In the space of two decades, social rights have emerged from the shadows and margins of human rights jurisprudence. The authors in this book provide a critical analysis of almost two thousand judgments and decisions from twenty-nine national and international jurisdictions. The breadth of the decisions is vast, from the prevention of forced evictions to the regulation of private medical plans to the development of state programs to address poverty and illiteracy. The jurisprudence not only implicates our understanding of economic, social, and cultural rights but also challenges the philosophical debates that question whether these rights can and should be justiciable.

Malcolm Langford is Research Fellow and Director of the Human Rights and Development Research Group at the Norwegian Centre on Human Rights at the University of Oslo. The author of many articles and books on human rights, economics, and law, he also advises a wide range of UN agencies on human rights and development issues and has drafted a number of key international standards in the field of economic, social, and cultural rights. He previously worked at the Geneva-based Centre on Housing Rights and Eviction (COHRE), where he founded an international litigation program, and he continues to act as an advisor in domestic and international litigation.
Social Rights Jurisprudence

Emerging Trends in International and Comparative Law

Edited by

MALCOLM LANGFORD

University of Oslo
There is growing acceptance all over the world that certain core fundamental values of a universal character should penetrate and suffuse all governmental activity, including the furnishing of the basic conditions for a dignified life for all.

I believe that 21st-century jurisprudence will focus increasingly on socio-economic rights.

Justice Albie Sachs
Constitutional Court of South Africa*

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Foreword

Philip Alston

This book provides eloquent testimony to the fact that the debate about the justiciability of social rights has come of age. For many years the debate was dramatically stuck in the mire of what might be termed a name-calling phase, in which opponents contented themselves with proclaiming that social rights were simply not susceptible to judicial review and implementation. This argument was pursued with particular vigour by those who clung to the old certitudes that social rights were by their very nature ‘positive’ and thus not amenable to judicial consideration. In contrast, civil and political rights were said to be inherently ‘negative’ and were thus eminently well suited to being litigated in courts. Indeed, despite a literature which is by now extensive, and which very effectively debunks this simplistic dichotomy, such arguments are still made by some participants in the international human rights debate. By and large, however, the growing number of social rights cases decided by judicial and quasi-judicial institutions, the range of issues they deal with, the diversity of jurisdictions in which they have occurred, and a thriving scholarly literature have combined to make such debates largely irrelevant in practice.

After the name-calling phase, the second phase in the international debate over justiciability was largely devoted to enthusiastic discussions of the jurisprudence emerging from the South African Constitutional Court in its application of the provisions of the South African Constitution. To a significant extent that constitution reflected the approach adopted in the International Covenant on Economic, Social and Cultural Rights (ICESCR). Rarely have developments in the field of comparative constitutional law been so dominated by the jurisprudence not only of a single country but in this case of a single court. Many legal sceptics and even some of those with philosophical reservations were won over by the combination of conceptual experimentalism with nuance and caution with which the Constitutional Court approached its challenging task. But the extent to which this debate focused so heavily on the approach adopted by a single country also had its downside.

The only other country which was attracting attention was India, where the Supreme Court approached public interest litigation with a spirit of adventure. This jurisprudence, however, actually had a much less significant impact on the emergence of an international constituency favouring the development of social rights justiciability than was the case with the South African experiment. The reason was partly because of the almost serendipitous nature of the Indian Court’s ‘epistolary jurisdiction’, which meant that a case could be launched and standing secured merely as a result of the Supreme Court agreeing to take up a case on the basis of a letter of complaint. In addition, the Indian developments were often not underpinned by clear constitutional provisions but depended rather heavily on progressive and creative interpretations of the right to life. Nor were all of the judgments as systematically grounded as was the case in South Africa. These problems are critically canvassed in detail by several of the contributions to this volume.

In the third and current phase of the justiciability debate, comparative constitutional lawyers have begun to transcend their fixation on the South African and Indian courts. In part this is because the
former court has produced too few relevant judgments to keep the debate focused upon itself. In part it is because of an increasingly critical literature drawing attention to the limitations of some of those judgments from various perspectives, including in terms of their impact on the situation on the ground and the Court's lack of success in fashioning procedural remedies designed to provide adequate follow-up. This is not to say that the Court's jurisprudence has not produced important achievements, as Liebenberg has noted in this volume. But the transition to the third phase is by no means premised on disillusionment with the South African experiment. On the contrary, the insights provided in the first few cases decided by that Court have provided the foundations upon which comparable developments have been able to take on a life of their own in other jurisdictions and triggered an interest in uncovering case law from elsewhere.

