farmer indebtedness, promoting the welfare of child workers and laying down principles of sustainable development in relation to environmental protection (Byrne and Hossein 2009).

Another innovation has been the reading into the guarantee of equal protection under Article 14[904] of the Constitution in the constitutional objectives embodied in the directive principles as norms of reasonableness. This has permitted the courts to uphold laws banning the alienation of lands belonging to the scheduled castes and tribes.[905]

Continual monitoring by the courts with respect to implementation of their decisions is another innovation introduced by the Indian courts in the interests of ensuring effective access to justice for the poor: 'in areas which relate to judicial pronouncements on socioeconomic rights, the judgment of the Court represents not the culmination but a beginning, though a much desirable beginning, of the process … [since] the problem is essentially one of implementation' (Chandrachud 2002: 7). Usually this will entail the provision of time schedules for completion by the state and then judicial oversight requiring regular reporting back on progress by officials. This could be in relation to the regulation of the actions of a non-state actor such as a polluting company or the need for a municipality to ensure forcibly evicted slum dwellers are properly resettled. Utilizing representative NGOs and community groups in monitoring can enhance active participation of victims in the administration of justice.

Technology has also been harnessed in the interests of justice. Legal literacy has been enhanced through the growth of judicial decisions free to access on the Internet, although this presupposes access to the necessary technology,[906] something that initiatives such as the Mandela Foundation-sponsored solar-powered IT is seeking to address.[907] Mobile courts, such as the justice on wheels programmes in Guatemala and the Philippines (Azcuna 2005) and neighbourhood law clinics can also bring justice closer to marginalized communities.

Many access to justice projects have focused on expanding legal aid coverage premised on the belief that assisting with the high cost of litigation can be one of the most effective ways of widening access: 'Well-intentioned governments and development agencies expend substantial resources on rewriting laws, training

903. The Pakistani judiciary has been particularly active in this area. See *Ghulam Ali v Ghulam Sarwar Naqvi* PLD 1990 SC 1; *Ghulam Haider v Niaz Muhammad* PLD 1995 SC 620; *Inayat Bibi v Issac Nazir Ullah* PLD 1992 SC 385 (inheritance rights of Christian women); *Shahro v Fatima* PLD 1998 SC 1512 (inheritance rights of females under Muhammadan law).

904. Article 14 provides: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

905. Report of Supreme Court decision 'SCs, STs being exploited to part with allotted land: court' *The Hindu* 13 February 2008. Available at: http://www.hindu.com/2008/02/13/stories/2008021360221400.htm

906. See www.worldlii.org and related sites.

907. http://www.self.org/southafrica.shtml

judges and prosecutors, improving case processing, strengthening bar associations, and engaging in a host of other initiatives that aim to build the rule of law. But these efforts often prove meaningless for the poor. Why? Because without legal aid, the poor will never even enter a courthouse or any other justice forum' (Golub 2007: xv).

However, too many schemes focus on merely covering the legal costs for the proceedings, important although that is, rather than viewing legal aid as a tool for wider legal empowerment. The latter approach was proposed as far back as 1977 by former Indian Chief Justice Bhagwati and Justice Krishna Iyer when they stated that legal aid should offer wider economic support for the rehabilitation of victims. Unfortunately their ideas were never implemented, due undoubtedly to the potential increased costs involved (Srivastava 2003). Despite this, the concept has seen a recent revival amongst PIL lawyers and those working with poor communities of women and Dalits etc., (see Muralidhar 2003) whilst some jurisdictions have actually introduced legal aid schemes that widen choice for litigants by empowering them rather than merely enabling them to access traditional legal mechanisms.[908]

Complementary to expanding legal aid is encouraging more lawyers to undertake pro bono work either through incentives – e.g. by giving tax credits to lawyers willing to undertake work on behalf of the poor – or (less ideally) through compulsory measures.[909]

Some practitioners have noted the need for courts to incorporate more participatory conciliation into their work based on facilitation rather than imposition of judicial solutions, combined with collaboration with state institutions to ensure appropriate remedial action is taken.[910]

Another bridge between the formal and informal legal systems has been the use of specialist tribunals, which can often exercise more discretion than courts on issues such as admission of evidence and the possibilities of mediation. In Brazil special tribunals have been used by the authorities since the late 1980s to deal with minor civil and criminal matters.[911] However, in India, where they have been

908. A World Bank-funded project in Ecuador 1998-2000 provided legal aid for poor women by establishing five regional legal aid clinics to enable women to take cases on for example obtaining child support or stopping domestic violence. The results were that women did better when they used the NGO legal aid service compared to private lawyers with between 20 and 50 per cent higher awards, combined with greater access to information and education about rights. In turn the scheme also increased the capacity of local NGOs. However, the Bank recognized that beyond its own two-year support substantial resources were needed to maintain the scheme.

909. In July 2008 the Philippines Supreme Court Chief Justice announced that he was looking into the possibility of ordering lawyers to do more pro bono work, noting that it 'is one model that is followed in other jurisdictions – compelling all the members of the Bar to render free legal service.'

910. See Chandrachud (2002: 9-10) in which he calls for more focus on judicial training on the 'art of persuasion.'

911. See Gargarella (2008). In some Latin American countries the Juzgados de Paz (Justices of the Peace), an institution dating from colonial times, have been revived to deal with minor local disputes in order to fill the gap left by formal institutions but having a status beyond the informal.

in operation for more than four decades, they are largely seen to have failed (see Muralidhar 2003).

Another potential significant development in widening access to justice for the poor has been the extension of the mandate of some human rights ombudspersons from a traditional focus on civil and political rights to embrace economic and social rights.[912]

12.6.4. Informal

> Many of the problems facing the poor may not be problems that find place within the formal legal system at all. There is no situation where the law actually gives an enforceable right to a person undergoing starvation to go to any authority to say that I am starving. [913]

The last two decades have seen an increasing realization by those responsible for dispensing justice that informal justice systems can play a significant role in advancing the interests of the poor. Such schemes are many and varied but they all have the common aim of trying to bring justice closer to the people – socially as well as geographically.

Many of the schemes have a long history, being rooted in the traditional dispute resolution methods practised by local communities. For example, in Peru, rural populations and indigenous people have historically appealed to non-official authorities, e.g. the local community president or chief of police to resolve disputes relating to property or debt.[914]

A survey in Indonesia showed not only the range of different dispute resolution actors but that the vast majority of disputes are resolved at the local level.[915] In Malawi, about 85 per cent of the population use primary justice, delivered through a variety of institutions and groups, including traditional, religious and community leaders, NGOs and faith-based organizations, to resolve disputes.[916] The value of communal justice is particularly high in countries with large numbers of remote communities with small populations.[917]

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912. Yamin (2005: 1213) citing the example of Peru where the country's Defensoria del Pueblo now includes the rights to water, environment and education within its mandate.
913. Muralidhar (2003: 5), although note the success of the right to food litigation conducted by PUCL. See also Chapter 5 in this volume, and http://www.righttofoodindia.org/case/case.html
914. Gargarella (2008) also notes the role of the 'Rondas Campesinas', 3,500 neighbourhood groups organized to protect peace and security, which originally meted out criminal justice but have gone on to adjudicate disputes.
915. Village officials were the main deliverers of justice (over 40 per cent) followed by informal leaders (35 per cent); police (27 per cent) and family or friends (17 per cent). Those going to either a lawyer, paralegal or NGO only accounted for approximately 5 per cent of the total (McLaughlin and Perdana (forthcoming) and the Asia Foundation (2001: 21)).
916. See Scharf (2003). See also Nyamu-Musembi (2003) on the nature and prevalence of non-formal justice processes in Uganda, Kenya and Tanzania to resolve land disputes.
917. For example, Bolivia has more than 12,250 communities with fewer than 250 inhabitants.

In some Latin American constitutions, such as Columbia, Peru, Bolivia and Ecuador, the value of alternative dispute resolution especially for indigenous people has been explicitly recognized.[918] Even more far-reaching has been the recognition by Columbia's Constitutional Court in 1996 of the constitutional validity of indigenous people's community justice decisions.[919] As one commentator noted '[t]his decision, like others that followed, was very rich in terms of its openness to issues of ethnic and cultural diversity not previously accepted within the 'formal' legal world' (Gargarella 2008: 14).[920]

In India, alternative dispute resolution is formally provided for under statute as an alternative to the formal civil dispute procedure, although, as such, it has been seen to suffer from some similar problems in terms of delay and enforcement. One of the main alternative mechanisms has been the community or caste adalats introduced under the Legal Services Authorities Act 1987. Staffed frequently by pro bono former judges, lawyers or academics, they deal with civil disputes. The parties, having agreed to be bound by jurisdiction, resolve their dispute at a public hearing (*Jan Sunwais*) where people should be able to feel free to speak without fear of intimidation by the judiciary or their opponents since the procedure is not adversarial.

Civil society has played an increasing role in assisting the poor to secure justice. Many NGO projects combine both securing redress for victims with awareness-raising of rights,[921] often utilizing paralegals.[922]

The use of university law school clinics has a long history in the United States but is now used widely in many jurisdictions. One leading example is the International Human Rights Law Clinic at Berkley, University of California, which has pioneered a rights-based approach to combating poverty.[923] At the same time the clinic has been involved in major public interest litigation.[924]

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918. Subject to the proviso that ADR does not have a detrimental impact on laws or individual rights.
919. E.g. decisions T-523/97 and T 344/98.
920. Gargarella (2008: 14). Since 1995, the Casas de Justicia project adopted in both Columbia and Peru has focused on both informal and formal services. Utilizing ADR, the project involves the community in problem-solving whilst also promoting public education in human rights. The result has been high satisfaction levels amongst users.
921. For example, an NGO project in Pakistan, the Legal Empowerment of the Populace Project, run by Lawyers for Human Rights and Legal Aid in Karachi Women's Prison, which combined legal aid, awareness-raising, paralegal training with campaigning against discriminatory laws, has resulted in the early release of many women and children and greater awareness of their rights. The Self-Employed Women's Association (SEWA) in India, a trade union of poor self-employed women, having used litigation to protect the rights of its members has now focused increasingly on enhancing legal knowledge in order to ensure that its members could effectively lobby the government and pressure the legal system to formulate and apply appropriate policies.
922. For example, Timap for Justice in Sierra Leone (http://www.timapforjustice.org/), which employs 25 paralegals working in 13 offices across the country: 'The program has succeeded in achieving solutions to more than a thousand justice problems of poor Sierra Leoneans'.
923. In 2007, the clinic partnered with the University of San Andres in Argentina to elaborate the minimum core content of the right of access to justice in international human rights law with the aim of informing the Inter-American Commission on Human Rights' understanding of the nature and scope of state obligations to provide effective remedies to protect social, economic and cultural rights.
924. One major example is the civil registration and right to education case of *Yean v Bosico v Dominican Republic,* Judgment of September 8, 2005, Inter-American Court of Human Rights,

12.7. LITIGATION SUCCESS STORIES: SOME POSITIVE EXAMPLES OF PEOPLE SECURING ECONOMIC, SOCIAL AND CULTURAL RIGHTS THROUGH LEGAL MECHANISMS

Litigation can be used to advance economic, social and cultural rights, and consequently tackle poverty, in several ways. It can be employed to make individual and collective human rights claims, to raise public awareness about problems related to economic, social and cultural rights, to help define the content of rights, and as a long-term strategy for law reform.

However, litigation is just one tool, and can be most effective when undertaken in co-operation with the active participation of the affected individuals and/or community[925] and in conjunction with other advocacy strategies. Legal cases can create a focal point for attention and awareness, around which broader campaigns can coalesce, to the extent that, even if the verdict is unfavourable, the consensus and energy already developed can be channeled into other forms of popular action.

Such initiatives require the continued commitment of the representatives in keeping the victims and the wider community informed of progress in the case in a clear, accessible language and to be receptive to their input. An example of active community participation in litigation was that conducted in the 1990s by the Social and Economic Rights Action Center regarding the forced eviction of 300,000 people from Nigeria's largest slum community. Cases saw regular attendance by huge numbers of people at the proceedings.[926]

It is also important to emphasize that litigation may not always be the most effective method of securing pro-poor change. Direct engagement with central and local government policy-makers can sometimes be the best way of ensuring that policies are human rights compliant and address the needs of the poorest. In South Africa the Legal Resources Centre has been actively involved in helping to shape land reform policies – work that began during the apartheid era – in order to enforce and extend the rights of ownership and tenure to dispossessed people.[927]

Other forms of constructive engagement can include budgetary analysis against human rights standards such as the work of the NGO DISHA in the Indian

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(Ser. C) No. 130 (2005), which resulted in recognition by the Inter-American Court of the right of Dominican-born children of Haitian migrant workers to nationality and education.

925. The Charter Committee on Poverty Issues in Canada, for example, requires at least 50 per cent representation of poor people on the 'project teams' it organizes related to pending litigation.

926. In *Farouk Atanda v The Government of Lagos State & Four Others* (2000), SERAC challenged whether the housing provided as resettlement to less than 3 per cent of families evicted from the Maroko slum was adequate and habitable by applicable human rights standards.

927. According to the LRC, its many years of consistent and committed work in this field have established its credibility with not just affected communities but also the government. This has enabled it to participate constructively in the drafting of a Land Affairs Green Paper, which set out the strategy for land policy, and in particular to address its legacy, which left 10 per cent of the population owning 87 per cent of the land through both restitution and redistribution. See http://www.lrc.org.za/parliamentary-submissions/

State of Gujarat to ensure greater transparency and community participation in budget-setting and monitoring.[928]

12.7.1. Making Indivisibility a Reality: the Need for Creative Approaches

In the absence of explicit economic, social and cultural rights guarantees, jurists need to adopt creative approaches. One strategy is to argue that, given that all human rights are indivisible, some civil and political rights, such as the right to life (as in the case of Article 21 of the Indian Constitution) and due process (as in the case of Article 6 of the European Convention on Human Rights),[929] can be used to indirectly protect economic, social and cultural rights. In the landmark case of *Francis Coralie Mullin*, the Indian Supreme Court held:

> The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms…[930]

This has been followed by a whole series of cases in which the right to life has been used to indirectly protect the rights to be free from bonded labour,[931] livelihood (a particularly important case recognizing the rights of slum dwellers),[932] shelter,[933] health[934] and education.[935] The strength of the Indian approach has been demonstrated by its adoption by other courts in South Asia (see Byrne and Hossein 2009)[936] as well as regional bodies.[937]

928. http://www.disha-india.org/achieve_ment.html
929. E.g. *Deumeland v Germany* (1986) 8 EHRR 425 and *Feldbrugge v Netherlands* (1986) 8 EHRR 425 developed further in *Salesi v Italy* (1993) 26 EHRR 187 and *Schuler-Zgraggen v Switzerland* (1995) 21 EHRR 404.
930. *Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2 SCR 516.
931. *Bandhua Mukti Morcha v Union of India* (1984) 3 SCC 161.
932. *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
933. *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan* (1997) 11 SCC 123.
934. *Paschim Banga Khet Majoor Samity v State of West* Bengal (1996) 4 SCC 37.
935. *Mohini Jain v State of Karnataka* (1992) 3 SCC 666 and *Unnikrishnan J.P. v State of Andhra Pradesh* (1993) 1 SCC 645.
936. A leading example is the Bangladeshi case of *Bangladesh Society for the Enforcement of Human Rights and Ors v Government of Bangladesh and Ors* 53 DLR (2001) 1, in which the Supreme Court, following its Indian counterpart in *Olga Tellis v BMC*, ruled that the forced eviction of a large number of workers and their children was unlawful both in terms of their right to livelihood and to be protected against forcible search and seizure of their home.
937. See the *SERAC v Nigeria* case (Communication No. 155/96) in which the African Commission on Human Rights was able to derive the rights to shelter and food from existing African Charter guarantees (Liebenberg 2006).

Although the South Asian approach has not always traveled well outside of the region,[938] civil society in other jurisdictions has sought to be similarly creative, e.g. the Canadian Centre for Equality Rights in Accommodation argued the link between 'security of the person' as recognized under Article 7[939] of the Canadian Charter of Rights and Freedoms and the right to food and housing.[940]

In a similar vein, courts,[941] together with the UN Human Rights Committee,[942] have sought to apply non-discrimination provisions to indirectly protect economic, social and cultural rights, although this risks the lack of development of the substantive rights.

12.7.2. Collective Action: The Impact of Public Interest Litigation

> What made public interest litigation unique [in India] was that it acknowledged that a majority of the population, on account of their social, economic and other disabilities, was unable to access the justice system. (Muralidhar 2000: 437)

The growth of public interest litigation in many jurisdictions during the last three decades has played a major role in enhancing access to justice for poor communities.

Although it is a relatively recent phenomenon in Central and Eastern Europe, in the assessment of one leading practitioner, 'public interest litigation has contributed significantly to the consolidation of the rule of law' (Goldston 2006).[943]

India has witnessed a number of significant public interest decisions. One of the most high profile and successful initiatives has been the right to food litigation conducted by the People's Union for Civil Liberties with a number of key victories,[944] including the provision of food to areas affected by starvation and of cooked midday meals for primary school children. The use of interim orders

938. E.g. see *Baitsokoli & Anor v Maseru City Council & Ors* 5 CHRLD 307 in which the Lesotho Court of Appeal case explicitly rejected the Indian approach and argument that the right to life could encompass the right to livelihood.

939. Article 7 provides: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

940. *Gosselin v Quebec* [2002] 4 S.C.R. 429. This was the first claim under the Canadian Charter of Rights and Freedoms and the first claim under human rights legislation to a right to an adequate level of social assistance for those in need. Although the decision went against the applicant some judges on the Supreme Court did hold that there was a legal obligation to provide adequate social assistance under the Charter.

941. See for example the Canadian Supreme Court in *Eldridge v British Columbia* [1997] 2 S.C.R. 624.

942. See *Zwaan de Vries v Netherlands* (182/1984) and *Broek v Netherlands* (172/1984).

943. This is despite the fact that the region suffers from inadequate legal aid; a limited tradition of pro bono and rules of procedure and judicial practice that are unreceptive to joint claims, proof of systemic problems, and equitable remedies.

944. See http://www.righttofoodindia.org/case/case.html. The process began in April 2001 when PUCL filed a writ petition in the Supreme Court seeking legal enforcement of the right to food as an integral

has been a particularly useful mechanism for holding the state accountable by demanding prompt action. Significantly, the litigation has not been seen as an end in itself but as a 'tool for action' helping people to understand that they have a right to certain forms of public support at a certain level of quality.[945]

Other courts in the region have also relaxed standing allowing claims on behalf of thousands of poor and marginalized people who would otherwise have been legally impotent.[946] In particular, courts have been active in the area of environmental protection, frequently handing down detailed orders for the authorities to take more concerted action, often in relation to the right to full and adequate participation in decision-making (Byrne and Hossein 2009).

Many public interest litigation claims are settled out of court. This may have the advantage of securing some form of relief for victims without them having to endure often lengthy court processes. However, it can also result in the avoidance of admissions of liability whilst failing to advance economic, social and cultural rights standards.[947]

The lack of capacity of local lawyers and NGOs in the South is often a major barrier to successful public interest litigation but can be overcome through the involvement of Western-based law clinics[948] and NGOs such as INTERIGHTS[949] and the Open Society Justice Initiative.[950]

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part of the right to life, particularly in relation to the need to release excess food stocks to the hungry. There have now been a number of subsequent hearings and handing down of interim orders.

945. PUCL's promotion of access to justice for the poor is further enhanced by the fact that its online resources have been designed to explain its litigation work in an accessible language. See also Chapter 2, Bilchitz, 'Taking Socioeconomic Rights Seriously: The Substantive and Procedural Implications'; Chapter 5, Cahill and Skogly, 'The Human Right to Adequate Food and to Clean and Sufficient Water'; and www. right to food campaign.

946. For example, the Bangladeshi Supreme Court in *Dr. Mohiuddin Farooque v Bangladesh* 49 DLR (AD) (1997) 1, when asked to consider the potential impact of a flood action project, funded with foreign donations, on the lives, property and environmental security of over a million people, overruled the High Court, which had held that the petitioner, an environmental lawyers' organization, lacked standing within the meaning of Article 102 of the Constitution to bring the action.

947. For example, in August 1999, two US lawsuits were settled on behalf of more than 50,000 workers in Saipan who came from China, the Philippines, Bangladesh and Thailand arising from challenges to sweatshop conditions endured by garment workers on Saipan.

948. Following the submission of a memorandum in 2002 by UC Berkley law school clinic students to provide HIV medicines in Sri Lanka on behalf of a local NGO to the Sri Lankan Ministry of Health and the World Bank in the context of a pending funding proposal from the state to the latter, the Sri Lankan Ministry announced that it would start treating HIV-infected individuals with antiretroviral medicines. In another project the clinic, in partnership with the Center for Latin American Studies, provided Californian trade unionists with an analytical framework to interpret environmental contamination and impoverished living conditions of Mexican workers within the context of the North American Free Trade Agreement.

949. In partnership with local human rights defenders, INTERIGHTS has litigated in the UN, African and European regional systems (including the European Social Charter), as well as supporting the domestic legal work of local lawyers and NGOs across the globe. Information on INTERIGHTS' litigation work can be found at http://www.interights.org/case-docket/index.htm.

950. OSJI has litigated across Africa, Europe and Latin America at the national and regional level. Information on OSJI's litigation work is available at http://www.justiceinitiative.org/advocacy/litigation

12.7.3. Not Just Respect or Protect but Fulfilment

Much of economic, social and cultural rights litigation addresses violations of the state's obligation to respect people's own resources, e.g. stopping forced evictions, or protecting them against the actions of a third party, e.g. regulation of a polluting company.

However, it is at the fulfilment end of the obligations spectrum that litigation can potentially have a real impact on poverty. Yet, precisely because of the significant resource implications that flow from such cases, courts have often proved reluctant to address fulfilment issues, preferring, instead, to only assess the legality of the decision-making process rather than the actual outcome for the victim.

Some have argued that courts are right to be cautious rather than making unrealistic orders that central and local governments are unable to implement – an accusation sometimes levelled at the Indian courts. However, there is a gradual but steady trend of judges being prepared to make decisions which do require positive fulfilment by the state.[951] For example, in a recent decision, the South African High Court in *Mazibuko v City of Johannesburg,* declaring pre-paid water meters unlawful, ruled that the residents of a township were entitled to 50 litres of free water per day.[952] The judgment's tone began with a quotation from the central government's own strategic plan: 'water is life; sanitation is dignity'. This is not the exception in this area. A recent survey of right to water litigation reveals that courts have distinguished between short-term relief and sustainable long-term solutions, thus addressing not only basic core obligations but also the duty to progressively achieve the full realization of the right to water (See Winkler 2008).

Another groundbreaking fulfilment case comes from Argentina, where a PIL case was filed by a number of NGOs on behalf of up to 3.5 million people. In the *Mariela Viceconte* case the Court of Appeals, ruling favourably on a judicial writ of amparo (a constitutional remedy providing individual relief),[953] the state was ordered to manufacture a vaccine against Argentine hemorrhagic fever, which threatened the lives of 3.5 million living in the endemic area, who did not have easy access to preventive medical services. The court not only established the state's obligation to manufacture the vaccine in the absence of private sector involvement, but also set a legally binding deadline for the obligation to be met. One of the authors of the complaint, Victor Abramovich, who went on to sit on the Inter-American Commission for Human Rights, noted the significance of the case from a number of viewpoints. Firstly, it reaffirmed the judicial process as

951. For a summary of the South African Constitutional Court approach see Budlender (2003) in which the Court in the *Grootboom* case confirmed that it could address fulfilment issues in relation to economic, social and cultural rights. See also Liebenberg (2006: 109-112).

