Part I

Overview

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Introduction: From Jurisprudence to Compliance

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In the past two decades, the volume of judgments on economic, social and cultural (ESC) rights has risen dramatically. Despite traditional reservations about justiciability, feasibility, and legitimacy, judicial decisions addressing multiple aspects of these rights can now be found in all regions of the world (see, e.g., Coomans, 2006; ICJ, 2008; Langford, 2008; Rossi and Filippini, 2009). The primary scholarly response to this new phenomenon has been normative and doctrinal. Research has been consumed by the justification of such adjudication in light of democratic and legal theory (e.g., Bilchitz, 2007; Dennis and Stewart, 2004; Fabre, 2000; King, 2012; Vierdag, 1978; Waldron, 2009) or the task of examining, systematising, refining and critiquing the emerging jurisprudence (e.g., Abramovich and Courtis, 2001; Gargarella, Domingo and Roux, 2006; Katherine Young, 2008; Liebenberg, 2010).

The post-judgmental phase of litigation has received comparatively less attention. Yet, both advocates and scholars have raised the alarm that a significant number of judgments on ESC rights remain unimplemented (Berger, 2008; CEJIL, 2003; Wachira and Ayinla, 2006). In reviewing the rise of ESC rights jurisprudence in South Asia, Byrne and Hossain (2008: 143) concluded that, 'Advances in jurisprudence urgently need to be matched by action on the ground to ensure compliance of all concerned authorities with the judgments'. Elsewhere, one can find critiques that ground-breaking judgments were poorly or sluggishly implemented in practice. Whether it is access to vaccines for haemorrhagic fever in

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Argentina, the right to emergency housing in South Africa or the right to adequate education in the United States, concerns have been raised that litigants have struggled to transform progressive jurisprudence into progressive outcomes. The same also applies to rulings from regional and international tribunals. This is evidenced by the patchy efforts by Nigeria to regulate the impact of the multinational Shell's activities on the right to food and water within the state (after a decision of the African Commission on Human and Peoples' Rights), the Czech Republic's failure to ensure equal access to schools for Roma children (following a judgment of the European Court of Human Rights) or Peru's sluggish approach to compliance with approved settlements and decisions on reproductive health (from the Inter-American Commission on Human Rights and the UN Human Rights Committee).

To this emerging narrative of poor or partial compliance we can find various scholarly responses. Some are pro-active, seeking to identify how enforcement may be improved in practice (Mbazira, 2008a; Roach and Budlender, 2005). Others are critical. Poor enforcement confirms some longstanding doubts over the appropriateness of social rights adjudication. Concerns with the justiciability, democratic legitimacy and the institutional competence of judges may account for governmental reluctance to comply. As Cavanagh and Sarat (1980: 372) put it, 'the more courts do, the less they do well'. Critics also seize on such evidence in order to cast doubt on the relevance and effectiveness of social rights adjudication as a framework for ensuring social justice (Hirschl and Rosevear, 2012; Thompson and Crampton, 2002), raising the spectre of Hazard's (1969: 712) prediction that the contribution of courts to social change will be 'diffuse, microcosmic, and dull'.

The truth is, however, that beyond some anecdotal evidence, we do not know the extent to which compliance is a problem in comparative and international perspective. Nor do we have a clear grasp of why levels of compliance vary. Yet, such an understanding is surely essential for any informed debate on the utility or reform of the practice of social rights adjudication. While it is common to hear that the type of right adjudicated (social, civil or political) determines the level of compliance, is this necessarily correct? Could compliance instead be a function of broader factors that are also relevant for civil and political rights? These might include the responsiveness of defendants, courts and public opinion, the influence of civil society groups and their allies and a host of contextual specificities that mark the trajectory of each case.

Until recently, the literature on the post-judgment aspects of litigation was primarily limited to the United States. Initially, it was the subject of specific compliance studies (Horowitz, 1977; Spriggs, 1997), although increasingly it has been subsumed by a surfeit of literature on the broader material, political and symbolic effects of judgments (e.g., Baas and Thomas, 1984; Hoekstra, 2000; Johnson and Martin, 1998; Linos and Twist, 2013; McCann, 1994; Muir, 1973; Rosenberg, 1991; Ura, 2014). The focus has largely been on civil and political rights with the exception of significant, but often overlooked, research on the implementation and impact of school finance litigation (e.g., Berry, 2007; Hickrod et al., 1992; Thompson and Crampton, 2002) – all US state constitutions provide varying degrees of recognition of the right to education.

