More Than the Sum of our Parts: Reflections on Collective Implementation of Economic, Social and Cultural Rights Decisions

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The process of implementing economic, social and cultural rights (ESCR) decisions is multifaceted. In addition to seeking redress for individual claimants, litigation and implementation strategies often aim to ensure the same type of violations won't occur for similarly situated communities in the future, as a result of underlying systems, structures, practices or power dynamics. It can also be a significant opportunity - given the captured attention of states and others at such times - to revisit, evolve and even reimagine our economic, social and political systems more broadly.

In this context, working collectively in the human rights field can enable us to achieve far more than would be possible to achieve alone. This post outlines some of the key themes emerging from collaborative experiences with NGOs, social movements, lawyers, academics and allies in connection with ESCR decision implementation, drawing particular insights from the case of *MBD v. Spain*, decided by the UN Committee on Economic, Social and Cultural Rights (CESCR) in 2017. These include shared visioning and early planning, the use of official follow-up procedures, countering resource constraint claims, and the importance of contextualising cases within broader socio-economic and ecological realities. Each should be taken as an invitation for further exploration, tailored to the conditions of specific cases and led by the communities most affected by the relevant human rights issues.

A shared vision and early planning for implementation

It may initially seem somewhat counterintuitive to begin thinking seriously about the implementation stage of a case prior to a court or quasi-judicial body actually handing down its final decision. However, effective implementation is commonly bolstered by a clear vision from the start of litigation as to what exactly those involved hope to achieve, beyond securing formal affirmation that a human rights violation has occurred.

Agreeing on this collective vision can be challenging. It may be possible to link human rights violations to discrete and identifiable state action, such as a discriminatory law or forced eviction, in which case it might then be relatively straightforward for claimants to pinpoint an appropriate remedy to correct the claimed violation. The process is more complex, however, where violations arise as a result of a failure by the state to undertake positive steps to adopt programs, enact legislation, and allocate resources necessary to progressively realise rights and ensure, for example, adequate food, housing, or access to healthcare or education. In outlining a proposed roadmap for the positive measures a state should be expected to take, the concept of 'reasonableness' is a useful tool. Used by CESCR, among others, as a standard of assessment in disputes, it can also support claimants to construct persuasive suggestions about potential courses of action for states during the implementation stage. Bruce Porter's excellent article on the reasons for including reasonableness in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) is instructive here, as is CESCR's 2007 statement on maximum available resources, which includes a non-exhaustive list of the factors the Committee takes into account in making this assessment.

A shared vision can then translate into specific remedial requests, making it easier for the respondent state, decision-maker and wider public to understand the exact changes claimants are seeking. ESCR case law from around the world provides useful examples of the range of potential remedies beyond simply seeking a declaration of violation or financial compensation, such as urgent interim measures, investigations, apologies, restitution, ecological restoration and changes to law, policy or practice, and orders for retention of court supervision. Early clarity about the path forward also gives claimants and their allies time to take preparatory steps, for example, devising an appropriate monitoring strategy or identifying and building relationships with the government officials and departments likely to be involved in implementation.

The process of developing this longer-term vision and complementary remedial strategy is itself an opportunity for mobilising the public and encouraging participatory implementation efforts. In recent years, strategic litigators in the field of human rights and climate change have created accessible websites to explain cases and strengthen support (see examples here), and have also 'crowdsourced' remedy suggestions. For instance, in taking the government to court to establish a legal obligation to reduce greenhouse gas emissions, claimants in *Urgenda Foundation v. the State of the Netherlands* gathered input from 800 Dutch organisations to compile a comprehensive 'Climate Solutions Plan', offering a range of publicly supported measures to help the government comply with the court's order.

Using and strengthening official follow-up procedures

Official follow-up procedures connected with UN treaty bodies and regional human rights mechanisms provide an excellent opportunity to share relevant information, particularly where this adds to or differs from what the state is reporting. Such processes also encourage collective action, drawing in allies to learn from the case, foster solidarity, and contribute to the implementation process through the provision of particular expertise or comparative material.

For example, in 2017 CESCR adopted its Working Methods Concerning the Committee's Follow-Up to Views under the OP-ICESCR. This outlines the timeline for exchange of information, the Committee's approach to the publication of material, and rules on the participation of civil society. In 2018, a coalition of NGOs and academics from different countries worked together to support effective implementation of *MBD v. Spain*. This case involved the court-ordered eviction of a family from their rented home in Spain, leaving them without alternative housing despite the family's lack of income, vulnerability, and repeated requests for support. (Further information about the case, including outline of the collective implementation activity, relevant documents, and reflections on the use of the follow-up procedure can be found here, as an illustration of how the process works in practice.) In its collective submission on implementation, the coalition offered international and comparative examples of laws, policies and practices from various jurisdictions to suggest ways forward for Spain to implement CESCR's views including, for example, ways to engage meaningfully with tenants at risk of eviction, security of tenure practices following lease expirations and guidance regarding disaggregated data collection, as well as relevant factual information including an overview of the current stock and public spending on social housing in Spain and how this compares to other European states.

