Justiciability of ESC Rights and The Right to Effective Remedies: Historic Challenges and New Opportunities

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Rights without Claimants

Questions about the justiciability of economic, social and cultural (ESC) rights have dogged the international human rights movement since the separation of the integrated rights in the *Universal Declaration of Human Rights*[1] into two Covenants. The *International Covenant on Civil and Political Rights* (ICCPR)[2] provided for an optional complaints procedure at the time of its adoption[3], but none has existed for the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[4] for the more than forty years since that time. This differentiation in relation to the ability to bring forward individual and group claims under the two categories of rights has had a profound effect on the coherence and integrity of the international human rights system. While civil and political rights jurisprudence has been nourished by a generation of individual cases that contextualize and refine our understanding of these rights by reference to real people and their actual circumstances, economic, social and cultural (ESC) rights norms have been developed at the international level largely without rights claimants.

This has led to some imbalances in the approach to and deficiencies in the understanding of ESC rights. There has been considerably more analysis, for example of different types of

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[1] *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (entered into force 10 December 1948).

[2] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [*ICCPR*].

[3] *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976.

[4] *International Covenant on Social, Economic and Cultural Rights*, 16 December 1966, 993 U.N.T.S 3 (entered into force 3 January 1976) [*ICESCR*].

government obligations than of different types of rights claims.[5] ESC rights jurisprudence and scholarship has also tended to over-emphasize criteria for identifying violations which can be applied universally, without reference to the historical circumstances that can only be considered in the context of particular claims. This has led some scholars to search for quantitative norms, universal indicators, or "minimum core obligations" of states that can be applied without reference to the important subjective and historical aspects of social rights – those dimensions that are linked to individual and group issues of dignity and security, in different cultural, historical and economic contexts.[6]

To its credit, the CESCR has made considerable effort to insert the perspective of rights claiming constituencies into its "jurisprudence" despite the absence of a complaints procedure. It has increasingly focused on vulnerable groups and particular constituencies such as women, people with disabilities and indigenous people in its assessment of state obligations.[7] It has invited NGO submissions in the preparation of general comments in order to ensure that its analysis and commentary is inclusive of the kinds of issues that individual communications would have brought to the Committee's attention. The CESCR also adopted a procedure for hearing submissions from domestic NGOs in the context of state periodic reviews before any other treaty monitoring body did so, creating what Mathew Craven referred to as an "informal petition procedure"[8]. The Committee has become adept at considering the submissions of NGOs,

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[5] The CESCR has described three types/levels of obligations on States Parties in relation to all ESC rights: the obligations to respect, protect and fulfil. See General Comment No.13 on the Right to Education at para 46; General Comment No. 15 on the Right to Water at para 20; General Comment No.14 on the Right to the Highest Attainable Standard of Health at para 33, General Comment No.12 on the Right to Adequate Food at para 15

[6] See, for example, Audrey R. Chapman and Sage Russell, eds., *Core Obligations: Building a Framework for Economic, Social and Cultural Rights*, Intersentia, 2002; Stephen Hansen, *Thesaurus of Economic, Social, & Cultural Rights: Terminology and Potential Violations* (Washington, D.C.: American Association for the Advancement of Science, 1999; Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights," *Human Rights Quarterly* 16 (1994): pp. 693-714; Paul Hunt, "State Obligations, Indicators, Benchmarks and the Right to Education," background paper written for the Committee on Economic, Social and Cultural Rights, June 1998; For an elaboration of my concerns about the search for "universals" in ESC rights scholarship and jurisprudence, see B. Porter "'The Crisis in ESC Rights and Strategies for Addressing It" in Bret Thiele and Malcolm Langford, eds., *Litigation of Economic, Social and Cultural Rights: The State of Play* (Sydney: University of South Wales Press, 2005).

[7] See, for example, General Comment No. 5 on the Rights of Persons with Disabilities and General Comment No. 16 (2005) on The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights.

[8] Matthew Craven, 'The Domestic Application of the International Covenant on Economic, Social and Cultural Rights', Netherlands International Law Review, Vol. XL, 1993 at p.389.

questioning State Parties regarding these concerns and coming to an informed conclusion as to whether or not a particular issue warrants inclusion in its concluding observations. The result of this quasi-adjudicative process has been increasingly authoritative observations and recommendations in relation to specific programs, legislation or failures of governments to adopt necessary measures. The CESCR's concluding observations include concerns and recommendations addressed to particular measures found to be incompatible with specific articles of the ICESCR. These views provide important guidance not only to governments but also to domestic courts and other bodies charged with adjudicating ESC rights at the domestic level.

Significant progress has also been made at the domestic and regional levels in the adjudication of ESC rights, with ever more possibilities to bring forward ESC rights claims in many different institutional contexts, and in different ways, resulting in an increasingly diverse jurisprudence.[9] ESC rights claims are now considered by regional bodies, including the African Commission on Human Rights,[10] the Inter-American Commission of Human Rights,[11] the Inter-American Court of Human Rights,[12] the European Committee of Social Rights[13] and the European Court of Human Rights.[14] Increasing numbers of domestic constitutions include ESC rights as justiciable

[9] One collection of developing jurisprudence is found at http://www.escr-net.org/caselaw.