Thus, today, as this book shows par excellence, the debate has moved into a more mature and diverse phase with a wide range of national courts, particularly in Latin America, South Asia, and some Western countries, adopting positions in relation to social rights and an increasingly expansive array of international instances generating social rights 'jurisprudence'. Another of the volume's achievements is to give a sense of the way in which these two developments have complemented one another. Neither at the domestic nor the international level did the relevant developments occur in isolation or in ignorance of what was being done elsewhere. In this regard it is instructive to recall briefly the contribution of the United Nations Committee on Economic, Social and Cultural Rights in the justiciability debate.

Although the ICESCR was adopted in 1966 and entered into force in 1976, it was not until 1987 that a specialised expert committee, the ESCR Committee, was created to monitor State parties' compliance with their obligations. In the years immediately following the adoption of the Covenant, the question of a role for the courts in the implementation of social rights was raised but subsequently dropped rather rapidly. The International Conference on Human Rights, held in Teheran in 1968, called upon 'all Governments to focus their attention . . . on developing and perfecting legal procedures for prevention of violations and defence of economic, social and cultural rights'. In response, the UN Secretary-General underook a detailed 'preliminary study of issues relating to the realization of economic and social rights'. In terms of national-level measures to promote respect for social rights, the study noted the desirability of both constitutional and legislative measures. But it also asserted that article 8 of the Universal Declaration (recognizing 'the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law') applied 'of course, also to economic, social and cultural rights'. The study went on to note that many of those rights were capable of being protected at the national level 'by the ordinary courts' and that, in many respects, that was already the situation in various States.

But these suggestions essentially fell victim to the emphasis upon international obligations on the part of the developing countries which promoted the social rights agenda most actively within the UN setting. Thus, the Secretary-General's report led to the commissioning of a major study prepared under the auspices of an official in the Government of the Shah of Iran, Manouchehr Ganji. His very lengthy study ignored 'national norms and standards governing the realization of economic, social and cultural rights' on the grounds that such an endeavour would have 'vastly exceeded the scope and space allotted to the study'. Instead, in a preview of many of the later debates over the content of the right to development, the study focused almost exclusively on the problems faced by developing countries in overcoming poverty. It did, however, note in passing that a study on the national dimensions of social rights, presumably including the role of the courts, 'should be undertaken in the future'. But the matter would not be taken up again within the UN until after the creation of the Committee on Economic, Social and Cultural Rights.

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3 Final Act of the International Conference on Human Rights (United Nations publication, Sales No. E.68.SIV.2), resolution XXI, para. 6.  
4 E/CN.4/988.  
5 Ibid. para. 157.  
6 Ibid. para. 159.  
7 The Realization of Economic, Social and Cultural Rights: Problems, Policies, Progress (United Nations publication, Sales No. E.75.XIV.2.).  
8 Ibid. Part Six, para. 151.  
9 Ibid.
The evolution of thinking within the Committee proved to be both a barometer of, and in some cases a stimulus to, the evolution of thinking at the national level. This evolution was reflected on several different fronts during the Committee's first twelve years, a period in which I served as its Rapporteur for four years and Chairperson for eight years. During these formative years, issues of justiciability arose in three principal contexts: (i) the examination of States' parties reports, (ii) the drafting of General Comments, and (iii) the consideration of an international complaints procedure for social rights. In the first of these involving the examination of government reports, the Committee was not infrequently informed either that the Covenant enjoyed the status of the 'supreme law of the land' and thus had to be applied by the courts of the country concerned, or that whereas the judges were not necessarily obligated to apply its provisions, they were in fact well disposed to doing so. But such claims rarely survived intact following questions put by Committee members to government representatives requesting examples of actual judgments which might substantiate the claims. Although, as this book points out, social rights jurisprudence had begun to emerge in a number of the countries, not all were party to the Covenant. This did not stop the Committee from recommending that consideration be given in various countries to making at least some social rights justiciable.