952. 30 April 2008 (06/13865). Judgment available at http://www.cohre.org/store/attachments/Mazibuko%20Judgment.pdf

953. The court's judgment was based on the American Declaration on the Rights and Duties of Man, the UDHR, and article 12 of ICESCR, all of which have been incorporated into the domestic law in Argentina and are considered to form part of the Constitution.

a method for enabling ordinary citizens to challenge state inaction. Secondly, it demonstrated that a domestic court could directly apply international standards on the right to health, thereby expanding the scope of activism for ensuring the realization of economic, social and cultural rights. Thirdly, it imposed personal time-limited responsibility on two ministers, thereby illustrating that obligations arising from economic, social and cultural rights are legal in nature and entail legal liabilities (see Abramovich 2000: 422).

Similar groundbreaking amparo actions have been successful in Peru,[954] Venezuela,[955] Brazil[956] and Ecuador,[957] guaranteeing access to medicines and/or treatment affecting thousands of victims and requiring states to take concrete and immediate action rather than a progressive realization approach.

12.7.4. Victories at the Supranational Level

If victims are unable to secure redress at the domestic level, their options in relation to economic, social and cultural rights remain limited. Given the current lack of dedicated economic, social and cultural rights international complaints mechanisms (see above),[958] those who have access to them (which excludes the

954. *Azanca Alhelí Meza García,* Expte. N.° 2945-2003-AA/TC: amparo action seeking drugs needed to treat HIV and AIDS upheld by the Constitutional Court, which ordered full treatment to be provided regardless of resource implications and subject to immediate and concrete state action. Consequently, the case is seen as a key precedent for the enforceability of social rights in the country.

955. *Cruz del Valle Bermúdez y Otros v MSAS* s/amparo. Expediente N° 15.789. Sentencia N° 196: amparo action to obtain supply of the drugs needed to treat persons living with HIV and AIDS upheld by the Supreme Court which urged the Health and Assistance Ministry to deliver the drugs on a regular and reliable basis. The order also required appropriate budgetary allocation and the development of preventive policies including information, awareness, education and full assistance programs. See also *López, Glenda y Otros c. Instituto Venezolano de los Seguros Sociales (IVSS) s/ acción de amparo*. Expediente 00-1343. Sentencia N° 487 where it was also affirmed that a group of HIV-infected people could petition the Court on behalf of those similarly affected. In another landmark case, the Caracas City Juvenile Court ordered that the State must provide timely and adequate surgical treatment in order to protect young people's rights to life and to health. Accordingly, the State was under a duty to guarantee sufficient budgetary allocations in order to fully equip a surgery room, together with the creation of a dialogue table aimed at identifying and addressing problems with hospital facilities.

956. *Estado do Rio de Janeiro* AgR No. 486.816-11: Duty of the state to supply medication to patients without the resources to afford the necessary medications. See also *Bill of Review 0208625-3* (August 2002) in which the Special Jurisdiction Court of Parana held that an individual's disconnected water supply should be immediately reconnected to safeguard his constitutional rights particularly in light of the vulnerability of one of the residents due to sickness.

957. *Mendoza & Ors v Ministry of Public Health* Resn No 0749-2003-RA (28 Jan 2004): the Constitutional Court held that the Ministry of Health had failed in its obligation under Article 42 of the Constitution to protect the right to health by suspending a HIV treatment programme. The Court also held that although right to health is an autonomous right it also forms part of the right to life. In so doing it envisaged that a right to health entitled citizens not only to take legal action for the adoption of policies and plans related to general health protection but also to demand that appropriate laws be enacted and that government provide the necessary resources.

958. Although there remains limited scope to use existing civil and political rights mechanisms such as the OP to the ICCPR and CAT – see Scheinin in Eide et al. (2001).

majority of the world's population living in the Asia-Pacific region) have to rely on regional and sub-regional procedures. Although the majority of the latter have tended to focus on civil and political rights, some significant economic, social and cultural rights jurisprudence is emerging.

In Africa by far the most significant case decided by the African Commission to date has been on behalf of the Ogoni people against Nigeria,[959] the impact of which has been increased with the subsequent agreement by Shell to engage in an (albeit controversial)[960] clean-up of the severely affected polluted area. Yet, with this notable exception the Commission's economic, social and cultural rights jurisprudence remains sparse. In the continued absence of a functioning African Court, the recently established sub-regional mechanisms[961] may offer greater prospects for securing economic and social justice in the short term. In a recent landmark case brought by local lawyers, Anti Slavery International and INTERIGHTS, that could potentially have implications for the millions of slaves in West Africa, the Economic Community of West African States (ECOWAS) Court of Justice found that the Niger Government had failed to take the necessary action to address the endemic problem of slavery.[962] Given that, unlike the African Commission, the court's decisions are binding, there are greater prospects that the Niger case will result in real change for thousands of people who continue to be subject to slavery.

The Inter-American organs have been amongst the most proactive in seeking to advance the economic, social and cultural rights (see Tinta 2007: 431-459) of particularly marginalized communities such as (a) street and working children who have a right to lead a dignified life under decent conditions;[963] (b) indigenous people where the land and other basic economic, social and cultural rights of an entire community were affirmed in cases adopting a progressive interpretation of civil rights guarantees of life and property contained in Articles 4 and 21 respectively of the American Convention;[964] and (c) landless poor.[965] In the latter case the Inter-American Commission was able to utilize its friendly settlement

959. *SERAC v Nigeria* (Communication N° 155/96). The Commission found a number of violations in relation to the rights to life, shelter and health of the Ogoni for permitting oil production by Shell in Ogoniland to '[take] place with complete disregard for the environment or health of the local inhabitants…'.
960. http://www.mosop.net/Archivesfiles/MOSOPPRApril232007.pdf
961. These are the court of the Economic Community of West African States, the East African Court of Justice and Southern African Development Cooperation Tribunal.
962. http://www.interights.org/niger-slavery/index.htm
963. *Villagran Morales et al. v Guatemala* (19 Nov 1999) Inter-American Court of Human Rights (Ser. C) No. 63 (1999).
964. See, for example, *Mayagna (Sumo) Awas Tingni Community v Nicaragua,* Inter-Am CHR, Ser. C No. 79 (31 Aug 2001) and *Communidad Yakye Axa v Paraguay*, Inter-Am. CHR, Ser. C No. 125 (17 June 2005).
965. *Jose Pereira v Brazil*. Case 11.289, Report No. 95.03, Inter-Am. CHR. OEA/Ser.L/V/II.118 Doc. 70 rev. 2 at 602 (2003). Having been found liable of failing to prevent and punish slave labour, the Brazilian state agreed to create a National Commission for the Eradication of Slave Labour, to make the necessary legislative changes, to resource prosecution organs and to raise awareness through a national media campaign.

procedure to obtain redress for a young person who had been subjected to slave labour. The system has also pioneered the use of provisional measures in economic, social and cultural rights such as the ordering of antiretroviral treatment for HIV sufferers[966] and TB drugs for a survivor of torture.[967] In addition, both the Commission and the court have provided innovative remedies such as reopening education and health facilities,[968] the reinstatement of 270 jobs together with payment of the accompanying unpaid salaries,[969] and the establishment of health, education and infrastructure programmes for hundreds of people displaced by internal conflict subject to a five-year implementation plan and regular reporting on progress made.[970]

The ten years of the European Social Charter's collective complaints mechanism has seen the European Social Rights Committee condemn the widespread forced evictions and lack of adequate housing of the Roma in Greece[971] and Bulgaria,[972] the lack of education for mentally disabled children in Bulgaria[973] and the widespread use of child labour in Portugal.[974] However, given the relatively few complaints submitted to the Committee to date (fifty-three by the beginning of 2009) there is still great scope to address a range of systemic economic and social abuses in Council of Europe member states. It also remains unclear how many of the Committee's decisions have been implemented to date given they often require significant resources and policy reforms.

Despite the inability of the European Court of Human Rights to address most economic and social rights issues, it has handed down some landmark judgments (many under Article 8 guaranteeing protection for the home and private and family life), including outlawing the widespread practice of segregated schooling for Roma children in Central and Eastern Europe,[975] condemning forced evictions in Turkey,[976] illegal occupation of land and housing in Northern Cyprus,[977] and failure to regulate polluting industries.[978] The fact that the court can hand down binding judgments, which tend to be implemented, is a strong argument for victims to use the mechanism where possible.

966. *Jorge Odir Miranda Cortez et al. v El Salvador*, Case 12.249, Report No. 29/01, OEA/Ser. L/II.111 Doc. 20 rev. at 284 (2000).
967. *Maximo Aparco Huicincho v Peru*.
968. *Aloeboetoe et al. v Suriname, Reparations,* Inter-American Court of Human Rights (ser C) No 15 at 24, (10 Sep 1993).
969. *Baena Ricardo et al.* case, Inter-Am. CHR, Ser C no 72 (2 Feb 2001).
970. *Caso Masacre Plan de Sanchez v Guatemala*, Reparations, Inter-American Court of Human Rights (ser C) No. 116 para 110 (19 Nov 2004).
971. *ERRC v Greece* (15/2003).
972. *ERRC v Bulgaria* (31/2005).
973. *MDAC v Bulgaria* (41/2007).
974. *ICJ v Portugal* (1/1998).
975. *DH v Czech Republic* [2007] ECHR 57325/00. The case is also notable for the court's approach to indirect discrimination and acceptance of the use of statistics to uphold claims.
976. *Selcuk v Turkey* (1998) 26 EHRR 477.
977. *Loizidou v Turkey* (1997) 23 EHRR 513.
978. *Lopez Ostra v Spain* (1995) 20 EHRR 27.

12.8. CONCLUSIONS

Achieving true economic and social justice for the world's poor clearly requires more than the law – whether through formal or informal mechanisms – can hope to offer. As Yamin (2005) notes, in advocating for a range of strategies to defend and promote economic, social and cultural rights, litigation tends to resolve a set of narrowly framed issues rather than the underlying structural problems.[979] Yet, without access to some form of dispute resolution procedure, millions will remain legally disempowered, unable to even assert let alone enforce the rights that their governments have signed up to. This results in a level of impunity that can be as bad or even worse than some of the worst civil rights atrocities.

For many who use the formal legal system, in particular to challenge structural economic and social inequalities, the real challenge will often be one of implementation. The approach pioneered by courts in South Asia and Latin America of handing down wide ranging orders, such as blueprints for health or education systems, has been subject to accusations of lack of realism and of overstepping the boundaries of the separation of powers. Instead, with some notable exceptions, there appears to be a trend towards examining obligations of conduct rather than result. Yet in the face of executive and legislature inaction and an ability of the poor and marginalized to exert political pressure, courts are often their last hope. In that respect true legal empowerment of the poor would be a worthy new Millennium Development Goal for the twenty-first century.

979. See also Pieterse (2007: 796-822), who argues that socioeconomic rights are accomplices to, rather than victims of, the sidelining of the needs they represent, despite their transformative potential.

13

Privatization and Freedom from Poverty

Danwood Mzikenge Chirwa

13.1. INTRODUCTION

Privatization is not an innovation of recent vintage. Non-state actors have participated in service delivery since time immemorial (see generally Chua 1995: 223; Jaffery 2000: 365). However, it is in the current era that this policy has gained worldwide attention. Privatization has in the past few decades been marketed as a key (and, in some countries, mandatory) measure for eradicating the failures in and improving public service delivery. In developed countries, the move from state domination in service provision to privatization began in earnest in the 1970-80s, principally because of the rise of the notion of market liberalization, the inefficiencies of public enterprises and the financial constraints faced by those countries, which made it difficult for them to support public enterprises (Cook and Uchida 2001; Ascher 1987: 3). In developing countries, by contrast, privatization took hold much later in the 1980s, not as a policy choice but as part of policy conditionality on which the approval of aid and loans depended (Baker 1999; Kikeri et al. 1992: 32). Privatization has attracted considerable attention more recently because of its reach to basic services. Unlike previously, it has now spread to such basic services as water, electricity, childcare facilities, sewerage, the administration of social grants, refuse collection and health (see McBeth 2004: 133).

There is a large body of jurisprudence that considers the merits and demerits of privatization from an economic perspective (see, for example, McDonald and Ruiters 2005; Gayle and Goodrich 1990*a*; Letwin 1988; Kikeri et al. 1992). However, privatization has rarely been analysed from a human rights perspective.[980] As a result, its effects on human rights and, conversely, the implications of human rights for this policy have not yet been fully considered. This chapter uses a human rights framework to demonstrate the impacts of privatization on the poor and how this policy could be implemented without harming and to promote the interests of these people. It starts with clarifying the meaning of privatization and establishing the link between poverty and human rights. Key human rights principles implicated by privatization are then identified. The next sections

980. A recent exception is De Feyter and Isa (2005).

extrapolate how these principles are affected by privatization and how they can be utilized to protect the rights of the poor.

13.2. THE MEANING OF PRIVATIZATION

Privatization raises many political and ideological controversies because it signifies a shift to a reduced role for the state in service provision. Consequently, it has provoked strong resistance from trade unions, consumers, environmentalists and community organizations (Hall and Lobina 2005: 286). As a result, many states are afraid of using this term in their policies and legislation. Such other terms as restructuring and public-private partnerships are thus sometimes used in its place (Kessler 2003). However, these terms are mere forms of privatization, not alternatives to it.

Privatization must also not be treated as synonymous with full divestiture – the complete transfer of a public enterprise to a private actor – as this is also just one form of privatization (McDonald 2002*a*: 296-7). Rather, it must be understood as a broad term encapsulating a process whereby the role of the government in asset ownership and service delivery is reduced while that of the private sector is increased (Gayle and Goodrich 1990*b*: 3). Viewed in this broad sense, privatization embraces a wide range of methods of private sector involvement in service delivery, including partnerships between public and private institutions, leasing of business rights by the public sector to private enterprises, outsourcing or contracting out specific activities to private actors, and management or employee buy-out (Gayle and Goodrich 1990*b*: 3; see also Vuylsteke 1988: 8) .

It is important to mention at the outset that some of the concerns raised by privatization may also arise when the state is providing the service while adhering to certain commercial principles such as financial ring-fencing, performance-based management, removal of subsidies, and full cost-recovery measures. The aim of these principles is to ensure that a service is run on a commercial basis (McDonald 2002b: 11; see also in this volume Chapter 1, Van Bueren, Fulfilling Law's Duty to the Poor). They are broadly called commercialization principles. While they usually find full application in the context of privatization, these principles are increasingly being applied by states through the so-called 'corporatized' entities. Corporatization enables the state to run a public service as a business while ownership, control and management of the assets remain firmly in the public sector. It can sometimes be a springboard to full-scale privatization or, at least, pave the way for the involvement of private actors in service delivery (McDonald and Ruiters 2005: 18). Thus, while this chapter is concerned primarily with privatization (a process whereby non-state actors are involved in service delivery), it will also consider the human rights implications of these commercial principles implemented by states simultaneously with privatization or without it.

13.3. THE LINK BETWEEN POVERTY AND HUMAN RIGHTS

The term poverty is complex and does not lend itself to easy definition. It is a condition that is relative and, as a result, the determination of the poor across disparate societies living under different circumstances is extremely difficult. While it overlaps in many important ways with human rights, the two are separate concepts. On the one hand, a person who lacks access to a given socioeconomic right may not be poor (ICHRP 2003: 17-8). For example, a person may be rich without being educated. Likewise, a well-to-do person may lack access to health in a country where medical doctors are in short supply. On the other hand, human rights constitute a set of entitlements claimable against specific duty holders, while poverty is a condition for which no one may be held accountable (Chirwa and Khoza 2005: 139). By way of illustration, the right to food is an entitlement claimable against the state, but the occurrence of hunger in a particular state may sometimes not be easily attributed to a breach of the state's obligations in relation to the right to food. In short, poverty may arise from an interplay of various economic and systemic factors for which no specific person or institution may easily be held responsible. Thus, it is still not universally agreed whether poverty constitutes a human rights violation (Alston 2005*a*: 785-9).

Notwithstanding these differences, there is a strong correlation between poverty and human rights. In a broad sense, poverty denotes a state in which a person is unable to live a long, healthy and creative life, nor to enjoy a decent life worthy of self-respect and the respect of others (UNDP 2000: 73). As was succinctly stated in the Programme of Action of the World Summit for Social Development (1995):

> Poverty has various manifestations, including lack of income and productive resources sufficient to ensure sustainable livelihoods; hunger and malnutrition; ill health; limited or lack of access to education and other basic services; increased morbidity and mortality from illness; homelessness and inadequate housing; unsafe environments; and social discrimination and exclusion. It is also characterized by a lack of participation in decision-making and in civil, social and cultural life. … Furthermore, poverty in its various forms represents a barrier to communication and access to services, as well as a major health risk, and people living in poverty are particularly vulnerable to the consequences of disasters and conflicts. Absolute poverty is a condition characterized by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to social services.[981]

981. See Resolution 1 of the World Summit for Social Development, Copenhagen 1995, A/CONF. 166/9, para. 19.

Understood in this broad sense, poverty means something more than income or material deprivation.[982] It connotes a lack of basic means of living with dignity. It is therefore immediately clear that conditions of poverty are closely linked to the raison d'être of economic, social and cultural rights, whose primary aim is to ensure access by all to the resources, opportunities and services necessary for an adequate standard of living (Liebenberg and Pillay 2000: 16). Socioeconomic rights are robbed of their core purpose if, for example, a significant number of individuals are deprived of minimum essential levels of basic services such as health care, primary education, food, water, social security, and housing.[983] These rights can serve as important instrumental values in combating poverty. Not only do they have the potential to empower individuals and communities, they can also assist in achieving the goal of equalizing 'the distribution and exercise of power within and between communities'.[984] Conversely, poverty stands in the way of the full realization of economic, social and cultural rights as intrinsic values in themselves. A poor person may not enjoy the right to education, the right to an adequate standard of living, or the right to adequate housing without state assistance.

Significantly, the links between poverty and human rights stretch beyond economic, social and cultural rights.[985] Civil and political rights are also vital to the fight against poverty. As noted above, poverty is also characterized by 'a lack of participation in decision-making and in civil, social and cultural life', which is indicative of the failure or inability to exercise civil and political rights. Thus, both these sets of rights are parts of a single whole and 'create synergies that contribute to poor people's securing their rights, enhancing their human capabilities and escaping poverty' (Alston 2005*a*: 789; see also Chapters 1, 8 and 10 in this volume).

The upshot of this discussion is that the notions of poverty and human rights are intimately interrelated and interdependent. The implementation of human rights, both civil and political rights and economic social and cultural rights, is a key to breaking the downward spiral of entrapment in poverty. Inversely, poverty alleviation can improve the enjoyment of human rights.

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982. Defining poverty in terms of income has been widely criticized as it, among other things, fails to capture in full the humiliation, powerlessness and hardships faced by the poor. See, for example, Reddy and Pogge (2005); Chossudovsky (1999).
983. Para. 9, CESCR General Comment No. 3 'The nature of States parties obligations (Art. 2, para.1 of the Covenant)' 14 December 1990, E/C.12/1991/23.
984. CESCR (2001), 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights', E/C.12/2001/10, para. 6.
985. See Van Bueren (1999*a*: 53-4), arguing that '[p]overty does not subdivide neatly into separate rights', and that ['t]here is no single right which protects against poverty, because by its very nature, poverty alleviation requires holistic solutions'.

13.4. A RIGHTS-BASED APPROACH TO SERVICE PROVISION

Arguments against privatization made by trade unions and many social movements turn largely on the ideological debate about the role of the state in society. Privatization is feared by these actors as it means a reduced role of the state in service provision. This policy is also generally implemented in the context of an increasingly capitalist global economic environment (see Isa 2005: 9). Bearing in mind that that privatization raises such ideological and political questions, it has been suggested that international human rights law is neutral on privatization in the sense that it is neither for nor against it (Isa 2005: 16; Hunt 2002: 4-5). This claim is premised on paragraph 8 of General Comment No. 3, where the Committee on Economic Social and Cultural Rights (CESCR) stated that:

> The undertaking '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. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot be accurately described as being predicated exclusively upon the need for, or the desirability for a socialist or capitalist system, or a mixed, centrally planned, or *laisser-faire* economy, or upon any other particular approach.

Similarly, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights posit that there is no single road to the full realization of economic, social and cultural rights, adding that '[s]uccesses and failures have been registered in both market and non-market economies, in both centralised and decentralised political structures' (para. 6).

The view that human rights are neutral on privatization is correct to the extent that this law does not erect any legal impediments to the involvement of non-state actors in service provision. Indeed, Liebenberg has argued that 'the state should be entitled to rely on private mechanisms of delivery in appropriate circumstances', citing the provision of education by private institutions and adult education by non-governmental organizations as examples of private sector contribution to service delivery (Liebenberg 2005*b*: 41-35). Furthermore, in the South African case of *Government of the Republic of South Africa and Others v Grootboom and Others* (*Grootboom)*, the Constitutional Court conceded that '[i]t is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing.'[986] These propositions are

986. 2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) para. 35.

consistent with the state's duty to fulfil human rights, which, among other things, requires it to facilitate the realization of rights.[987]

However, it can be misleading to argue broadly that human rights are neutral on privatization for two reasons. Firstly, both General Comment No. 3 and the Limburg Principles, on which this view is based, refer to the broader economic and political systems. These documents lend credence to the idea that human rights are interrelated, interdependent and mutually supporting, and not by-products of any political or economic system (Chirwa 2004*a*: 232). However, privatization is a much more specific policy which is implemented in a specific context. Its merits in human rights terms can therefore be determined more easily than the general economic system obtaining in a state.

Secondly, human rights law embodies specific and general substantive and procedural principles that should govern any policy aimed at implementing or affecting rights including privatization. A policy that contravenes these principles may not be upheld. As noted earlier, privatization has now extended to such basic services as health care, housing, education, water, food, childcare, electricity and sanitation, which are directly linked to economic, social and cultural rights.[988] These rights impose specific obligations on the state and have ascertainable content. Economic, social and cultural rights are important not only because they enjoin the state to refrain from interfering with existing access to these rights but also because they require it to adopt measures to ensure that everyone lives in dignity. Crucially, these rights require that services must be of acceptable quality, available in sufficient quantity and accessible physically and economically.[989] States are obliged without delay to embark on a path towards realizing these rights progressively and within the available resources.[990] Progressive realization has quantitative and qualitative dimensions. The former places an obligation on the state to ensure that accessibility to basic services is extended to larger numbers of

987. See Asbjørn Eide, Final report on the right to adequate food as a human right. UN Doc E/CN.4/Sub.2/1987/23; Eide (2001: 38).

988. Although electricity and sanitation are not expressly recognized as human rights in the ICESCR, these may be read into the existing provisions of the Covenant. In *Grootboom* (2000 11 BCLR 1169 (CC); 2001 1 SA 46 (CC) para. 37) the Constitutional Court construed the right of access to adequate housing, for example, broadly as encompassing provision of water, sewerage removal, electricity and access to roads. Likewise, the Committee on Economic, Social and Cultural Rights (CESCR) has stated that adequate housing implies 'sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'. See para. 8(b), CESCR General Comment No. 4 (1991), 'The right to adequate housing (art.11(1) of the Covenant)', Sixth Session, 13 December 1991, E/1992/23.

989. See, for example, para. 6, CESCR General Comment No. 12, 'The right to education (art. 13 of the Covenant)', Twenty-first Session, 12 December 1999, E/C.12/1999/10; para. 12, CESCR General Comment No. 13, 'The right to the highest attainable standard of health (art. 12 of the Covenant)', 11 August 2000, E/C.12/2000/4.