[10] See, e.g., *Purohit and Moore* v. *Gambia*, Communication 241/200. Decided at 33rd Ordinary Session of the African Commission, 15-29 May 2003(dealing with the right health of mental health patients); *SERAC and CESR* v. *Nigeria* African Commission on Human Rights, Case No. 155/96, Decision made at 30th Ordinary Session, Banjul, The Gambia, from 13th to 27th October 2001 (dealing with the right to health and the implied rights to food and housing). For more on the Commission's treatment of social and economic rights, see J. Olaka-Onyanga, 'Beyond the Rhetoric: Reinvigorating the Struggle for Economic and Social Rights in Africa' 26 Cal. W. Int'l L.J. 1 (1995); D. Chirwa,'African Human Rights System' in Malcolm Langford (ed.) *Social and economic Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, forthcoming April 2006).

[11] See, e.g., *Argentina: Jehovah's Witnesses, Case 2137*, Inter-Am. C.H.R. 43, OEA/ser. L/V/II.47, doc. 13 rev. 1 (1979) (Annual Report 1978) (dealing with the right to education); *Jorge Odir Miranda Cortez et al.* v. *El Salvador* Inter-American Commission on Human Rights, Case 12.249, Report No. 29/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000) (admissibility decision dealing with the economic, social and cultural standards enshrined in the OAS Charter);

[12] See, e.g., *Comunidad Mayagna (Sumo) Awas Tingni* v. *Nicaragua*, Inter-American Court of Human Rights Series C, No. 79, 31 August 2001 (involving the right to property); *Dilcia Yean and Violeta Bosica* v. *Dominican Republic*, 7 December 2005 (involving education rights and rights of the child).

[13] *Autisme-Europe* v. *France* Complaint No. 13/2002, 7 Nov. 2003, (dealing with the education rights of persons with autism); *FIDH* v. *France*, Complaint No. 14/2003, 8 Sept. 2004 (involving, *inter alia*, the right to medical assistance of non-nationals) and most recently *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006 (dealing with right to adequate housing and failure to make sufficient progress in addressing homelessness).

[14] For a list of decisions of regional bodies in relation to social and economic rights see A. Nolan, M. Langford & Ors. 'Leading Cases on Economic, Social and Cultural Rights: Summaires – Working Paper No.2' (Geneva;

rights, and domestic courts are considering ESC rights claims in a diversity of domestic legal settings.[15] With this growing body of ESC rights jurisprudence, it has become increasingly difficult to argue with any credibility that these rights are not justiciable. The debate about *whether* ESC rights are justiciable has now been replaced by a need to better understand *how* ESC rights ought to be adjudicated. Key questions include where the appropriate forum is for adjudication in different political and legal contexts, who ought to have standing to bring forward claims, what the appropriate standard of review ought to be, and how to fashion effective remedies that will deal with problems which are often systemic in nature, affecting large numbers of people in addition to the individual or group which brought the claim forward.

These and other challenges that lie before us in developing a coherent legal framework for ESC rights claims are of more than legal significance. Ensuring that human rights are integrated into the rule of law, and subject to effective remedies is a critical component of establishing human rights more broadly as foundational values and principles of democratic governance. Providing a legal "grounding" of ESC rights by creating institutional frameworks for adjudicating them as justiciable rights is central to establishing the link between ESC rights and democratic citizenship and respect for personal dignity. It is only by institutionalizing these rights at multiple levels of governance that we are able to create an ability at the local, the sub-national, the regional and the international levels to address the growing social and economic inequality and tragic deprivation, including widespread hunger and homelessness, that has accompanied strong economic development and increased productivity in recent years.

The Nobel prize-winning economist Amartya Sen taught us in his early work on famines to understand the cause of hunger and starvation not as a scarcity of food or a failure in food production but rather as a failure of domestic, regional and international "entitlement systems" – failures to ensure that the complex system of rights, property and program entitlements that determine what goods and services people have access to, is designed and regulated such that

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COHRE, 2005)..

[15] Jurisdictions in which social and economic rights have been deemed justiciable and judicially enforceable include, *inter alia*, Bangladesh Colombia, Finland, Kenya, Hungary, Latvia, the Philippines, Switzerland, Venezuela, South Africa, Ireland, India, Argentina and the USA. For a more details of decisions of national courts involving justiciability of social and economic rights see ibid.

adequate food is available to all.[16] Homelessness and other forms of socio-economic deprivation may similarly be understood as human rights failures – failures to ensure that the complex networks of institutional and legal mechanisms that determine entitlements are responsive to and made consistent with fundamental human rights values. The denial of effective remedies for ESC rights violations, and the failure to give a hearing to claimants of these rights at different levels of these "entitlement systems" is an over-arching human rights failure, a failure in participatory governance, which has immense repercussions.

This critical human rights failure is finally being addressed at the international level. The 60th anniversary of the Universal Declaration of Human Rights should see the historic adoption, by the UN General Assembly, of an Optional Protocol providing for a complaints mechanism under the ICESCR. A UN Open Ended Working Group mandated with the task of preparing a draft Optional Protocol agreed, in April, 2008, to refer a text of an Optional Protocol to the UN Human Rights Council for adoption at its eighth session.[17] From there, the text will proceed to the UN General Assembly in December, 2008. While the practical effect of this new protocol may take some time to be assessed, and will significantly depend on the CESCR to create persuasive jurisprudence, this long overdue reform reflects a broad acceptance that in addition to documenting and reviewing compliance with ESC rights through review mechanisms, it is also essential that the CESCR hear and adjudicate ESC rights claims.

Similar reforms of legal and human rights systems are occurring at many other levels. Local municipal governments are adopting city "charters", national human rights institutions are engaging more effectively with ESC rights and sub-national and national governments are adopting legislation or constitutional provisions providing for adjudication and remedy of ESC rights. This is therefore an appropriate time to reflect on some of the practical challenges associated with a growing acceptance of the justiciability of ESC rights in domestic, regional and now, finally, at the international level.

