

ECONOMIC AND SOCIAL RIGHTS IN THE COURTROOM

A LITIGATOR'S GUIDE TO USING EQUALITY
AND NON-DISCRIMINATION STRATEGIES
TO ADVANCE ECONOMIC AND SOCIAL RIGHTS



EQUAL RIGHTS TRUST

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TO ADVANCE ECONOMIC AND SOCIAL RIGHTS

London, December 2014

The **Equal Rights Trust** is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice.

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Foreword

This publication is meant as a guide to strategic litigators who want to advance economic and social rights, and who consider bringing equality claims as a way of achieving this. It adds to a growing series of similar guides – a whole new genre of rights literature that has evolved in the last couple of decades. I first thought this publication was a great idea a few years ago and, as others thought so too, a project was born, funding raised, experts recruited, a concept paper drafted, consultations organised, research undertaken, a draft produced, a seminar conducted, a second draft developed, discussed and revised, and the present guide is the result.

However, as I am signing off this text for publication, a brief though belated reflection, animated by the cover illustration of this book, presents me with a curious problem. It comes from the impossibility of reconciling the notions of “guide” and “strategic litigation”, and a feeling of gnawing tension between them compels me to provide a clarification to the reader. A “guide” implies that someone walked in an unfamiliar terrain before us and is now expertly offering to help us make that same or similar journey. Strategic litigation, however, is by definition – well, at least by my definition – a venture into unknown territory, where no guide is indeed available and all you can hope for is a sympathetic companion.

So then, strictly speaking, this book is a companion, not a guide. And since it is nothing like the Oxford Companion to whatever, let it remain a “guide”, but with a caveat.

In further attempting to remove any ambivalence, let me state that in my view strategic litigation that is worthy of its name is not a teachable set of skills, regardless of the particular issues to be litigated. It is an attitude. It is a wishful thinking about social change combined with the talent to turn a social problem into a vision of an actionable court case.

In 1998, James Goldston wrote:

Social change litigation – legal action in court aimed at achieving concrete and lasting transformation in structures of injustice and/or inequality – can take place only when people are willing to take risks. (...) Among these is the risk that a lawyer will develop a theory of a case – a way of articulating the wrong done and the remedy required – so new, so at odds with conventional ideas in the profession,

*as to be misunderstood, ignored or even laughed at by her colleagues. It is a risk worth taking.**

The practical use of this book is as a counterbalance to that indispensable dose of lunacy and the propensity to taking risks without which no great strategic cases will ever emerge. If anything, it is a litany of cautions to hold the legal imagination within limits. Creative lawyers may benefit from browsing through the components of decision making presented in these pages when building a strategic case and, in particular, from exploring the way in which these components are enmeshed in the themes and the jurisprudence specific to equality claims when economic and social rights are at issue.

This companion is limited only to the legal aspects of strategic decision making in building cases. It does no more than allude to the equally important extra-legal aspects that should be considered, hopefully in a glorious team of lawyers and non-lawyers brainstorming together. The potential positive or negative social and political effects of litigation outside the courtroom must be assessed as a matter of reality check as well as ethical responsibility: will the case play a role in educating the public, raising awareness on a specific injustice, or empowering a disadvantaged group in improving its own position? If lost, will it put the clock back too much to discourage us from filing a case? Are we sure a legal victory will precipitate a broader political or social victory? These are heavily context-specific issues that we have left out of the detail of the book, in order to focus on the legal issues.

Economic and social rights are notoriously difficult to enforce – not to mention suffering from effects of the still widespread view that they are mere aspirations rather than enforceable rights. Therefore, on the above premises of what strategic litigation is, or ought to be, striving to realise these rights through the courts should be a challenge worth addressing. Looking at the nexus between economic and social rights on one hand and equality and non-discrimination on the other might present one entry into this challenge. And once we have started sorting out the various challenges and weaving our argument back and forth from the desired results to the initial injustices, we must eventually prepare ourselves for the possibility, the burden, and the joy of victory.

Dimitrina Petrova

* Goldston, J., "Race discrimination litigation in Europe: problems and prospects", *Roma Rights*, Autumn 1998.

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Throughout the course of the project, we were assisted greatly by the work of a number of other individuals, many of whom generously gave their time on a voluntary basis. The concept of the project was initially proposed by members of the Trust's Board of Trustees, and developed by Dimitrina Petrova. Over the first six months of the project, Paola Uccellari, then the Trust's Legal Director, conducted preliminary research and prepared an early concept paper for the guide. In further developing the research, we were greatly assisted by the work of the Cambridge Pro Bono Project (CPP) which conducted a review of jurisprudence and prepared the first draft of the case compendium which informs much of the guide and is available online. CPP's research team was led by Shona Wilson Stark and supervised by David Feldman and Stephanie Palmer. It comprised Shona Daly, Samantha Godwin, Lindsay Heck, Carolina Helfmann, Tebogo Ketshabile, Nora Ni Loideain, Rebecca Savage and Stephanie Wookey. The Trust's interns Rebecca Mandal, Mariana Stigliano, Sandra Nwangwu, Charlotte Rushworth, Rupal Shah, Jack Dahlsen, Sarah Hutnick, Sara McLaughlin and Victoria Schmeda and volunteer Aditi Mittal all also provided valuable contributions to the research effort. Joanna Whiteman was assisted in producing the first draft of this guide by significant contributions from the Trust's staff members Amal de Chickera, Jim Fitzgerald and Richard Wingfield, and intern Charlotte Rushworth. Jade Glenister assisted with the editing of the final draft.

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Acronyms

ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and People's Rights
AComHPR	African Commission on Human and People's Rights
ACtHPR	African Court on Human and People's Rights
ASEAN	Association of South-East Asian Nations
AU	African Union
CEDAW	Convention for the Elimination of all Forms of Discrimination against Women
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CJEU	Court of Justice of the European Union
CMW	Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
CPP	Cambridge Pro Bono Project
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECSCR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ESC	European Social Charter
ESR	Economic and social rights
EU	European Union
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
NGO	Non-governmental Organisation
OAS	Organisation of American States
OSJI	Open Society Justice Initiative
RESC	European Social Charter (Revised)
UDHR	Universal Declaration of Human Rights
WHO	World Health Organisation

Executive Summary

This is a guide to achieving equal enjoyment of economic and social rights (ESRs) for all. The guide acknowledges that there is still some way to go before ESRs are fully realised and seeks to help move towards this goal, using an approach based on equality and non-discrimination. It identifies conceptual and practical links between the right to equality and ESRs, noting the mutually reinforcing nature of these rights. The guide proposes that this link should be explored further when developing strategies for advancing ESRs. Specifically, it proposes that the right to equality (and the right to non-discrimination subsumed in it) should be employed to advance ESRs; in conjunction with ESRs where they are available in law and as one alternative where they are not.

The guide finds that there are many strategies that non-governmental organisations (NGOs), lawyers and activists may employ in seeking to advance ESRs. It focuses on one strategy which has, to date, received scant focus: how legal responses to inequality and discrimination can be used in litigation to advance the realisation of ESRs. In so doing, the guide **serves to assist litigators** seeking to pursue such a strategy.

In conducting its research for this guide, the Equal Rights Trust has focussed on cases relating to the rights to: social security; an adequate standard of living, including adequate food, clothing, water and housing; the highest attainable standard of physical and mental health; and education. The Trust has reviewed case law from international and regional jurisdictions as well as the national jurisdictions of Australia, Canada, Colombia, Germany, India, Ireland, the United Kingdom and the United States of America, where equality claims and arguments have been pursued. The guide takes lessons from this case law as well as identifying aspects of equality and non-discrimination law which have yet to be employed to advance ESRs before the courts. The guide has been influenced by several other excellent strategic litigation guides on other areas of human rights or on equality in specific jurisdictions, which are referenced throughout where they may provide further elaboration.

The guide comprises three parts. **Part 1** introduces the rights framework upon which the guide is predicated. **Part 2** identifies the conceptual and practical reasons why equality and non-discrimination arguments should be employed when challenging violations of ESRs. The bulk of the guide appears at **Part 3**, which is presented in the form of a framework to litigators seeking to raise equality arguments in relation to ESRs. It sets out eight key components for consideration by such litigators and is proposed as a tool to facilitate their work. The guide is accompanied by **appendices** which provide litigators with

some key reference documents, together with an **online case compendium** of useful cases in which equality or non-discrimination strategies have been employed in cases related to ESRs.

1. The Rights Framework

Socio-economic rights and the rights to equality and non-discrimination are enshrined in international human rights law.

The key source of ESRs in international human rights law is the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognises in its preamble that:

The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.

ICESCR protects everyone's rights to, *inter alia*: social security (article 9); an adequate standard of living – including food, clothing and housing (Article 11(1)); the highest attainable standard of physical and mental health (Article 12); and education (article 13). The Covenant is the starting point for this guide's categorisation of cases as ESR-related. However, the guide takes a broad approach to the interpretation of the relevant ESRs, in order to encompass the most progressive thinking on their content. For example, its understanding of the right to health incorporates more recent discourses in relation to the social determinants of health.

The fundamental rights to equality and non-discrimination are at the heart of human rights law and are enshrined in all major international and regional human rights treaties. Article 1 of the Universal Declaration of Human Rights provides that “[a]ll human beings are born free and equal in dignity and rights”. The guide makes reference to key equality and non-discrimination provisions in international and regional laws, including ICESCR, the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of Persons with Disabilities, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights and the African Charter on Human and People's Rights (ACHPR), amongst others.

Noting that the rights to equality and to non-discrimination are not identical in all provisions, and that litigators need to be aware of the particularities of their jurisdiction, the Trust applies the definitions of equality and non-discrimination set out in the Declaration of Principles on Equality as the basis for its analysis. This is because the Declaration represents a global consensus on the meaning of

equality and non-discrimination. However, variations in interpretations across jurisdictions are acknowledged throughout the guide.

2. Why Raise Equality Arguments to Challenge Socio-Economic Rights Violations?

This guide does not advocate that equality and non-discrimination are the only or the best claims that should be made in relation to ESRs. On the contrary, litigators can and should be seeking the realisation of ESRs in their own right. However, there are clear conceptual and practical reasons why equality arguments should sometimes be used either in conjunction with ESR claims – where they are possible – or as an alternative route where they are not.

- Many jurisdictions will provide a constitutional right to equality and/or non-discrimination but no constitutional ESRs. In such cases, there may be no alternative but to use the constitutional right to equality or non-discrimination, either in conjunction with any national legislation which provides for certain elements of ESRs, or on its own.
- Some jurisdictions benefit from detailed and progressive equality provisions in ordinary legislation which can provide avenues for claims which may further ESRs. Such legislation commonly prohibits, for example, discrimination in access to employment, in the provision of public services such as health and education, and in the exercise of public functions, such as taxation and the provision of social security. It may also provide clear causes of action against non-state actors and contain useful enforcement mechanisms.
- The conceptual link between equality and ESRs is clear. It is an accepted principle of international law that human rights are interdependent, interconnected and indivisible. The Committee on Economic Social and Cultural Rights (CESCR) has noted that equality and non-discrimination are “essential” for the realisation of ESRs. Many of the ESR issues most often tackled by activists are also problems of discrimination against historically disadvantaged groups. Poverty may be both a cause and a consequence of discrimination. Moreover, groups which are particularly vulnerable to status-based discrimination such as, in most contexts, women, ethnic minorities, non-nationals and people with disabilities, are overrepresented among the poor.
- The right to equality may have what can be described as a “ratchet effect” upon ESRs. Once the state has made ESR-related provisions for some, the right to equality may be used to argue that it must do so for others. This is the case even where the state is providing a higher standard of provision than it would be required to at the time under its ESR obligations.
- In many jurisdictions, the traditional human rights discourse – whereby civil and political rights impose negative duties and are justiciable and so-

cio-economic rights impose positive duties and are mere aspirations – is still central to the interpretation of rights by courts. This has an impact at the substantive and remedial stages of the claim. Firstly, an ESR claim which is demanding that state resources be dedicated to positive steps to achieve the right may be more likely to succeed if accompanied by a claim for non-discrimination. The state’s obligation to refrain from discriminating against historically disadvantaged groups is widely recognised and taken very seriously by the courts. It is a powerful argument to allege that a state’s failure to expend its resources constitutes a failure to refrain from unlawfully discriminating against a particular group. Secondly, at the remedial stage, courts are more willing to make orders requiring the expenditure of state resources to redress inequality than to further ESRs *per se*.

- The rights are mutually reinforcing. The rights to equality and non-discrimination create immediate obligations on the state, whereas ESRs are generally drafted so as to give rise to a right to the progressive realisation of each right, within the limits of available resources. Once a certain level of enjoyment of an ESR has been achieved for some, the state has a duty under its ESR obligations of non-regression, meaning that it cannot later reduce the level of enjoyment of the right. At the same time, its obligation not to discriminate in the provision of social services can be used to argue that the state should “level-up” the enjoyment social services for the less advantaged to that achieved by others.
- Some jurisdictions adopt the opinion of the CESCR that the substantive content of ESRs is restricted to “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights” (CESCR, General Comment No. 3). By contrast, the right to equality allows a claimant suffering from deprivation to claim not only a minimum essential level of economic and social provision, but to demand the same treatment as those within the state’s jurisdiction who enjoy the highest standard of ESRs.

3. Raising Equality Arguments in Relation to Socio-Economic Rights

The guide recognises the burden on those litigating cases relating to ESRs, given that the resulting jurisprudence may have significant implications for resource distribution by the state. It seeks to ease the burden on litigators working in jurisdictions around the world. Recognising that individual litigators are working in a variety of contexts, Part 3 is not a litigation strategy, but rather a guide for litigators developing their own contextualised strategies.

Part 3 identifies eight key components for consideration when developing litigation:

1. Available Forum
2. Appropriateness Assessment

3. Goal Setting
4. Claimants
5. Claims
6. Respondents
7. Remedies
8. Proof/evidence

Component 1 is the consideration of whether there is an available forum for bringing a claim of equality and/or non-discrimination in relation to an ESR. Litigators must determine whether a forum is available both **legally** (in terms of the claimant's standing and the causes of action available under the applicable laws) and **practically** (in terms, for example, of whether it attracts prohibitive costs, is too time consuming, has no efficacy in terms of enforcement, etc.). Litigators must also weigh the pros and cons of different forums to help choose when there is more than one available option. The international and regional forums which may be available for bringing equality or non-discrimination claims in relation to ESRs are identified in the guide, and litigators may wish to consider the benefits and weaknesses of each mechanism as discussed. In terms of national forums, there are many variations in the types of laws which may apply, from states which provide full constitutional protection to the rights to equality and ESRs, to states which have no constitutional protection for the rights but may have some relevant piece of national legislation (such as an Education Act). The particularities of the relevant jurisdiction will have an impact on the litigator's decision.

Component 2 is deciding whether it is appropriate to pursue litigation in the given instance. Litigation will not always be the appropriate or most effective course of action. Litigators will need to consider the interaction between litigation and other social and political strategies for addressing the matter. Strategic litigation may be a good organising point, bringing together actors on the ground, and prompting dialogue with states or other respondents. Will the litigation empower the disadvantaged groups? Democratic participation is a key element in the effective enforcement of ESRs and the right to equality. How well does the litigation fit in with the broader social and/or political strategy? Is this an optimal or appropriate time in the social and political context for bringing a case of the type or subject-matter envisaged? Is the litigator themselves the most appropriate person to bring the case or do the facts or circumstances mean that another individual would be better placed and more able to bring a successful case?

Component 3 is the setting of goals by the litigator. Litigators should consider what kind of judgment or negotiated settlement they want to emerge from the case in an ideal scenario. What gaps in the law are they seeking to close; what previous jurisprudence, if any, would they like overturned and with what should it be replaced; what type of remedy do they want the court to order and with what scope?

Component 4 is the identification of claimants. Where there is a choice between an individual and a collective complaint, the litigator will need to

consider what will have an impact on the largest number of disadvantaged people. Collective complaints often seek significant institutional or policy change. However, individual complaints, if appropriately selected, and depending on the legal system, may also have a knock-on impact on a large number of people.

Potential claimants in **equality claims** are those who suffer an adverse impact as a result of a failure by the person against whom their claim may be brought to uphold the obligation to treat all persons equally. Strategically, litigators may wish, rather than pick claimants with the aim of encapsulating every person who may be adversely impacted by the treatment in question, to pick claimants who represent a smaller but particularly sympathetic group and later seek to extend any protection granted by the court to others.

When **discrimination claims** are considered, claimants will be those who possess a particular “protected characteristic” or “ground” on the basis of which the law protects them from discrimination. There can be different approaches to the choice of grounds, including the use of better established grounds or emerging grounds such as socio-economic disadvantage. Four of the more traditional grounds of discrimination are particularly closely linked with a person’s socio-economic situation: sex, race, nationality/immigration status and disability. There have been useful cases in relation to each. For example, courts have required formal equality between men and women in social security, overcoming historical presumptions about sex roles in the family (e.g. *Zwaan-de Vries v The Netherlands*, Human Rights Committee); and have found that a failure to provide for the specific healthcare needs of women constitutes discrimination (*Alyne da Silva Pimentel v Brazil*, CEDAW Committee).

In certain cases, bringing a claim based on a traditional ground of discrimination would ignore other groups disadvantaged by a particular policy or status quo. There has been some, albeit limited, acknowledgment by adjudicating bodies of a ground of “socio-economic status” in relation to an economic or social right (*Alyne da Silva Pimental v Brazil*, CEDAW Committee; *International Movement ATD Fourth World v France*, European Committee of Social Rights). But litigators may also seek to develop the law further in this area.

Component 5 is the identification of the form of prohibited conduct. The typical forms of prohibited conduct violating the right to non-discrimination include direct and indirect discrimination, and denial of reasonable accommodation. Direct discrimination is less favourable treatment because of a protected ground (e.g. race: *Malawi Africa Association and Others v Mauritania*, African Commission on Human and People’s Rights (ACoMHPR)).

Indirect discrimination occurs where a provision, criterion or practice applies to everyone but places a person at a particular disadvantage because of their protected characteristic, and cannot be justified. Examples include a finding of indirect discrimination based on national origin in admission policies in higher education (*Commission of the European Communities v Austria*, Court of Justice of the European Union).

Denial of reasonable accommodation is a failure to make modifications or adjustments necessary in a particular case to ensure to persons with a particular protected characteristic the enjoyment or exercise, on an equal basis with others, of a social or economic right without imposing a disproportionate or undue burden. Examples include a finding that failure to reasonably accommodate the needs of deaf patients in the provision of healthcare by providing sign language interpreters is a violation of the right to equality (*Eldridge v British Columbia (Attorney General)*, Supreme Court of Canada).

The lack of positive action (also known as affirmative action or special measures) to overcome past disadvantage and to accelerate progress towards equality of particular groups can constitute a violation of the right to non-discrimination or the right to equality. Positive action measures are most commonly used to promote equality within the ambit of socio-economic rights such as, for example, in education, work, housing or health. Examples include the recognition of special protection and special consideration to the needs of the Roma due to their different lifestyle (*Orsus v Croatia*, European Court of Human Rights (ECtHR)).

Component 6 is the identification of the respondent to be held accountable for violating equality rights. Whilst this will often be states, non-state actors are increasingly performing public functions and/or operating in areas of life relating to ESRs, such as in the provision of employment or goods and services. Over time, the distinction between state and non-state actor is becoming less and less relevant when determining whether an obligation in relation to equal ESRs exists.

States are obliged to respect, protect and fulfil human rights. This includes obligations to prevent violations of human rights by non-state actors. If discrimination is due to flawed or missing regulation, state responsibility can be engaged. States have been held responsible for ESR-related violations due to the actions or omissions of non-state actors, by a number of international and regional mechanisms including by the Inter-American Court of Human Rights in *Yanomami v Brazil* and AComHPR in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*.

Non-State Actors have obligations stemming from a number of different sources. The preambles of both the ICCPR and the ICESCR recognise individual responsibility to strive for the promotion and observance of rights, a sentiment which has been echoed by other international bodies. Their obligations have also been recognised at a regional level by the European Union (e.g. Article 3(1) of the Racial Equality Directive) and the ACHPR (Article 27). Depending on the country, non-state actors may have obligations under the national constitution and/or under pieces of national legislation regulating certain functions or areas of life. For example, the South African Constitution defines “organs of state” to be any body (public or private) exercising a public function in terms of either legislation or the Constitution. Accordingly non-state actors providing social services in terms of legislation are directly bound by the provisions of the Constitution, including the Bill of Rights. Further, national anti-discrimination legislation often provides a useful path for holding non-state actors responsible for ensuring equal enjoy-

ment of ESRs. In the United Kingdom, for example, the Equality Act 2010 places some responsibility for non-discrimination with a number of different non-state actors including employers, service providers, associations and those carrying out public functions.

Litigators, when choosing which claims to bring against whom, will be influenced by factors such as the likelihood of success and the nature of the remedy. For example, at the substantive stage, there may only be limited causes of action against non-state actors. Whilst there is precedent for holding certain non-state actors directly to account for discrimination, unless the non-state actor is carrying out a “public function”, it will be a bigger challenge to argue that a non-state actor has an obligation to uphold the full right to equality.

Component 7 is the consideration of the possible **remedy** which could and should be sought. It is critical that remedies be effective, proportionate, dissuasive and appropriate. The achievement of effective remedies in ESR-related cases will often be challenging where the potential impact is to require a large expenditure of resources by states. The availability of remedies is also strongly context-dependent and varies from a legal perspective as well as from the perspective of legal and political culture.

Litigators in any jurisdiction will need to be mindful of the following overarching considerations in deciding which remedies to pursue:

- i. the aim of not only compensating individual claimants but also achieving wider social transformation;
- ii. the legal and political limitations on the power of the adjudicating body in question to award certain remedies and the remedies awarded previously by the body; and
- iii. the record of the relevant respondent in complying with the remedial decisions of the body in question.

Available remedies vary in their degree of coerciveness on the state from legislative remedies (e.g. striking down legislation or reading wording into it) and structural injunctions requiring the state to take particular actions, to simple declarations of a violation and symbolic remedies such as public apologies.

Litigators should encourage courts to issue purposive remedies and to be creative to ensure that remedies are transformative. Courts should also be encouraged, where appropriate, to seek the co-operation of the state to ensure that remedies are implemented.

Component 8 is the consideration of the burden and standard of proof to which the litigator will be held at the chosen forum, together with the evidence available to them, to ensure their case is as strong as possible as well as to determine whether there are any insurmountable hurdles to their bringing a claim. Litigators will often be required to prove a *prima facie* case of discrimination and factors such as some courts’ insistence on the existence of a comparator

may make this challenging. Forums which require litigators to prove their case “beyond reasonable doubt” as opposed to “on the balance of probabilities” may demand stronger evidence. However, the case law of the ECtHR shows that some courts may circumvent the higher standard imposed by relaxing their evidential standards, e.g. by showing willingness to draw inferences from circumstantial evidence. In considering the available evidence, litigators may need to be creative. They should consider the value of certain types of evidence for equality and discrimination claims, in particular the use of statistics, situation testing, NGOs’ and public bodies’ reports and pre-claim questionnaires (where available) in addition to witness statements.

INTRODUCTION

This guide represents the culmination of a two-year research project carried out by the Equal Rights Trust and funded by the Ford Foundation, the overall purpose of which has been to develop strategies for applying equality law concepts and approaches to the realisation of economic and social rights (ESRs). The project research and this resulting guide have focused on one such strategy: the use of inequality and discrimination claims in **litigation** to advance the realisation of ESRs.

Most of the literature and legal thought relating to ESRs seeks to establish the **extent to which** these rights are justiciable, and **how** they should be made justiciable in a legal regime. Rather than contributing to this body of literature, this guide seeks an **additional** route to securing enjoyment of ESRs, considering equality arguments and strategies to be complementary, rather than alternative, to claims for ESRs as such.

Methodology and Approach

The guide argues that there is a clear link between the fundamental right to equality and ESRs and that this link should be exploited to advance realisation of ESRs. Noting that the courts are one important forum in this respect, it explains how equality arguments can be used by strategic litigators to advance enjoyment of ESRs. It also explores the obstacles to doing so and explains how these might be overcome.

Arguments about the justiciability of ESRs focus primarily on those rights which imply the greatest expenditure of state resources, namely the right to **social security**, the right to **an adequate standard of living**, including adequate food, clothing, water and housing, the right to the **highest attainable standard of physical and mental health**, and the right to **education**. Accordingly, the guide focuses in particular on the implications of equality for the enjoyment of these rights.

The guide takes an inclusive approach to the right to equality, making reference to all elements of equality from the right to be free from direct discrimination to the right to require the state to take positive action to correct structural inequality. The elements are covered regardless of the extent to which they are justiciable around the world, although the extent of each element's justiciability is acknowledged as a key factor in deciding whether or not to use that element in a particular case. For example, it is noted that aspects of the right to be free from discrimination are more widely justiciable than the positive right to equality.

However, the use of the latter, where it is available, has contributed to some of the most progressive ESR-related judgments.

From a practical perspective, the guide primarily aims to assist litigators to use equality and non-discrimination strategies to advance ESRs before the courts through litigation. However, it is both acknowledged and emphasised that strategic litigation is neither central to the eradication of poverty nor a panacea. In order for unequal enjoyment of ESRs to be fully addressed, comprehensive legislative and policy change is needed. Poverty is a barrier to the enjoyment of rights and its eradication, which is essential to the equal enjoyment of ESR rights, is, after all, primarily a task for governments. Further, socio-economic disadvantage is itself a barrier to individuals and groups having equal access to the law for the purpose of upholding their rights. Having said this, strategic litigation takes its place as one of the range of tools available to achieve policy change, by holding governments to account. This guide seeks to help litigators to use this tool effectively once they have established that it is appropriate to use in a given case.¹

In order to provide comprehensive guidance, the Trust has researched the extent to which jurisprudence exists in which equality and/or non-discrimination have impacted on judgments which seek to advance ESRs. The guide provides examples of cases from key international and regional jurisdictions and the following national jurisdictions: Australia, Canada, Colombia, Germany, India, Ireland, South Africa, the United Kingdom and the United States of America. These national jurisdictions were selected on the basis of (a) the presence of justiciable ESRs and/or justiciable detailed anti-discrimination or equality legislation; and (b) the availability of relevant national jurisprudence. While this guide has attempted to be as inclusive as possible, it is by no means a comprehensive review of relevant jurisprudence in geographically diverse legal systems. In producing the guide, we have been influenced by a number of excellent guides to strategic litigation in various areas of human rights and non-discrimination.² While none of them cover the topic which we cover herein, they do have sections which may be of further value on specific issues or in relation to particular jurisdictions. We refer the reader to those guides as appropriate throughout.

The guide is split into three substantive parts and is accompanied by two appendices and an online technical appendix.³ The guide begins by providing some background to the rights in question and identifying the theoretical link

1 For a discussion of the interaction between strategic litigation and other possible tools for the achievement of change see 3.2 below.

2 For some examples see European Roma Rights Centre (ERRC), Interights and Migration Policy Group (MPG), *Strategic litigation of race discrimination in Europe: From principles to practice: A Manual on theory and practice of strategic litigation with particular reference to the EC Race Directive*, 2004; Children's Rights Information Network (CRIN), *Children's Rights: A Guide to Strategic Litigation*, 2009; Interights, *Non-Discrimination in International Law: A Handbook for Practitioners*, 2011; and Advocates for International Development, *Short Guide – Strategic Litigation and its role in promoting and protecting human rights*, 2012.

3 The Online Case Compendium contains further information on all of the cases referenced in this guide plus some others. It can be accessed through www.equalrightstrust.org.

between equality and ESRs (Part 1) before identifying the practical reasons why equality arguments should be raised to advance ESRs (Part 2). The guide then explores the key considerations for litigators seeking to use equality arguments in cases relating to ESRs (Part 3). The Declaration of Principles on Equality and the International Covenant on Economic Social and Cultural Rights are provided as appendices and the guide is accompanied by an online compendium of case-law, which is intended to give litigators a first point of call for research.⁴

4 *Ibid.*

1. THE RIGHTS FRAMEWORK

Socio-economic rights and the rights to equality and non-discrimination are enshrined in international human rights law. This Part provides a brief overview of the rights as protected at an international and regional level. It is supplemented by Appendices 1 and 2 and the online case compendium.⁵ Appendix 1 contains the Declaration of Principles on Equality and Appendix 2 contains the full text of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The online case compendium includes an overview of the national legal protections of the rights in the jurisdictions referenced in this guide.

1.1 Socio-Economic Rights

The key source of ESRs in international human rights law is the ICESCR, which recognises in its preamble that:

*The ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.*⁶

The ICESCR includes provisions on all of the rights which are the focus of this guide and it has been interpreted by authoritative sources such as courts and international and regional treaty bodies.⁷ Although this guide uses the ICESCR as the starting point for its categorisation of cases as ESR-related, it takes a broad approach to the interpretation of the relevant ESRs in order to encompass the most progressive thinking on their content.⁸

1.1.1 The Right to Social Security

Article 9 of the ICESCR provides that “the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance”.

5 *Ibid.*

6 The International Covenant on Economic, Social and Cultural Rights (ICESCR) appears at Appendix 2 to this guide. Please note that the Universal Declaration of Human Rights (UDHR) recognises certain socio-economic rights (Articles 23–27). Further, the preamble of the International Covenant on Civil and Political Rights (ICCPR), refers to the ideal of human beings being free from want and fear and the need for enjoyment of economic and social rights (ESRs) for its realisation.

7 For some case examples see the Online Case Compendium, above, note 3.

8 See for example, the discussion on the social determinants of health at Part 1.1.2 below.

The Committee on Economic, Social and Cultural Rights (CESCR) has stated, in its General Comment 19, that “social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion”.⁹

The right to social security is further enshrined in a number of other international instruments.¹⁰ For example, the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) requires states to take the necessary measures to ensure “the right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age”¹¹ and the Convention on the Rights of the Child (CRC) requires states to “recognise for every child the right to benefit from social security”.¹² In addition, a number of regional instruments also enshrine the right to social security.¹³

1.1.2 The Right to Health

Article 12 of the ICESCR states:

- 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:*
 - a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;*
 - b. The improvement of all aspects of environmental and industrial hygiene;*
 - c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

9 Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 19: The right to social security*, UN Doc. E/C.12/GC/19, 2008, Para 3.

10 International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Article 5(e) (iv); Convention for the Elimination of all Forms of Discrimination Against Women (CEDAW), Articles 11(1)(e) and 14(2)(c); and Convention on the Rights of the Child (CRC), Article 26. See also the Conventions adopted by the International Labour Organisation, including the Social Security (Minimum Standards) Convention, 1952 (No. 102).

11 CEDAW, Article 11(1)(e).

12 CRC, Article 26(1).

13 American Declaration of the Rights and Duties of Man, Article XVI; Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights (Protocol of San Salvador), Article 9; and European Social Charter (Revised) (RESC), Articles 12, 13 and 14.

The right to health is also enshrined, in various guises, in a number of other international and regional human rights instruments.¹⁴ Of particular note, several group-specific conventions oblige states to protect the right in a non-discriminatory manner. For example, the CEDAW requires states to take all appropriate measures to ensure on a “basis of equality of men and women, access to health care services, including those related to family planning”¹⁵ and requires states to ensure provision of “women appropriate services in connection with pregnancy, confinement and the post-natal period”¹⁶ and the Convention on the Rights of Persons with Disabilities (CRPD) requires non-discriminatory treatment and specialised services for all disabled people.¹⁷

The right to health is an inclusive right and its scope has been enunciated further over time. The Constitution of the World Health Organisation (WHO) defines health as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.¹⁸ In 2000, the CESCR, commenting on the scope of Article 12 of the ICESCR, stated that:

*[T]he right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.*¹⁹

Over the past decade, the WHO has driven a realisation that a recognition of the social determinants of health, such as where a person is from, their employment, their community and so on (the “structural determinants and conditions of daily life”²⁰) and a commitment to addressing their impact on a person is central to the realisation of the right to health.²¹ This is now the dominant paradigm. Past and present Special Rapporteurs on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health have also had a

14 ICERD, Article 5(e)(iv); CEDAW, Articles 11(1)(f) and 12; CRC, Article 24; UN General Assembly, *Vienna Declaration and Programme of Action* (Vienna Declaration), UN Doc. A/CONF.157/23, 1993, Part I, Para 31; RESC, Article 11; African Charter on Human and Peoples’ Rights (ACHPR), Article 16; and Protocol of San Salvador, Article 10.

15 CEDAW, Article 12(1).

16 *Ibid*, Article 12(2).

17 Convention on the Rights of Persons with Disabilities (CRPD), Article 25.

18 UN International Health Conference, *Constitution of the World Health Organization*, 1948.

19 CESCR, *General Comment No. 14: The right to the highest attainable standard of health (Art 12 of Covenant)*, UN Doc. E/C.12/2000/4, 2000, Para 4.

20 Commission on Social Determinants of Health, World Health Organisation (WHO), *Closing the Gap in a Generation; Health Equity through Action on the Social Determinants of Health*, 2008, p. 1.

21 For further information see: 62nd World Health Assembly, Agenda Item 12.5, *Reducing Health Inequities through Action on the Social Determinants of Health*, 2009; World Conference on Social Determinants of Health, WHO, *Rio Political Declaration on Social Determinants of Health*, 2011; and WHO, *Report by the Secretariat: Social Determinants of Health*, 132nd Session, Provisional Agenda Item 7.3, 2012.

seminal influence on the development of the meaning of the right.²² As a result of the influence of the “social determinants” paradigm, there is a focus on health equity which places equality as a central concern in realising the right to health.

1.1.3 The Right to Education

Article 13 of the ICESCR includes the following state obligations:

1. *The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*
2. *The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:*
 - a. *Primary education shall be compulsory and available free to all;*
 - b. *Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;*
 - c. *Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;*
 - d. *Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;*
 - e. *The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.*

In its General Comment 13, the CESCR declared that:

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially

22 Of note, the reports of the Special Rapporteur may be of particular use to those litigating health-related cases. The reports are available at: <http://www.ohchr.org/EN/Issues/Health/Pages/SRRRightHealthIndex.aspx>.

*marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.*²³

The equal right to education is recognised in a number of other international and regional human rights instruments.²⁴ The CEDAW offers specific provisions aimed at the full realisation of the right to education for all women. Article 10 of the CEDAW sets out the various aspects of the right to education for women including: ensuring them the same conditions as men for “access to studies and for the achievement of diplomas in educational establishments of all categories”,²⁵ and the elimination of any stereotyped concept of the roles of men and women at all levels, through “encouraging coeducation” and “other types of education which will help to achieve this aim”.²⁶ The CRC is a rich source of detailed and extensive rights of children to education. Amongst other things, it requires primary education to be compulsory and free for all,²⁷ education to be progressively developed at secondary level²⁸ and higher education to be accessible to all.²⁹ States are required to ensure that children are educated in such a way as to prepare them

*[F]or responsible life in a free society in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin.*³⁰

Particular aspects of the right to education have been elaborated upon further through the reports of the UN Special Rapporteur on the right to education. These include specific aspects of girls’ right to education and the right to education of migrants, refugees and asylum seekers.³¹

1.1.4 The Right to an Adequate Standard of Living

Article 11(1) of the ICESCR states:

The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his

23 CESCR, *General Comment No. 13: The Right to Education (Art. 13 of the Covenant)*, UN Doc. E/C.12/1999/10, 1999, Para 1.

