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INTERNATIONAL HUMAN RIGHTS COLLOQUIUM

- Interview with Rindai Chipfunde-Vava, Director of the Zimbabwe Election Support Network (ZESN)
- Report on the IX International Human Rights Colloquium



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SUBSCRIPTION AND CONTACT

Sur – Human Rights University Network

Rua Barão de Itapetininga, 93 – 5º andar - República

São Paulo - SP - Brasil - CEP: 01042-908

Tel/Fax: 55 11 3884-7440

E-mail: <contato.sur@conectas.org>

Internet: <<http://www.surjournal.org>>

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PRESENTATION



This issue of the Sur Journal was developed in collaboration with the International Network for Economic, Social, and Cultural Rights (ESCR-Net). This network is a global initiative dedicated to promoting collective work between organizations and scholars around the world that strive to guarantee economic and social justice through human rights. To this end, the Network contributes to the development of a collective voice and joint activities among members, the exchange of information and mutual learning, the promotion of new tools and strategies, and the strengthening of links between different regions, languages, and disciplines.

Four of the articles published in this issue are revised versions of documents produced for the International Strategy Meeting on Economic, Social, and Cultural Rights and the ESCR-Net General Assembly held in Kenya, December 5-8, 2008, that grew out of the intense and valuable debates led by the participants in the event. The objective of these documents was to provide a critical evaluation of human rights work, placing a special focus on economic, social, and cultural rights – and, in particular, the collective work that the members and participants of the ESCR-Net have been developing in different thematic areas. At the same time, the articles sought to evaluate the future opportunities and challenges and discuss potential strategic interventions for ensuring effective human rights protection*.

In this way, we are presenting a dossier in this issue that discusses which challenges and opportunities organizations and social movements fighting for global social rights are facing in certain areas, their main strategies, and a catalogue of recommendations for future action.

In the first article of the dossier, Ann Blyberg presents a brief history of civil society's use of budgetary analysis and explains in what working with a public budget as a tool for enforcing rights consists, in particular, in terms of economic, social, and cultural rights. She discusses different foci – transparency, gender, and right to food – of current work in this field and provides examples of experiences gained by civil society groups from different countries.

Aldo Caliri analyzes the manners in which increased international commerce and transnational financial flows, deregulation, privatization, and reduced State functions, have culminated in the debilitation of States' abilities to adopt active measures necessary for respecting, protecting, and satisfying human rights in their territorial jurisdiction. Based on a general description of tendencies posed by the intersection of commercial, financial, investment and human rights policies, Caliri presents a panorama of the strategies used by diverse organizations for protecting human rights in this context, including some success stories.

Patricia Feeney describes the ups and downs of the process for developing universal standards regarding corporate responsibility for human rights violations. She reflects on the reasons that lead to the disintegration of the Draft UN Norms on the Responsibilities of

* Other articles addressing the use of human rights strategies by social movements and base communities and work in the area of women's economic, social, and cultural rights were produced on this occasion and can be directly requested from the Network's secretary by email: info@escr-net.org.

Transnational Corporations and evaluates the strengths and weaknesses of 'Protect, Remedy and Respect Framework' adopted by the Human Rights Council in 2008, at the proposal of the UN Secretary-General's Special Representative for that subject, John Ruggie.

Finally, Malcolm Langford offers a socio-juridical panorama of the justiciability of economic and social rights in the national arena, formulating some questions regarding their origins, content, and strategies. He also includes the debate surrounding the impact of litigation and an evaluation of the main lessons learned. In conclusion, he offers some ideas about the future development of this field.

Completing this issue of the Journal are five articles, on diverse subjects, and an interview. In the first article, Víctor Abramovich presents a general panorama of some strategic discussions surrounding the role of the Inter-American Human Rights System (IAHRS) in the regional political scenery. The author suggests that, in the future, the IAHRS should expand its political role, setting its sight on the structural patterns that affect the effective exercise of rights by subordinate sectors of the population.

In their article, Viviana Bohórquez Monsalve and Javier Aguirre Román carry out a conceptual reconstruction of the three tensions existing in the concept of human dignity: i) the tension between one's natural and artificial character (or consensual or passive); ii) the tension between one's abstract and concrete character, and iii) the tension between one's universal and particular character.

In the third article, Débora Diniz, Lívia Barbosa, and Wederson Rufino dos Santos seek to demonstrate the way in which the field of disability studies has been consolidated into the concept of disabilities as constituting a social disadvantage. As a result of this new concept, as adopted by the 2006 UN Convention on the Rights of Persons with Disabilities, disabilities are not summarized as a catalogue of diseases listed by biomedical experts, but rather constitute a concept that denounces the inequality imposed by environments with barriers on bodies with impediments.

Building on a description of violence faced in Colombia by lesbian, gay, bisexual, transvestite, transsexual, and transgendered (LGBT) persons and on decisions passed down by the Constitutional Court regarding the protection of free sexuality options, Julieta Lamaitre Ripoll analyzes, in the fourth article, the law's symbolic role and argues that activists in her country have an ambivalent relationship with the law; at the same time as they distrust it, because of its ineffectiveness, they mobilize themselves for legal reform and celebrate the progressive jurisprudence of the Constitutional Court.

For the first time, and at the request of the event's participants, a brief account of the IX International Human Rights Colloquium will be included in the Sur Journal. Furthermore, during the IX Colloquium, an interview was conducted with Rindai Chipfunde-Vava, Director of the Zimbabwe Election Support Network (ZESN) that ends this issue of the Sur Journal. In it, Rindai emphasizes the importance of electoral observation in Africa and insists on the necessity for human rights defenders to see elections as a human rights issue.

We appreciate the support from the Ford Foundation, the ESCR-Net and the Observatório Interdisciplinar de Direitos Humanos of the Universidade Federal do Rio Grande do Sul (UFRGS) for the publication of the present issue of the Sur Journal.

Finally, we are extremely pleased to report that the Carlos Chagas Foundation will support the Sur Journal in 2010 and 2011. This new cooperation is exceptionally promising, because, in addition to financial support, this prestigious research institution will complement the Journal's editorial efforts.



VÍCTOR ABRAMOVICH

Víctor E. Abramovich is a lawyer, Adjunct Professor in Human Rights at the University of Buenos Aires Law School since 2000 and presently directs the Masters of Human Rights and Public Policy Program at the National University of Lanús (UNLA, abbreviation in Spanish). In 1997, he joined the Center for Legal and Social Studies (CELS, abbreviation in Spanish), serving as Executive Director of the Institution from 2000 to December 2005. In June 2005, he was elected and served as a member of the Inter-American Commission of Human Rights (IACHR) of the

Organization of American States (OAS) from 2006 to 2009. At the IACHR, he was a rapporteur for Colombia, Guatemala, Cuba and Costa Rica. He has been rapporteur on the Rights of Women (2006/2007) and on the Rights of Indigenous Peoples. He was appointed representative of the IACHR for the national implementation of the Protocol of San Salvador (2008). As a commissioner, he participated actively in the development of diverse reports and thematic studies related to access to justice. He participated in the development of a thematic report, amongst others, for the IACHR on "Access to justice for women victims of violence in the Americas" (2006), and "Access to Justice and Social Inclusion. The road to strengthening democracy in Bolivia" (2007). Pursuant to the IACHR's mandate, he conducted a study on "Access to justice as a guarantee of economic, social and cultural rights" (2008). He also drafted the document, "Guidelines for the development of indicators of progress in economic, social and cultural rights" (2008), which was recently presented before the Committee on Juridical and Political Affairs of the OAS. In 2009, as a thematic rapporteur, he led the study: "The duty to protect indigenous communal ownership of lands, territories and natural resources" as well as "Guidelines on the state's duty to consult on development projects that may affect the rights of indigenous peoples."

Email: vabramovich@unla.edu.ar

ABSTRACT

The Inter-American System of Human Rights (ISHR), during the last decade, has influenced the internationalization of legal systems in various Latin American countries. This led to the gradual application of ISHR jurisprudence in constitutional courts and national supreme courts, and most recently, in the formulation of some state policies. This process resulted in major institutional changes, but there have been problems and obstacles, which have led to some setbacks. The ISHR finds itself in a period of intense debates, which seek to define thematic priorities and the logic of intervention, in the context of a new regional political environment of deficient and exclusionary democracies, different from the political landscape in which the ISHR was born and took its first steps.

This article seeks to present an overview of some strategic discussions about the role of the ISHR in the regional political sphere. This article suggests that the ISHR should in the future intensify its political role, by focusing on the structural obstacles that affect the meaningful exercise of rights by the subordinate sectors of the population. To achieve this, it should safeguard its subsidiary role in relation to the national justice systems and ensure that its principles and standards are incorporating not only the reasoning of domestic courts, but the general trend of the laws and governmental policies.

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KEYWORDS

Inter-American System of Human Rights – Human rights violations – Internationalization of domestic legal systems.



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FROM MASSIVE VIOLATIONS TO STRUCTURAL PATTERNS: NEW APPROACHES AND CLASSIC TENSIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

Víctor Abramovich

1 Introduction

The Inter-American System of Human Rights (ISHR), during the last decade, has influenced the process of internalization amongst the legal systems in various countries in Latin America. During this period, more countries have accepted the jurisdiction of the Inter-American court (such as Mexico and Brazil) and have given the American Convention constitutional status, or higher, compared to the laws of their judicial systems. Lawyers, judges, legal practitioners, officials and social activists have learned much about the workings of the ISHR and have begun to use it in a manner that is no longer extraordinary or selective. In addition, they have begun to cite its decisions and ground arguments in its precedents both in the local courts and in the public policy debates. This led to the gradual application of ISHR jurisprudence in constitutional courts and national supreme courts, and most recently, although to a lesser degree, in the formulation of some state policies. This process of incorporating international human rights law at the national level led to important institutional changes.

For example, the legal standards developed by the jurisprudence of the Inter-American Commission (IACHR or Commission) and of the Inter-American Court (IACHR Court or Court) about the invalidity of the amnesty laws pardoning gross violations of human rights, gave legal support to the transparency of trials against those charged with crimes against humanity, in Peru and Argentina. The standards set in the case *Barrios Altos* against Peru have played a decisive role in invalidating the self-amnesty law of the Fujimori regime, and in supporting the prosecution of crimes committed during his administration (*PERÚ, Barrios Altos vs. Perú*, 2005), but the decision in the case has had a cascading effect and has

Notes to this text start on page 34.

influenced the legal arguments of Argentine courts by invalidating laws of obedience (ARGENTINA, Simón, Julio Héctor et al, 2005). Inter-American jurisprudence is also present, although to a lesser extent, in recent decisions of the Chilean appellate courts¹. This is also relevant to the debates about reducing the penalties in the peace process with paramilitary groups in Colombia, as well as the political and judiciary treatment of the remaining issues of transitional justice in Guatemala, El Salvador, Honduras, Paraguay and Uruguay. Recently, cases alleging crimes against humanity that were committed during the “Cold War” have been brought before the Court regarding Brazil (IACHR, Julio Gomez Lund et al vs. Brazil, 2009c), Bolivia (IACHR, Renato Ticona Estrada et al vs. República de Bolivia, 2007b) and Mexico (IACHR, Rosendo Radilla Pacheco vs. México, 2008b), which has influenced local political and legal discussions.

This process, however, is not linear. It encounters problems and obstacles and has also suffered some setbacks. The ISHR, furthermore, finds itself in a period of intense debates that seek to define its thematic priorities and logic of intervention, in a new regional political environment of deficient and exclusionary democracies, different from the political landscape in which it was born and took its first steps, with the South American dictatorships in the 1970’s and the Central American armed conflicts of the 1980’s.

This article seeks to present an overview of some strategic discussions that take place both within the Inter-American organs, and the human rights community, about the role of the ISHR in the regional political arena.

First, we will try to identify the role of the ISHR organs in three distinct historical moments, presenting at each point the thematic priorities and main strategies for intervention. In this way, we will describe the present role of the ISHR, its status as an alternative to democratic systems, and its strategic use by civil society on the local and international level, and by governments and state agencies.

In the article’s *second part*, we will describe the expansion of the ISHR’s agenda into social and institutional issues, and present the recent developments in structural equality and the recognition of special rights for subordinate groups. In the second part, we will also call attention to the approach to certain human rights conflicts in the region, such as evidence of systemic racism, violence and exclusion, and we will relate this structural analysis to the contextualization of individual cases arising out of the massive human rights violations perpetrated during the dictatorships.

Finally, in the *third part* of the article, we will briefly present a preliminary agenda for discussion of some of the ISHR’s challenges, especially the review of its mechanisms for remedies, the procedures for implementing its decisions, the procedural rules for the litigation of multi-party cases, as well as the complex, tense relationship between the ISHR and the national judicial systems.

2 The changing of roles in new political settings

Undoubtedly, the roles of the system’s organs, of both the Commission and the Court, have changed in light of the changing political landscapes in the Americas.

At the beginning, the ISHR dealt with cases involving massive and systematic human rights violations perpetrated under systems of state terrorism, or in the context of violent internal armed conflict. Its role was, in short, **a last resort of justice for the victims** of these violations, as they could not look to national systems of justice that had been devastated or corrupted. In this initial phase of political gridlock within the member nations, the Commission's Country Reports served to document situation with technical precision, to legitimate complaints by victims and their organizations, and to expose and erode the image of the dictators in the local and international spheres.

Later, during the post-dictatorial transitions in the 1980's and the beginning of the 1990's, the ISHR had a broader purpose, as it sought to **monitor the political processes aimed at dealing with the authoritarian past** and its scarring of democratic institutions. During this period, the ISHR began to delineate core principles about the right to justice, truth, and reparations for gross, massive, and systematic human rights violations. It set limits on the amnesty laws. It laid the foundation for the strict protection of freedom of expression and the prohibition on prior restraint. It forbade the military courts from judging civilians and hearing human rights cases, limiting the space in which the military could operate, as they continued to have veto power during the transition and sought impunity for past crimes. It protected habeas corpus, procedural due process, the democratic constitutional order and the division of state powers, in light of the latent regression possibility to an authoritarian state and the abuses of states of emergency (IACHR COURT, 1986, 1987a, 1987b)². It interpreted the scope of the limitations imposed by the Convention as regards the death penalty, invalidating it for minors and the mentally ill, allowing it to be applied only in cases where a crime was committed, and establishing strict standards of due process, as a safeguard against the arbitrariness of the courts in imposing the death penalty. It also addressed regional social issues which showed a discriminatory bias by, for example, affirming equality before the law for women asserting their familial and matrimonial rights, and the rights of inheritance for children born out of wedlock, which the American civil codes still considered "illegitimate."

During the 1990's, moreover, it also confronted with firmness state terrorist regimes, such as the Peruvian regime of Alberto Fujimori, documenting and denouncing violations that had also been committed in South America in the 1970's, such as systematic forced disappearances and torture, and the subsequent impunity for these state crimes. It was also an important player in addressing the gross human rights violations and violations of international humanitarian law committed in the context of internal armed conflict in Colombia.

The present regional landscape is undoubtedly more complex. Many countries in the region made it through their transitional periods, but were not able to consolidate their democratic systems. These representative democracies have taken some important steps, by improving their electoral systems, respecting freedom of the press, the abandonment of political violence; but they show serious institutional deficiencies, such as an ineffective judicial system and violent police and prison systems. These democracies also have alarming levels of inequality and exclusion, which cause a perpetually unstable political climate.

In this new climate, the ISHR organs have sought not only to compensate the victims in individual cases, but to establish a body of principles and standards, with the objective of **influencing the equality of these democratic processes** and strengthening the main domestic rights protection mechanisms. At this stage, the ISHR faces the challenge of improving the structural conditions that guarantee the realization of rights at the national level. This approach takes as a given the *subsidiary character* of the international protection mechanisms in light of the rights guarantees made by the states themselves. It recognizes the clear limits of international involvement and, at the same time, maintains the necessary degree of autonomy from national political processes, to attain higher levels of efficacy and observance of human rights.

The ISHR thus interprets certain procedural rules that define the criteria for its intervention in such a way that the autonomy of the states is respected. For example, there is a rule that requires “previous exhaustion” of domestic remedies, as well as the rule of the “fourth recourse,” by which the ISHR refrains from reviewing the decisions of the national courts in cases not directly governed by the Convention, and satisfying procedural due process guarantees.

The first rule, of “prior exhaustion of domestic remedies,” although it is procedural in nature, is a key factor in understanding the working dynamic of the Inter-American system and especially its subsidiary role. By requiring that parties exhaust all remedies available in the state’s national judicial system, it gives each state the opportunity to resolve conflicts and remedy violations before the matter is considered in the international arena. The scope of this rule in the jurisprudence of the ISHR’s organs defines the degree to which it is willing to intervene as an international mechanism, based on the competence and effectiveness of the national judicial system.

The second rule, known as the “fourth recourse,” functions as a kind of deference to national judicial systems, because it allows them the autonomy to interpret local norms and decide individual cases, subject to the exclusive condition that they respect procedural due process guarantees established in the Convention³.

The ISHR has also come to recognize the new political environment of constitutional democracies in the region, showing deference to the member-states on how certain sensitive issues are defined, such as the design of electoral systems in accordance with each social and historical context, and always respecting the democratic exercise of political rights⁴.

In some cases, moreover, the IACHR in its reviews has paid special attention to the arguments developed by the state’s appellate courts, which have applied the provisions of the same Convention, or analyzed the same issues with their own constitutional parameters. It is not a matter of deference in the strict sense, but a kind of special consideration given to certain domestic court decisions and the arguments presented therein, which are given substantial weight as the IACHR conducts its own review of the case. This kind of argument has been considered in the analysis about the reasonableness of domestic laws that imposed restrictions on fundamental rights. This was the case, for example, when arguments made by local courts were considered in analyzing the proportionality of damages awarded

in a defamation case, to determine whether the right to a free press had been violated (IACHR, *Dudley Stokes vs. Jamaica*, 2008a). In addition, the IACHR considered a domestic court decision about the reasonableness of a social security reform, to determine if the reform complied with parameters of proportionality and progressiveness, and thus if there were legitimate restrictions on social rights (IACHR, *Asociación Nacional de Ex Servidores del Instituto Peruano de Seguridad Social y otras vs. Perú*, 2009d).

But in the new regional political landscape, in addition to a change in approach, it is also possible to identify a change in agenda.

As mentioned earlier, during the transitional phase, the ISHR contributed to some institutional debates, such as the subordination of the armed forces to civilian control and its involvement in internal security matters, and the scope of the privileges and powers of the military judicial system. These subjects had a direct connection with how past violations were treated, as it involved the military's ability to pressure and veto during the transitional period. In the aftermath of the transitions, the institutional agenda has grown considerably in terms of the kind of issues that come to the ISHR's attention.

A focuspoint of the ISHR's new agenda is to address issues relating to the functioning of judicial **systems**, which have an impact on or connection with the promotion of human rights. This includes procedural due process guarantees of the accused in criminal proceedings, as well as the right of certain victims, harmed by structural problems relating to the impunity of crimes committed by the state (by police and prison officials), to have equal access to the justice system. Strategies to combat organized crime and international terrorism have incorporated some discussions from the transitional period relating to the administration of justice, such as the debate about the jurisdiction of military courts. In that sense, it has become central in monitoring public security policies. It also guarantees the independence and impartiality of the courts and safeguards various issues related to the full protection of due process and the right to judicial protection, and to the judicial protection of social rights.

Another line of institutional issues considered by the ISHR in the post-transition era relates to the **preservation of the democratic public sphere** in the countries of the region. These issues include freedom of expression, freedom of the press, access to public information, freedom of assembly and association, freedom of protest and the gradual ripening of issues relating to equality and due process of law in electoral matters.

Moreover, a priority of the ISHR's agenda at this stage are the new **demands for equality made by groups and collectives**, relevant to the institutional issues discussed above, as they include marginalized and excluded sectors of society whose rights and ability to participate and express themselves are affected, who suffer from institutional or social patterns of violence, obstacles in accessing the public sphere, the political system, or social or judicial protection. This question will be explored in Sections 4 and 5.

In addition to broadening the agenda, in this third stage a change in how the ISHR intervenes, and the impact of its decisions at the local level can be observed.

The ISHR's jurisprudence has had a considerable **impact on the jurisprudence** of the **national courts** that apply the norms of international human rights law. It is important to consider that decisions made by the organs of the system in a particular case, in interpreting the treaties applicable to the conflict, have a heuristic value that transcends the victims affected in this process. This international jurisprudence, moreover, is often used as a guide for judgments issued by national courts, which seek to prevent countries from being named on petitions and eventually convicted in these international forums. This *globalization of human rights standards*, while not attaining the same level of development through the entire region and while subject to the precariousness of the national systems, has undoubtedly had a positive effect on the transformation of these same judicial systems, and has generated greater attention amongst the state authorities in regard to the ISHR's developments. Consequently, the jurisprudence established by the Commission and especially by the Court, has brought about several changes in the jurisprudence of the countries in the region on issues related to the weak and deficient institutions of Latin American democracies. Take, for example, the case about the decriminalization of defamation and the criticisms from the press, access to public information, and limits on the criminal prosecution of peaceful public demonstrations. Other issues include setting limits and objective conditions for the use of pretrial detention, the detention powers of the police and their use of public force; the determination of guidelines for a separate justice system for minors, the right to appeal a conviction to a higher court, the participation of victims of state crimes in judicial proceedings. Finally, there are the cases involving the recognition of procedural due process in the administrative and judicial review of administrative acts, as well as basic safeguards in the process of removal of judges, amongst other issues of great importance for the functioning of institutions and constitutional order in the states (MENDEZ; Mariezcurrena, 2000, ABRAMOVICH, cattle; COURTIS, 2007).

The influence of the ISHR, however, does not limit itself to the impact of its jurisprudence on the jurisprudence of local courts. Another important avenue for strengthening democratic institutions in the states stems from the ISHR's ability to influence **the general direction of some public policies**, and in the formulation, implementation, evaluation and oversight of those same policies. It is thus common that individual decisions adopted in one case generally impose upon states the obligation to formulate policies to redress the situation giving rise to the petition, and the duty to address the structural problems that are at the root of the conflict analyzed in the case.

The imposition of these positive obligations is generally preceded by a review of the legal standards, implemented policies, or lack of action (omission) of the state. These obligations may include changes in existing policies, legal reforms, the implementation of participatory processes to develop new public policies and often the reversal of certain patterns of behavior that characterize the actions of certain state institutions that promote violence. This includes police violence, abuse and torture in prisons, the inaction of the state when confronted with domestic violence,

policies of forced displacement of the population in the context of armed conflicts, and massive displacement of indigenous peoples from their ancestral lands.

Furthermore, in the context of individual cases, the ISHR, especially the Commission, promotes **friendly settlements** or negotiations between the petitioners and the states, where the latter will often agree to implement these institutional reforms or create mechanisms to consult with civil society in the formulation of policy. Consequently, in the context of amicable solutions, some states have changed their laws. For example, they repealed the defamation provisions that allowed the criminalization of political criticism; created procedures to confirm the whereabouts of disappeared persons; implemented massive programs of reparations for victims of human rights violations or collective reparation programs for communities affected by violence; implemented public programs to protect victims, witnesses, and human rights defenders, reviewed criminal cases in which defendants had been convicted without due process, or reviewed the closing of criminal cases in which state agents had been fraudulently acquitted of human rights violations; reformed civil code rules that discriminate against children born out of wedlock; or civil code rules that discriminate against women in their marital rights; or those that implement quota laws for women in elections, or laws on violence against women; implement protocols for the execution of non-punishable abortions, or abolished immigration laws that affected the civil rights of immigrants.

The IACHR also makes recommendations about public policy in its **country reports**. In these reports, it analyzes specific situations where violations have taken place and makes recommendations to guide state policies based on legal standards⁵.

The Commission may also issue **thematic reports** that cover topics of regional interest or of interest to several states. This type of report has enormous potential to set standards and principles and to address situations involving the collective or structural problems that may not be adequately reflected in individual cases. They also offer a clearer promotional perspective than the country reports, which are usually seen as publicity for the states before the international community and local groups. The process of preparing these thematic reports, in turn, allows the Commission to dialogue with local and international engaged stakeholders, collect the opinions of experts, agencies and international financial institutions, OAS political and technical bodies, and to establish ties with officials ultimately responsible for generating policies in the studied fields⁶.

Finally, the Inter-American Court of Human Rights may issue **advisory opinions**, which are used to examine specific problems that go beyond the contentious cases, and set the scope of state obligations deriving from the Convention and other human rights treaties applicable at the regional level, such as the legal status of migrant workers, and the human rights of children and adolescents. In these advisory opinions, the Court has sometimes tried to establish legal frameworks for policy development. For example, Advisory Opinion 18 seeks to define a set of principles that should orient states' immigration policies, in particular the recognition that undocumented immigrants should enjoy certain basic social rights. In Advisory Opinion 17, the Court seeks to influence policies aimed at imposing limits on criminal provisions directed at children.

3 The ISHR as an arena of transnational activism and political action by governments

At the same time, the ISHR, both the Commission and the Court, have gradually become a privileged arena of civil society activism, which has produced innovative strategies to make use of the international repercussion of the cases and situations denounced at the national level, in the so-called boomerang strategies (NELSON; DORSEY, 2006, RISSE; SIKKINK, 1999, SIKKINK, 2003).

Social organizations have used the international arena not only to denounce violations and make visible certain questionable state practices, but also to attain a measure of status that allows them to dialogue with governments and their partners from a higher plane, and to invert the power relationship and alter the dynamics of political processes. It has sometimes facilitated the opening of spaces for social participation and influence in the formulation and implementation of policies, and the development of institutional reforms. These social organizations have also frequently incorporated the legal standards set by the ISHR as a parameter to assess and monitor state actions and policies, and sometimes to challenge them in national courts or through the use of local and international opinion.

In Latin American countries, many human rights organizations and other socially minded organizations seek to vindicate rights, such as feminist, citizen, environmental, and consumer rights organizations, amongst others; in addition to monitoring state action, they have incorporated new strategies of dialogue and negotiation with governments, to influence the direction of its policies and attain transformations in the functioning of public institutions. This change of perspective seeks to incorporate to the traditional work of denouncing violations, a preventative and promotional measure intended to curb abuses.

In this way, the community of ISHR users has grown considerably and has become more varied and complex. The ISHR has begun to be utilized much more frequently by the local social organizations, and not only by the traditional international organizations that helped shape it in its early days, or by those that have specialized in using its mechanisms. Some of the more successful cases in terms of their social impact have been sustained and promoted by “multi-level” coalitions or alliances that have the capacity to act in different spheres both locally and internationally. In general, these coalitions are formed by regional or international organizations that have experience in using the ISHR, and local organizations with the capacity for social mobilization, dialogue and influence on public opinion and government policies. This type of alliance has engendered an improvement in the articulation of strategies in the international arena, as well as those used on the local level.

At the same time, many local organizations have gradually gained sufficient experience to act on their own before the ISHR, and have occasionally forged alliances amongst their peers in other countries in the region to promote regional issues of common interest at the ISHR such as police brutality, access to public information and violence against women (MACDOWELL SANTOS, 2007). For example, a network of organizations specializing in issues involving police violence and the criminal justice system has suggested that the Commission involve itself

in preparing a thematic report on citizen security and human rights, setting clear standard to guide democratic security policies throughout the region. The influence of the network of social organizations has also resulted in a recent report about the situation of human rights defenders developed by the Commission, as well as how to follow up on the Commission's recommendations in the States. A network of non-governmental organizations and community media advocates that the IACHR adopts a series of fundamental principles for the regulation of broadcasting.

In addition to legal public interest organizations, which generally represent victims or groups of victims, certain kinds of cases before the ISHR often involve community organizations that also are part of networks or alliances with the legal organizations, to promote IACHR cases, thematic hearings or reports. The work of the IACHR rapporteurs on the rights of indigenous peoples and racial discrimination has considerably expanded the use of the ISHR by Afro-American and indigenous communities. It has also increased the involvement of unions who have an alliance with human rights organizations, raising issues concerning the freedom to unionize, and the right to fair labor practices and pensions.

In countries such as Argentina and Peru where the ISHR is better known, private attorneys have begun using the international system as a new forum for litigating various issues, including those relating to delays in processing pension benefits, the application of emergency laws, and the due process rights of the accused in criminal proceedings.

But the ISHR has also been actively used by some states or government agencies with expertise in human rights to shed light on certain issues and promote national and regional agendas. These processes have led to the gradual formation of a *specialized state bureaucracy* to manage these issues, which have tended to influence some aspects of public management, such as human rights secretariats and commissions, specialized divisions in Foreign Ministries, ombudsmen, human rights attorneys, public defenders and special prosecutors, among others. Occasionally, when governments have clear policies on these issues, a case at the ISHR generally is considered an opportunity to shape policy in the areas of governmental interest, to overcome resistance in the state itself or other social sectors. This can be clearly seen in some amicable settlements that induced change in legislation and national policies (TISCORNIA, 2008). Occasionally, the petitioners are independent public agencies that litigate and sometimes negotiate on behalf of the government. Public defenders' offices have become a frequent and important player at the ISHR.

Some states, for example, have used, the Court's advisory opinions to promote human rights issues that occupy a central role in their foreign policy, such as the protection of its nationals who migrate to developed countries. For example, Mexico promoted the ISHR's pronouncements about consular assistance in death penalty cases and those involving the labor rights of undocumented immigrants, persuading the United States to present itself before the Court as *Amicus Curiae* to defend the tenets of its own policies. Recently the Argentine government, in conjunction with private social organizations, promoted a discussion about the legality of having states litigating before the Court, appointed judges to it on an

ad hoc basis, and on the potential impact on the principle of impartiality. In the last three years, there have also been two interstate lawsuits for the first time since the American Convention came into force⁷.

The number of public officials, judges, public defenders, prosecutors and judicial personnel that have come before the Inter-American Commission and Court of Human Rights seeking urgent protection against threats, intimidation and violence in retaliation for carrying out their duties has also grown significantly. These conditions break the classic pattern of the ISHR protecting victims from the abuses of authoritarian and monolithic states, and show that the ISHR nowadays is more complex in the execution of its duties, confronting democratic states that express internal ambiguities, disputes and contradictions.

4 A broader agenda. Institutional exclusion and degradation

This gradual change in the ISHR's role in the new political environment was accompanied by a gradual change in its agenda of issues. As has been shown, however, some of the traditional issues have been neither addressed nor displaced, as in the case of transitional justice. The new agenda is characterized by the incorporation of new issues, which coexist with traditional issues.

In recent years, the ISHR has increasingly confronted *an agenda tied to the problems stemming from inequality and social exclusion*. After enduring complicated periods of transition, Latin American democracies find themselves threatened by the sustained increase in social inequality and the exclusion of vast portions of the population from the political system and the benefits of development, which imposes structural limitations on the exercise of social, political, cultural and civil rights.

The problems of inequality and exclusion are reflected in *the degradation of certain institutional practices* and the deficient functioning of the democratic states, which engenders new forms of human rights vulnerability, often related to the practices of authoritarian governments from past decades. The issue is not that the states plan a systematic violation of human rights, nor that the upper tiers of government seek deliberately to infringe upon fundamental rights, but rather that states, with their legitimately elected officials, are not capable of reversing and impeding arbitrary practices committed by their own agents, nor of ensuring effective mechanisms of accountability, on account of the precarious functioning of their judicial systems (PINHEIRO, 2002). The social sectors that live under conditions of structural inequality and exclusion are the primary victims of this institutional deficit, which is reflected in some of the cases on the ISHR's docket: police violence marked by social or racial bias, torture and overpopulation in prisons, whose victims are usually young persons from the lower classes; a generalized practice of domestic violence against women, which is tolerated by state authorities; the deprivation of land and political participation of indigenous peoples and communities; discrimination against the Afro-Descendant population in access to education and justice; the bureaucratic abuse of undocumented immigrants; the massive displacement of the rural population in the context of social and political violence.

Thus, one of the main contributions and, at the same time, principal challenges of the ISHR regarding the regional problems rooted in institutional exclusion and degradation, lies in its capacity to set standards and principles to guide the actions of democratic States in specific situations, through the jurisprudence of the courts, to determine the scope of rights, as well as through the formulation of public policies, thereby contributing to the strengthening of institutional and social guarantees of these rights in different national spheres.

Faced with these types of situations, the Inter-American Commission and Court have sought to examine not only isolated cases or conflicts, but also the institutional and social contexts in which these cases and conflicts develop and gain meaning, similar to its role during the dictatorships and regimes of state terrorism, when the ISHR had monitored the situation of certain victims, the execution and forced disappearance of certain persons, a function of the context of massive and systematic violations of human rights. At present, in various situations, it has sought to frame particular facts in **structural patterns** of discrimination and violence against certain social groups or sectors. To do so, the ISHR has anchored itself to the principle of equality, which we will be summarily presented below. The reinterpretation of the principle of equality has allowed the ISHR to involve itself with social issues in light of a reinterpretation of the scope of civil and political rights established in the American Convention.

5 Rights in a context of structural inequality

It is important to illustrate the change of focus mentioned above and to discuss some ISHR interventions in cases concerning equality issues that are associated with various forms of violence, or matters relating to political participation and access to justice. These precedents constitute a line of jurisprudence that tends to a socially mindful reading of numerous civil rights in the American Convention, and affirms the existence of duties of positive action and not just the negative state obligations. These affirmative duties are generally exacted with greater intensity, as a result of the recognition that certain social sectors live in disadvantaged structural conditions in accessing or exercising their basic rights.

By observing the evolution of the jurisprudence on equality in the Inter-American system, one concludes that the ISHR demands of the states a more active and less neutral role, as a guarantee not only of the recognition of rights, but also of the real possibility of exercising them.

In this sense, the historical perspective on the jurisprudence of the ISHR shows the evolution of the concept of formal equality, developed during the transitional period, to a notion of substantive equality that has become more solid in the current phase characterized by the end of the transition to democratic regimes, when the subject of structural discrimination is presented with greater force in the cases considered by the ISHR. Thus, the idea evolves from its perspective of equality as non-discrimination, or as the protection of subordinates. This means that it evolves from a classical notion of equality, which focuses on the elimination of privileges or unreasonable or arbitrary differences,

and which seeks to produce equal rules for all, and demands of the State a kind of neutrality or “blindness” with respect to differences. And it moves towards a notion of substantive equality, which requires the state to assume an active role in attaining social equilibrium, *granting special protection to certain groups who have suffered historical and structural discrimination*. This notion requires the state to abandon its neutrality and rely on tools to diagnose the social situation to identify groups or sectors that should receive, in a given historical moment, urgent and special measures of protection.

In a report recently published by the Inter-American Commission, there is a systematization of the jurisprudence that shows the evolution of the concept of equality in relation to women’s rights (IACHR, 2007a).

There are some clear consequences of the adoption of the idea of structural equality by the Inter-American system. First, affirmative action by the state cannot be invalidated under a notion of formal equality. In any case, challenges to affirmative action must be based on concrete critiques of its reasonableness in light of the beneficiary group’s status in a given historical moment. The second consequence is that states not only have the obligation not to discriminate, but also of adopting affirmative action measures in instances of structural inequality, to ensure that certain marginalized groups be able to fully exercise their rights. A third consequence is that the state can violate principles of equality with practices or policies that on their face value are neutral, but that have a *discriminatory impact or effect* on certain disadvantaged groups.

This has already been noted by the Court, in the case of Yean and Bosico against Dominican Republic (IACHR COURT, 2005d). A number of practices that on their face value might appear neutral or lack the deliberate intent to discriminate against a certain group could in fact have a discriminatory effect on that group, thus violating the rule of equality. These consequences are based on a social reading of the equality principle, since these state actions can go beyond affecting a sole individual and impact an underprivileged sector of the population. It is tantamount to changing the lens and opening the prism. One need only observe the social context and trajectories of certain individuals who are part of a group suffering discrimination. Therefore, not only will norms, practices and principles that deliberately exclude a given group, without a legitimate purpose, violate the principle of equality, but so will those that have a *discriminatory impact or effect*⁸.

At the same time, this concept of equality is reflected in the way the ISHR has started to reevaluate the obligations of states with respect to civil and political rights in certain social contexts.

Some important precedents on the extent of the state’s duty to protect, in relation to non-state actors can be highlighted, for example regarding violence against women. The IACHR imposed special obligations of state protection tied to the right to life and to physical integrity based on an interpretation of the principle of equality in line with what was discussed earlier. In the case of María da Penha Fernández against Brazil, the IACHR, against a structural pattern of domestic violence affecting the women of Fortaleza, Ceará state, where there was a general practice of judicially sanctioned impunity in these kinds of

criminal cases, and the negligence of the local government in implementing effective prevention measures, established that the federal government had violated the victim's right to physical integrity and equality under the law. It also established that the states have a duty to take diligent preventative action to deter violence against women, even with respect to non-state actors, based not only on Article 7 of the Convention of Belém do Pará but also on the American Convention. The State's responsibility stemmed from not having adopted duly preventative measures. The IACHR fundamentally assesses whether there is a pattern or "systematic rule" in the State's response, which expresses in its view a kind of public tolerance of the violence denounced, to the detriment not only of the individual victim but also of others similarly situated. The focus, as stated before, goes beyond the situation of one particular victim, and instead is on the discrimination and subordination faced by the particular social group. The structural situation of women victims of violence on the one hand describes the state's duty to protect and provide reparations in a particular case, but also justifies the generalized recommendations made by the IACHR that include, for example, changes in public policy, legislation and judicial and administrative procedures (IACHR, *Maria da Penha Maia Fernández vs. Brasil*, 2001a, *Campo Algodonero: Claudia Ivette González, Esmeralda Herrera Monreal y Laura Berenice Ramos Monárrez vs. México*, 2007c). The IACHR gave special attention to the more severe effects suffered by certain social groups as a result of violence inflicted by state or non-state agents with the acquiescence or tolerance of the State. In this vein, the Commission, for example, held Brazil liable for not having adopted measures to prevent violence due to forced evictions undertaken by private armies of landowners, an expression of systematic rural violence tolerated by state officials, followed by systematic impunity when criminal investigation of these incidents are conducted. In light of this, the IACHR especially took into account the situation of structural inequality amongst the rural population in certain states in the Brazilian northern region, where there is collusion between the powerful landowners, the police, and the state justice system (IACHR, *Sebastião Camargo Filho vs. Brasil*, 2009a). In another case, the IACHR held Brazil liable for systemic police violence directed at black youth in the shantytowns of Rio de Janeiro, considering that the extrajudicial execution of a young member of this social group, was representative of this pattern, which in turn reflects a racial bias in the state police's conduct, with the complicity of the federal authorities (IACHR, *Wallace de Almeida vs. Brasil*, 2009b). Furthermore, the Inter-American Commission and Court consider this increased vulnerability that certain groups experienced in the context of the internal armed conflict in Colombia, imposing upon the state specific duties of protection that imply restrictions on the state's use of force, and special protection against other non-state actors, as well as special reparation obligations to a given community and socially progressive and culturally relevant policies. These protections stem from the obligation to respect and guarantee given cultural rights of ethnic groups, such as restrictions on certain military activities in defense of the land of indigenous peoples and black communities in Colombia⁹.

Amongst the groups suffering discrimination that require special protection or treatment by the ISHR are indigenous peoples¹⁰ and the Afro-descendant population (FRY, 2002, ARIAS; YAMADA; TEJERINA, 2004)¹¹ and women with respect to the exercise of certain rights, such as physical integrity¹² and political participation¹³. It has also emphasized the states' obligation to protect vulnerable groups, such as children who live on the street or in detention centers, the mentally ill who have been institutionalized, undocumented immigrants, the rural population displaced from their land, and the poor infected with HIV/AIDS, amongst others.

This brief review shows that the ISHR does not merely use a formal notion of equality, which requires objectively reasonable laws and prohibits laws that favor or disfavor groups in an unreasonable, capricious or arbitrary manner, but rather moves towards a concept of material or structural equality that recognizes that certain sectors of the population are disadvantaged in exercising their rights, due to legal and factual obstacles and consequently require the adoption of special measures to guarantee equality. This implies the necessity of differential treatment, when due to circumstances affecting a disadvantaged group, when identical treatment involves restricting or cutting access to a service or good, or the exercise of a right. It also requires an examination of the social trajectory of the alleged victim, the social context in which the norms and policies are considered, and the degree of subordination of the social group in question¹⁴.

The use of the notion of material equality implies a definition of the state's role as active guarantor of rights, in social contexts of inequality. It is also a useful tool to examine the legal framework, public policies and state practices, both their formulation and effects. The imposition of positive obligations has very important consequences for the political or promotional role of the ISHR, as it imposes on states the duty to formulate policies to prevent and redress human rights violations affecting certain disadvantaged groups or sectors.

It also has direct consequences on the debate about the availability of judicial remedies, as it is known that affirmative obligations are more difficult to impose on national justice systems, especially when positive behavior is required to resolve collective disputes.

Affirmative obligations are also in tension with the capabilities of American states. The ISHR has gradually imposed further obligations on the state to protect rights and deter violations with respect to non-state actors in particular circumstances. This expansion of state obligations highlights the gap between the expectations placed on states and the states' weak institutions and ineffective policies. To meet the exacting standards of the ISHR in regards to affirmative obligations, demands institutions that can formulate and implement policies and adequate human and financial resources. One can begin to see with greater clarity the growing gap between normative discourse and the actual capacity to meet the obligations imposed.

Affirmative obligations have also been imposed by the ISHR in relation to the *right of participation* of indigenous peoples. Amongst others, this includes the right to be consulted ahead of time about the policies that might affect their

communal lands, such as the exploitation of economic and natural resources, and the right to dialogue with governmental bodies and other stakeholders through its own mechanisms of political representation (AYLWIN, 2004). This topic shows the direct link between the exercise of social and cultural rights and of civil and political rights, since the basis of the argument is the special ties that indigenous peoples have to their lands and natural resources, which not only puts at risk economic interests, but also the preservation of their cultural identity and the very perpetuation of their culture¹⁵. These rights that are determined by international agreements, such as the ILO Convention 169, have also been recognized as being based directly on the American Convention, from a socially informed rereading of Article 21, which enshrined the right to property. In a series of decisions the Inter-American Court has established the obligation of states to have adequate mechanisms for political participation, the production of information on social and environmental impacts, and consultation seeking consent of the indigenous peoples in decisions that affect the use of natural resources or alter its territorial boundaries. In this sense, it is a matter of recognizing the powers of diverse political participation in shaping the State's public policies, but which at the same time goes beyond a procedural right and achieves the recognition of a "special group right" to preserve an area of self-government or autonomy in such matters (IACHR COURT, Comunidad Mayagna (Sumo) Awas Tingni, 2001, IACHR COURT, Masacre de Plan Sanchez vs. Guatemala, 2004a, Comunidad Moiwana vs. Suriname, 2005a, IACHR COURT, Comunidad Indígena Yakye Axa vs. Paraguay, 2005b, IACHR COURT, Pueblo Saramaka vs. Suriname, 2007). While the ISHR's case law has established that it does not confer veto power upon indigenous peoples, this is undoubtedly one of the most contentious issues of those presently addressed by the ISHR, as one can more clearly see the tension between the recognition of a favorable group right, and certain economic development strategies of the states meant to promote the public interest.

In a recent decision issued by the Inter-American Court of Human Rights, the obligation was imposed upon the states to adopt affirmative measures to ensure that the *indigenous communities can participate*, on equal footing, in making decisions on issues and policies that influence or could influence their rights in the development of those communities, so that they can integrate themselves into state institutions and organs and participate in a manner that is direct and in proportion to their populations in the management of public affairs, and do so through their own political institutions and in accordance with their values, customs, habits, and means of organization. The Court, in its ruling in the *Yatama* case (IACHR COURT, Yatama vs. Nicaragua, 2005c)¹⁶, determined that the Nicaraguan law on the monopoly of political parties, and the decisions issued by the state's electoral organs, had unreasonably limited the possibility of electoral participation by an organization representing indigenous communities from the country's Atlantic coast. This case also expresses an affirmation of the principle of structural equality, as the Court requires the State to show flexibility in applying the electoral norms of general applicability so that they fit the mechanisms of political organization that express the cultural identity of a group. Ultimately,

the Court recognizes a “special right conferred upon a group” (KYMLICKA, 1996, 1999), which gives the minority group certain “external protections” that are considered indispensable for the preservation of its autonomy, but also its participation in the State’s political structures.

The ISHR has also imposed strong affirmative obligations to ensure the right to have access to justice, which provides another layer of protection in the field of substantive equality. The ISHR has set specific standards about the right to have access to judicial and other kinds of remedies to sue for the violation of fundamental rights. In this regard, the state’s obligation is not merely negative, not to impede access to these remedies, but rather fundamentally positive, to organize the institutional apparatus in such a way that all, and especially the poor and the excluded, can obtain these remedies, thereby overcoming social and economic obstacles that render access to justice more difficult. Moreover, the State should *organize a state legal aid office*, as well as mechanisms to reduce the costs of litigation and make it affordable, for example, by implementing a system that waives costs¹⁷. The policies that aim to ensure that the indigent receive legal services act as mechanisms that compensate for conditions of material inequality that affect the ability to effectively defend their own interests and, thus, are judicial policies that are related to social policies. The ISHR has established that the State has a duty to organize these services to compensate for conditions of inequality, and to ensure a level playing field in a judicial proceeding. It has also imposed certain concrete due process obligations relating to judicial proceedings involving social issues, such as judgments regarding labor and pensions rights and eviction cases. Recently, it established some indicators to assess whether the states are honoring these obligations. (IACHR, 2007a)¹⁸.

This basis of positive obligations imposed on states, linked to the recognition of an assessment of inequality that characterizes the American reality, sometimes serves as a framework for examining public policy in the thematic and country reports, as was mentioned above, and is a central tool for the promotional work of the ISHR bodies.

6 The effectiveness of the decisions. Coordinating activities with local judicial systems

The authority of the decisions and of the jurisprudence of the System depends in part on their social legitimacy and on the existence of a community of engaged actors who monitor and disseminate their decisions and standards. It does not exert its influence through coercive mechanisms, which it lacks, but through a power to persuade that it should build upon and preserve.

Thus, in countries in which international human rights law is part of daily legal discourse and arguments raised in the courts, there are some factors that should be highlighted. On the one hand, the ISHR has gained legitimacy through its association with the political processes of countries at key moments, especially the resistance to dictatorships and the reconstruction of the democratic and constitutional order. On the other, and in part because of this, there is a community

of social, political and academic actors who consider themselves protagonists in the ISHR's evolution and participate actively in the national implementation of its decisions and principles.

