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Revisiting the Indian experience of economic and social rights adjudication: the need for a principled approach to judicial activism and restraint

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I.C.L.Q. 385 Abstract The Indian Constitution embraces economic and social rights as directive principles of state policy, ostensibly insulated from judicial review. The Supreme Court's interpretation of traditional civil and political rights to include economic and social guarantees has been praised by academics and activists keen to advance the cause of justiciable economic and social rights. In recent commentary, however, the extent to which the court's jurisprudence furthers the goal of increasing access to goods such as health care, housing, food and water for India's poor, is questioned. This article reconsiders the court's record in this area. It suggests that a more realistic assessment of the court's jurisprudence is necessary and draws on the South African experience of economic and social rights adjudication to argue for more serious engagement with factors that inform the level of judicial activism or restraint applied in the cases.

Keywords: adjudication, directive principles of state policy, economic and social rights, India, South Africa.

I. INTRODUCTION

For a number of democracies around the world, the last two decades have seen a steady expansion in judicial powers of review in cases where human rights are implicated. With the proliferation of human rights treaties at an international level has come corresponding pressure on states to incorporate human rights provisions into domestic legislation. Increasingly, courts are seen as important tools in the implementation of treaty obligations at a national level. And national experiences of human rights protection now exert a strong influence over the development of international human rights law. Despite this, ***I.C.L.Q. 386*** the capacity of courts to interrogate and overturn governmental acts on the basis that these acts conflict with fundamental human rights is the subject of a great deal of controversy. The contentious nature of judicial review in human rights matters is even more pronounced when it comes to economic and social rights (ESR). This is due largely to the perception that ESR adjudication, by definition, involves courts in politically sensitive matters that are outside both their constitutional mandate and institutional expertise.

For some time, the preoccupation with the justiciability of ESR--the question of whether judges should be pronouncing on these rights at all--diverted attention away from the issue of how courts may most effectively contribute to the implementation of these rights. But there is now a substantial body of academic, judicial and political analysis dedicated to showing that sharp distinctions between ESR, on the one hand, and civil and political rights, on the other, are impossible to sustain.[1] This development, together with more widespread constitutionalization of the rights in national jurisdictions,[2] has moved the debate forward. Whilst sceptics of judicial review remain, it has become more difficult for them to adopt a categorical position that insulates social and economic interests from judicial consideration.

Indian Supreme Court judgments on ESR have elicited praise, at least in academic and media circles,[3] for their legal creativity[4] and the clear demands they make of government.[5] But recent scholarship questions the extent ***I.C.L.Q. 387*** to which judges of the Supreme Court are committed to judicial activism on behalf of India's poor. In addition, irrespective of whether judgments favour the poor and the vulnerable, they are tainted by weaknesses in judicial reasoning. This article argues that these weaknesses are mainly a function of express or implicit disagreement amongst judges about the nature and limits of their role and that those with an interest in using courts to further the protection of

ESR must engage more seriously with the notions of judicial activism and restraint in order to develop a principled and robust approach to adjudication in this area.

Although South Africa's first democratic Constitution was drafted several decades after India's, the South African experience of ESR adjudication makes a useful comparative study. Many scholars have criticized the South African Constitutional Court judges for focusing on procedural values such as a fair hearing in their ESR jurisprudence, thereby failing to give real content to ESR.[6] There is merit to the argument that the South African Constitutional Court has been too cautious in certain ESR cases.[7] But, as a general approach, the judges' responsiveness to concerns about the appropriateness and effectiveness of ESR adjudication is both necessary and useful. By contrast, as noted by Cottrell and Ghai, the judges of the Indian Supreme Court 'have been less rigorous in discussing their constitutional status and mandate regarding rights, and have been less deferential to the legislature'.[8] The argument in this article is that the failure to properly engage with ideas about judicial restraint and intervention has resulted in a disturbing amount of incongruity in the resulting Indian ESR jurisprudence. The Indian experience of adjudicating constitutional social and economic guarantees is, by comparison with other jurisdictions, both long-standing and vast. There is much to be learnt, but only from a realistic assessment of this jurisprudence.

II. EXPANDING ARTICLE 21: DIGNITY, DIRECTIVE PRINCIPLES AND MINIMUM STANDARDS OF TREATMENT

The constitutional provisions dealing with health care, housing, water, etc in India and South Africa were very much informed by concerns about the limits of the judicial role; the need to respect democratic decision-making processes; and a desire for decisions about the distribution of limited resources to be made by those with more experience in economic and social policy-making than ***I.C.L.Q. 388*** judges.[9] But the status given to the rights in the constitutional texts is very different. The South African Constituent Assembly opted to include a series of directly justiciable ESR in the 1996 Constitution. As a result of this then fairly radical step, the ESR contained in the South African Constitution are quite carefully circumscribed. Each of the two main provisions--section 26 (housing) and section 27 (health care, food, water and social security) begins with a general statement of the rights but these sections also contain internal limitations. The identically-worded sections 26(2) and 27(2), which draw heavily upon the International Convention on Economic, Social and Cultural Rights (ICESCR), limit the state's obligations to 'reasonable legislative and other measures, within its available resources, to achieve the progressive realisation' of the rights set out in sections 26(1) and 27(1). In this respect, the South African Constitution mirrors the growing consensus in international human rights law in that, whilst it recognizes the importance of ESR and the benefits of some judicial intervention in implementing these rights, it also is concerned to contain the judicial role to what is appropriate and useful.

By contrast, the Indian Constitution protects interests in social and economic goods only as non-justiciable directive principles of state policy.[10] Despite this, in its decisions following the 1975 state of emergency, the Supreme Court began to interpret civil and political rights--mainly the right to life, protected in Article 21--to include economic and social guarantees protected in the directive principles. The court has found that Article 21 encompasses a right to adequate medical facilities or health care,[11] and a right to livelihood.[12] It has also interpreted other fundamental rights in light of directive principles--for instance, the right to equality before the law in Article 14, as interpreted by the court, includes a right to education.[13]

I.C.L.Q. 389 The Indian Supreme Court's interpretation of civil and political rights to include access to economic and social goods contained in the directive principles was foreshadowed by its increasingly expansive approach to the right to life and personal liberty in Article 21.[14] In cases like *Francis Mullin,* the court emphasized that the right to life included protection of human dignity and access to the 'bare necessaries of life' like clothing, food and shelter.[15] The 1986 *Olga Tellis* [16] decision was one of the Indian Supreme Court's most celebrated cases. The petitioners were pavement and slum dwellers living in deplorable conditions in the then city of Bombay. Attempts by the state to remove the petitioners were unsuccessful. Needing to be close to their places of work,[17] they returned and rebuilt their homes.[18] In a unanimous judgment, the judges held that the rights to an adequate means of livelihood and to work, protected as directive principles of state policy in Articles 39(a) and 41, respectively, were, 'equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights'.[19] Depriving a person of his or her livelihood would have the effect of making life impossible to live and was, thus, a violation of the right to life.[20] The state had an obligation not to deprive someone of the right to a livelihood or work without following a fair, just

and reasonable procedure established by law.[21]

The court noted that the pavement dwellings forced the public to use busy roads as thoroughfares and were, therefore, a nuisance and a safety hazard.[22] The judges went on to find that the petitioners in this case should have been given a hearing before they were evicted but that this opportunity had, in any event, been provided to them in the course of the hearings before the Supreme Court. In light of the impact of the dwellings on pedestrians, the governmental decision to remove the dwellers and their dwellings was, in fact, reasonable.[23]

Chief Justice Chandrachud directed that none of the dwellers be removed until a month after the monsoon season.[24] The court held that the government's undertaking to provide alternative pitches for the pavement dwellers with census cards should be met, but did not make this a condition of the evictions.[25] Slum dwellers with census cards had to be offered alternative accommodation before they could be removed.[26] Those slums which had existed for more than 20 years and in which improvements had been made could not be demolished unless the land was required for a public purpose. And, where the land was required for such a purpose, the state had to move the affected individuals on to an alternative site before it could proceed with any demolition.[27]

