This book is a first-of-its-kind, five-country empirical study of the causes and consequences of social and economic rights litigation. Detailed studies of Brazil, India, Indonesia, Nigeria, and South Africa present systematic and nuanced accounts of court activity on social and economic rights in each country. The book develops new methodologies for analyzing the sources of and variation in social and economic rights litigation, explains why actors are now turning to the courts to enforce social and economic rights, measures the aggregate impact of litigation in each country, and assesses the relevance of the empirical findings for legal theory. This book argues that courts can advance social and economic rights under the right conditions precisely because they are never fully independent of political pressures.

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## Contents

*Foreword*  
*Preface*  
*Contributors*

### 1  Introduction: The Elements of Legalization and the Triangular Shape of Social and Economic Rights

Varun Gauri and Daniel M. Brinks  
1

### 2  Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education

Jonathan Berger  
38

### 3  Accountability for Social and Economic Rights in Brazil

Florian F. Hoffmann and Fernando R. N. M. Bentes  
100

### 4  Courts and Socioeconomic Rights in India

Shylashri Shankar and Pratap Bhanu Mehta  
146

### 5  The Impact of Economic and Social Rights in Nigeria: An Assessment of the Legal Framework for Implementing Education and Health as Human Rights

Chidi Anselm Odinkalu  
183

### 6  The Implementation of the Rights to Health Care and Education in Indonesia

Bivitri Susanti  
224

### 7  Transforming Legal Theory in the Light of Practice: The Judicial Application of Social and Economic Rights to Private Orderings

Helen Hershkoff  
268

### 8  A New Policy Landscape: Legalizing Social and Economic Rights in the Developing World

Daniel M. Brinks and Varun Gauri  
303

*Index*  
353
I believe it is important for governments and international institutions, including the World Bank, to encourage research into social and economic rights in developing countries, and I welcome this excellent work on the topic. The enforcement of these rights represents a new and controversial area of judicial intervention. Social and economic rights fall into that category of rights, often referred to as second-generation rights, that also includes cultural and developmental rights. They are distinguished from first-generation rights, which consist of political and civil rights such as equality and the freedom of speech and of assembly.

Second-generation rights were recognized in the 1948 Universal Declaration of Human Rights and given effect in the International Covenant on Economic, Social, and Cultural Rights, which became effective in 1976. However, until comparatively recently, these rights were not taken seriously and were subordinated to civil and political rights. Few states took steps to entrench such rights constitutionally or to adopt legislation or administrative provisions to make such rights enforceable.

A common objection to giving courts jurisdiction over second-generation rights is that judges are ill equipped to adjudicate on the manner in which the legislative and executive branches of government determine how the national budget should be allocated. In countries like the United States of America, there is an additional objection – traditionally only negative rights are enforceable and the courts are regarded as not having jurisdiction to adjudicate positive rights. The latter, so it is argued, should be left exclusively to the domain of the legislative branch of government. It is pointed out that these rights are polycentric and, for example, if more money is spent on defense and education, there will be less to allocate for health and social benefits. How can judges become involved in second-guessing decisions on these issues? They have neither the information nor the training to make such decisions.

On the other side, and especially with regard to new democracies in developing societies, it is persuasively argued that the majority of citizens are not primarily concerned with first-generation rights. They are less interested in the right to freedom of speech or to freedom of assembly and more concerned with having sufficient food to eat, a roof over their heads, and education for their children. If a new constitution is to have credibility and command the respect of the people subject to its provisions, it must take account of these demands and reflect them.
Hence, one finds the inclusion of justiciable social and economic rights in some modern constitutions.

In India, social and economic rights were contained in the Constitution but expressly stated not to be enforceable by the courts. It is telling that in response to popular demands, activist Indian judges carved out enforceable social and economic rights from the right to life that was judicially enforceable. In this way, they have recognized the right to health care, nutrition, clothing, and shelter. The Supreme Court held that a lack of financial resources does not excuse a failure to provide adequate medical services. In this way, the judges of India have imaginatively fused social and economic rights with civil and political rights.

As far as I am aware, this is the first large-scale empirical study that systematically considers the feasibility and advisability of making social and economic rights justiciable. It focuses specifically on two areas: namely, the right to health and the right to education. It contains a structured comparison of five countries: Brazil, India, Indonesia, Nigeria, and South Africa. As such, it provides an indispensable guide for human rights activists, constitutional law practitioners, political scientists, economists, the international development community, and, of course, the judges who are increasingly being called on to enforce these rights.