The second context in which justiciability was considered was in the adoption of General Comments. In particular, two drafts which I prepared for the Committee, the first in 1990 and the second in 1998, addressed the potential role of the courts. The first was the framework-setting General Comment No. 3, which sought to spell out the nature of States parties obligations. In it, the Committee adopted a strategy which was at once bold and cautious. It was bold in the sense that there were relatively few national level precedents upon which to draw upon at the time. Another bold step was to specify a number of specific provisions which the Committee asserted ‘would seem to be capable of immediate application by judicial and other organs in many national legal systems’. The rights specified were wide ranging and included those relating to equal rights of men and women (Art. 3 of the ESCR Covenant); equal pay for equal work (Art. 7(a)(i)); the right to form and join trade unions and the right to strike (Art. 8); the right of children to special protection (Art. 10(3)); the right to free, compulsory, primary education (Art. 13(2)(a)); the liberty to choose a non-public school (Art. 13(3)); the liberty to establish schools (Art. 13(4)); and the freedom for scientific research and creative activity (Art. 15(3)).

The Committee combined this bold approach with a relatively cautious analysis in which it deferred to the national legal system rather than insisting that all jurisdictions could and should move to such an approach to justiciability. It also relied upon the fact that litigation over issues of discrimination, which is widely pursued in most jurisdiction, also constitutes an important part of any strategy for the protection of social rights.

Reaction on the part of governments and other actors to this dimension of the Committee’s analysis was muted. But there was another dimension of this General Comment No. 3 which was to prove much more significant in terms of facilitating advances in the debate over justiciability. The General Comment separated the key State obligations into a duty to take steps to progressively realise the Covenant rights and a ‘minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights’. In relation to the latter, the Committee asserted that ‘a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.’ It justified this position by arguing that ‘if the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d’être.’ The Committee concluded by addressing the all-important resources dimension:

In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

As this volume demonstrates, some courts such as the Colombian Constitutional Court have embraced, in their own particular way, both approaches. In South Africa, only the former approach has proved decisive, although the argument concerning the minimum core proved central to the initial efforts
by the South African Constitutional Court to give substance and procedural effectiveness to constitutional guarantees of social rights. This is not the place to explore the complex issue of how best to interpret and apply the minimum core concept, or whether it is likely to play a significant part in the future jurisprudence of the Constitutional Court. Suffice it to say that the concept was central in the early moves by the Court, a fact that served to underscore the interplay between the national and international forums dealing with these issues. Moreover, the paradox is that a minimum core or threshold obligation has been derived by a number of other national and regional courts largely from civil and political rights, although the extent to which this truly represents an economic and social right obligation greatly varies, as the authors point out.

The Committee was more emboldened in 1998 on the subject of justiciability when it issued General Comment No. 9, declaring, ‘While the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.’ In this General Comment, we emphasised that cases involving financial implications were not necessarily off-limits to the courts. While acknowledging the principle of the separation of powers of the various branches of government, we pointed out that courts are already ‘involved in a considerable range of matters which have important resource implications’.

The third context in which the Committee promoted the concept of justiciability was through its championing of an international procedure providing for the consideration of complaints alleging the violation of Covenant-protected social rights. In 1990, the same year that General Comment No. 3 was considered and adopted, I put forward a proposal that the Committee should undertake a preliminary study of the feasibility of such a procedure. The Committee agreed and requested me to submit a discussion note outlining the principal issues that would arise if such a procedure were established in relation to ‘some or all of the rights recognized in the Covenant’. In 1991, after considering my report, the Committee placed on record its support for the proposal and asked for an additional analysis to be drawn up. A year later, a report by Danilo Türk, then the Special Rapporteur on the realization of economic, social, and cultural rights of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, endorsed the proposal. The process of further refinement of the various analytical papers that I was asked to produce culminated in my being asked to draft a text of an Optional Protocol. As revised by the Committee that text subsequently became the basis upon which a working group, first of the Commission on Human Rights and then of the Human Rights Council, put forward a final draft for consideration in 2008. As of this writing the drafting process, in its many permutations, has taken a mere 18 years.

In retrospect, one of the Committee’s most important contributions consisted of simply breaking through the received wisdom of the day that an optional protocol was inappropriate in relation to social rights. That breakthrough, which came initially in 1990, helped to pave the way for a similar procedure to be adopted much more quickly in relation to the Convention on the Elimination of All Forms of Discrimination against Women.

