Litigation Strategies of Using Equality and Non-Discrimination Claims to Advance Economic and Social Rights

The Equal Rights Trust

In the last three years, ERT has worked on a study which is forthcoming later this year, entitled Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights. Legal research, guided by an advisory committee of senior equality and socio-economic rights experts, was intertwined with broad consultations with practitioners and academics from many countries. We are publishing here the Executive Summary of the study.

This is a study about achieving equal enjoyment of economic and social rights (ESRs) for all. The study 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 study 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 an alternative where they are not.

The study finds that there are many strategies that NGOs, lawyers and activists may employ in seeking to advance ESRs. It focuses on a 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 study serves as a guide for litigators seeking to pursue such a strategy.

In conducting its research for this study, The Equal Rights Trust (ERT) 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. ERT has reviewed case law from international and regional jurisdictions as well as the national jurisdictions of Australia, Canada, Colombia, Germany, India, Ireland, United Kingdom and United States of America, where equality claims and arguments have been pursued. The study takes lessons from this case law and also identifies aspects of equality and non-discrimination law which have yet to be employed to advance ESRs before the courts.

The study comprises three parts. Part I introduces the rights framework upon which the study is predicated. Part II identifies the conceptual and practical reasons why equali-
ty and non-discrimination arguments should be employed when challenging violations of ESRs. The bulk of the study appears at Part III which is presented in the form of a guide to litigators seeking to raise equality arguments in relation to ESRs. It sets out an eight step process of consideration, proposed as a tool to facilitate the work of litigators seeking to employ such a strategy when deciding whether to bring a claim and which claim to bring. The study is accompanied by a series of appendices which provide litigators with some key reference documents, including a case compendium of useful cases in which equality or non-discrimination strategies have been employed in cases related to ESRs.

**Part I: The Rights Framework**

Socio-economic rights and the right 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 1966 (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 the study’s categorisation of cases as ESR-related. However, the study 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 study 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 (ICERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of Persons with Disabilities (CRPD), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and People’s Rights (ACHPR), amongst others.

Noting that not all provisions for the rights to equality and to non-discrimination are identical, and that litigators need to be aware of the particularities of their jurisdiction, ERT 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 study.
**Part II: Why Raise Equality Arguments to Challenge Socio-Economic Rights Violations?**

This study does not advocate that equality and non-discrimination claims 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”, as it were. 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. And groups which are particularly vulnerable to status-based discrimination such as women, ethnic minorities, non-nationals and people with disabilities are over-represented 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 do 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 socio-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 state 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 its provision of social services can be used to argue that the state should “level-up” the social services enjoyment of the less advantaged to that achieved by others.

• Some jurisdictions adopt the opinion of 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.

Part III: A Guide to Raising Equality Arguments in Relation to Socio-Economic Rights

The study recognises the burden on litigators of 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 III is not a litigation strategy, but rather a guide for litigators developing their own contextualised strategies. Part III takes the following step-by-step approach to developing litigation:

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

Step 1 is to consider 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 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 study, 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 (e.g. and Education Act). The particularities of the relevant jurisdiction will impact on the litigator’s decision.

At Step 2 litigators ought to consider whether it is appropriate to pursue litigation in the given instance. Litigation will
not always be the most appropriate or effective course of action. Litigators will need to consider the interaction between litigation and other social and political strategies of 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 to 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 contexts for bringing a case of the type or subject-matter envisaged? Are the litigators themselves the most appropriate persons to bring the case or do the facts or circumstances mean that others would be better placed and more able to bring a successful case?

**Step 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?

At **Step 4** the litigator will identify 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 to 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 of socio-economic disadvantage. Four of the more traditional grounds of discrimination are particularly closely linked with a person’s likely 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 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.

Step 5 is to identify 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). An example of such a case is the African Commission decision in Malawi Africa Association and Others v Mauritania.

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, CJEU).

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).

At Step 6 litigators should identify the respondent who would 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 actors is becoming increasingly less relevant when determining whether an obligation in relation to equal enjoyment of 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 the African Commission 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 ICE-SCR 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 African Charter (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 enjoyment 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 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.

**Step 7** is to consider 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 terms of their degree of coerciveness on the state, from legislative remedies such as striking down legislation or reading wording into legislation and structural injunctions requiring the state to take particular actions and supervising their implementation through damages to financially compensate the claimants 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.

**Step 8** requires the litigator to consider the burden and standard of proof to which they 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 European Court of Human Rights shows that some courts may get around 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.