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PART ONE

Overview

The Justiciability of Social Rights: From Practice to Theory

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1. INTRODUCTION

In the space of two decades, social rights¹ have emerged from the shadows and margins of human rights discourse and jurisprudence to claim an increasingly central place. In a significant number of jurisdictions, adjudicatory bodies have intervened to protect a wide range of social rights from intrusion and inaction by the State, and increasingly by non-State actors. The breadth of the decisions is vast. Courts have ordered the reconnection of water supplies, the halting of forced evictions, the provision of medical treatments, the reinstatement of social security benefits, the enrolment of poor children and minorities in schools, and the development and improvement of State programmes to address homelessness, endemic diseases and starvation. These are just a few examples of the almost two thousand judicial and quasi-judicial decisions from twenty-nine national and international jurisdictions which are described and critically analysed in this book.²

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

The result is that we are now in a position to trace a pattern of judgments and decisions on social rights across the world. While social rights jurisprudence⁴ is nascent, it cuts across common and civil law systems, developed and developing countries and regional groupings. The decisions

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

² The book is certainly not the first to deal with the area but is perhaps the most comprehensive. See also F. Coomans and E. van Hoof (eds.), *The Right to Complain about Economic, Social and Cultural Rights: Proceedings of the Expert Meeting on the Adoption of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, (25–28 January 1995, Utrecht, SIM

Special No. 18, Utrecht); F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Antwerpen: Intersentia and Maastricht Centre for Human Rights, 2006); and R. Gargarella, P. Domingo and T. Roux (eds.), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Aldershot/Burlington: Ashgate, 2006). The incomplete nature of scholarship is perhaps most marked in N. Jayawickrama, *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (Cambridge University Press, 2002). While purporting to cover all human rights, a mere fraction of the publication is devoted to economic, social and cultural rights and major cases are absent from the discussion.

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

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

have been made under the umbrella of both express social rights as well as 'traditional' civil and political rights. As an example of the latter, the European Court of Human Rights has determined that the civil right to respect for family life obliges governments to guarantee protection from industrial pollution,⁵ prohibitively expensive divorce proceedings⁶ and, in certain instances, homelessness.⁷ Even a veteran civil and political right, the prohibition on cruel and degrading treatment, was read by the UN Committee Against Torture to proscribe the demolition of housing⁸ and by a US court to prohibit arrest of homeless men for sleeping in public places.⁹

This burgeoning case law provides an opportunity for determining the progress (and quality) of the jurisprudence and the potential for future development and application of the law. The case law also has consequences for the long-standing philosophical debates over economic, social and cultural rights. It is arguable that one debate has been resolved, namely whether economic, social and cultural rights can be denied the status of human rights on the basis that they are not judicially enforceable¹⁰ – there is now too much evidence to the contrary. Equally importantly, they

provide some answer to the critique that adjudicatory bodies lack the democratic legitimacy and institutional capacity to enforce such rights. As we shall see, the cases indicate that a significant number of adjudicatory bodies have been able to craft legal principles and develop legal tools that navigate the contours of philosophical concerns, such as pronouncing on the allocation of budgetary resources or making direct 'policy'.

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

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

⁵ *López Ostra v. Spain* (1995) 20 EHRR 277.

⁶ *Airey v. Ireland* (1979) 2 EHRR 305.

⁷ *Botta v. Italy* (1998) 26 EHRR 241.

⁸ See UN Committee Against Torture, *Hijirizi et al v. Yugoslavia*, Communication No.161 (2000) and the following cases of the European Court of Human Rights: *Mentes and Others v. Turkey*, 58/1996/677/867 and *Selcuk and Asker v. Turkey*, 12/1997/796/998-999. The Court had earlier stated that the prohibition on torture, inhuman or degrading treatment or punishment included 'the infliction of mental suffering by creating a state of anguish and stress by means other than bodily assault': see *Ireland v. United Kingdom*, Report of 5 November 1969, Yearbook XII.

⁹ *Pottinger & Ors v. City of Miami*, 810 F. Supp. 1551 (1992) (United States District Court for the Southern District of Florida).

¹⁰ See generally on economic, social and cultural rights: P. Alston and G. Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights', *Human Rights Quarterly*, Vol. 9 (1987), pp. 156–229; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995); M. Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights* (Antwerpen: Intersentia, 2002); and A. Eide, C. Krause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (The Hague, Martinus Nijhoff, 1995).

