CENTRE ON HOUSING RIGHTS AND EVICTIONS

LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS:

ACHIEVEMENTS, CHALLENGES AND STRATEGIES

FEATURING 21 CASE STUDIES

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It is not enough for these rights to be contained in documents.

They have to be functional in people's lives, and this has to be done in a more aggressive manner than is being done.

The journey is certainly not going to be easy as you shall be making incursions into a system where the rights of the underprivileged have never been a priority; where the underprivileged have no voice.

You shall come against pressure groups in your bid to alter the status quo.

You have to be steadfast and unbowed.

You have a name to protect and a cause to fight for.

You have to be bold and innovative in your recourse to the courts.

You may come against unfavourable decisions in the courts.

Your weapon however is to be armed with formidable case law on the subject, both local and international.

You have to be ready when you lose a case to proceed to the highest court of the land.

You have to be ready to test repeatedly unfavourable government policies until social and economic rights have become recognised and implemented.

Honourable Justice O. A. Adefope-Okorie, Nigeria[1]

1 Keynote Adress to Legal Action Program Network (LAPNET) Workshop '98

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PREFACE

It has been 12 years since the UN Committee on Economic, Social and Cultural Rights affirmed that many elements of economic, social and cultural rights are susceptible to judicial enforcement.[1] Despite objections of some critics, the Committee went on to recognise that these rights were not fundamentally different in this respect from civil and political rights, and that States parties should take steps to provide access to domestic legal remedies.[2]

As a member of that Committee from 1987 to 1996, I witnessed in practice how violations of these rights could be clearly identified from the information presented during our regular reviews of the performance of States. When given sufficient and credible evidence, our Committee was not hesitant to declare that countries were not acting in conformity with the *International Covenant on Economic, Social and Cultural Rights*.

But the time has come to evaluate how this idea of justiciability of economic, social and cultural rights has fared in practice. By examining those jurisdictions where the rights are actionable before courts and tribunals, we can answer a number of compelling questions: How have courts and tribunals dealt with these rights? What remedies have been provided? Have they been effective? What are the lessons to be learned?

This innovative publication, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies*, does not only ask these hard questions, but it asks them of the very people who are doing the work; those advocates, claimants and judges who are concerned on a daily basis with the adjudication of economic, social and cultural rights.

The 21 case studies discussed in this volume clearly illustrate that a wide variety of economic, social and cultural rights are indeed justiciable, whether it is the right to health care or rights to livelihood and culture. Moreover, this publication set out many concrete examples where legal action has made a difference and has unquestionably progressed the actual realisation of the rights.

Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies also reveals the many practical and theoretical obstacles that have been encountered in social action litgation. However it is not defeatist, and neither are those interviewed: the lessons learned from real cases point towards the significant potential for improved litigation to make the rights in the Covenant a living and daily reality for the vulnerable and marginalised.

Justice Bruno Simma
International Court of Justice

1 See UN Committee on Economic, Social and Cultural Rights, General Comment 4, The right to adequate housing (Art. 11 (1) of the Covenant), U.N. Doc E/CN.4/1991/4 (1991).
2 See Committee on Economic, Social and Cultural Rights, General Comment 9, The domestic application of the Covenant, U.N. Doc. E/C.12/1998/24 (1998).

1 INTRODUCTION

LESSONS FROM PRACTICE

The *Universal Declaration of Human Rights* affirms that 'everyone has the right to an effective remedy'. The UN Committee on Economic, Social and Cultural Rights has made it clear that this important principle of international human rights law applies to economic, social and cultural (ESC) rights, that "appropriate means of redress, or remedies, must be available to any aggrieved individual or group." As economic, social and cultural (ESC) rights gain prominence, advocates have increasingly looked to judicial remedies as an important way of holding governments accountable and empowering those whose rights are violated. Economic liberalisation, the shrinking of the welfare state and corruption in government institutions have only accelerated this interest.

The litigation of social and economic issues is not a new phenomenon. Courts and other tribunals commonly address claims ranging from labour rights to housing and health rights. What is more novel is the reliance on human rights norms themselves: invoking the rights directly in order to hold states and other actors to their obligations to respect, protect and fulfil ESC rights.[1] The experience of some countries and jurisdictions clearly shows that this is possible.

But judicial enforcement of ESC rights is not a task undertaken without difficulty. Even in the ever-growing list of countries with constitutions that provide judicial remedies for ESC rights, numerous challenges abound in securing the rights in practice. The *Grootboom* decision is a case in point. (See Box 1.1.) Socio-economic rights were declared judicially enforceable, but the court orders remain only partially implemented.

Nevertheless, as this publication demonstrates, there are many instances in which court orders have had a direct and immediate impact on the enjoyment of ESC rights. This has certainly been the experience of COHRE in litigating the right to housing. The challenge is not to despair or resort to cynicism, but to identify and overcome the obstacles facing those who are taking these important human rights claims forward, so as to ensure the adequate judicial recognition and enforcement of ESC rights.

Overview of the Study

In order to obtain a more global picture of the judicial enforcement of ESC rights, COHRE has surveyed organisations and individuals active in the litigation of these rights.[2] We interviewed 46 lawyers, civil society leaders, judges and community leaders (covering 17 countries and 9 international mechanisms) to learn from their experiences. By asking these actors to reflect on their experiences, we have aimed to provide an accurate depiction of the potential and the limitations of judicial enforcement of economic, social and cultural rights.

1 Luke Clements (Chapter 15) noted that, while some British lawyers consider the right to housing superfluous due to the dense web of national housing legislation in the United Kingdom, the new Human Rights Act (with its minimalist right to housing) has led to a number of successful housing cases that could not have been brought under other legislation.

2 Much has been written from a theoretical or case law perspective on justiciability. See, for example, F. Coomans and Fried van Hoof, 'The Right to Complain about Economic, Social and Cultural Rights', Netherlands Institute of Human Rights, S*IM Special,* No. 18, Netherlands Institute of Human Rights, Utrecht, 1995.

BOX 1.1 - THE GROOTBOOM CASE, SOUTH AFRICA

In early 1999, the 'Grootboom community', members of a shantytown just outside Cape Town, boarded buses each day for the High Court. Forcibly evicted from nearby private property, they lived on the perimeter of a sports field, with no water, no sanitation, no security of tenure. 'Our structures were simply bulldozed, and there was no opportunity for us to salvage our personal belongings,' said one resident.

The High Court was told that the right to housing in the South African Constitution entitled the community to something better. While an interim settlement provided for water, sanitation and some aluminium sheets for shelter, the case wound its way up to the Constitutional Court. This court faulted the Government for failing to include provisions for emergency relief in its housing programme, but stopped short of declaring an immediate right to shelter.

The judgment was hailed a triumph. The carefully reasoned decision recognised that socio-economic rights impose legal duties, government policy was closely scrutinised, and subsequent cases have built on the *Grootboom* precedent, some of the cases have been highly effective. But two years later, the mood was more sombre. The leader of the community told a visiting COHRE team, 'We won the championship, but where's the trophy?'. Land would be made available only in 2005, and the judgment made no provision for an effective further review of government housing policy.

The *Grootboom* case shows the promise and the challenge of ESC rights litigation. Despite the monumental effort involved in obtaining the decision, the task of implementation remains. In Chapter 10, the lead advocates in the case detail the experience and the lessons learned.

The interviews were focused around four principal issues. The first two are general in nature and were raised in any discussion on judicial remedies and ESC rights, while the latter two questions will be of more interest to advocates (and their supporters):

1 Can courts appropriately adjudicate violations of economic, social and cultural rights?
2 Is litigation an effective strategy in assisting vulnerable and marginalised groups to access their rights?
3 What are the principal obstacles that impede the conduct of litigation and the implementation of decisions?
4 What strategies have proved the most successful?

In the selection of cases and interviewees, an attempt was made to achieve a geographical and jurisdictional balance, as well as to examine the different ESC rights.[3] Almost all of the case studies concern the litigation of human rights norms rather than specific statutory or regulatory requirements linked to ESC rights. The rationale behind this decision is that human rights norms potentially provide broader protection and more solid remedies than legislation or regulations which can be repealed or amended; such norms have been criticised as non-justiciable when they deal with economic, social and cultural rights, and their application is of more relevance outside the national context. In each interview, we focused on specific legal cases in which practitioners or claimants had participated. The edited interviews are reproduced in the case studies (Chapters 2 to 22).

Some important lessons can be distilled from the case studies. In the first section, a brief sketch is made of the potential for judicial enforcement of ESC rights, while the next three sections identify the direct and indirect impact of the cases, the obstacles frequently encountered and the views of advocates on the design of effective strategies.

The lessons are not universal. What works in one situation may fail in another. For example, many advocates identify social mobilisation as an important strategy to complement litigation. In cases involving unpopular minorities, some interviewees noted that 'quiet' litigation often may avoid creating a political backlash and allows governments to defer to the courts. (See Chapters 7, 15 and 18.)

1 - CASE STUDIES: POTENTIAL FOR JUDICIAL ENFORCEMENT OF ESC RIGHTS

If an individual or community is legally empowered to claim in a court or similar institution a remedy for a violation of a right, then the right is justiciable in the strict sense. Establishing this right remains a major struggle in many places where ESC rights are not enshrined in the constitution or laws or where international law is not incorporated within the domestic law. The principal strategy in such circumstances has often been to ask courts to acknowledge the socio-economic dimensions of civil and political rights since these are more likely to be actionable. (See, for example, Chapters 2, 3, 13, 15, 17 and 18.)

But the critical issue is, as Geoff Budlender (Chapter 8) points out, the meaning the courts give to ESC rights. What legal protections do they provide if a right is taken away? Are there concrete entitlements to essential goods and services or is there only an obligation for governments to pursue policy goals? If it is only an obligation to pursue a policy, how closely will courts scrutinise government performance?

3 There is a slight bias towards housing rights. This is partially a result of COHRE's contacts, but also a reflection of the practice; it is very difficult to locate organisations litigating education rights, for example. Labour rights cases are included, but not extensively, since there is a better understanding and acceptance of their justiciable nature.

The case studies demonstrate that a wide array of issues can be litigated. These are presented below within a frequently used analytical framework: the duties to respect, protect and fulfil, as well as the overarching obligation not to discriminate.[4] Some suggestions are made on where future attention should be directed.

At the same time, the interviewees acknowledge some real limitations in seeking remedies through the medium of ESC rights. Courts find it difficult to order the implementation of novel and detailed policies with specific resource consequences: for example, to produce and provide a vaccine for a particular disease. They are reluctant to intervene if governments have a number of different policy options available for addressing the lack of an enjoyment of an ESC right or if their orders will have significant budgetary consequences. When confronted with difficult choices, courts will often defer to the principle of the separation of powers: that the democratically elected branches of government and not the courts should decide such issues.[5]

But the case studies demonstrate that such dilemmas are not insurmountable, particularly if the violation is serious, if policy or legislative decisions have already been made, or if orders can be crafted to allow governments the necessary flexibility to make policy decisions. In the *TAC* cases, for example, the judge poignantly asked the Government how it could claim it lacked the resources to provide a medicine when it had not developed a plan to determine the cost of a provision programme nor assessed the different means as its disposal to access the resources. (See Chapter 11.)

Most interviewees confirm that the biggest constraint to justiciability is the one identified by Matthew Craven: 'justiciability depends not upon the generality of the norm concerned, but rather on the authority of the body making the decision.'[6] If courts are given the authority to decide on the entitlements of rights-bearers, they are capable of developing reasonable principles and judgements. Yet, the issue in many cases is not only the lack of *express* judicial authority, but also excessive judicial restraint [reluctance to enforce ESC rights]. Courts and similar bodies have often made conservative interpretations of their own authority. The slow pace of development in the jurisprudence in many jurisdictions can often be attributed to this factor.

(a) The Duty to Respect

The *duty to respect* means that states must refrain from interfering directly or indirectly with the enjoyment of the right, such as by denying people access to essential resources or entitlements necessary to the enjoyment of ESCR.[7] As Victor Dankwa, member of the African Commission on Human and People's Rights, states in Chapter 13, 'You can ask all states to bring a stop to the destruction of resources needed to realise rights.' States are required to justify interferences with any ESC right and provide adequate reparation as far as possible.

4 See Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 22-26 January 1997. The obligation to promote, often included in this typology, is not included in the analysis.

5 These dilemmas are summarised by Cecil Fabre as follows: '[I]t requires that judges decide whether a right-bearer has been illegitimately denied resources he [sic] is entitled to. In making that decision, judges have to assess whether other people might have needed the resources the right-bearer did not get. ...[I]t requires that judges decide whether resources have been allocated correctly: a difficult task in an economy like ours which is very complex and where resources are scarce. [It] is [also] claimed that they ought not to be allowed to adjudicate constitutional social rights because it is the democratic majority's moral right to allocate resources as they see fit.' At page 280 in Cecil Fabre, 'Constitutionalising Social Rights', *The Journal of Political Philosophy*, Vol. 6, No. 3, 1998, pages 263-284.

6 At page 389 in Matthew Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights', *Netherlands International Law Review*, Vol. XL, 1993.

7 See Committee on Economic, Social and Cultural Rights, 'The Right to Adequate Food', General Comment 12, E/C.12/1999/5, (1999).

Violations of this obligation arise in most of the case studies, particularly in traditionally litigated areas such as labour rights (dismissal from employment and restrictions on trade union freedom)[8] and housing rights (forced evictions).[9] More recent cases have concerned contamination of water supplies,[10] restrictions on the provision of medicines by medical practitioners[11] and the interference by police in the ability of the homeless to access food, shelter and medicines.[12] The Indian *Olga Tellis* case is notable for drawing on US due process jurisprudence to require the Bombay authorities to provide adequate notice before the eviction of pavement dwellers and a recommendation that alternative accommodation be given. (See Chapter 2.)

The duty to respect is certainly a type of obligation with which most judicial authorities are more comfortable enforcing. It is often given as the most obvious example of justiciability: There is a clearly identifiable government action that can be examined and censured by a court. Yet, there are problems when courts focus too narrowly on restraining government action and avoid requiring governments to act. The substantive and procedural remedies ordered by courts in many of these cases have been weak, and often inconsistent with the jurisprudence of UN treaty bodies, which incorporates both positive and negative obligations on governments[13] (See Box 2.) In the *Olga Tellis* case, the pavement dwellers were simply evicted after the court order, and no space was provided for resettlement, a trend that has worsened in India. An examination of the cases reveals that, as with violations civil and political rights cases, governments will usually justify their actions by reference to broader public policy purposes: national security, economic development or even environmental protection[14] and contend that the remedies, such as resettlement, are too expensive. Courts can be overly deferential to these arguments.

Much work therefore remains to be done to entrench the various substantive and procedural rights associated with the duty to respect in law and in practice,[15] particularly the obligation of governments to justify their interference with the rights, ensure that those affected have adequate access to legal remedies and provide compensation, restitution, or adequate alternatives. The strategy employed by some advocates has been to approach courts with detailed alternatives to the planned interference[16] or to raise the positive obligation of governments to address the socio-economic right in the first place.[17]

(b) The Duty to Protect (and Non-State Actors)

The deleterious impact that the actions of private actors can have on the realisation of economic and social rights is an increasingly important issue for most ESC rights advocates. This has been the result in part of the dominant economic ideology that views the state simply as a regulator and not as a provider of social services. Many of the case studies indicate there has been a shift in legal strategies over time towards confrontation with the actions of private actors, particularly multinational companies.[18]

8 See Chapter 20.
9 See Chapters 2, 3, 7, 8, 10, 13, 15, 18 and 19.
10 See Chapters 8, 12, and 13.
11 See Chapter 11.
12 See Chapter 9.
13 See, for example, Committee on Economic, Social and Cultural Rights, 'Forced Evictions', General Comment 7, E/C.12/1997/4 (1997).
14 This is particularly evident in the case studies on India (Chapter 2) and the European Court of Human Rights (Chapter 12). As the Indian advocate Margaret Adenwala noted on forced eviction cases: 'The unfortunate thing is it's not only the builder's lobby that we're fighting; we're fighting the environmentalists too.'
15 This is also a task for jurists and scholars.
16 See Chapter 3.
17 See Chapter 10.
18 See Chapters 4, 7, 8, 11-13, 17, 18, and 20-22.

Since the current human rights framework places the responsibility largely upon states, few legal actions have been conducted directly against private actors themselves, usually under domestic legislation or common law. Chapter 22 shows how multinational companies can be directly sued in their home jurisdictions (or in the US) for actions taken in other countries, and Chapter 7 describes a series of cases against corporate landlords in Canada. Chris Jochnick, in the chapter on Ecuador, notes the need for more creative attention to the development of human rights and to legal frameworks and jurisprudence to hold multinationals to account.

Most of the cases have therefore been classified under a *duty to protect* that requires governments to prevent private actors (individuals, corporations, international organisations) from interfering with the enjoyment of a right.[19] In other words, the responsibility to guard against interferences with the right ultimately lies with the government. A mixture of negative and positive obligations, the duty to protect has also been widely incorporated within civil and political rights jurisprudence.[20]

One of the clearest examples is the case *International Commission of Jurists v Portugal*, brought under the *European Social Charter* (Chapter 16). Efforts undertaken by Portugal to prevent child labour were deemed insufficient by the European Committee on Social Rights. Legislative definitions were deficient; penalties were inadequate, and the number of labour inspections unsatisfactory. Similarly, the African Commission on Human and Peoples' Rights judged harshly the failure of Nigeria to prevent oil companies from polluting food and water supplies (Chapter 21), and the UN Committee against Torture called on Yugoslavia to investigate and prosecute town members who had destroyed the homes of Roma (Chapter 19). Remedies recommended have included the adequate prosecution of companies, the establishment of an appropriate regulatory framework and compensation.

Despite these and other precedents, the number of cases relating to the obligation to protect is not large. In particular, government duties in the context of privatisation to ensure access to and affordability of services have not received significant judicial attention. While employers, landlords and potential polluters are more likely to be regulated by legislation, other actors, such as private water and food vendors and other service providers, are not.

(c) The Duty to Fulfil

The *duty to fulfil* – or, more accurately, the obligation to take steps progressively to realise ESC rights within maximum available resources (see for example, article 2, *International Covenant on Economic, Social and Cultural Rights*) – is presumed to be the most difficult to litigate. It is thought that the various programmes and policies needed to ensure that everyone's economic and social rights are realised, to the maximum of available resources, require the balancing of too many variables. It is often argued that the myriad of policy choices and budgetary decisions involved in implementing social and economic rights are too complex for courts, and that courts cannot (or should not) access all the expertise necessary to make such decisions.

Nonetheless, the case studies indicate that courts have played a role in supervising these positive obligations, particularly when government action is woefully inadequate, when the state fails to implement existing programmes, or when legislation, policies and programmes discriminate on prohibited

19 See Committee on Economic, Social and Cultural Rights, 'The Right to Water', General Comment 15, E/C.12/1999/5, (2002).
20 See, particularly, the jurisprudence of the European Court of Human Rights, the Inter-American Court of Human Rights and the German Constitutional Court.

grounds. (See below.) Some cases also addressed other parts of the governments' duty to fulfil ESC rights, such as refraining from implementing harmful 'retrogressive measures' or ensuring that everyone immediately enjoys a minimum essential level or "core content" of each right.

Cases concerning the obligation to use maximum available resources are perhaps the rarest and most challenging. They include the attempt of the German Federal Constitutional Court in the *Numerus Clausus* cases (Chapter 14). In the US, advocacy groups have successfully challenged financing schemes for higher education by showing that they favoured wealthier districts.

(i) Challenging Inaction by Governments

Courts have been willing to intervene more forcefully to order governments to take action where government programmes are non-existent or patently flawed. The Constitutional Court of South Africa found that the housing rights plan was flawed because of its failure to address emergency relief (Chapter 10), while, in the TAC case, it faulted the failure of government authorities to develop plans for the distribution of medicines to prevent the mother-to-child transmission of HIV (Chapter 11). There are numerous cases in Latin America where courts, faced with government inaction in the supply of HIV/AIDS drugs, have made far-reaching orders with significant cost implications.[21]

However, in such cases, the gravity of the epidemic appears to have been a deciding factor in the judgments. Indeed, the decisions may be characterised as right-to-life cases. Furthermore, the failure of the government even to adopt a plan or strategy to address a glaring violation and initiate efforts to locate relevant resources allowed courts the latitude to intervene or, at least, to require the government to adopt or develop a strategy. Extending court action into other areas – for example, education or culture – may be more difficult.

(ii) The implementation and review of existing programmes

The implementation or review of existing legislation and policies is the area where the most significant litigation has occurred. Much of the jurisprudence in India has involved forcing governments to implement programmes already designed and funded. The Supreme Court, for example, recently ordered and supervised the implementation of a raft of programmes designed to prevent malnutrition and starvation (Chapter 2). In Argentina, the highest court ordered that a programme to produce a vaccine to which funds had been allocated be implemented more swiftly since a certain region of the country faced an epidemic (Chapter 6).

Courts are able to test whether a government endeavour matches the government's human rights commitments. Once the policy choices have been made and programs implemented, courts can review whether some people or groups have been improperly excluded, or whether the programs fail to provide what is necessary in a reasonable manner. But reviews of progress over time may be more difficult since these would require courts to take on an ongoing supervisory role in cases, a step that Indian courts have been willing to take (some cases have lasted 20 years), but which other courts have avoided. Victor Abramovich notes that one of the most significant lessons from positive obligations cases is that the courts need to develop new procedures and remedies (Chapter 6).

21 For example, for in Argentina, Chile, Venezuala, Colombia, Peru and Venezuela: see 'Putting Third First: Vaccines, Treatment and the Law', Proceedings of a Satellite of the XIV Aids Conference, 5 July 2002, Barcelona, 5 July 2002, *www.aidslaw.ca/barcelona2002/satellite_proceedings.pdf.*

(iii) Retrogressive measures

The proscription on retrogressive measures is, on its face, amenable to adjudication.[22] Governments should be required to justify why a particular programme benefiting vulnerable groups should be removed. This aspect has, admittedly, not been the subject of extensive litigation. For example, the Hungarian Constitutional Court struck down massive rollbacks in social security, maternal benefits and education subsidies, though the cuts had been strongly supported by international financial institutions. But this decision relied more upon the principle of legal certainty rather than on constitutional rights to minimum subsistence or fully fledged social and economic rights, thus leaving it open to attack.[23] In Canada, rollbacks to protections of the right to organise and bargain collectively were found to be unconstitutional because they denied vulnerable agricultural workers protection of the right to freedom of association enjoyed by other workers: *Dunmore v. Ontario* (Attorney General) 3 SCR 1016.

Victor Abramovich of the Centro de Estudios Legales y Sociales (Argentina) notes that the difficulty in challenging retrogressive measures lies in convincing a court that one particular programme should be favoured over other programmes, particularly socio-economic programmes, during periods of recession. This is the 'competing resources dilemma'. In seeking to protect the Garden Programme from being cut, the center, after considering domestic litigation, eventually petitioned the World Bank Inspection Panel (Chapter 21). The centre alleged that the World Bank had failed to monitor Argentina's commitment to maintain the programme in exchange for financial support from the World Bank. A review of the cases makes clear that further litigation will be needed to demonstrate the types of tests governments must meet before social programmes affecting social and economic rights can be removed.

(iv) Immediate entitlements

Finally, is there an immediate entitlement to a right that is not subject to progressive realisation over time? Many claimants are understandably interested in rising out of their current state of poverty rather than waiting for the promised progressive implementation of polices and programmes. There are a number of routes.

First, there is the obligation of all states immediately to provide the minimum essential level of food stuffs, water, shelter, health care and so on.[24] The South African Constitutional Court rejected such an approach on the basis that it was too difficult to identify exactly what the minimum was.[25] But interestingly, the Constitutional Court never asked the Government to provide its own definition of the minimum. Other courts have taken different approaches. The Federal Court of Switzerland has ruled that it will find a violation if the government fails to meet the minimum.[26] This is certainly a potential path for the future: placing the onus upon the government to define and to meet a minimum standard. Where courts feel unable to or reluctant to specify the precise nature of the measures required to be taken to meet the minimum requirements, governments could be required to provide a precise plan where the court has found that it has failed to meet minimum requirements.

22 See General Comment No. 3 of the UN Committee on Economic, Social and Cultural Rights: '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.'

23 See Andras Sajo, 'How the Rule of Law Killed Hungarian Welfare Reform', *East European Constitutional Review*, Winter, 1996, at pages 31-41.

24 The Committee on Economic, Social and Cultural Rights states, in General Comment No. 3, that 'the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.'

25 See Chapter 10.

26 *V v Einwohnergemeinde X und Regierungsrat des Kantons Bern* (BGE/ATF 121 I 367, Swiss Federal Court, of 27 October 1995).

The second route is to rely on the principle of non-discrimination and equality so that immediate entitlements are established as a society increases its capacity to provide everyone with access to the rights. (See below.)

A third approach is to address the issue of minimum requirements through remedies. Courts could order that governments supply a certain form of temporary relief, meeting immediate requirements, until further measures necessary to ensure access to the right in a sustainable manner can be implemented. For example, in Argentina, the Supreme Court found that the failure of the Government to prevent the pollution of a community's water supply violated the right to environmental health and ordered the Government to supply 100 litres of water per person per day until the local water supply had been decontaminated.[27]

(d) Non-Discrimination and Equality

The right to non-discrimination runs like a thread through the duties outlined above. Rights to non-discrimination and equality have been the basis for extensive litigation on ESC rights in relation to personal characteristics such as race, sex, age and marital status, but also, increasingly, accrued characteristics such as health status, poverty or the reliance on social security.

The advantage of using discrimination norms is that the party accused of discriminatory action must show that it would be too costly or unreasonable to refrain from the discriminatory act. The disadvantage is that it is often difficult to challenge the inadequacy of social rights unless courts take a substantive and not a formal view of equality. Not only does a formal approach ignore the difficulties that marginalised groups face (for example, if university places are simply allocated on the basis of merit, then minorities who cannot access primary and secondary education of a sufficient quality are less able and likely to access higher education), but it can lead to unintended consequences: In one case, litigation for equal heating subsidies for men and women led to the removal of the subsidy. This 'equalising down' may lead to formal equality, what the Supreme Court of Canada has termed "equality with a vengeance" but, with it, the loss of social rights.

The rights to non-discrimination and equality have played three important roles in ESC rights advocacy: (i) poverty is often a result of *direct* societal exclusion and marginalisation; (ii) poverty means that other, otherwise reasonable, measures fall the most heavily on vulnerable groups, resulting in indirect discrimination; and (iii) *positive measures* or affirmative action to assist vulnerable groups is necessary so as to remove discrimination in practice and ensure substantive equality.

Courts have frequently struck down *direct* discrimination in social legislation and policy. The most famous case in the socio-economic arena is *Brown v Board of Education*, in which the segregation of black and white school children and university students was ruled a contravention of the constitutional right to equal treatment before the law (Chapter 9). Lesser rights that accorded to indigenous natives title to land in Australia were found racially discriminatory (Chapter 5). Legislation denying unmarried women access to in vitro fertilisation treatment was ruled invalid (Chapter 5). Higher pensions for married men over married women was found by the Human Rights Committee to discrimi-

27 See *Defensoria de Menores Nro 3v. Poder Ejecutivo Municipal*, agreement 5, Superior Justice Court, Neuqen, (2 March 1999). See summary in COHRE, *50 Leading Cases on Economic, Social and Cultural Rights: Summaries*, 2003. Available at www.cohre.org/litigation.

nate on the basis of marital status and sex (Chapter 17). In all these cases, advocates were able to show that the distinctions among groups was unreasonable, and the governments shouldered significant resource burdens to rectify the discriminatory acts.

Indirect discrimination has frequently been litigated under legislation in countries such as Australia, Canada and the US. In the chapter on Canada, Bruce Porter recounts how various criteria used by landlords in allocating apartments (for example, rent was not to exceed 30% of income) were held unfairly to affect women, racial minorities and people on social security. And there was no evidence that rent in excess of 30% of income affected the ability to pay.

Courts have also been involved in affirmative action aimed at labour and social policies involving disadvantaged groups. In many cases, equality rights have been utilised to defend attacks on affirmative action schemes. The Supreme Court of the US has upheld, as a means to increase minority participation within universities, the preferential use of race as a factor in selection for admission.[28] Litigation requiring positive measures and programs to meet the needs of disadvantaged groups and to ensure substantive equality is less common, but the *Eldridge* case in Canada shows the potential.[29] The court ordered that the right to equality meant that deaf patients have a right to interpretive services in the provision of healthcare, and that governments must provide necessary funding for these services.

2 - EFFECTIVE IMPACT

It is commonly asked whether litigation accomplishes its ends. Was it effective? Did human rights beneficiaries gain from legal action? The interviews reveal that many of the judicial decisions had a direct or indirect beneficial impact in reducing poverty and social exclusion. But the results were not uniform, and most interviewees identified the implementation of court orders as the most necessary, but most difficult, task to ensure that litigation is effective.

However, there are three caveats. Some interviewees noted that the results of the measurement of effectiveness depended on the indicators used. While some cases were ambitious, few interviewees saw litigation as a panacea for redressing violations of ESC rights. In most cases, litigation formed part of a wider political strategy, or advocates noted that it should have done so. Indeed, one pattern among the cases indicates that creative test cases often produce well-known judgements, but are poorly implemented. Nonetheless, the effort and the judgment would commonly act as a catalyst for more nuanced cases that had greater support of communities and advocates. At the same time, unsuccessful cases have often likewise been used to great effect, 'the art of losing a case' according to Mark Heywood (Chapter 11).

28 See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
29 See Chapter 7.

Secondly, in many cases, a litigation strategy was the only strategy available, all other avenues having been exhausted. Every advocate interviewed in India commented that the court was the last bastion for the poor, the only official institution that would listen to them. Furthermore, courts are sometimes better placed to protect the rights of minorities than are the majorities who control governments.

Thirdly, other interviewees cautioned against considering litigation as purely instrumental. Bruce Porter (Chapter 7) notes that many claimants believe that the right to a hearing is as important as the remedy itself: 'When people see things and feel them and understand them as human rights issues, you claim them as rights.' He also says that litigation has been critical in demonstrating that ESC rights are legal rights and not just policy objectives. In other words, litigation should be seen as a long-term strategy to demonstrate the indivisibility of all human rights and thereby compel policy-makers to take ESC rights more seriously.

At the same time, all the interviewees point to the pitfalls represented by the failure to obtain a favourable decision and the failure to ensure implementation. For example, unhelpful legal precedents might be set; the broader social movement may be set back; opportunities for direct action may be forfeited, and communities may be given false hope. Careful case selection has therefore been identified as imperative.

(a) Direct Benefits

An increased observance of social and economic rights was evident in many case studies. Social programmes for food and nutrition have been reactivated in India and Argentina (Chapters 2 and 21). The implementation of medicine programmes has proceeded at a significantly more rapid pace (Chapters 6 and 11). Evictions have been prevented in the Dominican Republic and compensated in Serbia-Montenegro (Chapter 18). Indigenous livelihoods have been protected from forestry and mining in Finland (Chapter 17). Child labour laws have been amended in Portugal (Chapter 15). Compensation has been paid by multinational companies to workers with cancer (Chapter 22).

The most notable successes have been in the provision of medicines and related services, particularly HIV/AIDS drugs in South Africa and Latin American countries (See Chapters 11 and 6) . Geoff Budlender states: 'The *TAC* case has literally saved the lives of very many thousands of kids. That destroys the arguments of those who say these are just paper rights and have no value' (Chapter 10).

At the same time, an equal number of cases have made no direct impact. Evictions proceeded. Retrogressive measures were allowed. Social programmes were not progressively improved. The pollution of water sources continued. Compensation was not paid.[30]

In both the successful and the less successful cases, interviewees identified the importance of monitoring the court orders as the most critical task. Monitoring was almost always accompanied by a public or political campaign or the intense involvement of the affected communities. Others noted the importance of ensuring that remedial orders are appropriately framed. Declaratory, as opposed to supervisory, orders meant that it was difficult to return to court if the decision was not complied with.

30 See Chapters 2,3, 7, 8, 10, and 12 for example.

(b) Precedents

Many of the case studies were test cases that set groundbreaking legal precedents, but were poorly implemented. Yet, the decisions often acted as a catalyst for subsequent and more successful cases. For example, in Argentina, five years after the Viceconte case, a vaccine for haemorrhagic fever has not been produced despite close judicial supervision. Yet, the decision has spurred a series of successful cases for tuberculosis and HIV/AIDS cocktail medicines.[31]

(c) Increased Monitoring

Publicity surrounding judicial decisions has often stirred greater public and civil society scrutiny of ESC rights violations. The right to food case in India led to the creation of local and national campaigns to monitor the implementation of various food programmes (Chapter 2). Various legal actions concerning the contamination of water resources by oil companies in Ecuador facilitated the development of networks and became a rallying point and a focus for political action (Chapter 8). Multinational companies have amended their policies and practices to avoid the adverse publicity that comes with being sued (Chapter 22).

(d) Judicial Awareness

Many cases have led to more judicial awareness of ESC rights and international law. They have served as a valuable education technique that has subsequently affected other decisions where ESC rights are at stake. In South Africa and Argentina, ESC rights decisions have become stronger and more far-reaching because of the increased judicial awareness.

(e) Public Awareness

Advocates have often used litigation as a public education tool. HIV/AIDS litigation in South Africa has been utilised to educate the public about HIV/AIDS issues in light of the failure of authorities to adopt a proper education programme. Cases on water contamination have raised community awareness about water quality. Moreover, the training of the communities themselves to undertake the measurement of water samples means that the communities have become empowered with the tools to monitor oil company activity.

(f) Development Priorities

By identifying violations of ESC rights, advocates have been able to highlight shortcomings in development strategies and programmes. For example, forced eviction litigation in Bangladesh has led to comprehensive plans for resettlement that have been developed by communities, architects and international agencies. A complaint to the World Bank Inspection Panel demonstrated that international officials were not aware of how funds were being allocated for poverty programmes, despite the fact that proper allocation had been a condition of a structural adjustment loan agreement (Chapter 22).

(g) The Nature of Legal Proceedings

Litigation has served a useful function in subjecting government and corporate policies and practices to careful scrutiny. Defendants have been forced to try to justify, with evidence, actions and omissions which might otherwise be ignored. Bruce Porter notes (Chapter 7) how scrutiny of landlord policies by human rights tribunals and courts and a coroner's inquest into the death of a pregnant mother who had been cut off welfare and sentenced to house arrest for not reporting that she was going to school resulted in detailed public examination of corporate and government practices.

31 See Chapter 6, Argentina.

3 - OBSTACLES

Most of the advocates list a formidable array of obstacles. Sometimes, these have been insurmountable (political repression or the bribery of community leaders), but many could be overcome through resources, awareness of ESC rights, social mobilisation and so on. Rather than seeing obstacles as reasons for not claiming and enforcing ESC rights, advocates increasingly see obstacles to achieving effective remedies as being themselves violations of the rights. Access to effective legal remedies is part of ESC rights just as it is part of civil and political rights. The removal of these obstacles has become part of the process of claiming and enforcing and mobilising around ESC rights.

(a) Inadequate Law

ESC rights are fully justiciable in an increasing number of countries, but the number is not large. Reliance on civil and political rights has been frequent in western and common law countries, where courts are open to broad interpretations of the right to life and rights against torture or discrimination. An important component of promoting more expansive interpretations of these rights is to draw on the inter-dependence of all rights and to urge the judiciary to interpret constitutions and legislation so as to be consistent with international human rights law (Chapter 4). But there are clear limitations. In the US, some advocates believe there is no significant scope for further advances in the law, particularly in a country which has adamantly refused to recognise ESC rights in international law.

The incorporation of ESC rights within a domestic legal system is clearly an advantage, as the experiences in Latin America and South Africa demonstrate. However, such incorporation means that local remedies must be exhausted before international remedies can be sought. If the judiciary is conservative and slow to resolve issues domestically, this can mean long delays in achieving a successful decision at the international level.[32]

(b) Standing

Few advocates reported difficulties in being able to petition the courts *if* the right could be raised before the relevant body. In most cases, victims of violations could be identified, suggesting that the issue of standing may be less important for ESC rights than for the environmental movement. However, bringing urgent cases or matters involving large numbers of applicants is certainly facilitated by flexible standing rules. (For example, see Chapters 2 and 6.)

(c) Judicial Powers

In some jurisdictions, courts or international bodies clearly had limited powers. In France, legislation is judicially tested before it is enacted and cannot be challenged afterwards. In some countries, there is no full power of judicial review; courts are not empowered to strike down legislation, for example. At the international level, the relevant human rights bodies – such as regional courts, commissions and inter-

32 See comments of Martin Scheinin in Chapter 17.

national committees – have only limited powers of enforcement. Most are restricted to making recommendations and therefore rely on the moral authority of their status. (See, in particular, Chapter 20.)

(d) Conservative Judiciary

Interviewees reported that most judges were sceptical of ESC rights and had little awareness of international law. 'Getting the judges, even senior judges, to see there is no "in principle" difference between the various rights, I think, is the hardest part in the courts.'[33] Many interviewees noted the importance of judicial education, emphasising that it is best conducted by fellow judges. Irrespective of legal interpretation, many judges are hostile to the poor and to minorities. Even investigations by human rights commissions into issues of poverty and homelessness in Canada have been 'riddled with discriminatory stereotypes about people in welfare.'[34]

(d) Lack of Legal Resources

Both lawyers and advocates note the difficulty in accessing useful and appropriate legal resources on ESC rights. This applies particularly to those legal groups handling many cases or operating independently of academic institutions and the ESC rights movement. Full-text judgements from other countries or forums are often difficult to find. The use of comparative law is also a particular art: courts tend to be selective about the other jurisdictions from which they will draw guidance. For example, South African judges will look to Indian jurisprudence, but the Philippines judiciary prefers the Supreme Court of the US. Some interviewees noted that the legal profession itself can be an obstacle and that lawyers needed to be better trained in and sensitised to ESC rights so that they would make better use of this area of law and make more confident arguments.

(e) Lack of Financial Resources

Litigation invariably requires significant financial resources. The burden is more pronounced for cases that (i) are legally or factually ambitious, thereby requiring significant interdisciplinary sociological, health, economic and environmental evidence, (ii) involve large numbers of victims, or (iii) contain a strong opponent that uses delaying and procedural tactics. The cost of litigation can often be lessened through the active involvement of academic lawyers, international non-governmental organisations (NGOs) and union volunteers and community members, through the free donation of services by lawyers and experts, or through the contingent levying of legal fees. Attracting lawyers is sometimes difficult if the applicants are an unpopular minority. There is a clear need for increased funding for legal centres and NGOs so that they can conduct ESC rights litigation.

(f) The Power of Opposition

The ESC rights framework challenges the dominant discourses and practices around liberalisation, privatisation and diminished roles for governments. Attempts to increase government spending on social programmes are often not politically popular. In many cases, advocates have had to justify programmes as purely instrumental or economically justifiable rather than because they involve questions of dignity or rights.

The power of the opposing forces extends not only to governments and the private sector, but to citizens as well. The powerful middle class is not always sympathetic and is sometimes openly antagonistic towards the poor. Some environmental movements display this bias. Housing rights advocates in

33 Geoff Budlender, Chapter 10.
34 Bruce Porter, Chapter 7.

Argentina, India and Europe say that this animosity has provided governments with support in cases involving evictions.

Advocates have also sometimes faced harassment by governments or corporations. In Bangladesh, the police swamped the courts and lawyers' homes with slum dwellers. In cases against multinational companies, community leaders have been offered money to stop the litigation.

(g) Social Mobilisation

Social awareness and high-profile campaigns are often needed to sensitise the judiciary about ESC rights and to ensure the implementation of court decisions. But the ability to mobilise public opinion is very context-dependent; it is dependent on networks, organisations dedicated to particular issues, community leadership and public awareness, and the acceptance of ESC rights. Many of these factors are outside the control of legally oriented organisations. Ensuring that legal and non-legal strategies are complementary carries an additional resource burden. Furthermore, reaching the public often requires that issues be framed in a 'sensational' manner and with a 'public face'. Torture or extrajudicial killings are more likely to be covered by the media than is the closure of a school. This partly explains why many successful ESC rights cases concern a threat to life or some element of violence, for example, evictions.

(h) Remedies and Procedures

Not all courts surveyed are accustomed to making orders regarding ESC rights, particularly when this involves large numbers of applicants or the supervision of government compliance with the implementation of programmes. Furthermore, adjudication bodies are often overly deferential to governments and make only recommendations, although, in the case of international and regional human rights adjudication bodies, this is the sole remedial power available.

The reasons behind this are complex. On the one hand, this deference is sometimes related to concerns about the appropriateness of judicial intervention in policy-making or the capacity of courts to supervise orders. On the other hand, courts seem reluctant to issue orders that would be disobeyed by governments since the refusal of authorities to comply with the orders may diminish the authority of the court. ESC rights is a new and evolving area, and it is perhaps understandable that courts are cautious and are feeling there way to some extent. Advocates have emphasised that at the early stages of the development of domestic jurisprudence, it is important to take cases forward which will allow the courts, the legal profession and the public to become more comfortable with the idea of courts adjudicating and enforcing ESC rights.

4 - STRATEGIES

The preceding three sections indicate the significant challenges in successfully and effectively litigating ESC rights. While it is difficult to generalise about what makes a case successful since many local factors are involved, some basic themes emerge from the interviews.

(a) A Human Rights Approach

A number of interviewees noted that it was the adoption of a human rights approach,[35] as much as relying on human rights law, that made a difference in the litigation (see particularly Chapters 7, 4 and 9). By starting from human rights principles – for example, non-discrimination, participation, account-

ability and selecting cases based on actual violations of internationally recognised ESC rights – advocates were able to eventually access or develop the relevant law they required. For example, this explicit or implicit human rights approach led some advocates to discover that rights were already justiciable in their jurisdiction, to push for progressive interpretations of other human rights or legal standards, to campaign for new legislation, or to create "legal hearings" though other means, for example submitting evidence to a coronial inquiry or a regular review of a country´s human rights performance by a UN Committee. As Richard Meeran notes, a human rights approach even helped in the way evidence was presented: 'We didn't use a human rights legal argument . . . but, factually, we made a lot of the issue that they had utilised child labour on a wide scale. We emphasised the different treatment of UK and South African workers' (Chapter 20.)

(b) Case Selection

All interviewees emphasised the need for a long-term strategy in the selection of cases. As one interviewee noted, 'The whole strategy is to open the door gradually and then expand. If you aim for too much, you end up going backwards. You'll have five *Soobromoney's* [an early unsuccessful South African case], and that will be the end of economic and social rights. You'll have to wait a decade.'[36] Overambitious cases can result in negative judicial precedents, thereby frustrating more modest claims in the short term. At the same time, underambitious cases or avoiding arguments based on ESC rights because they may seem too radical to the courts can stultify the future development of the law.

Three categories of case selection tend to be successful. First is litigation that starts from claims resembling a defence of civil and political rights, for example, the contamination of water or forced evictions or discrimination. These actions tend to make the judiciary or the public more comfortable with ESC rights. Second are cases involving large, egregious violations or clear failures of governments to implement their own programmes. Third are modest claims that leave open the possibility for future development of jurisprudence. For example, Canadian advocates have worked hard over two decades to lay the foundations for broader interpretations of equality rights and the right to security of the person in future cases.

'Academic' cases that do not proceed from real violations or do not involve clearly defined victims are generally not favoured by the interviewees, since the jurisprudence may not reflect the real issues facing the poor.[37] At the same time, there seems to be scope for the establishment of mechanisms to allow for more general reviews of policy. In some cases, it is difficult to find the proper victim so as to bring forward a claim even though it may be clear that social and economic rights are being violated. In one case, an interviewee notes, the action taken to identify victims was 'frustrated' when other, non-legal remedies were discovered in the course of investigations, but the wider group of those affected by the harsh government welfare policy lacked the assistance to find these non-legal remedies. A system for challenging the policy on its face may have helped.

35 See Chris Jochnick and Paulina Garzon, *Rights-Based Approaches to Development: An Overview of the Field*, Care, Oxfam-America, Ford Foundation, October 2002. This and other relevant documents are available at the Resource Database on Rights-based Approaches to Development for Development Practitioners in Asia-Pacific *http://www.un.or.th/ohchr/database/database.asp.*

36 Geoff Budlender, Chapter 10.

37 One interviewee noted that some of the General Comments of the UN CESCR Committee on Economic, Social and Cultural Rights suffered from this problem. They sometimes ignored domestic experiences that identified other important aspects of ESC rights and obligations or fail to give domestic courts explicit directions on providing effective legal remedies.