Many countries in Latin America ratified human rights treaties and joined the ISHR as they transitioned to a democratic regime, as a kind of antidote to reduce the risk of a return to authoritarianism, tying their legal and political systems to the "mast" of international protection¹⁹. Subjecting human rights issues to international scrutiny was a functional decision made in furtherance of institutional consolidation during the transition period, as it served to fortify fundamental human rights protection in a political system hamstrung by military actors with veto powers, and still powerful authoritarian pressures.²⁰

In Argentina, for example, support for human rights treaties takes place in 1984 at the beginning of the transition to democracy. The incorporation of human rights treaties into the constitutional hierarchy in 1994 was an important step in this process. Another important step was the Commission's visit to the country in 1979 during the military dictatorship, and its report, which served to strengthen victims' rights organizations and to weaken the government in the international community. In Peru, the legitimacy gained by the Commission and Court for denouncing human rights violations committed during the Fujimori administration has been critical. The IACHR's visit to Peru in 1992, and later in 1999, and its report about "democracy and human rights," together with the Court's paradigmatic decisions on anti-terrorist legislation, freedom of expression and military commissions, helped document and expose the gravity of rights violations committed during this period. The full return of Peru to the ISHR in 2001 and the acceptance of responsibility, before the international community, for the atrocities committed during the Fujimori regime, were core policies of the transitional government. This has contributed to the formation of a group of social organizations, academics, judges and legal practitioners that are familiar with the system.

While in the last decade countries in the region have made considerable progress incorporating international human rights law into their national legal system, the Court's jurisprudence is seen as a guide, even an "indispensable guide" for the interpretation of the American Convention by local judges,²¹ the process is not linear and there are dissident voices.

Recent decisions of appellate courts in the Dominican Republic and Venezuela have downplayed the forcefulness of the Court's decisions and sought to give national courts the power to review its decisions (a legality test), to assess the compatibility of the international organ's decision with the country's constitution. This is an ongoing debate amongst the continent's different judicial systems, where resistance to the incorporation of international human rights law in national legal systems still carries considerable weight, and many argue for greater national autonomy in this area.

The legal review of these decisions goes beyond the scope of this article. It is noteworthy, however, that, often, certain positions that criticize the growing limitation on the autonomy of states in addressing human rights issues often

start with a simple vision or scheme to create international norms and apply them domestically. On the one hand, they downplay the importance of the participation of social actors and local institutions in creating norms and international human rights standards. On the other, they consider the domestic application of international norms as if it were an external imposition upon the national political and legal system, without considering that this incorporation is only possible through the active participation of relevant political, social and judicial actors, and by the gradual building of consensus in various institutional settings. Although there is typically a clear boundary between the international and domestic spheres, the boundaries are blurred when the dynamic of international mechanisms is examined. There is a constant back-and-forth between the local and international spheres, both in creation of human rights norms, and in their interpretation and application. Thus, relevant social actors and local politicians often participate in the process of the creation of norms in the international sphere, through both the ratification of treaties as well as decisions issued by international organs, which interpret their provisions and apply them in specific cases. At the same time, these international norms are incorporated into national legislation by the respective Congresses, governments and judicial systems, and also with the active participation of social organizations that promote, demand and coordinate the domestic application of international norms before various state organs. The application of international norms on the national level is not a mechanical act, but rather a process that involves different kinds of democratic participation and deliberation and provides ample room for a rereading or reinterpretation of the principles and international norms in accordance with each national context²².

In regard to the ISHR, as was shown in paragraphs 2 and 3 of this article, nowadays, in contrast with the periods of dictatorship, its intervention in certain domestic matters may reflect its working relationship with diverse local actors, both public and social, that participate in the formulation of demands on the international level, including how best to implement the ISHR's standards and rulings internally²³. It is thus difficult to conceptualize its intervention as a simple limitation on the autonomy of national political processes. International intervention in this context is varied and complex, but generally has the support of strong local actors, who help apply international standards on the domestic level. For example, on occasion the ISHR has leaned on civil society to monitor government activity in the classical manner²⁴; it can also coordinate with the federal government to implement policies in the local states and provinces²⁵; occasionally it will rely on court decisions to develop guidelines that the Congress and Government can use for follow-up action²⁶; or the Governments or the Congresses ask for its intervention to help build consensus amongst the other governmental branches, such as the Judiciary²⁷, or to monitor the resistance of local social and political actors regarding the implementation of measures²⁸. Often local courts cite ISHR decisions to monitor governmental and congressional policies²⁹. We also saw that in certain cases, and in particular in "friendly settlement" negotiations, the texture of alliances is even more complex, as even public agencies petition the ISHR, sometimes in partnership with social organizations, looking to trigger international scrutiny of particular questions. With

this brief review, one does not intend to deny the importance of preserving the political autonomy of the states to address certain issues, but rather to put into perspective certain interpretative approaches about how an international justice system actually works and how it relates to national political processes.

An important factor in increasing the application of international law by national justice systems is the presence of a strong academic community that critically discusses the international system's decisions and provides input as to how judges and legal practitioners can make use of this jurisprudence. This local and regional academic community is not only indispensable in ensuring the application of Inter-American standards at the domestic level, but also to hold the ISHR organs themselves accountable and exert pressure for an improvement in the quality, consistence and technical rigor of their decisions. While recently there have been clear signs of progress, it is still not possible to verify the existence of this community at the regional level. There is little discussion and critique of the decisions of the Court and Commission, and these decisions are hardly known in several countries. The underwhelming debates that have taken place recently have resulted in a reassessment, at least on a theoretical level, of some premises. As an example, it is interesting to consider issues rooted in traditional criminal doctrine and relevant to the criminal prosecution of gross human rights violations established in the ISHR's jurisprudence and its impact on the rights of the accused, such as the principle of *res judicata* and *ne vis in idem* (MARGARELL; FILIPPINI, 2006), as well as discussions in constitutional theory about the value of the decisions issued by international human rights organs. The democratic deficiencies of these international organs, or their lack of knowledge about what goes on inside national political communities, are questioned (GARGARELLA, 2008)³⁰.

It is true that the level of compliance of particular decisions issued by the ISHR is important vis-à-vis reparation measures, as well as on measures of legislative reform, mentioned above. In both cases, some preliminary studies suggest that the highest level of compliance is found in the context of friendly settlements, where the state has the autonomy to determine how it will meet the terms of the agreement.

The main problems, however, regarding non-compliance with the IACHR's recommendations and the Court's judgments, relates to criminal investigations conducted by the state, particularly when they have closed the investigation and its reopening could affect the rights of the accused. In some countries, courts have significantly deteriorated while participating in a culture of widespread impunity, which is not limited to cases involving human rights violations. The ISHR has used its review of structural patterns of impunity to invalidate judicial decisions that attempt to close the investigation of such crimes, usually to benefit groups in power, to the detriment of a certain class of victims³¹.

There have been no significant advances in how states' internal mechanisms implement decisions issued by the ISHR's organs³². This in particular becomes an obstacle when dealing with the impositions of affirmative obligations. Complying with the reparation measures issued by an international organ requires a high level of coordination between governmental agencies, which is often not achieved. This significantly hampers the processing of the case, the work of the ISHR's organs,

and the enforcement of decisions. Effectively coordinating between agencies even within the same government is complex, and even more so when the government must coordinate its activities with Parliament of the judicial system, when the measures involved in a case require legal reforms or the filing of lawsuits. This issue is even more problematic when agencies from the federal government must coordinate their activities with state governments in a federalized system.

The Inter-American Commission and Court drafted a report for the General Assembly of the OAS about non-compliance with their decisions, but they are given minimal time to present information on the states' mechanisms of implementation. Moreover, there is no serious debate within the system on how to improve enforcement mechanisms of a political nature and attain greater commitment by the various organs of the OAS.

The most effective enforcement mechanism has been the creation of institutions of international supervision, such as follow-up hearings before the Commission or Court. Many victims' rights organizations prefer these international supervisory mechanisms to internal enforcement systems, since they realize that attempting to compensate the victims at the national level will be disadvantageous for them, in light of the state's excessive power. Only the involvement of an international organ can level the playing field (ABREGÚ; ESPINOZA, 2006).

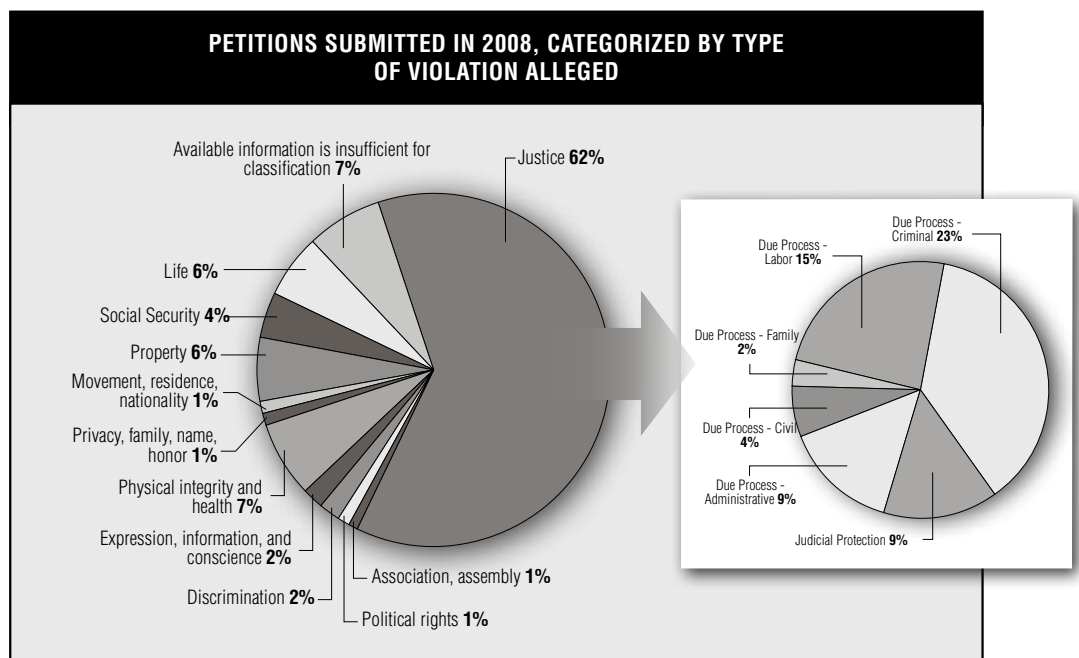
Another point to consider when examining obstacles reducing the system's effectiveness is the *kind of remedy* available, such as reparation measures in contentious cases, such as provisional or cautionary measures. Often, the remedies proposed result from suggestions made by the petitioners and victims' representatives, and there is no line of case law about this. Furthermore, the remedies are designed in accordance with a model developed during the transitional period, emphasizing the thoroughness of the investigation and determination of those responsible for the violations, and placing less emphasis on the structural problems the violations represent. The system of traditional remedies does not fully fit with the type of conflict found in the new agenda we referred to earlier, above all, when the ISHR does not limit itself to judging past events, but seeks to prevent harm and the aggravation of precarious situations, and aims to bring about the reversal of systematic patterns or overcome institutional deficiencies. This was explained more clearly in the context of the Court's interim measures in connection with prison reform. These issues involving inhumane detention conditions and structural patterns of violence tolerated by the state and federal authorities, functions as a kind of collective, international "habeas corpus" petition. They have developed an interesting debate about the kind of remedies and local and international mechanisms of supervision. The Court, at the request of the petitioners and the Commission, has gradually modified the kind of remedies imposed on the federal government and state governments, but it still has not achieved adequate compliance with its orders. The logic behind the remedies is similar to the remedies granted in the context of structural reform litigation in national courts. In this kind of case, it is necessary to balance several competing interests and give the government room to adopt measures, introducing medium term and long-term plans of action. It also seeks to protect the right to access information, and the right of victims and their

representatives to participate in shaping these policies (SABEL; SIMON, 2004, GAURI; BRINKS, 2008, ABRAMOVICH, 2009). It is still open to discussion whether these kinds of international supervision measures can be effective, without involving the national judicial system and national public organs that monitor and evaluate the situation inside the penitentiary system³³.

The persistence of low levels of effectiveness of these types of structural remedies can lead to a rethinking of all facets of the ISHR, and erode the Court's legitimacy. The ISHR has begun to develop a model of structural litigation to protect groups, without having refined it or engaged in an in-depth discussion about the limits and potentialities of its procedural rules³⁴, its system of remedies, and its mechanisms for the supervision of its decisions.

The debate about the effectiveness of international supervision is tied directly to a question that is critical to democratic processes, which is the poor performance of local judicial systems.

The chart below shows a division by topic of petitions received by the IACHR in 2008. The problems associated with the functioning of national judicial systems were the central focus, as 62% of the complaints filed are on this topic. A further breakdown of the "justice" complaints reveals that 23% dealt with due process, 15% with labor law, and 9% with administrative procedure.



Source: IACHR

Without a doubt, the response of national justice systems is critical to improving the effectiveness of the ISHR. It has taken important steps on this path by setting clear principles on what constitutes independent and impartial courts, a reasonable length of trial, the exceptional use of precautionary imprisonment, the reach of *res judicata*, and judicial review of administrative decisions, amongst others. A better

systematization of this case law can serve as the guiding framework for judicial reform policies in the region, improving the enforcement of rights in local judicial systems. The monitoring of national judicial systems is a priority on the IACHR's agenda, which can be concluded from the themes of its recent reports and documents.

The development of affirmative obligations in the field of human rights, as well as of rights that may have a collective dimension, requires determining with greater precision what constitutes adequate and effective remedies in furtherance of their protection. An adequate and accessible system of collective actions, such as collective protection, writs of mandamus, class action suits, and emergency precautionary protective measures, can promote local litigation in the public interest that allows national courts to rule on many cases heard in the international arena. The promotion of judicial remedies for local public interest litigation, in the field of human rights, is therefore also a strategy the ISHR should pursue.

7 Conclusion

Undoubtedly, the ISHR has significant legitimacy, which originated in its efforts to destabilize the dictatorships, and continued as it monitored the process of transition to democracy. In this article, it was suggested that in the present political landscape in Latin America, the strategic value of the ISHR consists in strengthening democratic institutions, especially judicial systems, and national efforts to overcome current levels of exclusion and inequality. In light of this, in addition to the efficacy of its jurisprudence and the development of its system of individual petitions, the ISHR should reflect on its political role, setting its sights on the structural patterns that impact the effective exercise of rights by disadvantaged sectors of the population. To achieve this, it should safeguard its subsidiary role to the national justice systems and ensure that its principles and standards are incorporating not only the reasoning of domestic courts, but the general trend of the laws and governmental policies.

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NOTES

1. The Court invalidated the provisions of Chilean self-amnesty in (Inter-American Court of Human Rights, *Almonacid Arellano et al vs. Chile*, 2006b). Without citing this precedent, arguments can be found in international humanitarian law and international human rights law that are grounded in the judgments of the Chilean Supreme Court, which struck down this norm (CHILE, Events that occurred in the Cerro Chena regiment, 2007).
2. In these decisions, the Court develops a basic doctrine about the relationship between human rights, procedural due process, the rule of law and democratic systems, with representational bodies reflecting the popular will.
3. See the doctrine explained by the IACHR in its most recent reports about inadmissibility, which includes declining to review criminal convictions that are allegedly unfair, given the impossibility of substituting its judgment for that of the national courts in the assessment of evidence (IACHR, *Luis de Jesus Maldonado vs Manzanilla*. Mexico, 2007d). Of course the line between reviewing court judgments or evaluating evidence of reasonableness, and observing certain procedural safeguards established by the Convention, is sometimes blurry, and requires fine-tuning technical standards.
4. See the debate about positive state obligations in electoral matters, and the deference granted to design electoral systems and political parties (IACHR, *Jorge Castañeda Gutman vs. México*, 2006, 2008c; IACHR COURT, 2008).
5. See, for example, a report about the human rights situation in a country that reflects the agenda of social exclusion and the perspective of impact on public policies: (IACHR, 2003, 2007d).
6. Regarding the value of these thematic reports, as an impactful tool at the IACHR in the context of the region's deficient democracies, see the precise analysis of (FARER, 1998). For an example of this type of thematic report, see (IACHR, 2006a). For an example of a thematic report applied in the domestic context, see (IACHR, 2006b, 2009a, 2009b).
7. See (IACHR, *Nicaragua vs. Costa Rica*, 2007). In June 2009, Ecuador's Attorney General filed a petition against Colombia with the Executive Secretary of the IACHR, alleging violations of the American Convention for the death of Franklin Aisalia, the result of a Colombia military operation in March 2008 against a FARC encampment in Angostura, Ecuador.
8. Along these lines, the Court held in the case *Niñas Yean y Bosico vs. República Dominicana* (IACHR COURT, 2005d): "*The Court considers that the binding legal principle of equal and effective protection of the law and non-discrimination mandates that the States, in regulating the mechanisms of granting citizenship, should abstain from promulgating regulations that discriminate on their face or in effect against certain sectors of the population when exercising their rights. Moreover, States must combat discriminatory practices at all levels, especially in government, and ultimately must adopt the necessary affirmative measures to ensure effective equality under the law for all persons.*"
9. The Court's interim measures are available, in the case of the indigenous people Kankuamo (Inter-American Court, 2009a), and in the case of the Afro-Colombian communities of Jiguamiandó and Curbaradó (Inter-American Court, 2009c), amongst many others. See also the situations mentioned in the context of the Colombian armed conflict (IACHR, 2008d).
10. Regarding the States' affirmative obligations to guarantee the exercise of certain civil, political and social rights of members of the indigenous communities, see the following cases: *Masacre de Plan Sanchez vs. Guatemala* (Inter-American Court, 2004a); *Comunidad Moiwana vs. Surinam* (Inter-American Court, 2005a); and *Comunidad Indígena Yakye Axa vs. Paraguay* (Inter-American Court, 2005b). Recently, this principle led the Court to reinterpret the State's obligation regarding the right to life to include a duty to ensure a minimum level of health, water and education, tied to the right to a life of dignity of an indigenous community expelled from its lands, in the case *Sawhoyamaya vs Paraguay* (Inter-American Court, 2006a) and subsequent decisions monitoring the execution of the sentence.
11. See the case *Simone André Diniz v. Brazil* (Inter-American Commission, 2002), declared admissible by the Inter-American Commission for the state's breach of a duty to protect individuals from discrimination based on color or race.
12. Regarding the obligation to adopt affirmative policies and measures to prevent, punish, and eradicate violence against women, see (Inter-American Commission, *Maria da Penha Maia Fernández vs. Brasil*, 2001a).
13. Regarding quotas in the Argentine electoral system, (Inter-American Commission, 2001b).
14. For a discussion of these notions of equality in legal philosophy and constitutional law, see the following examples (YOUNG, 1996, FERRAJOLI, 1999, GARCIA AÑÓN, 1997, FISS, 1999, GARGARELLA, 2008, SABA, 2004).
15. Regarding collective rights for the preservation of a culture and the neutrality of the liberal state, see the classic essay by Charles Taylor (1992) and Anaya (2005).
16. In this decision, the Court began to define the scope of the right to political participation enshrined in Article 23 of the American Convention and asserts that it includes participation in formal electoral processes as well as participation in other mechanisms for discussion and monitoring of

public policies. In its sentence the Court also states with greater precision the scope of the State's obligation to ensure such participation in socially disadvantaged groups that are trying to exercise this right. The Court links this right to both formal and substantive equality, which includes the right to association and political participation. On this topic, see the concurrence of Judge Diego García Sayán. To better understand the Court's reasoning in Yatama, it is helpful to read a subsequent, contrasting case about the exclusion of independent candidates, especially considering in Yatama the existence of a subordinate group with its own specific cultural characteristics (*Inter-American Court, Jorge Castañeda Gutman vs. México*, 2008).

17. Inspired by the *Airey* case, the Court held: *"the circumstances of a particular procedure, its meaning, its character and its context in a given legal system, are factors underlying the determination of whether legal representation is necessary to satisfy standards of due process"*, par. 28. In addition, the Court explicitly referenced the State's obligation to guarantee free legal services to the indigent when necessary to ensure equal and effective access to justice, in the *OC 18/03 Status and Rights of Undocumented Migrants*. In this document, the Court said: *"It violates the right to judicial guarantees and protection for several reasons: the risk the individual takes when he appears at administrative or judicial hearings of being deported, expelled or deprived of his liberty, and for the refusal to provide him with free legal services, which keeps him from fully vindicating his rights."* (IACHR COURT, Advisory Opinion OC-11/90, 1990).

18. See also the indicators on access to justice and social rights developed in the IACHR's report (2008a).

19. John Elster came up with this metaphor to refer to the constituent act in his book *"Ulysses and the sirens: studies on rationality and irrationality"* (1979).

20. For some authors, such as Andrew Moravcsik, recently established and potentially unstable democracies have more incentive to ratify human rights treaties and use international legal systems as a mechanism for the consolidation of democracy. The loss of a certain degree of self-determination that results from the ratification of these treaties and the acceptance of international jurisdiction imposes a cost in how it limits the discretion of the government and of the local political system, which gains the advantage of a reduction in political uncertainty (MORAVCSIK, 2000). Along the same lines, see Kahn, Paul W. (2002).

21. For example, see the Argentine Supreme Court's jurisprudence in cases such as *"Giroldi"*; *"Poblete"*; and *"Arancibia Clavel"*, amongst others (ABRAMOVICH; BOVINO; COURTIS, 2006).

22. Martín Bohmer's response to critics who claim international law lacks democratic validation signals that the moment of validation cannot be

limited to the celebration of treaty ratification or the approval of international norms, as it encompasses how it is interpreted and applied by courts and local politicians. International norms are thus not a finished and unambiguous product, but rather are open to different interpretations on the national level, and allow for substantial deliberation, as well as a consideration of the social and political context of each community. (BOHMER, 2007).

23. In this vein, trying to answer the question as to what states should obey international law, Harold Koh posits that the assumption of international legal obligations is the result of a *"transnational legal process"* that consists in complex sub-processes that include the articulation, interpretation and incorporation of international law on the local level, through social, legal and political mechanisms (KOH, 1996, 1997, 2004).

24. For example, when it drafts its reports, it receives information about particular situations through hearings at its headquarters, or visits to the country.

25. This can be seen, for example, in certain cases about overcrowding and violence in state prisons in Brazil and Argentina, where the ISHR's intervention has resulted in the intervention of the federal government in local penitentiary systems. Recently in Mexico, there was a friendly settlement agreement with the federal government in Mexico that led to the adoption by local states of a protocol on non-punishable abortions.

26. For example, in Colombia, the IACHR has been used the decisions of the Constitutional Court on internally displaced persons as a framework to monitor human rights situations (COLOMBIA, T-025, 2004, IACHR, 2007b, 2007e). Conversely, some of the Constitutional Court's decisions, for example on displaced women in the context of the Colombian conflict, have imposed lending obligations on the State and based its reasoning on other constitutional standards, decisions, progress reports and case-law from the Inter-American human rights system. Even a recent decision of the Constitutional Court invited the IACHR to join a compliance monitoring system of the domestic ruling (COLOMBIA, Auto 92, 2008).

27. Take, for example, the friendly settlement agreement about Peruvian amnesty in the *Barrios Altos* case, where the Peruvian government, the petitioners and the IACHR asked the Inter-American Court to define the standards on the compatibility of the amnesty laws covering gross human rights violations with the American Convention, giving national courts a legal framework for the reopening of cases. Another example includes the friendly settlement agreements on cases in Argentina about the right to truth, which helped mobilize local courts to implement the appropriate norms.

28. See for example the intervention of the IACHR in conflicts over the quasi-slave status of Guarani

Indian families in the Bolivian Chaco estates and obstacles to the implementation of legislation on land reform in Bolivia's eastern departments (IACHR, 2008b).

29. See for example the recent decision by the Criminal Cassation Chamber of the Colombian Supreme Court to limit the power of the United States to extradite AUC members who are participating in the Justice and Peace process in Colombia. The Court believes that the extradition hampers the investigation of human rights cases and the confession of the accused, affecting the victims' right to justice and truth. The Supreme Court invokes international law and gives special consideration to the decision to implement the Inter-American Court's decision in the case of the slaughter of Mapiripan. On this topic, the IACHR had previously used similar arguments. (COLOMBIA, 2009, Inter-American Court, The Massacres Mapiripan vs. Colombia. 2009b, IACHR, 2008c).

30. The author considers some questions that deal with issues ranging made from theories of deliberative democracy to the extent of authority of the decisions of international bodies to protect, many of which we acknowledge in this article. He discusses a number of problems concerning national constitutions and deficiencies in the democratic regime that internationalists usually do not consider. He engages in this discussion despite presenting a vision that, in my view, is somewhat schematic of the complex social, political and legal process that led to building a new consensus between the Argentine Congress and justice system to invalidate the amnesty laws in Argentina. For a critique involving some "communitarian" objections to the application of international human rights law in Argentina, see V. Abramovich, "Editorial", *New Criminal Doctrine*, 2007-B. You can also follow the debate between Charles F. Rosenkrantz and Leonardo Filippini (Rosenkrantz, 2005, 2007, Filippini, 2007).

31. In the case *Carpio Nicolle v. Guatemala* (Inter-American Court, 2004b), the Court has considered the concept "cosa juzgada aparente o fraudulenta" ("invalid *res judicata*") based not only on the circumstances of the judicial process being analyzed, but rather the context and existence of a "systematic pattern of impunity" for certain state-committed crimes. Again we see a perspective that aims to examine inequality in how the law is applied, benefiting privileged groups while harming disadvantaged social groups. In this case, unequal protection of the law is the basis for the disqualification of the judicial decision to close the case, and this allows the relativization of the principles of *res judicata* and *ne bis in idem* (KRSTICEVIC, 2007).

32. Colombia and Peru have sanctioned norms about implementation and the intergovernmental coordination of activities, which are models to consider.

33. See the case "Lavado, Diego Jorge and others vs. Provincia de Mendoza about declaratory action," Argentine Supreme Court (2006). The Court's decision discusses the implementation of provisional measures ordered by the Inter-American Court regarding the Mendoza Penitentiaries in Argentina.

34. For example, there is a debate about the degree of accuracy required in identification of the victims in collective cases. It is required in all cases to name each affected individual. The ISHR, which has begun to address structural problems and recognizes "group rights," should adapt its procedures to this new agenda, and to accept the identification of groups or "classes" of victims, especially in the context of reparations and cautionary protective measures. There is a risk of schizophrenia, or development in opposite directions, in equality jurisprudence and procedural decisions.

RESUMOS

O Sistema Interamericano de Direitos Humanos (SIDH) incidiu na última década no processo de internacionalização dos sistemas jurídicos em vários países da América Latina. A jurisprudência do SIDH começou a ser aplicada gradualmente nas decisões de tribunais constitucionais e das cortes supremas nacionais, e nos últimos tempos na formulação de algumas políticas estatais. Esse processo produziu importantes mudanças institucionais, mas também enfrenta problemas e obstáculos, o que tem provocado alguns retrocessos. O SIDH se encontra num período de fortes debates, que procuram definir suas prioridades temáticas e sua lógica de intervenção, num novo cenário político regional de democracias deficitárias e excludentes, diferente do cenário político que o viu nascer e dar seus primeiros passos. Este artigo procura apresentar um panorama geral de algumas discussões estratégicas sobre o papel do SIDH no cenário político regional. Neste artigo sugere-se que o SIDH deveria no futuro aprofundar seu papel político, colocando foco nos padrões estruturais que afetam o exercício efetivo dos direitos pelos setores subordinados da população. Para tanto, deverá resguardar sua função subsidiária aos sistemas de proteção nacionais, e buscar que seus princípios e parâmetros se incorporem não apenas nas decisões dos tribunais, mas também na orientação geral das leis e das políticas de governo.

PALAVRAS-CHAVE

Sistema Interamericano de Direitos Humanos – Violações de direitos humanos – Internacionalização dos sistemas jurídicos nacionais.

RESUMEN

El Sistema Interamericano de Derechos Humanos (SIDH) ha incidido en la última década en el proceso de internacionalización de los sistemas jurídicos en varios países de América Latina. La jurisprudencia del SIDH se comenzó a aplicar gradualmente en las decisiones de los tribunales constitucionales y las cortes supremas nacionales, y en los últimos tiempos en la formulación de algunas políticas estatales. Este proceso produjo importantes cambios institucionales, pero también enfrenta problemas y obstáculos, lo que lo ha llevado a sufrir algunos retrocesos. El SIDH se encuentra en un período de fuertes debates, que procuran definir sus prioridades temáticas y su lógica de intervención, en un nuevo escenario político regional de democracias deficitarias y excluyentes, diferente del escenario político que lo vio nacer y dar sus primeros pasos. Este artículo procura presentar un panorama general de algunas discusiones estratégicas acerca del rol del SIDH en el escenario político regional. En este artículo se sugiere que el SIDH debería en el futuro profundizar su rol político, poniendo la mira en los patrones estructurales que afectan el ejercicio efectivo de derechos por los sectores subordinados de la población. Para lograrlo deberá resguardar su función subsidiaria de los sistemas de protección nacionales, y procurar que sus principios y estándares se incorporen no sólo en la doctrina de los tribunales, sino en la orientación general de las leyes y las políticas de gobierno.

PALABRAS CLAVE

Sistema Interamericano de Derechos Humanos – Violaciones de derechos humanos – Internacionalización de los sistemas jurídicos nacionales.



VIVIANA BOHÓRQUEZ MONSALVE

Attorney, Universidad Autonoma de Bucaramanga, with Post-graduate Diploma in Human Rights and Democratization Processes at the University of Chile. Director, Center for Human Rights and International Litigation. Co-author of the book: *Forced Displacement in Colombian Rights: access to justice and reparations*, among other publications.



JAVIER AGUIRRE ROMÁN

Philosopher and Attorney, Universidad Industrial de Santander (UIS). Professor, School of Philosophy, UIS, pursuing Ph.D. in Philosophy at the State University of New York. Co-author of the books: *The Relationship between Language and Law: Habermas and the jusphilosophical debate*; *Justice and Rights in School Life*, among others.

ABSTRACT

This article is the result of the research conducted on “Human Dignity: Philosophical conceptualization and the implementation of law” promoted by the POLITEIA Research Group from the School of Philosophy at the Universidad Industrial de Santander, classified as category B by COLCIENCIAS. This text formulates a three-strand conceptual reconstruction of the concept of human dignity: i) the tension between its natural and artificial character (either consensual or positive), ii) the tension between its abstract and concrete character, and iii) the tension between its universal and individual character. First, the main theoretical elements of these tensions are outlined. After that, the tensions are illustrated using four Instruments of International Human Rights Law and five trials by the Inter-American Court of Human Rights. Finally, conclusions regarding the tensions are presented.

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KEYWORDS

Human dignity - Conceptual tensions - International human rights instruments - Jurisprudence - Inter-American Court of Human Rights



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TENSIONS OF HUMAN DIGNITY: CONCEPTUALIZATION AND APPLICATION TO INTERNATIONAL HUMAN RIGHTS LAW

Viviana Bohórquez Monsalve and
Javier Aguirre Román

1 Introduction

The theoretical and practical importance of the concept of “human dignity” is hard to deny. Moreover, it is a notion that can be approached from a variety of perspectives and disciplines because it is an idea that has applications in various areas of human life. Hence, it is necessary to indicate that this text will address the concept of *human dignity* from a philosophical perspective applied to the area of International Human Rights Law.

As a philosophical concept, human dignity can be traced back to Stoic thought, specifically, to its development by Christian thinker Thomas Aquinas’ medieval theory of natural law (LEE, 2008). However, despite the ancient historical, anthropological and religious roots of the concept of human dignity, its history as one of the universal values upon which human rights is based is relatively new.

This recent history, for its part, has been dominated by a great paradox: despite the existence of an almost absolute consensus that human dignity is a founding idea of human rights, the meaning and concrete scope of this idea, however, contains widespread and generalized disagreement (BOBBIO, 1991, p. 35). This disagreement exists even within Western societies and is further exacerbated if the Western and Eastern conceptions of peoples’ dignity are compared. Eastern researcher Karen Lee acknowledges this by noting that:

“Despite its prominent status in international law and many domestic constitutions, it does not have a concrete meaning or a consistent way of being defined. This lack of precision often leads judges to introduce their own moral standards amid competing claims of rights each of which has a plausible case of human dignity violation. The elusive nature of human dignity spells even greater challenges when it is evaluated across cultures”

(LEE, 2008, p. 1)

Notes to this text start on page 58.

A general review of the different theoretical approaches to human dignity reveals that any conceptualization of the term faces at least three apparent problems or contradictions (TORRALBA, 2005). These contradictions can be formulated as questions, thus: i) is human dignity a natural quality of human beings or is it, instead, a consensual aspect created by political will or state legislation ? ii) is human dignity an abstract value or, conversely, is it possible to define it in relation to concrete aspects of human life? And iii) is human dignity absolute and universal or, conversely, is it a particular value, dependent on historical, cultural and even individual contexts?

Nevertheless, to avoid falling into possible false dilemmas, it is more appropriate to rephrase the specific problem of this research as a conceptual reconstruction of three tensions involving the concept of human dignity, namely: i) the tension between its natural and artificial character, ii) the tension between its abstract and concrete character, and iii) the tension between its universal and individual character.

This reconstruction will take place in three stages. First, each of the three tensions will be expressed in a theoretical manner. Subsequently, the three strands will be identified by International Human Rights Law to obtain a better insight and to prove their existence; for this, first, four international human rights instruments that contain explicit references to the idea of human dignity, namely: the American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; and the Convention on the Prevention, Punishment and Eradication of Violence against Women, “Convention of Belem do Para”, will be used as study material. After this, five Inter-American Court of Human Rights’ sentences will be analyzed in order to show how these tensions can be identified in specific human rights violations. Finally, the third and final section will present some conclusions.

However, before developing the above, it is important to specify the following details on the nature and scope of this text. Firstly, it should be noted that the text presents itself as an exploratory essay on the theme of human dignity in the context of international human rights treaties and its jurisprudential interpretation in the Inter-American Court of Human Rights. Consequently, a number of important questions will remain unresolved. Questions asked, for example, from historical, political, rhetorical-discursive and even sociological perspectives would undoubtedly extend the analysis. We hope, nonetheless, that despite these limitations, this paper will contribute to the debate about the role that human dignity has played (and can play) in the favorable interpretation of human rights.

2 Conceptual tensions of human dignity

In the explanation of the three tensions identified as occurring in the concept of human dignity in this study, the following presentation strategy will be adopted. First, one pole of each tension will be presented followed by a problematic aspect, after which the same procedure will be presented with the tension’s second pole , and, finally, a synthesis of the tensions will be presented.

2.1 *The tension between the natural or consensual character of dignity*

The first of these tensions concerns the idea, enunciated in various international documents on human rights and modern constitutions, according to which dignity is a “natural” characteristic with which all human beings are born., thus, being, naturally endowed with an attribute called “dignity”, just as each human is endowed with reason, for the simple reason of having been born. In this way, dignity appears as the defining element of the idea of human nature, which, in principle, would essentially characterize every being that is part of the human species, regardless of random features such as place of birth, ethnic origin, social status, gender, etc. From this perspective, it is nature itself, or God, who gives every individual who belongs to the human species this essential attribute called “dignity”, an attribute that, therefore, would be present in humans from the moment of conception (SOULEN; WOODHEAD, 2006, p. 8). Hence, the individual, on the one hand, has no choice but to accept such an attribute since it is much more intensely a part of his being than, say, his arms or legs; on the other hand, his co-humans and the State would have no other option but to recognize his dignity, since it is not they who have granted it to him.

The metaphysical burden of this idea is as obvious as it is problematic, particularly in complex and pluralistic societies, such as in the present, where the idea of “a single human nature” seems untenable. For example, Mary Ann Glendon asks, “Is the universal rights idea merely based on a kind of existential act of faith? While ‘defending human dignity for all’ sounds a laudable goal in political debates, there are open questions as to what ‘the right to equal human dignity’ means, and it is not clear how far dignity could be counted on as an anchor for rights amid competing visions of human dignity in the pursuit of a good life”(GLEDON, 1999, p. 3).

Also, Serena Parekh recalls how these questions about “natural dignity” arose among the members of the committee that drafted the Universal Declaration of Human Rights:

“The question of whether human rights should be grounded in something that was considered ‘natural’ or essential to human beings was at the heart of the debate on the first international human rights document, the Universal Declaration of Human Rights (UDHR). The tension between the desire for a truly universal theory and the fear of relying on metaphysical concepts can be seen in these debates”.

(PAREKH, 2007, p. 763).

The first conceptual tension becomes evident when affirming, as opposed to what has been said above, , that the idea of human dignity is an artificial characteristic attributed consensually to all human beings because it is useful, nevertheless, it has no correspondence to an alleged reality of human nature since the existence of the latter is doubtful. Thus, it is not true that human beings are born with dignity, as if it were a natural or essential attribute; rather, it is a moral, political and especially legal fiction which is predicated on all members of the human species. Therefore it is the States, especially the constitutional States that are respectful of rights and liberties, that create the juridical-political principle of human dignity. This belief is

created largely as a way of trying to secure peace and peaceful human coexistence (HOERSTER, 1992). The fragility of the argument is revealed as obvious and problematic since the utilitarian principle could ultimately be used to justify anything, such as, for example, that the same peace in human society temporarily needs some members of the species not to be considered as bearers of this fiction called “dignity”.

In summary, this tension focuses on the very foundation of the concept of human dignity as a justification of human rights, and is closely related to the discussions between jusnaturalism and juspositivism.

2.2 The tension between the abstract or concrete character of dignity

The second tension concerns the level of abstraction or, on the other hand, concreteness possessed by the idea of human dignity (ASIS, 2001, p. 37). In principle, since the Enlightenment led by Kantian practical philosophy, human dignity has been considered as a general requirement under which each human being is an end in itself which, therefore, cannot be manipulated for any other purpose. This translates into a moral maxim according to which every rational human being should treat himself and all human beings who share this “attribute” as an end in itself and never as a means. Kant, as everyone knows, tried to develop an alternative to utilitarian ethics, based on the idea that every human being is endowed with a “self-legislating” ability due to his innate freedom, as well as to his rationality and some sense of duty towards all mankind. In this sense, for Kant, every human being who has the freedom to follow reason and moral imperatives is endowed, by this very fact, with universal human dignity (KANT, 2002).

One problem at this level of conceptualization is the fact that one can hardly be in contradiction with it. However, this character of unquestionable truth can be explained by the fact that it is a completely empty definition. In other words, the abstract idea of dignity is at risk of lacking practical content. This is why disagreements start to appear when this idea is translated into more concrete aspects of social and political life as, for example, having certain rights and possibilities (certain employment, education, social relations, etc.).

Thus, in addition to the necessity of accepting an abstract notion of human dignity, the opposite pole of this second tension emphasizes the necessity to define dignity more specifically permitting higher levels of verification. Among the aspects of this increased specificity one would find, *inter alia*, the freedom to choose a profession and also the guarantee of receiving fair remuneration for it; the possibility of obtaining education and also the freedom to choose what kind of education; the enjoyment of certain fundamental rights that define what a human being is, such as private property; and also the enjoyment of the material means necessary for a worthwhile life, etc. (PECES-BARBA, 2003, p. 77). This illustrates that, indeed, behind the idea of human dignity, is the idea of “living well”, a notion that nobody would accept to be defined only in formal and abstract terms.

The second tension, therefore, consists of the need for any definition of human dignity to be clearly related to specific aspects of human life itself. In this sense, if human dignity is defined, for example, as “always being treated as an end and not

as a means”, such a definition generates the need to clarify in which cases there is one (being treated as a means) and in which cases there is the other (being treated as an end). However, the risk with this logic is that of misrepresenting the very idea of dignity in such a way that it would be converted into specific, convenient, quotidian and even irrelevant issues. In some ways this is the criticism that was formulated several years ago by Hannah Arendt. According to her, the recumbent conceptual confusion of the Universal Declaration of Human Rights soon would lead to “philosophically absurd and politically unrealistic claims such as that each man is born with the inalienable right to unemployment insurance or an old age pension” (ARENDT, 1949, p. 34).

In summary, in this second tension, it is evident that in addition to a definition, any concept of human dignity seems to require, in and of itself, some privileged “places” and “ways” of exercising it.

2.3 The tension between the universal or individual character of dignity

In this third case, the first pole of this tension is based on the idea of the existence of an absolute and universal value, as human dignity would be, which would belong to every human being at all times and places. In this respect, human dignity would be one only, applicable to every individual of the human species (PICO DELLA MIRANDOLA, 1984, p. 50).

This character is, however, highly problematic because, in so far as dignity is related to the idea of a *good life*, it is hardly plausible to say that this could be absolutely universal. By contrast, the idea that each culture has developed, in different times and places, an idea of “living well” and, in this sense, an idea of dignity seems to be more acceptable. In this sense, according to Karen Lee,

“Human dignity becomes a value behind different ways of life as societies describe their own conceptions about how humans should relate to one another. When people in Western-style democracies in general regard liberalism as the cornerstone of worthy human existence, in many Asian cultures, the rights and freedoms of individuals are intertwined with their duties and roles as determined by religion or convention”

(LEE, 2008, p. 30).

This is why the polar opposite of the third tension, namely, the individual nature of dignity, refers to the fact that more than one “human dignity” what really exists is a multitude of dignity ideas, each one specifically located in culturally and historically determined social groups. Thus, one could speak of the dignity of human beings as a Latin American, or as an Easterner, or as a woman, or as a Native American, etc. (FERNANDEZ, 2001, p. 53).

What is involved is the necessity of the existence of a universal discourse that really encompasses all human beings without any other distinction, a claim that risks becoming empty discourse, as in the previous tension, since it seems clear that humans suffer and have needs not as human beings in general, but, say, as exploited workers or as women

or as indigenous peoples, etc. However, the risk at the opposite pole of this tension is to rip asunder idea of “human dignity” into an infinite variety of individual dignities.

With regard to the first tension, the third seems to revive those elements that were previously regarded as “accidental” (ethnicity, gender, etc.) to establish them as being essential for the definition of the individual dignity of the members of that ethnicity, gender etc. Finally, this is intended to indicate, that, ultimately, all three tensions are closely related.

3 Human Dignity in International Human Rights Law

In this second section, an analysis of four international human rights instruments will be provided in relation to the tensions identified in the concept of human dignity. How the theoretical tensions regarding human dignity have been translated into the practice of the Inter-American System of Human Rights will be studied and identified; subsequently, a study of the jurisprudence of the Inter-American Court of Human Rights as related to human rights violations and the application of the principle of human dignity will be conducted.

3.1 *Human Dignity in International Instruments*

a. The American Declaration of the Rights and Duties of Man

In the American Declaration of the Rights and Duties of Man, there are three explicit references to the concept of “human dignity”. The first appears in the first paragraph of the Declaration, according to which “The American peoples have acknowledged the dignity of the individual”. In line with the rest of this document, the American peoples have recognized in their Constitutions that the juridical and political institutions’, which were established to govern life in society, main purpose is to protect the rights of human beings and to create circumstances that allow them spiritual and material progress and the pursuit of happiness. The second allusion is found in the Preamble to the Declaration, which states that “All men are born free and equal, in dignity and in rights”.

These two references illustrate the first of the three tensions around dignity, namely, its jusnaturalist-essentialist character versus its consensual or political-positive character¹. The first of which is in the text of the Preamble, where dignity is located as the birthright of every human being, as if it were a defining characteristic of one’s nature or essence. The second character appears in the quotation in which the people of America are defined as those who, due to the juridical-political principles expressed in their constitution, have conventionally “placed” a very useful and relevant, but not necessarily natural, feature in human beings, namely, human dignity. To the extent that it is pointless to dignify that which from the beginning has always had dignity, such “dignification” is achieved historically and through the juridical-political process that develops the will and consensus of the States.

The third reference is explicit in Article 23 of the Declaration, which guarantees the right to private property. According to this article, “Every person has a right to own

such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home”. This reference illustrates the second of the tensions identified, i.e., the abstract character of dignity vis-a-vis their concrete manifestations. One should not underestimate the fact that of all the rights listed in the American Declaration, the concept of dignity appears only explicitly related to one of the rights contained therein, namely, the right to private property. The idea of dignity that expresses its essence and which defines all human beings, either naturally or positively, is limited, as it appears upon the right to private property and not dependent upon other rights such as equality, freedom, free expression, education, etc. Thus, having a valuable human life, which is what ultimately expresses the idea of “human dignity”, would be exhausted with the pleasure and enjoyment of the right to private property and not, for example, with active participation in the public and political life of the State.

Certainly, in light of the American Declaration, one could clearly develop a broader conception of what human dignity is. A systematic interpretation of the entire Declaration (especially of its Duties) could offer results in this regard. The above considerations should be understood, if one recalls, in connection with the illustration of the existing tensions around the understanding and the normative and jurisprudential development of the concept of “human dignity”. In this sense, the American Declaration of the Rights and Duties of Man (1948) is paradigmatic, unlike other subsequent international instruments, in that only it is alone explicitly to relate human dignity with the right to property.

b. The Universal Declaration of Human Rights

In the Universal Declaration of Human Rights, there are five explicit references to the idea of human dignity, two of which can be found in the Preamble and the remaining three in the articles.

In the first of the references in the Preamble, the Declaration seems to be committed to a naturalistic conception of human dignity since it is referred to as being “intrinsic” to all human beings. In this sense, dignity, as an intrinsic feature of every human being, pre-exists all juridical-political acts. Thus, juridical-political actions cannot “dignify” human beings, since dignity is already found in everyone inherently; the only thing one can do is to recognize that dignity, which, according to the Declaration, is necessary to realize the political and social principles of freedom, justice, and world peace.

Consistent with this, the fifth paragraph of the preambles states that the peoples of the United Nations have reaffirmed their “faith” in the dignity of the human person, which can be understood as a concession to the naturalistic idea, and if one desires, to the metaphysical conception of dignity as an essential attribute of every human being, a notion that for lack of an irrefutable demonstration can only be believed and accepted with the commitment to “promote social progress and better standards of life in larger freedom”.