¹¹ See for example, International Commission of Jurists, Kenyan and Swedish Sections, *Human Rights Litigation and the Domestication of Human Rights Standards in Sub Saharan Africa*, Vol. 1 (Nairobi: AHRAJ Case Book

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

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

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

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

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

2. THE EVOLUTION OF THE SOCIAL RIGHTS ADJUDICATION

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

Early international cases on discrimination also spoke to the social arena. The founding document of the League of Nations included minority rights and, in 1935, its Permanent Court of International Justice brushed aside Albania’s claim that the closure of Greek-speaking schools was consistent with the right to equality for minorities. According to the Court, equality must not only exist in law but in fact, and it went on to articulate the essentialist role of education for minorities declaring that ‘there may be no true equality between a majority and a minority if the latter were deprived of its institutions (schools in our case) and were consequently compelled to renounce what constitutes the very essence of it being a minority’.¹⁵

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

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

¹⁴ See Chapter 28, Sections 2.3 and 3.1.

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

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

Efforts were slightly more successful elsewhere. In 1972, the German Federal Constitutional Court held that the right to free choice of occupation obliged universities to demonstrate they had effectively deployed all available resources to maximise the number of places available.²³ From 1978, the Indian Supreme Court, and some state courts, went further and embarked on a process of deriving a broad range of social rights from the right to life in light of the directive principles in the Con-

stitution.²⁴ This stance was justified on the basis that the right to life was the 'most precious human right' and 'must therefore be interpreted in a broad and expansive spirit so as to invest it with significance and vitality which may... enhance the dignity of the individual and the worth of the human person'.²⁵ In its first clear social rights case in 1980, the Indian Supreme Court ordered a municipality to fulfil its statutory duties to provide water, sanitation and drainage systems.²⁶ The Court also relaxed rules of standing and remedies in order to facilitate both the filing of petitions and flexible remedial orders. However, Muralidhar argues in this volume that the practice of Indian courts is not as consistent or progressive as is frequently imagined. Courtis also illustrates also that labour, and to a lesser extent, social security rights have a long history of constitutional litigation in Argentina, although most early cases drew on statute law or arose in intra-federal constitutional disputes.²⁷

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

¹⁶ *Brown v. Board of Education*, 347 U.S. 483 (1954).

¹⁷ Separate schools were justified as long as both sets of schools had substantially equal facilities: *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁸ Racial segregation of schools generated a 'feeling of inferiority' depriving 'children of the minority group of equal educational opportunities': *Brown v. Board of Education*, 347 U.S. 483 (1954) at 493–494.

¹⁹ *Douglas v. California*, 372 U.S. 353, 357–58 (1963).

²⁰ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

²¹ *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

²² See respectively *Lindsey v. Normet* 405 U.S. 56, 74 (1972);

Estelle v. Gamble, 429 U.S. 97 (1976).

²³ *Numerus Clausus I Case* (1972), 33 BverfGE 303.

²⁴ *Sunil Batra v. Delhi Administration case*, 1978 SC 1675.

²⁵ See *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802. This included rights to 'adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about, mixing and co-mingling with fellow human beings'.

²⁶ *Municipal Council Ratlam v. Vardhichand and ors*, AIR 1980 SC 1622.

²⁷ See Courtis, Chapter 8, Sections 4.1 and 4.2.

²⁸ Case 4560/70. See also Case 5727/72.

²⁹ *Airey v. Ireland* (1979) 2 EHRR 305.

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

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

Pointing out the trajectory of the jurisprudence is one thing, explaining its rise is quite another. On one hand, it is undeniable that the space for the judicialisation of social rights has been significantly enlarged. The post-World War II human rights architecture gave short shrift to the enforcement of social rights. The Universal Declaration of Human Rights (UDHR) contained an almost exhaustive catalogue of human rights³² but indi-

vidual complaints could only be made concerning violations of the rights in the International Covenant on Civil and Political Rights.³³ Its sister treaty, the International Covenant on Economic, Social and Cultural Rights (ICESCR) remains deprived of such a mechanism,³⁴ although the Human Rights Council is close to addressing this historical imbalance.³⁵

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

just and favourable conditions of work; form and join trade unions; rest and leisure; adequate standard of living for health; education; and participation in cultural life (Articles 3–27).

