

Human Rights and Poverty Reduction

Strengthening pro-poor law: Legal enforcement of economic and social rights

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1. Introduction

Over the last two decades, a number of bilateral and multilateral donors have adopted rights-based approaches to development. The relative recentness of this process requires a sharing of knowledge and experience across professional and disciplinary boundaries. This paper focuses on the pillar of human rights work, exposing and opposing violations of economic and social rights. Its purpose is to summarise key lessons of human rights litigation that can support anti-poverty policies, using an array of real-life cases from different corners of the world.

Enforcing human rights is benefited by the mobilising power of the human face and the human fate of victims, and conveys their courage in challenging abuses of power. Unlike anti-poverty strategies, which rely on statistics and which tend to be numbing rather than mobilising, exposing and opposing human rights violations portrays victims as individuals. This helps people understand the obstacles that poor people – especially women – face, and their experiences in challenging and eliminating these obstacles.

The most important feature of legal enforcement is the fact that authorities are already committed to the rights in question under the country's constitutions and laws. The rule of law requires no more of them, but also no less, than to translate their commitments into reality. And yet, these authorities often have to be forced to comply. Otherwise, there is room left for the law to be transgressed with impunity, something which happens often when the victims of violations are poor.

This feature of legal enforcement forms a conceptual bridge to anti-poverty strategies, in that the poor are victimised by violations much more than the rich. Sharing experiences becomes easier because the underlying logic is similar. Making the law work for the poor often necessitates international action to facilitate change. Universality of human rights legitimises and supports such action. Legitimacy derives from minimum human rights standards laid down by the states themselves. Because the key precepts are intended for global application, they have been field-tested in different corners of the world, creating a wealth of experience.

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2. The rule of law

The insistence on the rule of law in human rights stems from the fact that governance is the exercise of power and human rights are safeguards against the abuse of power. Two consequences flow from the grounding of human rights in the rule of law.

First, the postulate of equal rights aims to provide those who are disempowered with a legal entitlement. Thus, children have stronger entitlements than adults. For example, human rights obligations regarding street children reach beyond preventing abuses of physical power by the police, exemplified by 'social cleansing', to include 'access to conditions that guarantee [the children's] dignified existence' (*Villagrán Morales vs Guatemala*, Series C 79, 1999). That children cannot develop unless they are nourished, housed, clothed, and educated is self-evident. Indeed, the establishment of the rights of the child has been one of the major global successes in the field of human rights, with the convention spelling them out accepted by 192 countries. Parents have the primary responsibility for their children, but children should not be left to die if their parents are abusive or if they are parentless. Children acquire political rights with adulthood; in most countries, they are legally deprived of the right to claim and defend their own rights. A case in Nepal illustrates this: child labourers were precluded by law from forming a trade union to vindicate their labour rights, because they were children. Owing to the armed conflict and the consequent paralysis of public authorities, this case has not as yet been adjudicated. An older case in Tanzania tackled women's status as perpetual children, minors in law, and modified discriminatory customary law so as to affirm that women had the right to acquire and sell land (*Ephrahim vs Holoria Pastory*, 1990, LRC (Const.) 757).

The second consequence of the rule of law is that only those rights bestowed upon people by law can be legally enforced. Legally recognised economic and social rights are few. Comparative analyses of country constitutions show that the most recognised right is the right to education, followed by the right to health; the right to housing is included in the constitutions of half of the countries in the world. The right to work forms part of the heritage of Soviet-inspired constitutions and is not recognised by the European Union. This is also the practice of the International Labour Organization, whose Declaration on Fundamental Principles and Rights at Work affirms freedom of association, freedom from forced and child labour, and freedom from discrimination. The Constitutional Court of Benin has confirmed that the right to work 'cannot be due from the State' (CC 02/93). However, trade union freedoms form part of global minimum guarantees and are legally enforced nationally and internationally. As early as 1985, the ILO rejected laws demanding that at least 60% of members of a trade union should be literate, so as to enable agricultural workers to defend their economic and social rights (Digest of 1985, para. 219).