24 *Ibid*, Para 13; CEDAW, Article 10; CRC, Article 29; ACHPR, Articles 12 and 17; Charter of Fundamental Rights of the European Union, Articles 2, 13, 14 and 32; CPRD, Article 24; and RESC, Articles 7(3) and 17(2).

25 CEDAW, Article 10(1)(a).

26 *Ibid*, Article 10(1)(c).

27 CRC, Article 28(a).

28 *Ibid*, Article 28(b).

29 *Ibid*, Article 28(c).

30 *Ibid*, Article 29(d).

31 UN Commission on Human Rights, *Girls’ right to education, Report submitted by the Special Rapporteur on the Right to Education, Mr. V. Muñoz Villalobos*, UN Doc. E/CN.4/2006/45, 2006; and United Nations Human Rights Council, *The right to education of migrants, refugees and asylum seekers, Report of the Special Rapporteur on the Right to Education, Vernor Munoz*, UN Doc. A/HRC/14/25, 2010.

family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

The CESCR has asserted that the ICESCR's recognition of the right to an "adequate" standard of living in Article 11(1) is not limited to the matters it explicitly lists, but further extends to incorporate the right to water.³²

The right to an adequate standard of living, or more limited elements of the right such as the right to food, are also protected under a number of other international and regional instruments.³³ For example, Article 14 of the CEDAW requires states to:

[E]liminate discrimination against women in rural areas (...) to ensure (...) the right (...) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Under Article 27 of the CRC, "States Parties recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development". Additionally, Special Rapporteurs have explored discrimination and unequal access to aspects of the right. For example, the Special Rapporteur on adequate housing has considered the right to housing of women and the extent to which discrimination persists more generally in relation to the right.³⁴ The Special Rapporteur on the right to food has also produced a detailed report on the link between gender discrimination and the right to food.³⁵

1.2 The Rights to Equality and Non-discrimination

The fundamental rights to equality and non-discrimination are at the heart of human rights law and are enshrined in all major international and regional

32 CESCR, *General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant)*, UN Doc. E/C.12/2002/11, 2003.

33 CESCR, *General Comment No. 12: The right to adequate food (art. 11)*, UN Doc. E/C.12/1999/5, 1999; CRC, Article 2; CEDAW, Article 14; UDHR, Article 25; Protocol of San Salvador, Article 12; and European Social Charter (ESC), Articles 4, 16 and 19; RESC, Article 4, 16, 19 and 31.

34 See UN Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr. Miloön Kathari*, UN Doc. E/CN.4/2002/59, 2002; and Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Raquel Rolnik*, UN Doc. A/HRC/19/53, 2011.

35 Human Rights Council, *Women's rights and the right to food, Report submitted by the Special Rapporteur on the right to food, Olivier De Schutter*, UN Doc. A/HRC/22/50, 2012.

human rights treaties. According to the Universal Declaration of Human Rights (UDHR), “[a]ll human beings are born free and equal in dignity and rights.”³⁶

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) enshrines freestanding rights to equality and non-discrimination in all areas of life, including those falling within the ambit of economic and social rights:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) of the ICESCR obligates states to guarantee the ESRs contained within it “without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Most other international human rights instruments contain a right to equality and/or non-discrimination and there are a number of conventions dedicated to the eradication of inequalities faced by particularly disadvantaged groups. These conventions – the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),³⁷ CEDAW,³⁸ CRPD,³⁹ and CRC⁴⁰ – all also make explicit reference to particular ESRs that are also protected under the ICESCR, requiring that states undertake to ensure their enjoyment without discrimination.

In addition, regional treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocol 12, the European Social Charter (Revised) (RESC), the American Convention on Human Rights (ACHR) and the African Charter on Human and People’s Rights (ACHPR), protect the rights to equality and non-discrimination.

Not all provisions for the rights to equality and non-discrimination are identical and each has been the subject of significant jurisprudence and commentary.

36 UDHR, Article 1.

37 Article 5(e) of ICERD requires states to guarantee, without discrimination on grounds of race, enjoyment of economic, social and cultural rights, including the rights to work, to form and join trade unions, to housing, to healthcare, to social security and social services and to education and training.

38 CEDAW, Articles 10, 11, 12 and 13. These Articles require states to eliminate discrimination against women in the areas of education, employment, health and economic and social benefits respectively.

39 CRPD, Articles 24, 25, 27 and 28. Under these Articles, state parties recognise the rights of persons with disabilities to education, health, work and employment and to an adequate standard of living and social protection, and agree to take steps to realise these rights.

40 CRC, Articles 24, 26, 27 and 28. Under these Articles, state parties recognise the rights of every child to the highest attainable standard of healthcare, to benefit from social security and social insurance, to an adequate standard of living and to education, and agree to take steps to realise these rights.

In 2008, in a process facilitated by the Equal Rights Trust, 128 human rights and equality experts from 47 countries in different regions of the world consulted and agreed on a set of principles of equality: the Declaration of Principles on Equality. The Declaration promotes a unified approach to equality and non-discrimination and its principles are “based on concepts and jurisprudence developed in international, regional and national contexts”.⁴¹ It has been endorsed and/or cited at a judicial or legislative level in some jurisdictions.⁴² Principle 1 of the Declaration defines the right to equality:

The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.

The Declaration also elaborates on the content of the right to equality. For example, Principle 3 identifies that positive action “is a necessary element” within the right.

Principle 4 of the Declaration states that the right to non-discrimination is a “free-standing, fundamental right, subsumed within the right to equality”. Principle 5 provides a comprehensive definition of prohibited discrimination which includes the prohibition of direct and indirect discrimination and harassment on the basis of a list of grounds, combinations of grounds and possible unidentified grounds.

This guide uses the definitions of equality and non-discrimination adopted in the Declaration as the compass for its analysis of the use of equality and non-discrimination strategies to advance ESRs. However, the guide acknowledges and identifies jurisdictional particularities throughout its analysis as appropriate, recognising that strategic litigators will be mindful of the law both as it is and as they may wish it to be interpreted to be.

41 The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, p. 2.

42 In 2008, CESCR made use of a number of the key concepts from the Declaration in its *General Comment No. 20: Non-Discrimination in economic, social and cultural rights*, UN Doc. E/C.12/GC/20, 2008. In 2009, the High Court of Delhi relied in part on the Declaration, in the landmark case of *Naz Foundation v Government of NCT of Delhi and Others WP(C)* No. 7455/2001, which declared the criminalisation of homosexuality unconstitutional. In 2011, the Parliamentary Assembly of the Council of Europe adopted Resolution 1844 calling on the 47 Council of Europe member states to take the Declaration into account when developing equality law and policy (see <http://www.assembly.coe.int/Main.asp?link=/Documents/Adopted-Text/ta11/ERES1844.htm>).

2. WHY RAISE EQUALITY ARGUMENTS TO CHALLENGE SOCIO-ECONOMIC RIGHTS VIOLATIONS?

There has been considerable disagreement among human rights advocates regarding the justiciability of ESRs and the debate has been described as “old and well-worn”.⁴³ Some authors express scepticism about the validity of ESRs. In Neier’s view, for example, aside from narrow and specific constitutional rights such as a right to free primary education, “unfair economic distribution” is only a matter for a justiciable right to the extent that there is an element of invidious discrimination involved.⁴⁴ This guide is based on the more widely shared view that litigators can and should be seeking the realisation through the courts of ESRs in their own “right”, as it were, by claiming violations of these rights. Having said that, as this Part 2 identifies, there are compelling conceptual and practical reasons why equality and non-discrimination arguments should sometimes be used to challenge violations of ESRs either in conjunction with ESRs – where they are available – or as an alternative route where they are not. Many of the practical reasons arise due to outdated human rights concepts and discourses which, although contested as conceptually inaccurate or misleading, continue to influence jurisprudence in certain jurisdictions.

2.1 Absence of Socio-Economic Rights Protected by Law

While many states have ordinary legislation which provides for certain aspects of ESRs, at the constitutional level only some states have enshrined ESRs and many states have only incorporated civil and political rights into a domestic Bill of Rights.⁴⁵ In cases where only civil and political rights have been enshrined, the right to equality, classified as one such right, will form part of the constitution, while ESRs are absent.

For states which have incorporated both civil and political rights and ESRs into their constitution, the operational provisions governing the application of those rights in the domestic legal order may nevertheless distinguish between the effect of civil and political rights and that of ESRs, in such a way that the latter do

⁴³ Nolan, A., Porter, B. and Langford, M., “The Justiciability of Social and Economic Rights: An Updated Appraisal”, *Center for Human Rights and Global Justice*, Working Paper Number 15, 2007, p. 1.

⁴⁴ Neier, A., “Social and Economic Rights: A Critique”, *Human Rights Brief*, Vol. 13, No. 2, 2006, pp 1–3.

⁴⁵ For further discussion see Part 3 below.

not give rise to a cause of action exercisable by claimants. For example, in India, there is a distinction between “fundamental rights” and “directive principles of state policy”. The majority of ESRs in India are “directive principles of state policy”, which are, according to the express terms of the Constitution, not directly enforceable by any court.⁴⁶ Rather, the Constitution provides that it is the duty of the state to apply those principles in making laws. By contrast, the right to equality is a “fundamental right” under the Constitution. Although Indian courts can read “directive principles” into “fundamental rights”, litigators must make additional argumentation to ensure individual courts do so in a given case and this does not fully negate the constitutional hierarchy of rights created by the distinction.⁴⁷ In Ireland, too, the “directive principles of social policy” in the Constitution, which include most ESRs, are not “cognisable by any Court”.⁴⁸ For practical reasons in certain jurisdictions, therefore, in order to seek constitutional protection, litigators may be forced to rely primarily upon civil and political rights, including the right to equality, in challenging ESR violations.

2.2 Progressive Equality Legislation Available

In some jurisdictions, the constitutional right to equality is further protected through detailed provisions in ordinary legislation which can be progressive and provide avenues for claims in relation to ESR violations which would otherwise be unavailable.⁴⁹ In practice, to win a claim under equality or anti-discrimination legislation will often promote the realisation of ESRs, because such legislation prohibits discrimination within the ambit of ESRs. It commonly prohibits, for example, discrimination in access to employment, in the provision of public services such as health and education, and in the exercise of public functions, such as taxation and the provision of social security.

There can be particular benefits to litigators in relying on specialised equality legislation to advance ESRs. Firstly, whilst states retain ultimate responsibility for guaranteeing ESRs, in practice non-state actors play an increasingly important role in influencing the extent to which people enjoy ESRs. While most national constitutions do not provide an explicit cause of action against non-state actors,⁵⁰ non-discrimination legislation often does so. Using equality or non-discrimination legislation may be the only option for holding such actors to account.⁵¹

46 Constitution of India, Article 37.

47 For more discussion of the Indian case law on this issue, see 3.1 below. See also Article 31C of the Constitution as introduced by 25th Amendment to the Constitution of India.

48 Constitution of Ireland, Article 45.

49 See 3.1 below for a discussion of the various ways in which ESRs may be protected in law – from their protection in national constitutions through to individual pieces of national legislation.

50 Cf Constitution of the Republic of South Africa which provides such a cause of action at Section 8. For further discussion of bringing action against non-state actors see 3.6 below.

51 For a full discussion of the ability to hold private actors to account see 3.6 below.

Secondly, the most progressive equality legislation often provides for particular enforcement mechanisms, to make justice accessible for the relatively powerless victims of discrimination. These can include provisions for class or representative actions, and are often designed to keep the cost and procedural burdens of bringing a claim to a minimum.

Finally, although there is a mixed record of courts recognising that the right to equality demands positive duties under international and constitutional law, positive duties in pursuit of the right are explicitly included in progressive equality legislation. Accordingly, the national courts have a clear instruction from the legislature to uphold positive obligations. There are two key examples:

- some such legislation requires the state to proactively eliminate inequality and discrimination – for example, the UK Equality Act 2010 includes a provision requiring the public authorities, in the exercise of their functions, to have due regard to the need to “eliminate discrimination” and “advance equality of opportunity” among other things; and
- some equality legislation includes measures providing for positive (affirmative) action. In practice, these can have the effect of enhancing realisation of ESRs. In particular, these provide a tool with which to tackle macroeconomic decisions and policies, in respect of which it may be difficult to bring a discrimination claim.

2.3 Links between Equality and Socio-Economic Rights

It is an accepted principle of international law that human rights are interdependent, interconnected and indivisible. As Article 5 of the Vienna Declaration on Human Rights states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

The interconnected and indivisible nature of equality and ESRs is particularly marked and De Vos has described them as “two sides of the same coin”.⁵² Sandra Liebenberg considers that the “mutually reinforcing relationship between socio-economic rights and the right to equality (...) should find expression in the interpretation of both rights”.⁵³ The CESCR appears to agree. It has stated that equality and non-discrimination are “essential” for the realisation of ESRs, highlighting that not only does the ICESCR explicitly protect the right to be free

52 De Vos, P., “Grootboom: The Right of Access to Housing and Substantive Equality as Contextual Fairness”, *South African Journal on Human Rights*, Vol. 17, 2001, p. 265.

53 Liebenberg, S., *Socio-Economic Rights: Adjudication under a Transformative Constitution*, Juta and Co. Ltd, 2010.

from discrimination at Article 2, but also that several other substantive rights provide for equality.⁵⁴

The link between equality and non-discrimination and ESRs exists at a number of levels. Firstly, the link between discrimination based on historic disadvantage (e.g. race and sex discrimination) and socio-economic disadvantage is “more than familiar”.⁵⁵ The CESCR has stressed the importance of the right to non-discrimination in the application of rights related to, *inter alia*, housing, food, education and health⁵⁶ and has stated that “individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical (...) forms of discrimination”.⁵⁷ Many of the ESR issues most often tackled by activists are also problems of discrimination against historically disadvantaged groups. For example, issues such as the forced eviction of indigenous persons from traditional lands, barriers facing persons with disabilities in accessing public services, the eviction of Roma persons, the denial of public services and social security to non-nationals, maternal deaths, rights to sexual and reproductive health, access to HIV treatments and linguistic rights in education, all have a very clear discrimination angle.

Secondly, the link between ESRs and discrimination on some less traditionally recognised grounds is evident. Properly understood, the right to non-discrimination protects people from discrimination on any ground:

*[W]here such discrimination (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on [already recognised grounds].*⁵⁸

The CESCR has identified that socio-economic inequality is often caused by “contemporary” forms of discrimination.⁵⁹ Considering “economic and social situation” as a ground on which discrimination is prohibited, the CESCR notes:

54 CESCR, above, note 42, Paras 2 and 4. Article 3 requires States to undertake to ensure the equal right of men and women to enjoy the Covenant rights and Article 7 includes the “right to equal remuneration for work of equal value” and “equal opportunity for everyone to be promoted” in employment. Article 10 stipulates that, *inter alia*, mothers should be accorded special protection during a reasonable period before and after childbirth and that special measures of protection and assistance should be taken for children and young persons without discrimination. Article 13 recognises that “primary education shall be compulsory and available free to all” and provides that “higher education shall be made equally accessible to all”.

55 Fredman, S., *Human Rights Transformed: Positive Rights and Positive Duties*, Oxford University Press, 2008, p. 177.

56 See above, notes 19, 23 and 33; CESCR, *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)*, UN Doc. E/1992/23, 1992; and CESCR, *General Comment No. 7: The right to adequate housing: forced evictions*, UN Doc. 1998/22, 1997.

57 See CESCR, above, note 42, Para 1.

58 See above, note 41, Principle 5.

59 See CESCR, above, note 42, Para 1.

A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.⁶⁰

In this respect, the intersection between discrimination and non-enjoyment of ESRs is clear. Poverty may not only be a consequence of discrimination but also a cause of it.⁶¹ Groups which are particularly vulnerable to status-based discrimination such as women, non-nationals and people with disabilities are overrepresented among the poor, but those who are poor also often find themselves to be victims of discrimination in the provision of social services, on the grounds of their poverty.

Finally and crucially, the unified human rights framework on equality postulates a right to equality which is broader than the prohibition of discrimination. As Fredman identifies, it encompasses both positive and negative human rights duties.⁶² In addition to prohibiting discrimination, the right to equality requires that positive action be taken to “overcome past disadvantage and to accelerate progress towards equality of particular groups”.⁶³ In this regard, Wesson describes the connection between equality and ESRs as concerning “the principle that preference should be accorded to those who are worst off”.⁶⁴ A person’s fundamental right to equality cannot be achieved if he or she is homeless or starving. Realising their right to equality requires that their economic disadvantage be acknowledged and that positive action be taken to realise their rights to housing and food. It is not necessarily sufficient for the state to treat all people the same in the provision of a particular social service. On the contrary, realising equality may require that additional resources be allocated to socio-economically disadvantaged groups. As the South African Constitutional Court has rightly recognised, it is necessary and appropriate for the state “to differentiate between people and groups of people in society by classification” in order to “provide efficient and effective delivery of social services”.⁶⁵ These differentiations must not be “arbitrary or irrational”, nor “manifest a naked preference”.⁶⁶ The positive duties to achieve equality demand a focus on relevantly disadvantaged individuals and groups. Such a focus, properly applied, will be both appropriately targeted and rational.⁶⁷

60 *Ibid*, Para 38.

61 See above, note 41, Principle 14.

62 See above, note 55, p. 175.

63 See above, note 41, Principle 3.

64 Wesson, M., “Discrimination Law and Social Rights: Intersections and Possibilities”, *Juridica International*, Vol. XIII, 2007, p. 82.

65 *Khosa and Others v Minister of Social Development & Others*, 2004(6) BCLR 569 (CC), Para 53.

66 *Ibid*.

67 For some discussion of the approach to testing the rationality of a classification in the Indian courts see the cases on the classification doctrine, including *Anwar Ali Sakhar v The State of West Bengal* AIR 1952 Cal 150. While a proportionality and arbitrariness approach now applies in India, the classification doctrine remains good law.

2.4 Immediate Obligation to Ensure Equality

ESRs and the right to equality are mutually-reinforcing and there are numerous reasons why a litigator may wish to plead both concurrently, where both are available. The rights to equality and non-discrimination create immediate obligations on the state.⁶⁸ By contrast, ESRs are generally drafted so as to give rise to a right to the progressive realisation of each right, within the limits of available resources. In this context, one of the few obligations of immediate effect in relation to ESRs is the obligation to “take steps” towards realisation of the rights. One consequence of this is that there can tend to be a focus on the state’s compliance with “obligations of conduct” - the steps taken to realise the right in question – rather than outcomes – the extent to which the right is enjoyed.

As a result of this obligation of “realisation over time”,⁶⁹ it is difficult to say at any given time how much progress the state should have made, and thus whether the substance of the right has been violated. However, there is “an immediate obligation to respect and ensure”⁷⁰ civil and political rights, including the right to be free from discrimination in all areas of life normally regulated by law.⁷¹ This right applies to those areas of life which fall within the ambit of ESR, such as employment, education, health and social security. Coupling an ESR claim with an equality or non-discrimination claim where appropriate may help a litigator to argue that the steps taken by a state towards progressive realisation will not be sufficient if they are discriminatory. Further, it is not necessary to show a breach of an ESR right in order to show that the right to non-discrimination has been violated.⁷² Accordingly, even if the ESR claim fails, the parallel equality/non-discrimination claim may still succeed.⁷³

The mutually-reinforcing nature of equality and ESRs means that the requirement of “progressive realisation” attached to ESRs can be used to ensure that there is no slipping back in relation to the level of ESR provision in a given state. This is particularly valuable. It mitigates against one of the dangers of bringing an ill-considered equality claim, namely that the state may seek to achieve equality by “levelling-down” the provision of a particular service. For example,

68 See CESCR, above, note 42, Para 7.

69 CESCR, *General Comment No. 3: The nature of States parties’ obligations (art. 2, para. 1, of the Covenant)*, UN Doc. 1991/23, 1990, Para 9.

70 *Ibid.*

71 *Ibid.* See also CESCR, above, note 42, Para 7; ICCPR, Article 26; and Human Rights Committee (HRC), *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add. 13, 2004, Paras 5 and 14.

72 This is because a state may have provided sufficient water, for example, to meet its obligations under the right to water, but may be providing it on an unequal basis (i.e. with some select people getting a better supply than is required under the right to water) such that a discrimination claim may still be able to succeed.

73 European Court of Human Rights (ECtHR), *Case “Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium” v Belgium* (Merits) (Application no. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), 23 July 1986, p. 30; ECtHR, *Case of Abdulaziz, Cabales and Balkandali v The United Kingdom* (Application no. 9214/80; 9473/81; 9474/81), 28 May 1985; and *Case of D.H. and Others v the Czech Republic*, (Application no. 57325/00), 13 November 2007.

rather than providing all persons with the level of healthcare received by the most advantaged, the state may reduce the level of healthcare provision for all to that received by the least advantaged resulting in a net decrease in the health of its citizens whilst ensuring that they are equally treated to a lower standard of healthcare.⁷⁴

2.5 Maximising Enjoyment of Socio-Economic Rights: the Ratchet Effect

The right to equality may have what can be described as a “ratchet effect” upon ESRs. The state is required to “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights”.⁷⁵ Once it has done so for some, the right to equality may be used to argue that it must do so for others. Further, any provision beyond the “minimum essential level” to one group within society may be the basis of a claim that another group has an equal right to that same level of provision.

For example, under the ECHR, whilst the state has no duty to provide ESRs, the European Court of Human Rights (ECtHR) has found in a number of cases that where the state does make certain ESR-related provisions, it is obliged by Article 14 of the ECHR (non-discrimination) to do so on a non-discriminatory basis.⁷⁶ The rights to equality and non-discrimination, therefore, complement ESRs and can be used as part of a strategy to ensure the highest possible socio-economic standards.

2.6 Traditional Discourse: Impact of Positive/Negative Duties Paradigm

In many jurisdictions, an outdated human rights discourse is still central to the interpretation of rights by courts and its impact is such that it may be beneficial to raise equality in relation to ESRs.

In the past, there was a widespread misconception that there existed a rights dichotomy whereby each right was considered to belong in one of two groups: the group of civil and political rights, or that of economic, social and cultural rights. Each of these two groups was seen as attracting different substantive obligations: civil and political rights imposed negative duties upon states to refrain from particular actions, whereas socio-economic rights imposed positive duties

74 For a consideration of some US equality cases which have resulted in “levelling-down” see Brake, D.L., “When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law”, *William and Mary Law Review*, Volume 46, 2004, pp. 513–573. Brake also makes some useful arguments as to why levelling-down has no place in equality law.

75 See above, note 69, Para 10.

76 ECtHR, *Stec and Others v the United Kingdom* (Admissibility) (Application no. 65731/01 and 65900/01), 6 July 2005, Para 55; and ECtHR, *Case of Andrejeva v Latvia* (Application no. 55707/00), 18 February 2009, Para 79.

on the state to take action to realise the rights. The former were seen as justifiable obligations of restraint by the state, which courts should uphold, and the latter were often presented as mere aspirations, the realisation of which was a matter for state policy but not the courts. Today, it is increasingly recognised that this is a false and unhelpful distinction and is not one that is made in the human rights instruments themselves. As Fredman has argued compellingly: “instead of drawing distinctions between civil and political and socio-economic rights, it is preferable to focus on the positive duties that arise from all rights”.⁷⁷ The right to equality implies that the state take positive action rather than simply refraining from certain acts. Likewise, the achievement of ESRs will in some cases require restraint by the state, e.g. not closing down certain schools in a district.

This said, the above unhelpful distinctions persist amongst many governments and courts. This has two key impacts. Firstly, claims such as those for non-discrimination – which is traditionally construed as a civil right demanding restraint on the part of the state – are more likely to be considered by a court to be within its powers of adjudication than claims which ask a court to require a government to allocate resources to a particular course of action.⁷⁸ The state’s obligation to refrain from discriminating against historically disadvantaged groups is widely recognised and taken very seriously by the courts. To this extent, an ESR claim which demands that state resources be dedicated to achieving the right may be more likely to be successful if accompanied by a claim that a failure by the state to do this would constitute a state failure to refrain from unlawfully discriminating against a particular group.⁷⁹

Secondly, as Jackman points out when criticising the approach of the Canadian courts to ESRs: “judicial adherence to a traditional positive/negative rights paradigm (...) has had perverse effects at a remedial level”.⁸⁰ For example, in the case of *Victoria (City) v Adams*,⁸¹ although the Supreme Court of British Columbia found that a bylaw prohibiting the erection of temporary shelters such as tents overnight in public places violated the constitutional right to housing of homeless people who had no other means of shelter, the case was “framed and decided in a way that reinforced (...) the traditional positive/negative rights framework” resulting in inadequate remedies with “discriminatory implications”.⁸² The remedial outcome, rather than requiring the state to ensure that there were sufficient shelter spaces for its homeless population, was to oblige the state to refrain from taking action to stop homeless people from erecting

77 See above, note 55, p. 204.

78 It is notable that the “global south” tends to place a higher emphasis on ESRs than the “global north” and, with its younger constitutions, is more likely to recognise all rights on an equal footing.

79 This is well illustrated by a series of successful cases brought under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on housing, education and welfare. See above, note 55, pp. 186–189.

80 Jackman, M., “Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box?”, in Sharpe, R. J., and Roach, K. (eds), *Taking Remedies Seriously*, Canadian Institute for the Administration of Justice, 2010, p. 25.

81 *Victoria (City) v Adams*, 2008, BCSC 1363.

82 See above, note 80, p. 14.

temporary shelter overnight. Such a decision, as Jackman points out, does not help particularly vulnerable groups such as some women and families with children who can neither get a shelter place nor sleep out-of-doors and does not ensure the equal protection and benefit of rights.⁸³

By contrast, judicial bodies seem far more comfortable making orders requiring expenditure in response to a finding of inequality. Cases where substantive equality is raised may result in remedies which are more appropriate and tailored to the needs of the group in question and also ones which are transformative, impacting on a wider group than only the claimants. Jackman notes this to be the case in judgments relating to the equality guarantee under Section 15 of the Canadian Constitution.⁸⁴

One of the greatest difficulties for courts in the terrain of positive duties is legitimately deciding what they should require governments to do. When the court is faced with an equality claim, particularly a claim of discrimination, it can normally make that decision on the basis of the nature of the discrimination. In an equality claim, the court is often considering something that the government has done for some but not for others. The court's role in finding an appropriate remedy does not therefore require it to engineer social programmes. This makes it easier for courts to intervene and find a remedy. For example, in *Khosa and Others v The Minister of Social Development and Others*, the Constitutional Court of South Africa held that denial of certain social security benefits to non-citizens was unconstitutional: the importance of providing social assistance to all residents outweighed the financial and immigration concerns relied upon by the state.⁸⁵ Courts may also be more willing to expand the scope of civil and political rights to cover aspects of economic and social life when there is a claim of equality attached.⁸⁶

In summary, as a result of the continued use of the positive/negative paradigm by many courts, a claim which highlights the equality angle of a particular deprivation of an ESR is more likely to be upheld than one which does not. Further, even if a non-equality aspect of an ESR is upheld, it is less likely to result in a remedy which is effective in dealing with the factors which led to the deprivation of the ESR.

2.7 Minimum Core versus Equal Treatment

The CESCR, seeking a solution to the difficulty of establishing the scope of the substantive content of ESRs, has opined that each ESR implies “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential lev-

83 *Ibid*, pp. 14–15.

84 *Ibid*, pp. 15–24.

85 See above, note 65.

86 For example, see ECtHR, *Sidabras and Džiautas v Lithuania* (Application no. 55480/00 and 59330/00), 27 October 2004.

els of each of the rights”.⁸⁷ This interpretation is not accepted by all and has been criticised for encouraging courts and states to concentrate on whether standards have fallen below a minimum level, rather than whether the right has been fully realised.⁸⁸ Nevertheless, it is an approach which is followed by some and which limits the potential of ESRs where it is followed.⁸⁹

By contrast, the right to equality allows a claimant suffering from deprivation to claim not only a minimum essential level of economic and social provision, but to demand the same treatment as those within the state’s jurisdiction who enjoy the highest standard of ESRs. Where the “core minimum” approach to ESRs is applied and some persons within the state’s jurisdiction enjoy ESRs to a standard beyond that implied by the “core minimum”, those suffering deprivation, by bringing an equality claim based on the notion of equal treatment, may be entitled to enjoy that higher standard.

87 See above, note 69, Para 10.

88 See Lehmann, K., “In Defense of the Constitutional Court: Litigating Socio-Economic Rights and the Myth of the Minimum Core”, *American University International Law Review*, Vol. 22 No 1, 2006, pp. 163–197; Young, K., “The Minimum Core of Economic and Social Rights: A Concept in Search of Content”, *Yale Journal of International Law*, Vol. 33, 2008, pp. 113–175; and Kende, M.S., “The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics”, *Connecticut Journal of International Law*, Vol. 19, 2004, pp. 617–624.

89 Pieterse, M., “Eating Socio-Economic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited”, *Human Rights Quarterly*, Vol. 29, 2007, pp. 796–822; and Bilchitz, D., “Giving Socio-Economic Rights Teeth: The Minimum Core and its Importance”, *South African Law Journal*, Vol. 119, 2002, pp. 484–581.

3. RAISING EQUALITY ARGUMENTS IN RELATION TO SOCIO-ECONOMIC RIGHTS

Litigators of cases relating to ESRs have a particularly heavy burden. The resulting jurisprudence may have significant implications for resource distribution by the state with courts sometimes requiring allocation of resources in order to rectify a violation.⁹⁰ The need for a strategic approach is palpable. In a detailed study for the World Bank of the distributive impact of socio-economic rights litigation, Gauri and Brinks found that of the five countries examined, only two had pro-poor distributive impacts (South Africa and India), with two being distribution neutral (Brazil and Indonesia) and one being “sharply anti-poor” (Nigeria).⁹¹ The appropriate use of equality and anti-discrimination strategies in ESR cases may mitigate against anti-poor outcomes.

This Part sets out practical guidance for litigators seeking to use equality and anti-discrimination strategies to enforce ESRs, either as a complement to ESR claims where such claims are justiciable, or as an alternative where they are not. It is **guidance for litigators, not a litigation strategy**. The guide’s global coverage demands a level of generality, while individual litigators are operating in a variety of contexts. The rights discussed in the guide are available, applied and interpreted to varying extents and in varying ways across jurisdictions. Accordingly, it would be unwise to pursue strategies elaborated in advance and in the abstract. Instead, Part 3 acts as a starting point for litigators developing their own contextualised strategies.

Part 3 identifies eight key components for consideration when developing litigation:

1. Available Forum
2. Appropriateness Assessment
3. Goal Setting
4. Claimants
5. Claims
6. Respondents
7. Remedies
8. Proof/Evidence

⁹⁰ See 3.8 below discussing remedies.

⁹¹ Brinks, D.M., and Gauri, V., “The Law’s Majestic Equality? The Distributive Impact of Litigating Social and Economic Rights”, *Policy Research Working Paper 5999*, The World Bank Development Research Group, 2012.

In relation to each component, challenges are addressed and examples provided. Whilst answers cannot always be provided, the right questions are asked.

A Preliminary Note on Strategic Litigation

Although the guide's contents should assist all litigators seeking to advance ESRs, it is intended primarily to assist strategic litigators. "Strategic litigation" is understood in this guide to be synonymous with "public interest litigation" and to refer to legal action which is aimed at social transformation to the benefit of the marginalised within society. It may seek to achieve this by: establishing an important principle or right in jurisprudence; receiving a judgment which positively impacts the lives of both the claimants and a wider population; or by resulting in a negotiated settlement which includes, for example, an agreement by the state to a change in policy and/or practice.⁹² The nature of the litigation pursued and the considerations which attach to it will depend to a certain degree on the broader strategy being pursued by the lawyers and/or their NGO clients. In some cases a litigator wishing to establish a particular legal principle may begin constructing their case by starting from the jurisprudence which they wish to emerge and working backwards. In such cases, a claimant or group of claimants would not necessarily have been identified and an out of court settlement would not be a preferred outcome. In other cases, lawyers or activists will be seeking to achieve a change in the way in which a particular right is being realised for a particular group. Depending on the clarity of the law on the particular issue, the aim of the litigation may be the achievement of clear jurisprudence and/or a change in the policy or practice of the state. Some of the steps below will be more or less relevant to litigators depending on the aim of their case.

3.1 Identifying a Forum

The first component is to consider whether there is an available forum for bringing a claim of equality and/or non-discrimination in relation to an ESR. The forum will need to be available both in law and in practice. This section begins by setting out guidance on how to identify the availability of a forum. It acknowledges that, in some cases, there will be multiple forums available and considers how litigators can choose between forums in such circumstances. The bulk of this section is then dedicated to identifying the main types of forum that may be available.

3.1.1 Choosing a Forum

In order to determine whether a particular forum is **legally** available, litigators will need to consider:

92 For an interesting discussion of public interest litigation in the context of social rights, see Gloppen, S., "Public Interest Litigation, Social Rights and Social Policy", conference paper at Arusha Conference, *New Frontiers of Social Policy*, 2005.

- Does the claimant have standing to bring a claim in this forum?
- Do the rules governing the forum enable an equality and/or non-discrimination claim in relation to ESRs to be brought?⁹³

However, the legal availability of a forum is only the starting point. Litigators must also conduct a risk analysis in relation to the forum to identify whether it is ill-advised, from a **practical** perspective, to take a strategic case before it. This consideration will be context specific and will include an analysis of the following:

- The content and status of the rights as understood and applied in each given forum – how expansively are the rights on which the litigator seeks to rely interpreted by the forum? Does one forum have a strong record of applying the rights in question? This will include a consideration of the past jurisprudence of the relevant forum.
- The applicable rules of evidence.
- The cost of litigating before the forum.
- The time it may take to litigate.
- Opportunities for appeal.
- Likelihood of success before the forum – the litigator will need to be mindful of the risk of an adverse judgment legitimating the status quo.
- Remedies available – the litigator will need to consider not only which remedies are available before a given forum, but the extent to which they are ordered in practice by the forum and the pros and cons of the various options.⁹⁴
- Whether there is a risk of having to pay costs in the event of a loss.
- The efficacy of the forum – what is the record of state compliance with the judgments of the forum?

As mentioned, in some instances, having gone through this process a litigator will have identified more than one available forum and will need to choose between them. A comparison of the benefits and risks of each forum identified in the above mentioned analysis provides a useful way of comparing the forums. However, the choice will also be influenced by the overall strategy within which the litigation sits and litigators will also consider the extent to which the engaging of a particular forum will assist that strategy.

