

# **RIGHTS, RESPONSIBILITIES AND SOCIAL PROTECTION. THE DYNAMICS OF SUPPLY AND DEMAND: AN ISSUES PAPER**

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## **Introduction**

This paper seeks to explore social protection from the perspective of social and economic rights. The 'supply' of rights within any given context is the responsibility of a number of institutional actors, with the state bearing ultimate responsibility for ensuring these rights are respected. The 'demand' for rights comes, in principle, from the population at large, both as citizens but also as workers, children, women and so on<sup>1</sup>. However, the 'effective' demand for rights, the capacity to ensure the translation of commitments into reality, to 'make rights real', is most often generated by collective actions on the part of citizens and civil society who use a variety of means to persuade and pressure the state to fulfil its obligations. There is an important two-way relationship between rights and social protection: the recognition and realisation of basic human rights provides a stable foundation on which to build social protection programmes while social protection programmes provide an important means for the operationalisation of rights.

The paper is structured along the following lines. The first section describes the different institutional actors who bear responsibility for rights, including rights relating to social protection, defines their respective roles and capacities and points to related institutional channels through which claims can be made, contested or fulfilled at domestic and international levels. The second section draws on various case studies to illustrate some of the ways in which citizens and civil society groups have mobilized around the idea of rights to support their claims to social protection or economic, social and cultural rights in various forums and at targeted levels (forum shopping). We conclude by drawing out the wider implications of a rights based approach both to social protection and how it might link up to Ford Foundation's own concerns. The Appendix provides a schematic overview of some of the issues discussed in the paper.

## **1. Institutional channels for the 'supply' of rights**

### **The legal system**

**The legal system** provides formal legitimacy and the weight of the judicial system to the concept of rights. It exists at a number of different levels. National legislation bears most closely on state responsibility for the socio-economic security of its citizens. *Constitutional law* is the highest law and the foundation of all other laws. If any other law can be deemed to contravene constitutional law, the victim of that violation is in a powerful position to re-assert their rights – assuming adequate access to justice. This is where rights pertaining to social protection are enacted, investing the relevant policies deriving from rights-based legislation with greater accountability and embedding them within the necessary secondary or administrative laws. If constitutional or legal safeguards had been in place during SAP era, many governments could have been taken to court for failing to guarantee access to education or basic health care. Efforts to claim social protection or to institute responsibility for it are futile in the absence of pro-poor administrative laws which govern how the social protection system will function.

Most of the world's constitutions carry commitments to meeting the basic needs of citizens, with various degrees of justiciability. Some specify the right to social security, often using universal terms, sometimes with specific guarantees to vulnerable groups. There is thus scope for 'targeting' within a framework of universalism. The constitution provides the backbone for a great deal of the legislation that seeks to operationalize constitutional commitments and provides a powerful safeguard against the violation of basic rights as well as any administrative laws or regulations that may contravene basic principles of justice.

India and Costa Rica are examples of countries where access to the courts is relatively simple and litigants are assisted with the investigation and representation of their case. In Malawi, the courts provide no assistance and litigants bear full responsibility, although its constitution is strongly pro-poor. Malawi does not allow for PIL; NGOs cannot bring cases on behalf of the vulnerable. The capacity for such social litigation is important as the more jurisprudence reinforcing the justiciability of socio-economic rights builds up, the easier it becomes for others to make claims based on established precedent. There is therefore scope for negotiation around legal interpretation.

The separation of powers between judiciary and the executive becomes important because it provides checks and balances. The South African courts have proven particularly pro-active in advising the executive on its responsibilities in the field of social and economic rights. Its judgements have been unsettling for European governments who do not think the courts can tell government what to do.

The *judiciary* is more subject to external evaluation and monitoring from international bodies and national human rights organisations than the executive arm of the state. It has an advisory capacity and hears formal litigation. But it is essentially reactive. It is not its role to make speculative or independent statements or actions. Rather it is the final arbiter on whether violations have occurred.

In addition to national legislation, most states today have signed up to *key international conventions* which have a bearing on the social and economic rights of their citizens and on the nature of their legal system. These include the Universal Declaration on Human Rights. Article 25 of the Declaration spells out the right to an adequate standard of living and to security in the event of livelihood failures. The Declaration is not binding but it gave rise to the two binding key covenants: the International Covenant on Civil and Political Rights (which includes the right to life) and the International Covenant on Economic, Social and Cultural Rights which are. The Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child and the Convention on the Protection of the Rights of All Migrant Workers are other international conventions which frequently feature in the social protection discourse and litigation. The passage of international conventions is frequently mirrored in modifications to national legislation, something which is particular to human rights law. A number of states, particularly in Latin America, modified their legal system to recognize equal rights to land after the passage of CEDAW.

There are also three active *regional conventions*. The importance of these regional legal systems is that if social and economic rights can be pursued successfully through them, it has wide-ranging implications for national legislation and the possibility of redress for individuals involved. The European Convention on Human rights is largely civil and political but does allow for the right to education, trade union activity and possession (ie. housing litigation). Housing laws and national policy have been reformed in the UK as the result of a succession of cases involving the socio-economic rights of gypsies and travellers brought before the European Court of Human Rights. The European Roma Rights Centre was instrumental in simultaneously bringing 5 such cases in 2001. Although, the cases were not successful the dissenting opinions contained in the judgments had a significant impact. The essential legal principle which emerged being that treating different people differently in proportion to their vulnerability is recognised a matter of justice.

The Inter-American Court of Human Rights, which covers most of the Americas, and the African Court of Human and Peoples' Rights are even more responsive to petitions on the grounds of social, economic and cultural rights. For instance, two girls born of Haitian mothers in the Dominican Republic were refused registration at birth and were consequently denied access to schooling and health. The country had to pay for damages for all human rights violations.

The African Charter encompasses collective, individual and customary rights, making it far easier for different groups to get their case admitted. This may improve access to justice in the long run. However, it is still young and struggling with compliance issues as it does not have a good level of enforcement capacity. While this does not bear directly on social protection, it is worth noting that SERAC in Nigeria took Shell to court for violating the rights of Ogoni people by destroying their sources of food, water and livelihoods. Shell pulled out of their pipeline project as much in response to adverse publicity as to Court's judgement.