(c) Jurisdiction and the Choice of Forum

The choice of forum or jurisdiction can sometimes be an important issue in ESC rights cases. For example, when bringing claims against multinationals, advocates were required to make careful choices over whether to sue in the country where the violations occurred or in the country where the company was registered or in the US under the Alien Torts Claim Act.

The desire to seek international remedies also means that the choices may be difficult. The international fora with better enforcement procedures (the European Court of Human Rights in particular and, to a lesser extent, the UN Human Rights Committee and the UN Committee against Torture) supervise human rights treaties that do not explicitly include ESC rights. Advocates must therefore rely on expansive interpretations of civil and political rights if they choose these fora.

Human rights commissions or tribunals may offer a more accessible and friendly environment for ESC rights claims than courts considering constitutional challenges. However, governments may have the power to over-rule the decisions of such tribunals or to change legislation in response to decisions against them.

(d) Legal Arguments

There is no uniformity in the opinions on the ideal type of legal argument. This varies according to the forum and the justiciability of ESC rights. Most interviewees rely upon international human rights treaties, and the General Comments and the concluding observations of the UN Committee on Economic, Social and Cultural Rights are used extensively and have been very important in some cases.[38] These documents add legitimacy to submissions that the rights are legal and justiciable. The concern was expressed, though, that some General Comments employ language unhelpful for judicial reasoning. Comparative jurisprudence has sometimes been successfully employed, for example in seminal Indian, South African and US jurisprudence.

An alternative strategy among some advocates is firstly to campaign for new legislation enshrining different ESC rights and then actively bring forward cases based on the legislation to ensure that the rights are realised in practice.[39]

It is evident from the interviews that a clear position on the role of the judiciary in adjudicating ESC rights is critical. The inherent conservatism of most courts means that urging them to take more progressive stances requires that one allay their fears about the maintenance of the separation of powers. They do not wish to be making policy; they want to be applying the law. For example, it helps to be able to point to other relevant jurisdictions and cases that demonstrate to the adjudicating body the limited nature of the intervention or that tend to accommodate concerns about the scope of the orders requested.

(e) The Involvement of Rights Claimants

Successful strategies tend to assign an important role to the claimants, to those people suffering because of ESC rights violations. This not only improves the evidentiary basis of the claim, but is also

38 For example, the *Grootboom* judgment quotes from General Comments No. 3 and 4 of the UN Committee on Economic, Social and Cultural Rights. See Chapter 10.
39 See Chapters 7 and 9.

crucial in the long-term empowerment of communities and in following up on orders. In Canada, the Charter Committee on Poverty Issues developed a model of accountable litigation, whereby low-income representatives are part of the project team for each case, advising and assisting in the development of the written argument. Often this meant ESC rights arguments were given greater prominence than lawyers might have been inclined to give them.[40] In India, one lawyer, after two decades of public interest litigation (where any citizen can petition the Supreme Court), now refuses to take a case unless a community is directly involved. In cases covering large and remote groups (for example, those suffering from a disease), public awareness campaigns and the development of localised leadership and initiatives are necessary.[41]

(f) Other Non-Litigation Strategies

Complementary non-litigation strategies, such as social mobilisation, awareness and media campaigns, and political lobbying, are frequently viewed as indispensable for successful litigation. Such strategies are important in sensitising the judiciary, showing them that ESC rights claimants have public support and that all avenues for remedying the violations have been exhausted. Mark Heywood credits the success of the *TAC* case to the ability of the claimants and their lawyers to win the argument before the public (Chapter 11). Furthermore and most critically, these strategies mean that pressure is placed on the opposing party – the government, corporations and so on – to comply with any decision of the adjudication body. The involvement of high-profile moral or technical 'voices', such as unions, religious institutions, or intellectuals, creates vast supportive networks and provides the litigation with added legitimacy.

However, high-profile campaigns are less helpful if the litigants have been victims of deeply held community prejudices.[42] The usually quiet nature of court proceedings allows such individuals to assert their rights and indecisive governments to defer to the courts to make unpopular decisions. It was apparent that advocates, communities and legal counsel frequently differ over the litigation strategies to be used in addressing particular ESC rights violations and clear procedures need to be developed for resolving any disagreements that might occur among those involved.

(g) Evidence

A number of the cases, particularly those involving positive obligations, have obliged advocates to rely on experts in a wide range of disciplines. This included sociology, economics, environment and health. Properly defined and measured statistics showing the effect of a policy, the lack of reasonable policy implementation or the damage to victims have sometimes been the deciding factor in a case. Evidence is compelling in health cases if advocates are able to show the efficacy of certain medicines, and, in environment cases, if they are able to show the existence of contamination. In the Canadian minimum income criteria cases, advocates were able to demonstrate that widely held prejudices and assumptions about poor people in the rental industry were flawed. In the Indian food rights cases, detailed evidence was given in relation to the food supplies and financial resources needed to reach the population at risk of malnutrition and starvation. However, while experts are useful, the courts must not be overburdened with incomprehensible statistics and advocates emphasised the need to be clear at the outset about what the evidence is meant to establish.

40 See Chapter 7.
41 See Chapters 6 and 11.
42 See Chapters 7, 15 and 18.

(h) Remedies

While courts appear willing to provide remedies that redress the violations of ESC rights, ensuring court supervision of court orders can be critical in guaranteeing their effectiveness. Decisions in environment cases in India and school segregation cases in the US have taken 20 years to implement and have required constant recourse to the courts in the follow-up phase. This may require the careful preparation of arguments and additional sensitisation of the judiciary in terms of comparable experiences.

Advocates stress that it is important to adopt a flexible approach to remedies, adapted to the issue and the context in which the case is brought forward. Sometimes a declaratory order is all that may be required, and it may be unwise to scare the court away from a finding of a violation by demanding large or complex damage awards or judicially imposed policy changes. Other times, it will be better to give the government the responsibility of designing the appropriate remedy and reporting back to the court after a period of time with its plan for compliance. In other cases, however, it will be important to ensure that victims are properly compensated for violations of the rights, and that very precise orders for governmental compliance are set out.

(h) Enforcement

A constant theme in the interviews is the need for a follow-up strategy so as to enforce a decision or capitalise on the gains made during the legal action. Some of the experts see follow-up as an acutely more difficult task than the litigation itself. Advocates therefore need to plan the follow-up from the beginning and be supported by sufficient resources for this role.

5 - RECOMMENDATIONS FOR IMPROVED ESC RIGHTS LITIGATION

It is clear from the survey of case studies that litigation not only plays a crucial role in the full realisation of ESC rights, but that litigation is intrinsic to these human rights. Litigation affirms the legal nature of these rights and provides, in practice, the right to an effective remedy as recognised in the *Universal Declaration of Human Rights* and in the jurisprudence of the Committee on Economic, Social and Cultural Rights. Indeed, Albie Sachs, Judge of the Constitutional Court of South Africa, believes that social and economic rights will be *the* 'jurisprudence' of the next century. But there are clear steps that need to be taken by all the actors involved.

States should take steps to:

1. Ensure that all international human rights treaties covering ESC rights achieve universal ratification.
2. Incorporate ESC rights in domestic law provisions in accordance with General Comment No. 9 of the UN Committee on Economic, Social and Cultural Rights. This General Comment states: 'In general, legally binding international human rights standards should operate directly and immediately with in the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals.'
3. Establish complaint mechanisms that allow complaints of violations of ESC rights by non-state actors (including international organisations, corporations and individuals) to be adjudicated and remedied.
4. Ensure the swift drafting and adoption of an optional protocol to the *International Covenant on Economic, Social and Cultural Rights* that would permit complaints of ESC rights violations to be made to the UN Committee on Economic, Social and Cultural Rights.
5. Establish more effective adjudication and enforcement provisions of ESC rights at both the regional

and international level which are at least as effective as enforcement provisions of trade and investment agreements and treaties and which ensure the primacy of human rights in the regulation of trade and investment.
6. Provide adequate legal aid and assistance to victims of ESC rights violations so that they are able to secure effective legal or judicial remedies.
7. Ensure that domestic human rights institutions have the responsibility and the authority to investigate violations of ESC rights, to take cases forward to appropriate courts or tribunals and to promote compliance with ESC rights, in accordance with General Comment No. 10.
8. Ensure that judicial decisions consistent with ESC rights are respected and implemented and develop mechanisms to ensure the effective oversight of the process.

Legal professionals, both national and international, and universities should:
9. Ensure that lawyers are trained in the adjudication of ESC rights as part of their initial and ongoing training.
10. Establish legal exchange programmes among countries so that lawyers can learn from those jurisdictions with greater experience in ESC rights litigation.
11. Ensure that legal resources on ESC rights are prepared and widely disseminated in the appropriate formats.
12. Facilitate judicial education on ESC rights, including training on bias and prejudice against the poor and on systemic barriers to access to justice for the poor .

The ESC rights movement should:
13. Increase lobbying efforts to ensure that ESC rights and international human rights treaties are incorporated in domestic law.
14. Launch targeted cases wherever possible to improve weak and undeveloped areas of ESC rights jurisprudence.
15. Facilitate closer cooperation among legal and non-legal NGOs and experts to ensure coordinated and effective ESC rights strategies.
16. Facilitate the greater involvement of the affected communities in litigation strategies.
17. Take an active role in educating lawyers and the judiciary about ESC rights and the needs of affected communities.
18. Develop legal and other resources so that ESC advocates and claimants can draw on developments in other countries and at international and regional bodies in ESC rights.
19. Ensure that significant ESC rights cases in different countries receive international attention and that countries are held accountable for any failure to provide effective legal remedies to ESC rights violations.
20. Develop joint strategies for holding non-state actors accountable to ESC rights, including taking legal action against trans-national corporations in their home country for violations of ESC rights in developing countries.
21. Demand institutions which are able to effectively adjudicate and enforce ESC rights at the international level (see further recommendation 5).

Donors should:
22. Include ESC rights litigation in their funding portfolios.
23. Help establish local, national and international funds for ESC rights legal assistance and test cases.

24. Ensure that funding is available for legal challenges to violations of ESC rights in all countries, including those perpetrated by affluent countries, both in their own territory and in other countries.
25. Ensure that funding is available for domestic ESC rights advocates and organizations to share their expertise with advocates, governments and the judiciaries of other countries.
26. Fund research, consultations and collaborative initiatives aimed at developing long term strategies for the creation of effective international institutions to adjudicate and enforce ESC rights at the international level (see further recommendation 5).

BOX 2 - AN ASSESSMENT OF THE STATE OF PLAY: PROFESSOR MATTHEW CRAVEN

How would you assess current state of ESC rights jurisprudence at the international and national level?
While it is still sparse to a degree, one suspects there is more to come. One probably should not expect any such jurisprudence to be too radical in the early stages whilst judges/ litigators are coming to terms with what are undoubtedly unfamiliar concepts. There will, as always, be a strong tendency to give considerable deference to governments in terms of their spending priorities, and I guess one should only expect that such deference will be eroded incrementally. On the positive side, there is clearly much more awareness these days of ESC rights and it will not always be easy for courts to resist the strength of those claims. I do worry, sometimes, however, that whilst the elaboration of categories of obligation may have served a useful purpose in breaking down the categorical distinctions between CP and ESC rights, it may occasionally backfire in the sense of not concentrating people's minds on the causes of poverty, malnutrition or homelessness

Lawyers have struggled to make justiciable the obligations to use maximum available resources and ensure a basic minimum? How do you think it could be done?
I am not sure there is a magic ingredient that we are waiting to find. At the outset, however, it needs to be made clear that nothing is innately non-justiciable - justiciability is not an idea that inherently attaches to certain issues and not others. it merely reflects a belief of a particular court/ tribunal that it does not possess the authority to make particular determinations. Broadly speaking there might be some use in employing the terminology used in case of discrimination - to speak about certain policies/ processes/ situations as being innately 'suspect' thus throwing the burden of proof on the government to justify them i.e. to explain why they are like they are. One of the most important tasks must be to 'denaturalise' poverty etc. - to make unstable the assumptions that go to make it seem a natural part of the environment and to trace the points of disempowerment. This would lead one to focus not merely upon present or future distributional activities – upon how to prioritise or direct the distribution of resources through society – but also upon the conditions, structures and processes that make poverty, homelessness or illiteracy possible.

See further: Matthew Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development* (New York: Oxford University Press, 1995).

Matthew Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights.' *Netherlands International Law Review* 40 (1993), p.367.

ASIA-PACIFIC

2 INDIA

THREE DECADES OF PUBLIC INTEREST LITIGATION

India has a lengthy history with the judicial enforcement of economic, social and cultural (ESC) rights. State repression between 1975 and 1979 prompted the development of what is called 'public interest litigation'. The Supreme Court accepted petitions from any individual in relation to a violation of constitutional rights, even if that person were not the victim. Justice Krishna Iyer stated in the *Fertiliser Corporation* case that rules of standing 'must be liberalised to meet the challenges of our times'.

BOX 1 - OLGA TELLIS V BOMBAY MUNICIPALITY CORPORATION[1]

Supreme Court of India
In 1981, the state of Maharashtra and the Bombay municipal council moved to evict all pavement and slum dwellers from Bombay city in accordance with an 1888 Act. The dwellers claimed such a step would violate the right to life, since a home in the city allowed them to attain a livelihood.

The court held that the constitutionally enshrined right to life (Article 21) encompassed means of livelihood. This was supported by constitutional directive principles concerning adequate means of livelihood and work. But the right to shelter for a livelihood could be denied, according to the judges, if there was a just and fair procedure undertaken according to law. The action must be reasonable, and the persons affected must be afforded an opportunity of being heard. This condition was held to be satisfied by the Supreme Court proceedings.

Orders
- The evictions were delayed by one month until after the monsoon season.
- There was no right to an alternative site.

However:
- sites should be provided to residents presented with census cards in 1976;
- slums in existence for 20 years or more were not to be removed unless land was required for public purposes, and, in that case, alternative sites must be provided, and
- high priority should be given to resettlement.

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

At the same time, the right to life and the right to non-discrimination were given a broad reading by the judiciary. Part III of the Constitution included directive principles covering social and economic rights. While they were expressly non-justiciable, they were used as interpretive aids in deriving socio-economic rights from the right to life. As a result, rights to work, health, shelter, education, water and food are regularly litigated. But the rights are rarely construed as fully fledged ESC rights. In most cases, courts intervened to protect interferences with rights or the implementation of the law.

In this chapter, Justice Krishna Iyer recounts the development of public interest litigation. The background and impact of the well-known *Olga Tellis* case on pavement dwellers is reviewed by Olga Tellis, and Colin Gonsalves discusses the recent high-profile right-to-food case that sought to address starvation deaths.

JUSTICE KRISHNA IYER - INTERVIEW

Krishna Iyer has been a Judge of the Supreme Court of India (1973 - 1980) and Kerala High Court (1968-1973) and Kerala Cabinet Minister. He has issued leading judgements in public interest litigation and continues to actively write and speak on human rights.

What are the origins of public interest litigation in India?

Public interest litigation is really a democratisation of the judicial office and judicial remedies. The traditional view, which we inherited from Britain, confines all litigation to private parties: if a person is beaten, he alone can go to the court; if a person's property is spoiled by pollution, she must complain. On the other hand, in a democracy, the injury of one person is common concern, and, very often, the victim may be too poor or illiterate to bring their grievance to court. If some organisation, oriented in public grievance, thinks of challenging on a victim's behalf, there is no reason for denying them this opportunity; so we begin with 'love thy neighbour' as applicable to jurisprudence.

What was the first public interest case you decided?

The first time it arose for me (the *Sunil Batra v Delhi Administration* case, 1978 SC 1675) was when a prisoner wrote a letter, saying to me, 'I believe my neighbour in the adjoining cell is being beaten; I hear cries, and will you do something about it?'. On the basis of that letter, I appointed counsel and directed them to visit the prison and make inquiries. I ordered the prison officials to make all materials available and ordered a report within one week. It was discovered that the warden was torturing the prisoners. The prisoner himself did not come to me, but his neighbour wrote a letter, what I call 'epistolary jurisprudence'.

What were the origins of the broad and socio-economic interpretation of the right to life?

One of my earlier cases, the *Ratlam Municipality* case, concerned a municipality that failed to construct drains; filth and dirt had accumulated, and people could not remain in the locality due to the noxious nuisance. A magistrate passed an order, saying, 'construct a drain', but the municipality responded, 'we have no money'. It was appealed to the Supreme Court.

We examined state legislation that obliges the municipal council to maintain sanitary conditions, and said that the lack of money or resources is no answer to this statute. When the statute casts a burden, it is the duty of the council to fulfil it. If they do not have resources, they must make a representation to the legislature and ask for them. We also made the state government a party and directed that they make sufficient resources available to the municipal corporation. So we held that the 'right to life' of the person is affected; environmental pollution affects your right to breathe fresh air. Sanitary conditions are essential for the proper enjoyment of this right.

As a coda to the story, two years later the minister in charge of the local administration informed me that the state legislature had passed a law and released enough resources for construction of the drains.

Since you left the Supreme Court, you have been critical of the feebleness of a number of their judgements? What is your view of the Olga Tellis case, for example?

The *Olga Tellis* case is a case where justice only seems to be done. Pavement dwellers were asked to quit the place where they were occupying public land, and, if they didn't, bulldozers would be brought to drive them out. The pavement dwellers have a right to shelter; the right to life means there is a right to shelter. This right to shelter, being a basic right, has to be the responsibility of the state. When people are on public land, they cannot be driven away without giving them an alternative place.

The court adopted rhetoric about the right to shelter, but when it came to the issue of alternate accommodation, the court said one-month notice only. That is where the contradiction arises. The court should have directed the Bombay municipal corporation not to move them until alternative help was provided. The state government is bound to account for the rehabilitation of people they evict, particularly people living on the pavements without other places to stay. It is recognition of their human rights.

Some argue that Indian courts interfere excessively in governmental policy-making and resource allocation? How do you respond to this?

I don't think the court interferes too much; in fact, I don't think they interfere enough. It is not a case of interfering in policy-making. That whole conception is mistaken. You have certain fundamental rights, human rights, basic rights: rights to association, to speech, to food, etc. When these rights are infringed, by action or inaction, the court must take action. But it only protects the fundamental rights. It may appear to be a policy decision, but the court is not taking one. The court is taking a decision to protect fundamental rights. Sometimes, there is a fear of excessive judicial activism. It is misplaced. Judges have a particular training, a certain discipline; they act on guidelines that come from their profession. As David Cardozo said, 'the judiciary is the least dangerous branch of government.'

Resources are obviously a problem for Third World countries. But, at the same time, there is so much public waste; more parsimony, economy, and conservation are required. Even with

those limited resources, we should see to it that everyone gets their basic needs; we are not asking for luxuries. All that the Constitution demands is provision for the basic rights.

Do you believe the court's decisions have made a substantive impact on people's lives?

It has a considerable impact. When the judiciary gives an order, it is a binding obligation to be carried out by the state. The state reacts; inevitably it has to. Take pollution, for example. In Kerala, the High Court ordered the cessation of sand mining since it would deprive people of drinking water. Naturally, legislation followed. Similarly with petroleum, legislation was passed after the Supreme Court's ruling that certain fuel was injurious to health.

... it was to shock the Government into doing something, to shock everyone into doing something ...

OLGA TELLIS - INTERVIEW

Olga Tellis is a Journalist, currently with the Asian Age.

Why did you take up the cause of pavement dwellers?

In the early 1980s, I started writing about slums and pavement dwellers, their lives, the way politicians manipulated and evicted them. I analysed the economics of their poverty. Most dwellers come from the interiors of Maharashtra and the very poor states of Orissa, Bihar, East Bengal, and Andhra Pradesh. The pavement dwellers are worse off than the slum-dwellers: poorly organised and without any government recognition. They take any kind of work. And many are brought to Bombay for construction work, but, after the job is completed, they are left to fend for themselves.

Why did you take legal action?

Our then - Chief Minister announced he was going to get rid of all the pavement dwellers, put them in a bus and send them back to where they belong. I was shocked. Many of the people are brought up on the pavements; they have no place to go. So we filed a public interest litigation case. It's not that I wanted them to live on the pavement – it's extremely degrading – but it was to shock the Government into doing something, to shock everyone into doing something.

The judge at that time only gave them a stay until the monsoon finished. But it was nothing

to do with the monsoon; they should not simply be thrown out. So I wrote a letter to the Supreme Court saying that these people are not in Bombay out of choice, that they are economic refugees, refugees from the rural areas; they come to the city looking for jobs, not housing.

The court recognised the pavement dwellers' right to housing, but did not make a binding order that alternative accommodation be provided. I was furious with the decision actually. In the press, I said, 'how dare you'; judges get land and housing free of cost; bureaucrats get very cheap housing, even rent out their servants quarters, while the servants live in slums.

DDA's demolition of leper huts illegal: SC

Express News Service

NEW DELHI, July 2.

The Supreme Court on Wednesday made it clear to the Delhi Development Authority that even if a person is in unauthorised possession of land or has built on it without authority, he cannot be evicted without authority of law.

"This is elementary," the Court stated in the order on a writ petition on behalf of the lepers of the Capital.

The DDA was unable to produce any order for the demolition of eight huts of lepers in the Jagjeevan leprosy ashram in Tilak Nagar here.

"Since DDA is unable to produce the order, we must take the tentative view that the action was not in accordance with law," Chief Justice P.N. Bhagwati, and Justice G.L. Oza stated. They asked the DDA to give the patients alternative accommodation adjacent to the ashram within two weeks.

The court also demanded the names of a few other states and union territories to appear on August 4 and explain what steps they were taking for the eradication of leprosy in their respective areas.

The governments which have been named in this are Bihar, Karnataka, Orissa, Tamil Nadu, Pondicherry, West Bengal, Andaman and Nicobar islands, and Lakshadweep. This list was taken from a report of the Health Ministry which identified the states from where lepers come to Delhi because of better facilities provided here.

The writ petition was filed by Gobind Ram, whose hut was demolished. His counsel, Mrs Kapila Hingorani, told the Court that the Delhi Administration was filing false affidavits in the case while promising new things to the lepers in front of the judges.

What was the impact of the case?

Ironically, it helped the propertied classes; lawyers often cite the case [to justify eviction of tenants and slumdwellers]. But it also helps the slumdwellers; the Government can't evict them summarily. The case also spawned a lot of interest in fighting for housing as a fundamental right; there are now many advocacy groups concerned with housing. This case generated a lot of overseas interest. There were some little achievements, but if you were a pavement dweller, it is just not enough. What we need is a comprehensive plan and not piecemeal policies.

One of the significant obstacles is the upper and middle class, whose sympathy is disappearing. They don't like informal settlements in their neighbourhood. They say it is unhygienic, complicates getting in and out of their property, and brings down the price of properties. But it is hypocritical. They used to live on this pavement before any housing came up; they built houses, and then they want to evict new pavement dwellers.

Plenty of food is available, but distribution of the same amongst the very poor and the destitute is scarce and non-existing leading to malnutrition, starvation and other related problems. . . [I]t is necessary to issue certain directions so that some temporary relief is available to those, who deserve it the most.
Supreme Court of India

BOX 2 - PEOPLE'S UNION FOR CIVIL LIBERTIES V UNION OF INDIA[2]

Supreme Court of India
Starvation deaths had occurred in Rajasthan despite excess grain being kept for official times of famine. Various schemes throughout India for food distribution were also not functioning. In 2001, the People's Union for Civil Liberties (PUCL) petitioned the court for enforcement of the schemes and the Famine Code, a code permitting the release of grain stocks in times of famine.

PUCL grounded their arguments on the right to food, deriving it from the right to life. The court agreed that it was a matter of the right to life: 'Would the very existence of life of those families which are below the poverty line not come under danger for want of appropriate schemes and implementation'.

Various interim orders by the court were made over two years, with meagre implementation by the national and state governments. In 2003, the court ordered that:

- the Famine Code be implemented for three months;

- grain allocation for the Food for Work Scheme be doubled (from five to ten million tonnes) and financial support for schemes be increased;

- ration shop licensees must stay open and provide the grain to families below the poverty line at the set price;

- the Government should publicise the rights of families below the poverty line to grain to ensure that all eligible families are covered;

- all individuals without means of support (older persons, widows, disabled adults) are to be granted an *Antyodaya Anna Yozana* ration card for free grain, and

- state governments should progressively implement the mid-day meal scheme in schools.

2 See www.righttofood.com

COLIN GONSALVES - INTERVIEW

Colin Gonsalves is a Senior Advocate of the Supreme Court of India and Director of the Indian Centre for Human Rights Law. He has litigated numerous public interest litigation cases.

What was the background to the right-to-food case? (See Box 2)

Starvation deaths have been a reality for a long time in India. The tragedy was brought before the Supreme Court as far back as 1988. But the court simply accepted the state of Orissa's promises that action would be taken. Another case in 1988 suffered the same fate, despite evidence of hundreds of deaths. My eyes were opened to it when I was taken by Jean Drèze to visit a village in Rajasthan.

The cruel irony is that we have surplus grain stock sitting in silos: a 60-million-tonne surplus. Yet, more than 53% of Indian children are undernourished. It is actually less costly to give the grain away than to store it. The issue gained nationwide media attention in 2001, but the state governments, the national Government and the Food Corporation of India all blamed each other.

The causes of the problem can be boiled down to political backsliding, apathy and ideology. The British had introduced a Famine Code, whereby everyone who turned up at a specified work site would receive a day's wage, half in grain. Those unable to work, received the dole. Data showed that malnutrition dropped dramatically. Today, we have less ambitious schemes, in disarray.

The Food for Work Scheme, if running in a region, only allows for 10 days of work a year. The ration card system for poor families has been subsumed by corruption and the exclusion of many families. The mid-day meal scheme for school children was only implemented in Tamil Nadu, one of India's states. A scheme allowing the poorest of the poor to purchase a kilogram of grain for 2 rupees was not implemented.

And behind the apathy and corruption is a free-market ideology that is hostile towards subsidies. Some recommend targeting the poorest, but that does not work. Many poor are excluded; there are incentives to cheat, and cutting off benefits after a certain period is nonsensical when incomes are falling. We need a system of universal provision.

What has been the impact of the right-to-food decision?

It is one of the most successful cases we have done; it has had a nationwide effect. After the judgment of the Supreme Court case, the right-to-food campaign has taken, with hundreds of groups joining the campaign. There has been some improvement with government programmes.

In fact, if we had not done the case, the entire programme would have closed down. The fact that we can hold the programmes to its present level and, in fact, actually improve on the present level is very significant. Take the mid-day meal scheme, for example, a scheme for children in schools. The programme had virtually closed down prior to the Supreme Court order. After the order, the mid-day meal has been restarted in six to eight states. And many states undertook to start the scheme in the next few months.

Are starvation deaths continuing?

Very many, unfortunately, more than when we started. We are asking the courts to summon the chief secretaries to the court and hold them personally responsible for the non-implementation of Supreme Court orders. That is the next step.

What are the principal difficulties in public interest litigation?

We are faced with so many cases that we just have to do it because there's nobody else doing it. So, you suffer in a sense because your understanding of some aspects of law is shallow; we need help. In many cases, your clients can't read English; so you don't get instructions.

What makes a successful public interest litigation case?

You need to take a genuine issue, and there are plenty. You need to do an enormous amount of research, although the law doesn't require you to do that. Judges will not be convinced otherwise. You need to push hard to get your case heard; simple cases in India can be delayed up to 10 years. And you need to be ready constantly to monitor compliance.

The right-to-food case was not simple. The International Monetary Fund and the World Bank basically say all subsidies are bad, so food subsidies are bad, and, if food subsidies are bad, you shouldn't get grain free. So, we had to overcome misperceptions. And we had to show that all the government schemes were phoney. It's hard to convince a judge these are not true schemes, but the judge respected us due to the volumes of material we gave him. He listened to their arguments, but agreed with us. And then, every month, we were back to court for the judge to make another order.

Would you have done anything differently?

I'd do exactly the same thing. We pushed everything to the maximum possible. I started 20 years ago when hope was beginning to fade, so I wasn't part of an earlier generation that worked when hope was on the rise. I was used to disillusionment from the beginning. Perhaps because I was never enamoured by public interest litigation, I was able to use it much better. I knew where the strengths and weaknesses were, and I was able to manoeuvre.

I've also tried to use the disproportionate status that society gives lawyers. I incite people to do things, go outside the law, to break the law when it's bad law, take to action and movement and so on.

With housing, I've learnt you must be there if the eviction takes place. You must document the burning of people's houses. You must do the case; you may win or lose. The danger as an NGO [non-governmental organisation] is that you start from fighting an eviction; then you go into monitoring an eviction and then move into policy work and so on. The latter can be important work, but it's a retreat from the struggle.

M. C. MEHTA - INTERVIEW

M. C. Mehta is a Senior Advocate of the Supreme Court of India and a leading environmental lawyer in India. He is winner of the Goldman Environmental Prize.

You've conducted over 40 public interest litigation cases around environmental and human rights issues.

India, with a population of one billion, is a big country with big problems in both the cities and the rural areas. We were faced with rising air and water pollution and the decline of the green cover. And the poor, the marginalised, have a right to breathe clean air and fresh water, clean water to drink. Seeing all this, I started taking cases. My first case was to protect the cultural heritage of this country, and I took the Taj Mahal as the symbol, one of the wonders of the world, which was being affected by air pollution from nearby industries. I started this case in 1984, and it continues today.

We have the Water Pollution Control Act 1974, the Air Pollution Act, the Environment Protection Act 1986, and so many other laws. But the authorities, the enforcement agencies, suffer from too much political interference, and they did not have much expertise and the resources to take action against the polluters or the people who were supporting the polluters. What is needed is the principle of accountability.

What was the result of the Taj Mahal case?

There have been many judgements and orders passed; the court is monitoring whether its instructions were carried out. But an area of 10,400 km2 was protected because of the court orders. This is a huge area, and it is full of cultural heritage, from a spiritual point of view, from an architectural point of view, and from an economic point of view. A refinery which was emitting 1,000 kilograms of sulphur dioxide per hour, has now reduced to 90% of the sulphur dioxide limit. This could have only happened because of the court intervention.

You have been credited with reducing air pollution in Delhi. What was the role of the court actions?

Three years back, this city was choking, and today it is not. I started this case in 1985, and directly it led to lead-free gasoline being introduced in India in 1985. From that time, the court has said that even cleaner technologies should be introduced, that cleaner fuels should be introduced, and now we are meeting the European standards. The Euro 2 standards have been complied with here. Because of this, cleaner fuels have been introduced in the whole country. Things have trickled down covering the whole country. The court has said that 12 other cities that are highly polluted, should introduce cleaner fuels. This is how the vehicle pollution case has helped not only 12 million people living in Delhi, but it has helped millions of people in the whole country. The right to housing means that a person who inhabited, who's staying in a city, should have a reasonable life, a reasonably good life to lead, and that reasonably good life to lead means that, without a clean environment, without a healthy environment, he cannot survive, he cannot live.

In another case in Delhi, at 16 places, sewer treatment plants have been set up because of another case. Seventy-five per cent of the untreated waste was going straight into the river. Because of the court orders, now, the situation has been reversed, and now at least 75% of the waste is treated and then discharged into the rivers.

Your cases have significantly impacted industries employing thousands of workers. How have you sought to protect their rights?

In Delhi, about 1,315 industries are closed, while 90,000 industries are being shifted – 90,000 not 90 – out of Delhi. There are difficult issues. I took these cases because the law was there, the whole planning process was there, and, according to the master plan of Delhi, you cannot set up such industries, hazardous or polluting industries in the city. The court passed orders to implement the law, but there were so many agitations. And here the question was environment versus development. If one industry is having ten workers, and, because of that industry, the health of a thousand people are affected, what is more important? So, we have to look into these aspects. We as a human species, we cannot live in isolation. So, it is not only that all rights are being infringed and violated; the rights of the other living beings are also being violated. So, we should not do anything that is harmful to the others also, nor to us. But the court only said move, not close down.

Take, for example, the Ganges, one of the holiest of the holy rivers in India. The people worship this river, but it actually caught fire over a half-kilometre stretch because of toxic effluent floating over it. So, I investigated the whole thing, brought a case before the Supreme Court, one of the largest legal cases in the world today. More than 125,000 industries are party, and more than 200 cities and towns are party to this case. The whole of the Ganga basin: it covers eight states in India. And here the court has passed orders from 1985, for example, ordering tanneries to stop discharging effluent.

What have been the crucial elements behind your success?

One thing is commitment to the cause, the hard work, and the dedication. A lawyer cannot succeed if he is fighting cases superficially for the client. In public litigation, you don't have a client, you have the interests of millions of people. So, here your approach is totally different. If a lawyer takes cases, then he should be very serious. I investigate every case on my own with the help of scientists, who give me an independent opinion. And then, after verification, after doing deep surveys and study, after one or two years in preparation, we commence. I don't go and jump immediately, because I know that, if I lose the case, the movement will suffer, the environmental movement will suffer, and many people will suffer in the process.

The Supreme Court has also said that the right to live in a clean environment is a part of the fundamental rights, that is, the right to life. The right to life is a constitutional right in the Indian Constitution, and has been expanded to include a reasonably good environment. So, this is how the court has taken the view of the environmental litigations in India. But this Constitution, which has stated the duties, it has cast the duties also upon private citizens, the duty of every citizen of India to protect the environment, rivers, lakes, and have compassion for animal life.

In one case, you secured innovative orders to prevent exploitative child labour. What has been the result of that case?[3]

This is not technically my case, but it is another landmark case in Indian history, whereby millions of children will be freed. So, the court has said that the children cannot work in the hazardous industries. So the case continues; the meetings are still going on. This case concerns a huge country, and implementation takes time.

There are so many orders. But millions of children will benefit. At the national level, a child fund is going to be created under the Supreme Court's orders, and this will allow for rehabilitation of the children. If a child is taken out of the industry, if he's not allowed to work in a hazardous or polluting industry or any establishment, then what he has he to do if he's poor? Then the solution is that he should be given education; he should be rehabilitated, and one person from his family should be given a job in that industry or somewhere else. So this is the solution given by the Supreme Court itself.

Your latest case to protect forest areas: will tribal people be evicted from those forest areas?

No. The court has passed orders that a rehabilitation plan has to be honoured. But the court has passed orders for a wildlife sanctuary: there should be no interference with the animal life, you know. I don't feel any conflict, you know, why? Because the reason is that, today, the situation has changed. The animal kingdom has also a right to live; we have taken their rights. We are killing them every day; the hundreds and hundreds of species are going extinct.

But one thing is, of course, the weakness on the part of the Government, weakness on the part of the enforcement agencies, who are not serious enough to execute the plans. But the court, of course, has looked into all these aspects, and the court has always tried to create a balance between the two, so that there's no harm to the environment and, at the same time, there's no harm to the livelihood of the people also; everything goes in a proper way.

The tribal people are usually the best protectors of the environment, of the forest wealth, of everything. They are not the source of conflict. The source of conflict is somewhere else. When you are setting up mega projects, environmental projects, and you are uprooting them from those forest areas or you are submerging the land, the forest, then there's the conflict.

3 *M C Mehta v State of Tamil Nadu*, AIR 1997 Supreme Court 699.

LESSONS LEARNED

- All ESC rights can be directly invoked to provide concrete remedies.
- The judiciary are sympathetic to well-researched and serious cases.
- Litigation can act as a catalyst for social mobilisation.
- Monitoring by affected communities of orders is critical.

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3 BANGLADESH

PREVENTING AND REMEDYING FORCED EVICTIONS

In 1999, the Supreme Court of Bangladesh made landmark orders recognising the right to protection from forced evictions. Since 1990, the Government has been conducting a campaign of sporadic squatter clearances: significant, since 40% per cent of the people in the capital, Dhaka, live in informal settlements. The court decision drew heavily on neighbouring Indian jurisprudence, but exhibits similar flaws (see Chapter 2) in relation to the coverage of certain settlements and the lack of a right to alternative accommodation.

The leading lawyer in the case, Kamal Hossain, notes that these orders have nevertheless been important in delaying evictions and mobilising support for the development of affordable and sustainable alternative rehabilitation sites. The World Bank and other development agencies have used the judgment to lobby the Government to halt evictions, which were jeopardising development projects. But implementation is still sporadic and has required intensive and ongoing monitoring: Five days after the 3 August 1999 orders, 14, 674 families (about 88, 044 individuals) were evicted.

DR. KAMAL HOSSAIN - INTERVIEW

Advocate, former Foreign Minister of Bangladesh and UN Special Rapporteur on Afghanistan.

What is the status of economic and social rights in Bangladesh?

Our economic and social rights were incorporated in the Constitution, but under the heading of principles of state policy. Therefore, you couldn't go to court and directly enforce your economic and social rights. If I was drafting the Constitution today, I would include them. But, having said that, some of these rights can be derived from an extended definition of the right to life. This started in India. During evictions of Bombay slumdwellers in the mid-'80s, the Supreme Court, in an innovative way, said

Thus, our country is pledge-bound, within its economic capacity and in an attempt for development, to make an effective provision for the right to life, livelihood.
Supreme Court of Bangladesh

the right to life includes the right to livelihood, and the right to livelihood also connotes the right to shelter: if you don't have shelter, you cannot obtain a livelihood. [See Chapter 2, *Olga Tellis* case.].

So, the Indian courts have said that even slumdwellers have a right to survive and work. Even if they're squatting on government land, you can't just bring a bulldozer and just throw them into the street. They have to have reasonable notice; they should have alternative rehabilitation suitable for their community.

What is the situation of slumdwellers in Dhaka?

Forty per cent in the capital, Dhaka, are slumdwellers. They come from the countryside, landless peasants. We have large rivers in our country which erode the land, so large chunks of cultivatable land are just washed away. The victims of this river erosion are left with no land - and suddenly find themselves destitute. So, what do they do with their families? They trickle into major cities and become labourers; women become domestic helpers and so on. That's why 40% percent of our population are slumdwellers. People come not by choice, but under compulsion. And why is it not the responsibility of the community to create viable housing schemes for them?

The Government says it needs to clear the slums to rid them of terrorists and criminals. But the people behind the evictions are property developers. The Government says to them, 'if you clear this slum, we can then do a multi-million project.' So, the developers bribe the police, who take bulldozers and try to evict people from a slum area. You also have slum fires, another technique they use. If you can't get them out legally, you discover there is a fire, and the whole slum is burned down.

Why do you think the court accepted your arguments in the forced eviction cases? (See Box 1)

A number of factors: one of them was the press. The newspapers carried very moving photographs of little children and women on the street with their houses being battered down by bulldozers. It makes very good reporting. These are people who are construction workers, women who work in houses or garment workshops, a very successful industry in Bangladesh. The informal economy would collapse without the slumdwellers contributing to it. The press explained why people came to the slums. The judiciary had therefore been sensitised and were more receptive.

And the NGOs went out and collected the facts. I could be very specific in court arguments. I was also able to say to the court: 'look, even in neighbouring India they use the right to life as a basis, as a plank, on which to give limited rights'. I said: 'we're not saying that you order the Government to give them houses. But you can protect them from inhumane treatment, this kind of forcible eviction, being thrown on the street.'

... Even if they're squatting on government land, you can't just bring a bulldozer and just throw them into the street ...

BOX 1 - ASK [AIN O SALISH KENDRA] V GOVERNMENT OF BANGLADESH (SUPREME COURT, 1999)

In Dhaka city, a large number of inhabitants of *bastis*, or (informal settlements,) were evicted without notice. Their homes were demolished with bulldozers. Two inhabitants and three NGOs lodged a complaint.

The Supreme Court recognised that such inhabitants are often the victims of misfortune and natural calamities, migrants who earlier fled from rural areas where profession, food or shelter were scarce. slumdwellers also contributed significantly to the national economy. The Court believed, however, that some dwellers became criminals.

Evictions had a severe impact on the right to livelihood. Noting *Olga Tellis v Bombay Municipality Corporation* (Supreme Court of India), the court found that the right to livelihood could be derived from constitutional fundamental rights. These included the right to life, respect for dignity and equal protection of the law.

The State must also direct its policy towards ensuring the provision of the basic necessities of life, including shelter [see Constitution, Article. 15]: 'Thus, our country is pledge-bound, within its economic capacity and in an attempt for development, to make an effective provision for the right to life, livelihood.' etc. 'While such State policies were not judicially enforceable (Article. 15 is only a directive principle), the right to life implied the right not to be deprived of a livelihood and shelter.

The Government effort to remove alleged 'criminals' through evictions meant that "innocent slumdwellers [had] become victims of repression/oppression not only by *mastans* and terrorists [sic], but sometimes through the government agencies."

The court ordered that:

- the Government should develop master guidelines, or pilot projects, for the resettlement of the slumdwellers;
- the plan should allow evictions to occur in phases and according to a person's ability to find alternative accommodation;
- reasonable time is to be given before the eviction, and
- for security reasons, slums along railway lines and road sides should be cleared, but inhabitants should be resettled elsewhere according to the guidelines.

All we have is a protection against some forcible evictions. But this temporary reprieve can be used to pursue other alternatives.

Kamal Hossain

Lastly, it was the monsoon season; it was pouring with rain; so, I said: 'look, this is so inhumane; why do they have to bring the bulldozers and put people out when it is pouring with rain?' And the judges agreed.

The atmosphere was right. It is really important to create this awareness, and that's why, I believe, those working in the housing rights area have certainly contributed to making people aware of who the people are who have to struggle for shelter.

What was the impact of the judgments?

Some communities continue to be evicted. Sometimes the leaders are bought off by property developers or they are persuaded or bullied into leaving. Or there are fires.

In terms of rehabilitation, the Government has occasionally made land temporarily available for evictees, for example, when it had an urgent need for squatters' land for a building site. But that's the extent to which we have been successful, only in getting temporary protection.

We don't have a right to shelter. All we have is a protection against some forcible evictions. But this temporary reprieve can be used to pursue other alternatives. Sometimes the developer is prevented from getting his targeted land; he may lose interest or, during the delay, find another site. But the new Government started evictions again, and we had to take the issue up with them.

But we're at the threshold of being able to do organised rehabilitation, if our first attempt succeeds. After getting the first judgment, whereby the court recommended that rehabilitation programmes should be made available, the judges suggested that we pursue the executive branch of the Government: 'they're the ones that will give you land'.

I am ten 10 years old. . . Everybody was shouting that the police had come to destroy our houses. . . The police started beating me, and I fell. My first thought was to protect my little sister. . . Then I saw a shell hit our building, and it caught on fire. I ran with my sisters and thought the police were bombing us. And then, as I reached the edge of the settlement, I fell again, and there was a sharp pain in my leg. A pellet had hit me. An older person saw me fall and helped me up; he took my youngest sister in his arms, and I hobbled after him. . . I still think about the day police came and evicted us and destroyed our house. . .

Abdul

So, we got together a group of architects, town planners, international aid agencies and so on together. They developed a scheme so that the Government made some land available, the building of low-cost housing could be financed. And the slumdwellers would only need to spend $50 dollars a month or something. Something they are quite willing to pay in

instalments, considering they will acquire ownership of these apartments in five to ten years. We also looked at the scheme they had run in Bombay.

We said to the Government: 'you have had a housing policy on paper for 10 ten years that says that slumdwellers shouldn't be evicted and they should obtain housing. It could earn you a lot of credit if you actually started doing something'. In our pilot case, we've got some land, and we're now asking building companies to come and bid for the contract. But we hope it is a precedent, something that is part of a programme, so that all of the slumdwellers can ultimately be accommodated in appropriate areas. It may be low land in the outskirts, but it will be part of the development scheme that will fill up the land and facilitate this kind of low-cost housing.

How far do you think the litigation of economic and social rights could go in a country like Bangladesh?

It is getting better, and we now have legislation for a human rights commission. You can go to them, and, hopefully, they will then put pressure on the Government to work on the decisions and so on.

The courts vary. Some judges have been good; some judges have become softer. By and large, I think that, in this area, especially when the rehabilitation programme starts taking place, you can show to the court that the order was beneficial, and say: 'Why don't you keep it up?' Judges, if they feel that their orders can be complied with, will keep making them. They don't like making orders that they know will be disregarded.