990. Art. 2 of the International Covenant on Economic Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976. Concerning Grootboom, see also Chapters 1, 2 and 3 in this volume.

people over time, while the quantitative element summons the state to ensure that the quality of access to basic services is improved over time (Liebenberg 2005*c*: 33-42). Where a service is provided by a private service provider, the state has the duty to adopt and implement protective measures against infringements of the rights of individuals.[991] Irrespective of who is providing the service, human rights impose an obligation on the state to fulfil them (Eide 2001). This duty encompasses the obligation to facilitate the realization of the right, to promote the right through education and information dissemination, and to provide the right to those who cannot afford it (Eide 2001). These are some of the key substantive human rights principles that may be used to test the acceptability of or inform privatization policies.

Human rights also espouse several procedural principles that ought to underpin policy development and implementation. Among them is the principle of accountability, which requires that development policies entrench legal and administrative measures to guarantee democratic accountability.[992] The second is the principle of public participation.[993] International human rights law demands that policies be devised, implemented and monitored in a manner that allows for the participation of local communities to ensure that collective decisions do not undermine their interests and rights. Both these principles form part of the so-called human rights-based approach to development, which is premised on the notion that the human person is the ultimate subject of human development.[994] It is therefore imperative that development measures or policies aimed at alleviating poverty be structured within a human rights framework.

It can therefore be argued that human rights contain certain specific principles that can be used for determining the acceptability of privatization of a particular service in a given context. The following sections examine the manner in which these principles are affected by privatization and, conversely, how they can be used to ensure that privatization benefits all, including the poor.

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991. See, for example, paras 15 & 18, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, January 22-26, 1997.
992. According to the CESCR: 'Rights and obligations demand accountability: Unless supported by a system of accountability, they become no more than window dressing.' CESCR (2001), 'Substantive issues arising in the implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights', E/C.12/2001/10 para. 14.
993. The right to participate in policy making and implementation derives from a range of well-entrenched rights such as the right to participate in the conduct of public affairs directly or indirectly through chosen representatives, freedom of association and assembly, the right to information, and freedom of opinion, speech and expression.
994. See Art. 2(1) of the Declaration on the Right to Development, 97th plenary meeting, 4 December 1986, A/RES/41/128. For scholarship on human rights based approaches to development see, for example, Jonsson (2003) and Uvin (2004).

13.5. OBJECTIVE OF PRIVATIZATIONS

Privatization policies rarely include the improvement of access to basic services, let alone the advancement of human rights, as their key objective. The only common objective of privatization that has a direct bearing on human rights is the objective to promote 'popular capitalism'. This objective has great appeal at face value. It is touted as a powerful tool of empowering marginalized groups by encouraging them to buy shares in privatized enterprises.[995] Despite the inclusion of such a noble goal, privatization initiatives rarely benefit local people in practice. This is so because the provision of basic services such as water and electricity are usually contracted out to multinational enterprises in an effort to attract foreign direct investment (see Naegele 2004: 112). This reality, coupled with massive job losses that accompany privatization (Ramanadham 1993: 54; Aharoni 1991: 80), means that the promotion of popular capitalism is an objective that is remotely achievable.

Privatization is intended mainly to achieve certain economic objectives. These include to foster increased efficiency, competition, economic growth and development; to contract the public sector to a manageable entity; and to reduce fiscal deficits and national debt. Although there is some evidence that privatization has the potential to achieve these objectives,[996] the attainment of such economic objectives does not guarantee greater access to the privatized service by poor people. For example, structural adjustment programmes – a set of economic policy prescriptions imposed on developing countries aimed at boosting their economic performance to enable them to repay debts owed to the IMF and the World Bank – were reported to have resulted in remarkable economic growth. However, these policies have been widely criticized for having exacerbated poverty in most countries where they were implemented.[997] Some studies on the impact of privatization on the welfare of households have revealed a similar trend. For example, it has been established that the privatization of telecommunications in Peru brought about competition and increased efficiency and service quality in the telephony sector (Torero and Pascó-Font 2001). However, it resulted in a significant reduction in the amount of household consumption of telephony services due to price increases (Torero and Pascó-Font 2001). The study also found that despite the increase in the supply of electricity (by 27 per cent since privatization) and water (from 75 to 84 per cent), there were insignificant or even negative impacts of privatization

995. See, for example, The Ministry of Public Enterprises Republic of South Africa (2000); Ministry of Finance and Development Planning (2000: 10); Section 3 of the Public Enterprises (Privatisation) Act of Malawi, Act No. 7 of 1996.

996. See, for example, Kikeri et al. (1992). However, some contest this conclusion and argue that privatization does not actually result in economic growth, increased competition and quality of services, and efficiency. See, for example, Cook and Uchida (2001); Gayle and Goodrich (1990*a*: 8).

997. See, for example, Oloka-Onyango and Udagama, 'Economic, social and cultural rights: Globalisation and its impact on the full enjoyment of human rights', Progress report submitted in accordance with Sub-Commission resolution 1999/8 and Commission on Human Rights decision 2000/102, 2 August 2001, E/CN.4/Sub.2/2001/10, para. 49.

on the welfare of households for these services (Torero and Pascó-Font 2001). Likewise, it has been argued that the water concession in Nelpruit, South Africa, led to an improved level and quality of service delivery to townships.[998] Despite this singular achievement, tariff increases and high levels of unemployment meant that most residents could not afford to pay for the services, which led to massive disconnections (Smith et al. 2005: 139-40). In the Philippines, although the twenty-five-year water concession involving Suez and Bechtel brought about some improvements in the number of water connections in Manila, it has been revealed that it made water less affordable due to, among other things, tariff increases of about 500-700 per cent within a space of just nine years (Hale 2006: 772-3). These studies flag the important point that economic considerations do not always cater for the social needs of the people.

Besides, it is doubtful, as regards basic services, that privatization may achieve some of its stated economic objectives. For example, privatization may not bring about competition in the provision of such basic services as water and electricity because these services are normally provided by one service provider at a time in a given area. Limited competition may take place at the bidding stage but, *even then*, there has not been a wide choice in service providers concerning basic services due to investor shortage (Bayliss 2002: 6; Baker 1999: 254). Furthermore, the fact that concessions for water and electricity are often long, it is practically not easy at the end of the contracts for new bidders to compete with the previous operators, who have the advantage of operating the service for a long time and are therefore are in a better position to submit a more realistic and attractive bid. Thus, privatization has great potential both to end public monopolies and install in their place private monopolies.

Lastly, it must also be observed that some of the principles implemented together with privatization conflict with human rights. As will be demonstrated below, the implementation of cost recovery measures and some of the credit enforcement measures that go with privatization may constitute a denial of human rights, especially those of the poor.

It can therefore be concluded that, generally, policy-makers do not view privatization as an important means of realizing human rights. Rather, they regard it principally as an economic measure aimed at achieving certain economic objectives. This section has attempted to demonstrate that placing much emphasis on economic objectives and neglecting social objectives or human rights presents the danger of privatization leading to increased quality and quantity of basic services but reduced access to them by the poor.[999] Since basic services constitute the core of certain human rights, the privatization of these services ought to have

998. Smith et al. (2005: 130), noting that about 70 per cent of the township population had 24-hour access to water and improved sanitation because of the privatization.

999. UN High Commissioner of Human Rights, Economic, Social and Cultural Rights: Liberalisation of trade in services and human rights, Report of the High Commissioner, E/CN.4/Sub.2/2002/9, 25 June 2002: 3.

as its primary objective the realization of the applicable rights in order to ensure that everyone, including the poor, benefits from privatization.

13.6. PRIVATIZATION PROCEDURES

It is common practice for many developing countries to determine beforehand a list of public enterprises earmarked for privatization. For these countries, privatization policies and legislation are thus formulated not to facilitate the process of determining what to privatize but simply how to privatize. The preceding section has argued that privatization does not constitute an assurance that the privatized enterprise will perform better than before. It also does not guarantee that all, including the poor, will benefit similarly from it. Furthermore, not all forms of privatization can produce similar results. Therefore, the decision regarding what to privatize ought to be made after careful consideration of each enterprise or service on its own merits. The first question ought to be: which mode of service delivery, public or private, would best achieve the chosen objectives? If a private mechanism is warranted, the next question must be: which method of private sector involvement or privatization is likely to secure the best outcome with regard to the stipulated objectives? This approach underscores the significance of integrating human rights in the objectives of privatization. Without such integration, it is possible to choose a method of service provision that has the greatest potential to achieve economic objectives although it poses a serious threat to human rights.

South Africa's Local Government: Municipal Systems Act 32 of 2000 (Systems Act) provides an ideal procedure[1000] for regulating decision-making processes regarding the privatization of basic municipal services. It empowers municipalities to provide municipal services through internal or external mechanisms.[1001] The principles to guide the relevant officials in choosing between these mechanisms are clearly set out in Section 78(4), as read with Section 73(2) of the Systems Act. Among other things, the municipality must consider a method that is likely to achieve the best outcome in providing the service, in a manner that is equitable, accessible, financially and environmentally sustainable, and conducive to the prudent, economic, efficient and effective use of available resources and the improvement of standards of quality over time. These provisions embody essential elements of socioeconomic rights.

Interestingly, the Systems Act also requires municipalities to undertake an assessment of the different options available and a feasibility study before deciding on the appropriate mode of service provision.[1002] However, the scope of the feasibility study is limited in that it does not include a human rights impact assessment

1000. The provisions dealing with the privatization procedure are discussed in greater detail in Steytler (2004: 169-179).
1001. Section 76(a) of the Systems Act.
1002. Section 78(3)(b) and (c) of the Systems Act.

(Chirwa 2004*a*: 192). The idea of impact assessments is novel in comparative human rights law but very well entrenched in comparative environmental law (see, for example, Alder 1993: 203; Brown 1997: 313; NGO Working Group on EDC 2004*a*: 5-6). It is currently being advocated as a powerful preventative device of human rights violations (see for example, NGO Working Group on EDC 2004*b*; Amnesty International 2005: 8). In the context of the privatization of basic services, a human rights impact assessment could, if integrated in the feasibility study or other pre-privatization assessment, help to determine the possible impacts of privatization on the accessibility to the privatized service, labour and employment rights, and human rights generally. It might also help with the identification of solutions to the problems forecast.

Once the decision to privatize a given service or enterprise has been made, the process and procedure of privatizing it ought to embody adequate participatory, transparency and accountability mechanisms.[1003] This is hardly done in practice. While competitive bidding is often included in privatization procedures, it alone is not enough to guarantee transparency and the identification of the best service provider as it gets easily sidestepped by collusion among bidders and the prevalence of corruption (Lobina and Hall 2000: 37; Amnesty International 2005: 9; Bayliss 2002: 17). Furthermore, although some states also make provision for some level of information dissemination to the public regarding the enterprises or services to be privatized and the progress on privatization, such information is not intended to facilitate public participation in the privatization process but is mainly targeted at possible investors.[1004]

The lack of participatory procedures and the inadequacy of transparency mechanisms have often yielded disastrous consequences. For example, a contract between the Eastern Cape Municipality in South Africa and a subsidiary of a French company, Suez, granted the status of a monopoly to the company as the exclusive operator of water and sewerage in the area for the duration of the contract (see Ruiters 2005: 152-6). It also embodied hidden subsidies to the company and hidden costs to the municipality. As a result, the municipality was required to pay large sums of money to the company until it could not afford them and decided to

1003. For example, the consultation process leading to water privatization in Zambia consisted of a study conducted under the supervision of a steering committee consisting of various government representatives, whose results were later presented to a stakeholders' workshop comprising 45 people, mostly government representatives and two NGOs only. A similarly dubious procedure was followed in Ghana in its water privatization project. See Cocq (2005: 240, 250); and Amenga-Etego and Grusky (2005: 275-285). The problem of accountability in the privatization process has been noted in many other countries outside Africa including in the Russian Federation, the former Eastern Bloc countries, Southeast Asia, Bulgaria and Nicaragua. See Amnesty International (2005: 9); and Kessler (2003).

1004. See, for example, rule 17(1) of the Public Enterprises (Privatisation) Regulations 1997 promulgated in terms of the Malawian Privatisation Act, which enjoins the Privatisation Commission to publish in the Gazette and at least two newspapers the names of public enterprises to be privatized and information on the privatizations completed in that quarter. However, these regulations do not provide for public participation in the decision-making processes on privatization.

cancel the contract (see Ruiters 2005: 159). Other contracts have created vaguely enforceable terms or failed to stipulate the exact obligations of the private service provider, paving the way for costly legal disputes between the parties. In Zimbabwe, a dam construction project proposed by Bi-Water, a British firm, and negotiated clandestinely with certain politicians was withdrawn after a commission of inquiry noted, among other things, concerns about the lack of clarity on certain terms and the inclusion of burdensome terms for the government in the proposal (Mate 2005: 232-234). In Tanzania, a privatization scheme involving Bi-Water and City Water, a subsidiary of the German transnational corporation Gauff, collapsed as the parties failed to renegotiate the contract due to unresolved disputes arising from the failure by the corporations to install new pipes, improve water quality and quantity and extend service delivery (see Vidal 2005).

It is therefore critical, in order to give effect to the human rights principles of public participation and accountability, that privatization procedures should include mechanisms for community participation in the privatization process both at the time of deciding whether an enterprise or service should be privatized and which service delivery mode to adopt, as well as during the selection of the appropriate provider and the negotiation of the terms of the contract. Crucially, it is also important that the procedures should include a requirement to consider the human rights obligations of the states and records of the private service providers when awarding or concluding contracts to or with private actors.

The Systems Act of South Africa is also unique in that it attempts to incorporate the principles of public participation, openness and accountability in its privatization procedures. These provisions were introduced following the problems encountered in the first few water privatization initiatives in that country. As noted above, this Act allows municipalities discretion to provide a municipal service through an internal mechanism or external mechanism. If it chooses an external mechanism, the municipality is required to give notice to the local community of its intention to explore the provision of a municipal service through an external service provider.[1005] In assessing different service delivery options, the Systems Act requires the municipality to consider, among other things, the views of the local community and those of organized labour.[1006] It also requires municipalities to establish, before they enter into a service agreement with an external provider, a mechanism and programme for community involvement and information dissemination regarding the service delivery agreement.[1007] Municipalities are also obliged to communicate the contents of the service agreement to the local community through the media.[1008] Once the agreement has been concluded, the act requires the municipality to make copies of the agreement available at its offices for public inspection during office hours and give notice to the media of the particulars of the service that will be provided under the agreement, the name

1005. Section 78(3)(a) of the Systems Act.
1006. Section 78(3)(b).
1007. Section 80(2).
1008. Section 80(2).

of the provider and the place where and the period for which the copies will be available for public inspection.[1009]

Such provisions would go a long way in ensuring meaningful participation of local communities in privatization processes, thereby restoring public confidence in these processes and removing a sense of distrust between the communities and the government. They would also help to ensure that privatization deals are not concluded hurriedly without considering fully the human rights obligations of the state and the needs and expectations of the communities.

13.7. ACCOUNTABILITY OF SERVICE PROVIDERS

A most critical issue raised by privatization concerns the accountability of private service providers. Privatization operates to shield service provision from the realm of public accountability and public law (Freeman 2000: 838-846). Public service providers are amenable to a whole range of accountability mechanisms such as the Parliament, the Auditor General, the Ombudsman and Human Rights Commissions (Hatchard 1999: 289). The activities of private actors, by contrast, rarely fall within the competence of these institutions. Furthermore, as human rights traditionally do not apply to private conduct and private actors, it is not possible in many countries to seek public law redress where a private service provider violates a human right (Aman 2001: 1495-1501). Such remedies may exist in countries where the horizontal application of the Bill of Rights is recognized.[1010] However, having regard to the lack of clarity on the nature of the obligations of non-state actors in relation to human rights, it is not easy for claimants to establish, for example, that a private service provider should be held responsible for failing to extend a service to a poor community as this may be regarded as an onerous obligation that should bind states only. Yet, private law itself does not offer easy solutions to problems raised by privatization. As the relationship between private service providers and states are governed by contract, the doctrine of privity of contract operates to prevent individuals whose rights have been infringed by a private service provider to rely on contract law remedies even where it can be established that the infringement was the result of non-performance of the contract.

One of the solutions to these problems is to hold the state responsible for the acts of private service providers. This course of action is premised on the notion that states are the primary bearers of human rights obligations.[1011] Privatization

1009. Section 84(3).

1010. Examples of countries that recognize the horizontal application of human rights in their constitutions include South Africa, Malawi, Ghana, Namibia and Northern Ireland.

1011. See para. 1 of the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23; para. 7 of the preamble to the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, UN General Assembly Resolution 53/144 of 9 December 1998.

does not mean a privatization of these obligations. The state remains ultimately responsible for implementing rights (see de Feyter and Isa 2005: 3-4). More specifically, the state has the duty to protect human rights (Eide 2001: 31-4). This duty entails that the state should prevent violations of human rights committed by third parties. In the context of the right to water, for instance, the CESCR has stated that the state has the duty to prevent third parties from 'compromising equal, affordable, and physical access to sufficient, safe and acceptable water'.[1012] Likewise, the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (Maastricht Guidelines) state that the duty to protect requires the state to 'ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights'.[1013]

According to the African Commission on Human and Peoples' Rights, which monitors the implementation of the African Charter on Human and Peoples' Rights, duty to protect can be fulfilled through 'the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations' that enables individuals to freely realize their rights and freedoms.[1014] The CESCR has emphasized the need for an effective regulatory system providing for 'independent monitoring, genuine public participation and imposition of penalties for non-compliance'.[1015]

It must be noted that the state may not be held responsible for any violation committed by private actors. Its liability only arises where it fails to exercise due diligence to prevent the violation or investigate the violation and provide redress.[1016] 'Due diligence' means that the steps taken must be serious or reasonable.[1017] It can therefore be said that the doctrine of state responsibility constitutes a useful tool for holding private service providers indirectly accountable for human rights. For example, the failure by the state to adopt protective measures against arbitrary disconnections of a service or unreasonable price increases for a service may lead to state responsibility. A state may also be held responsible where poor quality services are offered resulting in health complications.

However, state responsibility only offers a partial solution to problems raised by privatization.[1018] As noted earlier, the success of this device relies heavily on effective regulation and monitoring of private service providers. This

1012. Para. 3 of CESCR General Comment No. 15, 'The right to water (arts 11 and 12 of the Covenant)', adopted by the CESCR at its 29th Session, 11-29 November 2002, E/C.12/2002/11.
1013. Adopted by international experts in economic, social and cultural rights in Maastricht on 22-26 January 1997, para. 18.
1014. Para. 46, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Communication 1555/96, Fifteenth Annual Activity Report (2001-2002).
1015. See para. 24 General Comment No. 15, 'The right to water (arts 11 and 12 of the Covenant)', adopted by the CESCR at its 29th Session, 11-29 November 2002, E/C.12/2002/11.
1016. *Velásquez Rodríguez v Hondurus* [1988] Inter-American Court of Human Rights (Ser C) No 4.
1017. *Velásquez Rodríguez v Hondurus* [1988] Inter-American Court of Human Rights (Ser C) No 4, para. 177.
1018. For a discussion on the potential and limits of this device in an international context see Chirwa (2004*b*: 1).

task is an onerous one, involving considerable financial and human resources. And in some cases, privatization itself renders the task of regulation difficult to undertake. It has been argued, for example, that long concessions are particularly difficult to monitor because as time passes by, the private service provider gains better knowledge about the service than the state and holds monopoly over the information about the service on which the regulators have to rely.[1019] Effective monitoring can also be very costly. The World Bank has estimated that 'the total transaction costs involved in introducing private sector participation, including articulating a regulatory framework, conducting competitive bidding etc. … make up between 5 to 10 per cent of total project costs' (quoted in Ruiters 2005: 160). The state may not have the capacity to sustain an effective monitoring mechanism due not only to financial constraints but also to a lack of qualified and experienced officials to undertake the task. The state's capacity may also affected by the fact that privatization is implemented as part of efforts aimed at reducing stringent market regulations and contracting the state (see Baker 1999: 259-260).

Case studies from around the globe have cogently highlighted the problems of monitoring faced by municipalities during privatization. For example, it has been argued that an independent regulator of a thirty-year water concession in Buenos Aires in Argentina was largely ignored by Aguas Argentinas, a consortium of corporations led by a French transnational corporation, Suez (Bond et al. 2001). Not only did Aguas ignore the regulator's requests for information, it also regularly *bribed* government officials and routinely neglected its commitments, resulting in serious environmental problems (Bond et al. 2001). In the Philippines, it has been alleged that the regulatory office failed to monitor the performance of the private water operator due to, among other things, the fact that it had no enforcement mechanisms, lacked a clear mandate and excluded the public from participating in its activities (Hale 2006: 788-9). It has also been argued that a local authority in Nelspruit, South Africa, failed to effectively monitor the water concession there for various reasons including the lack of capacity and other service delivery challenges (Smith et al. 2005: 137-8), as epitomized by the closure at one point of the monitoring unit for six months. Likewise, Ruiters has argued that councillors appointed to monitor water concessions in the Eastern Cape, South Africa, had no capacity to do so (Ruiters 2005: 159-160). Not only were most of the councillors unaware of the terms of the contracts they were supposed to monitor, they were also not in a position to understand the complex, vague and largely enforceable terms embodied in those contracts (Ruiters 2005: 160).

These experiences highlight the fact that decisions on what to privatize and by what method ought to be taken very seriously as some services and some forms of privatization, such as long concessions, present particularly intractable problems of regulation and monitoring. Furthermore, they underscore the fact that it is not enough to have privatization commissions, as is the case in many countries,

1019. See Ruiters (speech delivered at a seminar on privatization of basic services, democracy and human rights, University of the Western Cape, 2-3 October 2003) as reported in Johnson and Chirwa (2003).

without national and, where necessary, service-specific monitoring bodies for privatized enterprises and services. Questions of accountability and transparency do not automatically disappear once the process of privatizing a service has been completed. They continue to arise throughout the implementation stage of the privatization project. Finally, problems of the accountability, monitoring and regulation of private service providers help to underscore the need for extending the application of human rights to non-state actors. These actors have now assumed more powers in the past and are increasingly being involved in functions that were once carried out by states alone. Neither private law nor public law offer easy solutions for holding private service providers accountable for wrongs committed against individuals and communities. Some non-state actors (especially transnational corporations) may not be easily controlled by states because they may be in a stronger financial position than some states.[1020]

It can therefore be concluded that privatization justifies the call for the extension of the application of human rights to non-state actors generally and, specifically in the privatization context, for the creation of specific accountability measures for private service providers consisting, among other things, of a system of complaints by individuals and groups affected by the acts or inactions of private service providers in connection with the provision of a particular service and providing for redress and remedies both against the state and the relevant private service providers. While the monitoring mechanisms could be state-led, it is important to establish them as independent bodies and make provision for the involvement of civil society and the affected communities in order to enhance their legitimacy and transparency and reduce chances of corruption.

13.8. ACCESS

The fear that basic services will become inaccessible to the poor is arguably the most commonly cited reason for the resistance to privatization. This concern arises chiefly from the fact that, unlike the public sector, private service providers are driven by the quest for profit and do not have binding social responsibilities. This quest, the argument goes, motivates them to be selective about beneficiaries (Bayliss 2002: 10-11). They tend to invest in areas that can bring huge turnovers, thereby favouring those that can afford the service, such as industrial users, while ignoring poor consumers. It has been argued, for example, that Bi-Water withdrew from a water privatization project in Zimbabwe because the consumers were too poor to afford the service (Bayliss 2002: 7).