Action in specific cases can also benefit from complementary, longer-term dialogue between civil society and decision-makers about official follow-up procedures generally, as these vary across human rights complaints mechanisms in terms of their availability and effectiveness. Such dialogue can deepen an understanding of ongoing challenges and the types of remedial and decision-making approaches that support effective implementation in practice. As an example, this collective civil society key proposals discussion paper advocates for, among other things, precise and practical orders, guidance for states regarding implementation plans, a participatory approach to follow-up, greater clarity regarding compliance assessments, and adequate resourcing and greater visibility for follow-up mechanisms. This paper was developed on the basis of cross-jurisdictional practice and shared analysis, including discussions with various UN treaty bodies.

Countering resource constraint claims by states

It's not uncommon for states to claim that they lack the resources necessary to comply with the orders made. Claimants need to be able to determine whether this is true or whether the government is simply unwilling or unable to direct resources in alignment with their human rights obligations, particularly as research indicates that the manageability of the order for the government in terms of resources is one of the key factors a court will consider in issuing an order with any budgetary implication.

Claimants and lawyers can turn to the extensive guidance available on key concepts such as 'progressive realisation' and 'maximum available resources', as interpreted and explained through case law, UN treaty body concluding observations and general comments, UN special procedure reports and academic materials, among other sources. There are also quite a few human rights NGOs with expertise in investigating how governments generate and allocate resources over time and how they determine their macroeconomic policies, as well as the ways in which this happens (such as, who participates in decision-making and how information is exchanged) – see, for example, member organisations of the economic policy and monitoring working groups of the global human rights network, ESCR-Net. Incorporating this existing knowledge or seeking the support of these organisations in relation to specific cases – for instance, connected with human rights-budget analysis, participatory budgeting, tax justice, macroeconomic policy analysis and other practices – can help to strengthen arguments to counter anticipated or actual resource challenges.

For example, during the implementation of the *MBD v. Spain*, some of the groups involved in the collective submission contributed recommendations on the progressive realisation of relevant rights within the maximum of available resources, including information on changes to the Spanish housing budget over time and as compared to other public sector expenditures, potential policy alternatives to increase Spain's fiscal space for housing and other social schemes in an equitable manner, and suggestions for potential avenues for altering the ways in which the government generates and allocates resources through its tax system. Providing this material allowed CESCR to ask more specific questions in its assessment of the state's proposed implementation plans.

A topic which receives little explicit mention in the area of human rights implementation at present is that of monetary policy (i.e., the control of money supply and use of tools such as interest rates), despite its importance to the issue of resource constraints, as well as to emerging or revitalised ideas such as universal basic income, national job guarantees and the funding of new green deals and other human rights-based social and environmental justice initiatives. While decisions about spending are inherently political, misconceptions about money are often used to continue privileging the interests of corporations and private wealth. Taking time to revisit our understanding of how money operates in reality (including recognition that, in addition to taxing and borrowing to access revenues, many governments create their own new money to flow into the financial system), which of our common assumptions are actually myths, and which questions are important for advocates and treaty bodies to ask governments in this context may stimulate a reclaiming of participatory decision-making about the creation and use of money in alignment with human rights principles and for the benefit of those most marginalised and vulnerable in society, as well as bolster complementary economic analysis and tax justice objectives.

Contextualising cases within broader socio-economic and ecological realities

Understanding how specific cases connect with the broader ESCR movement encourages a continuous cycle of shared expertise, lived experiences, intersectional analysis, solidarity and collaborative action, as advocates continually reiterate and apply international human rights principles. This process also gives us a greater sense of the entirety of long-held global narratives and practices – such as capitalism, patriarchy, colonialism, resource extraction and debt servicing – and the ways in which these manifest in concrete contexts and impact on human rights. In turn, this facilitates the gathering together of existing and emerging alternatives, as well as joint action to co-create new global narratives and practices.

For example, the collective engagement in the implementation of the CESCR case against Spain was enhanced as a result of a longer-term cross-jurisdictional exploration into ESCR implementation generally. Similarly, the strategic implementation of ESCR decisions can be strengthened as we view seemingly distinct issues in different localities – for example, mining in Zimbabwe or to the privatisation of healthcare in Brazil – as connected to broader neoliberal economic practices, through collaborative investigation aimed at both understanding how the current dominant economic system impacts the enjoyment of human rights (through pervasive practices of extraction, deregulation, privatisation of public services, violence and othering), and nurturing human rights-aligned alternative economic practices.

A final thought regarding a challenge that is increasing in relevance but not yet addressed to a great extent in practice. How can advocates better frame our remedial and connected implementation human rights strategies within ecological contexts and the boundaries of the natural world? The inherent anthropocentric nature of human rights can lead to implementation strategies that address immediate and even structural human rights violations, but may not serve humans or the rest of the living world in the longer term. Examples might include implementation in relation to the construction of social housing without considering sustainable building materials, or in relation to food supplies without prioritising regenerative practices. As we increasingly experience the escalating impacts of the climate and ecological crises, with disproportionate impacts on the most marginalised and vulnerable communities, this is a question we will have to face more explicitly – and indeed collectively – as human rights practitioners.

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