Many more economic and social rights, such as the right to development or the right to lifelong learning, have been advocated through human rights activism in the past four decades. Labelling a phenomenon a human rights violation is as popular a mobilisation tool as is the inclusion of the rhetoric of rights in demands for additional entitlements. However, many violations of economic and social rights do not revolve around state-provided benefits. An illustrative violation is the prevention of people with disabilities from earning their own livelihood. The Constitutional Court of Senegal invalidated in 2000 an automatic exclusion of all physically disabled people from teaching (CE No. 12/2000).

3. Judicial action against distorted governmental priorities

Colombia's rich constitutional jurisprudence in safeguarding economic and social rights offers fascinating cases. Alongside violations of individual rights, the Court diagnoses situations of unconstitutionality, where governmental policies and budgetary allocations impede the realisation of guaranteed rights.

The Court ruled in February 2004 that formal constitutional guarantees related to economic and social rights of the internally displaced had not been translated into governmental policies and supported by appropriate budgetary allocations. The plight of the internally displaced, after four decades of armed conflict and political violence, was known to all. Nevertheless, they were marginalised rather than prioritised. The Constitutional Court, in the words of Manuel José Cepeda, who delivered the judgment, faulted the government for its denial of the constitutionally guaranteed rights of the displaced. As a consequence, an unknown but large number of the displaced, probably over a million, were neither registered nor informed of their rights. Only a minority were provided with humanitarian assistance or housing, while budgetary allocations were diminished rather than increased with time. Having defined this situation as unconstitutional, the Court has elaborated the list of basic rights of the displaced and laid down a timeframe for the government's compliance with its human rights obligations (T-025 de 2004). The government was ordered to develop a time-bound plan within 54 days, and to allocate resources and secure the basic rights of the internally displaced under the continued supervision of the Court. This paradigmatic case has highlighted the core purpose of enforcement: halting and reversing governmental practice of denial of basic rights to a large, dispersed, impoverished and politically voiceless population.

This case illustrates two important considerations. First, unlike releasing an arbitrarily detained person, securing the right to education or health requires extensive and efficient institutional infrastructure which cannot be created overnight. Secondly, the task of the Court is to enforce the constitutional obligations of the government. These include policy design and implementation, which remain the government's prerogative as long as the constitutionally mandated minimum standards are met.

4. How to tackle development harmful to human rights?

Protection against harmful development interventions has generated a great deal of human rights jurisprudence. A retrospective assessment of the exploitation of natural resources in Nigeria has found violations of human rights through 'the destructive and selfish role played by oil development, closely tied with the repressive tactics of the Nigerian government, and the lack of material benefits accruing to the local population' (ACHPR, Case 155/96, decision of 27 October 2001).

Impoverishment resulting from forced displacement or a poisonous industry has been a particularly frequent cause of challenges to violations of economic and social rights. It is never easy to balance legitimate but conflicting priorities. The closure of a polluting tannery brings 'unemployment and loss of revenue' but environmental protection may have 'greater importance to the people', as the Supreme Court of India ruled in 1987 (4 SCC 463).

A particularly helpful innovation has been the establishment of global minimum standards, such as those of the World Bank Inspection Panel, because they are tailored to development and allow challenging decisions made on a supra-national level. Sometimes, the very filing of a case, and the expected publicity surrounding it, leads to the rectification of prospective harm to economic and social rights. For example, a request was filed in 1999 by CELS (Centro de Estudios Legales Y Sociales) in Argentina because budgetary reductions were threatening to annihilate a programme assisting the poorest to grow their own food. This resulted in an immediate change: the budget for the programme was doubled (Argentina: Special Structural Adjustment Loan 4405-AR).