Unlike other systems of international law which tend to focus on horizontal State-to-State agreements, international human rights law operates both horizontally and vertically and relies heavily on the domestic implementation of its norms. In recognition of the important role which *National Human Rights Institutions* (NHRIs) play in the effective implementation of International Human Rights Law the Paris Principles were drafted in 1993. They comprise of a series of recommendations regarding the role, composition, status and functions of independent NHRIs and list a number of responsibilities which they should shoulder: these include monitoring, advising governments, communicating with regional and international organizations, and fulfilling quasi-judicial competence with regard to individual and collective petitions, with or without formal referral. NHRIs are also encouraged to engage their governments and other national players in consultations to try and enhance compliance with treaty body recommendations.

The legal system is the forum for rethinking the relationship between state and citizens at the most central level; the creation of national human rights systems demonstrates willingness to acknowledge rights-based responsibilities. The legal system also holds the possibility of taking action against the state and so makes it difficult for the state to ignore or delay in its responses to complaints and claims from citizens. National legislation includes public commitments to provision for basic needs and promotion of livelihoods.

### **Politics and policy process**

The *political system* provides channels for the negotiation of policy at the highest and arguably the most powerful level within the country. It determines the structure within which states are expected to make good their ultimate responsibility to respect, protect and fulfil the obligations to their citizens as laid out in the constitution, national legal frameworks and the international and regional treaties to which they are signatories<sup>ii</sup>. The state discharges this responsibility through *legislation, policies and service provision*. It is through the policy process that negotiations over competing claims become concrete and where mechanisms around budgets allocation, resource distributions and accountability are put in place. This is where the broad architecture of social protection is formulated and resourced.

Fraser talks about the process of social policy-making in terms of the 'politics of needs interpretation' around a number of critical moments: the recognition and prioritisation of specific needs, their interpretation in the form of policy, the resources dedicated to meeting the needs and, we might add, the politics of implementation. The politics of needs interpretation includes the recognition of basic needs as basic rights. The discourse of rights clearly shifts the dynamics between policy makers and their publics. Needs are discretionary. They address those in 'deficit' and construct them in passive terms: beneficiaries and recipients of welfare. Rights represent the obligations that states have towards their citizens. They are non-negotiable and justiciable – although the translation of formal rights into real ones has its own politics of interpretation and implementation. It is also clear that rights will be interpreted very differently in different contexts. For instance, Argentina has estimated that the average household should have 200 litres of water a week whereas in South Africa, the ruling is closer to 50 litres. A rights-based approach does not define the content of provision, only what should be provided and on what terms.

**The policy process** is where most of the dialogue between government and civil society, including think tanks, committees and mid-level executives who wield considerable power, takes place. It is also where donors intervene, with important implications for the kinds of social protection that are pursued by different states. One of the major critiques levelled at the conditionalities which accompanied structural adjustment programmes and continue to feature as part of international concessional lending is the extent to which they compressed fiscal and policy space for governments, compromising their capacity (where political will exists) to uphold the basic rights of their citizens. The new 'aid effectiveness' stresses national ownership and international partnership, but funding remains conditional on the acceptance of the basic principles of macro-economic stabilisation.

The Tanzania Gender Networking Programme (TGNP) is an example of negotiations over issues of ownership and control of resources being channelled through activist organisations which seek to, 'challenge and change the structures of power which create policy and invent law' (Rusimbi & Mbilinyi 2005, 283-284). In Tanzania the combination of SAP, trade liberalisation and privatisation has led to patterns of ownership and resource control which have systematically excluded low and middle income groups from the labour market, social service provision and meaningful participation in decision-making about policy and law. The TGNP has been amongst the leading civil society organisations to challenge the status quo, foregrounding gendered and pro-poor agendas with key decision-makers at country and regional levels. In particular they have highlighted the importance of decentralising policy-advocacy by consciously linking national-level negotiations to grassroots activism and social movements thereby avoiding the cooption social change discourse into mainstream parlance devoid of its, 'original people-centred political content' (ibid, 308).

The dualistic structure of social protection in many developing countries, the privileged access by formal workers to state-mandated social security and the discretionary and piecemeal provision of social assistance to the vast majority of the working poor is evidence that the translation of needs into rights has been a highly uneven political process. The dismantling of state welfare provision as a result of neo-liberal reforms had the effect of eroding this dualism, on the one hand, but of reconstituting it on the other, between those able to benefit from privatized insurance and those relegated to residual safety net provision.

However, the growing frequency and intensity of the financial crises which have accompanied the processes of global integration have led to a more systematic approach to social protection strategies. This appears to be giving rise to a process of gradual and incremental universality of coverage. Some countries have gone further on this than others.

The translation of formal policy commitments to universal, or even simply pro-poor, social provision into concrete outcomes on the ground will depend on how the politics of implementation plays out through the *administrative channels* which govern the lower-level day to day operationalisation of policy. Administrative laws help to flesh out policy decisions. Negotiations over the implementation of entitlements and distribution/allocation of resources are most often done at this level. This is the domain of local level politics. The implementation process is generally far more decentralised than policy formulation. It is therefore more accessible to those who could not afford to

go to courts to claim their rights. A great deal of the variation in centrally determined social policies in India, including earlier programmes like the IRDP and more recent ones like the NREGA, relates to the interpretation of these policies at lower levels of government and the capacity of civil society organisations to bring pressure brought to bear on field-based officials. The 'generative' potential of the guarantee contained in the Maharashtra Employment Guarantee Scheme to mobilise workers to demand their entitlements has been documented by Joshi and Moore (2000).

### **Non-state channels**

**Private corporations** have generally been more successful in claiming their rights as profit-making corporate entities than discharging their responsibilities as wealthy tax payers, users of national resources and employers of labour. Negotiation over private sector entitlements and private sector activities. UN Global compact. Private companies have faced litigation over water provision. Water services were disconnected after failure to pay in Argentina. The case was won through provincial courts. Litigation was about failure to fulfil as well as protect and respect the right to water (although this right is not legally recognised in Argentina).

The private sector also provides contributions to the social security of employees. It also contributes to taxes which can be used to finance social security. It is a very powerful stakeholder in setting terms and conditions of employment so that its compliance with codes of conduct and principles of corporate social responsibility can send an important signal to both state and citizens about labour standards. Unfortunately, compliance has been very weak and uneven and often seen as a response to threats to reputational capital.