1020. This is particularly the case in developing countries where countries offering aid impose privatization as a conditionality. In most cases corporations from their own countries proceed to win the contracts to provide the services. In Southern Africa, for example, water concessions have mainly been granted to corporations from the UK, France and Germany. These countries provide the bulk of the development aid into the region.

The United Nations High Commissioner for Human Rights partly supported this viewpoint when he warned that liberalization policies, of which privatization forms a constituent part, can affect the quality and quantity of access to basic services in the following ways:

- the establishment of a two-tiered service supply in a corporate segment focused on the healthy and wealthy, and an under-financed public sector focusing on the poor and sick;
- brain drain, with better trained medical practitioners and educators being drawn toward the private sector by higher pay scales and better infrastructure;
- an overemphasis on commercial objectives at the expense of social objectives that might be more focused on the provision of quality health, water and education services for those that cannot afford them at commercial rates.[1021]

One of the principal ways in which privatization impacts on the accessibility of privatized services is through the use of full cost recovery measures. These measures require that a service be charged to recover the initial cost of installing the infrastructure (capital cost) and the expense associated with operating and maintaining the infrastructure (marginal cost). They also entail the ring-fencing of the accounting system for the service at hand so that cross-subsidies from other services or among consumers are eliminated. Thus, the service fees charged to consumers where cost recovery measures are in place reflect both marginal and operational costs plus the profit margin. It is therefore not surprising that privatization, which is invariably implemented simultaneously with full cost recovery measures, is often accompanied by dramatic tariff increases, rendering the services inaccessible to the poor.[1022]

Full cost recovery measures can be quite unfair. Since poor communities usually require new infrastructure to be installed in order to extend the provision of services to them, they often end up paying more for services than affluent communities because the tariffs for the former include the cost of the newly installed infrastructure. Such unfairness has been noted in South Africa, for example, where white South Africans and the industrial sector have continued to benefit unfairly from the heavily subsidized municipal service infrastructure erected during the apartheid era while Black South Africans, still living mostly in

1021. UN High Commissioner of Human Rights, 'Economic, social and cultural rights: Liberalisation of trade in services and human rights', Report of the High Commissioner, E/CN.4/Sub.2/2002/9, 25 June 2002, p. 3.

1022. See, for example, Ruiters (2002: 41) (noting that a 100 to 300 per cent increase on service rates was introduced in South Africa's three water privatization projects in Fort Beaufort, Queenstown and Stutterheim in the mid 1990s. See also McDonald (2002*c*: 17). Similar trends have been noted in many other countries including Hungary, Czech Republic, and Philippines. See Lobina and Hall (2000: 37-8). According to Bayliss (2002: 32, 13-14), tariff increases during privatization can also be attributed to such other factors as the guarantees of profit that states make to private service providers as part of efforts to attract more investors and the inability of states to regulate these actors.

informal settlements, require new infrastructure for basic services for which they must pay fully (McDonald 2002*c*: 27).

Tariff increases invariably lead to non-payment, which, in turn, prompts officials to resort to harsh credit enforcement mechanisms, including disconnections, water restrictors, pre-paid meters and intermittent water supply (see Ruiters 2005: 51-53; Khonou 2002: 59). In Durban, South Africa, for example, 800-1000 disconnections from the water supply were taking place every day in early 2003 (Loftus 2005: 194). Similarly, about 160,000 households, mostly in poor areas, experienced water cut-offs in Cape Town in 2001 due to non-payment (Smith 2005: 180). These disconnections present diverse health hazards for poor communities who have to resort to alternative sources of water, which is in most cases unsafe for household use (Grusky 2001: 15-16). Worse still, women and children bear a disproportionate burden of these disconnections as they have to walk long distances to fetch water (Grusky 2001: 15-16). Not only do these disconnections affect poor households, they are also being harshly used against schools. For example, in Namibia the introduction of cost recovery measures in the wake of a water privatization deal with Berliner Wasser Betriebe of Germany resulted in the suspension of water supply to all government schools in Tsumeb Municipality for one week (Labour Resource and Research Institute 2005: 263). Other schools were similarly affected in other municipalities (Labour Resource and Research Institute 2005: 263).

Apart from disconnections, pre-paid meters also provide an easy solution to the problem of non-payment and are increasingly being used against poor households (see Harvey 2005: 120). These meters discontinue a service automatically after the credit expires. They therefore have the effect of bypassing procedural fairness principles, such as the right to a notice of the impending disconnection and the right to a hearing (Flynn and Chirwa 2005: 69-70).

All in all, these experiences underscore the need for the state to put in place protective measures in favour of poor people in the event of privatization. These may include procedural safeguards against arbitrary disconnections setting out, among other things, the procedure for undertaking and challenging disconnections; and mechanisms for regulating tariff increases, pricing methods and credit enforcement measures.[1023] Provision should also be made to proscribe disconnections of certain basic services such as water and electricity from certain

1023. For example, Section 4 of the South African Water Services Act 108 of 1997 provides that procedures for discontinuance or limiting of water services must be 'fair and equitable' and that they must 'provide for reasonable notice of the intention to limit or discontinue water services and for an opportunity to make representations'. Similar requirements were laid down in the Water Industry Act of 1991 (UK), as amended in 1999. This act also limits the power of a water supplier to disconnect or limit water supply for non-payment from such places as private dwelling houses, children's homes, residential care homes, prisons and detention centres, schools and premises used for children's day care. Furthermore, in *R v Director General of Water Services Ex Parte Lancashire CC*, [199] Env. L.R. 114, 127-130, the English Queen's Bench Division held that prepaid meters were illegal as they circumvented procedural fairness rules.

premises where those services are needed most.[1024] Significantly, privatization should not be implemented as an isolated policy. Rather, it must be linked to other policies of the government concerning health, social security, housing, water, food security and education. For example, water privatization projects ought to be considered in the light of social security mechanisms that may assist poor communities in accessing water. Where social security provisions are inadequate or non-existent, the government might consider introducing a free water policy in order to ensure that poor households have access to minimum amounts of water necessary for human existence. The state might also have to subsidize the provision of these services to help the poor.[1025] Such measures would be in keeping with the state's duty to fulfil human rights, which includes an obligation to provide the right when individuals or groups are unable to realize the right by their own means.[1026]

13.9. CONCLUSION

The prevalence of poverty around the world is a strong indication of the failure of states to provide basic services to their citizens. Enhancing access to these services would without question go a long way towards alleviating poverty. In principle, privatization should be welcomed as an effort to boost service provision. The trouble, as this chapter has shown, is that policy-makers do not regard it as having social objectives including poverty reduction, enhancing accessibility to services and realizing human rights. Rather, they regard it as an economic measure intended to bring about certain economic objectives with the vague hope that these will in turn result in poverty reduction. Using human rights as a framework for analysing the effects of privatization on poor people, this chapter has attempted to establish that it is critical for privatization policies to integrate the realization of human rights as their central objective to ensure that everyone benefits from

1024. For example, the Water Industry Act of 1991 (UK) limits the power of a water supplier to disconnect or limit water supply for non-payment from such places as private dwelling houses, children's homes, residential care homes, prisons and detention centres, schools and premises used for children's day care.

1025. In *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC), for example, the South African Constitutional Court stated that cross-subsidization may in appropriate circumstances be necessary to uphold the right to equality. In this case, the court refused to hold that it was unfair to charge poor residents different rates from those applicable in a more affluent residential area for the same service.

1026. The CESCR has stated: 'States parties must adopt the necessary measures that may include, inter alia, (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.' Para. 27, General Comment No. 15, 'The right to water (Arts 11 and 12 of the Covenant)', adopted by the CESCR at its 29th Session, 11-29 November 2002, E/C.12/2002/11.

them, including the poor. The need for such integration is heightened in the case of basic services as these relate directly to socioeconomic rights.

Due partly to the fact that policy-makers have thus far not considered the relevance of human rights to privatization, privatization procedures face the challenge of embodying sufficient transparency and accountability measures for both state and private entities before, during and after the privatization process. Areas of special concern relate to the lack of specific procedures to regulate the choice of a service provision mechanism for each service, the lack of involvement of the public in the privatization and monitoring procedures, the inadequacy or absence of monitoring mechanisms, and the lack of provision for remedies against both state and relevant private actors to redress violations of human rights committed in the context of the privatization. Crucially, this chapter has also demonstrated that privatization must not be looked at in isolation from other policies and pieces of legislation. The challenge lies in synchronizing all these to ensure that poor people derive full benefits of the successes of privatization on an equal footing with everybody else.

14

Litigation in Regional Human Rights Systems on Economic, Social and Cultural Rights against Poverty

Mónica Feria Tinta

The jurisprudence reviewed in this chapter demonstrates that regional systems (the Inter-American, African, and European) have been serving to redress violations of economic, social and cultural rights of those living in extreme poverty. This chapter reviews case law produced by three quasi-judicial bodies that assess compliance with regional treaties (the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights and the European Committee on Social Rights), as well as relevant jurisprudence produced by the Inter-American Court of Human Rights and the European Court of Human Rights. The subjects cover a wide spectrum: from the Inter-American Commission on Human Rights' decisions on access to antiretroviral treatment by HIV-positive individuals under the American Convention to the African Commission's dealing with pressing issues such as forced evictions, or the European Committee on Social Rights addressing the effective right to housing.

A number of emerging trends can be observed from the analysis of this jurisprudence. First, often it is not that economic, social and cultural rights are unprotected in domestic courts, but rather that states fail to enforce judgments issued by their own courts, as in *Butan and Dragomir v Romania*[1027] in the European system or *Five Pensioners v Peru*[1028] and *Mapuche Paynemil and Kaxipayiñ Communities v Argentina.*[1029] International bodies act as corrective mechanisms to ensure rights to effective judicial protection and access to justice for economic, social and cultural rights in domestic systems. Second, economic, social and cultural rights are often violated by breach of an obligation not to interfere with a right, rather than by failure to provide the right. The cases of *Maya Indigenous Communities of the Toledo District v Belize,*[1030] and *Social and Economic Rights*

1027. No. 40067/06, ECHR, 14 February 2008 (in French only).
1028. Inter-American Court of Human Rights, Series C No 98, judgment of 28 February 2003.
1029. Reported on: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=405939
1030. Inter-American Commission on Human Rights, Report No 40/04 Case 12.053, Merits, 12 October 2004.

Action Center & the Center for Economic and Social Rights v Nigeria,[1031] involving violations threatening the survival of entire communities in Latin America and Africa, illustrate this point very well. Third, states are increasingly held responsible for failure to ensure the protection of economic, social and cultural rights against non-state actors such as corporations. Fourth, the cases show a common approach by different regional bodies regarding the indivisible, interrelated and interdependent nature of rights. This approach has given rise to a doctrine in the Inter-American system in relation to the right to life as entailing 'the right to a dignified and decent existence', which encompasses basic economic, social and cultural rights, as well as the doctrine of 'implied' rights in cases by the African Commission (e.g. holding that the right to food is implicitly guaranteed in the African Charter in such provisions as the right to life, the right to health and the right to economic, social and cultural development). Fifth, the cases show that the reasoning underlying most of them ultimately aims to protect a core right within public international law: the dignity of the human person. Sixth, states are complying with courts' and quasi-juridical organs' orders to redress violations for economic, social and cultural rights just as with any other obligation under international law. The case of *Jorge Odir Miranda Cortez et al. v El Salvador*[1032] before the Inter-American Commission, *Baena Ricardo (270 workers) v Panama*[1033] before the Inter-American Court of Human Rights or *Purohit and Moore v the Gambia*[1034] before the African Commission are examples of this. Finally, upholding economic, social and cultural rights of victims in the most disadvantaged sectors by peaceful settlement of disputes not only brings remedies to the victims, but also strengthens democracy and prevents civil unrest.

14.1. THE INTER-AMERICAN SYSTEM

14.1.1. Inter-American Commission on Human Rights[1035]

Individual petitions alleging mass violations of economic, social and cultural rights (with related environmental issues) are among the cases in the docket of

1031. African Commission, Communication No 155/96. http://www.escr-net.org/usr-doc/serac.pdf, accessed on 27/11/2008.
1032. Inter-American Commission on Human Rights, Case 12.249, Report No 209/01., OEA/Ser.L/V/II.111 doc 20 Rev. at 284 (2000).
1033. Inter-American Court of Human Rights, Series C No 72, judgment of 2 February 2001.
1034. African Commission, Communication No 241/2001, Sixteenth Activity Report 2002-2003, annex VII. Available on http://www1.umn.edu/humanrts/africa/comcases/241-2001.html
1035. This quasi-juridical organ settles disputes concerning violations of economic, social and cultural rights both under the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man. In cases where states have become party to the American Convention on Human Rights, individual complaints can be brought to the Commission and can potentially be referred to the Inter-American Court of Human Rights if violations are found. The organs of the Inter-American system have consistently held that developments

the Inter-American Commission today. These cases primarily concern indigenous peoples, and displaced and marginalized communities fighting for their survival against environmental pollution threatening their lives, their land and livelihoods. In a region rich in resources, where mining and exploitation of oil and gas are on the increase, the Inter-American Commission has acted as a forum for the settlement of disputes concerning violations of the rights to health, water, a clean environment, property and cultural rights of indigenous communities living in the affected lands.

The responsibility of a state for actions of a non-state actor concerning toxic waste produced by mining activities affecting an entire community, for example, is at the centre of a dispute in *Community of San Mateo de Huanchor and its Members v Peru*.[1036] The case illustrates how economic, social and cultural rights may be protected by administrative law in domestic systems, but systems either fail to implement administrative rules and decisions that could prevent or stop harm, or are insufficiently developed to redress damage already caused. International fora may act in these cases as corrective mechanisms.

In this case environmental pollution had been caused despite an administrative order requiring the removal of a field of toxic waste sludge. The mining activity was brought to a halt by a ministerial resolution, yet nothing had been done about the pollution caused. The Commission admitted the case, holding that, if proven, all these facts could be characterized as 'a violation of the right to personal security, right to property, rights of the child, right to fair trial and judicial protection and the progressive development of economic, social, and cultural rights' of the American Convention. It further provided for a number of precautionary measures for the immediate protection of the affected population, pending adjudication on the merits of the case.

In other instances domestic systems may provide remedies for violations, yet states may not enforce orders issued by their own domestic courts. The case of *Mapuche Paynemil and Kaxipayiñ Communities v Argentina*[1037] was brought for the failure of the state to comply with a decision of its own national courts. Through an amparo action filed in the Argentine domestic courts to protect the health of the children and youth exposed to water contaminated with lead and mercury, a judicial decision ordered the provincial government to provide an emergency supply of water within two days and a permanent supply of water within

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in the corpus of international human rights law relevant to interpreting and applying the American Declaration and the American Convention on Human Rights may be drawn from the provisions of other prevailing international and regional human rights instruments, as well as other Inter-American regional instruments including the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador). The Inter-American Commission does not have the power to issue legally binding decisions but rather issues recommendations to states. If a state fails to implement such recommendations the Commission takes the case further, bringing an individual complaint before the Inter-American Court of Human Rights.

1036. Inter-American Commission on Human Rights, Report No 69/04, Petitions 504/03, Admissibility, 15 October 2004.

1037. http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=405939

45 days.[1038] The court also ordered the government to conduct studies on harm to the population caused by heavy metal contamination and, if harm were found, to provide treatment as well as measures to prevent environmental damage.[1039] The contamination was caused by hydrocarbon exploitation by a transnational company. But the Argentine judicial order was not complied with, leading to the case being brought before the Inter-American Commission.

The right to effective judicial protection in Article 25(c) of the American Convention entails a duty on the part of state parties to 'ensure that the competent authority enforces such remedies when granted'.[1040] In the hearing Argentina undertook to provide medical attention for the child population that had been exposed, a water treatment plant under construction would be monitored by the Mapuche communities, and water in containers would be provided. Argentina also agreed to disclose information about the location of abandoned wells, oxidation pools and piping. As Argentina has failed to implement these agreements, the case before the Inter-American Commission continues.

A similar claim against Belize, based on the right to property, was examined by the Commission under the American Declaration of the Rights and Duties of Man. *Maya Indigenous Communities of the Toledo District*[1041] alleged that Belize had violated the rights of the Maya people by awarding logging and oil concessions on Maya lands without consulting them, causing irreversible damage to the natural environment upon which they depended. Citing jurisprudence of the African Commission about the impact of resource development on an indigenous community in Nigeria, the Inter-American Commission emphasized the balance a state needed to strike between economic development by multinational corporations and the common good and rights of individuals and local communities. The Commission held: '… development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being.' It concluded that Belize had violated the right to property in two ways: (1) 'by failing to take effective measures to recognize the communal property right to the lands that [the Mayas] have traditionally occupied and used'; (2) by granting logging and oil concessions to the corporation to utilize the property and resources without effective consultations and informed consent of the Maya

1038. For a copy of the amparo action see: http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=405963

1039. The amparo action was filed on 24 March 1997 and the court order issued on 11 April 1997. Carlos Falaschi and Nara Oses, CIDH: La causa No 12.010, Comunidades Mapuche Paynemil y Kaxipayiñ-Neuquen, Argentina, p.2. Available at http://www.cedha.org.ar/docs/doc221-spa.doc

1040. Inter-American Commission on Human Rights, Report No 110/00, case 11.800, *Cesar Cabrejos Bernuy v Peru*, 4 December 4 paras. 45-47.

1041. Inter-American Commission on Human Rights, Report No 40/04 Case 12.053, Merits, 12 October 2004.

people and with resulting environmental damage. The Commission held that these were violations of several other rights under international law including the rights to life, religious freedom, the family, preservation of health and well-being and the 'right to consultation' implicit in Article 27 of the ICCPR, Article XX of the American Declaration, and self-determination. Particular importance was given to 'the distinct nature of the right of property as it applies to indigenous people … whereby the land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality'.

The Commission recommended that Belize (a) adopt in its domestic law (through fully informed consultations with the Maya people) the legislative, administrative, and any other measures necessary to delimit, demarcate and title the territory in which the Maya people have a communal property right, in accordance with their customary land use practices, and without detriment to other indigenous communities; (b) implement such measures and 'until those measures have been carried out, abstain from any acts that might lead the agents of the state itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people'; and (c) repair the environmental damage resulting from the logging concessions granted by the state in the territory traditionally occupied and used by the Maya people.

The Kichwa Peoples of the Sarayaku Community v Ecuador,[1042] brought under the American Convention for failing to protect indigenous peoples against an oil company in their ancestral lands, is currently pending before the Commission. As in the case of *San Mateo de Huanchor*, the Commission granted interim measures of protection.

In a different line of cases, the rights to health, to a minimum standard of living conditions (including access to water and to nutrition) and to education have been at stake on several occasions before the Inter-American Commission in litigation on the rights of the child. An example is *Adolescents in the Custody of the FEBEM v Brazil*,[1043] concerning Articles 4 (life), 5 (humane treatment), 19 (rights of the child), 8 (fair trial) and 25 (judicial protection) in relation to Article 1 of the American Convention, as well as Article 13 of the Protocol of San Salvador on the right to education. The adolescents accused of committing criminal offences are in the custody of the Foundation for the Well-Being of Minors (FEBEM) in São Paulo. One of the units is the *Complexo do Imigrantes*, which according to the plaintiffs, has capacity for 320 adolescents but houses 1,400.

1042. Inter-American Commission on Human Rights, Report No 64/04, Admissibility, 13 October 2004.

1043. Inter-American Commission on Human Rights, Report No 39/02, Decision on Admissibility, Petition 12.328, 9 October, 2002.

Friendly Settlements and Economic, Social and Cultural Rights

Redress for violations of economic, social and cultural rights sometimes is a result of negotiations for friendly settlements at the Inter-American Commission.[1044] In the case of *Mercedes Julia Huenteao Beroiza v Chile*[1045] a group of indigenous families settled a dispute this way. The case was filed on 10 December 2002 for alleged violations of Articles 4 (life), 5 (inhumane treatment), 8 (fair trial), 12 (conscience and religion), 17 (family), 21 (property), and 25 (judicial protection). The case concerned hydroelectric plants authorized by Chile on the ancestral land of the Mapuche Pehuenche people of the Upper Bío Bío sector in Chile. Chile had authorized a company to build a dam that would destroy indigenous land, threatening the Pehuenche culture. The petition requested provisional measures. The Commission granted the request in 2002 and reissued it in 2003, adding the proviso that the state should 'avoid … any judicial or administrative action that entails eviction of the petitioners from their ancestral lands'.

By the time the petition was lodged, nearly 70 per cent of the construction of the dam was completed. The parties eventually agreed to a friendly settlement of the matter. The families agreed to be relocated and accepted a grant of land, technical assistance for agricultural production, scholarships for education and a compensation of US$300,000 per family. Regarding the last measure, Chile agreed to act as a guarantor of the obligation to be carried out by the company. Chile also undertook to adopt other measures, including ratification of ILO Convention No. 169, to carry out a constitutional reform to grant constitutional recognition to indigenous peoples, as well as refraining from authorizing hydroelectric projects in indigenous land. Although the majority of the families were relocated according to the terms of agreement and compensated, by 2005 the core of the measures that formed part of the friendly settlement was still to be implemented.[1046]

Amilcar Menéndez, Juan Manuel Caride et al. v Argentina[1047] involved the right to judicial guarantees (Article 8), property (Article 21), equal protection of the law (Article 24) and effective remedy (Article 25 (2)(c)), together with duty to respect rights (Article 1) and duty to give effect to those rights (Article 2) of the American Convention. The petition also alleged violations of the rights to the preservation of health and well-being (Article XI) and to social security, in relation to the obligation to work and contribute to social security (Articles XVI, XXXV and XXXVII), in the American Declaration on the Rights and Duties of Man.

1044. Article 41 of the Rules of the Inter-American Commission provides that 'the Commission shall place itself at the disposal of the parties concerned, at any stage of the examination of a petition or case, with a view to reaching a friendly settlement of the matter ….'

1045. Inter-American Commission on Human Rights, Petition 4617/02, Report No 30/04, Friendly Settlement, 11 March 2004.

1046. See Case P-4617-02-*Mercedes Julia Huenteao y Otras v Chile*, Incumplimiento de Acuerdo de Solución Amistosa, 19 de Octubre de 2005. http://wwww.escr-net.org/caselaw/caselaw_show.htm?doc_id=406010

1047. Inter-American Commission on Human Rights, Case No 11.670, Report No 03/01, 19 January 2001.

Retired persons seeking an adjustment to their pensions faced a cumbersome administrative and judicial system that failed to realize their rights. The central claim focused on unwarranted delays in legal proceedings and on deferred and inappropriate enforcement of judgments. The petitioners challenged Law 24463, which allowed the postponement of enforceability of judgments favourable to them because of budgetary restrictions, and for postponing indefinitely payments of social security adjustments. It was alleged that the enforcement of a judgment was postponed indefinitely until the state had sufficient funds to pay pensions. The Commission declared the case admissible. In 2003 a friendly settlement process started, and the Social Security Department gave instructions to enforce court decisions.[1048]

Provisional Measures and Economic, Social and Cultural Rights before the Inter-American Commission

Jorge Odir Miranda Cortez et al. v El Salvador[1049] concerned carriers of HIV/AIDS, alleging violations including the rights to life (Article 4), humane treatment (Article 5), equal protection of the law (Article 24), judicial protection (Article 25) and progressive realization of economic, social and cultural rights (Article 26). They also alleged violation of Article 10 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), as well as Article XI (right to health) of the American Declaration on the Rights and Duties of Man.