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[16] Amartya Sen, Poverty and Famines: An Essay on Entitlement and Deprivation. (Oxford University Press, Oxford, 1982)

[17] *Report of the Working Group on an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, ICESCROR, 5th Sess., UN Doc. A/HRC/8/7 (2008), online: Office of the United Nations High Commissioner for Human Rights <http://daccessdds.un.org/doc/UNDOC/GEN/G08/136/12/PDF/G0813612.pdf?OpenElement>.

Justiciability and the Right to a Remedy

Traditionally, debates about the justiciability of ESC rights have focused on the respective roles of legislatures and courts in relation to the two categories of human rights, created by the two Covenants, the ICCPR and the ICESCR. Denying hearings and adjudication to ESC rights claimants has been justified on the basis of dichotomies between ESC rights and civil and political rights such as: positive v. negative, undefined and vague v. clear and defined, aspirational v. immediate, and 'resource dependent' v.' independent of available resources'. All of these dichotomies have been used as a basis on which to argue that ESC rights ought not to be adjudicated by courts, because providing remedies to positive, aspirational and resource-dependent rights would lead courts to usurp the proper role of legislatures in designing programs and allocating resources.[18]

These dichotomies have been largely rejected in more recent scholarship as being over-simplified.[19] Civil and political rights are not inherently clear and precise. They often seem clearer simply because they have been clarified through procedures for claims and adjudication, whereas ESC rights have not.[20] There are also many positive obligations, resource implications, and aspirational dimensions to civil and political rights.[21] Many of the institutions and positive measures required to realize civil and political rights, including judicial systems, employment equity programs and human rights institutions, require resources and time to implement. The dichotomies may be refined into more nuanced appreciation of some particular challenges of ESC rights, of course, but the idea of excluding human rights claims requiring positive measures or resources from judicial consideration is now recognized as contrary to our modern understanding of human rights.

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[18] C. Scott, C., & P. Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution', 141 *U. Pa. L. Rev.* 1 (1992).

[19] *Ibid*. See also See CESCR General Comment No. 9 at para 10 and the judgment of the Constitutional Court of South Africa in *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 78.

[20] S. Liebenberg,"Social and economic Rights" in Chaskalson et al (eds), *Constitutional Law of South Africa* (Cape Town; Juta, 1996) 41-11.

[21] Liebenberg, S., 'The International Covenant on Economic, Social and Cultural Rights and its Implications for South Africa' (1995) 11 SAJHR 359 at 362.

What is particularly problematic about the traditional framing of debates about the justiciability of ESC and civil and political rights around these simplistic dichotomies was that the debates themselves tended to exclude the claimants, and the claimants' perspective. Whether a person is homeless because of state *action* (for example, through eviction) or because of state *inaction* (for example, a failure to provide housing to those in desperate situations), is of little consequence for the person who is homeless. The effect of homelessness on personal dignity or security remains the same, and the need for judicial protection of rights, and for an effective remedy, is equally compelling. It has long been recognized that human rights must be understood, in the first instance, from the perspective of the rights holder and the focus must be on the interest meant to be protected. Only then do we consider the limitations that ought reasonably to be placed on rights. Yet debates about the justiciability of ESC rights have approached the problem largely from the opposite direction. Instead of first considering the rights holders and the interests meant to be protected, and deriving from these the respective responsibilities of courts and legislatures to protect and implement the rights, the reasoning has proceeded in the opposite direction. Certain categories and limits have been affirmed in relation to the responsibilities of courts and legislatures, and on the basis of these, conclusions have been made about which human rights will be adjudicated, and whose interests will be protected. The improper framing of the question has given a false legitimacy to what should really be seen as a discriminatory exclusion of particular groups of rights claimants from judicial protection, contrary to the rule of law.

Approaching the issue of the justiciability of ESC rights from the standpoint of the rights holders and the interests meant to be protected leads to very different conclusions. Rights claims requiring positive measures of protection or provision from the state may be considered more problematic in terms of the roles of courts in relation to legislatures, but the rights holders who require positive measures of the state for the protection of their fundamental rights also tend to be the most disadvantaged and marginalized groups with the greatest need for access to the courts for the protection of their human rights. These groups are those most likely to be ignored in the political process, most likely to face discrimination and thus least likely to be able to protect their interests through political action. A judiciary anxious to avoid trespassing on the historic domain of the legislature in relation to fiscal management may be inclined against judicial protection of the dignity and security of these groups, bur if we start from the rights

themselves and the fundamental interests of the rights holders we come to a very different conclusion about the responsibility of courts as the guardians of rights.