I.C.L.Q. 390 Although *Olga Tellis* has come to be regarded by some as groundbreaking judicial confirmation that the right to life includes a right to shelter,[28] the discussion above indicates that the court's findings were more limited than that implies. Nevertheless, Scott and Macklem argue that those aspects of the court order dealing with provision of alternative sites for the affected individuals and the need for existing government shelter and slum improvement programmes to be pursued in earnest were intended to get government to address the broad, systemic problems with provision of housing or, at least, to 'engender political dialogue' about the issues involved.[29]

The potential benefits of remedies which focus on ameliorating the harsh effects of evictions; encouraging dialogue in finding solutions to housing crises; and holding government to its own undertakings are highlighted by the South African housing jurisprudence, developed some two decades later. By the time the now well-known *Grootboom* case came before the Constitutional Court, the Cape Metropolitan Council had already conceded that its housing programme needed to be amended to cater for people in crisis situations.[30] In an order handed down before its decision on the reasonableness of the housing programme, the Constitutional Court essentially gave formal judicial recognition to an agreement reached between the parties.[31] The remedy set out several conditions which the temporary accommodation had to meet. These related to provision of water and sanitation; and protection from inclement weather. In subsequent cases, where there has been less agreement between the state and affected individuals, the Court has emphasized the importance of procedural fairness in evictions proceedings. It has also fashioned orders making the provision of temporary accommodation by the state a prerequisite of eviction and detailing the quality required of this accommodation.[32] Some of these decisions have been criticized for not going far enough. Scholars have argued that the jurisprudence does not clarify the state's obligations with respect to the right to housing. Furthermore, the court's reluctance to order court supervision of judgments through structural interdicts is viewed by some as a weakness in its approach to ESR adjudication.[33]

I.C.L.Q. 391 But the problems with the decision in *Olga Tellis* were much more serious than this. The court made it quite clear that there was no positive obligation on the state to provide people with shelter or an adequate means of livelihood.[34] Given the fact that the court was relying on the directive principles and not on a justiciable right, this level of restraint was understandable. However, the court also accepted that the state could demolish dwellings without notice to affected parties in urgent cases.[35] In respect of the pavement dwellers, their eviction was not made conditional on the provision of alternative accommodation.[36] Moreover, although the court has confirmed the finding that the right to life includes a right to shelter or 'reasonable accommodation',[37] it has not yet found that the right to livelihood and, therefore, the right to life would be breached by the eviction of people living in slums or on the pavements. It has also not yet held that eviction is conditional on government making provision for the relocation and settlement of slum and pavement dwellers on suitable alternative sites.[38]

In cases like *Francis Mullin* and *Olga Tellis* the judges had moved constitutional interpretation up a gear, applying a significant amount of judicial creativity to the cases before them. Policy considerations were no longer a bar to justiciability in cases dealing with fundamental rights and directive principles.[39] But it is important not to claim more for these cases than the judgments actually support. The Court's inclusive approach to the scope of the right to life did not often translate into positive obligations on the state or even a willingness to impose more onerous procedural requirements on the government than those which already existed in the legislation.[40] The cases

cannot simply be read as the beginning of a movement aimed at the judicial implementation of ESR through the directive principles. This is clear from the cases themselves but also from the subsequent development of the jurisprudence.

*I.C.L.Q. 392 III. A RETREAT FROM JUDICIAL ACTIVISM?

As noted earlier, the image of the Indian Supreme Court as tireless protector of the marginalized, and the perception that it enjoys widespread public support and respect are contested.[41] Examined more closely, the record of the Indian Supreme Court in protecting ESR is not one of consistent judicial activism in securing these rights. There are a number of cases that support this point.

In *Calcutta Electricity Supply Corporation (CESC) Ltd Etc v Subash Chandra Bose and Ors,* [42] for instance, the issue was whether people working for the respondent, which CESC had contracted to carry out work related to public roads, fell within the definition of 'employee' in the State Insurance Act, 1978. If they did, the respondent would have had to pay contributions to the Employment Insurance Fund and the workers would have been entitled to the relevant health and welfare benefits. The Act defined an employee as someone who is, *inter alia* 'employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent'.[43]

Adopting an approach to constitutional interpretation consistent with the court's post-emergency jurisprudence, described above, Ramaswamy J referred to international sources on health and workers' rights,[44] Article 39(c) of the Indian Constitution[45] and the purpose of the Act-to extend health benefits and 'relieve employees from occupational hazards consistent with the constitutional and human rights scheme'.[46] He held that the degree of supervision necessary depended on the nature of the work and that the term was broad enough to include legal control of the work, as existed in this case.[47] But a majority of the judges held that CESC's final acceptance or rejection of the work was not 'supervision' and that the workers were, therefore, not entitled to the relevant benefits.[48]

Similarly, in the heavily criticized *Almitra Patel* case,[49] the court prioritized the cleaning up of the city over the welfare of a vulnerable community. In this case, the court handed down a series of orders aimed at enforcing statutory obligations regarding the cleaning up of the city of Delhi, which suffers *I.C.L.Q. 393 from notoriously high levels of pollution. One of the issues in the case was the management of domestic solid waste. In his judgment for the court, Kirpal J saw the existence of slums as an obstacle to the cleaning up of the city, indicating that management of waste was made more complicated when people lived in settlements with no proper means of disposing of domestic waste and effluents.[50] The court directed that steps be taken to improve the sanitation in the slums as a temporary measure but made it clear that the goal was to get rid of them altogether as soon as possible.[51] Kirpal J ordered the government to 'take appropriate steps' to stop new illegal occupation of public land[52] and stated that '[r]ewarding an encroacher on public land with a free alternate site is like giving a reward to a pickpocket'.[53] The court's complete failure to consider what was to become of the slum dwellers is worrying.[54] The approach may be contrasted both with the *Olga Tellis* decision, in which the court showed some concern for the need to provide pavement and slum dwellers with alternative accommodation close to their places of work, and with the South African Constitutional Court's decisions on housing and evictions. In *Grootboom* [55] and *President of the Republic of South Africa v ModderklipBoerdery (Pty) Ltd,* [56] the South African judges expressed concern about the illegal occupation of land. They indicated that self-help was not to be viewed as an acceptable solution to the country's housing problems and did not want to appear to be rewarding illegal occupiers at the expense of those waiting to be allocated low-cost housing by the state. However, they balanced this against the terrible circumstances in which the individuals concerned were living and the length of time for which they had been waiting for lawful housing.

Finally, many commentators consider the Indian Supreme Court's long and complex history with the Sardar Sarovar Dam Project to be a low point in the court's record. In its 2000 decision *Narmada Bachao Andolan v Union of India,* [57] the court approved 'the largest Court-sanctioned forced eviction in the world'[58] in the face of evidence that the government had not attained environmental clearance for the project or done much to secure the rehabilitation of the displaced peoples, both of which were legally required.[59] The Ministry of Environment and Forests had given conditional clearance for the dam project in 1987. In response to concerns raised by Narmada Bachao Andolan, the non-governmental organization which ultimately filed the case with the Supreme Court, government set up a group to look into *I.C.L.Q. 394 the environmental issues and the questions around rehabilitation of displaced persons.[60] The group noted that the height of the dam could make the

social costs of displacement and rehabilitation too burdensome to manage effectively but recommended that government's plan for a phased construction go ahead on the basis that the situation be monitored and that construction would be halted if became clear that the height of the dam would result in problems too difficult to solve.[61]

Justice Kirpal criticized Narmada Bachao Andolan for bringing the case to court seven years after the construction of the dam had begun.[62] According to him, this delay meant that the only proper question for the court was whether the government's rehabilitation and relief measures were being properly implemented, consistently with the affected parties' Article 21 rights. In other words, the court would not address the concerns about the construction of the dam itself.[63] In making this decision, the court failed to recognize that the question of effective rehabilitation was inseparable from the question of whether the construction should go ahead as originally planned. The petitioners were arguing that the building of the dam at the planned height would result in a displacement problem impossible for government to manage. Furthermore, the court did not acknowledge that the reason for the delay was that the organization was engaging in an ongoing process with government to try to get a comprehensive assessment of the project.