Each of the country-specific chapters addresses four key steps in the impact of social and economic rights. This is a useful device to bring coherence and structure to the work. The first step is to consider the legal mobilization of demands, whether through negotiation with or without the threat of litigation, and court intervention; the second step relates to the consequences of court intervention, whether this be a negative or positive response or even a decision not to intervene; the third step is the response of the body, usually governmental, to a court intervention; and the fourth step is the reaction of the original claimants who might follow up a court decision by seeking appropriate enforcement of an order made by the court or even by launching a new round of litigation.

Lawyers tend to be primarily concerned with the second step. Their interest typically begins and ends with the outcome of negotiation or litigation, whether the result is positive or negative. However, for the would-be beneficiaries, it is the first, third, and fourth steps that are crucial. They would often prefer a negotiated outcome rather than placing all of their hopes in costly, time-consuming, and often risky litigation. It is the third and fourth steps that will determine whether they have really received any benefit from the enforceability of social and economic rights. They and nongovernmental organizations (NGOs) will wish to know and be advised on the various alternative approaches to realizing these rights. It is in this context that the comparative experience of the five chosen countries becomes so useful and relevant.

1 See, for example, Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 2 SCR 516 ("The right to life includes the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.")
In some of the chapters there is reference to the “unintended consequences” of litigation. Those consequences might be negative or positive. I recall two South African situations in which there were important and beneficial unintended consequences. The first was during the apartheid era. In 1982, I heard an appeal from a decision in a lower court on a provision of the Group Areas Act, 1950. This was the statute that enforced residential racial segregation. The legislation empowered the government to decree that certain areas of South Africa were to be reserved for the exclusive use of people of one or another color. It was a criminal offense for a person of the “wrong” color to reside or own property in such a group area. The most desirable areas were set aside for whites. Some areas were set aside for Asians. I wrote an appellate opinion in the case of Mrs. Govender, an elderly South African woman of Indian extraction. She faced a criminal charge of residing with her children and grandchildren in a rented house in a part of Johannesburg reserved for whites.

When Mrs. Govender appeared in the trial court, she pleaded guilty and was sentenced to a paltry fine or the alternative of fifteen days in prison, all of which was suspended for three years on condition that she was not convicted of a similar offense during the period of suspension. However, what was most serious for her was an order that she be ejected from her home. Mrs. Govender’s counsel had persuaded the judge to suspend the ejectment order for nine months. He did so in light of evidence that established that there were no alternative accommodations for Asians in the Johannesburg area, that Mrs. Govender had been on a waiting list for seven years, and that she might have to wait for another ten years before such accommodations would become available to her. Mrs. Govender appealed to the High Court only on the ground that the judge should have suspended the ejectment order indefinitely or until she was able to find alternative accommodations.

For some thirty years, the lower courts had uniformly and as a matter of course granted ejectment orders in such cases. However, while listening to argument by counsel before the High Court, it struck me that the statute in question did not oblige the judge to grant an ejectment order – it gave him discretion. On the basis of the plain text of the statute, we decided to rule that no such orders could be made without granting the affected party a full hearing and the exercise of judicial discretion. We ruled that in cases where there were no alternative accommodations available, an ejectment order should not be made. We set aside the order made in the case of Mrs. Govender.²

The completely unintended consequence of the order was to bring to a permanent end all prosecutions under the Group Areas Act. Prosecutors stopped bringing cases because they were unable to establish the availability of alternative accommodations. Although the government could have amended the statute to make the ejectment orders peremptory, this would have been too embarrassing politically, especially in light of the intense international scrutiny to which apartheid policies were being subjected at that time. In consequence, substantial areas of the

² R v. Govender, 1986 (3) SA 969 (T).
larger cities in South Africa became “mixed” in the years immediately following the Govender decision.

Another unintended consequence of a positive nature followed the 2000 decision of the Constitutional Court of South Africa in the Grootboom case. Reference is made to this decision in some of the chapters that follow. It was a decision that found the housing policy of the South African government, in some respects, to violate the right to housing contained in the Bill of Rights. In essence, the Court stated that insufficient attention had been given to the housing needs of the poorest in our nation and to emergency situations where, through natural calamities, people were rendered homeless. Less than a year after that decision was made, a group of residents were rendered homeless by a flash flood in a poorly resourced black township outside Johannesburg. The national government immediately established a Cabinet Committee and placed R300 million (South African rand) at its disposal for emergency relief to be given to the homeless families. There can be little doubt that that action would not have been taken prior to the decision in Grootboom.