Rethinking the issue of justiciability from the standpoint of the rights holder required a paradigm shift in the approach to the issue of justiciability. Such a shift can be seen the CESCR's important General Comment No. 9, adopted in 1998.[22] Instead of framing the question of justiciability around problematic attempts at distinguishing ESC rights from civil and political rights and assessing the role of courts in relation to these two categories of rights, the Committee took as its starting point in this General Comment the principle that a rights holder to any human right must have access to an effective remedy. The CESCR reminds us that the principle that every human right must have an effective remedy is affirmed in article 8 of the *Universal Declaration of Human Rights* in relation to *all* human rights, and is fundamental to the rule of law. States may, according to General Comment No. 9, determine that in certain instances, the courts are not the best place for particular ESC rights claims to be adjudicated. They may develop creative administrative remedial procedures, invest expanded authority in national human rights institutions or otherwise ensure access to fair and effective adjudication of ESC rights claims. But institutional roles must be assigned in a manner which implements the principle of a right to an effective remedy for ESC, as well as civil and political rights. Institutional roles or limitations cannot be affirmed as a basis on which to deny a hearing or a remedy, or to circumvent rules of procedural fairness or natural justice. Administrative remedies for ESC rights must, according to the CESCR, be "accessible, affordable, timely and effective. An ultimate right of judicial appeal from administrative procedures of this type would also often be appropriate."[23]

The inclusion of both judicial and quasi-judicial or administrative remedies in the analysis of "justiciability" is critical to any contemporary implementation of the principle of effective remedies to ESC rights. Increasingly, domestic law provides for a diversity of such procedures, particularly in the sphere of socio-economic entitlement systems. Even where ESC rights are not directly incorporated into domestic law, all decision-making, whether in courts or in administrative bodies, must be exercised consistently with the ICESCR. This "consistency" principle is critical to the overall coherence and unity of legal systems founded on human rights values and the rule of law. Domestic law must be interpreted and applied so as to provide,

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[22] *Draft General Comment No.9: The domestic application of the Covenant*, CSECROR, 19th Sess., E/C.12/1998/24 (1998), online: Office of the United Nations High Commissioner for Human Rights <http://www2.ohchr.org/english/bodies/cescr/comments.htm>.
[23] *Ibid*., para. 9.

wherever possible, effective remedies to ESC rights. For courts to deny remedies to ESC rights would place the state in violation of its obligations under the ICESCR. Human rights provisions such as the guarantee of equality should be interpreted so as to provide, "to the greatest extent possible" the full protection of ESC rights. As noted in General Comment No.9 "Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations".[24] This principle was emphasized by the CESCR in its concluding observations on China in 2005.

> The Committee urges the State party to ensure that legal and judicial training takes full account of the justiciability of the rights contained in the Covenant and promotes the use of the Covenant as a source of law in domestic courts. The Committee draws the attention of the State party to general comment No. 9 on the domestic application of the Covenant and invites the State party to include information concerning case law on the application of the Covenant in its next periodic report.[25]

The remedial approach framed by the CESCR in General Comment No. 9 and applied in periodic reviews answers justiciability concerns in a contextual rather than in an abtract or universal fashion. Canada or China, for example, may take the position that courts are not always the appropriate forum in their particular legal systems for the first level review of legislation and housing policy linked to homelessness or to provide a remedy for the violation of the right to housing. However, domestic courts and international reviewing bodies must follow up immediately with the question: "Then what venue is provided for a person alleging a violation of the right to adequate housing to go for a hearing and a remedy?" If there is an administrative alternative to courts which meets the various tests for procedural fairness, timeliness, accessibility and effectiveness, with recourse to the courts where necessary, then the State Party will have satisfied the requirement of effective remedies.

The one place where a rights claimant cannot be directed for a fair hearing, however, is to the alleged rights violator. Governments cannot simply affirm that housing policy is best left to governmental decision-makers. They have to provide an adjudicative space through which claims can be heard. Nor can they suggest that courts ought to remove themselves entirely from the responsibility to safeguard the right to housing or other ESC rights. Courts must ensure that in all areas of decision-making, whether in administrative decisions, judicial interpretations of statutes or the exercise of discretion by officials, domestic law is applied so as to ensure

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[24] *Ibid*.
[25] CESCR, Concluding Observations on China, E/C.12/1/Add.107.
13 May 2005, para. 42.

compliance with the ICESCR and provide effective remedies to any alleged violations.

Elsewhere I have analogized the common responses of courts and tribunals regarding justiciability of ESC rights to a common children's story called "The Little Engine that Could".[26] I do not know if it has been translated into Chinese, but I am sure there are similar stories, with a similar message, for Chinese children. It is a story of hungry and cold passengers in a broken down train stranded on a side track and in need of a train engine to pull them up and over a mountain in order to get home to warmth and food. The first engine to come along is a fancy engine, designed for high speed, luxury travel, that does not consider it its job to address the plight of these destitute passengers. Its response, analogous to the traditional "legitimacy" concerns of courts in relation to ESC rights claims, particularly those related to poverty and homelessness, is to leave the passengers stranded because it is not his proper role to deal with their plight: "I could, if I would" says the locomotive " but I won't". The second engine to come along has a different attitude. It has never pulled passengers up the mountain, and does not think it is capable of doing so. In a refrain that is analogous to competency concerns of courts faced by complex social policy issues in ESC rights claims, the under-confident engine says: "I would, if I could, but I can't."

It is only when a third engine comes along that the passengers meet with any success. That modest little engine is not so preoccupied with whether it is its assigned role, or whether it has the experience or strength needed. It is simply moved by the plight of the passengers and focuses on the task at hand. It rises above doubts about competence, reciting "Ï think I can, I think I can" all the way up the mountain, to successfully pull the passengers to their warm homes and their meals.

In an article that was influential during the debates in South Africa about whether economic, social and cultural rights should be made fully justiciable in the new constitution there, Craig Scott and Patrick Macklem noted that assessments of what are legitimate roles for the courts, and of their competence to perform the them, are largely dependent on how important the courts consider the interests at stake. They observed that "courts create their own competence. The

[26] Watty Piper, *The Little Engine that Could*, (New York: Penguin Group USA, 2000).

courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary."[27] Courts tend to invoke legitimacy or competency concerns when the real issue is a failure of the judiciary to engage adequately with the human rights values at stake in an issue. In the decade since the adoption of the South African Constitution, the Constitutional? Court and other courts there have risen to the challenge, and become leaders among the world's judiciaries in engaging with the fundamental human rights values that are at stake in ESC rights claims.