**iii) Private sector:** Negotiation over private sector activities, entitlements, and responsibilities has become increasingly central to discussions surrounding the realization of human rights. Labour rights in particular bear an obvious relevance to discussions concerning the operationalisation of social protection. The UN have responded to the debates with the drafting and implementation of the Global Compact, a strategic policy initiative ("soft law") providing a framework through which businesses can successfully align their operations and strategies with ten principles derived from international legislation ("hard law") in the areas of human rights, labour, environment and anti-corruption. Today the Compact, boasts the largest corporate citizenship in the world, with over 4700 corporate participants and stakeholders from over 130 countries, including numerous NGOs and civil society groups.

As membership to the Compact and compliance with its principles remain voluntary, while non-compliance remains undisclosed, the initiative has been heavily criticised both by the corporate sector and human rights advocates for permissiveness and lack of accountability. Nonetheless, taken important steps towards high-lighting the pivotal role played by non-state actors both in the perpetration and prevention of human rights abuses. In particular the Compact has aimed to foster partnerships, openness and communication between business, government, civil society, labour and the UN. And there is no doubt that one of the most useful by-products of the Compact has been the promotion and formation of powerful “local networks” of stakeholders which have in turn facilitated dialogue between activists, civil society organisations, corporations and governments at all levels.

The importance of fostering these types of regional and global linkages is clearly illustrated by the *Kukdong* case in which workers at Kukdong, a Korean-owned Nike contractor, located in Mexico struggled for official recognition of their labour rights, specifically their right to unionize. The successful resolution of the case in 2001 was due to a combination of factors. Firstly, vocal campaigns for workers’ rights on the part of a Transnational Advocacy Network (TAN), including NGOs and student movements from the US and Mexico, mobilized Nike’s management to support the Kukdong worker’s efforts to unionize, in turn putting the Mexican labour authorities under considerable international pressure to recognize the union’s legal standing. In doing so the TAN relied heavily on Nike’s “soft law” commitments not only to external agreements such as the Global Compact but also on the corporation’s own Code of Conduct. Simultaneously, local pro-bono lawyers were engaged in negotiating their way through the complexities of the Mexican judicial institutions and labour code on the workers’ behalf, appealing the case through the myriad of institutional channels available, including the Mexican Supreme Court on constitutional grounds. The fact that the Kukdong Union remains the only independent union in the Mexican apparel industry to have been granted legal standing despite numerous attempts by other workers’ collectives to obtain official government recognition of their union status is, however, an important reminder of the complex interconnections which exist between the channels of supply and demand when it comes to the rights and responsibilities linked to social protection.<sup>iii</sup>

The competing interests in the *Kukdong* case were both powerful and transnational making the litigation process particularly complex and politically charged. However, there are cases in which litigation against the public sector on the basis of economic and social rights can be much more

straightforward. The case of *Quevedo Miguel Angel y otros c/ Aguas Cordobesas S.A* in Argentina, for instance, the water supply of a group of indigent families in Cordoba had been disconnected by the water services company due to non-payment. The applicants requested that the court order the company to provide them with at least 200 litres of water per family per day. In its judgement the court considered the regulatory framework in place at the time which deemed 50 litres per family per day was sufficient as a basic free entitlement. The judges found this framework to be lacking and insufficient to meet the basic requirements for health and hygiene of a family and ordered the company to reconnect the services and provide 200 litres of free potable water per family per day. The court then went on to stipulate that an arrangement be reached between the company and state authorities for compensation over the costs entailed by such action, unequivocally reasserting the responsibility of the state to protect its citizens' basic rights.

Crucially, in both the Kukdong and Aguas Cordobesas S.A cases the private sector corporations were not the object of direct litigation. Instead the state was taken to task for its failure to discharge its responsibilities to **respect, protect, and fulfil** the basic rights of its citizens. So in the Kukdong case the state was deemed to have failed to respect the worker's rights to form a trade union under national and international labour codes. While in the case of Aguas Cordobesas S.A it was considered that the state had failed to protect its citizens' right to water in the context of water supply privatisation.<sup>iv</sup>

The **media** occupies a special status. It can be either an executive branch of government or a powerful medium of contestation. It is always politicized because of laws governing its content. According to Amartya Sen, the freedom of the press in India has played a major role in averting famine – but has been less active or effective in reducing more invisible chronic hunger.

Some of the literature on social protection points to **communities and informal safety nets** as a major source of social security for the poor in the face of adversity. The World Bank's approach has warned against 'crowding out' these mechanisms through too much state intervention. However, there are reasons to be cautious about too much reliance on these safety nets. First of all, the spread of markets, migration, urbanisation and other features of change have led to the disruption of many of these older forms of security. Secondly, in times of generalised crisis, informal safety nets are generally unable to cope with the demands made on them. And thirdly, informal safety nets in many countries are embedded in patron-client relationships which militate against the voice and citizenship of subaltern groups. Some of the most marginal groups in a society are those who are excluded from even these patronage relationships. While there are informal rights embedded

within community networks, their governance systems tend to be dominated by powerful sections of the community and are rarely offered on democratic or accountable terms.

## **2. The demand for rights: contesting and claiming**

There is one major problem with this conceptualization of the various possible channels for the supply of rights. They rely heavily on the ability of citizens to access social, political and legal networks that will ensure that social and economic rights are translated into concrete policy commitments and outcomes. They are closed to those who are deprived of access to these networks by their poverty, social exclusion or ambiguous legal status. This is a major factor behind the failure of many states to provide adequate social protection to those who are most in need. It has fallen to civil society organisations of various kinds, with the assistance of donors, foundations and international NGOs to create the channels through which an effective demand for the right to socio-economic security can be expressed.