El Salvador had not provided the medication needed to prevent the petitioners from dying and to improve their quality of life. The petition asked for an exception to the exhaustion of the domestic remedies rule because amparo proceedings instituted in El Salvador had been subjected to unreasonable delays. The petition, filed on 24 January 2000, included a request for precautionary measures. On 29 February the Commission asked the state to adopt urgent measures, in particular, to 'provide the anti-retroviral treatment and medication necessary to avoid the deaths of [the petitioners], as well as the hospital, pharmacological and nutritional care needed to strengthen their immune systems and to prevent the development of disease and infections.' The Commission gave the state a deadline of fifteen days to provide information on the implementation of this request. By 11 May two of the petitioners had died because they had not received the treatment requested from the state, and the petitioners asked the Commission to request the Inter-American Court of Human Rights to issue a legally binding order giving effect to the same request. On 12 July El Salvador reported that it had authorized the purchase of the triple therapy medication, and by 13 January 2001, the state indicated that 'anti-retroviral medication had been provided to 11 of the 24 persons included in case 12.249' and the treatment was available for the rest.

1048. http://www.escr-net.org/caselw/caselw_show.htm?doc_id=414336
1049. Inter-American Commission on Human Rights, Case 12.249, Report No 209/01., OEA/Ser.L/V/II.111 doc 20 Rev. at 284 (2000).

The implementation of these measures by El Salvador was remarkable because, on 13 January 2001, a severe earthquake occurred in the Pacific Ocean affecting El Salvador's coastal regions, leading to a declaration of a state of emergency.

In *Community of San Mateo Huanchor*[1050] the Commission adopted precautionary measures to avoid irreparable damage because the severe environmental pollution caused by the mining sludge field had triggered a public health crisis in the risk from exposure to the metals in the sludge. The Commission took notice that those who were most severely affected were the children. The Commission asked Peru to adopt within fifteen days measures which included 'starting up a health assistance and care program for the population of San Mateo de Huanchor, especially its children, in order to identify those persons who might have been affected by the pollution so that they can be given relevant medical care' as well as 'drawing up as quickly as possible an environmental impact assessment study required for removing the sludge containing the toxic waste'.

14.1.2. The Inter-American Court of Human Rights[1051]

The Inter-American Court has so far made economic, social and cultural rights justiciable in three main lines of cases: concerning the rights of the child, workers' rights and indigenous peoples. It has also developed doctrines incorporating economic, social and cultural rights in rights traditionally conceived as 'civil and political', and conceiving reparations so as to redress 'historical wrongs' to communities.

The Right to Life

One doctrine developed by the Inter-American Court is the right of life (Article 4) encompassing the notion of the right to a dignified existence and the right to a decent life. The Protocol of San Salvador contains references to the right to living a 'dignified and decent existence' in Article 6 (right to work), Article 7 (just, equitable and satisfactory conditions of work), Article 9 (social security) and Article 13 (education).The right to a 'dignified existence' and to a 'decent life' was first expressed by the Inter-American Court in its examination of the rights of the child (Article 19). In its first case concerning children, *Villagrán Morales y Otros v Guatemala* (Street Children case),[1052] the court established the principle that 'the right to life includes not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having

1050. Inter-American Commission on Human Rights, Report No 69/04, Petitions 504/03, Admissibility, 15 October 2004.
1051. Established in 1979, the Inter-American Court of Human Rights has broad powers to provide reparation, with no equivalent in any other region. The judgments of the Court are legally binding.
1052. Inter-American Court of Human Rights Series C: No 32, judgment of 19 November 1999.

access to the conditions that guarantee a dignified existence'. It held Guatemala accountable for the violation of Article 4 of the Convention not only because state agents had murdered the victims, but also because the state had deprived the latter of the minimum conditions for a dignified life.

In its Advisory Opinion *Juridical Condition and Human Rights of the Child*,[1053] the Court elaborated on the notion of 'a decent life' (including 'a dignified existence') as encompassing several aspects with respect to children: conditions of life that ensure dignity, the right to receive the highest priority and the best effort from states, the right to education and the right to health. The court referred to Article 13 (right to education) Article 15 (right to the formation and the protection of families) and Article 16 (rights of children) of the Protocol of San Salvador in its interpretation of Article 19.

In the case of *Children's Rehabilitation v Paraguay*[1054] concerning institutionalized minors in conflict with the law, the court reiterated the principle that the protection afforded by Article 19 of the American Convention exceeded the strict area of civil and political rights and included economic, social and cultural rights that form part of the right to life and the right to integrity of children. In order to meet their duties under Article 19 of the American Convention of Human Rights, states parties must ensure that children in their jurisdictions have their basic economic, social and educational needs met.

In the *Yakye Axa v Paraguay*[1055] case, the court held that Paraguay had violated Article 4 because it had failed to ensure the indigenous community's 'right to a life in dignity'. The community lived alongside a road, where it was impossible for them to carry out traditional agricultural activities, lacking sanitation facilities and other basic services. Members of the community fell sick and children were malnourished for lack of access to clean water and food. The court ordered that while the right to property was being restored, the state was obliged to take measures 'to have the basic conditions required for a life of dignity', including drinking water, medical care and food, installing latrines, and providing the school with sufficient bilingual materials.

In *Sawhoyamaxa Indigenous Community v Paraguay*[1056] the court again emphasized the duty of states to guarantee the creation of conditions that may be necessary in order to prevent violations of the right to life.

What emerges from this jurisprudence is a consolidated notion of the right to life entailing the concept of the 'right to a life of dignity'. *Derecho a una vida digna* therefore entails the duty of the state to ensure that everyone has a right to self-development and not just a right to subsist. The Spanish *derecho a una vida digna* is broader than 'right to a decent life', which appears sometimes as its translation. The word 'dignity' refers to something that goes beyond material well-

1053. Inter-American Court of Human Rights Series A: No 17; Advisory Opinion OC-17/2002 of 28 August 28. Requested by the Inter-American Commission on Human Rights.
1054. Inter-American Court of Human Rights Series C: No 112; judgment of 2 September 2004.
1055. Inter-American Court of Human Rights Series C No 125, judgment of 17 June 2005.
1056. Inter-American Court of Human Rights Series C No 146, judgment of 29 March 2006.

being. It is a concept that has a spiritual dimension. It refers also to the right to have one's identity respected (including the racial, cultural and religious elements of it).

The Right to Education

Girls Yean and Bosico v Dominican Republic[1057] concerned two minors born in Dominican Republic of Haitian descent, who had been denied birth certificates in Dominican Republic and their right to nationality. As a result, they could not be admitted into school. The case raised for the first time violations of Article 3 (right to juridical personality), Article 20 (right to nationality), and Article 24 (equality before the law).The court held that the duty of special protection for children in Article 19 of the American Convention, interpreted in the light of the Protocol of San Salvador and in relation to the duty of progressive development contained in Article 26 of the Convention, required the state to provide education free of charge to all minors. By being denied juridical personality, the minors had been denied the right to education.

Workers' Rights

Five Pensioners v Peru[1058] and *Baena Ricardo (270 workers) v Panama*[1059] concerned rights of workers. *Five Pensioners* concerned pensioners from the public sector who had a pension system that progressively equalized their pensions with the salaries of people occupying the same positions in the public body where they had worked. In 1992 the payments were discontinued without any notice and subsequently reduced by approximately 78 per cent. A decree law modified the pension system, denying any equalization. Judicial orders in favour of the victims were not implemented.

The court found that the pensioners were entitled under Peruvian law to a pension (a right that was 'acquired' and had been incorporated into the patrimony of the plaintiffs), and that they had been deprived of it in an arbitrary manner, without any legal proceeding. It found violations of Article 21 (property) in conjunction with Article 1 (obligation to respect rights), Article 25 (judicial protection), and Article 2 (domestic legal effects). It found no violation of Article 26 (progressive development), unlike the Commission. For the court the 'progressive development' requirement of Article 26 could only be measured against the treatment afforded to the general population in a country. The case brought on behalf of five victims could not serve as a basis to judge the progressive development of economic, social and cultural rights in Peru.

The case of the *Five Pensioners* is an example of how concepts apply in unexpected circumstances (e.g. how the right to social security can relate to the

1057. Inter-American Court of Human Rights, Series C No 130, judgment of 8 September 2005.
1058. Inter-American Court of Human Rights, Series C No 98, judgment of 28 February 2003.
1059. Inter-American Court of Human Rights, Series C No 72, judgment of 2 February 2001.

right to property). The violations came as a result of 'intervention' of the state amounting to an infringement of the right of the pensioners: it arbitrarily reduced their pensions. The duty of the state at that point was 'not to interfere'. But there also existed positive duties. The court said that the general duty under Article 2 entails two things: 'on the one hand derogation of rules and practice … that imply the violations of guarantees in the Convention' and on the other, 'the issuance of rules and the development of practice leading to an effective enforcement of the said guarantees.' In the case, the state had the positive duty to make effective the right to property of the victims.

In *Baena Ricardo,* 270 public sector workers were arbitrarily dismissed (the majority trade union leaders) on the basis of a decree law (with retroactive effect) that gave powers to public institutions for a massive dismissal for participation in a national work stoppage and other activities (including a demonstration for labour rights).

'The principle of legality must govern the actions of public administration', the court held. 'The definition of an act as an unlawful act, and the determination of its legal effects must precede the conduct of the subject being regarded as a violation. Otherwise individuals would not be able to orient their behaviour according to a valid and true legal order'. The court found that workers had been subject to a law which violated Article 9 of the Convention (freedom from ex post facto laws) and had been deprived of due process guarantees. Moreover, the court found that both the dismissals and the law were acts that interfered with the freedom of association (which included labour union rights) of the victims. The court held that the massive dismissal of trade union leaders and workers seriously violated principles of the right to unionize and to collective negotiation.

In both cases the court resolved disputes related to crucial issues on labour regimes applied to workers in Peru and Panama, and in so doing had to revise complex national legislation. In *Baena Ricardo* the court had to review over 500 pieces of evidence; in the *Five Pensioners* case it had to grasp complex issues of the social security and pension system in Peru.

Redressing 'Historical Wrongs'

The court has made orders of reparation that often involve measures of restitution, satisfaction and guarantees of non-repetition. The *Aloeboetoe* case,[1060] where the court ordered measures that included re-opening a school and making the medical dispensary in the locality of the victims operational, has been followed by other landmark decisions. In *Baena Ricardo* reparation measures included wide-reaching restitutive measures: Panama was obliged to pay 270 workers unpaid salaries accrued over the ten years that the matter had remained unresolved, reinstate the 270 workers or pay an indemnity corresponding to the termination

1060. Inter-American Court of Human Rights, Series C No 15, *Aloeboetoe et al. v Suriname,* Reparations (Article 63 (1) of the American Convention on Human Rights), Judgment of 10 September 1993.

of employment, and provide pension or retirement payment to the beneficiaries of victims who had died.

A court may not be institutionally equipped to do everything but it can rely on other mechanisms to provide justice. In *Baena* the court gave the national courts the task of computing the amount owed to each worker in accordance with labour law in the country, with the court supervising compliance. In *Instituto de Rehabilitación del Menor Panchito López*, the court required that, within six months and in consultation with organizations of civil society, Paraguay develop a policy of short-, medium- and long-term application for children in conflict with the law, consistent with its international obligations. In cases presenting complex technical questions the court has found innovative ways of settlement. In the case of *Cesti-Hurtado v Peru*[1061] the Inter-American Court referred the reparation award to arbitration, as it needed specific expertise in economic matters.

In a case about a massacre in Guatemala the court ordered measures that included establishing development programmes in the affected communities. Such programmes included medical care, native language educational programmes, and access to drinkable water.[1062] The court set a five-year period for full implementation of the reparation programme, and ordered the state to report each year on the implementation of the measures.

In redressing the *Sawhoyamaxa Indigenous Community v Paraguay*[1063] the court ordered that the indigenous community regain its right to property on its ancestral lands and to have its right to a life in accordance with its traditions. The court ordered a community development fund for the Sawhoyamaxa community, to deliver basic supplies and services for their survival while they remained landless, a communication system for victims to contact health authorities, and a registration and documentation programme for members to obtain identification documents. The court ordered Paraguay to allocate one million United States dollars to the fund.

1061. Inter-American Court of Human Rights, Series C No 86, Interpretación de la Sentencia de Reparaciones (Art. 67 Convención Americana sobre Derechos Humanos). Sentencia de 27 de noviembre de 2001.

1062. See Inter-American Court of Human Rights, Series C No 116, Caso *Masacre Plan de Sánchez v Guatemala*, Reparaciones (Art. 63.1 de la Convención Americana sobre Derechos Humanos), Sentencia de 19 de Noviembre de 2004, at para. 110 (only in Spanish).

1063. Inter-American Court of Human Rights, Series C No 146, judgment of 29 March 2006.

14.2. THE AFRICAN SYSTEM

14.2.1. The African Commission on Human and Peoples' Rights[1064]

The African Charter on Human and Peoples' Rights places economic, social and cultural rights on equal footing with civil and political rights. As in some jurisprudence of the Inter-American system, economic and social rights have appeared in the African system in the right to humane treatment and to dignity of the person (Article 5 of the African Charter). In *John K Modise v Botswana*,[1065] a man was deported from Botswana and stranded in a no-man's land. The Commission held that this enforced homelessness was inhuman and degrading treatment that offended 'the dignity of human beings and thus violated Article 5 of the Charter'.

In *Communication 212/98 Amnesty International/Zambia*,[1066] another case of forcible expulsion, the Commission held that forcing two victims of the case to live as 'stateless persons under degrading conditions' violated Article 5. It also found that the forcible expulsion had 'forcibly broken up the family … thereby failing in its duties to protect and assist the family, as stipulated in Article 18(1) and 18(2) of the Charter'. The case law of the Commission is clear that mass expulsion of non-nationals 'violates most of the economic social and cultural rights in the African Charter'. In *159/96, Union Inter-Africaine des Droits de l'Homme v Angola*,[1067] concerning the expulsion of West African nationals from Angola in 1996, the Commission stressed that 'mass expulsion [is] a special threat to human rights.'

1064. The African Commission on Human and Peoples' Rights is a quasi-juridical organ with the mandate to promote human and people's rights under the African Charter of Human and Peoples' Rights. The Charter provides a system of individual petition for alleged violations of its provisions. Individuals have the right to file a claim alleging violations of rights in the jurisdictions of states parties. After dealing with a claim, the Commission passes recommendations on to the state involved. As in the case of the Inter-American Commission, the recommendations of the African Commission are not legally binding. The need to strengthen the African system has recently given rise to the development of an African Court of Human Rights. At the time of the writing of this chapter the Court has been established, but has not yet begun to function.

1065. *Communication 97/93 John K. Modise/Botswana,* in Tenth Annual Activity Report of the African Commission on Human and Peoples' Rights, in Institute for Human Rights and Development, 'Compilation of Decision on Communication of the African Commission on Human and Peoples' Rights Extracted from the Commission's Activities Reports 1994-1999', Norwegian Human Rights Fund 1999, pp. 111-117.

1066. Twelfth Annual Activity Report of the African Commission on Human and Peoples' Rights 1998-1999 in Institute for Human Rights and Development, 'Compilation of Decision on Communication of the African Commission on Human and Peoples' Rights Extracted from the Commission's Activities Reports 1994-1999', Norwegian Human Rights Fund 1999, pp. 94-206.

1067. In Institute for Human Rights and Development, 'Compilation of Decision on Communication of the African Commission on Human and Peoples' Rights Extracted from the Commission's Activities Reports 1994-1999', Norwegian Human Rights Fund 1999, pp. 141-144.

Article 15 (right to work under equitable and satisfactory conditions) in connection to Article 5 has also come under the examination of the Commission. In *Communication 39/90 Annette Pagnoulle (on behalf of Abdoulaye Mazou) v Cameroon*,[1068] the Commission held that by not reinstating a former magistrate (who had been wrongly imprisoned by a military tribunal without a trial, and without the right to defence) to his position as a magistrate, to which he was legally entitled, Cameroon had violated Article 15.

In *Malawi African Association v Mauritania*,[1069] the Commission denounced a wide range of violations suffered by black Mauritanians, working in conditions analogous to slavery. The Commission held that:

> there was a violation of article 5 of the Charter due to practices analogous to slavery, and emphasises that unremunerated work is tantamount to a violation of the right to respect for the dignity inherent in the human being. It furthermore considers that the conditions to which the descendants of slaves are subjected clearly constitute exploitation and degradation of man; both practices condemned by the African Charter.

As in the jurisprudence of the Inter-American system, the right to health has also been examined by the African Commission in cases concerning persons deprived of their liberty. Article 16 of the African Charter provides:

1. Every individual shall have the right to enjoy the best attainable state of physical and mental health.

2. States parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.

In the Mauritania case, the African Commission also considered the treatment of persons deprived of liberty, including malnutrition and lack of medical attention (which caused the death of several prisoners); prisoners having only one set of clothes and living in very unhygienic conditions in the cell, sleeping on the floor without any blankets, even during the cold season; living in cells infested with lice, bedbugs and cockroaches without any provision of health care. The Commission found Mauritania in violation of Article 16 and held:

> The State's responsibility in the event of detention is even more evident to the extent that detention centres are of its exclusive preserve, hence the physical integrity and welfare of detainees is the responsibility of competent public authorities.

1068. In Institute for Human Rights and Development, 'Compilation of Decision on Communication of the African Commission on Human and Peoples' Rights Extracted from the Commission's Activities Reports 1994-1999', Norwegian Human Rights Fund 1999, pp. 93-98.

1069. Communications Nos. 54/91, 61/91, 98/93, 164/97 á 196/97 and 210/98 (2000) http://www1.umn.edu/humanrts/africa/comcases/54-91.html

The Commission also found that confiscation and looting of the property of black Mauritanians (including livestock essential for their subsistence) and the expropriation or destruction of the land and houses before their mass expulsion violated the right to property (Article 14) as well as the right to freedom of movement and residence (Article 12(1)). The Commission recommended that Mauritania implement several measures, including restitution of belongings looted from the victims at the time of their expulsion, and take the necessary steps for the reparation of the deprivations of the victims.

In a case concerning Zaire, failure to provide basic services including safe drinking water and electricity, and the shortage of medicines, was held to violate Article 16.[1070] The Commission also held that closure of universities and secondary schools for two years violated Article 17, which guarantees the right to education.

Purohit and Moore v the Gambia[1071] concerned mental health patients from the psychiatric unit of a hospital in the Gambia, challenging mental health legislation. Having found a violation, the Commission called on the Gambia 'to take concrete and targeted steps', taking full advantage of its available resources, so as 'to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.' It specifically required the state to: (a) replace the Lunatics Detention Act with legislation compatible with the African Charter and international standards for the protection of mentally ill or disabled persons; (b) pending (a), to create an expert body to review the cases of all persons detained under the Act and make appropriate recommendations for their treatment or release; and (c) provide adequate medical and material care for persons suffering from mental health problems.

In *Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria*[1072] the African Commission examined a claim against Nigeria concerning violations as a consequence of the failure of Nigeria to prevent pollution and ecological degradation to the detriment of the Ogoni people. This was the first time in the history of international human rights litigation that a state was brought to account for the environmental harm carried out by a corporation to the detriment of an entire community. As such it is a leading precedent on state responsibility. The ruling of the Commission is a landmark not only because it displays an understanding of the law of state responsibility (applying the rules

1070. African Commission, Communications 25/89, 47/90, 56/91, 100/93 (jointly processed by the Commission), *Free legal Assistance Group, Lawyers' Committee for Human Rights, Union Interafricaine de Droits de l'Homme, Les Témoins de Jehovah v Zaire,* in Institute for Human Rights and Development, 'Compilation of Decision on Communication of the African Commission on Human and Peoples' Rights Extracted from the Commission's Activities Reports 1994-1999', Norwegian Human Rights Fund 1999, pp. 67-73, at para. 47.

1071. African Commission, Communication No 241/2001, Sixteenth Activity Report 2002-2003, annex VII. Available at: http://www1.umn.edu/humanrts/africa/comcases/241-2001.html

1072. African Commission, Communication No 155/96, available at: http://www.escr-net.org/usr-doc/serac.pdf, accessed on 27/11/2008.
Also see in this volume Chapter 5, Cahill and Skogly, 'The Human Right to Adequate Food and to Clean and Sufficient Water'.

of attribution and producing an account of the acts and omissions giving rise to state responsibility) but also because the approach taken to the construction of the different substantive rights and duties under scrutiny constitutes a good example of the most advanced doctrines in international human rights protection.

Articles 16 and 24 were held to 'recognise the importance of a clean and safe environment that is closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual.' Among the clear obligations that the right to a healthy environment imposes on a state were 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.' It was stressed that the right to enjoy the best attainable state of physical and mental health enunciated in Article 16(1) and the right to a general satisfactory environment favourable to development (Article 16(3)) required states 'to desist from directly threatening the health and environment of their citizens', primarily non-interventionist conduct (such as refraining from carrying out, sponsoring or tolerating any practice, policy or legal measures violating the integrity of the individual). It held that state compliance with the spirit of Articles 16 and 24 must include 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.

The Commission recognized that although Nigeria had the right to produce oil ('the income from which will be used to fulfil the economic and social rights of Nigerians'), the care that should have been taken and which would have protected the rights of the victims had not been observed. On the contrary, to exacerbate the situation, state security forces had engaged in further violations of Articles 16 and 24 by attacking, burning and destroying several of the Ogoni villages and homes.

Nigeria's failure to monitor or regulate the operations of the oil companies and to involve the Ogoni communities in the decisions that affected the development of Ogoniland was further held to constitute a violation of Article 21. Nigeria had 'facilitated the destruction of the Ogoniland' by giving the green light to oil companies 'to devastatingly affect the well-being of the Ogonis'. 'The destructive and selfish role played by the oil development companies in Ogoniland, closely tied with the repressive tactics of the Nigerian government', and 'the lack of material benefits accruing to the local population' were held to be at the basis of the violation of Article 21.

An interesting aspect of the case concerned the claims made in relation to the right to housing and the right to food. The Commission agreed with 'implied rights', holding that:

> Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions

> protecting the right to enjoy the best attainable state of mental and physical health… under Article 16 … the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing.

The Commission pointed out that 'at a very minimum' the right to shelter imposes on Nigeria the obligation 'not to destroy the housing of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes'. Stressing the negative obligation of 'no interference' with the enjoyment of a right placed upon states, it held that respect for housing rights entailed abstaining from 'infringing upon the individuals' freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs'. Protecting the right to housing would entail 'preventing the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners, and where such infringements occur, acting to preclude further deprivations as well as guaranteeing access to legal remedies'. 'The right to shelter goes even further than a roof over ones head. It extends to embody the individual's right to be let alone and to live in peace – whether under a roof or not', stressed the Commission. Thus the destruction of Ogoni houses and villages, and the obstruction, harassment, beatings and, in some cases, shooting and killings of those who had attempted to return to rebuild their ruined homes by the Nigerian security forces were held to constitute massive violations of the right to shelter, in violation of Articles 14, 16, and 18(1). The right of protection against forced evictions defined as 'the permanent removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection' was held to be an additional implicit right protected under the right to housing, which Nigeria had violated.

