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Human Rights Based Approaches to Development

Concepts, Evidence, and Policy

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Abstract

This paper assesses the benefits, risks, and limitations of human rights based approaches to development, which can be catalogued on the basis of the institutional mechanisms they rely on: global compliance based on international and regional treaties; the policies and programming of donors and executive agencies; rights talk; and legal mobilization. The paper briefly reviews the politics of the first three kinds of human rights based approaches before examining constitutionally based legal mobilization for social and economic rights in greater detail. Litigation for social and economic rights is increasing in frequency and scope in several countries, and exhibits appealing attributes, such as inclusiveness and deliberative quality. Still, there are potential problems with this form of human rights based mobilization, including middle class capture, the potential counter-majoritarianism of courts, and difficulties in compliance. The conclusion summarizes what is known, and what remains to be studied, regarding human rights based approaches to development.

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Human Rights Based Approaches to Development: Concepts, Evidence, and Policy

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Human rights are probably the dominant normative conception in the contemporary globalized world. It is common for struggles for national self-determination, the recognition of alternative identities, class-based and labor empowerment, gender equality, democratic inclusion, property rights protections, rectification of state violence, and consumer goods to use rights discourse – in spite of varying political orientations and alliances among the actors involved. Development is no exception. Whereas it was understood primarily in the terms of economic output from about 1950 to 1970, and concerned with poverty from around 1970 to 1990, development has in the past two decades increasingly been framed in the language of human rights and related concepts, such as fundamental human capabilities and multi-dimensional poverty. The objectives for doing so, on the part of advocates, have been, broadly speaking, to characterize the elimination of extreme poverty as a moral imperative, and to underscore that the kind of political power associated with the assertion of claims by the poor themselves is a prerequisite to the elimination of extreme poverty. The first point is commonly thought of as speaking to the "intrinsic" dimension of human rights, and the latter to their "instrumental" dimension.

The intrinsic dimension is instrumentally useful, however, if it mobilizes rich country governments and citizens, as well as the privileged citizens of developing countries, to contribute more resources to development, and to do so more effectively. So perhaps it is better to say that there are aspects of human rights based approaches to development (HRBAs) that target duty-bearers by raising the moral pressure, and other aspects that target rights-holders by instilling the dignity and self-respect necessary for political, social, and legal mobilization; and that both can, arguably, reduce poverty and inequality at the global and national levels. In other words, HRBAs work both on the supply and demand sides of development.

Although HRBAs have been widely discussed and used, definitions vary; and there is not, to our knowledge, an authoritative source. For our purposes, we define HRBAs as principles that justify demands against privileged actors, made by the poor or those speaking on their behalf, for using national and international resources and rules to protect the crucial human interests of the globally or locally disadvantaged. Note that this account takes sides on some of the semantic controversies surrounding human rights: it does not distinguish between so-called "positive" (economic, social, and cultural) rights and "negative" (civil and political) rights, merely noting that both may involve crucial interests; nor does it restrict the targets of human rights claims to states or governments, leaving open the idea that individuals, firms, and other private actors may be duty-bearers.

The definition is also narrower than most accounts of rights claims. More particularly, this definition of HRBAs (i) does not include the rights of the relatively well-off, focusing instead on poverty; and (ii) emphasizes resources and regulation rather than the more interactional duties that arise from the natural law and natural rights traditions. (It is for this reason that we refer, in this paper, to "human rights based approaches," rather than the more widely used phrase "rights based approaches" to development.) HRBAs, moreover, do not subsume the various other social practices and rules that underpin political morality, social stability, and modern economic growth. HRBAs may include principles by which these other institutions and rules systems might be evaluated; but HRBAs cannot construct all social principles from the ground up, as they leave out many obvious and important elements of social organization. For these reasons, and probably others as well, it would be a mistake to equate HRBAs with more encompassing accounts of social justice or social change. In particular, we understand HRBAs to be targeted interventions on the part of governments and donors; and we

distinguish them from broader transformations in state-society relations, such as democratization or the creation of "open access orders"(North, Wallis, and Weingast 2009), that have large economic repercussions.