Economic and social rights may be worded as individual entitlements or as corresponding governmental obligations. The Supreme Court of India has made huge strides throughout the past decades in specifying how constitutionally defined governmental obligations should be enforced. In May 1986, Chief Justice Bhagwati pointed out that the law had 'a social purpose and an economic mission'. At the time, a judicial definition of freedom from hunger required identifying governmental human rights obligations to prevent starvation deaths during a famine. This was not an aspect of charity or state benevolence, the Court explained, but a

constitutional obligation to 'mitigate hunger, poverty, starvation deaths'. The state had to undertake adequate measures but could accomplish no more than mitigation (AIR, 1989, SC 677). To clarify governmental responsibility in the elimination of child labour, the Court has also acknowledged that this cannot be achieved without tackling underlying poverty. In terms of hazardous child labour, the Court suggested alternatives: ensuring work for an adult family member in lieu of the child, or a stipend to the family in order to enable the child to attend school (AIR, 1997, SC 699). Rectifying divergent policies of consecutive governments, however, has proved to be a long-term process, requiring patience and persistence. The Supreme Court ruled on education in 1993, stating that education was a fundamental right, albeit not absolute, as it was 'subject to limits of economic capacity and development of the state'. It posited that 'every child/citizen of this country has a right to free education until he completes the age of fourteen years' (SC. 2178, 1993). However, it took until 2002 to constitutionalise this right, and the implementing legislation to ensure it for all school-age children is still being drafted.

5. How can women escape poverty if they are precluded from owning anything?

Often, the reason that women are poorer than men amongst the rural poor is the existence of a denial of their rights to inherit and own land. More often than not, it is customary law that denies daughters or wives land rights, and the courts in individual countries may uphold such discriminatory exclusions. Indeed, the Supreme Court of Zimbabwe did exactly that. It stated that 'a lady' could not inherit her father's estate 'when there is a man' (S.C. 2 0/98, 16 February 1999).

This case highlighted the importance of the universality of human rights. International human rights law operates vertically and horizontally. Vertically, human rights law defines the protection of the people *from* their government and *by* their government. Horizontally, it provides a solid legal basis for donors to demand that other states comply with human rights obligations *vis-à-vis* their population. Most importantly, international human rights law has taken away from individual governments the role of arbiter. Since non-discrimination is the key human rights principle, women should not remain 'rights-less'. Indeed, the Protocol to the CEDAW Convention (Convention on the Elimination of All Forms of Discrimination against Women) has instituted access to two types of international remedy. One bestows upon victims the right to pursue their case internationally when violations of their rights were not remedied domestically; another enables inquiries into grave and systematic violations of women's rights with a broad-based right of initiative. The CEDAW Convention explicitly lists women's economic and social rights; the Protocol came into force rapidly for more than 70 countries and is open to others. This has added a gender-specific component to international complaints procedures. Together, these procedures bestow upon individuals the right to hold governments legally accountable for failure to implement human rights obligations, both domestically and internationally.

6. Coping with the last vestiges of the Cold War: subsidy instead of liberty

Self-assessments by the governments of Cuba or North Korea offer an image that all economic and social rights are guaranteed to all. This model continues the Cold War notion of 'rights' as government-provided, often imposed, services. However, there is no freedom to complain. Indeed, both governments are on the agenda of the United Nations Commission on Human Rights for violations.

Global ideological disputes during the Cold War legitimised this extreme as well as the other, epitomised by the US, which denied that economic and social rights were human rights. The United Nations imported guarantees of all-encompassing, fully subsidised public services into some of the older human rights instruments. However, human rights jurisprudence has clarified that education can be made compulsory only when freedom of choice is guaranteed,

and that public health measures (such as vaccination) can be made obligatory only under strictly defined conditions.

7. The free or for-fee dilemma

Two post-Cold War changes have profoundly affected economic and social rights. One is the obliteration of the previous expectation that the state will provide all public services to everybody, free of charge. The other is the institutionalisation of legal duality of services, whereby these continue as recognised rights but are also traded, domestically and internationally. The combined effects of these two changes have generated more heat than light, owing to the fact that they are new and the practice of state has not yet settled. As was seen in Bolivia, in the aftermath of the shift from the supply of water as a free public service to a freely traded service, the absence of human rights safeguards can trigger a profound, painful and prolonged crisis. The background was privatisation of water supply, with major involvement of international agencies and multinational companies, which steeply increased prices (UN Doc. A/58/330, paras 36–37).