BOX 2 - OTHER BANDGLADESH CASES-FOOD SAFETY AND RIGHT TO LIFE

A consignment of powdered milk imported by a company exhibited an unacceptable radiation level in some (but not all) of the examinations. The Bangladesh Environmental Lawyers Association (BELA) argued that the failure of the relevant government officers to take action, namely compelling the importer to send the consignment back to the exporter, violated the constitutional right to life of the people of the country, including himself, who were potential consumers of such goods. He sought an order directing that measures be taken to send the consignment back. Concurrently, the exporter initiated a civil suit against the Government contesting orders that sending it back was illegal.

The Supreme Court of Bangladesh considered Indian Supreme Court decisions and held that the right to life is not limited to the protection of life and limb but also includes, amongst other things, the protection of the health and normal longevity of an ordinary human being.[1] Even though the directive princple (Art 18 of the Constitution) of raising the level of nutrition and improving public health cannot be enforced, the State can be compelled by the courts to remove *any* threat to public health unless such a threat is justified by law. The Court made specific directions for the better implementation of radiation standards and ordered the Government to properly contest the suit field by the exporter challenging the return of the consignment so that the matter can be properly adjudicated.

1 *Dr Mohiuddin Farooque v Bangladesh & Ors (No 1)*, 48 DLR (1996) (HCD) 438; (1996) 2 CHRLD 107.

LESSONS LEARNED

- Foreign jurisprudence can be used to advance local law.
- Media and photography are highly effective in sensitising the public and the judiciary to human rights violations.
- There are serious difficulties in implementing orders when the government has a strong economic interest.
- Court orders halting government action, even temporarily, may allow development of alternative solutions.

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FURTHER READING

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4 THE PHILIPPINES

CONFRONTING THE PRIVATISATION OF ESSENTIAL SERVICES

Courts in the Philippines have had a mixed and ambivalent history with socio-economic rights[1]. [See Box 2.] In the well-known *Oposa Forestry* case,[2] the Supreme Court affirmed the right of present and future generations to healthy ecology, but, in another case, they confined the mandate of the Commission on Human Rights to civil and political rights.[3] As in India and Bangladesh, economic and social rights are constitutionally enshrined in the Philippines as directive principles but have been more conservatively interpreted.

In this chapter, Cookie Diokno outlines various cases brought by the Free Legal Assistance Group to confront the privatisation of essential services, such as electricity and water. The Free Legal Assistance Group was successful in invalidating legislation deregulating the oil industry in the *Tatad* case, although the legislation was later amended to ensure consistency with constitutional provisions. While the cases have not specifically relied upon human rights norms, they are illuminating because they embody a human rights approach, seeking to use constitutional and other legal provisions to protect basic rights of the poor.

COOKIE DIOKNO - INTERVIEW

Cookie Diokno is Secretary General of the Free Legal Assistance Group (FLAG).

What were the origins of the oil deregulation case?

What we did there was extremely technical. It wasn't what I would strictly call a human-rights-based case. A couple of members of the Philippines Congress who had opposed the deregulation law approached us after it had been passed. We were all concerned that energy would become unaffordable. The congressmen wanted to bring legal action on these issues, and we were willing to try it.

We went into the anti-monopoly provisions of the Constitution and challenged the deregulation of the oil industry. Our basic argument was that the deregulation law would allow three oil companies to collude and keep prices high. The old law required that companies seek permission from the government regulator before increasing prices. And the court agreed with us. [See Box 1.]

1 See Raul C. Pangalangan, 'Economic and Social Human Rights: Breach and Compliance in International Law', (1999), P*hilippine Peace and Human Rights Review.*
2 *Minors Oposa vs. Secretary of the Department of Environment and Natural Resources,* (DENR) 33 I. L. M. (1994) 173.
3 *Brigido Simon v Commission on Human Rights*, G. R. No. 100150, 5 January 5, 1994.

BOX 1 - TATAD V SECRETARY OF THE DEPARTMENT OF ENERGY[4]

Supreme Court of the Philippines (pages 37-38)

In recent memory there is no law enacted by the legislature afflicted with so much constitutional deformities as R. A. No. 8180. Yet, R. A. No. 8180 deals with oil, a commodity whose supply and price affect the ebb and flow of the lifeblood of the nation. Its shortage of supply or a slight, upward spiral in its price shakes our economic foundation. Studies show that the areas most impacted by the movement of oil are food manufacture, land transport, trade, electricity and water. At a time when our economy is in a dangerous downspin, the perpetuation of R. A. No. 8180 threatens to multiply the number of our people with bent backs and begging bowls. R. A. No. 8180 with its anti-competition provisions cannot be allowed by this Court ...

The Court, however, takes note of the plea of Petron, Shell and Caltex to lift our restraining order to enable them to adjust upward the price of petroleum and petroleum products in view of the plummeting value of the peso. Their plea, however, will now have to be addressed to the Energy Regulatory Board ...

With this Decision, some circles will chide the Court for interfering with an economic decision of Congress. [But the] right call ... should be for Congress to write a new oil deregulation law that conforms with the Constitution and not for this Court to shirk its duty of striking down a law that offends the Constitution.

Striking down R. A. No. 8180 may cost losses in quantifiable terms to the oil oligopolists. But the loss in tolerating the tampering of our Constitution is not quantifiable in pesos and centavos. More worthy of protection than the supra-normal profits of private corporations is the sanctity of the fundamental principles of the Constitution... The Constitution mandates this Court to be the guardian not only of the people's political rights but their economic rights as well. The protection of the economic rights of the poor and the powerless is of greater importance to them for they are concerned more with the esoterics of living and less with the esoterics of liberty. . . .

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

What was the impact of the case?

The media then asked, 'what happens now?' We said, 'it's very simple. We go back to the way it was, which means that every time the companies want a higher oil price, they have to go through hearings, public hearings, and the regulatory board decides.'

But it was not a fantastic decision, because the Supreme Court told Congress how to amend the law. So, Congress just enacted a new law with all the necessary corrections. As a result, prices have continually increased. And, yet, if you read the decision, it's beautiful, for it talks about oil being the lifeblood of the economy and how it is a strategic industry, etc.

We now have a situation where, each time a company raises its prices, the others follow. They respond to our allegation by saying, 'what proof do you have that it is because they are working as a cartel?' That's what we don't currently have: the evidence that they're working as a cartel.

The Supreme Court has a mixed view on ESC rights. Why is this?

The court has had a couple of catastrophes. The judges had a number of seminars trying to understand ESC rights, but then they have a recent decision stating that the *International Covenant on Civil and Political Rights* was only at draft stage, ten years after it entered into force![5] plus, a series of rulings stating that municipal law or domestic law is of greater importance than international law, or that, where there's a conflict between domestic and international law, domestic law will prevail[6]. Therefore, whenever we cite these covenants, the court will just ignore the arguments or make a ridiculous statement that it's just a draft.

In relation to economic and social rights, this court agreed with us when we questioned the oil deregulation. Likewise, in the *Manila Prince Hotel*, the court protected the cultural rights of Filipinos,[7] and in *Oposa* protected environmental rights. Mining companies also challenged the Indigenous People's Rights Act in the Supreme Court.[8] This was handled by the Legal Rights and Natural Resources Centre, and our chairman was involved in that case. This was a very strange decision, since the court couldn't get a majority either way, and the law remained constitutional.

[Other positive Supreme Court decisions have included rulings that the State has the duty to regulate and exercise authority over foreign investments,[9] that the right to freely choose the field of study prevents the arbitrary expulsion of students by universities[10] and that a law requiring doctors to prescribe cheaper generic drugs is supported by the State duty to protect and promote the right to health.[11] – Ed.]

But it has depended on the issue. They were very bad in the Simon case in terms of what is the mandate of the Commission on Human Rights; they specifically said ESC rights aren't real rights.[12] Honestly, when it comes to human

5 *People v. Leo Echegaray*, G. R. No. 117472, *Resolution on Motion for Reconsideration* (7 February 7, 1997). In its decision, the Supreme Court, referring to the *International Covenant on Civil and Political Rights* and its Optional Protocol, said: '...the Philippines cannot be deemed irrevocably bound by said covenant and protocol considering that these agreements have reached only the Committee level'. (page. 19).
6 See, for example, *Kuroda v. Jalandoni,* 83 Phil 171 (L-2662, 26 March 1949), *Philip Morris v. Court of Appeals*, G. R. No. 91332 (16 July 1992); see also Salonga and Yap, *Public International Law*, pages 10-14.
7 *Manila Prince Hotel v Government Service Insurance System*, G. R. No. 122156 (3 February, 1997).
8 *Sagani Cruz v Secretary of Environment and Natural Resources*, G. R. No. 135385 (6 December, 2000).
9 *Board of Investments v Garcia*, 191 SCRA 288.
10 *Guzman v National University*, G. R. No. L-68288 (11 July, 1986).
11 *Del Rosario v Bangzon*, 180 SCRA 521 (1989).
12 *Brigido Simon v Commission on Human Rights*, G. R. No. 100150, 5 January 1994.

rights, we have a big problem. Human rights are always related with civil and political rights in the Philippines. This is the martial law legacy. Also, human rights are associated with the left, communist, terrorists (now) and criminals. Whereas, towards the end of the martial law period, human rights advocates were heroes, and everyone was so proud to call themselves human rights people, now no one does, because if you do, you're pro-communist, pro-terrorist and pro-criminal.

You have a history of working closely with activists. When do you resort to legal action over direct action?

It depends on the group affected and the issues and whether you want an immediate solution. For example, energy companies wanted to charge an automatic currency adjustment rate for our electricity bill. I used to pay less than 1,000 a month, but, after the currency adjustment, I was paying close to 2,500: more than double. People were really angry. The opposition, the NGOs, all the political parties and, more importantly, the person on the street started protesting. So, the President ordered it suspended. So, that worked better. I believe a case was later filed to challenge it, but the Supreme Court decided on the case years after the President suspended the increases.

. . . if the issue will touch the life of an ordinary person, the chances are that direct political action is much more effective. But if the issue is one that will only touch a sector of society . . . your best bet will still be to go to court.

BOX 2 - MANILA PRINCE HOTEL CASE

The Supreme Court of the Philippines

And when our Constitution declares that right exists in certain specified legal circumstances an action may be maintained to enforce such right not withstanding the absence of any legislation on the subject; consequently, if there is no statute especially enacted to enforce such constitutional right, such right enforces itself by its own inherent potency and puissance, and from which all legislations must take their bearings. Where is a right there is a remedy. *Ubi jus ibi remedium.*

Justice Bellosillo

On 15 November 2002 and later, on Motion for Reconsideration on 9 April 2003, the Supreme Court expressly recognised 'the right of our people to electricity and to be reasonably charged for their consumption'. The court referred to the 'right to electricity' as an 'economic right to a basic necessity of life'. The court ruled on the issue whether public interest should prevail over private profits. The court expressly stated: 'When private property is used for public purposes and is affected with public interest, it ceases to be *juris privati* only and becomes subject to regulation. The regulation is to promote the common good.'[13]

What other cases have you been investigating?

I have been doing budget analysis based on a human rights framework for some time. I'd been reviewing the budget since 1999, when we were paying 20% of our budget on debt servicing. The 2002 budget allocated 23% for servicing government loans. Automatically, 23% goes into interest payment. Our vice president, Teofisto T. Guingona, questioned the automatic debt appropriations law before the Supreme Court, but he lost.[14]

So, they were asking us what to do. I haven't figured it out. Using it as a rights violation case? You're automatically depriving 23% of the budget for education or 23% for health, but we're looking for a legal anchor, a human rights anchor. And, yet, I keep saying, we have an obligation to use our resources to the maximum. Yet, why are we automatically paying 23%? We're not even giving the Congress, nor the people, the right to review the budget or say anything about it because, by law, again a Marcos decree, we are obliged automatically to pay this as a condition of all the government's loans. And a lot of those debts went to building a film centre where so many people died, or hotels, or beautification projects so that Imelda Marcos could contain all the urban poor in a shantytown.

We have also been looking at suing the water companies. The price of water has almost tripled since privatisation. The water company, with French partners, decided to increase again in 2001 the price of water. Now, we opposed the increase and asked for a public hearing. So, what did they do? The arbiter under the franchise agreement, someone from the Australian Chamber of Commerce, gave them something like an 18% increase. But the regulatory office said 'no': they were only entitled to 4%. But then some other official within the water regulatory office gave them a 32% increase.

We had been approached by an NGO closely monitoring the water prices to bring a case. But we were distracted from filing a petition because the regulators were fired! The regulators then came to us and said, 'can you help us?'. But I think what we should question is the whole concept of privatisation, which might work for certain industries, communications, for example, but, when it comes to vital social services like power or water, even health, the whole issue of privatisation can be very dangerous, especially in a country like ours.

13 The Court ordered the electric company to refund to all its customers the excess amounts it had collected from them since February 1994. *Republic of the Philippines, represented by Energy Regulatory Board v. Manila Electric Company*, G. R. No. 141369, (15 November 2002); *Resolution on Motion for Reconsideration*, (9 April 2003).

14 *Teofisto T. Guingona, Jr. and Aquilino Q. Pimentel, Jr. versus Hon. Guillermo Carague, in his capacity as Secretary, Budget and Management, Hon. Rizalina S. Cajucom in her capacity as National Treasurer and Commission on Audit*, G.R. No. 94571, (22 April 1991); petition questioning constitutionality of automatic appropriation for debt service dismissed.

BOX 3 - WHAT HAVE BEEN THE LESSONS LEARNED?

It makes a big difference if you're dealing with a community rather than if you're dealing with an NGO. If you're dealing with a community, where their life is at stake, you expect a lot of cooperation, all the information you ask for. Secondly, you can't work alone in ESC rights. You need a group of technical consultants, and you need them in various fields. You need economists; you need accountants, and you need business people for various issues. For example, when we were working on water, the water company fooled us in terms of their computations of discount rates for loan repayments. The company cited the figure of 18%, but some of our experts were able to compute the actual discount rate and told us that the discount rate should have been 5%. But it makes litigation more expensive compared to a common criminal case or a civil suit.

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FURTHER READING

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Human Rights Network on the Web (The Philippines): *www.hrnow.org*

5 AUSTRALIA

USING ANTI-DISCRIMINATION LAWS AND TREATIES

In the *Mabo* decision, the Australian High Court famously used international law to condemn centuries' old discrimination in land law against indigenous people. Although international treaties are not directly applicable in Australia, they were used in the *Mabo* case progressively to develop the common law. [See Box 1.]

The absence of a constitutional mandate for economic and social rights has meant advocates have thus relied on a mélange of legal sources, from discrimination and sectoral laws to international treaties. In this chapter, Linda Hancock recounts the legal action brought by the Women's Electoral Lobby to protect the rights of non-married women to access in vitro fertilisation treatment (IVF).

LINDA HANCOCK - INTERVIEW

Linda Hancock is Associate Professor of Deakin University and member of the Victorian Section of the Women's Electoral Lobby.

What was the origin of the IVF case?

The IVF case in the High Court of Australia in April 2001 arose out of the decision of Justice Sundberg of the Federal Court of Australia regarding an inconsistency between Victorian (state) and Commonwealth law. The background to this is that Dr Mc Bain, a medical practitioner in the state of Victoria, had sought, and obtained in the Federal Court, a declaration that s8 of the Infertility Treatment Act 1995 (in the state of Victoria) was invalid, because it was inconsistent with Commonwealth law. In the Australian federal law system, Commonwealth law prevails where there is an inconsistency between state and Commonwealth law. Section 8 of the Victorian Infertility Treatment Act had precluded in vitro fertilisation treatment to be provided to Dr Mc Bain's patient, Lisa Meldrum, on the basis that she was single. According to J Sundberg, this was in breach of s 22 of Commonwealth Sex Discrimination Act 1984 (the SDA).

Section 22 of the SDA provides:
(1) It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person's sex, marital status, pregnancy or potential pregnancy:
(a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person'.

BOX 1 - THE DOMESTIC APPLICATION OF INTERNATIONAL HUMAN RIGHTS NORMS

Michael Kirby, High Court of Australia

. . . [t]he culture of resistance, or indifference, to international law is changing. If one asks for the vision of the legal order in the twenty-first century, an aspect of great relevance is the growing rapprochement which can be detected between international and domestic law. This is happening as a natural and inevitable result of the increasing influence of international law upon the municipal legal system, including the influence of the international law of human rights.

In *Mabo v State of Queensland* [No 2], as a step in his reasoning towards the conclusion that the 'native title' to land of Australia's indigenous peoples had survived the acquisition of sovereignty over the continent by the British Crown and its settlement by the European colonists, Justice Brennan said of the influence of international human rights law:

"Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and indiscriminatory document of that kind can no longer be accepted. The expectations of the international community accord in this respect with the contemporary values of the Australian people. The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights* brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional land".

. . . An expression of the new approach was given in February 1988 in Bangalore, India in the so-called *Bangalore Principles* . . .if an issue of uncertainty arises (as by a *lacuna* in the common law, obscurity in its meaning or ambiguity in a relevant statute), a judge may seek guidance in the general principles of international law, as accepted by the community of nations; and . . . .

. . . There is one further development which should be mentioned. It represents a further step in the logic of the *Bangalore Principles* and one to which I have recently given expression. It involves the adoption of an "interpretative principle" for the construction of constitutional texts, so that the text is construed, as far as possible, to resolve any ambiguities that may exist, in favour of a construction which upholds universal human rights in preference to one which does not.

Reprinted with kind permission of Justice Michael Kirby[1]

1 Text taken from *The Road From Bangalore*, speech given by Justice Michael Kirby on 26 December 1998. Full speech available from Law & Justice Foundation of New South Wales, *www.lawfoundation.net.au/resources/kirby/papers.*

Lisa Meldrum, the woman at the centre of the Federal Court case, was a fantastic advocate for this case. She is incredibly sincere in what she wants. She had a partner at one stage, but then came to a time in her life, with economic security and a supportive family, when she wanted to nurture and bring up a child. In our society, self determination over reproduction is a right available to any woman, irrespective of marital status or other factors like the views of different groups regarding who qualifies to be a parent. Lisa had been told she was essentially infertile, so she pursued having IVF treatment to become pregnant. Her Doctor, Dr. McBain had then sought clarification of his legal position, as he did not know whether he could legally treat her under state legislation. So that's what the [Sundberg] judgment clarified.

Why did WEL intervene?

Central to this case was the principle, enshrined in the SDA, of the right to receive services irrespective of marital status. As feminist advocates, we are committed to this principle, which was enshirined about 20 years ago. To us, it was not relevant that the service in question was IVF, although this did give the case a high media profile. We went into this case because the Australian Catholic Bishop's Conference and the Australian Episcopal Conference of the Roman Catholic Church (who were appointed as amici curiae in the Federal Court), brough an action within the jurisdiction of the High Court under s75(v) of the constitution, to appeal the Sundberg decision. In the intervening period between the direction to proceed and the sub-

BOX 2 - FERTILISATION TREATMENT FOR UNMARRIED WOMEN, MCBAIN V VICTORIA

Federal Court of Australia

. . . the Victorian [Infertility Treatment] Act provides that to be eligible to undergo infertility treatment a woman must either be married and living with her husband on a genuine domestic basis or be living with a man in a de facto relationship. Section 22 of the Commonwealth Act [Sex Discrimination Act] makes it unlawful for a person to refuse to provide services to another person on the ground of the other person's marital status.

Dr McBain wishes to provide infertility treatment to Ms Meldrum, who is a single woman not living in a de facto relationship. Dr McBain has asked the Court to declare that the requirements of the Victorian Act are inconsistent with those of the Commonwealth Act. . . and the Court declares that, by force of the Constitution, the State Act is invalid. . . . This means that women are not required to be married or in a de facto relationship in order to be eligible for infertility treatment, and Dr McBain is at liberty to provide that treatment to Ms Meldrum.

Justice Sundberg, McBain v Victoria [2000] FCA 1009

2 The High Court dismissed the appeal since the interveners, Australian Family Association, Catholic Bishops Conference and the Australian Attorney-General, had not participated in the case when it was first heard. See Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attor [2002] HCA 16 (18 April 2002).

BOX 3 - ADEQUATE HOUSING PLANS FOR PEOPLE WITH DISABILITIES[3]

Disability legislation provided that the Government must develop plans for the improvement of institutions housing people with disabilities. A number of organisations including the Public Interest Advocacy Centre[4] argued that the plans did not meet the progressive policies and principles in the legislation, namely, the right to live in a single family dwelling in the community and participate fully in the life of the community.

The Community Services Appeals Tribunal held the plan was inadequate. Noting that the legislation reflected the principles of the *Convention on the Rights of the Child*, they found numerous deficiencies, for example, the use of cottages to house six children at a time. They rejected as irrelevant the arguments that the Minister had not been allocated sufficient resources by Parliament.

stantive hearing, leave to intervene was granted to us (Women's Electoral Lobby Inc.), the Australian Family Association and the Human Rights and Equal Opportunity Commission (HREOC). Basically, the Australian Family Association argued along similar lines to the Catholic Conferences applicants, against the Sundberg judgement, while WEL and HREOC argued in favour of upholding the decision and the SDA underpinning that decision.

There was some media hype representing the case as a lesbian rights issue. However this is not what the case was about (although Sundberg did clarify the legal position of any single woman seeking IVF services). We didn't respond on a pro-lesbian platform but wanted to defend women's rights as human rights currently protected under the Sex Discrimination Act. This Act was after all, the Australian articulation of our obligations under international UN declarations and CEDAW.

WEL was motivated to take up the case for a number of reasons: We were concerned the appeal would allow conservative organizations, and the Howard government to intervene and use the case to push narrow definitions of the family - the picket fence notion of the nuclear family of two parents and children - which is only one of a variety of family forms currently accepted in Australia. The case was possibly the 'thin end of the wedge' in terms of erosion of rights embodied in the SDA. We were concerned that legislation in Australia should not discriminate against being single. In our view, single people have as much right to be parents as do those who are married. The divorce rate of one in three marriages reinforces this. Who is to judge who are the better parents?

The Australian Family Association tried to wrongly argue about enshrining notions of the types of parents' children should have, even relying on the Convention on the Rights of the Child. In the end the High Court dismissed the case for procedural reasons.2 This of course, does not preclude the same parties trying to bring another case in the future.

3 *People with Disabilities* (NSW) *Inc. and the NSW Council on Intellectual Disability v Minister for Disability Services*, Matter Nos 067 and& 194 of 1997 (17 March 1998), Community Services Appeals Tribunal.

4 See *www.piac.asn.au.*

What were the obstacles you faced in bring the case to the High Court?

We are a really small organization, a small state based but nationally networked NGO that has a membership of a couple of hundred women and women's organisations. Like most NGO's, our members pay minimal dues and we mostly lobby government on policy issues relevant to gender equality and women's rights. We run on an incredibly tight budget from a community base. Along with another group, Feminist Lawyers, we had followed the Sundberg case. We became involved because we could see the broader issues involved when conservative groups began to appeal the Sundberg judgment and so we joined forces with the pro bono legal team. Suddenly, we found ourselves involved in a potentially high cost legal action in the highest court in the country, which caused incredible internal problems for us. We had resignations from the executive because we weren't sure whether we would become personally liable and even lose our homes if we lost. We had incredible support from the lawyers and from the community-mainly women's groups and our national WEL. We had a national fund raising drive and we raised quite a bit of money – we had to cover the out-of-pocket expenses and maintain a fighting fund.

What was the impact of the case?

The legal impact was in principle, to uphold the Sundberg decision which is underpinned by the SDA. In practice, the state of Victoria still needs to bring its Infertility Treatment Act 1995 into conformity. However, this is not straight forward and the state government has instructed the Victorian Law Reform Commission to enquire into and report on the desirability and feasibility of changes to the legislation within a broader brief including any forms of assisted reproduction and adoption.

Initially, we were jubilant that legal costs (amounting to a few hunded thousand dollars) would be repaid. However, the matter of costs is also still unresolved, despite costs being awarded against the applicants (the Catholic Bishop's Conference and the Australian Episcopal Conference of the Roman Catholic Church). WEL was not the Respondent but an Intervener. Clarifying whether the direction on costs applies would require a new application to the High Court and we are not sure this is feasible or risk free.

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FURTHER READING

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AMERICAS

6 ARGENTINA

THE RIGHT TO MEDICINES

The Constitution of Argentina is exceptional in that it directly applies international human rights law. The *International Covenant on Economic, Social and Cultural Rights* is incorporated in the Constitution and is fully justiciable. Any individual or organisation can instigate, in the public interest, complaints concerning violations: an Amparo action. [1]

Legal action by the Centro de Estudios Legales y Sociales has judicially invigorated the country's constitutional social rights. Born during Argentina's military dictatorship (1976-1983), the Centro de Estudios Legales y Sociales (CELS) launched domestic and international legal action on behalf of victims of government atrocities. Following the restoration of democracy, CELS' focus gradually shifted to poverty and inequality in light of the shrinking role of governments and the onset of privatisation.

If, in a case it is proved – for reasons of economic profitability or commercial interest – that persons and private institutions cannot take care of the health of the population, it can only be concluded that it is the concern of the State, in the position of guarantor, to offer the necessary services in order to face sicknesses in an effective and suitable manner.

Court of Appeals, Viceconte v. Ministry of Health and Social Welfare

In this chapter, the Executive Director of CELS describes the first case that successfully compelled the government to provide a vaccine to prevent an endemic fever. The case then spawned a series of cases that have protected and invigorated programmes for the supply of medicines (for HIV/AIDS, tuberculosis, etc.). But Victor Abramovich notes that implementation of the original *Viceconte* decision has required close judicial supervision: a result of government delays and the long process of validating the vaccine.

1 See *Constitution of Argentina*, 1853, Article 43. Paradoxically, the 1994 constitutional amendments were introduced at the height of economic liberalisation with remarkably little pressure from civil society: See Janet Levit, 'The Constitutionalisation of Human Rights in Argentina: Problem or Promise?', 37, *Colombia Journal of Transnational Law*, 281.

VICTOR ABRAMOVICH - INTERVIEW

Victor Abramovich is Executive Director of the Centro de Estudios Legales y Sociales (CELS).

Why did the CELS take legal action over haemorrhagic fever?

We had been exploring different ways to enforce economic and social rights before domestic courts. The newspapers in 1996 were filled with many articles about Argentine haemorrhagic fever and the lack of the vaccine. We researched the issue with students at the University of Buenos Aires legal clinic and established contact with the people in the Pampas region, as well as doctors and researchers.

It was a complex situation. We were facing an epidemic, but it was extremely difficult to make a diagnosis of the fever. And the disease kills: a 30% chance of mortality. Since the fever is unique to Argentina, the Government had started a laboratory – the National Institute of Haemorrhagic Viruses – to produce the vaccine but bureaucracy and a lack of resources halted the project. Argentina had been acquiring a limited supply of an experimental vaccine (Candid-1) from a US laboratory, the Salk Institute. But production was stopped in 1996; the institute claimed it was unprofitable. Thus, no one could access the vaccine, and the rate of deaths increased in the Pampas region.

In September 1996, we initiated a class action – an Amparo action – asking the State to complete the construction of its own laboratory. A law student, Mariela Viceconte, from the affected area filed the petition. The Ministers of Health and Economy responded by saying that they would produce the vaccine and sent a budget proposal to Parliament. The judge therefore ruled the question moot. He also said our request exceeded the jurisdiction of the judiciary, and our claim for ecological reconstruction (to prevent the disease) was dismissed because of evidentiary complexity.

But we appealed: the Government had made only a political decision. A legal decision was critical, in our view, to enforce State promises, a strategy confirmed by yet another delay to the production schedule for the vaccine.

The Federal Appeals Court was more open. They visited the laboratory, in Pergamino, posing questions to the technicians about the disease and the completion of the laboratory. They concluded that the State had delayed in the schedule, and it was important to establish a legal obligation, particularly since the fever was an epidemic and endemic disease. They based the decision on the *International Covenant on Economic, Social and Cultural Rights*, Article 12, on the right to health. [See Box 1.]

The orders of the court were interesting. The Ministry of Health and Social Action was required to adhere strictly to their proposed time-frame, and this duty was made a personal obligation of the Health Minister and the Economics Minister. The latter had control over release of budgeted funds. After that, the State started completion of the laboratory.

BOX 1 - VICECONTE V MINISTRY OF HEALTH AND SOCIAL WELFARE

The plaintiff, Mariela Viceconte, and the National Ombudsmen requested the court to order that the Argentine Government take protective measures against haemorrhagic fever, to produce the Candid-1 vaccine and to rehabilitate those environments where the disease was breeding.

The Federal Court of Appeals found that any individual could bring complaints concerning the right to health, due to the Constitution's incorporation of international treaties referring to the right.[2]

According to the court, the Government was legally obliged to intervene to provide health care when individuals and the private sector could not guarantee their own health. In the case of Argentine haemorrhagic fever, this duty entailed the production of the Candid-1 vaccine. The court cited evidence from the government that (a) the fever was epidemic and endemic, (b) the Candid-1 vaccine was the most effective protection against the disease, (c) both the World Health Organisation and Argentina's Minister of Health had previously endorsed Candid-1, (d) the stock of Candid-1 was insufficient and (e) the disease was exclusive to Argentina, thereby making it an unattractive commercial proposition.

The court found that the Government had not punctually fulfilled its obligations to produce the vaccine and made the Ministers of Health and Economy personally liable for its production with in a specified time schedule.

Was the decision implemented?

We faced two obstacles. The first concerned government execution of the order. Obtaining a judgment is not the end; it is the beginning. You have to execute the order, and it is very difficult to impose positive obligations. If you have a debt to be paid, it's easy. But, when you have to execute an order to produce a vaccine, that is a complex procedure. It is dependent on the different parts of the Government working in a coordinated fashion. It's very difficult to enforce.

And enforcement of these types of obligations requires new legal procedures. The court in this case empowered itself to supervise the execution procedure, to demand information and to establish hearings before the court. For example, the Minister of Public Health had to appear before the court and inform it of progress made in producing the vaccine. But the method is still very weak. The Minister was made personally liable, which was groundbreaking, but what do you do if they don't comply? Throw them in prison? Impose a penalty of $4 million? It is impossible.

2 The *American Declaration on the Rights and Duties of Man* (Article XI); *Universal Declaration of Human Rights* (Article 25); *International Covenant on Economic, Social and Cultural Rights* (Article 12), including the provision on the duty to prevent, control and treat epidemic and endemic disease (Article 12(2)(c)).

And enforcement of these types of obligations requires new legal procedures. The court in this case empowered itself to supervise the execution procedure, to demand information and to establish hearings before the court.

The court also established another way of supervising the orders. The National Public Ombudsmen intervened to get information and supervise fulfilment of the different steps that the Argentine State had to take. This was another actor and was important in a political sense. Supervision continues.

But this was still not enough. The laboratories were eventually finished, and the funds were allocated. But we don't have a vaccine because it had not been technically approved. The previous US-produced vaccine had only been experimental. Approval of the final version involved a considerable number of steps, a very bureaucratic and complex process, with strong technical control exercised over the quality of the vaccine.

So, in May 2003, we are still in court. It will take perhaps another year until the vaccine is approved. But the court action was very important. If we had not initiated it, the other steps would not have been taken.

How did you overcome arguments that courts should not interfere with resource allocation and technical policy decisions?

We had two advantages in this case. We said that, when a state faces an epidemic and endemic disease, the legal obligation under the *International Covenant on Economic, Social and Cultural Rights*, Article 12(2)(c), right to health, on the duty of a state is very very strong. In this situation, millions of lives were threatened.

Secondly, there was no real 'public policy' debate in the courts. The State had recognised that the vaccine was the only way to counter the epidemic. They had commenced building a laboratory. In that sense, the litigation was really the enforcement of a political decision. We actually relied on Ministry of Health documents issued about the vaccine, its effectiveness and the political policies needed to overcome the problem. This public information was very important because it was State recognition of the facts. We therefore didn't have to discuss various options. We just had to transform a political decision into a legal obligation.

In other cases where you have no legal or state recognition of public policies, it is more difficult for the court to intervene. If you have a very deep discussion about different options, it is very hard to get the court involved in that decision. In such a case, where the margin of discussion is much broader, you might have to explore more indirect ways to assert the rights, for example, the right to information, which may then expose misguided government decisions or inaction.

Viceconte opened up the possibilities for economic and social right litigation.

How did you seek to represent 3.5 million people?

With difficulty. You can't talk with 3.5 million people. And, when we contacted the doctors, they said, 'stop the case, because the Government is near to deciding to produce a vaccine'. But we decided to continue: it was only a political decision. We felt strongly the Government had a legal duty.

We have changed our strategy now. We try to establish better contact with all social actors: grassroots movements, peasant organisations, professionals, etc. We also try better to articulate the relation between the legal and political actions and strategies, between the media campaigns and political lobbying. But *Viceconte* was our first case in this area.

The upshot has been that Argentina in 2003 developed a social plan to deliver basic medicines.

What has been the impact of the case?

Viceconte opened up the possibilities for economic and social rights litigation. It was not the first case on positive obligations, but it was the first collective action, and it involved a significant allocation of resources. It cost $12 million to finish the laboratory. It sensitised the judiciary to collective actions in the area of ESC rights. And it produced very important discussions amongst academics, the judiciary, lawyers, students and NGOs about the possibilities of these kinds of legal actions to enforce social and economic rights.

After that, there was a very important case in the Supreme Court that established a State obligation to deliver HIV medicines to all people potentially affected. In that case, a law had been passed by Parliament to deliver the HIV cocktails to various beneficiaries. The Supreme Court simply enforced the law.

With the collapse of the health care system in 2001, the judiciary became an important actor in the area. In the middle of the social crisis, medicines were not being delivered to the poor: HIV, tuberculosis and some simple medicines. There were many legal actions, and the courts put significant pressure on the Government to supply the drugs. The judiciary can't resolve the problem, but they *can* put pressure on the Government to establish priorities.

The upshot has been that Argentina in 2003 developed a social plan to deliver basic medicines. We see a clear link between the development of this plan and programme and *Viceconte* and other cases.

LESSONS LEARNED

- Courts can sensibly make orders for governmental distribution of affordable drugs.
- The judiciary's willingness to make and supervise detailed orders is increased by a pre-existing government policy decision.
- Class actions and orders for positive action will usually require courts to develop new rules of procedure.
- Implementation of court orders is unlikely without social mobilisation.
- A successful case (even if the order is not implemented) may sensitise the judiciary and inspire further actions.

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FURTHER READING

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7 CANADA

SUBSTANTIVE EQUALITY RIGHTS FOR THE POOR

Faced with limited constitutional recognition of social and economic rights[1], social advocates in Canada have pushed with some success for substantive interpretations of the rights to equality and security of person. Most notably, the Supreme Court, in *Eldridge v. British Columbia*, found that governments have positive obligations to provide resources to ensure that deaf people have access to interpreters in the provision of health care. [See Box 1.]

But other litigation strategies are equally interesting. Poverty or reliance on social assistance has been effectively established as a prohibited ground of discrimination; detailed statistical evidence and experts have been creatively used, and strategic use was made of United Nations bodies during, not after, domestic litigation [see Box 2]. Conscious attempts were also made to include the poor in litigation strategies through a model of 'accountable litigation'.

In this chapter, Bruce Porter describes these and many other lessons learned from two decades of social rights litigation in Canada. He challenges, in particular, self-defeating and deprecatory attitudes about the use of courts and emphasises the importance that marginalised groups place upon the right to be heard.

BRUCE PORTER - INTERVIEW

Bruce Porter is former Director of the Centre for Equality Rights in Accommodation, Director of the Social Rights Advocacy Centre and Chairperson of the Charter Committee on Poverty Issues.

You have been litigating social rights for two decades. What was the formative case?

An early instructive case for me was a couple with five children, illiterate farm workers relying on social assistance. They were refused any apartments they could afford because of their children. The family had tried to live in a garage, but eventually moved into a van, relinquishing four of their children to foster care in a town at some distance away. Ironically, it would have been less costly to provide the family with housing assistance than to provide foster care for the children.

1 Calls for the inclusion of social and economic rights in Canada's *Charter of Rights* (adopted 1985 and revised 1992) were rejected by the drafters.

We first considered, in that case, discrimination claims against prospective landlords alleging discrimination on the basis of family status, but the apartments they applied for were one-bedroom apartments, and the landlords were concerned about over-crowding. The real problem was inadequate levels of assistance for large families and the unreasonable refusal of emergency assistance in these circumstances.

So we framed a human rights complaint that tried to address the real discrimination in order to achieve an effective remedy. The complaint made extensive references to the right to adequate housing under the *International Covenant on Economic, Social and Cultural Rights*. We relied on Canadian decisions that said international human rights treaties signed by Canada were a persuasive source of the interpretation of the rights in our Charter and, by analogy, the Ontario Human Rights Code, which we were relying upon.

We argued that governments are responsible to take the appropriate measures to ensure that people receiving public assistance have equal access to accommodation. Under the Human Rights Code, where there is no direct discrimination, but a policy or factor results in the effective exclusion of the group, then appropriate measures must be taken to accommodate the needs of the group.

Unfortunately, in this case, after five years of obfuscation and a completely inadequate investigation, riddled with discriminatory stereotypes about people on welfare, the Human Rights Commission decided not to proceed to a tribunal. An appeal looked hopeless. I had learned how poor people were excluded from human rights paradigms in Canada, and faced invidious discrimination even within human rights institutions. Perhaps it was fortunate the case did not proceed; we had to do a lot of other work to create the winning conditions.

. . . the Government simply saw the issue as a housing problem, ... but we realised it was a human rights issue.

Why did you embrace litigation?

I'm actually not a lawyer, and my early efforts in the 1980s were focused upon helping low-income families with children improve human rights protections in housing. We had discovered that landlords often refused to rent to families with children; you would see signs saying 'adults only'. There was a cultural assumption that wealthier people delay having children until they owned a home. Therefore, landlords used the presence of children as an indicator of poverty. At the time, such discrimination was exempt from the Human Rights Code.

Now, the Government saw the issue as a housing supply problem, but we realised it was a human rights issue. The constituency we were working with felt it was a human rights issue, and, after three years of lobbying, we were successful. By 1986 we had a revised and remarkable piece of discrimination legislation for its time, which included sexual orientation, receipt of public assistance, family status, broadly defined marital status and people with disabilities.

But it was clear that low-income people weren't benefiting from advances in human rights; discrimination in the housing market was rampant and largely unchallenged, and access to courts was difficult. So we established the Centre for Equality Rights in Accommodation in 1985 to try and make the human rights protections that we had won in law successful in practice.

But relatively good law was very poorly interpreted when it came to the problems of the poor. The Human Rights Commission basically said that it's okay to deny accommodation to someone if the reason is low income. Since those relying on welfare have the lowest incomes, this meant that the protection from discrimination on the ground of 'receipt of public assistance' was illusory. Landlords weren't allowed to hang out 'adult-only' signs anymore; but they imposed minimum income requirements that kept most people with children out of their apartments. If you were paying more than 30% of your income towards rent, you were not allowed to rent there.

Faced with this, we turned to international human rights law. We saw that economic disadvantage was a catch-all way of keeping out virtually all the groups we had been working for. The interest at stake was not only discrimination, but the denial of someone's access to a basic necessity. We saw how the substantive right to adequate housing – recognised in international law – could intersect with the equality claims.

BOX 1 - FINANCIAL COST OF PROVIDING INTERPRETATION IN HEALTH SERVICES[2]

Justice La Forest ... "In the present case, the government has manifestly failed to demonstrate that it had a reasonable basis for concluding that a total denial of medical interpretation services for the deaf constituted a minimum impairment of their rights. As previously noted, the estimated cost of providing sign language interpretation for the whole of British Columbia was only $150,000, or approximately 0.0025 percent of the provincial health care budget at the time."

What was the next stage in your strategy?

In 1989, we created the Charter Committee on Poverty Issues, a national coalition that would bring together low-income activists and advocates to assist poor people make better use of our Charter and human rights legislation. Our strategy was threefold: to create a body of useful jurisprudence, which meant intervening in significant cases, including those where the courts might go legally backwards and indirectly close the door on future poverty related claims; launch new claims in human rights tribunals and courts, and take a more political stance, intervening in constitutional discussions over the Charter rights and using UN procedures.

We intervened at the Supreme Court of Canada and the Ontario Court of Appeal and utilised international provisions in every case. We challenged cases in the lower courts where they said you can't impose positive obligations on governments and that courts have no role in getting involved in social and economic policy.

In the *Eldridge* case, the governments were arguing that the court has no role in ordering the British Colombia government to provide any particular form of medical service – in this case, interpretive services for deaf patients – since these are resource allocation decisions. [See Box 1.] They claimed the lack of services didn't qualify as a violation of Section 15

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

(equality) because it relates to a pre-existing disadvantage. And there are so many disadvantages in society; it should be left up to the Government to decide which ones are going to be addressed.

Now, most of the interveners and parties said the courts did not have to address these bigger questions; there may not be obligations to provide health care, but once you provide it you have to do so without discrimination. We took a different approach and said consistently to the Court that Canada does have an obligation to provide health care, and, more to the point, substantive equality means that obligations of adequate health care and housing recognised in international human rights law are components of the equality guarantee under the Charter.

Our arguments did not seem to be warmly received in court, but, when the decision came out, lo and behold, we had the strongest language ever with respect to positive obligations to allocate resources to address pre-existing disadvantage. There was an eloquent paragraph that says the argument advanced by the governments is a 'thin and impoverished notion of equality'. The Government therefore has to justify its decision not to provide resources that are necessary for this group to enjoy health services. The Court found that it's not reasonable to have provided no interpretive services, given the relative insignificance of the cost.

In the Kearney decision, you managed to establish poverty as an effective ground of discrimination.

We considered this a huge victory at the Ontario Human Rights Tribunal.[3] The tribunal found that income criteria, which excluded low-income applicants, were prohibited discrimination. On one hand, it was a substantive claim concerning access to housing, and, on the other hand, it was a non-discrimination claim. The tenants weren't asking for subsidy or reduced rent; they just wanted to pay the same rent as everybody else, and they were actually refused on the basis of stereotypes of low-income people being a risk of default, which, with statistical evidence, we proved not to be true at all.

The case also raised the issue of social and economic rights as not being confined to obligations of governments to provide housing, but also to ensure that markets are regulated in a proper fashion. We argued that landlords weren't permitted to take on the business of renting housing without complying with appropriate rules regarding access. There are certain things that society can't afford to allow businesses to do, including refusing to rent to low-income families. The same applies to the utilities company or a telephone company for that matter or a doctor. There are certain services – fundamental to social or economic rights – that must not be denied to anyone in society simply because they are low income.

What has been the impact of this Income Criteria decision?

It's hard to know what to use to measure that. The conservative government responded to landlord pressure around the case by changing the Human Rights Code, and we then had to litigate to determine the effects of those changes. Measuring our success was difficult given the muddle of the changes to the legislation and confusing appeal decision that followed. But, to cut a long story short, the upshot seems to be that the original decision of the tribunal is still largely applied.

Another problem was that we actually had to avoid giving a lot of publicity to the victory because, if the headline in the newspapers said,

3 See *Kearney & Ors v. Bramlea Ltd & Ors,* Board of Inquiry, Ontario Human Rights Code, 2000.

'landlords prohibited from using income in selecting tenants', then landlords would have mobilized to lobby the conservative government for further changes to the legislation. We used our victory energetically on individual cases with individual landlords, but the impact hasn't been as large as it might have been because we kind of had to lay low about it in the shorter term.

The decision was also accompanied by changes in the housing market and welfare rates, so that people on welfare now cannot afford even the most affordable housing. We shifted the focus of advocacy to challenge the inadequacy of the benefits, more along the lines of that early case I mentioned. But we've at least established in law that landlords have an obligation to rent to low income applicants.

The big picture is that we won a significant victory because we established that income criteria discriminate on the basis of income levels, sex, race, family status, and discriminated against newcomers. It's the first decision I'm aware of in the world that finds discrimination because of poverty to be a form of sex discrimination, and it was upheld even by the most conservative panel of judges that you could have got. That's something no one thought possible when we began the case.

You have campaigned strongly for inclusion of economic and social rights to be made justiciable in the Constitution. What has been the result of the lobbying?

The constitutional negotiations reopened in 1991, and such rights were on the table for discussion. Obviously, if we could get reference to social and economic rights in our Constitution, even as an interpretive framework, this would make the cases we were doing under the Charter and under human rights legislation more winnable.