3.1.2 National Courts

National courts are often the first place in which a strategic case will be brought, with regional courts and international bodies being used as an option of last resort either where the national courts are unavailable or the national mechanisms for redress have been exhausted. However, when there are other options, the advantages and disadvantages of choosing the national courts as the forum for a claim will vary dramatically depending on the jurisdiction, as will the

93 The answers to these questions are explored in some detail in relation to each of the forums identified below.

94 For more information see 3.8 below.

answers to the three key questions for determining the availability of the forum. This guide does not seek to generalise in relation to the rules of standing or practical impediments, which must be explored by a litigator in their own context, but it does explore some of the considerations in relation to the rules governing the forum.

The potential of national courts as a suitable forum varies as significantly as the types and levels of legal protection for equality, non-discrimination and ESRs at the national level. Part 1 broadly identified the rights to equality, non-discrimination and ESRs recognised at the international and regional levels. Rights which are provided in international or regional treaties are not always directly enforceable before the national courts. Also, there may or may not be alternative national laws upon which to rely. In assessing the potential for using a national court as their forum of choice, **a litigator will need to reflect on the model of law in the jurisdiction within which they are seeking to litigate and the corresponding causes of action that may be available.** There are a number of key variations, set out below.

International Conventions containing Equality and/or Socio-Economic Rights Protection Directly Enforceable at National Level

In some jurisdictions, international conventions containing equality and/or ESR protection are directly enforceable at a national level.⁹⁵ However, the extent to which each of the rights in relevant treaties are enforceable before the national courts varies to a significant degree. For example:

- In Brazil, depending on the date of Brazil's ratification of a human rights treaty and the result of a vote of each of Brazil's Houses of National Congress, the treaty may be considered to be "equivalent to Constitutional Amendments" or to have "supralegal" status. "Supralegal" status means that the treaty takes precedence over ordinary laws but cannot override the Constitution.⁹⁶
- Under the South African Constitution, national courts are obliged to "consider" international law when interpreting the constitutional Bill of Rights, an obligation which has been read broadly.⁹⁷

95 However, this will often not be the case. For example, although the majority of states have ratified the ICESCR (162 as of November 2014) and accordingly have binding obligations under international human rights law in relation to the rights to equality, non-discrimination and ESRs, the rights contained in the ICESCR are not directly enforceable before national courts in many jurisdictions. Available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

96 Under Article 5, Para 3, Constitutional Amendment No. 45, 2004, Constitution of Federative Republic of Brazil, "The international treaties and conventions on Human Rights which are approved, in each House of National Congress, in two rounds, by three fifths of votes of the respective members, will be equivalent to Constitutional Amendments". This only applies to treaties approved after the date of the Amendment, namely 2004. However, as a result of a Brazilian Supreme Court decision in Habeas Corpus 87585-8/TO, all international treaties approved by Brazil will be considered to have "supralegal" status, meaning that they will be considered to take precedence over ordinary laws of Brazil, albeit will not overrule a constitutional provision.

97 See above, note 50, Section 39(1)(b). In *State v Makwanyane and Anor.* [1995] ZACC 3, Chaskalson P of the Constitutional Court, at Para 35, held that under Section 31 of the (Interim) Constitution, all forms

In some contexts, whilst international conventions are not directly enforceable by the national courts, national courts have nevertheless determined that the conventions are to be applied in some circumstances. For example, the Supreme Court of India has regularly used international conventions to interpret fundamental constitutional rights. In *Vishaka v State of Rajasthan*,⁹⁸ the Supreme Court held that, in the absence of domestic law, international conventions that are not inconsistent with and are in harmony with the spirit of fundamental rights under the constitution must be read into them.⁹⁹

Constitutional Right to Equality and/or Non-Discrimination

Most national constitutions guarantee a right to equality and/or non-discrimination to some degree. However, it will be important to identify the extent of the constitutional protection available. There is significant variation, from a simple declaration that people are “equal before the law” to comprehensive protection for an enumerated right to equality and a subsisting right to be free from discrimination. For example:

- The Fourteenth Amendment to the US Constitution simply prohibits each state from denying “to any person within its jurisdiction the equal protection of the laws”.¹⁰⁰ In an example such as this, it is particularly crucial to examine how the courts have interpreted the right;
- The Bill of Rights in the South African Constitution contains a detailed right to equality which includes the subsisting right to protection from discrimination:

9. Equality

1. *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
2. *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
3. *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*

of international law, including treaties not ratified by South Africa and “soft” law instruments such as reports of specialised agencies, are of assistance to the court when interpreting the Constitution. This broad interpretation is particularly important given that South Africa has never ratified the ICESCR. In practice the Constitutional Court has followed the approach of Chaskalson P and has cited treaties that South Africa is not a party to, such as the ICESCR, as well as “soft” law.

98 *Vishaka v State of Rajasthan* (1997) 6 SCC 241.

99 *Ibid*, Para 7.

100 Section 1 of the Fourteenth Amendment to the US Constitution.

4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
5. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

This protection is broad, with the South African Constitution expressly enabling the state to take positive action to “promote the achievement of equality” and prohibiting direct and indirect discrimination by both the state and private actors on one or more of an open-ended list of grounds. A wide range of people are entitled to seek enforcement of this right by the court, including people who are acting in the interest of a group or class of persons or in the public interest.¹⁰¹

- The Brazilian Constitution contains separate provisions for the rights to equality and non-discrimination. Non-discrimination is a fundamental principle and the right to equality is a fundamental right:

Title I: Fundamental Principles

(...)

Article 3. The fundamental objectives of the Federative Republic of Brazil are:

(...)

IV – to promote the well-being of all, without prejudice as to origin, race, sex, colour, age and any other forms of discrimination.

(...)

Title II – Fundamental Rights and Guarantees

Chapter I – Individual and Collective Rights and Duties

Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the [listed] terms.

Litigators must be mindful of the particularities of the constitutional provisions in their jurisdiction and must consider any interpretative jurisprudence of the national courts. For example, in Ireland, the Constitution only grants the right to equality to citizens.¹⁰² However, the Irish Supreme Court has, in some cases, applied the constitution to every individual under Irish jurisdiction and in others – notably immigration cases – interpreted the Constitution narrowly as applying only to citizens.¹⁰³

¹⁰¹ See above, note 50, Section 38.

¹⁰² See above, note 48, Article 40(1).

¹⁰³ For a further discussion of varied case-law on the application of the Irish Constitution to non-citizens, see Irish Human Rights Commission, “Observations on the Proposed Referendum on Citizenship and on the 27th Amendment to the Constitution Bill 2004”, 2004, Para 1.2.2.

Constitutional Social and Economic Rights

Fewer national constitutions protect ESRs than protect equality and/or non-discrimination. Where they do, however, these can be a powerful tool. Amongst constitutions which do recognise ESRs, there are significant variations in the scope and application of the rights. In determining the potential for bringing a successful case, litigators must carefully consider the particular provisions, together with any associated jurisprudence. For example:

- In India the key provision protecting ESRs under the Constitution states that:

*The State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want.*¹⁰⁴

However, this is not a “fundamental right” identified by the Constitution, but rather a “directive principle of state policy”. Unlike fundamental rights under the Constitution, the directive principles are intended to provide guidance only and are not legally enforceable. They are accorded a lower status.¹⁰⁵

- The South African Constitution’s Bill of Rights includes fully justiciable ESRs, including rights to housing, healthcare, food, water, social security and education, amongst others.¹⁰⁶ These rights (with the exception of basic education which is immediately applicable) are ones which the state must progressively realise. There has been much consideration of what a state must do to meet the obligation to “progressively realise” the rights with the courts, focussing on a consideration of whether the measures taken by the state have been reasonable in a given circumstance.¹⁰⁷

Constitutional Right to Life/Livelihood which Include Certain Socio-Economic Rights

In certain jurisdictions, particularly where there are no constitutionally recognised ESRs, the courts have interpreted a constitutional right to life or livelihood broadly so as to include a right to certain elements of ESRs, such as adequate food and shelter. For example, as identified above, this approach has been taken

104 See above, note 46, Article 41.

105 This has left courts, to a certain extent, to read ESRs into the fundamental right to livelihood which is protected and enforceable under the India constitution.

106 See for example above, note 50, Section 26, 27 and 29.

107 See for example *Government of the Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC); and *Minister of Health v Treatment Action Campaign*, 2002 (5) SA 721 (CC).

by the Indian Supreme Court in its interpretation of the fundamental right to livelihood to include some ESRs, such as the right to water and shelter.¹⁰⁸

Equality/Non-Discrimination Legislation

National civil law often includes some legislative provision for, at the least, prohibiting certain discriminatory acts. The extent of the protection provided under civil law varies. Jurisdictions with some form of civil law protecting from discrimination or providing for equality may:

- Have a general equality act. Such acts usually protect people from discrimination on a number of grounds, e.g. race, disability, etc., and in a variety of spheres of life, e.g. employment, service provisions, education, etc. A clear example of this is the UK. The UK's Equality Act 2010 currently prohibits discrimination on the basis of nine protected characteristics¹⁰⁹ and provides protection from discrimination in many areas of life including employment, education, and the receipt of goods and services.
- Provide piecemeal protection from discrimination for certain protected groups. An example of this approach is Australia, which, having recently shelved the comprehensive anti-discrimination bill on which it has been consulting, currently provides for protection from discrimination under separate legislation covering four protected characteristics: race, sex, disability and age.¹¹⁰
- Provide for equality or protection from discrimination in a piecemeal fashion through scattered provisions in laws focused on particular areas of life, e.g. in employment/labour law, housing law or education law. This is common.

Socio-Economic Rights Legislation

It is commonplace for national law to regulate the provision of certain ESRs. In many countries, whilst there may be no recognised right to food or water, there will be basic social security laws or provisions for the education of young people. Whilst these may not be sufficient to fully protect ESRs, they may provide some useful causes of action and, in some cases, they will regulate certain aspects of ESRs in great detail. Colombia, for example, has specific laws providing for a national health service, education and a universal system of social secu-

108 For jurisprudence on the relationship between Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy) in India see *Minerva Mills Ltd. & Ors v Union Of India* (1980) AIR 1789; *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545; *Ahmedabad Municipal Corporation v Nawab Khan Gulab Khan and Others* (1997) 11 SCC 123; and see above, note 46, Article 21.

109 Section 4 of the Equality Act 2010 identifies these as age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

110 Racial Discrimination Act 1975; Sex Discrimination Act 1984; Disability Discrimination Act 1992; and Age Discrimination Act 2004

rity in addition to its constitutional provision for ESRs.¹¹¹ Furthermore, in states which do protect constitutional ESRs, those ESRs may be further elaborated in valuable legislation. In the Indian context, where ESRs are not directly enforceable,¹¹² they have nevertheless, in some cases, been operationalised by important national legislation. For example, the right to education declared in Article 21A of the Constitution of India has been elaborated upon by the Right of Children to Free and Compulsory Education Act 2009.

3.1.3 Regional Mechanisms

As has been identified in Part 1, each of the regional mechanisms adjudicates one or more conventions that contain some protection for the rights to equality and non-discrimination and some or all ESRs. Whether or not a mechanism such as a regional court or treaty body will be available in a given case will depend in part upon whether a country has ratified the relevant convention and, where relevant, has agreed to submit to the jurisdiction of the regional court or body. The following key mechanisms may be available forums in a given case.¹¹³

European Court of Human Rights

The ECtHR has jurisdiction to hear allegations of violations of the ECHR and its Protocols by states which have ratified ECHR and if relevant, the Protocol to which the allegation relates.¹¹⁴ This includes allegations of violations of the rights to freedom from discrimination and also certain ESRs, including the right to education.¹¹⁵ The ECtHR accepts individual applications which may be lodged by any person, group of individuals or NGO.¹¹⁶ However, the court will only address matters “after all domestic remedies have been exhausted” and so

111 See Colombian Law 10 of 1990; Colombian Law 100 of 1993; Colombian Law 115 of 1994.

112 Although see discussion above in relation to the “reading-in” of ESRs to the right to life/livelihood.

113 Please note that this does not amount to a full list of the potentially relevant regional mechanisms. There are others including, in the European context, the Court of Justice of the European Union and, in the African context, the Economic Community of West African States. For example, for an overview of the African human rights courts, see Murungi, L.N. and Gallinetti, J., “The Role of Sub-regional Courts in the African human Rights System”, *Sur International Journal on Human Rights*, Vol. 7 No. 13, 2010, p.119. The summaries contained within this section have drawn heavily on the analysis of the forums in Whiteman, J., and Neilsen, C., “Lessons from Supervisory Mechanisms in International and Regional Law”, *Journal of Refugee Studies*, Vol. 26, 2013, pp. 360–392. For a more detailed analysis of the various advantages and disadvantages of each forum for the adjudication of allegations of breaches of the relevant human rights law, see pp. 370–381.

114 As of November 2014, 47 states are party to the ECHR and, of these, 18 have ratified Protocol 12. Protocol 12 provides a general prohibition on discrimination in the enjoyment of any right within the law of a state. This right is wider than the prohibition on discrimination found in Article 14 of ECHR which only applies to discrimination which takes place in a matter which falls within the ambit of ECHR rights. The right to education is provided for by Article 2 of Protocol 1, which has been ratified by 45 of the member states. The Rules of the European Court of Human Rights are available at: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

115 See the right to freedom from discrimination under ECHR, Article 14 (in conjunction with the civil and political rights protected in the ECHR) and Protocol 12 and the right to education under Protocol 1, Article 4.

116 ECHR, Article 33. The Court will also hear interstate complaints, which are applications brought by one state against another state.

litigators must have first pursued the matter nationally to the extent it is possible to do so.¹¹⁷

Overall, the ECtHR is a “well-functioning and accessible” forum which enables participation by a variety of stakeholders.¹¹⁸ However, there are some practical impediments to its use. Despite reforms to the Court reducing its backlog of cases and continuing to result in an improved situation, for now the Court remains burdened by a big caseload which impacts on the timeframe for the resolution of a complaint.¹¹⁹ Further, the effectiveness of a decision of the ECtHR is affected by the attitude of the state in question to the Court and its decisions and there is much variance in the attitudes of member states.¹²⁰

Inter-American Human Rights System

The Inter-American human rights system comprises the Inter-American Commission on Human Rights (IACHR)¹²¹ and the Inter-American Court of Human Rights (IACtHR).¹²² These bodies monitor compliance by member states of the Organisation of American States (OAS) with their obligations under the ACHR and, in some cases, the Additional Protocol to the ACHR.¹²³ This includes monitoring OAS member states’ obligations to respect the right to equal protection of the law and to ESRs.¹²⁴

The IACHR accepts individual petitions submitted by individuals, groups of individuals, or NGOs “legally recognised” in one or more OAS member states.¹²⁵ It may only hear complaints against states which have made a declaration recognising its competence.¹²⁶ The IACHR may then refer cases to the IACtHR, which only hears cases that have been referred to it either by the IACHR or by state parties who have accepted the IACtHR’s jurisdiction.

117 *Ibid*, Article 35.

118 See Whiteman, J., and Neilsen, C., above, note 113, p. 372.

119 As of November 2014, there were 78,000 pending cases, see <http://www.echr.coe.int/Pages/home.aspx?p=reports> for up to date figures. This was down from a high of 160,200 in September 2011, see ECtHR Registrar, “Press Release: Reform of the Court: Filtering of cases successful in reducing backlog”, 2013. Reforms included prioritisation of cases, filtering of cases to be dealt with by a single judge and change to admissibility criteria. The reform process in ongoing and further information is available at <http://www.echr.coe.int/Pages/home.aspx?p=court/reform&c=>.

120 See Whiteman, J., and Neilsen, C., above, note 113, p. 372. For a further discussion on the extent of the enforcement of court ordered remedies see Baluarte, D.C. and De Vos, C., *From Judgment to Justice: Implementing International and Regional Human Rights Decisions*, Open Society Justice Initiative, 2010.

121 The Mandate and function of the Inter-American Commission on Human Rights are available at: <http://www.oas.org/en/iachr/mandate/functions.asp>.

122 The Rules of the Procedure of the Inter-American Court of Human Rights (IACtHR) are available at: http://www.corteidh.or.cr/sitios/reglamento/ene_2009_ing.pdf.

123 ACHR, Chapters VI–VIII.

124 *Ibid*, Article 24 and 26; Additional Protocol to the ACHR.

125 ACHR, Article 44.

126 *Ibid*, Article 45.

In terms of practical issues, the two-tiered system for individual complaints arguably helps reduce the burden on the IACtHR and helps to make the mechanism more efficient.¹²⁷ Further, it removes some of the litigation burden from individuals.¹²⁸ However, there are some impediments to the use of the forum. For example, it is severely under-staffed and under-funded and suffers significantly from “uneven and erratic support” from governments.¹²⁹

African Court on Human and People's Rights

The African Court on Human and People's Rights (ACtHPR)¹³⁰ is the main judicial organ of the African Union (AU). It has jurisdiction over cases which relate, amongst other things, to the interpretation and application of AU treaties.¹³¹ This includes matters relating to the right to be equal before the law and have the equal protection of the law and the rights to health, education and other ESRs.¹³² In addition to states parties to the Protocol to the ACHPR and certain AU organs, a number of other parties may submit cases relating to rights violations of the key AU treaties to the Court.¹³³ Individuals and “relevant” NGOs “accredited to the [AU] or to its organs” may also submit cases in relation to states which have made a declaration recognising the competence of the Court.¹³⁴

The biggest practical impediment is that the majority of AU states have not recognised the competence of the ACtHPR and even fewer have made a declaration to extend its competence to hearing claims from individuals and relevant NGOs.¹³⁵ As Juma points out, “the restrictive access of individuals and NGOs to

127 See Whiteman, J., and Neilsen, C., above, note 113, pp. 372–373.

128 *Ibid.*

129 Steiner, H., Alston, P., and Goodman, R., *International Human Rights in Context*, Oxford University Press, 2008, p. 1038; and Project on International Courts and Tribunals, “Inter-American Court of Human Rights”, available at: <http://www.pict-pcti.org/courts/IACHR.html>. For a detailed discussion of the advantages and disadvantages of the forum see Whiteman, J., and Neilsen, C., above, note 113, pp. 372–373, 375–376. For a detailed consideration of the problems of implementation of the court's decisions see Baluarte, D.C. and De Vos, C., above, note 120.

130 The mandate for the African Court on Human and People's Rights (ACtHPR) is available at: <http://www.african-court.org/en/index.php/about-the-court/mandate>.

131 For the full extent of its jurisdiction see Protocol on the Statute of the African Court of Justice and Human Rights: Annex, Statute of the African Court of Justice and Human Rights, Article 28. The ACtHPR was created by Article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which came into force in January 2004. The ACtHPR officially began its work in 2006. In 2008, a resolution was adopted by the African Union Assembly to merge the ACtHPR with the still non-existent African Court of Justice to become the African Court of Justice and Human Rights. As of February 2014, only five states had ratified the protocol, from a necessary 15 for the protocol to come into force and the new Court to be convened. The new Court will have two chambers, one of which will be dedicated to human rights cases.

132 ACHPR, Article 3, 15, 16, 17 and 19.

133 See Statute of the African Court of Justice and Human Rights, above, note 131, Article 29.

134 *Ibid.*, Article 30(f); and Article 5(3) of the Protocol To The African Charter On Human And Peoples' Rights On The Establishment of An African Court On Human And Peoples' Rights, Article 5(3).

135 As of March 2014, only 7 countries have made the declaration accepting the jurisdiction of the Court. For the list of countries, please see: <http://www.african-court.org/en/index.php/about-the-court/brief-history>.

the African Court” is “a fundamental flaw” of the mechanism and is a major practical barrier to its availability as a forum for litigation.¹³⁶ In addition, there is a lack of awareness both as to the existence of the ACtHPR and its potential for addressing human rights violations. It also faces financial difficulties, a lack of resources and judgments not being properly enforced.¹³⁷

European Committee of Social Rights

The European Committee of Social Rights (ECSR)¹³⁸ is mandated to monitor states parties’ conformity with the provisions of the European Social Charter, European Social Charter (Revised) (RESC)¹³⁹ and their Additional Protocols.¹⁴⁰ The RESC includes provisions protecting a large range of ESRs and the RESC also protects freedom from discrimination.¹⁴¹

Complaints of a failure by a state to ensure “the satisfactory application” of the RESC,¹⁴² as applicable, may be brought against one of the 15 states which have ratified the Additional Protocol in relation to the rights with which they have agreed to comply.¹⁴³ Only collective complaints, i.e. those which concern a gen-

136 Juma, D., “Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher turned Game-keeper”, *Essex Human Rights Review*, Vol. 4, No. 2, 2007, pp. 15-16.

137 Mutua, M., “The African Human Rights System: A critical evaluation”, UNDP, *Human Development Reports*, 2000; and Schulman, M., “The African Court of Justice and Human Rights: A Beacon of Hope or a Dead-End Odyssey”, *Inkundla, Student Law Journal of the University of Witwatersrand*, Vol. 2, 2013. For further information on the enforcement of court judgments see Baluarte, D.C. and De Vos, C., above, note 120.

138 The Rules for the European Committee of Social Rights (ECSR) are available at: http://www.coe.int/t/dghl/monitoring/socialcharter/ESCRrules/Rules_en.pdf.

139 The European Social Charter (ESC) was adopted in 1961. After discussion as to its revision, in 1996 the European Social Charter (revised) (RESC) was adopted. While the RESC is gradually replacing the ESC, the two Charters remain in force. 33 states have ratified the RESC while another 10 have only ratified the ESC. For this reason, while we predominantly refer to the RESC in this guide, we do not overlook relevant jurisprudence which relates to an interpretation of the ESC.

140 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (APESC).

141 The RESC only obliges member states to adopt a minimum of 16 of its articles (or, if unwilling to accept whole articles, then 63 discretely numbered paragraphs). Article E, which obligates non-discrimination, is not optional.

142 APESC, Article 1. It should be noted that this language of “unsatisfactory application” is unusual and differs from the term used in the Charter in connection with the role of the ECSR, which is “compliance”. The reasons for the difference in terminology are unclear and whether this language results in a weaker role for the ECSR or expands its remit is not clear. For further discussion see Churchill, R., and Khaliq, U., “The Collective Complaints of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights”, *European Journal of International Law*, Vol. 15, 2004, pp. 417, 429-432.

143 Of the 15 states, three (Croatia, Czech Republic and Greece) have only ratified the European Social Charter (ESC) and not the RESC. See http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp. It has been argued that many of the rights contained in the ESC are outdated and lag behind the national laws of states parties and EU law (where applicable), so that the bringing of collective complaints is likely to be of limited use. See Churchill, R. and Khaliq, U., above, note 142, p. 417, 453. It is noteworthy that judgments may impact indirectly on the practice of other member states. ESCR opinions are applied in the context of the state reporting system which binds all member states to the Charter. See Quesada, L.J., “The European Committee of Social Rights and the collective complaints procedure: present and future”, *Seminar on the Reform of the European Social Charter*, 2011, available at: https://www.coe.int/t/dghl/monitoring/socialcharter/activities/50anniversary/Quesada50thannivHelsthan_en.pdf.

eral situation prevailing in a member state, may be submitted.¹⁴⁴ And standing before the ECSR is limited to: national trade unions and employers' organisations; certain international trade unions and employer's organisations; NGOs fulfilling specified criteria; or representative national NGOs who have been identified as entitled to do so by a state declaration.¹⁴⁵

A further limitation of the mechanism is that the ECSR's reports are not legally binding. Furthermore, it appears to be limited to expressing a view as to whether the defendant state has complied with either Charter, as it has no explicit entitlement to award or suggest a remedy for non-compliance nor to make an order for costs.¹⁴⁶ The main weakness in the ECSR collective complaints system is therefore the lack of a mechanism to ensure state compliance.¹⁴⁷

On the plus side, the procedure for complaints before the ECSR is otherwise fairly relaxed. The ECSR may agree to hear a complaint even if domestic remedies are not exhausted and even if a similar case is pending before national or international bodies.¹⁴⁸ Further, there is no time limit for filing a complaint¹⁴⁹ and, in general, the ECSR gives well-reasoned reports on the merits and often considers the relevance of equality.¹⁵⁰ Despite the non-binding nature of ECSR decisions, there have been some examples of them leading to positive changes in law and practice, as noted by the ECSR in its annual report.¹⁵¹ In the period between October 1998 and September 2014, 111 complaints were registered with the ECSR.¹⁵²

3.1.4 International Mechanisms

Part 1 has identified that numerous international treaties and conventions protect the rights to equality and/or non-discrimination and ESRs. In many cases,

144 Harris, D.J., "Collective Complaints under the European Social Charter: Encouraging Progress?" in Kaikobad, K.H. and Bohlander, M., (eds.), *International Law and Power: Perspectives on Legal Order and Justice*, Koninklijke Brill NV, 2009, pp. 3–24.

145 So far, Finland is the only country to recognise the right of national NGOs to bring collective complaints, see Council of Europe, "European Committee of Social Rights: Activity Report 2012", 2013. For more detail on the restrictions on who may bring a complaint and how the ECSR judges eligibility see Churchill, R. and Khaliq, U., above, note 142, pp. 417, 424–429.

146 *Ibid*, pp. 417 and 437.

147 European Parliament, "The Evolution of Fundamental Rights Charters and Case Law", 2011, p. 18.

148 Hammerberg, T., "Council of Europe: Viewpoint: Governments should open up channels for civil society complaints against violations of social rights", 2008, available at: <http://www.bettercarenetwork.org/resources/infoDetail.asp?ID=20339>.

149 APESC, Article 4.

150 For a broader discussion of the ECSR mechanism and an analysis of its merits see above, note 144, pp. 3–24.

151 For examples of impact on law and practice in 2012, see Council of Europe, above note 145, pp. 19–20; Council of Europe, "Practical impact of the Council of Europe monitoring and mechanisms in improving respect for human rights and the rule of law in member states", 2010; and Quesada, L.J, above, note 143.

152 Council of Europe, "List of complaints and state of procedure", 2014, available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp.

states which have ratified these treaties or conventions have, by so doing, agreed to be subject to the jurisdiction of an international body tasked with interpreting and enforcing the rights contained within the relevant treaty.

Human Rights Committee

The Human Rights Committee (HRC)¹⁵³ is responsible for the supervision of the ICCPR. This includes a mandate to adjudicate on alleged violations of the ICCPR by a state party, which includes violations of the right to equality and non-discrimination. The HRC's mandate extends to the adjudication of individual complaints brought by individuals against states which have ratified the (First) Optional Protocol to the ICCPR.¹⁵⁴ However, individuals must first exhaust all domestic remedies.¹⁵⁵

Almost three-quarters of state parties to the Covenant have ratified or acceded to the Protocol¹⁵⁶ and the individual complaints procedure has been used much more extensively than the procedures under the other human rights treaties.¹⁵⁷ However, compliance with its decisions by the relevant states is reportedly poor.¹⁵⁸

Committee on Economic, Social and Cultural Rights

The CESCR is mandated with monitoring compliance with ICESCR.¹⁵⁹ Since 2008, states that have ratified the Optional Protocol to ICESCR have recognised the CESCR's competence to consider individual complaints ("communications") of violations of rights protected under the ICESCR, including the rights to non-discrimination and a full range of ESRs.¹⁶⁰

These complaints may be submitted "by or on behalf of individuals or groups, under the jurisdiction of a state party (...)" but will only be admitted by the CESCR for consideration if the complainant has first exhausted all domestic remedies.¹⁶¹

153 Article 41 of the ICCPR provides for the HRC to consider inter-state complaints.

154 See Optional Protocol to the ICCPR, Article 2.

155 *Ibid.*

156 115 states out of the 168 state parties to the ICCPR have ratified or acceded to the Optional Protocol. The full list of the states is available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.

157 Steinerte, E., and Wallace, R.M.M., "United Nations Protections of Human Rights – Section A; Mechanisms for Human Rights Protections by UN Bodies" *University of London Press*, 2009, p. 20. Communications have been registered against at least 70 different states and over 1000 individual communications had been registered by the HRC.

158 See Baluarte, D.C. and De Vos, C., above, note 120, p. 27.

159 See Economic and Social Council (ECOSOC) "Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights" Resolution 1985/17; Optional Protocol to the ICESCR.

160 Optional Protocol to the ICESCR, Article 1.

161 *Ibid.*, Article 2 and 3(1).

As of November 2014, only 17 states had ratified the Optional Protocol, meaning that CESCR's jurisdiction to hear individual complaints remains relatively limited.¹⁶²

Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination (CERD) is the body of independent experts that monitors implementation of the ICERD by its state parties. This includes monitoring the implementation of the rights to freedom from racial discrimination in the enjoyment of ESRs.¹⁶³ The CERD is mandated with a number of monitoring functions, including the ability to adjudicate individual complaints brought by individuals or groups within the jurisdiction of the state party against which the complaint is brought.¹⁶⁴

A limitation of the availability of this forum is that the CERD will only be competent to hear individual complaints against states that have made a declaration recognising the Committee's competence under Article 14.¹⁶⁵ Of the 177 current states parties to ICERD, only 55 states have made this declaration.¹⁶⁶ The complaints procedure under CERD has been used infrequently to date by individuals.¹⁶⁷

Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women (CEDAW Committee) is the body of independent experts that monitors implementation of CEDAW. This includes monitoring compliance with the rights of women to equality in all fields, including "social, economic and cultural fields".¹⁶⁸

States parties to the Optional Protocol to CEDAW recognise the competence of the CEDAW Committee to, amongst other things, receive communications "submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a state party, claiming to be victims of a violation of any of the rights set forth in the Convention by that state party".¹⁶⁹ The individuals or groups must have first exhausted all domestic remedies.¹⁷⁰

162 For details of current signatures and ratifications of the Optional Protocol see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

163 ICERD, Article 5(e).

164 *Ibid*, Part II and Article 14 in particular.

165 *Ibid*, Article 14(1).

166 For detail of the current states parties and the status of declarations under Article 14, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

167 As of May 2014, 48 cases had been decided by the Committee Elimination of All Forms of Racial Discrimination (CERD), with six ongoing cases. The complete list can be found at <http://www.ohchr.org/en/hrbodies/cerd/pages/cerdindex.aspx>.

168 CEDAW, Article 3.

169 Optional Protocol to the CEDAW, Article 2.

170 *Ibid*, Article 4(1).

The CEDAW Committee's competence to hear individual complaints has been recognised by a large number of states and those states are not permitted to make any reservations to the Optional Protocol so must accept every aspect of the CEDAW Committee's mandate in this respect.¹⁷¹ The CEDAW Committee has some valuable powers in relation to individual complaints, including the power to request states to take interim measures in advance of a decision on the merits of a complaint to "avoid possible irreparable damage to the victim or victims of the alleged violation".¹⁷² Accordingly, litigators should consider making use of the mechanism where it is available. There are, however, some practical limitations to be borne in mind when doing so. The CEDAW Committee's decisions are not legally binding and the complaints mechanisms can only make recommendations as to remedies.¹⁷³

Committee on the Rights of Persons with Disabilities

The Committee on the Rights of Persons with Disabilities (CRPD Committee) is the body of independent experts which monitors implementation of the CRPD by the state parties. This includes monitoring states parties' compliance with the rights of persons with disabilities to non-discrimination and "progressive realisation" of their ESRs.¹⁷⁴ The rights contained within the CRPD reflect a later generation of conceptualisation in international human rights law, meaning the CRPD has the potential to issue some valuable jurisprudence in relation to the ESRs of persons with disabilities.

Under the Optional Protocol to the CRPD,¹⁷⁵ the CRPD Committee has competence to examine individual complaints "from and on behalf of individuals or groups" with regards to alleged violations of the Convention by states parties to the Protocol, of which there are 85 at the time of writing.¹⁷⁶ Individuals must have first exhausted all domestic remedies unless "the application of the remedies is unreasonably prolonged or unlikely to bring effective relief".¹⁷⁷

The Optional Protocol was adopted in 2006 and the CRPD's individual complaints mechanism is a newcomer. The Committee has only issued six "views"

171 *Ibid*, Article 17.

172 *Ibid*, Article 5.

173 Ritz, K., "Soft Enforcement: Inadequacies of Optional Protocol as a Remedy for the Convention on the Elimination of All Forms of Discrimination against Women" *Suffolk Transnational Law Review*, Vol. 25, 2001, p. 191. For further discussion of the mandate and authority of the Committee see: Ontario Women's Justice Network, "CEDAW: Background Information", 2009, available at: http://owjn.org/owjn_2009/legal-information/international-law/281-cedaw-background-information; and Keller, M. L., "The Convention on the Elimination of Discrimination Against Women: Evolution and (Non)Implementation Worldwide", *Thomas Jefferson Law Review*, Vol. 27 No. 1, 2004, p. 35.

174 CRPD, Article 4.

175 Optional Protocol to the CRPD.

176 *Ibid*, Article 1. For the status of ratifications of the Optional Protocol to the CRPD see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsq_no=IV-15-a&chapter=4&lang=en.

177 CRPD, Article 2(d).

in response to individual complaints so far.¹⁷⁸ Accordingly, it is too early to draw any firm conclusions about the impact of using the mechanism.

Other Possible Present or Future Mechanisms

The above section has focussed on the key available mechanisms for bringing claims of violations of equality and/or non-discrimination and one of the ESRs on which this guide is focussed. However, litigators should not be restricted to exploring these options. In particular, litigators should examine whether other mechanisms have become available after the time of the publication of this guide.

Notably, the Committee on the Rights of the Child (CRC Committee) reviews the implementation of the CRC by state parties to the Convention and its Optional Protocols.¹⁷⁹ As the CRC has been ratified by more countries than any other human rights treaty in history, the CRC Committee has a geographically expansive mandate.¹⁸⁰ In April 2014, three months after the tenth ratification of Optional Protocol No 3 (communications procedure) to the CRC, the Committee gained the competence to receive and consider individual communications alleging violations of the CRC by states parties.¹⁸¹

Further, litigators seeking to bring claims relating to the equal right to work will also wish to determine whether the competence of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) to hear individual complaints is yet operative.¹⁸²

3.2 Appropriateness Assessment

Before embarking on any litigation, a litigator must first consider whether it is appropriate to pursue litigation in this instance. As discussed, strategic litigation is brought in order to seek a legal or social change which impacts beyond the individual or group bringing the claim, having effects which resonate beyond the resolution of the claim itself.¹⁸³ It will not always be the appropriate or most

178 Two additional complaints have been declared inadmissible. For details see <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Jurisprudence.aspx>.

179 Optional Protocol on the Involvement of Children in Armed Conflict; and Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography.

180 By November 2014, 194 countries had become State Parties to the Convention. The full list of state parties is available at: http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en.

181 Optional Protocol No. 3 (on a communications procedure), Article 19. For the current status of ratifications see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en.