In spite of this effective throwing out of a large part of the petitioner's case, the court went on to discuss the organization's contentions on the impact of the project on the environment and on displaced peoples. One of the main arguments presented by Narmada Bachao Andolan was that there had never been an independent assessment of the impact of the project.[64] The court's response to this was that soliciting the views of independent experts was unnecessary as there was no reason to question the accuracy of the governmental studies or to believe that the government would not be able to manage any problems that arose.[65]

On the Article 21 argument, the court took at face value the government's assertions that the project would ultimately benefit the people displaced by the construction of the dam and found that their right to life was not under threat.[66] Justice Kirpal chose not to engage with the petitioner's submissions that the rehabilitation programme was fundamentally flawed and that the alleged benefits were in doubt.[67]

Judicial caution in the face of large, complex projects like this is to be expected. In some of its recent jurisprudence, the South African CC has had to consider the reasonableness of such projects in the light of claims about their detrimental impact on individuals; and poor management, including a failure to live up to promises made to the affected parties. In the *Joe Slovo* case, decided in 2009, about 20,000 residents of the Joe Slovo informal settlement in the Western Cape challenged a governmental programme aimed at developing low-cost housing on the site. The programme was part of a nationwide project aimed at eliminating unsafe, unhygienic informal settlements and replacing them with permanent, affordable housing. The laudable aims of the project, as well as concern for the impact of further delay on residents who had already moved away from the Joe Slovo settlement voluntarily, weighed heavily with the judges. They ordered that the remaining residents be evicted, despite glaring problems with the implementation of the project.[68] But what sets this decision apart from that in *Narmada Bachao Andolan* is that the South African Constitutional Court was careful to frame a remedy which detailed the quality of the temporary accommodation and required government to engage with the residents about the timing of the evictions, amongst other things.[69] Ultimately, the South African government decided to upgrade the settlement whilst the residents remained on site, effectively acceding to one of the main demands made by the group which had brought the case to the Constitutional Court. Sustained pressure from the Joe Slovo community played a very significant role in bringing about this change to governmental policy. The government may well have ignored the court's instruction that further engagement with the community take place in the absence of this pressure. But, the tenor of the judgment is important. The Indian Supreme Court's censure of the petitioners in *Narmada Bachao Andolan* and absolute trust in the capacity and good faith of government left the petitioners with little further recourse. By contrast, in *Joe Slovo,* the South African Constitutional Court made it clear that the government had a continuing responsibility to engage with the affected community and to provide them with good-quality temporary accommodation. This gave the community some tools with which to continue fighting for on-site upgrading. Ultimately, the government was forced to acknowledge the flaws in the original programme.

The Indian Supreme Court cases discussed in this section do not represent a complete retreat from activism in protecting ESR. Recent jurisprudence on the Right to Food[70] is held up as an example of the effective use of the courts to widen access to socio-economic goods. The Human Rights Law Network began the public interest litigation on the right to food by filing a writ petition in the Supreme Court in April 2001.[71] At the time, India's grain stocks were overflowing and in danger of being

dumped into the sea or eaten by rats.[72] ***I.C.L.Q. 396*** Yet India's rural population was experiencing a famine-malnutrition was common and people were dying of starvation.[73] A Famine Code and various schemes for distribution of food were already in place but were not being implemented by government.[74] The People's Union for Civil Liberties (PUCL) asked for immediate release of the surplus food stocks.[75] The legal basis for the claim was Article 21. Using its 'continuous mandamus' jurisdiction, the court has kept the case open and made periodic orders aimed at ensuring that the remedies it hands down are enforced.[76] The most important of these orders was that handed down on 28 November 2001.[77] The order converted the schemes' benefits into legal entitlements.[78]

The November 2001 order dealt with eight schemes.[79] Each of the schemes centred on some aspect of food distribution as it related to a particular social group. The Midday Meals Scheme, for example, was directed at providing midday meals for all children in primary schools.[80] The court ordered government to make good defects in the implementation of these schemes--by completing the identification of people who fell into the targeted groups, issuing cards to allow them to collect the grain and distributing the grain to the relevant centres.[81] The court also ordered that those states which had been providing dry rations for the midday meal in schools begin providing cooked meals within three months of the order. Aspects of the order also dealt with inspection by government to ensure fair-quality grain and replacement of grain that did not meet this standard.[82] In this and subsequent orders, the court has also set out requirements on reporting, accountability, monitoring, transparency and dissemination of court orders aimed at ensuring that its orders are followed.[83]

The Right to Food case certainly indicates that the history of the Supreme Court cannot be neatly divided into activist and non-activist phases. But there are several points to be made about the context of the case. For one thing, whilst the court has accepted the idea that the right to life contains a right to food,[84] its remedies focus on the provision of grain to people who are without food in a national context of abundant food stocks. Furthermore, the litigation is primarily aimed at forcing government to fulfil its pre-existing guarantees and there are no competing 'big business' or national development interests for the court to grapple with. PUCL has gone back to court repeatedly due to delays in compliance; non-compliance with the orders; or governmental ***I.C.L.Q. 397*** decisions to remove people from the list of those 'Below the Poverty Line', for example. As the litigation is ongoing, any overall assessment of its effectiveness will have to wait but the court orders must be read within this wider context.

There have been some promising developments in the context of the right to education. In *State of Bihar and Ors v Project Uchcha Vidya, Sikshak Sangh and Ors,* the Supreme Court acknowledged that the Constitution only recognized education as a fundamental right for children under age 14 but held that 'education as a part of human development indisputably is a human right'.[85] The case arose in the context of the State of Bihar's decision to establish 'Project Schools', including a specified number of girls' schools, as a response to its poor progress in the area of education. In light of deviations from this policy, the court ordered that a committee be appointed to investigate the matter. The court's order included details as to the composition of the committee, its brief, some guidelines as to what would constitute irregularities in the implementation of the state's policy and an expectation that the state of Bihar would take appropriate action in the event of the committee finding such irregularities.[86]

The court's approach to affirmative action in education is also instructive. In *Ashoka Thakur v Union of India* [87] the court upheld the 93rd Amendment to the Constitution, which allows for special measures to be taken for the advancement of India's 'socially or educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to the educational institutions'.[88] At the same time, the court held that the 'creamy layer' should be excluded from the 27 per cent quota for 'Other Backward Classes' (OBC)[89] and that the inclusion of particular groups in the OBC category be reviewed every five years.[90] The term 'creamy layer' refers to those people within the OBC category who are relatively wealthier and better educated.[91] The concern was that people in this group would always be the beneficiaries of governmental ***I.C.L.Q. 398*** reservations policies, and that, as a result, the position of the most desperately poor would remain unchanged. Although the court left the government a wide discretion in deciding which people fell within the 'creamy layer',[92] its approach was certainly less deferential than in some of the cases referred to above.

Some of the most interesting recent developments with respect to the right to health have occurred in the context of HIV/AIDS. In 2003, the Punjab Voluntary Health Centre, represented by the Human Rights Law Network (HRLN), petitioned the Supreme Court to order the government to provide free anti-retroviral drugs (ARVs) to HIV-positive people.[93] On 5 August 2008, the court approved a list of

commitments regarding the treatment and other forms of support for people living with HIV/AIDS which were made by the government and put before the court. HRLN welcomed the response but expressed concern about a lack of provision of second-line treatment that is, a different combination of ARVs for those people who have become resistant to their initial medication or who are suffering serious side effects.[94] Another petition, filed in 1999 by Lawyers' Collective, acting on behalf of Sankalp Rehabilitation Trust, was initially aimed at removing obstacles to the treatment of HIV-positive people in hospitals. According to Lawyers' Collective, 'this PIL [public interest litigation] has been sought to be used as an oversight mechanism for the National ARV Rollout Programme and a number of issues affecting access to treatment have been addressed'.[95] At the court's request, the Sankalp Rehabilitation Trust filed the directions it sought before the court in 2008. There followed a number of meetings between the National AIDS Control Organisation (NACO), people living with HIV/AIDS and representatives of the office of the Solicitor-General of India and Lawyers' Collective. These stakeholders agreed upon 14 points which were then endorsed by the court. In another order, Sankalp Rehabilitation Trust filed an application arguing that NACO guidelines restricting the provision of second-line ARV treatment to four categories of people amounted to discrimination and violated the right to life. The court indicated that the scheme was impermissible and, in a series of discussions, NACO agreed to widen access to second-line treatment to all people who needed it.[96] On 2 December 2013, the Supreme ***I.C.L.Q. 399*** Court disposed of the petition but gave Sankalp Rehabilitation Trust permission to make a separate submission on four issues which had not been resolved in consultation between the parties. Further litigation is likely and there remain significant problems with implementation[97] of the orders issued thus far but the institution of the litigation, the interim orders handed down by the court and dialogue between interested parties have already resulted in a widening of access to HIV/AIDS treatment in governmental policy.