But our strategy changed when we found that we didn't get support from the labour movement or the left-wing parties; they put forward proposals which explicitly stated that the right to housing, for example, wasn't a right, but a policy objective, that it was not justiciable. That, of course, would have been very damaging to our equality claims under the present Charter because it would have given a constitutional instruction to the courts that any substantive claim to access to housing should be thrown out. We were also starting to lose some cases under the Charter in the early '90s. Therefore, faced with all these negative movements, our strategy was to keep the door open, to ensure that there were no clear statements against justiciability.

And, once again, the real issue was the value of the rights paradigm. The argument as it was framed by academics and some labour movement allies – juxtaposing courts versus Parliament – assumed social rights meant some kind of institutional reform that gave more power to the courts and took power away from Parliament. What they didn't understand was that people in poverty didn't want the courts to have more power; they wanted to get a hearing into violations of fundamental rights.

My sense was that we had to get used to poor people participating in this rights revolution in Canada, so that people would get a sense of how it felt and how it worked rather than getting stuck in debates about courts versus legislatures. The failure of the constitutional discussions in 1992 to come up with anything positive led to a growing understanding that we had to keep working on advancing social rights claims to get people more comfortable with the idea of adjudication.

What they didn't understand was that people in poverty didn't want the courts to have more power; they wanted to get a hearing into violations of fundamental rights.

What was your strategy before the UN Committee on Economic and Social Rights?

Domestic obstacles had led us to look at the international law not just as an area that we could use interpretively, but a mechanism where we could flesh out what these rights mean in the specific context of Canada. We wrote in 1993 to the Committee, prior to the second periodic review of Canada, and we were permitted to try out this new procedure of NGOs providing information. [See Box 2.]

And it was so empowering for low-income constituencies. After we did the presentation, a colleague wrote a great article about it in the National Anti-Poverty Organisation newsletter. It was all about going into marble hallways and having their voices heard. It was really quite a moving experience – and that continues to happen – when you're getting a sense that you're experiencing a real hearing, an effective review procedure within a human rights framework.

BOX 2 - USING INTERNATIONAL LAW AND UN COMMITTEES

Canadian NGOs have made strategic use of international law and UN Committee. Decisions of provincial courts and government pleadings were presented to the international bodies, which registered strong concerns over their inconsistency with international human rights law. Canadian advocates in later domestic cases cited the Committee's concluding observations. See below the submission of CCPI in the case of *Louise Gosselin v Le Procureur Général du Québec*.[4]

Factum on the Charter Committee on Poverty Issues,
In the Supreme Court of Canada

...

15. The right to social security and to an adequate standard of living, including food, clothing and housing, are recognised as fundamental rights in the *Universal Declaration of Human Rights* and in virtually all human rights instruments that have been adopted since that time.

16. The Court has taken an expansive approach to the use of international law as an interpretive framework for domestic law. In considering the effect of international law when interpreting domestic legislation enacted with a view to implementing international obligations in the *National Corn Growers* case, Justice Gonthier held that courts should not only turn to relevant international law to resolve blatant ambiguities in the domestic legislation, but rather, should "strive to expound an interpretation which is consonant with the relevant international obligations".

17. A similarly expansive approach to the use of international human rights law has been adopted by this Court to ensure that Canadians are provided the "full benefit of the Charter's protection." The Court's approach has been founded on the 'interpretive presumption' laid out in the *Slaight*. Referring to protections in the *International Covenant on Economic, Social and*

4 For the final decision see *Gosselin v Quebec (Attorney General)*, 2002 SCC 84, File No. 27418.

Cultural Rights, the Court found that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified."

18. The interdependence and indivisibility of all human rights has been a central tenet of international human rights law since the adoption of the *Universal Declaration* in 1948. These principles have been reinforced by jurisprudence from all of the U.N. treaty monitoring bodies, both in general, and in the particular context of periodic reviews of Canada.

19. The Committee on Economic, Social and Cultural Rights (CESCR) has similarly recognised that the interdependence and indivisibility of all human rights makes it impossible to justify any categorical distinction between the two sets of rights with respect to the provision of legal remedies.

20. Consequently, in its review of *Charter* jurisprudence related to Canada's obligations under the *ICESCR*, the Committee has expressed concern that in poverty-related cases governments have argued for and lower courts have adopted Charter interpretations which are inconsistent with Canada's obligation under the *ICESCR*, and which could leave claimants "without the basis necessities of life and without any legal remedy."

21. The Human Rights Committee found that social program cuts in Canada have had a discriminatory impact on women, and may violate the obligation to take positive measures to protect children. In addition, the Committee noted that "homeless has led to serious health problems and even to death" and recommended that governments in Canada "take positive measures required by article 6 [the right to life] to address this serious problem."

We brought before the Committee the case of the family I spoke of earlier, who couldn't get a case to a tribunal in Canada, and we had pictures of them living in a tent in a muddy field. So, we actually got more of a hearing of those cases in 1993 before the Committee than we had achieved domestically. Even though it wasn't a hearing which would provide a legally binding remedy, it had still had a significant legal and moral weight.

We didn't want to make U.N. Committee review just another social policy review. We got lots of that at home. We approached it like a hearing, and we encouraged the Committee to look at domestic implementation, asking the Committee to push the courts in the direction of a more substantive approach to human rights and the Charter, so that we would have more effective remedies at home.

It was an interpretive battle that we were waging around the Charter and domestic human rights legislation, and we asked the Committee to engage directly in that battle. We did the same thing five years later in 1998 when we asked the Committee to make very strong comments about interpretations by lower courts that were inconsistent with the Covenant and so on. And they did.

Did you consider taking these poverty cases to the Human Rights Committee?

After we had considerable success in the 1999 review of Canada in getting the Human Rights Committee to look at issues of poverty and homelessness as violations of the right to life, to non-discrimination and of the obligation to take positive measures to protect children, we wondered if we should use the individual complaints mechanism there. I made inquiries about this, but most people felt it might still be a bit risky.

I was also a bit wary because when we raised issues of discrimination because of poverty and receipt of public assistance at the 1999 review, such as the issues of income criteria that we had dealt with at home, I found I didn't get much support from Committee members. We wanted them to say something about including the ground of "social condition" or poverty in the Canadian Human Rights Act because it doesn't have anything to protect people on welfare or people living in poverty from discrimination, and this had emerged as an important issue in Canada.

But Committee members I spoke to didn't seem to be very advanced in their thinking on this issue. They said that requiring a higher income for housing or for mortgages wasn't what they thought of as discrimination. One member told me that poor people are never going to be treated the same as more affluent people in a market economy – the kind of thing the landlords argued unsuccessfully in the income criteria case. I may have got it wrong, but I got the impression that there was some risk at that time of taking some of these cases of poverty-related discrimination - that we were actually doing better on this particular issue in Canada. Hopefully, the Committee has moved forward on this since then, so this is certainly something we would look at now.

What have been the critical successes?

I think the most important success has been that poor people and homeless people have successfully advanced a claim to be equal participants in Canada's rights revolution and in our understanding of international human rights law. They have begun to shift our understanding of both domestic and international human rights so as to be more inclusive of social and economic rights. It is now widely recognised that poverty-related discrimination must be prohibited in human rights legislation and under the Charter. To some extent, the equal recognition of the social and economic rights has flowed from this. Government refusals to address poverty or deliberate measures to cut welfare and deprive people of necessities are clearly acts of discrimination in an affluent country like Canada. The idea that the right to equality or to life, liberty and security of the person can be narrowly construed so as to exclude positive government obligations to address disadvantage and social exclusion is now no longer accepted.

We have a lot of work to do, still, in getting courts to move forward in their understanding of these issues has human rights issues. That was clear in the decision of the Supreme Court of Canada in *Gosselin v. Quebec*, the first welfare case in which we asked the court to recognise the right to an adequate standard of living as a component of the right to security of the person under the Charter. The majority decision from the Chief Justice revealed a shocking lack of understanding or empathy with the plight of vulnerable individuals relying on social assistance. But at the same time, two justices, Justice Arbour and Justice L'Heureux DubJ found in that case that the right to security of the person under the Charter does oblige governments to provide an adequate level of assistance. And six other justices found that while the evidence did not warrant such a finding in

that case, this 'novel interpretation' might well be adopted in a future case. The remaining justice, Justice Bastarache, agreed that the right to security of the person places positive obligations on government that embrace both social and economic and civil and political rights, but he restricted these to situations in which the state is acting through the administration of justice. No one would ever predicted that we would get that much support for our arguments the first time around. Most of academics and even many of our supporters in the legal profession thought we were dreaming in technicolour to think that a court would make such a finding. So I think that constitutes a major success which may well have spin-offs in other jurisdictions.

I think the other major success is that we have really changed the way international human rights, particularly social and economic rights, are perceived in Canada. It is rare to read legal pleadings or social commentary now on issues of poverty and homelessness where no mention is made of the U.N. Committee reviews. This is no longer a remote and irrelevant procedure as it was when we began. The failure of governments to respond in positive way has been disconcerting, but the victory is that their refusal to respond is now an issue which will not go away.

Even my old nemesis the Human Rights Commission has now moved forward in recognising the importance of social and economic rights. Various human rights commissions have done a lot of work on social and economic rights in recent years. Of course, when social and economic rights are 'mainstreamed', they tend first to be reduced to a kind of rhetoric, but again, I think we have laid some important foundations for progress.

While we have experienced the inadequacies and biases of the legal system we have also learned that it has some real benefits to offer poor people if they can get access to it to advance rights claims. An investigation and judicial procedure often brings stuff out in evidence much more rigorously than the political process. I find that even in political lobbying I rely heavily on evidence that was compiled for our court cases and human rights tribunal claims.

BOX 3 - WHAT HAVE BEEN THE CRITICAL LESSONS?

Bruce Porter

• Concreteness is critical; you have to start by situating the question in a real situation. What does it mean if social and economic rights aren't going to be treated as rights? It means you bring evidence that, through welfare cuts, 120,000 people would be made homeless; here's what they receive; this is what they pay for rent, etc.

• I find it really important to get people to understand what poor people are asking courts to do. I have always found that the philosophical, abstract stuff doesn't really help that much; it's a matter of inserting the claimant into the discussion and this justiciability debate. Does a family lose their children or do they get to keep them? Does a family have to live in a garage or do they get to be provided with assistance? If so, how much will it cost? We've always found that, if we get real, then we win; they engage us in questions that we're raising in a responsible fashion.

• I can't really separate what I think is the essence of a really good social and economics rights claim and a substantive equality claim, or even a right-to-life or security-of-person claim. I think the equality perspective is very critical to social and economic rights claimants because you make an implicit comparison with what other people are getting and the capacity for the state or private actor to provide, rather than this idea of a simple minimum requirement.

Framing Test Cases

• You need to go after the real issue, not a subsidiary one, even at the risk of having a claim that might not normally be seen as a proper claim. I think, in Canada now, it's important to challenge government action on homelessness in a systemic fashion. Rather than focusing on what would be seen as a more traditionally winnable legal argument – for example, a benefit has been denied on a discriminatory basis or the distinctions between different groups on social security – we need to focus on the real issues. Do courts really want to look at whether Aboriginal people are equally or more disadvantaged than poor non-Aboriginal people? They're both disadvantaged.

• In framing test cases, it is important to find claimants who capture the systemic issue in their individual circumstances and are able to capture those qualities in their evidence and so on. In Canada, groups are often not given standing to take forward rights issues that could be advanced by individuals, so we have had to learn to get at the systemic through individual claims.

• You can also get cases where you're going to get a sympathetic hearing on social and economic rights because of the constituency involved, *Eldridge v. British Columbia* was a really good case to start on in terms of the right to adequate health care as an equality rights issue, because you had a vulnerable constituency and a previously won concept of substantive equality for people with disabilities. We can then apply this to people living in poverty rather than trying to win everything in the first case.

Winning Cases

• I think it's important to use international law in a very real and concrete way. Go to the Committees about the specific cases before you actually go to court about that specific case. So you're not just saying everyone has a right to adequate housing, but the Committee raises concerns about the use of income as a discriminatory factor, for example. In *Gosselin* we were able to point to the Committee's comment about the trial judge's decision. It's unlikely the court's specifically going to rely on it, but it makes an impact.

• I've always found that the really critical thing for the courts is whether or not we can convince them that there's a group that lacks power and political voice, on whose behalf the court has to intervene to ensure their interests aren't totally neglected. Rights are, at that point, a corrective to democratic processes as opposed to some sort of conceptual idea of a universal minimum or a universal standard that the courts are going to derive in opposition to legislations.

• It really matters that you get the basic approach and arguments right. Courts are really nervous about starting from obligations to have legislation in place, because, once you go down that road, they don't know where to start. They prefer to begin with the government having already acted. Then they can evaluate whether they acted properly. But with growing familiarity with international standards, I think, courts will become increasingly comfortable with the idea that you can actually start from the obligation to have the legislation, and moreover, that it has to be adequate.

• You can only sort of push the litigation so far or you might then provoke a negative political response, but, alternatively, you can only push the law reform so far. If you don't have your strategy informed by real concrete experiences of how adjudication works, you'll get the kind of academic or leftist critics coming in and saying, 'these are non-justiciable', even though such statements are so damaging for the people that we were working with.
• Our experience of the Supreme Court of Canada has been that they are more interested in the issues that we're promoting than most of the other lawyers would have thought. They all felt that our arguments would scare the court off, but the whole point was to reassure the court that our approach was not as radical as was being suggested.

Evidence
• It's important to be involved with the experts. We haven't found that academic experts are naturally going to do everything right. At the same time, surveys done through the non-governmental agencies can be difficult, too. It really varies from case to case. We are still learning about the right way to use statistical evidence, something that the American cases deal with in much more detail. For example, at what point can you rely on predicting the effect of a policy against the data?
• There's a tendency to be sloppy with the evidentiary stuff, especially when you're looking at comparisons. You really have to think about all the different ways the court might look at the evidence. It's worth doing, though, because the evidence we got for the Income Criteria Case – which took a lot of time and money – has been used in the challenge to the welfare cuts, in our public education work, in our mediation work with landlords and has been taken up by US advocates working on income criteria.
• At the same, I'm now coming to a conclusion that, perhaps paradoxically, you need to specify exactly what it is that you're trying to prove and try to do it in a simple way; to demonstrate the existance of a terrible policy, rather than trying to all document the facts statistically. Simplicity makes courts think that they're in a good position to intervene.
• Another thing that we did is we relied more on community-based witnesses as experts. In most of our cases, we had to fight for recognition of people like me as experts because you do get a different perspective from people who actually work with poor people. Of course, it's really helpful also to have the claimants involved in giving their evidence. In the Kimberly Rodgers inquest, her voice was missing, but the fact that she filed an affidavit to challenge the ban on welfare prior to her death means that we have her statement of what it all meant to her, and that's been very important to all of the mobilising work.

Remedies
• It really is important to try to bring conceptual victories early on without requiring courts to grant remedies that may seem too intrusive on the legislative domain. In the *Gosselin* case, there was a class action for almost half a billion dollars to compensate all of the people on social assistance under 30 during the time the challenged provision was in effect. The monetary damages claim was not going to succeed even if we won on all the Charter arguments, so in a way it was an unfortunate distraction from the important issues of dignity and social exclusion that were at stake in the case.
• In many cases it better to first go to court on the important interpretive issues, where you're really only asking for an order that won't necessarily have a specific impact on any individual. The critics of this type of litigation tend to look exclusively for instrumental gains, at what eco-

nomic benefit was gained for the litigants, such as Louise Gosselin. But my experience with litigants of this sort is that they are primarily interested in staking a claim to equal rights and equal citizenship, and prepared to wait for the economic benefits of equality to flow more slowly. What Louise won in terms of expanding our conception of the right to security of the person is going to do a lot for people like her because, in the long run, you get the overall framework of a paradigm, and then we can work on getting more specific remedies in subsequent cases. The first case shouldn't be one that scares the court off but rather one which raises the issues of principle in compelling and fairly straightforward way.

What non-legal strategies do you use?

I think they are very essential, but I have a slightly different view than others perhaps. I see legal strategies not as lawyers coming up with strategies, but rather the constituencies insisting that they want their rights to mean something, and so it doesn't necessarily have to be in court.

The politically correct statement would be, well, legal strategies are one component, but certainly not the critical component. The main thing is social mobilising, organising social movements, etc. Honestly, that's not what I think. I think that a critical battle right now for social and economic rights is in the courts. Although the political battles are probably more important in the long run, the reason the so-called 'legal strategy' is important is that it's forcing us to figure out, well, what does it mean for a social right to be a human right?

And I actually don't find the distinction between legal strategies and political strategies helpful. I would distinguish between rights-based approaches and other approaches, and I don't think that every approach has to be rights based. It could be really important for people and politicians in Canada to start thinking about and acting upon poverty and homelessness as a human rights issue. That would be a huge political advance, but, as a critical component for making them think it's a human rights issue, I think legal strategies are essential.

I don't like it when it's just rhetoric. I want it to mean something to people. I find the constituencies that I work with want it to mean something, too. So that's the question: can I go to court? Can I go to a human rights tribunal? Can I have a procedure of some sort? Is that a political strategy or a legal strategy? I don't know, but it's a rights-based strategy because it's identifying violations and giving some sort of remedy. We're not just talking courts versus Parliament; we're talking rights versus other kinds of issues. We're fighting for the idea that these are rights and not policy objectives, and there has to be some effective remedy for people who are affected by decisions. An inquest into a death is also a legal strategy.

What have been the key obstacles?

We have learned that lawyers need to get trained in this area. There are huge problems with lawyers not being comfortable with social rights claims. Our experience in Canada was that it was often lawyers who were acting as the screen that kept social and economic rights claims from being advanced as such. But, on the other hand, it is important that, when we go to court on these cases, we do it with the best counsel possible and with the best chance of winning, because it doesn't help to use litigation simply as a mobilising strategy.

It's important to have mobilising with the litigation, but there's no point taking a bad case just because of the media publicity. It's impor-

tant to have people who are working on early political mobilisation to respect the work that this one segment is doing around legal strategies as an important segment on its own. Litigation has to be respected rather than just used as a vehicle for media strategies.

Taking rights claims forward is really the best way of developing our understanding of what economic, social and cultural rights are all about. Canada, in opposing a complaints procedure to the ICESCR, says they need more and more general comments so they know what the rights mean before they will allow complaints to be heard. But that is not the way good law develops. General Comments are useful, but it isn't a good idea to have law developed in isolation from the claims of affected constituencies. If you are in the process of challenging the inadequate shelter component in welfare, a situation that will force people on welfare in Ontario out of their homes, you would want to make the link between welfare cuts and forced evictions, but I couldn't find much in the General Comment on Forced Evictions on that. Likewise, the General Comment on the right to food didn't help us much in challenging welfare rights in Canada even though we've got massive reliance on food banks. Taking claims forward allows the rights to evolve and be clarified in light of the diversity of circumstances, and so become much more useful to affected constituencies.

We will only really know what rights mean and what works about social and economic rights once we start litigating these things. But, for all that, I have to say that General Comment 9 on the domestic application of the Covenant is brilliant because it lays out general principles of interpretation that can be applied to specific cases. Just the one statement that the right to equality should be interpreted wherever possible to provide as much protection of economic, social and cultural rights: we use that in every case.

The CCPI's [Charter Committee on Poverty Issues] Board included low-income representatives who have taught advocates some of the complexities of poverty, ensured that legal strategy does not distract us from what our movement is really about and ensured low-income plaintiffs do not feel unsupported in venturing into the hostile terrain of the judiciary.

I do think you need to be aware of two other dangers. Sometimes we've had trouble accepting social and economic rights practice, including legal practice as a field of specialty. If we are ambivalent about the project in the first place, concerned that somehow it's too elitist to go to court or too naïve to think we're really going to win, we create these coalitions that are unworkable – some might be in it for some media coverage of the issue while others are focused on longer term advances in legal protections. Those different assumptions about what we're doing can lead to conflict, or to compromising the integrity of the legal challenge. We might not get the best lawyers or make sure all of the evidence is in place. We put ourselves at a disadvantage if we're not sure about our own cause.

The other danger is, and this is maybe a personal one, but I do find that vilifying judges or the judicial system – an academic tendency – is not an effective strategy and is not necessarily accurate. There's no question you get terrible judges and class biases, but you get terrible politicians with class bias too, and no one suggests that political mobilizing is bad for that reason. There's something in legal rights claim-

ing that is valued by disenfranchised constituencies, so I don't think we're being fair if we set out to prove how bad the system is instead of trying in every way to make it work better for these groups.

I don't feel that other groups have the same scepticism attached to their rights claims, because at a certain point, when Aboriginal people or women claim something, or gays and lesbians claim issues as fundamental human rights, and they go to court because they see them as rights, nobody is assessing that as a political strategy. When someone calls me up because they lost their children because of government's refusal to provide emergency assistance or adequate shelter, isn't this a human rights issue? When people see things and feel them and understand them as human rights issues, you claim them as rights.

REALITY BITES: MAKING SOCIAL RIGHTS CONCRETE

In 1999, before the UN Human Rights Committee, they did not want to hear us talking about poverty, and I had to plea with them. So, I referred to an Aboriginal woman who died about a week and a half earlier, about a block and a half away from the Parliament buildings in Ottawa, on a freezing cold night under a bridge. She was seven months pregnant. She died because she was homeless and hungry in a country that has all the resources necessary to prevent that from happening. I asked the Committee members why her loss of life as an Aboriginal woman living in poverty was different from somebody who might be more affluent and dies in prison? I don't see the difference. It's government decisions that resulted in her death. It was only by looking at that contradiction that we could get the Committee to engage in some of the worst human rights violations in Canada.

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FURTHER READING

Bruce Porter, 'The Uninvited Guests: Reflections on the Brief History of Poor People Seeking their Rightful Place in Equality Jurisprudence', in 3 *Roads to Equality*, Canadian Bar Association, Continuing Legal Education Programme, Annual General Meeting, 1994, available at *www.equalityrights.org/cera/docs/guests.htm*

8 ECUADOR

THE RIGHT TO WATER AND ENVIRONMENTAL HEALTH

Oil pollution by the Texaco Oil Company in the lands of indigenous Ecuador has generated international attention, including a high-profile lawsuit in the US. [See Box 1.] The Center for Economic and Social Rights worked with local and international groups to inject a human rights approach into the various strategies, assisting with political mobilisation and human rights education and in the initiation of various legal actions, from the rights of participation of indigenous people to the prevention of cuts to the health budget. In this interview, Chris Jochnick sets out the challenges involved in bringing legal action against multinational companies (and governments) at the local level and before the Inter-American Commission on Human Rights.

CHRIS JOCHNICK - INTERVIEW

Chris Jochnick is former Co-Executive Director of the Center for Economic and Social Rights (CESR).

Why did you choose to work on oil pollution?

Oil companies are amongst the most powerful actors in the world and frequently responsible or involved in violations of ESC rights. In 1993, the Centre for Economic and Social Rights organised a mission to Ecuador as part of a team of lawyers and health officials to conduct an initial investigation of damages caused by Texaco Oil Company in the Amazon. We had an eye to a possible lawsuit in the US against Texaco and took samples of water and examined skin rashes, etc. A case was later launched against Texaco in the US [see Box 1], but we decided we could add more value by promoting economic and social rights as part of this issue. This involved workshops with Amazon communities, mobilisation and different sorts of advocacy efforts alongside these communities, as well as some national and international environmental NGOs.

BOX 1 - 'CHEVRONTEXACO FACES HUGE POLLUTION SUIT'
by richard valdmanis, may 3, 2003, reuters

NEW YORK - ChevronTexaco next week will begin its defense in a multibillion dollar legal battle in Ecuador against accusations it has polluted portions of the country's Amazon region, the company said.

The suit, which was brought [originally in the US ten years ago] by thousands of residents near the company's former oil fields, alleges Texaco Petroleum Co, a subsidiary of Texaco Inc. which merged with Chevron in 2001, dumped roughly 18.5 billion gallons of oil-laden water into unlined pits, estuaries and rivers during its operations in Ecuador's Oriente between 1971 and 1992.

People living near the fields, now operated by state firm Petroecuador, claim the oil pollution destroyed sources of drinking water, caused health problems, and led to deaths of farm animals, lawyers for the plaintiffs said.

ChevronTexaco denies the allegations, saying the "produced water" in question, a by-product of oil drilling, was treated before being discharged. They also say that the firm has already completed a remediation project to eliminate any permanent effect from its operations.

After 10 years of jurisdictional disputes, the case will be heard in court starting May 6 in Lago Agrio in Ecuador. The 2nd U.S. Circuit Court of Appeals, based in New York, ruled in 2002 that a ruling on the case in Ecuador would be enforceable in the United States.

What was your strategy in working with local indigenous peoples?

They had been working and struggling with oil pollution for about a decade. But their efforts were stymied by a lack of scientific knowledge and institutional leverage. They had some political leverage through the mass mobilisations around indigenous and land rights, but it was not specifically focused on the Amazon. Another set of victims, poor settlers (or 'colonos') had no organisation; they had no voice at all. But bringing together indigenous groups and the settlers was not an easy task, and there was suspicion of international organisations.

The lawsuit that we helped bring against Texaco at the end of '93 was very helpful in generating a focus and excitement. It was something very novel. The idea that you could sue a company and even sue it in the US was very appealing to many. Although people had overly high expectations, it did help organise them. But, I have to say that, if everything had just been left to the lawyers, it would have been more problematic because the lawsuit went through these long intervals, and people would never hear from the lawyers.

There was also almost no information about legal rights, international or national. A new Constitution gave them a lot of rights, and the country had signed onto ILO Convention 169 [of

the International Labour Organisation],[1] which gave birth to the idea that there should be transparency and participation before major projects get under way in areas that will affect indigenous groups. So, we did a lot of work on rights education and capacity-building.

Alongside that, we worked closely with national NGOs and looked for advocacy opportunities in Ecuador or the US. Some of the more successful efforts were getting the Ecuadorian Congress involved and educating political representatives at the Ecuadorian-level about certain constitutional rights – economic and social – of which they were ignorant. We brought them out and showed them the impacts of the oil company.

More broadly, we helped to organise the network of settler communities to give them an organised voice on issues of oil and development. The organisation has gradually become more independent. We helped train them to do simple observation and recording and some very simple water tests to look for damage from oil not only for Texaco, but the many other new oil companies coming in. We were then able quickly to draw attention to oil spills or emissions from oil companies. We also worked very closely with the local media: a very useful way of raising awareness in the public generally, especially in the Amazon, but even at the national level. Newspapers started carrying stories. All those sorts of things were tied, in some way, to the lawsuit, but also independent.

BOX 2 - PARTICIPATION AND PROTEST RIGHTS OF INDIGENOUS GROUPS

The Sarayacu community of Pastaza province, Ecuador, faced violent government repression during protests over new oil drilling. Over 5,000 people were arrested and troops shot at protestors and prevented food and medicine reaching them. The Inter-American Commission, after receiving an urgent submission from Centro de Derechos Economicos y Sociales,[2] ordered in May 2003 that the offenders be prosecuted and the governments take all the necessary steps to protect the community and its leaders[3].

How did you analyse the situation in human rights terms?

In 1994, we published a report, including a scientific study, showing increased risk of cancer from exposure to oil and a legal analysis demonstrating human rights violations. The violations analysis was very conservative. At that time, economic and social rights issues had a lower profile, even in Ecuador, where they are contained in the Constitution, and, since the report was aimed at a US audience, US media and others with influence on oil issues, we tried to find violations that paralleled traditional civil and political rights, so called 'negative rights', those elements of economic and social rights that were not going to raise questions about resources or whether it was an appropriate issue to be handled by courts.

On that basis, we looked at whether the Government was poisoning the water directly through its control of the state oil company, PetroEcuador. We linked contaminated drinking water to the right to life, right to health and right to environment under the San Salvador

1 Convention No.169 of the International Labour Organisation, the *Indigenous and Tribal Peoples Convention*, 27 June 1989, in force 5 September 1991, (1989) 28 I L M 1382.
2 See letter to Commission at *http://icci.nativeweb.org/levantamiento2001/taiana.html*.
3 See the community's website: *www.sarayacu.com/*

protocol that the Government had recently ratified[4]. As a second issue, we claimed the Government violated the duty to protect the rights of these people, which was violated by not regulating the private corporations like Texaco. As a third violation, we looked at procedural issues, the right to information and to participation in the oversight and decisions about the oil industry, using ILO Convention 169, the *Rio Declaration on Environment and Development* and other human rights intruments.

We didn't talk about, for example, the fact that these communities had no access to basic health facilities. We didn't look at the question of resource distribution, that the community bears the cost of the oil, but receives none of the benefits, or even discrimination, not even land rights or cultural issues. We were trying to carve out a narrow set of rights as a first effort. It seems obvious that people have a right to clean drinking water, and, at the very least, the Government should not be poisoning their water. People can at least tick that much off as a right. At the same time, people would have to accept the idea that there is no civil and political right to clean water; so there must be economic and social rights.

We were immediately confronted, though, with whether we should be focusing on Texaco or the Government. Addressing non-state actors is a whole other leap under current human rights instruments. We had tried to focus on the Government's responsibilities, keeping it as close to the traditional human rights model, to create legitimacy for economic and social rights. But that was a very contentious issue with some local organisations. Texaco has done a lot of damage, and there was understandably some feeling that this was a typical instance of a Northern organisation coming down and protecting the multinational and blaming the poor Ecuadorian Government. That underscores some of the shortcomings of a traditional human rights approach – particularly in the field of economic and social rights – if it's going to be limited just to state actors.

How did you hold Texaco responsible under international law?

Texaco has the obligation not to poison people's water; so, Texaco violated that basic level of respect. Also, a company like Texaco is so intertwined with governmental functions. Texaco really was determining the oil policy of the Government and had a lot to do with how the oil resources were distributed. Oil resources are 50% of the budget in Ecuador! Oil companies more recently have been involved in building schools and funding them. Some territory people will go to the oil companies to get goods and services before they go to the Government. Our approach was to argue that, in human rights law, all actors, both non-state and state, have some obligations under human rights treaties, including corporations, especially when they act in a manner similar to the Government.

How did you develop your legal strategies? Did you bring cases in Ecuador?

We didn't have a legal strategy at that time as much as a political activism strategy. We were working with these lawyers to bring this lawsuit against Texaco. The lawsuit had many benefits in providing a focus for campaigns and raising awareness, but it risked leaving the activist thrust in the hands of foreign lawyers and in taking pressure off the local court system. We saw it as important to also push local initiatives, including domestic lawsuits because it is a way of educating judges and holding the local judiciary accountable for economic and

4 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov 17, 1988, OASTS No. 69 (1988) 28 ILM 156 (1989), *entered into force* Nov 16, 1999.

social rights. It is also a little more concrete in many cases. In Ecuador, there are rights in the Constitution.

So, with a small indigenous community, we brought a case in Ecuador on the right to participation. One of the tactics of the oil companies was to divide the communities. Instead of working with the organised group, they would negotiate deals separately. We brought the lawsuit against another multinational corporation, ARCO, based on ILO Convention 169 and the Constitution, and we won. The court said that oil companies could not negotiate separate deals with the community without going through the National Indigenous Federation. Not only was the case groundbreaking legally, it galvanised these communities. There was a lot of discussion about the lawsuit. There were about 400 or 500 affected community members who marched for a day and arrived at the courthouse to present the lawsuit.

Thus, the way we came to a legal strategy was opportunistic; once we've set up the campaign, we try to think if there is a legal angle.

We also brought some cases that lost at the local level on the right to health concerning cuts to the health budget. We figured that, even if we lost, it would be a way to create a national dialogue, and it did do that. Then we brought the case to the Organisation of American States, where it's still sitting. [See Box 3.] This is a very good case because it also creates a dialogue at the Inter-American Commission.

BOX 3 - CHALLENGING CUTS TO THE HEALTH BUDGET

From 1990 to 1998, the health share of the Ecuador budget went from 8% to 2%. Debt payment or payment on debt interest went from 12% to 50% in the same years. So we relied on the Constitution, which explicitly says you cannot cut the health budget, and the health budget must rise with the increase in GDP. So, there were two very clear-cut health violations there.

We also added that debt servicing should not be considered an extreme event to justify budget cuts, and we used the yearly UN Commission on Human Rights resolution, which stated that debt servicing cannot supersede the right to health. We also relied on the right to life: a certain percentage of people would die each year because of these health cuts.

But the courts didn't understand it. Their response was on the lines that, if the Government presented the budget procedurally correctly, it is a legal budget. So the Centre for Economic and Social Rights took the case to the Inter-American Commission on Human Rights, where it is waiting to be heard.

Chris Jochnick

BOX 4 - ESC RIGHTS IN THE AMERICAS

The Inter-American Commission of Human Rights and Court of Human Rights have gradually addressed ESC Rights claims. The Commission condemned, in the 1977 Aché case, the denial of health services to Indigenous people and the failure of Brazil to prevent disease affecting the Yanomani Indians in the *1985 Yanomani case*. More recently the Court found that Panama unjustly dismissed striking workers, Guatemala violated the right to life of street children by denying them the basic necessities and Nicaragua was obliged to officially recognise and demarcate the lands of Indigenous people on account of their right to property and judicial protection. See *Tara Melish, Protecting Economic, Social and Cultural Rights in the Inter-American System: A Manual on Presenting Claims (CDES, 2002)*. Available at *www.cdes.org*

How would you evaluate the efforts of yourselves and others in fighting oil pollution?

Well, Texaco is a big issue. We were one tiny piece of a broader national and international campaign. On the question of economic and social rights relating to oil and the oil industry in Ecuador, I believe we had a big impact. We created a legal precedent in the national courts with this decision against ARCO which has survived. Our initial report in '93 was one of the first explicitly economic and social rights reports to deal with issues of health and the health of the environment, and we helped many groups with their legal arguments.

In terms of public education about these issues, I think, we had an impact in raising the profile of some of these issues. Rights gave the affected people a hook with certain audiences like the Congress and the national media in Ecuador and the US, the World Bank and the Commission of the Organisation of American States.

Our work, human rights retoric provided a language that helped with public awareness, with mobilising. The right to a healthy environment was a concept that could bring together a lot of different factions: indigenous groups, environmentalists, development organisations, colonists, lawyers and even judges.

The legal actions were also helpful in getting people to talk about it. If people feel like there's something concrete happening, they are more willing to come to events, be educated, bring others and do something.

After a decade, has the drinking water quality improved?

Actually, mobilisation and cases definitely had an impact on industry behaviour and government oversight. There are laws now providing for stronger oversight; the public regulatory bodies have more resources and are more effective. Companies come down, and they don't want to be like Texaco; they don't want to risk what Texaco has suffered in terms of its image and various legal and political problems.

The role of economic and social rights should not be exaggerated, because there were many different and effective groups, particularly indigenous groups. Things have changed, and, while there are still problems with contamination, there have been fewer massive dumpings

of waste without public awareness of it. Of course, there are a lot of other hotly debated issues, including roads into protected areas, but companies rarely go into indigenous communities without at least discussing it with them.

What have been the major lessons learned?

Lawyers bringing cases in front of these international bodies are not going to be as effective on the ground in terms of impacting things in a country unless there is a much larger effort linked to it. Sending a decision to a government or even to the press is a very limited way of effecting change. It may have an impact, particularly in creating valuable precedents, but, in terms of promoting the two other prongs of this work – education and mobilisation – and getting impact on the ground, you need local action.

We fell into this error. We brought a submission to the Committee on the Rights of the Child when they were looking at Ecuador. We got a very good decision from the Committee, but then there was no follow-up from the local organisations. We provided some information to the local groups, but, really, you would have had to have done a lot more work in terms of educating them about the process.

But there's so much potential from some of these decisions. The Government was embarrassed by that report, and it would have proved effective if the groups had organised around it. But these groups have really limited resources and have so much on their plates that they can't do this sort of follow-through that needs to be done. But they have to be brought in from the beginning and take some ownership of the process and push it along.

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FURTHER READING

Chris Jochnick, *Promoting Economic, Social and Cultural Rights, a Case Study: Communities, Rights and Petroleum in the Ecuadorian Amazon*.

9 US

THE ROLE OF CIVIL AND POLITICAL RIGHTS

The US is a paradox in social rights litigation. Outright official hostility to ESC rights has meant a dearth of constitutional recognition, except for a few states. [See Box 3.] Yet, an active legal culture has resulted in extensive legal action to exhaust fully the potential of existing rights.

Relying on civil and political rights and the right to non-discrimination, advocates have creatively challenged prison conditions, the denial of social security, the criminalisation of homelessness, and segregation in education and housing. In the famous *Brown v Board of Education* case, the Supreme Court declared the educational segregation of Afro-Americans a violation of the equal protection clause.[1]

In this chapter, Maria Foscarinis of the National Center on Homelessness and Poverty discusses various strategies – from law reform to litigation to rights education – that have been used with some success to protect the various social rights of the homeless while Andrew Scherer describes efforts to secure a right to legal assistance in eviction cases. In a climate of welfare cutbacks and hostility to the poor, litigation has clearly offered some results, but, as Professor Schwarz noted in an interview, the lack of recognition of social rights in the US complicates any such efforts.

MARIA FOSCARINIS - INTERVIEW

Maria Foscarinis is founder and executive director of the National Law Center on Homelessness & Poverty, established in 1989 as the legal arm of a nationwide effort to end homelessness.

What is the extent of homelessness in the US?

Homelessness in the US has grown dramatically in the past two decades in numbers and types of people affected. We now see many more homeless families, younger people and children. Estimates are that two to three million people are homeless every year, and, on any given night, this may be 800,000 people. Then there is a much larger group of people who live in very poor housing conditions, about 12.6 million people.

1 *Brown v Board of Education*, 347 U.S. 483 (1954); see summary in COHRE, '50 Leading Cases on Economic, Social and Cultural Rights' 2003, available at *www.cohre.org/litigation*.

What do you identify as the main causes of homelessness?

Most people agree that the lack of affordable housing is a common cause. There has been a huge loss of affordable housing over the past 20 years because of funding cuts and changes in the private housing market. There are other causes, such as inadequate income, the flip side of the lack of housing, because of low wages, especially in minimum wage jobs and jobs for unskilled labour. There's a lack of health care, especially mental health care; a significant number of homeless people are mentally ill. Substance abuse treatment programmes are also lacking.

How have you attempted to tackle homelessness issues?

In a number of different ways. At our center, we focus on legal strategies, but in a broad sense, since we find that to be the most effective and because there is a lack of laws protecting the interests of homeless people. We have worked with the US Congress, state congresses and local authorities to get new laws passed to protect rights of homeless people, to provide benefits and to help them out of homelessness. Our goal is to prevent and end homelessness. We also work within the regulatory process, primarily the federal agencies, to encourage them to issue rules or directives that provide aid and resources to homeless people.

We pursue litigation, and that has been a necessary tactic, because getting a law passed does not necessarily mean that anything is going to happen. Often, you have to go to court to enforce it. And sometimes we've gone repeatedly back to court to enforce a court order. These different strategies work together. We also have a large outreach component in our work to help people in the field and on the frontline understand the rights homeless people have and work with them to get those rights enforced.

Getting a law passed does not necessarily mean that anything is going to happen. You have to go to court to enforce it. And sometimes we've gone repeatedly back to court to enforce a court order.

Which litigation attempts have been successful?

We've had a number of different types of litigation. Sometimes, it is straightforward enforcement. For example, we initially lobbied for the first piece of federal legislation to address homelessness, the McKinney Homeless Assistance Act. I worked closely with Mitch Snyder, a controversial and colourful advocate who camped out on the street living as a homeless person that year as protest until the law passed. When the law was passed, the federal agencies entrusted to implement the act were reluctant to implement it, even though there were timelines in the statute. So we initiated a few quick lawsuits in the beginning just to get the process started.

Another case was against five federal agencies to enforce their duty under the McKinney Assistance Act[2] to make property that they own available for free to groups that provide services to homeless people. The Federal Government owns many buildings that they are not always using. The law is complicated, but it says groups providing services to the homeless have priority. We were able to present a strong argument because we made sure that language in the statute was mandatory. The judge agreed with us, and we have had to keep going back to court, about five times over the past ten years, to help some service providers who wanted to use these buildings.

2 42 U.S.C. Sec. 11301 *et seq.* (2003)

BOX 1 - FIGHTING CRIMINALISATION OF THE HOMELESS[3]

Six thousand homeless people in Miami launched a class action alleging that police arrests and destruction of their property interfered with 'life-sustaining activities' such as sleeping and eating. The evidence revealed a systematic police practice of arresting homeless individuals for harmless activity, destroying their personal property and even eliminating food sources to prevent homeless individuals congregating. Justice Atkins, in a sensitive judgment, found the police actions unconstitutional because they constituted cruel and unusual punishment, violated due process rights and were violations of privacy and the right to travel under the equal protection clause. A settlement was eventually reached with the City of Miami whereby police cannot arrest a homeless individual if no alternative accommodation is available.

And have you seen measurable change in the activity of the federal agencies?

We have seen measurable change, but not nearly enough. The agencies have tried to get the law changed or repealed, and they have been to Congress. But we have opposed these efforts successfully so far. If they don't comply, they come up with novel interpretations of the law, and we have to go back to court to try to fight that.

One of your aims is to prevent homelessness, how have you used litigation to accomplish this?

We have placed a strong focus on the education of homeless children because education is essential to break the cycle of homelessness and poverty. Homeless children are often not considered residents of any school district because they don't have a permanent address. In addition, there are other things, like lost documents, lost records, no transportation, and the kids moving around a lot. There is a specific part of the McKinney Act[4] that addresses this and provides specific remedies and rights to homeless kids. We launched a suit to enforce this obligation on state and local government in the District of Columbia ten years ago. The case was an odyssey in itself. Eventually, the US Court of Appeals said that homeless children have an enforceable right to an education, and then the lower level court ordered the District of Columbia to take specific actions, such as providing tokens to make sure homeless kids can go to school.

But the District of Columbia resented being told by a federal court what to do and gave back the federal money rather than comply with the law. And this is an example of an unintended result. However, it was a valuable suit because the precedent we set was very important outside the District of Columbia, because it is a Federal Appeals Court, and it's judgments are persuasive authority in other US states, for example a case being brought in Chicago in state court in Illinois relied on our case to support the holding that this law was enforceable. And we have used it since then in other parts of the country. And the District, for a while at least, continued to comply with the court order even though it wasn't getting any money.

And then there's another, more recent issue: the criminalisation of homelessness. The trend in the cities around the country to pass laws which make it a crime to sleep in public or to sit down on public sidewalks, things that people

3 *Pottinger v City of Miami*, 810 F. Supp. 1551 (1992), 16 November 1992.
4 42 U.S.C. Secs. 11431 et seq. (2003)

who are homeless end up having to do because they have no place else to be. We have challenged these laws, generally on constitutional grounds, and some of it has been successful. [See Box 1.]

One of the constitutional arguments that has been successful in some courts is that these kinds of laws violate the Eighth Amendment to the Constitution, which prohibits cruel and unusual punishment. But it is important to have a very specific set of facts for this and a certain type of law, one that prohibits sleeping in any public place. You can make a good argument that, by prohibiting sleeping, a necessary life activity, you are essentially prohibiting people from existing in the city, and that is penalising involuntary and otherwise innocent conduct. And there are some Supreme Court cases that stand for opposition of this cruel and unusual punishment, as well as right to travel and freedom of movement. Sometimes, these are known also as status offences; and in general you can't just punish someone criminally just based on their status. Not all cases have been successful. In some, the law is not all-encompassing; it may only prohibit sleeping in some parts of the city at certain times, for example.

There are also some due process arguments because some of these laws can be very vague. In one case in the Supreme Court that we participated in involving loitering on the street. The City of Chicago made it a crime to stand on a public street with no apparent purpose! – the Supreme Court actually struck it down saying that it violated the due process clause.

Do you work with individual clients or rely on the public interest?

We do both. All our litigation aims at systemic reform; but in bringing these cases we represent individual homeless people as plaintiffs. We may also represent organisations as plaintiffs in these cases. But we don't do individual representation; we don't represent individuals outside the context of systemic reform.

How do you acquire standing before the courts so as to bring public interest claims?

Its getting harder and harder. An organisation can have standing to bring a suit challenging laws or practices that harm homeless people if the organization can show harm to its purpose or work, and we have been able successfully to establish standing in such cases. Also, even with an individual claimant you can still accomplish systemic impact. If you are suing a federal agency because one person has not received their benefits then a favourable ruling or a favourable settlement can be used to effect systemic impact.