Furthermore, Article 1 of the Universal Declaration almost exactly reproduces the first line of the Preamble of the American Declaration quoted above by saying that “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit

of brotherhood". Once again, dignity is attributed to the biological fact of the birth of every human being, as if it were a defining characteristic of its nature.

However, the remaining explicit allusions to dignity that appear in Articles 22² and 23³ do show a considerable difference with respect to the American Declaration as dignity is not directly related to property rights but to the rights to social security and work. This suggests that in this international instrument, the abstract idea of dignity becomes more concrete due to the correspondence with the above mentioned rights.

A historical explanation of this difference would indicate that this divergence is due to the North American influence in the first Declaration in contrast to the presence of the socialist countries participating in the second. However, without intending to deny the value and veracity of explanations developed from that perspective, to the extent that this research has a theoretical framework and a philosophical rather than historical methodology, what is important is to show the conceptual tension that exists when considering that human dignity is, so to speak, closer to property rights than to other social or political rights, such as social security or work. In any case, historical explanations constitute a great help for the identified purpose while aiding understanding that the idea of what is proper for a human being or, in other words, that which gives value to human existence, is, ultimately, dependent on political, social, cultural, and historical circumstances. This dependence immediately evokes the third of the identified conceptual tensions about human dignity, that is, the contradiction between its alluded to universal character vis-a-vis its historical and individual reality.

It is clear that from a socialist perspective what one conceives as valuable and desirable for all human beings differs greatly from that which is conceived from a liberal or capitalist perspective. However, the very idea of dignity always demands a remoteness and an abstraction of these particular and concrete circumstances that produce it. This underscores the third of the tensions that have been identified around the idea of human dignity, namely, the tension between its universality versus its individuality. This tension may be found more clearly in the fourth international instrument under discussion, namely, the Convention of Belem do Para.

c. American Convention on Human Rights

In the American Convention there are three explicit references to the idea of human dignity, all of which are found in its articles. Also, the Preamble to the Convention is permeated with direct allusions that are committed to some idea of naturalistic human dignity to the extent that rights are consistently defined as "essential rights of man [which] are based upon attributes of the human personality".

Article 5 of the Convention is directly linked to dignity with the right to personal integrity while it establishes in Section 2, "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

Article 6 relates to dignity with freedom from slavery and servitude by indicating in Section 2 that "Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner."

Once again, one could envisage a causal explanation linking this direct

relationship between dignity and rights as outlined above with the experiences of Latin American dictatorships in the twentieth century—dictatorships that committed much of their extraordinary constraints and deprivations through massive violations of freedom. However, as noted above, for the purposes of this research, these explanations, although probably true, are only relevant in that they shed light on the internal tensions that have built the concept of human dignity. Thus, despite the reiteration made in the Preamble to the American Convention, according to which the ideal of a free human being can only be realized “if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights” and, also, in spite of the same Article 26 of the Convention⁴, the explicit idea of dignity that exists in such an international instrument is not linked to economic, social or cultural rights but to the rights mentioned above that are part of the tradition called first generation rights.

Thus, it is perfectly consistent with the aforementioned that Article 11 of the Convention establishes explicit protection for dignity; this protection is directly related to honor. This implies that although dignity does not appear linked only to private property, as was the case with the American Declaration of the Rights and Duties of Man, the document continues to conceive of it as something that refers exclusively to the private realm, as stipulated in Section 2 of that article: “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation”.

d. Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, “Convention of Belem do Para”

In the explicit references to dignity in the *Convention of Belem do Para*, the three identified strands once again appear. In effect, Article 4 of the Convention concerns the right of women to be respected, in “the inherent dignity of her person”. Similarly, the same Article also states that the rights of women include their right to the protection of her family. Therefore, following the same line of argument developed in the three previous international instruments, a reader of this Convention may well be interested in the reasons that led to the expression “the inherent dignity of her person” to be expressed jointly and immediately after the idea of family. Once again, the concrete “place” which holds the reference to dignity cannot be accepted so innocently and meaninglessly, in the same way that it could not be in the previous instruments, in which, one will remember, dignity appeared related directly with some rights but not with others. Consequently, it might be suspected that despite the great progress that has been made in the world as a result of this Convention, it would seem to include a traditional idea, namely that it accepted that the privileged locus for the dignity of women (the one where this dignity becomes more concrete) is found in the family.

The Convention of Belem do Para also lets one observe the third of the tensions identified, namely, the universal or individual character of dignity. In the case of the present Convention, this tension takes a different form than those identified before. On the one hand, we have the assertion in the introduction of the Convention that “violence against women is an offense against human dignity”. This proposition, as one can see, suggests an abstract and universal idea of a single human dignity that

is thwarted and attacked by any act of violence against women. Note that this may involve both an offense against the dignity of women suffering the violent event as well as an offense against the more abstract idea of human dignity represented as the dignity of the human species as a whole. That is to say, from this standpoint, any act of violence against women is a direct affront to the dignity of humanity, composed of all human beings, men, women, etc., to the extent that such a fact would be found based on an idea of the superiority of men over women, a notion that is unacceptable in relation to the ideal of a humanity composed of free and equal beings, whose existence has value in and of itself, in each individual belonging to the human species.

On the other hand, the Convention, in Article 8, also makes a direct allusion to the idea of dignity, but this time no longer understood as a characteristic of the whole human species but as a particular attribute of every woman. In fact, letter g) of that article provides that party States should adopt progressive measures and programs “to encourage the communications media to develop appropriate media guidelines in order to contribute to the eradication of violence against women in all its forms, and to enhance respect for the dignity of women”. Therefore, the Convention presents an individual idea of dignity, so to speak, that corresponds to and originates from the fact of being a woman. This means that not only would there be an overall human dignity but also the special dignity of the human being called woman, a specific dignity, different and self-originated from the “woman being”. This perspective would seem to be based on those critical approaches that indicate that behind the alleged universality of the same human rights, there really lies an individual and specific idea of human being, namely, the idea of man, bourgeois, Western, Christian, heterosexual, white, etc. As such, this dominant idea of dignity that intends to impose itself universally would be contrary, or at least different, from other ideas of dignity (dignity of women, indigenous peoples, African descents, homosexuals, etc.) that appear particular only in so far as one is opposed to them. Yet this opposition neither removes these individuals nor their right to exist. However, one could also think that what appears is not an adversarial relationship between two particular ideas of dignity (one of which falsely appears to be general) but rather a complementary relationship between a general idea of general human dignity and a particular idea of dignity, for example, of women. In any case, the tension between the alleged universalism versus individualism of the idea of dignity is evidenced by the reference discussed in this Convention.

3.2 Human dignity in the jurisprudence of the Inter-American Court

The study of inter-American jurisprudence permits one to illustrate the way in which the theoretical and philosophical principles of the International Human Rights Treaties materialize in enforceable rights that are embodied in specific cases. Thus, judges have the task of determining the extent of the law and the scope of protection in practices that are contrary to international principles.

Next, five judgments from the Inter-American Court of Human Rights (IACHR COURT, hereafter IACHR), where the protection of human dignity recognized in the inter-American instruments of protection have been invoked, will be analyzed. The sentences studied correspond to different periods of publication,

which permits one to observe the evolution of the Inter-American Court's judgments and its line of interpretation with regard to human dignity vis-a-vis the various human rights violations alleged by the parties.

a. Velasquez Rodriguez vs. Honduras

The facts of the case have to do with the “disappearance” of Manfredo Velasquez by the Honduran Armed Forces. The IACHR studied the human rights violations resulting from the forced disappearance and the State's role as guarantor. In this sense, the IACHR affirmed:

“Without question, the State has the right and duty to guarantee its own security. It is also indisputable that all societies suffer some deficiencies in their legal orders. However, regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action”

(IACHR, Velasquez Rodriguez vs. Honduras, 1988, para. 154).

In addition to the above, the IACHR emphasized the violated rights of people illegally detained:

“Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the individual and a violation of the right of respect for any detainee's inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the individual's personal integrity.

(IACHR, Velasquez Rodriguez vs. Honduras, 1988, para. 156).

The range of human dignity and the State's role as guarantor discussed above are reinforced by the Court by recalling that:

“The first obligation assumed by the States Parties under Article 1(1) is ‘to respect the rights and freedoms’ recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State. On another occasion, this Court stated: ‘The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the State has but limited access’”

(IACHR, Velasquez Rodriguez vs. Honduras, 1988, para. 165).

The IACHR also reiterated the range of the rights that had been violated in the basic sentence since it was related to forced disappearance:

“The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention”
(IACHR, *Velasquez Rodriguez vs. Honduras*, 1988, para. 158).

Considering the above, the Velasquez Rodriguez Case is a valuable reference to demonstrate all of the argumentative force that results from considering human dignity as being inherent to the nature of every human being, as expressed by the IACHR itself. Indeed, from this perspective it is clear that, as shown by the decision of the Court, the liability that a person could have for having committed a grave crime against the security of the State itself can not imply, in any way, that said State could carry out acts that violate the dignity of that person or of other people. Human nature does not change as the result of having committed any crime, which means that even the worst criminals are still human beings with dignity and, therefore, should be well treated by the Democratic States.

Conclusions might be different if one considered that human dignity is a principle generated by a social and political consensus since, from this perspective, it seems justifiable that individuals who by their very actions reject this consensus are not entitled to the benefits to be derived therefrom. This idea, in fact, seems to be that which dominant contemporary discourses wish to impose about the fight against terrorism.

Secondly, the IACHR maintains that illegal detention or the forced disappearance of persons causes a definite risk of infringing on other rights, such as the right to physical integrity and the right to be treated with dignity. Thus, this establishes a presumption of risk when faced with a particular practice that violates human rights, which translates into a measure that defines the scope of human dignity. In this sense, the Court turned the abstract idea of dignity into concrete form by indicating that prolonged solitary confinement and incommunicado detention represent, in and of themselves, forms of cruel and inhuman treatment that contradict dignity. Thus, it is clear that the tension between the abstract and the concrete nature of human dignity finds its resolution in the courts to the extent that it is part of its work to determine the precise meaning of what is a “violation of human dignity” in the cases Brought before it.

b. Carmen Caballero Delgado and Santana vs. Colombia

In this case the petitioners alleged that Carmen Caballero Delgado and Carmen Santana, at the time of their disappearance, were tortured and some witnesses stated that Carmen Santana was seen naked, which was claimed to be a violation of the right to human dignity and personal integrity.

Faced with the accounts of some witnesses about Carmen Santana’s nakedness, the Court stated that:

“this Tribunal does not find sufficient evidence to demonstrate that Isidro Caballero-Delgado and Maria del Carmen Santana had been subjected to torture or inhumane

treatment during their detention, since that allegation is based solely on the vague testimony of Elida Gonzalez-Vergel and Gonzalo Arias-Alturo and was not confirmed by the statements of the other witnesses”

(IACHR, Caballero Delgado and Santana vs. Colombia, 1995b, para. 53).

Consequently, due to a controversial assessment of evidence, it was left undetermined whether the forced nakedness that was inflicted on Carmen Santana, according to accounts of two witnesses, at the time of the arrest by the army, is a fact that undermines human dignity and, especially, the human rights of women.

On this point, it is worth noting that Judge Maximo Pacheco filed a dissenting opinion in relation to the aforementioned point. According to the judge: “(...) 2. No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person” (IACHR, Caballero Delgado and Santana vs. Colombia, 1995b, Dissenting Judge Maximo Pacheco Gomez).

Due to the above, the majority’s position generates the following concerns in relation to the natural conception of human dignity which had been accepted until then. Indeed, if human dignity really originates in the very nature of the person, it seems inconsistent to believe that its violation should be subject to stringent tests. On the other hand, such naturalness would seem to require a *prima facie* belief for a of its potential vulnerability. Moreover, one could very well think that the fact of being a woman reinforces the idea that dignity must be particularized and understood differently in the case of particularly disadvantaged or vulnerable subjects. However, one must also take into account that at the time these points were not as clear to the IACHR, since this is a sentence dated in 1995, the same year in which the Convention of Belem do Para went into effect.

c. Neira Alegria et al vs. Peru

In this case, the responsibility of the State in the disappearance of Victor Neira Alegria, Edgar Zenteno-Escobar, and William Zenteno Escobar is debated. These people were detained in prison, as defendants, as alleged perpetrators of terrorism, and disappeared at the time that the armed forces took control of the penal institutions. For this reason, the Inter-American Commission alleges violation of Article 5.2 of the Convention relating to personal integrity and human dignity.

Upon studying the facts, evidence and possible violations of the alleged rights, the Court states the following:

“This Court considers that in this case the Government has not violated Article 5 of the Convention. While the deprivation of a person’s life could also be understood as an injury to his or her personal integrity, this is not the meaning of the cited provision of the Convention. In essence, Article 5 refers to the rule that nobody should be subjected to torture or to cruel, inhuman, or degrading punishment or treatment, and that all persons deprived of their liberty must be treated with respect for the inherent dignity of the human person. It has not been demonstrated that the three persons to whom this matter refers

had been subjected to cruel treatment or that the Peruvian authorities had damaged their dignity during the time that they were being detained at the San Juan Bautista Prison...”
(IACHR, *Neira Alegria et al vs. Peru*, 1995a, para. 86).

At this time, this brief reference made by the IACHR is useful to clarify the tensions of the concept of human dignity insofar as it clarifies that, although dignity is understood as inherent to the nature of human beings, it is not possible to identify it absolutely with the existence of life, because, as noted by the Court, human dignity has an autonomous and different sphere of meaning. Therefore, in this and in most other cases, the Court does not profoundly develop a specific concept of what should be understood by human dignity in the Inter-American system. This reference, along with all the others, creates a meaning that unfolds over all cases. This meaning, as noted above, is what really makes concrete, at least in legal terms, the abstract meaning which, in itself, contains the concept of human dignity.

d. Case of the “Street Children” (Villagran Morales et al) vs. Guatemala

In the ruling on the Villagran Morales et al landmark case, known as “The Street Children vs. Guatemala”, the kidnapping, torture, and murder of five youths who lived on the streets, two of whom were minors, is discussed. In this case it is disputed whether there was a failure of the State mechanisms to address these violations in court and convict those who were responsible. During the trial, it was revealed that four of the victims were placed in the trunk of a vehicle. As a result, the Court stated that “even if no other physical or ill treatment occurred, that action alone must clearly be considered to contravene the respect due to the inherent dignity of the human person” (IACHR, “Street Children”- Villagran Morales et al vs. Guatemala, 1999, para. 164).

The Inter-American Court, with regard to illegally detained people, recalled that “a person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to being treated with dignity, will be violated” (IACHR, “Street Children”- Villagran Morales et al vs. Guatemala, 1999, para. 166).

Overall, in this case the IACHR required two elements to identify and define the violation of human dignity: *i.* conditions of people’s special vulnerability and *ii.* the context in which the violations take place. Thus, faced with evidentiary problems that had arisen in cases like *Caballero Delgado and Santana vs. Colombia* and *Neira Alegria et al v. Peru*, the tensions were resolved by putting into the balance the elements aimed at specifying and particularizing the human dignity of the victims in terms of an inherent human attribute.

For its part, the separate vote of judges A. A. Cancado Trindade and A. Abreu Burelli, recalls that:

“The duty of the State to take positive measures increases precisely in relation to the protection necessity of the life of vulnerable and defenseless persons, in situations of risk, such as children in the streets. The arbitrary deprivation of life is not limited, thus, to

the illicit act of homicide; it extends likewise to the deprivation of the right to live with dignity. This position conceptualizes the right to life as belonging, both to the domain of civil and political rights, as well as of economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights”

(IACHR, “Street Children” - Villagran Morales et al vs.

Guatemala, 1999, Separate vote of judges.

A. A. Cancado Trindade and A. Abreu Burelli, para. 4).

Additionally, the separate vote notes the constraints that must be taken into account because the case is dealing with children and their particular vulnerability: “The needs of protection of the weaker, such as children in the streets, require definitively an interpretation of the right to life so as to comprise the minimum conditions of a life with dignity” (IACHR, “Street Children” - Villagran Morales et al vs. Guatemala, 1999, separate vote by judges. A. A. Cancado Trindade and A. Abreu Burelli, para. 7).

These separate votes are of the utmost importance since they return to the connection between human dignity and life, but, this time, the judges indicated that dignity cannot simply be a concept that applies only to limit any abuse by the State power in relation, for example, to private property, life, personal integrity, etc. Even if one cannot say that this is part of the majority decision, the separate votes really open a space to indicate that human dignity is not limited solely to the protection of these rights but actually relates to the enjoyment of some minimum conditions for a “decent life”. Thus, the interpretative work of the IACHR continues, even if it is in the separate opinions, solidifying the abstract meaning of human dignity to extend it to “the domain of civil and political rights, as well as economic, social and cultural rights, thus illustrating the interrelation and indivisibility of all human rights” (IACHR, “Street Children” - Villagran Morales et al vs. Guatemala, 1999, separate vote by judges. A. A. Cancado Trindade and A. Abreu Burelli, para. 4).

e. Case of the Miguel Castro Castro Prison vs. Peru

The Inter-American Human Rights Commission filed before the Court a demand to declare the Peruvian State responsible for the violation of human rights of 42 inmates who died, 175 inmates who were wounded, and 322 prisoners who were subjected to cruel, inhuman, and degrading treatment.

The IACHR, upon analyzing the extent of violations arising from the fact that the inmates were subjected to forced nudity during periods of time states:

“...it is necessary to emphasize the fact that said forced nudity had especially serious characteristics for the six female inmates who, as proven, were submitted to this treatment. Likewise, during the entire time they were in this place, the female inmates were not allowed to clean themselves up and, in some cases, in order to use the restroom they had to do so in the company of an armed guard who did not let them close the door and who aimed their weapon at them while they performed their physiological needs (supra para. 197(49)). The Tribunal considers that these women, besides receiving a treatment that violated their personal

dignity, were also victims of sexual violence, since they were naked and covered only with a sheet, surrounded by armed men, who apparently were members of the State police force. What qualifies this treatment as sexual violence is that men constantly observed the women.”
(IACHR, *Criminal Castro Castro Prison vs. Peru*, 2006, para. 306).

The decisive factors in this case that characterized the violation of human dignity were based on the circumstances in which the events unfolded, i.e., not only the deprivation of freedom, but the subjection to nudity, to being observed, among other considerations, which the Court described as degrading, obviously taking into account that these prisoners were women.

According to the criteria of the Inter-American Court, based on the Convention of Belem Do Para, certain violations against women are inadmissible and particularly serious because they are particularly vulnerable and discriminated against in various areas. Therefore, dignity is not the same for everyone as this case reaffirms the idea that if subjects are especially vulnerable, the protection of human dignity must be strengthened, i.e., in the case of women, children, and indigenous peoples, the concept of dignity demands different obligations of the States.

4 Conclusions

From a theoretical viewpoint, the three conceptual tensions regarding human dignity seem unsolvable when faced with the difficulty of the problems that they present. Indeed, dignity is either natural to human beings, therefore, it antedates every social, legal, or political act, or, conversely, it is an attribute created by the dynamics of the juridical-political systems of modern societies. On the other hand, the right to human dignity is either an abstract value defined in formal terms and, therefore, ambiguous, or it is a specific value that is embodied in various spheres of human life, such as the right to property, personal integrity, social security, etc. Finally, either there is only one notion of human dignity that applies to all people without distinction of culture, class, gender, or other “accidental” attributes, or, conversely, human dignity is a concept that is necessarily qualified by these individual participation in various different social groups.

Furthermore, a systematic reading of the various international human rights treaties does not seem to suggest an answer to the above questions since, on the contrary, such a reading proves the existence of these tensions within the international documents. In this sense, the theoretical problem persists and even intensifies because each day new international documents appear (resolutions, treaties, conventions, declarations, etc.) which intend to recognize the existence of certain social groups which, in one way or another, had become invisible due to the generalities of existing documents to date. Recent cases of the rights of indigenous peoples and even religious groups illustrate this assertion.

But amid these conceptual uncertainties, there is one safe constant: the judicial decision. Indeed, irrespective of the level of difficulty a case presents, or whether or not there are theoretical doubts about the extent of certain concepts, such as human dignity, the judge always has the absolute obligation to make a decision.

Therefore, as shown, the jurisprudence analyzed participates at another level

in the theoretical debate about the tensions of human dignity. For this purpose, the main value of the court rulings is that through them, implicitly or explicitly, the judges are defining the range and meaning of certain terms and, especially, are making concrete that which, in principle, seems hopelessly abstract.

Thus, the jurisprudence of the IACHR that was analyzed and the inter-American precedents in relation to the range and protection of the right to human dignity have common roles in what concerns their applicability in certain situations.

As a first ruling, the Velasquez Rodriguez Case marks the interpretation line of the Court regarding the right to human dignity and the characterization of particular practices like the practices of forced disappearance, partly in response to the plight of many Latin American countries as the result of military dictatorships and gross practices of human rights violation.

However, the jurisprudence of the IACHR shows several cases of ambivalence when trying to translate human dignity into concrete facts in part, admittedly, because it is dealing with violations that are difficult to prove due to the ageing of the facts. Thus, the IACHR prefers, in some cases, to appeal to the lack of evidence to avoid a problematic substantive ruling. In other cases, the IACHR argues lack of cooperation on the part of national authorities and/or over-valuation of the context existing when the events occurred or, also, chooses to condemn the State assuming its defaulting on its duty to respect and guarantee human rights.

Given the evidential problems of lack of clarity in the events that constitute the violation of international treaties currently in different courts, both international and domestic, courts have been at the task of broadening the perspectives of interpretation and have used different decision criteria: pro person, pro worker, pro diversity, pro child, preferred position, special vulnerability, etc. These criteria seek to protect the human dignity of those who are threatened and vulnerable in different ways. In this regard, Judge Cecilia Medina warns:

“if we consider that one of the elements to interpret international norms is taking into consideration the object and the purpose of the treaty, which both aim at the protection of human rights, one cannot but conclude that the interpretation must always be in favor of the individual (a pro person interpretation). This being so, it follows that the formulation and scope of rights must be interpreted broadly, while restrictions on them require a restrictive interpretation...A pro person interpretation is, thus, an important feature of the interpretation of the norms about human rights, which is the north that should guide the interpreter at all times”

(MEDINA, 2003, p. 9).

Therefore, dignity is not only a right or a recognized principle in international treaties but it is also reborn as interpretive criterium in favor of broader human rights. Overall, it is undeniable that the general and abstract principles of international protection treaties that protect human dignity of all people have a range of shades of grey when it comes to applying them to specific cases. However, beyond the tensions presented, appealing to the respect for human dignity today is a positive strategy for the defense of human rights.

However, as we noted at the beginning of this paper, too many questions remain unsolved. At a theoretical level, for example, it seems necessary to develop an historical and socio-political reconstruction system to complement and help better to explain the three identified strands of human dignity. This type of analysis would, among other things, develop a better understanding of the explanatory functions of these three tensions, particularly with respect to the discourse of human rights. Similarly, from this wider perspective one could certainly make a critical assessment of the jurisprudence of the Inter-American Court of Human Rights to take into account not only those instances in which the Court has explicitly used the concept of “dignity”, but all those in which, having had the possibility of using it, chose (consciously or unconsciously) not to do so. Even from this perspective, it would be desirable to include the role of the Inter-American Commission in the analysis. Ultimately, as we also have noted at the beginning of this essay, the debate is open, and what is at stake is not insignificant.

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NOTES

1. In the present text, the adjectives "artificial", "consensual", and "positive" are taken to be synonymous. We understand this need not be. However, we consider in all of them the aspect that interests us in the context of this article, namely, its contrast with the idea that human dignity is something "natural".

2. Article 22 "Everyone, as a member of society, has the right to social security and is entitled

to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality."

3. Article 23.1 "Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection

against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests."

4. Article 26. Progressive Development "The States Parties undertake to adopt measures, both

internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires, according to available resources, through legislation and other appropriate measures".

RESUMOS

Este artigo é resultado da pesquisa "Dignidad Humana: conceptualización filosófica y aplicación jurídica" apresentada pelo Grupo de Pesquisa POLITEIA da Escola de Filosofia da Universidade Industrial de Santander, classificado na categoria B por COLCIENCIAS. Neste texto, fazemos uma reconstrução conceitual de três tensões inerentes ao conceito de dignidade humana: i) a tensão entre seu caráter natural e seu caráter artificial (ou consensual ou positivo); ii) a tensão entre seu caráter abstrato e seu caráter concreto; e iii) a tensão entre seu caráter universal e seu caráter particular. Em um primeiro momento, expomos os principais elementos teóricos destas tensões. Posteriormente, tais tensões são ilustradas mediante quatro instrumentos de Direito Internacional de Direitos Humanos e cinco sentenças da Corte Interamericana de Direitos Humanos. No final, apresentamos conclusões.

PALAVRAS-CHAVE

Dignidade humana – Tensões conceituais – Instrumentos internacionais de direitos humanos – Jurisprudência – Corte Interamericana de Direitos Humanos.

RESUMEN

El presente artículo es resultado de la investigación "Dignidad Humana: conceptualización filosófica y aplicación jurídica" adelantada por el Grupo de Investigación POLITEIA de la Escuela de Filosofía de la Universidad Industrial de Santander, clasificado en categoría B por COLCIENCIAS. En este texto se realiza una reconstrucción conceptual de tres tensiones del concepto de dignidad humana: i) la tensión entre su carácter natural y su carácter artificial (o consensual o positivo); ii) la tensión entre su carácter abstracto y su carácter concreto y iii) la tensión entre su carácter universal y su carácter particular. En un primer momento se exponen los principales elementos teóricos de las tensiones. Posteriormente, las tensiones se ilustran mediante cuatro instrumentos de Derecho Internacional de los Derechos Humanos y cinco sentencias de la Corte Interamericana de Derechos Humanos. Al final se presentan las conclusiones lo anterior.

PALABRAS CLAVE

Dignidad humana – Tensiones conceptuales – Instrumentos internacionales de derechos humanos – Jurisprudencia – Corte Interamericana de Derechos Humanos.



DEBORA DINIZ

Debora Diniz has a doctorate in anthropology. She is a professor at the University of Brasilia and is also a researcher at Anis: Institute of Bioethics, Human Rights and Gender.



LÍVIA BARBOSA

Livia Barbosa is a doctoral student in social policy at the University of Brasilia and a researcher at Anis: Institute of Bioethics, Human Rights and Gender.



WEDERSON RUFINO DOS SANTOS

Wederson Rufino dos Santos is a doctoral student in sociology at the University of Brasilia. He is also a social worker at the Federal District Health Department and a researcher at Anis: Institute of Bioethics, Human Rights and Gender.

Email: anis@anis.org.br

ABSTRACT

This paper aims to demonstrate how the field of disability studies consolidated the concept of disability as social oppression. By reviewing the main ideas of the social model of disability, this article presents the genesis of the concept of disability as a restriction of participation for disabled people, as adopted by the United Nations Convention on the Rights of Persons with Disabilities, which Brazil ratified in 2008.

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KEYWORDS

Disability – Social model of disability – Medical model of disability – Convention on the rights of persons with disabilities.



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DISABILITY, HUMAN RIGHTS AND JUSTICE*

Debora Diniz, Livia Barbosa and
Wederson Rufino dos Santos

1 Introduction

To inhabit a body with physical, intellectual or sensory impairment is one of the many ways of existing in the world. Among the narratives of inequality that are expressed in the body, disability studies appeared as the late comers in the humanities and social sciences. Heirs to gender studies, feminists and anti-racists, the social model of disability proposed a redefinition of the meaning of living in a body that had been considered, for a long time, abnormal (DINIZ, 2007, p. 9). As for sexism or racism, this new expression of oppression led to the creation of a neologism: *disablism* (DINIZ, 2007, p. 9). Disablism is a result of the culture of normality, in which the impairments are the target of oppression and discrimination (inserir nota 2). Normality, which can either be understood as a biomedical expectation of standard functioning for the species or as a moral precept for productivity and adaptation to social norms, was challenged by the understanding that disability is not only a biomedical concept but a political one as well. Disability expresses the oppression of the body with impairments: the concept of a disabled body or person with disabilities should be understood in political terms and no longer strictly in biomedical terms.

This change of the body with impairments from a medical problem to disability as oppression is challenging for the establishment of public and social policies (DINIZ, 2007, p. 11) (inserir nota 3). Disability is not limited to a list of diseases and impairments that come from biomedical knowledge (DINIZ *et al.*, 2009, p. 21). Disability is now considered to be the patterns of inequality that are imposed by environments with barriers on a body with impairments. Therefore, the United Nations Convention on the Rights of Persons with

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Disabilities refers to participation as a parameter for the formulation of policies aimed at this population, defining people with disabilities as “those who have physical, intellectual or sensory impairments, which, in interaction with various barriers, may hinder their full and effective participation in society with others” (UNITED NATIONS [UN], 2006a, Article 1). Disability is not only what medical discourse describes but specifically the restriction of participation caused by social barriers.

Brazil signed the Convention on the Rights of Persons with Disabilities in 2008. This means a new concept of disability must guide political actions to ensure justice for this population. According to the 2000 Census, 14.5% of Brazilians are living with disabilities (BRAZILIAN INSTITUTE OF GEOGRAPHY AND STATISTICS [IBGE], 2000). The criteria used by the 2000 Census to calculate the size of the population with disability were markedly biomedical, such as difficulty in seeing, hearing, or moving. This is due not only to the biomedical model currently in force in the planning and management of public policies for this population in Brazil but mainly due to the difficulty of measuring what is considered *participation restriction* by the interaction between the body and the social environment.

The Convention on the Rights of Persons with Disabilities does not ignore the body, as it states “impairments of a physical, intellectual or sensory nature” (UN, 2006a, Article 1.). It is the interaction between the impairments and the social barriers that restrict people’s effective participation. According to the Convention, the new understanding of disability should not ignore the bodily impairments, nor is it restricted to listing them. This redefinition of disability as a combination of a biomedical framework, which lists bodily impairments, and a human rights perspective, which denounces this type of oppression, was not a creation of the United Nations alone. For over four decades, the so-called social model of disability provoked the international political and academic debate on the failure of the biomedical concept of disability to promote equality between disabled and non-disabled people (BARTON, 1998, p. 25; BARNES *et al*, 2002, p. 4).

The biomedical model of disability claims that there is a causal relationship between the impairments and the social disadvantages experienced by people with disabilities. This thesis was challenged by the social model, which not only challenged the medical power over bodily impairments but also showed how the body is not a destiny of exclusion (BARNES *et al*, 2002 p. 9; TREMAINE, 2002 p. 34). The social meaning attributed to these impairments is that they are a natural disadvantage, which historically meant that bodily impairments were seen as bad luck or personal tragedy (BARNES *et al*, 2002, p. 6). If in the 19th century the biomedical model was a kind of redemption from religious narratives, which described impairments as the result of sin or divine wrath, today it is the biomedical authority which is being challenged by the social model of disability (FOUCAULT, 2004, p. 18). The criticism of medicalization suggests the inadequacy of the biomedical discourse to evaluate the participation constraints imposed by social environments with barriers. Therefore, for the United Nations Convention on the Rights of Persons with Disabilities, the disadvantage is not inherent to the body, but the result of values, attitudes and practices that discriminate against disabled people (DINIZ *et al*, 2009, p. 21).

This paper demonstrates how disability studies reinforced the understanding of

disability as a social disadvantage, challenging the biomedical narrative about what is normal and pathological. Through a historical review of the main ideas of the social model of disability, the article draws a picture of the concept of disability as a restriction on participation. This was the concept adopted by the United Nations Convention on the Rights of Persons with Disabilities, which was ratified by Brazil in 2008.

2 Disabilities and Impairments

There are at least two ways of understanding disability. The first way understands it as an expression of human diversity. A body with impairments belongs to someone who experiences impairments of a physical, intellectual, or sensory nature. But the social barriers are the ones that, by ignoring the bodies with impairments, force the experience of inequality. Oppression is not an attribute of the impairment itself but the result of non-inclusive societies. The second way of understanding disability claims that it is a natural disadvantage, and efforts should be focused on repairing the impairments in order to ensure that all people can operate in a typical pattern for the species. In this interpretative process, bodily impairments are classified as undesirable and not simply as a neutral expression of human diversity, as one must understand racial, generational, or gender diversity. The body with impairments should undergo a metamorphosis to normality, be it through rehabilitation, genetics, or educational practices. These two narratives are not mutually exclusive, although they point to different perspectives regarding the challenge posed by disability and human rights.

For the social model of disability, ensuring equality between people with and without disability should not be reduced to the supply of goods and biomedical services: as with racial, generational or gender issues, disability is essentially a human rights issue (DINIZ, 2007, p. 79). Human rights have an important claim to universal validity, which is to return the responsibility for the inequalities to oppressive social constructions (SEN, 2004). This means that impairments acquire meaning only when converted into experiences through social interaction. Not everyone with impairments experiences discrimination, oppression, or inequality, because it is the relationship between the body and the society which produces disability (DINIZ, 2007, p. 23). The greater the social barriers, the greater the participation constraints imposed on disabled people.

For the biomedical model of disability, a body with impairments should be the object of biomedical knowledge intervention. Impairments are classified by medical narratives, which describe them as natural and undesirable disadvantages. Rehabilitation practices or healing are offered and even imposed on bodies in order to reverse or mitigate the signs of abnormality. The result is that the closer to the simulacra of normality, the greater the success of the medicalization of impairments (THOMAS, 2002, p. 41). Educational practices comprise another universe for the taming of bodies: the controversy over oralist or manualist practices for deaf children is an example of different perspectives regarding how the deaf shall dwell in non-bilingual societies (LANE, 1997, p. 154). This was actually a controversy covered by the Convention on the Rights of Persons with Disabilities, which recognizes the “facilitation of learning sign language and promotion of the linguistic identity of the deaf community” (UN, 2006a, article 24, 3b).

Disability has been understood as a personal or family destiny according to religious explanations, which was understood either as misfortune or as a blessing in almost all societies (LAKSHMI, 2008). The challenge of the mystical and religious narrative by the biomedical narrative was received as an important step towards ensuring equality (BARTON, 1998, p. 23; COURTINE, 2006, p. 305). The origins of the barriers were no longer sin, guilt, or bad luck but genetics, embryology, degenerative diseases, traffic accidents, or aging. The biomedical narrative marked the dichotomy between normal and pathological since the impairments are only defined when contrasted with an ideal of the body without them. The challenge now is to refute the description of a body with impairments as abnormal. Abnormality is an aesthetic judgment and, therefore, a moral value on life styles, not the result of a universal and absolute catalog about bodies (DINIZ, 2007, p. 23).

3 The Genesis of the Social Model

One of the early attempts to bring disability close to the culture of human rights was made in England in the 1970's (UNION OF THE PHYSICALLY IMPAIRED AGAINST SEGREGATION [UPIAS], 1976). The first generation of scholars defending the social model of disability was inspired by historical materialism and sought to explain oppression through the core values of capitalism, such as ideas of productive and functional bodies (DINIZ, 2007, p. 23). Bodies with impairments would be useless to the productive rationale in an economic structure that is not open to diversity. The biomedical model, on the other hand, indicated that the experience of segregation, unemployment, low education, among many other expressions of inequality, was caused by the inability of the body with impairments to do productive work. Today, the centrality of historical materialism is considered insufficient to explain the challenges imposed by disability in environments with barriers, but one must recognize the originality of this first movement to empower the social model of disability (CORKER, SHAKESPEARE, 2002, p. 3).

Other approaches emerged in disability studies, but the social model has remained hegemonic. The feminist and phenomenological approaches gained ground in the debate, expanding the narratives about the meanings of disability in cultures of normality (CORKER, SHAKESPEARE, 2002, p. 10). This was how impairments came to be described as neutral bodily attributes, and disability has summarized the oppression and discrimination suffered by people living with impairments in environments with barriers. By resisting the reduction of disability simply to impairments, the social model of disability offered new tools for social transformation and the guarantee of rights. It was not biology that oppressed but the culture of normality, which described some bodies as undesirable.

This change of interpretation on disability, shifting from the inequality of the body to social structures, had two implications. The first was to undermine the authority of the corrective resources that biomedicine commonly offered as the only alternative for the well-being of people with disabilities. Disabled people could not deny the benefits of biomedical goods and services, but they could challenge the supremacy that healing and rehabilitation had attained, implying the idea that the body with impairments is abnormal and pathological (CANGUILHEM, 1995, p. 56).

The second implication was that the social model opened analytical possibilities for a new description of the meaning of living in a body with impairments. The private experience of being in a body with impairments caused a limited scope of care in the household, often condemning those with greater dependence to abandonment and institutionalization. By exposing the oppression of social structures, the social model showed that impairments are one of many ways of experiencing the body.

The central thesis of the social model has enabled a shift of disability from private to public spaces. Disability is not only a matter of privacy and family care but a matter of justice (NUSSBAUM, 2007, p. 35). This symbolic passage from the *domestic* to the *public* shook several biomedical assumptions about disability. It has been stated, for example, that disability is not abnormal, not being limited to stigma or shame because of difference. The critique of the biomedical model does not mean ignoring how technology ensures people's well being (DINIZ, MEDEIROS, 2004a, 1155). People with bodily impairments experience pain, get sick, and some need permanent care (KITTY, 1998, p. 9). However goods and services are biomedical responses to health needs and are, therefore, universal demands. Unlike non-disabled people, impairments comprise lifestyles for those who experience them. Therefore, there are social model theorists that explore the idea of disability as an identity or community, like cultural identities (LANE, 1997, p. 160).

With the social model, disability came to be understood as an experience of inequality shared by people with different types of impairments: not the blind, deaf, or people in wheelchairs in their particularities, but disabled people, discriminated and oppressed by the culture of normality. Just as there are a variety of bodies, there are a variety of ways to inhabit a body with impairments. It was by bringing the studies of disability and cultural studies together that the concept of oppression won argumentative legitimacy: despite the ontological differences imposed by each impairment of physical, intellectual, or sensory nature, the experience of living in a body with impairment is discriminated against by the culture of normality. The dichotomy normal and pathological, represented by the opposition of the body with and without impairments, opened way for a new strategy for political intervention, as envisaged by the Convention on the Rights of Persons with Disabilities (UN, 2006a). In addition to other forms of discrimination, the concept of discrimination in the Convention includes the denial of reasonable accommodation, which demonstrates the recognition of barriers as a preventable cause of inequalities experienced by disabled people.

The social model originally claimed that a body with impairments would not be able to endure the capitalistic system (BARTON, OLIVER, 1997). The centrality of the social model as a critique against capitalism was substituted by cultural studies, which distanced disability even more from biomedical authority over the body. It is also the culture of normality which oppresses the body with impairment and not only the economy (DINIZ, 2007, p. 77). Social model theorists have offered evidence that to inhabit a body with impairments does not necessarily mean a sentence of segregation (YOUNG, 1990, p. 215). In the last two decades, the growth of population studies on aging strengthened the argumentative strategy of the social model of disability as a human rights issue: a body with impairments is a shared experience with aging (WENDELL, 2001, p. 21; DINIZ, MEDEIROS, 2004b, 110).

4 The World Health Organization and the Social Model of Disability

The World Health Organization (WHO) has two classification references for describing the health conditions of individuals: the International Statistical Classification of Diseases and Related Health Problems, which is the tenth revision of the International Classification of Diseases (ICD-10) and the International Classification of Functioning, Disability and Health (ICF). The ICF was approved in 2001 and anticipates the main political challenge of the definition of disability proposed by the Convention on the Rights of Persons with Disabilities: the document establishes criteria for measuring the barriers and restriction of social participation. Until the publication of the ICF, the WHO had adopted strictly biomedical language for the classification of bodily impairments, which is why the document is considered a milestone in the legitimization of the social model in the field of public health and human rights (DINIZ, 2007, p. 53).

The shift from the biomedical model to the social model of disability was the result of an extensive debate in the consultative stages of the ICF. The document that preceded it, the International Classification of Impairments, Disabilities, and Handicaps (ICIDH), assumed a causal link between impairments, disabilities, and handicaps (WHO, 1980). In this interpretative model of disability, a body with impairments would experience restrictions that led to social disadvantage. The disadvantage would be the result of impairments; therefore, the emphasis was on models of healing or rehabilitation. For nearly 30 years, the biomedical model of disability was sovereign in the actions of the WHO, which meant the hegemony of a language focused on the rehabilitation or cure of impairments in public policies in several countries. In Brazil, the biomedical model is used in population research, healthcare, and, in large part, education and health policies for people with disabilities (FARIAS; BUCHALLA, 2005, p. 192).

The vocabulary proposed by the ICIDH in 1980 was widely criticized by the emerging disability studies (WHO, 1980). There were different levels in the debate, but one was particularly embodied by the text of the Convention on the Rights of Persons with Disabilities: linguistic sensitivity towards the description of disability as a human rights issue, not just a biomedical one. As in studies of race and gender, biology and culture impose a permanent pendulum between what is defined as the fate of the body or the social oppression of the body. In feminist studies, the dichotomy between nature and culture was deconstructed in its own terms; the constitutive nature of sex to explain the existence of gender was ignored: sex and gender are interchangeable categories for the analysis of sexism (BUTLER, 2003, p. 25).

A similar analytic turn was triggered in disability studies to face *disablism*, the ideology that oppresses a body with impairments. The first generation of the social model sustained that the body should be ignored, as its emergence would facilitate the biomedical understanding of disability as a personal tragedy (DINIZ, 2007, p. 43). Adopting this posture, the study of aspects of the body with impairments, such as pain, addiction, dependency, or weaknesses would be to surrender to the concept of biomedical control of disability as a deviation or abnormality (WENDELL, 1996,

p. 117, MORRIS, 2001, p. 9). The result was the silencing of the body as an instance of habitability, and as a locus in which to describe disabilities. The semblance of normality for all bodies set the tone of the debates and political struggles of the 1970s for the social model.

But the silence was challenged by the emergence of other perspectives into the social model, especially feminism. Not coincidentally, the social model of disability began with white adult men in wheelchairs (DINIZ, 2007, p. 60), a group of people for whom social barriers would be essentially physical. The inclusion of this group would not subvert the social order, as in their specific case the simulacrum of normality was effective to demonstrate the success of inclusion. Even today road signs and public representations of disability indicate someone in a wheelchair as the icon. The metonymy of disability by the wheelchair should not be underestimated in a culture of normality filled with barriers to social participation for people with other impairments, for whom these barriers are not only physical.

The first feminists working in the social model launched the issue of intellectual impairments and care to the center of the discussions (KITTAI, 1998, p. 29). To seriously consider the diversity of impairments was not resolved with the simulacrum of normality; it was necessary to challenge the culture of normality. Social barriers for the inclusion of a person with severe intellectual impairments are multiple, difficult to measure, and permeate all spheres of public life. This is how the narratives about the body with impairments and the theme of care as a human need came to be discussed in disability studies. However, to consider care as a human need is also to bring the issue of disability closer to gender and family studies. The issue of gender equality serves as a background for the Convention on the Rights of Persons with Disabilities, from the preamble to the specific sections on the protection of girls and women with disabilities, and the role of families of people with disabilities (UN, 2006a).

The ICF, thus, was born after a long process of reflection on the potential and limits of biomedical and social models of disability. In a position of dialogue between the two models, the proposal of the document is to launch a bio-psychosocial vocabulary to describe disability. Despite the diversity of experiences of people with impairments related both to the body and to society, the ICF has universal ambitions (THE WORLD HEALTH ORGANIZATIONS' COLLABORATING CENTER FOR THE FAMILY OF INTERNATIONAL CLASSIFICATIONS, 2003, p. 18). This universal claim can be understood in two ways. First as recognition of the political force of the social model of disability for the revision of the document: from a classification of abnormal bodies (ICIDH) to a complex evaluation of the relationship between the individual and society (CIF). A disabled person is not simply a body with impairments but a person with impairments living in an environment with barriers. The second way of understanding the universal ambition of the ICF is also a result of the social model: the body with impairments is not a personal tragedy, but a life condition for those who experience the benefits of biotechnology and aging. Old age and disability are concepts brought closer together by the CIF and the new generation of disability theorists (DINIZ, 2007, p. 70).

But while progressing from the ICIDH towards the ICF, one of the most sensitive issues was how to describe disability. The same challenge was present in the elaboration

of the Convention on the Rights of Persons with Disabilities. The ICIDH used the concepts of impairments, disabilities, and handicaps. The demand from the social model of disability was to describe impairments as a neutral expression of the diversity of the human body, understanding the body as an instance of individual habitability – therefore, diverse in its condition. The vocabulary proposed by the ICIDH classified physical diversity as a result of diseases or abnormalities, besides considering that the disadvantages were caused by the inability of the impaired body to adapt to social life.

The revision of the ICF tried to resolve this controversy by incorporating the main criticisms of the social model (THE WORLD HEALTH ORGANIZATIONS' COLLABORATING CENTER FOR THE FAMILY OF INTERNATIONAL CLASSIFICATIONS, 2003, p. 32). According to this new vocabulary, disability is an umbrella term that embraces the body with impairments, activity limitations, or participation restrictions. This means that disability is not limited to impairments; it is the negative outcome of the insertion of a body with impairments into social environments that are insensitive to people's physical diversity. There is no primordial meaning in the body, so any attempt to reduce it to a certain fate must be ignored. This redefinition conformed to the critique proposed by the social model: disability is a cultural experience and not just the result of a biomedical diagnosis of abnormalities. It was also this spirit that has abandoned the notion of "handicap", especially because of its etymology which referred to disabled people as beggars ("cap in hand") (DINIZ, 2007, p. 35).

The Convention on the Rights of Persons with Disabilities has proposed a concept of disability that recognizes the experience of oppression suffered by disabled people. The new approach overcomes the idea of impairment as synonymous for people with disabilities, recognizing the restriction of participation as being the main aspect that causes the disability to be perceived as inequality. The importance of the Convention is to constitute a document of reference for the protection of the rights of disabled people in countries around the world. In all the signatory countries, the Convention is taken as the basis for the construction of social policies regarding the identification of both the subject of social protection as well as the rights to be guaranteed. The ICF, in turn, provides objective tools for the identification of the different expressions of *disablism*, enabling better targeting of policies.

5 Final Considerations

The recognition of the body with impairments as an expression of human diversity is recent and still a challenge for democratic societies and public policies. The history of the medicalization and normalization of disabled bodies by biomedical and religious knowledge superimposed a history of segregating people in long-term institutions. Only recently were the demands of these people recognized as a human rights issue. The United Nations Convention on the Rights of Persons with Disabilities established a new framework for understanding disability (UN, 2006a). Ensuring decent life no longer limits itself solely to the provision of goods and health care services, but also requires the removal of barriers and the guarantee of a social environment that is accessible to all people with physical, intellectual, or sensory impairments.