It is rarely appreciated that rights are realized not only when the officials responsible for providing them take appropriate action in consequence of litigation but, more frequently, when they do so in order to preempt litigation. This is especially the case with regard to social and economic rights. It follows, I would suggest, that the instances of court proceedings or even the call for negotiations often reflect only the tip of the iceberg. The very recognition of these rights induces government officials to modify their behavior and take actions for the protection of needy people without any outside interventions. This is a much-neglected aspect of the realization of social and economic rights.

Another neglected issue, usefully canvassed in this book, is that a sustained litigation policy is often essential for the successful enforcement of these rights. It is in this context that the involvement of well-resourced and efficient NGOs is crucial. Too frequently and not unexpectedly, the lawyers involved in a discrete case consider their work to end with the issue of the court order. That is usually when the real work begins, if the court's order is to be translated into benefits for a large number of people. A good illustration of this is provided by the Treatment Action Campaign case, which also came before the South African Constitutional Court in 2002. This case involved the availability in public hospitals of an antiretroviral drug – nevirapine – that prevents the transmission of the HIV virus from mothers to infants at the time of birth. The Court held that the government objections to the dissemination of the drug were without merit and ordered that the drug be made immediately available to all mothers who wished to take it. The government complied with the Court's order. Treatment Action Campaign, a most efficient NGO, used the decision to press, with much success, for more substantial changes to the regrettable HIV/AIDS policies of the South African government. The most recent government program aims to provide treatment to 80 percent of the adults who need it by 2011, increasing the percentage of HIV patients overseen by professional health-care providers to 70 percent. Equally ambitious targets have been set for children. The plan calls for an annual review of treatment guidelines. The major problems are finding the R45 billion (South African rand)
that the South African treasury calculates the program will cost and increasing the
capacity of the public health system to deliver the substantially increased health
services.

Another much-neglected aspect of litigation based on social and economic
rights is the problem faced by judges who are called on to adjudicate claims for
the enforcement of those rights. The first problem is the often difficult navigation
between the traditional domains of the organs of government – the separation
of powers issue. In budgetary matters there is an obvious need for the judiciary to
show appropriate deference to the executive and legislative branches. Especially in
new democracies, it is important that there is a relationship of respect between the
three organs of government. It is a truism that the judiciary is by far the weakest of
those branches. The judges have no way, themselves, to enforce their orders. They
are entirely reliant on the executive branch in that respect. Their public credibility
is also important in ensuring that their orders are respected. If orders made by
courts are not conscientiously respected and implemented by the executive branch,
judicial credibility will inevitably be prejudiced, with possibly critical consequences
for the rule of law.

Judges are frequently criticized by human rights activists for not making stronger
orders against government in social and economic rights cases. This was the case
with the Treatment Action Campaign case, in which our Constitutional Court
refused to follow the lower court in issuing a structural order. We said the following:

The order made by the High Court included a structural interdict requiring the
appellants to revise their policy and to submit the revised policy to the court to
enable it to satisfy itself that the policy was consistent with the Constitution. In
Pretoria City Council this Court recognized that the courts have such powers. In
appropriate cases they should exercise such a power if it is necessary to secure
compliance with a court order. That may be because of a failure to heed declaratory
orders or other relief granted by a court in a particular case. We do not consider,
however, that orders should be made in those terms unless this is necessary. The
government has always respected and executed orders of this Court. There is no
reason to believe that it will not do so in the present case.

That belief turned out to be justified, and the government did substantially execute
the order made by the Court. However we were also aware that if the government
flouted the order, the Treatment Action Campaign would have come back to court.

Human rights activists can and should encourage judges to make orders that are
likely to yield the most beneficial results for the intended beneficiaries of the
litigation and, indeed, also for those who might not be direct parties to such
litigation. At the same time, however, human rights activists should be aware of
and alert to the complex issues that are at work between the organs of state. In
this regard, I emphasize the position of new democracies in which constitutional
values might well be subject to stress.

It should also be borne in mind that in new democracies, the legal profession
is still in a learning phase. Lawyers too frequently do not prepare their cases ade-
quately at the trial level and expect courts of appeal to come to their relief on inade-
quate and incomplete records. The Grootboom case provides a good illustration.
For the first time on appeal before the Constitutional Court, counsel sought to rely on the approach of the United Nations Committee on Economic, Social, and Cultural Rights that socioeconomic rights contain a “minimum core.” (This issue is discussed in some detail in the chapter by Jonathan Berger.) It appears from the reports of the Committee that it considers that every state party to the Convention is bound to fulfill a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socioeconomic rights in question, including the right to housing.