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

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

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

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

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

³¹ In the *Legal Consequences of the Construction of a Wall in the Israeli Occupied Territories* (2004) ICJ Reports 136, the majority of the International Court of Justice opined on various activities of Israel that were said to impede and restrict the rights of Palestinian persons under the International Covenant on Economic, Social and Cultural Rights, concluding that construction of the fence and its associated regime 'impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living as proclaimed in the International Covenant on Economic, Social and Cultural Rights and in the United Nations Convention on the Rights of the Child'. (p. 192.) However, the lingering misunderstandings of social rights can be witnessed in the separate concurring opinion of Rosalyn Higgins (p. 213).

³² The UDHR includes the following rights: life; freedom from slavery; freedom from torture; recognition before the law; non-discrimination; right to an effective remedy; freedom from arbitrary arrest or exile; fair trial; presumption of innocence in criminal trials; freedom of movement and residence; asylum; a nationality; marriage; own property; freedom of conscience and religion; freedom of opinion; peaceful assembly and association; take part in government and vote; social security; work;

To some extent, this division reflected the schismatic understanding of human rights amongst scholars at the time. Human rights were frequently allocated between the two categories of negative and positive liberties as set out in the philosopher Isaiah Berlin's lecture of 1958.³⁷ As Sy Rubin put it, '[W]hen one discusses civil and political rights, one is generally talking about *restraints* on governmental action, not *prescriptions* for such action... [It] is easier to tell governments that they shall not throw persons in jail without a fair trial than they shall guarantee even a minimal but sufficient standard of living'.³⁸ The 1960s were also partly characterised by the economic doctrines of Keynesianism in the West and centralised socialism in the East that assumed that benign policy intervention would cure a range of social ills.

However, the post-Cold War wave of democratisation and constitutionalisation took a different direction and led to the cataloguing of many justiciable economic, social and cultural rights in many constitutions.³⁹ In some jurisdictions, the right to bring *collective* actions (for example, with a public interest organisation acting as claimant) clearly assisted the initial development of the jurisprudence (for example, in South Africa, Argentina and Venezuela) while in Brazil, Piovesan notes that a strategic decision was made in HIV/AIDS litigation not to use this option.⁴⁰ Some of the landmark decisions include the *Grootboom* decision in South Africa, where the Court ruled that the gov-

ernment's housing policy breached the constitutional obligation to progressively realise the right to housing due to inattention to emergency relief; the *Campodónico de Beviacqua* case⁴¹ where the Argentine Supreme Court ordered the State to continue provision of medication to a child with a disability in accordance with the right to health; and the *Eldridge* decision in Canada where the right to equality was interpreted to include the right of deaf patients to receive interpretive assistance in a province's health care facilities.⁴²

Simultaneously, the number of avenues for social rights litigation at the regional and international level expanded with the newly established Inter-American Court on Human Rights (1987) and the African Commission on Human and Peoples' Rights (1987) while the European Committee on Social Rights was able to entertain collective complaints from 1999. The UN Committee on Elimination of Racial Discrimination addressed racial discrimination in the workplace in its 1988 decision *A. Yilmaz Dogman v The Netherlands*,⁴³ while in 1987 the Human Rights Committee struck down social security legislation that discriminated on the basis of sex and marital status.⁴⁴ In 1987, the UN Committee on Economic, Social and Cultural Rights ('CESCR Committee') was established to monitor and guide the interpretation of ICESCR, and this gave significant impetus to efforts to move forward a coherent legal vision of economic, social and cultural rights⁴⁵ – an increasing number of judgments refer to its general comments.

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

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

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

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

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

⁴⁰ See Chapter 9, Section 5.