When we move beyond the United States, the pattern is similar. Emerging research on the judgments of domestic and international courts has been largely confined to civil and political rights. This is the case whether it concerns compliance (Çali and Wyss, 2011; Ginsberg and McAdams, 2004; Goldsmith and Posner, 2005; Hillebrecht, 2014; OSJI, 2010) or broader impacts (Helfer and Voeten, 2014; Hillebrecht, 2014; Keller and Sweet, 2008; OSJI, 2010). Nonetheless, the past few years have witnessed a growth in the studies on the impact of ESC rights judgments. This includes cross-country studies (Gauri and Brinks, 2008; Yamin and Gloppen, 2011), in-depth single-country studies (Langford et al., 2014; Rodríguez Garavito and Rodríguez-Franco, 2015), and single-case studies (e.g., Heywood, 2009; Rodríguez-Garavito, 2011; Wilson, 2011).

However, by and large, these studies on ESC rights either ignore the specific compliance dimension of impact or note it without theorising or analysing it in any detail. Yet, compliance deserves particular consideration on instrumental and methodological grounds. As Kapiszewski and Taylor (2013: 803) argue, compliance may not only 'influence broader policy and political outcomes', it is also central to the rule of law, 'undergirding and reinforcing the institutional framework for legality and constitutionality', and can have 'powerful feedback effects on judicial decision making, independence and power'. Moreover, there are a host of specific challenges in measuring and explaining compliance, determining 'when and why' defendants conform to judicial mandates (Kapiszewski and Taylor, 2013: 804). To this we would add the challenge of identifying which type of reforms or changes would improve compliance. In other words, there is a need to transform explanatory theories

into workable policy policies and advocacy strategies in order to improve implementation?

This book therefore sets out to shed light on the degree and causes of compliance with ESC rights judgments and helps shape the growing policy discussions on improving the rule of law. It poses three distinct questions in comparative and international perspective. The first is *empirical:* What is the current level of enforcement of ESC rights judgments, including international quasi-judicial decisions? The second is *explanatory*: What is the reason for the level of compliance with a given ruling (or set of rulings) on ESC rights? The third is *strategic* and forward looking: What legal and political arrangements and strategies help promote the implementation and the impact of ESC rights judgments?

The authors in this book are drawn from law, political science and sociology; they are mostly scholars but some are practitioners with in-depth knowledge of the particular cases. All authors were asked to combine social science methods of research (e.g., interviews, focus groups, generation or analysis of quantitative data) with a solid understanding of the legal arc and remedial framework of their cases.

The remainder of this Introduction proceeds by first outlining the methodology behind this book in the context of the broader literature on compliance (Section 1.1), which is followed by an overview of the various chapters in the volume (Section 1.2), a synthesis of the key themes concerning measurement and particularly explanation of compliance (Section 1.3) and some practical suggestions on how enforcement might be improved (Section 1.4).

1.1 Methodology in Context

1.1.1 Measuring the Level of Compliance

Determining the level of compliance involves a standard but not uncontroversial or unproblematic task of selecting a set of judgments, defining the relevant baseline (*what* is to be done, by *when* and by *whom*) and comparing it against the outcomes in practice. For the most part, authors have chosen a comparative case method of tracing implementation of three to ten cases within a select jurisdiction in order to generalise at some level of abstraction. Some authors go further and adopt a large N approach, drawing on a broader sample of judgments and systemic surveys of implementation.

The cases principally deal with rights concerning health, education, housing, social security and food at both the domestic and international level. While the bulk of the judgments come from a cross-regional selection of national courts, this domestic sample is complemented by decisions from the European Court of Human Rights, European Committee on Social Rights and African Human Rights Commission together with a number of cases from the Inter-American and UN human rights treaty body system. The inclusion of the latter may seem unusual. The field of compliance studies is strongly bifurcated between domestic and international adjudication. This may be partly because international adjudication presents an additional wrinkle: adjudicators often lack the remedial and enforcement powers of their domestic counterparts. However, it is doubtful whether formal remedial power should be considered a scope condition – it may function better as an independent variable. This is because the coercive power of the judiciary is rarely the solely determinative cause of compliance. Moreover, the debate over compliance often takes the same course, regardless of whether the adjudicatory institution is national or supranational. Thus, in our view, there is much to be gained from a multilevel analysis that draws on the similarities in compliance behaviour rather than the differences.

One of the most difficult aspects of this research question is defining what constitutes full, or even partial, compliance. As Hillebrecht (2014: 11) laments, 'The domestic politics of compliance can be murky and difficult to navigate, and almost always contentious'. The meaning of a judicial remedy may be highly contested, the order may be complex or multi-level, or intervening events may confound the scope or sequencing of compliance steps. To this we could add further complexity such as multiple petitioners and defendants or government responses that meet the spirit but not the letter of the remedy (Kapiszewski and Taylor, 2013: 815–816). Thus, as some of the studies make clear, measuring compliance is as much an exercise in interpretation as one in data gathering.