In his opinion on behalf of a unanimous Court, Justice Yacoob said that this minimum core was the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation. Each right has a “minimum essential level” that must be satisfied by states parties. . . . Minimum core obligation is determined generally by having regard to the needs of the most vulnerable group that is entitled to the protection of the right in question. It is in this context that the concept of minimum core obligation must be understood in international law.3

There was no evidence at all on the record that would have enabled the Court to begin a consideration of an appropriate minimum core for the provision of housing or access to housing in the South African context. Justice Yacoob went on to say that

There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.4

Many commentators have interpreted this passage as rejecting out of hand the minimum core approach. I do not agree and suggest that future litigants are open to raise the issue on the basis of an adequate factual record in the trial court. This is an issue that highlights the difficulties facing lawyers undertaking constitutional litigation in new democracies. There is a substantial need for learning about what is effectively a new development in the law. The comments of Justice Yacoob should have been seen by the legal profession as a challenge and not as a call to abandon any future reliance on the minimum core approach. South African lawyers, in particular, need to adopt what are, in the United States, often called “Brandeis briefs.” These are briefs that contain an analysis of factual data rather than relying solely on legal submissions. It was precisely such a brief that was fundamental to the success of the applicants in Brown v. Board of Education of Topeka.5

I would also suggest that there is a need in new democracies, and probably in many older ones too, for judicial education in the field of social and economic

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4 Id. at par. 33.
Foreword

rights. This is a topic that few, if any, judges were taught at university. I would refer, in this regard, to the important experience of South African judges who attended conferences during the 1980s and 1990s that were designed to introduce them to domestic and international human rights law. They, too, had never enjoyed formal training in these subjects. Until 1994, human rights law was hardly relevant in a state where human rights were not recognized and violations of them were the order of the day. Those opportunities, enjoyed by a number of South African judges, opened windows and inspired us to use international human rights law norms in our own domestic courts.

I end with a reference to a statement to the Vienna World Conference in 1993 by the UN Committee of Economic, Social, and Cultural Rights. They said that there is

[...]he shocking reality . . . that States and the international community as a whole continue to tolerate all too often breaches of economic, social and cultural rights which, if they occurred in relation to civil and political rights, would provoke expressions of horror and outrage and would lead to concerted calls for immediate remedial action.... Statistical indicators of the extent of deprivation, or breaches, of economic, social and cultural rights have been cited so often that they have tended to lose their impact. The magnitude, severity and constancy of that deprivation have provoked attitudes of resignation, feelings of helplessness and compassion fatigue.6

I would suggest that by giving attention to this issue this book will influence governments to pay greater attention to the importance and utility of these rights and will also encourage NGOs to pursue their realization with even greater vigor in the interests of millions of people whose social and economic rights are being neglected.

This book was conceived as an effort to join three streams of inquiry. First, ever since the mid- to late-1990s, when governance became a development priority, scholars and policy makers have sought institutional reforms to make governments more accountable for failures to provide basic services and alleviate poverty. Second, many of the innovative constitutions that emerged around the time of the “third wave” of democratization, as well as developments in legal and political theory, blurred the once bright-line distinction between negative and positive rights, with the consequence that legal or quasi-legal accountability for social and economic performance became more attractive. And third, studies in judicial politics have elaborated frameworks for assessing the causes and consequences of the legalization of political demands. Simply put, the time had come for a book on the role and impact of courts in fulfilling social and economic rights in the developing world.

A key initial conversation about this project occurred in Bangkok at the Fifteenth International AIDS Conference, where Varun met Jonathan Berger. Over a late-night beer, Jonathan agreed to write a review of social and economic rights court cases in South Africa. Shortly thereafter, Varun had the good fortune to meet Florian Hoffmann and Daniel Brinks, who drafted engaging analyses of health and education rights cases in Brazil. After a handful of conversations, it became clear that Dan and Varun shared research interests and a style of thinking, and that Dan’s experiences and skills would contribute enormously to the project, so he became a co-editor. By the summer of 2005, the other key collaborators for this project were also in place – Chidi Odinkalu, Pratap Bhanu Mehta, Bivitri Susanti, and Helen Hershkoff. We all gathered in Washington for two days in September of that year to present our chapter outlines and to propose, debate, repudiate, refine, and then settle on a comparative framework. It was a stimulating and productive meeting that was crucial for the development of a broadly similar methodology across the country studies, a quality that, hopefully, gives this book more argumentative coherence than that of many edited volumes. We also greatly benefited from the participation of Oscar Vilhena Vieira, Siobhan McInerney-Lankford, Caroline Sage, and Mark Tushnet in that workshop.