So far, we have said little about what kinds of institutions HRBA principles speak through. We have left the definition deliberately open because HRBAs entail various kinds of "mechanisms." For instance, HRBAs sometimes entail persuading states to ratify and then live up to international and regional human rights treaty commitments, enhancing a variety of accountability oriented institutions in governments and donors (e.g., human rights commissions, ombudsmen, agencies of administrative redress), persuading citizens to think of themselves as rights-holders through civil society-based rhetoric, and employing legal mobilization in national courts.[2] In a given country, HRBAs might employ any combination of these "mechanisms," and the quality of the institutions sustaining these sub-approaches varies significantly, even within a given country. As a result, it is difficult to demarcate the boundaries of an HRBA in a given context, and to identify its contribution to development in isolation from the institutions it relies on. The approach we take here, therefore, is analytic rather than strictly empirical. We differentiate HRBAs on the basis of four analytic components: HRBAs rooted in international and regional treaties, policies and principles of donors and executive agencies, normative beliefs, and constitutional rights. We try to assess the prospects for each on the basis of extant research on the channels through which they are likely to operate. (But although we isolate them for analytic purposes, these components rely on and activate each other.) In the remainder of this

[2] For descriptions of HRBAs or RBAs, see Banik, Dan 2010. *Poverty and elusive development*: Universitetsforlaget., Uvin, P. 2004. *Human rights and development*: Kumarian Pr., OHCHR, Office of the High Commissioner for Human Rights. 2006. *Frequently asked questions on a human rights-based approach to development cooperation*: United Nations Pubns., Jonsson, Urban. 2005. "A human rights-based approach to programming." *Reinventing Development*:47-62., Darrow, Mac and Amparo Tomas. 2005. "Power, capture, and conflict: a call for human rights accountability in development cooperation." *Human Rights Quarterly* 27:471-538..

paper, we briefly review the first three kinds of HRBAs before characterizing the judicial/constitutional mode in greater detail.

Global Compliance

The UN Office of the High Commissioner for Human Rights names nine core international human rights treaties: the International Convention on the Elimination of All Forms of Racial Discrimination, 1965; the International Covenant on Civil and Political Rights, 1965; the International Covenant on Economic, Social and Cultural Rights, 1966; the Convention on the Elimination of All Forms of Discrimination Against Women, 1979; the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; the convention on the Rights of the Child, 1989; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990; the International Convention for the Protection of All Persons from Enforced Disappearance, 2006; and the Convention on the Rights of Persons with Disabilities, 2006.[3] There are also several Optional Protocols attached to these treaties, and the several regional treaties with human rights components (along with their amendments), such as the European Social Charter, 1961; the American Convention on Human Rights, 1978; and the African Charter on Human and Peoples' Rights, 1981. It is often said that these various instruments are grounded, for purposes of interpretation and inspiration, in the Universal Declaration of Human Rights, 1948.

One analytic component of HRBAs pressures states to ratify these regional and international instruments, and uses the fact of ratification to hold states to account for the delivery of increased and higher quality development assistance. This holding to account can

[3] See http://www2.ohchr.org/english/law/.

take both legal and political forms, and can operate both on rich country governments and on developing country governments. When first conceived in the mid to late 1940s, the international human rights regime was intended to operate juridically (Beitz 2009; Glendon 2002). Treaty bodies would hear complaints against UN member states in a court-like setting, and they would issue opinions that would be binding, from the point of view of international law. The effectiveness of human rights courts at the international level is somewhat mixed (Helfer and Slaughter 1997b; Voeten 2008).

The juridical model has had very limited impact in motivating rich country governments to increase the quantity or quality of development assistance. As a textual matter, none of the core international human rights treaties establishes obligations of development assistance on the part of rich country governments, and a draft of an international instrument related to the Right to Development has languished without much prospect of achieving approval by the General Assembly.[4] Quasi-juridical modes of development review, such as the World Bank's Inspection Panel, have reoriented or blocked development projects in new cases; but neither the World Bank nor the IMF is bound by international human rights treaties, and complaints that have been lodged have almost entirely focused on acts of commission rather than omission.[5]

As contributors to political mobilization, however, human rights treaties may be beginning to play a role in pressuring rich country governments to increase the quantity and quality of development assistance. Pogge (2002) and others have argued human rights demand a

[4] The Declaration on the Right to Development was adopted by the UN General Assembly in 1986; and while proponents have attempted to put together a binding international instrument, that effort has not succeeded. For the text see http://www2.ohchr.org/english/law/rtd.htm. For a history and analysis see Sengupta, Arjun. 2002. "On the Theory and Practice of the Right to Development." *Human Rights Quarterly* 24:837-889..

[5] An exception is the recent World Bank Inspection Panel case on the Land Management and Administration Project in Cambodia, Request RQ 09/08. Documentation is available here: http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:22326773~menuPK:64129250~pagePK:64129751~piPK:64128378~theSitePK:380794~isCURL:Y,00.html

reform of the international aid architecture, as well as of international trade, carbon emissions, tax policies, and intellectual property regimes. While it is possible to ground such rules in Article 28 of the UDHR, which states that "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized," that provision, to date, typically plays a stronger role in motivating activism than structuring state-party negotiations regarding international regime design.