The growing acceptance of ESC rights as justiciable and the extension of the optional communications procedures at the UN into the sphere of ESC rights is a reaffirmation of the basic values that lie behind international and domestic human rights. Human rights values are intricately linked with participatory rights and must ensure the ability of vulnerable and disadvantaged groups in society to advance claims to dignity, equality and security in their own voice, bring to light injustices and exclusions that occur in the political process, and seek effective remedies. That, rather than any reconsideration of the respective roles of courts vis a vis legislatures, is what is at issue in the developments we are witnessing at the UN and elsewhere in relation to the justiciability of ESC rights.

With an increasing number of ESC rights cases being brought forward at the domestic and regional levels and with expanded opportunities for the adjudication of ESC rights within the UN human rights treaty monitoring system, we are now in a position to leave behind conceptual debates about justiciability premised on and reinforcing an absence of rights claimants. We can rely instead on a developing field of human rights practice in which human rights claimants are advancing claims to ESC rights, where courts and other adjudicative bodies are making determinations as to whether rights have been infringed and where remedial recommendations or orders are being fashioned.

This is not to say that concerns that are voiced about justiciability have been entirely displaced. Rather, they will be situated and responded to constructively within the context of particular

[27] Craig Scott & Patrick Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? 141 University of Pennsylvania Law Review, Vol. 141 (1992) 1, pp. 35-36.

claims or fields of practice. Concerns about the extent to which unelected courts or administrative bodies ought to have authority to interfere with decisions made by elected legislatures in difficult areas of socio-economic policy, for example, will be reflected in more careful consideration of the democratic decision-making processes in place, and how courts might enhance these. Where competing interests need to be balanced, bodies adjudicating ESC rights claims will need to ensure that hearings are inclusive of different constituencies. Courts may also lay out in their remedial orders requirements of consultation with affected groups in the process of designing and implementing remedies. In this sense, ESC rights claims can be used to enhance rather than undercut democratic processes.

Concerns about whether an individual complaints procedure is well suited for the review of complex social policy and resource allocation decisions are leading courts and tribunals to encourage interventions by amicus NGOs and human rights institutions, and to ensure that additional evidence from experts is brought before them. In domestic procedures, it has become clear that active involvement by NGOs representing various stakeholder groups such as women, persons with disabilities, young people, newcomers and minorities is essential when courts or tribunals consider important systemic claims related to government programs or policies.[28]

Concerns about whether legal claims, rather than political advocacy, are the best tools for the marginalized and vulnerable groups to use to address systemic injustice may now be addressed by considering new ways in which litigation strategies can be used in conjunction with political advocacy strategies. There have been many instances such as in advocacy for HIV-AIDS treatment in South Africa, where ESC rights claims have been used to enhance political strategies and make them more effective.[29]

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[28] In the well known cases of *South Africa* v. *Grootboom,* 2001 (1) SA 46 (CC) ('*Grootboom*') and *Treatment Action Campaign* cases (*supra*) in South Africa, amicus interventions by NGOs, human rights centres and the Human Rights Commission played an important role. These written briefs are available at www.escr-net.org/caselaw.

[29] Mark Heywood, "Preventing Mother-to-Child HIV Transmission in South Africa; Background, Strategies and Outcomes of the Treatment Action Campaign Case against the Minister of Health" *South African Journal On Human Rights* Vol. 19 No. 3 (2003) 278 ; Steven Friedman and Shauna Mottiar , "A Moral to the Tale: The Treatment Action Campaign and the Politics of HIV/AIDS" Centre for Policy Studies, University of KwaZulu-Natal (2004); Geoff Budlender, "A Paper Dog With Real Teeth: The TAC case has proved that the Constitution is a powerful people's tool" *Mail and Guardian* (July 12, 2002).

Situating ESC Rights Claims within a New Human Rights Practice

One of the key features of emerging social rights practice is diversity and creativity. ESC rights are being claimed in a diversity of settings in a variety of ways. They are claimed as constitutional rights in jurisdictions where ESC rights enjoy explicit constitutional protection, such as in South Africa and in a many Latin American countries, and as critical dimensions of rights such as equality, life and security of the person in other jurisdictions, where ESC rights are not explicitly protected. They are claimed before courts, administrative bodies, municipal actors, local institutions, city charters and human rights institutions, as well as before regional bodies and in interventions before trade and investment tribunals or WTO panels. They are claimed in conjunction with political action and they are claimed in individual litigation. They are claimed in relation to governments, in relation to private actors, and in relation to various combinations of the two. They are claimed by NGOs, by informal groupings of victims and by individuals. Despite the diversity of settings and types of claimants, however, there are some general themes emerging about the role of claimants in developing new understanding of ESC rights.

One critical aspect of social rights claiming that is emerging in all of these settings is the way in which individual stories or circumstances play a key role in promoting adequate adjudication of ESC rights. Individual social rights claims bring with them compelling stories which reveal the dignity issues involved in a way that broad social indicators or statistics do not. It is the ability of courts and human rights institutions to engage with human rights values in the context of particular claimants which ensure that the adjudicative and evidentiary framework is properly informed by the claimant's unique perspective and interests.