182 The Committee on the Protection of the Rights of All Migrant Workers and Members of their Families (CMW) is the body of independent experts that monitors implementation of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW) by its state parties. Under Article 77 of the Convention, 10 states parties need to recognise the Committee's individual complaints procedure in order for it to become operative. At the time of writing only two had done so. See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en.

183 See "A Preliminary Note on Strategic Litigation", above Part 3.

effective course of action. In order to determine whether it is, litigators will need to consider the following:

- How well does the litigation fit in with the broader social and/or political strategy? Strategic litigation may be a good organising point, bringing together actors on the ground, and prompting dialogue with states or other respondents. The object of the litigation will often be to bring about what the South African Constitutional Court has called “meaningful engagement” between the parties, in order to achieve social changes.¹⁸⁴ Consideration of whether litigation can achieve this in the circumstances will be important. The relation to social processes should also be thought of in terms of enforcement. It’s well known in South Africa and elsewhere that without grass roots organisations monitoring and reporting, court orders may be useless. There have been issues of a lack of compliance with settlements in the South African mud school cases, for example.¹⁸⁵
- Are there other, less burdensome options available in the jurisdiction, which may achieve the purpose? For example, litigators may first wish to consider the possibility of seeking an administrative remedy from quasi-judicial bodies, as appropriate. In India, for example, statutory bodies such as the National Commission for Scheduled Castes, National Commission for Scheduled Tribes and the National Commission for Women, which are established under the Constitution, have certain powers to summon parties and give immediate decisions on matters related to their particular focus area.
- Will the litigation empower the disadvantaged groups? Democratic participation is a key to the effective enforcement of ESRs and the right to equality. Everyone has to take ownership of their rights and participate actively in their realisation rather than simply expecting the state and the courts to deliver them. As Hepple has observed:

*The object of “inducing large-scale social change through non-violent political processes grounded in law” can be successful only if those who are directly affected by the enforcement of socio-economic and equality rights have an effective voice in their implementation.*¹⁸⁶

For example, parents and children in mud schools in South Africa have been given a voice through the process of collecting affidavits around right to education litigation.¹⁸⁷

184 See *Government of the Republic of South Africa v Grootboom*, above, note 107, Para 44 (Yacoob JJ) and later cases.

185 For a discussion of state action in relation to mud schools see Isaacs, D., “South Africa: Mud Schools – a Decade of Lying to Children”, *The Times*, 5 March 2013.

186 Hepple, B., “Negotiating social change in the shadow of the law”, *South African Law Journal*, Vol. 29, No. 2, 2009.

187 Equal Education, *Annual Report 2012*, pp. 7–14, available at: http://www.equaleducation.org.za/content/2013/08/07/Annual_Report_2012.pdf.

- The litigation risks. The potential risks of litigation which were identified as part of component 1 (e.g. costs, potential for an adverse judgment entrenching the status quo, etc) will play into the consideration of how appropriate litigation is in the context of the wider strategy. For example, in some cases, the threat of litigation has led to settlements worth large sums of money. On the other hand, litigation may lead to defensiveness, or it may divert resources from organising other activities.
- The timing of the case. Is this an optimal or appropriate time in the social and political contexts for bringing a case of the type or subject-matter envisaged?
- If the circumstances and timing are favourable, is the most appropriate litigator to bring the case available? And are they willing to bring the case? There may only be a few litigators with the particular expertise in the specific issues faced by certain disadvantaged groups. In some cases relating to these groups, it will be important to ensure that the litigator taking the case has this expertise, in order to increase the likelihood of a strong and successful case being taken.
- The particular circumstances of an identified claimant. A claim usually has a better chance of success if the chosen claimant is one to whom the court is likely to be sympathetic because of the disadvantage suffered by that person.¹⁸⁸

3.3 Goal Setting

Strategic litigation varies from the broader provision of legal services, in that litigators must be careful to only take on a case which they consider will best advance the wider goal that they need to achieve whilst maintaining their duty to act in the best interests of the client. Accordingly, having determined that a strategic litigation approach is appropriate, litigators should then consider what kind of judgment they want to emerge from the case in an ideal scenario. Specifically, this requires a detailed consideration of what would best serve the interests of the group they are representing; what gaps in the law are they seeking to close; what previous jurisprudence, if any, would they like overturned and with what should it be replaced; what type of remedy do they want the court to order and with what scope?

Of course, a degree of unpredictability is an inherent aspect of litigation, but having a clear optimal outcome in mind will help the litigator to navigate through the litigation process without inadvertently taking a wrong direction.

188 For additional considerations see CRIN, above, note 2.

3.4 Claimants

The starting point for strategic litigators under this component depends upon whether they have already identified the claimant(s) in the case. The first part of this component considers, for litigators looking for claimants for a particular case, the advantages and disadvantages of bringing individual versus collective complaints. The second part then considers who may be potential claimants of a claim of a violation of: (a) the right to equality; and (b) the right to non-discrimination.

3.4.1 Individual versus Collective Complaints

Strategic litigators will be seeking to ensure that the litigation they take has the maximum possibility of benefitting a large number of people. Depending on the forum, it may be possible for individual and/or collective complaints to be brought before the adjudicating body and the type of complaint may affect the prospects of the judgment impacting on a large number of people.¹⁸⁹ In addition to any particular benefits and detriments to using a particular forum to bring a claim,¹⁹⁰ litigators will wish to consider the respective pros and cons of individual versus collective complaints where they have options.

On the whole, judgments in collective complaints cases may be more likely to address systematic issues than those in response to individual complaints, thus arguably having the potential to be of wider impact on the realisation of equal ESRs. They are also more likely to focus clearer attention on the broader impact of a particular set of facts meaning the most disadvantaged are more likely to benefit.

Further, there are strong practical reasons why a collective complaint may be beneficial. The impact of any legal process on an individual victim is tangible. The process can be stressful and time consuming. In some circumstances, challenging the state also comes with significant risks to personal safety or victimisation. Collective complaints tend to reduce the burden felt by individuals involved in the complaint. They are also usually co-ordinated by organisations which have expertise and access to resources which individuals are less likely to have. Where individual litigation is launched, it is essential to ensure that the individual claimant has strong support from an organisation and others within the group affected. Further, collective actions can bring to court cases in which the individual benefits are too small to justify even a modest lawsuit for a private individual.¹⁹¹

Having said that, whether a judgment has wide ranging effects depends on factors other than whether the complaint has been filed collectively or by an individual. There will be circumstances in which an individual claim may be

¹⁸⁹ Under most regional and international complaints procedures complaints can be brought by individuals or groups. RESC is unique in only accepting collective complaints.

¹⁹⁰ For example, see above Part 3.1.3 about the limitations of bringing a claim before the collective complaints mechanism of the ECSR.

¹⁹¹ See above, note 91, p. 14.

the best option. For example, where the case requires the government to modify or create a regulatory environment that is more conducive to the realisation of the right in question, individual judgments almost necessarily impact non-litigants as well.¹⁹² Decisions brought in individual complaints can also have effects on non-litigants when litigants sue for (*de facto*) non-excludable goods (e.g. higher quality care in a hospital or a handicap access ramp in a school).¹⁹³ In such cases, it might be more efficient to bring an individual complaint for a number of reasons.

First, a collective complaint may be more cumbersome and costly in terms of collection and presentation of evidence and making sure the interests of each of the litigants is aligned. It may be logistically simpler to file an individual complaint.

Secondly, arguably individual complaints can bring concrete and tangible issues into focus allowing both the adjudicating body and the state to understand more clearly how particular circumstances may or may not violate legal obligations and focussing, in the event of a violation on providing relief to an individual.¹⁹⁴ This is particularly important in jurisdictions where courts are traditionally wary of intervening in what are perceived to be areas of policy. Remedying collective complaints often requires an adjudicator to encroach on what they consider to be matters of state policy. Adjudicators may be more open both to finding a violation and to granting a remedy to an individual. And judgments providing specific relief to certain individuals are also likely to be easier to enforce against a reluctant government.¹⁹⁵

Finally, of course, individual complaints should be filed where the aim of the litigator is not a change in law or policy but a direct enforcement of the client's rights as an individual.¹⁹⁶ In many cases, especially in common law jurisdictions, this may in turn have wider implications.¹⁹⁷

However, there is an important note of caution for litigators looking to bring an individual claim. It is crucial to ensure that the litigation does not risk resulting in sharper inequality. Ferraz, whose research focuses on the right to healthcare in Brazil, has been very critical of the impact of individualistic ESR jurisprudence in Brazil. He has persuasively argued:

192 *Ibid*, p. 11.

193 *Ibid*, p. 13.

194 Bedford, V., "Working Paper No. 2: Complaints", *International Council of Voluntary Agencies*, 2011.

195 In Europe states tend to comply with decisions of the ECtHR more than those of the ECSR. The levels of ratification of the RESC are also lower than the ECHR. For an analysis of the ECSR procedure, see Novitz, T.A., "Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter" *European Human Rights Law Review*, Vol. 1, 2002, pp. 50–66.

196 See above, note 194.

197 See above, note 91, p. 10.

1. *when pushed to enforce some social rights assertively, courts have a tendency (and an incentive) to misinterpret these rights in an absolutist and individualistic manner;*
2. *such interpretation unduly favours litigants (often a privileged minority) over the rest of the population;*
3. *given that state resources are necessarily limited, litigation is likely to produce reallocation from comprehensive programs aimed at the general population to these privileged litigating minorities.*¹⁹⁸

He cites, in particular, a number of right to health cases in which relatively wealthy individual litigants have asserted a right to relatively niche and expensive treatments under the right to health, which, as Ferraz argues, result in a reallocation of resources away from other health programmes aimed at the broader, less privileged, population.¹⁹⁹ A further example of an anti-poor outcome is the Canadian Supreme Court's decision in *Chaoulli*.²⁰⁰ The court held that it was unconstitutional to prohibit claimants who could afford it from accessing private health insurance where there were deficiencies in the public health system.²⁰¹ Arguably, if equality considerations are at the centre of the considerations for the selection of cases and are then incorporated in the substantive arguments before the court both in relation to the alleged violations and the appropriate remedies, anti-poor outcomes could be prevented.

Accordingly, it is clear that one type of claim is not necessarily better than the other and a lot will depend upon the circumstances of the case. But litigators taking individual claims will need to be particularly aware of the type of social transformation they are seeking to achieve and the risk of the litigation achieving the opposite, particularly where a favourable decision has budgetary implications.

3.4.2 Claiming Violation of the Right to Equality

As Part 1 identified, the right to equality is:

*[T]he right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.*²⁰²

198 Ferraz, O., "Harming the Poor through Social Rights Litigation: Lessons from Brazil", *Texas Law Review*, Vol. 89, 2011, p. 1646.

199 Ferraz, O., "The Right to Health in the Courts of Brazil: Worsening Health Inequities?", *Health and Human Rights Journal*, Vol. 11, No. 2, 2009, pp. 33–45.

200 *Chaoulli v Quebec (Attorney General)* [2005] 1 SCR 791.

201 For more discussion of this case see 3.7 below.

202 See above, note 41, Principle 1.

The right creates an obligation, amongst other things, not to design programmes that deliver ESRs in a manner that impacts adversely on some people unless there is a good justification for that adverse impact. Potential claimants are those who suffer an adverse impact as a result of a failure to uphold this obligation by the person against whom their claim may be brought. Any individual who is not treated equally before the law or has not received equal protection and benefit of the law, is a potential claimant and should be entitled to bring a claim before the courts either alone or as part of a group, alleging a violation of their right to equality. There is no requirement that the individual can identify with a particular group. Defined as a potential claimant only as a result of suffering an adverse impact, equality claims are of particular value where a person or group is marginalised and/or impoverished but which may not fall within a clearly definable “protected characteristic” for the purpose of anti-discrimination law. This value will be discussed in more detail in the discussion of jurisprudence in which the courts have required positive action to be taken to protect the ESR of certain impoverished individuals in South Africa and elsewhere.²⁰³

Although any individual who has been adversely impacted may be a possible claimant, there is an important strategic point for litigators who have not yet identified their claimant(s). It may not always be advantageous to pick claimants with the aim of encapsulating every person who may be adversely impacted. Brinks has argued that “limiting ESR claims to those that can be satisfied with perfect equality” would be “problematic” and “overly limiting”.²⁰⁴ Instead, recognising that the “ratchet effect” discussed above means that once one group receives a service it may later be possible to argue for an extension of that service to others on equality grounds, strategic litigators may in some cases serve long term social transformation by, in the short term, seeking realisation of the ESR in relation to a smaller but particularly sympathetic group of claimants. Brinks suggests that the South African case of *Minister of Health v Treatment Action campaign (TAC)*, which related to the provision of anti-retroviral drugs to HIV-positive mothers to prevent mother-to-child transmission, may be one such example.

Pregnant mothers and their unborn children are a sympathetic group and so focusing on the effect of the limited government programme on those women was more likely to be effective than identifying its exclusion of sex workers or intravenous drug users for example. As Brinks posits:

*[I]t is often the case that we only notice how unjust it is to deprive someone of something when we sympathise with them but then basic justice takes over when we can't find a rational basis to distinguish less sympathetic ones.*²⁰⁵

203 See 3.5.4 below.

204 Brinks, D., unpublished comments provided at *Expert Roundtable on Using Equality Law to Advance Socio-Economic Rights* on 6 June 2013.

205 *Ibid.*

Of course, this strategic consideration must be made with caution. ESR claims which have the potential to worsen the position of the poorest and most vulnerable, rather than leave it unchanged, are to be avoided.²⁰⁶ But where no such worsening is likely, bringing an ESR claim on behalf of a sympathetic group and later seeking to extend the right upheld by a successful judgment in that case to less sympathetic groups, may be more likely to succeed than an initial claim for the ESRs of the unsympathetic groups.

3.4.3 Claiming Discrimination

Identifying whether a person has a non-discrimination claim is less straightforward. The right to be free from discrimination does not render every difference in treatment or unequal situation unlawful. It treats as suspect only those differences in treatment which are linked to a prohibited “ground” of discrimination. Before bringing such a claim it is necessary to consider the extent to which the potential individual claimant or group of claimants’ complaints relate to one or more protected characteristics. The Declaration of Principles on Equality identifies an extensive list of grounds on which discrimination must be prohibited:

*[R]ace, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.*²⁰⁷

It goes on to state that:

Discrimination based on any other ground must be prohibited where such discrimination

- i. causes or perpetuates systemic disadvantage;*
- ii. undermines human dignity; or*
- iii. adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.*

*Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.*²⁰⁸

²⁰⁶ See the critique of the use of ESR claims to benefit the rich over the poor expounded by Ferraz, above, note 199, pp. 33–45.

²⁰⁷ See above, note 41, Principle 5.

²⁰⁸ *Ibid.*

Litigators must identify whether the ground or grounds of discrimination in a particular scenario are recognised as “prohibited” under applicable discrimination provisions. In this regard, it is notable that the extent to which discrimination on the above mentioned grounds is prohibited in binding international, regional and national law varies to a significant degree. Article 2(1) and Article 26 of the ICCPR and Article 2(2) of the ICESCR prohibit discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property and birth – all of which are grounds which are commonly identified in other discrimination provisions at an international, regional and national level. Discrimination on grounds of disability, age and sexual orientation is also becoming more commonly explicitly prohibited in legislation or is being read into existing provisions.²⁰⁹ Litigators should bear in mind that, the lists of grounds in the ICCPR and the ICESCR and many other regional and national documents, are non-exhaustive. For example, the ICCPR and the ICESCR provide that there should not be discrimination based on any “other status”, and the HRC and the CESCR have identified certain characteristics as covered through “other status”.²¹⁰ Again, the approach to whether the list of grounds is fixed or non-exhaustive varies.

The remainder of this section focuses in detail on the potential claimants in a discrimination claim and is split into three parts. First, it examines the use of some of the grounds of discrimination more commonly recognised expressly in international treaties and regional and national laws. Secondly, it explores the extent to which discrimination on grounds of “socio-economic status” or an analogous status may be prohibited. Finally, it discusses the tensions which arise when considering whether to approach an issue from the position of a vulnerable group whose common characteristic is widely recognised as one on the basis of which discrimination is prohibited (e.g. race) as opposed to seeking to rely on characteristics that are less accepted but, in some cases, more accurately related to the issue in question such as that of poverty or socio-economic status.

Effective Use of a Traditional Ground of Discrimination

The list of characteristics commonly recognised as “protected” in non-discrimination law has expanded over the last forty years and there is a variance across jurisdictions as to the extent of a particular ground’s explicit inclusion within anti-discrimination laws. This section explores the possibility of advancing ESRs for groups identifiable by some of the more commonly recognised explicit grounds of discrimination, namely sex, race and disability. These grounds have been identified to have a particularly notable impact on the likely socio-economic position of an individual. However, it is important to emphasise at the outset that other grounds may be relevant in a given context. For example, in a number of jurisdic-

209 See, for example, *Toonen v Australia*, Comm. No. 488/1992, UN Doc. CCPR/C/50/D/488/1992, in which the HRC determined that sexual orientation was a prohibited ground.

210 The CESCR has recognised disability, age, nationality, marital and family status, sexual orientation and gender identity, health status, place of residence and economic and social situation. For more detail see CESCR, above, note 42, Paras 27–35. The HRC has, amongst others, has stated that marital status is a protected ground under “other status” in *Danning v the Netherlands* (Communication No. 180/1984), UN Doc. CCPR/C/OP/2 at 205 (1990); and *Sprenger v the Netherlands* (Communication No. 395/1990), UN Doc. CCPR/C/44/D/395/1990 (1992)).

tions social and economic benefits are often distributed according to age. Furthermore, the intersection of two or more protected characteristics may be relevant to understanding and assessing the disadvantage suffered, e.g. where young women or young men from particular racial groups are particularly disadvantaged.²¹¹

This section provides guidance on: the laws under which each of the grounds upon which this study focuses is protected; the extent to which each ground is relevant to an individual's enjoyment of ESRs; the extent to which a violation of a relevant group's ESRs has been recognised by the courts; and some associated challenges.

Sex

Sex is one of the original grounds of discrimination identified in international human rights law and is one of the most widely protected.²¹² Accordingly, there are many possible avenues for a claim of sex discrimination.

All the key international and regional conventions which contain provisions relating to non-discrimination expressly prohibit discrimination on grounds of sex.²¹³ Of particular note is the CEDAW. Women have historically suffered most acutely as a result of sex discrimination and continue to be subjected to disproportionate burdens in seeking to access ESRs. The CEDAW not only prohibits discrimination against women (Article 2) but also obliges states parties to uphold many ESRs for women. It provides detail of the precise nature of the state's socio-economic obligations, which include taking positive measures as and when appropriate.²¹⁴ For example, Article 12 of the CEDAW requires states to:

[T]ake all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

It also makes requirements of particular positive measures for women-specific healthcare by requiring states to:

211 Courts often remain unwilling to make findings based on "multiple discrimination" of this type, but this is not to say the arguments should not be brought. See, for example, the Canadian decisions in *Gosselin v Attorney General of Quebec* [2002] 4 SCR 429; and *Withler v Canada (Attorney General)* [2011] 1 SCR 396.

212 Understandings of the notion of sex and the related notion of gender have developed significantly over the past decades. There has been a clear shift away from the notion of the sex binary, which categorises people on the basis of whether they have been biologically determined to be a man or a woman. We strongly support the move away from a biological focus to a social focus. We also support a move away from the notion of a binary, recognising that some individuals identify themselves as intersex and that some peoples' gender identities do not accord with the biological sex which they have been given. This section does not seek to ignore the invidious discrimination against individuals who fall outside of the traditional sex binary. However, it focuses on the impact of sex on equality between men and women in the enjoyment of ESRs. For this reason, references to sex inequality in this section are references to differences in enjoyment of ESRs between men and women.

213 UDHR, Article 2; ICCPR, Articles 2(1), 4(1), 24(1) and 26; ICESCR, Article 2(2); CEDAW, Article 2; CRC, Article 2(1); ICMW, Articles 1(1) and 7; ACHPR, Article 2; ACHR, Article 1(1); ECHR, Articles 1 and 14; and ESC, Article E.

214 See for example, Article 10 with regard to education, Article 12 with regard to health and Article 14 in relation to social security.

*[E]nsure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.*²¹⁵

In many jurisdictions women (and men) also have recourse to specific national laws which prohibit sex discrimination, both by the state and by private actors in the provision of public services and in employment.²¹⁶ Accordingly, people who have suffered sex discrimination in their enjoyment of an ESR may have both a claim against the state itself and a civil claim against a private actor.

The Link between Sex and Socio-Economic Situation: The link between a person's sex and their socio-economic situation has been widely researched and discussed.²¹⁷ As Fredman explains, not only are women more likely to live in poverty than men, but "gender inequality specifically shapes women's experience of poverty".²¹⁸ The nature and extent of the link, and the reasons for it, vary from jurisdiction to jurisdiction. But two key causes can be identified. First, Liebenberg, discussing South Africa, explains that "women bear a disproportionate burden" of work such as caring for children and the elderly and carrying out tasks "associated with keeping households and extended families going", a burden "which is exacerbated when the State cuts or fails to provide basic social services such as potable water, health care, good and accessible school facilities and social security".²¹⁹ So long as society differentiates between the roles that men and women play within the family and in society such that women care for the home and family, women will be disproportionately negatively impacted by the inadequate provision of social services.

Secondly, women may have specific needs which have often not been taken into account when designing a particular social service. This means that existing social provisions may be available to all and, on their face, appear to fulfil a given ESR, but be constructed in a way which leaves women systematically disadvan-

215 CEDAW, Article 12(1) and (2).

216 See, for example, (i) the Sex Discrimination Act, above note 110, in Australia; (ii) the Equality Act, above note 109 and the Human Rights Act 1998 in the United Kingdom; (iii) the Equal Status Act 2000 and the Employment Equality Act 1998 in Ireland; (iv) the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 2000 in South Africa; (v) the Canadian Human Rights Act 1985 and the Canadian Bill of Rights 1960; (vi) the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the Civil Rights Act 1964 in the United States; (vii) the Constitution of India under Articles 14-18 "Right to Equality"; and (viii) the Brazilian Constitution under Article 5(1).

217 See, for example, the United Nations online resource centre for Gender Equality and the Empowerment of Women (WomenWatch) for different information and resources on the thematic issue of women and poverty, available at http://www.un.org/womenwatch/directory/women_and_poverty_3001.htm; McLanahan, S.C., Sørensen, A. and Watson, D., "Sex Differences in Poverty – 1950–1980", *Signs*, Vol. 15, No. 1, 1989, pp. 102–122; Krishnaji, N., "Poverty and Sex Ratio – Some Data and Speculations", *Economic and Political Weekly*, Vol. 22, No. 23, 1987, pp. 892–897; Brodsky, G. and Day, S., "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty", *Canadian Journal of Women and the Law*, Vol. 14, 2002, pp. 184–219; and Fredman, S., "Engendering Socio-Economic Rights", *South African Journal of Human Rights*, Vol. 25, Part 3, 2009.

218 See Fredman, S., above, note 217, p. 412.

219 See above, note 53, p. 208.

tagged. For example, given the biological differences between men and women, women will have specific healthcare needs which men do not have. A health system which provides adequate healthcare for men but has been constructed without the specific needs of women in mind, may fall short of meeting the right to health of women but not men. As Fredman explains:

[S]imply extending socio-economic rights to women is not sufficient. This does little to address the gendered nature of social institutions and structures. Instead, socio-economic rights should be 'engendered' or infused with substantive gender equality.²²⁰

Case Law: Sex Discrimination in Relation to Socio-Economic Rights: An examination of the substantial jurisprudence relating to sex discrimination in the enjoyment of ESRs reveals precedent both for the requirement that both men and women must have access to social services (the equal treatment model, or “formal equality”) and for the requirement to take certain special measures in the provision of services to recognise the specific requirements of women (“substantive equality”). Litigators may wish to draw on the following examples.

In Focus: Gender Discriminatory Social Security Laws

A number of cases demonstrate that whilst courts remain reticent to require states to provide progressive social security systems, they seem more willing to hold that, where a state already provides a particular social security benefit, that benefit must be available on an equal basis regardless of the sex of the individual in question. A number of cases arose in European jurisdictions against a backdrop of historic national social security schemes which were premised on an assumption that married women were dependent on/“kept” by their husbands and that this meant they did not require the same access to social security as their husbands. The jurisprudence is clear that such a differentiation constitutes unlawful sex discrimination.

Adjudicating Body: Human Rights Committee

Case: *Zwaan-de Vries v The Netherlands*, Comm. No. 182/1984, UN Doc. CCPR/C/OP/2, 9 April 1987.

Under a social security law in the Netherlands, social security benefits for the long-term unemployed were not available to married women who were not the “breadwinner” in their family, albeit the benefits were available to married men regardless of whether or not they were the “breadwinner”.

The Committee noted that Article 26 of the ICCPR which guarantees equality, “prohibits discrimination in law or in practice in any field regulated and protected by public authorities” including the regulation of social security provision. It identified that:

[W]hat is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26.

The Committee noted that, under the Netherlands Civil Code, spouses have equal rights and obligations regarding their joint income but that the Unemployment Benefits Act differentiated between spouses, requiring married women but not married men to prove that they were the “breadwinner” to be eligible. The Committee held this differentiation to be unreasonable and a violation of Article 26 on the grounds that it constituted sex discrimination.

Comment: This case demonstrates the Committee’s willingness to find a violation of the right to equality where social security laws contain outdated discriminatory provisions stemming from historical presumptions about the roles of men and women within a family unit.

In Focus: Women's Healthcare

There are a number of decisions identifying that a failure to provide for the specific healthcare needs of women will constitute discrimination in relation to the provision of healthcare.

Adjudicating Body: Committee on the Elimination of Discrimination Against Women

Case: *Alyne da Silva Pimentel v Brazil*, Comm. No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 25 July 2011.

Ms Pimentel died of complications resulting from her pregnancy after a health centre in Brazil failed to provide for appropriate and timely access to emergency obstetric care. Her death could have been prevented if the health centre had diagnosed and treated her intrauterine foetal death.

The Committee stated that “[t]he lack of appropriate maternal health services in the State party that clearly fails to meet the specific, distinctive health needs and interests of women” constitutes discrimination under Article 2 of the CEDAW together with violations of some other substantive provisions. Furthermore, the Committee stated that “the lack of appropriate maternal health services has a differential impact on the right to life of women”.

Alluding to the structural inequality against women in the financing of Brazil's health programmes, the Committee stated that:

Brazil's health policies need to be backed up by adequate funding which is equitably allocated: although 10 per cent of Government spending is dedicated to health, spending on maternal health is minimal in comparison to other programmes. (Para 5.8)

Comment: The Committee is unequivocal that a failure to provide a service which is inherently for women only, adequate maternal healthcare, constitutes discrimination as it fails to acknowledge needs specific to women.

Challenges: There is clear evidence of the relationship between sex and disadvantage in access to particular social and economic services and there is reason for optimism as to the possibilities for successfully challenging sex discriminatory lack of enjoyment of ESRs. However, beyond the medical context, in which the impact of the biological differences between men and women have a particular resonance, it is unclear to what extent courts are ready to recognise that the need for substantive equality between men and women requires certain positive

actions to correct embedded disadvantage for women in the enjoyment of ESRs. In general, in the European jurisprudence on differential social security benefits for men and women, the courts have interpreted the equal treatment of men and women as requiring formal equality, i.e. that men and women of comparable status should receive the same level of social security benefit.²²¹ This is of course useful where the characteristic of sex is entirely irrelevant. However, as Wesson paraphrasing Fredman notes: “What formal equality fails to recognise (...) is that it is only in certain contexts that such characteristics are irrelevant”.²²² It may be more challenging to bring a claim that a certain group, e.g. men, women or intersex persons, require additional support in relation to an ESR where the link between access to the right and their sex is based on practical realities rather than biology.²²³ Reliance on some of the reasoning from the health-related jurisprudence may prove more useful than that from the social security cases, in helping to bolster an argument for the need for measures to achieve substantive equality between men and women.

Race

Race discrimination is one of the original grounds of discrimination identified in international human rights law.²²⁴ There are many potential avenues for a claim of race discrimination as it is the most widely prohibited form of discrimination. All the key international and regional conventions which contain provisions relating to non-discrimination expressly prohibit discrimination on grounds of race.²²⁵ Much of the current law around the prohibition of discrimination developed during the civil rights movement in the United States, a time during which widespread racial segregation and entrenched racial prejudice was beginning to be seen to be invidious and in need of eradication.

221 This is perhaps due to the formulation of the requirement of the “equal treatment of men and women” in Council Directive 79/7/EEC of 19 December 1978. For other European examples, please see *Emmott v Minister for Social Welfare and Attorney General*, Case C-208/90; *Van Cant v Rijksdienst voor pensioenen*, Case C-154/92; and *The Queen v Secretary of State for Social Security, ex parte John Henry Taylor*, Case C-382/98.

222 See above, note 64, p. 76.

223 For example, in an environment where girls are culturally prohibited from walking to school or taking public transport but boys are not, would the right to education require the state to provide transport for girls in order that they could attend school? It would amount to the provision of a benefit only to school children of a certain sex. A litigator may argue that this is positive action which is required as a result of the structural inequality faced by girls in the society. But litigators may find this to be a harder case to bring as it relates to structural inequality rather than biological difference.

224 The notion of racial discrimination is treated in different ways in different international instruments. Article 1(1) of the ICERD defines racial discrimination as discrimination on the basis of “race, colour, descent, or national or ethnic origin”. The CERD has explained that, for the purposes of the ICERD, “descent” includes “caste and analogous systems of inherited status” (see *General Recommendation No. 29: Discrimination Based on Descent*, UN Doc. A/57/18 at 111, 2002, Preamble). These various subcategories have their own very specific characteristics and the particular nature of the discrimination in a given case which broadly falls within this definition of “race” should be carefully considered. However, the subcategories share similar implications in relation to the bases on which a particular group is likely to be disadvantaged in the enjoyment of its economic and social rights. For this reason, this report considers “race” in the sense it is considered by the CERD as a broad umbrella term for many categories of discrimination.

225 UDHR, Article 2; ICCPR, Articles 2(1), 4(1), 24(1) and 26; ICESCR, Article 2(2); CRC, Article 2(1); ICMW, Articles 1(1) and 7; ACHPR, Article 2; ACHR, Article 1(1); and ECHR, Articles 1 and 14; and ESC, Article E.

Particularly detailed protection is afforded under the ICERD. The Convention requires state parties to prohibit all forms of racial discrimination and, amongst other things, to ensure the enjoyment for all, regardless of race, of economic, social and cultural rights, in particular:

- i. *The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;*
- ii. *The right to form and join trade unions;*
- iii. *The right to housing;*
- iv. *The right to public health, medical care, social security and social services;*
- v. *The right to education and training;*
- vi. *The right to equal participation in cultural activities.*²²⁶

As mentioned above, the CERD, responsible for reviewing state compliance with the ICERD, is also mandated to hear individual complaints against states that have recognised its competence to do so.²²⁷ This provides a valuable method of redress for race discrimination in enjoyment of the above-mentioned ESRs where such protection is not afforded in national law. However, in many jurisdictions individuals also have recourse to specific national laws which prohibit race discrimination, both by the state and by private actors, in the provision of public services and in employment.²²⁸ Accordingly, people who have suffered race discrimination in their enjoyment of an ESR may have both a claim against the state itself and a civil claim against a private actor.

Link between Race and Socio-Economic Situation: In many jurisdictions, the link between income poverty, race and a lack of access to social and economic services has been researched and reported.²²⁹ Race discrimination continues to be widespread, albeit to varying degrees and in different forms across jurisdictions. In some parts of the world, it is so invidious that being amongst the most improv-

226 ICERD, Article 5(e).

227 *Ibid*, Article 14.

228 See for example, (i) the Equality Act, above note 109 and the Human Rights Act, above note 216, in the United Kingdom; (ii) the Equal Status Act, above note 216, and the Employment Equality Act, above note 216, in Ireland; (iii) the Promotion of Equality and Prevention of Unfair Discrimination Act, above, note 216, in South Africa; (iv) the Canadian Human Rights Act, above, note 216, and the Canadian Bill of Rights, above, note 216; (v) the Equal Protection Clause of the Fourteenth Amendment, above, note 216 and the Civil Rights Act, above, note 216 in the United States; (vi) the Constitution of India under Articles 14–18 “Right to Equality”; (vii) the Brazilian Constitution under A 5(1); and the Brazilian Racial Equality Statute established by Federal Law No. 12.288/2010.

229 See for example, The Henry J. Kaiser Family Foundation, “Poverty Rate by Race/Ethnicity in the United States for the period 2010-2011”, available at: <http://kff.org/other/state-indicator/poverty-rate-by-race-ethnicity/>; Leibbrandt, M. et al., “Trends in South African Income Distribution and Poverty since the Fall of Apartheid”, *OECD Social, Employment and Migration Working Papers*, No. 101, 2010; and Institute for Applied Economic Research (IPEA), “Poverty Rate by Race in Brazil for the period 1995-2009” (table 10.10) (in Portuguese), available at http://www.ipea.gov.br/retrato/indicadores_pobreza_distribuiacao_desigualdade_renda.html. For the situation in the UK, see Barnard, H. and Turner, C., *Poverty and Ethnicity: a review of evidence*, Joseph Rowntree Foundation, 2011.; and Rao, J., “The Caste System: effects on poverty in India, Nepal and Sri Lanka”, *Global Majority E-Journal*, Vol. 1, No. 2, 2010, pp. 97–106.

erished sections of society is synonymous with belonging to a particular racial or ethnic minority group.

Case Law: Race Discrimination in Relation to Socio-Economic Rights: Race discrimination is treated particularly seriously by the courts and any evidence of socio-economic policies which are based on racial prejudice may be quickly found to be a violation.

In Focus: Racial Segregation in US Schools

The seminal case on racially discriminatory access to ESRs is the case of *Brown v Board of Education* which went before the US Supreme Court in 1954.

Adjudicating Body: US Supreme Court

Case: *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

In *Brown* the court was required to consider whether segregation of children in public schools on the basis of race violated the equal protection of the laws afforded under the Fourteenth Amendment of the U.S. Constitution, even in cases where the physical facilities were substantially equal. The case was brought by a number of black children who wanted to be granted admission to schools in their local community on a non-segregated basis.

In finding a violation of the Fourteenth Amendment, the Supreme Court overturned the “separate but equal” doctrine of the time under which equality between the races was said to exist when they were accorded substantially equal facilities, even if they were separate.