In economic and social rights, the corresponding obligation of governments is to enable people to provide for themselves and, exceptionally, to be providers of the last resort. Taxation is a duty, enforced in particular under the European Convention on Human Rights. The human rights discourse tends to be hostile towards the concept of individual duties, although these represent the logical consequence of rights. It is hard to imagine how any state would raise the revenue to finance health, education, water and sanitation, or assistance for those too young or too old to work, were it not for taxation. The European Court of Human Rights has legitimised 'the States' power to pass whatever fiscal laws they considered desirable' so as to secure the payment of taxes, provided that judicial remedies exist lest taxation amounts to arbitrary confiscation (*Gasus Dosier – und Fördertechnik GmbH vs Netherlands*, Series A 306-B, 1995). This is a reminder that most services are paid for, whether through taxation or direct charges. However, the difference between taxation and direct charges is fundamental. The human rights jurisprudence regarding taxation has affirmed the principle of ability to contribute: those with insufficient income are not taxed. The imposition of charges for basic public services (such as vaccination of children or primary schooling) upon those who cannot pay them amounts, then, to regressive taxation. Legal challenges have been mounted in countries as different as the Czech Republic (US 25/94 of 13 June 1995) and the Dominican Republic (Case No. 12.189). Their scarcity is the result of the absence of information on the rights that people should have, or the absence of the rule of law, which invalidates formally proclaimed constitutional rights.

8. Translating law into practice: the realm of the possible

Law is symmetrical. No government can be legally obliged to do the impossible. The illogic of burdening any actor with obligations it cannot perform would collapse the rule of law. Accordingly, universal human rights are few and the corresponding governmental obligations are set at a minimum feasible in all corners of the world. Governmental obligations corresponding to economic and social rights are defined in terms of progressive realisation. Although the European Court of Justice can state that 'the right to paid leave is a social right conferred on all workers by Community law' (C-173/99), paid leave is a distant dream for many workers in many developing countries. Even more important than the list of enforceable substantive rights is the notion of progressive realisation, which mandates improvement. However, economic circumstances change and curtailing acquired social rights may become necessary. In a case concerning old-age pensions of previous public employees, the Inter-American Court of Human Rights ruled that the rights of a privileged minority had to be balanced against the misery of the majority, who did not enjoy any pension rights (IACtHR Series C 86).

In education, the universal minimum is defined as primary schooling. When a government is unable to ensure all-encompassing free and compulsory primary education, it should develop

a strategy for doing so and seek international assistance. Pre-school education is not defined as a right in most countries. Post-primary education is subject to progressive realisation and guarantees vary. Education which is legally defined as compulsory should be free; laws vary regarding university education. Indeed, in most countries the latter is not free, although jurisprudence in Argentina and Venezuela has confirmed that it should be.

In health, the right itself is defined in relative terms, as the highest attainable standard of health. Judicial interpretations of the right to health have focused on public health, such as vaccination or prevention of epidemics. Entitlements to health services vary enormously. The huge difference between wealthy and poor countries has been reflected in the judicial protection against expulsion of an AIDS patient from the United Kingdom to St Kitts, on the grounds that he would not have had an effective entitlement to health services in the latter (*D. vs United Kingdom*, judgment of 2 May 1997).

With regard to housing, a frequent misconception is that having the right to housing means obtaining free housing at the government's expense. The Constitutional Court of South Africa has clarified that the government should realise the right to housing progressively, through a 'reasonable provision within its available resources'. This necessitates strengthening 'the capacity of institutions responsible for implementing the programme'. However, excluding from the programme those 'with no access to land, no roof over their heads, and who are living in intolerable conditions' cannot qualify as reasonable (CCT 46/01).

By definition, progressive realisation has to do with differences in the stage of development and, especially, financial constraints. As put by Mark Malloch Brown, 'you cannot legislate good health and jobs. You need an economy strong enough to provide them.' (Human Development Report 2000: iii.) Nonetheless, the government can ensure that resources that can be invested in health or education do not disappear through corruption. Paradoxically, the government itself can be the principal culprit. It took a change of government in Zambia for the parliament to remove in 2002 the immunity of former President Chiluba, so as to start proceedings for corruption. Lesotho made the headlines that same year with the first convictions in a major bribery scandal concerning the Highlands Water Project.