How responsive have local officials been to these legal challenges?

It depends. Following a strong court ruling in *Pottinger v Miami,* the county government decided to impose a meal tax, a 0.5% meal tax on restaurants that grossed over a certain amount of money a year. [For background, see Box 1.] It was a dedicated tax: all the money raised from it would go towards supporting programmes to help homeless people, ranging from emergency relief to more permanent housing to job assistance to substance abuse. So that's a fairly dramatic example of governments doing something potentially constructive in response. In other cases, officials have responded by simply amending their laws to make them litigation proof. But, in between, there are some local governments that have undertaken some more constructive things.

What are the methods you've found to make public officials more sensitive to your arguments?

A number of different approaches, depending on the issue and the public official. With regard to the criminalisation issue, we have been working to promote the idea that the interests of the public officials and the business groups – who pressure them to arrest homeless persons – are the same as the advocates; no one wants people to be living on the street, and it costs money to arrest and imprison homeless people. We have been able to get police on our side in some cases because they realise that this is a waste of their time. They keep arresting the same people, and they realise that it's not a solution.

We did bring a case against the Social Security Administration some years ago that was not successful in court. It was a suit to require the Social Security Administration to do outreach and take certain other steps to make it easier for homeless people who are disabled to get supplemental security income benefits, which are a type of disability benefit for poor people. And a huge number of homeless people are most likely eligible for these benefits. Yet, very few of them are receiving these benefits. The Court denied us standing, but the Social Security Administration then decided to fund some demonstration programmes to do outreach to homeless people. And then Congress last year required the Social Security Administration to make a plan to increase access to benefits to homeless people.

BOX 2 - ADEQUATE FINANCING OF EDUCATION[3]

The Campaign for Fiscal Equity alleged that the State of New York's education financing scheme failed to provide public [government] school students an opportunity to obtain a sound basic education. Property-rich districts were able to raise greater revenue for schooling than were property-poor districts. The court found that there was a sustainable claim that the state had failed its constitutional duty to 'provide for the maintenance and support of a system . . . wherein all children may be educated'.

What have been your principle obstacles in using litigation strategies?

The main problem is that there's not a lot of law. In many ways, it's a sort of do-it-yourself kind of effort to come up with a law. Then you have something to litigate with. It's a sort of back and forth. There is also the fact that the people we're representing are not likely to be people who are in a position just to walk in the door of our office and say, 'I have this case. Can you please take it on?'.

You raised the issue before about the problem with orders not being implemented. Do you have a strategy for monitoring court victories and legislative victories?

If the goal is actually to get some concrete benefits for real people on the ground, you really have to be persistent; you have to monitor and do a lot of follow-up. And so we work with a network of organisations around the country that are direct service providers or other sorts of grassroots advocates, and we rely on them to

3 See website of Campaign for Fiscal Equity: *http://www.cfequity.org/*.

know whether laws are being implemented or court orders are being implemented. It's a two-way process. We do outreach to let people know that this law exists. At the same time, by educating people about the law, we can then ask people for information about violations of the law, and then we can do something about it.

How do you see the litigation strategies as part of such an empowering strategy?

I think litigation strategies can be very important to this, but I mean litigation strategies, not just litigation. Litigation strategies include outreach to service providers, like 'know your rights' campaigns, informing people about their rights. We've gotten very good feedback from people about it. That is something targeted at service providers. Those are the people you can most easily reach. But it's also intended to reach their clients who are homeless people themselves. Sometimes, we do get feedback from homeless people themselves. We've had examples of families in shelters not being able to get the kids into school, and they take our fact sheet into the school, and they say, 'look, the national law center says this', and they're able to get the kids into school. So, that's, I think, that's empowering.

ANDREW SCHERER - INTERVIEW

Andrew Scherer is Executive Director of Legal Services for New York City.

One of the main obstacles vulnerable and marginalized groups face in the struggle to enforce their ESC rights in courts is access to legal aid. Andrew Scherer describes how New York legal advocates have fought for a right to legal aid in the case of forced evictions:

For over 15 years, advocates in New York City have litigated and advocated for a constitutional right to counsel for tenants facing eviction. While the courts have yet to recognize legal assistance in the face of eviction as a right, advocacy efforts have led to greatly expanded government funded programs to provide legal assistance to the poor in eviction cases.

In the late 1980's, as a combination of abandonment and decay of low-income housing in some areas and a rising real estate market driving up rents in other areas, more and more of New York City's poor were squeezed out of their homes. The city was, for the first time since the Great Depression of the 1930's, confronted with enormous growth in the numbers of homeless families and individuals. New York City's Housing Court, the forum in which eviction cases are heard, was, and continues to be, a confusing, chaotic environment dominated by lawyers for the landlords in which over 300,000 cases are heard each year and over 100,000 judgments for eviction are issued. A fair amount of tenant-protection legislation exists in New York City – limiting rent increases, mandating minimal housing quality standards and requiring specific procedures before a tenant can be evicted from her home. These rights, if asserted, could thwart eviction. Yet, with the vast majority of tenants unable to afford or obtain legal representation, tenants

usually confront eviction without an opportunity to assert their defenses.

Against this backdrop, advocates in New York City have argued for years in the courts and in public policy arenas that, under the due process clause of the United States Constitution, there is a right to counsel for tenants facing eviction. The right to Due Process of Law under the Fourteenth Amendment to the U.S. Constitution requires adequate notice and a meaning opportunity to be heard prior to a deprivation of property. The loss of one's home is a devastating deprivation of property – most likely to result in homelessness in a city with virtually no affordable housing left. Without counsel in the complex, highly technical, heavily regulated process for eviction, a tenant is denied a meaningful opportunity to be heard. Attorneys in non-profit legal assistance organizations as well as advocates in housing and community groups have over the years, helped scores of unrepresented tenants facing eviction to prepare papers to ask the courts to assign them counsel. A dozen or so of these requests have been granted. Appeals have been taken of denials. One case we brought in the mid-1990's – Donaldson v. State of New York – sought a broad-based court order declaring that tenants facing eviction had a right to have counsel assigned if they could not otherwise afford or obtain counsel.

While the courts have thus far avoided declaring a broad-based right to counsel for tenants who face eviction, the Donaldson case (which was ultimately dismissed as moot when the plaintiffs obtained counsel), the accretion of individual lower court rulings assigning counsel, the steady growth in homelessness, and the pressure of the advocacy community's efforts have led to vast expansion in New York City government-funding of programs to provide legal assistance to the poor in eviction cases. The expansion of government-funded programs helps, but still leaves far too many low-income households facing eviction and homelessness without a meaningful opportunity to defend themselves. So, the core advocacy goal – a right to counsel for tenants facing eviction – remains very much part of the agenda.

...the accretion of individual lower court rulings assigning counsel, the steady growth in homelessness, and the pressure of the advocacy community's efforts have led to vast expansion in New York City government-funding of programs to provide legal assistance to the poor in eviction cases.

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FURTHER READING

Maria Foscarinis, 'Homelessness and Human Rights: Towards an Integrated Strategy' (2000) 19 S*t Louis University Public Law Review 327, 353.*

AFRICA

10 SOUTH AFRICA

POSITIVE OBLIGATIONS AND THE RIGHT TO HOUSING

South Africa is often viewed as the litmus test for the judicial enforcement of ESC rights. This view obviously ignores decades of litigation in other jurisdictions. But the express recognition of justiciable socio-economic rights in the Constitution, the historical and active use of legal action in the courts by civil society and the well-reasoned and high-profile court judgments have made South Africa a good illustration of both the possibilities and the difficulties of social justice litigation.

In the *Grootboom* case, the Constitutional Court laid down the principles for the interpretation of socio-economic rights. The 'Grootboom' community of 900 adults, evicted from private property and living on the edge of a sports field in appalling conditions, launched a legal action for immediate relief when winter rains made their temporary shelter unsustainable. The court found there was no immediate entitlement to housing, but that the local, provincial and national governments had violated the right to housing for failing progressively to provide for emergency housing relief. [See Box 1.]

But, in the end, it went to their [the court's] questions of what is reasonable under a constitution, a constitution that clearly directs that sufficient priority be given to dealing with the consequences of past discrimination and poverty.
Geoff Budlender

COHRE visited Cape Town and spoke to the leading lawyers in the case and to members of the Grootboom community to evaluate their experiences. While the judgment has provided the foundation for a swath of subsequent cases, the decision remains largely unimplemented in terms of the development of emergency housing relief programmes.[1] Those involved attribute this to the deficiencies in the remedies – the various government authorities are not obliged to report back to the court, and there are no time-frames – and the absence of a supportive housing rights movement.

1 Kameshni Pillay, 'Implementing Grootboom: Supervision Needed', *ESR Review*, Vol. 3, No. 1, July 2002, University of the Western Cape, Bellville, Cape Town.

GEOFF BUDLENDER - INTERVIEW

Geoff Budlender is Director of the Constitutional Litigation Unit at the Legal Resources Centre and has been Visiting Professor of Law, University of the Witwatersrand. He represented the interveners in the Grootboom case and has appeared in more than ten other leading social and economic rights cases.

How have you managed to convince a sceptical judiciary to take a more progressive approach to ESC rights?

I think what makes all the difference is what is in our Constitution. The rights are very explicit. The Constitutional Court said from the outset, when it had to certify the Constitution, that these rights are legal and justiciable rights. So, it has not been a matter of convincing them that socio-economic rights are enforceable. It has been a matter of giving meaning and texture to the rights, which is very difficult. It is difficult particularly in relation to positive obligations.

But judges are judges. They read words. Words have meaning. We haven't had to invent the meaning. There was a clear and conscious political decision at the adoption of the Constitution that we were going to have economic and social rights; so, it is too late to argue anything else. We are then met with arguments about interference with the role of the executive and the separation of powers, and that's where the real argument takes place: about where the role of the judiciary starts and stops.

In the TAC (Treatment Action Campaign) case, we were able to show an egregious disregard for people's rights, an obstinacy and obduracy, which couldn't be justified on any basis. [See Chapter 11]. The *Grootboom* case was more difficult. There, the court was trying to give some texture to the words 'take reasonable measures'. The international jurisprudence was quite helpful in showing that the meaning we were contending for was not ludicrous. That clearly played a role; the General Comments of the Committee on Economic, Social and Cultural Rights interested the court. But, in the end, it went to their [the court's] questions of what is reasonable under a constitution, a constitution that clearly directs that sufficient priority be given to dealing with the consequences of past discrimination and poverty.

Is the Grootboom case a good reflection of the justiciability of ESC rights in terms of law and remedy?

I can only give a mixed report. I work with the judgment daily, and I think it is very carefully and skilfully written. It has had a real impact on official housing policy and on the way in which the courts deal with evictions. But it has a weakness. It does not deal with the question of what you can do if you are a person who has no home, and you are left out in the cold. Is there any direct remedy provided under the Constitution? Can you get a direct benefit by going to court? The judgment is quite weak on this point. All you are entitled to is a reasonable programme which will give you access within a reasonable period. It does not give you a directly enforceable right as an individual.

What key obstacles do you continue to face?

The first obstacle is trying to find an appropriate remedy. The second is that there is still a feeling on the part of some judges that economic and social rights are somehow different from other rights. One has to keep on saying to the judges, 'no, these are rights just like all the others'. The difficult part is the positive obligations, the duty to fulfil the rights. How do you give meaning to those obligations? But that's a difficulty that also arises with positive duties in respect of the traditional civil and political rights, whether the right to fair trial, the right to vote, the right to security and physical integrity: they all create positive obligations.

We have to prevent judges from rolling their eyes and just dismissing the rights. When you bring a case and argue that social and economic rights are involved, they often get very uncomfortable and try to decide the case on another basis. Getting the judges, even senior judges, to see there is no 'in-principle' difference between the various rights, I think, is the hardest part in the courts.

BOX 1 - THE GROOTBOOM JUDGMENT (EXCERPTS)[2]

Justice Yacoob ... This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the State to act positively to ameliorate these conditions. The obligation is to provide access to housing, health care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right that this be done.

Water and sanitation block provided by local authority to the community during Court proceedings.

I am conscious that it is an extremely difficult task for the State to meet these obligation in the conditions that prevail in our country. This is recognised by the Constitution, which expressly provides that the State is not obliged to go beyond available resources or to realise these rights immediately. I stress, however, despite all these qualifications, these are rights, and the Constitution obliges to give effect to them. This is an obligation that courts can and, in appropriate circumstances, must enforce.

Neither Section 26 [right to housing] nor Section 29 [right of children to shelter] entitles the respondents to claim shelter or housing immediately upon demand. . . . However, Section 26 does oblige the State to devise and implement a coherent, coordinated programme designed to meet its Section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought fell short . . . . it failed to provide any form of relief to those desperately in need of access to housing.

2 See paragraphs 93-95, *Government of the Republic of South Africa and & Others v Grootboom and Others*, 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

What role do litigation and non-litigation strategies each play?

Well, I think, one of the things I've learnt is the critical connection between the litigation and social mobilisation. The story of the TAC case is one of strategically chosen litigation, which, at the same time, is linked to a great deal of mobilisation in the streets, politically in the Parliament, with the churches, trade unions, etc., and that makes the legal work quite different. [See Chapter 11.] It gives the legal work a significant impact that isn't possible otherwise.

One compares that with the *Grootboom* case, where there was no social movement behind the judgment, and, as a result, the judgment has not been effectively enforced. But, at the same time, *Grootboom* created a very important legal principle that all the other cases have built on, and it is having a significant impact on housing issues.

What has been the response of courts to 'negative obligation' cases?

Well, the negative cases that we deal with are mainly eviction cases or the cutting off of services such as water and electricity, and they, too, raise resource questions. But the courts seem less troubled by them because it is familiar territory. There have always been cases brought before them to stop evictions or restore services that have already been provided. All you are doing, as far as the judges are concerned, is putting one additional factor in the pot, namely, a constitutional right.

What have been the key lessons?

I have learnt three critical things. Firstly, the duty progressively to realise socio-economic rights is absolutely the key. It stops backsliding by governments. Secondly, if governments take reasonable measures, courts will have the necessary guidance; they will neither take over from the executive, nor do nothing. Courts understand the principle of reasonableness; they use it every day in many contexts. Thirdly, unpicking the various obligations of respect-protect-fulfil is very important, as you can make something useful of each one of them.

It is important to have a litigation strategy. The whole strategy is to open the door gradually and then expand. If you aim for too much, you end up going backwards. You'll have five *Soobromoney's*, and that will be the end of economic and social rights. You'll have to wait a decade. [In the *Soobromoney* case, the court, faced with a demand for access to a limited number of kidney dialysis machines, simply dismissed the case on the basis of lack of available resources.[3] – *Ed*.]

What is the potential for ESC rights adjudication in South Africa?

I think we are just beginning to see the potential. We have had social and economic rights since 1996, a few since 1994. In the Constitutional Court, there have only been three cases where that has been the core question which is in issue. I think the success of the TAC case and the usefulness of that case for social movements will see more energy being released into socio-economic rights litigation. There is now a great deal more interest in trying to make these rights real. Many people see the TAC case as a model in a way which has a real impact on people's lives. The TAC case has literally saved the lives of very many thousands of kids. That destroys the arguments of those who say these are just paper rights and have no value.

3 *Soobroamoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

The focus of our future legal strategy will have to be to develop three types of cases. First, to infuse the principle of equality with progressive realisation, so you can only equalise up and not down. Second, use the principle of legitimate expectation in the ESC rights context; when a government promises something, it should be held to account. Third, develop the entitlement to direct benefits from the rights, so there is some definable and directly enforceable aspect to ESC rights.

[In] the Grootboom case, . . . there was no social movement behind the judgment, and, as a result, the judgment has not been effectively enforced. But, at the same time, Grootboom created a very important legal principle that all the other cases have built on ...

BOX 2 - POST-GROOTBOOM CASES

Geoff Budlender has litigated in a range of social rights cases in South Africa, including the TAC case [see Chapter 11] *and*:

Richtersveld: Restitution of land annexed for mining in the 1920s to a community in the far north-west of South Africa.[4]

Ndlovu: The constitutional and legislative prohibition on forced evictions applies to all evictions, including tenancies and mortgages.[5]

Kyalami: State obligations to provide emergency housing relief (*Grootboom*) override the concerns of private property owners that the temporary resettlement of flood victims in a locality would threaten property values.[6]

Rudolph: Court refused eviction order against homeless on vacant land on procedural grounds and declared the City of Cape Town in breach of its *Grootboom* obligations, and ordered it to remedy the breach and report to the court.[7]

For more information see www.lrc.org.za/News/judgements.asp

4 *Richtersveld v Alexkor Ltd and Government of South Africa*, 2003 (Supreme Court of Appeal).
5 *Ndlovu v Ngcobo,* 2002 (High Court)
6 *Minister of Public Works v Kyalami*, 2001 (Constitutional Court).
7 *City of Cape Town v Rudolph* (High Court, 2003).

SANDY LIEBENBERG - INTERVIEW

Sandy Liebenberg is Senior Researcher at the Socio-Economic Rights Project, Community Law Centre. She has written extensively on the judicial enforcement of social rights, and the Centre has intervened as amicus curiae[8] *in two of the leading cases on socio-economic rights in South Africa.*

How did the Community Law Centre become involved in the Grootboom case?

It was a fortuitous situation. An African National Congress councillor had approached a private lawyer to help the community. The lawyer got funding from the European Union Litigation Fund, but, when they went to the High Court, they asked us for advice, and we gave input on the preparation of the arguments for the case. When the State appealed to the Constitutional Court, our centre intervened jointly with the South African Human Rights Commission as *amici curiae* in the case. Geoff Budlender of the Legal Resources Centre did a wonderful job representing us and presenting oral argument to the court on our behalf. We have been involved in monitoring the implementation of the court's order and have completed a major research project on the implications of the *Grootboom* case for social transformation in South Africa. These papers, including a study on the implementation of the *Grootboom* judgment, have been published in the journal, *Law, Democracy and Development*, and will also shortly be available on our project's website, *www.communitylawcentre/org/za/ser/index/php*

What were the most useful legal arguments?

The High Court had decided the case on the basis of the right of children to shelter in Section 28 of the Constitution. In our *amicus* brief, we argued that the case should also be decided on the basis of Section 26, the right of everyone (including adults) to have access to adequate housing. The Constitutional Court accepted this argument, and a positive judgment was given in terms of Section 26. Through utilising the state reports to the Human Rights Commission on their progress in realising socio-economic rights, we were also able to show that none of the relevant government departments had a programme catering for people, like the Grootboom community, who find themselves in situations of urgent need.

What was the impact of the action on the situation of the claimants?

The Grootboom community have won a degree of temporary security of tenure around a sports field in Wallacedene and some very basic services. Their situation is far from ideal, but at least they do not face imminent eviction and have access to water and toilets. They have been incorporated into the local authority's housing plan for the area and should be allocated permanent accommodation within the next two years.

In terms of the broader declaratory order of the Constitutional Court, the State is obliged to adopt reasonable measures to provide relief for groups in desperate need and living in intolerable conditions. The State has been somewhat tardy in implementing this systemic order. Provinces were required to set aside 0.5 to

8 Friend of the court', one who intervenes independently in a case.

0.75% of their annual budget housing allocation for emergency projects. However, such programmes must be undertaken in terms of existing housing programmes, which have not been designed specifically to address the relevant circumstances envisaged in the *Grootboom* judgment. A promising recent development is that the Housing Department has drafted a programme for housing assistance in situations of exceptional housing urgency. The adoption of this draft policy will go a long way towards meeting the State's obligations in terms of the *Grootboom* judgment. It will also provide a safety net in situations where communities are faced with evictions that will leave them in crisis.

What have been the key lessons?

The slow implementation of the *Grootboom* order is largely a result of a lack of social mobilisation around the case. This can be contrasted with the intensive social mobilisation that occurred around the TAC case. In addition, the order of the court was in the form of a declaration, as opposed to the mandatory orders given in the TAC case. We need to focus much more on what are effective remedies in particular socio-economic rights cases. Sometimes, when the implementation of the order will involve ongoing policy processes over a period of time, it may be more effective for the courts to retain jurisdiction in the case by handing down a supervisory order. This type of order would require the State to report to the court on a periodic basis on what it is doing to implement the order and allow for litigants and civil society organisations to comment on the progress made. The Treatment Action Campaign asked for this type of order in the TAC case, but the court declined to grant it. However, the court left the door open by saying that this type of order is certainly possible if it is deemed appropriate in the particular circumstances of the case.

One of the very useful aspects of the judgments was the right to demand that government formulate a comprehensive, coordinated programme to give effect to socio-economic rights.

While vindicating socio-economic rights as an important objective, it is a mistake to focus only on a positive court result. Litigation and activist strategies need to focus equally on what happens after the judgment to ensure that it is implemented effectively.

It is important not to overemphasise the role of law. You often need a broader political strategy using interdisciplinary networks, like the TAC litigation. [See Chapter 11.] The problem with is there was not a mass movement championing the rights.

In both *Grootboom* and TAC, the Constitutional Court rejected the notion of a minimum core obligation. The jurisprudence is not clear on the circumstances, if any, in which individuals will be entitled to come to court to claim tangible goods and services, e.g., access to food for a starving person. I think this is a matter for concern. While litigation in the public interest is important, it is also important that socio-economic rights offer individuals in desperate need a right to claim basic forms of state assistance. More thought needs to be given on the circumstances in which it is appropriate to seek individual relief in socio-economic rights cases from the courts.

Did the action spur other similar actions or ESC rights activities?

The *Grootboom* and TAC cases have also been a very useful tool for civil society to use in policy and legislative advocacy. It has been used by

We have also got to explore and propose innovative ways to improve the programmes through which socio-economic rights are delivered.

organisations campaigning for the extension of social assistance grants, a national anti-retroviral treatment campaign and the realisation of the right to education, to name a few. One of the very useful aspects of the judgments was the right to demand that government formulate a comprehensive, coordinated programme to give effect to socio-economic rights. Thus, even where it is not possible to give everyone access to the rights immediately, the first step should be to formulate, on a transparent and participatory basis, a plan for the progressive realisation of the rights in question. This promotes accountability and participation by civil society in programmes that are critical to the realisation of socio-economic rights.

There is a common fear that these cases would unfairly increase the resource burden borne by governments? To what extent has this been true?

While socio-economic rights test-cases cannot be used directly to challenge government's resource allocation decisions, the courts accept that their decisions can have budgetary implications. In both *Grootboom* and *TAC*, it was evident that the Government would have to budget more resources than they otherwise would have to give effect to the judgments. However, as in the case of civil and political rights, this is an inevitable by-product of a justiciable Bill of Rights.

In some social sectors in South Africa, it is not so much a problem of a lack of resources, but a lack of capacity to spend resources. Certain departments can't spend their entire budget and are returning money to the Treasury. The problem is often structural: insufficient staff, lack of training and infrastructure, too much bureaucracy, etc. A child support grant of 160 rand per month, for example, is given to the primary caregiver of children living in poverty. However, primary caregivers living in poor communities often can't get access to the official identification documents that are necessary in order to gain access to the grant. As a result, many children suffering severe malnutrition in the rural areas are deprived of a life-saving social assistance grant.

The Constitutional Court in *Grootboom* said it was not enough to have good laws and policies; they must also be reasonably implemented. This poses another challenge to socio-economic rights lawyers and activists. We've got to be able to analyse the real constraints that impede delivery of socio-economic rights: lack of coordinated, intersectoral planning and lack of information, infrastructure and training. We have also got to explore and propose innovative ways to improve the programmes through which socio-economic rights are delivered.

LUCKY - INTERVIEW

Lucky is the community leader in the Grootboom community and was deeply involved in the preparation of the case. In February 2002 we asked him about his perceptions of the case.

How long have you been living in this area?

It is [for] up to eight years I lived inside Mooitrap area [pointing to the old site which theGrootboom community originally occupied in Wallacedene]. But it was flooding and was very bad for the children. So, we decided to move from that land to new land.

But, at that time, we didn't know it was private land. We just see the open space. Some people came to our house and say we don't have permission to stay there, they say this is private land. And they come later, I think it was 8 o'clock in the morning. They just come and bulldoze everything. So we moved onto this sports field.

Did you receive any warning?

Nothing, we just the court papers. But when we ask, 'Why is this short notice; you didn't call us on the meeting or write some letters.' They say, 'You didn't receive papers?' We say, 'No, we didn't receive the papers.'

Why did you bring a legal case to seek relief?

Now, we had a problem because the sports bodies need their place. They said that the community must not throw anything on the sports field. But where can we throw our dirty water? Things are terrible here. So, we found a lawyer, Julian, to take the case to the High Court. The first outcome of the case, they say, was some temporary things: ten sheets each, one door, one window, small one, toilets and the taps. And then the Constitutional Court of South Africa say that they must soon provide land. But we are still waiting for this.

When will you be provided with land?

In the plan, they say they want to start to develop the whole Wallacedene, the great Wallacedene. We are one of the first three. But the first one can take two-three years. So, we are waiting. But we just need the land. So, we can say, 'This is the Grootboom community.'

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c/o Sandy Liebenberg (see above)

FURTHER READING

Geoff Budlender, 'Justiciability of the Right to Housing in South Africa' in Scott. Leckie, *National Perspectives on the Right to Housing*, Kluwer International, 2003, at pp.207 to 220.

Sandra Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems', in Asbjørn Eide, Catarina Krause and Allan Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, I, 4, second revised edition, The Hague, The Netherlands, Kluwer Law International, 2001.

11 SOUTH AFRICA

THE TAC CASES AND THE RIGHT TO MEDICINES

Civil society groups in South African have gained international attention and support in challenging the policy of the South African Government and corporate pricing policies on HIV/AIDS drugs. Among the numerous strategies employed, high-profile health rights litigation has clearly been indispensable in achieving major successes, which have included the halting of corporate challenges to health laws, a huge drop in drug prices, a court ruling that the Government must adopt a reasonable programme for nevirapine, a drug that helps prevent mother-to-child transmissions of HIV, and the gradual, but fragmented introduction of a nevirapine programme.

Only two years ago the idea of the world's major pharmaceutical companies being ready to charge poor countries lower prices for essential drugs looked like an unrealistic idealist's dream. . . . Thirty-nine of the biggest companies were still embroiled in a civil trial to prevent the South African Government from importing cheaper generic drugs to fight HIV/AIDS. But much has changed since the climb-down by the 39 in April 2001 in the wake of worldwide protests.

The Guardian, 26 March 2003

The Treatment Action Campaign (TAC) has been at the forefront of these campaigns. Initially focused on drug pricing by multinationals, the campaign culminated in TAC's intervention in the High Court case *PMA v South Africa* [see Box 1]. Drug companies had challenged the validity of legislation designed to enable the supply of cheaper medicines, arguing that it violated intellectual property rights. But they withdrew from the case before the court pronounced on whether human and health rights took precedence.

A later case, *Minister of Health v TAC*, addressed Government inaction and obfuscation in providing the nevirapine. [See Box 3.] The Constitutional Court ordered that the drug be supplied progressively; yet, implementation has been uneven, sparking protests and civil disobedience campaigns. TAC's Mark Heywood notes that courts will often need to exercise supervisory jurisdiction since the 'shades and speeds of compliance by government with court orders . . . may range from active and vigorous implementation to turgid and tortoise-like.'[1]

1 Mark Heywood, 'Contempt or Compliance?: The *TAC* Case after the Constitutional Ccourt Judgment', *ESR Review*, Vol. 4, No. 1, March 2003.

MARK HEYWOOD - INTERVIEW

Mark Heywood is National Secretary of the Treatment Action Campaign and Head of the AIDS Law Project.

What was the inspiration for the TAC?

Many of us have worked in the HIV field and human rights since the early 1990s. By 1998, it was becoming quite clear that we were no longer dealing with an HIV epidemic; we were dealing with an AIDS epidemic. People who we knew were becoming sick. The death of one person from AIDS was a significant catalyst.

On 10 December 1998, TAC's Zackie Achmat called a one-day fast on the steps of a Cape Town cathedral to highlight issues related to access to treatment. It triggered something. In the following year, we formally launched the TAC with a petition campaign to collect signatures for a medicine, AZT, to prevent mother-to-child transmissions (MTCT) of HIV. We ran a very high-level publicity campaign from January to April 1999, mobilising support for MTCT prevention. It led to strong relationships with trade unions, churches and outspoken AIDS organisations, as well as medical professionals and paediatricians.

Why did you adopt a litigation strategy?

It was intentional. We are fortunate that, in this country, we've got constitutionally entrenched rights of access to health care services. Now, of course, you need litigation to define precisely what that right to health care means. But the meaning of that right is critical for people's rights of access to treatment. Litigation therefore had to be one of our strategies in trying to get better health services, better access to medicines and cheaper medicines.

It's never been our sole strategy. We've used litigation to catalyse research, as an advocacy strategy, as a way of mobilising communities, for public education, and it's been beneficial in all of those respects. Our announcement of our intention to enter the *PMA v South Africa* case as an *amicus curiae* focused the attention of the trade union movement and churches, as well as those who supported the Government legislation. More recently, the MTCT litigation has helped to mobilise and inform the public.

The AIDS Law Project was established in 1993 and has always aspired to do public impact litigation to benefit people with HIV and to set human rights precedents. In 1999, we were involved in a big Constitutional Court case concerning cabin attendants with HIV, and we won.[2] So, we got a very important Constitutional Court judgment on rights to equality for people with HIV.

One of the TAC's objectives was to turn a dry legal contest into a matter about human lives.

2 *Hoffman v South African Airways,* 2000 (11) BCLR 1211 (CC).

BOX 1 - PRICES OF MEDICINES: PMA V SOUTH AFRICA

In a bid to lower the costs of medicines, the South African Government introduced an amendment to the Medicines and Related Substances Control Act, 1965. The amendment encouraged pharmacists to substitute generic off-patent drugs if they were cheaper; it permitted the importation of medicines from countries where multinational companies sold them more cheaply, and, more controversially, it introduced a compulsory licensing system allowing competitors to apply to produce patented drugs.

The law was challenged in the South African High Court (Case No. 4183/98) by the Pharmaceutical Manufacturers Association (PMA) and 39 drug companies. They attacked the legality of every clause and asserted violations of the World Trade Organisation's international intellectual property agreements. TAC intervened to assert that the legislation was valid since it constituted part of a government's positive duty to fulfil the right to health care access. The companies settled the case before a decision was made.

BOX 2 - TAC FOUNDING AFFIDAVIT IN PMA V SOUTH AFRICA (EXCERPTS)[3]

Theodora Steele, Member of TAC and the Congress of South African Trade Unions

44. Unless there is access to appropriate medicines, most of the four million people living with HIV in South Africa will become ill and die within ten years of infection.

48. The Medicines and Related Substances Control Amendment Act, in so far as it is intended to improve access to safe and affordable medicines, therefore has a very direct bearing on the rights to dignity, life and access to health care services of people with HIV. It also has a bearing on the State's ability to respond to this emergency.

78. In addition to the exceptions provided in TRIPS [the Agreement on Trade-Related Aspects of Intellectual Property Rights] itself, [TAC] submits that other international instruments on the rights to dignity, life and health care access, as well as children's and women's rights instruments and the South African Constitution, provide further support for [the] legislation.

3 *PMA v Republic of South Africa:* Founding Affidavit of TAC', www.cgil.it/org.politicasalute/adessostomeglio/200130/TestSudafr.doc.pdf.

How did you intervene in the PMA v South Africa case? [See Box 1 and 2]

In late 1997, the South African Parliament passed legislation to reduce the costs of medicines. In February 1998, the Pharmaceutical Manufacturers Association and some 40 multinational pharmaceutical companies challenged the Act. The case proceeded slowly, as the Ministry of Health sought adjournments, and most of the important action happened outside. TAC launched various international and domestic campaigns, including patent-abuse defiance campaigns. For example, Zackie Achmat returned from a trip to Thailand with 5,000 tablets of a cheaper and bio-equivalent anti-fungal generic. The activism led to intense public discussion about the morality of patent abuse and the pricing of medicines.

The hearing of the case had been quietly set for March 2001. The Government, strangely, made no public announcement. TAC then decided to break the two-year inertia, to draw international attention to the dates of the case and to seek to join the legal action as an *amicus curiae*. The court accepted TAC's intervention.

TAC's main argument was that health rights had priority over property rights, that the Constitution is the supreme law, that international law and obligations, such as the *Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)*, must not conflict with constitutional rights or the *International Covenant on Economic, Social and Cultural Rights*. We said that there's a constitutional right to improve access to health care services. If the interpretation of TRIPS given by the pharmaceutical companies threatens to erode that right, then the Constitution must take precedence. But of course, we never got a judgment in that case, which was a pity because that would have been groundbreaking.

What was the impact of the PMA v South Africa case?

The mobilisation around the legislation led to a much deeper and better understanding in South African civil society about generic medicines, pricing problems, access to medicines and certain of the key medicines. From TAC's viewpoint, it gave us first-hand experience of running that kind of litigation. It gave us a platform in South African society from which to conduct future litigation. There was a whole range of benefits, perhaps, apart from the one that was most at stake! These sorts of battles are not won in a few weeks, anyway. It is about a gradual build-up of support, winning small battles along the way.

One of the immediate results of the case was that anti-retroviral medicine prices came down very significantly. I have no doubt that can be attributed to our campaign. At the start of that campaign, the price of these three medicines in the anti-HIV 'cocktail' in South Africa was about 4,000 rand per month. Within a few months of the case ending, it was 1,000 rand per month. This meant that these medicines became affordable to the private sector, hospitals and insurance coverage. Before that, the private sector was saying, 'we can't afford this', but, at 1,000 rand per month, it became affordable under medical insurance.

How did the Minister of Health v TAC case emerge? [See Box 3 and 4]

For many years, we had lobbied for the prevention of the transmission of HIV from mothers to their children. The Government was failing to provide medicines such as nevirapine or AZT to stop MTCT. By the time we initiated the legal action, we had reams of correspondence with the Government. We could show to the court that we had pursued all other avenues to resolve this issue and that legal action was the last resort.

It is essential that there be a concerted national effort to combat the HIV/AIDS pandemic. The Government has committed itself to such an effort. We have held that its policy fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat MTCT of HIV. That does not mean that everyone can immediately claim access to such treatment, although the ideal, as Dr Ntsaluba says, is to achieve that goal. Every effort must, however, be made to do so as soon as reasonably possible. The increases in the budget to which we have referred will facilitate this.

Constitutional Court of South Africa, Minister of Health v TAC, paragraph 25

Also, because we had constantly engaged the issue, we had the research and experts at our fingertips. The day we decided, 'let's do it', we put the case together from the first letter to the judgment in about five months, which is fairly rapid. We wrote a letter of demand in July and filed our Founding Affidavit in August. We had some of the best lawyers in the country; we could command the best scientists, from anywhere in the world, to give us supporting affidavits.

BOX 3 - MINISTER OF HEALTH V TREATMENT ACTION CAMPAIGN[4]

TAC sought to compel the national and provincial health ministries to provide or allow the provision of the anti-retroviral drugs nevirapine or AZT to all HIV-positive pregnant women in order to prevent transmissions of HIV from mothers to their children. The Ministry of Health had even ordered the doctors not to prescribe the drug.

The case was appealed to the Constitutional Court (after the interview with Mark Heywood) and the Court found that while it is impossible immediately to give everyone access even to a 'core' service, the State must act reasonably to provide access to the constitutional socio-economic rights on a progressive basis. The State's policy of not making nevirapine available at hospitals and clinics, other than for research and training, was unreasonable: The Government had failed to devise and implement – within its available resources – a comprehensive and coordinated programme to realise progressively the rights of pregnant women and their newborn children to have access to health services in order to combat the transmission of HIV from mothers to their children.

The court ordered that the Government act 'without delay' to provide nevirapine in public hospitals and clinics when medically indicated and to take reasonable measures to provide testing and counselling facilities at hospitals and clinics.

4 Case CCT 8/02, Constitutional Court of South Africa, 5 July 2002.

BOX 4 - STATEMENT TO THE COURT BY BUSISIWE MAQUNGO

Minister of Health v TAC

Busisiwe Maqungo had lost her child to HIV/AIDS.

3. I am single and have one 9-year-old boy, Bongisisa. I have been unemployed since July 2000. Before that, I briefly worked as an administrative assistant

4. I was tested for HIV in Conradie Hospital, Pinelands, in May 1999, when my daughter, Nomazizi, then aged 1 month, was very sick. She suffered from various illnesses, including pneumonia, diarrhoea and dehydration. . . .

5. I was hurt for my child when I found out that she was HIV positive. I never suspected that I could be positive. The antenatal clinic that I visited before giving birth never mentioned HIV. . . .

7. I gave birth to an HIV-positive child and wondered why [this could be so] if she could be saved with AZT. I should have been told what I was tested for and asked if I wanted to be tested for HIV. If there was a programme in all hospitals where mothers book and women were asked to be tested for HIV, I would have gone for a test. . . .

9. My baby was always sick. I had to borrow money from her father's parents to take her to hospital. . . .

10. Doctors always told me that my baby would die and that there was nothing they could do for her. . . . My baby received no special medicines after she was diagnosed. . . .

14. The Government should give people with HIV anti-retroviral drugs because they need it. The Government should implement MTCT prevention nationally so that women can be given a choice and their children can be saved. People with HIV should also get treatment for opportunistic infections. . . .

16. I gave birth to an HIV-positive baby who should have been saved. That was my experience, the sad one, and I will live with it until my last day.

Were you going further than the Grootboom case [see Chapter 10] in asking the Government to supply a specific medicine?

The *Grootboom* case said that the Government's programmes relating to socio-economic rights must be reasonable. We recognised this was useful for the MTCT case. We knew that the Government would put forward so-called 'evidence' suggesting that it was, in fact, providing services to prevent mother-to-child transmissions. But we felt confident because *Grootboom* said that an otherwise reasonable programme that leaves out large parts of the

population or the most vulnerable people in society is an unreasonable programme. And, while they [the Government] put forward their evidence, the High Court quoted chunks of *Grootboom* and came down on our side.

It went further than *Grootboom*, perhaps, in certain respects. Not so much in that it said, 'you must supply this particular medicine'. There is really only a choice of two medicines for preventing MTCT, and the Government had already decided on nevirapine instead of AZT. It went beyond *Grootboom* in the sense that it talked about the relationship between planning and resources. When the Government said, 'we don't have resources', and produced lots of evidence, the judge made quite a perceptive and intelligent point. He said to the Government, 'You don't have a plan, and, if you don't have one, then you are never going to have the resources because a plan creates the resources': *the plan creates the necessity to find the resources* from *somewhere*. In a sense, he called their bluff: "There's no plan; so, I don't accept your arguments about resources.' That's quite a profound point. It's a development on *Grootboom*.

Why do you think the MTCT case was successful?

I think what swung it was that we were able to marshal the best evidence on the safety, efficacy, cost and cost-savings of the medicine, as well as on the human benefits. We put in affidavits of nurses who said they wanted to treat and affidavits of doctors saying they were tired of looking at dying kids. Our papers were full of expert evidence. Their [the Government's] papers, by contrast, indicated that they couldn't find a single scientist who would support them.

They were transparently dishonest as well. You look at the affidavits they put up on available resources: they got each of the nine provincial heads of health to put up almost identical affidavits. They read like templates with slight modifications. They made ridiculous statements like, 'outside the pilot sites, there is no capacity or ability to provide this intervention.' South Africa is not Malawi. As most judges would know, we have a resource-constrained, but significant health infrastructure, even a significant public health infrastructure.

BOX 5 - IMPROVED ACCESS TO MEDICINES?[5]

The TAC found that generally, in provinces where there was already a commitment to establishing a comprehensive MTCT prevention programme (Gauteng, Western Cape, KwaZulu-Natal, North West), the judgment unshackled health departments and politicians and opened the door to implementation. In these provinces, there has been an ongoing expansion and improvement. In contrast, other provinces have required active engagement, and the TAC's advocacy and legal team has focused on improving compliance at this level.

Mark Heywood

5 Mark Heywood, 'Contempt or Compliance?: The *TAC* Case after the Constitutional Court Judgment', *ESR Review*, Vol. 4, No. 1, March 2003.

What has been the impact of the case?

One of the lessons has been the importance of public awareness. Everyone knows about the *MTCT* case and part of the value – a great part of the value – of public impact litigation. So, this will entrench our Constitution because it will, hopefully, make the country look at the Constitutional Court and consider what this document really means to them. And the reaction of the public was overwhelmingly supportive. The significance of the judgment is that it swings the pendulum once more towards the justiciability of socio-economic rights. That's what the Government is scared of: communities holding the Government to the progressive improvement of social and economic rights.

How far do you believe courts go in their intervention in the area of socio-economic rights?

I think that courts should go basically as far as we're going at the moment. Our society made a compact with itself, if you like, which is reflected in the Constitution. The Constitution is a product of the aspirations that we all held when we got rid of apartheid in 1994, and it encapsulates our aspirations in terms of better access to health care, a better environment, certain inviolable civil and political rights, etc. The job of the court really is to police that Constitution and to hold this Government and successive governments to that Constitution, to adjudicate where there is conflict, to determine whether what is being done is reasonable, whether it's progressive, whether it's the best use of available resources. The court is not *making* policy, it is *pronouncing* on whether the existing policy of the executive is reasonable or not. That's the core of the South African Constitution.

We would never go to the courts to ask unelected, still mostly white, judges to decide policy or to take over key executive functions. For us, the law or litigation is one part of a broader strategy to improve access to health care services for people who have HIV and AIDS in this country.

Luckily, quite a lot of our lawyers have previous experience in using the law against apartheid, and one of the things we discuss is what they term 'the art of a losing case', where you lose in court, but you get a whole number of other benefits.

How do you deal with the argument that South Africa cannot bear the resource burden: the medicine is relatively cheap, but the counselling services are not?

It depends on how it's raised in Government arguments. We said to government, 'Yes, the drug is the least expensive part of the whole programme, but it's still more expensive to look after kids with HIV than it is to invest in milk formula to avoid MTCT through mother's milk, counselling and so on.' I think that was an argument that the judge was persuaded by. It was an argument that we were able to back up with serious scientific research. And the programme was only 250 million rand. Look at other programmes. In 1997 or 1998, South Africa introduced a hepatitis vaccine overnight at the cost of 500 million rand, and the risk of death from hepatitis was much less.

The Government has tried to misrepresent our position, but we have never said MTCT is simple or very easy to do. You can't wish away the stigma around HIV, the fact that there aren't enough counsellors, the fact that you can't use formula feed in areas that don't have clean water. But you can have a plan that acknowledges those issues.

Do you risk raising the false hopes of the claimants?

We consider these things at a fairly early stage. Luckily, quite a lot of our lawyers have previous experience in using the law against apartheid, and one of the things we discuss is what they term 'the art of a losing case', where you lose in court, but you get a whole number of other benefits. You get the issue out into the public domain. But you cannot afford to lose every case, for example the *MTCT* case. We had to make sure that we did everything possible to win in order to avoid negative consequences.

On the *PMA v South Africa* case, we could afford to lose the first stab, because the case would generate enormous discussion in the country. As far as false hopes for the direct litigation, the TAC has a mass base of people, and, when we start litigation, we don't just hand it over to the lawyers. We make sure that, at all points, there is a linkage between the legal strategy and the people who are doctors or the people who have HIV. We constantly workshop the legal issues with our mass base so that people don't develop illusions about what the law is actually going to give us.

Our overriding campaign . . . is to try to get the Government to agree to, budget for and develop what we call a 'National Treatment Plan'.

What campaigns do you have planned for the future?

Our overriding campaign is to try to get the Government to agree to, budget for and develop what we call a 'National Treatment Plan', a comprehensive plan that improves the health services, that supplies the relevant medicines to people who need them, that budgets for the better training of doctors and nurses. We will use a specific negotiating process to mobilise society and to focus attention onto that.

Underneath that, we are looking at legal strategies to apply for compulsory licences for patented medicines. We're focusing more on the private health sector in South Africa. While only 20% of people have access to the private sector, medical insurance now covers HIV/AIDS, and that's a first step to universal coverage.

Shortly after this interview was conducted, the Constitutional Court of South Africa essentially affirmed the High Court decision.[See Box 3.]