IV. JUDICIAL ACTIVISM: A SITE OF BETRAYAL?[98]

As noted earlier, recent scholarship acknowledges the achievements of the court in some of its watershed rulings on social and economic equality but raises a number of concerns about the impact and coherence of its ESR jurisprudence. Studies convincingly demonstrate that non-governmental organizations are slow to turn to the courts[99] because of institutional challenges such as the high cost of litigation and the massive delays in getting a judgment at all.[100] The courts are overloaded and, contrary to the popular belief that India is a highly litigious society, the delays in getting a final judgment are due mainly to the fact that there are not enough judges and courts.[101]

A second criticism of Indian Supreme Court ESR jurisprudence focuses on a lack of principle in judicial reasoning.[102] It is extremely difficult to ascertain when and how the court will make use of the directive principles.[103] ESR have not always been attributed to the directive principles and it is, thus, unclear where they derive from, making it difficult for future litigants to be certain of their legal position.[104] Furthermore, the court has sometimes extended remedies granted against the government to States that were not represented in court.[105] This tendency to hand down judgments without fully considering their implications is one of the main reasons why the efficacy of the court's approach to ESR is doubtful. The huge backlog of cases in India,[106] is due, in part, to the fact that cases are often repeatedly brought back to court for 'fine-tuning' or because judgments have not been enforced, the court having failed ***I.C.L.Q. 400*** to accurately assess the wider implications of their earlier orders.[107] Moreover, it is often not clear why the judges found they had the (institutional and constitutional) capacity[108] to act in particular cases and not in others. Instead, deference to the executive occurs on an ad hoc basis.[109] This makes it more difficult for litigators and activists to identify and rely on a coherent body of ESR jurisprudence when making arguments before the courts.

A third concern is that, alongside the court's much-praised 'pro-poor' judgments, sit a number of cases in which judges have upheld the interests of big business or national development against the ESR of the poor and vulnerable. As Upendra Baxi puts it '[j]udicial activism is at once a peril and a promise, an assurance of solidarity for the depressed classes of Indian society as well as a site of betrayal'.[110] Based on a recent empirical assessment of Indian Supreme Court cases, Varun Gauri notes that there is a trend for the judges to look upon claims made on behalf of the poor and marginalized members of society less favourably. Whilst it is possible that this may be attributed to factors such as the relative weakness of the claims brought before the courts, a corresponding increase in successful judgments for more advantaged persons suggests that the court is generally less disposed to come to the assistance of people living in poverty.[111] Increasingly, judges of the Supreme Court cite policy considerations as justification for minimal or no scrutiny of government action.[112] Economic liberalization and a governmental emphasis on sustainable development have had a significant impact on judicial decisions-land reform, housing and tribal rights take a back seat to

these concerns in an increasing number of cases.[113]

These explanations for the court's inconsistent approach to the adjudication of economic and social guarantees are relatively well rehearsed. In a more recent attempt to understand what others have referred to as the court's ad hoc approach to economic and social rights adjudication, Madhav Khosla suggests that the approach is conditional upon whether the state has taken action to implement the rights. This is an unusual approach, analogous to the ***I.C.L.Q. 401*** adjudication of contract or tort cases in private law. The court will hand down a remedy when the state has breached an undertaking to take certain action (to provide shelter to slum dwellers, for instance) or when the state has been negligent--for example, by not maintaining a hospital it chose to build.[114] Where prior state action allows the court to conclude that a duty exists and has been breached, its remedial capacity is wide--illustrated by the use of the continuing mandamus referred to earlier and by innovative remedies such as compensation.[115]

However, the conditional social rights thesis does not, and arguably was not intended to provide a complete explanation for inconsistencies in the court's approach. Even where there has been some prior governmental undertaking on access to housing, health care, rehabilitation education and so on, the court's approach to both reasoning and remedy can vary quite dramatically. In the Right to Food case, for example, the court has gone as far as setting out the number of calories a midday meal provided to schoolchildren should contain.[116] In *Olga Tellis,* the court was content to effectively make government's undertakings an order of court. Second, the approach does not account for the court's treatment of the *Narmada Bachao Andolan* case. As discussed earlier in this article, the court ordered that eviction go ahead despite glaring omissions in the state's legal undertakings. By contrast, the court has been willing to interrogate, and place restrictions on, governmental policy on affirmative action in the context of education.[117] And, in the ongoing litigation on HIV treatment discussed earlier, the court has played an important role in driving the process forward by asking Sankalp Rehabilitation Trust to place the directions it was seeking before the court. This acted as a catalyst for dialogue with interest holders and that dialogue, in turn, framed government's commitments with respect to access to ARVs.

The question of whether there has been some state action which the court can use as a reference point for deciding a case is only one factor that informs the extent to which the court will adopt an interventionist or more deferential approach. The role of this factor and the existence and role of other factors influencing levels of judicial restraint remain under-analysed in the cases and literature. Moreover, it is clear that there are important discrepancies in the attitudes of individual judges to the nature and limits of the judicial role. The seriousness of the disagreement amongst judges about their role is illustrated in a number of recent Supreme Court pronouncements. ***I.C.L.Q. 402*** The *Delhi Jal Board* case[118] arose in the context of the work-related deaths of, and injuries to, people hired to work in the sewers by companies contracted to government.[119] The Delhi High Court had ordered the relevant governmental authorities to provide the contract workers with protective equipment, arrange for them to undergo free medical examinations and pay compensation to the families of the victims.[120] Counsel for the government argued that this amounted to the court assuming legislative powers.[121] In a 12 July 2011 judgment, Justice Singhvi noted that the drafting of legislative measures aimed at securing the constitutional goal of social and economic equality is sluggish and, when such measures are in place, they tend to remain unimplemented.[122] Furthermore, when courts attempt to fill the ensuing gap, they are often confronted with 'the bogey of judicial activism or judicial overreach'.[123] The court concluded that, in handing down the impugned order, the High Court had simply exercised its 'obligation to do justice to the disadvantaged and poor sections of the society'.[124] But this statement of support for strong judicial interventions in the interests of expanding social welfare does not reflect a consensus within the Supreme Court.

In the much discussed 2007 case *Aravali Golf Club and Another,* [125] Justice Katju criticized the Delhi High Court for straying 'into the executive domain or in matters of policy' by handing down orders on

age and other criteria for nursery admissions, unauthorized schools, criteria for free seats in schools, supply of drinking water in schools, number of free beds in hospitals on public land, use and misuse of ambulances, requirements for establishing a world class burns ward in the hospital, the kind of air Delhities [sic] breathe, begging in public, the use of sub-ways, the nature of buses we board, the legality of constructions in Delhi, identifying the buildings to be demolished, the size of speed-breakers on Delhi roads, auto-rickshaw over-charging, growing frequency of road accidents and enhancing of road fines etc.[126]

According to Katju J, these were all matters exclusively within the competence of the legislature or

executive. All that judges were entitled to do was to enforce pre-existing laws in these areas.[127] Justice Katju expressed a worry that judicial overzealousness could cause politicians to step in and restrict judicial powers.[128] He conceded that judicial activism can be a 'useful adjunct to democracy' but only in 'exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society'.[129]

I.C.L.Q. 403 This aspect of the judgment has provoked a strong reaction in certain quarters.[130] Justice Katju has come under criticism for pronouncing on matters not before him, some of which were yet to be decided by the Delhi High Court.[131] Furthermore, given the fact that the marginalization of the interests of the poor and weak is anything but exceptional in India and that a number of the High Court cases Katju J referred to dealt precisely with matters impacting on the everyday lives of vulnerable citizens, it is difficult to see where the judge thought the line between judicial responsibility and judicial overreach should be drawn.