The Court examined the psychological effects of segregation in public education upon black children, noting that separation on the basis of race:

[G]enerates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. (p. 494)

In Focus: The Roma Cases

There has been a series of judgments against a number of European states in which the adjudicating bodies have found that the Roma have been discriminated against in regard to their rights to housing, health and education.* The discrimination has been found to be both direct, discrimination in an explicit and stigmatising manner, and through a failure by the state to take positive measures to account for the Roma's particular vulnerability as "a specific type of disadvantaged group and vulnerable minority" requiring "special protection" whose needs and different lifestyle should be given "special consideration".**

Adjudicating body: European Committee of Social Rights

Case: *Centre on Housing Rights and Evictions (COHRE) v France*, Complaint No. 63/2010, 28 June 2011 and *European Roma and Travellers Forum (ERTF) v France*, Complaint No. 64/2011, 24 January 2012.

In two cases brought between 2010 and 2011, COHRE and the ERTF respectively claimed that Roma and Travellers from Romania and Bulgaria suffered systematic discrimination in France with regard to their right to housing. They claimed a violation because of: the groups' insecure housing situation; the fact that they were being forcibly evicted from their homes and "voluntarily" sent back to Romania; and their difficulties acquiring social and housing benefits.

In both cases, France was accused of violating Article 16 (the right of the family to social, legal and economic protection), Article 19(8) (the right of migrant workers and their families not to be expelled) and Article 31 (the right to housing) and Article E (non-discrimination) of the RESC.

In the ERTF case, quoting the ECtHR, the Committee noted that:

Discrimination on account of one's actual or perceived ethnicity is a form of racial discrimination (...). Racial discrimination is a particularly invidious kind of discrimination and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction.

In considering the discrimination element of the claim, it went on: "human difference should not only be viewed positively but should also be responded to with discernment in order to ensure real and effective equality". (Para 40)

Article E not only prohibits direct discrimination but also all forms of indirect or systemic discrimination. Discrimination may in fact also arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights

and collective advantages that are open to all are genuinely accessible by and to all (...) Systemic discrimination can be understood as legal rules, policies, practices or predominant cultural attitudes, in either the public or private sector, which create relative disadvantages for some groups, and privileges for other groups. (Para 41)

In both cases the Committee unanimously found that there had been a catalogue of discriminatory violations of rights of the Roma and Travellers by France. Amongst others, in the ERTF case, France's administrative decisions ordering the Roma to leave the country directly discriminated against the Roma, targeting them. The decisions had also failed to examine their personal circumstances and were disproportionate. (Para 66)

Comment: The cases highlight the ongoing invidious discrimination faced by the Roma and Travellers with regard to enjoyment of the right to housing in France. They also demonstrate that not only will direct discrimination against such groups be unacceptable but that states must ensure that, in making decisions regarding social rights, particular consideration of the specific needs of certain ethnic minority groups be taken into account. The Committee was able to draw not only on its own jurisprudence on the strict approach taken to racial discrimination but also the developed jurisprudence of the ECtHR in this regard.

- * It is noteworthy that these cases are a good example of the potential for strategic litigation to be used to foster change. The cases largely exist thanks to the European Roma Rights Centre being a very active strategic litigator. For information about Roma cases where discrimination was found in relation to ESRs, see www.errc.org.
- ** ECSR, *European Roma and Travellers Forum (ERTF) v France*, No. 64/2011, Para 24, quoting ECtHR in *Oršuš and Ors v Croatia*, (Application No. 15766/03), 16 March 2010, Para 147, 148.

The above examples are not unique and litigators seeking to claim that there has been racial discrimination against an ethnic group in relation to the enjoyment of ESRs are advised to consider the significant jurisprudence of the ECSR together with a number of useful cases from other jurisdictions on this issue.²³⁰

Importantly, litigators have a large number of precedents to draw from on the subject of race discrimination in the enjoyment of an ESR in which courts have

²³⁰ See for example, on housing ECSR, *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No. 58/2009, 25 June 2010; ESCR, *Centre on Housing Rights and Evictions (COHRE) v Croatia*, Complaint No. 52/2008, 22 June 2010; ECSR, *International Movement ATD Fourth World v France*, Complaint No. 33/2006, 5 December 2007; and CERD, *Ms. L. R. et al. v Slovakia*, Communication No. 31/2003, UN Doc. CERD/C/66/D/31/2003, 10 March 2005. On health, see ECSR, *European Roma Rights Centre v Bulgaria*, Complaint No. 46/2007, 3 December 2008.

been willing to consider not only a lack of formal equality between different ethnic groups residing within a state, but also to identify the substantive inequality faced by some groups. Courts and other adjudicating bodies have proved willing to hold states to account for failing to take positive measures in recognition of the specific needs of particular groups.

Disability

In the earlier international human rights treaties, the right to non-discrimination did not explicitly include disability as a protected ground.²³¹ However, disability is now widely accepted to be a protected ground. International law recognises the specific needs of people with disabilities and provisions detailing the rights of people with disabilities are arguably some of the most progressive within equality law. There are a number of international and regional conventions which can be used as the basis for claims before the courts of discrimination on grounds of disability in ESR cases.²³² Most notably, the CRPD contains detailed provisions setting out the specific rights of people with disabilities in the enjoyment of ESRs, identifying the particular aspects of their rights to an education,²³³ the highest attainable standard of health,²³⁴ and to adequate standard of living and social protection.²³⁵ The CRPD requires states to take various positive measures to accommodate the needs of people with disabilities.

The need to provide special measures in order for people with disabilities to be able to equally participate in society is also recognised in a variety of ways in a number of regional instruments. For example, Article 15 of the European Social Charter states that “the effective exercise of the right to independence, social integration and participation in the life of the community” of people with disabilities requires, among other things, that the state undertake:

*[T]o promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.*²³⁶

231 Persons with disabilities are defined by Article 1 of the CRPD to “include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others”.

232 For a useful list of the key international conventions and other documents relating to the rights of people with disabilities please see <http://www.un.org/esa/socdev/enable/disovlf.htm>.

233 CRPD, Article 24.

234 *Ibid*, Article 25.

235 *Ibid*, Article 28.

236 ESC, Article 15(3).

Article 18 of the ACHPR notes that “the disabled shall (...) have the right to special measures of protection in keeping with their physical or moral needs”²³⁷ and the Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities notes that people with disabilities require “special attention” and that states must “adopt the legislative, social, educational, labour-related, or any other measures needed to eliminate discrimination against persons with disabilities and to promote their full integration into society”.²³⁸

Some earlier conventions do not explicitly recognise “disability” as a protected ground of discrimination. However, in many cases it has now been read into the discrimination provision. For example, Article E of the RESC has been held by the ECSR to protect people on grounds of their disability.²³⁹

Link between Disability and Socio-Economic Situation: As the Supreme Court of Canada has identified, the “true characteristics” of people with disabilities:

*[A]ct as headwinds to the enjoyment of society's benefits (...) Exclusion from the mainstream of society results from the construction of a society based solely on 'mainstream' attributes to which the disabled will never be able to gain access.*²⁴⁰

Cultural attitudes mean that persons with disabilities continue to be subjected to individual prejudice when seeking to access social services. They also often suffer as a result of misplaced assumptions as to their inability to exercise the same rights as people without disabilities.²⁴¹ Crucially, there are many structural barriers to their equal access to services which come about through a misunderstanding of their needs or, often, a failure to consider those needs at all. From segregation in schooling systems, the provision of inaccessible services such as housing and public transport and workplace environments and procedures which fail to take account of the specific needs of employees with disabilities, it is perhaps unsurprising that persons with disabilities have been found to be overrepresented amongst the lowest socio-economic strata of society.

Case Law: Disability Discrimination in Relation to Socio-Economic Rights: The extent of the obligations under equality law to take positive measures in relation to people with disabilities, outlined above, has resulted in a large number of cases which illustrate that equality law can be useful in advancing the ESRs of people with disabilities, but that it contains challenges.

237 ACHPR, Article 18(4).

238 Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons With Disabilities, Preamble and Article III(1).

239 ECSR, *Autism-Europe v France*, Complaint No.13/2000, 4 November 2003.

240 *Eaton v Brant County Board of Education*, [1997] 1 SCR 241.

241 United Nations Enable, “Overview of International Legal Frameworks for Disability Legislation” available at: <http://www.un.org/esa/socdev/enable/disovlf.htm>.

In Focus: Access to Education for Children with Disabilities

Determining the best method by which to achieve the right to inclusive education for children with disabilities is complex as it is critical that the particular needs of the individual child in question are met. The general understanding of how best to achieve this has developed significantly over the past two decades. Litigators must look to recent and human rights compliant jurisprudence on this issue for guidance. Such jurisprudence makes clear that courts require states to take progressive measures to ensure the right to inclusive education of children regardless of their disabilities.

Adjudicating Body: European Committee of Social Rights

Case: *International Association Autism Europe v France*, Complaint No. 13/2002, 4 November 2003.

Autism Europe claimed France's failure to improve its provision for education of children and adults with autism put it in violation of its responsibilities under the Charter. As 80-90% of young adults and children with autism had no access to adequate educational services, Autism Europe claimed France had not fulfilled the requirement to achieve measureable progress within a reasonable time toward securing the right of education for persons with autism as effectively as for those without autism. This, it claimed, amounted to a breach of Article 15(1) (measures to provide persons with disabilities with (...) education) and Article 17(1) (measures designed to ensure that children and young persons have (...) the education (...) they need) taken in conjunction with Article E (anti-discrimination provision) of the RESC.

Holding that "disability" was a ground covered by the RESC, the Committee also stated that:

[H]uman difference in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality. In this regard, the Committee considers that Article E not only prohibits direct discrimination but also all forms of indirect discrimination. Such indirect discrimination may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all. (Para 52)

It went on:

[T]he implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. When the achievement

of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources. State Parties must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings.

Noting that there was a national debate going back 20 years on the matter, the Committee found that the lack of measureable progress to address the unacceptable and chronic shortage of educational places for persons with autism was sufficient to amount to a violation of Articles 15(1) and 17(1) of the RESC when read alone, or in combination with Article E. The costs involved in resolving the problem were not a sufficient excuse for this lack of action.

In Focus: Reasonable Accommodation by Service Providers

The concept that, in certain circumstances, in order to achieve equality the state has a duty to make reasonable accommodation and to ensure that private parties made it for people with disabilities in the provision of services, has been the subject of some useful jurisprudence.* Perhaps the following decision is the clearest illustrative example:

Adjudicating Body: Supreme Court of Canada

Case: *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

The court was asked to consider whether the absence of interpreters for deaf hospital patients subjected them to an increased risk of misdiagnosis and ineffective treatment and whether not requiring and funding hospitals to provide such services was a violation of the right to equality under Section 15 of the Canadian Charter of Rights and Freedoms.

In an unequivocal judgment responding to arguments that resource limitations justified limiting funding for this service, the Court concluded that “it is impossible to characterize the government’s decision not to fund sign language interpretation as one which reasonably balances the competing social demands which our society must address”. (Para 93)

Accordingly, the Court held that the government must rectify the situation. It issued a declaration suspended for 6 months to give the government time to do this. The only possible interpretation of the judgment for the government was that it must fund the provision of sign language interpreters for hearing impaired patients.

* For a detailed discussion of the reasonable accommodation obligation see 3.5 below. See also ECHR, *Botta v Italy* (Application No. 21439/93), 24 February 1998.

Challenges: The actions which will be necessary to uphold the rights of a person with disabilities vary dramatically depending on the given facts of the case. Whilst it is clear that courts have no problem identifying that states are obliged to take special measures for people with disabilities in order to enable them to access social services, there are mixed results in the extent to which courts will find that it is legitimate and proportionate, in the face of limited resources, for a state to take special measures to take account of the particular disability of a given individual. For example, in the UK there has been a struggle to identify when special dispensation must be made for person with disabilities when allocating limited housing stock/benefit.²⁴²

242 See for example, *Burnip v Birmingham City Council*; *Trengove v Walsall MBC* [2012] EWCA Civ 629.

Another difficulty for litigators in certain contexts may be that of proving that an individual falls within the protected group. The CRPD definition of persons with disabilities is broad. However, whilst litigators should submit that this is the definition that should be applied by courts, the legal definition adopted varies across jurisdictions and this may impact on a court's assessment of the applicability of a disability discrimination prohibition in a given case.

Nationality/Immigration Status

Citizenship remains central to most people and states' general conception of national rights and obligations. As a result, discrimination claims on the basis of citizenship in accessing ESRs are likely to be of limited use. Nevertheless, although nationality and immigration status are not explicitly identified as protected grounds in international human rights treaties, the obligation to protect from discrimination on such grounds is clear.²⁴³ And there are some limited, but important, circumstances in which one can successfully bring a claim for discrimination on these grounds in the realisation of ESRs. These bear consideration.

Under the ICESCR, state parties undertake that the Covenant rights will be exercised "without discrimination of any kind"²⁴⁴ and the CESCR has interpreted this to include a prohibition on discrimination on grounds of nationality, stating that:

*The ground of nationality should not bar access to Covenant rights (...) [t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.*²⁴⁵

Likewise, the HRC, in interpreting state obligations under the ICCPR, has stated that: "In general, the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness".²⁴⁶ While it is generally accepted in international law that it may be legitimate for states to distinguish between citizens and non-citizens in certain strictly defined areas such as immigration control, this must be seen as an exception to the principle of equality and so "must be construed so as to avoid undermining the basic prohibition of discrimination".²⁴⁷

243 Nationality may not be one of the most traditional grounds of discrimination but it is widely recognised and, due to its particularly strong link with a person's economic and social situation, it merits exploration. In some jurisdictions, e.g. the UK, nationality is considered to fall under the umbrella of "race" discrimination. We consider that a person's nationality/immigration status, as determined by law, carries with it some very distinct issues when it comes to their enjoyment of ESRs. For this reason, we have considered it in isolation from other "race" discrimination.

244 ICESCR, Article 2(1).

245 See CESCR, above, note 42, Para 30.

246 See above, note 32, Para 1.

247 CERD, *General Recommendation No. 30: Discrimination against Non-Citizens*, UN Doc. A/59/18, 2004. For further discussion, see the Equal Rights Trust, *Unravelling Anomaly: Detention, Discrimination and the Protection Needs of Stateless Persons*, 2010, pp. 32–42.

Link between Nationality/Immigration Status and Socio-Economic Situation: For certain categories of immigrants, one's nationality or immigration status may be strongly correlated with the extent of their enjoyment of ESRs in a given jurisdiction, with access to social services continuing to be a major issue for people who are outside of their home state or are stateless. Irregular migrants are the most vulnerable group in this regard. For centuries, the formal structure of societies governed by law has been dominated by the nation state, with the nation responsible for the wellbeing and security of its citizens. Social security and other welfare systems for the benefit of citizens have developed based on this premise. It is commonplace for states to restrict access to social benefits to people on the basis of their nationality of the state, leaving non-citizens unable to access healthcare, education, housing and social security benefits on an equal basis with citizens. Accordingly, migrants have a "special vulnerability".²⁴⁸ As "strangers to society,"²⁴⁹ they face discrimination in many aspects of their lives and this is particularly evident in relation to their access to their ESRs. The interconnectedness between nationality and access to rights is particularly stark in relation to stateless people. If access to ESRs (and other rights) is dependent on a person's nationality and a person's right to nationality has been violated, they are denied their fundamental rights.²⁵⁰

Case Law: Discrimination on Grounds of Nationality/Immigration Status in Relation to Socio-Economic Rights: In a number of cases, courts have emphasised that discrimination on grounds of nationality will not be tolerated. Setting a high bar for the justification of nationality-based differential treatment, the ECtHR has on a number of occasions gone so far as to say that "very weighty reasons would have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention".²⁵¹ Mindful of the need for such "weighty reasons", in *Andrejeva v Latvia*, the ECtHR held that the state's reasons fell short of the "reasonable relationship of proportionality" despite the fact that states enjoy a "wide margin of appreciation" in determining matters of social security.²⁵²

248 Grant, S., "International migration and human rights: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration", 2005, p. 1.

249 *Ibid*, p. 2.

250 For a detailed discussion of the situation of stateless people see the Equal Rights Trust, above, note 249. In particular, for a discussion of the rights of non-nationals and the prohibition of discrimination on grounds of nationality, see Chapter 1.

251 See, for example, ECtHR, *Andrejeva v Latvia*, above, note 76, Para 87.

252 *Ibid*, Paras 88–89.

Example

Adjudicating Body: South African Constitutional Court

Case: *Khosa and Others v The Minister of Social Development and Others* 2004 (6) SA 505 (CC).

Among other claims, the applicants in the case contended that the exclusion of all non-citizens from a number of social security schemes (including the provision of certain child benefits and old-age grants) was inconsistent with the state's obligations under Section 27 (1)(c) of the South African Constitution to provide access to social security to "everyone" and the right to equality under Section 9 of the Constitution.

The ground of alleged discrimination was that of "citizenship" which was not expressly recognised in the South African Constitution. However, the Court held that it was analogous to the explicitly recognised grounds of "race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth"²⁵³ because:

*[C]itizenship is typically not within the control of the individual and is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs. It is also true, as was noted in Larbi-Odam, that in the South African context individuals were deprived of rights or benefits ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race.*²⁵⁴

The court held that Section 27's applicability to "everyone" must be interpreted to include non-citizens.

It stated that:

[E]ven where the state may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole. Thus if the means chosen by the legislature to give effect to the state's positive obligation under section 27 unreasonably limits other constitutional rights, that too must be taken into account. (Para 45)

²⁵³ See above, note 50, Section 9(3).

²⁵⁴ See above, note 65, Para 71.

The court noted that it is necessary for the state “to differentiate between people and groups of people in society by classification” in order to “provide efficient and effective delivery of social services.” (Para 53). These distinctions must be reasonable in the given context and must not be “arbitrary or irrational” nor “manifest a naked preference”. (Para 53)

The court held that, while there was a rational link between the citizenship requirement within the social security laws under discussion and the immigration policy it was meant to support, this was not sufficient for such a distinction to be constitutional. Instead, the restriction of the benefit in question to citizens had to be “reasonable”, a higher threshold for the state to meet in seeking to justify the provision.

Challenges: As mentioned at the outset, there are some big challenges to overcome if seeking to rely on a status of “nationality” or “migration status”. First, it is not always accepted that “citizenship” or status as a “non-national” are protected under the relevant non-discrimination provision and yet many of the key issues with regard to access to social and economic services are those faced by non-nationals. While the case law discussed above should prove useful in countering this argument, there are other less helpful cases.

Secondly, even where nationality is recognised as a protected characteristic, there is express acknowledgement in a number of contexts that it may be legitimate to discriminate on grounds of nationality in relation to the provision of such services. Notably, the advancement of the ESRs of non-nationals in developing countries faces a particular challenge as the ICESCR expressly states that:

*Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.*²⁵⁵

Thirdly, when ratifying the Covenant, a number of states reserved a right to discriminate between citizens and “foreigners” or “non-nationals” in the provision of certain economic and/or social services.²⁵⁶ And states who have not made such reservations also continue to distinguish between individuals in granting access to certain economic and social services. The justifications given for such discrimination usually relate to the finite nature of the available resources for the provision of the benefits and/or the desire to avoid mass immigration.

255 ICESCR, Article 2(3). It is notable that, whilst this is a challenge in relation to the position in developing states, this acknowledgement can be used to conclude that, in other contexts, Article 2(2) of the Covenant prohibits discrimination on grounds of nationality.

256 See, for example, ratifications by the Bahamas, Belgium and France, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

Finally, whilst the above cases are of use in expounding on the legitimacy or otherwise of distinctions based on nationality, they do not take a radical approach. Courts have been cautious in the extent to which they will declare differential access to social security benefits to non-nationals unlawful, tending to take a restrictive approach as to when they will hold that a non-national is in a sufficiently similar situation to a citizen for the justification to receive significant analysis. In *Andrejeva v Latvia*, the court was only determining whether a failure to treat a stateless “permanently resident non-citizen” in the same way as a citizen in relation to calculating state pension entitlements amounted to unlawful discrimination.²⁵⁷

In *Khosa*, the court was careful to limit its decision to a discussion of the reasonableness of a distinction between permanent residents and citizens, as opposed to citizens and all non-citizens including temporary and irregular migrants. There has been no case law to support an obligation under equality law to provide social security and other benefits to all non-nationals. In *Khosa*, the court’s interpretation of the scope of the state’s obligation to provide social security benefits to non-citizens was limited. In conducting its analysis of the state’s obligations under Section 27, the court accepted “that there are compelling reasons why social benefits should not be made available to all who are in South Africa irrespective of their immigration status”.²⁵⁸ Rather than holding that any distinction on the basis of citizenship amounted to unlawful discrimination, the court drew a distinction between the legitimacy of excluding permanent residents and of excluding “temporary residents or illegal immigrants” from such benefits stating that permanent residents are “in much the same position as citizens”.²⁵⁹

This is perhaps understandable given the desire of states to avoid mass migration of individuals who wish to benefit from social security benefits. This is a legitimate concern, particularly for poorer states with limited resources, who will want to avoid being in a position where they are unable to provide basic services to everyone. However, it means that the case-law on this ground is currently of limited value to litigators seeking to compel a state to provide basic emergency social services to migrants who are extremely vulnerable and have no option to seek the benefits elsewhere, such as stateless persons and asylum seekers. While the court in *Andrejeva* noted the fact that the applicant who was stateless had no other country with which they had stable legal ties, it did not go so far as to say that in all such cases the obligation would be found to exist. It may be that, bringing a claim based upon the general right to equality requiring certain minimum standards or arguing that there is a prohibition of discrimination on grounds of socio-economic disadvantage or race, may be preferable.²⁶⁰

257 See ECtHR, *Andrejeva v Latvia*, above, note 76.

258 See above, note 65, Para 58.

259 *Ibid*, Para 59.

260 Given the strong overlap between citizenship and race/ethnicity, it may sometimes be possible to bring such cases as claims of indirect race discrimination.

Summary

The above examples in relation to sex, race, disability and nationality illustrate that each ground carries its own potential benefits and challenges for litigators seeking to advance ESRs. The extent of the challenges depends to some degree on the historic entrenchment of certain grounds in equality law.

Discrimination Based on Socio-Economic Status

There has been much discussion of whether discrimination law does or should prohibit discrimination on grounds of what has variously been described as a person's "socio-economic status", "poverty" or "economic and social situation".²⁶¹

Principle 5 of the Declaration of Principles on Equality explicitly prohibits discrimination on grounds of "economic status" and also goes on to state that:

Discrimination based on any other ground must be prohibited where such discrimination

- i. causes or perpetuates systemic disadvantage;*
- ii. undermines human dignity; or*
- iii. adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds.*

There have been doubts and scepticism as to whether it is possible to define socio-economic status and on what basis it should be defined.

Fredman has discussed the desirable definition of a socio-economic status related ground. She notes a reluctance to have a ground of "poverty" but also considers "socio-economic status" and other similarly phrased grounds to be problematic. In her view:

*[T]he danger in using such terminology (...) is that it is symmetric, protecting the better off as well as the poor. This risks the possibility of challenges by better off people against programmes specifically designed to benefit poor people.*²⁶²

Fredman's solution is to adopt the phrase used in Section 1 of the UK's Equality Act 2010 (which has not been brought into force), which referred to "socio-economic disadvantage".²⁶³ Having an asymmetric ground recognised does appear to exclude certain groups who fall outside it from the protection of anti-discrimination provisions. However, there is a clear need for the focus to be on the less

²⁶¹ European Network of Equality Bodies (Equinet), *Addressing poverty and discrimination: two sides of the one coin: An Equinet Opinion*, 2010.

²⁶² Fredman, S., "Positive Duties and Socio-Economic Disadvantage: Bringing Disadvantage onto the Equality Agenda", *European Human Rights Law Review*, 2010, p. 10.

²⁶³ *Ibid.*

well-off and to safeguard against the risk of the law being used by the better-off, who are more likely to be able to afford litigation which would indirectly further disadvantage the poor.²⁶⁴ And it does not automatically exclude other groups who may, in certain circumstances, be in a position to make use of the protection as an “other status”.

In defining what it means to be “socio-economically disadvantaged”, it becomes clear that there is no need to deal separately with the link between this ground and the enjoyment of ESRs. Socio-economic disadvantage is inherently linked to this enjoyment as, by definition, it assumes the lack of adequate social services. Broadly speaking, it consists of living in poverty with inadequate access to financial help to secure housing, food and water and with inadequate or no access to education or healthcare.

None of the international or regional conventions which contain a non-discrimination provision recognise “socio-economic status” explicitly as a protected ground. However, it could be argued that the explicit reference to “social origin” in most major treaties could be used. Further they all contain non-exhaustive lists, prohibiting discrimination on grounds of “other status” or “other analogous grounds”. In considering the application of “other status” in the ICESCR, the CESCR has identified “economic and social situation” as an “other status” falling under Article 2(2) of the ICESCR and thus being a ground of discrimination which states should prohibit. According to the CESCR:

*Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.*²⁶⁵

At a national level, none of the leading jurisdictions with well-developed equality frameworks considered in this guide recognise “socio-economic status” as ground of discrimination. In South Africa, however, it is a directive principle under the Constitution, defined as meaning “the social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status, or lack of or low-level educational qualifications.”²⁶⁶ Directive principles act as guidelines for the courts in interpreting the Constitution, rather than being directly enforceable themselves. In the UK, the text of the Equality Act 2010 refers to the need to consider the impact of policies on reducing “the

264 See above, note 91; and note 199, pp. 33–45.

265 See CESCR, above, note 42.

266 See the Promotion of Equality and Prevention of Unfair Discrimination Act, above, note 216, Sections 1(xxvi) and 34(1).

inequalities of outcome which result from socio-economic disadvantage”.²⁶⁷ Furthermore, the UK courts have been prepared to give a wide interpretation to the “other status” contained in Article 14 of the ECHR and the UK High Court has interpreted Article 14 as prohibiting discrimination on grounds of socio-economic status in the context of the right to education.²⁶⁸

There is a dearth of cases in which arguments have successfully been brought that a persons or group has been unlawfully discriminated against because of their socio-economic situation. As a result, in addition to that limited jurisprudence, we provide examples here both of cases which recognise the relevance of socio-economic disadvantage when interpreting civil and political rights and of ESR cases in which, although a right to non-discrimination on grounds of socio-economic disadvantage was not brought, much emphasis was placed on the need to protect the socio-economically disadvantaged when interpreting the ESR in question.

Acknowledging existence of a socio-economic status as a prohibited ground

There has been some, albeit very limited, acknowledgment by adjudicating bodies of a ground of “socio-economic status” and discrimination on this basis in relation to an ESR.

In *Alyne da Silva Pimentel v Brazil*, the CEDAW Committee found that Brazil was in breach of its obligations under the CEDAW as it had both failed to provide adequate obstetric care to Mrs Pimentel and had failed to provide a swift civil redress in the courts to her family after she died as a result of this failure. It heard the expert opinion of the author who, referring to a report by the IACHR relating to judicial remedies, claimed that:

*Judicial delays are compounded for some of the most vulnerable segments of society; women from lower socio-economic backgrounds and women of African descent face widespread difficulties “in availing themselves of judicial remedies to redress acts of violence and discrimination committed against them.”*²⁶⁹

The CEDAW Committee, in considering the evidence of the situation of women in certain groups within society, recognised that there was a more specific form of discrimination in play here and concluded that:

*Ms. da Silva Pimentel Teixeira was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.*²⁷⁰

²⁶⁷ See above, note 109, Section 1.

²⁶⁸ *R (Hurley & Moore) v Secretary of State for Education* [2012] EWHC 201 (Admin). Note that the case was ultimately only partially successful and it did not result in the quashing of the increase in university tuition fees.

²⁶⁹ CEDAW, *Alyne da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008, 25 July 2011, Para 5(5).

²⁷⁰ *Ibid*, Para 7(7).

In *International Movement ATD Fourth World v France*,²⁷¹ a case relating to the forcible eviction of Roma families from their homes, the ECSR heard, amongst other claims, the claim that families living in extreme poverty were being discriminated against in relation to their effective access to their rights. Amongst others, the relevant provisions of the RESC were Article 30, which provides the right to protection against poverty and social exclusion and Article E which provides that the Charter rights:

[S]hall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

The Committee voted by nine votes to four that this constituted a violation both of their Article 30 and Article E rights. The Committee did not, however, provide reasoning for its decision on this point in relation to Article E. It arguably indicates a willingness to hold that discrimination on grounds of extreme poverty is an “other status” protected by Article E, but this is not made explicit and the case was also one of evident race discrimination.

It is of note that neither of these cases was brought solely on the basis of socio-economic status but rather on the basis that socio-economic status was one of a number of contributing factors to the unlawful discrimination in a context where there is also a finding of sex or race discrimination.

Courts requiring special measures for “poor” or “socially vulnerable” groups

Whilst it is clear that the recognition of a ground of “socio-economic status” for the purpose of discrimination law by the courts has been very limited, there is a much clearer line of cases in which courts, when determining whether a state has taken adequate measures in pursuit of a right (be it civil, political, economic, social or cultural), are proving willing to require the state to give particular consideration to its obligation to identify most vulnerable socio-economic groups and to ensure their protection. Given that this exercise requires a consideration of what constitutes “most vulnerable” for this purpose, there is no reason why this should not extend to identifying them as a group against whom discrimination is prohibited. In our view, such cases can and should be used by litigators to argue this point.

For example, in *Airey v Ireland*,²⁷² the ECtHR was required to consider the case of a woman who was unable to afford the court fees necessary to seek a judicial separation from her abusive husband. She claimed this constituted discrimination in relation to her right to access the courts under Article 6(1) of the ECHR. The Court, having found that her Article 6 right had been violated in the case as her lack of finances had meant she could not find a lawyer willing to act for

271 See *International Movement ATD Fourth World v France*, above, note 230.

272 ECtHR, *Airey v Ireland*, (Application No. 6289/73), 9 October 1979, Para 29.

her, decided by a four to three majority that it was not necessary to consider the applicant's claim that "since the remedy of judicial separation is more easily available to those with than to those without financial resources, she [had been] the victim of discrimination on the ground of 'property'".²⁷³ One of the dissenting judges, expressing the view that the Article 14 claim should have been considered, stated that "there can be no doubt that in making the claim in question the applicant was complaining of a 'clear inequality' of treatment which is based on property and is a 'fundamental aspect' of the case".²⁷⁴

At the national level, the German Federal Constitutional Court has an established jurisprudence relating to the provision of legal aid, in which the court has clearly stated that the right to equality requires access to legal aid for those who are economically disadvantaged.²⁷⁵

Further, in a number of frequently-cited ESR cases from the South African Constitutional Court, the notion of the need to protect those living in poverty or socio-economic hardship has been central. By implication, some of this reasoning (see for example *Grootboom* and *TAC*)²⁷⁶ is an acknowledgement that people with a particular socio-economic status require particular basic protection. In *Grootboom* the court said that "those whose needs are most basic" constitute a "significant segment of society".²⁷⁷ The court, rejecting the "minimum core obligation" approach which would require that all those who are in need be able to access public resource, instead examined whether an identified group had "a legitimate claim to inclusion in a social programme from which others already benefit".²⁷⁸ In Wesson's view, in so doing:

*[G]rootboom accords with a classic justification for judicial review in the area of discrimination law, which is that courts should protect the interests of vulnerable sectors of society who are unable to avail themselves of majoritarian political processes.*²⁷⁹

Following this analysis through, he posits, may lead to a conclusion that "poverty or some such criterion can be recognised as a ground of discrimination" something which he thinks many would find "implausible".²⁸⁰

Wesson raises concerns about the "minimum core obligation" approach which has been mooted as an answer to the most extreme forms of deprivation in that it does not work well when there is more than one "worse off" group, i.e. in the

273 *Ibid.*

274 *Ibid.*, Para 1 (dissenting opinion of Judge Evrigenis).

275 The leading case is BVerfGE 9, 124 of 1959. The most recent case of relevance is BVerfGE 122, 39 of 2008.

276 See *Minister of Health v Treatment Action Campaign*, above, note 107.

277 See *Government of the Republic of South Africa v Grootboom*, above, note 107, Paras 43, 44.

278 See above, note 64, p. 79.

279 *Ibid.*, p. 79.

280 *Ibid.*, p. 79.

healthcare scenario where the choice is between the provision of various types of treatments for a variety of illnesses.²⁸¹ Perhaps the notion of “worst off” is unhelpful as the notion of worst is too subjective and different people may be badly off in different ways so cannot be considered to be a group in a useful sense for discrimination law purposes. However, it is submitted that the use of a ground of socio-economic status, or poverty, is useful at least in so far as it relates to a person’s financial position, which in many states is determinative of whether or not that person is able to access health, education, social security and so on.

Challenges

Bringing a claim on grounds of socio-economic disadvantage in jurisdictions where this ground is not recognised in law will no doubt be a challenge. As discussed, most laws do not explicitly protect people from discrimination on this ground and so, in most cases, litigators will need to be creative in arguing that the ground falls within “other status”. However, the value of the ground in helping to achieve the enjoyment of ESRs for the most vulnerable in society is clear.

The key challenge for litigators will be responding to the view held by many that it is not possible to define the group which is protected by such a ground.²⁸² The clearest example of the courts’ scepticism as to the definitive quality of the ground is the US Supreme Court judgment in *San Antonio Independent School District v Rodriguez*.²⁸³ The judgment is discussed in detail here in order that litigators may understand some of the difficulties they may face in bringing a claim on the basis of “socio-economic disadvantage” or “poverty”.

In *Rodriguez*, the US Supreme Court considered whether the apparatus for financing public elementary and secondary schools in Texas violated the Equal Protection Clause of the US Constitution. In some districts, state aid provided to all schools was supplemented by the districts which were populated by more affluent families, leaving inter-district disparities in educational offerings that favoured the affluent and discriminated against children in poorer school districts. The Supreme Court, overturning the view of the District Court that “wealth” could be a criterion in defining a suspect class, held that:

The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of “poor” people or to occasion discriminations depending on the relative wealth of the families in any district. And, insofar as the financing system disadvantages those who, disregarding their individual

281 *Ibid*, p. 80.

282 See for example, MacKay, W., and Kim, N., *Adding Social Condition to the Canadian Human Rights Act*, 2009, for some common arguments against including social condition as a ground of discrimination in the Canadian Human Rights Act, and some feasible options for defining such a prohibited ground of discrimination.

283 *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).

*income characteristics, reside in comparatively poor school districts, the resulting class cannot be said to be suspect.*²⁸⁴

In a damning indictment of earlier district court decisions, the Supreme Court expressed its concerns with the use of “wealth” as a suspect class (prohibited ground) for discrimination purposes and went on:

*Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged “poor” cannot be identified or defined in customary equal protection terms, and whether the relative – rather than absolute – nature of the asserted deprivation is of significant consequence.*²⁸⁵

(...)

*In support of their charge that the system discriminates against the “poor,” appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level.*²⁸⁶

It went on to find that “there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts”.²⁸⁷

*[I]t is clear that appellees’ suit asks this Court to extend its most exacting scrutiny to review a system that allegedly discriminates against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts. The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.*²⁸⁸

284 *Ibid*, p. 2.

285 *Ibid*, p. 19.

286 *Ibid*, p. 23.