Regarding the right to food, the petition argued that this right is also implicitly guaranteed in the charter, in such provisions as the right to life (Article 4), to health (Article 16) and to economic, social, and cultural development (Article 22). The Commission stated that 'the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.' It also held that Nigeria was required 'to protect and improve existing food sources and to ensure access to adequate food for all citizens'. Under the charter, the minimum core of the right to food requires that a state should not destroy or contaminate food sources and should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves. The Commission found that Nigeria had destroyed food sources through its security forces and state oil company, and had allowed private oil companies to do the same. The Commission finally held that the widespread terrorizing and killings, the persecution and destruction of the land and farms of the Ogoni by direct involvement of the government, as well

as the pollution and environmental degradation inflicted in Ogoniland by private actors 'to a level humanly unacceptable', threatened the survival and affected the life of the Ogoni society as a whole and constituted further violations of Article 4 of the charter, which guarantees the inviolability of human beings and everyone's right to life and integrity.

The Commission called on Nigeria to stop all attacks on Ogoni communities, ensuring adequate compensation to victims, to implement a programme of relief and resettlement assistance and to undertake a comprehensive clean-up of lands and rivers damaged by oil operations. It also called upon Nigeria to ensure that appropriate social and environmental impact assessments of future oil development on its territory were prepared, so as not to harm local communities.

The case is an example of cross-fertilization between regional systems. In its examination of the case the African Commission relied on the jurisprudence of other regional systems, such as the Inter-American system. It served in its place to create new jurisprudence before the Inter-American Commission in the protection of the rights of peoples affected by corporate practices, as seen in the case of Belize.

14.3. THE EUROPEAN SYSTEM

14.3.1. The European Court of Human Rights

Although the Strasbourg jurisprudence has been more limited to civil and political rights, some important developments have also taken place there.

From early jurisprudence of the European Court, Article 8 of the European Convention on Human Rights (protection of privacy, family life, home) has served as a provision protecting certain economic, social and cultural rights in the system. The right to housing has found some protection under Article 8. In *Selçuk & Asker v Turkey*,[1073] the European Court held that destruction of dwellings and livestock by the state may constitute grave violations of both Articles 3 and 8. More recently in *Moldovan v Romania [No.2]*,[1074] although the court was procedurally barred from examining acts of burning and whole-scale destruction of houses of Roma in Romania because it had taken place before Romania became a party to the European Convention, the court nevertheless examined the living conditions of the Roma and the conduct of the state in the aftermath of these acts under the scope of Articles 8 and Article 3, finding that both provisions had been violated. The court held that not only had the state failed to institute criminal proceedings against the public officials involved in the organized actions of burning the houses of the Roma, but it had repeatedly failed to put a stop to the breaches of the Roma's rights under Article 8: domestic courts had refused for many years to award

1073. No. 12/1997/796/998-999, ECHR, 24 April 1998.
1074. Nos. 41138/98 & 63420/01, ECHR, 30 November 2005.

pecuniary damages, civil courts had rejected payment for non-pecuniary damage and most of the applicants had not returned to their villages, living in crowded and improper conditions (in cellars, henhouses, stables and uninhabitable dwellings) scattered throughout Europe.

A 1994 case, *Lopez Ostra v Spain*,[1075] illustrates how the right to a healthy environment may also be justiciable under the protection of the right to respect for private life, home and family life. The complaint, filed before the now extinct European Commission on Human Rights, argued that the state's failure to take any measures against the emission of gas fumes, pestilential smells and contamination caused by a plant for the treatment of liquid and solid waste belonging to a private company, built with a state subsidy on municipal land, and located twelve metres away from the applicant's house, amounted to a violation of Article 8.

The court stated that 'even supposing that the municipality did fulfil the functions assigned to it by domestic law …, it need only establish whether the national authorities took the measures necessary for protecting the applicant's right to respect for her home and for her private and family life under Article 8 …' It was noted that not only had the municipality failed to take steps to that end, but it had also resisted a judicial decision to that effect. In addition, other state authorities had also contributed to prolonging the situation. The court noted that in the meantime 'the family had to bear the nuisance caused by the plant for over three years before moving house with all the attendant inconveniences'. It therefore concluded that the state had not succeeded 'in striking a fair balance between the interest of the town's economic well-being – that of having a waste treatment plant – and the applicant's effective enjoyment of her right to respect for her home and her private and family life'.[1076] As a result, it granted approximately 24,000 euros as non-pecuniary damage.

Economic, social and cultural rights may also be made justiciable through claims concerning Article 6(1), when domestic proceedings adjudicating entitlements to economic, social or cultural rights under the domestic law do not conform to fair trial standards.[1077] The court interpreted the right to the realization of justice as an integral part of the notion of due process protected under Article 6(1). Publicists writing on the jurisprudence of the court point out that Article 6(1) protects the right of access to a court, and that the notion of a 'fair hearing' 'has an open-ended, residual quality' (Harris, O'Boyle and Warbrick 1995: 196-202).

1075. No. 16798/90, ECHR, 9 December 1994.

1076. Compare this precedent with *Hatton and others v United Kingdom,* where it was alleged that government policy on night flights at Heathrow airport gave rise to a violation of the applicants' rights under Article 8. Although the Grand Chamber of the Court reaffirmed the principle that 'Article 8 may apply in environmental cases whether the pollution is directly caused by the State or whether State responsibility arises from the failure to regulate private industry properly', it did not find in the particular case a violation of Article 8, overturning an earlier decision of a Chamber. No. 36022/97 Grand Chamber, ECHR, 8 July 2003.

1077. Article 6 reads: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a far and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Butan and Dragomir v Romania[1078] (a cased granted priority status by the court and processed in two years), brought under Article 6(1), concerned the right to water of a father and a son living in a top flat located in Bucharest. As noted by commentators, 'the case formed part of a wider phenomenon of mass voluntary disconnection from the public utilities system which took place in post-Communist Romania throughout the 1990s … caused by the widespread poverty associated with economic transition as well as the unwillingness of the consumers to continue supporting a costly and inefficient system of delivery' (Cojocariu 2008). The inhabitants of the other flats of the building where the applicants lived had voluntarily disconnected from the private supplier. Individuals like the applicants who were willing to continue paying for the water supply from the company were left without water. The complaint alleged that the petitioners had lived without running water in their home for several years and described the actions they had taken against the utility company responsible for the drinking water supply, who had refused to supply water to their flat because costly structural changes would have been necessary in the building where their flat was located in order to fulfil the contract they had. A final judgment in domestic courts held that the utility company had the duty, under applicable domestic regulations, to ensure provision of drinking water to the applicants. However, the decision was not complied with. As a result, the petitioners brought their case to the European Court on Human Rights, alleging that the failure to enforce this judgment was attributable to the Romanian authorities. They also alleged failure of the authorities to take action to stop the violations.

The court noted that although it was a private company in charge of the water supply, this concession was ruled by an administrative contract between the public authority and the private company. Therefore, the public authority was ultimately responsible for supervising the execution of this service. The court analysed whether the public authorities had discharged their duty, in particular in ensuring compliance with the final judgment obtained by the petitioners. It held that the state is ultimately responsible for the enforcement of final judgments of its courts and the realization of justice, and held the state accountable for the violation of Article 6(1) on account of failures by the Romanian authorities to enforce the final decision in the applicants' favour. The court ordered that reparation of 10,000 euros be paid to the applicants. By the time the Strasbourg Court delivered its judgment, the water company had still not complied with the Romanian High Court judgment that ordered the connection of the applicants' flat to the water grid so that it could be supplied with water. Moreover, a fresh complaint in domestic court on the issue had given rise to a judgment ordering the company to pay approximately 6 euros per day up to the date of enforcement of the judgment.

1078. No. 40067/06, ECHR, 14 February 2008 (in French only). Also see in this volume Chapter 3, Goonesekere, Civil and Political Rights and Poverty Eradication; and Chapter 10, Nolan, Rising to the Challenge of Child Poverty: the Role of the Courts.

The case is instructive in many respects. It illustrates the point (as in the Inter-American system) that economic, social and cultural rights are often protected in domestic systems, but judgments in favour of them are not enforced. The principle in the case is of great importance: the privatization of basic services does not exempt states from responsibility for the provision of basic services, as the private company is a mere contractor acting under administrative agreements with the state, which is ultimately responsible for the provision of basic services.

In *Dybeku v Albania*,[1079] the court held that Article 3 of the Convention imposes an obligation on the state to protect the physical well-being of persons deprived of their liberty, including providing them with requisite medical assistance. Inappropriate conditions of detention and the failure to provide adequate medical care were therefore held to amount to a violation of Article 3. The applicant suffered from chronic paranoid schizophrenia and argued that his detention conditions and the medical treatment provided by the Albanian prison system were inadequate considering his state of mental health. The court held that 'the state must ensure that a person is detained in conditions which are compatible with respect for his human dignity', which entailed 'that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured'. The court considered three elements: (a) the medical condition of the prisoner; (b) the adequacy of the medical assistance and care provided in detention; and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant. The court finally held that 'a lack of resources cannot in principle justify detention conditions which are so poor as to reach the threshold of severity for Article 3 to apply'. It concluded that the nature, duration and severity of the ill-treatment to which the applicant was subjected and the cumulative negative effects on his health were sufficient to be qualified as inhuman and degrading in violation of Article 3.

In another case the court held that the deprivation of livelihood and the destruction of one's housing may also amount to a violation of Article 3. In *Selçuk and Asker v Turkey*, the court examined the case of two elderly people who had lived all their lives in the same village, and who 'had to stand by and watch the burning of their homes' by the security forces, depriving them of their livelihoods and forcing them to leave the village. The court held that 'it is clear they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3'.

In *Moldovan v Romania* [No.2] the court held that the severely overcrowded and unsanitary environment, combined with the period during which the applicants had been forced to live in such conditions and the general attitude of the authorities (over a period of ten years), constituted a violation of Article 3 because the combination of these conditions 'must have caused them considerable

1079. No. 41153/06, ECHR, 2 June 2008.

mental suffering, thus diminishing their human dignity and arousing in them such feelings as to cause humiliation and debasement'. The court found that the applicants' living conditions and the racial discrimination to which they had been publicly subjected by the way in which their grievances had been dealt with by the various authorities, constituted an interference with their human dignity, which amounted to 'degrading treatment' within the meaning of Article 3.

DH and Others v the Czech Republic[1080] was brought on behalf of eighteen Romani children who had been placed in 'special schools' for the mildly mentally disabled (Cahn 2007: 1-6). According to the evidence submitted in the case, '75 % of Romani children were in special schools'. Overturning the ruling of a Chamber, the Grand Chamber ruled that Article 14 (prohibition of discrimination) had been violated. The Grand Chamber decision was based on 'indirect discrimination', a concept developed by the European Union, which 'shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary' (Cahn 2007: 4).[1081] The court inverted the burden of proof and shifted it onto the state to show that it had not discriminated against the applicants, considered appropriate in cases where the applicant is able to show, by means of reliable and significant statistics, the existence of a prima facie indication that a specific rule, although formulated in a neutral manner, in fact affects negatively a clearly higher percentage of one group as opposed to others. The court stated 'it is not necessary in cases in the educational sphere … to prove any discriminatory intent on the part of the relevant authorities'.

14.3.2. European Committee on Social Rights[1082]

The European Committee on Social Rights' case law has covered labour rights, access to education, housing and health care. As pointed out by Malcolm Langford,

1080. No 57325/00, ECHR, 13 November 2007.

1081. Citing EU Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

1082. The Council of Europe adopted the European Social Charter in 1961 in order to protect economic and social rights in the European region. In 1995 the Council of Europe adopted a Protocol which came into force in 1998 and which provided for a system of collective complaints. As its name indicates, the European Committee on Social Rights is not a court. It is a quasi-judicial body. It does not deal with individual petitions. Only certain types of organizations can make complaints to the Committee on Social Rights (international organizations of employers and trade unions, international non-governmental organizations with consultative status at the Council of Europe, and representative national organizations of employers and trade unions). The Committee assesses whether state practice conforms with the European Social Charter 1961, or in cases where the state is party to the Revised Charter, with its latest Revision. It is optional for a state to be bound by the collective complaints system. By 2009 only 14 States (Belgium, Bulgaria, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden) of the Council of Europe had

the work of the Committee has so far been 'an interesting mixture of progressive and conservative legal interpretation' (Langford 2005: 4). In *International Federation of Human Rights Leagues (FIDH) v France*,[1083] the Committee acknowledged 'the undeniable link between the right to medical assistance and the right to life.' In *European Roma Rights Centre v Greece*,[1084] its first decision on merits to address violations of housing rights, the Committee held that Article 16 of the Social Charter, which provides for the right of the family to social, legal and economic protection (including the provision of family housing), contains obligations similar to those of Article 8 of the European Convention of Human Rights. In *European Roma Rights Centre v Italy*,[1085] it was alleged that Italy denied the Roma an effective right to housing in violation of Article 31 of the Revised Charter because (a) there was insufficiency and inadequacy of camping sites for the Roma, (b) the Roma were subjected to forced evictions and other sanctions, and (c) there was a lack of permanent dwellings for the Roma. It was also alleged that segregationist policies and practices in the housing sector constituted racial discrimination contrary to Article 31, read alone or in conjunction with Article E of the Revised Charter (principle of non-discrimination).

Article 31 of the Revised Charter establishes:

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

The Committee held that Article 31 is directed at the prevention of homelessness with its adverse consequences on individuals' personal security and well-being and that the right to housing secures the social inclusion and integration of individuals into society and contributes to the abolition of socioeconomic inequalities. It held that Article 31 'guarantees access to adequate housing, which means a dwelling which is structurally secure; safe from a sanitary and health point (i.e. it possesses

ratified acceptance of the Protocol. There is no time limit to file a complaint, as the issues at stake are not individual violations but rather issues of a general nature, in order to bring the policies and legislation of a country in conformity with the Social Charter. The Committee has no power to promote friendly settlements or to order precautionary measures. The Committee decisions are not binding, since, as in the case of the African and Inter-American Commission, it issues only recommendations. However, its recommendations are not final either, as its report is transmitted to the Committee of Ministers for a definitive disposal of a complaint. The role of the Committee of Ministers in this context has been very much criticized by publicists. By 2004, of the seven complaints for which the Committee had reached the conclusion that the defendant state had not ensured the satisfactory application of the Charter, in only one case had the Committee of Ministers in fact addressed this recommendation to the defendant state endorsing the Committee recommendation. See Churchill and Khaliq (2004: 439).

1083. Complaint No. 14/2003, 8 September 2004.
1084. Complaint No 15/2003, 8 December 2004, available at http:www.escr-net.org/caselaw/caselaw_show.htm?doc_id=401086, accessed on 27/11/2008.
1085. Complaint No. 27/2004, 7 December 2005.

all basic amenities, such as water, heating, waste disposal, sanitation facilities, electricity); not overcrowded and with secure tenure supported by law'.[1086] It additionally held that the temporary supply of shelter cannot be considered as adequate, and individuals should be provided with adequate housing within a reasonable period. The Committee held that equal treatment implied that Italy should take measures appropriate to the Romas' particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless.

As to the scope of Article E, the Committee has pointed out that equal treatment requires a ban on all forms of indirect discrimination, which can arise 'by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all'.[1087]

In *FEANTSA v France*,[1088] the deaths of homeless people in Paris prompted an expert group of the Fédération Europeenne d'Associations Nationales Travaillant avec les Sans-Abri to file a collective complaint (see Kenna and Uhry 2008: 3). After holding a hearing and examining relevant French legislation, policy documents, statistical data on provision, finance, allocations and homelessness, the Committee concluded that France was not complying with its duties under Article 31 because there was insufficient progress regarding the eradication of substandard housing and lack of proper amenities in a large number of households; there was an unsatisfactory implementation of the legislation on the prevention of evictions and a lack of measures for providing re-housing solutions for evicted families; measures in place to reduce homelessness were insufficient both in quantitative and qualitative terms; there was an insufficient supply of social housing accessible to low-income groups; and there was a malfunctioning of the social housing allocation system, among others.

A case from the Croatian civil war has been sent to the Committee with a claim concerning 'the systematic failure to remedy housing rights abuses of ethnic Serbs displaced in Croatia'.[1089] It is alleged that 'during and after the 1991-1995 civil war in Croatia Croatian authorities engaged in massive, discriminatory cancellations of occupancy rights mainly of ethnic Serbs often in absentia [and that] Croatia has consistently refused to consider restitution or compensation for former holders of occupancy rights'.[1090]

1086. http://www.coe.int/t/dghl/monitoring/socialcharter/ComplaintSummaries/CCSummariesMerits_en.pdf, p. 56.
1087. *Autism-Europe v France*, Complaint N° 13/2002, decision on the merits, 4 November 2003.
1088. Complaint No. 39/2006, 5 December 2007. For a full summary of the case see http://www.coe.int/t/dghl/monitoring/socialcharter/ComplaintSummaries/CCSummariesMerits_en.pdf
1089. See 'European Social Charter: collective complaint against systematic failure to remedy housing rights abuses' (2008).
1090. See 'European Social Charter: collective complaint against systematic failure to remedy housing rights abuses' (2008).

14.4. CONCLUSION

Boldness, legal imagination and daring are the characteristics of the case law reviewed in this chapter. Despite the differences in the legal mechanisms at their disposal, regional organs have been increasingly effective in the enforcement of economic, social and cultural rights. The case law shares a common approach: human rights are interrelated, indivisible and interdependent. It testifies to the fact that justiciability of economic, social and cultural rights is no longer a matter of perfectly dissecting and distinguishing the inseparable, but of finding the key relations between apparently separate notions. The proliferation of quasi-juridical and juridical organs in public international law is effectively serving to add additional fora as corrective mechanisms to the lack of enforcement of economic, social and cultural rights in domestic systems. The litigation taking place is proof that economic, social and cultural rights can be and are being subject to international adjudication just as any other right. The beneficiaries of such activity have been the most disadvantaged populations in each region: indigenous populations, migrants, racially discriminated groups and children living in poverty. It is perhaps not surprising that the protection of economic, social and cultural rights is led first and foremost by the regions with the highest incidence of poverty. The battle for economic, social and cultural rights is being led by those most affected by their violations, as the cases reviewed in this chapter have served to demonstrate.

15

Poverty and the International Covenant on Economic, Social and Cultural Rights

Mashood Baderin and Robert McCorquodale

15.1. INTRODUCTION

> Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and *want* can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.
> International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR), Preamble (emphasis added)

On 16 December 1966, the United Nations General Assembly voted unanimously for the adoption of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[1091] Those present noted that this adoption was 'historic'[1092] and provided 'a new frame of reference'[1093] for the protection of economic, social and cultural rights, including for 'the unarmed, the economically under-developed [and] the technologically underprivileged'.[1094] Its preamble, quoted above, affirmed that 'freedom from want' was a human rights issue. However, a right to freedom from want or any direct right to be free from poverty was not included in the ICESCR.

This chapter will examine the history and the extent of the acknowledgement of poverty as an issue within the framework of the ICESCR. It will first give an overview of the general history of the drafting of the Covenant and set out

1091. General Assembly Resolution (2200 (XL)), incorporating the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR) and the Optional Protocol to the ICCPR. The ICESCR was adopted by 105 votes to zero with no abstentions.
1092. Mr Tinoco (Costa Rica) 21 GAOR, 16 December 1966, para 177.
1093. Mr Rossides (Cyprus) 21 GAOR, 16 December 1966, para 174.
1094. Mr Ornes-Coiscou (Dominican Republic) speaking at the General Assembly Plenary Meeting, 21 General Assembly Official Records (GAOR), 1495th meeting, 16 December 1966, paras 137-138.

some of the core conceptual debates about economic, social and cultural rights, including their justiciability and the nature of the relevant legal obligations. It will then examine the discussions about poverty as an issue in relation to the ICESCR, especially the views of the Committee on Economic, Social and Cultural Rights (ESCR Committee), which supervises compliance by states with their obligations under the ICESCR.

15.2. DRAFTING THE ICESCR

Barely had the excitement died down about the adoption on 10 December 1948 of the Universal Declaration of Human Rights (UDHR)[1095] before the drafting of a legally binding treaty on human rights was commenced. Indeed, it had been decided in 1947, at only the second session of the United Nations (UN) Commission on Human Rights (the Human Rights Commission), that the Commission should draft a declaration, a human rights treaty (to be called a 'Covenant') and a document setting out measures of implementation.[1096] The drafting process for the Covenant ended up taking nearly twenty years and was so difficult to do that, barely half-way through the process, it was declared to be 'a probable failure' (Green 1956: 67). The drafting process involved a range of UN bodies, principally the Human Rights Commission (comprised of members voted on by governments and chaired for the first five years by Eleanor Roosevelt), the Economic and Social Council (ECOSOC, which had responsibility for the Human Rights Commission), the Third Committee (being the Committee on Social, Humanitarian and Cultural Questions) and the General Assembly. There was also a great deal of influential input from those UN specialized agencies that had responsibilities that covered aspects of economic, social and cultural rights, especially the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the Food and Agriculture Organization (FAO),[1097] as well as from non-governmental organizations (NGOs) (see McGoldrick 1991: 10).

In the very early stages of the drafting work, the Human Rights Commission took the decision not to include any economic, social and cultural rights at all

1095. The then President of the General Assembly, Dr H.V. Evatt of Australia, stated: '[T]he adoption of the Declaration is a step forward in a great evolutionary process … the first occasion on which the organised community of nations has made a declaration of human rights and fundamental freedoms. That document is backed by the authority of the body of opinion of the United Nations as a whole and millions of people, men, women and children all over the world who would turn to it for help, guidance and inspiration', UN GAOR, 183rd Plenary Meeting, 10 December 1948, p. 934. See also Devereux (2005).