An acknowledgement of the need for the court to exercise restraint in appropriate cases is reconcilable with the conviction that the court has a duty to step in when people like the sewerage workers in *Delhi Jal Board* are left without any protection. But the cases discussed here highlight the difficulties with defining the limits of the judicial role in ESR cases. As noted earlier, the South African Constitutional Court has also struggled with this issue. In what is arguably its most criticized ESR judgment to date, *Mazibuko,* [132] the South African Constitutional Court was called upon to decide whether a complex project aimed at overhauling the system of water provision in the city of Johannesburg was constitutional.[133] The applicants, from Phiri Township in Soweto, where the project was initiated, argued that the government's free basic water allocation was insufficient in the light of the purposes to which it would be put and the number of people dependent on it. Summarizing the court's approach to the state's positive obligations in respect of the ESR in the Constitution to date, Justice O'Regan held that courts would 'at least' require government to take steps to realize those rights where no steps were being taken and would review unreasonable measures to ensure that they met the standard of reasonableness.[134] Furthermore, government had to regularly reassess its policies to check that those policies were capable of progressively ***I.C.L.Q. 404*** realizing the rights. Courts would find government action that did not make provision for those in desperate need to be unreasonable and would order government to remove any unreasonable limitations or exclusions from its ESR policies.[135] The court noted that a challenge to the reasonableness of government action required government to explain its choices by providing the information it had considered in making those choices and describing the process it had followed in formulating its policy.[136]

As a description of the Court's general approach to ESR adjudication, the judgment in *Mazibuko* suggested that a form of light-touch review, placing little more than a burden of explanation on governmental authorities, was the only appropriate role for the courts in this area. However, two points must be made here. First, this deferential approach may still be distinguished from the kind of non-justiciability doctrine advocated by Justice Katju in the *Aravali Golf Club* case and effectively followed by the Court in *Narmada Bachao Andolan.* Second, subsequent decisions have indicated that the South African CC's account of its reasonableness-based approach to ESR in *Mazibuko* was driven by the circumstances of the case and was not an indication that there could be no robust scrutiny of governmental decisions in ESR cases. In the subsequent *Blue Moonlight* decision,[137] for instance, the Constitutional Court rejected government's argument that it did not have the resources to provide emergency housing for people ejected from private property. The court noted that the City of Johannesburg should have made provision for this kind of housing in its budget. It also stated that the City had not provided sufficient evidence of a general, rather than housing-specific, financial deficit. In addition, although the Court has traditionally resisted calls to order supervisory jurisdiction because of the potential of such jurisdiction to allow courts to usurp executive powers,[138] it has been more willing to use this relatively exacting remedy in recent cases.[139]

Attitudes to the limits of the judicial role within any apex court need to be responsive to the particular features of a case and to changes in the political climate. However, the differences in the approach of various Indian Supreme Court judges do not merely concern the question of what level of scrutiny is appropriate in cases involving ESR. The differences suggest that there is fundamental disagreement about whether judges have a role to play in this ***I.C.L.Q. 405*** area at all. The fact that the South African Constitution makes ESR directly justiciable means that there is no longer scope for arguing that ESR are immune from judicial interpretation and implementation. But in India, giving effect to the ESR recognized as directive principles of state policy was a judicial move, not a legislative one. Adjudication of ESR is therefore much more controversial in this jurisdiction. And the need for some clarity about the extent of the judicial role in Indian ESR cases is that much more pressing because of

this.

V. LESSONS FOR ECONOMIC AND SOCIAL RIGHTS ADJUDICATION

The Indian Supreme Court's early ESR jurisprudence occupies an important space within legal scholarship. The court's willingness to interpret civil and political rights in light of the directive principles of state policy was an innovation. The novelty of the approach is perhaps what led advocates of justiciable ESR to claim more for the Indian jurisprudence than is strictly accurate. The court was cautious in terms of the consequences it attached to the new status of the directive principles.

Despite this more modest appraisal and the flaws identified in section IV above, non-governmental organizations working in this area are quick to affirm the benefits of a judicial precedent recognizing access to goods such as housing and health care and imposing corresponding duties on government. [140] Gauri cautions against critiques that contrast idealized, unrealistic forms of legislative action with actual judicial interventions. The latter may be imperfect but nonetheless valuable and are usually sought because of the 'real world failings' of legislative and executive bodies.[141] Even relatively weak remedies such as those used by the court in *Olga Tellis* may give rise to concrete benefits for those persons affected by government action. Thus, in terms of the Supreme Court's order, certain of the petitioners in that case had to be provided with alternative accommodation upon their removal from the sites.

Neuborne refers to the Court's break with traditional adversarial modes of litigation--the relaxation of the rules of standing, flexible pleading rules, new methods of fact finding and expanded remedial powers as the real 'groundbreaking event' of the PIL movement.[142] A continued attachment to an adversarial approach, resulting in limited access to courts for the most vulnerable members of society, is an important weakness of the South African legal system.[143] Furthermore, as noted by the South African Constitutional Court in the *Treatment Action Campaign* decision, '[e]ven a cursory perusal of the relevant Indian case law demonstrates a willingness on the part of the Indian courts to grant far-reaching remedial orders' including 'highly detailed ***I.C.L.Q. 406*** mandatory and structural injunctions'.[144] This kind of supervisory jurisdiction is something the South African Constitutional Court has only recently begun to implement.[145] Apart from requiring governmental bodies to report to the courts on their progress, the Indian Supreme Court has also appointed socio-legal commissions to conduct research into complex matters. These remedies are an attempt to preserve respect for the democratic authority of legislative bodies and the expertise of executive authorities, whilst at the same time, moving the implementation of social and economic guarantees forward. Such remedies tend to be time-consuming and their short-term impact is difficult to gauge. But they do have the effect of encouraging an ongoing debate between stakeholders (civil society, government bodies, lawyers, judges) about how best to broaden access to goods such as shelter, education, water, food, etc. Furthermore, they play an educative role in generating societal acceptance of the importance of ESR and of the fact that government has duties with respect to these rights.

The lesson here is that social advocacy groups need to consider how best to use the courts, with all their limitations, in creating greater access to socio-economic goods. To date, the most successful legal interventions have been those which

envisioned 'strategic' operations of a scale, scope, and continuity that enabled lawyers to acquire specialized experience, coordinate efforts on several fronts, select targets and manage the sequence and pace of litigation, monitor developments and deploy resources to maximize the long-term advantage of a client group.[146]

The Right to Food campaign in India and the work of the Treatment Action Campaign in South Africa are good examples here. The 2001 drought in India left large numbers of people facing starvation in the knowledge that government was allowing excess grain stocks to rot. This galvanized disparate groups and individuals into a 'full-fledged Right to Food campaign'.[147] As Colin Gonsalves, founding director of the Human Rights Law Network, the organization which has been driving the right to food litigation in India, notes '[t]he Court's four initial orders lifted our morale and spurred a national campaign on the right to food that was subterranean and waiting for something to set off a chain reaction'.[148] The court's willingness to hand down creative monitoring remedies in the case and the Human Rights Law Network's ***I.C.L.Q. 407*** capacity to follow up on these by returning to court on numerous occasions also contributed to the relative success of the litigation. Similar lessons about the value of a multi-pronged strategy for the implementation of social and economic rights are

apparent from the work of the Treatment Action Campaign in broadening access to anti-retroviral drugs in South Africa. This organization has used a combination of protest, lobbying, litigation and the threat of litigation to further its aims.[149]

In sum then, whilst Supreme Court judges' pronouncements on ESR are more modest than has sometimes been suggested, the court has made a significant contribution to the implementation of these rights. But the question of whether the court will continue to play a useful role in the kinds of 'strategic operations' referred to above is complicated by two concerns. First, there is the courts' ad hoc approach to judicial activism. With respect to the Right to Food case, Colin Gonsalves recalls advising a colleague not to talk about the case 'because the chances were high of the Supreme Court rejecting the petition %Y(3)27 [w]hat we didn't factor into our calculation was Justice B.N. Kirpal who unexpectedly took up the case with gusto'.[150] The fact that so much turns on the attitudes of individual judges makes for a huge amount of uncertainty for those thinking about bringing a case. In addition, if the government is arbitrarily held to account for failing in its duty to implement ESR in one case but not in another, there is little opportunity for the rights to become 'mainstreamed'. A culture of following good administrative practice and considering the impact of policies on individuals' rights--say, when removing residents from unhygienic settlements--has a significantly better chance of taking root within governmental bodies when judges enumerate state duties clearly and consistently.