The social disadvantage experienced by disabled people is not a sentence of nature

but the result of disablism, which describes bodily impairments as abject to social life. The social model of disability challenged the narratives of misfortune and personal tragedy that confined disabled people to the domestic space of secrecy and guilt. The social model not only proposed a new concept of disability in dialogue with theories of inequality and oppression, but also revolutionized the way of identifying the body and how it relates to societies. The International Classification of Functioning, Disability and Health (ICF) of the World Health Organization has proposed a vocabulary for the identification of persons with disabilities in order to guide public policies in each country. Since 2007, the ICF has been adopted in the Brazilian legislation for the implementation of the Continuous Cash Transfer Program (CCT), a welfare income transfer to the disabled and poor elderly. The trend is that the ICF is being used in the identification of disability for social welfare policy as well as in all other Brazilian public policies.

The adoption of the Convention on the Rights of Persons with Disabilities recognizes the issue of disability as a question of justice, human rights, and promoting equality. The Convention was ratified in 2008, which will require the revision of infra-constitutional laws and establishing new bases for the formulation of public policies for the disabled population. One of the requirements of the Convention is the immediate review of all laws and state actions related to the population with disabilities. Compliance with this measure will bring direct results to guarantee the well being and promotion of dignity for people with disabilities in Brazil.

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RESUMOS

O objetivo deste artigo é demonstrar como o campo dos estudos sobre deficiência consolidou o conceito de deficiência como desvantagem social. Por meio de uma revisão das principais idéias do modelo social da deficiência, o artigo traça uma gênese do conceito de deficiência como restrição de participação ao corpo com impedimentos, tal como adotado pela Convenção sobre os Direitos das Pessoas com Deficiência da Organização das Nações Unidas, ratificada pelo Brasil em 2008.

PALAVRAS-CHAVE

Deficiência – Modelo social da deficiência – Modelo biomédico da deficiência – Convenção sobre os direitos das pessoas com deficiência.

RESUMEN

El objetivo de este artículo es demostrar cómo el campo de los estudios sobre discapacidad ha consolidado el concepto de discapacidad como desventaja social. Por medio de una revisión de las principales ideas del modelo social de la discapacidad, el artículo traza una génesis del concepto de discapacidad como restricción de participación al cuerpo con deficiencias, tal como adoptado por la Convención sobre los Derechos de las Personas con Discapacidad de la Organización de las Naciones Unidas, ratificada por Brasil en 2008.

PALABRAS-CLAVE

Discapacidad – Modelo social de la discapacidad – Modelo biomédico de la discapacidad – Convención sobre los derechos de las personas con discapacidad.



JULIETA LEMAITRE RIPOLL

Julieta Lemaitre Ripoll (S.J.D., M.A.) is an Associate Professor at the University de los Andes Law School in Bogotá, Colombia, and Director of the Center of Socio-Legal Investigations (CIJUS, Spanish abbreviation). Her most recent publication is the book: *The Law as a Spell: Legal Fetishism, Violence and Social Movements* (2009).

Email: jlemaitr@uniandes.edu.co

ABSTRACT

In a recent hearing before the Inter-American Commission for Human Rights, human rights activists denounced the violence in Colombia besetting lesbian, gay, bisexual, transvestite, transsexual and transgendered individuals (LGBT). Amongst the problems enumerated were abuse of police power, sexual violence in the prisons, murders fueled by hate, as well as several kinds of discrimination. This contrasts with the jurisprudence of the Constitutional Court, where there has been advancement in the protection of individuals' sexual rights. This article, which describes both the violence as well as the Court's sentencing, analyzes the symbolic role of the law and argues that these activists have an ambivalent relationship with the law: while wary of it, for its inefficacy, they mobilize for legal reform and benefit from the Court's progressive jurisprudence.

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KEYWORDS

Gay rights – LGBT rights – Sexual rights – Same-sex equality – The Colombian Constitutional Court – Hate crimes.



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LOVE IN THE TIME OF CHOLERA: LGBT RIGHTS IN COLOMBIA

Julieta Lemaitre Ripoll

On November 5, 2009 a group of Colombian organizations¹ held a special hearing before the Inter-American Commission on Human Rights (IACHR) on LGBT rights². The fact that Colombia is one of the first nations in the region to have a hearing on this subject can be considered surprising since, without a doubt, in large part thanks to the Constitutional Court, LGBT rights are subject to special protection, which exceeds that of other countries and even that provided by international law. The jurisprudence not only considers laws that discriminate based on sexual orientation suspect, but has also explicitly prohibited discrimination on this ground in the military, schools, and the Boy Scouts. Moreover, same-sex couples enjoy many of the same rights as heterosexual couples, including the right to marital union, the right to an inheritance, the right to a pension, the right to be a health insurance beneficiary and the right to food.

What then could bring these organizations, including Colombia Diversa, a leader in the defense of LGBT rights, before the IACHR? On the one hand, its presence is undoubtedly a result of the success of the legal reform campaigns, which is reflected not only in the most recent jurisprudence, but also in the fact that a generation has been trained in human rights discourse, using it to pressure and shame the authorities. But its presence is also a manifestation of the Colombian paradox, so often mentioned, of a country that produces a luminous jurisprudence while at the same time being terrorized by bloodshed and violence.

In Colombia, as press reports and articles have repeatedly demonstrated, progressive norms co-exist daily with the impunity enjoyed by the state for human rights violations, territorial control by illegal armed groups and the terror engendered by the drug wars and the persistence of Marxist-Leninist guerrillas³. Neither regime has supremacy: judges, lawyers, and social organizations genuinely have this level of

Notes to this text start on page 88.

creativity, intelligence, and commitment to a liberal-progressive vision of rights. At the same time, the armed groups, both legal and illegal, due to belief, convenience, or for profit, sow the fields and rivers with corpses and their limbs. In this article, I will discuss this paradox in the particular case of LGBT rights: both the violence that is denounced before the IACHR, as well as its exemplary constitutional jurisprudence, and I will speak about the unwavering faith in the law (and love for it) in the midst of violence (or cholera).

In her presentation to the Commission, Marcela Sánchez, director of Colombia Diversa, put forth a list of human rights violations; the abuses and deaths described were not unknown to the Commissioners, as they have the same format and content of claims made repeatedly in that venue, a limited repertory of the human capacity to inflict pain and humiliation. As many had done before her, she described a society plagued by discrimination, murder, torture, persecution, rape, and widespread fear. And of course, there are no national information systems; law enforcement officials, when they are not openly persecuting members of the LGBT community, are passive about investigating crimes against them. From 2006-2007, Colombia Diversa registered at least 67 hate murders in Colombia (ALBARRACÍN; NOGUERA; SÁNCHEZ, 2008).

In presenting this report, and this list of human rights defenders killed, Marcela Sánchez should also speak the names of those with tangible faces and voices, associates and acquaintances of Colombia Diversa, such as Álvaro Miguel Rivera, the Young activist who had helped draft the Colombia Diversa human rights report in 2005. He was found dead in his apartment in Cali on March 6, 2009, bound and gagged, with broken teeth and bruises on his body (ALBARRACÍN; NOGUERA; SÁNCHEZ, 2008; EL TIEMPO, 2009; YANED; VALENCIA, 2009). Similarly to the murderer of León Zuleta, a gay leader during the 1980's, Rivera's murder remains unpunished; no one seems to know who murdered him or why⁴. Except the obvious. That they were gay men visible as much for being out of the closet as for their activism, in a country that is virulently homophobic and where being a human rights defender carried an enormous risk⁵.

Listening to Marcela Sánchez discuss before the Commission not only the litany of human rights abuses but also the non-compliance of human rights norms, an inevitable question is why rely on the law as an engine of social change, both at the hearing and before the Constitutional Court⁶? Why would the Commission's pronouncement have any more effect than Colombia's progressive norms? It is not only because the law is breached for "lack of political will" embodied in some conservative officials who reject gay rights, and insist on the superiority of heterosexuals, as in the case of notaries who refuse to sanction same-sex marital unions (SARMIENTO, 2009). Nor is it a matter of a few local armed individuals bent on "social cleansing." It is a deeper problem of the law's inefficacy as an instrument of change, in particular judgments made without the support of the other branches, as we shall see in the case discussed. (ROSENBERG, 2008).

The weakness of the law, and of the rights defended by the Court, invites the question of the utility of constitutional jurisprudence, and even if useful, if it is worth expending so much effort and merits such enthusiasm. In other words, if we

subtract from the concrete benefits of a successful case the costs of litigation and legal mobilization (not only in terms of legitimizing power but in terms of money, work, and effort), it is possible that the difference between the costs and the benefits reflect an inexplicable excess of enthusiasm for and faith in the transformative potential of constitutional jurisprudence. The question that this article intends to answer is central to this discussion: why do so many intelligent and experienced individuals insist on using the law as an instrument of social change when they know of its limitations?

1 Fifteen years of luminous constitutional jurisprudence

It is probable that the main reason LGBT organizations place so much faith in the law is the Constitutional Court's jurisprudence. The Constitution of 1991, and especially its interpretation as provided by the Constitutional Court, have been central in mobilizing leadership, providing a vocabulary and a stage on which to make demands. While the Constitution itself makes no mention of gay rights, the Court, in a series of liberal decisions, extended the right to equality and human dignity to include protections against sexual orientation discrimination. These decisions served to change activist discourse, transforming what had previously been conceived as a question of culture and "lifestyle" into a question of fundamental rights.

Sexual orientation case law first emerged in the mid-1990's, when individuals, most of whom bore no relationship to one another, demanded protection and framed their suffering as a rights violation. During this time period, the lawyer Germán Rincón Perfetti stands out, as he began more or less systematically filing suit to protect individuals from sexual orientation discrimination. These first cases were rejected by the Court with sentences that perpetuated homophobic stereotypes by stating, for example, that homosexuality was abnormal and insisting that its expression was limited by "the rights of others," which seemed to include the right to be disgusted. (COLOMBIA, T-539, 1994b; T-037, 1995a)⁷.

One of the most widely recognized judgments from this time period was the case against the National Television Commission for censoring an AIDS prevention commercial that showed two men kissing at the Plaza de Bolívar in Bogotá (COLOMBIA, T-539, 1994b)⁸. In this case, the Court asserted that the Commission's decision was "technical," and that it fell within their jurisdiction; nonetheless, it added that gays had constitutional rights: "Homosexuals have legally protected interests when their conduct does not adversely affect the interests of others or become a stumbling block, especially during childhood and adolescence" (COLOMBIA, T-539, 1994b).

The Court's decisions began to change course in the mid-1990's. In 1995, the Court upheld the refusal of the Colombian Family Welfare Institute (ICBF, abbreviation in Spanish) to give a gay man custody of a girl in his care; the judgment made clear that this decision was grounded not in the man's sexual orientation, but his indigence and inability to provide materially for the girl (COLOMBIA, T-290, 1995b). Since that ruling, the Court began vigorously to adopt a discourse in favor of gay rights, based on the fundamental right to choose one's sexual orientation, and the right of individuals not to suffer discrimination for their choice of partner (COLOMBIA, C-098, 1996).

Ironically, this discourse was communicated more articulately in a 1997 judgment that denied equality for gays, upholding as constitutional a marital union law that denied its benefits to same-sex couples. Nevertheless, the Court affirmed in the judgment that it would reconsider its decision if it were proven harmful to norms of equality.

The cases that followed this ruling rejected discrimination against individuals on the basis of sexual orientation in several scenarios. In 1998, the Court linked the right to free development of personality and sexual choice in a case where it defended the right of gay teenagers to express their identity in school through their clothing, haircuts, attitudes, etc.⁹. In two judgments rendered in the same year, the Court ruled that it was unconstitutional both for homosexuality to be grounds for disciplinary action for teachers in public schools and for it to be deemed a violation of military honor (COLOMBIA, C-481, 1998b; C-507, 1999).

In these judgments, particularly in the ruling on military honor, the Court gave more substance to what it called the right to self-determination based on two grounds of protection: on the one hand, the individual is protected by the right to equality and, on the other, by the right to the free development of his/her personality. This dual protection gives rise to a right to freely express one's personal identity, or to a right of self-determination, self-possession, and self-government. The Court spoke on this issue:

"If sexual orientation is biologically determined, as asserted by some research, then the exclusion of homosexuals is discriminatory and in violation of equality, equivalent to segregation based on sex (CP art. 13). By contrast, other schools of thought argue that if the individual freely exercises his/her sexual preferences, that choice is protected as an essential element of his/her autonomy, intimacy and particularly his/her right to the free development of his/her personality (CP art. 16).

The core of the free development of one's personality refers to those decisions one makes over the course of time and that are critical to a life of autonomy and consistent with a vision of one's individual dignity. In a society that respects notions of autonomy and dignity, it is the person who defines, without outside interference, the meaning of his/her own existence, life, and the universe, since such determinations lie at the very foundation of what it means to be a human being.

(COLOMBIA, C-481, 1998b).

Moreover, the Court stated that laws that discriminate on the basis of sexual orientation are suspect and that consequently any such rule or policy would require a strict application of the test for discrimination to determine its constitutionality. Any distinction based on sexual orientation, like race, ethnicity and sex, must meet certain conditions to pass constitutional muster, balancing the harm caused with the end result, while not infringing upon any fundamental right.

Despite this defense of gay rights, until 2006 the Court had not taken a progressive position on same-sex couples (LEMAITRE, 2005; MONCADA, 2002). In 2000, the Court slowed the pace at which it was expanding rights by claiming that it did not have jurisdiction over some matters (invoking the discretion of the legislative and executive branches), including cases in which a same-sex partner was

denied social security or compulsory health insurance (COLOMBIA, T-999, 2000a; T-1426, 2000b). That same year, the Court denied same-sex couples the right to adopt by asserting that it would not be in the best interests of the child. (COLOMBIA, T-999, 2000a; T-1426, 2000b). In both cases, the Court did not apply the strict test for discrimination that it had used previously, since the law did not use the word “homosexual” but instead limited the benefits outlined only to heterosexual couples. For this reason, the Court found no discrimination of a suspect class.

It became clear in the early years of the decade of 2000 that the Court protected sexual orientation vis-à-vis an individual’s rights, but not those of a same-sex couple. The protection of individual rights continued: the Court stated that notaries could not act on the basis of sexual orientation (COLOMBIA, C-373, 2002), and the Colombian Boy Scouts could not expel a member for being gay (COLOMBIA, T-808, 2003b). The Court held that conjugal visits in prison for same-sex couples were part of their right to the free development of their personalities ((COLOMBIA, T-499, 2003a), and that the police could not ban public gatherings simply because the individuals participating were gay (COLOMBIA, T-301, 2004).

It insisted that the homosexual couple conjugal visits in jail was part of the free development of personality (COLOMBIA, T-499, 2003a), and that police could not ban public gatherings of people for being gay (COLOMBIA, T - 301, 2004). But the Court also said the department of San Andres and Providencia could deny a person’s residence invoking as a justification the homosexuality of partners involved, the right of residence in the islands being reserved , for heterosexual couples (COLOMBIA, C-336, 2008a). These judgments of the Court helped gay rights activists mobilize (GARCÍA; UPRIMNY, 2004), and perhaps even ushered in an era of more tolerant social attitudes towards sexual diversity (Restrepo, 2002). Mauricio García Villegas and Rodrigo Uprimny conducted a preliminary empirical study of the impact of Court decisions on gay rights activists, and concluded that the judgments encouraged mobilization and legal activism, and even strengthened the sense of identity and self-respect in the gay community. Not only was this true, but it stimulated the creation of organizations and their mobilization in Congress in search of greater protection of gay rights, for both individuals and couples.

2 From the Court to Congress and Back

After the issue reached this impasse in the early 2000s, some activists, motivated by the favorable rulings, went enthusiastically to Congress to lobby for legal reforms, in particular the adoption of a law permitting gay marriage. This course of action was suggested by the Court, which believed that the matter was in the purview of the legislator. The bill for same-sex rights, however, was repeatedly rejected¹⁰.

Since its introduction in 2001, the bill in support of same-sex rights has been attacked by conservatives, Catholics, and other Christians. It was introduced by Senator Piedad Cordoba; after being approved by the First Commission, it prompted several opponents to publish a full-page ad in *The Spectator*, with signatures of those who wished to kill the initiative, calling it immoral. The Catholic Church also opposed the initiative, warning that it might result in the acceptance of homosexuality and

even the adoption of children by same-sex couples (El Tiempo, 2002). The initiative fell through, and this situation repeated itself in the years that followed: introduced by progressives, the initiative sank amid public opposition, from the Catholic Church, several other Christian churches, and prominent political conservatives. In all cases, the initiative enjoyed some support by activists; the difference over the years has been that the quality and quantity of support of the bills has been increasing.

The moment in which the bill had the best chance of becoming law was 2006-2007; it was approved, despite some difficulty, by the commission and plenary sessions of both houses of Congress, and was endorsed by government parties¹¹. Several senators and representatives opposed the bill, including House Speaker Alfredo Cuello, and tried to delay the vote: they finally succeeded in having the Senate, in the conciliation commission, the last step before submission for presidential approval, vote against the bill without providing justification for the votes and in violation of party law which mandates voting along party lines. The project was also sunk by the Uribe government's disinterest in it, although it had been a campaign promise in 2006: the Minister of the Interior said that although the president supported the bill, he deemed it a project of no consequence and therefore had not bothered to follow up on it¹².

Working in concert with a number of youth organizations, activists again looked to strategic litigation in 2006 as a real possibility of obtaining protection often denied them in Congress. Colombia Diversa and the Litigation Group for Public Interest Law at the University of the Andes filed a new lawsuit challenging the exclusion of same-sex partners from receiving an inheritance from their spouses¹³.

On 7 February 2007 the Constitutional Court announced a change in its previous position on the marital union of same-sex couples¹⁴. The Court said that it now considered that the exclusion of these couples from the economic benefits of the marital union was a fundamental human rights violation (COLOMBIA, C-075, 2007a; C-098, 2007b). It insisted that the law was unconstitutional because it imposed heterosexuality as a condition of access to those benefits. This ruling gave same-sex couples the same ability to build an estate as heterosexual couples. The Court also argued that the law that restricted marriage benefits to heterosexual couples imposed limitations contrary to "the constitutional principles of respect for human dignity, the state's duty to protect all persons equally and the fundamental right to freely develop one's personality."

From this ruling the Court has issued a number of other decisions that reinforce the equality of same-sex couples. In the years that followed, notions of equality extended to other situations in which the same-sex pair created rights and obligations: in 2007, the Court said that individuals were entitled to enroll their same-sex partner in a mandatory health insurance plan (COLOMBIA, C - 811, 2007c) and, in 2008, the Court stated that survivors had a right to their same-sex partner's pension (COLOMBIA, C-336, 2008a) and also that the offense of child neglect for failure to provide sufficient food also applied to them (COLOMBIA, C-798, 2008b).

In January 2009, following the "great demand" made by Colombia Diversa, the Court established that the terms "family", "familial", "family group", "permanent partner", "exclusive, permanent and continuous union" and "permanent union" in the context of various legal norms included same-sex couples (COLOMBIA, C-029,

2009). Some of the consequences of this “great demand” are that same-sex couples have the right to family reunification during armed conflict, build a family estate that cannot be garnished, live in subsidized housing as a same-sex couple, and have their living quarters be characterized as family housing. The same-sex foreign partner of a Colombian citizen has an equal opportunity to obtain citizenship as the member of a heterosexual couple, and can establish residence according to the same rules as same-sex couples in the archipelago of San Andrés. Same-sex equality also applies to the criminal realm: in same-sex couples, partners are not obligated to incriminate each other in a criminal case; the same circumstances that increase a criminal penalty apply to same-sex couples; the same principles guide same-sex domestic violence cases and disqualification on the basis of nepotism. Same-sex couples also enjoy the same protections in the event of a kidnapping or disappearance, or when one of the partners dies in a vehicular accident (SOAT insurance, abbreviation in Spanish).

3 The LGBT and legal fetishism

At the hearing before the Inter-American Commission, Commissioner Sergio Pinheiro acknowledged both the significant progress made by the Court, and what the IACHR must learn from this, including how to deal with the tension between standards and practice: “the general practice on the continent is akin to a hunting season that never ends”¹⁵. The difference between existing rights and the actual enjoyment of such rights is not the only paradox; the other is the contrast between reported violence and the weakness confronting such violence, both in terms of vindicated rights (e.g., the right to be an insurance beneficiary and to not be fired from one’s job) as well as the inflicted harms unprotected by the law (e.g., pre-contractual discrimination and the use of hazardous operations in transvestites) in the context of hate crimes.

Sometimes explicitly, but most often implicitly, the rights discourse can be understood as the denial of violence regardless of its severity. This discourse does not deny that violence exists, but rather denies the social meanings constructed from it. Thus, while the violence against homosexuals appears to serve as public and private punishment for their sexual orientation, the rights guaranteed them contradict this. And while fate decides who will be the victims of social cleansing in everyday life, especially when gays and transvestites are the victims, the rights discourse reclaims the humanity of each deceased person and their dignity embodied in small victories in areas such as insurance, pensions, and employment. This reference to violence, while present in other social movements that look to the law (Lemaitre, 2009), is particularly evident in the context of LGBT rights. Behind the bloody stories that reach the Commission are thousands of smaller stories, unrecognized under the law, about the aggressive and persistent refusal to recognize the full humanity of LGBT individuals. The human rights reports, however, do not recount the daily episodes of discrimination that probably produced the activists who write about them: the stares, the giggles, the loss of jobs and work, concerns and pressure from family and friends, their rejection, and the need to conceal and hide emotions. Nor do the reports shed light on how they should learn to live with the vicious current of hatred that permeates the seemingly innocent gestures, ostensibly playful comments, and

the graffiti that fade over time. They are subtle acts, whose existence is confirmed by a survey of high school students in Bogotá: six in ten admitted they had mocked children perceived as gay; three in ten admitted to having insulted them, 37.9% said they were afraid of homosexuals; and 17.6% said they were disgusted by gays¹⁶.

Quotidian violence, which may not amount to a human rights violation, or at least not the kind that can be reported to the Commission, is still overwhelming. The 2006-2007 report issued by Colombia Diversa (2007) documents the harassment by the police and citizens upon viewing public expressions of affection for same-sex couples, subsequent arbitrary detentions and discrimination in the workplace and at school.

But the most telling data come from the survey conducted in 2007 by CLAM, Profamilia and the National University (2008) with participants in the gay pride parade. These revealed that 77% have suffered some form of discrimination and 67.7% some form of aggression. Both are embedded in all areas of everyday life: 49.3% of those who reported discrimination said that such discrimination had taken place in schools and universities, by classmates and teachers; 43.8% in the street, by police; 42.8% in their homes, by neighbors; and 34.1% by their families. And while the most common form of assault was verbal (87.9%) followed by threats (36.2%), physical aggression still took place with alarming frequency: of the 67.7% who had suffered some type of aggression, in 31.6% of the cases such aggression was physical.

That the facts reported in the hearing before the Commission are more shocking than that which takes place on a daily basis is a matter of degree, and not one of motive, and it shows how deeply difficult it is to be LGBT in a deeply homophobic society. Gay individuals live with the constant threat of violence in all of the social spaces through which they move and with actual violence in response to their sexual orientation.

In the private sphere, many grow up in families in the midst of rejection and recriminations that quickly turn into insults and beatings. In the public sphere, they are subject to a mechanism of permanent social control, where any public display of affection or sexuality is met with aggressive hostility. This control seems to be more oppressive in rural areas and in areas controlled by illicit armed groups. Even in Bogotá, a same-sex couple seen hugging, holding hands or kissing can provoke the intervention of private security guards, the police and even bystanders who begin to assail it verbally and physically, to remove it from the premises and, in the case of the police, arrest it. Police often aggressively raid sites of commerce in pursuit of gay individuals. In prison, if their sexual orientation is revealed, they might be victims of sexual aggression and intimidation. And they are especially vulnerable to many kinds of violent crime, from serial killings in private homes to serial killings in public spaces known as “social cleansing,” extortion by blackmailers who threaten to reveal their identity to the public, and abuse from several officials, especially the police, who sometimes arrest them. Moreover, even for those who have never been the victims of violence, there is significant stress and anxiety associated with the possibility of suffering physical harm, and consequently those who would normally be affectionate in public in ways permissible to heterosexual couples end up repressing themselves.

Maria Mercedes Gómez (2006, 2008) explains this violence through the difference between discrimination and exclusion. Discriminatory violence is perpetrated against people who consider themselves part of society but in a subordinate

position, the purpose of this violence, both instrumental and symbolic, is to maintain this subordination. However, violence for the purposes of exclusion from society seeks to expel certain elements that are considered undesirable. This violence, moreover, is exacerbated when, as is the case of sexual orientation, the characteristic is perceived as relatively invisible and mutable: in this case the punishment is both a form of expulsion from the body, by rendering the difference visible, and at the same time constitutes an attempt to eradicate the difference (e.g., the idea that sexually violating a lesbian can change her sexual desires).

Without a doubt, the law has frequently been complicit in this violence, implicitly or explicitly excluding the LGBT community (for example, by granting rights only to heterosexual couples) or calling attention to them in ways that exclude them from society (for example, by punishing them with special criminal penalties). It is equally true, however, that the current trends in the law, as developed by the judgments of the Colombian Constitutional Court, have focused on normalizing homosexuality and the inclusion of the gay community.

To that extent, the law, or a certain area of the law, rises above the violence, and what it reveals about our society. The symbolic effect is reflected as a significant alternative, for example, in how the stories in the Colombia Diversa report for 2006-2007 are preceded by quotations from Constitutional Court judgments and the norms that prohibit the conduct described. As in so many human rights reports, the horror of the narrative contrasts with the formal nature of legal discourse, creating a strange tension between recognizing the reality of violations, which underscores the fragility of the law, and the intense desire to escape menacing hands, penises, knives and pistols to find refuge in the arms of the law.

The existence of rights, irrespective of their impact, means both equality between homosexuals and heterosexuals and the rejection of violence; these rights also fulfill the aspiration of normalization. By definition, rights are tied to that which is normal and included in the social body. The law prohibits that which is “abnormal,” or contrary to accepted standards, in two ways. First, because that which is prohibited is ostensibly conduct that takes place not on a daily basis, but occasionally, if not rarely; second, because that which is prohibited is that which is rejected morally, the abnormal. To that extent, the law is a powerful way to create significant social rights that are deeply moral, and the LGBT community’s use of the law is also marked by a desire for the moral acceptance of their identity; this desire stems from understanding the law as a symbol and object of desire.

4 The law as fetish

The effects of legal reforms are not merely symbolic; undoubtedly the forementioned jurisprudence will bring real benefits beyond the creation of social meaning. There will be individuals who benefit from reduced discrimination, either because they win specific cases in the courts or by the elimination of certain rules, such as those that prohibited gay individuals from teaching in public schools. It is possible that the court’s rulings will lead some family members, employers and educational institutions to change their behavior and be more tolerant and respectful¹⁷.

Furthermore, we can assume that same-sex couples who request them will have access to a wide range of benefits that were previously limited to heterosexual couples. These benefits include survivors' pension rights, health insurance, etc.

At the same time the limits of these rules are relatively clear. First, having rights as an LGBT individual does not ensure greater protection against physical or sexual violence than the general rights to life and physical integrity. Second, the burden of proof for discrimination cases is so high that it is met only in the most egregious cases; in most cases, it is difficult to show that the conduct was motivated by discriminatory animus. Even in cases involving pre-contractual discrimination, lower wages and the glass ceiling, it is virtually impossible to prove causation. Third, for same-sex couples to have access to almost all rights, the individuals must fit a very specific profile that includes having a stable partner and both being out and *having the capacity* to be out of the closet. Being out of the closet, however, as we have seen, creates a permanent vulnerability that many individuals are not prepared to take on. Moreover, as has also been documented, officials show a cultural resistance to granting rights, which constitutes another barrier to same-sex equality. For these reasons, one can easily conclude that the enthusiasm elicited by this jurisprudence might be an excess of enthusiasm, a kind of optimistic fervor that does not correspond to the magnitude of the forementioned material benefits.

Still, the Court's judgments carry a weight greater than the result of a cost-benefit analysis, a weight arising from its symbolic value, including its impact on self-perception and social identity. Garcia and Uprimny classify this effect as "anticonformist" (GARCÍA; UPRIMNY, 2004, p. 493-495). This symbolic effect is a powerful antidote to the harsh effects of discrimination on one's sense of self and social life and, perhaps, is a kind of antidote or spell to combat the emotional scars from suffering violence -- an "anti" that is grounded in the possibility of using the symbolic force of the law to combat the interpretive power of violence.

The law confronts and denies the symbolism of violence and is not limited to the symbolic violence defined by Bourdieu, those negative social meanings with which discriminated and excluded groups are burdened, as part of their oppression¹⁸. Sheer physical violence also destroys and creates silent meanings about oneself and collective life, including the value of a human body, how to define human dignity, and what one can do with impunity to another body.

The threat of violence and violence itself penetrate the lives of homosexuals at all levels, constructing meaning about their identity and place in society. It might be more intensely felt by men, for the many ways in which violence is embedded in male socialization, but it is definitely present in the lives of women. It manifests itself not only as physical violence, but as the many forms of rejection, ridicule, insult and unrelenting hostility that can be observed even amongst those who would consider themselves tolerant.

How could one understand, for example, the practice in the 1980's of middle and upper-class teenage boys going to areas frequented by transvestites, such as the Avenue Carrera 15, with the sole purpose of attacking them in different ways?¹⁹ How did the boy feel who could not understand his attraction to transvestites or to the boys with whom he went on these excursions? And how did it feel to be a transvestite?

Some of them began carrying knives to cut their own arms, as they discovered that sight of blood calmed the various assailants, including the police.

The positive symbolic effect of the Court's judgments should thus not be understood as a mere attempt to raise the self-esteem of the LGBT community, although this certainly happened. Or perhaps what is lacking is a more nuanced definition of what self-esteem is, one that is more closely tied to the possibility of articulating an identity and understanding of community life within a meaningful social network. What is at stake is not only the self-esteem notion of "feeling good about oneself," but rather the power to give social meaning to life itself, to denominate a partnership and its daily struggles, and to recognize the moral gravity of the violence they have suffered. The same-sex couple then becomes legitimate and normal, and the violence against it illegitimate and abnormal; in the language of the law, their partnership becomes a marital union, and the violence suffered is consequently understood as a human rights violation.

These definitions do not make complete sense if not understood as a response to years of being subjected to or fearing every type of aggression, and the necessity to appear twice, to hide, to exercise a permanent silence that distrusts the moral intelligibility of the social world. Violence, hate and contempt, both real and feared, impact community life even for those who do not experience it personally, and represent a profound challenge to the possibility of providing a moral foundation to a secular society.

The object, or potential object, of this kind of hatred can take three possible paths: two apolitical and one that leads to political participation in the collective life. The first is accepting the violence and what it symbolizes, and to justify the expression of violence while denying the validity of one's own story, one's own desires, etc. To a great extent, this characterizes life in the closet, accepted not as a strategic necessity but as a moral necessity.

The second option for those who are victims of homophobia is accepting the reality of violence, while rejecting the moral system that condones such violence. It is a "realist" position that leads to disenchantment with collective life, politics, and social life, and that finds refuge in the intimacy of the private sphere. Certainly, this has been a recurring solution amongst sexual minorities, as well as other minorities victimized by hate. In this way, for many experiencing violence, it only teaches that collective life is immoral, or amoral, or hypocritical, or simply hostile, and occasionally lethal. They thus find refuge in social ghettos that are rarely visible.

A third option is to reject not only the violence but also the notion that the morality of homophobia is "truly" the dominant one. It is the position of a crusader, an idealist and, of course, a social movement that refuses to accept the morality that rejects it, and that looks to other arguments to show that the morality of homophobia is above all a lie about social life. The law to a great extent is critical of this third option, as legal discourse rejects the morality of homophobia and its violence, and attempts to construct a separate societal morality.

In this process, the judgments of the Constitutional Court have played a decisive role. The Court's favorable decisions redefine collective life, by denying the symbolic effects of violence and insisting instead on a public discourse of dignity that produces tremendous satisfaction and mobilization without depending on the

enforcement of the law. By deeming homosexuality normal and violence abnormal, the Court recognizes homosexuals as fully human in a social world where violence would be by definition abnormal, or against the norm. Taking this redefinition seriously changes how one understands violence's relationship to personhood, and permits with this change the possibility of engaging again with a redefined social life, or at least provides a measure of value, or confidence. And it allows us to feel pleasure in seeing the law enshrined in the words of the Constitutional Court.

This is the law as fetish, but not with the negative connotation of being a "false" object of desire (LEMAITRE 2007; 2008; 2009). There is also the positive connotation of the sexual fetish metaphor (and not related to goods): it is inexhaustible pleasure, the rejection of certain conventions and antiquated ideas of morality, the denial of a "realism" that was burdensome, a wager on an alternate reality. And of course, it is deeply ambiguous: certainly individuals such as Marcela Sánchez have looked and continue to look to the court to vindicate rights; those who insist on the right to equality and dignity recognize the limitations of the law as an instrument of social transformation. They understand it in physical terms and perhaps better than those who theorize about it. At the same time, they celebrate the law, and each judgment that asserts their right to equality dignity, and treats them as equals and as part of the national community. This ambivalent relationship with the law is what leads them to the Commission; despite knowing its limits, they nevertheless look to it. They refuse to accept the violation of norms, but also enjoy the law's meaning-making capacity. It is a condition shared by hundreds of thousands, perhaps millions, of Colombians who, in the midst of the exhausting violence of the last thirty years, have decided, as we have decided, in the shadow of the 1991 Constitution, not to stop believing in (and loving) the law.

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NOTES

1. The organizations present were: the Association for the Promotion of Social Alternatives MINGA, the "José Alvear Restrepo" Lawyers Group, the Commission for Justice and Peace, the Colombian Commission of Jurists, the Judicial Freedom Association, the Association for the Defense and Promotion of Human Rights RESET, the Committee for Solidarity with Political Prisoners Foundation, Interdisciplinary Group for Human Rights GIDH, Sisma Women and Colombia Diversa.

2. The issue of LGBT rights is relatively new in international law, and is not mentioned in treaties and conventions. The United Nations Human Rights Committee has commented on this topic, highlighting for the first time the issue of failed pension substitution in a same-sex couple in the case *Young vs. Australia* (Communication N° 941/2000). The Inter-American Commission has not yet staked out a clear position but on July 23, 2008 accepted the case *Karen Atala e Hijas vs. Chile* (Petition 1271-04), about a lesbian mother who lost custody of her daughters. In the activist community, it is hoped that the Commission position itself firmly against discrimination based on sexual orientation when deciding this case.

3. Additional information can be found in human rights reports of various organizations worldwide. Some of the latest entries of the Inter-American Commission on Human Rights (IACHR) are the report on women in armed conflict (IACHR, 2006) and the chapter on Colombia in the last annual report of the IACHR (2009b). Several reports by Human Rights Watch on Colombia are available at: <http://www.hrw.org/americas/colombia> and those by Amnesty International can be found at: <http://www.amnesty.org/en/region/colombia>

4. León Zuleta, murdered in 1993, was a renowned human rights and gay activist in the city of Medellín. His murder was never solved. His biography was written by Manuel Velandia in 1999.

5. In December 2008 a series of non-governmental organizations for human rights defenders asserted before the Universal Periodic Review of Colombia that between 2002 and 2007 75 human rights defenders were murdered, not including union members (HUMAN RIGHTS FIRST; FRONT LINE; FIDH; OMCT, 2008). The same Commissioner in her report on Colombia in 2008 reported that there had been a significant number of attacks against human rights defenders that year, including murders, property damage, thefts, burglaries and threats. He further stressed that it was "worrisome that some senior government officials have continued the practice of publicly stigmatizing human rights defenders and trade unionists, accusing them of being guerrilla sympathizers." (UN, 2008). The Inter-American Commission on Human Rights has ruled in the same direction recently in its annual

reports of 2007 and 2008; it also has expressed concern about the spying and harassment by the government's security agency of recently revealed human rights advocates (IACHR, 2009b).

6. It is interesting to note that the name of the march, which had been known as "gay pride," was changed to a "march for citizenship," showing the importance of the legal framework.

7. In a 1994 decision, (COLOMBIA, T-097), the Court protected a student at the School of Carabineros de Villavicencio, who was expelled for engaging in homosexual conduct. In this case, however, the Court's decision was rooted not in prohibiting discrimination but in a violation of the student's procedural due process rights, as he was not allowed to present his defense.

8. The rulings of the Constitutional Court are available at: <http://www.corteconstitucional.gov.co/relatoria>

The judgments concerning the rights of LGBT individuals and couples are easily researched by topic on the website of the NGO Colombia Diversa, at the following link: www.colombiadiversa.org.

9. This is the first decision in which the Court upheld the right of gay students to be free from discrimination, and ordered that the two students expelled on the basis of their sexual orientation be received back at the school. The Court protected their right to education and free development of personality. (COLOMBIA, T-101, 1998a).

10. Bill 85 of 2001, Bill 43 of 2002, Bill 113 of 2004, Bill 130 2005.

11. This bill includes marital union, coverage on a partner's health insurance, and survivor's pension.

12. For a more detailed report of this legislative process, see (LEMAITRE, 2009). On July 20, 2007, they returned to the bill: this time, three bills similar in content were filed from three different political parties.

13. Interview with Marcela Sanchez, director of Colombia Diversa, and conversation with Esteban Restrepo, November 2006. See also: www.colombiadiversa.org.

14. For a more detailed account of this jurisprudence, see: (ALBARRACÍN; AZUERO, 2009).

15. Audio clips of Sergio Pinheiro's comments in that hearing can be found at: http://www.colombiadiversa.org/index.php?option=com_content&task=view&id=738. Last accessed: November 2009.

16. Survey conducted by the NGO Promote Citizenship (El Tiempo 2007a; 2007b).

17. This kind of impact is documented by Munger and Engel (2003) regarding the disabled in the United States.

18. Bourdieu has explained his concept of symbolic violence in various texts. In one of his most didactic works, with Loic Waquant (1992, p. 167-168), he defines it as that element of domination that beings with the complicity of the dominated, as they accept as normal a social world of mechanisms of domination, and therefore do not recognize the violence of the cognitive structures of the social world. At the bottom of page 123, Waquant explained that the difference between this concept

and Gramscian hegemony is that for Bourdieu there is no process of convincing the dominated groups but rather that the cognitive structures exist in the social world. In the case of the negative social meanings associated with stigmatized identities, they are accepted as natural – not through persuasion, but rather because they are part of the cognitive structures of societies.

19. I do not know if this situation continues, as it has not appeared in human rights reports.

RESUMOS

Em uma audiência recente perante a Comissão Interamericana de Direitos Humanos, ativistas denunciaram a violência que as pessoas lésbicas, gays, bissexuais, travestis, transexuais e transgêneros (LGBT) enfrentam na Colômbia. Entre os fatos denunciados estavam o abuso policial, as violações sexuais nas prisões, os assassinatos motivados pelo ódio, bem como múltiplas formas de discriminação. Isso contrasta com a jurisprudência avançada da Corte Constitucional da qual decorre a proteção da livre opção sexual. A partir de uma descrição tanto da violência como das sentenças, este artigo analisa o papel simbólico do direito e argumenta que os ativistas têm uma relação ambivalente com o direito: ao mesmo tempo em que desconfiam dele, por sua ineficácia, se advogam pela reforma legal e se beneficiam da jurisprudência progressista da Corte.

PALAVRAS-CHAVE

Direitos dos homossexuais – Direitos LGBT – Direitos sexuais – Igualdade – Casais do mesmo sexo – Corte Constitucional Colombiana – Violência por preconceito.

RESUMEN

En una audiencia reciente ante la Comisión Interamericana de Derechos Humanos activistas denunciaron la violencia que enfrentan en Colombia las personas lesbianas, gays, bisexuales, travestis, transexuales y transgeneristas (LGBT). Entre los hechos denunciados estaban el abuso policial, las violaciones sexuales en las cárceles, los asesinatos motivados por el odio, así como múltiples formas de discriminación. Ello contrasta con la jurisprudencia de avanzada de la Corte Constitucional que ha desarrollado la protección de la libre opción sexual. Este artículo a partir de una descripción tanto de la violencia como de las sentencias la Corte Constitucional analiza el papel simbólico del derecho y argumenta que los activistas tienen una relación ambivalente con el derecho: al mismo tiempo que recelan de este, por su ineficacia, se movilizan por la reforma legal y gozan con la jurisprudencia progresista de la Corte.

PALABRAS CLAVE

Derechos de los homosexuales – Derechos LGBT – Derechos sexuales – Igualdad – Parejas del mismo sexo – Corte Constitucional Colombiana – Violencia por prejuicio.



MALCOLM LANGFORD

Research Fellow, Norwegian Centre for Human Rights, and Director, International Office, Hakijamii (Economic and Social' Rights Centre). This paper was presented at the ESCR-Net International Strategy Conference, 1-4 December 2008, Nairobi, and partly prepared in cooperation with the organisations who coordinate the ESCR-Net Case Law Database – Centre on Housing Rights and Evictions, Centre for Legal Studies (CELS) and Social Rights Advocacy Centre. The author acknowledges the helpful comments of Aoife Nolan and Khulekani Moyo.

Email: malcolm.langford@nchr.uio.no.

ABSTRACT

Viewed in historical perspective, the recent rise of economic, social and cultural (ESC) rights in comparative legal jurisprudence and litigation strategy is remarkable. From a small number of jurisdictions to countries in all regions and legal systems of the world, there has been both a broadening and deepening of domestic judicial enforcement of these rights. While this enterprise casts some doubt on traditional presumptions concerning the non-justiciability of ESC, there remain a number of conceptual, instrumental and empirical questions. This paper seeks to provide an overview of the underlying causes of this socio-legal development, the nature and content of the emerging jurisprudence, the empirical evidence and debates around impact, lessons learned in effective litigation strategy and concludes with some thoughts on how the field could be developed.

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KEYWORDS

Social rights – Justiciability – Impact – Litigation strategy



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DOMESTIC ADJUDICATION AND ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A SOCIO-LEGAL REVIEW

Malcolm Langford

1 Introduction: The rise of domestic adjudication of ESC rights

Viewed in historical perspective, the rise of economic, social and cultural (ESC) rights in comparative legal jurisprudence and litigation strategy is remarkable. For most of the 20th Century we must strain to find such judgments and decisions although statutory and administrative law has fostered a range of enforceable social entitlements (ANNAN, 1988; KING, 2008). We can only point to particular international bodies such as the International Labour Organization (ILO) Committee on Freedom of Association (FENWICK, 2008) or scattered decisions in national jurisdictions such as Germany, United States and Argentina (ALBISA; SCHULTZ, 2008; ACKERMAN, 2004; COURTIS, 2008). For example, the Federal Constitutional Court of Germany ruled that there was an entitlement to a basic minimum standard of living (*Existenzminimum*) and that universities had to use their maximum available resources in offering places to applicants to medical studies (GERMANY, *Numerus Clausus I Case*, 1972).

The last two decades have witnessed a sea change. ESC rights appeared to have been partly rescued from controversies over legitimacy, legality and justiciability and in many jurisdictions have been accorded a more prominent place in advocacy, discourse and jurisprudence (LANGFORD, 2008b). If we were to speculate on the total number of decisions that have invoked constitutional and international ESC rights, a figure of at least one to two hundred thousand might be in order. Hoffman and Bentes (2008) track more than 10,000 cases in Brazil alone and similar patterns can be seen in Colombia and Costa Rica (SEPÚLVEDA, 2008; WILSON, 2009). The trend is likely to continue with the adoption by the United Nations (UN) General Assembly in 2008 of a complaints and inquiry procedure under the International Covenant on Economic, Social and Cultural Rights (ICESCR). This

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Optional Protocol could prompt greater national litigation and constitutional reform by virtue of its requirement that domestic remedies first be exhausted and its role in promoting awareness of the potential justiciability of ESC rights (MAHON, 2008; LANGFORD, 2009).

India is often credited with being the first jurisdiction to develop what we might call a relatively mature ESC rights jurisprudence. Following the emergence in the 1970s of public interest litigation on civil and political rights, the right to life was interpreted broadly to include a range of economic and social rights (DESAI; MURALIDHAR, 2000; INDIA, *Bandhua Mukti Morcha vs. Union of India*, 1984). In its first social rights case in 1980, the Indian Supreme Court ordered a municipality to fulfil its statutory duties to provide water, sanitation and drainage systems (INDIA, *Municipal Council Ratlam vs. Vardhichand and others*, 1980). However, the Supreme Court's decisions and orders have at times been markedly conservative, particularly as regards labour, housing and land rights, creating a certain level of ambivalence over the Indian experience (MURALIDHAR, 2008; SHANKA; MEHTA, 2008).

Later judgments from South Africa's Constitutional Court have captured international attention due to the clarity of the judicial reasoning and reliance on explicit constitutional rights. In the pioneer case of *Grootboom*, a group of residents who were living on the edge of a sportsfield filed a claim that their right to housing was being violated. The Court found that the government authorities had failed take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realisation of the right to housing as its programmes neglected to provide emergency relief for those without access to basic shelter (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000). In subsequent decisions, this Court alone has ordered the roll-out of a programme to prevent mother-to-child transmission of HIV/AIDS (SOUTH AFRICA, *Minister of Health and Others vs. Treatment Action Campaign and Others*, 2002), found the exclusion of migrants from social security benefits unconstitutional (SOUTH AFRICA, *Mahlaule vs. Minister of Social Development, Khosa vs. Minister of Social Development*, 2004a) and, surpassing the timid Indian jurisprudence on urban evictions, made relatively concrete orders in six different cases to prevent urban displacement or access to resettlement (SOUTH AFRICA, *Port Elizabeth vs. Various Occupiers*, 2004b; *Jaftha vs. Schoeman and others*, 2005b; *President of RSA and Another vs. Modderklip Boerdery (Pty) Ltd and Others*, 2005c; *Van Rooyen vs. Stoltz and others*, 2005a; *Occupiers of 51 Olivia Road, Berea Township And Or. vs. City of Johannesburg and Others*, 2008). At the same time, a number of decisions such as *Mazibuko* on the right to water (SOUTH AFRICA, *City of Johannesburg and Others vs. Lindiwe Mazibuko and Others Case*, 2009) give support to critics who say the Court's reasonableness approach is too thin on positive obligations and excessively deferential to the State (PIETERSE, 2007).