Civil society organisations often act as brokers and cultural/linguistic translators between government and poorer citizens, or work to empower poorer citizens to learn the language and act for themselves. In this section, we discuss some of the strategies used by such organisations to promote the rights of marginalised groups. We distinguish between **three** alternative approaches:

- The first entails direct legal action in which organisations acting in pursuit of specific rights or on behalf of specific groups take the state to court domestically or internationally.
- The second entails collaboration between state and civil society in the provision of basic needs. We count this as falling within a rights rubric because it often helps to extend or strengthen state capacity to discharge its responsibilities. We distinguish this collaborative model from NGOs acting as independent service providers because of the very different implications for the rights agenda of the latter model.
- The third consists of efforts on the part of civil society organisations to build a constituency for rights among poorer citizens: it includes advocacy for change, educating people about their rights and mobilising them to make their own claims.

### **Holding states legally accountable**

States can be held legally accountable by their citizenry at a number of different levels. But regardless of whether litigation occurs at local government level or in the highest international courts and tribunals the three principles of state responsibility and accountability remain the same: when

we talk about human rights the state has the obligation to **respect, protect** and **fulfil** its citizens' rights. The most frequently litigated rights, with relevance to social protection, tend to be the rights to water, housing, health, education, social security and in certain circumstances livelihood. There is a wealth of case law available from a number of different jurisdictions; the following broadly represent the types of NGO assisted social litigation regarding the justiciability and enforceability of economic and social rights which are relevant to social protection.

**a) *Ain o Salish Kendra (ASK) v Government and Bangladesh & Ors*** 19 BLD (1999) 488. Supreme Court of Bangladesh, July 29, 2001

This case was brought by residents of *bastees* (informal slum settlements) in Dhaka City with the help of public interest organizations, led by Ain o Salish Kendra, to challenge the eviction without notice of a large number of slum dwellers and the subsequent demolition of their homes by government authorities. The plaintiffs based their case on the State's fundamental Constitutional obligations to its citizens and residents, including the protection of the right to life, the right to respect for dignity and the principle of equal protection before the law. The Court found that the constitutionally protected right to life included the right to livelihood, a right which evictions without reasonable notice or resettlement alternatives jeopardised. The Court, therefore, ordered the government to develop guidelines and pilot projects for the phased and properly facilitated resettlement of slum dwellers. Further, they stipulated that reasonable notice be given to residents before eviction. They did not, however, impose a positive obligation on the government to *provide* alternative accommodation for evictees.

Despite the Court's orders, the Government summarily evicted an additional 14,674 families (approximately 88,044 individuals) from this particular slum. The case is, nonetheless, important in Bangladesh as the Supreme Court's recognition that constitutional and human rights protections apply in cases of eviction set a useful precedent for subsequent PIL which may eventually lead to shifts in state policy and practice in relation to the socio-economic security and livelihood protection of its citizens.

**b) *Government of the Republic of South Africa. & Ors v Grootboom & Ors*** 2000 (11) BCLR 1169. (CC) October 4, 2000

The Grootboom judgement of the Constitutional Court of South Africa, which laid the foundation for many subsequent economic and social rights claims in South Africa and elsewhere also focuses primarily on the right to shelter. A community of squatters, evicted from an informal settlement in Wallacedene

had set up minimal temporary shelters of plastic and other materials at a sports centre adjacent to Wallacedene community centre. They lacked even basic sanitation or electricity. The Legal Resources Centre, an NGO based in Cape Town together with other legal activists, decided to challenge the government's failure to provide them with their constitutionally protected rights to adequate housing through the courts. The Constitutional Court held that Section 26 of the South African Constitution obliges the state to devise and implement a coherent and co-ordinated housing programme and that in failing to do so the government had fallen short in their responsibility to take reasonable measures to progressively realise the right to housing. The Court ordered the State to immediately "devise, fund, implement and supervise measures to provide relief to those in desperate need".

As well as guaranteeing the applicants redress the decision has had a major impact on housing policy in South Africa and most municipalities have included a "Grootboom allocation" in their budgets to address the needs of those in desperate need. Significantly the Grootboom judgement established the general legal principle of "reasonableness" providing human rights observers with an effective mechanism through which to scrutinise the government policies related to the operationalisation of economic and social rights. Importantly, the ruling also places the adjudication of ESC rights within a framework of general legal principles translatable to courts in many different jurisdictions.

**c) Amilcar Menéndez, Juan Manuel Caride, et al. v. Argentina.** Inter-American Commission on Human Rights, Case N° 11.670. Report N° 03/01, January 19, 2001

Another case of particular significance in thinking about the relevance of rights to social protection was brought before the Inter-American Commission on Human Rights by a group of Argentinean pensioners with the support of non-governmental legal aid organizations. The pensioners claimed that their rights under the American Declaration on the Rights and Duties of Man (ADRDM) and American Convention on Human Rights (ACHR) had been violated. According to the petitioners, pensioners seeking an adjustment in their retirement benefits had to deal with a cumbersome administrative and judicial system that obstructed the realization of their rights to social security. The petitioners particularly questioned Law 24463, a piece of administrative legislation which allowed the state to postpone the fulfilment of favourable judgements in accordance with budgetary restrictions, effectively indefinitely delaying payment of social security adjustments causing hardship and insecurity to countless pensioners.

In 2003, a friendly settlement process was initiated and the parties engaged in talks and working groups dedicated to discussing the reform of law 24463. Argentina's Social Security Department, meanwhile, has instructed the relevant government body to strictly enforce the reformed law when it is eventually confirmed through the domestic courts.

This case is of major importance because the Inter-American Commission acknowledged its competence to hear cases regarding the violation of economic and social rights enshrined in the relevant Conventions. This extends the enforceability of economic and social rights within the Inter-American system and shows that friendly settlement processes provide a fruitful framework to promote effective and participatory forum for repositioning the relationship between the state and its citizens and reaffirming their respective rights and responsibilities.

d) *Case of the Yean and Bosico Children v. The Dominican Republic* Inter-American Court of Human Rights, September 8, 2005

This petition was submitted to the Inter-American system on behalf of two girls of Haitian descent born in the Dominican Republic, alleging the violation of their rights to nationality, and consequently to an education. The petitioners claimed that, since their nationality had not been acknowledged, the girls were exposed to the imminent threat of being expelled from the country and, lacking an identity document, could not attend school. The Court concluded that the right to nationality opened the way to the enjoyment of other citizenship rights, and that denying children their birth certificate amounted to denying them their right to be part of the political and socio-economic community. Therefore, the Court ordered the State to adopt measures to reverse the institutionalised discrimination perpetuated by its birth record and education systems. In particular, it insisted upon the adoption of a simple, accessible and reasonable procedure for Dominican children of Haitian descent to obtain a birth certificate. Finally, the Court requested that the State to guarantee access to free primary education for *all* children regardless of their background or origin.