Coupled to this is a second concern--the inconsistent approach to judicial activism makes it easier for judges to use judicial deference as an excuse to sacrifice the social and economic interests of poor litigants when these conflict with the interests of multinational companies or with major governmental projects. Sustained engagement with the issues raised in the *Aravali Golf Club* case would produce more nuanced arguments about when robust judicial intervention is needed and when a more restrained route should be followed. Then Chief Justice Balakrishnan's announcement in 2007 that he would appoint a larger bench of the Supreme Court to formulate PIL guidelines following the decision in that case held the promise of initiating ***I.C.L.Q. 408*** a serious debate about judicial activism.[151] But such guidelines have yet to be produced.

The extensive debate preceding the inclusion of ESR in the South African Constitution, and the drafters' decision to incorporate internal limitations modelled on the ICESCR in the ESR provisions,[152] meant that the South African Constitutional Court had to engage with debates about the limits of the judicial role in this area from the very early years of its existence.[153] This comparatively greater deliberation about the appropriate role of the judiciary in South African ESR cases has produced a jurisprudence which, whilst still marred by some inconsistency and problematic reasoning, does not suffer from the radical divergences in approach reflected in the Indian cases. The reasons for this are complex. For instance, institutional differences between the two courts, such as the fact that the judges of the South African Constitutional Court always sit as a single bench whereas the Indian Supreme Court hears a large number of cases as two-judge Division benches, are significant.[154] But the primary argument here is that the profound differences in judge's views about judicial intervention and restraint is an issue which deserves much more serious attention.

It is unlikely that the Indian Supreme Court will initiate a debate about the judicial role without serious pressure from other quarters being brought to bear upon the judges.[155] It is important that those bringing cases before the Indian Supreme Court regenerate interest in such a debate by explicitly addressing arguments pertaining to the limits of the judicial role to the court. Rather than simply finding that policy factors are a complete bar to justiciability, then, judges will be required to justify the level of scrutiny they apply to governmental action by reference to a series of relevant factors such as the impact of that action on the affected parties, the number of people affected, the extent to which important policy considerations are actually in issue, the question of whether the subject matter of the case gives rise to serious resource implications and whether the state is flouting commitments it has already agreed to. The development of a more principled approach to judicial activism is to be encouraged as an integral part of an effective model for ESR adjudication in India and elsewhere.

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1. See eg S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), ch 1; and M Pieterse, 'Coming to Terms with Judicial Enforcement of Socio-Economic Rights (2004) 20 South African Journal on Human Rights 383, 389-99 especially. For a detailed examination of the arguments for and against judicial enforcement of ESR, see N Jheelan, 'The Enforceability of Socio-Economic Rights' (2007) 2 EHRLR 146. See also G van Bueren, 'Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act' (2002) PL 456.

2. South Africa, Malawi, Finland, Latvia, Estonia, Poland and Romania are examples here.

3. The attitude of ordinary citizens to the Indian Supreme Court is far less clear. See J Krishnan, 'Scholarly Discourse, Public Perceptions and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research' (2007) William Mitchell Legal Studies Research Paper Series Working Paper No 77, available at <http://papers.ssrn.com/so13/papers.cfm?abstract_id=1003811>.

4. M Jain, 'The Supreme Court and Fundamental Rights' in SK Verma and SK Kusum (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (OUP 2004) 1, 16.

5. See eg V Sripati, 'Human rights in India Fifty years after Independence' (1997) 26 Denver Journal of International Law and Policy 93; B de Villiers, 'Directive Principles of State Policy and Fundamental Rights: The Indian Experience' (1992) 8 South African Journal on Human Rights 29; S Meer, 'Litigating Fundamental Rights: Rights Litigation and Social Action Litigation in India: A Lesson for South Africa' (1993) 9 South African Journal on Human Rights 358; M Kirby, 'Judicial Activism' (1997) 23 Commonwealth Law Bulletin 1224. For some examples of later commentary, see G Subramanian, 'Contribution of Indian Judiciary to Social Justice Principles Underlying the Universal Declaration of Human Rights' (2008) 50(4) Journal of the Indian Law Institute 593; B Neuborne, 'The Supreme Court of India' (2003) 1 ICON 476; and S Ibe, 'Beyond Justiciability: Realising the Promise of Socio-Economic Rights in Nigeria' (2007) 7 African Human Rights Law Journal 225, 233-8 in particular. These writers are not uncritical of the Supreme Court's record but they are overwhelmingly positive about the court's independence and creativity.

6. See eg D Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (OUP 2007) ch 5; and M Pieterse (n 1) 407.

7. See further A Pillay, 'Economic and Social Rights Adjudication: Developing Principles of Judicial Restraint in South Africa and the United Kingdom' (2013) PL 606.

8. J Cottrell and Y Ghai, 'The Role of the Courts in the Protection of Economic, Social and Cultural Rights' in Y Ghai and J Cottrell (eds), *Economic, Social and Cultural Rights in Practice: The Role of Judges in Implementing Economic, Social and Cultural Rights* (Interights 2004) 85.

9. For some of the debates preceding the drafting of the 1996 Constitution in South Africa, see N Haysom, 'Constitutionalism, Majoritarian Democracy and Socio-Economic Rights' (1992) 8 South African Journal on Human Right 451; E Mureinik, 'Beyond a Charter of Luxuries: Economic Rights in the Constitution' (1992) 8 South African Journal on Human Rights 464; and D Davis, 'The Case against the Inclusion of Socio-Economic Demands in a Bill of Rights Except As Directive Principles' (1992) 8 South African Journal on Human Rights 475. On the drafting history of the directive principles of state policy in the Indian Constitution, see G Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966) ch 3.

10. See art 37 of the Constitution.

11. See *Paschim Banga Ket Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37; *Consumer Education and Research Centre v India* (1995) 3 SCC 42; *Bandhua Mukti Morcha v Union of India and others* 1984 SCR (2) 67.

12. See *Olga Tellis and others v Bombay Municipal Corporation and others* 1985 SCR Supl (2) 51; *Delhi Development Horticulture Employees' Union v Delhi Administration, Delhi and others* 1992 SCR (1) 565.

13. See *Mohini Jain v State of Kerala and others* (1992) 3 SCC 666. Later, the court clarified the position in *Mohini Jain* by holding that art 14 gave rise to a right to *primary* education-see *Unnikrishnan v State of Andra Pradesh* 1993 (1) SCC 645. See also M Jain (n 4) 32-3. See further J Kothari, 'Social Rights and the Indian Constitution' (2004) 2 *Law, Social Justice and Global Development Journal,* available at <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/kothari/>.

14. *See Maneka Gandhi v Union of India and another (1978*) 1 SCC 248 at 670-1; and *Francis Coralie Mullin v The Administrator, Union Territory of India and others* 1981 SCR (2) 516.

15. *Francis Mullin* (n 14) 528-9.

16. (n 12).

17. *Olga Tellis* (n 12) 73 and 83.

18. *Olga Tellis* (n 12) 63-4.

19. *Olga Tellis* (n 12) 80.

20. *Olga Tellis* (n 12) 79-80.

21. *Olga Tellis* (n 12) 80-1 and 85.

22. *Olga Tellis* (n 12) 87-8.

23. *Olga Tellis* (n 12) 86-7.

24. *Olga Tellis* (n 12) 94.

25. *Olga Tellis* (n 12) 95-6.

26. *Olga Tellis* (n 12) 96.

27. *Olga Tellis* (n 12) 98.

28. See N Robinson, 'Expanding judiciaries: India and the rise of the good governance court' (2009) 8(1) Washington University Global Studies Law Review 1, 43; S Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002) 118.

29. C Scott and P Macklem, 'Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a N New South African Constitution' (1992) 141(1) UPaLRev 1, 121.