These Indian and South African experiences are symbolic of a wider and contemporary trend with the acceleration of litigation in Latin America and South Asia and to a lesser degree in Europe, North America, the Philippines and some African countries (COOMANS, 2006; GARGARELLA; DOMINGO; ROUX, 2006; LANGFORD, 2008b; ICJ, 2007; ODINDO, 2005; MUBANGIZI, 2006).

To pick out one of these jurisdictions, the Constitutional Court in Colombia has used the *tutela* procedure to issue thousands of decisions to ensure immediate access to medicines for people living with HIV/AIDS, social security for indigent persons and food subsidies for poor and unemployed pregnant women (SEPÚLVEDA, 2008). The Court also developed the doctrine of an ‘unconstitutional state of affairs’ to address systemic violations of economic and social rights, such as those involving internally displaced persons or a dysfunctional health system (YAMIN; PARRA-VERA, 2000).

While the focus of this paper is on domestic adjudication, the international dimension should not be ignored. International and regional mechanisms have been utilised in this field and the jurisprudence of these bodies has shaped domestic interpretation of ESC rights (BADERIN, 2007; LANGFORD, 2008b). For example, the decision of the European Committee on Social Rights on exploitative child labour in *International Commission of Jurists vs. Portugal* has had a significant impact on Portuguese law and practice (EUROPEAN COMMITTEE ON SOCIAL RIGHTS, *ICJ vs. Portugal*, 1999). The findings in *SERAC vs. Nigeria* by the African Commission on Human and Peoples Rights are notable for their articulation of African States’ obligations concerning ESC rights and, while largely unimplemented, it has provided a key guiding standard for the continent and follow-up litigation in Nigeria (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, *Purohit and Moore vs. The Gambia*, 2003)¹. Even the International Court of Justice has entered the arena, holding that the State of Israel had violated the ICESCR and the Convention on the Rights of the Child (CRC) by the construction of the ‘security’ fence and its associated regime (INTERNATIONAL COURT OF JUSTICE, 2004). Beyond international human rights mechanisms, there has been growing civil society intervention in international investment arbitration disputes together with a use of the World Bank Inspection Panel and OECD multinational enterprises complaints procedures despite their limited powers (PETERSON, 2009; CLARK; FOX; TREAKLE, 2003; CERNIC, 2008).

This sketch is not meant to paint a simple and rosy picture. A significant number of States, many from South-East Asia, Middle East and the West, have declined to constitutionalise the rights with justiciable effect. This is despite the UN Committee on Economic, Social and Cultural Rights (CESCR) boldly urging all States in this direction in its General Comment No. 9 and making specific recommendations to States, such as Canada, United Kingdom and China, in the course of periodic review (UNITED NATIONS, 1998; 2002; 2005; 2006). In other jurisdictions, philosophical objections to the justiciability of ESC rights persist even when justiciable rights are set out in a constitution. Ireland is a good example (NOLAN, 2008). In the *O’Reilly* case, later approved by the Irish Supreme Court, Justice Costello stated that “no independent arbitrator, such as a court, can adjudicate on a claim by an individual that he has been deprived of what is his due” if it is to involve a distribution of public resources for the common good (IRELAND, *O’Reilly*, 1989). Eastern European courts have also displayed similar levels of conservatism or what could be seen as neo-judicial activism. I don’t mean to suggest that democratic and institutional concerns over the role of the courts should be disregarded. In some cases or jurisdictions, the pendulum may have swung too far. Doctrines such as

separation of powers should set limits for courts but the question for many is where such lines should be drawn and whether jurisprudential, procedural and remedial innovations can assuage these apprehensions in practice.

This paper sets out to provide a largely socio-legal overview or state of play of ESC rights in domestic adjudication by asking a number of questions concerning its origins, content, impact and strategy. The paper partly takes a point of departure in issues that may be of particular relevance for legal practitioners and social movements and does not dwell at length on questions of legal or political theory. Section 2 seeks to identify some of the reasons behind the rise of the jurisprudence and what obstacles continue to confront advocates in many national jurisdictions. In Section 3, the trends in legal jurisprudence are categorically analysed while in Section 4 the emerging evidence of the impact of litigation is briefly discussed. Section 5 outlines some key lessons on litigation strategy, particularly as reported by advocates, and the last section of the paper casts an eye over some strategies that could be effective for movements and organisations in this field.

2 Explaining the rise of ESC rights adjudication

A common legal assumption is that the volume of adjudication is a function of the *legal landscape*. The ascendance of the jurisprudence is clearly correlated with the rise in the constitutionalization of ESC rights (SIMMONS, 2009), particularly in Latin America, Eastern Europe, Africa and to a lesser extent in the West. However, ESC rights jurisprudence has not always emerged evenly in these jurisdictions and it has also flowered in jurisdictions with a more restrictive approach to justiciability, for example South Asia.

A second articulation of a single theory is Charles Epp (1998, p. 2-3) who argued that the rise of court-based ‘rights revolutions’ (for all rights) was predicated on *civil society configuration*. He writes that “sustained judicial attention and approval for individual rights grew primarily out of pressure from below, not leadership from above”. He points to the “deliberate, strategic organizing by rights advocates” which became possible because of the “support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers... and sources of financing.” It is clear in the field of ESC rights that most precedent-setting and large-scale cases have been instigated by social movements, indigenous communities, women’s and human rights organisations and groups working on the rights of children, migrants, minorities, persons with disabilities and people living with HIV/AIDS with a considerable degree of coordination and support. These new non-state actors have augmented the traditional trade union movement and have been generally more willing to use courts as a vehicle for social change. In some cases this movement is made up of ‘leftists’ moving towards more ‘reformist rights-based models’ (GARGARELLA; DOMINGO; ROUX, 2006) but it is equally populated by traditional civil and political rights organisations which have increasingly embraced social rights.

However, the explanatory power of this thesis is cast into doubt by cases such as Costa Rica. Litigation has mushroomed in the absence of any significant support structure for legal mobilisation (WILSON, 2009). In Latin America and South Asia,

numerous cases have been filed directly by individuals and small communities outside any legal mobilisation support structure. Thus, the use of adjudication to address violations of human rights, including ESC rights, cannot be explained by reference to a single factor. States with similar justiciable guarantees have experienced different trajectories (LANGFORD, 2008b) and Gauri and Brinks (2008, p. 14) point to the strategic calculation by the relevant actors: “Potential litigants, for example, evaluate their legal capabilities and the likely benefit of pressing a demand in the political arena instead (or indeed, of going to the market)”.

For those who wish to identify the means by which social rights adjudication can be encouraged, it is important to understand the multiple drivers which have led to its success and failure. Obviously, ensuring the inclusion of constitutional and enforceable rights and a well-funded and organised civil society will heighten its likelihood but it is not decisive and the following two factors appear to be of equal importance.

The first is the *institutional configuration* of the legal system, particularly the availability of courts, their processes, the orientation of adjudicators and the existence of jurisprudence on civil and political rights. Many victims of violations have significant difficulties in simply accessing a court. This is particularly an acute problem in peri-urban areas and rural areas. A South African study found that only 1 per cent of farm dweller evictions cases involved a judicial procedure despite the constitutional provision that all evictions require a court order (SOCIAL SURVEYS AFRICA; NKUZI DEVELOPMENT ASSOCIATION, 2005). This access gap is compounded by a lack of affordable legal and dedicated legal assistance² and judicial corruption. In Cambodia, many have pointed out the futility of court-based strategies due to systemic corruption within the judiciary. Although it is notable that advocates are now experimenting with litigation in that country in the seeming absence of any other alternative remedies or strategies.

Other jurisdictions are characterised by complex and inflexible court processes, with high burden of proof requirements for applicants, an aversion to collective or public interest mechanisms or innovative fact-gathering or remedial procedures (ICJ, 2008). Some of these problems have been addressed. Courts in India, Pakistan, Bangladesh, Sri Lanka and Nepal as well as the Costa Rica and Colombia have developed public interest litigation procedures that more easily facilitate individual and collective claims; e.g., cases can be triggered with a simple application (even a postcard) and courts play a more active procedural role. Constitutions in Argentina, Hungary, Nigeria and elsewhere permit collective complaints while the Colombian Constitutional Court has developed a practice of drawing together similar cases if they believe there is an unconstitutional state of affairs. However, these courts have varied in their ability to cope with the increased workload. Colombian and Costa Rican courts have fared better than their Indian counterparts in processing tens of thousands of cases while the Pakistan Supreme Court tightened its admissibility procedures as a result. The International Commission of Jurists (2008) also note that in civil law systems, the State has procedural advantages over individual complainants. Others argue that traditional civil law systems may be better equipped than common law systems at providing individual applicants with urgent and basic relief. However, orders for immediate relief can allow courts to ignore other potential beneficiaries and resource constraints potentially creating broader

ethical, legal and institutional dilemmas (HOFFMAN; BENTES, 2008) unless done in a sophisticated manner (ROACH, 2008).

The orientation or preferences of judges is also decisive. Some take a teleological approach to interpreting ESC rights or standards while others have been remained 'conservative', even in the face of explicit justiciable rights. And a third group of courts seem simply unaware of the existence of human rights standards and jurisprudence. These differences often apply at the intra-national level; judges outside urban areas tend to be less familiar with human rights and are often more conservative. This orientation is not static. In a groundbreaking housing rights case in one country, the applicant and lawyer delivered a number of books on the topic to the judge's home address in advance which seems to have had some impact on the final decision (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000). Moreover, the judiciary is often striving to maintain their legitimacy vis-a-vis the State which often has the power of appointment and ensure they make rulings capable of implementation. Thus decisions in some cases can only be understood as part of the wider and historical dance between the different organs of the State (ROUX, 2009). This variable of judicial culture is also affected by wider understandings of the nature and scope of human rights. In those countries where ESC rights were not part of the founding constitutional mythology (which particular affects pre-1980 constitutions), these broader social discourses appear to play out in the court room.

Another institutional factor appears to be the presence of civil and political rights jurisprudence. Courts that are comfortable with general human rights legal reasoning and application are more likely to extend it into the field of ESC rights. Well-protected civil and political rights also help create some of the underlying conditions for social rights litigation such as freedom of expression, effective court processes and some attention to the enforcement of remedies. However, the reverse has also been true. Morka (2003) has pointed out that ESC rights litigation in Nigeria during the years of dictatorship was more acceptable than civil and political rights cases (MORKA, 2003, p. 113) and a similar phenomenon is now observable in China (TANG, 2007).

A final set of explanatory variables relate to the *level of realisation of socio-economic rights* within a States' maximum available resources. Judicial receptivity to social rights claims, particularly of a positive nature, is usually conditioned by clear evidence of State or private failure. Inhumane suffering in the face of the State unwillingness to fulfil its own legislation and policy has sparked much of the groundbreaking jurisprudence in countries such as South Africa, United States, India and Colombia but may be one reason why litigation has been infrequent in a State such as Norway. As Gauri and Brinks paradoxically note, in the field of socio-economic rights courts often act as "pro-majoritarian actors" in the sense that "Their actions narrow the gap between widely shared social belief and incomplete or inchoate policy preferences on the part of government, or between the behaviour of private firms and expressed political commitments" (GAURI; BRINKS, 2008, p. 28). Therefore, litigation which tackles long-standing and systemic failure may be accorded a greater chance of success when there has been a clear political ineptitude. A different but

complementary explanation would be that countries with very high levels of structural social inequality makes the possibility of effective use of representative mechanisms very difficult for marginalised groups and individuals. Courts, if they retain a strong degree of independence, may be less likely to excessively defer to elitist or majoritarian executives and legislatures in such circumstances.

3 Substantive legal and remedial achievements and conceptual barriers

Turning to the jurisprudence itself, we might note that one of its first ‘achievements’ has been that its cumulative weight has helped overturn two long-standing philosophical objections to the justiciability of ESC rights. These objections are well expressed by Vierdag who claimed, in a somewhat circular fashion, that: (1) *ESC rights were not legal rights* since they were not inherently justiciable; and (2) *ESC rights were not justiciable* since they involved issues of *policy not law*. In setting out the thesis, he provided the typical and ubiquitous example: “implementation of these provisions [in the ICESCR] is a political matter, not a matter of law” since a Court must engage in prioritisation of resources by “putting a person either in or out of a job, a house or school” (VIERDAG, 1978, p. 69).

These conceptual criticisms now carry less weight. Commentators such as Dennis and Stewart (2004, p. 462) concede that justiciability is possible even if they are not personally enamoured of it. This is because many judges have dismissed the first argument on the basis that the inclusion of ESC rights in constitutional bills of rights and international law means, ipso facto, that the rights are legal: as one court stated, “Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only ... and the courts are constitutionally bound to ensure that they are protected and fulfilled”. In addressing the law and policy divide expressed in the second objection, many courts have move beyond more abstract considerations to adopt or adapt existing legal principles in particular cases. The South African Constitutional Court thus invoked a classic common law gradualist approach and stated in *Grootboom*, “The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case” (SOUTH AFRICA, *Government of the Republic of South Africa and Others vs. Grootboom and Others*, 2000).

Two other philosophical and legal objections are more persistent and arguably provide the basis for determining the limits or the shape of ESC rights adjudication. The first is the contention that adjudication is *democratically illegitimate*, a claim not necessarily confined to socio-economic rights (WALDRON, 2006; BELLAMY, 2008). Judicial review of human rights, particularly the striking down of legislation, remains controversial in some quarters. ESC rights have traditionally been viewed as additionally problematic on account that it requires the legislature and executive to legislate, spend or adopt particular spending and policy priorities. This concern with the implications for the doctrine of separation of powers, one species of the democratic concern, led one court to state that “if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general,

and ranking some areas of policy in priority to others, they would step beyond their appointed role” (IRELAND, *Sinnott*, Justice Hardimann, para. 375-377, 2001)³.

The idea that democracy is threatened by human rights adjudication has been much debated in political science and legal theory and some arguments against this objection can be found in FABRE, 2000; GARGARELLA, 2006; BILCHITZ, 2007. The arguments often draw on traditional democratic theory (e.g., that judicial review of social rights complements parliamentary democracy by taking account of minorities and enables citizens and residents to effectively participate in democratic process due to adequate access to education and nutrition etc.), press substantive arguments (e.g., ESC rights need to be protected as fundamental rights on par with civil and political rights) or seek to highlight the distinctly legal and deliberative role of the judiciary (its accountability not policy-making function and its ability to provide a forum for individuals to engage with the State on basic rights in a more considered fashion). These considerations often appear, although with different results, in the jurisprudence. The Swiss Federal Court partly justified its derivation of a right to minimum subsistence from a range of civil and political rights on democratic and substantive grounds: “The guaranteeing of elementary human needs like food, clothing and shelter is the condition for human existence and development as such. It is at the same time an indispensable component of a constitutional, democratic polity” (SWITZERLAND, *V. vs. Einwohnergemeinde X. und Regierungsrat des Kantons*, para. 2(b), 1995). And it drew its legal borders narrowly, stating that they will only intervene if the State has first demonstrably failed to provide a minimum level of social assistance for an adequate standard of living and all persons residing within its territory (SWITZERLAND, *V. vs. Einwohnergemeinde X. und Regierungsrat des Kantons*, para. 2(b), 1995).

The second persistent objection is *institutional*; that adjudicators are not suited to the task since not only do they lack the requisite expertise and information on economic and social questions but they are not in a position to resolve the competing policy considerations and consequences that would flow from their decisions. These are of course real constraints. But it is arguable that they are largely relative and not absolute. Every area of law requires some level of specialist expertise and adjudicatory institutions have responded to the challenge of information by using specialist bodies and expert witnesses as well as accepting submissions from *amicus curiae* interventions, a phenomenon that has been embraced in ESC rights adjudication. Scott and Macklem (1992) thus treat this problem in a positive light arguing that social rights adjudication plays a valuable function in bringing forth information into the public domain that may not be traditionally available to legislature – concrete violations of rights, particularly of marginalised groups. Horowitz (1977) argues that the force of this argument is partly blunted by the fact that courts tended to be backward-looking as well, in terms of using precedents as existing evidence.

The seemingly real challenge is the ‘polycentric’ dilemma as termed by Lon Fuller (1979), who argued that the judiciary cannot and should not deal with situations in which there are complex repercussions beyond the parties and factual situation before the court. Critics of social rights adjudication typically fear that a decision providing more funding to housing, for example, could imperil funding for health or the police

(VIERDAG, 1978). The problem with this argument is that almost every area of adjudication involves polycentric questions (KING, 2008). However, this objection has led to judicial innovation as opposed to either activism or resignation. The first is to keep close to clearly defined legal principles such as reasonableness or to adapt procedure and remedies (CHAYES, 1976; ROACH, 2008). For example, the order of the Canadian Supreme Court in *Eldridge vs. British Columbia*, which involved the provision of interpretive services to deaf patients in hospitals, provided that: “A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished.” (CANADA, *Eldridge vs. British Columbia*, 1997).

3.1 *Removal and restrictions of rights*

In some jurisdictions, many ESC rights cases have generally mirrored traditional civil and political rights claims. This has been the case in long-standing labour rights claims around union freedoms and unfair dismissals although courts have increasingly reviewed legislation in this area. In *Aquino*, the Supreme Court of Argentina struck down a 1995 law which severely circumscribed compensation for employment injury on the basis that it would violate a wide range of international standards, including the ICESCR (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. slaccidentes ley 9688*, 2004). More recently, there has been a significant increase in cases concerning denial of access to health care, education and social security, forced evictions and removal of basic services or interference with the exercise of cultural rights, particularly of indigenous peoples (see overview in LANGFORD, 2008b). In many cases courts are requiring both substantive justification and procedural due process before vital social and economic interests are affected. For example, the Colombian Constitutional Court halted exploitation of natural resources on indigenous territories on the basis of violations of rights of indigenous peoples to ancestral territories as well as rights to ethnic and cultural diversity and cultural identity (SEPÚLVEDA, 2008, p. 158). Some cases have involved a direct overlap with civil and political rights. The Supreme Court of Bangladesh (BANGLADESH, *Bangladesh Society for the Enforcement of Human Rights and Others vs. Government of Bangladesh and Others*, 2000) has ruled that the forced eviction of a large number of sex workers and their children violated their right to life, which included the right to livelihood and their right to be protected against forcible search and seizure of their home.

While these cases may appear conceptually straightforward, it is notable that they challenge powerful interests in terms of state authority and economic expectation. The result is that the jurisprudence is not always consistent. The *Narmada Dam* case in India is a good example of court being reluctant to enforce its own order for the provision of compensation or alternative livelihoods to those who have been displaced (INDIA, *Narmada Bachao Andolan vs. Union of India*, 2000). The jurisprudence also seems to be affected by two other factors. The first is the character of the complainants. If violations affect groups that are considered illegal under national law – for example, people living and working in the informal economy – then the

response of the judiciary in some countries can sometimes be less sympathetic while in other countries it may be the reverse if this group is viewed by the courts and society as being in greater need of protection. Second, and relatedly, it is noticeable that where ESC rights are explicitly incorporated in the constitution, the nature of orders are sometimes more firm. In South Asian jurisprudence, alternative accommodation in the case of forced eviction has often been framed as a remedial recommendation (INDIA, *Olga Tellis vs. Bombay Municipal Corporation*, 1985) but in a series of cases in South Africa, where the right to housing and protection against forced eviction are constitutionally recognised, courts have required higher levels of justification for eviction and creation of homelessness (SOUTH AFRICA, *Port Elizabeth vs. Various Occupiers*, 2004b): “In general terms, however, a court should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme” Therefore, litigation strategy will need to take account of the balance of power, law and prevailing moral norms which can significantly sway middle class and conservative judiciaries.

These substantive and procedural tests are being adopted to protect not only the assets, resources, positions and organising space of individuals, communities and associations but the maintenance of government programmes and services. At the international level, this type of case is commonly categorised as a ‘retrogressive measure’ and requires explicit consideration of the available resources of a state in addition to other substantial and procedural considerations (UNITED NATIONS, 1990). In Portugal, the government decision to remove the National Health Service and increase the qualifying age of a minimum income benefit was found to be retrogressive, violating the right to health and social security respectively (PORTUGAL, *Decision (Acórdão) nº39/84*, 1984a; *Decision (Acórdão) nº 509/2002*, 1984b). However, such cases are not numerous and it is important to explore why this is the case: is it the problem of having ‘ample proof’ in a short and often politically charged time period? Is it that courts are more likely to provide governments significant deference if claims are made that a country has entered recession for example or needs to try a new economic model? Or is it that advocates are only beginning to move into this area? Witness the recent creative argument in the South African case of *Florence Mahlangu vs. The Minister For Social Development* where advocates argued that the failure to extend a child grant to 15-18 year olds violated the principle of progressive realisation.

3.2 *Restraining the power of private actors*

ESC rights litigation has increasingly tackled the actions of non-State actors, from multinational corporations⁴ to new service providers under public-private partnerships through to family members and traditional leaders. The human rights legal framework is obviously heavily State-centric but some constitutions and laws provide for complaints to be made directly against private actors while some adjudicatory bodies have focused on the State’s role of protection. In relation to the former, many cases concern the right to work where the role of private actors is significant in

market economies. The Colombian Constitutional Court found that this right was violated by an employer who dismissed an employee after being tested HIV-positive and payment of compensation was ordered (COLOMBIA, *SU-256*, 1996). In *Slaight Communications*, the Canadian Supreme Court held that the decision of a private labour arbitrator must be in conformity with the Canadian Charter, which is to be interpreted as far as possible with rights contained in the ICESCR (CANADA, *Slaight Communications Inc. vs. Davidson*, 1989). In *Vishaka vs. State of Rajasthan*, a case concerning sexual harassment at the work place, the Indian judiciary drew on CEDAW to develop binding guidelines which would remain in force till such time the Parliament enacted an appropriate law (INDIA, *Vishaka and others vs. State of Rajasthan and others*, 1997).

With regard to the latter form, the obligation to protect, we can find examples such as the first complaint decided by the Committee on the Elimination of Discrimination Against Women. In *A.T. v Hungary* (UNITED NATIONS, 2003), the Committee made extensive recommendations in a case concerning domestic violence including reform of legislation and provision of social and housing support services. In *Maya Indigenous Communities*, the Inter-American Commission (IACHR) found Belize had violated the equality and property rights of Maya people by granting logging and mining concessions without their consent and any consultation process (IACHR, *Maya Indigenous Communities of the Toledo District vs. Belize*, 2005). In *Tatad vs. Secretary of the Department of Energy*, the Philippines Supreme Court struck down a deregulation law that would have permitted the three major oil companies to avoid seeking permission of the regulator to increase prices. Citing the right to electricity, the Court warned that higher oil prices threaten to “multiply the number of our people with bent backs and begging bowls”, with the Court declaring that it could not “shirk its duty of striking down a law that offends the constitution” despite the law constituting an “economic decision of Congress” (PHILIPPINES, *Tatad vs. Secretary of the Department of Energy*, 1997). The Court pointed out though the way in which the Government could achieve the same result through legislative amendment, which it promptly did.

However, numerous obstacles exist in this area. First, horizontal-based litigation tends to be contractual and tort-based, which may be sufficient, but only occasionally are constitutional or statutory ESC rights norms (e.g., discrimination law) used to ensure that such laws or principles always protect human rights. Second, privatisation processes seemed to be challenged less frequently than imagined although one can now point to additional cases in Egypt and Sri Lanka, where privatisation of health and water services has been halted partly on account of litigation (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. slaccidentes ley 9688*, 2004). This may be explained by the speed and secrecy with which these processes move and the difficulties in raising substantive arguments. Since human rights are generally viewed as neutral as to choice of economic system, one requires evidence that privatisation will harm economic and social rights, and this is usually only available after the event has happened. However, some movements and even governments have used more creative arguments loosely based on the obligation to protect to forestall privatisation through litigating for minimum standards that would make for-profit

provision difficult (ARGENTINA, *Aquino, Isacio vs. Cargo Servicios Industriales S. A. slaccidentes ley 9688*, 2004) or challenging the process on participation and other procedural grounds (SOUTH AFRICA, *Nkonkobe Municipality vs. Water Services South Africa (PTY) Ltd & Ors*, 2001b).

Third, remedial orders can be more difficult to craft. In South Africa, evictions by landlords and property owners are increasingly being challenged on the basis that rights to housing are being violated but private actors complain that their right to property is not being respected and that housing rights obligations should fall on the State. The solution in a growing number of cases is to join the Government as a third party so that it is forced to explain progress in its housing programme and provide alternative accommodation in the event of an eviction (SOUTH AFRICA, *Blue Moonlight Properties 39 Pty (Ltd) vs. The Occupiers of Saratoga Avenue and the City of Johannesburg*, 2008) or, in one case, pay compensation to the property owner (SOUTH AFRICA, *President of RSA and Another vs. Modderklip Boerdery (Pty) Ltd and Other*, 2005c). Fourth, human rights protection is not always extended if the laws restrict duties to public actors. For example, the test for whether a private provider is a public authority in the United Kingdom, and hence falls under the Human Rights Act, has been conservatively interpreted (ENGLAND, *Donoghue vs. Poplar Housing and Regeneration Community Association Ltd*, 2002a). However, in the Canadian case of *Eldridge*, the Court found that hospitals, although non-governmental, were providing publicly funded healthcare services and delivering a comprehensive healthcare program on behalf of the Government, and were thus constrained by equality rights set out in the Canadian Charter (CANADA, *Eldridge vs. British Columbia*, 1997).

3.3 *Compelling State action to fulfil the rights*

As discussed, the idea of a court ordering States or other actors to take positive action has been at the heart of the controversy over the justiciability of ESC rights. The emerging legal jurisprudence has provided a range of practical responses to these dilemmas, largely mirroring a move within civil and political rights to embrace positive obligations (EUROPEAN COURT OF HUMAN RIGHTS, *Airey vs. Ireland*, 1979). In broad brush terms, many adjudicators have tended to enforce some or all of the two key State obligations identified by the CESCR in General Comment No. 3 (UNITED NATIONS, 1990)⁵. These are the duty to *take adequate steps* towards the progressive realisation of the rights within available resources and the duty to immediately achieve of a *minimum level* of the right, with the state bearing the burden of proof if it claims the latter cannot be achieved on account of deficient resources.

Colombia is an example of a jurisdiction that has adopted and enforced both. The Constitutional Court has recognised that obligations concerning ESC rights are progressive in character (COLOMBIA, *SU-111/97*, 1997) but has stressed that the State at the very least ‘must devise and adopt a plan of action for the implementation of the rights’ (COLOMBIA, *T-595/02*, 2002; *T-025/04*, 2004). Equally, and far more often, the Court together with lower courts makes orders under its *tutela* procedure for immediate enforcement of ‘minimum conditions for dignified life’ for an individual, which is based on the right to life, dignity and security and increasingly in connection

with ESC rights. This dualistic approach is evident in Finland, where authorities have been faulted for failing to *take sufficient steps* to secure employment for a job seeker and *immediately provide* child-care for a family (FINLAND, *Employment Act Case*, 1997; *Child-Care Services Case*, 1999; *Medical Aids Case*, 2000)⁶. The New York state courts have both struck down the design of school financing on the grounds that it fails to provide adequate education and found ‘a positive duty upon the state’ to provide welfare payments to anyone considered indigent under the state’s ‘need standard’ (UNITED STATES OF AMERICA, *Tucker vs. Toia*, 1997).

Other courts have taken only one of these paths. The South African Constitutional Court has opted only for the former, in the form of a reasonableness test, and rejected the idea of immediate enforcement of a minimum core (BILCHITZ, 2002, p. 484; BILCHITZ, 2003, p. 1; LIEBENBERG, 2005, p. 73). The apex courts of Hungary and Switzerland have taken the reverse position. They have largely declined to accept any role in examining whether the Government has sufficiently taken steps to realise constitutional social rights – the former merely requiring that such a law or programme exist (HUNGARY, *Decision 772/B/1990/AB*, 1991) - and they instead only look to whether a minimum of the right is met (HUNGARY, *Decision 32/1998 (VI.25) AB*; *Decision No. 42/2000*). Interestingly, this minimum core approach is particularly evident in jurisdictions where social interests are judicially protected through civil rights and have thus drawn on the German doctrine of a *Existenzminimum* (HUNGARY, *Case No. 42/2000 (XI.8)*, 2000; GERMANY, *BverfGE 40, 121 (133)*, 1975; IACHR COURT, *Five Pensioners’ Case vs. Peru*, 2003; SWITZERLAND, *V. vs. Einwohnergemeine X und Regierungsrat des Kantons Bern*, 1995).

In most jurisdictions, concerns over democratic legitimacy and institutional competency appear to shape many judgments. In some cases, courts use these markers to develop a seemingly coherent doctrine that can be applied in different cases – the Colombian and South African courts providing different sets of criteria for their respective tests. At the same time, one can also observe the arbitrary use of these concerns by courts to dismiss difficult cases and avoid a proper accounting of the relevant obligations and how they apply in a particular case (COURTIS, 2008, p. 175). It is thus difficult to predict sometimes where a court will draw line, particularly in cases which involve allocation of resources. However, the jurisprudence suggests that Courts are more likely to intrude in such cases according to the (1) *seriousness* of the effects of the violation; (2) *precision* of the government duty; (3) *contribution* of the government to the violation; and (4) *manageability* of the order for the government in terms of resources (LANGFORD, 2005, p. 89).

It is also important to recognise that some of the required action may simply involve recognition of underlying rights, such as requiring States to recognise and protect land tenure or labour rights (EIDE, 1995, p. 89). The Inter-American Court of Human Rights (IACHR COURT) found that Nicaragua had violated the right to judicial protection under Article 25 of the Inter-American Convention on Human Rights by failing to legislate and ensure that the lands of Indigenous peoples were demarcated and titled (IACHR COURT, *The Mayagna (Sumo) Indigenous Community of Awas Tinga v. Nicaragua*, 2001; EUROPEAN COMMITTEE ON

SOCIAL RIGHTS, *ICJ v. Portugal*, 1999; CANADA, *Dunmore vs. Ontario (Attorney General)*, 2001a). In the *Vishaka* case discussed above, the Indian Supreme Court issued binding guidelines on sexual harassment (INDIA, *Vishaka and others vs. State of Rajasthan and others*, 1997). However, broad-ranging orders for positive recognition of underlying rights from domestic courts tend to be rare given the concern that they may be intruding on the policy domain of the legislature. In many cases, the positive recognition tends to be more context specific – for example recognising tenure rights of marginalised communities. Even a Court like the Hungarian Constitutional Court which has the explicit power to find a ‘failure to legislate’ has not used it. However, courts in India and Colombia have not been shy in making sweeping orders where they have found systematic violations.

3.4 Equality rights

The invocation of equality rights in the field of ESC rights has a long pedigree in cases such as *Brown vs. Board of Education* (UNITED STATES OF AMERICA, *Brown vs. Board of Education*, 1954) and anti-discrimination legislation. In other jurisdictions, the phenomenon is more recent. The jurisprudence covers a wide range of prohibited grounds to include not only the express characteristics mentioned in international instruments (i.e., race and colour, sex, language, religion, national or social origin, property, birth) to include others such as age, disability, nationality, sexual orientation⁷. For example, the Court of Appeal of Versailles, France, annulled a provision of a collective agreement between labour and management on the grounds that it prohibited the recruitment of people after the age of thirty five (FRANCE, *Recueil Dalloz*, 1985). There is of course a danger, as the UN Human Rights Committee implicitly suggests, in placing too much emphasis on finding the specific suspect grounds as opposed to looking for the arbitrariness of the classification (UNITED NATIONS HUMAN RIGHTS COMMITTEE, *Karel Des Fours Walderode vs. the Czech Republic*, 2001). The use of ‘comparators’ in many national courts may not always be appropriate in the case of ESC rights, and they can be particularly difficult to find in cases of structural-based segregation of different groups or discrimination against women on the basis of pregnancy.

Most cases have involved direct discrimination but there are a number where indirect discrimination on the basis of prohibited grounds has been found (JAYAWICKRAMA, 2002). Bulgarian courts, for instance, have held that the predominant placement of Romani children in schools for children with disabilities amounted to racial discrimination (EUROPEAN ROMA RIGHTS CENTRE, 2005) and the European Court of Human Rights held the same against Czech Republic (EUROPEAN COURT OF HUMAN RIGHTS, *D.H. and Others vs. Czech Republic*, 2008). In *Kearney vs. Bramlea Ltd*, the use of income criteria to assess tenant applicants was found to be unjustified (on the basis that it took no account of a person’s real willingness and ability to pay) and constituted discrimination on a number of grounds, including race, sex, marital status, age and receipt of public assistance since it disproportionately affected those groups (CANADA, *Shelter Corporation vs. Ontario Human Rights Commission*, 2001b).

The question of whether equality rights or guarantees possess a substantive character and contain positive obligations to eliminate discrimination has exercised the attention of some courts. In Pakistan, the Supreme Court has enunciated the principle quite boldly during a flowering of public interest litigation. In *Fazal Jan vs. Roshua Din*, they held that the constitutional right to equality imposed positive obligations on all State organs to take active measures to safeguard the interests of women and children (PAKISTAN, *Fazal Jan vs. Roshua Din*, 1990). In Canada, the Supreme Court rejected the British Columbian provincial government's arguments that the right to equality did not require governments to allocate resources in healthcare in order to address pre-existing disadvantages of particular groups such as the deaf and hard of hearing (CANADA, *Eldridge vs. British Columbia*, 1997, para. 87). Brazilian courts have held that the right to health of children requires a higher level of prioritisation and that to "submit a child or adolescent in a waiting list in order to attend others is the same as to legalise the most violent aggression of the principle of equality" (BRAZIL, *Resp 577836*, 2003). However, other courts, for example in South Africa and Hungary, have been cooler to the idea of prioritising children's rights in the socio-economic arena.

One continuing quandary is whether adjudicatory bodies can 'equalise down' in order to achieve equality in respect of a social interest or right. In Canada, the Supreme Court has issued positive remedial orders in equality rights cases, extending or increasing social assistance, pension benefits and security of tenure. But it has not ruled out the possibility that it can equalise down. In *Khosa vs. Minister of Social Development* (SOUTH AFRICA, 2004a), the Constitutional Court of South Africa adopted a formula of equalising up and including permanent residents in social assistance schemes. However, the Court noted that the presence of the right to social security in the constitution was a factor in considering the unreasonableness of the exclusion of permanent residents, a factor not present in all constitutions.

3.5 Remedial achievements

A significant accomplishment in the field has been to open up the remedial perspective beyond traditional private law remedies such as compensation, restitution and declarations of invalidity or wrongdoing. A number of trends can be observed. First, some courts have issued orders requiring States to follow a course of action in remedying a wrong, occasionally with supervisory jurisdiction. In Argentina, courts were deeply involved in ensuring that the authorities complied with their plan and budget to provide a vaccine against "Argentine Hemorrhagic Fever" which threatened 3.5 million residents (FAIRSTEIN, 2005; ARGENTINA, *Viceconte, Mariela vs. Estado nacional - Ministerio de Salud y Acción Social slamparo ley 16.986*, 1998). Surveying the emerging jurisprudence, Roach and Budlender (2005) argue that courts tend to take this course of action when authorities or other defendants are *unwilling* or *unable* to implement orders. In many ways, the US Supreme Court's innovative remedial orders in *Brown vs. Board of Education II*, which concerned desegregation of schooling, (UNITED STATES OF AMERICA, 1955) have been recognised as a forerunner of this new remedial space (CHAYES, 1976, p. 1281).

Second, there has been the development of more ‘dialogic’ and ‘interim’ remedies. One example is the increased use of a *delayed* declaration of invalidity where courts find a violation but delay the effect of the order so as to allow the government time to find a method to remedy the legislative or policy defect (CANADA, *Eldridge vs. British Columbia*, 1997). The Nepal Supreme Court in *Mira Dhungana vs. Ministry of Law* declined to declare unconstitutional a law which gave a son a share of his father’s property from birth but not a daughter (at least until she was 35 and remained unmarried) and instead required the State within one year to review the legislation after consulting with interested parties, including women’s organisations. This dialogic aspect is also evident in the increased use by courts (and much earlier by international bodies) of the adjudicatory space as a place for dialogue with parties, including urging them to find solutions before a judgment is given (SOUTH AFRICA, *Occupiers of 51 Olivia Road, Berea Township And Or. vs. City of Johannesburg and Others*, 2008). Another strategy is recommendations. For instance, Indian and Bangladeshi courts have sometimes adopted this approach instead of making orders for alternative accommodation in the case of forced evictions, but this has been criticised for depriving applicants of any relief in practice (BANGLADESH, *Ain o Salish Kendra and others (ASK) vs. Government and Bangladesh and others*, 2001). More dexterous approaches can be seen by those adjudicatory bodies that have used two-track remedies. The Indian Supreme Court in cases on environmental health and food rights have issued continuing series of interim orders before they come to any final order. For instance, authorities were forced to report back on orders that the court made for extending and efficiently implementing food ration schemes (INDIA, *People’s Union for Civil Liberties vs. Union of India*, 2001; INDIA, *People’s Union for Civil Liberties vs. Union of India*, 2004). Careful use of interim orders can be one way to avoid critique that more systematic orders of courts provide nothing for victims in the short-term (ROACH, 2008, p. 46).

Third, advocates have been creative in securing follow-up orders for ensuring remedies are implemented. In Argentina, India and South Africa, advocates have used criminal and contempt proceedings to ensure compliance with decisions (HEYWOOD, 2003, p. 7; SWART, 2005, p. 215). In one South African case, a judge ordered that a Minister be arrested if the police did not restore an informal settlement within 24 hours after earlier demolishing it. In India, the Supreme Court threatened contempt of court proceedings if a schedule for conversion of motor vehicles to cleaner fuels was not complied with (INDIA, *M.C. Mehta vs. Union of India*, 1998).

4 Achieving impact?

One of the strongest objections to ESC rights adjudication is that it cannot fulfil the expectations of delivering individual and transformative social justice. These instrumental critiques vary in nature and many are equally applicable to civil and political rights litigation. Some point to the weakness of courts in enforcing their judgments – and every jurisdiction seems to have at least one notable case that falls in this category. Other critiques are more political in nature – with claims that litigation can distract attention from building new coalitions for social change and that the middle

classes are more adept and successful at using the courts to enforce ESC rights than the poor (BELLAMY, 2008; ROSENBERG, 1991). Determining the actual impact of litigation in practice is a complex exercise as it is dependent on the selection of the benchmark for success, the isolation of different causes and comparison with alternative strategies. This methodological challenge has resulted in vastly differing conclusions for the same case. Rosenberg (1991) measured the impact of US Supreme Court judgments by determining whether they met the expectations expressed in the public statements of lawyers before a case, which Feeley (1992, p. 745) found to be unreasonable on the basis that the real expectations of the applicants may have been more modest.

In response to this critique, three things can be said. First, there is emerging evidence that many, but certainly not all, cases have had a direct and indirect impact, such as setting judicial precedents, influencing legal and policy developments, catalysing social movements and raising awareness and even in the event of a loss, demonstrating the lack of legal protection (LANGFORD, 2008b). In an quantitative study of five developing countries, Gauri and Brinks (2008) were “impressed by what courts have been able to achieve” summarising that “legalizing demand for SE [socioeconomic] rights might well have averted thousands of deaths” and “enriched the lives of millions of others”. Cases can certainly be found which give credence to the critics. The recent *Chaoulli* decision in Canada on the right to access private health insurance, is perhaps one example of this and one notices a greater prevalence of stronger positive orders in cases that include the middle class as beneficiaries. However, it is possible to point to a large number of decisions which have been made in defiance of middle class property owners (SOUTH AFRICA, *Minister of Public Works vs. Kyalami Ridge Environmental Association*, 2001; SOUTH AFRICA, *Blue Moonlight Properties 39 Pty (Ltd) vs. The Occupiers of Saratoga Avenue and the City of Johannesburg*, 2008) or those which involve broad coalitions of different groups – often in the area of health and education where the need for or existence of universal policies assists the process of coalition-building.

It is important to point out that it is not always a judicial order that leads to impact – in some cases it is the threat of or the commencement of litigation that triggers a change in policy or the reaching of a settlement. Even if they don’t appear on the formal record, these cases need to be brought into the equation. In the case of Nigeria where judgments can take decades to be delivered, Felix Morka (2003) records that social rights litigation was used as a community mobilisation tool and a platform for making initial contact and negotiating with Government and powerful non-State actors, such as multinational oil companies who have been otherwise impervious to dialogue.

Second, in considering impact, one needs to consider unintended consequences, both positive and negative. Initial high profile cases in Argentina and South Africa were only partly implemented but significantly advanced the law or legal culture, providing the building blocks for more successful litigation in the future. Other results can be negative and Rosenberg (1991) points to the complacency in policy advocacy that successful court decisions can bring while Williams (2005) and Scheingold (2004) note the increasing backlash by conservative groups in the United States to the use of progressive rights-claiming strategies. Too many losses for a government

can also make courts more vulnerable to both political pressure and pro-executive judicial appointments, as the Hungarian experience demonstrates.

Third, in thinking about impact, one should ask where does the fault lie where no substantive impact can be found. Was it litigation or the context? In other words, in critiquing litigation, one needs to consider whether alternative strategies were available, such as mobilisation, lobbying or negotiation, or whether adjudication was really just the last and final resort for the victims. Or can the blame for a poor judgment or implementation be really placed at the feet of the adjudicatory system if the litigants and advocates made key errors in their legal and non-legal strategies?

5 Lessons learned on litigation strategy

The rise of ESC rights litigation together with its practical successes and failures has led to a growing reflection on effective strategy (see ICJ, 2008; GARGARELLA; DOMINGO; ROUX, 2006; LANGFORD, 2003). We can summarise a number of them as follows:

5.1 *Broader advocacy strategy - social movements and communities*

Many view the presence of 'broader advocacy' as critical, particularly for cases that involve public interest or marginalised groups. Social mobilisation, community organisation, awareness and media campaigns, and political lobbying, are thus seen as indispensable for successful litigation. It provides ownership of the strategy, supports the preparation of evidence, provides wider legitimacy to the claim and helps ensure that orders or settlement agreements are implemented. There are a significant number of cases where large-scale movements were mobilised behind cases, such as the social benefits cases in Hungary the *TAC* case in South Africa and the right to education cases in Kentucky, Texas and New York. Although, some have been less successful even when hewing to this model, such as the Narmada dam case in India.

However, it is important to avoid dogmatism on this point. High-profile campaigns may be less helpful if the litigants have been victims of deeply held community prejudices. The quiet nature of court proceedings may allow such individuals to more effectively assert their rights and permit indecisive governments to defer to the courts in order to make unpopular decisions. In other cases, one can observe that social movements have been born out of successful judgments, such as the right to food movement in India (MURALIDHAR, 2008).

Successful litigation strategies also tend to assign an important role to the claimants or victims, which is crucial for empowerment, arguable a long-term impact indicator in itself. In Canada, the Charter Committee on Poverty Issues developed a model of accountable litigation, whereby low-income representatives sit on the committee's board. In India, one lawyer, after two decades of public interest litigation now refuses to take a case unless a community is directly involved. However, large-scale cases can raise particular difficulties in negotiating with clients. While legal firms in the USA, UK and Australia have developed management systems for such cases, the practice is comparatively rare.

5.2 *Case and procedural selection*

Many advocates advise incorporating long-term strategies in the selection of initial cases. For instance, it is suggested that it is better to begin with modest cases before moving to more ambitious ones. At the same time, under-ambitious cases can stultify the future development of the law. Three categories of case selection tend to be successful in the early stages: litigation that starts from claims resembling a traditional defence of civil and political rights, egregious violations or clear failures of governments to implement their own programmes; and modest claims that leave open the possibility for future development of jurisprudence. A second group of decisions revolve around the type of procedure to be used, particularly when there is a possibility of both individual and collective litigation. Some advocates and commentators legitimately warn against collective complaints since NGOs and lawyers may co-opt litigation strategy (PORTER, 2004) or it may remove the possibility of international remedies since individual remedies have not been exhausted (MELISH, 2006). However, collective procedures can be particularly useful when individual victims fear or are likely to be harassed for participating in the case or where victims are dispersed (FAIRSTEIN, 2005). One possible solution, which is used in some jurisdictions, is to include both individuals and organisations as litigants.

5.3 *Legal, factual and remedial arguments*

Successful cases are usually marked by close attention to quality legal arguments. However, the types of submissions tend to vary considerably between jurisdictions and it is obviously difficult to classify them precisely. For example, international human rights treaties and international and comparative jurisprudence have been particularly influential in some countries but less so elsewhere. Likewise, some cases have benefited from very narrow legal arguments while more expansive arguments have been crucial in others. Nonetheless, the fact that ESCR-Net's comparative case law database of a mere 100 cases registered 72,000 hits across the world within two years signals the strong and growing interest in comparative learning.

Organisations and movements that carry a more long-term vision tend not to rely solely on human rights norms alone but also devote sufficient energy to developing legislation that would enhance legal strategies. For example, housing rights groups in the US campaigned for a new federal law that provides a range of specific and concrete rights for homeless persons. This was then followed up by litigation for enforcement when it went unimplemented⁸. However, while this approach is usually the ideal, including from a political perspective, it may not always be available, particularly when groups are highly marginalised or there is little political will to implement existing legislation.

Some ESC rights cases raise complex evidential issues. One notable example is the *Kearney* case in Canada, where advocates quantitatively demonstrated that the minimum income criteria for the rental market was based on flawed assumptions – most low-income tenants could actually afford higher rents and maintain a low default ratio even in the face of economic difficulty. Properly defined and measured

statistics have thus sometimes been the deciding factor in a case. But others are beginning to raise concerns that some courts are placing too much emphasis on the development of quantitative evidence.

Weak or inappropriate remedies are often cited by advocates as a key obstacle in securing implementation of successful decisions. While it may be stating the obvious, developing a careful strategy for remedies should accompany the decision to litigate, and inform wider campaigning and the way in which the case is shaped. While courts appear willing to provide remedies that match the violations, ensuring court supervision of the orders can be critical in guaranteeing the effectiveness of the orders. Decisions in environment cases in India and school segregation cases in the US have taken years to implement and have required constant recourse to the courts.