This case represents a valuable precedent in the field of socio-economic rights. On the one hand, the fundamental value of nationality rights was acknowledged. On the other, it was also one of the first cases in which the right to education for all, regardless of background or legal status, was judicially reasserted. Significantly, the Inter-American Court refused the Dominican state's request for a "friendly settlement", insisting instead that the hearing and judgement procedures be carried through to their very public conclusion.

### **Co-operating with the state**

An excellent example of the collaborative model is provided by federations of the urban poor that are springing up in a number of cities in developing countries: in 2005, there were 16 such federations spread over cities in Africa, Asia and Latin America (Satterwaite, 2008). These federations focus on 'housing' defined broadly to include not only better quality and legal housing but also basic services such as water, sanitation, schools, health care services and security of tenure to land on which houses are, or will be, built. The catalyst for this was provided by the vision and strategies of an alliance of three organisations in India: the National Slum Dwellers Federation, Mahila Milan, a federation of savings groups of women pavement and slum dwellers and SPARC, an NGO which had help to set up the latter. The Alliance built its approach on past experience of the ineffectiveness of lobbying city and state governments for housing and basic services which they were incapable of providing and of the need to develop their own solutions, demonstrate to the government the kinds of housing and basic service programs that would work for slum-dwellers and to show their capacity to work with governments in implementing these to scale. There are a number of elements to their strategies which have also been picked up by other federations:

- Federations are made up of savings groups which are managed by their members. This helps to fund housing improvements and income generation initiatives. Collective management helps to build trust between members and becomes the basis for collaboration in local and sometimes citywide and even national processes. Federations have set up their own urban poor funds where their savings are deposited along with external funding from governments and international agencies.
- Piloting projects and setting precedents: Groups are encouraged to experiment with different pilot projects, such as an upgrading scheme or a community toilet. Those that work well are tried out in different places and become 'precedents' to demonstrate to governments and international agencies in order to promote their adoption on a wider scale. A successful example of this was the community toilet blocks which were designed, built and managed by Mahila Milan members and which were then adopted by the state government for other cities in the state. Similar blocks were experimented with in Sri Lanka, Uganda, South Africa, Kenya and Zimbabwe.
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- All federations strongly emphasize keeping costs down in order to minimize gap between what is being implemented and what their members can afford. Combining unpaid labour contributions and low unit costs enables improvements that can be carried out without loans

and subsidies. Where government subsidies are available, federations have been able to show that community-driven housing construction provides better quality at lower costs. The South African Federation of the Urban Poor has build thousands of good quality four room houses for the same costs as contractors charged for one room core units.

- Household enumeration and settlement surveys carried out by group members to provided detailed information on inhabitants and services which re needed for planning upgrading, secure tenure and services. This has also been used to map out the availability of vacant land, information that is used to negotiate with governments when in situ upgrading is not possible.
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- Community exchanges to provide, spread and acquire knowledge about tactics and strategies that have worked in negotiations with government and to promote a relationship of co-operation rather than competition between urban communities needing government support. Civil servants and politicians are also invited to participate.

These federations have been successful on a number of fronts, including positioning the urban poor as active and responsible citizens, capable of working with government to find solutions to problems and to change policies which do not work. They have been able to effect citywide changes in Durban, Mumbai, Pnom Penh and a number of cities in Thailand. The upgrading programme of the Cambodian federation received the support of the national government. While the members of most of these federations would view themselves as engaging in the practices of active citizenship, Sheela Patel, one of the founding members of SPARC, explains why they eschew the 'protest mode' which often made headlines but achieve little in the long run. She explains about the federation's strategy in India as 'working for rights from the grassroots': a sustained and long-term commitment to working with the communities of the poor and strengthening their capacity to negotiate with the state machinery.

Another initiative which has successfully fostered collaboration between an NGO and State over service provision is the Alternate Education Programme run by 'Butterflies' an organisation which has been working to empower street children in India, Afghanistan, Nepal, Bangladesh and Sri Lanka since 1989. The Alternate Education Programme has been piloted in India and aims to build on the knowledge and experience which street and working children have of the world of formal and informal labour. It, therefore, focuses on skills-based practical aspects of education as well as academic literacy and numeracy skills.

Time spent in this programme is seen as an interim phase prior to the child being admitted to a formal school or to the National Institute of Open Schooling (NIOS). NIOS is an autonomous institution of the Department of Education and aims to provide relevant, continuing, flexible and life related education from primary levels up to pre-degree training through open and distance learning schemes.

With this in mind Butterflies, which is an accredited partner of NIOS, ensures that Child Rights Facilitators and trained teachers are available at times to suit the children's needs; classes take place both during the day and at night, and in locations convenient to a working child (e.g. at street corners, in parks and at bus stations). This increases the visibility and accessibility of this initiative, so that even children who are not regulars can "drop-in" on classes whenever they are able to. When children reach a certain level of educational achievement they are coached to undertake national exams and in some cases move on to attend "formal" schools.

This flexible partnership with government departments at national, district and sub-district levels has yielded a plausible and innovative programme with the potential for positive outcomes in both the long and short term. On the one hand, street children who would otherwise be excluded from education are given opportunities to engage in relevant and useful training schemes designed by and for them. On the other the training they receive retains a level of coherence and common-ground with the State education system, increasing the possibilities for the future social inclusion of even the most marginalised children into the mainstream (Source: <http://butterflieschildrights.org>).

It is worth noting that Butterflies have chosen to provide an alternative education programme with the potential for future integration into the mainstream rather than engaging in aggressive strategic litigation tactics which might make unrealistic demands on an already stretched state education system. Instead they are balancing the rights of India's child citizens against the state's capacity to fulfil its obligations and actively cooperating with the government to find a dynamic and flexible solution which promotes the realisation of the right to education both in the short term for individual children and in the long term by strengthening State responses to marginalised youth.