30. *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).

31. Order dated 26 September 2000, available at <http://www.saflii.org/za/cases/ZACC/2000/14.html>.

32. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and others* 2009 (9) BCLR 847 (CC); 2010 (3) SA 454 (CC); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) at para 104.

33. See further A Pillay, 'Towards Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement' (2012) 10(3) ICON 732; D Bilchitz (n 6); and Pieterse (n 1) 407.

34. See Sathe (n 28) 118.

35. *Olga Tellis* (n 12) 89.

36. Compare the South African Constitutional Court's approach in *Joe Slovo* (n 32); *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and others* 2008 (3) SA 208 (CC); and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 Property (Ltd) and Another* (CC) 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).

37. See *Shantistar Builders v Narayan Khimalal Totame* (1990) 1 SCC 520; and *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan and others* (1997) 11 SCC 123.

38. See *Municipal Corporation of Delhi v Gurnam Kaur* (1989) 1 SCC 101; and *Sodan Singh and others v New Delhi Municipal Committee and others* 1992 SCR (2) 243. These cases are discussed in S Muralidhar, 'India: The Expectations and Challenges of Judicial Enforcement of Social Rights' in M Langford (ed) *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008) 113.

39. See also *Sachidananda Pandey and Another v State of West Bengal and others* 1987 SCR (2) 223 at 242.

40. See Neuborne (n 5) 501.

41. See eg B Rajagopal, 'Pro-Human Rights But Anti-Poor? A Critical Evaluation of the Indian Supreme Court from a Social Movement Perspective' (2007) 18 Human Rights Review 157, 157; and Krishnan (n 3).

42. 1991 SCR Supl (2) 267. See also *BALCO Employees' Union v Union of India* (2002) 2 SCC 333.

43. Section 2(9)(ii)--see *Calcutta Electricity Supply Corporation* (n 42) 279.

44. Art 25(2) of the Universal Declaration of Human Rights; and art 7(b) of the ICESCR.

45. Providing that state policy should be directed at securing the health and strength of workers. See *Calcutta Electricity Supply Corporation* (n 42) 293.

46. *Calcutta Electricity Supply Corporation* (n 42) 301.

47. *Calcutta Electricity Supply Corporation* (n 42) 298 and 301.

48. *Calcutta Electricity Supply Corporation* (n 42) 289.

49. Unreported judgment, decided 15/02/2000, available at <http://www.judis.nic.in/supremecourt/imgst.aspx?filename=16532>.

50. *Almitra Patel* (n 49) 4.

51. See para 6 of the court's order in *Almitra Patel* (n 49) 7.

52. *Almitra Patel* (n 49) 7.

53. *Almitra Patel* (n 49) 4.

54. For a critique of the case, see U Ramanathan, 'Demolition Drive' *Economic and Political Weekly,* 2 July 2005, 2908, 2908-10.

55. (n 30) at para 2.

56. 2005(5) SA 3 (CC) at paras 33 and 50.

57. (2000) 10 SCC 664, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=17165>.

58. Rajagopal (n 41) 162.

59. S Muralidhar, 'Economic, Social and Cultural Rights: An Indian Response to the Justiciability Debate' in Ghai and Cottrell (n 8) 27-8; and Rajagopal (n 41) 162.

60. *Narmada Bachao Andolan* (n 57) 11.

61. *Narmada Bachao Andolan* (n 57) 12-13. The petitioners argued that this recommendation had not been taken seriously by government--at 39.

62. *Narmada Bachao Andolan* (n 57) 14.

63. ibid 14-15.

64. ibid 22.

65. ibid 34--see also the judgment at 70.

66. ibid 19-20.

67. ibid 16.

68. See further Pillay (n 7).

69. *Joe Slovo* (n 32) at para 7.

70. *Peoples' Union for Civil Liberties v Union of India* (2001) 5 SCALE 303; 7 SCALE 484. See Muralidhar (n 59) 29-30. The Supreme Court's orders have been compiled in N Saxena et al (eds), *Right to Food* (3rd edn, Socio-Legal Information Centre 2008).

71. M Higgins et al (eds), *Food Security and Judicial Activism in India* (Human Rights Law Network 2007) viii.

72. Supreme Court order of 20 August 2001 in Saxena et al (n 70) 27.

73. N Saxena, 'Food Security and Poverty in India' in Higgins et al (n 71) 9-12.

74. On the failings of the Public Distribution Schemes, see B Patnaik, 'The Poorest in the Poorest States Suffer the Most' in Higgins et al (n 71) 45.

75. See Supreme Court order of 2 May 2003 in Saxena et al (n 70) 42-4.

76. See *Vineet Narain v Union of India* (1998) 1 SCC 226; and Fredman (n 1) 131.

77. Saxena et al (n 70) 31-7.

78. Saxena et al (n 70) 23.

79. Saxena et al (n 70) 31-4. The schemes are described in detail in Higgins et al (n 71) 23-37.

80. Higgins et al (n 71) 27-8.

81. Saxena et al (n 70) 31-4; and Higgins et al (n 71) 24-37.

82. Saxena et al (n 70) 32.

83. See Higgins et al (n 71) 23-4.

84. See the order of 2 May 2003 in Saxena et al (n 70) 45.

85. Appeal (civil) 6626-6675 of 2001 at 13, judgment delivered on 3 January 2006, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=27407>.

86. *Project Uchcha Vidya* (n 85) 21-2.

87. Writ petition (civil) No 265 of 2006, judgment delivered on 10 April 2008, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=27407>.

88. The challenge made in the case related to 'Other Backward Classes' rather than the Scheduled Castes or Tribes.

89. *Ashoka Thakur* (n 87) at paras 150-152 of the judgment of Balakrishnan CJ; para 139 of the judgment of Pasayat and Thakur JJ; para 1 of the judgment of Raveendran J and paras 30 and 52 of the judgment of Bhandari J. For an analysis of the judgment, see PB Mehta 'It's a Landmark', *The Indian Express,* 11 April 2008, available at <http://www.indianexpress.com/news/its-a-landmark/295263/1>.

90. Balakrishnan CJ and Raveendran J held that review should take place every ten years but Justices Pasayat, Thakkur and Bhandari endorsed a five-year period of review. See the judgment of Balakrishnan CJ at para 187; para 139 of the judgment of Pasayat J and Thakker J; para 1 Raveendran J; and para 56 of the judgment of Bhandari J. See also Mehta (n 89).

91. See para 144 of the judgment of Balakrishnan CJ, *Ashoka Thakur* (n 87).

92. Para 154 of the judgment of Balakrishnan CJ; and para 54 of the judgment of Bhandari J, *Ashoka Thakur* (n 87).

93. Writ petition 311 of 2003--see S Shankar and P Mehta, 'Courts and Socioeconomic Rights in India' in V Gauri and D Brink (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (CUP 2008) 146, 161; and V Hiremath, 'HIV/AIDS and the Law' in M Desai and K Mahabal (eds), *Health Care Case Law in India: A Reader* (Centre for Enquiry into Health and Allied Themes (CEHAT) and India Centre for Human Rights and Law (ICHRL) 2007) 58-9 available at <http://www.cehat.org/humanrights/caselaws.pdf>.

94. M Sharma, 'These Commitments Make Provisions for People Living with HIV/AIDS (PLHA) in India', *The Indian Post,* 9 August 2008, available at <http://www.theindiapost.com/health/these-commitments-make-provisions-for-people-living-with-hivaids-plha-in-india>.

95. Writ petition 512 of 1999. See <http://www.lawyerscollective.org/hiv-and-law/current-cases.html>.

96. ibid.

97. S Shankar and P Mehta (n 93) 161.

98. The term 'a site of betrayal' comes from Upendra Baxi's influential article (2000) 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of (In)justice' in Verma and Kusum (n 4) 161.

99. Shankar and Mehta (n 93) 176-9; and J Krishnan, 'Social Policy Advocacy and the Role of the Courts in India' (2003) 21 *American Asian Review* 91, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=682326> 10.