LESSONS LEARNED

- Instigating a public movement in conjunction with legal action has significant benefits.
- It is important to gather solid interdisciplinary evidence.
- A clear legal strategy is needed for the development of the law.
- Litigation can be a tool for public awareness, mobilisation and research.
- Strategies are needed for the implementation of court orders.

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FURTHER READING

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12 NIGERIA

SOCIAL JUSTICE AND LITIGATION STRATEGIES

Nigeria, bedevilled in recent decades by dictatorship and corruption, has not used its massive oil revenues for the benefit of the poor. Indeed, oil exploitation has frequently led to violations of human rights. [See the next chapter.] During the dictatorship years, a number of NGOs began to challenge Nigerian governments in court despite the restrictions on judicial independence and review and the fact that social and economic rights were only directive principles in the constitution.

'In many cases we have filed, we have to withdraw them because the media attention and public debate has forced the government to back down.'

In this chapter, Felix Morka recounts the experiences and lessons learned in legal challenges of education, health and housing policies and practices. The interview also demonstrates a slow shift over 10 years from focusing on government violations to challenging the impact of non-state actors, particularly multinational companies and international financial institutions.

FELIX MORKA - INTERVIEW

Felix Morka is Executive Director of the Social & Economic Rights Action Center (SERAC) based in Lagos, Nigeria.

Why did SERAC choose the courts to fight for ESC rights?

Basically, human rights are about enforcement of rules, of law, of standards - whether national, regional or international – in order to ensure that government behaviour is consistent with these rules. In our work, many of the issues we encountered were of a legal nature involving acts of governments that infringed upon clearly stipulated human rights standards.

In 1995 when SERAC was founded, the military government was very much in control of life in Nigeria. There wasn't a lot of political space for

anything else –for dialogue, for consultation, for access to policymakers and government officials. We had a very narrow corridor in which to work, to try and address issues and questions that touched upon the human rights of Nigerians. Our legal practice developed in direct relation to the prevailing political environment. Even though we would make efforts to reach responsible officials we didn't get a lot of feedback. We didn't have a legislature or parliament where we could go and complain. So within that political environment, it was inevitable that legal strategy became an important part of our work.

Virtually all the cases we filed were default actions that were taken only when other strategies had failed. Even now that Nigeria has a civilian government, SERAC's Legal Action Program is the last to be activated. First, we use our Monitoring and Advocacy Program that aims at identifying the root causes of social and economic rights violations. We then go to our Community Action Program that works with and within local groups and communities to education and mobilize them towards becoming pro-active in the defense of their human rights. When a case is filed, it usually means that other options have not achieved the desired result. Litigation is the last recourse.

For example, in 1997, when the World Bank in collaboration with the Lagos State government, tried to evict thousands of people under the Bank-funded Lagos Drainage and Sanitation Project, we petitioned the World Bank independent Inspection Panel when all other interventions and efforts proved futile (see Chapter 22). That inspection panel process was helpful in averting the planned large-scale forced evictions.

What have been the major obstacles to litigating ESC rights?

On average in Nigeria, any case filed in the High Court will take 5-10 years to get a verdict. The courts are terribly congested, are not computerised, and the facilities are lean. Daily, a judge has 60-70 cases – so you can imagine how much time we get before them! It's a terribly slow process, which is why we are not usually in a hurry to go to the courts. It is a longstanding nightmare in the court system, and we are just one of the victims. Court reform in Nigeria is therefore critical.

But even after we have filed cases in courts, we do not abate the efforts to crack that issue. We continue to explore ways to solve the case. In many cases we have filed, we have to withdraw them because the media attention and public debate has forced the government to back down. We have been able to get the public to be aware of what is happening and pressure policymakers to comply with human rights standards.

Do you have an example of such cases?

In the cases we have recently filed against Mobil (a matter regarding a massive oil spill from Mobil's facilities) and Shell (an action where we represent members of the Ozoro community who were adversely affected by the company's alleged dumping of toxic waste), SERAC has made a lot of progress. Preliminary objections filed by both companies have been defeated and both cases are making steady progress.

In the Shell case, the federal government convened a panel to investigate the alleged toxic waste dump. We later discovered that several of the sample tests relied upon by the panel were sponsored by Shell. Moreover, two community members who had been appointed to

BOX 1 - DURU V MINISTRY OF EDUCATION[1]

Many universities, particularly in the southern regions of Nigeria, increased tuition fees for Universities by over 1000%. SERAC, representing the National Association of Nigerian Students, filed suit in 1997 claimed the increase was arbitrary and would impede equal access to higher education and unjustifiable due to the decline in the quality of education. The case continues.

serve on the panel were never informed of their appointment and were therefore not involved in the panel's work. SERAC is now asking the court to quash the panel's findings.

The Mobil case concerns an oil spill in south-eastern Nigeria that resulted in a lot of damage to several fishing communities along Nigeria's coastal waters. It took a year and half to compile the case for filing because of the number of people affected and involved (about 600 communities and societies).

What have been the important lessons?

We don't use litigation as an end in itself: we use it as a tool for mobilization. Client communities will fill the court gallery, making their point with their presence and their numbers. Litigation is often a pivot around which communities can organize.

LESSONS LEARNED

- Litigation, if used creatively, can be more than a means for winning court judgments.
- Litigation is a valuable tool for mobilizing and rallying public support for a stated objective.

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1 *Duru Amarachukwu, et al. v Minsiter of Education, et al.*, Federal High Court of Nigeria, Suit No. FHC\L\CS\94897, filed 25 August 1997.

13 THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS

THE JUSTICIABLE INDIVISIBILITY OF HUMAN RIGHTS

Is Africa too impoverished to sustain formal complaints about economic and social rights? The answer is 'no' according to the African Commission on Human and Peoples' Rights. In 2001, the Commission held that, in Nigeria, pollution of the environment and destruction of crops and housing policies violated a plethora of of social, economic as well as civil rights in the *African Charter on Human and Peoples' Rights* [see Box 1.]

In this chapter, Professor Victor Dankwa indicates that all African governments can take steps to respect and protect rights already enjoyed: 'You can ask all states to bring a stop to the destruction of resources needed to realise rights'. He surmises that all African countries have sufficient, though varying, levels of resources to start the task of fulfilling the rights, particularly for the most vulnerable.

The petitioning NGOs described the decision as groundbreaking because of its application of international human rights law, including General Comments of international bodies, such as the UN Committee on Economic, Social and Cultural Rights. But SERAC's Felix Morka points out that, owing to the Commission's weak enforcement powers, the recommendations remain only partially implemented [Box 2].

Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. . . . there is no right in the African Charter that cannot be made effective. As indicated in the preceding paragraphs, however, the Nigerian Government did not live up to the minimum expectations of the African Charter.

SERAC and CESR v Nigeria Decision, African Commission on Human and Peoples' Rights, paragraph 68

VICTOR DANKWA - INTERVIEW

Victor Dankwa is a Member and former Chairperson of the African Commission on Human and Peoples' Rights. He is also Professor of Law at the University of Ghana.

How does the African Commission view socio-economic rights?

The *African Charter on Human and Peoples' Rights* encompasses all human rights. Economic, social and cultural rights are as important as any other. The Commission takes the view that enforcement of human rights must not be discriminatory: all rights must be enforceable. The advantage of the African Charter is that, under Articles 60 and 61, the Commission has the mandate to go beyond the Charter rights to look at international standards. There is hardly a right at the international level that cannot be subject to protection in the African system.

Are these rights viewed as justiciable?

The Commission starts from the basic premise that economic, social and cultural rights and civil and political rights are justiciable. The precise (and justiciable) burden carried by a government depends on the corresponding duty and the circumstances of a case.

Because of the fortune in having international standards incorporated in the Charter, there is no problem in going beyond the Charter to examine the work of international bodies. We look at the UN Committee on Economic, Social and Cultural Rights, the Inter-American Court of Human Rights and the European Court of Human Rights. To the extent that we are assisted in making a reasoned decision, we have no difficulty taking that route.

Can African Governments meet such expectations?

The Commission looks to the States Parties progressively to achieve these rights. Whatever their resources, states have positive obligations to take steps towards respecting, protecting and fulfilling their obligations.

In relation to the achievement of a minimum, it is not easy to give a methodological formulation for all countries. But the complaint will reveal what is expected. In the *Zaire* case [see next question], the closure of schools was unnecessary. In Nigeria, security forces destroyed homes and polluted food resources. It was something you could demand of every government in Africa; you can ask all states to bring a stop to the destruction of resources needed to realise rights. This is something you can expect all countries not to be involved in. Within those contexts, you can talk about the minimum expected.

In relation to fulfilling the rights, the situation is more complex. Conditions should be created, though, so that people follow their own way to attain the essentials, for example, assisting people to find work to buy food or grow food itself. In African countries with more developed systems, the states should be able to provide the basic amenities. All countries should begin to provide for the most vulnerable groups: the aging, the sick who cannot provide for themselves. States have to begin somewhere. The imbalance in development should be addressed.

BOX 1 - SERAC AND CESR V NIGERIA[1]

Oil reserves in Ogoniland were being exploited by a consortium consisting of a subsidiary of the multinational Shell Oil Company and the State-owned Nigerian National Petroleum Company. After the murder of Ogoni activist Ken Saro-Wiwa, the activities surrounding oil production attracted international attention.

In 1996, two NGOs – the Nigerian-based Social and Economic Rights Action Centre (SERAC) and the US-based Center for Economic and Social Rights (CESR) – filed a petition with the African Commission on Human and Peoples' Rights alleging that: the oil consortium disposed of toxic waste in the environment, contaminating water, air, soil and crops; security forces – police, army, navy and air force, as well as unidentified gunmen – destroyed villages, crops and animals; security forces attacked villagers and executed Ogoni leaders; pollution had led to skin infections, gastrointestinal and respiratory ailments and increased risk of cancers, and malnutrition and starvation were widespread.

Drawing on international law, the Commission pointed out that all human rights entail four general obligations: to respect, protect, promote and fulfil. The right to health (Article 16) and the right to a clean environment (Article 24) had been contravened. While the Government had the right to produce oil, it had failed to prevent pollution and ecological degradation. It should have: (i) ordered or permitted independent scientific studies prior to major industrial developments, (ii) monitored such activities and (iii) provided information to affected communities and allowed them to participate in decisions.

The failure to monitor oil activities and involve local communities in decisions violated the State's duty to protect its residents from exploitation (including foreign economic exploitation) and despoliation of their wealth and natural resources (Article 21). It was suggested that the failure to provide material benefits for the local population from the oil exploitation was also a violation.

The right to housing and protection from forced eviction was violated by the destruction of housing and the harassment of residents who had returned to rebuild their homes. This right is derived from express rights to property, health and family. Furthermore, the destruction and contamination of crops by Government and non-State actors violated the duty to respect and protect the implied right to food.

The Commision ordered that the government: cease attacks on Ogoni people; investigate and prosecute those responsible; provide compensation to victims; prepare environmental and social impact assessments in future; provide information on health and environmental risks.

1 *CESR v SERAC and CESR v Nigeria* Decision: *http://www.cesr.org/publications.htm*; *CESR and & SERAC* Petition: *www.cesr.org/text%20files/nigeria.pdf*.

Greater attention should be paid to regional areas, those deprived or marginalized for a long time. The task is enormous. But it is a duty that is to be embarked upon, pursued and fulfilled.

What are the leading examples of cases before the Commission?

OMCT v Zaire partially concerned the right to education. Closing down of schools by the Government violated education rights. Zaire was ordered to provide a minimum in terms of social amenities for the community, i.e., water, electricity and health. In the case concerning Cameroon, we held that the right to work proscribed arbitrary dismissal.

The principal case concerns environmental degradation, shelter and food: *SERAC and CESR v Nigeria*. Toxic wastes from oil exploitation by the State oil company, together with Shell Petroleum Development Corporation, had polluted the environment and water in Ogoniland, resulting in infection and disease and contamination of crops. Security forces had also destroyed housing and crops. This violated a range of rights, from environment and health to food and housing. [See Box 1.]

In the *SERAC* case, the complainants did not petition local or national courts, but went straight to the Commission.

Before bringing a complaint to us, a petitioner must exhaust domestic remedies. This rule was waived in the *SERAC* case because the then-military government of Nigeria had ousted the jurisdiction of the courts from reviewing government acts potentially violating the national Constitution or the African Charter. They also had notice of the complaint, but did not respond. For urgent complaints, we also waive the domestic remedies rule, if irreparable damage would be caused.

You can ask all states to bring a stop to the destruction of resources needed to realise rights.

How were the far-reaching and continuous remedies identified?

We have a wide ambit in identifying the appropriate remedies. If there are violations, specific action is recommended. In the *Zaire* case, we asked them to desist from action and stated what was required: to respect the minimum of basic health care, water and electricity. But only recommendations can be given. We rely on the political will of States Parties, proceeding on the basis that they will fulfil their Charter obligations.

The Commission is not in a position to monitor compliance with any recommendation or continuing recommendation. In the *SERAC* case, the systematic failure to regulate activities in Ogoniland meant we made recommendations for other projects. The difficulty with this is that the State Party may think such a continuous recommendation too onerous.

BOX 2 - IMPLEMENTING THE DECISION - 2003

Felix Morka, SERAC: The government is yet to take steps as required under the decision. The only thing we have been able to make sure that all the government agencies and the multinational companies are fully aware of the decision. We have sent out tens of copies of the decisions and set up meetings with some of the agencies. We are trying to work with the Niger Delta Development Corporation that is responsible for the oil-producing delta region from roads, to health to water.

The case was filed in 1996; yet, the decision was not made until 2001. Why the long delay?

The Commission takes the view that it needs the cooperation of the state to provide effective protection of human rights. We want a response from governments and for them to participate in the hearings. For a long time, we received no response from Nigeria. The Commission has limited time, meeting only twice a year, with a very full agenda. I also believed that the case was important, that more attention should be paid to it, and, after some efforts, a written position was eventually submitted by Nigeria. The Commission also sent a mission to Nigeria. We went to Ogoniland and met the relevant actors. From all sides, we received information and assurances that the matter would be resolved, including the establishment of a body to investigate the matter and provide compensation.

Were the Commission's orders implemented?

It is difficult for the Commission to follow up and monitor compliance with its findings. We do not have the capacity; it is a question of resources.

. . . it is not easy to give a methodological formulation for all countries. But the complaint will reveal what is expected.

What does the Commission need to enforce human rights more effectively?

The Commission should work more closely with national institutions and NGOs to monitor compliance by governments. The bulk of information comes from states. A second opinion always helps. States usually paint a rosier picture and therefore look to other sources.

LESSONS LEARNED

- The African human rights system can be used to advance economic and social rights.
- Countries can be held to account for failing to regulate multinational companies.
- International human rights law can be directly applied.
- Concrete remedies for ESC rights violations can be obtained, e.g.prosecutorial investigation, compensation and the implementation of impact studies in the future.
- The African human rights system is currently weak in enforcing recommendations.

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FURTHER READING

Institute for Human Rights and Development, 'Compilation of Decisions on Communications of the African Commission on Human and Peoples' Rights, 1994-2001', *www.AfricanInstitute.org*

EUROPE

14 FRANCE, GERMANY AND HUNGARY

NATIONAL EXPERIENCES

Continental Europe has a long constitutional history of social rights but judicial involvement is a more recent phenomenon. As citizens (and politicians) have slowly availed themselves of judicial mechanisms jurisprudence has started to develop. Justice Texier notes the slow movement of the French judiciary to apply social rights and international law. The remaining two case studies deal with the question of the role of the judiciary in allocation of budgetary resources. In the Hungarian case, budget cuts to social programs were challenged [see Box 2] while in Germany Professor Riedel describes how courts required Universities to prove the maximum number of University places had been offered to applicants for medical schools.[see Box 1].

JUSTICE PHILIPPE TEXIER - INTERVIEW

Justice Texier is a member of the French Cour de Cassation (Supreme Court) and the UN Committee on Economic, Social and Cultural Rights.

What role do economic and social rights play in France's legal order?

Concerning domestic law, we need to go back to the preamble of the Constitution of 1946 which includes almost all economic, social and cultural rights, including the right to work, the right to a minimum income, the right to social security, etc. This preamble is in the actual Constitution, the 1959 one, giving it a constitutional value.

This is the first point; the second point is that the *Covenant on Economic, Social and Cultural Rights* itself is not directly applicable. There is little jurisprudence that refers to the Covenant. There are a few decisions from the Cour d'Appel (Court of Appeal) and the Cour de Cassation (Supreme Court), but on very specific points, for example the right to housing.[1] However, the Covenant was not directly mentioned.

The *European Convention on Human Rights* on the contrary is part of domestic law, but this Convention only mentions civil rights not social, economic and cultural rights. And, like its international counterpart the *European Social Charter*, it has less value at the national level. Now, that is the general background.

1 The French judicial system is divided into two streams. The first concerns 'private' cases: criminal prosecution of individuals or civil disputes between individuals. It has 35 Courts of Appeal and the apex Supreme Court. The second stream concerns administrative law: claims against public authorities. The highest Court in this branch is the Consel d'Etat (Council of State).

Unfortunately, French judges have a very limited knowledge of the social rights in international law. It is regrettable, because the magistrates received a day of training dedicated to these rights. However, International Labour Conventions are very often applied in decisions concerning the right to work.

There was a decision a few years ago, concerning children's rights, in which the Cour de Cassation said that the *Convention on the Rights of the Child* was not applicable. The decision was heavily criticised, but for the time being these conventions are not considered directly applicable.

In any case, legislation actually takes into account almost the entirety of economic, social and cultural rights: housing rights, trade union rights, right to a minimum salary, the right to go on strike. The question is more difficult concerning the right of access to the health system, to education and to food, for which there is specific legislation, and I don't believe there are many judicial decisions on these questions.

But doesn't section 55 of the constitution incorporate international law?

Normally, section 55 takes precedence over national law and thus we have a contradiction between this article and the decision of the Cour de Cassation in the case on children's rights I previously mentioned. Unfortunately, we have in France a limited system for reviewing the constitutionality of laws. The Cour de Cassation only gives its opinion *a priori* at the creation of law, not after it is passed. A citizen therefore cannot ask the judge to reconsider the constitutionality of a law.

However, the superiority of international treaties is maintained (in theory) and the European Convention has become internal law. But as much as lawyers are aware of this Convention they are in equal ignorance of the universal instruments.

But the right to housing is in the preamble to the 1946 Constitution and there have been strong opinions in its favour from the Conseil d'Etat and the Cour de Cassation. Moreover, since 1990, we have had a law recognising the right to housing, and since then this matter has not been discussed at the judicial level.

Have there been any cases?

The Court of Appeal in Paris recognised the right to housing in a decisions concerning squatters threatened by eviction. The decision asked the authorities to negotiate with the occupants and to evict them only if another accommodation solution had been found for them. The decision makes specific reference to the *Covenant on Economic, Social and Cultural Rights*.

Concerning the right to work, there is abundant jurisprudence, especially concerning dismissals, which is very well regulated by the law, and abusive layoffs, which are common subjects before the Cour de Cassation. These rights are very important because the unemployment subsidies expire after a certain time. There is rich jurisprudence concerning the equal access to a working career, for example the equality between men and women in the working environment, such as salary conditions. Likewise, there are a lot of cases on the right to a minimum salary, which in France is ruled by law and fixed every year on the life cost. An employer who employs someone for less than the minimum salary, fixed by law, will be recognised as guilty. The same with right to strike and safety of the workplace.

BOX 1 - SOCIAL RIGHTS IN GERMANY

The limited socio-economic rights in the German Constitution have been given a broad interpretation due to the 'Social State' principle, and the right to dignity and equality. Professor Eibe Riedel of University of Mannheim, and member of the UN Committee of Economic, Social and Cultural Rights, describes how they were applied in a claim concerning allocation of resources for higher education.

Professor Eibe Riedel

What was the essence of the claims in the Numerus Clausus cases? [2]
Some students wanted to get places in the medical faculties at the University. Now, the *Abitur* [the examination at end of secondary school] is critical for University entrance. And if you came top in your class it was a foregone conclusion that you would study medicine. But anyone who gets the Abitur is entitled to apply for University – and in the past this was never a problem. But when nearly 50 per cent wants higher education, the University created restrictions – making entry more difficult.

Some students then brought a case and the Federal Constitutional Court decided that, since the Constitution speaks of freedom of occupation, the State is under an obligation to justify its inability to provide access to education that is relevant to one's chosen profession. And further, any restrictions must be objectively justified.

In this case, the applicants lost since the University of Hamburg proved that it could only offer 80 places. But it turned out that 6 or 7 students did not accept the offer and the University failed to enrol the students placed on the waiting list. Somebody got word of it, and pleaded that they should be allowed to enrol. And the Court agreed, saying that the University was capable of providing the places. But it was a question of proof as to whether the State was capable of providing the places? Here it was clearly evident – places had been previously available.

What was the reaction of the public and government?
It caused a tremendous stir because nobody expected it. But all the Universities increased the number of places since there was obiter dictum (comments) by some of the judges saying that the State could afford it. And they changed the criteria to make access more objective; not just based on academic results or the school one attended.

Now this did lead to an increased number of doctors – and we have unemployed doctors for the first time. But in my personal opinion that is good - the link between social prestige and medicine has been broken and we are more likely to get doctors truly interested in the profession. More broadly though, despite the efforts of the Social Democratic Party and the labour movement to extend the judgment into other spheres, it had no other immediate impact. The judgment has nearly been forgotten. But what it left of it is this: anyone who does the Abitur has the right to study at University. And the State has the positive duty to see that they can study.

2 *Numerus Clausus I Case*, Federal Constitutional Court of Germany,(1972), 33 BverfGE 303.

However, I don't there that there is any decision on the right to health care, right to food and right to education. Although that needs to be verified because the French system is very complex, due to the existence of judicial and administrative jurisdictions. Cases could arise in which the State will be condemned, for example if a primary school refuses to accept a student – education rights go back to the Napoleonic code.

BOX 2 - STOPPING RETROGRESSIVE BUDGET CUTS IN HUNGARY[3]

Under pressure from international financial institutions, the Hungarian Government in the mid-1990s enacted legislation that made significant cuts in various social welfare programmes, ranging from maternity allowances to education benefits. The laws were immediately challenged, and the Constitutional Court struck them down, citing the principle of legal certainty: recipients had made future economic decisions based on the expectation of receiving the benefits, for example decisions over pregnancy. They also noted that benefits could not fall below a minimal level.

Andras Sajo[4] has criticised the decision because of the interference with the Government's ability effectively to reform the economy in the post-communist era. His most forceful observation is that families with sufficient income will continue to receive the benefits, as they did in communist times. And the court's activism appears to have led to conservative appointments to the bench, resulting in a more cautious court. Nevertheless, the judgment presents a good example of an attempt to halt retrogressive budgetary cuts that violate economic and social rights.

BOX 3 - FINLAND AND JUDICIAL ENFORCEMENT OF ESC RIGHTS

ESC rights are now regularly litigated in Finland. The 1995 and 2000 Constitutions ushered in a wide range of rights, including education, culture and language, social security, health and housing, and a limited right to work. These rights are justiciable, and refusals by local authorities to provide assistance for housing, education, health and childcare assistance have been struck down by courts. [5]

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

4 Andras Sajo, 'How the Rule of Law Killed Hungarian Welfare Reform', *East European Constitutional Review*, Winter 1996, at pages 31-41.

5 See M. Scheinin 'Protection of Economic, Social and Cultural Rights in Finland' and C. Krause 'Constitutional Protection against Retrogressive Social Security in Finland', in M. Scheinin (ed.), *The Welfare Sate and Constitutionalism in the Nordic Countries*, Nordic Council of Ministers, 2001, :5, See *www.nordichumanrights.net/tema/tema3/*.

15 EUROPEAN COURT OF HUMAN RIGHTS

POSITIVE DUTIES TO RESPECT FAMILY LIFE

Since the late 1970s, the guardian of the *European Convention of Fundamental Rights* and Freedoms has gradually infused this civil and political rights instrument with a partially socio-economic character. The European Court of Human Rights, based in Strasbourg, has condemned forced evictions, discrimination in educational languages and the destruction of the property of slumdwellers,[1] a natural outgrowth perhaps of commonly overlooked provisions concerning the respect for family life and home, property and education.

Sally Chapman and family

But it has also held that positive obligations flow from the rights in the Convention. Most famously, it ruled that Spain had failed to take steps to protect Mrs Lopez Ostra from toxic fumes from a nearby private factory.[2] More recently, it has extended the right to life and protections from cruel and degrading treatment to cover protection from forced eviction and environmental hazards and acknowledged that the right to family life may entitle people with severe disabilities or diseases a right to a home.[3]

At the same time, the court has moved very slowly. In this chapter, Luke Clements outlines the long struggle to draw the court's attention to discrimination in housing against Travellers and Roma. While the cases were ultimately unsuccessful, the court affirmed the duty of governments to take positive steps to facilitate the Gypsy way of life, and Luke Clements notes the incremental impact of the cases on policy-making and the mobilisation of the Traveller community to pursue a political agenda.

1 See COHRE, '50 Leading Cases on Economic, Social and Cultural Rights', 2003, available at *www.cohre.org/litigation*
2 *López Ostra v Spain,* (1994) Series A No 303C; (1995) 20 EHHR 277, EctHR.
3 See COHRE, '50 Leading Cases on Economic, Social and Cultural Rights', 2003, available at *www.cohre.org/litigation*

LUKE CLEMENTS - INTERVIEW

Luke Clements is Co-Director of the Traveller Law Research Unit at Cardiff Law School, Cardiff, Wales. Since 1981, he has brought numerous cases concerning Travellers and people with disabilities before British courts, the European Commission and the European Court of Human Rights.

What was the origin of the British 'Gypsy'[4] cases before the European Court of Human Rights?

We have taken a number of cases on behalf of Roma and Travelling People, including *Buckley v UK*, the first Gypsy case that was considered by the European Court of Human Rights. After witnessing how badly Travellers were treated in the early 1980s, we began taking Traveller cases in the United Kingdom, and we were initially quite successful. But then the judges got 'sympathy fatigue': they felt they had made their contribution and that Gypsies were being too demanding. We started losing major cases. Then there were certain cases we couldn't litigate at the national level because the injustice was enshrined in domestic legislation. For example, under the Caravan Sites Act, 1968, it was a criminal offence for a Gypsy to camp in certain designated areas, whereas it wasn't an offence for a non-Gypsy to camp in the same areas. So, we started making complaints to the European Commission and the European Court of Human Rights.

Initially, we got admissibility hearings in Strasbourg because it was a novel area, but the cases were potentially too controversial and were ruled inadmissible. Eventually, we shifted our focus to the issue of planning development permissions rather than simply the issue of access to suitable accommodation. My client in *Buckley v UK* had a caravan; she had land, but she didn't have anywhere legally to put the caravan. So we took these cases [see Box 1], but we have so far been unsuccessful. The court has come down on the side of environmental regulations.

In the most recent case, *Chapman v UK*, the court pretty much split down East-West lines. Only one Eastern European judge found a violation, and then only two Western European judges didn't find a violation, one of them being the *ad hoc* British judge. So, it's very depressing.

Why do you think the cases were unsuccessful?

On one hand, you have Turkey and Bulgaria killing people, torturing them, and you have us arguing esoteric points about access to accommodation. But, on the other hand, the court has been totally inconsistent. There's a British case called *Hatton v UK*, which was about aircraft noise in Heathrow when they found that there was an unreasonable violation of Article 8 (respect for the home) because people's sleep was disturbed, and therefore the State didn't have such a wide margin of appreciation.[5] Now, that only involved 11 flights per night, but somehow at the same time it was not disproportionate not to allow Gypsies anywhere to live at all.

4 The word 'Gypsy' is a pejorative term in Eastern Europe, but is used by some of the Traveller community in the United Kingdom. Travellers in the United Kingdom and Ireland are sometimes called Roma, but the ethnic history of many of them is understood to be significantly different.

5 Subsequently partially reversed by the Grand Chamber, - (36022/97) 8 July 2003.

Likewise, in *Gillow v UK*, the applicants were denied the right to occupy their own house in Guernsey. Guernsey has very strict laws on only native people living there. The applicants succeeded, even though the case is, to all intents and purposes, indistinguishable from *Buckley*. Mr and Mrs Gillow were living in their house unlawfully and being evicted. The court, by allowing their claim, but refusing it in *Buckley*, was again creating double standards between Roma and non-Roma.

From our perspective, we are beginning to question whether the engine at Strasbourg is running out of steam. There is a backlog of 18,000 cases, and we think the court is concentrating on the more gross violations in Central and Eastern Europe as opposed to Western European cases, which require more careful attention to the law. We are increasingly looking now to taking the debate to the European Court of Justice, particularly if the Amsterdam recommendations on discrimination are rolled out.

BOX 1 - THE CHAPMAN CASE

Mrs Chapman purchased a piece of land in 1985 with the intention of living on it in a caravan. But the Three Rivers District Council refused planning permission purportedly for environmental reasons since the land was within the 'green belt'. The family were given 15 months to leave the land and the Council stated it would seek suitable alternative accommodation.

A slim majority of the European Court on Human Rights found that while the right to respect for private and family life, home and correspondence prohibited action to remove a caravan, since it interfered the home and private and family life, (in this case a traditional way of life), the United Kingdom was permitted a wide margin of discretion since it involved planning permission and complex issues. But it indicated that if a generally accepted standard for treatment of minorities existed throughout Europe it would require the United Kingdom to conform to such a standard.

What were the positive aspects of the court's decision?

Aspects of the *Buckley* judgment are actually brilliant in that they articulate the problem extremely well. Moreover, in the *Chapman* decision, there is an excellent set of dissenting opinions. The minority argue that we have now reached a time in Strasbourg where there is a right, a positive right, under Article 8 to be accommodated in certain situations. And that, of course, would be very interesting if we could link it up with a very large housing rights movement. Judge Bonello gives one of the best Strasbourg dissenting speeches I've ever read.

Also, the courts have always alleged that one of the problems is that the Roma are illegally on land. They have defied the law and are therefore outside the protection of the laws. In adopting this approach, the courts are applying the legal maxim, 'he who comes to court must have clean hands'. Judge Bonello, however, questions why this maxim is only applied to Roma? They may have broken the law, but so, too, has the State. The State has broken law; the State has broken its international obligations in relation to minorities, and, in the UK, it has bro-

In other words, the Roma have only broken the law because of the prior breach by the State. And why should the benefit of the doubt be given to the powerful rather than the weak?

ken the law because the law required local authorities to provide sites, and they didn't. In other words, the Roma have only broken the law because of the prior breach by the State. And why should the benefit of the doubt be given to the powerful rather than the weak?

What has been the result of the new Human Rights Act?

Now that the UK has incorporated the Convention, we are beginning to get a much more dynamic approach from our own judges. In a recent case, *South Bucks v Porter*, the courts considered that Chapman and the other recent Strasbourg cases were not very helpful since the concept of the 'margin of appreciation' is an international law concept that has limited application in the UK.

Have you seen any actual impact in policy-making? In planning?

One of the great positives is that we very nearly won *Buckley* and *Chapman*. And the Government knows that. The Government knows that, if it doesn't watch this area very carefully, it will lose these cases. So, losing cases has a very significant impact on domestic policy because, basically, their lawyers have gone back to the Government and said, 'we won't be able to do this forever'. Losing cases can have a very dramatic effect on the Government, especially when you lose cases narrowly.

In the area of planning control, I believe that more Gypsies are now being granted planning permission. We haven't got the statistics, but recent research would suggest that's the case. In my own anecdotal experiences, Gypsies are much more likely to get planning permission now than they were before.

I suppose the other thing about *Buckley* is that there is now a substantial network of excellent solicitors who are taking similar cases. That's a good thing about the UK: once you do take a case, lots of lawyers are prepared to take the follow-up cases. The later Chapman case was one of six brought to Strasbourg.

In the long run, we'll win. But, in the short term, I think that political action is necessary. Historically, British Roma and Travelling People institutions have been fragmented. However, in the last few years, they have built an alliance and agreed on a common approach to law reform and a common approach to the media; so, there's a much more coherent and mature voice being articulated in the press and on radio and TV.

BOX 2 - TEN YEAR STRUGGLE

Sally Chapman was the claimant in the case of Chapman v United Kingdom [See Box 1]. Diana Allen has represented, and acted as expert witness for, many gypsies in England.

Dianne Allen and Sally Chapman

You have been involved in over 100 planning permission cases: Why are gypsies constantly refused access to their land?

Diana Allen: For many years I used to be one of the main expert witnesses in inquiries all over the country....in virtually every case where gypsies apply to local authorities for planning permission on their own land they're turned down.... The authorities always find some excuse. Prejudice against gypsies cuts right through society.

What made you decide to buy a piece of land?

Sally Chapman: Well, I had four kids – young school age. While I was brought up on the road and never went to school I wanted an education for my children, we're in different times now. And the only way I could give them that, was to settle. But to be on a [government] site was just not on for me ... You haven't got much privacy, and the plots are so small there's just nothing. So we bought that piece of land ... But since we moved on the land, I've had nothing but hassle.

How do you assess the court decision?

Sally Chapman: But where I live, the Council said they'd like to protect the greenbelt and the land of natural beauty – so they said I can´t stay on the land. But if you go past my land, then there's more bungalows!, and then you come to the land of natural beauty. Since I have been here, the Council have allowed others to build on it, but not us!.

Diana Allen: The government case was totally wrong because they said that if they [the Chapmans] travelled all over the country, they would always find a site to stop on. Now this fact was based on adding together both official sites and private sites. But you can't do this, add private sites – you have no right to use them. Just because I have spare rooms in my house does not mean that any homeless person can come here!

What is the current situation on gypsies being granted planning permission?

Diana Allen: It's a bit better since the Human Rights Act; courts have gone as far as saying that a gypsy's caravan is his home, and should not be moved unless there is alternative accommodation....Moreover, my former firm has just won a case that offering traveller's a house is not a sufficient offer, because they must be allowed to live in their own way, in their own culture...

Is Mrs Buckley still in a caravan?

No, she was forced off. She's in a house now. It's terrible. It's an appallingly sad case. She was in a terrible situation, and, I believe, the council was unreasonably oppressive. She was causing no harm; her caravan was hidden by hedges and trees and almost invisible. We tried to protect her for as long as possible. We lost the case in Strasbourg, and she was forced off. She now lives in a house with her kids. She's been forced to give up her way of life, which is true of many Gypsies; so it was awful. At the moment, Mrs Chapman is still living where she was, but it's a wretched situation for the Travellers.

Do you think someone like Mrs Buckley regrets going through the whole process?

No, she had no choice. It prolonged the eviction, and it kept her kids in school for longer. But, at the end of the day, we couldn't avert a tragedy. I suppose the worst thing is that they had hope that was dashed. You try not to raise their hopes, but, in her case, it was particularly sad because, of course, we won in the Commission and then lost before the court.

What other strategies are you employing?

We are trying to make a positive difference, to promote change. So, we used the British courts in the '80s, and it helped a little. We then took the argument to Strasbourg, and this also had some positives. Since the *Buckley* decision, we've worked though the Traveller Law Research Unit, at Cardiff University, to help Gypsy and Travelling People organisations to work together and to develop a blueprint as to how they would like to see law and policy changed. We will shortly launch a draft bill – the Traveller Law Reform Bill – in the House of Commons, which would reform the law affecting Gypsies in this country. We don't expect that to become law, but it's a modest proposal, and the Government has already used it to take a number of steps to remove discrimination. So, that's just using another vehicle.

In any sort of test-case litigation, you think about using other levers. With Roma and Travelling People, I don't think it works. The media is uniformly hostile. The media is the main problem in fact.

I think the way common law lawyers think is, 'how can we promote change?'. The law doesn't seem, at the moment, to be a very good vehicle for this, arguably because the endemic prejudice against Gypsies is institutionalised in the policies and the perspectives of the establishment, which includes, of course, the judiciary. And, so, we are now trying a political route. If that fails, God knows what we'll do.

Was the media helpful or unhelpful in the litigation?

In any sort of test-case litigation, you think about using other levers. With Roma and Travelling People, I don't think it works. The media is uniformly hostile. The media is the main problem in fact. The media coverage of the *Buckley* case was appalling. She was one of the nicest people I have ever met; she was living in an area that was rough land, causing no harm, and bringing up delightful children. Yet, the media smeared her as a scrounging claimant who was costing the country millions of pounds. In many cases, asbestos litigation or other personal injury type litigation, the media is currently used, but not here at all because Roma and Travelling People are a despised minority.

You have also taken cases involving social services for people with disabilities?

I've taken a number of human rights cases, including cases to Strasbourg, on behalf of disabled people. The interesting thing about disabled people is that their rights are trampled upon in every way, very similar to Gypsies in that they are people who, by and large, don't have a voice. They're not heard, and, until recently, there were no significant disabled person cases in Strasbourg. In the UK, it's a criminal offence for somebody who's called 'mentally defective' to have sexual intercourse. Well, fine. But maybe such a person might enjoy it, but it's a criminal offence. Why hasn't this state of affairs at least led to a challenge? We have challenged discriminatory criminal codes for others, transsexuals, gay rights, even sadomasochistic rights. So, it seems to me that, at the moment, the main issue of disabled people's rights is an issue of access, access to justice.

But perhaps some of the cases may be too bizarre to take. There was the issue about the rights of profoundly disabled to access education on masturbation; otherwise, they become profoundly sexually frustrated and can seriously harm themselves. Who's going to take these cases? They straddle the whole spectrum of the Convention: the right to associate, to a family life, to privacy, the right of access to information, the right to expression, the right to vote, not to be abused or even not to be left to die.

Basically, the people who go to Strasbourg are the ones who have access to lawyers, not people whose rights are being violated. The complaints in Strasbourg are directly proportional to the likelihood of having a lawyer, not to the severity of the infringement of your rights.

What have been the main obstacles?

One of the real problems with Travelling People cases has been keeping contact. I have had to abandon 'un-losable' cases simply because the client was travelling. And, so, these cases just disappear. If there was some possibility of a popular action, an *act popularis*, it would be a lot easier. Travellers will just move on rather than challenge an injustice. So, even though government policies are having a serious impact on their way of life, they are not a group of people who have any history of standing up and fighting. Only when their land is involved will they generally take action. Mrs Buckley and Mrs Chapman both owned land, the value of which they stood to lose if evicted. It was worth fighting for, and they had nowhere else to go, anyway. But Travelling People who live a nomadic life or are being repeatedly evicted; then they just move on.

I'm sure the judges are all good men (and in the UK they are almost exclusively 'men'), but how do you make them listen? How do you make them see? We're talking about people – Roma and Travellers – who are everywhere around them in Europe; they're a European minority, but the judges see them in the way they've always seen them, since childhood, you know, as a criminal nuisance. How do you get rich people to see poor people? How do you get rich people, powerful people, to see disabled people? How do you get them to understand what it is like to live with social exclusion when they have no comprehension about what that could possibly feel like? They have no comprehension about poverty, about social isolation, about disability. But, in taking a case to Strasbourg, we are forced to play a game where the rules are, essentially, that you've got to convince seven judges of what this feels like, seven uncomprehending members of the European establishment.

I think building alliances is very useful. We need to recruit young lawyers – especially now that 43[5] states have signed the European Convention, since we are all speaking the same legal language, the language of the Convention – and for lawyers to realise that they are part of a common process and to build some sort of European links.

It takes a great deal of courage for young lawyers in many parts of Europe to take a case on behalf of Roma, particularly if they try to argue the case on the basis of fundamental human rights. In many Central and Eastern European states, the judiciary are not familiar with the European Convention or other international human rights treaties and are hostile if these instruments are referred to. In effect, a lawyer has to break the 'club rules' - the unwritten practices of their local legal profession - and do things a different way. They have to speak a different language and break out of the stultifying customs of precedent, of doing things the way they are traditionally done, which is the way of most professions. I liken it to becoming a cubist lawyer; we have to see differently and express ourselves differently. This takes courage when the audience is a hostile judge.

When, 20 years ago, we started arguing cases by reference to the *European Convention on Human Rights*, we experienced this hostility; the judges went ballistic: 'You cannot mention that; that's a foreign treaty'. It was considered, professionally, a 'bad show', not playing the game. The judges considered that we were crackpots who didn't understand how to behave. All that has changed; today, the Convention is mentioned every day in almost every court in the kingdom. So, things are gradually improving; there is a very long road to travel, and it may take several hundred years before we get there, but, in Strasbourg and, increasingly, in Luxemburg, Roma and disabled people are being heard, and gradually we are all beginning to comprehend the extent of the injustice that has been their experience.

BOX 3 - EDUCATIONAL SEGREGATION IN EUROPE

Jean Garland [See also Chapter 19]

Roma are commonly segregated and, in your case, in the Czech Republic, where you did some cases. Probably our biggest case against the Czech Republic concerned the segregation of Roma in the educational system. But the case has been sitting and rotting before the European court for a couple of years, since April 2000. We had asked that the case be expedited because it involves young children, but it has not yet even been communicated to the government.

The case challenges the practice of sending Romani children in disproportionately high numbers to schools for the mentally handicapped. The Czech Constitutional Court basically said, 'well, for these specific 15 plaintiffs, you haven't proven the discrimination claim; we can't consider your overall statistics and data.' Yet, the statistics showed an overwhelming difference in the number of Romani children sent to 'special' schools compared to their representation in the general population. That was that. The court said the arguments were 'persuasive'. Despite that, they're

5 This number has since increased to 45 states.

not a judicial activist court, and the justices held there was nothing a court can do; this is a political question basically. So, it is stuck in Strasbourg. We hope it will be considered soon.

How common is this practice in Eastern Europe?
It is surprisingly common. We also launched a case in Croatia, but that case involves not schools for the mentally handicapped, but separate Roma classrooms in the regular schools.

We did a field mission to Croatia two years ago and talked to some of the headmasters about why some of the Roma kids were placed in standard classes, while others go to separate classes. And the answer was, 'After a certain age level, we don't have enough Roma kids to make a separate class.' Then they described their problem: they need more money from the Government for more teachers. They just don't have any, and, if they have only five or six Roma kids in the sixth grade, they can't justify putting them in separate classes because they don't have enough money to pay a separate teacher.

My reaction was, like, 'okay, thank you; can we get this on tape please?'. We filed this lawsuit on behalf of 59 kids.We picked the ones who had done well in school, and we filed the lawsuit in May 2002 with a big press conference.

After that, our clients were threatened by local government officials with having their social benefits cut off, with public announcements that fees would be imposed on schoolbooks for everybody because of the cost of defending the Roma lawsuit. So, that, of course, stirred up the local community. And some of the Romani children have dropped out of the lawsuit; they got scared.

How are you arguing the cases?
There are provisions in the Croatian Constitution about education and equal education opportunities; so, we're arguing that Roma are being deprived of the same opportunities available to others. We're also citingUS case law on segregation, like *Brown v Board of Education*. In addition, we're raising European Convention rights, claiming that official discrimination can violate Article 3 (freedom from degrading treatment) and Article 2 of Protocol 2 (right to education).

And how did you go about preparing for the case?
We worked with the Helsinki Committee and with a local lawyer.We'd go out to the settlements with the local lawyer and the Helsinki Committee, and they would explain what the case was about and what the complainants could expect, and they were warned it might be difficult. I don't think they were specifically told they might lose their social benefits because that would be speculating; you don't know until it happens. But they were definitely told that the government officials would not be very happy about being sued, and they might try to put some pressure on them, and they should be aware of that. So, they were warned, but, I think, it's one thing to hear it in abstract, and it's another when your neighbour spits at you or something because you're causing all these troubles. A couple of the people working with us on the case are very respected in the Romani community. People sometimes think they're getting a lot of money for helping us; they're not. We're giving them some money; it's compensation for their time.

Has there been a policy change so far?
No, it's hard to say because, now, it's summer time. The suit was filed in May 2002, maybe it was April, but, anyway, it was close to the end of the school year. There were still separate classes the following year. It will be interesting to see if they continue to segregate the classes while the case is pending. They certainly have a lot more Romani kids at the lower grade levels, first and second grade, but that can also be a product of the system as much as anything else.

The Czech case is still pending with the European Court of Human Rights and is yet to be communicated to the Czech Government. The *Croatian* case is also currently pending, with the Croatian Constitutional Court. However, just to be on the safe side in case the Constitutional Court decides it has no jurisdiction, we have recently filed a pre-application letter with the European Court of Human Rights.