Importantly, this book largely avoids a binary understanding of compliance and distinguishes between partial and full implementation. While this distinction is harder to sustain in quantitative studies (Hillebrecht, 2014; Voeten, 2012: 45–47), the qualitative thrust of this books allows us to describe a richer picture of post-judgment implementation. This is particularly important from the perspective of the litigant or respondent: partial compliance may be respectively significant or costly. Moreover, some courts may be less reflexive in their remedial orders, requiring an

unrealistic number of actions within a short period of time. Compare, for example, the anaemic and thin orders of the European Court of Human Rights with the expansive and multi-pronged remedies of the Inter-American Court of Human Rights. With the lens of partial compliance, we can track important behavioural changes by respondents as a consequence of an ambitious judgment.

At the same time, the book seeks to avoid conflating compliance with impact. Impact means the total influence or effect of a decision, which may be greater than mere implementation of the order (e.g., through additional indirect effects) or even 'net negative' due to unintended consequences. The chapter by Rodríguez-Garavito provides an analytical framework with which to specify the relationship between the two concepts in theory and practice. Comparing the possible results for implementation and impact, he distinguishes four possible combinations: non-implemented rulings with no impact; non-implemented rulings with significant impact; implemented rulings with little or no impact and implemented rulings with significant impact.

A good example of the dangers of conflating compliance and impact is the common analysis of the iconic South African *Grootboom* judgment on the right to housing. Drawing on a single newspaper article,[1] scholars often describe the passing away of the lead applicant without a home as an illustration of the court's inability to ensure implementation with its decisions on socio-economic rights. Yet, Liebenberg (2008: 99) points out though that 'a widely misunderstood feature' of the case is that it was partly settled at an earlier stage by the parties. The community were saved from eviction and secured access to basic services and basic building materials. Moreover, the Constitutional Court's judgment did not address an immediate right to *permanent housing* for the community but rather the broader obligation of the state to develop an *emergency housing* programme with earmarked funding (which it did four years later). In any case, as this book shows, the community itself achieved permanent housing on account of the local interpretation of the judgment.[2]

However, this is not to deny the importance of analysing the impact of judgments. The broader impact of a court's decision in setting a jurisprudential standard for other cases, catalysing state action, or fostering political and attitudinal change is commonly invoked in justifications for judicial review or the practice of public interest litigation. For instance, Howse and Teitel (2010) decry a recent turn in international law

[1] Joubert (2008).
[2] See also Langford (2014).

scholarship to compliance as it hollows out our understanding of law's functions. They claim that such research ignores the 'centrality of interpretation to the generation of legal meaning' and the role of law in managing the relations 'between diverse norms and regimes', setting 'benchmarks' for decision making, bargaining and institutional access for actors, transforming perceptions of political conflicts and problems and catalysing ultra-compliance by producing 'normative effects that are greater or more powerful or different' than intended or envisaged (Howse and Teitel, 2010: 128, 30, 31, 33).

Importantly, key actors in litigation often have their eye on such impacts. Applicants may seek, or courts may order, very narrow remedies in the expectation that they will be sufficient to generate broader effects. A straight-jacketed compliance analysis will miss such strategic nuances and potentially inflate the effects of the decision if the strategy fails; or under-count a judgment's importance if the effects go beyond the realm of compliance. A mere focus on compliance may also under-estimate the substantial impacts that flow from partial or even minimal implementation. In some instances, divorcing the two concepts is rather challenging. In the literature, there is methodological divergence in examining the *erga omnes* effects of decisions. Some see failure by the state to abide by the precedent set in a judgment in subsequent analogous cases as one of compliance (e.g., Mbazira, 2008a) while others view it as a lack of impact. As a consequence, while the book's chapters focus primarily on compliance, it remains open to the analysis of other types of effects. The result is that a number of authors consider broader impacts, including in cases in which compliance has been partial.

1.1.2 Explaining Compliance

Why do states and other respondents comply or not comply with judgments? This is the subject of a long and contested methodological and theoretical debate in both law and social science. We agree with Kapiszewski and Taylor (2013: 819) that the different theories of compliance can be broadly and roughly classified as *instrumental* and *norms based* although we describe them somewhat differently and introduce social rights in to this explicatory terrain.