287 *Ibid*.

288 *Ibid*, p. 66.

Arguably, “poverty” and “socio-economic disadvantage” are no less capable of definition than some of the other grounds of discrimination. Take disability for example. The problems inherent in defining disability, which is very situation-specific, have been overcome sufficiently for the courts to work with the concept to help protect a marginalised group from discrimination. Socio-economic disadvantage will, to a degree, be situation specific too – in order in part to prevent undue burdens being placed on developing country resources in upholding the right to non-discrimination. Accordingly, when bringing these cases, it would be essential to carefully and clearly define what is meant by “socio-economic disadvantage” in a given context and to keep this at the heart of their analysis of the discrimination in question.

Traditional Grounds versus Socio-Economic Grounds: Tensions and Solutions

In determining which are the relevant protected characteristics in the claim, litigators should be mindful that, from a principled perspective, it is not always desirable to bring a claim based on a traditional ground of discrimination where doing so, in effect, ignores another group or groups of people disadvantaged by the particular socio-economic policy. As Liebenberg and Goldblatt acknowledge, identifying that women tend to bear responsibility for children and care for elderly and ill relatives and are thus disproportionately affected by a lack of accessible health-care facilities does not mean that poor men should not also be entitled to such services.²⁸⁹ If this is the case, is it sufficient to approach the issue on the basis of sex discrimination or would a successful judgment on that basis risk an overlooking of the ongoing plight of the poor men who were excluded? We have identified that there is a need for specific measures where women face structural inequality, but should such issues be addressed only once a basic minimum provision is available for all? As Fredman points out, “there are groups living in poverty who remain outside the protection of status-based anti-discrimination law”.²⁹⁰

However, taking a pragmatic approach, there will be instances where it is not possible to gain recognition of grounds such as socio-economic status under equality laws and in those cases it will be beneficial to argue that treatment which is disadvantageous to poor people constitutes indirect discrimination against one of the groups which is protected. For example, if it can be shown that women, persons from an ethnic minority, or disabled persons are more likely to be disadvantaged by a decision to increase university tuition fees, this may constitute indirect discrimination on grounds of sex, race and/or disability.

To some extent, the approach that a litigator takes will depend on their judgment of the appropriateness of a case in the particular circumstances. From a

289 Liebenberg, S. and Goldblatt, B., “The interrelationship between equality rights and socio-economic rights under a transformative constitution”, *South African Journal on Human Rights*, Vol. 23, 2007, p. 340. For other useful discussion of the connection between socio-economic disadvantage and traditional grounds of discrimination see Brodsky, G., and Day, S., above, note 217, pp. 185–220; and Brodsky, G., Cox, R., Day, S., and Stephenson, K.M., “Gosselin v Quebec (Attorney General)”, *Canadian Journal of Women and the Law*, Vol. 18, pp. 189–249.

290 See above, note 55.

strategic perspective, the Equal Rights Trust is of the view that more needs to be done to take the principled approach where possible, if we are ever going to see the courts recognise the failure to provide social services to the poorest as a matter of unlawful unequal treatment. The extent to which principle can be outweighed by pragmatism in a given case is one for the litigators to assess.

3.5 Claims

Litigators seeking to rely on the right to equality in challenging a violation of ESRs will need to show unequal enjoyment of ESRs. Where everyone within a state's jurisdiction is equally impoverished with respect to the enjoyment of ESRs, equality arguments will be of little help. In practice, such a situation is unlikely to arise. There are always likely to be some who are better off than others in their enjoyment of ESRs. In most cases, it will be possible to show that a denial of ESRs affects some groups and not others, or affects some groups more deeply, or in a different way, than others. In relation to women, for example, as discussed under Step 1, it has been said that "women have a higher incidence of poverty, and women experience greater depths of poverty than men".²⁹¹

Traditionally, a person seeking to show that they have been discriminated against would have to show less favourable treatment because of a protected characteristic (direct discrimination), a particular disadvantage resulting from a neutral criterion, rule, policy, or practice (indirect discrimination), a failure to make reasonable accommodations, or harassment. In some jurisdictions it is also possible to claim that the state has violated a person's right to equality by failing to take positive measures to achieve substantive equality. Of course, the claims available and their exact wording will vary across jurisdictions.

This section sets out key claims that may be brought under the right to equality or the right to non-discrimination in order to advance ESRs, as understood under the Declaration of Principles on Equality. It focuses in particular on the claims which have the most resonance in relation to issues of violations of ESRs. It provides examples based on typical classifications that have been made in certain jurisdictions and encourages litigators to consider the body of jurisprudence set out in the online case compendium as a whole when considering how to frame their claim.

3.5.1 Direct Discrimination

Most modern legal systems which provide protection against discrimination recognise that discriminatory treatment includes **direct** discrimination. Principle 5 of the Declaration of Principles on Equality states that:

291 Brodsky, G. and Day, S., above, note 217, pp 185–220.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Intention is not required for direct discrimination on a particular ground to be found. In order to determine whether there is discrimination, we look at the causal links between the protected ground and the treatment rather than considering the subjective reality in the mind of the respondent.

Direct discrimination is generally considered to be the most invidious form of discrimination and identifying direct discrimination in relation to an ESR can have a powerful impact.²⁹² Further, to litigate a case in which the violation of someone's ESRs is the result of direct discrimination without claiming a violation of the right to non-discrimination as a distinct claim (e.g. by claiming a violation of ESRs alone), would be to misrepresent the nature of the human rights violation in a serious way.

There are many ways in which direct discrimination results in a certain group in society being deprived of ESRs.

²⁹² However, it is worth noting that direct discrimination on grounds of age has often been treated in many jurisdictions, e.g. the EU, as being less invidious than other forms of direct discrimination.

Example

Adjudicating Body: African Commission on Human and Peoples' Rights
Case: *Malawi Africa Association and Ors. v Mauritania* (2000) AHRLR 149.

The Commission heard a litany of complaints about the treatment of Black Mauritians by the government of Mauritania which was alleged to be discrimination based on race in contravention of Article 2 of the ACHPR. Amongst other things the complainants alleged that while in detention, they were subjected to inhumane treatment coupled with poor nutrition and hygiene, in breach of, among other things, their right to adequate healthcare under Article 16 of the ACHPR. Within the community, it is alleged that Black Mauritians were denied access to employment and that those in the employ of government were not afforded the same benefits as other racial groups in breach of Article 15. Further, Black Mauritians were evicted and displaced from their lands.

Finding multiple violations of the ACHPR and clear evidence of direct discrimination, the Commission stated:

[F]or a country to subject its own indigenes to discriminatory treatment only because of the colour of their skin is an unacceptable discriminatory attitude and a violation of the very spirit of the African Charter and of the letter of its Article 2.

In many jurisdictions, any form of direct discrimination on the grounds of a protected characteristic is prohibited and there is no general justification for it.²⁹³ For example, provision of housing to the majority ethnic population at the exclusion of ethnic minority families would be a clear case of direct discrimination and in jurisdictions such as the UK, where direct discrimination because of race in the provision of services cannot be justified, the discrimination claim would be irrefutable.

The concept of direct discrimination is relatively uncomplicated and direct discrimination is widely condemned in all but the most exceptional of cases. Accordingly, where an argument can be made that there has been direct discrimination in the provision of ESRs, this may be a particularly strong route for litigators to follow.

²⁹³ Such is the case in the UK. However, note that, as in the UK, not all grounds are treated in the same way. In a number of jurisdictions which provide that direct discrimination on grounds of race can never be justified, it remains possible to justify direct discrimination on grounds of age (see, for example, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation).

3.5.2 Indirect Discrimination

Most modern legal systems which provide protection against discrimination outlaw **indirect** discrimination. Principle 5 of the Declaration of Principles on Equality states that:

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

For example, requiring all candidates for a job to have completed a specific qualification has the potential to be indirectly discriminatory if, for example, the qualification has only been available for a certain period and people over a certain age would have gone through the education system before that form of qualification was introduced or if the qualification is jurisdiction specific meaning candidates of other nationalities are less likely to have received the qualification.

The elements which need to be in place in order to establish a claim of indirect discrimination include the existence of a provision, criterion or practice which: is applied, or would be applied, equally to all persons; puts or would put persons to whom a particular protected ground applies at a particular disadvantage when compared with other persons; and cannot be shown to be a proportionate means of achieving a legitimate aim.

The “provision, criterion or practice” can be written or unwritten, formal or informal. The “would put” language means that it can be challenged before it has been applied. Determining whether or not the provision, criterion or practice puts those with a particular protected characteristic at a particular disadvantage may be obvious or based on common knowledge. However, in some cases, litigators will need to be mindful that showing this to be the case may require statistics or special expertise. The comparators may be actual or hypothetical.

Often the most challenging aspect of indirect discrimination jurisprudence is the question of whether or not the discrimination can be justified. Litigators must be prepared to rigorously test justifications to determine whether they are sound. They must consider:

- i. does the provision, criterion or practice have a legitimate aim;
- ii. are the means to achieving the aim “appropriate **and** necessary” – could this aim be achieved by other, less restrictive means; and
- iii. is the provision, criterion or practice proportional – weigh discrimination against legitimate needs of discriminator?²⁹⁴

294 See *Bilka – Kaufhaus GmbH v Karin Weber von Hartz*, Case No. C-170/84, 13 May 1986 in which the Court of Justice of the European Union established the test of objective justification in indirect discrimination cases in the EU context.

Example

Adjudicating Body: Court of Justice of the European Union

Case: *Commission of the European Communities v Austria*, Case C-147/03.

The European Commission sought a declaration that an Austrian law which imposed additional conditions on students with secondary education diplomas obtained outside Austria that were not imposed upon students with diplomas from Austria for entry into higher or university education, was discriminatory on the basis of nationality. Applying the right of equal treatment in Article 12 of the EC Treaty the Court noted that:

[T]he principle of equal treatment prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, lead in fact to the same result (...) [A]lthough [the law] applies without distinction to all students, it is liable to have a greater effect on nationals of other Member States than on Austrian nationals, and therefore the difference in treatment introduced by that provision results in indirect discrimination.

In considering whether the discrimination could be justified, the Court stated, among other things:

[I]t emerged from the hearing before the Court that the Austrian legislation aims to restrict access to Austrian universities for holders of diplomas awarded in other Member States. (...) [E]xcessive demand for access to specific courses could be met by the adoption of specific non-discriminatory measures such as the establishment of an entry examination or the requirement of a minimum grade.

It concluded that the law was not a proportionate means of achieving a legitimate aim and so Article 12 of the EC Treaty had been violated.

3.5.3 Failure to Make Reasonable Accommodation

The right to be free from discrimination also implies a right to **reasonable accommodations**. Principle 13 of the Declaration of Principles on Equality elaborates on what is required to accommodate difference and from whom it is required:

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.

To establish a claim of discrimination consisting in a denial of reasonable accommodation, the following elements need to be present: the modifications or adjustments claimed have to be:

- i. necessary in a particular case to ensure to persons with a particular protected characteristic the enjoyment or exercise on an equal basis with others of a social or economic right;
- ii. appropriate; and
- iii. not imposing a disproportionate or undue burden on the provider.

Key examples include a finding that failure to reasonably accommodate the needs of deaf patients in the provision of healthcare by providing sign language interpreters was a violation of the right to equality (*Eldridge v British Columbia (Attorney General)*),²⁹⁵ Supreme Court of Canada).

3.5.4 Failure to Take Appropriate Positive Action

Many issues which ESR activists wish to tackle will not involve discriminatory “treatment”, but unequal enjoyment of ESRs in practice. For example, it may not be possible to show that certain sections of a given society live in poverty because of a particular act, omission or policy. As O’Cinneide has explained, the “anti-discrimination” model of law has at its heart what Fredman describes as “equality as sameness” and so has its “inevitable” limitations with “underlying structural forms of inequality being ignored”.²⁹⁶ The right to equality, properly understood, is a right to genuine equality of opportunity and equality of participation. For this to be achieved it is incumbent upon both states and relevant non-state actors to take positive steps to ensure participation by persons with a certain protected characteristic on an equal basis with others who do not share that characteristic.

In this regard, the right to equality can require the state to institute what is variously known as “positive action”, “affirmative action” or “special measures” in order to remove disadvantage caused to particular groups by underlying structural inequality.

Principle 3 of the Declaration of Principles on Equality states:

²⁹⁵ *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624.

²⁹⁶ O’Cinneide C., “Positive Action and EU Law”, p. 3, available at http://www.era-comm.eu/oldoku/SNL-Law/04_Positive_action/2011-111DV20-0%27Cinneide_EN.pdf.

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

The HRC has stated that the “principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant”,²⁹⁷ while the CESCR has said that “States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination.”²⁹⁸ As O’Cinneide has explained:

*“[P]ositive action” is best understood as including any form of proactive action designed to benefit a disadvantaged group, and therefore can cover a huge variety of policies and initiatives. It can extend from the taking of basic steps to eliminate prohibited discrimination to the use of “mainstreaming” initiatives, the provision of special welfare assistance and preferential treatment in certain employment contexts.*²⁹⁹

In practice, the wide variety of positive action measures are most commonly used to promote equality within the ambit of economic, social and cultural rights, such as, for example, in education, work and health, and such measures have much scope to help achieve ESRs. At a state level there is a large variance in approaches to positive action. O’Cinneide discusses the “wide diversity” of approaches amongst EU member states.³⁰⁰ The diversity of approaches to positive action depending on the protected ground involved is also noteworthy. There is more recognition and acceptance of the legitimacy of positive action for people with disabilities than in relation to correcting structural disadvantage faced by racial groups for example. Having said that, the European case-law in relation to positive action for disadvantaged Roma communities provides one positive example of jurisprudence in this area.

297 Human Rights Committee, *General Comment 18: Non-discrimination*, UN Doc. HRI/GEN/1/Rev.1, 11 October 1989, Para 10.

298 See CESCR, above, note 42, Para 9.

299 See above, note 296.

300 *Ibid.*

Example

Adjudicating Body: European Court of Human Rights

Case: *Oršuš and Others v Croatia*, Application No. 15766/03, 16 March 2010.

The Court heard the case of Roma children from a number of towns throughout Croatia, some of whom were schooled in separate classes as a result of their lack of or limited Croatian language skills. The Applicants claimed that the Roma-only curriculum in their schools had 30% less content than the official national curriculum. They alleged that this was racially discriminatory (in violation of Article 14 of the ECHR) and violated their right to education (Article 2, Protocol 1) as well as their right to freedom from inhuman and degrading treatment (Article 3 of the ECHR). They also submitted a psychological study of Roma children who attended Roma-only classes in their region which reported that segregated education produced emotional and psychological harm in Roma children, both in terms of self-esteem and development of their identity.

Finding a violation of the right to non-discrimination (Article 14) read in conjunction with the right to education, the Court stated:

[T]he schooling arrangements for Roma children were not sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group.

It should be noted that some states which have more limited legal provisions permitting positive action have instead instituted innovative positive duties, which require those bodies which are best placed to do so, such as public bodies and employers, to proactively promote equality. These can be useful in bringing about a more rapid, systematic, and comprehensive approach to the promotion of equality. They can also be used to promote equality in areas which can be difficult to render subject to equality legislation, such as macro-economic policy. For example, in the UK, the public sector equality duty in Section 149 of the Equality Act 2010 has been used to challenge the coalition government's series of public sector spending cuts.³⁰¹

301 However, note that this has been a mixed success. Courts are still grappling with the extent of the obligation imposed by the public sector equality duty with some taking an expansive approach and others much more restrictive. Recent cases in relation to the impact of changes to various welfare benefits on people with disabilities provide a good example of this. Contrast *R (on the application of MA & Ors) v Secretary of State for Work and Pensions* [2012] EWHC (2213) with *Bracking and others v Secretary of State for Work and Pensions* [2013] EWCA Civ 1345 and *Burnip & Ors v Secretary of State for Work and Pensions* [2012] EWCA Civ 629.

Litigators will also wish to draw lessons from the complex US case law on “affirmative action”, which has been criticised by some for being too restrictive.³⁰² Furthermore, the extent to which a positive action measure will be legitimate for the advancement of socio-economic rights will depend on a number of factors including the socio-economic and political circumstances. Positive action measures which remain in place after the balance of power has shifted may in fact privilege the better off and thus constitute discrimination.³⁰³

3.6 Respondents

The sixth component is to identify the party which has breached its obligations. This will often be a state actor. However, certain non-state actors have long had some responsibilities in respect to equality or non-discrimination in areas of life relating to ESRs, such as in the provision of employment or goods and services. Further, non-state actors are increasingly performing public functions and/or operating in areas regulated by the state and are increasingly being considered to have obligations in this regard.

In fact, over time, the distinction between state and non-state actors is becoming less and less relevant when determining whether an obligation in relation to equal ESRs exists. As Michelman puts it:

Suppose everyone has a constitutionally super-valued interest in having ‘access to sufficient food and water’. Food-sellers exercising powers under the law of contract to set highly profitable prices for their wares, and landowners exercising rights and privileges under the law of property to convert land from food production to game parks, may threaten those interests as gravely as any state official ever would be likely to do.³⁰⁴

As Reinisch has argued, the traditional understanding of human rights, as limitations of state power that apply in the public sphere, protect individuals against the state and impose corresponding obligations on the latter, has evolved as the world has changed.³⁰⁵ The influence of non-state actors over a person’s equal enjoyment of ESRs can be most acutely evidenced by the crippling impact on access to medicines in Africa caused by large multi-national pharmaceutical companies retaining intellectual property rights over medicines and preventing the manufacture of cheaper alternatives.

.....

302 See, for example, above, note 296.

303 Positive action measures in favour of ethnic Malays in the Malaysian Federal Constitution, for example, fall short of what is required to be legitimate and benefit the now dominant ethnic population. See The Equal Rights Trust, *Washing the Tigers: Addressing Discrimination and Inequality in Malaysia*, 2012, pp. 245–254.

304 Michelman, F.I., “The bill of rights, the common law, and the freedom-friendly state”, *Miami Law Review*, 2003–2004, pp. 414.

305 Reinisch, A., “The changing international legal framework for dealing with non-state actors”, in Alston, P., (ed), *Non-State Actors and Human Rights*, Oxford University Press, 2005, p. 38.

The “radical conceptual change in how we use and think about human rights” has been influenced by various factors including the questioning of the public/private divide, the debate on horizontal impact of human rights, the good governance discourse and transfer of powers from state to non-state actors.³⁰⁶ In many cases, this change has been reflected in the law at the international, regional and national levels. In determining whether an entity owes an obligation in relation to human rights, including the rights to equality and non-discrimination and ESRs, we see a move away from a focus on the type of entity to which we are referring and towards a focus on the type of function that the entity (whether public or private) is carrying out.

However, the distinction between state and non-state actors is still relevant. Accordingly, this section first identifies the potential obligations of the state and non-state actors in realising equal ESRs, dealing with each in turn. The section recognises that the bases upon which the responsibilities of state and non-state actors are determined in international human rights law are not determined by right but rather by duty and so it is necessary to refer to the relevant general international human rights law in this area. However, we have sought to provide clear references to laws and jurisprudence within the realm of equality and non-discrimination in relation to ESRs specifically. Secondly, acknowledging that there will be scenarios in which there may be a potential claim against both the state and a non-state actor, the section details some of the considerations the litigator will wish to bear in mind when deciding against whom to bring a complaint.

3.6.1 The State

The extent of the state’s enforceable obligations will depend on the status of the human rights in question under the applicable law before the chosen forum. However, in relation to all rights, the states obligations are to respect, protect and fulfil. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights set out the obligations of the state:

Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the

306 *Ibid.*

*failure of States to provide essential primary health care to those in need may amount to a violation.*³⁰⁷

There is little that remains unsaid about state responsibility for violations directly linked to its own action. For example, a state that does not afford primary education to a minority ethnic group is clearly in violation of its obligation to uphold the right to education as well as its obligation to ensure freedom from discrimination. However, the state's obligations in relation to the actions or omissions of non-state actors are less rehearsed. Accordingly, these latter obligations are the focus of this section.³⁰⁸

The state obligation to take effective measures to prevent violations of human rights is well established in international and regional human rights law.³⁰⁹ The CESCR has expanded on this obligation, making it clear that it requires states to prevent discrimination by non-state actors:

*Discrimination is frequently encountered in families, workplaces, and other sectors of society. For example, actors in the private housing sector (e.g. private landlords, credit providers and public housing providers) may directly or indirectly deny access to housing or mortgages on the basis of ethnicity, marital status, disability or sexual orientation while some families may refuse to send girl children to school. States parties must therefore adopt measures, which should include legislation, to ensure that individuals and entities in the private sphere do not discriminate on prohibited grounds.*³¹⁰

Accordingly, if discrimination is due to flawed or missing regulation, state responsibility can be engaged.

Elsewhere, the extent of the state's duty to "protect" has been described as including a "due diligence" obligation. According to the landmark IACtHR case of *Velasquez-Rodriguez v Honduras*:

*An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.*³¹¹

307 Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, Maastricht, 2E/C.12/2000/13, 1997, Para 6.

308 For a more detailed discussion of the extent of the state's obligations in relation to the realisation of ESRs, see Prada, M.F., *Empowering the Poor through Human Rights Litigation*, UNESCO, 2011, pp. 38–41.

309 See, for example, ICCPR, Article 2 (3)(a); CEDAW, Article 2(e); ICERD, Article 2 (e); ECHR, Article 1; ACH-PR, Article 2; and ACHR, Article 1.

310 See CESCR, above, note 42.

311 IACtHR, *Velasquez Rodriguez v Honduras* (Ser. C) No. 4 (1988); Para 172.

The Court proceeded to state that this “due diligence” obligation requires states to prevent, investigate, punish and remedy human rights violations committed by non-state actors.³¹²

In *Alyne da Silva Pimentel v Brazil*,³¹³ the CEDAW Committee rejected the state’s attempt to submit that because Ms da Silva Pimentel had died as a result of the failures of a private medical institution, the state was not responsible. The CEDAW Committee stated that “the State is directly responsible for the action of private institutions when it outsources its medical services” and “the State always maintains the duty to regulate and monitor private healthcare institutions”.³¹⁴

The obligation to protect is thus an obligation of means, not of result. In other words, there is an obligation imposed on the state to take all reasonable measures that might have prevented the event from occurring. This is important from an evidential perspective. The mere fact the event which should have been prevented did occur is not evidence, *per se*, that the state did not discharge its obligation to protect. It is only if litigators can demonstrate that there were certain supplementary measures which the state could have taken but failed to take, although this would not have imposed a disproportionate burden, that the state can be considered to be in violation of its obligations.³¹⁵

The same interpretation of the duty to protect is adopted by the ECtHR, albeit the Court has taken perhaps a more measured stance in interpreting when the state will have discharged its obligation, seeking to balance the state’s obligation against other factors:

*Genuine, effective exercise of this freedom does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (...) In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States (...) and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities.*³¹⁶

Therefore, positive obligations upon states to protect human rights (including in the realm of private-private relationships) will vary according to the circum-

312 *Ibid*, Paras 173–174.

313 See above, note 269.

314 *Ibid*, Para 7.5.

315 De Schutter, O., *International Human Rights Law*, Cambridge University Press, 2010, p. 415.

316 ECtHR, *Ozgur Gumden v Turkey*, Application No. 23144/93, 16 March 2000, Para 43. See also, ECtHR, *Osman v. UK* Application No. 23452/94, 28 October 1998.

stances of each case and each state. Litigators assessing whether there has been a failure by the state of this duty to protect will need to give due regard to:

- the fair balance between the general interest of the community and the interests of the individual;
- the specific situation obtaining in the state; and
- whether an obligation would impose an impossible or disproportionate burden on the authorities.³¹⁷

States have been held responsible for ESR-related violations due to the actions or omissions of non-state actors, by a number of international and regional bodies:

- The 2010 case of *Nyusti & Takacs v Hungary*³¹⁸ decided by the CPRD Committee provides a clear example of the state being held to account for discrimination in the provision of a service by a non-state actor. The Committee was asked to consider whether the failure by the state to ensure that banks provided ATM machines which were accessible for people with severe visual impairments, was a violation of the CRPD. Holding that it was, the Committee stated that the measures taken by the state to improve access to the facilities were insufficient and that, amongst other things, the state must ensure both that adequate legislation is in place and that the judiciary interprets that legislation in a manner compliant with the state's obligations under the CRPD.³¹⁹
- In 1985, the IACHR dealt with the health implications of mining corporate activities on indigenous lands in the *Yanomami v Brazil* petition, and resolved to declare that by reason of the failure of the government of Brazil to take timely and effective measures on behalf of the Yanomami Indians, their rights to life, liberty, personal security, residence, movement and health and well-being had been violated. The Commission recommended that the government of Brazil take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases.³²⁰
- In 2001, the AComHPR adjudicated on rights violations by the Shell Company in Nigeria.³²¹ The Commission found violations of the ACHPR in several respects, but, in particular, it referred to the obligations of states with regard to non-state actors in the context of the people's rights to natural resources and the right to food:

317 See above, note 315, p. 415.

318 Committee on the Rights of Persons with Disabilities (CPRD Committee), *Nyusti & Takacs v Hungary* Comm. No. 1/2010, CRPD/C/9/D/1/2010, 16 April 2010.

319 *Ibid.*

320 Inter-American Commission on Human Rights (IACHR), *Yanomami v Brazil*, Resolution No. 12/85, Case No. 7615, 5 March 1985.

321 African Commission on Human and Peoples' Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* Comm. No. 155/96, Ordinary Session, 1-27 October 2001.

*The Commission notes that in the present case, despite its obligation to protect persons against interferences in the enjoyment of their rights, the Government of Nigeria facilitated the destruction of the Ogoniland. Contrary to its Charter obligations and despite such internationally established principles, the Nigerian Government has given the green light to private actors, and the oil Companies in particular, to devastatingly affect the well-being of the Ogonis. By any measure of standards, its practice falls short of the minimum conduct expected of governments, and therefore, is in violation of Article 21 of the African Charter.*³²²

- The ECtHR *Costello-Roberts v United Kingdom* case dealt with the use of disciplinary punishment in schools. No violation of the right to education was found. However, the Court conceded that the state could not “absolve itself from responsibility by delegating its obligations [to secure to the children their right to education] to private bodies or individuals”.³²³
- In *International Committee of Jurists v Portugal* the ECSR concluded that the situation in Portugal did not comply with Article 7(1) of the ESC, which provides that the minimum age of employment is 15 with certain exceptions. The Committee noted that Portugal had in place rigorous statutory provisions which comply with Article 7(1) but found that several thousand children performed work in violation of Article 7(1), which included work within the home.³²⁴

3.6.2 Non-State Actors

The obligations on non-state actors stem from a number of different sources. Non-state actors’ obligations may come from the international, regional, constitutional or national legislative level. Whilst some obligations attach to all non-state actors, most are only owed by non-state actors who are carrying out certain functions within society.

Obligations of Non-state Actors under International and Regional Human Rights Law

From the outset, human rights mechanisms envisaged a role for non-state actors in ensuring the enjoyment of human rights. The preambles of both the ICCPR and the ICESCR state as follows:

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to

322 *Ibid*, Para 58.

323 Chirwa, D.M., “The Doctrine of State Responsibility as a potential means of holding private actors accountable for human rights”, *Melbourne Journal of International Law*, Vol. 5, 2004.

324 ECSR, *International Committee of Jurists v Portugal*, Complaint No. 1/1998, 1999.

*strive for the promotion and observance of the rights recognized in the present Covenant*³²⁵

As the law has developed, it has become increasingly important to ensure that a private entity which takes on an important role in relation to the provision of services that affect ESRs cannot do so without taking responsibility. The nature of the development of the law in this regard is encapsulated by the Declaration of Principles on Equality, according to which:

*States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.*³²⁶

The increasing recognition of the obligations of private actors in relation to the realisation of ESRs is evident and litigators may be in a position to rely on a number of useful provisions and statements in international and regional law. The CESCR has stated in relation to the right to health, for example, that:

*While only state parties are parties to the Covenant and thus ultimately accountable for compliance with it, all members of the society – individuals, including health professionals, local communities, inter-governmental and non-governmental organisations, civil society organisations, as well as the private business sector – have responsibilities regarding the realization of the right to health.*³²⁷

There have also been numerous useful examples from the regional level:

- Within EU law, according to Article 3(1) of the European Racial Equality Directive:

Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

- a. conditions for access to employment, to self-employment and to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;*
- b. access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;*
- c. employment and working conditions, including dismissals and pay;*

325 See the preamble to both the ICCPR and the ICESCR.

326 See above, note 41, Principle 10.

327 See above, note 19, Para 42. See also, with regard to non-state actors and the right to food, above, note 33, Para 20.

- d. membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations;
- e. social protection, including social security and healthcare;
- f. social advantages;
- g. education;
- h. access to and supply of goods and services which are available to the public, including housing.³²⁸

The Directive is a good example of both the manner in which the law holds non-state actors to the same standards as the state, and the benefits of using anti-discrimination law to pursue ESRs.

- The ACHPR provides that every individual shall have duties towards his or her family and society, the state and the international community and that the rights of each individual shall be exercised with due regard to the rights of others.³²⁹
- The ECHR does not impose duties on individuals but through the development of the principle of horizontal effect (or *Drittwirkung*), European human rights jurisprudence has held non-state actors responsible for rights violations. Thus, non-state actors may have duties and obligations stemming from the Convention, even when they are not and cannot be respondents before the Strasbourg Court. For example, the European Commission has stated that:

*[I]f it is the role of the Convention and the function of its interpretation to make the protection of individuals effective, the interpretation of [the right to freedom of assembly and association under Article 11] should be such as to provide, in conformity with international labour law, some protection against private interference.*³³⁰

Obligations of Non-state Actors under National Law

Depending on the country, non-state actors may have obligations under the national constitution and/or under pieces of national legislation regulating certain functions or areas of life.

In South Africa, for example, the principle of horizontal effect is constitutionally entrenched.³³¹ Consequently:

328 Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

329 ACHPR, Article 27.

330 ECtHR, *Swedish Engine Drivers' Union Case*, Application No. 5614/72, 6 February 1976.

331 See above, note 50, Section 8(1)–(3) and 39(2).

*Private entities and law can be held accountable for infringements of the socio-economic rights in the bill of rights (...) [N]o exercise of public or private power is immune from critical scrutiny and re-evaluation in the light of constitutional rights and values of the constitution. There are no immunised zones, only better or worse constitutional justifications for leaving intact, invalidating or changing the particular legal rule (whatever its source) which is subject to challenge.*³³²

The South African Constitution also explicitly defines “organs of state” to be any body (public or private) exercising a public function in terms of either legislation or the Constitution.³³³ Accordingly non-state actors providing social services in terms of legislation are directly bound by the provisions of the Constitution including the Bill of Rights. The South African Courts have on various occasions judged non-state actors by constitutional standards including those that protect ESRs, with the added benefit of progressing the common law of South Africa and increasing its uniformity with the constitution.³³⁴

In Brazil too, the courts have actively held non-state actors responsible for violations of ESRs. For example, the case of *Alberdan Nascimento de Araujo v Hospital Santa Lucia S/A* dealt with the failure of a private hospital to provide lifesaving healthcare to an eight month old patient, despite the Courts having ordered the hospital to treat the patient, as public hospitals did not have the necessary facilities for her treatment. The Supreme Court ruled that the hospital had violated the rights of the infant and that the refusal of medical care, which privileged bureaucratic procedures at the expense of the health of the infant, has no legal or moral support.³³⁵ In another case, which demonstrates the connection between the rights to health, social security and freedom from discrimination, the Brazilian courts held that the Statute of the Elderly,³³⁶ which protects against age discrimination, was violated by a health insurance company that adjusted the insurance premium based on age.³³⁷

In India, certain fundamental rights under the Constitution are directly enforceable against non-state actors. For example, the Article 21 right to life which, as has been discussed, has been interpreted broadly to cover a wide range of ESRs, is enforceable against non-state actors. However, the Indian example demonstrates the need for consideration of the practicalities of the mechanism for the

332 Liebenberg, S., “The application of socio-economic rights to private law”, *TSAR, Special Edition in honour of Professor I Rautenbach*, Vol. 3, 2008, pp. 464–480.

333 See above, note 50, Section 239.

334 See for example, *Jaftha v Schoeman*; *Van Rooyen v Stoltz*, 2005 2 SA 140 (CC), and *Brisley v Drotsky*, 2002 4 SA 1 (SCA).

335 Superior Court of Justice, *Alberdan Nascimento de Araujo v. Hospital Santa Lucia S/A*, Final Judgment, 18 December 2012.

336 Lei n. 10.741, de 1º de outubro de 2003 (Law No. 10.741 of 1 October 2003).

337 Superior Court of Justice, *Amil Assistencia medica Internacional Ltda (Health Insurance Company) v. Oracy Pinheiro Soares da Rocha*, Judgment, 25 March 2008.

achievement of rights enforcement. Access to justice is a real concern given that claims relating to allegations of violations of constitutional rights cannot be brought before local courts in India. Practically, therefore, individuals may not have the means to travel for the purpose of bringing the case and so may look at other national laws which can be used to hold non-state actors to account in local courts in such cases.

National anti-discrimination legislation often provides a useful path for holding non-state actors responsible for ensuring equal enjoyment of ESRs. In the UK, for example, in addition to placing obligations on public authorities, the Equality Act 2010 places some responsibility for non-discrimination with a number of different non-state actors including employers,³³⁸ service providers,³³⁹ associations³⁴⁰ and those carrying out public functions.³⁴¹ Individuals who do not fall within one of these categories are not subject to the obligations contained within the Equality Act 2010. The extent of a non-state actor's obligations under the Act varies to a limited degree depending on the role of that agent.³⁴²

3.6.3 Against Whom Should a Claim Be Brought?

In situations where a violation has been committed by a private actor but the state is additionally responsible for a failure to regulate, investigate or provide alternatives, the claimant would have the option of pursuing both or only one claim, and factors such as the likelihood of success and the nature of the remedy are likely to influence the path chosen. In addition, to the analysis that a litigator will carry out under component two before deciding to bring a particular claim, there are a number of considerations to bear in mind in particular in relation to non-state actors.

Firstly, at the substantive stage, it is clear from the above analysis that there may only be limited causes of action against non-state actors. While there is precedent for holding certain non-state actors directly to account for discrimination, it will be a bigger challenge to argue that a non-state actor has a full obligation to uphold the right to equality. The challenge will be easier if the non-state actor is carrying out a "public function" and is arguably a proxy for the state but, while this is happening more and more often, this will currently account for only a small proportion of the situations in which non-state actors are involved.

Secondly, even in jurisdictions where non-state actors are bound by constitutional rights, there are some complexities which have not been fully resolved by the courts. For example, in the South African case of *Brisley v Drotsky*, an eviction case, the Supreme Court of Appeal applied the Constitution (Article

338 See above, note 109, Part 5 EA.

339 *Ibid*, Parts 4 and 6 EA.