9. Focus on poverty caused by discrimination

Commentaries of the jurisprudence of South Africa's Constitutional Court regarding economic and social rights have often depicted these as 'rights of the poor.' There and elsewhere, previous human rights litigation was seen to vindicate individual liberties while ignoring the plight of the poor. The racial and gender profile of poverty facilitated human rights litigation by demonstrating that discrimination – rather than poverty – was at issue. Those who could not – still cannot – afford to finance their own housing, education or health services tended to be both black and female. Both domestically and internationally, legal enforcement of economic and social rights has been particularly successful in exposing and opposing discrimination on the grounds of gender, race, and indigenous or minority status. This results from the human rights principle of equality. The primary characteristic of human rights is that no particular feature attaching to any individual can affect his or her entitlement to human rights. Although social and economic rights should be realised progressively, it is settled jurisprudence that non-discrimination applies fully and immediately.

Much of the jurisprudence related to women's rights is recent. Denials of property rights to women were overturned by the Supreme Court of Vanuatu in 1994 (Case No. 18, 1994), as was a company policy as late as 1997 in the Philippines not to employ married women (G.R. No. 118978, 272 SCRA 596). Women's legal situations can be much worse where they are treated as property of their husband. In Cameroon in 1998, the Supreme Court dismissed as contrary to the CEDAW Convention a husband's demand for a judicial order to force his levirate wife to return to him on the grounds that she was part of his late brother's property (CASWP/42M/98).

As early as 1977, the Inter-American Commission on Human Rights ruled that indigenous health rights could be violated through inappropriate development policies (IACmHR No. 1802). Gross abuses, such as massacres of indigenous communities in the exploitation of gold or timber, generated jurisprudence specifying governmental obligations (IACmHR No. 11.706). Protection of indigenous land rights as an economic and environmental base has entailed adjudication of collective complaints mounted by indigenous communities to vindicate their 'communal ownership of the collective property of land' (INCtHR Series C 79). Indigenous land rights have been constitutionalised in countries such as Brazil and the Philippines, followed by complex delimitation, demarcation and formalisation of land titles.

One of the most controversial issues in discrimination is the differentiation between citizens and non-citizens concerning economic and social rights, a bone of contention in countries as different as Latvia and Côte d'Ivoire. The International Covenant on Economic, Social and Cultural Rights has explicitly affirmed that developing countries may determine the extent of guarantees to non-citizens. Developed countries do this also, prompting numerous legal challenges with, as yet, unsettled jurisprudence.

10. Judicial activism and judicial restraint

Human rights guarantees act as correctives for budgetary allocations. This is explicitly anticipated in mandating the deployment of 'the maximum available resources' for progressive realisation of economic and social rights. The International Covenant on Economic, Social and Cultural Rights obliges in Article 2 each party to take steps 'to the maximum of its available resources', both domestically and also 'through international assistance and cooperation'. The Convention on the Rights of the Child stipulates in Article 4: 'With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.' This formulation indicates why legal enforcement is crucial. It would be impossible to define in the abstract those resources that might be 'available' for investment in economic and social rights or to specify what 'the maximum' might be. Moreover, the boundaries of the judiciary are defined by the remits of the legislature and the executive. Judges do not have constituencies whose interests they should articulate and defend. Furthermore, they are lawyers. No constitution in the world has empowered (or is likely to) the judiciary to design and adopt the government's budget. However, the judiciary *can* furnish safeguards against misappropriation of the budget, as was shown in the early, precedent-setting case against the Estate of Ferdinand E. Marcos, which succeeded in returning some of the misappropriated funds to the Philippines (New York Centre for Constitutional Rights Docket, 1987).

Accountability necessitates explicit standards against which a government's performance is measured, and procedures to ensure that these standards are met. In assessing whether a government has complied with its obligation to invest the available resources to their maximum for the progressive realisation of human rights, constitutional courts have advanced the common, global understanding of economic and social rights and the corresponding governmental obligations. Three important clarifications stem from this jurisprudence.