At the regional level, quasi-juridical human rights treaty bodies have made significant rulings in a number of cases (Langford 2008a; Langford 2008b). The numbers of rulings related to development are relatively small (the Inter-American Court of Human Rights had issued some 92 opinions in 2009), and partial or non-compliance are more common than full compliance (Hawkins and Jacoby 2008). The basic problem remains that of the absence of a political authority above states, or international anarchy, which neo-realists emphasize (Krasner 1993).

The strongest effects of international human rights treaties are expected to be visible at the national, rather than the international or regional, levels. The literature has developed an approach to human rights treaty compliance that Simmons (2009:125) calls a "domestic politics theory of treaty compliance." In that approach, compliance requires domestic pressure on the government. The pressure might take the form of NGO- and civil society-initiated mobilization on behalf of treaty goals, the judicial application of treaties and the human rights norms embedded in them to domestic settings, or the empowerment of elements of the executive whose goals are consistent with treaty objectives.

The empirical record of the effects of treaty ratification on human rights outcomes at the national level remains mixed. Hafner-Burton (2008) finds that the presence of NGOs is associated with (incomplete and transient) compliance with treaties in the area of political rights.

Neumayer (2005) finds that civil society strength increases the likelihood of compliance with human rights treaties. Helfer and Slaughter (1997a) argue that supranational adjudication of human rights treaties in Europe empowered domestic courts and individuals in particular countries. Powell and Staton (2009) argue that the effectiveness of the domestic legal regime constrains states' choices to violate human rights. Moravcsik argues that treaty effects are conditional on the relative strength of domestic political actors (political parties, NGOs, and others), who in liberal democratic regimes support the treaty goals (Moravcsik 1997). (Gauri 2011) contends that ratification of the CRC was correlated with a subsequent increase in immunization rates, but only in upper middle and high income countries. Helfer documents how the "overlegalization" of the human rights regime led Caribbean governments to opt out of treaty agreements and resulted, in some cases, in worse human rights outcomes (Helfer 2002). Hathaway finds that "state expressions of commitment to human rights through treaty ratification may sometimes relieve pressure on states to pursue real changes in their policies and thereby undermine the instrumental aims of those very same treaties." (Hathaway 2002) Simmons (2009) is probably the most optimistic, finding that treaty ratification was associated with better performance on child labor and gender equality. Overall, however, the empirical work on the contemporaneous effects of treaty ratification on development outcomes is relatively limited, and the findings mixed.

Constructivists, however, argue that over longer time periods debates surrounding human rights can change identities, interests, and preferences in such a way that government leaders and citizens begin to embrace human rights norms. The processes through which these change include NGO pressure and transnational advocacy that eventually lead governments to move from repressing human rights movements to endorsing them, often by enhancing the stature of

reformers in the coalition (Risse, Ropp, and Sikkink 1999). (This suggests that some constructivist accounts are not inconsistent with domestic mobilization explanations.) On the other hand, the processes can be more sociological in nature, involving personal and institutional interactions that lead particular interpretations of human rights norms to be internalized (Koh 1999), or peer influences to affect observable behavior through processes of acculturation (Goodman and Jinks 2005).

In summary, theory suggests that treaty-based HRBAs are more likely to achieve "enforcement" or "compliance" at the national level through domestic political mechanisms, such as civil society organizations, courts, and bureaucratic entrepreneurs, than at the international or regional levels through quasi-juridical enforcement. The evidence to date indicates that treaties can have some limited direct, contemporaneous impact on development outcomes. It is likely that treaties have more long-term effects on development policies through constructivist channels; but more empirical work along these lines remains to be done.

Policies and Programming

A number of international and bilateral development agencies have endorsed a human rights orientation in the provision of health care and education in developing countries.[6] The notion of rights as high priority goals is implicit in some of the legal documents underlying the rights approach to development. The WHO Constitution, 1946, and the Declaration of Alma Ata,

[6] See, for example, DFID, Department for Internatinal Development. 1997. "Realising human rights for poor people.", UNDP, United Nations Development Program. 2000. *Human Development Report*. New York: Oxford University Press, UNESCO, United Natinos Educaitonal, Scientific, and Cultural Organization. 2000. *World Education Report 2000: The Right to Education: Towards Education for All Throughout Life*. Paris: Unesco.. Summary reviews are Hamm, B.I. 2001. "A human rights approach to development." *Human Rights Quarterly* 23:1005-1031, Piron, Laure-Helene. 2005. "Rights based Approaches and Bilateral Aid Agencies: More Than a Metaphor?" *IDS Bulletin* 36:19-30..

1978, for instance, make reference to the "highest attainable standard of health," which implicitly acknowledges that many developing countries cannot provide comprehensive health care for all of their citizens. The WHO interprets the principle to mean that governments should put into place "policies and action plans which will lead to available and accessible health care for all in the shortest possible time." (WHO 2002) The UN also describes the right to education as a mandate that is being progressively realized (UNESCO 2000). A number of large international and domestic NGOs have also adopted human rights based approach to service provision.