5.4 Preparing for enforcement

A seeming weakness in many legal strategies is that there is no preparation to enforce a successful settlement or adjudicatory decision. As noted above, a wider advocacy strategy and mobilisation can ensure there are financial, human and technical resources and a will ‘beyond lawyers’ to implement decisions. Advocates frequently note that implementation can take as much, if not more, work as obtaining an order in the first place. It may also take skills which are beyond the claimants and the parties, necessitating the deployment of mediating individuals or community workers. Claimants and advocates therefore need to plan the follow-up from the beginning and be supported by sufficient resources for this role.

6 Conclusion

This comparative survey of ESC rights adjudication reveals a field in flux between nascence and maturity. For many states in the world, ESC rights litigation remains a small and insignificant part of the landscapes of human rights, social justice campaigning and jurisprudence. However, in a context of poverty and social inequality, the combination of rights awareness, the spread of litigation strategies and the increasing independence of the judiciary has led to ESC rights litigation in countries as diverse as China, Egypt, Namibia and the United States. In the not insignificant minority of jurisdictions, a certain level of maturity is being reached in both jurisprudence and debates over appropriate litigation strategy even if there is not uniformity amongst all actors involved particularly over legal doctrine or enforcement.

In historical perspective it is noteworthy that many of the traditional assumptions concerning ESC rights as non-legal and non-justiciable have been rendered doubtful in a short period of time. Domestic courts have made orders across the spectrum of obligations of States to realise ESC rights, from the prevention of harm, to the finding of discrimination to orders to ensure access to basic services and medicines. This jurisprudence does not dispense with objections that ESC rights adjudication is democratically illegitimate or institutionally fraught with complexity but it provides a more grounded context for these debates and their judicial resolution.

For those who wish to encourage the development of ESC rights adjudication as

a field of both law and practice, the key is to build on both the causes of jurisprudential developments and the lessons learned in ensuring successful litigation. It means ensuring there is awareness of many under-utilised justiciable avenues, undertaking the long struggle of improving them elsewhere, building national and transnational alliances with different human rights groups, social movements and communities and focusing on cases which are concrete, burning and reveal political failure. It demands wisdom in avoiding excessive or overly ambitious use of the courts that demobilise the possibilities of political action or gradual development of jurisprudence and at the same time robustly exercising the fundamental human right to a remedy and ensuring that ESC rights become embedded in legal jurisprudence and by extension the political and policy space of nation-States.

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NOTES

1. For example, in *Gbemre vs. Shell Petroelum and Others* (NIGERIA, 2005) the Nigerian High Court cited the earlier finding by the African Commission on Human and Peoples Rights in *SERAC vs. Nigeria* and ordered the halting of gas flaring by oil companies on the basis that it violated the Iwherekan community's right to life (including environmental health) and dignity.

2. While there has been an emerging recognition that legal aid is a human right in the field of ESC rights (GALOWITZ, 2006; DURBACH, 2008) securing it represents something of a lottery. Some countries have adopted legal aid policies that include non-criminal cases but re-allocation or increased funding does not always follow.

3. However, the Court's stance has more recently slightly softened (NOLAN, 2008).

4. Domestic challenges to the activities of large or transnational corporations have met with some success while attempts at transnational litigation (suing a multinational in their home state) have led to many settlements but no judgments (JOSEPH, 2008).

5. Although the difference between them is not always easy to discern (FINLAND, *Child-Care Services Case*, 1999).

6. For English summaries of a wide range of cases see <www.nordichumanrights.net/tema/tema3/caselaw/>.

7. This trend is also evident in international jurisprudence on the ground of 'other status' (UNITED NATIONS, 2009).

8. See http://www.nlchp.org/about_us.cfm. Last accessed on: 19 October, 2009.

RESUMOS

Do ponto de vista histórico, pode-se considerar notável a importância recentemente adquirida pelos direitos econômicos, sociais e culturais (ESC) na jurisprudência comparada e nas estratégias de litígio. Vislumbra-se hoje um processo, ao mesmo tempo, de ampliação e aprofundamento da exigibilidade destes direitos perante tribunais nacionais, o que, embora antes tenha se restringido a uma parcela pequena de jurisdições, hoje pode ser constatado em diversos países de todas as regiões e sistemas jurídicos do mundo. Embora esta tendência nos leve a duvidar de pressupostos tradicionais acerca da não-justiciabilidade dos direitos ESC, ainda restam certas questões conceituais, instrumentais e empíricas a serem respondidas. Este artigo procura apresentar uma visão geral sobre as causas para estas mudanças de cunho socio-jurídico, sobre a natureza e o conteúdo da crescente jurisprudência acerca deste tema, sobre evidências empíricas e discussões referentes ao impacto desta jurisprudência, bem como sobre lições aprendidas a partir de estratégias efetivas de litígio. Por fim, conclui com sugestões para que se possa avançar nesta seara futuramente.

PALAVRAS-CHAVE

Direitos sociais – Justiciabilidade – Impacto – Litígio estratégico

RESUMEN

Desde una perspectiva histórica, el avance de los derechos económicos, sociales y culturales (DESC) en la jurisprudencia comparada y estrategias de litigio resulta notable. Ha habido una ampliación y profundización de la exigibilidad de estos derechos por vía de los tribunales nacionales, comenzando por un número reducido de jurisdicciones y extendiéndose a países de todas las regiones y sistemas jurídicos del mundo. Si bien esta tendencia arroja dudas sobre las suposiciones tradicionales acerca de la no justiciabilidad de los DESC, sigue habiendo interrogantes conceptuales, instrumentales y empíricos. Este trabajo intenta ofrecer un panorama general que incluye las causas subyacentes de este desarrollo socio-jurídico, el carácter y contenido de la jurisprudencia emergente, las pruebas empíricas y debates en torno al impacto y lecciones aprendidas a partir de las estrategias efectivas de litigio. Como conclusión se ofrecen algunas ideas sobre cómo podría desarrollarse este campo.

PALABRAS CLAVE

Justiciabilidad – Derechos sociales – Impacto – Litigio estratégico

ANN BLYBERG

Ann Blyberg is the Executive Director of the International Human Rights Internship Program (IHRIP) in Washington, D.C., which aims to help strengthen human rights groups, particularly in countries of the global South. She also coordinates the initiatives of the Human Rights Budget Group (HURIBUG).

Email: ablyberg@iie.org

ABSTRACT

The paper provides a short history of the development of **human rights budget work** and explains what human rights budget work is. It discusses the different focuses — including on transparency, on gender, and on the right to food—of current work and provides examples of some of the work done by civil society groups in different countries. It also summarizes some of the strategies used by groups in their human rights budget work. The next part of the paper focuses on the current environment for the work and opportunities for its development as well as challenges civil society groups face in doing the work. The last part of the paper makes recommendations for initiatives that need to be undertaken by civil society, governments, intergovernmental bodies and donors to encourage and facilitate the development of human rights budget work.

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KEYWORDS

Human rights budget – Economic, social and cultural rights - NGOs



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THE CASE OF THE MISLAID ALLOCATION: ECONOMIC AND SOCIAL RIGHTS AND BUDGET WORK

Ann Blyberg

Human rights budget work is like detective work. Like detectives, human rights budget analysts track down clues. Like detectives, they too work to determine the relationship between the clues, and to understand what the clues, taken together, are saying about what happened and “whodunnit.” Of course, budget analysts do not have the allure of the world’s great detectives nor are they surrounded by the same air of mystery and adventure. However, their work is just as serious, because they also are on the trail of miscreants and they too are investigating what often turns out to be a crime.

Despite its seemingly more prosaic nature, over the past five years human rights budget work has been growing rapidly in its scope, creativity and impact. Budget work¹ brings new types of investigative tools to rights work. The findings of budget analysis provide important technical data to back up human rights claims, data that are particularly persuasive because they are often derived from the government’s own figures. Budget work, when properly used, can even expose human rights abuses that may otherwise remain hidden in the dense complexity of a government’s financial reports. Moreover, a human rights framework strengthens the work of civil society budget groups through infusing that work with the moral claims of human rights and grounding it in legal obligations of governments.

Groups in a range of countries have challenged budget policies and expenditures that have deprived people of their livelihoods, harmed their health, robbed them of basic education, and otherwise negatively affected their essential economic and social rights. These human rights budget groups have pressured governments to release essential budget information, so that the evidence can be examined in the light of day. They have pressed for open budget processes, so that people can find out what has been happening and hold wrongdoers accountable for their actions. In a few

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short years, in other words, budget work has proven itself to be an effective tool in furthering the enjoyment of human rights.

The following pages give some background on the development of human rights budget work and provide some details on the nitty-gritty of the “detective” work being done. They explain the different focuses of that work along with giving short descriptions of what some groups are doing. The paper then summarizes a few strategies and particular methodologies used by groups, along with trends and opportunities in, as well as challenges to doing, human rights budget work. The paper concludes with recommendations for future work.

1 Some Background

Human rights budget work is young, no more than 5-10 years old. To understand where it came from and where it is going, it is helpful to take a brief look at the broader field of civil society budget work, which itself is generally considered to have started only in the mid-1990s. Reasons that have been given for the growth of civil society budget work are:

- The end of the Cold War and increased democratization in countries around the world, and particularly in countries of the former Soviet bloc, created more hospitable environments for the growth and greater influence of civil society;
- During this same period, the United Nations, the World Bank and other international agencies focused increasing attention on “good governance” and the components thereof, including transparency, a decrease in corruption, and so on. This emphasis on “good governance,” while welcomed by many human rights activists, has also at times created confusion and served as a diversion from human rights concerns. In any event, it has certainly affected the development of human rights budget work;
- In recent decades there has been increased decentralization of governments in a large number of countries. With this decentralization and the move to more local governance and local budgeting, many civil society groups have felt better able to tackle budget issues, because local budgets and local government expenditures are generally more understandable and easier to influence than is the central budget;
- During the same time many legislators became more interested in budget issues and their role in the budget processes, and civil society organizations (CSO) saw greater opportunities to influence the budget through access to and pressure on legislators;
- There have also been significant technological developments in the past couple of decades, and in particular, the more widespread use of personal computers. Budget analysis generally requires a lot of calculations. Prior to the availability of personal computers, the resources necessary to do extensive number crunching were simply beyond the reach of much of civil society; and
- A number of donors, particularly the Ford Foundation and subsequently the Open Society Institute and others, were willing to support civil society budget work.

Human rights budget work started only a few years after the broader civil society budget work had begun. The reasons for its development are the same, with one important addition: with the end of the Cold War and its ideological battles, the human rights field was able to focus significant attention on economic and social (ES) rights. While government expenditures are necessary for the realization of all rights, because of the central role of government in providing education, health care and other social services, the connection between government expenditures and human rights is more visible. Thus, as they got involved in ES rights work, human rights groups became interested in learning more about government budgets and about budget work.

2 “Human rights budget work”—What is it?

Before considering the current state of human rights budget work, perhaps it would be useful to clarify what the phrase “human rights budget work” means. Various other phrases also used to describe the work include “human rights budgeting,” “budgeting or budget work from a rights perspective,” and “budget analysis and ESC rights.” Essentially, it is work that seeks to relate human rights to government budgets, and budget work to human rights work.

This sounds quite broad, and currently it is. Organizations working in a number of areas have used one or more of these phrases to describe their work. These organizations focus on:

- Transparency in budgeting
- Participatory budgeting
- Gender budgeting
- Children’s budgets
- Budget work focusing on specific “substantive” (as opposed to “process”)rights
- “Frontloading” human rights into budgets
- Macroeconomic policies and ES rights

A fuller description of these different areas of work might help to clarify what work currently falls within the ambit of “human rights budget work”:

Transparency in budgeting: The most common challenge that civil society budget groups face in their work is access to the government information necessary to analyze the budget. Thus, many groups, at least initially, focus their advocacy on encouraging the government to make budget information more readily available. Their advocacy also typically includes a call for easier access to other data, such as, for example, statistics on school attendance or disease and immunization rates—information that is essential to understanding the implications of budget figures. (Of particular importance for human rights budget work are disaggregated data, that is, data broken down by key characteristics, such as ethnicity, gender and so on).

Civil society budget groups are, of course, concerned about access to information for their own work, but first and foremost they focus on transparency and access to information because they believe that all people in the country should

be able to see their government's budget. However, "transparency" is not just about seeing, but also about being able to understand, the budget. Given the complexity of most government budgets, this is difficult without specific training and skills. In response, these same groups often encourage the government to develop an alternative format for the budget—typically called a "citizens' budget"—that is more readily understandable by the ordinary person than is the formal budget².

While the relationship between budget transparency work and human rights is quite direct, most groups focusing on transparency do not explicitly use a human rights framework in their work, although national and international guarantees related to access to information³ could obviously underpin and potentially strengthen it. One group that does address transparency issues while working within a rights framework is Muslims for Human Rights (MUHURI), a non-governmental organization based in Mombassa, Kenya. MUHURI monitors expenditures under the Constituency Development Fund (CDF) in Kenya's Coastal Province. Under the CDF, every Member of Parliament (MP) is entitled to allocate funds to support development projects in his/her constituency. The CDF is very popular but also controversial. A number of people and organizations are concerned about corruption and the mismanagement of the monies, as management of the CDF is shrouded in secrecy with no functioning accountability mechanisms. In the initial stages of its work, MUHURI struggled simply to access information on CDF-supported projects. When it finally succeeded in obtaining records on 14 projects in one constituency, it organized a day-long community hearing that was attended by 1,500–2,000 people. Civil society groups trained by MUHURI read out the findings of their review of the projects, and invited those attending to ask questions to the CDF officials present. This hearing demonstrated how citizens at the grassroots can demand greater transparency and accountability in the government's budget and in government operations. (RAMKUMAR; KIDAMBI, 2007).

Participatory budgeting: Another area of human rights budget work focuses on participatory budgeting. There are many civil society organizations involved in this work, which falls into two broad categories: 1) work related to government-initiated participatory budget processes, the most famous of which is undertaken in Porto Alegre, Brazil;⁴ and 2) work by non-governmental groups to increase civil society involvement in and influence on the formulation and expenditure of government budgets (aside from any government-initiated process). This latter is more common. An example of civil society work in encouraging citizen participation in the budget and budget process is by the Instituto Brasileiro de Análises Sociais e Econômicas (IBASE) in Brazil, which focuses on long-term public education on budget issues. The organization has developed training packages for the general public and citizen leaders to promote budget awareness and strengthen capacity for budget monitoring, initially in Rio de Janeiro and then in other municipalities. It has also developed distance learning packages which reach 350 participants annually (ROBINSON, 2006, p. 23).

Many groups involved in participatory budgeting refer to the right of people to participate in governmental affairs, as guaranteed either in their national constitutions and laws, or in international documents⁵. Many other groups, however, do not explicitly refer to human rights guarantees—and indeed, international human rights standards guaranteeing participation are underdeveloped.

Gender budgeting: A significant number of groups around the world are involved in gender budgeting, whose principal aim has been to make gender visible in government budgets⁶. In one example of such work, Tanzania's Gender Budgeting Initiative (GBI), led by the efforts of the Tanzania Gender Networking Programme (TGNP), undertook research in teams of three—one academic (economist or sociologist), one NGO activist and one government worker. Using participatory techniques, teams identified structural and social constraints to progressive and gender responsive budgeting as well as the lack of gender awareness of policy-makers, budget officers and civil society actors. Reports were disseminated to different sectors of society, including activist organizations, government departments and external agencies. Findings were shared through working sessions and public forums with civil society, donors, policy-makers and technocrats within research areas, and groups of MPs, specifically women MPs and those active in parliamentary committees such as the Parliamentary Finance/Budget Committee. One strategy for the dissemination of findings was the publication of a popular book called *Budgeting with a Gender Focus*. In addition, dialogue was initiated with key policy-makers, the legislature and political parties to seek positive changes in discriminatory, retrogressive and gender-blind policies, laws and development programs (RUSIMBI, 2002, p. 119-125).

While gender budgeting work is motivated by a concern about inequities and discrimination in budget allocations and expenditures that are to the detriment of women, most of this work has not been explicitly shaped by international human rights norms related to gender discrimination, most notably those embodied in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). In 2006, however, an important guide was produced on how to assess a government's compliance with its CEDAW obligations through looking at its budget. This guide, *Budgeting for Women's Rights: Monitoring Government Budgets for Compliance with CEDAW*, (ELSON, 2006, p. 3) does a very thorough analysis of the relationship of CEDAW standards and obligations to government budgets, proposes ways that the treaty can be used in budget work, and highlights the "value added" of using international legal standards as a framework for evaluating a government's budget as it affects women. This guide will hopefully expand use of a human rights framework in gender budget work.

Children's budgets: Civil society groups in many countries work on "children's budgets," which are similar to gender budgets in that they seek to understand how and how much the government is allocating and spending on programs affecting children, and how the government's budget impacts children. A very important early initiative in human rights budget work was undertaken by the Children's Budget Unit (CBU) of Institute for Democracy in South Africa (IDASA). Over the course of several years, the CBU produced reports that used the human rights provisions in the South African Constitution to assess funding in the areas of health, education, housing and social development for children, making specific recommendations to the government on how it should build its programming and budgeting to better fulfill its rights obligations to children. The CBU has also worked to develop the capacity of children themselves to monitor the budget and participate in decision-making in the areas of the budget that affect them (STREAK, 2003, p. 2-3).

Budget work focusing on specific "substantive" (as opposed to "process") rights:

Because various economic and social issues, such as poverty, hunger and illiteracy, are highly complex in their causation, and because international human rights standards are themselves in the process of development, the conceptual task of relating “substantive” economic and social rights to government budgets is challenging. Budget work of this type been done to date has relied both on national constitutions and laws, and on international standards related to specific rights. The principal international documents have been the International Covenant on Economic, Social and Cultural Rights (ICESCR) and related General Comments issued by the UN Committee on Economic, Social and Cultural Rights. Despite the complexity of relating specific rights to the government’s budget and budget process, some important and inspiring work has been done. For example:

- Women’s Dignity in Tanzania focuses on maternal mortality in that country. Key to improving maternal mortality ratios (and thus realizing women’s right to health) is ensuring access to prenatal care and emergency care during childbirth. In reviewing data on women’s access to these two types of care, the organization learned that poor women in Tanzania (as in many countries) have markedly less access to these services than do the better off, with the result that disproportionately more poor women die in childbirth. Women’s Dignity used budget analysis to track funds earmarked for the “delivery kits” used by midwives and doctors, and learned that these kits were not available at all facilities. The organization began a push for greater transparency in the health budget, to determine where the kits should be and if the money allocated for them was being properly spent (HOFBAUER; GARZA, 2009, p. 11-13).
- The Centro Internacional para Investigaciones en los Derechos Humanos (CIIDH) in Guatemala investigated the implementation of a school supplementary feeding program, the Vaso de Leche Escolar – VLE (school glass of milk), which was intended to help guarantee the right to food of the most food-insecure people in the country. CIIDH learned through feedback from communities as well as by examining government expenditures under the program that students in more food-secure areas of the country were benefiting disproportionately from the program, while those in more remote communities, which tended to be the most food-insecure, were either not benefiting from the program, or, if they were, delivery of the milk was erratic and the milk was often spoiled. The government was also paying more for the milk than it should have, which meant that the limited program funds were able to reach fewer communities than they could have, had the milk been bought at a more reasonable price. When a new government came into power in Guatemala, it decided to discontinue the VLE program, and substitute a more cost-effective, culturally-appropriate alternative. Many of the intended recipients of the VLE were from indigenous communities, which in Guatemala tend to be lactose-intolerant (FAO, 2009, p. 53).

“Frontloading” human rights into budgets: Current human rights budget analysis focuses primarily on what has been described as “hindsight” analysis: identifying ways that government budgets and implementation of the budgets have failed to meet

human rights standards. Some organizations are trying to develop methodologies for identifying the costs of implementing specific human rights, and to encourage those costs to be included “up front” in the formulation of national budgets⁷. In 2005, for example, the National Food and Nutrition Security Council (CONSEA) in Brazil set out to put together a “right to food budget.” It has encountered significant challenges along the way, a key one of which was deciding which aspects of the society and economy are related to the right to food, and thus which areas and line items in the government’s budget are relevant to the right to food. In order to make the project feasible, CONSEA decided it needed to focus only on the federal budget and limit itself to food security (rather than the broader right to food concept). Despite these limitations, for 2008 CONSEA nonetheless needed to look at 43 government programs and 143 related activities (FAO, 2009, p. 88-92).

Macroeconomic policies and ES rights: The size, content and priorities in a government’s budget are determined to a significant degree by the government’s macroeconomic policies. Some of these policies are adopted on the urging of international financial institutions, such as the International Monetary Fund (IMF); some are the result of political priorities otherwise chosen by governments. Because the budget should be part of a government’s efforts to realize the right of its people, it should prioritize funding to programs and projects that realize human rights, such as health care services, job training and job creation programs, education and so on. If the macroeconomic policies that shape a government’s budget are not human rights sensitive, this will not happen.

The effect of macroeconomic policies on human rights through their impact on the government’s budget is quite a new area of research and advocacy. It has, however, been examined in some important recent reports. ActionAid has looked at the effect of “wage cap ceilings” on the capacity of governments in three countries in Africa to hire a sufficient number of teachers to help meet their right to education obligations (MARPHATIA et al., 2007). Another study focused on a range of macroeconomic policies and their impact on the right to work and other rights in Mexico and the United States (BALAKRISHNAN, 2005).

3 Approaches to human rights budget work and strategies pursued by groups

It is not surprising that to date the most common concern for those involved in human rights budget work has been the impact of government budgets on “vulnerable groups,” which include the poor, women, children, indigenous peoples and minority groups. Despite sharing such common concerns, approaches to budget work can and do vary significantly, depending upon the capabilities of the organizations, the specific issues they address, and advocacy goals for their work. Because civil society budget work is young, many strategies for the work are still very much in the developmental stage. Some are currently being pursued by only a few civil society groups, and given the more recent development of human rights budget work, it is not surprising that even fewer have as yet been employed in that work.

Many civil society budget groups seek to influence the national government

budget through discussions with and lobbying of ministries or departments, and legislators. Some, increasingly frequently, are taking their concerns about the national budget to the courts. One example of work with ministries and legislators was undertaken by Fundar – Centro de Análisis e Investigación. Fundar, a Mexican NGO, was one of the first groups to locate its budget work within a human rights framework, and has done a great deal of work on health issues in Mexico. One Fundar initiative, undertaken in collaboration with other civil society groups, focused on allocations in the budget for HIV/AIDS programs, funds that appeared to have been diverted from their intended purpose by the Ministry of Health. Using the freedom of information law in the country, the coalition secured Ministry of Health documentation that confirmed their suspicion that the funds had been directed to Provida, a right-wing organization that campaigns against abortion and the use of condoms (both campaigns contrary to established government policies). Fundar helped analyze the data available about the use of the funds by Provida, and found that approximately 90% had been blatantly misused. When the Ministry of Health refused to meet with the coalition to discuss these findings, the coalition went to the media, which provided extensive coverage to the issue. Numerous other civil society groups joined the coalition, and more than 1,000 organizations put pressure on the government to investigate the case. It finally did, confirmed the findings, and called on Provida to return the funds.

Another initiative took place in Argentina, where an NGO took the government to court on a case involving budget issues. Despite the contentiousness surrounding justiciability of economic and social rights, in recent years courts in a number of countries have started to take a more active role on ES rights issues, including ones where information about the government's budget is part of the evidence. One such case was handled by the Centro de Estudios Legales y Sociales (CELS) in Argentina. In the *Mariela Viceconte* case, Argentine groups sought to pressure the government to manufacture a vaccine against Argentine hemorrhagic fever, which annually threatens the lives of the 3.5 million people who live in the endemic areas. In 1998 a Court of Appeals ordered the government to do so. Although the vaccine was to be produced and administered to the affected population by the end of 1999, CELS verified that up until July 2000 the government had not fulfilled its obligation. The organization filed a petition asking the judge to fix a new, reasonable deadline, and presented budget figures and information demonstrating that enough resources had been allocated in the budget for the manufacture of the vaccine, but the funds had not been used. The judge fixed a new deadline, which the relevant government ministries did not honor. The judge then ordered the budget funds that had been allocated for the production of the vaccine to be frozen, to prevent the government from spending them on other activities (IHRIP; FORUM-ASIA, 2000, p. 42).

While some groups, such as Fundar and CELS, work at the national level, others focus their research and advocacy on state or local-level budgets and authorities. With many governments decentralizing and a lot of civil society groups working within a single province or state, or at a local level, there are a good number of groups doing budget work that focuses on provincial/state and local budgets. The Asociación Civil por la Igualdad y la Justicia (ACIJ) in Argentina, for example, has been working on a significant initiative on the right to education, which pays particular attention to

equality in education among different neighborhoods of the capital, Buenos Aires. One of its education projects (all of which involve close work with affected communities) documented the use by the city's education department of cargo containers as extra classrooms to relieve overcrowding in schools in poor neighborhoods. ACIJ uncovered information that showed that overcrowding of schools was a greater problem in poorer neighborhoods, and that the containers were used only in those neighborhoods. It learned from analyzing the city's education budget that rental of the containers was actually more expensive on an annual basis than building additional classrooms would have been. Following publication of these results, the education authorities in Buenos Aires took steps to replace some of the containers with new classrooms.

While ACIJ examined government budget documents and financial reports to learn more about the city's expenditures on education, other organizations working at the local level have involved communities themselves in different ways of tracking expenditures. One well-documented example was a 2006 "social audit" undertaken by Mazdoor Kisan Shakti Sangathan (MKSS) together with other civil society groups in India. The audit involved the efforts of some 800 people, who examined funds spent under the National Rural Employment Guarantee Act (NREGA), which entitled rural households to 100 days annually of government employment at minimum wage. The 800 audit participants visited all the villages in Dungarpur district of Rajasthan where there were NREGA programs, meeting with approximately 140,000 individuals who had worked under the programs. The audit uncovered a large number of irregularities, and concerns about these irregularities were, in turn, raised with the district administrators in a public forum (RAMKUMAR, 2008, p. 21-23).

Before considering yet another approach to budget work (assessing impact), it is worth recalling that from a human rights perspective, it is not sufficient for a government to "do the right thing", which speaks to its obligation of conduct. Governments also have an "obligation of result," an obligation to ensure that their actions—policies, plans, budgets, programs—actually result in an increase in people's enjoyment of their rights. Work that groups do assessing the impact of government expenditures is an important way to analyze compliance with this obligation of result. In 1993, for example, the Public Affairs Centre (PAC) in India initiated a "citizen report card" survey, to measure satisfaction with municipal services (water, garbage collection, park maintenance, etc.) in Bangalore, one of the country's largest cities. The survey measured not only degrees of satisfaction, but also sought to pinpoint which aspects of services were implemented in a more, which in a less, satisfactory manner. It also looked at costs of the services. The results of the surveys—very poor grades in service provision—were publicized through the media and public meetings. Despite subsequent surveys and the attendant negative publicity, the services failed to improve in a marked way for a few years—until 2003, when the survey of that year revealed a significant increase in public satisfaction with municipal services (RAMKUMAR, 2008, p. 75-77).

Finally, it is important to stress that because of the complexity of much of budget work, the work can be most effective when undertaken in formal or informal coalitions or alliances. Through coalitions and alliances groups can access needed technical knowledge and skills on, for example, analyzing budgets or handling

statistics. Groups that do technical research and analysis can ensure that their work is grounded in reality and responsive to people's needs through allying with groups that work at the community level in service provision. Such coalitions and alliances are also a key to effective budget advocacy. For example, groups that do not normally work with government ministries or lobby legislators can work with groups that have experience in these areas and by drawing on their knowledge, skills and capacities, they can influence the national budget. Groups that lobby legislators can, in turn, maximize the impact of their lobbying if they work in alliance with groups who can turn out large numbers of people in vocal public demonstrations, which put pressure on politicians and government agencies.

A particularly significant example of effective coalition work has been provided by the Right to Food Campaign in India. In 2001 the People's Union for Civil Liberties (PUCL) filed a lawsuit to force the government to use food stocks to prevent hunger during a widespread drought. In the years since, the Indian Supreme Court has issued a number of orders related to the case that have, in effect, turned certain government programs into legal entitlements—rights. The Court appointed Commissioners to monitor the government's implementation of the Court orders. As part of their work, the Commissioners monitor the government's budget allocations and expenditures on programs. The Campaign, which now involves more than 1,000 organizations around the country, coordinates a range of activities around the Court rulings. It undertakes social audits to assess the effectiveness of the government's implementation of the programs and the Court's orders. Member organizations do independent analysis of the government's expenditures on the program, and bring their results back to the Commissioners. The Campaign also organizes public rallies and protests to bring the public's attention to the issue and keep pressure on the government (FAO, 2009, p. 82-88).

4 Trends, opportunities and challenges

Civil society budget work is expanding at a rapid pace, with a substantial (but not exclusive) focus among involved groups on issues of transparency as well as peoples' participation in various ways in the budget process. A significant number of CSOs have also developed impressive skills in analyzing budget allocations and bringing the attention of the media and legislators to their findings, while others have developed important capacities to track expenditures and organize communities around budget issues. "Human rights budget work" can be considered a subset of this broader development and is expanding in step with it.

Human rights budget work reflects the way human rights work itself has been changing and becoming increasingly complex. The emergence of work on economic and social rights has already been mentioned. Not only has this emergence meant that human rights groups take on a much broader range of issues than they have traditionally done; it has also challenged them in other ways. Because, for example, a number of the methodologies used for monitoring civil and political rights realization are not effective or relevant for monitoring economic and social rights, concurrent with the growing engagement by groups in economic and social rights work has been a search for

methodologies and tools to monitor realization of these rights. Budget analysis and other forms of budget work are perhaps the most commonly mentioned “new” methodology.

In addition to the identification and adoption of new methodologies, groups active on economic and social rights often talk about the ways in which their relationships with governmental bodies and agencies is different from the traditionally more adversarial stance taken by groups doing civil and political rights work. The difference is rooted in part in the fact that economic and social rights work necessarily addresses government policies, plans and budgets. Working with these key government documents requires discussions with government ministries, departments, agencies and officials, if only to get copies of the policies, plans and budgets. This more affirmative approach, however, is only one half of the relationship with government, as human rights budget groups also perform in the more traditional role when they confront governments with documentation about shortcomings and violations identified in their budget analyses, and demand a response and a remedy.

The relationship between the government and groups doing human rights budget work is not simply one way, with the CSOs needing something from government. Line ministries in the areas of, for example, health and education, have at times valued and encouraged the work of civil society groups that are demanding greater funding for health and education. In addition, legislators are not always just the targets of advocacy, but have often benefited from the assistance of budget groups. Because they have a responsibility to approve the Executive’s budget, but typically lack the technical knowledge to understand the content of the budget in any detail, legislators often value civil society’s analyses of the budget, as these provide legislators with information enabling them to do their job in a more informed manner.

The current environment also contains a number of other factors conducive for the development of human rights budget work. Because of the growth of civil society budget work in a large number of countries, human rights groups with less experience in budget work may be able to learn from (and potentially collaborate with) these more experienced groups. Much of the work these other CSOs do is relevant to human rights work, even if it has been approached from a different perspective or framed somewhat differently. In addition to civil society groups, there are also individuals (including economists within think tanks or in academia) with important technical skills, who have at times been willing to assist human rights groups with budget analysis. The challenge for human rights groups is to identify these individuals and develop collaborative relationships with them. In addition, there are important resources in civil society budget work available at the international level. The International Budget Partnership (IBP) and Revenue Watch, for instance, play key roles in enabling human rights groups to learn about work being done by other CSOs in their own and other countries.

Also conducive to the growth of human rights budget work are initiatives in the human rights field to develop and make accessible resources that are complementary to budget analysis and expenditure tracking. One such initiative, by the Center for Economic and Social Rights⁸, involves developing other methodologies for monitoring “available resources” and “progressive realization,” through using statistical analysis, indicators and so on. The American Association for the Advancement of Science

(AAAS) has developed a database of “‘On-call’ scientists,” which includes the names of a large number of scientists (including social scientists and statisticians) who would like to volunteer their time to human rights work⁹.

Despite the positive environmental factors and the opportunities available for human rights budget work just mentioned, groups doing the work (or those who would like to do the work) still face very substantial challenges. The most common and most significant challenge is a lack of access to government information — whether that information is the budget itself, the policy and other documents underlying the budget, or population and other data necessary to make sense of budget figures. As a result, groups interested in budget work often find that their principal task turns out to be pressuring for greater openness in government, for making the budget more readily available to civil society, and encouraging the government to gather and publicize disaggregated data that allows for analysis of the impact of the budget on specific groups.

For most human rights groups, working with government budgets also requires considerable re-tooling. Reading budgets and related documents, and doing budget analysis, are not part of the “traditional” tool set used by these groups. Even if groups rely on others to do the actual budget analysis (for example, colleagues in civil society budget groups, academic institutions or think tanks), they nonetheless have to have a sufficient level of understanding of budgets to be able to pose the appropriate questions for analysts, understand the implications of the analysts’ findings, and speak with governments and others about those findings.

An additional challenge faced by human rights budget groups lies in the complexity, already alluded to, of relating human rights standards (particularly those guaranteeing “substantive” rights, such as housing, food, water) to the government’s budget, the budget process and budget analysis. Moreover, knowledge and understanding of economic and social rights are not yet as developed as they need to be. This can be important, because if groups do not have a strong grasp of economic and social rights standards — what they are and how to assess compliance with international or national guarantees — then they will not be in a position to make the best use of budget monitoring and analysis in their work. While budget work has direct relevance to civil and political rights work, it is a more central tool for those working on economic and social rights.

In addition, the development of civil society budget work generally has been slowed by a “bottleneck” — a shortage of individuals in civil society groups who have experience and skills in budget work and who can provide technical assistance to groups and individuals trying to learn the work. Human rights budget work will initially be stymied for similar reasons. Until capacity is built up within a greater number of CSOs, human rights budget work will need to rely on the same cadre of budget analysts.

An additional complexity: While there is considerable activity relating government budgets to the Millennium Development Goals (MDGs) and Poverty Reduction Strategy Papers (PRSPs), both MDGs and PRSPs have their own standards and jargon. The relationship of these standards and jargon to human rights standards and terminology is often unclear, and this, in turn, can be a source of considerable confusion for those seeking to learn from the budget work of groups focused on MDGs and PRSPs.

Finally, a challenge to the rapid development of human rights budget work is resources to support the work. Although some donors are directing funding to human rights budget work, funding currently remains quite inadequate when compared with the enormous promise of the work.

5 Recommendations looking to the future

As has already been mentioned, human rights budget work is young. As a consequence, many of the key steps required to ensure the sustainability and effectiveness of the work have yet to be taken. The following paragraphs describe some activities that would contribute significantly to forwarding the work.

Firstly, the “learning curve” in budgets and human rights work is very steep. Having access to information about work already done — what groups have done, how they have approached the work, challenges they have encountered and overcome, and successes they have had — would help everyone learn faster. Human rights groups could, for example, seek out and learn from the experience of other civil society groups in their country and elsewhere working on government budgets. The IBP and other groups produce a lot of information on this work. While much of the work described through IBP resources does not take place within a rights framework, there is nonetheless a great deal that human rights groups can learn from it. At the same time other organizations are working on creating a central web-based resource for human rights budget work, which will speak directly to the specific challenges of integrating budget work and human rights work¹⁰.

Secondly, there is a need for significant research to be undertaken on a range of topics related to human rights and budgets work, for example:

- Paul Hunt, the previous Special Rapporteur on right to health, looked closely at the relationship of government budgets to the right to health. The Right to Food Unit of the Food and Agriculture Organization of the United Nations (FAO) has done the same with regard to the right to food. Groups and institutions working on other specific rights, such as housing, education or water, should usefully undertake similar explorations.
- Budget work that is being done around specific topics, such as extractive industries, could explore how human rights relate to the issues their budget work addresses, and consider adopting a rights framework for it. Indeed, an increasing number of civil society budget groups are exploring the rights framework, as they find that it provides both a legal grounding for their work, and an agreed-upon set of priorities with regard to specific issues, such as health and education.
- There is a need for more work, such as that being done by the Center for Economic and Social Rights, to develop solid tools and methodologies (related to statistical analysis, indicators and such) for investigating and documenting economic and social rights issues. Such tools and methodologies are often a necessary complement to effective budget analysis, as they provide information that helps make sense of budget figures.

Thirdly, in a survey done by the International Network for Economic, Social and Cultural Rights (ESCR-Net) a couple of years ago, groups doing human rights budget work identified capacity-building as one of their principal needs. There are several possible approaches to capacity-building, and a number could be pursued. Groups reported, for example, that materials like *Dignity Counts: A guide to using budget analysis to advance human rights* (FUNDAR; INTERNATIONAL BUDGET PROJECT; IHRIP, 2004) are useful, and more guides on different aspects of human rights budget work, as well as work in related areas (civil society budget work generally, work on statistics and data analysis) should be developed and made widely available. In addition to these printed resources, some organizations currently run learning programs on human rights budget work¹¹, but these need to be offered more frequently, and, as more groups become involved in the work, should address a broader range of topics.

Civil society groups generally value technical assistance provided by skilled budget analysts who at the same time understand civil society research and advocacy work. Human rights budget work could benefit significantly from increased technical assistance. Exchange programs, where a staff member of a group doing human rights budget work spends time with a more experienced budget group or human rights group, is also an important format for capacity-building. Such exchanges allow staff taking part to learn key skills necessary to budget work through “on-the-job” training—the sort of in-depth training that is not possible in shorter-term learning programs.

Fourthly, as was already mentioned, there are many groups doing various forms of budget work that could be considered “human rights budgeting,” but who do not explicitly use a rights framework. These groups, including those working on transparency as well as participatory budgeting, should be encouraged to use national and international human rights standards on access to information and participation to both develop and present their work. In addition, groups working on gender budgeting should be encouraged to use CEDAW and other international and regional human rights frameworks to design and present their work.

Finally, international bodies and mechanisms with responsibility to oversee and report on human rights situations and compliance with treaty obligations should consider the relevance of government budgets to the issues they are addressing, and take relevant budget analyses into account in data-gathering and reporting. Specifically, the Committee on Economic, Social and Cultural Rights (CESCR) should consider requiring certain basic budget information from governments submitting their periodic reports to the Committee, and encouraging civil society to include budget analysis in the alternative reports they bring to the CESCR.

6 Conclusion

Many human rights abuses are rooted in an unequal distribution of the wealth and resources of a society. Human rights budget work can be a very effective tool in pinpointing and documenting some of those inequalities, and the reasons for them. By providing them with information about government allocations and expenditures, and by developing specific recommendations for reallocation and suggesting different targets for expenditures, human rights budget work can enable citizens and civil

society groups to hone their demands, and articulate requests for quite specific actions to improve the situation.

The government's budget is a key document and an essential process in managing the financial and resource wealth of a society. Governments, if they have the political will, can shape their budgets and spend them in ways that help guarantee a more equitable distribution and use of the society's wealth. In doing so, they can ensure that at least the resources under their control are utilized in ways that best enhance the access of each and every person in the country to those basic facilities and capacities that are essential for human dignity. This is government at its best.

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NOTES

1. In this article, the term "budget work" is used to refer to a range of possible work related to a government's budget, including, in particular, budget analysis, expenditure tracking, costing, budget impact assessments and budget advocacy.
2. The International Budget Partnership (IBP) has a web page that includes more detailed information about civil society transparency initiatives (<http://www.internationalbudget.org/themes/BudTrans/index.htm>). In addition, IBP, in collaboration with other civil society budget groups around the world, has developed an "Open Budget Index," which rates the degree of transparency of budget processes in 85 countries (<http://www.openbudgetindex.org/>). Last accessed on: 5 Aug. 2009.
3. UNESCO has produced a useful resource that provides an extensive analysis of these standards (MENDEL, 2003).
4. For a fuller description of this process, see (WAGLE; SHAH, 2003).
5. For example, the Universal Declaration of Human Rights, article 21(1), and the International Covenant on Civil and Political Rights, article 25.
6. A website, hosted by the United Nations Development Fund for Women (UNIFEM) provides extensive information and resources on "Gender Responsive Budgeting" around the world: <http://www.gender-budgets.org/>. Last accessed on: 5 Aug. 2009.
7. One such initiative, started in early 2006 by the APRODEV Rights and Development Group, is now housed with Equalinrights. More information on this initiative is available at: <http://www.equalinrights.org/budgeting-for-human-rights/>. Last accessed on: 25 Jun. 2009.
8. CESR's website is at <http://www.cesr.org/>. Last accessed on: 25 Jun. 2009.
9. This initiative's web site is <http://oncallscientists.aaas.org/default.aspx>. Last accessed on: 25 Jun. 2009.
10. The International Human Rights Internship Program (IHRIP) is developing such a web page.
11. A partnership of four organizations, IHRIP, IBP, Fundar and ESCR-Net, sponsor 10-day learning programs, primarily at the regional level, on a regular basis.

RESUMOS

O artigo apresenta uma breve história do desenvolvimento da incidência em orçamentos públicos com base em direitos humanos e busca explicar o significado desse trabalho. São abordados diferentes enfoques – incluindo transparência, gênero e direito à alimentação – da incidência atualmente exercida sobre orçamentos públicos, bem como apresenta, a título exemplificativo, experiências de organizações de direitos humanos em diferentes países com relação a este trabalho. Resume também algumas estratégias empreendidas por organizações em sua incidência sobre orçamentos públicos com base em direitos humanos. A segunda parte do artigo concentra-se no contexto atual em que esta incidência se dá, analisa as oportunidades para maior desenvolvimento deste tipo de trabalho, bem como apresenta os desafios enfrentados por organizações neste campo. A última parte apresenta recomendações para futuras iniciativas por parte da sociedade civil, governos, órgãos intergovernamentais e doadores para promover e facilitar o desenvolvimento da incidência sobre orçamentos públicos com base em direitos humanos.

PALAVRAS-CHAVE

Trabalho sobre orçamento público em direitos humanos – Direitos econômicos, sociais e culturais – ONGs

RESUMEN

El artículo presenta una breve historia del desarrollo del análisis presupuestario sobre derechos humanos, y explica en qué consiste el trabajo con el presupuesto público como herramienta de exigibilidad de derechos. Discute diferentes enfoques –transparencia, género y derecho a la alimentación– del trabajo actual, y proporciona ejemplos de experiencias realizadas por grupos de la sociedad civil de diferentes países. También resume algunas de las estrategias utilizadas por grupos que realizan análisis presupuestario sobre derechos humanos y analiza las oportunidades para un mayor desarrollo de este trabajo, así como los desafíos que la sociedad civil afronta en este campo. En la última sección se formulan recomendaciones sobre iniciativas que deben ser llevadas a cabo por la sociedad civil, gobiernos, órganos intergubernamentales y donantes, para facilitar el desarrollo del trabajo de análisis presupuestario sobre derechos humanos.

PALABRAS CLAVE

Presupuesto público como herramienta de exigibilidad de derechos humanos – Derechos económicos, sociales y culturales – ONGs

ALDO CALIARI

Originally from Argentina, Aldo Caliarì has a Master of International Policy and Practice from George Washington University (2007), with a focus on economics and finance. He also holds a Masters Degree from the Washington College of Law, American University, on International Legal Studies (2000), where he was honored with the Outstanding Graduate Award. He earned his first law degree in Argentina, at the Universidad Nacional de Tucumán Law School, in 1997.

Since 2000 Aldo has worked at the Center of Concern where he lead the Rethinking Bretton Woods Project. Aldo has done considerable writing and public speaking on issues of debt, international financial architecture and human rights in international economic policy. In the last few years he has focused on linkages between trade and finance. He routinely acts as a consultant on these topics for international organizations, foundations, media and civil society groups and networks.

Email: aldo@coc.org

ABSTRACT

The emergence of trade, finance and investment policy as priorities for those engaged in promoting the respect and defense of economic and social rights has to do with the increasing realization that, in the struggle to promote those rights, such policies cannot be ignored or abstracted as a separate field. The human rights paradigm as shaped by post-World War II developments which relies on the responsibility of state actors is complemented by economic aspects of globalization, e.g. the rise of international trade and financial flows across borders, deregulation, privatization and the reduction of the role of the state, culminating in an eroding capacity of states to take active measures required to respect, protect and fulfill human rights in their territorial jurisdiction. On the other hand, international organizations such as the World Trade Organization, the World Bank and the International Monetary Fund have increased their influence on the capacity of states to implement human rights obligations. This paper seeks to fulfill several aims. Based on an overview of trends posed by the intersection of trade, investment and financial policies and human rights, the rich landscape of strategies and activities for human rights advocates will be presented. Before formulating some recommendations in the last chapter, the success stories and future trends, including opportunities and obstacles will be looked at.

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KEYWORDS

Human rights - Economic and social rights – Globalization - Human rights advocacy



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TRADE, INVESTMENT, FINANCE AND HUMAN RIGHTS: ASSESSMENT AND STRATEGY PAPER¹

Aldo Caliarì

The fields of investment, trade and finance have gained importance for the conditions of enjoyment of economic, social and cultural rights (ESCR). The trends towards the globalization of trade, finance and investment represent, in this regard, a great challenge that ESCR advocates have faced by resorting to a diverse set of strategies. Even as they made remarkable progress in expanding their level of knowledge, resources and skills, a large gap remains between the available resources and the dimension of the challenge. In particular, ESCR advocates struggle to address the advocacy targets relevant for trade, finance and investment issues in an effective way.

In what follows, Section I provides an overview of trends posed by the intersection of trade, investment and financial policies and human rights, and the emerging challenges for human rights advocates. Section II explores the rich landscape of strategies and activities that the human rights community has deployed so far as a response. Section III looks at the success stories and the future trends that will act as a context to the strategies going forward, including the opportunities and obstacles that they constitute. The final, Section IV, formulates some recommendations.

1 Trends and challenges: an overview

The emergence of trade, finance and investment policy as priorities for those engaged in promoting the respect and defense of economic and social rights has to do with the increasing realization that, in the struggle to promote those rights, such policies cannot be ignored or abstracted as a separate field.

Notes to this text start on page 157.