Of the 1200 children taking part of the alternate education programme, 450 students have been enrolled in the NIOS in the current academic year and 50 have been admitted to formal schools. This attests to the fact that this kind of collaboration can lead to tangible successes in the area of social protection for

the most vulnerable and is a good example of state-led initiatives and NGO interventions intersecting in a viable, productive and potentially transformative way which envisions those involved as active agents and citizens rather than passive recipients of aid.

### **Confronting power relations**

A third model is one in which rights-based organisations work outside the state, seeking to hold it accountable for its actions. Some of these are urban-based and engage in legal advocacy. One example is **Black Sash**, one of the most established and consistently successful legal aid and advocacy NGOs in the world. In the past five years Black Sash has provided paralegal assistance to over 58 000 people seeking to assert their basic rights to social protection as well as monitoring the government's efficiency and effectiveness in delivery. They have done this through a three pronged approach concentrating on:

1. **Rights Education:** enabling individuals and groups to access their rights within the areas of social and consumer protection;
2. **Advocacy Actions:** lobbying for legislation, policy and delivery systems, supported by appropriate budgets, which promote comprehensive social security for South Africa's citizens;
3. **Advice Giving:** enabling and empowering individuals and groups to exercise their socio-economic rights as prescribed by the laws in South Africa through individual legal aid casework and information dissemination. Black Sash uses both the media and low-tech strategies such as leaflets which provide concrete guidance on how to claim social security entitlements such as child benefits, disability grants, or carers' allowances in order to reach to greatest possible number of people. Black Sash aim to take on a minimum of 10 000 cases per annum with a turn around time of less than twelve months, and a 75% closure rate: these are impressive levels of coverage especially given the diversity of services they offer. (Source: <http://www.blacksash.org.za/>)

While they view it as a last resort the Black Sash is actively involved in social litigation against the State in cases where lengthy and cumbersome administrative processes form a barrier between citizens and the enjoyment of their constitutionally guaranteed rights to socio-economic security. As such their creative use of litigation as an advocacy strategy has, 'positioned the Black Sash at the forefront of developments exploring the nature and appropriate mechanisms to be used by courts in facilitating greater service delivery' (Black Sash Annual Report 2007, 11). This active engagement with the legislative protections already in place in relation to social protection has also given the organisation a keen sense of what is missing in the current

legislation. Combined with the trends they have observed in their regional legal aid clinics this has led them to believe that existing legislation in the field of social protection needs to be reformed to be, above all, more inclusive. For instance, they argue that, 'eligibility for the State old age pension should be equalised at age 60 for men ... [and that] ... domestic workers should be included in the Compensation for Occupational Injury Act' (ibid, 18). This clarity of intention and aim is part of what makes both the Black Sash's litigation and their targeted advocacy actions so effective.

A second set of examples come from rural Bangladesh (Kabeer, 2008). These are grassroots based organisations which seek to build organisations of landless men and women at the village level and to create federations of these groups across the villages in which they are active. Both Samata and Nijera Kori began in the aftermath of Bangladesh's liberation war at a time when ideals and expectations were high. Both drew on the work of Paolo Freire to the need for 'conscientisation' based on the everyday experiences of injustice that poor women and men faced at the hand of powerful landlords, state officials and fundamentalist religious leaders. Their strategies also rely on regular savings by their groups which are used for individual and collective purposes, including taking their cases to court if they do not win justice within informal forums for dispensing justice.

Group members are highly active in protesting various forms of injustice, including violence against women, land grabbing and corruption, through a variety of methods (demonstrations, petitions, press conferences, boycotts, lobbying local officials). In addition, their group members play an active role in holding local service providers accountable, campaigning against failure of doctors to attend clinics or attempts of service providers to charge illicit fees. They also monitor various social protection schemes to ensure that benefits go to those who are eligible. Group members have recently been successfully contesting local elections and thus playing a more direct role in the distribution of public goods.

### **PWESCR: Programme for Women's Economic Social and Cultural Rights**

PWESCR is an international initiative which works to promote women's human rights, addressing women's poverty, health standards, and right to food, education, water and work by bringing a gender perspective to policy, law and practice at the local, national, regional and international levels.

PWESCR conduct action-oriented research to provide deeper analysis of women's economic, social and cultural issues and to facilitate new strategies for defending human rights and are actively engaged in pushing for social security as a right for workers in the unorganized sector. The Social Security

Now campaign is, for instance, aimed at highlighting the survival needs of the poor, particularly women and the marginalized. In particular, they have focused on the marginalisation of Dalit women in relation to the legal, social and political systems through which their social protection rights should be operationalised (Darooka 2008).

At the same time as campaigning PWESCR also provides technical assistance and imparts human rights education to individuals and to women's groups on monitoring and self-representation skills through leadership development programs. This empowers Grassroots women leaders from South Asia to acquire legal literacy and leadership skills which they can in turn pass on to others.

PWESCR also engages in advocacy, working to strengthen standards and full implementation of government's commitments within the international human rights framework. In order to monitor women's economic, social and cultural rights in India, PWESCR has initiated a collective action process which led to the successful drafting of a shadow report to be submitted alongside the Indian Government's periodic progress report to the UN Committee on ESCR in May 2008.

PWESCR also provides human rights education and training to other civil society and social organisations enabling them to participate actively in monitoring human rights institutions such as the Council for ESCR and CEDAW among others. *(Source: <http://www.pwescr.org> )*

## **Conclusion**

This paper has sought to present a dynamic view of the relationship between social protection and the legal system. Civil society organisations working with poor and marginalised groups have sought to use both law and policy in a variety of ways to ensure the rights of these groups. In some cases, they have mobilised to ensure that the legal system recognises these rights. In some cases, they have taken the state to court for its failure to uphold the law in these matters. They have also worked in partnership with the state to strengthen its capacity in the field of social protection as well as outside the state to put pressure on service providers to demonstrate a greater responsiveness to the needs of poor people.