1096. Human Rights Commission, 2nd session, UN Doc E/600, ECOSOC OR, sixth session, Supp. 1 (1948), para. 18.

1097. For a comprehensive analysis of the role of these UN specialized agencies in the drafting of the ICESCR, see Alston (1979).

in this Covenant.[1098] This was despite the fact that the UDHR included specific economic, social and cultural rights (in Articles 22-27) and that the UN Charter provided that the UN shall promote 'higher standards of living, full employment, and conditions of economic and social progress and development; [and] solutions of international economic, social, health, and related problems; and international cultural and educational cooperation'.[1099] This decision 'was not reached without spirited and lengthy controversy' between the members of the Human Rights Commission (Holcombe 1949: 421). The Human Rights Commission's decision was overruled by the General Assembly (to which the matter had been referred by the ECOSOC), which resolved that:

> [W]hen deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man… [and so requests that the Covenant includes] a clear expression of economic, social and cultural rights in a manner which relates them to the civil and political freedoms proclaimed by the draft Covenant.[1100]

The Human Rights Commission first prepared a single draft covenant containing seventy-three articles grouped into six parts covering both economic, social and cultural rights and civil and political rights.[1101] However, this was not the end of the issue as some states indicated their unwillingness to be parties to a covenant that would commit them to provisions on economic, social and cultural rights (see Sohn 1968: 105-106). Both the ECOSOC and the General Assembly debated the matter again, with the final decision being to request that the Human Rights Commission:

> [D]raft two Covenants on human rights … one to contain civil and political rights and the other to contain economic, social and cultural rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim in view and to ensure respect for and observance of human rights, as many similar provisions as possible.[1102]

This decision to draft two separate covenants was deeply divisive. Most commentators consider that this was a reflection of the dominance of Western liberal states in the UN, with their emphasis on international supervision of civil and political rights (e.g., Cassese (1986: especially 297-300), Eide (2001: 9-11) and Nowak (2003: 78-79)). A participant at the time considered that there

1098. Human Rights Commission, 5th session, UN DocE/1371, ECOSOC OR ninth session, Supp. 10 (1949).
1099. UN Charter, Article 55(a) and (b).
1100. General Assembly Resolution 421 (V), 4 December 1950. See also Simsarian (1951).
1101. Human Rights Commission, 7th session, UN ESCOR, Supp. 9 (E/1992) 24 May 1951, pp. 20-26.
1102. General Assembly Resolution 543 (VI), 5 February 1952.

were four main reasons underpinning this decision to have separate covenants: it would enable states to ratify one or other covenant; civil and political rights were 'rights' to be given effect to promptly, while economic, social and cultural rights were 'goals' to be achieved progressively; civil and political rights would be implemented primarily by legislation, whilst economic, social and cultural rights would be implemented by a variety of methods, both public and private, would be costly and would not be immediate; and economic, social and cultural rights could not be defined precisely and were not justiciable by a legal body, in contrast to civil and political rights (Simsarian 1952: 710-712).[1103] As will be seen below, these reasons have proved to be mistaken or overstated (see comments in Eide (2001: 9-10)), though they were decisive at this point in the drafting process. From this time onwards, two separate covenants were drafted: one to deal with civil and political rights and one to deal with economic, social and cultural rights. Yet, it should not be overlooked that the General Assembly Resolution that decided that there were to be two covenants also affirmed the position that 'the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent.'[1104] Indeed, the preambles of each of the final covenants confirm, in essentially the same terms, that:

> [I]n accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.[1105]

The contention about drafting one or two covenants was inextricably linked to the perceived differences between the two groups of rights and the issue of implementation. The debates on drafting appropriate implementation procedures for the ICESCR were, as one member of the Commission noted, 'the most difficult and controversial aspect of the covenant'.[1106] As early as 1951, a detailed proposal for a Committee on Economic, Social and Cultural Rights, comprising fifteen members elected by ECOSOC, was put forward but rejected.[1107] Interestingly in light of subsequent events, two of the reasons for rejection were that a separate body would lend support to the contention that economic, social and cultural

1103. See also Simsarian (1951).
1104. General Assembly Resolution 543 (VI), 5 February 1952, Preamble. See also Van Bueren (Chapter 1 in this volume).
1105. Preamble to the ICESCR. The Preamble to the ICCPR merely reverses the order of the rights at the end, i.e. 'everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights'.
1106. E/CN.4/SR.424 (1954), 12 (statement by Polish member).
1107. This was a proposal by Lebanon (E/CN.4/570 (1951)) and revised (E/CN.4/570/Rev.1 (1951)).

rights and civil and political rights were different, and that 'the time had come to call a halt to the process of setting up new committees'.[1108]

A proposal that the Human Rights Committee (HRC), established under the International Covenant on Civil and Political Rights (ICCPR), should also have responsibility for considering reports under the ICESCR was not pursued.[1109] Instead, it was accepted by the Human Rights Commission, once it had been decided that there were to be two covenants, that the implementation procedure for the ICESCR was to be by periodic reports, where states would submit regular reports to ECOSOC on the measures that they had adopted and the progress they had made in achieving the observance of the rights recognized in the ICESCR.[1110] This position was supported even by the ILO, which had been operating a complaints procedure for decades.[1111] In fact it was not until 1966 (the year that the ICESCR was adopted) that an alternative proposal was made. This proposal suggested that a committee of independent experts should be created to review state reports.[1112] The proposal was not supported, probably because of the then recent decision of the International Court of Justice (ICJ) in the *South-West Africa cases.*[1113] In that case, the ICJ had to consider the argument by Ethiopia and Liberia that the application of apartheid by South Africa in the territory of South-West Africa (now Namibia), which it was governing under a mandate by the old League of Nations, was contrary to international law. In its decision (after six years of litigation), the ICJ held that Ethiopia and Liberia had no legal standing to bring the case and thus lost their claim. The decision split the ICJ, with seven votes in favour and seven votes against, with the President's casting vote determining the outcome. Whilst the decision may have been open to disagreement as to its legal reasoning, it led to accusations by some non-legal observers that, as most of the judges in the majority were Western European or from 'white' Commonwealth countries (with the President being Australian), they were upholding a white majority rule in South Africa and that developing states could not get a fair hearing at the ICJ. In the context of the debates elsewhere in the UN at the time, including by the Human Rights Commission, this decision appeared to create doubt in the

1108. Statements by the Chinese and Pakistan members of the Commission in 1951, quoted in 'The Committee on Economic, Social and Cultural Rights', in Alston (1992: 476-477).

1109. This was a proposal by France: E/CN.4/L.388 (1954). The French member argued at the time that economic, social and cultural rights will, after all, 'tend to become semi-enforceable or even fully enforceable by judicial action': E/CN.4/SR.432 (1954), 10.

1110. See Article 16, ICESCR.

1111. 13 ESCOR 1, E/2057/Add.2. It is likely that the reason for the lack of support by UN specialized agencies for a complaints procedure in the ICESCR was to maintain their own authority and to prevent duplication (Alston 1979: 90-92).

1112. There was a proposal by Italy (A/C.3/L.1358 (1966)) and by the United States of America (A/C.3/L.1360 (1966)), the latter being influenced by the establishment of such a committee under the Convention on the Elimination of All Forms of Racial Discrimination, which had been adopted the year before (General Assembly Resolution 2106, 21 December 1965).

1113. *South-West Africa Cases (Ethiopia and Liberia v South Africa,* ICJ Reports 6 (1966).

minds of many state representatives about the roles of expert bodies (see Higgins 1966: 573).[1114]

After the ICESCR entered into force in 1976,[1115] ECOSOC established working groups of governmental experts to assist it with reviewing state reports, though the first working group only came into existence in 1979.[1116] These working groups were generally acknowledged to be an unsatisfactory means of supervision (see Craven 2005: 40-42), though little was done until a working group itself suggested in 1985 that it should become a committee of independent experts. This was endorsed by ECOSOC (as a simple 'renaming') with surprisingly little discussion.[1117] This resolution of ECOSOC created a Committee on Economic Social and Cultural Rights, comprising eighteen independent experts (who serve in their 'personal capacity'), voted for by state parties for four-year terms, 'with due consideration being given to equitable geographical distribution and to the representation of different forms of social and legal systems'.[1118] This change in the composition and independence of the body supervising the ICESCR has had a significant effect on its status. Most commentators agree that the ESCR Committee now operates in practice (and is treated by states) in much the same way as the other bodies that supervise compliance with the global human rights treaties (see, for example, Alston (1992: 487-489) and Craven (2005: 49-51)). This is despite the fact that the ESCR Committee is still subject to the power of ECOSOC to alter its composition and operation, and it does not have the security of being a treaty-based body.

The ESCR Committee's role in supervising the obligations that states have undertaken under the ICESCR is, of course, affected by the content of those obligations. The substantive issue of obligations will be discussed below, yet the extent of these obligations was a matter of debate during the drafting process. During the early debate, it was stated that '[i]ndividuals must be allowed to enjoy human rights beyond those specifically conceded by the State. Freedom to enjoy such rights must be established, otherwise economic, social and cultural rights would be illusory and devoid of real meaning'.[1119] Once it was clear that there were two covenants to be drafted, in 1952 the Human Rights Commission largely adopted a (revised) draft proposal of the United States of America (USA) concerning state parties' obligations under the Covenant (see Alston and Quinn

1114. One representative in the Third Committee of the General Assembly said: 'The peoples of Africa had recently seen an example of what experts were capable of, and they would never forget what the judges of the International Court of Justice had done to the people of South West Africa': A/C.3/SR.1410 (1966), para. 11.
1115. The ICESCR entered into force on 3 January 1976, three months after the deposit of the thirty-fifth ratification of the treaty (in accordance with Article 27(1) of the ICESCR.
1116. ECOSOC Resolution 1988 (LX) (1976).
1117. ECOSOC Resolution 1985/17: 43 votes in favour to 1 against (USA – due to the 'need for budgetary austerity': E/1985/SR.22, para. 11) with 4 abstentions (Bangladesh, Brazil, Japan and Malaysia).
1118. E/1985/SR.22, para. (b).
1119. E/CN.4/SR.269, p. 6 (Eleanor Roosevelt).

1987: 223-229). This remained essentially the same through to the final version of the ICESCR.[1120]

When the final version of the ICESCR was adopted it had been through nearly twenty years of drafts, debate, disagreements and disavowal. It entered into force ten years later as 'the first comprehensive international human rights instrument to be legally binding on state parties.'[1121] Its adoption, entry into force and widespread ratification has been important,[1122] and has been a significant part of the considerable debate on a range of key issues in regard to economic, social and cultural rights and about human rights more generally.

15.3. THE NATURE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS AND THE SCOPE OF OBLIGATIONS OF STATE PARTIES

Within the provisions of the ICESCR, economic, social and cultural rights consist of the right to work,[1123] the right to enjoy just and favourable conditions of work,[1124] the right to form and join trade unions,[1125] the right to social security and social insurance,[1126] the right of family to protection and assistance,[1127] the right to

1120. Article 2(1) ICESCR.
1121. E/CN.4/SR. (1987), 7 (statement by Mr Smirnov, USSR).
1122. One hundred and fifty-eight states have now ratified the ICESCR, representing more than three-quarters of the members of the UN, and from across all regions and all political and economic systems of the world. The current state parties to the Covenant are: Afghanistan, Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Cape Verde, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Estonia, Ethiopia, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libyan Arab Jamahiriya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mongolia, Montenegro, Morocco, Namibia, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Papua New Guinea, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Rwanda, Saint Vincent and the Grenadines, San Marino, Senegal, Serbia, Seychelles, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Somalia, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, The Former Yugoslav Republic of Macedonia, Timor-Leste, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe. See http://www2.ohchr.org/english/bodies/ratification/3.htm (last accessed: 2/11/08).
1123. Article 6.
1124. Article 7.
1125. Article 8.
1126. Article 9.
1127. Article 10.

an adequate standard of living,[1128] the right to the highest attainable standard of physical and mental health,[1129] the right to education[1130] and the right to cultural life and benefits of scientific progress.[1131] This group of rights is considered to be essentially humanitarian and aimed at providing human beings with a right to those basic subsistence needs that make life liveable in dignity, because no dignity can be said to be inherent in a jobless, hungry, sick, homeless, illiterate and impoverished human being (Mapulanga-Hulston 2002: 29-48). Thus, by their intrinsic nature, economic, social and cultural rights 'imply a commitment to social integration, solidarity and equality and include tackling the issue of income distribution … [which] … are indispensable for an individual's dignity and the free development of their personality' (Mapulanga-Hulston 2002: 34). Shue has observed that economic, social and cultural rights are very important basic rights and that '[n]o one can fully, if at all, enjoy any right that is supposedly protected by society if he or she lacks the essentials for a reasonably healthy life' (Shue 1980: 24-25). Skogly has also observed notably that:

> The poor are the subjects of poverty [and that] … if the human rights violations experienced by poor people are to be addressed, poverty will need to be addressed through the rights of the individual, the family and the social and economic setting in which they live (Skogly 2002: 63).

The nature of economic, social and cultural rights makes the ICESCR very relevant in that regard and the realization of economic, social and cultural rights, in conjunction with the civil and political rights, can therefore be an important means for moving impoverished individuals and poor people out of poverty.

However, economic, social and cultural rights are traditionally referred to as the 'second generation' of human rights in contrast to civil and political rights, which are traditionally referred to as the 'first generation' of human rights, due to these rights being drafted later in time, at least in terms of national constitutions (Vasak 1977: 29-32). This very unhelpful terminology has often led to the misconception of economic, social and cultural rights as second-class rights compared to civil and political rights. But, as noted above, the decision to have separate covenants for civil and political rights and economic, social and cultural rights respectively was based mainly on disagreements regarding the technical nature of economic, social and cultural rights and the obligations of states in relation to these rights. Yet, to some extent, these disagreements continue to haunt the development of economic, social and cultural rights today, which has adversely affected the effective utilization of the ICESCR as a prospective instrument for the alleviation of poverty. Indeed, the arguments about the technical nature and obligations of economic, social and cultural rights have been debated and challenged in various

1128. Article 11.
1129. Article 12.
1130. Articles 13 and 14.
1131. Article 15.

ways over the years in publications and at conferences, by academics, government officials and human rights activists (see generally Van Hoof (1984); Eide and Rosas (1995: 15); Mapulanga-Hulston (2002: 29-48); An-Na'im (2004: 7- 22)).[1132]

The first key argument was that, unlike civil and political rights, economic, social and cultural rights were perceived, especially by some industrial states, as not being 'real' human rights but merely as aspirational 'societal goals' to be determined by social policy (see the discussion in Harris (2004: 655)). For example, the US government deleted the sections dealing with economic, social and cultural rights from the US State Department's annual *Country Reports on Human Rights Practices* submitted to the US Congress in 1982 (Alston 1990: 372-375),[1133] with the then US Assistant Secretary of State arguing that 'the rights that no government *can violate* [i.e. civil and political rights] should not be watered down to the status of rights that government should *do their best to secure* [i.e. economic, social and cultural rights]' (Alston 1990: 373 (emphasis and brackets in the original)). Of course, the adoption and entry into force of the ICESCR as a human rights treaty should have put to rest, at least for the states parties to it, any pre-adoption legal arguments that economic, social and cultural rights were not human rights per se (see also Alston and Quinn 1987: 158).

Second, economic, social and cultural rights were perceived as vague and non-justiciable, and could thus not be claimed against a state in the same manner as civil and political rights (Vierdag 1978). Whilst there is some vagueness and lack of conceptual clarity of economic, social and cultural rights, Alston has noted that this is not peculiar to economic, social and cultural rights but that the difference is the extent of elaboration enjoyed by civil and political rights (Alston 1992: 490). Since 1989, the ESCR Committee has provided considerable conceptual clarity and elaboration to the nature and scope of many economic, social and cultural rights contained in the ICESCR, through the publication of General Comments, and has more recently linked the rights to the issue of poverty as will be discussed in Section 15.5 below. Of more significance is the question of non-justiciability, which seems to have been the most impeding factor against the development and judicial enforceability of economic, social and cultural rights. The argument of non-justiciability is to the effect that courts and quasi-judicial institutions cannot adjudicate on economic, social and cultural rights because they involve policy decisions that fall within the functions of the legislature and executive of a state rather than that of the judiciary, and that the courts (or any international human rights supervisory body) cannot take over policy-making from governments in relation to economic, social and cultural rights (see discussion on this issue in Beddard and Hill (1992)).

1132. See generally, Van Hoof (1984); Eide and Rosas (1995: 15); Mapulanga-Hulston (2002: 29-48); An-Na'im (2004: 7- 22). See also the Limburg Principles on the Implementation of Economic, Social and Cultural Rights, UN doc. E/CN.4/1987/17 and NGO Coalition for an Optional Protocol to the ICESCR, Fact Sheet No. 7 'The Question of Justiciability'.

1133. See also Harris (2004: 655, note 18), 'During the Reagan Presidency, the US took the view that such rights were 'societal goals' rather than human rights': see the US statement in UN Doc. A/40/C.3/36, p.5 (1985).

This view has been challenged in the following terms:

> Adjudicating economic, social and cultural rights claims does not require courts to take over policy making from governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases, courts and other bodies adjudicating economic, social and cultural rights review governmental decision-making, to ensure consistency with fundamental human rights. Holding governments accountable to human rights [whether civil and political rights or economic, social and cultural rights] enhances democracy. It does not undermine it.[1134]

The ESCR Committee similarly observed that the classification of economic, social and cultural rights as non-justiciable rights is arbitrary and 'would drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society'.[1135] The adoption (without vote) by the UN General Assembly of the Optional Protocol to the ICESCR on 10 December 2008[1136] is a ground-breaking statement that these rights are able to be considered by a human rights supervisory body. The Optional Protocol enables an individual or groups of individuals within the jurisdiction of a state party to the Protocol to bring a complaint to the ESCR Committee against that state, to have interim measures given to protect the complainant before the Committee can consider the case in full, and the Committee can undertake an inquiry, including a visit to a state (for those state parties agreeing to such powers under Article 11), where it receives reliable information indicating grave or systemic violations of human rights. This development of such a complaints system is to be welcomed as a statement of the justiciability of these rights and could lead to a significant increase in both implementation of these rights and acknowledgement of their importance by states. This development is also consistent with the jurisprudence of the African Commission on Human and Peoples' Rights on economic, social and cultural rights under the African Charter on Human and Peoples' Rights (ACHPR),[1137] and of some national courts, with the South African Constitutional Court specifically rejecting the argument that economic, social and cultural rights were not justiciable.[1138] Thus the argument of non-justiciability of economic, social

1134. Coalition for an Optional Protocol to the ICESCR's Fact Sheet No. 7, 'The Question of Justiciability', 3.
1135. ESCR Committee, General Comment 9, para. 10.
1136. General Assembly Resolution 63/1117 (A/Res/63/117). This General Assembly Resolution was based on the recommendation by the UN Human Rights Council (adopted without a vote on 18 June 2008 (UN Doc. A/HRC/8/L.2/Rev.1/Corr. 1).)
1137. See particularly the case of *The Social and Economic Rights Action Center for Economic and Social Rights v Nigeria*, Communication No. 155/96 (2001).
1138. See, particularly, *Soobramoney v Minister of Health (Kwazulu Natal),* 1997(12) BCLR 1696 and *The Government of the Republic of South Africa and Others v Grootboom,* 2000 (3) BCLR 277(C). See also Leading Cases on Economic Social and Cultural Rights, Working Paper No. 3 (ESC Rights Litigation Program COHRE, Geneva, 2006). http://www.cohre.org/store/attachments/COHRE_Leading%20ESC%20Rights%20Cases.pdf.pdf (accessed 28/01/09).

and cultural rights can clearly no longer be legitimately sustained in international law.

A related argument to that of non-justiciability was the view that, unlike civil and political rights that mostly required 'negative obligations' on the part of states, economic, social and cultural rights required 'positive obligations' on the part of states to fulfil them and, consequently, economic, social and cultural rights were more resource demanding than civil and political rights, and so could only be progressively implemented depending on the availability of resources.[1139] The obligations of states parties are recognized under the ICESCR as being subject to the availability of resources and require only the 'progressive realization' of the recognized rights.[1140] Although it has been argued accurately that some civil and political rights also require resources to be protected (see, for example, Craven (2005: 15)), it is clear that economic, social and cultural rights generally require greater resources to achieve. This has greatly affected the full development and realization of the economic, social and cultural rights over the years, especially in developing states, which continues to affect poverty levels in many of those states. The ESCR Committee has, however, indicated that these differences must not be seen as watering down the obligations of states under the ICESCR. It has stated that 'while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect'.[1141] For example, the obligation to ensure the right of everyone to form and join a trade union (Article 8) is of immediate effect.

The obligations of states under the ICESCR are perceived as a combination of 'obligations of conduct' and 'obligations of result'.[1142] While the undertaking of state parties 'to take steps' under Article 2(1) to realize the rights protected in the Covenant is an 'obligation of conduct' and has immediate application, the realization of the relevant rights, in most cases, is an 'obligation of result' that may be achieved progressively.[1143] In its General Comment No. 3, the ESCR Committee stressed the 'obligations of conduct' as follows:

> [W]hile the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. The means which should be used in order to satisfy the obligation to take steps are stated in

1139. For a comprehensive analysis see Alston and Quinn (1987).
1140. Art. 2, ICESCR. See also Steiner and Alston (2000: 246).
1141. ESCR Committee, General Comment 3, para 1.
1142. See, for example, Report of the International Law Commission (1977) 2, *Yearbook of the International Law Commission* 20, para 8.
1143. See Alston and Quinn (2000: 107-109).

> article 2(1) to be 'all appropriate means, including particularly the adoption of legislative measures'.[1144]

The ESCR Committee explained the 'obligations of result' and the progressive realization of the rights as follows:

> [T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'etre*, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[1145]

Although the Committee confers upon itself 'the ultimate determination as to whether all appropriate measures have been taken' in respect of the above obligations,[1146] there is no doubt that in respect of both 'obligations of conduct' and 'obligations of result' much will still depend on the humane volition and good faith of the states parties to take the appropriate steps towards the realization of the economic, social and cultural rights, which, we argue, can facilitate development and, consequently, move people out of poverty. In this regard, we have observed elsewhere that '[t]he development of a state depends largely on the level of human development within the state,[1147] and human development is a principal objective of human rights, especially through the guarantee of economic, social and cultural rights. Where states uphold their obligations to respect, protect and fulfil human rights generally, and economic, social and cultural rights in particular, they would consequently fulfil their developmental obligations' (Baderin and McCorquodale 2007: 17), and enhance the possibilities of alleviating poverty in the respective states.

In appreciation of the resource-demanding nature of economic, social and cultural rights, Article 2(1) of the ICESCR indicates the obligation of

1144. ESCR Committee, General Comment 3, paras 2 and 3.
1145. ESCR Committee, General Comment 3, para. 9.
1146. ESCR Committee, General Comment 3, para. 4.
1147. See, for example, Article 2(1) of the UN Declaration on the Right to Development, which provides that: 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development'.

states parties to 'take steps *individually and through international assistance and co-operation, especially economic and technical*' (emphasis added) to realize the rights guaranteed. Developing states would certainly favour the argument that this places some level of obligation on the international community, especially on the economically powerful states, to assist and co-operate with the developing states in the realization of the economic, social and cultural rights,[1148] with the aim of helping to alleviate the problem of poverty in developing states. The ESCR Committee also seemed to have suggested this when it emphasized that:

> [I]n accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States. *It is particularly incumbent upon those States which are in a position to assist others in this regard.* The Committee notes in particular the importance of the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and the need for States parties to take full account of all of the principles recognized therein. *It emphasizes that, in the absence of an active programme of international assistance and cooperation on the part of all those States that are in a position to undertake one, the full realization of economic, social and cultural rights will remain an unfulfilled aspiration in many countries.*[1149]

Most industrial states do not seem to accept that they have a legal obligation under the ICESCR to provide international assistance and co-operation to developing states for the realization of economic, social and cultural rights. In their view, while developing states may seek the assistance and co-operation of developed states, they cannot claim it as a legal right in the strict sense of the word (see Craven 1995: 148-150). They make reference, for example, to the wording of Article 11 of the ICESCR, which, in recognizing the right of everyone to an adequate standard of living, also recognizes that international co-operation in that regard is 'based on free consent' of states (see Craven 1995: 148-150). Assistance and co-operation for the full realization of economic, social and cultural rights in developing states tends therefore to depend on the moral will and humane volition of industrial states, rather than any international legal obligation on their part. It must be emphasized, however, that the developing states must themselves make a conscientious effort in meeting their economic, social and cultural rights obligations to the maximum

1148. See, for example, Chile's argument during the drafting of the Covenant that 'international assistance to under-developed countries had in a sense become mandatory as a result of commitments assumed by States in the United Nations'. E/CN.4/SR.1203, at 342, para. 10 (1962).

1149. ESCR Committee, General Comment 3, para. 14 (emphasis added). See also ESCR Committee, General Comment 2 on International Technical Assistance Measures; UN Doc. HRI\GEN\1\ Rev.1 at 45 in E/1990/23. See also below for the Committee's observation regarding the need for international cooperation to curb poverty.

of their available resources through a careful balancing of the available resources, in a way that will encourage international assistance and co-operation from industrial states.

Therefore, it is clear that there have been considerable debates about the nature of economic, social and cultural rights and the scope of the obligations of the state parties, both during the over forty years of the existence of the ICESCR and beforehand. The essence of the arguments that doubted the nature, the justiciability and the scope of obligations of economic, social and cultural rights have, in our view, now all been comprehensively rebutted in the literature and jurisprudence, both through strong conceptual analysis and clear applications of economic, social and cultural rights.