That has always been true of this set of rights, as the instruments that define the obligations regarding ESCRs are framed in language that forces resort to extra-legal assessments of an economics and economic policy nature. The obligation of States in this area is usually defined as to “take steps... to the maximum of its available resources”, “achieving progressively,” etc². The language specific to certain rights adds even further qualifications, such as when language about the right to health refers to the “highest attainable standard”. This is not to deny that there are standards according to which a violation is immediately configured by the deprivation of a right, such as, for instance, the obligation not to discriminate in the enjoyment of any of the ESCRs. But in most cases ESCR obligations are expressed in language that makes resort to economic policy judgments inevitable in order to ascertain whether states are, for instance, making “the best use” of resources or what are the “available resources” they actually have at their disposal.

Trends towards economic globalization have compounded the problems associated with these factors. This is because the human rights paradigm, as shaped by the post-World War II developments, comes to rely on the responsibility of State actors, making them the only direct holders of obligations. But economic aspects of globalization such as the rise of international trade and financial flows across borders, deregulation and privatization and the reduction of the role of the state, erode the capacity of States to take active measures required to respect, protect and fulfill human rights in their territorial jurisdiction. So something that - from a traditional civil and political rights perspective - used to be welcomed (the receding role of the State vis-à-vis the sphere of individual freedoms) - from an ESCRs perspective - represents a handicap. Economic and social rights call, by their essence, for a State more capable of taking active measures in economic and social policy—even when these active measures do not amount to intervention but to a more active regulation and oversight of private sector activity³.

The same phenomenon has meant that international organizations such as the World Trade Organization, the World Bank and the International Monetary Fund (IMF) have increased their influence on the capacity of states to implement human rights obligations. The same can be said of a number of actors in deregulated international financial markets, such as hedge funds or private equity funds. Put in other words, a range of policy areas that used to be left to domestic decisions alone, and have consequences on how human rights commitments are met, are increasingly being permeated by policies and rules defined at the international level, or in collegial processes of which the national state is only one part (trade, intellectual property, finance). Internationally-organized business actors have also growing weight on the domestic sphere, either directly or indirectly. This weight strongly intersects with the capacity of this sector to lobby on the policies and rules defined at international level.

Nonetheless, these organizations and actors are not themselves parties to the human rights instruments whose development and adoption constitute the result of long struggles by the human rights movement. Ultimately, of course, international organizations are made of States parties to human rights instruments. Likewise, private sector actors do not function in a vacuum but are, arguably, subject to the

jurisdiction of States parties to such instruments. But the fact remains that the chain of accountability in the case of these non-state actors is, to say the least, less straightforward just at a time when their influence has increased.

Therefore, with their growing importance, organizations and bodies with jurisdictions on trade, finance and investment, as well as the policies they issue, have gained more relevance in struggles to promote and respect ESCRs.

The challenges

The efforts to make economic policy- and rule-making accountable to the human rights framework face important challenges.

The first challenge is that posed by economic globalization. This is the one that logically emerges when pursuing rights-based claims (which by definition represent the other side of an obligation) in an increasingly globalized environment where the main economic actors are neither parties to, nor do they feel bound by, the existing human rights instruments that create such obligations. The removal of decision-making on economic policies from the national level also makes it more difficult to pursue accountability. It allows for national and supranational instances to start a “blaming game” whereby each of them alleges the other is responsible for a specific outcome, blurring the responsibility for upholding the right in question.

The difficulties to access information also are a challenge, and this challenge is two-fold. Instead of referring to a national government only, cross-border economic policy issues by definition affect the behavior and policies of more than one party. These parties may be the negotiating parties to a trade agreement or to a loan being drawn either from another country, or from an international financial institution (this financial institution having, in turn, also a broad membership collectively responsible for the decision). These parties may also be the home and host states in an investment project, or the donor and recipient country of a grant. For citizens it is hard enough to gather information about a party that is not their own government. But globalization has also made it more difficult for them to gather information about what their own government is doing in international negotiations, even if outcomes of such negotiations will eventually bind the national and local legislators.

Third, human rights demands on economic policy issues can be condescendingly dismissed by economic policy-makers as well-intentioned, but out of touch with the realities of limited resources. Economic policy practitioners who may entirely agree with those demands oftentimes wonder whether they offer any useful guidance in dealing with intricate policy questions such as: what is the optimal degree of openness in a particular industry, or where to obtain the resources to fulfill immediate and conflicting needs of different social groups. The challenge imposed by the limitation of resources is one that human rights advocates, whose demands oftentimes do not seem to leave room for the trade-offs that are a necessary ingredient of economics, have yet to answer credibly. Where attempts to develop such answers have been made, they are not widely known, lack a solid base on binding human rights standards or are vulnerable to the claim of not being based on sound economics.

Four, the legal human rights framework is also rather mute when seeking guidance on detailed policy prescriptions. Come to think of it, this is neither a flaw, nor should it be surprising. If one accepts the sensible notion that economic and development models should be tailored country-by-country, and even region-by-region, as a product of unique economic, political and social realities, trying to come up with universal best policies is an exercise doomed to failure. Just like the much-criticized structural adjustment programs, similar exercises to establish one-size-fits-all models will attract warranted criticism. But this lack of precise prescriptions, while a strength, may also mean that unscrupulous –or simply misguided—policy-makers can appropriate human rights language to justify ill-guided or questionable economic policies.

Five, the lack of widespread expertise about trade and financial policies and the policy formation process around them among human rights groups represents a hurdle to their operations to try to have an impact on economic policies and practices. This lack of a solid understanding of trade, finance and investment and their relative relevance to specific ESCR objectives hampers the capacity and confidence for human rights advocates to design strategies and propose actions based on evaluations of where a planned advocacy intervention may be useful⁴.

Given this backdrop, there is a temptation to confine human rights advocacy to the “micro” level, as it is in the limited context of a specific project or micro-economy that the impacts of a specific policy or project can be more easily identified and articulated. Yet, this approach cannot come to grips with macroeconomic environments that may be responsible for the need, feasibility or existence of alternatives to the same micro and specific projects. Focusing on the micro impacts amounts, in a sense, to focusing on the symptoms, without tackling primary causes. In addition, the “micro” focus is vulnerable to the claim of lack of rigor in not accounting for trade-offs among rights of different regions or portions of the population. For instance, in a dam project that will require removing a community from its habitat it is easy to identify the affected rights of the community but, from a larger perspective, the government doing so may argue it is simply trying to reduce poverty so other portions of the population can have access to education, health, electricity or even water. The questions of where the line should be drawn and what is an acceptable trade-off cannot be answered in the abstract, and will require a case-by-case examination. The human rights approach certainly does apply to the drawing of this line, as the guidelines issued by Treaty-monitoring bodies allow for measures that will imply retrogression on the enjoyment of certain rights but as long as they are justified in terms of the rights that are being promoted (UNITED NATIONS ORGANIZATION, 1990). The human rights framework does offer a framework for policy choices. But this framework is more difficult to utilize, its application requiring expertise on trade and financial policies, and its conclusions will not be as absolute and straightforward as the ones that can emerge from the micro approach.

Six, a growing number of decisions that would require a delicate balance

between principles of international human rights law and the imperatives of running a good economic policy seem to be *de facto* (or, in some cases, *de iure*) subject to decisions by bodies with purely economic (trade, investment, finance) backgrounds and on the basis of considerations that exclude human rights. This is the case, for instance, with disputes involving access to services that have been submitted to investment arbitration tribunals⁵.

At the same time, civil society organizations seem to find their highest level of comfort focusing on norm-setting and development by human rights bodies and mechanisms. This observation is not meant to, in any way, diminish the importance of developing standards. “Soft law” such as the Concluding Observations the UN Committee on Economic, Social and Cultural Rights (Committee on ESCR) can formulate after examination of country reports, or General Comments, are useful not only to human rights advocates, but also to governments. Yet, it is clear that international financial institutions, or the branches of government engaged in negotiations on trade agreements, pay little attention to such norms and standards, and consider them, in the best case, of an advisory nature.

This is certainly compounded by the enforcement structure. For instance, General Comments of the CESCR are the authoritative interpretation of the Covenant. But these interpretations are binding upon the primary obligation-holders, this is, states. Tenable arguments have been made to justify the applicability of the statements by this body to non-state actors (such as international organizations and private sector entities). At the end of the day, however, what matters is whether a tribunal exists to ventilate the claim. In the case of the CESCR, besides the national level jurisdiction, such tribunals are usually not available.

As a result, human rights advocates oftentimes find that, in order to have an impact on economic policy discussions and negotiations, they are forced to contest them at a disadvantage, in institutions for which human rights are, if anything, an ancillary consideration of rather discretionary application. There are supporters of the view that bodies with economic jurisdictions, if properly staffed, might be more open to applying human rights law. For instance, some scholars—including human rights scholars—invoke the World Trade Organization (WTO) dispute settlement system as a potential avenue to litigate human rights cases⁶. Building the human rights education and expertise of such bodies should certainly be considered, as a pragmatic alternative.

But the notion that changes in staffing can overcome the cultural and structural difficulties for bodies primarily oriented to economic law enforcement to give a fair hearing to human rights claims, or even admit them on a consistent basis, rests on thin grounds. This is because adjudication in such bodies takes place in the context of a primary body of law oriented to open markets for international transactions, as is the WTO law, or international investments. Moreover, the tool of building precedents before judicial tribunals and developing jurisprudence and principles on the interpretation of rights via strategic litigation is, as far as economic law- and policy-making bodies are concerned, not available. Investment arbitral tribunals, unlike courts, are simply not bound by precedent, nor are their proceedings—in most cases—publicly available. This means human rights

advocates are in the Sisyphean position of having to fight every case as if it were the first, in very unfavorable conditions, an endeavour for which the human rights community simply does not have enough resources.

Reform of the institutional machinery to direct the processes for economic policy decision-making towards the consideration of human rights matters would be of benefit to the whole human rights community. Yet, there is no concerted and collective strategy by the community to carry systematic advocacy on the reforms of these institutional processes (or build tactical alliances with the groups that are engaged in such reforms).

Seven, it is very difficult to identify a specific contribution of the human rights movement to changes and reforms. When it happens, it is more often a result of having joined efforts with a large number of non-human-rights based groups in an effort negatively formulated, such as “remove investment rules from the WTO”, or “remove the influence of the IMF in a specific country”. This is, indeed, good, and should not be minimized. To the extent that these efforts free space for rule- or policy-making at the national level that could be more in sync with the human rights obligations of the specific country, this can be considered progress. But less often is it possible to identify a positively formulated human rights message that states what the specific policy alternative should be. For instance, once the states are free to articulate an investment policy, what should these policies be in order to better foster the achievement of ESCRs? Or, once a country gains policy space vis-a-vis a previously-constraining IMF program, what does a human rights-based macroeconomic policy call for?

2 Strategies and activities

These numerous challenges have not prevented the emergence of a rich response from the human rights community in terms of strategies to promote accountability of economic policies to human rights. This section offers examples of activities and strategies. For the sake of presentation the exercise, rather than a long descriptive list, offers a classification by type of strategies, including one or two representative examples for each of them⁷. It should be kept in mind that the classification is for analytical purposes only. In reality, it would be hard to find an organization that focuses on only one of these strategies. Most of them focus on more than one strategy at a time and, in fact, try to make different strategies work together.

Types of strategies/activities:

- a. *Awareness-building amongst grassroots, other NGOs, government officials and broader public* consists of activities devoted to raising awareness in the public or in specific communities by holding of talks, workshops, preparation and distribution of materials, press campaigns, arts performances and other public events. The Malaysia-based South East Asian Council for Food Security and Fair Trade (SEACON), for example, is engaged in education of farmers’

interest groups about the implications of Free Trade Agreements on agriculture. Likewise, 3D builds awareness amongst trade, development and human rights organizations to ensure that trade rules are developed and applied in ways that promote an equitable economy.

- b. *Capacity-building and public mobilization* consists of activities devoted to organizing and mobilizing affected groups and NGOs. Some sections of the FoodFirst Information and Action Network (FIAN) in Latin American and African countries, for instance, work with other human rights NGOs to mobilize farmers and peasants' groups to demand their rights. Likewise, members of the Habitat International Coalition in Mexico and other countries have carried out particular work, and capacity-building is a traditional strength of the Secretariat of the Asian Forum for Human Rights and Development (FORUM-Asia headquartered in Bangkok) with regards to trade and human rights. The Land Center for Human Rights, for their part, work to build the capacity of small-scale farmers to analyze trade and investment policies for their impacts on their communities in Egypt. The Ecuador-based Centro de Derechos Económicos y Sociales (CDES) have also worked to thwart regional and bi-lateral trade agreements which have threatened human rights, specifically focusing on the role of public mobilization around the US-Ecuador Free Trade Agreement, the Free Trade Area of the Americas, and most recently the Community of Andean Nations (CAN)-EU Economic Partnership Agreement.
- c. *Influencing decisions, policy- and rule-making by national governments* seeks to change the behavior of a specific government with regards to trade, finance or investment policies. DECA Equipo Pueblo, for example, incorporates a strong component of advocacy work with the executive and legislative branches of the Mexican government (such as the Secretariat of Foreign Relations, the Secretariat of the Economy, the Chamber of Deputies and the Senate), the European Commission (EC) and the EC's Delegation in Mexico and with the Multilateral Development Banks (MDBs) and their offices in Mexico. Part of this work is to establish consultation mechanisms, particularly with the Mexican government, on the impacts of trade and economic policies on social development, sustainable development and human rights in the country. The Instituto de Servicios Legales Alternativos (ILSA), based in Colombia, challenges the ongoing US-Colombia Free Trade Agreement negotiations as unconstitutional before the Colombian courts⁸. The litigation in South Africa spurred by Treatment Action Campaign on the lack of access to HIV/Aids retroviral drugs which aimed not only at a domestic change, but had also an international dimension, seeking to force the South African government to pursue changes to the Intellectual Property Rights regime through available international negotiations (SOUTH AFRICA, 2002). The Mexican NGO FUNDAR, for their part, engages in the government fiscal policy-making process by monitoring and analyzing national budget negotiations from a human rights and gender perspective.

- d. *Influencing decisions, policy- and rule-making in international fora and institutions* consists of activities that aim to influence the behavior of an international institution involved in economic policy such as the International Monetary Fund, the WTO or the World Bank. Halifax initiative and others work to ensure that human rights impact assessments become part of the procedures of such institutions for screening financing projects that they will fund. FORUM-Asia often advocates as a regional Asian platform for advocacy within such bodies as ASEAN, and the UN for a human rights-consistent trade regime. The Institute for Agriculture and Trade Policy's (IATP) Biodiversity and Intellectual Property Project advocates for significant reforms in the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPs), which violate basic human rights jeopardizing access to AIDS drugs and other medicines as well as farmers' rights to save and sow harvested seeds. The Bretton Woods Project advocates within the World Bank so that it acknowledge its obligations by integrating a human rights approach into its own policies and programmes with transparency and public participation.
- e. *Norm-development at the national level* consists of activities devoted to create national norms that may help challenge certain trade, investment or finance activities. Example: a number of groups-nucleated through networks such as those promoting the International Parliamentarians' Petition for Democratic Oversight of World Bank and IMF policies (BRETTON WOODS PROJECT, 2004), are engaged in campaign efforts to pass laws that will make it mandatory for Executive Branches to get Parliamentary approval for any loan they negotiate with the International Monetary Fund or World Bank, so the loan could be declared illegal, and beyond the authority of the government otherwise. The work of the Egyptian Initiative for Personal Rights (EIPR) on trade is connected to their Health and Human Rights program, mainly focusing on intellectual property rights in trade agreements and the affordability and availability of medicines. In this, they carry out lobbying within the European Union and the UN, particularly with the former Commission on Human Rights, UNGASS, and other mechanisms, which focuses on incorporating stronger human rights language on health and trade issues, access to medical treatment, etc.
- f. *Norm-development at international level* consists of activities devoted to expanding and refining international human rights law, both through hard and soft norms, as it relates to trade, finance and investment. Example: the development of the Tilburg Guidelines on Human Rights in International Financial Institutions, by a group of experts convened by the University of Tilburg in 2000 (VAN GENUGTEN; HUNT; MATHEWS, 2003, p. 247-255); the engagement by some organizations in the design of general guidelines on a human rights-consistent design and implementation of economic reform policies and foreign debt programmes led by the Independent Expert on Foreign Debt and Human Rights (UNITED NATIONS ORGANIZATION, 2008a); efforts by groups such as 3D -> Trade - Human Rights - Equitable

Economy to ensure that General Comments of the Committee on Economic Social and Cultural Rights (CESCR) address trade, finance or investment and deal appropriately with other, trade-related issues such as intellectual property.

- g. *Jurisprudence by judicial and quasi-judicial mechanisms at the national level* directed at creating national jurisprudence referred to the interpretation and implementation of trade and investment rules, or loan conditions. In a recent example, the Costa Rica Supreme Court placed an injunction on implementation of the Central American Free Trade Agreement with the US –to which Costa Rica is a party—on the basis that requirements on consultation with affected indigenous communities had not been followed, making the implementing provisions unconstitutional (INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, 2008). The Movimento do Atingidos por Barragens (MAB) in Brazil for their part have sought redress for the impacts of public financing of Brazilian hydro-electric sector by engaging with an investigative committee set up by Brazil's Office of the Special Secretary for Human Rights (Secretaria Especial dos Direitos Humanos). The Kenya Human Rights Commission has developed national litigation challenging the Kenya-EU Economic Partnership Agreement. The Human Rights Law Network in India has challenged the intellectual property rights regime as related to access to medicines in the nation's Supreme Court, successfully advocating for a court order forcing the government to guarantee that all essential drugs be available and affordable for all people living below the poverty line.
- h. *Jurisprudence by judicial and quasi-judicial mechanisms, as well as human rights supervisory and monitoring bodies at international level* directed at establishing international jurisprudence referred to the interpretation and implementation of trade or investment rules, or loan conditions. Example: the Argentina-based Centro de Estudios Legales y Sociales (CELS) and Asociación Civil por la Igualdad y la Justicia (ACIJ) together with consumers organizations filed an amicus curiae with the International Centre for Settlement of Investment Disputes, on a case involving the Argentinean government's concessions for water services provision to foreign companies (ICSID, 2003a); ICSID accepted presentation. 3D has successfully sought to get language warning about the potential consequences of intellectual property rights provisions being negotiated by specific countries in the relevant country reports by treaty-monitoring bodies⁹. A group of 4 NGOs—including the Centre for Applied Legal Studies and InterRights—have successfully petitioned an arbitration tribunal at the International Centre for Settlement of Investment Disputes (ICSID) to intervene in a case between the European owners of certain South African mining companies and the Republic of South Africa related to the implementation of the Black Economic Empowerment measures in South Africa. (INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, 2008)

- i. *Project-level Human Rights impact assessments* directed at designing methodologies and actually carrying out human rights impact assessments of trade, finance and investment policies or rules. When Human Rights Impact Assessments (HRIAs) are not yet official exercises nor have endorsement by a government, they can still be a tool for the qualitative value of the assessment, and to empower a community affected by a project by facilitating a vehicle for them to voice their concerns. The Canadian-based NGO Rights and Democracy in collaboration with Tebtebba, Association Africaine de Défense des Droits de l'Homme (ACIDH), Action Contre l'Impunité pour les Droits Humains (ASADHO) and/or CELS, Rights & Democracy have developed a series of publications and exercises of human rights impact assessments for foreign investment projects (RIGHTS AND DEMOCRACY, 2008).
- j. *Improving access to information* directed at expanding the access to information on government activity regarding trade, finance and investment. While access to information is not directly recognized in the International Covenant on Economic, Social and Cultural Rights, it is clearly instrumental and the authoritative comments by the CESCR so recognize. Access to information has proved essential to the timeliness and well-targeting of any substantive advocacy and mobilization for ESCRs in trade, finance and investment –this is particularly so given the degree of opacity that characterizes activity in this field.

3 Looking towards the future: Successes, opportunities and obstacles

Successes

In spite of the enormous difficulties, and taking into account the inevitably gradual pace of progress that can be expected in the ambitious goal of achieving human rights-accountable trade, investment and finance regimes, the last few years have seen some successes that should be noted as steps towards this direction:

- a. *Optional Protocol on ESCRs*: The adoption in 2008 of the Optional Protocol for ESCR, brings a mechanism for individual complaints that so far had been missing— placing accountability for ESCRs at sort of a handicap when compared to civil and political rights. Its achievement is tribute to the relentless campaigning by civil society organizations (UNITED NATIONS ORGANIZATION, 2008b).
- b. *TRIPs and Public Health*: The relentless campaigning, including litigation in countries such as Brazil and South Africa, led to framing some provisions of the TRIPs agreement as a violation of some ESCRs (notably the right to health). The CESCR, the Office of the High Commissioner for Human Rights and other human rights bodies seized on the matter and issued official documents that represent useful precedent to challenge intellectual property provisions

not only in the WTO, but also at the bilateral level (which is the case with a number of bilateral Free Trade Agreements - FTAs where the CESCR has issued pronouncements). In turn, national bodies in charge of protecting health goals or the right to health, and which otherwise would have probably lacked the clout to influence these decisions, seized on those precedents to maximize their impact, such as in Peru¹⁰ and Thailand¹¹. True, the Doha Declaration on TRIPS and public health gives countries the space to derogate from trade rules when required to uphold public health. Arguably, it should have been the other way round: countries should have been required to derogate from trade rules to protect public health. So, from a human rights perspective this is only a step in the right direction, but a step nonetheless.

- c. *IFC's human rights impact assessments*: After several years where environmental and social – but not human rights per se— were the norm in impact assessments, the International Finance Corporation (IFC) last year developed a guiding manual for human rights impact assessments. The document has been heavily influenced by transnational corporations and some criticize it as a public relations exercise. It is also of doubtful value as an expression of IFC and/or companies self-monitoring. But it is the first time that in one of the institutions of the World Bank group the notion of a human rights impact assessment is accepted. Before, human rights issues were condemned to being on the fringes and approached on a selective basis in assessments of environmental or social impacts. That IFC felt it necessary to issue such a document is also a sign of the seriousness with which claims of human rights violations by companies that it finances are beginning to be taken (INTERNATIONAL FINANCE CORPORATION, 2007).
- d. *The adoption of the Millennium Development Goals (MDGs)*: The MDGs are not exempt of criticisms. Not the least of these is that they are a diluted, watered down version of the human rights framework, only focusing on specific targets. Their blindness to the economic policies needed to achieve them, on which they are sort of neutral, is also a weak point. But, from the perspective of ESCRs, it is worth noting that they embody for the first time hard numbers accepted universally as a target for all countries. Given the perceived elusiveness of concepts usually associated to ESCRs, such as “progressive realization” and “minimum core,” and the reluctance of states to take steps to accept numerical targets, the MDGs, even if only doing this for some dimensions of some rights, should be taken as an element of progress. At the very least, they set a precedent to build upon demonstrating that the mobilization of political will is critical in pulling ahead progress in developing standards for ESCRs rather than expecting the process to run the other way around (or offering the lack of standards as an excuse for not mobilizing political will). MDGs, by containing a dimension that refers to the international environment, shed light on the fact that progress in ESCRs does not only rest on national governments, but also on the other members of the international community, including international organizations¹².

- e. *Development of human rights norms that address trade, finance and investment:* Here the movement has also scored some successes such as the General Comments of CESCR and the criteria for development partnerships developed within the Working Group on the Right to Development¹³. These all build a body of norms and interpretations that are useful tools for activists, organizations, researchers and national and international authorities in charge of adjudicating matters of economic rules and policies. Of course, as mentioned earlier in this paper, whether the bodies with economic policy competences that are de facto able to influence human rights implementation are willing to take such norms seriously in their decisions is rather questionable. But this should not diminish the importance that developing norms and standards for what are the intended changes in the practice, are a first step in any advocacy activity. It is for this reason that the UN Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, while with an ultimately disappointing result,¹⁴ can be held as a positive story as far as the development of standards is concerned.
- f. *Marked increase of expertise on the political economy aspects of trade, finance and investment by human rights organizations.* Compared to a decade ago, human rights organizations have a more realistic approach to the shared responsibility of developed and developing countries in breaches of human rights obligations due to trade, finance and investment policy. This represents a step in factoring in the dynamics of a more globalized world. The better that the mechanisms by which policies are formed are understood, the more that framing of targets and the strategies and tactics to influence policy-making will be effective. The more that targets and tactics are effective, the more that the resources of the civil society community will be efficiently deployed.

4 Trends, opportunities and obstacles

Some of the observable trends in the field that will shape the scenario for future work of ESCRs defenders, are presented in this section, with some reflections on the opportunities and obstacles that they may imply.

The return to human rights?

The world of international advocacy has its fashions. In the light of campaigns for MDGs, debt relief, poverty reduction, the “Singapore issues”¹⁵, and a number of summits that followed the UN Conferences of the end of the 1990s - on women, population, social development, sustainable development - human rights as such have sort of “fallen out of fashion.” However, a certain fatigue is settling into the follow-up processes to different international conferences of the 1990s and early millennium. There is a noticeable lack of leadership by governments in tackling the issues that require a collective action in ways that acknowledge the increasing interconnection of economic policy issues and those in the social and environmental field.

The onus is falling back on civil society to generate new momentum in international struggle for social justice and, in doing this, the human rights framework, being legally binding, supported by a number of conventions that have been widely signed by governments, may regain prominence as a default framework of commitments that governments cannot sidestep and as the perennial mobilizing tool for grassroots.

***Halting of process of economic liberalization expansion
(WTO, IFIs): more policy space?***

The processes of liberalization and expansion of globalization, seemingly unstoppable until recently, are grinding to a halt. This opens an opportunity for a reframing and redefinition of paradigms for economic policy-making. The decrease in size and relevance of international organizations that have commanded a great deal of attention in the last few years (World Bank, IMF, World Trade Organization) has some countries regaining a measure of “policy space”. While the ongoing global financial and economic crisis is meaning for several countries a return to the constraints of IMF policy, it is also acting as a sobering note of caution with regards to the policy model that it is worth accepting in exchange for aid or finance.

Whether alternative policies that countries enjoying more policy space choose will be in accordance with human rights is certainly open to question. For instance, the halting of the WTO talks has brought added pressures on many countries to sign bilateral agreements that have been shown to be much more constraining for national governments than the multilateral rules have ever been. Resort to alternative sources of finance, in turn, poses its own challenges, whether they are emerging donors such as China and India, international financial markets or domestic private sector. It adds up to a more diverse landscape that challenges the logic of work of civil society organizations that for a long time became used to concentrate their advocacy on international meetings and events driven by international organizations such as the WTO or the World Bank (even if only to oppose them). For economic and social rights advocates the fragmented nature of the movement will become more apparent. Coalition-building in the new environment will have to be more issue-based, less reliant on using opposition to large global institutions as a galvanizing framework.

Expansion of role of IFC and, in all financial institutions, direct financing and public subsidization of private sector.

As the World Bank faces lower levels of lending, the IFC is reporting unprecedented growth. To the extent that the public sector financing arms of the World Bank are surviving, this is on condition of wider support to the subsidization of private sector activities in provision of services, resource extraction projects, etc. These trends are also noticeable in the dynamics between private and public sector arms of all regional development banks.

Emergence of regional financial and trade institutions, associated to a more social justice-friendly discourse.

The emergence of regional financial institutions such as the Banco del Sur, for example, spearheaded by most governments in South America and associated to political changes in the region that have generated more progressive governments, is an example of this trend. There is an opportunity to test in practice how a different paradigm for development finance might work but, as activists also warn, it may also be a case of the new masters carrying the same failed development model, with different means.

Role of new donors/ creditors.

The growing role as lenders and donors of Southern governments tests the usual “North-South divide” model that advocates tend to use for analysis. On the one hand, this contributes to the lack of predominance of the Bretton Woods Institutions and western governments, and paves the way for access to alternative financing, all of which has positive potential connotations. At the same time, the human rights track record at home, as well as the lending practices being already exhibited, by some of these new donors and lenders, gives reason for caution in examining the impacts of these new trends on ESCRs.

Confluence of food, energy, climate and finance crises.

The confluence of global crises in these areas is paving the way for a deep reexamination of the role ascribed to market forces during the last twenty five years. In act, the failure of markets to solve problems that mainstream economics had tried to minimize should provide a boost to heterodox schools, including the struggle of ESCR advocates rethinking approaches to these problems along lines that incorporate human rights.

5 Recommendations

1. The fact that trade, finance and investment regimes are collective phenomena that involve always more than one country, means that a collective, transnational approach, is a condition of success in holding them accountable to ESCRs. There is a need to strengthen platforms that can promote such type of collective work with interested human rights organizations.
2. The concept of extraterritorial obligations is promising and of particular interest for this field (given what was said above about cross-border trends in trade, finance and investment). ESCR advocates should focus more on it and seek to strategize on application in specific cases¹⁶.
3. More attention should be given to the human rights responsibilities of non-state actors, without diminishing the State’s obligation to protect human rights from

being affected by third parties. These responsibilities entail not only direct violations, but responsibility in lobbying activities that shape international legal norms and contracts that may enter in conflict with international human rights law.

4. There is a need to address the process dimension –e.g. how decisions on economic policy and human rights are made—rather than only the content dimension –e.g. what should be the content of decisions on such matters. Advocacy for more suitable forums to resolve the conflicts that emerge between human rights and economic policies/rules will be of benefit to all ESCR advocates, and, yet, are a clear example of collective action, as it is hard for individual organizations to have the incentives to pursue action in this field.
5. Though alliances will be eventually necessary, there is a strong need to make full use of the resources in the human rights community in a more synergic way. These resources include, notably, social movements, well-known human rights organizations, large networks that have developed expertise in approaching trade, finance and investment issues from a human rights perspective, and academics. In this regard, it is crucial to encourage and nurture efforts that go in this direction such as the International Network for Economic, Social and Cultural Rights (ESCR-Net)¹⁷.

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NOTES

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2. This formulation, found in Art. 2 of the Covenant on Economic, Social and Cultural Rights, applies to all rights contained in the Covenant. Similar ones have been pursued in other instruments on economic and social rights, such as for instance the Protocol of San Salvador to the Inter-American Convention on Human Rights. (whereby Parties undertake to adopt the necessary measures "to the extent allowed by their available resources, and taking into account their degree of development..." , conf. Art. 1). This has led to a long held –but arguably wrong– perception that ESCR obligations are formulated in less assertive terms, or softer, than those on civil and political rights. This is far from being the case, even if the standards and indicators for determining non-compliance take more work to define, especially in concrete cases, for economic and social rights.
3. It is generally accepted today that the receding role of the state may, in fact, be also a handicap for its capacity to take measures on civil and political rights, especially to promote and fulfill them.
4. See the "Identified needs " in ESCR-Net 2006, "Human Rights, Trade and Investment Mapping." (Beginning in May 2006, in response to Members' expressed needs for capacity building, as well as interest in collective efforts and advocacy, the ESCR-Net Secretariat initiated a mapping of current work, expertise, challenges and proposals related to trade, investment and human rights of Member organizations and active participants in Latin America, Asia and Africa. Building on extensive interviews with thirteen organizations, an analysis and assessment was completed in February 2007, in order to prioritize and strategize areas of work in discussion with mapping participants.)
5. Examples to mention in this regard are cases involving water and sewage services filed before the International Centre for Settlement of Investment Disputes (ICSID) against Argentine Republic by Compañía de Aguas del Aconquija S.A. & Vivendi Universal S.A. (ICSID, 1997b), and by Azurix (ICSID, 2003b); as well as by Aguas del Tunari S.A. (controlled by Bechtel) against Bolivia (ICSID, 2002). Likewise, a case involving toxic waste disposal filed under NAFTA Chapter 11 by Metalclad against Mexico (ICSID, 1997a).
6. "The creation of the WTO gives the world a new opportunity to put Article XX in its rightful place in the GATT. Doing so must involve the re-interpretation of Article XX in light of the norms of international human rights law. (...) the construction of WTO jurisprudence by its dispute settlement organs must not contradict rules of interpretation set forth in the Vienna Convention on the Law of Treaties. This must include 'any rules of international law' relevant to the dispute" (HOWSE; MUTUA, 2000, p. 11).
7. As this is a non-exhaustive list, the lack of mention of some groups and activities does not imply a value judgment about their importance.
8. Comprehensive information on the actions filed to question constitutionality is available at (Gaviria Díaz, 2009).
9. See several country-specific briefings where 3D has done this posted at <http://www.3dthree.org/en/page.php?IDpage=23>

10. See (OVETT, 2006) subsequent to recommendations by the UN Special Rapporteur on the Right to Health to undertake an assessment of the US-Peru FTA the Ministry of Health undertook an impact assessment of the effect of proposed FTA rules on the cost of medicines in Peru, concluding that an extra 700 to 900 thousand people would be excluded from treatment

11. Subsequent to recommendations by the Committee on the Rights of the Child, the National Human Rights Commission of Thailand performed a human rights impact assessment of an FTA in negotiation between such government and the United States. See (UNITED NATIONS ORGANIZATION, 2006a) and (THIRD WORLD NETWORK, 2007).

12. See, for the relationship between MDGs and human rights, (UNITED NATIONS ORGANIZATION, 2006b) and (Idem, 2008c).

13. The open-ended Working Group on the Right to Development was established in 1998 by resolution of the Commission on Human Rights (resolution 1998/72). For the latest on the status of the efforts to develop the guidelines mentioned in the text see Human Rights Council 2009, 12th Session, Report of the Secretary-General and the High Commissioner for Human Rights on the right to development, A/HRC/12/29, 23 July.

14. After several years in the making, the UN Norms on the Responsibility of Transnational

Corporations and Other Business Enterprises with Regard to Human Rights were ultimately rejected by the UN Commission on Human Rights in 2005. The Commission recommended, instead, the appointment of a Special Rapporteur with a more restrictive mandate.

15. "Singapore Issues" is the shorthand used to refer to attempts to launch negotiations in the World

Trade Organization on investment, competition, government procurement and trade facilitation. These items were placed on the WTO agenda at the WTO Singapore Ministerial meeting of 1996. On strong pressure by developed countries to start full-steam negotiations, developing countries walked out of the WTO Ministerial at Cancun in 2003 and, as a result, the items were dropped from the WTO agenda, with the exception of trade facilitation (government procurement also is embedded in some ongoing WTO processes, in a partial way, but not as an independent negotiation process).

16. It is worth mentioning the work of the ETO Consortium, a network of around 30 NGOs, university institutes and individuals from different parts of the world, who is preparing a "document of principles" on extraterritorial state obligations for economic, social and cultural rights. FIAN's International Secretariat serves as the secretariat to the Consortium's steering committee consisting of Abo Akademi, Brot für die Welt, International Commission of Jurists, and the universities of Lancaster, Maastricht, North Carolina.

17. ESCR-Net's mandate is general, to strengthen economic, social and cultural rights by working with organizations and activists worldwide to -facilitate mutual learning and strategy sharing, -develop new tools and resources, -engage in advocacy, and -provide information-sharing and networking. But its contribution to the preexisting situation for connecting groups that work on trade, finance and investment from a human rights perspective has been particularly noteworthy. Since its foundation it has provided the fertile ground for discussion on topics of interest for this community, developments requiring a response, etc. In addition, it has successfully sought to involve not only NGOs but also social movements and academics.

RESUMOS

O fato de as políticas de comércio, financiamento e investimento se tornarem prioridades para aqueles que estão comprometidos com promover o respeito e a defesa dos direitos econômicos e sociais tem a ver com a percepção crescente de que, na luta em defesa desses direitos, essas políticas não podem ser ignoradas ou abstraídas como se fossem um campo separado. O paradigma dos direitos humanos tal como moldado pelos eventos posteriores à Segunda Guerra Mundial, que se baseia na responsabilidade dos atores estatais, complementa-se com os aspectos econômicos da globalização como, por exemplo, a ascensão do comércio internacional e dos fluxos financeiros transnacionais, a desregulamentação, a privatização e a redução do papel do Estado, culminando com o desgaste da capacidade destes de tomar as medidas ativas exigidas para respeitar, proteger e fazer cumprir os direitos humanos em suas jurisdições territoriais. Por outro lado, organismos internacionais como a Organização Mundial do Comércio, o Banco Mundial e o Fundo Monetário Internacional aumentaram sua influência sobre a capacidade dos Estados de implementar as obrigações relacionadas com os direitos humanos. Este artigo atende a vários objetivos. Com base numa visão geral das tendências apresentadas pela interseção das políticas de comércio, investimento e financiamento com os direitos humanos, apresentaremos um rico panorama de estratégias e atividades para os defensores de direitos humanos. Antes de formular algumas recomendações no último capítulo, examinaremos algumas histórias de êxito e tendências futuras, inclusive oportunidades e obstáculos.

PALAVRAS-CHAVE

Direitos humanos – Direitos econômicos e sociais – Globalização – Defesa dos direitos humanos.

RESUMEN

El surgimiento de las políticas de comercio, finanzas e inversiones como prioridades para quienes se dedican a promover el respeto y la defensa de los derechos económicos y sociales está relacionado con el hecho de que cada vez es más evidente que en la lucha por promover esos derechos, dichas políticas no pueden pasarse por alto ni abstraerse como si pertenecieran a un área separada. El paradigma de los derechos humanos, según quedó conformado por los acontecimientos posteriores a la Segunda Guerra Mundial, que depende de la responsabilidad de los actores estatales, se complementa con aspectos económicos de la globalización; por ejemplo, el aumento del comercio internacional y de los flujos financieros transnacionales, la desregulación, las privatizaciones y la reducción de la función del Estado, que culminaron en el desgaste de la capacidad de los Estados de adoptar las medidas activas necesarias para respetar, proteger y cumplir los derechos humanos en su jurisdicción territorial. Por otra parte, las organizaciones internacionales como la Organización Mundial del Comercio, el Banco Mundial y el Fondo Monetario Internacional han aumentado su influencia sobre la capacidad de los Estados de implementar obligaciones de derechos humanos. Este artículo se propone varios objetivos. En base a una descripción general de las tendencias planteadas por la intersección de las políticas comerciales, financieras y de inversiones y los derechos humanos, se presentará el rico panorama de estrategias y tendencias para los defensores de los derechos humanos. Antes de formular algunas recomendaciones en el último capítulo, se expondrán algunas historias de éxitos y las futuras tendencias, incluyendo las oportunidades y obstáculos.

PALABRAS CLAVE

Derechos humanos – Derechos económicos y sociales – Globalización – Defensa de los derechos humanos.



PATRICIA FEENEY

Patricia Feeney is the Executive Director of Rights and Accountability in Development, a British NGO that conducts research into corporate accountability, human rights and the extractive industries. Mrs Feeney is a research affiliate of the University of Oxford where she teaches post-graduate students. She is a founder of OECD Watch, a network set up to monitor the implementation of the OECD Guidelines for Multinational Enterprises. She is the author of numerous reports and articles including *Accountable Aid* (Oxfam Publications, Oxford 1998).

Email: tricia.feeney@raid-uk.org

ABSTRACT

Over the past 40 years the United Nations has made various attempts to develop global standards to hold companies accountable for their involvement in human rights abuses. This article traces the growing awareness of business-related human rights abuses and the limitations of the traditional State-centric approach to regulating corporations in the era of globalisation. It reflects on the reasons for the demise of the Draft UN Norms on the Responsibilities of Transnational Corporations and considers the strengths and weaknesses of 'the Protect, Remedy and Respect Framework' adopted by the Human Rights Council in 2008. The article concludes with a warning that unless the demands for global standards and an effective remedy for those affected by corporate misconduct are addressed, pressure for change is only liable to intensify.

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KEYWORDS

Business and human rights – UN norms – Corporate accountability



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BUSINESS AND HUMAN RIGHTS: THE STRUGGLE FOR ACCOUNTABILITY IN THE UN AND THE FUTURE DIRECTION OF THE ADVOCACY AGENDA

Patricia Feeney

1 Introduction

This article traces the various attempts over the past 40 years by the United Nations (UN) to develop global standards to hold companies accountable for their involvement in human rights abuses. It argues that the business and human rights agenda came into its own due to (i) the growing awareness of the potential human rights obligations of non-state actors; (ii) the increasing recognition of social and economic rights; and (iii) campaigns outside of the UN system against the destructive nature of large development projects, which ushered in new ways of holding financial institutions to account for environmental and social harms. The article examines the different UN initiatives that have been proposed to monitor and regulate business, along with the backlash these efforts prompted from business groups and governments, keen to protect their perceived economic interests. The draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UNITED NATIONS, 1983 – hereinafter, Norms) was an attempt to deal with the inadequacy of the traditional State-centric approach to regulating corporate behaviour in the era of globalisation (UNITED NATIONS, 2006, para. 11). The article goes on to cast a critical, but constructive, look at the mandate of the UN Secretary-General's Special Representative on Business and Human Rights (SRSG). It concludes with an assessment of the status of the current business and human rights debate and offers a perspective on the future direction of the corporate accountability agenda.

Notes to this text start on page 174.

2 Early developments: from the 1970s to the 1990s

Concerns about the impact of powerful commercial interests on the lives of people and their environment are nothing new. The struggle to curb and restrain economic actors has a long pedigree. In the early 1970s, the revelations about wide scale unethical and illegal activities by multinational companies prompted calls for international regulation of corporations. Two of the best known incidents were the involvement of ITT and other US companies in the 1973 Chilean coup and the bribes paid by Lockheed to Japanese officials to obtain military contracts (SALZMAN, 2005; UNITED STATES OF AMERICA, 1975). In the 1970s and 1980s, activism aiming at business actors often took the form of boycotts, particularly of companies and banks that provided economic support to the Apartheid regime in South Africa. Companies that supplied military equipment to regimes engaged in systemic human rights abuses were also targeted during this time (HANLON, 1990).

In response to the growing public unease about the role of companies in relation to human rights, the United Nations became a natural focus for efforts to strengthen the accountability of business actors in the 1970s. The UN Commission on Transnational Corporations was established in 1973, for example, to investigate the effects of transnational corporations (TNCs) and strengthen the negotiating capacity of countries in which they operate. (JERBI, 2009) The resulting draft UN Code of Conduct on TNCs (UNITED NATIONS, 1983) was the first attempt to provide global social and environmental guidelines for transnational corporations¹. This UN Code of Conduct process, however, faced stiff resistance from powerful governments in the North, where many TNCs had their headquarters. Despite support from many governments in the global South, the UN Code of Conduct project was first sidelined and then over time derailed².

Rich countries, fearing the emergence of a global UN initiative regulating business, then turned to the Organization of Economic Cooperation and Development (OECD) for a solution. In 1975, the Committee for International Investments and Multinational Enterprises was established to investigate the possibility of codes of conduct for TNCs (SALZMAN, 2005). The OECD wanted first and foremost to protect international investors from discrimination and expropriation by host country governments. In 1976, then, the OECD Guidelines for Multinational Enterprises came into being as part of “The Declaration and Decisions on International Investment and Multinational Enterprises” (SALZMAN, 2005). The Guidelines, while they did incorporate some labour rights, had no explicit reference to other human rights. They were widely perceived as a token concession to civil society concerns about the power of multinationals and the instrument, which underwent various revisions, remained little used for two decades (SALZMAN, 2005).

In 1977, the International Labour Organisation (ILO) adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (INTERNATIONAL LABOUR OFFICE, 1977), which calls for corporations to respect the Universal Declaration of Human Rights and the corresponding

international human rights covenants. Though not legally binding, and focused specifically on workers' rights, this Declaration did establish a mechanism through which civil society groups, in cooperation with trade unions, can bring claims concerning business abuse³.

Throughout the 1980s, civil society campaigns exposed the harmful role played by the World Bank in supporting large-scale development projects in many low-income countries which generated environmental destruction and human rights harm. Campaigns against mega projects like the Narmada Dam in India and Polonoroeste in Brazil exposed the multiple failures of the World Bank to lift people out of poverty, to defend the rights of indigenous peoples and to protect the environment (RICH, 1995). Structural adjustment programmes and reduced aid flows during this period also worked to pry open the economies of developing countries to foreign investment. NGOs in turn began to develop increasingly sophisticated critiques of the macroeconomic policies of the IMF and World Bank. In response to such pressure, the World Bank's Inspection Panel was later created, which offered a new, if limited, method of holding powerful international economic actors to account (FEENEY, 1998). It also offered a template which might be replicated in relation to the private sector.

Nonetheless, throughout the 1980s and 1990s, the size and power of TNCs grew exponentially (UNITED NATIONS, 2007b), and suspicion grew that the interest of global business was being promoted in various inter-governmental bodies over and above the rights of everyday citizens. Public awareness about sweatshop labour conditions prompted picketing outside some retail stores. In 1995, human rights activist Ken Saro-Wiwa and eight others were executed following an unfair trial brought in retaliation for their protests against Shell Oil in Nigeria. The late 1990s witnessed widespread protests, epitomized in 1999 in Seattle by a march of 100,000 people demonstrating against the World Trade Organization (WTO), perceived by activists as a body set up to increase the mobility and power of business globally. This was all against a backdrop of a surge in domestic litigation, especially in courts in the United States and Europe, against companies accused of directly committing human rights violations or being complicit in human rights violations committed by host States (INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, 2002).

These struggles to exact accountability from national-level courts, international organizations and from companies themselves was coupled with a series of UN Summits and conferences in the 1990s which strengthened ties between NGOs and social movements and influenced the environment for corporate accountability moving forward. The most important were the Earth Summit in Rio de Janeiro (1992), the World Conference on Human Rights (Vienna, 1993) and the Women's Summit (Beijing, 2006). In these conferences, the divisions between human rights, environment and development activists began to gradually break down as new alliances were formed.

Other walls were also pulled down in this period. The World Human Rights Conference in Vienna for its part acknowledged that all human rights are universal, indivisible, interdependent and inter-related. Before Vienna, civil and political rights

were privileged by most human rights organizations in the North, while economic, social and cultural rights were neglected and marginal. Vienna helped to redress the balance. The human rights community was challenged to 'to move beyond old certainties' and to reconsider the assumption that recognition of economic, social and cultural rights would inevitably undermine the status of civil and political rights (ALSTON, 1994). In this context in Vienna, NGOs and indigenous peoples spoke out on 'hazardous industrialisation' and 'harmful development projects' and challenged the negative impact of several early free trade agreements. (ALSTON, 1994) There were also calls in Vienna for a reform of the international financial institutions and for an end to structural adjustment policies which eroded the capacity of the State in much of the developing world, with 'particularly severe and discriminatory impacts on women' (CLAPHAM, 2006). So, while the UN summits and conferences throughout this period did not have a particular focus on corporate accountability, they helped promote a new sensibility about development and human rights. The movement for women's rights and gender equity also played an increasingly prominent role in these debates and helped promote the concept of the responsibility of private actors for human rights violations⁴.