CHANNELS OF DEMAND/CONTESTATION

Institutional channel	Types of claims	Methods of citizen and NGO action	Channel(s) of Supply/Delivery (Duty bearers)	Relevant Case Studies
<b>Political system</b>	<p>Identification of new claims (e.g. women's rights, children's rights, disability rights)</p> <p>Negotiation on how rights should be interpreted and recognised (e.g. content of a law)</p> <p>Negotiations on how entitlements should be implemented</p>	<ul style="list-style-type: none"> <li>- Voting</li> <li>- Lobbying</li> <li>- Demonstrations</li> <li>- Media reports</li> <li>- Public hearings</li> <li>- Policy Advocacy</li> </ul>	<p>State holds ultimate responsibility to:</p> <ul style="list-style-type: none"> <li>- Respect</li> <li>- Protect</li> <li>- Promote</li> <li>- Fulfil</li> </ul> <p>the rights identified and negotiated (i.e. to draft appropriate legislation in line with international standards, where relevant, and engage in the strengthening of institutions at national and regional levels etc.)</p>	<ul style="list-style-type: none"> <li>- SERAC (Nigeria)</li> <li>- CDES (Ecuador)</li> <li>- Black Sash (South Africa)</li> <li>- Butterflies (South Asia)</li> </ul>
<b>Legal system</b>	<p>Claiming specific rights through the International human rights system either at international (i.e. treaty bodies, international courts etc.) or at domestic level.</p> <p>Re-negotiation of the legal (authoritative?) interpretation of individual entitlement to specific rights</p>	<ul style="list-style-type: none"> <li>- Rights education and legal literacy</li> <li>- Bringing a legal claim, either individually or through public interest litigation</li> <li>- Quasi-judicial options, such as ombudsman or</li> </ul>	<p>State holds ultimate responsibility to:</p> <ul style="list-style-type: none"> <li>- Respect</li> <li>- Protect</li> <li>- Promote</li> <li>- Fulfil</li> </ul> <p>the rights it has committed to realizing through the ratification of international</p>	<ul style="list-style-type: none"> <li>- SERAC (Nigeria)</li> <li>- CDES (Ecuador)</li> <li>- CEDHA (Argentina)</li> <li>- Black Sash (South Africa)</li> <li>- Butterflies (South Asia)</li> <li>- FORJA (Chile)</li> </ul>

<b>Institutional channel</b>	<b>Types of claims</b>	<b>Methods of citizen and NGO action</b>	<b>Channel(s) of Supply/Delivery (Duty bearers)</b>	<b>Relevant Case Studies</b>
	Enforcing and monitoring the implementation of judicially claimed rights	Human Rights Commission - Competent NGOs and, where they exist, National Human Rights Institutions monitor state reports to international treaty monitoring bodies	legal instruments, and adaptation of such instruments into their domestic legal frameworks.  Respective, appropriate international bodies (e.g. courts, commissions, treaty bodies etc.) have a responsibility to monitor and evaluate the processes they set in motion.	
<b>Policy channels</b>	Negotiation over interpretation of public provision of entitlements and allocation of resources  Negotiation over the distribution and accounting/accountability of Foreign Aid budgets; and the qualitative and quantitative relevance and effectiveness of their work	- Participatory policy and planning processes - Participatory budgeting and access to information (what type of participation?) - Actors from NGOs and civil society engage in international, national and regional conferences and forums	State Executive bodies UN Agencies ICRC NGOs	- Butterflies (South Asia) - Black Sash (South Africa)

<b>Institutional channel</b>	<b>Types of claims</b>	<b>Methods of citizen and NGO action</b>	<b>Channel(s) of Supply/Delivery (Duty bearers)</b>	<b>Relevant Case Studies</b>
<b>Administrative channels</b>	<p>Negotiation over implementation of entitlements and the allocation of resources</p> <p>Negotiation over accessibility of services and entitlements (esp. to the poorest and most vulnerable)</p>	<ul style="list-style-type: none"> <li>- Interactions with health workers, teachers, etc</li> <li>- Monitoring of local services e.g. patient charters, report cards, codes of conduct</li> <li>- Monitoring of information sharing</li> <li>- Rights education and legal literacy</li> <li>- Awareness-building, especially amongst the most vulnerable</li> </ul>	<p>Executive bodies of the State NGO facilitators ICRC</p>	<ul style="list-style-type: none"> <li>- Butterflies (South Asia)</li> <li>- MLAA (Bangladesh)</li> <li>- Black Sash (South Africa)</li> </ul> <p>(Find)</p>
<b>Social channels</b>	<p>Negotiation over access to natural resources or labour</p>	<ul style="list-style-type: none"> <li>- Informal intra-household or community-based negotiations</li> <li>- Collective action, trade unions, workers collectives etc.</li> </ul>	<p>Complex, multiple, formal, informal etc.</p>	<ul style="list-style-type: none"> <li>- Butterflies (South Asia)</li> <li>- MLAA (Bangladesh)</li> </ul> <p>(Find)</p>
<b>Private sector channels</b>	<p>Negotiation over private sector-related entitlements and private sector activities</p>	<ul style="list-style-type: none"> <li>- Labour standards, union rights, credit provision, consumer</li> </ul>	<ul style="list-style-type: none"> <li>- Corporate Social Responsibility Initiatives</li> <li>- Emerging</li> </ul>	<p>(Find)</p> <p><u>Legal Backdoor</u></p> <ul style="list-style-type: none"> <li>- SERAC (Nigeria - Oil)</li> </ul>

Institutional channel	Types of claims	Methods of citizen and NGO action	Channel(s) of Supply/Delivery (Duty bearers)	Relevant Case Studies
		action	jurisprudence on State responsibility to protect its citizens from the excesses of unregulated private companies, multinationals etc.	Companies) - <i>Quevedo Miguel Angel y Otros cl Aguas Cordobesas S.A (Water Services Disconnection Case – won through provincial courts - Argentina) - CEDHA (Argentina)</i>

Source: Adapted from Piron (2004).