Well, that was so much fun we decided to do it again and assembled in Washington in the fall of 2006 to present and critique first drafts. Pratap could not attend, but his co-author, Shylashri Shankar, did join us, as did William Forbath and Gretchen Helmke, whose thoughtful comments from outside the project validated, as well
Preface

as challenged, aspects of our approach. On the second day, we held a public conference at the World Bank on the book draft and on the general topic of social and economic rights in developing countries. Speakers at the conference included, in addition to the contributors to this volume, Ana Palacio, Philip Alston, Shanta Devarajan, Sanjay Pradhan, William Forbath, Siobhan McInerney-Lankford, Jacques Baudouy, Chris Beyrer, Jodi Jacobson, Robin Horn, Mara Bustelo, and Michael Bochenek. A Web cast of that conference can be viewed at http://info.worldbank.org/etools/BSPAN/EventView.asp?EID=902.

In addition to those who participated in the conference, many others at the World Bank have given us crucial encouragement, support, and comments, including Beth King, who has backed and promoted our work throughout, as well as Steve Commins, Luis Crouch, Nina Cunanan, Adrian Di Giovanni, David Freestone, Sangeta Goyal, Imran Hafiz, Susheela Jonnakuty, Steen Lau Jorgensen, Kai Kaiser, Rosalinda Lema, Rick Messick, Claudio Montenegro, Andy Norton, Oscar Picazo, Vikram Raghavan, Martin Ravallion, Lars Adam Rehov, Ritva Reinikka, Randi Ryterman, Hedy Sladovich, Galina Sotorova, Matt Stephens, Doris Voorbraak, and Alan Winters. To the others who in his ever-increasing forgetfulness Varun is neglecting to acknowledge here, let him make it up to you with a cup of coffee!

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The principal sponsors of this research project have been the World Bank’s Research Committee, the World Bank–Netherlands Partnership Program, and the World Bank Trust Fund for Environmentally and Socially Sustainable Development. Of course, the findings, interpretations, and conclusions expressed in this volume are entirely of the authors and do not necessarily represent the views of the World Bank or its executive directors. During the writing phase, Dan also received the financial support of the Kellogg Institute for International Studies of the University of Notre Dame, in the form of a one-year Visiting Fellowship, supplemented by a Faculty Research Assignment from the University of Texas at Austin. Dan would also like to thank the Government Department at the University of Texas for making possible a one-day workshop to review the nearly final
manuscript. At that workshop we had the good fortune to receive extensive, incisive, and helpful comments from Robert Kaufman and Zach Elkins. Not the least of their contributions was Robert’s suggestion for a title, which we have partially adopted. We also thank Cristiano Ravalli for permission to reprint his striking photograph of a scene outside the Madras High Court.

We join the chapter authors in thanking a number of research assistants whose work has been crucial for the country analyses. They are acknowledged by name in the country chapters. In addition, we had terrific research assistants based in the United States who helped with background papers, project coordination, and data analysis, including Leila Chirayath, Mangesh Dhume, Kaushik Krishnan, Brett Stark, Megan Westrum, and Sam Wolfe. John Berger, our editor at Cambridge University Press, has been extremely supportive throughout, and three anonymous reviewers gave us valuable comments at an important stage of the research.

I, Dan, want to especially thank Varun for conceiving and putting together such a great project, for doing all the work of assembling the teams and the funding, and, most crucially, for inviting me to participate. It has truly been a great privilege to work with Varun, both for his intellectual companionship and for his friendship. This book is dedicated to my wife, Sandra, for her patience and support, and especially for moving from sunny Austin to frozen South Bend and back again, just so I could write with fewer distractions.

Finally, I, Varun, dedicate this book to my wife, Ayesha, who has offered comments and insights drawn from her work as a civil rights advocate, and whose support has been my rock during the course of this project, and to my wonderful and lovely children, Yasmine and Sharif, who show me every day what it means to demand fairness and claim rights.
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