15.4. POVERTY AND THE DRAFTING OF THE ICESCR

As noted in the introduction above, 'freedom from want' was expressly included in the preamble to the ICESCR, as it was directly quoting from the preamble to the UDHR. The idea of 'freedom from want' was originally one of US President Franklin Roosevelt's 'four freedoms' advanced in 1941 prior to the adoption of the UDHR.[1150] Craven (1995) has observed in that regard that '[e]conomic, social and cultural rights could [itself] be said to be an expression of Roosevelt's idea of 'freedom from want' (Craven 1995: 8, fn.16), which indicates that the need to address issues relating to poverty had been identified right from the beginning of human rights development at the international level (see Skogly 2002: 63).

The word 'poverty' does not, however, appear in the ICESCR or, indeed, in any of the major international human rights treaties. During the drafting of the Covenant, poverty was also not specifically discussed as a separate item. Rather, the issue of poverty arose largely within the context of the discussions on the drafts of relevant articles of the Covenant, particularly Article 11 on the right to an adequate standard of living (which seems to have been accepted as the right relevant for all issues associated with poverty). The non-specific discussion of poverty during the drafting may have been due to the fact that the drafters were at that point in time thinking of the standard to be achieved in respect of economic, social and cultural rights rather than the problems to be avoided or solved through them.[1151] For example, while employment is an important means of earning a livelihood and eradicating poverty (see, for example, Drzewicki (2001: 223)), a proposal during the discussion of the provision on the right to work that 'the right to work be guaranteed *with the object of creating conditions precluding the threat to death from hunger or inanition*'[1152] was not successful as it was considered as representing 'too low a standard in respect of the right to work'.[1153]

1150. President Franklin D. Roosevelt, Address to Congress, 6 January 1941.
1151. Professor Mathew Craven's insight on this point is much appreciated.
1152. UN Doc. A/2929, 1 July 1955, p. 300, para. 3 (emphasis added)
1153. UN Doc. A/2929, 1 July 1955, p. 300, para. 3.

Despite the lack of discussion about poverty as a specific item during the drafting of the Covenant, it is obvious, as has been noted by the ESCR Committee, that poverty 'is one of the recurring themes in the Covenant' and that the 'rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the Covenant, have a direct and immediate bearing upon the eradication of poverty'.[1154]

For example, a link to alleviation of poverty could be deduced from the debates on the provisions of Article 7 (just and favourable conditions of work) in relation to the right of workers to minimum remuneration that ensured a decent living for themselves and their families.[1155] During the debates, a majority of the states were of the view that this specific provision was necessary (Craven 1995: 230), which, in effect, indicated not only their recognition of the important role of work but also the need for adequate remuneration to workers as a means of alleviating poverty. A proposition that 'workers should have the right to share in increased profits and undertakings and that their wages should be fixed in relation to increases in the cost of living', was, however, not supported.[1156]

The debates on the provisions of Article 11 on the right to an adequate standard of living also provide links to issues relating to poverty. Covering issues like right to food, clothing, housing and freedom from hunger, the relevance of the right to an adequate standard of living to the issue of poverty is very obvious. Craven has observed correctly that this right 'represents a question of survival',[1157] and that some states had noted during the drafting that 'the concept of an adequate standard of living related to virtually all of the economic, social and cultural rights'.[1158] This perhaps was to underline the fact that economic, social and cultural rights as a whole were aimed at ensuring an adequate standard of living for all and thus aimed at eradicating or, at least, alleviating poverty. The link of this right to poverty alleviation is also apparent in the argument of the Belgian representative, during the drafting, that, 'the primary aim [of this right] should be to improve the living conditions of the most under-privileged'.[1159]

A large number of states also acknowledged the 'paramount importance' of the right to freedom from hunger, with the Australian representative specifically noting that 'no human right was worth anything to a starving man'.[1160] There was also a general acceptance of the fact that 'food production, conservation, and distribution were objectives of fundamental importance with a view of ensuring freedom from hunger'.[1161]

By the time of the completion of the drafting of the ICESCR, despite the powerful statement about freedom from want in its preamble, poverty was only

1154. UN Doc A/Conf.191/BP/7, para. 1.
1155. Art. 7(a)(ii)
1156. UN Doc. A/2929, 1 July 1955, p. 300, para. 3
1157. UN Doc. A/2929, 1 July 1955, p. 287.
1158. UN Doc. A/2929, 1 July 1955, p. 292.
1159. UN Doc. A/2929, 1 July 1955, p. 294.
1160. UN Doc. A/2929, 1 July 1955, p. 298.
1161. UN Doc. A/2929, 1 July 1955, p. 300.

indirectly addressed in the Covenant. Despite this, the ESCR Committee has acknowledged directly the link between poverty and the ICESCR, as is analysed below.

15.5. POVERTY AND THE ESRC COMMITTEE

The ESRC Committee has taken the view that, although the term 'poverty' is not explicitly used in the ICESCR, it nevertheless forms an essential element of the ICESCR:

> Poverty is one of the recurring themes in the Covenant and has always been one of the central concerns of the Committee. The rights to work, an adequate standard of living, housing, food, health and education, which lie at the heart of the Covenant, have a direct and immediate bearing upon the eradication of poverty. Moreover, the issue of poverty frequently arises in the course of the Committee's constructive dialogue with States parties. In the light of experience gained over many years, including the examination of numerous States parties' reports, the Committee holds the firm view that poverty constitutes a denial of human rights.[1162]

This statement was made by the ESRC Committee in 2001.[1163] Until about that time, the Committee had only made a few rather vague explorations in their General Comments about poverty, such as the need for states to have policies that provide access to land by 'landless or impoverished segments of society'.[1164] From 2000, the ESRC Committee seems to have begun to incorporate poverty more closely into its expectation of what is included in the state's obligations under particular rights, with a recurring view, for example, that 'equity demands that poorer households should not be disproportionately burdened with water expenses [or whatever the relevant right is about] as compared to richer households'.[1165] These statements seem to bring poverty within the broader coverage of non-discrimination by states in the application of these rights,[1166] rather than directly requiring states to take specific action on poverty due to its own impact on human rights. However, in its

1162. Statement by the ESCR Committee, Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the ICESCR, made at the Third UN Conference on the Least Developed Countries, 4 May 2001, UN Doc. A/Conf.191/BP/7, www.unctad.org/conference (ESCR Committee Statement on Poverty) para. 1.

1163. Our thanks to Brendan Plant for his research assistance on this part.

1164. General Comment 4 on the Right to Adequate Housing, UN Doc E/1992/23 (1991), para. 8(e). Similarly in General Comment 12 on the Right to Adequate Food, UN Doc E/C.12/1999/5 (1999), para. 13.

1165. General Comment 15 on the Right to Water, UN Doc E/C.12/2002/11 (2000), para. 27. See also General Comment 14 on the Right to the Highest Attainable Standard of Health, UN Doc E/C.12/2000/4 (2000), para. 12(b).

1166. See, for example, General Comment 16 on Equality, UN Doc E/C.12/2005/4 (2005), para. 21 and General Comment 18 on the Right to Work, UN Doc E/C.12/2005/18 (2005), para. 14.

General Comment on the Right to Social Security adopted on 23 November 2007, they did note the broader impact on poverty when they stated: '[s]ocial security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion'.[1167] This could indicate a conceptual step towards upholding poverty as a denial of human dignity.

In its concluding observations to state reports, the Committee has repeatedly referred to its concerns about poverty in a state. It expresses its 'grave concern about the constantly increasing level of poverty in the State party'[1168] and it is 'gravely concerned about the widespread and unacceptable incident of poverty'.[1169] It 'urges' or 'recommends' that states take appropriate measures to combat poverty, especially in relation to disadvantaged groups, such as families, girl children and those with HIV and AIDS.[1170] Indeed, the Committee is alert to the particularly heavy impact of poverty on marginalized groups, whatever the level of industrialization of a state,[1171] and it comments on the increasing inequality of wealth in many states.[1172] Whilst the Committee is aware of the difficulty of the lack of available resources that restricts the ability of states to take significant action,[1173] it frequently urges states to take action to address poverty, including through international co-operation[1174] and national poverty reduction policies.[1175]

In all these comments, observations and statements it is rare for the ESCR Committee to clarify what it means by poverty. Indeed, the Committee often expresses concern at the failure by states to develop indicators, such as setting an official poverty line by which to measure poverty and progress by states in

1167. General Comment 19 on the Right to Social Security (E/C.12/GC/19, 4 February 2008), para. 3: see http://www2.ohchr.org/english/bodies/cescr/comments.htm (last accessed 17.03.08)
1168. See, for example, the Concluding Observations on the State Report by Georgia (2002) E/C.12/1/Add.83, para. 21.
1169. See, for example, the Concluding Observations on the State Report by China (Hong Kong Special Administrative Region) (2001) E/C.12/1/Add.58, para. 18.
1170. See, for example, the Concluding Observations on the State Report by Zambia (2005) E/C.12/1/Add.106, para. 26 and the Concluding Observations on the State Report by El Salvador (2007) E/C.12/SLV/CO/2, para. 42.
1171. See, for example, the Concluding Observations on the State Report by Canada (2006) E/C.12/CAN/CO/4, paras 14, 15 and 44.
1172. See, for example, the Concluding Observations on the State Report by Russia (2003) E/C.12/1/Add.94, para. 25 and the Concluding Observations on the State Report by Mexico (2006) E/C.12/MEX/CO/4, para. 23.
1173. See, for example, the Concluding Observations on the State Report by Sudan (2000) E/C.12/1/Add.48, paras 15 and 16.
1174. See, for example, the Concluding Observations on the State Report by Azerbaijan (2004) E/C.12/1/Add.104, para. 27 and the Concluding Observations on the State Report by Georgia (2000) E/C.12/1/Add.47, para. 7.
1175. See, for example, the Concluding Observations on the State Report by Algeria (2001) E/C.12/1/Add.71, para. 34 and the Concluding Observations on the State Report by Brazil (2003) E/C.12/1/Add.87, para. 55. See also Tooze (2007: 347-348) for a discussion of the Committee's assessment of poverty in relation to social security and social assistance.

combating poverty.[1176] Nevertheless, the Committee, in its Statement on Poverty, provides a useful definition:

> In the recent past, poverty was often defined as insufficient income to buy a minimum basket of goods and services. Today, the term is usually understood more broadly as the lack of basic capabilities to live in dignity. This definition recognizes poverty's broader features, such as hunger, poor education, discrimination, vulnerability and social exclusion. The Committee notes that this understanding of poverty corresponds with numerous provisions of the Covenant.
>
> In the light of the International Bill of Rights, poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights. While acknowledging that there is no universally accepted definition, the Committee endorses this multi-dimensional understanding of poverty, which reflects the indivisible and interdependent nature of all human rights.[1177]

In reaching this definition, the Committee shows its awareness of the inadequacy of an insufficient income approach to poverty (found in documents such as the Millennium Declaration),[1178] by which individual human rights can be determined by financial calculations,[1179] and prefers the arguments that a capability approach is more in keeping with human dignity.[1180] On this basis, the Committee has helpfully clarified that poverty is more than economic deprivation and instead is when basic capabilities to command and access economic resources (not just personal income) do not reach minimally acceptable levels. The difficulty remains that the Committee has not yet explained this sufficiently in its General

1176. See, for example, the Concluding Observations on the State Report by Australia (2000) E/C.12/1/Add.50, para. 20 and the Concluding Observations on the State Report by Spain (2004) E/C.12/1/Add.99, para. 19.
1177. ESCR Committee Statement on Poverty, paras 7 and 8.
1178. UN Millennium Declaration, Goal 2000 No. 1: 'Reduce by half the proportion of people living on less than a dollar a day.' (General Assembly Resolution 55, 18 September 2000, UN Doc A/Res/55/2).
1179. 'Markets … cannot fairly allocate public goods, or foster social accountability in the use of resources or democracy at the workplace, or meet social and individual needs that cannot be expressed in the form of purchasing power, or balance the needs of present and future generations' (Lukes 1993).
1180. 'Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles). For example, an affluent person who fasts may have the same functioning achievement in terms of eating or nourishment as a destitute person who is forced to starve, but the first person does have a different "capability set" than the second (the first can choose to eat well and be well nourished in a way the second cannot)' (Sen 1999).

Comments for a coherent conceptual basis to be found for its approach to poverty in its consideration of economic, social and cultural rights.

15.6. RESERVATIONS TO THE COVENANT AND ITS IMPACT FOR COMBATING POVERTY

As the ICESCR does not prohibit reservations, it is necessary to consider briefly the possible impact of reservations for combating poverty through the provisions of the Covenant. Currently, 42 of the 158 state parties have entered different declarations or reservations to their acceptance of the obligations under the Covenant (see, for example, Ssenyonjo 2008: 315-358).[1181] Some of these declarations and reservations are general in nature, while others are in respect of specific provisions of the Covenant. By its definition, the purpose of a reservation by a state party to a treaty is 'to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State',[1182] which, in essence, means a 'lessening [of] the formal commitment of the state party to the particular treaty' (Olowu 2006: 173). Ssenyonjo has observed notably in that regard that, 'some States have limited their legal obligations under the Covenant by formulating reservations, at times disguised as "declarations", "understandings", "explanations", or "observations" to some of the Covenant's provisions' (Ssenyonjo 2008: 2). Some state parties have also noted that they regarded some 'declarations' as reservations, as such 'declarations' actually limit the scope of application of the Covenant.[1183] Thus, reservations to the Covenant, 'however phrased or named',[1184] can impede the combating of poverty in the respective reserving states owing to its limitation of the Covenant's scope of application in such states. Such an impediment could be of a general or specific nature depending on the scope of the reservation by a particular state. Unlike the HRC, which has issued a General Comment on reservations in respect of the ICCPR,[1185] the ESCR Committee is yet to issue one in respect of the ICESCR. It has however been observed, based on an analysis of the Committee's practice, that it appears to consider 'ratification of the Covenant without reservations, or the withdrawal of the existing reservations, as the preferred option and a positive aspect in line with the object and purpose of the Covenant' (Ssenyonjo 2008: 11-12).

1181. See also status of reservations to the Covenant on the UNHCHR website at http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (last accessed 15/11/08).
1182. See Article 2(1)(d) Vienna Convention on the Law of Treaties, 1155 United Nations Treaties Series, 331.
1183. See, for example, the observation of Latvia in respect of the 'declaration' entered by Pakistan on signing the Covenant that: 'the Government of the Republic of Latvia is of the opinion that the declaration is in fact a unilateral act deemed to limit the scope of application of the International Covenant and therefore, it shall be regarded as a reservation'. http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (last accessed 25/11/08).
1184. See Article 2(1)(d), Vienna Convention on the Law of Treaties, 1155 United Nations Treaties Series, 331.
1185. See HRC General Comment 24, CCPR/C/21/Rev.1/Add.6, of 4/11/94.

Reservations of a general nature that seek to modify or limit the general application of the Covenant by subjecting it to some national conditions or legislation can impede the general application of the Covenant as an important instrument for moving impoverished individuals and poor people out of poverty. Such reservations have been described as 'problematic' (Ssenyonjo 2008: 16) and 'questionable' (Shelton 1983: 227). One example of such is the 'declaration' entered into by Pakistan on signing the Covenant in November 2004 to the effect that:

> While the Government of Islamic Republic of Pakistan accepts the provisions embodied in the International Covenant on Economic, Social and Cultural Rights, it will implement the said provisions in a progressive manner, in keeping with the existing economic conditions and the development plans of the country. The provisions of the Covenant shall, however, be subject to the provisions of the constitution of the Islamic Republic of Pakistan.[1186]

This 'declaration' has been criticized as being 'a reservation in substance' as it is 'aimed at precluding or modifying the legal effect of the provisions' of the Covenant, and that its formulation is 'extremely broad', in the sense that it subjects the implementation of the Covenant to 'existing economic conditions and development plans of the country' as well as to the country's constitution (Ssenyonjo 2008: 22 -27).[1187] Thus, some state parties to the Covenant have entered objections to such broad declarations and reservations on the grounds of lack of clarity as to the specific commitment to the Covenant by such reserving states.[1188] However, when Pakistan finally ratified the ICESCR on 17 April 2008 it had a reservation stating that: 'Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources'.[1189] This would appear to be in consonance with the acknowledged progressive nature of the obligation of states under the Covenant, subject to the principle established by the ESCR Committee that:

> [W]hile the full realization of the relevant rights may be achieved progressively, steps towards the goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant. The means which

1186. See http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (last accessed 25/11/08)
1187. See also the observation by Latvia in that regard that: 'the Government of the Republic of Latvia is of the opinion that the declaration is in fact a unilateral act deemed to limit the scope of application of the International Covenant and therefore, it shall be regarded as a reservation.' http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (last accessed 25/11/08)
1188. See, for example, the objections of Finland, Denmark, Austria, Latvia, Netherlands, Norway, and Sweden to such generic declarations/reservations. http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (last accessed 25/11/08).
1189. http://www2.ohchr.org/english/bodies/ratification/docs/Egypt.pdf (last accessed 25/11/08)

> should be used in order to satisfy the obligation to take steps are stated in article 2(1) to be 'all appropriate means, including particularly the adoption of legislative measures'.[1190]

On the basis of its new reservation, Pakistan should consider withdrawing the broad 'declaration' it earlier entered into on signing the Covenant in 2004. Similarly, other state parties that have entered into such general 'declarations' or reservations that can inhibit the general implementation of the Covenant, should also consider withdrawing them. Such actions can assist in helping to combat poverty if taken as part of a general commitment to the full implementation of the Covenant.

Apart from generic reservations, there have also been specific 'declarations' or reservations entered into by some states parties to the Covenant that could directly impede the combating of poverty in those states by limiting the application of specific articles of the Covenant. For example, there have been specific reservations or declarations entered into by different states in respect of Article 7 (the right to enjoy just and favourable conditions of work),[1191] Article 8 (the right to form and join trade unions),[1192]Article 9 (the right to social security and social insurance),[1193] Article 10 (the right of family to protection and assistance),[1194] Article 11 (the right to an adequate standard of living),[1195] and Article 13 (the right to education).[1196] As the effective guarantee of these rights – both collectively and individually – can contribute significantly to combating poverty, reservations specifically limiting their guarantee can definitely inhibit efforts to combat poverty in the reserving states. Many of these specific reservations or declarations have also attracted objections from various other states parties to the Covenant.[1197] As part of its recent endeavour to link the Covenant to the alleviation of poverty, it is necessary for the ESCR Committee to adopt a practice of inviting relevant states parties to revisit any declarations or reservations they have entered into the Covenant, with a view to possibly withdrawing such reservations or 'declarations'. Where such reservations are eventually withdrawn by states, it would enhance the Covenant as an instrument for alleviating poverty amongst the states parties to it.

1190. ESCR Committee, General Comment 3, paras 2 and 3.
1191. For example, Bangladesh, Barbados, Denmark, India, Japan, Sweden, United Kingdom.
1192. For example, Algeria, Bangladesh, France, India, Kuwait, Mexico, Monaco, the Netherlands, New Zealand, Norway, United Kingdom.
1193. For example, France, Kuwait, Monaco.
1194. For example, Bangladesh, United Kingdom.
1195. For example, France and Monaco.
1196. For example, Algeria, Bangladesh, France, Monaco, Turkey, United Kingdom.
1197. See Objections at http://www2.ohchr.org/english/bodies/ratification/3.htm#ratifications (last accessed 25/11/08)

15.7. CONCLUSIONS

For most of the world's population, issues of food, water, education, health and work are part of the pressing reality of their daily lives. For many governments, economic, social and cultural rights appear to be a long way from implementation. Indeed, '[some argue that] the incorporation of economic and social rights in the human rights canon is simply spitting in the wind, when hundreds of millions suffer from malnutrition and vulnerability to disease and starvation. Worse, it is an insult to them to insist on their 'human rights' when there is no realistic prospect of these being upheld' (Beetham 1995). However, as the ESCR Committee has made clear,

> [w]hile the common theme underlying poor people's experiences is one of powerlessness, human rights can empower individuals and communities. The challenge is to connect the powerless with the empowering potential of human rights. Although human rights are not a panacea, they can help to equalise the distribution and exercise of power within and between societies.[1198]

This is one of the challenges and one of the transformation possibilities of economic, social and cultural rights.

Just as with the drafting of the ICESCR, the protection of economic, social and cultural rights remains a contentious, difficult and challenging matter, particularly in relation to the alleviation of poverty. Indeed, it has been stated that 'there hardly exists another human rights treaty which has been more frequently misinterpreted, downplayed or intentionally abused' than the ICESCR (Simma 1991: 79). Yet, it is clear that, after forty years of debate, development and application since the adoption of the ICESCR, economic, social and cultural rights are now accepted as being part of the international human rights legal obligations of states and there are institutional supervisory bodies – global, regional and some national – that are able to check compliance with these obligations. In addition, the protection of economic, social and cultural rights has affected a very wide range of issues of concern to the international community, from peace and security to world trade and, most importantly, poverty. Indeed, many commentators, as we have shown, have taken the view that the Covenant provides important guarantees and obligations, which, if fulfilled by the state parties, would assist in tackling the problem of poverty in most parts of the world today. For example, Craven sees the lack of enjoyment of economic, social and cultural rights by the poor as a 'dispossession' and thus advocates that 'the conditions for legitimizing the discourse or economic, social and cultural rights necessarily involve placing the issues of poverty, disease or malnutrition within a global, rather than a local

1198. ESCR Committee, Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights (2001) E/C.12/2001/10, para. 6.

framework, so as to make possible the idea that the dispossessed are legitimate agents, capable of articulating meaningful claims on their own behalf' (Craven 2007: 86).

For this law to be strengthened, it also relies on action, so that the law has an effect – a meaning – on daily lives, particularly of the poor and impoverished individuals, as was acknowledged by the first chair of the Human Rights Commission:

> Where after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person: the neighborhood he [or she] lives in; the school or college he [or she] attends; the factory, farms or office where he [or she] works. Such are the places where every man, woman, or child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere.[1199]

1199. Eleanor Roosevelt, remarks at presentation of booklet on human rights, *In Your Hands,* to the Commission on Human Rights, New York, 27 March 1958.

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'This book is a treasure-chest of scholarly experience and reflection… I will not be surprised if it proves itself to be as influential as some of the early feminist and environmental law books turned out to be in their respective areas.' Professor Justice Albie Sachs

This volume inquires into the potential of socioeconomic rights to contribute to making poverty history. The idea that law owes a duty to the poor rather than being a discretionary function of government is comparatively new. Yet all the different levels of poverty – extreme, moderate and relative – albeit to very different degrees, shorten life expectancy and render choices either impossible or more difficult.

The contributors, who are from a wide range of countries in Africa, the Americas, Asia, and Europe, do not claim that socioeconomic rights are the only means of combating poverty, but that access to the courts by the most vulnerable in society can play a significant role. They skilfully analyse new developments in law, arguing that there is now a clear responsibility of law and lawyers to contribute strategically to the eradication of poverty.

Geraldine Van Bueren, a barrister, is Professor of International Human Rights Law at Queen Mary, University of London and a Visiting Fellow at Kellogg College, Oxford. She held concurrently the position of WP Schreiner Professor of International Human Rights Law at the University of Cape Town. One of the original drafters of the UN Convention on the Rights of the Child, she was awarded the UNICEF Child Rights Lawyer Award. Her work has been cited with approval by courts around the world including the House of Lords, the South African Constitutional Court and the European Court of Human Rights. She is a Commissioner in the Equality and Human Rights Commission.

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