## REFERENCES

**Barrientos, A. & Hulme, D.** (2008) ‘Social protection for the Poor and Poorest in Developing Countries: Reflections on a Quiet Revolution,’ *Brooks World Poverty Institute: Working Paper 30*. [<http://www.manchester.ac.uk/bwpi>, accessed 12<sup>th</sup> October 2008]

**Darooka, P.** 2008. ‘Dalit Women in Rajasthan: Status of Economic, Social & Cultural Rights’ Programme for Women’s Economic Social and Cultural Rights: Fact Finding Mission Report [[http://www.pwescr.org/Dalit\\_Report.pdf](http://www.pwescr.org/Dalit_Report.pdf), accessed 8<sup>th</sup> March 2009]

**Dennis, M.J. & Stewart, D.P.** (2004) ‘Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?’ *The American Journal of International Law*, 98(3) 462-515

**Derman, B & Hellum, A.** (2008) “Observation on the Intersections of Human Rights and Local Practice: A Livelihood Perspective on Water,” *Law, Social Justice & Global Development Journal*, 2008 (1). [[http://www.go.warwick.ac.uk/elj/lgd/2008\\_1/derman\\_hellum](http://www.go.warwick.ac.uk/elj/lgd/2008_1/derman_hellum), accessed 20th November 2008]

**Gloppen, S. & Kanyongolo, F. E.** (2007) 'Courts and the poor in Malawi: economic marginalization, vulnerability, and the law,' *International Journal of Constitutional Law*, 5(2), 258-293

**Gloppen, S.** (2008) 'Courts and Social Transformation: An Analytical Framework' in Gargarella, R., Domingo, P., Roux, T., (eds.) *Courts and social transformation in new democracies: an institutional voice for the poor?* Ashgate Publishing, Ltd.: UK (35-107)

**Golub, S.** (2000) "Non-Lawyers as Legal Resources for Their Communities" in Golub, S. & McClymont, M. (Eds.), *Many Roads to Justice: The Law-Related Work of Ford Foundation Grantees Around the World*, Ford Foundation: USA.  
([http://www.fordfound.org/pdfs/impact/many\\_roads.pdf](http://www.fordfound.org/pdfs/impact/many_roads.pdf), accessed 2<sup>nd</sup> January 2009)

**Jochnick, C.** 1999. 'From Needs to Rights: Recognizing the Right to Health in Ecuador' (English Edition) *Center for Economic and Social Rights: Latin America Program* Quito, Ecuador

**Kabeer, N.** (2008) 'Citizenship narratives in the absence of good governance: voices of the working poor in Bangladesh' IDS Working Paper 331 (Institute of Development Studies Brighton).

'The International Human Rights Movement: Part of the Problem?' *European Human Rights Law Review* 2001(3) 245-267

**Kennedy, D.** (2001) 'The International Human Rights Movement: Part of the Problem?' *European Human Rights Law Review* 2001(3) 245-267

**Marcus, R., Piron, L-H., & Slaymaker, T.** (2004) 'Basic Services and Social Protection,' *ODI Special Series on Social Protection*.  
[<http://www.odi.org.uk/resources/specialist/social-protection-theme-papers/basic-services.pdf>, accessed the 15<sup>th</sup> January 2009]

**Morrison, A., Ellsberg, M., & Bott, S.** 2007 'Addressing Gender- Based Violence: A Critical Review of Interventions,' *The World Bank Research Observer*. 22 (1) (28-51)

**Munro, L.T.** (2008) 'Risks, Needs and Rights: Compatible or Contradictory Bases for Social Protection,' in Barrientos, A. & Hulme, D. *Social Protection for the Poor and Poorest: Concepts, Policies and Politics*. Palgrave Macmillan: London. (27-46)

**Piron, L-H.** (2004) 'Rights-Based Approaches to Social Protection,' *ODI Special Series on Social Protection*.  
[<http://www.sed.manchester.ac.uk/research/events/conferences/documents/Winners%20and%20Losers%20Papers/Piron.pdf>, accessed on 15<sup>th</sup> January 2009]

**Rodriguez-Garavito, C.A.** (2005) 'Nike's Law: the anti-sweatshop movement, transnational corporations, and the struggle over international labour rights in the Americas' in Santos, B.D.S. & Rodríguez-Garavito, C.A. (Eds.) *Law and*

*Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge University Press (Cambridge Studies in Law and Society): UK, 64-92

**Santos, B.D.S. & Rodríguez-Garavito, C.A.** (2005) "Law, Politics, and the Subaltern in Counter-Hegemonic Globalization," in Santos, B.D.S. & Rodríguez-Garavito, C.A. (Eds.) *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge University Press (Cambridge Studies in Law and Society): UK, 1-26

**Satterwaithe, D.** (2008). Building homes: The role of the federations of the urban poor. In *Assets, livelihoods and social policy*, Moser C. and A.Dani, eds. Washington DC: World Bank.

**Scott, C.** (1999) 'Reaching Beyond (Without Abandoning) the Category of "Economic, Social and Cultural Rights,"' *Human Rights Quarterly* 21(3) 633-660

**Shamir, R.** 'Corporate social responsibility: a case of hegemony and counter-hegemony' in Santos, B.D.S. & Rodríguez-Garavito, C.A. (Eds.) *Law and Globalization from Below: Towards a Cosmopolitan Legality*, Cambridge University Press (Cambridge Studies in Law and Society): UK, 92-118

**Shelton, D.** (2002), Decision Regarding Communication 155/96 (Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1 Author(s): Dinah Shelton Source: The American Journal of International Law, Vol. 96, No. 4 (Oct., 2002), pp. 937-942 Published by: American Society of International Law Stable URL: <http://www.jstor.org/stable/3070689> Accessed: 16/01/2009 11:44

**UNDP.** (2003) *Poverty Reduction and Human Rights: A Practice Note*.

**UNICEF.** (1998), *A Human Rights Approach to UNICEF Programming for Children and Women: What it is, and some changes it will bring*. CF/EXD/1998-04

**Winkler, I.** (2008) 'Judicial Enforcement of the Human Right to Water – Case Law from South Africa, Argentina and India,' *Law, Social Justice & Global Development Journal*, 2008 (1). ([http://www.go.warwick.ac.uk/elj/lgd/2008\\_1/winkler](http://www.go.warwick.ac.uk/elj/lgd/2008_1/winkler), accessed 20th November 2008)

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<sup>i</sup> International migrants occupy a special category, often falling between the legal systems of the countries they came from and those in which they now work and reside. Most countries do not extend social protection and citizenship rights to migrants. Exceptions include Bolivia and Ecuador whose new constitutions have extended the right to education and health to migrants, regardless of whether or not they are documented.

<sup>ii</sup> The idea of promoting rights has come out in the jurisprudence from the African Court of Human and People's Court as a signal for the need for positive obligations on the part of states.

<sup>iii</sup> Rodríguez-Garavito (2005)