340 *Ibid*, Part 7 EA.

341 *Ibid*, Section 150 and Schedule 19 EA.

342 *Ibid*. For example, there are some exceptions to the prohibition on direct discrimination which apply only to religious organisations and schools (Schedule 23 EA).

26(3)) horizontally, but did not go so far as to apply Article 26(3) in a manner which would have a transformative impact on the common law.³⁴³ A broader interpretation “which would give a court any discretion in relation to an eviction application taking into account a broader set of circumstances relating to the dealings between the parties and the personal circumstances of the former tenant” was rejected.³⁴⁴

Finally, complaints against individual non-state actors are arguably less likely to result in transformative remedies than collective complaints against the state. However, litigators should be careful as to how much weight they place on this consideration. Claims against individual non-state actors may, as is the case in some individual complaints against the state, have the potential to widely affect large numbers of individuals. For example, the resolution in an employee’s favour of an employment dispute against a large multi-national may not only have a knock-on effect on the working conditions of other employees by extension, but it may also influence the employer’s competitors and thus extend the benefit to employees of other private employers. On the other hand, but also noteworthy, judgments finding violations by non-state actors will only be the first step. Their limitations are notable when there are insufficient enforcement mechanisms in the jurisdiction, as is evidenced by the problems in ensuring adequate provision of triage facilities by private hospitals in India, despite a judgment of the Indian Supreme Court finding they have a duty to make these provisions.

3.6.4 Summary

There is clear and helpful jurisprudence for litigators seeking to hold a state accountable for shortcomings in the achievement of ESRs when those shortcomings are the result of actions or omissions by a non-state actor such as a private hospital or school. The extent to which it will be possible to hold non-state actors directly to account through civil actions will be much more dependent on the national law in a given state and, in this regard, developed anti-discrimination laws are most likely to be of use.

3.7 Remedies

While a judicial finding of a rights violation can be of significant intrinsic value, as the International Commission of Jurists has stated, “the right to a remedy has often been considered one of the most fundamental and essential rights for the effective protection of all human rights”.³⁴⁵ This position is reflected in the Declaration of Principles on Equality which states that:

343 See *Brisley v Drotzky*, above, note 334, Paras 40, 42–43.

344 See above, note 332, pp. 464–480.

345 International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability*, 2008.

*Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.*³⁴⁶

In some cases, the achievement of effective remedies will be the most challenging aspect of the litigation. In equal ESR-related cases, remedies are often controversial. As has been acknowledged above, ESR claims, particularly those which relate to cases challenging widely applicable government policies, can result in a request for a remedy which demands a large expenditure of state resources.³⁴⁷ As discussed, courts may be more willing to order transformative remedies to rectify findings of breaches of the rights to equality and non-discrimination than ESRs.³⁴⁸ Nonetheless, remedies which require large state expenditure are likely to remain controversial and it is likely to remain the case that even claims relating to non-discrimination within the remit of ESRs will continue to suffer from the general perception that the remedy will require vast state expenditure, whether true or not.³⁴⁹

The availability of remedies is context dependent. The variance across jurisdictions, both in terms of legal powers of the judiciary and political culture, is palpable. For example, Canadian courts have a wide range of remedial powers in addressing violations of constitutional rights. By contrast, UK courts have very limited powers to respond to violations of the Human Rights Act 1998. Accordingly, this section aims to do no more than to pick out some overarching considerations which will be applicable in most contexts and to present a spectrum of remedies which may or may not be available to litigators.

3.7.1 Overarching Considerations

In deciding which remedies to pursue, litigators will need to be aware of the following three crucial overarching considerations:

346 See above, note 41, Principle 22. This principle is consistent with the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, GA Res. 60/147, 2005, in that the term “reparation” is used to refer to a number of measures which may be adopted, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, UN, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, General Assembly Resolution 60/147, 16 December 2005. For discussion see Petrova, D., “The Declaration of Principles on Equality: A Contribution to International Human Rights” in The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, p. 40.

347 See 3.4.1 above.

348 See 2.6 above.

349 For a powerful argument as to the fallacy that ensuring equal access to social and economic rights places an impossible burden on state resources, see Ferraz, O., “Inequality, Not Insufficiency: Making Social Rights Real in a World of Plenty”, *The Equal Rights Review*, Vol. 12, 2014.

- i. the aim of not only compensating individual claimants but also achieving wider social transformation;
- ii. the legal and political limitations on the power of the adjudicating body to award certain remedies and the remedies awarded previously by the body; and
- iii. the record of the relevant respondent in complying with the remedial decisions of the body in question.

Litigators are thus required to conduct a careful balancing act. They will wish to push for the most transformative remedies possible whilst being realistic about what may be achievable before a given forum and enforceable in a given context. There are numerous challenges.

As to i), it will not always be the case that the desired outcome of the claimants in question corresponds with the outcome which would create the widest possible social transformation. Some individual claimants may be satisfied to receive financial compensation for a violation of their ESRs whereas a striking down of a discriminatory law or an order of the court requiring a policy change may be most likely to ensure there are no future violations of the rights of others. Depending on the forum, it will not always be possible to seek a combination of remedies. Ideally, the litigator will have identified claimants who intend to seek an outcome which impacts on the broader issue so as to avoid this conflict. But, in any case, the desires of the claimants may change and, particularly in individual complaints (as opposed to collective complaints), the litigator will be respecting the wishes of the particular claimant. Gauri and Brinks predict that:

*[T]he more SE rights litigation takes the form of broadly binding, erga omnes decisions, rather than purely inter partes decisions, the more likely it is to have a progressive result.*³⁵⁰

As to ii), there may be some legitimate questions as to the interpretation of the legal powers of the adjudicators to award particular remedies. The issue is in part one of fundamental constitutional law – when does a decision rightly fall within the powers of the judiciary and when is it one reserved for the legislature or indeed the executive? However, more often the real determination will be a political one. The judiciary’s concern not to overstep its remit is particularly acute when it is being asked to demand of the state that it makes changes to legislation or policy. Even where there can be little doubt as to the extent of the constitutional power awarded to the judiciary under relevant legislation, the reality in some contexts is that the judiciary will be influenced by political concerns in making remedial decisions. The relative assertiveness of different judiciaries is marked.³⁵¹

350 See above, note 91, p. 13.

351 For example, the record of the frequency of the issuing of declarations of unconstitutionality/incompatibility by the UK, Canada, France and Germany is explored in King, J., “Parliament’s Role Following s.4 Declarations of Incompatibility”, unpublished manuscript.

There are numerous examples of judicial reticence in ESR cases. In its oft-criticised judgment in *Chaoulli v Quebec (Attorney General)*,³⁵² the Supreme Court of Canada made a simple declaration that a prohibition in Quebec on individuals taking out private insurance to obtain certain healthcare services was a violation of the constitutional rights to life, personal security, inviolability and freedom. The remedy did “not necessarily provide a complete response to the complex problem of waiting lists” but the court felt that the solution for that problem “must come from the state itself”.³⁵³

In the also criticised decision of the Supreme Court of Ireland in *Sinnott v Minister for Education*,³⁵⁴ in deciding what remedies to award an autistic claimant whose right to and education had been violated, the Court acknowledged its power to mandate relief but nevertheless opted to issue a declaration.³⁵⁵ Chief Justice Keane stated that it was:

*[A]ppropriate (...) for the courts to presume that where this court grants a declaration that he or she has failed to meet his or her constitutional obligations, the Minister will take the appropriate steps to comply with the law as laid down by the courts.*³⁵⁶

This was despite the Court’s acknowledgement of the fact that years of inaction had followed an earlier decision finding a violation of the right to education of children with disabilities in Ireland.³⁵⁷ Identifying the limited role of courts, Chief Justice Keane also echoed the telling comments of Justice Hardiman in relation to the general separation of powers between the legislature and the judiciary. Justice Hardiman stated:

In my view, conflicts of priorities, values, modes of administration or sentiments cannot be avoided or ignored by adopting an agreed or imposed exclusive theory of justice. And if judges were to become involved in such an enterprise, designing the details of policy in individual cases or in general, and ranking some areas of policy in priority to others they would step beyond their appointed role. The views of aspirants to judicial office on such social and economic questions are not canvassed for the good reason that they are thought to be irrelevant. They have no mandate in these areas. And the legislature and the executive, possessed of a democratic mandate, are liable to recall by the withdrawal of that mandate.

352 See, above, note 200.

353 *Ibid*, Para 100. For criticism of the Court’s failure to provide a remedy which could be accessed by the economically disadvantaged, see above, note 80, p 289. The case also provides an excellent example of the dangers of litigators failing to identify claimants whose circumstances mean that a judgment is most likely to have a “pro-poor” outcome.

354 *Sinnott v Minister for Education* [2001] 2 IR 545.

355 The Court also awarded pecuniary and non-pecuniary damages, as discussed in 3.7.2 below.

356 See above, note 354, p. 631.

357 The Court was referring to the decision in *O’Donoghue v Minister for Health* [1996] 2 IR 20.

*That is the most fundamental, but by no means the only, basis of the absolute necessity for judicial restraint in these areas. To abandon this restraint would be unacceptably, and I believe unconstitutionally, to limit the proper freedom of action of the legislature and the executive branch of government.*³⁵⁸

Litigators will need to address such concerns head on if they are hoping to achieve transformative remedies.

As to iii), part of the reason for the existence of the difficult issues that arise under ii) is that adjudicators are aware not only of the limits on their powers to issue certain decisions but also of the political limitations on the efficacy of their decisions. Adjudicators will be mindful (and so must litigators) of the fact that some respondent states will simply ignore remedial orders of the court where they consider the judiciary to have overreached their powers. The relative implementation rates by the state of specific remedies is relevant to whether a case will achieve genuine social transformation.³⁵⁹ This should not stop litigators from seeking creative remedies and pushing the boundaries of hitherto unenforced remedies, but should be a factor in determining the extent to which a particular demand is likely to be so far from implementable as to be potentially counterproductive.

In a 2010 report, the Open Society Justice Initiative (OSJI) declared that there was an “implementation crisis” in relation to the remedies awarded by certain international and regional bodies (HRC, ACtHPR, IACtHR and ECtHR).³⁶⁰ The overall record of implementation, as one would expect, varies from state to state. However, importantly, it also varies depending on the type of remedy awarded. For example, implementation of IACtHR-ordered remedies stood at 29%. However, some remedies were more likely to be implemented than others. Pecuniary damages awards were most likely to be implemented, and symbolic remedies such as orders of the court demanding the erection of a memorial, for example, were implemented 50% of the time. However, OSJI noted that “Orders to investigate the circumstances of human rights violations and prosecute and punish those found responsible, known as ‘justice’ measures, present the biggest challenge for implementation.”³⁶¹ The Court’s judgment in the *Case of the Jean and Bosico Children v The Dominican Republic*,³⁶² for example, had not resulted in a better situation for Dominicans of Haitian-descent. On the contrary, the situation had worsened.³⁶³ From the litigator’s perspective, understanding the record

358 See above, note 354, p. 711.

359 This is not to ignore the longer term social transformation which may occur as a result of public outrage and advocacy efforts in the event of a failure by the state to enforce a court ordered remedy.

360 See Baluarte, D.C. and De Vos, C., above, note 120.

361 *Ibid*, p. 20.

362 IACtHR, *Case of the Jean and Bosico Children v The Dominican Republic*, (Ser. C) No. 130 (2005), 8 September 2005.

363 For a recent overview of the treatment of individuals of Haitian descent in the Dominican Republic see Gamboa, L. and Harrington Reedy, J., “Judicial denationalisation of Dominicans of Haitian descent”, *Forced Migration Review*, Vol. 46, 2014, p. 52.

of the state and the political culture with regard to remedies will be critical to gauging the level at which to pitch demands.

How to Address these Considerations at the Remedies Stage

- Wherever possible, when the claimant's desired outcome does not fully overlap with broader social transformation, seek concurrent remedies which would achieve both (with the claimant's permission).
- Maximise the possibility that the adjudicators will find the issuing of a particular remedy to be within their power. For example, this may be achieved by encouraging the court to take a purposive approach to interpreting the remedies that they have been granted a statutory power to award. The Supreme Court of Canada has issued some particularly compelling guidance to courts in this regard. In *Doucet Boudreau v Nova Scotia (Minister of Education)*,³⁶⁴ the Court held that courts should adopt a purposive interpretation of the provisions of the Canadian Charter of Rights and Freedoms (which includes provisions on remedies). This meant the courts' powers to grant remedies should be interpreted in such a way as to provide full, effective, and meaningful remedies to violations of the Charter. The Court stated:

*A purposive approach to remedies in a Charter context gives modern vitality to the ancient maxim ubi jus, ibi remedium: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies.*³⁶⁵

- Be mindful of the past conduct of the respondent in question. Does it respond differently to different types of remedy? What is its past history in relation to remedies similar to that which you wish to seek?
- Unless the state or body has a particularly poor record of implementation, seek remedies which encourage state "buy-in". States may be more likely to implement a decision where they have been engaged in determining how best to do so.

3.7.2 Types of Remedy

This section identifies a selection of the large range of remedies which may be available depending on the claim and jurisdiction. It provides some comments on the possible pros and cons of each. Given the overarching considerations it is

³⁶⁴ *Doucet Boudreau v Nova Scotia (Minister of Education)*, [2003] SCC 62.

³⁶⁵ *Ibid*, Para 25.

always critical to consider where the remedy sits on what King has described as a “spectrum of coerciveness”, with the least coercive being those which enable the legislature to make the final determination of how precisely to remedy a situation.³⁶⁶ We shall begin the discussion with the most coercive remedies on the spectrum and descend towards the least coercive. Litigators will note through this discussion that the extent to which the remedy will be seen as coercive will depend not only on the type of remedy itself but also the way in which the remedy is employed.

Legislative Remedies

Where the source of a rights violation is a piece of legislation, courts may have the power to remedy the injustice by striking down, amending or providing a required interpretation of the legislation of their own volition, without necessarily requiring that such a process be undertaken by the legislature. The various options which may be available are explored in detail in the leading case of *Schachter v Canada*³⁶⁷ before the Canadian Supreme Court. The Court’s power to adopt legislative remedies is provided by Section 52 of the Canadian Charter of Rights and Freedoms:

Section 52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Depending on the circumstances, a court may do one of the following in relation to the relevant legislation: sever, read in, read down, strike down or strike down with suspension of the invalidity. To elaborate:³⁶⁸

- **Severance:** This option may be available where only part of the legislation in question is in violation of the constitution, i.e. where the statute in question wrongly **includes** certain unconstitutional sections. The court may decide to “sever” the offending provisions from the rest of the legislation before striking them down, leaving the rest of the statute in force.
- **Reading in:** This option may be available where a statute wrongly **excludes** wording which is needed in order to make the statute constitutional. For example, in a discrimination case, the unconstitutionality may be the exclusion of one group from the protection afforded by the legislation. The court may decide to read wording into the statute in order to include the excluded group and remove the discrimination.

³⁶⁶ Paper delivered by King, J., at *Expert Roundtable on Using Equality Law to Advance Socio-Economic Rights on 6 June 2013*, unpublished manuscript.

³⁶⁷ *Schachter v Canada* [1992] 2 SCR 679.

³⁶⁸ The below summaries are based on the judgment of the majority in *Schachter v Canada* [1992] 2 SCR 679.

- **Reading down:** In some cases it may be possible to read a statute with an interpretation which makes it comply with the constitution where another reading would mean it was in violation.
- **Striking down:** Where the whole statute is unconstitutional, or where it is not possible to sever an unconstitutional section (or read wording in) without unacceptably intruding into the legislative objective, the statute may be struck down. This means it will no longer be enforceable law.
- **Striking down with a temporary suspension of the declaration of invalidity:** In some cases, an immediate declaration that a law, or part of a law, is invalid could have a negative outcome, leaving a hole in important legal protection. This would be the case where the law provided housing benefits to the majority but was unconstitutional for excluding the minority. In such cases, where the courts have considered it to be a step too far, or indeed impossible, to read wording into a statute to keep it in force, they may prefer to suspend the declaration for a period of time to enable the legislature to “bring the impugned legislation into line with its constitutional obligations”.³⁶⁹

There is no clear formula for courts in determining which of the above options to apply.³⁷⁰ However, the Supreme Court of Canada emphasises that the guiding principles for a court when making a determination are (a) the role of the legislature and (b) the purposes of the Canadian Charter of Rights and Freedoms.³⁷¹ For example, both severance and reading in have the purpose of “avoiding undue intrusion into the legislative sphere”.³⁷² It is likely that most courts will be mindful of the “primary importance of legislative objective”.³⁷³ Many courts are far more reticent to award coercive remedies in ESR cases than in civil and political rights cases.³⁷⁴ This is part of the reason why we identify the inclusion of an equality or non-discrimination claim in relation to ESRs as a potential benefit. However, even where they do so, litigators will need to be prepared for this reticence, especially where the proposed legislative remedy would necessitate state expenditure. The Supreme Court of Canada has suggested that the appropriate test to adopt when considering reading in, for example, is as follows:

In determining whether reading in is appropriate (...) the question is not whether courts can make decisions which impact on budgetary policy; it is to what degree they can appropriately do so. A

369 See above, note 367, Majority Judgment Section d.

370 Instead the Supreme Court identifies a series of factors that a court should take into consideration. Litigators are advised to read the judgment in full for further guidance.

371 See above, note 367, Majority Judgment Section b(v).

372 *Ibid*, Majority Judgment Section b(i).

373 *Ibid*.

374 This is in part due to the persistence of the false positive/negative duties dichotomy discussed in Part II above.

*remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.*³⁷⁵

Legislative remedies, properly employed, have great potential to impact a broader group of affected individuals and achieve social transformation. The following considerations and examples may assist litigators in determining their pros, cons and availability in a given context:

- Reading in may be a powerful remedy in cases where there is a risk of the state otherwise responding to the finding of discrimination by removing the statute's protection from all persons, i.e. "levelling down". For example, if a state were found to have violated the right to non-discrimination by providing social security benefit to men but not women, the aim will be to prevent the state from simply responding by removing the benefit from men rather than extending it to women. However, this is arguably one of the most coercive possible remedies as it may be seen as the court putting words into the mouth of the legislature. Accordingly, courts are likely to use the remedy relatively rarely. As the Supreme Court of Canada noted, reading in should only be used:

*[W]here it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimise the interference of the court with the parts of the legislation that do not themselves violate the Charter.*³⁷⁶

- Striking down legislation will not always be a desirable outcome. It is crucial that litigators are mindful of the nature of the statute when considering whether a strike down is desirable or whether it would amount to a disastrous outcome. For example, where a court has found that a law which entitles everyone except those from a particular ethnic minority to housing benefits is discriminatory, striking down would result in the disentitlement of everyone else to the benefits, which will not be the desired outcome. By contrast, if the law provides only that housing benefits are not available to those of a particular ethnicity, striking down would be a positive outcome.
- The remedy is most likely to be effective where its coercive nature is tempered by an approach which maximises involvement for the state (where that state is generally co-operative). A good example is the development of the use of a temporary suspension on declarations of invalidity to offer the state an opportunity to rectify the violation. This approach arguably balances respect for the role of the legislature in determining how best to bring its legislation into compliance with the constitution while ensuring that the court still has some control over

375 See above, note 367, Majority Judgment Section b(ii).

376 *Ibid*, Majority Judgment Section c(ii).

the implementation of its decision. It does, of course, mean that an unconstitutional situation may persist for a time after a declaration of unconstitutionality has been made.

- The availability of legislative remedies varies significantly across jurisdictions. In the United States of America, for example, the Supreme Court has the power to strike down legislation which is unconstitutional.³⁷⁷ However, in the United Kingdom, while courts are required to read and give effect to legislation “in a way which is compatible with the [European Convention on Human Rights], so far as it is possible to do so”,³⁷⁸ they do not have the power to strike legislation down, save for secondary legislation.³⁷⁹
- The use of temporary suspensions by courts is increasing. It is not only used in Canada but there are also examples of its use in France. In Germany, 40% of the determinations of the Constitutional Court are suspended.³⁸⁰
- While the remedy may prevent a particular violation of rights from continuing, this may not adequately compensate the victim for the harm which they had suffered beforehand. In Canada, for example, if a legislative remedy is adopted under Section 52, the court will only very rarely also award a remedy under Section 24 of the Canadian Charter of Rights and Freedoms, which provides that:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The extent to which litigators can make submissions advocating such remedies in a given case will depend on the wishes of the individual claimant. The claimant may be unwilling to push for a remedy which does not result in the receipt of some personal compensation (be it financial or otherwise).

- In *National Pensions Office v Jonkman*,³⁸¹ the Court of Justice of the European Union (CJEU) examined provisions in Belgian law which distinguished between air hostesses and other members of cabin crew in the determination of pensions. It held not only that member states were required to “take the general or particular measures necessary to ensure

377 *Marbury v Madison*, 5 U.S. 137 (1803).

378 Human Rights Act, above, note 216, section 3.

379 *Ibid*, Section 4.

380 See above, note 351.

381 European Court of Justice, *National Pensions Office v Jonkman; National Pensions Office v Vercheval; Permeaen v National Pensions Office*, Joined Cases C-231/06 to C-233/06, 21 June 2007.

that Community law is complied with in that state”,³⁸² but also that national courts were obliged to disregard any national law which was discriminatory *before* the legislature had amended or repealed it. The CJEU stated that:

*[O]bservance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category. In such a situation, a national court must set aside any discriminatory provision of national law, without having to request or await its prior removal by the legislature, and apply to members of the disadvantaged group the same arrangements as those enjoyed by the persons in the other category.*³⁸³

- In *Khosa and Others v The Minister of Social Development and Others*,³⁸⁴ the Constitutional Court of South Africa held that certain provisions of the Social Assistance Act No. 59 of 1992 distinguished unjustifiably between citizens and permanent residents in relation to the provisions of social security and so violated the constitutional right to equality. Instead of striking down the impugned provisions as the High Court had done, the Constitutional Court chose to read in the words “or permanent resident” after the word “citizen” in each of the challenged sections:

[88] When courts consider a remedy following a declaration of invalidity of a statute, the question of remedial precision, which relates directly to respect for the role of the legislature, is an important consideration. As permanent residents are not included in the allocation of social grants in section 4(b)(ii) of the Act, remedying the defect with the necessary precision would require the reading in of the curing words, rather than striking down the impugned provisions and suspending the declaration of invalidity, as submitted by the respondents. Suspending the declaration of invalidity would, in my view, not constitute a “just and equitable order” as contemplated by section 172(1)(b) of the Constitution. There is every reason not to delay payment of social grants any further to the applicants and those similarly situated. Even if this Court were to grant interim relief to the applicants during the period of suspension, other permanent residents would be barred from applying until the end of the period of suspension. Striking down without an order of suspension is not appropriate either, as it would make the grants instantly available to all residents including visitors within South Africa who satisfy the other criteria.

382 *Ibid*, Para 38.

383 *Ibid*, Para 39.

384 See above, note 65.

[89] Reading in the words “or permanent resident” after “South African citizen” in section 3(c) and “or permanent residents” after “South African citizens” in section 4(b)(ii) offers the most appropriate remedy as it retains the right of access to social security for South African citizens while making it instantly available to permanent residents.

Structural Injunctions

Structural injunctions have been defined by Hirsch as follows:

*[A]n order handed down by a judge who tells a party what she must and must not do. In particular, a structural injunction is an order that dictates how and when government officials must change their behaviour and in what ways to be in compliance with the constitutional requirements of the state.*³⁸⁵

Once a court has issued a structural injunction, it will usually remain involved in the implementation process, supervising the state to ensure that the order is complied with and issuing follow-up orders until the state has fully complied with its ruling. Hirsch is a strong proponent of the value of structural injunctions in ESR-related cases. She says:

*Since the violation may be too diffused or nebulous, conventional litigation and remedies are inadequate for socio-economic rights violations as monetary damages may not be able to repair the constitutional harm. Declaratory orders are likely ineffectual because the constitutional violations are often too widespread to stop government inaction in a single court order; to have any meaningful effect, the court order would have to direct reform at the state institution itself.*³⁸⁶

Structural injunctions have long been used in some common law jurisdictions. For example, they have been used widely in equal ESR-related cases in the US, beginning with *Brown v Board of the Education* in which the court directed and supervised the desegregation of schools.³⁸⁷ This process ultimately included the imposition of numerous court-ordered injunctions against authorities and individual schools.

In *Doucet Boudreau v Nova Scotia (Minister of Education)*,³⁸⁸ the Supreme Court of Canada upheld, by a five-four majority, a trial judge’s order that not only the French language minority in Nova Scotia be provided with “homogenous educa-

385 Hirsch, D.E., “A Defense of Structural Injunctive Remedies in South African Law”, *Oregon Review of International Law*, Vol. 9, 2007, p. 19.

386 *Ibid*, p. 22.

387 *Ibid*, p. 34; and *Brown v Board of Education of Topeka* 347 U.S. 483 (1954).

388 See above, note 364.

tional facilities in specific regions for specific grades by specific times”,³⁸⁹ but also that the government officials “use their best efforts to comply with this order and that the court would retain jurisdiction to hear reports from the government on compliance with the order”.³⁹⁰ The Supreme Court characterised the order as an injunction. Justices Iacobucci and Arbour stated that the evolution of remedies:

*[M]ay require novel and creative features when compared to traditional and historical remedial practice because tradition and history cannot be barriers to what reasoned and compelling notions of appropriate and just remedies demand. In short, the judicial approach to remedies must remain flexible and responsive to the needs of a given case.*³⁹¹

Structural injunctions are generally considered to be a useful remedy where the state has continually failed to uphold constitutional rights and has ignored or misinterpreted judicial declarations.

On the other hand, it is arguable that the judiciary has neither the capacity (in terms of requisite expertise, knowledge and experience) nor the legitimacy to make detailed policy decisions. A court which makes a determination as to the “correct” approach to a particular institutional violation in a landscape of political co-operation may legitimately be accused of usurping the decision-making role of a democratically elected legislature. There is a risk that the court’s focus on the particular issue before it, e.g. inadequate access to housing, and its lack of detailed knowledge and understanding of the other priorities of the government in allocating budget, may lead it to make an injunction which has a net adverse impact on the overall equal provision of ESRs, to the extent that it results in budget for other aspects of equal ESR realisation being reduced. For these reasons, among others, some have argued that structural injunctions should be a remedy of “last resort” used only where co-operation between courts and the legislature has broken down or where the legislature cannot be trusted.

In practice, as one of the most coercive forms of remedy, even where the structural injunction is an option, courts may be unlikely to use it, preferring instead to leave the state to determine how best to rectify a violation of the constitution. For example, in South Africa whose Constitution has particularly strong transformative aims, the Constitutional Court has declined to uphold structural injunctions issued by High Courts in a number of ESR cases, instead issuing a declaratory order without mandating judicial supervision of the state’s implementation of its order.³⁹²

389 Roach, K., “Crafting Remedies for Violations of Economic, Social and Cultural Rights”, in Squires, J., Langford, M., and Thiele, B. (eds), *The Road To A Remedy: Current Issues in the Litigation of Economic, Social and Cultural Rights*, Australian Human Rights Centre, University of New South Wales, 2005, p. 117.

390 *Ibid*, p. 117.

391 See above, note 364, Para 59.

392 See, for example, *Government of the Republic of South Africa v. Grootboom*, above, note 107; and *Minister of Health v Treatment Action Campaign*, above, note 107. For a more detailed discussion of the jurisprudence, see above, note 387, pp. 1-66. However, note the use by some lower courts in South Africa of the Constitutional Court’s decisions as the basis for the award of injunctive relief, e.g. *City of Cape Town v Rudolph* 2004 (5) 39 (C), discussed in Hirsch at p. 51.

Damages

Damages may be both pecuniary and non-pecuniary and consist of the award of financial compensation to the victims of the violation. Pecuniary damages (also known as special damages) are damages awarded for any loss which is attributable to the actions which formed the basis of the claim and which can be measured in monetary terms. Examples include lost wages, the cost of replacing or repairing property or other goods, and the estimated cost of future care. Non-pecuniary damages constitute financial compensation awarded for the negative consequences of the actions which formed the basis of the claim but which cannot be easily quantified in monetary terms. Examples include physical harm, including pain and suffering, psychological harm, and frustration or upset as a consequence of the violation of the victim's rights.

There are numerous benefits to damages as a remedy. Firstly, the award of damages is one of the most widely available remedies. Secondly, an award of damages is one of the remedies most likely to be implemented.³⁹³ Finally, an award of damages will often be important to individual claimants who, even if they cannot be returned to the position they were in before the violation, may seek damages as a symbolic compensation for their loss.

The key disadvantage to damages is that they provide no immediate reparation to individuals who are not parties to the claim but who are in similar positions to that of the claimant. This is particularly relevant for claims of violations of the rights to equality or non-discrimination in realising ESRs, as it is usually the case that the individual claimant is only one of a group or class affected. Further, damages do not necessarily result in a change of situation so as to prevent people from becoming victim to the same violation in future. An award of damages may set an important precedent and ultimately have a knock-on effect for others or pave the way for further claims. However, litigators wishing to redress institutional inequality will wish to explore whether a court is empowered to grant damages for the individual claimant as well as providing other transformative relief.

There are numerous precedents relating to the award of damages in cases concerning equal realisation of ESRs. Litigators seeking damages will wish to consider the sums awarded by the adjudicator in question in past cases together with the criteria the adjudicator employs when arriving at the figure.

- In *Sinnott v Minister for Education*,³⁹⁴ the Supreme Court of Ireland awarded the victim of a violation of the right to education with pecuniary damages for the estimated costs of a programme of education for two and a half years at £28,000 per annum and for ancillary services (speech, physio, occupational and music therapists and medical care) for the same period

³⁹³ See, for example, the record of state compliance with "just satisfaction" awards of the ECtHR as opposed to their record of taking measures to prevent future violations, as discussed in Baluarte, D.C. and De Vos, C., above, note 120.

³⁹⁴ See above, note 354.

at £15,000 per annum and non-pecuniary damages of £90,000 for “additional suffering, distress and loss of enjoyment of life” and £25,000 for “ongoing distress in the future through gross delay in providing education and training, and permanent additional damage suffered by the [applicant]”.

- In *Ponomaryovi v Bulgaria*,³⁹⁵ the ECtHR examined a complaint from two non-nationals who were required to pay for their education in Bulgaria even though it was provided free of charge to nationals. The Court considered that “the applicants suffered a certain amount of frustration on account of the discrimination of which they were victims” and awarded them €2,000 each in non-pecuniary damages.

Symbolic Remedies

Some adjudicators may grant “symbolic” remedies in given cases. These include for example, an order to make a public apology or erect a memorial. Such remedies are relatively uncommon but may provide an element of restorative justice for the victims. The IACtHR is one body which awards them and it has been reported that, for a body which suffers from poor implementation of its decisions, such remedies are more likely to be implemented by states than, for example, remedies which require legislative change.³⁹⁶

Symbolic remedies do not compensate individuals for the harm caused, save for potentially at an emotional level, and do not provide the legislative, policy or structural changes that would be required to ensure non-repetition of the violation. Litigators may therefore wish to invite courts to require a public apology as a remedy in addition to other, more effective remedies, rather than in isolation.

In the *Case of the Jean and Bosico Children v The Dominican Republic* (2005),³⁹⁷ relating to discrimination against children of Haitian descent, the IACtHR ordered that the Dominican Republic:

*[O]rganize a public act to acknowledge its international responsibility for the facts referred to in [the] judgment and to apologize to the children (...) within six months of [the] judgment, with the participation of the authorities, the victims and their next of kin, and disseminate it via the media (radio, press, television).*³⁹⁸

In so ordering, the Court felt that “[t]his act would be a measure of satisfaction and would serve as a guarantee of non-repetition”.³⁹⁹ The requirement of a public apology was one of a number of remedies provided by the court, and

395 ECtHR, *Ponomaryovi v Bulgaria*, Application No. 5335/05, 21 June 2011.

396 See Baluarte, D.C. and De Vos, C., above, note 120.

397 See above, note 362.

398 *Ibid*, Para 235.

399 *Ibid*.

was specifically requested by the applicants. It is notable that the judgment of the Court in this case has not led to an improvement in the situation in the Dominican Republic and the discrimination against Dominicans of Haitian descent is ongoing.

Declaratory Orders

Declaratory Orders are orders in which a court makes a declaration that there has been a violation of the right in question but does not mandate that the state take particular action. Usually one of the least coercive remedies, they offer an opportunity for the judiciary to declare that there is a fault without being accused of usurping the rightful role of the legislature in determining how best to remedy the fault. However, declaratory orders can take many forms and the degree of coercion exerted by the remedy varies. At its most basic, a court may simply make a declaration that there has been a violation of the victim's rights, and regard this declaration as a sufficient remedy. Alternatively, a court may declare that specific changes must be made by the state or body to ensure that future violations do not occur. The level of direction provided by the court can range from absolute discretion to detailed prescription.

At the more prescriptive end of this spectrum, the South African Constitutional Court has often either issued prescriptive declaratory orders and/or accompanied an order with a judgment which makes detailed comments as to what the state must do to comply with the order:

- In *Grootboom* (violation of the right to access to adequate housing) Justice Yacoob noted that [t]he precise contours and content of the measures to be adopted (...) are primarily a matter for the legislature and the executive"⁴⁰⁰ but declared that "[i]t is essential that a reasonable part of the national housing budget be devoted to [giving effect to this Court order]".⁴⁰¹ The court also noted that the South Africa Human Rights Commission would monitor and report on the state's implementation of the order.
- In *Minister of Health v Treatment Action Campaign* (violation of right of access to healthcare services) the court ordered that the state remove restrictions on the use of the anti-retroviral nevirapine, permit and facilitate its use, and:

*[T]ake reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.*⁴⁰²

400 *Government of the Republic of South Africa v Grootboom*, above, note 107, Para 41 as quoted in above, note 387, p. 6.

401 *Government of the Republic of South Africa v Grootboom*, above, note 107, Para 66 as quoted in above, note 387, p. 6.

402 See *Minister of Health v Treatment Action Campaign*, above, note 107, Para 135.

The Canadian Supreme Court has also been prescriptive on occasion:

- In *Eldridge v British Columbia (Attorney General)*⁴⁰³ (violation of the right to equality) the Court issued a declaration, suspended for six months, that the failure to provide sign language interpreters was a violation of the Canadian Charter of Rights and Freedoms, and directed the government of British Columbia to administer the relevant legislation in a manner consistent with the requirements of the Charter. The Court stated that a declaration was an appropriate remedy as “there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court’s role to dictate how this is to be accomplished”.⁴⁰⁴ However, the discretion given to the government was not absolute. In determining how to respond to the judgment, the government was obliged, amongst other things, to ensure that “sign language interpreters will be provided where necessary for effective communication in the delivery of medical services”.⁴⁰⁵ Accordingly, in reality, the state’s discretion was limited.