It was against the background of increased mobilization and growing discontent, that three initiatives emerged, each with their own standards and modalities. These were the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the Norms.

In 1999, the UN Secretary-General Kofi Annan launched the UN Global Compact, described as a voluntary learning initiative aiming to align business operations with ten principles in the area of human rights, labour, environment and anti-corruption. But, like many other corporate social responsibility initiatives, the Global Compact lacked a means of enforcing its principles, and thus was considered by many amongst civil society as insufficient on its own to end the startling levels of impunity enjoyed by TNCs (TEITELBAUM, 2007).

By the end of the 1990s, campaigns exposing human rights-related problems in the garment and textile sector and the extractive industries spawned a dizzying number of private company and industry-wide codes. This led to renewed calls for global standards to define a common benchmark for business conduct in relation to human rights. In 1998, NGOs and unions helped defeat the plans of the member governments of the OECD for a Multilateral Agreement on Investment (MAI), which they perceived as an attempt to promote the interests of foreign investors over and above the development needs and priorities of low-income countries (SALZMAN, 2005). Chastened by the MAI debacle and fearful of a rising tide of anti-globalization protests, these governments embarked on a major revision of the OECD Guidelines for Multinational Enterprises in which NGOs were for the first time allowed to participate. The new text, unveiled in June 2000, included an explicit reference to the Universal Declaration on Human Rights. The implementation procedures were revamped to enable NGOs and others to bring complaints about corporate misconduct to the attention of home governments, including for actions that occurred outside of OECD territories. The struggle for accountability seemed to be gaining ground.

3 The fight for universal human rights standards: UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

This environment of growing demands for meaningful curbs on abusive practices of businesses also prompted efforts at the UN Sub-Commission on the Promotion and Protection of Human Rights an advisory expert body to the UN Commission on Human Rights (the latter is now known as the Human Rights Council) to develop a draft international instrument based on human rights law to strengthen corporate accountability. In 2003, after four years of discussions and consultations, the Sub-Commission approved the ‘Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’ (Norms) (UNITED NATIONS, 2003).

At its heart, the Norms embodied and articulated four general principles: that while States were the primary duty-holders, business actors also have responsibilities under international human rights law; these responsibilities apply universally and cover a broad range of rights; governments need to take action to protect people from abuses by companies; and the transnational nature of the problem requires that there be monitoring of company behaviour and enforcement mechanisms beyond national boundaries to ensure that companies comply with the Norms and relevant national and international law when operating outside their borders.

In general, civil society strongly endorsed the Norms and hoped that the core ideas would eventually form the basis for the development of binding international law (ESCR-Net, 2005). The reaction of business, however, was largely hostile. The Norms quickly became a lightning rod for counter-lobbying, spearheaded by various business associations. Along with business, many governments were also deeply uncomfortable with the document. Several substantive criticisms were advanced by opponents of the Norms. The Norms failed to distinguish clearly between the human rights obligations of States and the responsibilities of companies, some critics asserted. Others argued that international human rights law could only be directly applicable to States, thereby rejecting the notion that businesses have human rights duties. The Commission for its part expressed the view that, while the Norms contained “useful elements and ideas”, as a draft the proposal it had no legal standing (UNITED NATIONS, 2004). To move the process forward, the Office of the United Nations High Commissioner for Human Rights (OHCHR) was requested to consult widely in the elaboration of a report examining the scope and legal status of existing initiatives and standards, including the Norms (UNITED NATIONS, 2004). By this time, however, the debate had already become polarized.

In 2005, despite strong lobbying and various favourable submissions including the report by the OHCHR which encouraged a review of the Norms, the Commission failed to explicitly mention the Norms and called on the Secretary General to appoint a Special Representative on the issue of business and human rights (UNITED NATIONS, 2005a, para. 2). The Commission’s swift neglect

of the Norms effectually consigned them to the same fate as the Draft Code of Conduct for TNCs. The lack of political will to adopt a truly global instrument on business and human rights was indeed a setback for the corporate accountability movement. But, the Norms did play an important role in shaping the debate as one leading commentator noted:

Whether or not the Norms develop..., the stage has been set for the development of a normative framework that sets out the meaning of human rights obligations of corporations. Any such exercise will have to not only revisit the terrain covered by the Norms, but also consider how the international legal order has developed beyond an exclusive concern with state actors (CLAPHAM, 2006, p. 237).

So, despite controversies over the Norms' precise content and legal standing, the initiative served an important purpose towards the increasingly shared recognition that companies have responsibilities to all human rights everywhere, that national governments must act to protect people from abuses by companies, and that extra-territorial or global monitoring and enforcement mechanisms are needed. In this sense, the development and promotion of the UN Norms laid the ground-work for future steps to prevent human rights violations involving business and hold those responsible to account.

4 The Special Representative to the Secretary General on Business and Human Rights

Professor John Ruggie, Kofi Annan's former chief adviser for strategic planning, was appointed the Special Representative on Business and Human Rights (SRSG) in 2005⁵. He had previously been involved in the creation of the UN Global Compact and the drafting of the Millennium Declaration. Unlike the mandates of other UN Special Procedures, which often require country visits and engagement with directly-affected people, the work of the SRSG was to be limited to a "desk-study"⁶. The mandate, despite civil society lobbying, did not then require the SRSG to examine specific situations of business-related abuse (UNITED NATIONS, 2005a). Thus, from the outset, the mandate marginalised the individuals and communities directly affected by business abuse, effectively denying them a voice in the debate. In his first report, the new SRSG did, however, note the problems inherent in globalisation and the need for some means of reducing the likelihood of corporate misconduct.

In a move that seemed to be calculated to appeal to business groups, but one which further alienated many NGOs, the SRSG swiftly closed down further discussion of the Norms, insisting that they were so deeply flawed that no part could be salvaged (UNITED NATIONS, 2006, para. 69). Yet, as commentators noted at the time, this wholesale rejection of all aspects of the Norms made little sense because parts of the document simply restated international legal principles already applicable to business with regard to human rights. (KINLEY; CHAMBERS, 2006). Nevertheless, the SRSG made clear that he regarded the

UN Norms project as dead, basing his assessment on the two criticisms that the Norms by implication purported to invent a new avenue of international law directly applicable to corporations, and that the Norms ill-defined the respective obligations of States and corporations (UNITED NATIONS, 2006).

The SRSG's 2006 interim report concluded nevertheless that the need remained for a common, international set of ultimately enforceable standards articulating the human rights responsibilities of business. Leading NGOs in a written response to the Interim Report stated that the Norms, irrespective of their perceived shortcomings, had "potential and ought to have been supported as a viable first step in the establishment of an international legal framework through which companies can be held accountable for human rights abuses they inflict, or in which they are complicit". The NGOs stressed the need of developing international human rights standards for business that would move beyond existing frameworks and the *status quo*, and avoid the pitfall of reaching agreements that merely reflect the "lowest common denominator". The NGOs were also critical of what they perceived to be the SRSG's failure to appreciate the inadequacy of voluntary standards and mechanisms. (ESCR-NET, 2006) The report's key pitfall, one could say, was that it seemed to be more concerned with "human rights challenges" facing business rather than the human rights abuses faced by victims.

While the restrictive mandate given to the SRSG seemed to be a step backwards by many NGOs rather than progress toward corporate accountability, others saw the approach taken by the SRSG as essential in order to achieve support from the business community and overcome government reluctance (JERBI, 2009). The balance between the interests of business and the needs of affected people was slightly restored in the 2007 report which was described as a "mapping exercise" to illustrate existing international standards, instruments and treaty body guidance in the field of corporate responsibility and accountability (UNITED NATIONS, 2007a). The report recognized that the expansion of markets and the transnational reach of corporations had not been matched by an expansion in protection for individuals and communities suffering business-related human rights abuse:

Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation. For the sake of the victims of abuse, and to sustain globalization as a positive force, this must be fixed (UNITED NATIONS, 2007a, para. 3).

The report also noted the inability or unwillingness of many States to offer protection against corporate abuse. But again, with the exception of the OECD Guidelines for Multinational Enterprises, the SRSG offered few criticisms of voluntary or multi-stakeholder initiatives, such as the Voluntary Principles on Security and Human Rights, which he seemed to endorse and encourage (UNITED

NATIONS, 2007a, para.18). Many amongst civil society further called on the SRSG to turn his focus to the perspective of victims, consult more widely with them, and appropriately reflect the results of meetings with affected groups. Groups also urged the SRSG to analyze the reasons States often fail to discharge their duty to protect against corporate abuse, and to spread awareness of the compelling need for global standards on business and human rights to strengthen the protection of human rights and provide a common framework to address business conduct (ESCR-NET, 2007).

In his 2008 report, “Protect, Respect and Remedy: A Framework for Business and Human Rights,” the SRSG outlined a three-part conceptual framework: (i) States have the duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation and adjudication; (ii) companies have the responsibility to respect human rights, which the SRSG defined as in essence involving managing the risk of human rights harm with a view to avoiding it; and (iii) victims require greater access to effective remedies, including non-judicial grievance mechanisms (UNITED NATIONS, 2008b). This broad framework was welcomed by business associations, governments and many civil society groups, who appreciated the fact that it encapsulated many of the conclusions that expert bodies and human rights advocates had previously expressed.

5 Emerging issues for debate within the SRSG mandate, 2009-2011

In June 2008, the Human Rights Council extended the SRSG’s mandate for another three years and requested him to “operationalize” the framework by providing concrete guidance and recommendations to States and business (UNITED NATIONS, 2008a). The SRSG has set out his priorities and has made clear that his final concrete recommendations will be made in 2011, at the end of his mandate (UNITED NATIONS, 2008c).

These recommendations have the potential to define UN approaches to corporate accountability issues for years to come. While much valuable corporate accountability work may best be pursued outside the scope of this mandate, the current environment opens a small, but important space for groups to identify and prioritize issues for deeper debate and further action, offer suggestions where they think the SRSG’s work could lead to meaningful results, and offer critiques where they are concerned by the direction the SRSG may be taking (ESCR-NET, 2009).

6 Future direction of the corporate accountability agenda in the UN

Despite these potential openings, it is not clear after more than a decade of false starts and continuing debate, that the UN is any closer to developing appropriate, enforceable standards for business and human rights. In fact, the opportunity for reaching agreement on a soft law instrument of global standards for business and human rights may have been lost for the immediate future. After the near collapse

of the global financial system, the emerging economies of China and India are, if anything, less hospitable now to persuasion than they were in 2004. It seems inevitable that *ad hoc*, voluntary alternatives will continue to be proposed as a means of filling the protection gap. This is already the case in relation to private military and security companies (PMSCs), which at first sight appears to be a startling omission from the work plan of the SRSG, given the public function they fulfil and their lack of accountability to international humanitarian and human rights law. According to the International Peace Institute,

In the absence of the necessary support (political and material) for the UN to become the primary forum for states to develop more detailed regulation, the most significant contemporary international efforts to improve standards implementation and enforcement within the global security industry are now occurring outside the UN (COCKAYNE et al, 2009, p. 53)⁷.

The SRSG's approach, which has been criticised by NGOs for being unduly conservative, can claim a number of achievements, not least, as noted by the High Commissioner for Human Rights, the affirmation by the Human Rights Council that 'transnational corporations and other business enterprises have a responsibility to respect human rights' (resolution 8/7). This sets "a new and clear benchmark and represents an important milestone in the evolving understanding of human rights in our societies." (PILLAY, 2009). OECD governments however remain cautious about the implications of the SRSG's analysis of the State duty to protect against human rights abuses by non-State actors under international law, even while they are expected to initiate a review of the OECD Guidelines for Multinational Enterprises in 2010. Industry bodies for their part, such as the International Council on Mining and Metals, have also enthusiastically responded to the SRSG's call for human rights impact assessments and company-level grievance mechanisms (INTERNATIONAL COUNCIL ON MINING AND METAL, 2008).

In his 2008 report, the SRSG referred to the incomplete and flawed "patchwork of mechanisms" which exists today to ensure that people and communities affected by business-related abuses have access to a remedy (UNITED NATIONS, 2008b, para. 87). In 2009, he further reiterated the State duty to "investigate, punish and redress" such abuses "within their territory and/or jurisdiction." (UNITED NATIONS, 2009, para. 87). But unless governments demonstrate a greater willingness to use their powers to reassert their regulatory role, progress in the exercise of extra-territorial jurisdiction to end the impunity enjoyed by abusive private actors is unlikely. NGOs remain unconvinced that a requirement on companies to reduce the risk of complicity in human rights violations, particularly in conflict zones, by conducting enhanced due diligence will be truly effective. Such measures, as highlighted by the *Global Witness v. Afrimex* case (UNITED KINGDOM NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, 2008), unless accompanied by a rigorous enforcement mechanism for non-compliance, may do little to alter company behaviour.

It may be too soon to predict, but the SRSG's most tangible legacies may be his clarification of the issues through a Respect, Protect and Remedy framework, along with the second pillar of his framework. Professor Ruggie is developing a set of guiding principles on the corporate responsibility to respect and related accountability measures, which unlike with the Norms, the SRSG believes he has an explicit mandate from the Human Rights Council to elaborate (UNITED NATIONS, 2008c, para. 2). But in the absence of a major shift in the attitude and actions of governments towards effective regulation of companies at home and abroad, and without a clear international legal framework and enforcement mechanism, it is unclear how companies will be effectively brought to account if they should fail to meet their human rights responsibilities. At most, failure will 'subject companies to the courts of public opinion' (UNITED NATIONS, 2008c, para. 2). Some experts (JERBI, 2009) point to the fact that the SRSG has convened 'a global leadership group' to advise him, echoing the way in which Francis Deng, a former Special Representative, developed the highly acclaimed Guiding Principles on Internally Displaced Persons (IDPs). But Deng's first-hand knowledge of IDPs and the specific situations in countries such as Sudan and Colombia, which gave rise to mass displacement, imbued his work with a high degree of credibility. It is unclear whether a global leadership group can help the SRSG overcome the credibility gap arising from his lack of personal contact with individuals and communities affected by business-related abuse and direct knowledge of the circumstances in which they occur. Another concern for human rights advocates is that the SRSG defines company responsibility in terms of evolving social expectations, a weaker formulation than that used by other UN bodies, which have stated that this responsibility stems from the Universal Declaration on Human Rights and existing international law (ESCR-Net, 2009).

Ultimately the greatest achievement of the SRSG's six-year mandate may be judged to have been the fact that it has kept the business and human rights debate alive in the UN, and that in the process it helped stimulate a tremendous amount of new research and interest outside of the UN. But after the failure of the Norms, powerful arguments and demands remain for the creation of global standards on business and human rights, and effective mechanisms to ensure the human right to a remedy for individuals and communities suffering the consequences of business misconduct. These demands will only intensify in the years to come.

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NOTES

1. While the UN Code of Conduct was never intended to be a human rights instrument *per se*, it did make clear reference to the responsibility of business to respect human rights in para. 13: “Transnational corporations should/shall respect human rights and fundamental freedoms in the countries in which they operate. In their social and industrial relations, transnational corporations should/shall not discriminate on the basis of race, colour, sex, religion, language, social, national and ethnic origin or political or other opinion. Transnational corporations should/shall conform to government policies designed to extend equality of opportunity and treatment.”
2. One of the reasons the Code of Conduct for TNCs was unpalatable to Northern governments was that newly independent developing countries conceived of it as part of ‘a New International Economic Order’.
3. Many of the provisions of the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy were incorporated into the revised versions of the OECD Guidelines for Multinational Enterprises.
4. The Declaration on Violence against Women (adopted by the UN General Assembly in 1993), for example, called on States to punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.
5. Now the Berthold Beitz Professor in Human Rights and International Affairs, John F. Kennedy School of Government, Harvard University; Affiliated Professor in International Legal Studies, Harvard Law School; former Assistant Secretary-General and senior advisor for strategic planning to Secretary-General Kofi Annan.
6. The SRSG’s initial two-year mandate, later extended to three, was to clarify the implications for transnational corporations and other business enterprises the concepts of ‘complicity’ and ‘spheres of influence’.
7. Swiss Government together with the International Committee of the Red Cross has adopted The Montreux Document on private military and security companies (PMSCs), which has been endorsed by over 30 governments. It seeks to promote respect for international humanitarian law and human rights by PMSCs in armed conflicts. The document is available at: <http://www.eda.admin.ch/psc>. The Swiss Government has also taken a lead in developing a Code of Conduct for Private Military and Security Companies, which overlaps with the SRSG’s mandate.

RESUMOS

Nos últimos 40 anos, as Nações Unidas têm buscado elaborar parâmetros globais para responsabilizar empresas pelo envolvimento com violações de direitos humanos. Este artigo detalha a atenção cada vez mais dispensada às violações de direitos que envolvam empresas, bem como analisa as limitações apresentadas por uma abordagem centrada nos Estados no que diz respeito a regular empresas num mundo globalizado. O artigo investiga as razões para que o Projeto das Nações Unidas de Normas sobre Responsabilidades das Empresas Transnacionais não tenha se consumado, bem como pondera os pontos positivos e negativos da ‘Estrutura Proteger, Remediar e Respeitar’, adotada pelo Conselho de Direitos Humanos das Nações Unidas em 2008. O artigo conclui com a seguinte advertência: ao menos que sejam atendidas as demandas em prol de parâmetros globais e instrumentos efetivos para vítimas de práticas empresariais nocivas, a pressão por mudança só tende a aumentar.

PALAVRAS-CHAVE

Empresas e direitos humanos – Normas da ONU – Responsabilidade das empresas.

RESUMEN

Durante los últimos 40 años, la Organización de Naciones Unidas ha llevado a cabo varios intentos de elaborar estándares globales que permitan hacer responsables a las empresas por su participación en violaciones de derechos humanos. Este artículo describe la creciente toma de conciencia sobre las violaciones de derechos humanos vinculadas a las empresas y las limitaciones que ofrece el enfoque tradicional centrado en el Estado, al momento de regular la conducta de las empresas en la era de la globalización. Reflexiona sobre las razones del decaimiento del Proyecto de Normas de la ONU sobre Responsabilidades de las Empresas Transnacionales, y evalúa las fortalezas y debilidades del Marco “Proteger, Respetar y Remediar” adoptado por el Consejo de Derechos Humanos el año 2008. El artículo concluye con la advertencia de que a menos que sean atendidas las demandas por estándares globales y por un recurso efectivo para los afectados por malas prácticas empresariales, lo único seguro es que se intensificará la presión para un cambio.

PALABRAS CLAVE

Empresas y derechos humanos – Normas de Naciones Unidas – Responsabilidad/Accountability de las empresas.



RINDAI CHIPFUNDE-VAVA

Rindai Chipfunde-Vava is the Director of the Zimbabwe Election Support Network (ZESN). She is a political scientist and a Stanford University fellow. Rindai formerly served as the Zimbabwe Country Coordinator for Southern African Human Rights NGOS Network (SAHRINGON) and as the Program Coordinator for the Zimbabwe

Human Rights Association (ZimRights). She has observed many elections under the different bodies of the Southern African Development Community (SADC), as well as in many countries in Africa, Asia, North and South America.

Original in English.



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INTERVIEW WITH RINDAI CHIPFUNDE-VAVA, DIRECTOR OF THE ZIMBABWE ELECTION SUPPORT NETWORK (ZESN)

By Conectas Human Rights*

Conectas conducted this interview during Rindai's participation in the IX International Human Rights Colloquium in São Paulo, Brazil in November 2009. Since June 2007, Conectas has facilitated the cross-regional campaign "Friends of Zimbabwe", which is composed of seven NGOs from six Latin American countries (Argentina, Brazil, Chile, Mexico, Peru and Venezuela). The campaign is carried out in partnership with NGOs in Zimbabwe, including the ZESN and Zimbabwe Lawyers for Human Rights (ZLHR).

The objectives of the campaign are: (1) to increase awareness of the current situation in Zimbabwe among different stakeholders; (2) to empower NGOs from Zimbabwe, by sharing experiences and supporting their actions; (3) to lobby governments from Latin America to pressure and influence the government of Zimbabwe to reestablish the rule of law and protect human rights; and (4) to promote collaborative actions at the African Union (AU), Organization of American States (OAS) and United Nations (UN) levels.

Conectas: *How did you become involved in monitoring elections?*

R: I started my career working for a human rights organization named ZimRights during the late 1990s. Whilst working there, I observed elections. I once observed elections in Malawi and realized that positive electoral changes were taking place because of the presence of observers. I also realized that in Zimbabwe there was nothing in this regard for elections. As a result, a group of non-governmental organizations (NGOs) formed the Zimbabwe Election Support Network (ZESN) in 2000. The elections held upon its inception were very contestable and the stakes were very high. The elections were very

*We would like to thank Rebecca Dumas for her collaboration in the transcription of this interview and Tamaryn Nelson for the final editing

controversial because, for the first time, there was a very strong opposition - the Movement for Democratic Change (MDC). This made election observation very relevant to every civil society organization. Had the election observation not happened, I think most of the irregularities would have gone undetected.

Conectas: *How is the ZESN organized?*

R: ZESN was formed at the end of 1999, but the actual work began when we observed the local government elections in 2000. Since then, we never have stopped observing elections. In terms of the structure, we are a coalition of 30 organizations, all of which participate in the annual general meeting. There is also a Board and the Secretariat, which I am heading as the National Director. We also have field offices in three provinces, in addition to the head office in Harare.

Conectas: *What activities did ZESN conduct during the last election in Zimbabwe?*

R: In the 2008 election we went beyond general observation. Most election observation groups do “parallel vote tabulation*”, but for Zimbabwe we decided on doing “sample-based observation”.

Sample-based observation works in the following way: statistically based, a sample of polling stations is chosen and an observation team is deployed. As soon as the results are counted at the polling station, they are transmitted to the main communication center, where they are tallied and the projection is calculated, taking into consideration the margin of errors, confidence levels, and so forth. In addition to using this method, we had ten thousand observers at nine-thousand polling stations all over the country so we were physically present in almost all polling stations. This alone built confidence in the Zimbabweans, even in terms of our projection. After we released the results of our projection, the Electoral Commission could not release results for a month. Finally, when the results were released, they fit into our margin of error and, therefore, the official results were within our projection.

This was the first time that ZESN used “sample-based observation” so we hired consultants to guide us. A lot of research was conducted and it was very successful. Many countries have used this methodology, but I think we are the first group to do it in Africa.

Conectas: *What was essential to organize it successfully?*

R: To ensure the success of the project it needs a statistician, telephonists, Information Technology (IT) staff, data capturers, a database developer and a project manager to run the whole process. As far as equipment, you need

*The Parallel Vote Tabulation (PVT) is an election observation methodology that is employed for independent verification (or challenge) of election results. It involves observation of the voting and counting of ballots at the polling stations, collection of official polling station results and independent tabulation of these results, parallel to election authorities.

efficient communication systems, including satellite phones, cell phones, and vehicles. These are very important for the collection of results. Most importantly, there is need for a lot of volunteers.

As I mentioned earlier, we worked with a total of ten thousand (10,000) volunteers. Within those ten-thousand (10,000), 500 were for the projection only. These volunteers were prioritized in terms of communication because the results collected are supposed to be known and announced within twenty-four (24) hours. The results are then compared with the Electoral Commission's results but we wanted to announce beforehand so as to *deter* any kind of fraud in the election results. Therefore, it was very important for us to collect and announce the results within 24 hours. Otherwise, the whole purpose of the project would have been defeated.

Conectas: *During the Colloquium, we discussed how difficult it is for human rights advocates to understand elections as a human rights issue. What is your view?*

R: Elections fall under citizen and political rights, and when you look around the world - for example, in Kenya and Zimbabwe - there are lots of human rights violations associated with elections. These are in the forms of torture, beatings, killings, forced disappearances, arson and so forth. For me, that's when elections become a human rights issue. In Zimbabwe, elections are very much related to human rights violations. If it weren't for the elections, I don't think we would have such a bad record. When you look at the records of Zimbabwe's crises, they all took place during the years of elections. When you look at elections, there are so many rights that are involved: the right to assembly, the right of association, the right of free speech and free association, etc. These rights are somehow violated within the context of elections and that's the key. I think human rights organizations should consider this and focus on it as a thematic issue in their various scopes of work.

Conectas: *Why do you think there has been a recent increase in violence after elections in several African countries?*

R: After independence, most political parties that had taken part in liberation struggles pursued the single-party system. Therefore, from the 1980s to the 1990s, there were virtually no opposition political parties. At the end of the 1990s, we noted opposition parties emerging as was the case in Zambia. As other countries realized that it was the "end warning" [to the single-party system], there was need for them to "watch out" for opposition parties. As a result, these parties began to be treated as "enemies" that were representing Western interests and coming to unsettle the liberation struggle regimes. For these opposition parties, the only way to fight back was through violence, which they had experienced during the liberation struggle and they hadn't forgotten. The result of this polarization is violent elections because of a lack of tolerance for differing political views. When you look also at our electoral systems, most countries use the "first past the post" voting, where

the winner takes all and forms the government. It is unlike a proportional representational system, where many are represented in Parliament and power is shared across parties.

Conectas: *How do you see the role of the international community within this context of polarization?*

R: In terms of elections, the international community should support local initiatives such as domestic observers. At the same time, they also should send international observers to augment the work we do. I also think that the international community should fund more projects related to democracy, elections and voter education. Voter education is fundamental. It is important that people know their rights and how to vote so that they will do so on an informed basis. I also think that once they know their rights, they will feel more confident that their vote counts.

Conectas: *What about the international role of African countries? Do you think it is possible to break the pattern of African countries voting in block at the United Nations?*

R: It's a process and it depends on the situation. I think that the United Nations (UN) should be more thematically oriented, rather than country-based. If you want to put a country such as Zimbabwe on the agenda before discussing any specific issue, other countries such as China, Russia and even South Africa will sit on the fence. If specific countries are placed on the agenda, I don't see how those voting blocks would go away. There is also Pan-Africanism. We need strategies on how to put the specific issues on the table.

Conectas: *As you mentioned China, we would like to ask you what in your opinion is its role as a member of the international community, specially in the context of Africa?*

R: China is very present in Zimbabwe. We used to have countries from the European Union as our main investors and now we have China. It is a pity that some of the countries or organizations, like the Commonwealth, have disengaged from Zimbabwe.

At the beginning of the crisis, the European Union pursued the policy of non-engagement, which gave China space to come into Zimbabwe. No matter how bad a country's situation may be I don't think that the international community should ever disengage. It should keep on hammering the point and pushing on so that other countries like China don't monopolize the investment opportunities. Right now we see China investing in minerals and farming in Zimbabwe. For me, China's strong presence is a problem because there is no democratic history in the country. If these are the friends of Zimbabwe, they will be invited to observe our elections, without having a history of free and fair elections. Other examples are Libya and Russia. A country must invite a mix of states, including those with good human rights records, so that these countries scrutinize the process in a

very objective manner and give recommendations on how Zimbabwe can improve its electoral system.

Conectas: *Finally, can you give us your personal opinion regarding the International Criminal Court's indictment of Omar al-Bashir, President of Sudan?*

R: I think it was very good because where I come from there is a belief that sitting presidents cannot be indicted. This is a warning to all Presidents that if they abuse human rights, they can still be indicted and no one is above the law. Nothing else has really happened so far, but I think it's good progress. It's a warning to the sitting presidents who violated human rights and abused their power. The world is watching.

São Paulo, November 14th, 2009.

REPORT ON THE IX INTERNATIONAL HUMAN RIGHTS COLLOQUIUM

By Conectas Human Rights

1 Introduction

In November 2009, Conectas organized the ninth edition of the International Human Rights Colloquium, whose theme was: **“An Appraisal of the Global Human Rights System from a Southern Perspective: Common Strategies and Proposals for Reform”**. The Colloquium is an annual event held since 2001 in São Paulo (Brazil) designed, primarily, for young activists from the Southern Hemisphere, completely carried out in three languages (English, Portuguese, and Spanish), that facilitates dialogue between different work agendas of the human rights movement, addresses the latest topics through a multidisciplinary focus, and creates spaces for establishing cooperation between all of the participants.

In the last eight editions, from 2001 to 2008, the Colloquium has welcomed 529 participants from 59 countries in Latin America, Africa, and Asia. Furthermore, 226 people have attended as lecturers and collaborators. In addition to its training mission, the Colloquium plays an important role in the development of policy capabilities of human rights defenders participating in this event and provides the opportunity for participants to expand the scope of their work, to establish connections with networks and groups in other regions.

The ninth edition of the Colloquium sought to bring together a group of young activists and scholars to collectively appraise the efficiency of the international human rights system from a southern perspective. For the first time since its creation in 2001, the IX Colloquium gathered ex-participants from previous editions of the event, exclusively. Thus, the meeting sought to strengthen collaborative work between different generations of participants. The working methodology sought to create a propitious space for developing future strategies for action and concrete proposals for reform in the multilateral human rights system.

The group, which gathered participants from all of the colloquia, also

carried out an evaluation of the results from the previous eight editions of the Colloquium and discussed the format and content of the 2010 and 2011 editions.

The meeting gathered 34 participants from 22 countries (14 men and 20 women) from Latin America (14), Asia (4), and Africa (16). It also received 32 observers and support from a team of 14 volunteer monitors for the organization. From the event's selection process until its conclusion, the participants completed a series of readings and preparatory coursework on the themes addressed in the program.

Hosting the IX International Human Rights Colloquium was possible thanks to generous contributions from the Open Society Institute, the Ford Foundation, and the United Nations Foundation. It also received support from the French and Canadian Consulates, OSISA, and Ashoka Social Entrepreneurs. As in previous years, the Getulio Vargas Foundation Law School welcomed the event for a week and the Ruth Cardoso Youth Center, of the Municipality of São Paulo, received the participants during the inaugural session.

The participants requested that the present review of the event be published in the *Sur Journal* to inform those who formed a part of previous editions of the Colloquium and other interested persons.

2 Program: A Critical Analysis of the UN Human Rights System

This year's program sought to provide a general panorama of the functioning of the main UN human rights mechanisms and, at the same time, encourage discussions of concrete strategies for joint action and proposals for reform. Thus, each one of the mechanisms analyzed (the UN Charter system and the treaty system) was studied from three perspectives: Conectas was responsible for providing an overview of its functioning, a speaker was invited to formulate a critical view, and, finally, the participants presented concrete examples of their use. There were 11 practical presentations that illustrated the difficulties that activists have found in using these mechanisms. During the group work, the participants discussed some strategies for overcoming challenges and formulated concrete proposals for reform.

The group of lecturers and panelists gathered academics, activists, and UN officials who analyzed the operation of UN bodies from a human rights perspective and discussed opportunities for civil society participation.

The Program placed special emphasis on UN Human Rights Council (UNHRC) mechanisms and treaty bodies. As a result, Camila Asano of Conectas presented the political context of the UNHRC and Philippe Dam of Human Rights Watch (Geneva) discussed resistance from UNHRC member states to adopting resolutions on countries. Lucia Nader of Conectas presented an overview of the functioning of Universal Periodic Review (UPR) and Sandeep Prasad of Action Canada for Population and Development – ACPD (Canada) presented the challenges involved in including the issue of sexual rights in UPR. Mustapha Al-Sayyid, from Cairo University, spoke about the role of Arab countries in the Human Rights Council. Julia Neiva of Conectas described the functioning of treaty

bodies, and Gabriela Kletzel of the Center for Legal and Social Studies - CELS (Argentina) presented her organization's experience in presenting shadow reports.

Two Special Rapporteurs also participated: the UN Special Rapporteur on Arbitrary Executions, Philip Alston, sent a video explaining the work of special mechanisms, and the UN Special Rapporteur on Adequate Housing, Raquel Rolnik, spoke about her one-year experience as a Special Rapporteur, and shared the challenges of combining field work with the institutional requirements of the United Nations.

June Ray of the Office of the United Nations High Commissioner for Human Rights (Civil Society Unit, Geneva) and Katherine Thomassen of the International Service for Human Rights (Geneva), presented opportunities for civil society to effectively participate in the United Nations system. June Ray emphasized the role of the OHCHR as a bridge between human rights defenders and different United Nations bodies.

Two other topics were discussed: the Security Council and the International Criminal Court, respectively by Joanna Weschler, from the Security Council Report (USA), and Camila Maturana, from the Humanas Corporation (Chile). Both gave an overview of the functioning of these international institutions and explained how NGOs can monitor their work.

2. 1 Case Studies – Lessons Learned and Practical Advice

Some participants presented their experiences in engaging with the international system to illustrate the lectures. This methodology, used for the first time during the colloquium, made the discussions more horizontal, and allowed a true exchange of experiences between the participants.

Case Studies		
Human Rights Council Special Mechanisms	Human Rights Council UPR	Treaty Bodies
José Ferrara, Mexico: How to submit a case to the Special Rapporteur (SR) for freedom of expression.	Florita Telo, Angola: Presentation of civil society's report to UPR: the case of Angola.	Babalola Medayedupin, Nigeria: Denouncing torture cases to the Convention Against Torture Committee.
Luis Emmanuel Cunha, Brazil: Implementing recommendations made by Special Rapporteurs	Andrea Dejten, Uruguay: Monitoring the UPR process in Uruguay.	Wendy Flores, Nicaragua: Shadow reports to Treaty Bodies.
Renata Lira, Brazil: How to organize the Special Rapporteur's visit..	Mauricio Caballero, Colombia: UPR process in Colombia and LGBT rights.	Chibogu Obinwa, Nigeria: The domestication of CEDAW in Nigeria.
	Carlo Cleofe, Philippines: Implementing UPR recommendations.	Maria Esther Mogollón, Peru: Ratification of the Convention on the Rights of Persons with Disabilities

2. 1. a Human Rights Council: Special Mechanisms

José Ferrara, of the Miguel Agustín Pro Juárez Human Rights Center (Mexico) told his organization's experience in using a UN special report, in the context of civil society's preparation of shadow reports for UPR. He therefore affirmed "sending information to the Rapporteur was convenient for forming a part of the broad strategy involving the media and organizations dedicated to defending freedom of expression. Our approach found an echo among the diverse delegations that were present during the appearance of the Mexican delegation. The activism of international organizations linked to the subject was also helpful." He added, "in sending information to the Rapporteurs, it is important for the information sent to be highly trustworthy, and for it to propose the actions it wishes to ask the States to take." Finally, he recommended, "that the information sent form a part of a broad strategy that includes the committed mobilization of diverse social sectors."

Luis Emmanuel Cunha, of Gajop (Brazil) presented his organization's experience in developing a methodology for evaluating the implementation of recommendations from the UN system. Luis highlighted the difficulty faced in evaluating compliance with recommendations from different UN mechanisms, due to the fact that each one of the mechanisms drafts recommendations in accordance with its own criteria, impeding the creation of a uniform procedure for analysis.

Regarding the visits of the Rapporteurs, Renata Lira of Global Justice (Brazil) emphasized the importance for the reports delivered to the Rapporteurs during the visit to be drafted in English, and to have official statistics, emblematic cases, and, above all, a contextual political analysis. She also stressed the importance of organizing meetings with victims and their family members so that the Rapporteur may have a vision of the country's actual situation.

2. 1. b Human Rights Council: Universal Periodic Review (UPR)

Florita Telo, from the Mosaiko Cultural Center (Angola) told of an experience in drafting a civil society report for UPR. The report was developed by 10 organizations from different regions in Angola. They worked fundamentally around six themes: the right to housing, to education, health, indigenous peoples' and rural communities' land rights, access to natural resources, freedom of association, and freedom of assembly and expression. In her presentation, Florita emphasized the additional difficulty faced by activists who speak Portuguese, since this is not one of the official languages of the UN.

Andrea Dejen, of the Interdisciplinary Center of Development Studies (Uruguay) gave an account of how, upon beginning to participate in UPR, organizations realized that they were in a sort of haze with respect to this new, novel, and participative mechanism, but they still did not fully understand it. At the same time, the government called for civil society collaboration in drafting the official report. From Andrea's viewpoint, this process of consultation and information on UPR in Uruguay suffered from a series of difficulties, among them, the scarce

and selective call for an organized civil society, executed with insufficient time for ensuring the broadest participation, and with scarce information that would allow for civil society organizations to carry out a proper analysis for drafting a position. Finally, Andrea mentioned that a good idea for the future would be to announce a permanent round table for the next review.

Mauricio Caballero from Diverse Colombia (Colombia) presented a project for including the issue of LGBT rights in the UPR of Colombia. Mauricio began by emphasizing that UPR represents various difficulties. First, the mechanism was new, unknown, and with unclear rules. Second, he mentioned that the issue of homosexuality is a subject that generates controversy and division within the Human Rights Council. Third, he highlighted that Colombia is a complex country, with a great number of serious human rights problems, which makes it very difficult to incorporate all subjects.

The result of the organization's work was positive, since the UNCHR included a specific recommendation on the subject that was assumed by the State and, thus, the first explicit international recommendation regarding LGBT human rights in Colombia. Mauricio explained that the recommendation has been used to strengthen internal debate. This recommendation has been important for generating spaces for dialogue with the government and other international mechanisms (Inter-American Commission on Human Rights) and in internal litigation (Constitutional Court). It has been also useful to strengthen public policies regarding the rights of this segment of the population, especially to strengthen the normative framework and to create indicators of the effective enjoyment of these rights.

Carlo Cleofe, of the Task Force Detainees of the Philippines (Philippines), mentioned that for the civil society report to UPR to be taken into consideration, they were worried about ensuring that the information appeared trustworthy, so they called for a wide spectrum of organizations to sign the document. He also emphasized that being able to participate in the Council's session twice was very important in order to speak with the delegations about the country's review. In these visits, parallel events were also organized, which helped to generate interest regarding the situation in the Philippines. Finally, Carlo highlighted that it was fundamental for the delegations to have drafted a list of recommendations to their country in advance: of the 19 delegations that were gathered, 11 used the recommendations drafted by civil society.

2. 1. c Treaty Bodies

Babalola Medayedupin, of the Center for Community Development and Conflict Management (Nigeria) gave an account of the difficulties that her organization faced in trying to internationally denounce a serious case of torture, due to the fact that Nigeria had not ratified the Protocol to the Convention Against Torture. Therefore, she emphasized the importance of studying, while preparing a case, which treaties the country in question has ratified.

Wendy Flores Acevedo from the Nicaraguan Center for Human Rights (CENIDH) (Nicaragua), explained her organization's experience in presenting

alternative reports before the different treaty bodies of the UN, such as the Human Rights Council in October 2008, the Committee on Economic, Social, and Cultural Rights in November 2008, and the Committee Against Torture in May 2009. As the main lesson learned, Wendy emphasized the necessity of working together with other organizations with the goal of gathering broad and complete information. She also mentioned the need for setting dates for presenting reports on the part of the State and for programming reviews of the different bodies. The main challenge identified was the importance of constructing a working methodology for drafting a report in coordination with other organizations. She suggested, as a mechanism, appointing a small group of drafters to be responsible for compiling the information and writing the final draft so that the document may have consistence, harmony, and a unified language.

2. 1. d Drafting and Ratification of International Standards

Chibogu Obinwa, of BAOBAB for Women's Human Rights (BAOBAB) (Nigeria) commented on her organization's experience surrounding implementation in the internal environment of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). She pointed out that Nigeria ratified the Convention during the military government in 1985, and that it never really incorporated it internally. Chibogu also mentioned that the internalization of the Convention faces some difficulties, based on contrary cultural stereotypes of women's rights. Thus, the strategy of a broad collation of organizations was to draft a very well documented shadow report on 16 articles of CEDAW and to participate in the Committee's sessions in New York during the evaluation of Nigeria. Chibogu went on to state the importance of maintaining informal dialogue with CEDAW members to call attention to the most important points that should be questioned of the government. On the other hand, as strategies for the implementation of the Convention, she mentioned the media's role in presenting which aspects of the legislation need to be reformed, and in training judges and legislators on the subject.

María Esther Mogollón, of the MAM Foundation (Peru) presented her experience in the efforts for the approval of the UN Convention on the Rights of Persons with Disabilities. María Esther had the opportunity to inform the position of the Peruvian government, following a prior investigation that she had carried out concerning the sexual and reproductive rights of persons with disabilities, especially the right to maternity of disabled women. Even though Peru voted in favor of the Convention and subsequently ratified it, Maria Esther denounced a diminishing trend in protecting the rights of persons with disabilities in her country.

2. 2 Final Document: Proposals for Reform in the UN System

During the work groups, the participants actively collaborated in order to produce a joint statement on the following challenges faced by the United Nations human rights system:

Challenges for Increasing Civil Society Participation and Effectiveness in the UN Human Rights System

1. The lack of cooperation of States with the United Nations (UN), often justified with the false argument of the incompatibility of sovereignty with human rights protection;
2. The lack of the implementation of United Nations recommendations and the difficulty of measuring the effectiveness of treaty bodies and international human rights mechanisms;
3. Obstacles to civil society participation in the United Nations system, which includes the lack of financial resources, physical and language barriers, the lack of communication and access to information;
4. Insufficient interaction between and among the Human Rights system and Regional Systems;
5. Selectivity and politicalization in the Human Rights Council (UNCHR);
6. The failure to ratify the main group of human rights treaties and obstacles to civil society participation in treaty bodies;
7. Insufficient attention on the part of the Security Council to the human rights agenda; and
8. The need for guaranteeing greater effectiveness in the International Criminal Court (ICC), and for improving its relationship with the UN human rights system.

The work groups made recommendations directed towards the UN, governments, and civil society organizations. Conectas presented, in the name of all of the participants, the Final Document to the Office of the High Commissioner for Human Rights, and all participants presented the document to their respective governments (in their countries as well as in their respective delegations in Geneva). Conectas also distributed the document through its website and newsletter. The complete version of the final document may be found at: http://www.conectas.org/arquivospublicados/IXColoquioDDHH_DocFinal_Espanol.pdf

3 Evaluation of the Colloquium 2001-2009

In previous years, Conectas has carried out evaluations with the participants in the Colloquium, during and after the event, and has taken the results of these evaluations into consideration in order to introduce changes and improvements in its format and content. These consecutive evaluations have shown that the Colloquium has been transformed into a recognized space in which human rights organizations, especially from the Global South, may conduct capacity-building and create networks. Nevertheless, Conectas wished to have a more substantial evaluation from the beneficiaries of the different editions of the Colloquium, as regards to its impact.

Taking these evaluations into consideration, the IX Colloquium gathered 34 participants from the 8 previous events. This was the first time that the participants of different generations had the opportunity to meet each other and create links for future joint activities. Moreover, they could give their opinion with respect to the content and format of future editions of the Colloquium.

Conectas requested that the participants contribute to the evaluation process in three phases: i) responding via internet to a questionnaire prior to the event; ii)

discussing the results of the questionnaire during the Colloquium, y iii) drafting proposals for future editions.

During the preparatory stage, the participants were requested to give their opinion on the degree of compliance with the five objectives that the Colloquium seeks to achieve.

Questionnaire Results *	
Objective 1: The Colloquium offers a forum for exchanging experiences and practical knowledge:	78% strongly agree 22% agree
Objective 2: The Colloquium provides a forum for sharing information on the latest advancements in the field of human rights:	56,5% strongly agree 43,5% agree
Objective 3: The Colloquium offers opportunities for acquiring professional skills:	52% strongly agree 36% agree 12% disagree
Objective 4: The Colloquium provides information about how to navigate the United Nations system in order to advance human rights protection:	52% strongly agree 39% agree 9% disagree
Objective 5: The Colloquium creates a foundation for future collaboration and alliances:	56,5% strongly agree 43,5% agree

* 23 of the 34 participants responded to the survey.

The survey showed a very positive evaluation of the Colloquium. 100% of the participants “Strongly agree” or “Agree” that the Colloquium: i) Offers a forum for exchanging experiences (objective 1), ii) Provides a space for learning about the latest human rights development (objective 2) and iii) Creates a foundation for future collaboration (objective 5). It is interesting to highlight that those three objectives were also selected in the last part of the evaluation as the main objectives for the Colloquium’s future.

With respect to acquiring professional skills (objective 3), the participants that were of the opinion that this objective was not within reach (voting “disagree”) explained that they disagreed with the manner in which the phrase was presented, especially with the term “acquiring.” With respect to the offer of information about how to navigate the UN system (objective 4), the participants that “disagreed” asked Conectas to organize complementary courses about the UN system. They affirmed that a Colloquium lasting one week was not sufficient for leaning about such a complex system.

During the discussions, the participants made several positive comments. They spoke about the impact of the Colloquium in their lives, giving concrete examples of joint projects implemented thanks to the Colloquium. They also mentioned that the Colloquium is different from other courses, because it takes

the social aspect of human rights work into consideration, allowing for the creation of new friendships. In addition, they emphasized its unique character as a South-South forum.

The participants made proposals for future Colloquia, including the incorporation of French as one of its languages, and recommended continuing many of its traits, such as the *Open Space Forum* (a space for discussion of subjects proposed by participants), Brazilian NGO visits and case studies presented by participants. The participants also recommended that Conectas document the impact that the Colloquium has had in the lives of its participants, affirming that *“this story must be told.”*

4 Final Comments

The Colloquium plays a central role in the life of Conectas. Each year, the Colloquium is the moment in which the organization invests its greatest effort. It is, additionally, the main space for hearing the opinion of human rights activists from the Southern Hemisphere, to whom a large part of the organization's activities are directed.

It was extremely comforting to hear the opinion of ex-participants during the evaluation carried out during the IX Colloquium. In this sense, four aspects are particularly relevant: 1) the recognition of the Colloquium's being the only event of South-South integration in human rights; 2) accounts of collaborative projects between participants begun following the Colloquium regarding which Conectas didn't have information; 3) the recognition of the efforts of Conectas in keeping in touch with ex-participants after the Colloquium, and 4) the importance of spaces for socializing during the Colloquium and the recognition of Conectas' work in creating these spaces for integration.

In light of the results of the evaluation, it is clear that the main challenge for Conectas is to design a tool that allows measuring the impact that the Colloquium has in strengthening a new generation of human rights activists that values collaboration and perceives the difference between North-South and South-South relations.

In order to obtain more information about the X International Human Rights Colloquium that will be held in October 2010, visit: www.conectas.org/coloquio.

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