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

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

⁴³ Communication No. 1/1984

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

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

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

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

times, such as in Ireland and the US Supreme Court.⁴⁹

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

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

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

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

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

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

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

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

The second is the degree of the political achievement of social rights. Judicial receptivity to social rights claims is usually conditioned by clear evidence of State or private failure. Inhumane suffering in the face of the State unwillingness to fulfil its own legislation and policy has sparked much of the groundbreaking jurisprudence from South Africa to the United States to India to Colombia. As Gauri and Brinks note, ‘courts remain promajoritarian actors. Their actions narrow the gap between widely shared social belief and incomplete or inchoate policy preferences on the part of government, or between the behaviour of private firms and expressed political commitments’.⁵⁴

The third is the judicial culture itself and the degree of judicialisation of human rights. The establishment of a culture of litigation for human rights within a jurisdiction makes the induction of ‘newer’ rights much easier. Social rights jurisprudence is almost always significant in those jurisdictions that have developed robust judicial or quasi-judicial review for civil and political rights. This creates both the underlying conditions for social rights litigation (in terms of effective court

processes, freedom of expression, relative enforcement of remedies), and the acceptability of human rights legal reasoning. It is no great leap to go from assessing the proportionality of restrictions on the rights of dissidents or media proprietors to free speech to evaluating forcible evictions or denial of access by non-nationals to social security schemes. Some courts have increasingly spelt out the positive obligations surrounding civil and political rights, providing them with a new terminology that helps them overcome traditional classifications of human rights, which squirrel away civil and political rights as ‘negative rights’ and ESC rights as ‘positive rights’. As will be discussed in Section 3, the degree of judicial openness to comparative and international law is also positively correlated with more progressive decisions.

Beyond law, social/legal movements, and judicial practice, there is perhaps a deeper keel that aids or obstructs attempts to introduce social rights within human rights practice. It is the way in which human rights are understood, valued and embedded within a particular society, a factor we might describe as culture. The permeation of human rights ideals into a particular context is closely associated with societal repulsion at, or experience of, particular manifestations of human indignity.⁵⁵ It is perhaps no different for adjudicatory bodies. The graphic presentation of forced evictions to the UN Committee on Economic, Social and Cultural Rights in 1991 helped pave the way for more vigorous concluding observations by the Committee.⁵⁶ The growing number of court orders concerning lack of state provision of HIV/AIDS medicines⁵⁷ is partly attributable to the ‘shock value’ that these bodies experience when confronted with clear

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

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

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

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

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

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

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

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

The adaptability of cultures to new values and rights is certainly undeniable but culture plays perhaps a different role than Sunstein suggests. A comparative review of jurisprudence indicates the crucial role of history, in particular the national and international mythologies surrounding the adoption of constitutional documents at a particular point in time. Although Sunstein later distinguishes between the US and South African Constitutions on the basis that the latter was clearly transformative (p. 216–17). Advocates seeking to advance the recognition and enforcement of social rights seem to fare better in countries whose con-

stitutional and democratic revolutions were partly aimed at overcoming social injustice (e.g. Latin America, South Africa and India) as opposed to those revolutions that were more focused on civil and political freedoms (e.g. United States and Eastern Europe). The current attempt at constitutional reform in United Kingdom may be a pertinent example of the latter. The current focus is not on asking what human rights need to be recognised today but what has been recognised in the twelfth century Magna Carta, seventeenth century English Bill of Rights and some timid advances in common law. The result at the time of writing is the meagre proposal that ‘no person shall be *denied* the right to education’⁶¹ and that ‘no person shall be *denied* the right to a minimum standard of healthcare and subsistence *as set out in statutory provisions* to be enacted from time to time’ (emphasis added).⁶² In other instances, economic, social and cultural rights were made justiciable almost accidentally (constitutions were copied from other jurisdictions⁶³) or international treaties were incorporated in the constitutional order with no public pressure.⁶⁴

3. ASSESSING THE JURISPRUDENCE

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

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

⁵⁸ See particular interview with Geoff Budlender in Langford, *Litigating Economic, Social and Cultural Rights* (n. 53 above), pp. 96–99.
⁵⁹ C. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need It More Than Ever* (New York, Basic Books, 2004), pp. 127–138.
⁶⁰ *Ibid.* p. 137.

⁶¹ The State is also to respect in education systems the ‘religious and philosophical convictions’ of parents.
⁶² See The Smith Institute, *The constitution of the UK as of 1 January 2007*, printed in C. Bryant (ed.), *Towards a new constitutional settlement* (London: Smith Institute, 2007), appendix.
⁶³ Jayawickrama, *The Judicial Application of Human Rights Law* (n. 2 above).
⁶⁴ J. Levit, ‘The Constitutionalisation of Human Rights in Argentina: Problem or Promise?’, *Colombia Journal of Transnational Law*, Vol. 37.
⁶⁵ See M. Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2007), p. 9.