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FURTHER READING

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16 EUROPEAN COMMITTEE ON SOCIAL RIGHTS

PREVENTING CHILD LABOUR

The Council of Europe instituted a collective complaints mechanism for violations of social rights in Europe in 1998. Under the 1995 Additional Protocol to the European Social Charter,[1] international organisations of workers and employers, representative national organisations of workers and employers, and also national and international non-governmental organisations, can file complaints.

While the procedure certainly possesses limitations, trade unions and NGOs are increasingly using it to challenge or promote certain laws and practices among the 45 member States of the Council of Europe that have ratified the Social Charter and accepted the collective complaints procedure.[2]

Nathalie Prouvez (formerly of the International Commission of Jurists) reflects below on the first case brought to the European Charter's supervisory body, the European Committee on Social Rights. The International Commission of Jurists questioned the compliance of Portugal with its obligations under the European Social Charter, which prohibits child labour.

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NATHALIE PROUVEZ - INTERVIEW

Nathalie Prouvez is a former Legal Officer of the International Commission of Jurists and is currently Secretary of the UN Committee on the Elimination of Racial Discrimination.

Why did you initiate the child labour case before the Committee?

The International Commission of Jurists took the case for several reasons: we considered that an issue of such scale – at least 200,000 children in Portugal under age 15 were employed in a member state of the European Union in the late 1990s was a major concern, and it deserved to be raised before the European Committee on Social Rights.

1 Additional Protocol of 1995 providing for a system of collective complaints.
2 As of 23 June 2003, only 13 States had accepted this procedure among the 33 that had ratified the Charter.

We also wanted to pick an issue that was beyond traditional labour rights, in order to shed some light and publicity on the width of the rights that were protected by the European Social Charter. The Charter is not a sufficiently well-known instrument, and, very often, people interpret it as being limited to labour rights as opposed to covering a wider range of economic, social and cultural rights.

It has to be acknowledged that at the time, few states had ratified the 1995 Additional Protocol. So, so we had a rather limited choice of countries and violations of social rights. Many people asked why we had not chosen other European States in which child labour was allegedly also a major problem, but, very simply, those other States had not ratified the Protocol.

What were your central arguments? [See Box 1]

Our principal argument was that Portugal was not doing enough to ensure that its legislation on child labour was effectively implemented. There were too few labour inspectors, and family businesses were not sufficiently monitored. The statistics were also flawed and understated the problem.

BOX 1 - COMPLAINT FILED BY THE INTERNATIONAL COMMISSION OF JURISTS (EXCERPTS)

The working conditions of the children are particularly alarming. . . . For instance, the granite industry in the north employs young boys who work unprotected from the granite dust while breaking stones. Children are reported to suffer badly from this work, as their lungs are dangerously coated with granite dust, and their backs are badly affected. . . .

To comply with Article 7 paragraph 1 of the Charter, a State must not only fix the minimum age of admission to employment at 15 years, but also has to take the necessary steps to ensure that this rule is adequately enforced. Furthermore, according to the case law of the *European Social Charter*, the prohibition [extends to] children working in family businesses. . . .

The Committee made a wide series of recommendations [See Box 2] – what was their impact?

The case certainly prompted further action by Portugal. The Portuguese Government reported to the Committee in 1999 that they had amended the labour legislation, and increased penalties for employers and the number of labour inspectors.

It has been difficult though for us to gauge the extent of implementation, as we had difficulties in establishing contacts locally that would follow-up. This is certainly something to learn for the future, and I hope that organisations that follow in our footsteps ensured that they have adequate links on the ground – not only to lodge the complaint in the first place with adequate information, but also to ensure the follow-up on the ground in terms of publicity for the decision of the Committee and using the decision of the Committee to get actual results.

BOX 2 - DECISION OF THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS

The Committee acknowledges that the Government, especially in recent years, has taken many legal and practical measures to combat child labour. . . . These measures have brought about a progressive reduction in the number of children working illegally. . . . However, it is clear that the problem has not been resolved.

The Committee . . . observes that . . . in 1998 labour inspectors carried out 2,475 visits in enterprises and found 191 children under the age of 16 years working illegally. The Committee considers that, in light of the results of the 1998 survey, . . . these figures are modest. The . . . situation in Portugal is not in conformity with Article 7, paragraph 1.

Unfortunately, there were limitations, which were mainly political. According to Article 9 of the 1995 Protocol, if a violation has been found by the European Committee of Social Rights, the Committee of Ministers of the Council of Europe should adopt by a majority of two-thirds of those voting a recommendation addressed to the State party concerned. In this particular case, however, the Committee on Ministers said that the issue had already been addressed during the reporting cycle and adopted a resolution rather than a recommendation, as if no violation had been found. Bearing in mind the fact that this was the first case and that the issue was politically sensitive, the outcome was, however, positive in many respects, and the finding of a violation by the Committee despite these difficulties most certainly encouraged other organisations to use the procedure.

How important was the decision for the Committee's jurisprudence?

I think it was very important for the Committee in several respects. First of all, as mentioned earlier, it was important to the extent that it was not a narrow case; it went beyond traditional labour rights.

Secondly, it was also a case that related to an issue that had been raised before in the context of the reporting procedure of the Committee. We had deliberately chosen such an issue so that the Committee would have the opportunity to establish a precedent and decide that, no matter what conclusions they have adopted in the context of their reporting procedure, they can still consider themselves competent to examine an issue in the context of a complaint procedure. Indeed the Committee did use this opportunity and provided in its decision on admissibility that 'the object of this procedure is different in nature from the procedure of examining national reports, and is to allow the Committee to make a legal assessment of the situation of a state in the light of the information supplied by the complaint and the adversarial procedure to which it gives rise'.

How resource-intensive was the case for the International Commission of Jurists?

Like any international process, the submission of a complaint is resource-intensive and requires a lot of human and financial resources – the ICJ [International Commission of Jurists] requested that Portugal pay it the costs incurred in preparing and submitting the complaint; the Committee left the matter for the

Committee of Ministers to decide and no decision was made in this respect.

The drafting of the initial complaint but also the exchange of several memoranda with the concerned government after the initial submission imply full-time work for several weeks for staff with a good knowledge of international human rights law, but also with a knowledge of the situation on the ground and of the relevant national law. The ideal situation would be one whereby an international lawyer's organisation cooperates with a national organisation, thus benefiting from a complementarity of skills and knowledge.

The Committee is sometimes seen as the poor cousin of the European Court of Human Rights. What are the advantages and disadvantages of using the Committee?

If we look at the international level, there is still no individual complaints mechanism for the *International Covenant on Economic, Social and Cultural Rights*. Therefore, there are still few alternatives.

It is true that the Committee tends to be regarded as the poor cousin of the Court, and likewise that the Social Charter is considered to be the poor cousin of the European Convention. I am also convinced, however, that using the collective complaints mechanism to its full potential in order to encourage the elaboration of case law in relation to the European Social Charter is the only way forward to remedy this situation.

The reason why we acted so rapidly in filing a complaint after the protocol entered into force was to ensure the system was not discredited by its far too many numerous opponents, saying that it was going to serve no purpose and that NGOs themselves did not consider it useful. These detractors have been proven wrong as, by 26 September 2003, 21 complaints had been lodged before the Committee by various international and national trade unions and international NGOs.

Our principal argument was that Portugal was not doing enough to ensure that its legislation on child labour was effectively implemented.

What were the key obstacles you faced and what did you learn in conducting the case, particularly the procedural aspects?

I would say the key obstacle was our difficulty to identify partners on the ground that would cooperate and assist both in the gathering of information for the drafting of the complaint and for the follow-up to the decision.

Secondly, the Protocol provides that the decision of the Committee is not made public immediately after its adoption. It is transmitted to the Committee of Ministers, and is made public only after adoption[1] of a resolution or a recommendation by the Committee of Ministers, the delay being up to 4 months after the adoption. So even if you [as the complainant] are aware of the decision, you are not in a position to make it public right away, and by the time you can make it public, the impact of the decision has been diluted. This is undeniably a drawback of the provisions of the protocol which requires from NGOs that they make a double effort to publicise the decision.

3 See Article 8, Additional Protocol of 1995, providing for a system of collective complaints.

BOX 3 - SELECTIVE OVERVIEW OF CASES

Syndicat National des Professions du Tourisme v France (No. 6): Differences in the treatment between museum and other guides based on the place of education constitute discrimination.

STTK ry [Finnish Confederation of Salaried Employees] *and Tehy ry* [Union of Health and Social Care Services] *v Finland* (No. 10): Exposure to radiation in the health sector justifies additional paid holidays or reduced working hours so as to limit the exposure.

IAA Europe [International Association of Art, Europe] *v France* (No.13): The IAA alleges that France provides inadequate funding for education services for people with autism. The case has been ruled admissible.

ERRC [European Roma Rights Centre] *v Greece* (No. 15). The European Roma Rights Centre alleges that Greece discriminates against Roma in housing, resulting in segregation, forced evictions and substandard housing. The case is to be heard in November 2003.

I would encourage organisations interested in using this mechanism to get in touch with NGOs that have submitted complaints in order to benefit from their experience and to seek beforehand information from the Secretariat in order to ensure that they will comply with the basic requirements of the procedure.

I would also encourage NGOs to consider submitting complaints jointly with trade unions if at all possible, in order to reinforce cooperation and eliminate what one may call a sense of competition between the two types of organisations in the area of economic and social rights.

Lastly, the Committee can hold public hearings – and it is an important opportunity to give publicity to the complaint and allow the Committee to hear the parties' arguments in different ways, for example hearing witnesses. The Committee is the one to decide on a hearing, but I would encourage the organisation lodging the complaint to at least express its wish to have a hearing.

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FURTHER READING

'Complaint No. 1/1998, *International Commission of Jurists against Portugal', Social Charter Monographs*, No. 9. [Contains all submissions and Committee decisions.]

For details on the complaint system, see the excellent website, *www.coe.int*.

INTERNATIONAL MECHANISMS

17 UN HUMAN RIGHTS COMMITTEE

PROTECTING INDIGENOUS LIVELIHOODS AND CULTURE

A small number of cases of a socio-economic character have been brought before the UN Human Rights Committee, the body that oversees the *International Covenant on Civil and Political Rights*.[1] The covenant is dedicated to civil and political rights, but the Committee has been ready to apply the rights in the social and economic domain if a sufficient link with the treaty can be demonstrated [See Box 2]. For example, discrimination in social security legislation and the loss of livelihoods due to violations of cultural rights have been held to violate the treaty. Other rights such as the right to respect for home and the social or economic dimensions of the right to life have not been significantly tested.

Jouni Länsman

In this chapter, Professor Martin Scheinin discusses the reindeer herding cases brought before the Committee by Sami indigenous groups in northern Finland. In the early 1990s until 1997, he cooperated with the Sami in building up their litigation strategy. The origin of the cases by Finnish Sami was in stone quarrying and logging that threatened traditional livelihoods, something that the Sami claimed violated their right as a minority to enjoy their culture [See Box 1]. While the cases were ultimately lost on the merits, the Committee's decisions have led to the improvement of the law on minority rights and participation, as well as increased confidence amongst Sami groups to secure greater protection from forestry and mining interests.

In this interview Martin Scheinin offers some insights related to his cooperation with the Sami until 1996 when he was elected to the Committee. Since 1997, Professor Scheinin is a member of the Human Rights Committee and looks at similar issues in a different capacity and never participates in deciding cases against his own country, Finland.

1 In *Lantsova v The Russian Federation*, the Committee found that the right to life obliged authorities to monitor prisoner health and provide necessary health care, regardless of financial cost. This is consistent with their General Comment No. 6, that states that the right to life implies programmes to eradicate epidemics and malnutrition. See Communication No. 763, CCPR/C/74/D/763/1997 (15 April 2002) and the discussion in 'Housing and & ESC Rights Case Law Update', issue No. 1, 2003, *www.cohre.org/litigation.*

2 Paragraph 10.4.

MARTIN SCHEININ - INTERVIEW

Martin Scheinin is Director, Institute of Human Rights and Member of the UN Human Rights Committee since 1997. He previously brought cases to the European Court of Human Rights and the Human Rights Committee.

What was the background to the first Länsman case?

A female Sami journalist, Ritva Torikka, had been building up the community spirit amongst the Sami community in and around the Angeli village, next to the border of Norway and some 250 kilometres north of the Arctic Circle. She began to think that stone quarrying in reindeer herding lands raised human rights issues and contacted me for advice. The herdsmen had already taken the case quite high in the Finnish legal system (the Supreme Administrative Court) so when I was contacted there was not even a question of joining as counsel. Nevertheless, I gave a legal opinion to the Court, drawing on international case law, which was appended to their documentation. At that time the use of international human rights treaties was new for Finnish courts and it did not come as a surprise that the Supreme Administrative Court upheld the quarrying concession. This opened the way for a communication to the Human Rights Committee under article 27 of the *ICCPR [International Covenant on Civil and Political Rights]*.

The core of the complaint was that the stone quarry at Mt. Riutusvaara would seriously disturb their annual cycle of reindeer herding because it was located in a strategic place in the natural environment. The reindeer were brought from the summer herding lands to the winter herding lands and the stone quarry would disturb this very important moment in the animal's cycle. I also made a trip to Angeli to see the mountain and learned a lot about reindeer herding, the Sami culture, and the way competing uses of land affect their rights under Article 27.

Why was there so much pressure to log and mine these remote areas?

The national Forestry Board that is an agency of the State, is based on regions. Every region has it's own quota for how much they should cut down. The region of Upper-Lapland, which overlaps with the Sami homeland, has a quota just as other regions, which in practice means they want to cut trees in every reindeer-herding cooperative equally. Then there is pressure from the local population. They want jobs. The Forestry Board is not just any government department; it is the main contributor to the economy, the main source of jobs. They effectively run politics in the rural areas of the North. They are rulers. If you want to fish, if you want to hunt, if you want to you use your snowmobile, you have to go to the forestry board. For me it was a shock to experience that even the litigation leading up to Länsman No. 2 was held on the premises of the forestry board as there was no courtroom in Inari.

Why did the community choose to use a legal strategy?

This was an interesting development, because to some extent it's contrary to their traditional approach. The Sami are considered a reserved people who tend to remain passive when their

BOX 1 - THE REINDEER HERDING CASES

Reindeer herding by the indigenous Sami in Nordic countries is constantly under threat from mining and logging. Domestic legal challenges are often unsuccessful, and self-determination powers granted to Sami parliaments have not included significant control over land.

Between 1992 and 2001, Sami groups from the Angeli region of Finland were partially successful in three UN Human Rights Committee cases. In *Länsman v Finland* (No. 1),[3] the Committee affirmed that reindeer herding was an essential element of their right to enjoy their culture despite the introduction of some modern technologies.[4] No violation was found because the stone quarry approaved by the National Beginning Forestry Board was adjudged to have minimum impact on herding routes. But the Committee warned against future large-scale mining and emphasised the importance of pre-consultation with Sami. They also noted that the mountain, which was partially quarried, had spiritual significance for the culture.

In *Länsman v Finland* (No. 2),[5] Sami herdsmen challenged the granting by the Forestry Board of a forestry concession in winter herding lands. These untouched forests were a rich source of lichen, a reindeer food. The Committee noted that the herdsmen were consulted on the logging plans and decided that, in the circumstances, the profitability of reindeer herding would not be affected. But they issued a strong warning to Finland that future large-scale logging and mining may violate Article 27.

In a more recent case, in 2001, the Sallivara Cooperative of Herdsmen challenged a logging concession in the Kariselkä area (*Äärelä and Näkkäläjärvi v Finland*). These herdsmen had lost a much earlier case before the Committee when the Finnish government was able to show, at a very late stage, that it could be brought before national courts. In the new case initiated after unsuccessful proceedings in domestic courts the Committee decided that the domestic courts' conclusion that logging would not significantly impact reindeer herding was tainted by a procedural violation of fair trial and should be reconsidered. Also, it held that the imposition of a large legal costs award by Finland's Court of Appeal against the reindeer herdsmen was a violation of their right to a fair trial under Article 14.

3 *Ilmari Länsman et al. v Finland* ('No. 1'), No. 511/1992, 8 November 1994.
4 This echoed their earlier decision in *Kitok v Sweden*, Communication No. 197/1986, 10 August 1988. In that case, they found no violation of Article 27 as a result of an exclusion of Ivan Kitok from a statutory-empowered reindeer herding association.
5 *Jouni Länsman v Finland* ('No. 2'), No. 671/1995, 30 October 1996. (Available at *www.unhchr.ch*.)
6 *Äärelä and Näkkäläjärvi v Finland*, No. 779/1997, 7 November 2001. (Available at *www.unhchr.ch*.)
7 See *O. Sara et al. v Finland*, No. 431/1990, 24 March 1994 (Available at *www.unhchr.ch*).

BOX 2 - THE RIGHT TO NON-DISCRIMINATION AND THE HUMAN RIGHTS COMMITTEE

The Committee has previously struck down discriminatory legislation in the field of ESC Rights and noted that States must take positive steps to remove discrimination. But Martin Scheinin noted the difficulty when national courts find that a distinction is reasonable and objective; such an assessment can be very influential before the Committee.

In the Mrs. Zwaan de Vries case, the claimant was denied an unemployment benefit since she was a married woman and was not the family 'breadwinner'.8 The Netherlands opposed the claim on the basis that the right to social security was not included in the International Covenant on Civil and Political Rights. The Committee found that the right to non-discrimination in article 26 was an independent right. If there was discrimination in the socio-economic domain, that could not be objectively justified, it was a violation of the covenant. In this case they found the legislation unreasonable.

Martin Scheinin notes that this right has been underused and could be more often included in claims concerning minorities. For example, 'the Sami could have argued that the logging disproportionately affects them, which means indirect discrimination, because in practice they get their living from their herds'.

rights are violated. Traditionally they have often kept silent and tried to find a way to survive. That has been their tradition over centuries during which time they were gradually pushed further to the north. It has not been usual for them to embrace in litigation. I believe it was largely Ritva Torikka who personally created the community spirit, being a person involved in the worldwide movement of indigenous peoples.

Why did the Sami choose the Human Rights Committee and not other mechanisms?

Finland was not yet a party to the European Convention on Human Rights when the Sami designed their strategy, and our Constitution did not yet include a comparable provision to ICCPR article 27. The Sami rights cases where I was involved were also part of a global test case/ research project on the ICCPR and its application or non-application in domestic courts. When Finland joined the European Convention, there was some effort to bring other test cases even there but this was not particularly successful partly due to the very long delays and because the procedural requirements are tougher, to make a case admissible. There were also many professional practicing lawyers who were interested and started working on the cases before the ECHR organs, so there was less need for litigation based on a combined research and activism interest. All this said, it was of course a major consideration that the ICCPR includes a minority rights clause applicable to traditional livelihoods as "culture", whereas the European Convention does not have a similar provision and one can even say that the European Court of Human Rights has remained insensitive in relation to claims by minorities.

8 *Zwaan -de Vries v. the Netherlands*, No. 182/1984 9 April 1987; *Broeks v. the Netherlands*, No. 172/1984, 9 April 1987.

Were there any non-legal strategies that the Sami used?

Questions were posed to Parliament as part of a political approach. Parliament was asked to take action in relation to the government, and they tried but were compromised. And the Sami sought to meet with government Ministers to express their priorities. So, there were political approaches, but they never proved very successful. In some other Sami issues, such as education and linguistic rights, there has been more success with the Finnish Parliament.

Ritva Torrika, a journalist who helped with mobilisation behind the reindeer herding cases.

What were the most difficult issues in the cases before the Human Rights Committee?

The most difficult was exhaustion of domestic remedies. Originally it was thought to be quite easy. Finnish courts ignored international human rights treaties and earlier Finnish cases were almost automatically admissible before international bodies. But partly because of these test cases, Finnish courts suddenly started applying human rights treaties. That resulted in reconsideration of admissibility in the Sara case. [See Box 1.]

In some cases the Sami therefore had to go to domestic courts, which is time-consuming and expensive but of course a precondition for taking a case before an international body in countries whose own courts are accessible. It also became problematic because the government Forestry Board started to claim costs, and the court awarded them. That was a very serious blow to the litigation strategy because you not only had to exhaust domestic remedies but you also had the risk of costs. This was partly remedied in the latest case, *Äärelä*, where the Committee said that it was wrong to make an individual pay costs for the Forestry Board.

The other difficult thing was proving sufficiently serious adverse effect upon the right to culture, amounting to denial in terms of Article 27. That was relatively easy as long as domestic courts did not apply Article 27: since you can say there hasn't been judicial assessment. But when domestic courts started to apply it, the situation becomes more difficult. Usually the Human Rights Committee agrees with facts and evidence already addressed and assessed in a domestic court: it is very hard for an international body to second-guess a domestic court as to the facts and their assessment. That means that domestic courts can quite easily get around it- simply by paying lip service to human rights treaties when addressing the facts. As a result the Sami changed tactics in the *Äärelä* case by also alleging that the herdsmen were not being granted a fair trial. Besides adding an additional element to the case this challenged the legitimacy of the assessment by national courts.

Still, proving adverse effect is difficult. There's always the argument that States use for any area of land that is at issue, that logging or mining will only affect a minor part of the overall lands used by the indigenous community. International bodies have a tendency to adopt that kind of quantitative reasoning: they don't look at the strategic importance of a particular small location. In the Länsman cases the Sami made some use of expert opinions but this is

probably something where more work could have been done to demonstrate the strategic importance of even small tracts of land and to clarify the negative effects on traditional reindeer herding practices.

How did the Committee respond to the claimed right to participation?

That's been made part of the test by the Human Rights Committee: consultation and participation. But, if the state says they did it, it is hard to disprove. Even if what the Sami took as unilateral information from the Forestry Board is presented, to an international body, by government as meaningful consultation. So there's work to do in order to have the participation or consultation environment include a full assessment of environmental, legal, social, cultural implications. Only then would you have effective consultation if they went through the phase of serious assessment of all the implications.

What do you think are the beneficial impacts of the cases?

The Committee held in the two *Länsman* cases that the particular quarry or logging tract did not significantly affect reindeer herding. This was of course disappointing for the Sami who expected a straightforward ban, but we can point to some significant impacts. In both cases and even generally the Forestry Board became much more careful in pushing for further projects in areas where there is active opposition by the Sami. It has contributed to the consciousness of the Sami - their individual and collective consciousness, and strengthened their confidence in legal avenues. Which might be bad in the long run! But, at least, they have that community spirit. The *Länsman* cases have contributed to the international jurisprudence, and the standard achieved by these cases can be used by the domestic courts.

But I think a series of later mining cases are the main victory: 100 to 150 mining licenses were cancelled by the Supreme Administrative Court due to the lack of consultation with the Sami herdsmen. This never resulted in really important case law, but the increased legal consciousness among Sami altered the positions of certain multi-nationals and they decided to leave. To my knowledge, only one of the cases ultimately resulted in a new and more restricted mining licence being upheld by the Court. Of course, this situation is not a permanent victory but perhaps there is no such thing as a permanent victory in indigenous litigation.

Have the cases affected government decision-making?

Not really. I don't think politicians have really understood that there is need for a change. I think there is still a tendency among them to prefer assimilation of indigenous people. For instance, although the Constitution of Finland recognises the Sami as an indigenous people, ILO Convention No. 169 remains unratified due to the unwillingness of politicians to legislate on affirmative action in the form of Sami land rights to support the preservation and development of a distinct culture.

What do you think are the critical elements in litigation strategy?

There must be a test case where there is room for movement and for argument. I guess public image is important but not always decisive, there must be some kind of sympathy in the public. And it's always good to litigate before a court or body in an area where they feel proud of themselves. For example the Human Rights Committee might feel proud of Articles 26 and 27, whereas the European Court might feel proud of Article 6 (fair trial).

LESSONS LEARNED

- Reaching international mechanisms for a hearing can be time-consuming and expensive when the rights are theoretically justiciable at the national level and judges are conservative. These local remedies have to be exhausted, even though the result may be predictable.
- Greater use could be made of non-discrimination provisions, particularly before the Human Rights Committee. Also, more attention should be given to the right to a fair trial.
- Civil and political rights can be used to secure participation rights for minorities.

A co-operative government also helps. We didn't have it here, but, in my first test cases, including *Vuolanne v. Finland* [No. 265/1987], we had good cooperation – they waived certain admissibility issues. This was because they thought that it was an important issue and they wanted the Committee to decide it on its merits. But they have changed since the Sami cases and are attacking complainants now. In the *Äärelä* case there was a very bad incident. The Inari municipality decided that unless the Sami withdrew their lawsuit the municipality would block all subsidies to reindeer herders. We lodged a complaint with the parliamentary ombudsman, who reprimanded the board and director of the municipality but only after a delay of two and a half years.

What are the future strategies you would recommend?

It's now tougher to try new litigation because of the costs involved and the government's defense based on the requirement to exhaust domestic remedies. And then there is the political side; the government is trying to seek a solution through some sort of land management board, partly attached to the regional Forestry Board. It would comprise Sami and non-Sami and give advice to the Forestry Board. And that would according to some suffice for International Labour Organisation Convention 169 because it would give the indigenous population a meaningful role in decision-making. But there are so many unsatisfactory elements in the plan. My view is that the Sami should strive for a political deal simply to abolish the logging quota of the Northern-most region of the Forestry Board, the whole Sami territory.

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FURTHER READING

Martin Scheinin, "The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land" in Theodore Orlin, Allan Rosas and Martin Scheinin (eds.), *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach,* (Åbo Akademi University Institute for Human Rights, Turku, 2000) at pages 159-122.

A Guide to the Optional Protocol to the International Covenant on Civil and Political Rights, Australian Human Rights Information Centre, available at *www.ahrcentre.org*.

Amnesty International, *Using the International Human Rights system to Combat Racial Discrimination: A Handbook*, Amnesty International Publications, London, available at *www.amnesty.org*.

18 UN COMMITTEE AGAINST TORTURE

HOUSING DEMOLITIONS AS CRUEL AND DEGRADING TREATMENT

Attempts to argue that interference with economic and social rights amounts to torture or cruel or degrading treatment have largely been met with scorn or indifference, but this is changing. A series of cases in the European Court of Human Rights and the UN Committee against Torture has pushed the scope of torture provisions to show how a loss of social rights can breach this characteristically civil right.

In the face of continuing violations of Roma rights across Central and Eastern Europe, the European Roma Rights Center launched a wide range of legal actions at the national, regional and international levels (see also Chapter 14: Box 3). In the *Dzemajl* case, the Committee Against Torture (CAT) accepted the Center's submissions that the failure of the government to prevent the destruction of a Serbian-Montenegrin Roma settlement by non-Roma local residents amounted to cruel and degrading treatment (See Box 1 below). In this Chapter, Jean Garland describes the Center's various legal strategies and their success in implementing the historic decision of CAT.

JEAN GARLAND - INTERVIEW

Jean Garland served for over three years as the Legal Director at the European Roma Rights Center. She recently returned to the United States.

How have you attempted to fashion litigation strategies?

When the European Roma Rights Centre first started, a lot of our case work involved police brutality and violence. We're now making a very conscious effort to focus on discrimination in the social sectors. Besides education [see Chapter 14], we have targeted employment and housing and access to places of public accommodation (restaurants, shops, etc.). Employment's a bit tough. We had a few cases in employment, but it's been very difficult to prove discrimination.

Our emerging strategy has been to target the distribution of public housing on a discriminatory basis, because it's easier to attack state action. If a landlord doesn't want to rent his house to a Romani family, then you face issues of personal property rights. If you own a house, to what extent can you decide who should live in that house? So, in the future we would probably challenge the distribution of publicly owned housing on a discriminatory basis.

The other thing we really want to focus on is getting a basic minimum level of decent housing. In Slovakia, in particular, the housing conditions are horrible, and a lot of people don't have the papers they need to get the social assistance they need. Social assistance is distributed by the local governments. You need to be a legal resident of a particular municipality to qualify for social assistance, which is often impossible if you're living in makeshift, illegal housing settlements. Public housing is in short supply; people don't know how to apply for it. They're told, 'go away; you don't live in this town; so we won't help you.' They end up living in home-made sheds without adequate plumbing, sometimes one water tap for 20 families, and the housing conditions are horrendous, inhuman.

Those who discriminate in this way can't be effectively challenged under local law. You almost certainly have to go under international conventions to get the legal basis.

And evictions?

Our biggest success is probably before the Committee Against Torture where they accepted the argument that demolition of housing amounts to cruel and degrading treatment. We were able to use jurisprudence from the European Court of Human Rights to show that in some circumstances evictions can violate 'torture' provisions in international treaties. In this case you had people, including elderly people, trapped in houses while the non-Roma community destroyed the settlement. The decision was also groundbreaking because it held that the compensation provisions of the Convention apply to inhuman or degrading treatment and not just torture. And as a result compensation has been paid. [See Box 1]

But evictions are complicated. We have taken some eviction cases, but often they involve situations where people haven't paid rent, or they haven't paid utilities in a long time. Their argument is, 'Well, I can't pay them because I'm unemployed, and I don't have any money', but

Litigation is a tool to promote social change in view of the reluctance of politicians to do the correct things for fear they will get voted out of office. That's what I see as the primary value. So courts should not be blamed for judicial activism when they enforce international treaties to get politicians off the hook.

Jean Garland

BOX 1 - MONTENEGRIN GOVERNMENT AGREES TO PAY 985,000 EURO[1]

European Roma Rights Center Press Release, 4 July 2003

In one of the most significant Roma rights victories to date, the Montenegrin Government agreed on 19 June 2003 to pay in compensation 985,000 euros to 74 Romani victims of the Danilovgrad tragedy, a notorious 1995 pogrom involving mob-violence and the total destruction of an entire Romani neighbourhood.

The award follows a decision adopted by the UN Committee against Torture on 21 November 2002 expressly finding the Montenegrin authorities in violation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.[2]

On 14 and 15 April 1995, following an alleged rape of a non-Romani girl by two Romani youths, several hundred non-Roma gathered and, with the acquiescence of the municipal authorities and the police, destroyed the Romani settlement in Bozova Glavica, Danilovgrad. The police simply stood by and did nothing as the pogrom unfolded.

The Roma were able to flee, but their homes and other belongings were ultimately burned or otherwise destroyed. In fear for their lives, the Danilovgrad Roma fled the town and moved to the outskirts of Podgorica, where most still live under terrible conditions and in abject poverty. Moreover, in the aftermath of the incident, several Roma were fired from the jobs they held in Danilovgrad, with the excuse that they had stopped coming to work.

that's not legally a very good argument, at the moment at least. 'Your contract says you have to pay, and you didn't pay. So, we're evicting you.'

There have been times where Romani families have been evicted not for not paying rent, but for reasons like, the city will say, 'we're renovating the building, so everyone needs to move out while we do major renovation work'. And then, of course, the rents go up, and the poor families can't move back in. So, that's a different factual scenario than just being evicted because you didn't pay the rent. In at least one such case, NGOs staged a protest, but, in terms of a strategic case, legally it's hard to find the right anchor. But such scenarios present good possibilities because the practice affects more than just one family and usually in a racially discriminatory manner.

In Italy, we believe Roma are being targeted unfairly for building code violations for, like, trying to fix up these horrible shacks that they're living at in these refugee camps. We're focusing there on the allocation of public housing, because the state's an easy target; the state has obligations to the party a person doesn't have.

1 European Roma Rights Centre, 'Montenegrin Government Agrees to Pay 985,000 Euro in Compensation to Pogrom Victims', press release, 4 July 2003.
2 *Hajrizi Dzemajl et al. v Yugoslavia*, CAT/C/29/D/161/2000. In the proceedings before the Committee, the victims were represented jointly by the European Roma Rights Centre, the Humanitarian Law Centre and Dragan Prelevic, an attorney in Podgorica.

What are the major obstacles?

In Central and Eastern Europe, one of the biggest obstacles is the lack of adequate legislation.. Another is that the governments do not have the money to meet their obligations. For example, Romania has laws that require social housing for families below a certain income level, but they just do not have the money to provide it. From a practical point of view, we often have trouble finding lawyers who are adequately trained and sensitive to the issues facing the clients that we need to represent. It's also hard to get the clients sometimes. They're afraid that, even though they have a crummy house, if they challenge the conditions, then the house will be taken away and they'll end up with nothing. Unfortunately, they have enough past bad experiences with state officials credibly to believe this possibility. So those are the main problems.

How do you advise Roma who face retaliation for launching legal actions?

I may take a somewhat different approach than some of my colleagues, and that's perhaps due to my American background. But I think the client needs to be fully aware of the risks. I think you need to find the right client, and if someone's reluctant, or they're scared, then don't push them. Find someone else who's perhaps a little more angry, or a little more ready to challenge the system, or a little more self-confident, and then use that case. But, I think, they have to be told what the risks are and make an informed decision as to whether or not they're willing to challenge the practice and take the risks. We do tell them that retaliation is illegal. 'You'll get even more damages if there's retaliation. Let us know; we'll put pressure on people. We have these resources; we have these abilities. The mayor of this town will be terribly embarrassed nationally, internationally, for these stunts; so, don't be afraid of them.' But, again, we're not there all the time.

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FURTHER READING

Branimir Pleše, UN Committee Against Torture Finds Montenegrin Authorities in Flagrant Breach of Human Rights Standards, *Roma Rights*, nos. 1 and 2, 2003.

19 UN Committee on Economic, Social and Cultural Rights

AN UNOFFICIAL COMPLAINTS MECHANISM

In the early 1990s, little work was being done at the international level to give substance to the various housing rights clauses in treaties, declarations and other standards. This was a key problem confronting housing rights activists. At the same time, the UN Committee on Economic, Social and Cultural Rights was starting to breathe life into the entire category of these rights.

Scott Leckie outlines in this chapter the way forced evictions cases have been brought before the UN Committee so as to develop ESC rights jurisprudence and halt and remedy forced evictions. Philip Alston, former Chair of the Committee, discusses the way the Committee has viewed justiciability and the potential of international human rights law.

SCOTT LECKIE

Scott Leckie is Executive Director of the Centre on Housing Rights and Evictions.

What housing issues can courts adjudicate?

If we take the indivisibility of human rights seriously, then it is quite easy to conclude that virtually every dimension of housing rights is to a certain degree justiciable. At the individual and household level, any issue relating to evictions is capable of being adjudged. Discrimination in the housing sphere is likewise justiciable; all sorts of groups, including women, children, elderly people, disabled people and tenants, face discrimination in housing. In many countries, legislation ensures affordable housing, and landlords can be prevented from unfairly increasing rents. The same applies to services controlled by an outside body such as electrici-

ty, water and drainage; a state or landlord can be taken to court if they arbitrarily disconnect you from that service.

The critical issue is the willingness of a particular judge to consider that housing rights are justiciable. It does get more difficult as you move from the individual to the collective, into issues of policy and public expenditure. It's hard in many countries to argue before a judge that public expenditure for housing is insufficient and violating international law and then demand that parliament increase public expenditure. But, as numerous cases have shown, there are aspects of governmental housing policy and expenditure that can be adjudicated.

Where have you been directly involved in housing rights adjudication?

We have advised national and local level lawyers in litigation and intervened as *amicus curiae* in regional level causes, but most of our energies have gone to the international level, to breathe life into these housing rights standards. For example, we urged the Committee on Economic, Social and Cultural Rights to define the right to housing in General Comment 4, forced evictions in General Comment 7 and the right to water in General Comment 15. As early as 1987, we drew the attention of the Committee to the housing rights situation in individual countries, pointing out clear patterns of systematic housing rights violations.

We had to go out of our way 15 years ago to convince the Committee that countries such as the Dominican Republic had actually, through actions and omissions, committed violations of the *International Covenant on Economic, Social and Cultural Rights*. We had to overcome the first conceptual hurdle: that housing rights could be violated. Our strategy was to take the most grave and graphic examples of violations: forced evictions. There is also always a party clearly responsible for carrying out an eviction: a private individual, a private institution, or the state. A state is always culpable for either letting the eviction happen, or encouraging it to happen. And there is always a very clear group of victims, and it's easy to see it; you can take pictures of it; you can take a film of it. You can't do that with many violations of ESC rights. If a State cuts public expenditure or repeals a good law, it is hard to show that in graphic form.

One of our earliest goals was to see a violation declared of a State Party, making it easier for the Committee to do so in the future. It happened with the Dominican Republic in 1990, and it was the first time that any UN body had explicitly declared a State Party to be in violation of their obligations under the *International Covenant on Economic, Social and Cultural Rights.*

What was the origin of the Dominican Republic cases before the Committee?

I was working with Habitat International Coalition at the time, and I was contacted by two groups in the Dominican Republic: Ciudad Alternativa, a professional group of architects and planners, and another, called Committee for the Defence of the Barrio (COPADEBA), working at the grassroots level. Starting in 1985, a huge wave of evictions had taken place in the capital, Santo Domingo. The Government wanted to 'beautify' the city in preparation for the 500th anniversary of Columbus' landing in the Dominican Republic, and the inevitable media attention it would receive.

I was in the Dominican Republic in 1990 and met with these groups, the various communities that had been evicted and others threatened by eviction. I offered to intervene on their behalf in Geneva to condemn the evictions. At the Committee's fifth session, I distributed a dossier to the Committee outlining the scale of past and threatened evictions and the commu-

nities affected. I asked the Committee to declare the Dominican Republic to be in violation of the Covenant, since they were appearing at that session of the Committee. That was one of the limitations of working with the Committee at that time: any judgment or determination that was made had to be based on the country appearing before it at that time. But they responded positively, requesting further information from the country and asking them to desist from forced evictions.

BOX 1 - DOMINICAN REPUBLIC EVICTIONS CASE

Phase 1

1991 Submission by the NGO, Habitat International Coalition[1]

7. . . . [The Committee] should therefore call upon the State Party, as a matter of urgency, to provide it with a detailed response to the allegations that have already been made as well as to those which are alluded to in the information below.

8. A dossier of detailed information about this recent decree and the evictions which includes analyses, photographs and a copy of the decree itself has been provided to the Secretariat and is available for consultation by members of the Committee. Since the largest part of the eviction has not yet been carried out, the Committee can play a preventive and constructive role in officially addressing this intended large-scale violation of housing rights in a State Party which appeared before the Committee only one year ago.

9. An official request for information sent urgently by the Committee directly to the President of the Dominican Republic expressing its concern at Decree 358-91, and requesting that no further evictions are carried out, could encourage the Government to reconsider its current plans.

1991 Concluding Observations of the Committee on Economic, Social and Cultural Rights[2]

330. The Committee notes that its request for additional report on those issues has not evoked a response from the Government. It notes that in the meantime it has received additional information from several sources, . . . which, if accurate, would give rise to serious concern on the part of the Committee. The Committee thus requests the State Party to suspend any actions which are not clearly in conformity with the provisions of the Covenant, and requests the Government to provide additional information to it as a matter of urgency.

1 Written Statement Submitted by Habitat International Coalition, A Non-Governmental Organisation, on the Roster', 3 December 1991 (UN Doc. E/C.12/1991/NGO/1).
2 Committee on Economic, Social and Cultural Rights, 'Report of the Sixth Session', 6 December 1991 (UN Doc. E/C.12/1991/4).

Phase 2

1994 - Concluding Observations of the Committee on Economic, Social and Cultural Rights[3]

18. The Government should ensure that forced evictions are not carried out except in truly exceptional circumstances, following consideration of all possible alternatives and in full respect for the rights of all persons affected. On the basis of the information available to it, the Committee has no reason to conclude that existing plans for forced eviction in Santo Domingo, to which its attention has been drawn, are necessitated by any such exceptional circumstances.

19. All persons residing in extremely precarious conditions, such as those residing under bridges, on cliff sides, in homes dangerously close to rivers, ravine dwellers, residents of Barrancones and Puente Duarte, and the more than 3,000 families evicted between 1986 [and] 1994 who have yet to receive relocation sites (from Villa Juana, Villa Consuelo, Los Frailes, San Carlos, Guachupita, La Fuente, Zona Colonial, Maquiteria, Cristo Rey, La Cuarenta, Los Ríos and La Zurza) should all be ensured, in a rapid manner, the provision of adequate housing in full conformity with the provisions of the Covenant.

21. The Committee notes that Presidential Decrees 358-91 and 359-91 are formulated in a manner inconsistent with the provisions of the Covenant and urges the Government to consider the repeal of both of these decrees within the shortest possible time-frame. The Government should seek to remove the military presence in La Cienaga and Los Guandules and allow residents the right to improve their homes and the community at large. The Government should also give careful consideration to implementing alternative development plans for the area, taking full account of plans developed by non-governmental and community-based organisations.

27. Subsequent to the appearance before the Committee of two representatives of the Government of the Dominican Republic, the Committee received information that, based on a recommendation by the Special Committee on Urban Affairs, Decree No. 371-94 was promulgated on 1 December 1994, ordering the immediate eviction of two sectors situated on the banks of the Isabela River. In the implementation of this decree, the Committee requests the Government to ensure its compliance with the terms of the Covenant and to take full account of the recommendations contained in these concluding observations.

3 'Concluding Observations on the Reports Submitted by the Dominican Republic Pursuant to the 6 December 1991 Request', 19 December 1994 (UN Doc. E/C.12/1994/15).

In the September 1991 case, we received a letter from a group in Santo Domingo, along with copies of a presidential decree, stating that a community called 'La Cienega – Los Guandule' was about to be evicted. The Committee was meeting in November, but it was not scheduled to look at the Dominican Republic. We obtained further information, including newspaper clippings, and presented it to the Committee members. I asked them to issue an injunction requesting the Government not to carry out this act; otherwise, it would be in gross violation of the Covenant. The Committee responded and issued the decision and included it in their report. [See Box 1.] Immediately, we sent out a press release and faxed copies to colleagues and newspapers in the Dominican Republic. The next day, the Committee's finding was the headlines of every major newspaper: 'UN Condemns Government, Demands Halt To Eviction Plans'.

What was the impact of the Committee's statement?

The great thing about this case is that the community is still there today. A year or two after that decision, I visited the community, about 70,000-80,000 people right near the centre of Santo Domingo. Every person I spoke to there had heard about the UN telling the Government not to evict. Local groups had undertaken a huge popular education campaign. The Government could not risk total condemnation in the eyes of the world in 1992. Instead they gave funds to the community, and there are now roads and a better water supply system. It is now a vibrant low-income community that will hopefully continue to develop. It shows that local agitation and activism, combined with international activism and advocacy, can really yield results.

In 1994, the Government was required to submit its next report. We undertook a fact-finding mission in the Dominican Republic and brought back slides, documents and pictures and presented a slide show to the Committee on the first day of the session. We showed pictures of slums and the people responsible for evicting them. The resulting concluding observations were the most detailed to date and focused almost entirely on the housing rights issues. They were extremely effective observations because they were specific; the Committee included individual names of whole communities and names of the government departments responsible and the precise steps to be taken.

We had lobbied on behalf of eight to ten different communities. Some faced eviction; some had been improperly resettled; some lacked adequate services, and some lived in precarious housing conditions. One group lived under a bridge in a shelter they built with stones: one of the worst places I've ever seen. Those people

eventually got re-housed by the State. The 1991 decree that demanded the eviction of La Cienaga and Los Guandules was repealed by 1995; so, that was a positive outcome. But not all of the communities that were addressed by the concluding observations got relief.

Have you been able to make an effective impact in other cases?

We went to the Philippines in the early '90s, and many local grassroots organisations brought to our attention a presidential decree from President Marcos' time that criminalised homelessness. We suggested that the groups could use international law. Several lawyers and NGO people from the Philippines urged the Committee to address the criminalisation-of-squatting decree. In their concluding observations, the Committee said that the Government should repeal it directly, and it was eventually repealed. [See Box 2.] Most of the success is due, of course, to local grassroots and national level efforts. But it certainly helped that the international community, through the Committee, made a very formal and explicit pronouncement that the law should be repealed.

What is the most effective way to use the UN Committee?

There is a paradox! On one hand, the Committee has developed a large body of jurisprudence, receives a lot of information from NGOs and regularly criticises governments. Yet, they are increasingly inaccessible to NGOs in a meaningful way, perhaps because of the larger numbers of NGOs who come and often only stay for a short period of time.

I think it is very important for NGOs to present the information in a user-friendly manner, providing good evidence of the allegations, and, most importantly, to ask the Committee to make clear and specific recommendations. A recommendation that 'Law X' be repealed is clearly preferable to a statement urging a reduction in poverty. Lastly, the concluding observations need to be followed up in the media and with governments.