At the less prescriptive end, courts have issued simple declarations with no prescription as to how to respond to the declaration to rectify the violation.

- As already mentioned, the simple declaration by the Supreme Court of Canada in *Chaoulli v Quebec (Attorney General)*⁴⁰⁶ (right to health), that the prohibition of private health insurance was unconstitutional, has been heavily criticised as an inadequate response which failed to address the problem of inadequate access to healthcare for the economically disadvantaged. The Court has also been criticised for its approach to judicial deference.⁴⁰⁷
- The UK’s unique system under Section 4 of its Human Rights Act 1998, whereby a court may make a “declaration of incompatibility” with ECHR rights is a form of non-prescriptive declaration. It is used less often than declarations of unconstitutionality are in some other jurisdictions.⁴⁰⁸ There is a good record of the state acting (albeit slowly) to rectify a violation following a declaration of incompatibility. However, King has described the impact of Section 4 declarations as “modest”.⁴⁰⁹

403 See above, note 295.

404 *Ibid*, Para 96.

405 *Ibid*, Para 96.

406 See 3.7.1 above.

407 King, J., “Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision”, *The Modern Law Review*, Vol. 69, 2006, pp. 631–643.

408 For the figures for usage of declarations in the UK as compared to France, Germany and Canada see above, note 351.

409 *Ibid*.

With these varying examples in mind, litigators will wish to seek to influence the content of a declaratory order wherever possible, to ensure that it has sufficient “teeth” to have impact. They should be used in appropriate ways to avoid negative outcomes (cf *Chaoulli*). One potential risk of a simple declaration that there has been discrimination in relation to the provision of a particular service is that the state may decide to remedy the discrimination by “levelling down”. Where a state has constitutional ESR obligations, it will be prevented from “levelling down” by the requirement of “non-regression” in relation to ESRs. But elsewhere, if courts fail to mandate a particular action by the state, the outcome may be not only that the claimant does not get what they sought, but also that other persons are disadvantaged as a result of the judgment.⁴¹⁰

In general terms, declarations are useful remedies in tackling the underlying causes of the rights violations so as to ensure that they do not occur in the future, thereby assisting not only the actual victim but other victims and potential future victims. However, they may not adequately compensate the claimants for harm suffered nor provide immediate relief. Furthermore, they are only effective if the state pays attention to them. Accordingly, declarations are arguably best used where states have a strong record of respect for the adjudicating body which is evidenced by their instituting of timely and appropriate measures to rectify violations identified by judicial declarations.

3.7.3 Summary

The legal and political landscape across jurisdictions varies dramatically when it comes to remedies and these comments will be a starting point for a more in depth strategic consideration of the options. They may provide some useful comparative lessons. However, the key message to litigators regarding remedy is to be mindful of the overarching considerations on how they apply in the given jurisdiction. Courts should be expected to be only as intrusive in their remedies as is required based on the state’s record of co-operation. In many instances, if the court can design a remedy in conjunction with the state it is most likely that genuinely transformative remedies will result.

3.8 Evidence and Proof

The particular procedural and evidential burdens faced by litigators seeking to use equality or non-discrimination to advance ESRs before a court will depend on the jurisdiction in question. Accordingly, here we do not seek to provide guidance as to what those specific burdens may be, but rather indicate some of the considerations that are often relevant to discrimination and equality cases.⁴¹¹ There exist, in relation to a number of the international, regional and national

410 For some examples of this unsatisfactory outcome in the US, see above, note 74, pp. 513–573.

411 The following section has been heavily influenced by the excellent discussion of proof and evidence issues in non-discrimination cases in international law in Interights, above, note 2, pp. 103–114. See also, ERRC, Interights and MPG, above note 2.

mechanisms discussed herein, useful guides to matters of procedure including matters of evidence and proof.⁴¹² Litigators are well-advised to refer to any such relevant guide for more detail on considerations of evidence and proof in their forum of choice.

3.8.1 Burden of Proof

Litigators will need to consider who has the burden of proof in relation to the claim they wish to bring before the forum they have chosen. It will usually be upon the claimant to provide some evidence of discrimination before the respondent is required to rebut it.⁴¹³ Providing this evidence may involve a number of challenges. Litigators will wish to consider the following:

- Litigators of discrimination claims will wish to argue that they are required only to establish the treatment complained of and the existence of a protected ground in order to discharge their burden of proof.⁴¹⁴ However, they will often be required to show that the claimant has suffered less favourable treatment when compared to someone else or has not been treated differently to someone when their situations are relevantly different. As Interights has pointed out, this use of a “comparator” creates both philosophical and practical problems. Philosophically:

*A concept of equality based on the notion of comparison generally uses the ‘majority’ or dominant group as a reference group against which treatment is judged (i.e., the group of the different status). The application of such a notion might, for example, grant women what men have, as long as they are like men – judging women according to the male standard. This has the effect of encouraging integration or assimilation, thus removing the difference and diversity the law is trying to protect. The notion of comparison between groups based on one ground also ignores the overlapping and intersecting identities of an individual, which may impact the way in which they are discriminated against.*⁴¹⁵

412 For matters of proof and evidence in relation to the EU Non-discrimination Directives see Farkas, L., *How to Present a Discrimination Claim: Handbook on Seeking Remedies under the EU Non-Discrimination Directives*, European Network of Legal Experts in the Non-discrimination Field, European Commission, 2011, pp. 45–58. In relation to the ECtHR (and national courts of Council of Europe members) see Arnardóttir, O.M., “Non-discrimination under Article 14 ECHR: the Burden of Proof”, *Scandinavian Studies in Law*, 1999-2012, p.13. In relation to the Inter-American system see International Justice Resource Center, *Preventing and Remedying Human Rights Violations through the International Framework Advocacy before the Inter-American System Manual for Attorneys and Advocates*, 2012, pp. 55–60.

413 In the European context, the requirement is often understood as a requirement to establish a *prima facie* case of discrimination at which point the “burden of proof” shifts to the respondent. The shifting of the burden of proof in discrimination cases after a *prima facie* case has been established is an approach taken by a number of international mechanisms. For further discussion see Interights, above, note 2, p. 107; Farkas, L., above, note 412, p. 5; and ERRC, Interights and MPG, above, note 2.

414 See discussion in Arnardóttir, O.M., above, note 412, p. 36.

415 See Interights, above, note 2, p. 104.

Practically, there may not be an easily identifiable comparator. Whilst the use of hypothetical comparators is recognised and may be helpful in some jurisdictions, this may not be the case everywhere. If the court rejects the relevance of a comparator, it may find that there has been no unfavourable treatment. Litigators may wish to argue that it is not appropriate for the claimant to be required to identify a comparator and in some cases will be in a position to draw on conflicting views on whether such a comparator is required in the jurisdiction in question.⁴¹⁶

- Helpfully, it is not necessary to prove that the person who allegedly discriminated *intended* to do so. There is much useful precedent on the irrelevance of intent, including from the HRC and a number of regional courts.⁴¹⁷ However, before some courts there is still some confusion on this issue and litigators may find that precedent indicates that some form of subjective intention is expected before the courts will find discrimination.

3.8.2 Standard of Proof

The standard of proof required from a claimant in order to discharge their burden of proof in discrimination cases varies across jurisdictions. Litigators will need to establish whether the claimant is required to prove the discrimination “beyond reasonable doubt” or is held to the lower standard of proof whereby the court will determine whether it has been proved on the “balance of probabilities”.

Given some of the particular difficulties in evidencing a discrimination claim (discussed below), the application of a “beyond reasonable doubt” standard of proof may be an insurmountable challenge in relation to some cases. It has been alleged that where it is applied by human rights courts, it can lead in effect, to “virtual impunity” in relation to human rights violations.⁴¹⁸ However, it has also been noted that, where the standard applies, some courts have been mitigating against its effects by, for example, drawing inferences from circumstantial evidence and making presumptions which a court would not otherwise make.⁴¹⁹ In *Nachova v Bulgaria*, the ECtHR departed from its previous insistence on the strict application of the criminal law standard of proof “beyond reasonable doubt”. It recognised for the first time that:

416 For a discussion of the issue of comparisons in the context of the ECtHR’s jurisprudence, see Arnardóttir, O.M., above, note 412, pp. 32–35.

417 For a more thorough discussion see Interights, above, note 2, p. 106.

418 For a discussion of the negative impact of this high standard of proof in the case law of the ECtHR see Arnardóttir, O.M., above, note 412, pp. 32–35.

419 *Ibid*, pp. 37–39 for a discussion of case law which appears to show the ECtHR doing this.

*According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact.*⁴²⁰

3.8.3 Considerations in Relation to Evidence

Proving discrimination is not easy. There will often not be direct proof of discrimination and even if the proof is there, e.g. where it relates to a matter of state policy, it may nevertheless not be accessible.⁴²¹ Some courts have taken steps to reduce the burden of proof on claimants as a result of evidential issues and the precise requirements of the courts should be carefully explored by a litigator when deciding whether or not the case can be brought.⁴²² Other courts have generous criteria for determining whether evidence is relevant and admissible in relation to the claim.⁴²³

Litigators should be both thorough and creative in gathering evidence to prove the claim. Where they are bringing equality/non-discrimination cases against a state, it will not be uncommon for them to find themselves facing a lack of co-operation from the state in question. This will result in a particular need to be resourceful in gathering evidence. NGO contacts and community networks may be of particular value in helping to build the case. A non-exhaustive list of the types of evidence a litigator may wish to secure in relation to an equality or non-discrimination claim together with some key considerations could include:

- **Witness Statements:** Often, particularly in cases of alleged direct discrimination, claims will hinge on whether the adjudicating body finds the evidence of individual witnesses to be compelling. Witness statements and statements of victims will therefore be critical. They are also an important element of ensuring that the litigation is suitably participatory, enabling claimants and affected communities to be involved and have their say. Expert witnesses may also provide valuable testimony to a particular state of affairs.⁴²⁴
- **Situation Testing:** This consists of testing a belief that there is direct discrimination on grounds of a particular protected characteristic. For example, one may wish to use situation testing to test a hypothesis that an employer is discriminating against candidates on grounds of their

420 ECtHR, *Nachova and Ors v Bulgaria*, Application No. 43577/98 and 43579/98, 6 July 2005, Para 147. See also the earlier chamber judgment in the same case, *Nachova and Ors v Bulgaria*, Application No. 43577/98 and 43579/98, 26 February 2004, Para 166.

421 For further discussions and specific examples, see ERRC, Interights and MPG, above, note 2; and Interights, above, note 2.

422 For some examples of the steps taken by courts in this respect see ERRC, Interights and MPG, above, note 2; and Interights, above, note 2.

423 See for example the rules relating to the IACHR and IACtHR, Melish, T., *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System: A Manual on Presenting Claims*, 2002, p. 363.

424 *Ibid*, pp. 366–368 for a detailed consideration of the use of witness statements before the IACHR or IACtHR.

ethnicity, choosing not to hire candidates with names which may indicate a minority ethnicity. Situation testing would, in such a case, involve submitting job applications to that employer from: Candidate A, with a name that implies minority ethnicity; and Candidate B who has a name which implies a majority ethnicity and who is equally qualified for the role as Candidate A. If Candidate B is shortlisted but not Candidate A, this is then used as *prima facie* evidence of discrimination on grounds of ethnicity by the employer.⁴²⁵ There are examples of organisations and litigators using testing as the basis for discrimination claims in a number of jurisdictions.⁴²⁶

- **Pre-claim questionnaires:** These are used in a number of national contexts to enable claimants/litigators to gain more information from the potential respondent before deciding whether or not to bring a claim. They can be a useful way of gaining information disaggregated on the basis of protected grounds of discrimination, for example, from employers or service providers with regard to their recruitment/service provision history. However, such a system is not available everywhere. And the UK, which has had such a procedure available in relation to discrimination in employment, has recently repealed the process.⁴²⁷
- **Visual and audio evidence:** Some courts will admit video or audio recordings as evidence, which may be particularly useful when the litigation is being brought in the context of wider situation research and testimony collection by an NGO client for example.⁴²⁸
- **Relevant studies and reports:** This may include, for example, the human rights reports of various UN bodies, human rights commissions, special rapporteurs or NGOs, or other third party researchers. Such reports may be considered by courts in human rights cases, particularly where a state is not co-operating with the judicial process. Litigators should have them in mind although should pay particular attention to the need to convince the court of their relevance to specific cases in question as well as their reliability.
- **Statistics:** Statistics may be particularly useful evidence to help a litigator to discharge the burden of proving the claim of inequality or non-discrimination. For example, litigators may seek to use statistics in relation to a claim of indirect discrimination, where they seek to show that a particular provision, criterion or practice disproportionately impacts on in-

425 For a detailed consideration of the use of situation testing in the European and US context, please see Rorive, I., *Proving Discrimination Cases – the Role of Situation Testing*, joint publication by Centre for Equal Rights and MPG, 2009.

426 *Ibid.*

427 See above, note 109, Section 138 which provides for discrimination questionnaires, has been repealed by the Enterprise and Regulatory Reform Act 2013, a change which came into effect on 6 April 2014.

428 The IACtHR may also use such evidence in order for a victim who cannot travel to give evidence, to present their evidence remotely. See International Justice Resource Center, above, note 412, p. 60.

dividuals within a particular protected group. The source of the statistics will be critical to whether the court is willing to rely on them as evidence of inequality or discrimination. States are increasingly likely to gather and publish official data in relation to certain protected characteristics as a result of international and regional non-discrimination obligations and accordingly, litigators are advised to explore any statistics of this kind published as well as any unofficial statistics which may nevertheless be of value. As Interights has noted, “the use of statistics helps to shift the focus away from narrow individual comparisons and toward the identification of broader, underlying, structural inequalities” and some national courts have shown a preference for statistics, where they are available, to the use of individual comparators.⁴²⁹

3.8.4 Summary

Litigators will always need to have in mind whether the specific requirements of proof of a given jurisdiction coupled with evidential challenges in relation to a case, impact on the feasibility of bringing a successful case. This section has highlighted some of the key considerations for litigators when carrying out this assessment. However, litigators will wish to consider in detail the specificities of their chosen forum. They may seek further guidance from the numerous useful sources on procedure.

CONCLUSION

Wherever one is situated in the world, the inequality of access to and enjoyment of ESRs is evident. The gap between the rich and poor continues to grow and enjoyment of basic rights such as water, food, housing and education remains no more than an aspiration for many. Lawyers face a number of challenges in seeking to ensure that everyone enjoys these rights. Activists agitating for social justice regularly face a series of unhelpful and inaccurate ripostes from governments to the effect that: they are doing everything they should be to uphold ESRs; people have an obligation to help themselves out of poverty; to do any more would be too resource intensive; and so it goes on. The regularity with which resources are posited as an excuse for failing to uphold fundamental rights is depressingly predictable and it is not only governments to whom this appears to be a legitimate concern. The perception that upholding ESRs is more costly than upholding other rights has continued to influence the way in which courts decide these cases⁴³⁰ and at the same time judgments which may not be so costly to implement in individual cases may actually have “anti-poor” outcomes in the broader context.⁴³¹ Activists and lawyers continue to in their campaign for the realisation of ESRs.

And yet it is still too rare that the fundamental right to equality of the most disadvantaged groups features in this campaign. As usual, despite the best intentions, these groups remain the most invisible. And therein lies the key problem. As this guide has argued, equality is at the heart of ESRs. It is the most historically and socio-economically disadvantaged groups who do not enjoy ESRs. States have a clear obligation under human rights and equality law to respect, protect and fulfil the rights to equality and freedom from non-discrimination and this must include equality and non-discrimination in the enjoyment of ESRs. As NGOs and lawyers, we must work together to send a clear message that equality is central to the enjoyment of ESRs. We must pursue a clear and well-coordinated strategy for change which encompasses a variety of social, political and legal approaches driven to have the greatest effect in the particular context in question. Strategic litigation has an important role to play in this broader strategy.

When faced with a lack of co-operation from the state in upholding ESRs, it is the turn of litigators, remembering that:

430 See above, note 351, p. 77 and Nolan, A., *Children's Socio-economic Rights, Democracy and the Courts*, Hart Publishing, 2011, p. 25.

431 See above, note 91.

*[C]ourts are the guardians of constitutional rights. A vitally important function of courts is to interpret constitutional provisions conferring rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford.*⁴³²

The guide has shown that the jurisprudence of courts around the world is already helping both to shape and to enforce the law in the area of equality in ESRs. However, the guide has also demonstrated that the courts need to address the substantial remaining gaps in the equal enjoyment of these rights. We have sought to demonstrate that the rights to equality and non-discrimination are key. The courts cannot address the gaps without hearing strong arguments from litigators brought on the basis of equality and/or non-discrimination as appropriate. Helping to enable lawyers to bring such arguments to bear on cases related to the adequate enjoyment of a fulfilling economic and social life has been the central purpose of this guide. We hope that we have succeeded in this purpose and that Budlender will be proven right in thinking that “in time we will find that equality moves to the centre stage in social and economic rights litigation”.⁴³³ We are confident that such a change would result in a greater realisation of the social and economic rights of all people, including the most vulnerable.

432 Joint dissent of Lord Nicholls of Birkenhead and Lord Hope of Craig Head, Privy Council, *Prince Pinder v The Queen* [2002] UKPC 46.

433 Interview with Geoff Budlender conducted by the Equal Rights Trust, “Socio-Economic Equality in the Courts: The Litigator’s Perspective”, *Equal Rights Review*, Vol. 12, 2014, p. 126.

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Appendix 1

Declaration of Principles on Equality (2008)

We, the undersigned human rights advocates and experts in international human rights law and equality law

Preamble

Recalling the principles proclaimed in the Charter of the United Nations which recognise the inherent dignity and worth and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world;

Recalling Article 1 of the Universal Declaration of Human Rights proclaiming that all human beings are born free and equal in dignity and rights;

Recalling that the United Nations, in the Universal Declaration of Human Rights and in the International Covenants on human rights and other universal treaties, has proclaimed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, committing States to take all possible measures to ensure non-discrimination in the enjoyment of all human rights;

Noting the recognition, in Article 26 of the International Covenant on Civil and Political Rights, of the right to non-discrimination as an autonomous human right and the correlative obligation of States to realise this right;

Observing that discrimination by its nature harms human capabilities in unjust ways, creating cycles of disadvantage and denials of freedom which hinder human development;

Recognising the importance of combating every form of discrimination, including the need to take appropriate action to enable people who are disadvantaged to realise their full potential, and contribute to their full participation in economic, social, political, cultural and civil life;

Convinced that comprehensive anti-discrimination legislation and its effective enforcement are necessary to promote equality and eliminate discrimination;

Concerned that the vast majority of States do not have effective legal protection, including comprehensive legislation, to promote equality and combat discrimination;

Understanding that States may need guidance and assistance in introducing effective legal protection, including legislation, to promote equality and combat discrimination;

Noting that while legal provisions relating to equality should provide legal certainty, those responsible should be willing to improve and interpret legislation in order to reflect the changing experiences of all people disadvantaged by inequality;

Resolved to take further steps to promote the equality of all persons through the effective enforcement of prohibitions of discrimination in international human rights law as well as in national legislation;

Aiming to eliminate unjust inequalities and to promote full and effective equality;

Having participated in a meeting held in London, in the United Kingdom, from 2 to 5 April 2008 and/or in subsequent consultations facilitated by the equal rights trust, hereby adopt the following declaration on principles of equality.

PART I. Equality

1. The Right to Equality

The right to equality is the right of all human beings to be equal in dignity, to be treated with respect and consideration and to participate on an equal basis with others in any area of economic, social, political, cultural or civil life. All human beings are equal before the law and have the right to equal protection and benefit of the law.

2. Equal Treatment

Equal treatment, as an aspect of equality, is not equivalent to identical treatment. To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals.

3. Positive Action

To be effective, the right to equality requires positive action.

Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

PART II. Non-discrimination

4. The Right to Non-discrimination

The right to non-discrimination is a free-standing, fundamental right, subsumed in the right to equality.

5. Definition of Discrimination⁴³⁴

Discrimination must be prohibited where it is on grounds of race, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender identity, age, disability, health status, genetic or other predisposition toward illness or a combination of any of these grounds, or on the basis of characteristics associated with any of these grounds.

Discrimination based on any other ground must be prohibited where such discrimination

- i. causes or perpetuates systemic disadvantage;
- ii. undermines human dignity; or
- iii. adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on the prohibited grounds stated above.

Discrimination must also be prohibited when it is on the ground of the association of a person with other persons to whom a prohibited ground applies or the perception, whether accurate or otherwise, of a person as having a characteristic associated with a prohibited ground.

Discrimination may be direct or indirect.

Direct discrimination occurs when for a reason related to one or more prohibited grounds a person or group of persons is treated less favourably than another person or another group of persons is, has been, or would be treated in a comparable situation; or when for a reason related to one or more prohibited grounds a person or group of persons is subjected to a detriment. Direct discrimination may be permitted only very exceptionally, when it can be justified against strictly defined criteria.

Indirect discrimination occurs when a provision, criterion or practice would put persons having a status or a characteristic associated with one or more prohibited grounds at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

⁴³⁴ Throughout this Declaration the term "discrimination" is used as defined in this Principle and the term "prohibited grounds" refers to the grounds or combination of grounds described in this Principle.

Harassment constitutes discrimination when unwanted conduct related to any prohibited ground takes place with the purpose or effect of violating the dignity of a person or of creating an intimidating, hostile, degrading, humiliating or offensive environment.

An act of discrimination may be committed intentionally or unintentionally.

6. Relationship between the Grounds of Discrimination

Legislation must provide for equal protection from discrimination regardless of the ground or combination of grounds concerned.

7. Discrimination and Violence

Any act of violence or incitement to violence⁴³⁵ that is motivated wholly or in part by the victim having a characteristic or status associated with a prohibited ground constitutes a serious denial of the right to equality. Such motivation must be treated as an aggravating factor in the commission of offences of violence and incitement to violence, and States must take all appropriate action to penalise, prevent and deter such acts.

PART III. Scope and Right-holders

8. Scope of Application

The right to equality applies in all areas of activity regulated by law.

9. Right-holders

The right to equality is inherent to all human beings and may be asserted by any person or a group of persons who have a common interest in asserting this right.

The right to equality is to be freely exercised by all persons present in or subject to the jurisdiction of a State.

Legal persons must be able to assert a right to protection against discrimination when such discrimination is, has been or would be based on their members, employees or other persons associated with a legal person having a status or characteristic associated with a prohibited ground.

⁴³⁵ Certain signatories have endorsed the Principles on the basis that “incitement to violence” means incitement to imminent violence”.

PART IV. Obligations

10. Duty-bearers

States have a duty to respect, protect, promote and fulfil the right to equality for all persons present within their territory or subject to their jurisdiction. Non-state actors, including transnational corporations and other non-national legal entities, should respect the right to equality in all areas of activity regulated by law.

11. Giving Effect to the Right to Equality

States must take the steps that are necessary to give full effect to the right to equality in all activities of the State both domestically and in its external or international role. In particular States must:

Adopt all appropriate constitutional, legislative, administrative and other measures for the implementation of the right to equality;

Take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that conflict or are incompatible with the right to equality;

Promote equality in all relevant policies and programmes;

Review all proposed legislation for its compatibility with the right to equality;

Refrain from adopting any policies or engaging in any act or practice that is inconsistent with the right to equality;

Take all appropriate measures to ensure that all public authorities and institutions act in conformity with the right to equality;

Take all appropriate measures to eliminate all forms of discrimination by any person, or any public or private sector organisation.

12. Obligations Regarding Multiple Discrimination

Laws and policies must provide effective protection against multiple discrimination, that is, discrimination on more than one ground. Particular positive action measures, as defined in Principle 3, may be required to overcome past disadvantage related to the combination of two or more prohibited grounds.

13. Accommodating Difference

To achieve full and effective equality it may be necessary to require public and private sector organisations to provide reasonable accommodation for different capabilities of individuals related to one or more prohibited grounds.

Accommodation means the necessary and appropriate modifications and adjustments, including anticipatory measures, to facilitate the ability of every individual to participate in any area of economic, social, political, cultural or civil life on an equal basis with others. It should not be an obligation to accommodate difference where this would impose a disproportionate or undue burden on the provider.

14. Measures against Poverty

As poverty may be both a cause and a consequence of discrimination, measures to alleviate poverty should be coordinated with measures to combat discrimination, in the pursuit of full and effective equality.

15. Specificity of Equality Legislation

The realisation of the right to equality requires the adoption of equality laws and policies that are comprehensive and sufficiently detailed and specific to encompass the different forms and manifestations of discrimination and disadvantage.

16. Participation

All persons, particularly those who have experienced or who are vulnerable to discrimination, should be consulted and involved in the development and implementation of laws and policies implementing the right to equality.

17. Education on Equality

States have a duty to raise public awareness about equality, and to ensure that all educational establishments, including private, religious and military schools, provide suitable education on equality as a fundamental right.

PART V. Enforcement

18. Access to Justice

Persons who have been subjected to discrimination have a right to seek legal redress and an effective remedy. They must have effective access to judicial and/or administrative procedures, and appropriate legal aid for this purpose. States must not create or permit undue obstacles, including financial obstacles or restrictions on the representation of victims, to the effective enforcement of the right to equality.

19. Victimisation

States must introduce into their national legal systems such measures as are necessary to protect individuals from any adverse treatment or adverse consequence as a reaction to a complaint or to proceedings aimed at enforcing compliance with equality provisions.

20. Standing

States should ensure that associations, organisations or other legal entities, which have a legitimate interest in the realisation of the right to equality, may engage, either on behalf or in support of the persons seeking redress, with their approval, or on their own behalf, in any judicial and/or administrative procedure provided for the enforcement of the right to equality.

21. Evidence and Proof

Legal rules related to evidence and proof must be adapted to ensure that victims of discrimination are not unduly inhibited in obtaining redress. In particular, the rules on proof in civil proceedings should be adapted to ensure that when persons who allege that they have been subjected to discrimination establish, before a court or other competent authority, facts from which it may be presumed that there has been discrimination (*prima facie* case), it shall be for the respondent to prove that there has been no breach of the right to equality.

22. Remedies and Sanctions

Sanctions for breach of the right to equality must be effective, proportionate and dissuasive. Sanctions must provide for appropriate remedies for those whose right to equality has been breached including reparations for material and non-material damages; sanctions may also require the elimination of discriminatory practices and the implementation of structural, institutional, organisational, or policy change that is necessary for the realisation of the right to equality.

23. Specialised Bodies

States must establish and maintain a body or a system of coordinated bodies for the protection and promotion of the right to equality. States must ensure the independent status and competences of such bodies in line with the UN Paris Principles, as well as adequate funding and transparent procedures for the appointment and removal of their members.

24. Duty to Gather Information

To give full effect to the right to equality States must collect and publicise information, including relevant statistical data, in order to identify inequalities, dis-

criminatory practices and patterns of disadvantage, and to analyse the effectiveness of measures to promote equality. States must not use such information in a manner that violates human rights.

25. Dissemination of Information

Laws and policies adopted to give effect to the right to equality must be accessible to all persons. States must take steps to ensure that all such laws and policies are brought to the attention of all persons who may be concerned by all appropriate means.

PART VI. Prohibitions

26. Prohibition of Regressive Interpretation

In adopting and implementing laws and policies to promote equality, there shall be no regression from the level of protection against discrimination that has already been achieved.

27. Derogations and Reservations

No derogation from the right to equality shall be permitted.

Any reservation to a treaty or other international instrument, which would derogate from the right to equality, shall be null and void.

Appendix 2

International Covenant on Economic, Social and Cultural Rights (1966)

Preamble

The States Parties to the present Covenant,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognising that these rights derive from the inherent dignity of the human person,

Recognising that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognised in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognised herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognised or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognise such rights or that it recognises them to a lesser extent.

PART III

Article 6

1. The States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- a. Remuneration which provides all workers, as a minimum, with:
 - i. Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work.
 - ii. A decent living for themselves and their families in accordance with the provisions of the present Covenant.
- b. Safe and healthy working conditions.
- c. Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.
- d. Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

Article 8

1. The States Parties to the present Covenant undertake to ensure:
 - a. The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organisation concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - b. The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organisations;
 - c. The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
 - d. The right to strike, provided that it is exercised in conformity with the laws of the particular country.
2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.
3. Nothing in this article shall authorise States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

Article 9

The States Parties to the present Covenant recognise the right of everyone to social security, including social insurance.

Article 10

The States Parties to the present Covenant recognise that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be

protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 11

1. The States Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realisation of this right, recognising to this effect the essential importance of international co-operation based on free consent.
2. The States Parties to the present Covenant, recognising the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
 - a. To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilisation of natural resources;
 - b. Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

Article 12

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
 - a. The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
 - b. The improvement of all aspects of environmental and industrial hygiene;
 - c. The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
 - d. The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Article 13

1. The States Parties to the present Covenant recognise the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and

shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognise that, with a view to achieving the full realisation of this right:
 - a. Primary education shall be compulsory and available free to all;
 - b. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - d. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - e. The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

Article 15

1. The States Parties to the present Covenant recognise the right of everyone:
 - a. To take part in cultural life;
 - b. To enjoy the benefits of scientific progress and its applications;

- c. To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
4. The States Parties to the present Covenant recognise the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

PART IV

Article 16

1. The States Parties to the present Covenant undertake to submit in conformity with this part of the Covenant reports on the measures which they have adopted and the progress made in achieving the observance of the rights recognised herein.
2.
 - a. All reports shall be submitted to the Secretary-General of the United Nations, who shall transmit copies to the Economic and Social Council for consideration in accordance with the provisions of the present Covenant;
 - b. The Secretary-General of the United Nations shall also transmit to the specialised agencies copies of the reports, or any relevant parts therefrom, from States Parties to the present Covenant which are also members of these specialised agencies in so far as these reports, or parts therefrom, relate to any matters which fall within the responsibilities of the said agencies in accordance with their constitutional instruments.

Article 17

1. The States Parties to the present Covenant shall furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into force of the present Covenant after consultation with the States Parties and the specialised agencies concerned.
2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Covenant.
3. Where relevant information has previously been furnished to the United Nations or to any specialised agency by any State Party to the present Covenant, it will not be necessary to reproduce that information, but a precise reference to the information so furnished will suffice.

Article 18

Pursuant to its responsibilities under the Charter of the United Nations in the field of human rights and fundamental freedoms, the Economic and Social Council may make arrangements with the specialised agencies in respect of their reporting to it on the progress made in achieving the observance of the provisions of the present Covenant falling within the scope of their activities. These reports may include particulars of decisions and recommendations on such implementation adopted by their competent organs.

Article 19

The Economic and Social Council may transmit to the Commission on Human Rights for study and general recommendation or, as appropriate, for information the reports concerning human rights submitted by States in accordance with articles 16 and 17, and those concerning human rights submitted by the specialised agencies in accordance with article 18.

Article 20

The States Parties to the present Covenant and the specialised agencies concerned may submit comments to the Economic and Social Council on any general recommendation under article 19 or reference to such general recommendation in any report of the Commission on Human Rights or any documentation referred to therein.

Article 21

The Economic and Social Council may submit from time to time to the General Assembly reports with recommendations of a general nature and a summary of the information received from the States Parties to the present Covenant and the specialised agencies on the measures taken and the progress made in achieving general observance of the rights recognised in the present Covenant.

Article 22

The Economic and Social Council may bring to the attention of other organs of the United Nations, their subsidiary organs and specialised agencies concerned with furnishing technical assistance any matters arising out of the reports referred to in this part of the present Covenant which may assist such bodies in deciding, each within its field of competence, on the advisability of international measures likely to contribute to the effective progressive implementation of the present Covenant.

Article 23

The States Parties to the present Covenant agree that international action for the achievement of the rights recognised in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organised in conjunction with the Governments concerned.

Article 24

Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the specialised agencies which define the respective responsibilities of the various organs of the United Nations and of the specialised agencies in regard to the matters dealt with in the present Covenant.

Article 25

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources.

PART V

Article 26

1. The present Covenant is open for signature by any State Member of the United Nations or member of any of its specialised agencies, by any State Party to the Statute of the International Court of Justice, and by any other State which has been invited by the General Assembly of the United Nations to become a party to the present Covenant.
2. The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.
3. The present Covenant shall be open to accession by any State referred to in paragraph 1 of this article.
4. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.
5. The Secretary-General of the United Nations shall inform all States which have signed the present Covenant or acceded to it of the deposit of each instrument of ratification or accession.

Article 27

1. The present Covenant shall enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the thirty-fifth instrument of ratification or instrument of accession.
2. For each State ratifying the present Covenant or acceding to it after the deposit of the thirty-fifth instrument of ratification or instrument of accession, the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 28

The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.

Article 29

1. Any State Party to the present Covenant may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate any proposed amendments to the States Parties to the present Covenant with a request that they notify him whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that at least one third of the States Parties favours such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of the States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.
2. Amendments shall come into force when they have been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties to the present Covenant in accordance with their respective constitutional processes.
3. When amendments come into force they shall be binding on those States Parties which have accepted them, other States Parties still being bound by the provisions of the present Covenant and any earlier amendment which they have accepted.

Article 30

Irrespective of the notifications made under article 26, paragraph 5, the Secretary-General of the United Nations shall inform all States referred to in paragraph I of the same article of the following particulars:

- a. Signatures, ratifications and accessions under article 26;
- b. The date of the entry into force of the present Covenant under article 27 and the date of the entry into force of any amendments under article 29.

Article 31

1. The present Covenant, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of the present Covenant to all States referred to in article 26.

The Equal Rights Trust is an independent international organisation whose purpose is to combat discrimination and promote equality as a fundamental human right and a basic principle of social justice. The Trust focuses on the complex relationship between different types of discrimination, developing strategies for translating the principles of equality into practice.

This guide is the result of the Trust's deep concern that, in all of the countries in which it works, there continues to be significant inequality in the enjoyment by different individuals and groups of their economic and social rights. An approach based on

equality and non-discrimination is one way to move towards the realisation of these rights. Winning a discrimination case related to education, for example, may go a long way toward better enjoyment of the right to education. The courtroom should and could become one of the key spaces where the promise of equal rights to education, health, social security or adequate standard of living is fulfilled.

Economic and Social Rights in the Courtroom:

A Litigator's Guide to Using Equality and Non-discrimination Strategies to Advance Economic and Social Rights

The primary purpose of this book is to elaborate upon how legal responses to inequality and discrimination can be used in litigation to advance economic and social rights. Based on detailed research, this guide assists litigators by:

- ✓ Elucidating the conceptual links between equality and non-discrimination on the one hand and economic and social rights on the other.
- ✓ Explaining why the rights to equality and non-discrimination could be employed to advance economic and social rights.
- ✓ Bringing together for easy reference caselaw which may provide useful precedents for lawyers.
- ✓ Providing guidance to litigators on how to assemble the building blocks of a case strategy to advance economic and social rights while making the most of the equality and non-discrimination framework.