First, human rights obligations do not necessarily prevail over other obligations of the state. This has been affirmed in the Philippines, in a unique case of weighting repayment of foreign debt against the constitutional priority for education. A group of senators challenged in 1991 the constitutionality of the budgetary allocation of P86 billion for debt servicing as compared with P27 billion for education. The Constitution of the Philippines obliges the government to assign the highest budgetary priority to education. The issue to be decided was whether debt servicing, at more than three times the budgetary allocation for education, was unconstitutional. The Court found that education should obtain the largest allocation as the Constitution required, but that debt servicing was necessary for the creditworthiness of the country and, thus, the survival of its economy (G.R. No. 94571, 22 April 1991). This

highlights the need to integrate human rights in the policies and practices of creditors and donors.

Secondly, the courts are not empowered nor are lawyers equipped to address inherently political decisions, such as budgetary priorities, or areas such as health or education where the executive has the professional expertise lacking to the courts. The Constitutional Court of South Africa has defined the boundaries that the judiciary should not cross. In the area of health, it has emphasised that 'a holistic approach to the larger needs of society' may often prevail over an individual right to health services (CCT 32/97). Moreover, it has added that 'in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum standards should be nor for deciding how public revenues should most effectively be spent' (CCT 8/02).

Thirdly, the courts are required to uphold the rule of law. This includes holding the executive accountable for keeping within the law and, for constitutional courts, also verifying whether the legislation is in conformity with the constitution. The practice of the Constitutional Court of Hungary, for example, has confirmed that the Court should protect social rights against austerity measures justified by economic crises. In a widely publicised case, the Court invalidated in 1995 large parts of the austerity package negotiated with the IMF (43/1995 and 44/1995 (VI.30) AB). It ruled that respecting parliamentary powers to determine how social rights should be actualised did not preclude the Court from ensuring that no violation occurred. The Court has acknowledged that living standards can decrease in response to worsening economic conditions, but also that measures which dramatically and immediately reduce almost all social entitlements are impermissible. The means that, although the government ensures that minimum standards guaranteed by the Constitution are beyond the Court's remit, those affected ought to be provided with time and opportunity to seek alternatives.

11. Pro-poor law to strengthen pro-poor development strategies

The focus on governmental human rights obligations is particularly well suited to poverty reduction, because poverty does not conveniently slice itself into portions pertaining to health, housing, education or food. The Committee on Economic, Social and Cultural Rights has called for a strengthening of the capacity of the judiciary 'to protect the rights of the most vulnerable and disadvantaged groups in society' (UN Doc. E/C.12/1998/24). An important reason behind the fact that the supply of this type of human rights litigation does not match the range of problems is that human rights litigation remains dangerous. The consistently high casualty rate among human rights lawyers has led to special regional and global procedures for protecting human rights defenders.

Because legal proceedings are routinely lengthy and undertaken only by trained lawyers, ombudsman-type institutions have proved a useful complement. In its first annual report, the Uganda Human Rights Commission put it thus: 'Most complainants are simply vulnerable people, who say that court procedures are too complicated for them and that they do not have the money to engage private lawyers to pursue their cases.' (1997 Annual Report: 13.)

In most developing countries, much of the work of national human rights commissions is taken up by economic and social rights. For example, 44.5% of the caseload of Indonesia's Human Rights Commission was in 2001 classified as 'violations of the right to welfare' (Annual Report, Jakarta, 2001: 69). Such institutions tend to provide open access to all potential complainants, a cost-free procedure, and flexibility in methods of work. However, they do not have powers to interpret law and, thus, complement rather than supplant the judiciary.

The judiciary interprets formal, and necessarily abstract, human rights guarantees in specific circumstances. Courts do not act on their own motion but follow complaints of human rights violations or requests for judicial review where a claim has been made that harm to human

rights is imminent or inevitable. The interplay between abstract legal norms and factual circumstances enables precise definitions of rights and violations. The government is a party to the case, and can present all factual and legal arguments, and explain and justify its policy decisions or strategic choices. The courts have to provide reasons for their decisions which are, increasingly, reviewed internationally.

Human rights law has affirmed that each individual is the subject of rights and, consequently, has provided a broad basis for claiming and vindicating them. Because no right can exist without remedy, the evolution of human rights law has been accompanied by the establishment of domestic institutions to provide remedies for violations. The experiences of these institutions provide inspiration for replication or adaptation of innovative models for enforcing the rights of the poor and, thus, strengthening anti-poverty policies.