But, once again, that crucial question must be asked: does it make a difference? Does it physically change the situation that people are living in? That's the question housing rights activists need to ask all the time.

Does it mean that we need simply to return to purely political and popular processes, protesting, demonstrating, getting the right political parties in power so that they make the right decisions to protect people from violations? Or is there another way that we haven't thought of yet? It's the constant dilemma, and, I think, it is something that, if we are all honest, ESC rights activists must confront and not be satisfied with getting standards adopted or a case decided in court if it doesn't actually have real impacts on people's lives. Even relying on political pressure is highly dependent on political factors. There is a new law in Brazil, with the statute of the city, which will result in millions of people getting security of tenure, being protected from eviction. Now that Lula has been elected president, it is even more likely to be enforced. But what if he hadn't been elected president?

It is important to remember that the UN is able to make strong pronouncements, and this can be achieved with a small investment in resources for lobbying and advocacy. Of course, the pronouncements are less detailed than you get at the national level.

PHILIP ALSTON - INTERVIEW

Philip Alston is Professor of Law at New York University and was the Chair of the UN Committee of Economic, Social and Cultural Rights from 1982 to 1997.

What role does litigation play in advancing ESC rights?

It depends very much on the society, but it can play a very important role. But it is easy to get their importance out of perspective because, even in a country like the US, where we're accustomed to everything being litigated, the biggest gains are often made by haggling in Congress or at the state level in policy terms rather than through court cases.

But court cases can have a significant impact; a few high-profile cases can act as serious deterrents to the bureaucracy in relation to how they see issues. If you were to speak to housing rights activists in New York, for example, they'll tell you the impact which was achieved by ensuring a right to shelter in the state constitution and the resulting high-profile cases.

What role does international law play in assisting such strategies?

Often pretty marginal. The main thing it does is provide inspiration and authority for domestic activists, but not for very long. Domestic NGOs have to make sure that international human rights law is translated to a domestic level. If there's no domestic echo or resonance of the international propositions, then they don't amount to much. So it's a matter of inspiring and giving some leverage to go and try to develop their own domestic legal framework for pushing.

Would it be more fruitful to concentrate on creating national complaints mechanisms rather than international mechanisms?

Sure, there's no question of that. In the whole human rights area, the biggest mistake is to see the international arena as the first line of attack, and it's not; it's secondary. It can be a useful catalyst, and it's necessary when all else fails. But the first line of attack must always be domestic. And domestic procedures are far more valuable and useful.

How did the Committee on Economic, Social and Cultural Rights approach the question of justiciability?

Well, in two ways. The Committee took quite an important path in insisting that a number of the rights were justiciable, despite the popular misconception that they were not, and this was said in various General Comments. And then there was the General Comment 9 on the domestic applicability of the norms, which was, as far as I'm aware, the strongest statement from any UN body about the need for states to transform their international obligations into effective remedies. [See Box 4.]

In practice, beyond our concluding observations on government reports, we did respond to some requests from NGOs, who wrote to us and demonstrated that there was a really major problem. There were several big cases that were well known, involving Canada, Israel, the Philippines and a couple of others, where we

2 EDITOR: DOMINICK NA. DANAO METRO TODAY JANUARY 12, 1996 SUNDAY

UN committee hits demolitions

By RIC PUDO
Correspondent

THE United Nations Committee on Economics, Social and Cultural Rights has criticized the Philippine government for the large-scale demolition of shanties which deprived more than 200,000 people of their homes.

In a press statement, the committee's chairman, Philip Alston, said the committee would like President Ramos to explain the recent demolitions, saying they grossly violated the human rights of those evicted.

Based on reports the committee received, Alston placed the number of demolished shanties in the country between 10,000 and 33,500, affecting an estimated 200,000 individuals.

The reports said most of the shanties were demolished during the preparations for the Asia-Pacific Economic Cooperation summit last November.

"At its current session, the committee received detailed information from a number of sources alleging large-scale forced evictions," Alston said.

"Estimates of those directly affected by such evictions vary from 9,987 families to 33,500 families (and) that those families were arbitrarily evicted and have not been adequately relocated," he said.

The committee is tasked with monitoring the enforcement of provisions enshrined in the International Covenant on Economics, Social and Cultural Rights, and censures countries which violate the international agreement.

In May 1995, the Philippine government had to appear before the committee to answer complaints of massive demolitions.

The committee issued a highly critical document, but also listed strategies on how to stop demolitions and possible solutions to the country's housing problems.

The committee said that while it recognizes the necessity of eviction in certain cases, it should only be carried out if it meets the requirements of the covenant.

wrote letters to the governments in a proactive manner, based on solid information that we got from NGOs. And each of those governments actually responded when we asked them for reports. They came forward; so that, in a sense, was an informal petition system.

What do you think is critical for the development of litigation strategies in this area? What is needed?

Well, you first need to understand the complex nature of the economic and social rights that are at risk so that you can then shape a strategy. Then the big problem is the old one of the divide between the international and the domestic. Those involved at the different levels are like ships passing in the night. The internationalists operate at a rather rarified level whereas the litigators are immersed in domestic laws and administrative procedures. And the two don't come together often enough to explore what they have to offer to one another. You hear a lot about then need to train judges, but there should be training for activist litigators before they get to the judges because the cases have got to be put to the judges in a convincing fashion. This involves a careful choice of cases and arguments; most progressive social action litigation doesn't just happen by accident.

BOX 3 - PRESIDENTIAL DECREES CRIMINALISING SQUATTERS

In its 1995 Concluding Observations on the Philippines,[4] the Committee expressed 'particular concern at the use of criminal law provisions to deal with problems arising from the inadequacy of housing. It notes in this regard that Presidential Decree (PD) 772 has been used in some cases as a basis for the criminal conviction of squatters and that PD 1818 restricts the right of due process in the case of evictees. While the Committee does not condone the illegal occupation of land nor the usurpation of property rights by persons otherwise unable to obtain access to adequate housing, it believes that in the absence of concerted measures to address these problems resort should not be had in the first instance to measures of criminal law or to demolition.'

The Committee then urged 'that consideration be given to the repeal of PD 772 and PD 1818.' The law was repealed shortly thereafter by the Philippines Government.

4 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Philippines', 7 June 1995 (E/C.12/1995/7).

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FURTHER READING

Matthew Craven, 'Towards an Unofficial Petition Procedure: A Review of the Role of the UN Committee on Economic, Social and Cultural Rights', in Drzewicki, Krause and Rosas (eds.), *Social Rights as Human Rights: A European Challenge* (1994).

Scott Leckie, 'Another Step Towards Indivisibility: Identifying Key Features of Violations of Economic, Social and Cultural Rights', *Human Rights Quarterly 20* (1998) pp.81-124.

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20 INTERNATIONAL LABOUR ORGANISATION

ADJUDICATION OF LABOUR RIGHTS

The International Labour Organisation (ILO) has receiving complaints about violations of economic and social rights – ie, labour rights standards – for decades, being the oldest UN specialised agency and the most innovative in its structure – it is a tripartite body made up of governments, unions and business representatives.

In this chapter Dan Cunniah (from the International Confederation of Trade Unions) and Colin Fenwick, a labour rights lawyer, describe their experiences in using the various ILO complaint mechanisms. It is clear from the cases analysed that the ILO is relatively effective due to the clear and specific standards set out in the numerous ILO Conventions, the cooperative multi-party structure of the institution and the strength of unions operating at the national level. However, both note that not all decisions are implemented.

DAN CUNNIAH - INTERVIEW

Director, Geneva Office, International Confederation of Trade Unions.

What's your strategy in using various ILO supervisory bodies to bring cases of specific violations of ILO standards?

To be frank, the whole system evolves from the concept that we should mobilise shame against a country that does not respect the standards that it voluntarily ratifies. And that's the basis of it. So, we use the system to put moral pressure, not really legal force, on governments that do not respect the standards.

We have a number of mechanisms. The Committee on Freedom of Association is concerned with violations of the right of workers to form an organisation, interference in trade union matters, intimidation of trade union leaders, interference in collective bargaining and prevention of collective bargaining where, for example, the legislation is not in conformity with ILO Conventions 97 and 98.

Then, we have 'Article 24 representations', using Article 24 of the ILO Constitution. We have the possibility of making representations against the country that does not apply a convention which it has ratified. After that, after, let's say, a trade union organisation has made such a complaint, the Governing Body would set up a committee, a tripartite committee, to examine the complaint, and then the committee would make its report to the Governing Body. So that's another procedure.

Then we also have the Committee of Experts, which is appointed by the Governing Body. It comprises independent people, people of integrity, appointed by the ILO Director General, in consultation with the ILO partners. The peculiarity of the Committee of Experts is that they are trusted with the task of not only monitoring the obligation of standards in countries that have ratified the conventions, but also in countries that have not ratified the conventions. So, that's an important element. And the committee publishes a huge report every year that is brought to the attention of the delegates of the ILO Conference and then the public at large. That report is examined by a special Committee set up by the Conference every year. It is called the Committee on Application of Standards. The most serious cases are mentioned in a special paragraph in the report of the Committee to the Conference.

So, then we have the final procedure, the 'Article 26 complaint', which is, let's say, the most extreme weapon in the ILO's legal arsenal, because it is used very rarely. It's only after a country has seriously violated the convention and after we have made several attempts to bring that country to order and failed that we use this mechanism. It leads to the appointment of a commission of inquiry, which is what we did in Myanmar, for example, and Poland. We didn't succeed in getting it in Colombia, because the employers' Group in the ILO and some Latin American governments have blocked it. We are likely to use it now against Belarus.

What have been some of the tangible results of these procedures?

In the Myanmar/Burma case, we got the Government to acknowledge that forced labour does exist in the country. If you see their previous reports in the UN, they were saying there was no forced labour in Myanmar/Burma , stating, "it's none of your business; we have no forced labour; this is voluntary labour; people offer their labour voluntarily, to contribute to the country's development" But here, when we had this high-level committee visiting the country and talking to people and finding things for themselves, the reports began to acknowledge forced labour. The fact that the Burmese military regime even accepted a mission from the ILO was remarkable. They did prevent, in the past, the UN Special Rapporteurs from getting access to several ministries and areas in the country, and telephones were tapped, etc. But, for the high-level meeting, it was different, and the ILO made sure that those people would get free access to institutions and even the military.

I would not claim a big victory, but there were some results, but not to the total satisfaction of the ICFTU. But those are the limitations of the system itself. The ILO is not an enforcement institution that can bring countries like that to obey or to comply with these decisions. They can use moral pressure; they can mobilise public opinion, strengthen sanctions, etc. These are all the kinds of things that help to make the situation better.

But let me also qualify my comments by saying that, in the world we are living in now, the moral pressure, the gentlemanly type of criticism for not behaving properly in a civilised

society, is losing its persuasive force. So, this is why the ICFTU is now seeking something stronger in terms of linking the observation of these rights with the access to markets, etc., because trade is something which is going to affect every country.

For example, we have appealed to the World Bank and their financial institutions to deny loans to countries that are serious violators of trade union rights. And, just now, I got a note from a colleague stating that the International Finance Corporation, part of the World Bank Group, have said that they are going to take labour standards into account in their discussions with countries applying for loans.

So, we can't rely just on the mobilisation of shame and moral persuasion, branding a country before international public opinion as a pariah state. That will not help in all cases. If you bring a case against, say, the UK Government or the French Government, they do take these things very seriously, and they will act. But, if you're dealing with a regime that does not care about the international community at large, the mobilisation of shame will not yield any result. So, international mechanisms have to be applied judiciously.

What have been the most important elements in your strategy?

We need to have strong evidence of an actual violation having taken place because we place great importance on credibility; we would not want to submit cases that can be solved at national level, or petty cases. I am not saying that we are always successful, but we try to submit cases that are really extreme, difficult, and where no other recourse has been possible. And that gives us a body of jurisprudence that is based on serious violations of trade union rights, and this is how the committees have established their reputation when making recommendations. Their recommendations are taken into account by the courts of justice, labour lawyers and judges, which gives them a very good reputation at country level.

[T]hat gives us a body of jurisprudence that is based on serious violations of trade union rights, and this is how the committees have established their reputation when making recommendations. Their recommendations are taken into account by judges, which gives them a very good reputation in-country.

Does the presence of nationally based union members help you mobilise around decisions?

Yes, since, by the time the cases are submitted to the committees, there is some publicity given to the claims. The union has appealed the laws, brought their attention to the issue, and, so, after the report is published, we can also help give publicity to it in that country. But, in cases being examined, we don't allow any publicity; it's all confidential, to make sure that the committee is not acting under pressure. We are not allowed to give any publicity to any pending case.

How can the human rights NGOs work better with unions?

In the ILO framework, we have collaborated with, for example, Amnesty International on cases and so on. In some cases, we've had information, or they have contacted us, and then we have joint consultation and strategies with them. But we should not forget that the ILO is a labour organisation, unique in the UN system for it's tripart nature. So, it is primarily servic-

ing, I would say, its constituencies of governments, workers and employers. Now, this is why other groups, such as human rights NGOs, find it difficult to enter. But, if they do it with good will, through one of the existing partners, workers or even employers, there is some potential. The trade unions have never had a situation where we would refuse the help coming from NGOs working on economic and social issues, and, in some cases, we have even acted as a sort of post office, channelling a claim into the ILO system. I don't think there is any problem from this side; provided they understand that they need to consult workers before they make a case on an issue which affects workers.

COLIN FENWICK - INTERVIEW

Colin Fenwick is Senior Lecturer at the University of Melbourne and the University of Virginia. He has ten years of experience in the field of labour relations law in Australia, the United States and Switzerland, as well as at the ILO.

The Committee on Freedom of Association has received and adjudicated over 2,000 complaints. Why do you think this procedure is the most heavily used, and how effective has it been in practice?

The freedom of association complaint procedure is well used because it applies to countries whether or not they have ratified the relevant ILO instruments (No. 87 and No. 98); rather, member states of the ILO are susceptible to complaints concerning freedom of association simply by virtue of their membership of the ILO. Another reason it's well used is that it's simple: relatively little formality is required. A third reason is that the committee is always of tripartite composition.

As for all international supervisory bodies, complaints to the Committee have not always led to changes on the ground. There have been many complaints against Canada, for example, particularly concerning the provincial governments (especially Ontario in recent years), but the lodging of these complaints and the findings of the Committee on Freedom of Association have had little or no impact on the situation. Complaints have been lodged against the US, but it has not changed its laws or practices or ratified Conventions 87 or 98. Complaints were lodged against the United Kingdom over the legislated de-unionisation of civil servants at government communications headquarters (the *GCHQ* case); yet, nothing changed until a change of government. In Australia, a complaint in the early 1990s concerning the unusually high minimum membership requirement for trade union registration (10,000 members) did result in a change in the legislation back to a more appropriate number. In Colombia, many complaints about the deaths and other horrors experienced by trade unionists have not led to much change on the ground.

You appeared before the Commission of Inquiry into Forced Labour in Myanmar. What was the nature of the inquiry? How would you evaluate its effectiveness, and what lessons can be learned?

The Myanmar commission of inquiry investigated allegations that Myanmar was not complying with its obligations under Convention 29 to suppress forced labour in all its forms and to punish those guilty of unlawfully exacting forced labour.

It is difficult to evaluate the effectiveness of the commission of inquiry. In a simple sense, it has been totally ineffective; it still frequently reported that forced labour continues in the country. The climate of repression in Myanmar appears to have been little altered generally, or specifically in respect of forced labour.

On one view, the regime has been rewarded. Whereas, before the establishment of the commission of inquiry, the ILO would not run any technical programmes in Myanmar for fear of appearing to legitimise the regime, under the decisions taken by the Governing Body and the Conference since the commission of inquiry, there is now an official ILO liaison office in Rangoon.

What happened after the commission of inquiry is that the regime in Myanmar has been dragged along to a series of deadlines at ILO Governing Body meetings and conferences, for the first few years, in the shadow of the possibility that the Conference would act under Article 33 of the ILO Constitution. It did so a couple of years ago, but, `to what effect?´, some would wonder. Basically the Conference passed a resolution calling on other states and international organisations to recognise the published findings of the commission of inquiry and to examine closely all their interactions with the regime and the country to see that they would not assist in propagating the practice of forced labour. On one view, 'big deal!' On another view, further grist to the mill of keeping international pressure, including economic pressure, on the regime to reform its practices. It is difficult for nation states to ignore the findings of an independently constituted commission of inquiry held under the auspices of an international organisation.

How do you evaluate the ILO's claims that little use has been made of 'special machinery, including the Commission of Inquiry procedure', because employers and workers groups 'have no doubt considered active participation in the regular system of supervision preferable to the use of more formal procedures'?

The idea of the general supervisory machinery is that it can work in an integrated way with the bureaucratic arm of the ILO, which has the technical expertise to help countries that seek assistance. How often this happens in practice is difficult to say. The supposition that limited use of the complaint procedures is because of a feeling that it is better to use the regular procedures is not necessarily true. Frankly, the procedures are complex and not widely understood.

I suspect that many trade unions and trade union members would not have recourse to any of the procedures were it not for the coordination and guidance offered by the International Confederation of Free Trade Unions and the Global Union Federations.

It has to be remembered also that it takes a lot of time and resources at the union end to do something like run a case for a commission of inquiry. It's a lot more economical to lodge some observations with the Committee of Experts, and let the ILO, with its much greater resources, take things on from there.

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21 WORLD BANK INSPECTION PANEL

CHALLENGING STRUCTURAL ADJUSTMENT PROGRAMMES

After decades of criticism, the World Bank has made itself partially accountable for the negative social impacts of its lending activities. In 1993, it created the World Bank Inspection Panel, a monitoring body empowered to receive complaints from affected communities. While the Panel can only scrutinise compliance with Bank operational guidelines, NGOs have made use of the standards to contest human rights violations stemming from Bank activities.

This is the all-important thing: Pro-Huerta continues, and it is one of the most important social programmes in the country.
Victor Abramovich

The majority of the cases heard by the Panel concern damage directly caused by major projects, for example displacement of persons and environmental degradation. While there have been some notable successes (the Bank has withdrawn from a specific project), Dana Clark notes that 'troublesome gaps remain in the system, preventing local people whose rights are violated from obtaining an effective remedy', particularly in relation to involuntary resettlement.[1]

More recently, an Argentine NGO successfully challenged, before the Panel, the implementation of one of the Bank's controversial loans for structural adjustment. Structural adjustment accounts for up to one-third of Bank lending and usually requires fiscal restraint (budget cuts) by a government in exchange for credit. In the Garden Programme case [see interview below], the Centro de Estudios Legales y Sociales, an NGO, successfully prevented the elimination of a nutritional programme by invoking the 'social clause' in the structural adjustment agreement.

1 Dana L. Clark, 'The World Bank and Human Rights: The Need for Greater Accountability', *Harvard Human Rights Journal*, Vol. 15, Spring (2002), 205. Clark notes that resettlement programmes have rarely provided adequate compensation or livelihoods. The inability of the Panel to supervise its recommendations means it has little control over the remedying of violations.

VICTOR ABRAMOVICH - INTERVIEW

Executive Director of the Centro de Estudios Legales y Sociales, Victor Abramovich established the Economic, Social and Cultural Rights Programme of the centre. [See also Chapter 6.]

Why was the Garden Programme Nutrition Plan cancelled?

The Garden or Pro-Huerta Programme was an extremely innovative and effective programme. With an annual budget in 1998 of around $11 million, it assisted almost three million people achieve self-sufficient food production through seed distribution and technical assistance. The recipients largely ran the programme themselves with assistance from 500 or so technicians.

But, at the same time, the Argentine Government obtained a structural adjustment loan from the World Bank in order to avoid currency devaluation. The loan was for about $2.5 billion. The Government was required drastically to reduce fiscal expenditure, but a social clause in the agreement meant that they had to maintain a safety net of social programmes worth about $680 million. And the Garden Programme was included in this safety net.

In the following year came the national elections. The Government wanted to increase expenditures in certain areas to maximise its electoral chances, but it still needed to cut expenditure so it could receive the next tranche of credit from the Bank. What it did was to reallocate the money for the Garden Programme to fund projects in places where it needed votes. The Garden Programme was simply allocated $4 million for 1999, meaning that it would disappear by the middle of that year.

Why did you make a complaint to the World Bank Inspection Panel?

The technicians in the programme had started a nationwide campaign. They presented 1,200 letters from programme recipients, organisations and provincial parliaments to the Minister of Health, the Minister of Agriculture and the Cabinet of Ministers and began to mobilise. The programme was critical for the beneficiaries because it helped them grow their food; it delivered the seeds, and the technicians worked with the people in order to teach the best ways to use the garden. It created very important social contacts and allowed effective grassroots organisation.

But, when they received no response from the Government, they contacted us. We began to study the possibilities of presenting the case in the domestic courts. Since we knew the Bank agreement included a safety net, we considered challenging the constitutionality of the budget law, since a treaty supersedes domestic legislation under our Constitution. But we decided it was a very difficult case legally and strategically; the Argentine judiciary was very conservative when faced with the halting of executive or budget decisions.

We then started exploring the possibility of the Inspection Panel. We got a copy of the agreement from the World Bank and discovered that the Garden Programme was explicitly included in the safety basket of programmes. We began a discussion with the technicians and the pro-

FINDING OF THE INSPECTION PANEL IN THE GARDEN PROGRAMME CASE

22. . . . In this case, the Panel is satisfied that the Requesters are beneficiaries of the Pro-Huerta programme and that they would sustain harm if the programme were to be terminated and they were left without any other forms of nutrition assistance. . . .

23. The Bank's supervision and monitoring of compliance with the Social Budget Condition appears to have been limited almost exclusively to the review of the amounts allocated in the federal budget to the social programmes listed in the Loan Agreement. In the case of Pro-Huerta, no attempt was made to contact the executing agency or programme beneficiaries to ascertain whether the proposed budgetary allocations were sufficient to sustain the programme throughout the fiscal year.

gramme beneficiaries, and they decided that a case should be brought, but with the confidentiality of the recipients maintained.

Did you consider bringing the case domestically, alleging a retrogressive step by the Government?

We looked at arguing that the cutbacks violated the right to an adequate nutritional diet. This argument was particularly pertinent since the Government had created the programme in the first place, and people depended on it. But we faced the problem of a conservative judiciary.

The retrogression argument is difficult to bring to court. It's easy if you present cases of a retrogressive nature with regard to legal protection, for instance legislation that establishes conditions for the exercise of rights or the protection of a right. But, when the retrogressive nature of the action concerns finance, it's more difficult. You have the court involved in discussions about public policies and priority of resources. In order to make a case strong, you often need another link, another basis to justify keeping the programme.

How did you develop your legal arguments before the Panel?

The *Garden Programme* case was a legal action, but in a more political sense. The Inspection Panel is not a court, and you can only rely on the Bank's operational guidelines. But we used human rights standards to inform our submissions. We invoked the right to food, but it was not the central argument.

The central argument was the lack of supervision by the Bank management. They should have ensured that the social clause was complied with. When we sent our first petition, the management responded, saying, 'We share your concerns about the fate of the programme, but we cannot do anything about that, because the Government has satisfied us that they have allocated the total share of the money to the social programmes, and we cannot ask the Government to put one specific amount of money in one specific programme.'

But we said the programme was important because it was in the original basket, and all these programmes were essential according to the agreement. The agreement did not say that

funding for Pro-Huerta had to be maintained at a certain level, but we argued that the programme had to be viable, particularly when the Bank had conducted analysis about which sectors would be disproportionately affected by the structural adjustment plan.

We argued that the Bank has to supervise the fulfilment of the agreement, including the obligation with regard to the social programme. We used that in our presentation in Washington, saying that the management had said it is possible that the budget cut could affect the programme, but they didn't know whether it would or not. This was evidence for the lack of supervision; they should know if the cuts would affect the programme. We also said management had failed to provide information and that the elimination of the programme would violate the poverty reduction strategy.

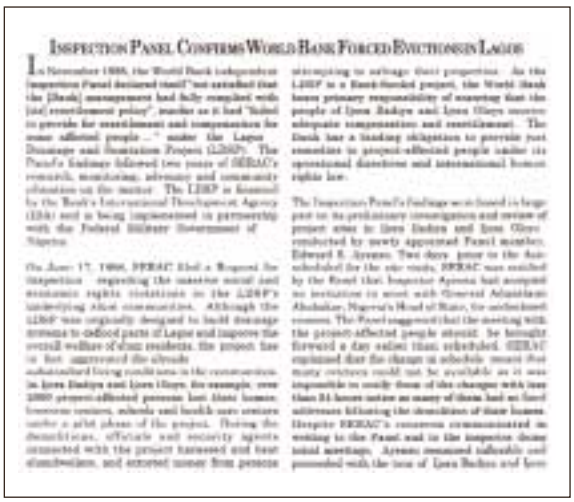
This was the legal argument. It was an alternative route to get a similar result. It was a very exciting case because it was the first time that the World Bank Inspection Panel had examined a structural adjustment agreement and the basket of social programmes that link with it.

What was the result of the complaint?

The pressure from the Inspection Panel on the management of the Bank helped us to get a favourable result. [See Box 1.] The complaint and accompanying mobilisation were very helpful in influencing a fight inside the Government about the decision to cut the programme. The Minister of Agriculture wanted to keep it, and the Minister of Finance wanted to cut it.

We had asked for the second and third tranches of the loan to be halted until the Garden Programme was restored to full funding. The case then put enormous pressure on the Government, and the Minister of the Economy decided to release the money to the programme. It was a game of political pressure, a chain of political pressure. We put pressure on the Inspection Panel in order to put pressure on the [Bank] management; the management put pressure on the Minister of the Economy, and he gave us the money. This was the strategy.

If you read the report of the Inspection Panel, they said that the reaction of the Government began after we presented the case in Washington, and the case would also have been unnecessary if the Bank management had responded fairly and properly when we first contacted them.



INSPECTION PANEL CONFIRMS WORLD BANK FORCED EVICTIONS IN LAGOS

On June 17, 1998, SERAC filed a Request for Inspection regarding the massive social and economic rights violations in the LDSP's underlying slum communities in Nigeria.

- In November 1998, the World Bank independent Inspection Panel declared itself "not satisfied that [Bank] management had fully complied with [its] resettlement policy", insofar as it had "failed to provide for resettlement and compensation for some people ..." under the Lagos Drainage and Sanitation Project (LDSP).

How important was the Panel's visit to Argentina?

It was very important because the World Bank had no idea about the amount of money that the Government was giving to the programme, and this was very important evidence about the lack of supervision.

This decision has significant consequences for the World Bank. It means they will have to monitor their programmes more closely.

This is true, and the Inspection Panel noted that more internal resources may be required. I think it also made the Bank understand the importance of working with local organisations, working with the local people that presented the case in Washington, that this kind of mechanism was a tool for the citizenship to control the Government, but also to control the Bank management. After the case, they tried to establish better relations with social organisations.

And does the programme continue today?

Yes. This is the all-important thing: Pro-Huerta continues, and it is one of the most important social programmes in the country. We had a big meeting with the technicians and the beneficiaries, and they said that the action against the Bank had been essential in ensuring the programme kept going and got stronger.

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MULTINATIONAL CORPORATIONS

22 HOLDING MULTINATIONAL CORPORATIONS ACCOUNTABLE

In many cases, the economic and political power of multinational corporations eclipses that of their host governments. Holding multinational corporations accountable for human rights violations is not a simple task [see Box 1] because there are no strong and effective international complaint mechanisms. Furthermore, bringing complaint cases in developing countries is complicated by the financial and power imbalance between companies and their 'victims' and, in many cases, by the absence of an independent and properly funded judiciary.

Advocates have increasingly turned to courts in developed countries to sue parent companies for injuries caused at their overseas operations. In this chapter, Richard Meeran relates the experience of South African workers and residents who took legal action in the United Kingdom against Cape Plc, a British asbestos-mining company. [See the court's decision in Box 2.] A number of similar cases have been brought in the US and Australia. [See Boxes 3 and 4.]

RICHARD MEERAN - INTERVIEW

Richard Meeran is a Partner at Leigh Day & Co, London.
He has spearheaded cases against numerous multinationals.

What was the origin of the Cape cases?

The *Cape* cases grew out of our earlier litigation on corporate abuse. Our case against British Nuclear Fuels, for example, concerned children who had developed leukaemia from living close to a nuclear reprocessing plant or from their fathers who had been exposed to radiation. We then started turning our attention to abuses overseas. We were in contact with various

1 Note the increasing use of the complaints mechanisms under the OECD Guidelines on Multinational Enterprises: see forthcoming COHRE, *Litigating Economic, Social and Cultural Rights: A Guide*, 2003.

BOX 1 - THE CONDUCT OF MULTINATIONALS NEEDS TO BE REGULATED

Sanchia Temkin (Business Day, Johannesburg, 26 August 2002)

There is a need for an international system to regulate the conduct of multinational corporations, says London lawyer Richard Meeran. . . . There had been industrial disasters such as Thor Chemical, Cape Plc, and the explosion at Union Carbide's chemical plant in Bhopal, India. There had been the dumping of obsolete drugs in Asia and the intensive promotion by Nestle of powdered baby milk as a substitute for breast-feeding in regions where the water required to mix the powder was contaminated.

Multinational corporations had not been subjected to proper systems of accountability, said Meeran, the lawyer representing 7,500 SA [South African] victims suffering from asbestos-related disease. The only effective way for governments to control the conduct of corporations was through 'internationally binding regulations, national legislation and law enforcement', he said. . . . Meeran said multinationals whose operations straddled national boundaries were able to elude legal responsibility. The parent company was based in one country and the subsidiary in another. . . .

unions in South Africa and elsewhere, and we found numerous cases of UK-based companies abusing health and safety standards.

Our first major case, *Thor Chemicals*, concerned 20 employees of a mercury plant in South Africa who were suffering from mercury poisoning. The plant had actually been moved there after more stringent standards were introduced in the United Kingdom.[2] We brought the case in the UK, and the parent company was unsuccessful in having the case moved to South Africa. The company later settled.

At the same time, we brought the *Connelly v Rio Tinto (RTZ)* case, which established the principle that access to legal assistance in the UK could be taken into account in deciding whether the case could be litigated there.[3] The action concerned a Scotsman who contracted laryngeal cancer while working for Rio Tinto in Namibia. That was a landmark ruling, and at first glance it may appearunattractive; many British people aren't eligible for legal aid because their means are too high. But the case concerns UK companies and their foreign victims, who should have an equal right to legal assistance.

'I found young children completely included within large shipping bags, trampling down fluffy amosite asbestos, which all day long came cascading over their heads. They were kept stepping down lively by a burly supervisor with a hefty whip.'

Dr Gerrit Scheepers, Government Health Inspector

2 *Ngcobo and Others v Thor Chemicals Holdings Ltd*, TLR, 10 November 1995.
3 *Connelly v RTZ Corporation Plc and Others* [1997] UKHL 30; [1998] AC 854; [1997] 4 All ER 335; [1997] 3 WLR 373, *www.bailii.org/uk/cases/UKHL/1997/30.html.*

BOX 2 - HOUSE OF LORDS RULED THAT CASE COULD PROCEED IN THE UK[4]

Beginning in 1999, 7,500 workers and residents lodged claims in UK courts against the Cape parent company, alleging that it had failed to ensure that its subsidiary (sold in 1979) adopted healthy and safe working practices. Since the claimants were South African and most of the evidence had been gathered there, the House of Lords held that South African courts were more appropriate to hear the case. But the Lords found that, in the interests-of-justice test, the proceedings should take place in the UK because:

- only UK solicitors were able and willing to provide legal assistance due primarily to the availability of UK legal aid;
- South Africa's lack of experience with such complex cases would delay or frustrate the hearing of the case, and
- this was consistent with Article 6 of the European Convention on Human Rights, concerning the right to a fair trial.

'I cannot conceive that the court would grant a stay in any case where adequate funding and legal representation of the plaintiff were judged to be necessary to the doing of justice and these were clearly shown to be unavailable in the foreign forum although available here.'

Lord Bingham of Cornhill, House of Lords, Lubbe and Others v Cape Plc

This all helped in the larger case against Cape Plc, whose asbestos-mining activities have had disastrous consequences for workers' health and the environment all over the world. Victims were compensated in countries, including the US and the UK, but not in South Africa. So, we lodged claims on behalf of three residents and two workers in the UK High Court. At first, we were successful in quashing the company's request for the proceedings to be transferred to South Africa. But, when a further 2,000 clients were added, we ended up in the House of Lords [the highest court in the United Kingdom]. But we were successful.

What legal obstacles had to be overcome to bring the case in the UK?

There were two issues. One was a jurisdiction problem: how to persuade a UK court to hear the case. The workers had contracted diseases in a foreign country due to the activities of a locally registered company. In each case, we had to show that the UK was an appropriate legal forum in which to conduct the case, and we relied on the fact that the victims could secure justice in the UK where funding was available but not locally where funding was not available. Companies frequently try and have cases stayed, but, when cases are dismissed, they rarely proceed elsewhere.

4 For the text of the decision, see Lubbe and Others v Cape (Plc) [2000] UKHL 41; [2000] 4 All ER 268; [2000] 1 WLR 1545 (20 July 2000), *www.bailii.org/uk/cases/UKHL/2000/41.html.*

BOX 3 - CHOOSING A JURISDICTION, BY RICHARD MEERAN

Besides the United Kingdom, the other option is always the US or other jurisdictions if a company is registered there. On one hand, it is more difficult suing in the US under normal torts law since many courts are stricter when it comes to the limitation rule.[5] On the other hand, the US has the advantage of juries, more severe sanctions and more lawyers willing to take cases.

The US also has the Alien Torts Claims Act. A whole barrage of human rights cases have recently been brought under the law, Myanmar, Nigeria, sweatshop cases, but you have to fit the claim into certain categories: forced labour, torture, rape. Obtaining the necessary evidence is also difficult since government forces usually carry out such violations, and you have to prove that the company (e.g., Shell in Nigeria) conspired. A US federal court recently held that peasants in Myanmar had presented sufficient evidence that the Unocal company had knowingly assisted the Myanmar military in committing abuses, and the case could proceed to trial.

In the choice of a jurisdiction, there are some paradoxes and difficult ethical issues. It is commonly assumed that laws in developing countries are less stringent than those in more developed ones. Our experience contradicts that. The laws in developing countries are often the same, but they are not enforced. You also have to consider general political and economic questions. Some people felt that the cases would deter investment in South Africa. But there's a difference between companies operating with low health and safety standards and companies paying people lower wages in developing countries. If you pay too little, then that can also lead to serious consequences, but, when it comes to worker health and safety, these cases are clearly the thin end of the wedge.

The second issue was that of making a parent company liable for conduct that was ostensibly that of its local subsidiaries, a difficult task given legal precedents concerning the corporate veil. [Each company in a corporate structure is a separate legal entity, which theoretically means that the parent is not responsible for actions of its subsidiary. – Ed.] But our strategy was to show that the parent company was itself directly involved in occupational health and safety issues of its overseas subsidiaries.

The reaction of most people – even the most sympathetic – to our plans was negative. The first time we went into court with the *Thor Chemicals* case, the judge asked, in a somewhat sceptical manner, 'What are these South Africans doing sitting in England?'. But we succeeded: the judge was so appalled by the facts of that case.

Why did you choose to litigate in the UK and not South Africa?

It was a trade-off. If you were to go to South Africa, you wouldn't have the parent company obstacle. You could sue the subsidiary company that was directly responsible for injuring workers and contaminating the environment. The problem with the subsidiary companies was

5 Claims must be lodged within a certain period after the damage becomes apparent.
6 Doe v Unocal, 18 September 2002. The lawyers are Earth Justice, US Office, 1612 K St. NW, Suite 401, Washington, DC 20006, Tel: +1 202 466 5188, Fax: +1 202 466 5189, *Email: infousa@earthrights.org, Web: www.earthrights.org.*

that they had no assets or insurance. Also, you couldn't directly sue an employer in South Africa on these issues, and there was no legal aid available. So the practical obstacles were colossal. It was infinitely better, in terms of the prospects of getting justice, to sue in the United Kingdom.

The issues of liability were also complicated. To prove that the parent company was liable for the asbestos, you had to go through detailed analysis of the company's structure to show that the parent company had a role in determining the policies of the subsidiary. In the *Cape Plc* case, we had to go through about half a million documents on that question.

What was the result for the claimants?

After our victory in the House of Lords, we spent a year fighting in the courts over procedural issues. The judge agreed to the defendant's request that we should produce details for each and every claimant. We had to produce 5,000 medical reports, and, by October 2001, we were able definitively to show that 85% had asbestosis.

The company then told us that they had virtually no money, only 6 million British pounds for a settlement. If we didn't settle, they threatened they would spend the money fighting the legal case. The situation was precarious. But one of the shareholders, aware of the impact of the cases on Cape's share value, was willing to make a deal with us for £21 million. It subsequently increased its shareholding and became controlling shareholder, whereupon it's Managing Director was appointed as Chairman of Cape Plc.[7]

Eleven million pounds was paid into a trust in 2002, and the other £10 million is to be paid to the victims on an instalment basis over ten years. The maximum payment that a claimant could receive is £5,250, for the fatal asbestos-related cancer of the lining of the lungs. These amounts are a tenth of what you would receive in the UK. But you should bear in mind that the cost of living is lower in South Africa and that we would still have faced numerous legal hurdles if the case had proceeded.

Have there been other beneficial impacts of the case?

Someone at a large commercial law firm was quoted as saying these cases have not increased corporate liability; rather, it's just more likely that these kinds of cases will be heard in the UK. That, to me, was quite revealing, because it acknowledged that the liability had always been there in theory; it was just that no one had been able to enforce his or her rights in practice. He then went on to say, 'Companies must now adopt the same standards overseas as they do in the UK.' And, if you walk into court now with a case representing some South Africans or other foreign claimants, the judges are not going to raise an eyebrow. They've seen it now; they know it happens.

7 The settlement was later effectively increased to 26 million; the Legal Aid Board and the law firm waived some of the costs, and a company insurer made a contribution.

BOX 4 - AUSTRALIA

Rex Dagi v BHP (The Ok Tedi Mine case)[8]

Untreated mine tailings were dumped by the OK Tedi mine into the Ok Tedi and Fly rivers of Papua New Guinea. Thirty thousand villagers living along the rivers sued the mine's parent company, the multinational BHP. Assisted by the law firm Slater & Gordon, the villagers brought their claim in Australia, requesting compensation for environment degradation, loss of livelihoods and disease. BHP successfully lobbied the Papua New Guinea Government to legislate that the litigation was illegal. But the Melbourne-based Supreme Court found this action a contempt of court, stunning BHP into reaching a settlement with the villagers, which included compensation and the halting of waste dumping. Compensation has been paid, but progress has been slow on safer ways to deal with tailings. More recently, a new action was launched on behalf of other villagers, and, in 2002, BHP controversially sold its share in the mine and was fully released from its environmental obligations by the Papua New Guinea Parliament.

What key obstacles did you face?

We had a difficult time during the second Court of Appeal judgment. We were criticised for starting with five workers and not indicating to the court that there were 3,000 potential claimants. The company pushed this argument very hard because to attack the lawyers who are dealing with a case is quite an effective way of derailing it. Cape Plc also contracted political lobbyists to try and disrupt the case, but they were unsuccessful.

One of the more controversial aspects of the settlement was the stipulation that the South African Government should release Cape from all its environmental obligations. Cape had left South Africa with areas contaminated with asbestos. All the parties ultimately took a pragmatic approach and accepted the release for the sake of the victims who were desperately impoverished, but the trust established covered not only our clients, but all victims of Cape's asbestos mining.

One of the hardest tasks was holding together the communities. You need a large number of people to liaise with them, a proper system of communication, and people to receive information from people whom they trust and who know what's going on. Throughout, we had a very clear liaison with the communities and the union. If the community had not understood the strategy, it would have been very easy for people to get disheartened and lose interest or for the company to create divisions, because they did try.

What have been the lessons in developing litigation strategy?

The cases have highlighted the importance of a clear strategy. The difficulty for lawyers who act for individuals is that you can't manufacture cases, although we are accused of this, caricatured as 'ambulance chasers', etc. If you want to develop the law, then you have to do it through

8 The lawyers are Slater & Gordon, The Dominion Building, 533 Little Lonsdale Street, Melbourne, VIC 3000, Australia, Web: *www.slatergordon.com.au*.

We didn't use a human rights legal argument . . . but, factually, we made a lot of the issue that they had utilised child labour on a wide scale. We emphasised the different treatment of UK and South African workers . . . .

Richard Meeran

real cases. But it's a difficult balance. You could think up in your mind the most ideal case, but that probably doesn't exist. You don't just bring any case, though: bad cases make bad law.

It is important to recognise that you need an entire body of legal principles in place. Campaigners often forget it. The legal system works in a holistic way, and, because rulings are based on principle, the same principle can apply to completely different cases. It doesn't have to be a case involving a worker in a sweatshop to establish a legal principle that helps workers in other sweatshops. Some of the decisions that we relied on were from commercial cases. Our cases have profound implications for all kinds of people, including sweatshop workers and people who work in uranium mines, etc.

Public exposure is important. There was an argument in the courts about whether it was in the public interest for the case to be heard in the UK; so we held photographic exhibitions to show that there is such a public interest there. And the demonstrations in London were very significant because, when you have victims who are far away from the court, the litigation becomes a bit unreal for them, and it becomes worse when you suffer a series of defeats. So, during the Court of Appeal hearing, it was important for them to see on TV all these people in London demonstrating in the pouring rain.

Another interesting point was the intervention of the South African Government, which intervened in the House of Lords to argue that public interest considerations should include South Africa's interest. The Government got a lot of pressure from the unions. In the event, the House of Lords decided that public interest factors could not be taken into account, and they hardly mentioned the South African Government intervention. But I think that having the South African Government intervening on the side of the victims raised the credibility of our arguments.

It was also important to focus on the human rights aspect. Our cases in the past have been portrayed a bit as 'compensation culture', and that reduces sympathy for the victims and may discourage a court from finding in your favour. Once you start viewing something as a human rights case, then it gives you an advantage, because it's an impression you want to give: these are people who've been abused by a greedy, undemocratic company. We didn't use a human rights legal argument, apart from access to justice and the right to a fair trial, but, factually, we made a lot of the issue that they had utilised child labour on a wide scale. We emphasised the different treatment of UK and South African workers: one group being given masks and the other not. We had pictures of white managers wearing full respirators and black workers working right next to them loading up sacks of asbestos with nothing at all.

LESSONS LEARNED

- In suing multinational corporations, advocates must be aware of unintended consequences, for example, workers losing their jobs. Cases should be carefully chosen.
- A long-term legal strategy is critical; overly ambitious and unsuccessful early cases can backfire.
- In transnational litigation, the importance of choosing the right jurisdiction is paramount.
- Where appropriate, non-legal strategies such as raising media awareness can have enormous influence.
- Substantive justice can be achieved, but requires enormous resources. Companies place many obstacles in the way.

Postscript: Unfortunately Cape did not honour the December 2001 settlement agreement, by which it was to pay a total of 21 million pounds (payable over a period of 11 years) into a trust to be established in South Africa for the benefit of the existing 7,500 claimants and future victims also. Cape cited severe financial difficulties as the reason for its failure. (It subsequently emerged that Cape was on he verge of insolvency). The litigation was revived in September 2002. A smaller settlement in the amount 7.5 million pounds, payable in one go, to the 7,500 claimants was re-negotiated with Cape. At the same time a legal challenge had been launched in the South African High Court against a proposal by a Gencor Ltd, a South African mining company to "unbundle" its assets. Lawyers argued that the unbundling should be stopped as Gencor had failed to make any provision for asbestos victims. Gencor settled the case, based on the model of the December 2001 Cape Plc settlement. Gencor agreed to pay the Cape Plc victims (many of whom had also worked fro Gencor) about 3 million pounds so that the total settlement for the Cape Plc victims was approximately 10.5 million pounds.

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See the website, *www.business-humanrights.org*

The Centre on Housing Rights and Evictions (COHRE) is an independent, international, non-governmental human rights organisation committed to ensuring the full enjoyment of the human right to adequate housing for everyone, everywhere.

The ESC Rights Litigation Programme aims to support and initiate legal efforts to bring social and economic justice to the poor, particularly in the area of housing. Based in Geneva and Washington , the Programme works to facilitate the judicial application of ESC rights by working with local, national and international advocates and lawyers throughout the world.

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