100. Krishnan (n 99) 3 of the online version.

101. Krishnan (n 99) 10 and 33 of the online version.

102. See Shankar and Mehta (n 93) 146; Krishnan (n 3); JK Krishnan, 'The Rights of the New Untouchables: A Constitutional Analysis of HIV Jurisprudence in India' (2003) 25 HumRtsQ 791-819; Muralidhar (n 59); and Ramanathan (n 54).

103. Cottrell and Ghai (n 8) 76-7.

104. Cottrell and Ghai (n 8) 74.

105. Cottrell and Ghai (n 8) 75.

106. Neuborne (n 5) 504.

107. Cottrell and Ghai (n 8) 84-5.

108. For a discussion of these terms, see J Jowell 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) PL 592.

109. Muralidhar (n 59) 31. Rajagopal refers to a 'serious measure of substantive *ad hocism'* in the judgments of the Indian Supreme Court (n 41) 160.

110. (n 98).

111. V Gauri, 'Public Interest Litigation: Overreaching or Underachieving?' The World Bank Development Research Group Policy Research Working Paper 5109, November 2009, at 13 available at <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/11/03/000158349_20091103104346/Rendered/PDF/

112. Justice Suresh(ret), 'Socio-Economic Rights and the Supreme Court' at para 13, available at <http://escr-net.org/usr_doc/suresh_article.doc>. See also U Ramanathan, 'Communities at Risk: Industrial Risk in Indian Law' *Economic and Political Weekly,* 9 October 2004, 4521, 4524-5 on the court's approach to industrial risk.

113. Rajagopal (n 41) 161 and 166. See also Justice Krishna Iyer in *The Hindu,* 17 December 2002, as cited by Suresh, (n 112) at para 15; and P Bhushan, 'Sacrificing Human Rights and Environmental Rights at the Altar of Development' (2009) 41 George Washington International Law Review 389; and Ramanathan (n 112) 2910.

114. M Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8(4) ICON 739.

115. See further Khosla (n 114) 759-60.

116. See P Ahluwalia 'The Implementation of the Right to Food at the National Level: A Critical Examination of the Indian Campaign on the Right to Food as an Effective Operalization of Article 11 of ICESCR' Center for Human Rights and Global Justice Working Paper Economic, Social and Cultural Rights Series No 8, 2004 (NYU School of Law) at 45-6, available at <http://www.chrgj.org/publications/docs/wp/AhluwaliaÏmplementationöf¨the¨Right¨to¨Food.pdf>.

117. See the discussion of the *Ashoka Thakur* case (n 87).

118. *Delhi Jal Board v National Campaign for Dignity and Rights of Sewerage and Allied workers and others* at para 15, in particular, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=20373>.

119. *Delhi Jal Board* (n 118) paras 3-4.

120. *Delhi Jal Board* (n 118) para 9.

121. *Delhi Jal Board* (n 118) para 10.

122. *Delhi Jal Board* (n 118) para 15.

123. ibid.

124. *Delhi Jal Board* (n 118) para 20.

125. 2007 (12) SCR1084, 2008(1) SCC683, available at <http://judis.nic.in/supremecourt/imgst.aspx?filename=29995>.

126. *Aravali Golf Club* (n 125) para 26.

127. ibid.

128. *Aravali Golf Club* (n 125) para 38.

129. *Aravali Golf Club* (n 125) para 39.

130. I am indebted to contributors to the blog, law and other things <http://lawandotherthings.blogspot.com/> for the news sources referred to in footnotes 130, 132 and 151. See B Dutt, 'Order of the Day', *Hindustan Times,* 14 December 2007, available at <http://www.hindustantimes.com/News-Feed/bigidea/Order-of-the-day/Article1-263165.aspx>; M Rama Jois, 'Crossing the Lakshman Rekha', Indianexpress.com, 17 December 2007, available at <http://www.indianexpress.com/news/crossing-the-lakshman-rekha/251051/>; and T Sharma, 'Apex Court Says Go by Judgment, Not Observations Made by Judges', 12 December 2007, Indianexpress. com, available at <http://www.indianexpress.com/news/apex-court-says-go-by-judgment-not-observations-made-by-judges/249343/>. Although framed in the abstract, the court's pointed comments about the non-binding nature of mere observations by judges appeared to be directed at Justice Katju's remarks in the *Aravali* case, decided six days previously.

131. See TR Andhyarujina, 'Courting Limits', 15 December 2007, Indianexpress.com, available at <http://www.indianexpress.com/news/courting-limits/250392/>.

132. *Mazibuko and others v City of Johannesburg and others (Centre on Housing Rights and Evictions intervening*) 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

133. A fuller discussion of the case is beyond the scope of this article-see M Wesson, 'Reasonableness in Retreat? The Judgment of the South African Constitutional Court in *Mazibuko v City of Johannesburg'* (2011) Human Rights Law Review 16 and Pillay (n 7) 620-3.

134. *Mazibuko* (n 132) para 67.

135. ibid.

136. *Mazibuko* (n 132) para 71.

137. *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC).

138. See *Minister of Health v Treatment Action Campaign (No 2)* 2002 (10) BCLR 1033 (CC) at para 129; T Bollyky, 'R if C > P+B: A Paradigm for Judicial Remedies of Socio-Economic Rights Violations' (2002) 18 South African Journal on Human Rights 161; K Pillay, 'Implementing *Grootboom:* Supervision Needed' (2002) 3 ESR Review 11; and D Davis, 'Socio-Economic Rights in South Africa: The Record of the Constitutional Court after Ten Years' (2004) 5(5) ESR Review 3.

139. *Pheko and Others v Ekurhuleni Metropolitan Municipality* 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC); and *Schubart Park Residents Association and others v City of Tshwane and others* [2012] ZACC 26.

140. See Krishnan (n 102) 791-819; see also Shankar and Mehta (n 101) 178.

141. Gauri (n 111) 7.

142. Neuborne (n 5) 501-3.

143. Fredman (n 1) 107, 112 and 122.

144. *Minister of Health and Others v Treatment Action Campaign and Others (No 2*) 2002 (10) BCLR 1033 (CC) at para 108.

145. (n 137).

146. M Galanter and J Krishnan, "'Bread for the Poor": Access to Justice and the Rights of the Needy in India' 2004 (55) Hastings Law Journal 789, 796.

147. J Kothari, 'The Right to Water: A Constitutional Perspective', paper prepared for the International Environmental Law Research Centre (IELRC) workshop 'Water, Law and the Commons', New Delhi, 8-10 December 2006, available at <www.ielrc.org/activities/workshop_0612/content/d0607.pdf>.

148. C Gonsalves, 'The Politics of Hunger, the Privatisation of Food and the PDS' *Right to Food: Vol 1* (Human Rights Law Network 2004) 310, 310.

149. See M Heywood, 'South Africa's Treatment Action Campaign: Combining Law and Social Mobilization to Realize the Right to Health' (2009) 1 Journal of Human Rights Practice 14. On the use of marches, the media and civil disobedience, as well as litigation, in the struggle for wider access to water in South Africa, see J Dugard, 'Urban Basic Services: Rights, Reality and Resistance' in M Langford, B Cousins, J Dugard and T Madlingozi (eds), *Symbols or Substance: The Role and Impact of Socio-Economic Rights Strategies in South Africa* (CUP 2013) 28.

150. Gonsalves (n 140) 310.

151. See 'Supreme Court Plans Guidelines on PILs', Indianexpress.com, 15 December 2007, available at <http://www.indianexpress.com/news/supreme-court-plans-guidelines-on-pils/250497/>; and S Rautray, 'Activism-Wary Judges Wash Hands of Case', *Telegraph,* 12 December 2007.

152. See section II above.

153. See *Certification of the Constitution of the Republic of South Africa (First Certification case)* 1996 (10) BCLR 1253 (CC) at paras 76-8.

154. See further A Sengupta, 'Inconsistent Decisions' 30(8) *Frontline,* 3 May 2013, available at <http://www.frontline.in/cover-story/inconsistent-decisions/article4613887.ece>.

155. See A Thiruvengadam, 'The aftermath of the Aravali Golf Club Ruling and an Analysis of Some of the Initial Commentary', 15 December 2007, <http://lawandotherthings.blogspot.co.uk/2007/12/aftermath-of-aravali-golf-club-ruling.html>.