A clear example of this factor was in the *Grootboom* case,[30] in South Africa, the definitive case in which the Constitutional Court decided it would accept a more active standard of "reasonableness review" of social policy and resource allocation decisions in relation to economic and social rights. In a previous case, involving a difficult issue of allocating resources among competing needs in the healthcare system, the Court had adopted a very hands off

[30] *South Africa* v. *Grootboom*, 2001 (1) SA 46 (CC) ('*Grootboom*').

approach.[31] In the context of a claim by destitute families suffering the indignity of homelessness, however, the court adopted a more active judicial role in relation to ESC rights because it perceived that basic constitutional and human rights values were at stake, and that the Court had a critical role in ensuring that the needs of the most disadvantaged groups were not ignored. Justice Yacoob in the *Grootboom* case describes the plight of three hundred families living under plastic on a Sports Field, with the winter rains arriving, and no water or sewage facilities. He writes: "The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream".[32] The ability and willingness of the Court to engage in meaningful review of government decisions in these areas is largely dependent on an understanding of how they engage not only explicit constitutional rights, but also central constitutional values and principles of dignity and equality. These values, and the assessment of whether government programs are consistent with them, emerge most clearly in the context of individual stories and circumstances.

The Supreme Court of Canada, in a very different context, arrived at a similar approach to assessing the reasonableness of state action in light of basic human rights values. In reviewing a decision by an immigration officer to deport an impoverished mother of four Canadian children who had been working illegally in Canada, the Supreme Court of Canada was asked to consider whether the officer was obliged to act in accordance with the Convention on the Rights of the Child. [33] The Court found that although the Convention is not incorporated into domestic law in Canada, it nevertheless embodies the "values and principles" which inform reasonable decisions.[34] In another case the Court relied on the right to work under the ICESCR as a component of the basic values of Canada's constitutional democracy, despite the fact that this right is not explicitly recognized in Canadian law.[35] In very different legal contexts, courts in Canada and South Africa have converged on a "reasonableness" standard for the review of governments social programs and resource allocation decisions, to ensure that these decisions are consistent with ESC rights.

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[31] *Soobramoney* v. *Minister of Health (Kwazulu-Natal)* (CCT32/97) 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696.
[32] *Ibid*,, para 2, *per* Yacoob J for the court.
[33] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
[34] *Ibid*, at paras 69-71.
[35] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, at 1056-7.

Interdependence of Rights in the Domestic Context

Another key feature of emerging ESC rights practice is its reliance on the notion of interdependence of ESC rights and civil and political rights, particularly with broadly framed rights to equality, to life and to security of the person. Even where ESC rights are not directly incorporated into domestic law, they may nevertheless be subject to effective remedies by way of reasonable interpretations of domestic law, and of other rights that are interdependent with ESC rights. This is an issue which has been taken up with particular energy by the UN High Commissioner on Human Rights, both in her previous role as a Justice of the Supreme Court of Canada, and in her present role as High Commissioner.[36] In a recent speech to the European Court of Human Rights, she commented on the importance of an understanding of interdependence of rights to domestic judiciaries seeking to protect human rights in the socio-economic sphere:

> Although the Convention's articulation of rights is essentially civil and political in character, the Court has not hesitated to draw upon the inter-connected nature of all rights to address many economic, social and cultural issues through the lens of - nominally - civil rights. The Court's approach, for example, to health issues through the perspective of the right to security of the person – in the absence of a right to health as such - shows how rights issues can be effectively approached from various perspectives. These techniques are of real value to national judiciaries, whose constitutional documents are also often limited to listings of civil and political rights, which nevertheless seek to address issues of broader community concern in rights-sensitive fashion.[37]

Canada has witnessed in the last decade dramatic and disturbing increases in poverty, homelessness and hunger, despite the fact that the country has enjoyed robust economic growth. The juxtaposition of economic development with backwards movement in the implementation of ESC rights has led to strong and unprecedented statements of concern from the CESCR about a wide range of government measures. The concerns about poverty and homelessness have been reiterated by other UN human rights treaty monitoring bodies, which have pointed out that the

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[36] L. Arbour, '"Freedom From Want" – From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7, available at: www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument; *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429, at paras. 82-83.

[37] Address by Louise Arbour, United Nations High Commissioner for Human Rights, Opening of the Judicial Year 2008 of the European Court of Human Rights, Strasbourg, 25 January 2008.

effect of social program cuts and poverty are felt unequally by groups such as women, children and indigenous people. [38] The violations of ESC rights in Canada have an obvious equality rights dimension. They may also be seen as violations of the right to life and security of the person. The Human Rights Committee has noted that the consequences of widespread homelessness in Canada can be ill health or death, and that positive measures are required to address this problem in order to comply with the obligation under the ICCPR to protect the right to life. [39]

The provisions of the ICESCR and other international human rights law are not directly enforceable in Canada, and there is no explicit recognition of most ESC rights in the *Canadian Charter of Rights and Freedoms.*[40] However, the Charter does contain broadly framed rights to equality, and to life, liberty and security of the person. Historically, it was expected by those who fought for broad protections of equality and security in the Charter, that these rights in the Charter would be interpreted to address the key equality, security and dignity issues plaguing Canadian society.[41] The Supreme Court has affirmed 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'[42] and that international human rights law is 'a critical influence on the interpretation of the scope of the rights included in the *Charter*.'[43] As the UN High Commissioner of Human Rights, Louise Arbour has noted, "the potential to give economic, social and cultural rights the status of constitutional entitlement represents an immense opportunity to affirm our fundamental Canadian values, giving them the force of law."[44] The same may be said, of course, of many other countries. The Supreme Court

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[38] C. Scott, 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight?', *Constitutional Forum*, Vol. 10, No. 4 (1999), pp. 97-111; B. Porter "Judging Poverty: "Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights" *15 Journal of Law and Social Policy* (June, 2000).