Instrumental Theories

Instrumental theories focus on the costs and benefits of compliance, whether material or political in nature. The traditional instrumental

approach, for many lawyers and their critics, has been based on the assumption that the potency of law, and by extension courts, stems from its *coercive* power (OSJI, 2010). Thus, consequences compel non-compliance. If the judiciary possess the authority to constrain the options of any actor, and thus force them to do something contrary to their will,[3] implementation of judgments should, *ipso facto*, follow. This classical conception of law involves both the power to *order* sanctions and *enforce* them (Yankah, 2008).

Domestic courts (and to a much lesser extent international courts) are usually empowered to punish recalcitrant defendants ('contempt powers'), secure property and monies ('execution powers') or establish continuing supervision over implementation. Such powers have been exercised in social rights adjudication. For instance, in India, the Supreme Court threatened, with some success, to imprison officials if they failed to implement its order to convert motor vehicles to cleaner fuels in order to protect the right to environmental health;[4] a survey of sixty right to health cases in Argentina found that a quarter of the judgments were implemented only after courts imposed fines on various health insurers, providers and authorities (Bergallo, 2011); and in South Africa, the Constitutional Court opened the door to money-based claims being made against the assets of the state in a case concerning medical negligence.[5]

However, this conception of compliance is open to challenge in various ways. First, although *realists* accept this classical understanding and expectation of law, they doubt whether it fits with practice. Contrary to the democratic concern that the judiciary will overstep its boundaries, the assumption is that the judiciary is weak. In the face of resistant politicians, government officials or private defendants, judges remain powerless in their ability to enforce effectively their orders. Judicial institutions are mere 'epiphenomena or surface manifestations of deeper forces operating in society', and social change occurs only when 'the balance of these deeper forces shifts' (Young, 2001: 117–118). For instance, Rosenberg (1991) doubts whether the US Supreme Court's *Brown v. Board of Education* was responsible for progress on school desegregation. In his opinion, it

[3] Wertheimer (1987: 172) defines coercion as creating a 'choice situation' in which a person or entity has 'no reasonable alternative' but to accept the coercive proposal. Quoted in Edmundson (1995: 82).

[4] *M. C. Mehta v. Union of India* (1998) 6 SCC 63 (Supreme Court of India). See discussion in Muralidhar (2008), Shankar and Mehta (2008) and Gauri (2010).

[5] *Nyathi v. Member of the Executive Council for the Department of Health Gauteng & Ors*, 2008 (5) SA 94 (CC) (Constitutional Court of South Africa).

was 'growing civil rights pressure from the 1930s, economic changes, the Cold War, population shifts, electoral concerns, the increase in mass communication' that prompted desegregation. The Court simply 'reflected that pressure; it did not create it' (Rosenberg, 1991: 168).[6] Going further, Rosenburg claims that the use of litigation itself may be an endogenous variable in explaining poor progress, if the turn to legal strategies distracts advocates from potentially more effective political strategies.[7]

However, realist perspectives may underestimate the power of courts and neglect mediating and conditioning variables. We can thus identify a second and alternative instrumental account that we might label strategic. Defendants are assumed to be rational actors, but their calculus is driven by a diverse set of benefits and costs. This calculus may be political: Governments and other powerful actors may be incentivized to comply with a judgment if it is consistent with public opinion, diffuses protest and dissension from activist groups and other states, or legitimates existing but unpopular policies (Helfer and Voeten, 2014; Moravcsik, 2000; Simmons, 2009). It may also be material: Compliance may be financially rewarding. For instance, it may constitute a useful 'signal' to the international community that uses human rights performance as 'conditions on trade, aid, and a seat at the international negotiating table' (Hillebrecht, 2014: 27); or permit corporations access to particular public goods. Alternatively, compliance may be financially costly, a not uncommon claim about social rights. Such a strategic outlook may also be reflexive and diachronic. A state may begrudgingly comply in order that future governments, other states, or other actors will also comply. It seeks to create a culture of compliance or a reciprocal sense of duty.

Despite the eclectivism of the strategic approach in its choice of costs and benefits, it can nevertheless overlook the particular legal, social and institutional *characteristics* of a particular case. Three are particularly worth mentioning. The first is the complexity of the remedy. Some remedies may be particularly difficult to implement (regardless of the material cost). Sometimes change simply takes time (a development of a new policy or practice), and courts lack the necessary levers to hasten it. Melish and Courtis argue that in both civil and social rights cases of the Inter-American Court of Human Rights and Argentinean courts, compensation and individual-based

[6] Rosenberg (1991).

[7] '[A] danger of litigation as a strategy for significant social reform is that symbolic victories may be mistaken for substantive ones, covering a reality that is distasteful. Rather than working to change that reality, reformers relying on a litigation strategy for reform may be misled (or content?) to celebrate the illusion of change' (p. 248).