This brief survey is designed to illustrate one of the points that emerges most clearly from this excellent collection of essays. It is that international developments, including those within the United Nations context, interacted in important ways with developments at the national level in terms of building support 10 See R. Dixon, ‘Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited’, Int J Constitutional Law, vol. 5 (2007) pp. 391–418; and K. G. Young, ‘The Minimum Core of Economic and Social Rights: A Concept in Search of Content,’ Yale Journal of International Law vol. 33 (2008) pp. 113–175. Note the recent judgment in Mazibuko and Ors v. City of Johannesburg & Ors, High court of South Africa (Witswatersrand Local Division), unreported 30 April 2008, in which Tsoka J. argues that the Constitutional Court had only ruled it out in certain circumstances.


for, and understanding of the modalities of, approaches to making social rights justiciable. I should end, however, on a note of caution which Malcolm Langford also stresses in his introduction to the volume. Although the debate has come a very long way in the course of a couple of decades, it is premature to assume that social rights have come fully of age in terms of justiciability. There is still a long way to go and a great many challenges to be overcome before we can conclude that social rights enjoy a status in any way comparable to that of civil and political rights in terms of the ability and preparedness of judges to adjudicate upon them.
Preface

Economic, social, and cultural rights case law deserves its place as a body of comparative and international law. The rapidly growing jurisprudence and the often untapped knowledge of scholars, advocates, and judges triggered this attempt to provide a systematic, scholarly, and critical treatment of the emerging trends, and their implications for philosophical debates over the justiciability and legal nature of social rights. However, as a body of law, it also deserves scrutiny, both in the legitimacy of the legal methods and its underlying promise to achieve social change.

The origins of this book lie in research that first commenced at the European University Institute and was significantly deepened during my tenure at the Centre on Housing Rights and Evictions (COHRE) in Geneva. The Norwegian Centre of Human Rights at the University of Oslo provided a stimulating and supportive environment in which to bring this book to completion. I am grateful to the Lionel Murphy Foundation, the Government of Netherlands, and the Government of Norway, who, respectively, provided background support during each of these stages.

The authors for this volume were selected on the basis of their familiarity with relevant jurisdictions. I am particularly thankful to them for their painstaking expositions and those who peeled back new layers of unknown case law and examined to what extent it had affected poverty and discrimination. Their patience during the long process in bringing this book to fruition is much appreciated.

I am indebted to Professors Sandra Liebenberg and Philip Alston, who assisted in the early design of the book. Matthew Craven, Asbjørn Eide, Andreas Follesdal, Wojciech Sadurski, Wouter Vandenhole, Sandra Liebenberg, Thorsten Kiefer, Jeff King, Aoife Nolan, Danie Brand, Padrac Kenna, Carolina Fairstein, and Morten Kinander kindly independently reviewed various chapters, and I am grateful to those reviewers who commented on chapters at the request of authors.

The book would not have been possible without the committed and thoughtful editorial and technical assistance of Thorsten Kiefer, Tara Smith, Khulekani Moyo, and Tiffany Henderson, and I am thankful to the Human Rights and Development Research Group at the University of Oslo for facilitating this support. Rob Zimmermann also provided valuable assistance in editing a number of chapters.

John Berger at Cambridge University Press has been patient beyond measure, encouraged the project from its inception, and helped it expand beyond its humble beginnings. Mary Cadette at Aptara, Inc., has graciously steered the unwieldy volume through the strictures of the production process. My wife, Eirinn Larsen, has also made many incisive and thoughtful suggestions throughout the book’s journey.

Social rights jurisprudence would not exist without the efforts of individuals and communities who embarked on litigation as a means to address their exclusion and poverty. Behind them are often organisations, movements, and lawyers who donate much of their time. Sometimes their names are reflected in the public record; sometimes they remain invisible. Sometimes they achieve concrete justice; sometimes they don’t. Sometimes they deserve justice; perhaps sometimes they don’t. For scholars who ply their trade in analysing the fruits of their efforts, this fundamental contribution is acknowledged.

The cut-off date for jurisprudence in this book is March 2007, unless otherwise noted by an author.

M.L.
Oslo, 4 June 2008