[39] Human Rights Committee *Concluding Observations of the Human Rights Committee: Canada* UN Doc CCPR/C/79/Add.105 (7 April 1999). See C. Scott, 'Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally Into the Spotlight? *supra* nt. 39.

[40] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c.11 ('Charter').

[41] On the historical "social rights" expectations associated with the right to equality in the Charter, see B. Porter "Expectations of Equality" (2006) 33 *Supreme Court Law Review 23*.

[42] *Slaight Communications Inc. v. Davidson*, [1989] 1 SCR 1038, at 1056-7.

[43] *Baker v. Canada* (n. 46 above), para. 70.

[44] L. Arbour, '"Freedom From Want" – From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7, available at:

of India has played a leading role in developing the notion that the right to life, interpreted consistently with the recognition of economic social and cultural rights such as the right to adequate food or adequate housing, imposes a broad range of positive obligations on governments to take appropriate measures to address hunger. In *People's Union for Civil Liberties* v. *Union of India*[45] that Court responded to claims related to starvation deaths by making extensive orders concerning increased resources for famine relief, the provision of grain at the set price to families below the poverty line and the progressive introduction of midday meal schemes in schools

The question of the justiciability of ESC rights in many domestic contexts thus may come down to the interpretation of existing rights protections and assumptions about the role of courts. It is not really necessary to stretch the meaning of the right to life, security of the person, or equality in order to find that these rights include ESC rights within their scope. Those living with poverty and hunger find it obvious that the right to equality and the right to security of the person include protection from hunger and homelessness in situations of abundant resources. To read such protections *out* of these rights, one has to take the plain meaning of the words and distort them so as to exclude certain dimensions of experience, in the name of a preconceived idea of the appropriate role of courts. The division of human rights into two categories really makes no sense from the perspective of these rights holders. It is really a question of an inclusive reading of constitutional and human rights protections, ensuring that the most vulnerable and disadvantaged groups are accorded an equal claim to the enjoyment of broadly framed rights to dignity, security and equality. It is a question of whether the poor, to use the phrase of Canada's Chief Justice, are to be made into "constitutional castaways" in the service of a restriction of the role of courts.[46]

Vulnerable Groups and Equality Rights

In a 1998 case called *Eldridge*[47] Canada's Supreme Court considered a claim by two deaf

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www.unhchr.ch/huricane/huricane.nsf/0/58E08B5CD49476BEC1256FBD006EC8B1?opendocument

[45] No.196 of 2001, Interim Order of 2 May 2003.

[46] *R. v. Prosper*, [1994] 3 S.C.R. 236 at 288, l'Heureux-Dubé, J.29Ibid. at 302, McLachlin J.

[47] *Eldridge v. British Columbia (Attorney General)* [1997] 3 S.C.R. 624

women that their right to equality under the Canadian Charter had been violated when the provincial government declined to provide ongoing funding for a program to provide interpreter services for the deaf in hospitals and other health facilities. The plaintiffs were unable to communicate effectively with their doctors and healthcare providers, one of them during a very difficult childbirth.

The governmental respondent argued in *Eldridge* that courts ought not to interfere with governments' decisions about how to allocate scarce healthcare dollars. But using reasoning almost identical to that employed by the South African Constitutional Court in similar cases dealing with resource allocation, the Supreme Court of Canada found that to entirely ignore the needs of those who are deaf was not a reasonable allocation of health resources. The court rejected the government's argument that resource allocation issues ought not to be adjudicated by courts, stating that:

> To argue that governments should be entitled to provide benefits to the general population without ensuring that disadvantaged members of society have the resources to take full advantage of those benefits bespeaks a thin and impoverished vision of s. 15(1) [equality rights].[48]

Violations of ESC rights invariably affect the most vulnerable and marginalized in society. It will be rare that ESC rights claims could not also be framed as a violation of the right to equality - particularly if poverty or economic status is recognized as a prohibited ground of discrimination, as is increasingly the case. The CESCR has in recent years elaborated on the important equality dimensions of ESC rights, with respect to women, indigenous peoples, those with disabilities, the elderly and many other groups. Other treaty monitoring bodies such as the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Committee on the Elimination of All Forms of Racial Discrimination (CERD) are increasingly focusing on issues of poverty, access to housing and other ESC rights violations in ways which bring an equality framework to ESC rights.[49] The new Convention on the Rights of Persons with Disabilities has extensive protections of ESC rights of persons with disabilities, and an Optional Protocol has been adopted for that Convention to provide for a complaints

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[48] *Ibid* at 677-78.

[49] Leilani Farha, "Committee on the Elimination of Discrimination Against Women: Women Claiming Economic, Social and Cultural Rights – the CEDAW Potential", in *Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative and International Law,* Cambridge University Press, (Forthcoming, 2007).

procedure.[50] Communications under these Optional Protocols will increasingly create a converging jurisprudence on the ESC rights of vulnerable groups to that which will emerge from the CESCR.

As noted by the CESCR in General Comment No. 9, it would be extremely difficult, in light of these overlaps and convergences, to justify different means for giving domestic effect to ESC rights than for civil and political rights. The Committee states that to declare this one category of rights to be beyond the reach of courts would be "arbitrary and incompatible with the principle that the two sets of rights are indivisible and interdependent".[51] The indivisibility of the two categories of rights, in fact, makes it a practical impossibility to institutionalise a bifurcation with respect to the appropriate role of courts.

In jurisdictions such as in South Africa, social and economic rights are explicitly enumerated as justiciable rights, courts are interpreting the obligations emanating from these rights, appropriately, through an equality lens.[52] In order to establish a foundation of justiciability and effective review of such rights, and to ground an understanding of where governments must begin in the process of implementing them, in the face of massive problems and scarce resources, social and economic rights have been approached by advocates and courts within an 'equality' paradigm. In the *Grootboom* and *Treatment Action Campaign* cases in South Africa, for example, the Constitutional Court adopted a standard of "reasonableness" which incorporated as a central principle the obligation to take positive measures to address the needs of the most disadvantaged groups in relation to the enjoyment of fundamental social rights such as housing and healthcare.

Using International Human Rights to Interpret and Apply Domestic Law and as a Basis for Reasonableness Review of Administrative Decisions

Another critical aspect of emerging ESC rights practice is the use of both domestic and international processes in relation to particular issues, in order to allow domestic courts to interpret and apply law more consistently with international human rights. As mentioned above,

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[50] *International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities,* G.A. res. A/61/611 (2006)
[51] *General Coment No. 9,* para. 10.
[52] Pierre de Vos. "Substantive equality after *Grootboom:* the emergence of social and economic context as guiding value in equality jurisprudence" (2001) 52 *ActaJuridica*.

in the *Baker*[53] case in Canada, the Supreme Court found that the values of international human rights law must inform the understanding of what is a "reasonable" exercise of discretion.

Any state party to the ICESCR must now be considered to have accepted ESC rights as rights subject to effective remedies. Any interpretation of domestic law which downgrades ESC rights to mere policy objectives and thereby deprives affected constituencies an effective remedy is clearly incompatible with the ICESCR. In recent reviews of Hong Kong Special Administrative Region, the Committee expressed concern about court decisions describing the rights in the Covenant as "promotional" or "aspirational", rather than justiciable human rights, noting that "such opinions are based on a mistaken understanding of the legal obligations arising from the Covenant." The Committee has urged that the government of HKSAR cease from advancing these kinds of arguments before courts.[54] Similar concerns both about judicial treatment of ESC rights and the nature of governments' arguments in courts have been raised in reviews of Canada.[55]

The recent reviews of Hong Kong and Canada show that the CESCR is willing and anxious to pay considerable attention in periodic reviews to the question of effective remedies, the status of ESC rights in the domestic legal order and the appropriate interpretation of domestic law so as to ensure effective remedies to ESC rights. These reviews thus provide an important means for advocates and affected constituencies to create a type of dialogue between treaty review and domestic adjudication. By getting actively involved in the periodic review process at the Committee, groups advancing domestic ESC rights claims have been able to ensure that the Committee has the necessary information about attempts at securing domestic legal remedies, and is thus able to issue concerns or recommendations that are directly relevant to cases advancing through the courts. In turn, domestic courts are able to benefit from specific concerns and recommendations from the Committee as to the interpretation and application of domestic law in specific contexts.

In reviewing ESC rights caselaw, we tend, naturally to focus on high profile cases in which marginalized or disadvantaged groups such as the homeless community in the *Grootboom* case

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[53] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 69-71

[54] Committee on Economic, Social and Cultural Rights *Concluding Observations of the Committee on Economic, Social and Cultural Rights:*HKSAR (2001) paras 26-.27.

[55] Committee on Economic, Social and Cultural Rights *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada* UN Doc E/C.12/1/Add.31 (10 December 1998)

or the large numbers of women seeking treatment for HIV-AIDS in South Africa manage to retain lawyers and go to court to claim ESC rights. These cases are rare, however, and it is equally important to recognize that judges and lawyers and many other decision-makers deal, perhaps unreflectively, with issues of ESC rights on a routine basis. Often, poor people have been dragged into the justice system, rather than turning to it to advance a rights claim. They are likely to be unrepresented, and even if they have a lawyer, the lawyer is unlikely, in many jurisdictions, to be knowledgeable about ESC rights in international law. However, every time a judge or adjudicator deals with an application to evict households where no alternative accommodation is available, or a sentencing judge ponders whether to send a homeless offender to prison because no housing is available for the sentence to be served in the community, there is a potential ESC rights claim in a courtroom. These and many other everyday occurrences in courts and tribunals around the world offer unique opportunities to apply ESC rights to the application of domestic law. There are a myriad of institutions and procedural mechanisms which are critical to the implementation of ESC rights, and which must supplement the critical role of courts. One positive example is that a number of cities around the world are now drafting and adopting human rights charters, establishing a cosmopolitan framework for new forms of local accountability to ESC rights at the municipal level.[56]

Similar reforms are needed at all levels of local and regional decision-making, to ensure transparency and accountability to the norms and values of international human rights and to provide less formal and more community-based methods for hearing complaints and providing remedies. But as the CESCR notes, these alternative procedures can be "rendered ineffective if they are not reinforced or complemented by judicial remedies." The courts and international human rights bodies, therefore, need to send out a clear message that ESC rights are fundamental human rights, subject to a right to an effective remedy, and that affected constituencies have an equal right to a hearing.

[56] See, for example, the Montreal Charter, at http://ville.montreal.qc.ca/portal/page?_pageid=3036,3377687&_dad=portal&_schema=PORTAL.