It is difficult to characterize the policies and programming approaches because they sometimes include neighboring development interventions, and sometimes do not. These neighboring development interventions involve a variety of efforts to introduce accountability into development governance, and include urban service delivery scorecards, social audits, the establishment of redress mechanisms in donor projects and government line agencies, participatory involvement in development programming such as "community-driven development," and national consultations such as poverty-reduction strategy processes (PRSPs). Policies and programing can also involve strengthening human rights commissions, information campaigns, and creating or strengthening public sector ombudsmen or other accountability offices (e.g., comptrollers, auditors, the "Ministerios Publicos" in Latin America). Some forms of HRBAs emphasize participation in sectors, such as informed consent so that patients can make fully informed treatment decisions and parental participation so that local understandings of respect for elders and holidays are included in classroom practices. More encompassing accounts of HRBAs in donor policies include putting conditionality for development assistance on human rights performance, placing greater weight on distributional outcomes instead of average growth or employment rates, working with excluded populations, policy dialogue on human rights

conducted by development agencies, and human rights-related projects (e.g., security forces training and prison conditions projects).

There is now some evidence on the effectiveness of HRBAs in these settings, but the overall effects seem to vary with the local context and institutional details. For instance, a newspaper campaign in Uganda aimed at reducing corruption by providing schools and parents with information to monitor the way that local officials handled educational transfers reduced the capture of public funds and increased student enrollment and learning (Reinikka and Svensson 2005). But in a set of interventions in India, however, there was no significant effect of information campaigns on community involvement, teacher effort, or learning outcomes (Banerjee, Banerji, Duflo, Glennerster, and Khemani 2008).

Rights Talk and Rights Consciousness

Rights-based approaches to development do not always take the form of formal institutions and mechanisms, such as international human rights treaties or human rights based approaches to programming, policy and legislation. They also, potentially, constitute "politics from below" or processes of "social accountability" (Peruzzotti and Smulovitz 2006) that activists, non-governmental organizations, and social movements engage in. Merry (2003) notes that "rights talk remains a dominant framework for contemporary social justice movements"; and, more generally, Dembour (1996) observes that it is hardly possible to open a newspaper without coming across a reference to human rights.

As noted above, we understand HRBAs to include rights talk where the poor or those speaking on their behalf address human rights based claims against privileged actors, in order to protect their crucial human interests. We exclude, here, rights talk that defends the intellectual

property of firms and other privileged actors, libertarian discourse that understands redistribution to be rights violation, and related arguments. This understanding highlights a conceptual and political problem for this HRBA channel: a crucial aspect of human rights is their role in elevating the dignity, self-esteem, and capacity to mobilize of those whose rights are violated or unfulfilled, but the rights discourse they then use for political mobilization is also a bulwark to protect the interests of the privileged.

The main "mechanisms" of rights-talk are the formation of *rights consciousness* on the part of those whose rights are violated. Human rights norms have encouraged the formation and probably promoted the effectiveness of civil society organizations (CSOs), both in developing and rich countries; and the CSOs have in turn both pressured governments and provided direct services to poor people. HRBAs might also directly raise the expectations of citizens regarding what they are entitled to.[7]

How is rights consciousness formed? What explains that transition in outlook from, as Hannah Pitkin puts it, "I want to" to "I am entitled to"? (Pitkin 1981: 347) Rights consciousness and its role in shaping agency and political action in social movements has been the focus of a rich tradition of socio-legal research, with scholars such as Sally Engle-Merry, Sally Falk More, Stuart Scheingold and Michel McCain making central contributions to our understanding of how this phenomenon plays out, its potential as well as its limitations (Englund and Nyamnjoh 2004; Moore 2005; Sarat and Scheingold 2006). It is clear that norms associated with human rights have shaped historical developments. Paradigmatic examples include the US civil rights

[7] Although HRBAs typically focus on the rights-holders, they can also affect duty-bearers by activating their moral obligations. They might directly influence developing country officials and politicians when they formulate and implement government policies on topics such as school fees, child labor, taxation, and social assistance. They might also influence governments in rich countries to increase development assistance, or to change rules that govern the cross-national flows of goods, services, capital, and people. Human rights norms might also change the practices of multinational firms and donors, making them more responsive to the needs of poor people in developing countries.

movement (Lieberman 2002; Smith 1997), the French Revolution (Sewell 1985), the emergence of international norms of multilateralism and human rights (Crawford 2002; Hunt 2007; Risse-Kappen, Ropp, and Sikkink 1999), and the suppression of the slave trade and decolonization (Crawford 2002). One question that has increasingly concerned scholars interested in rights-talk and rights consciousness – in the light of the globalization of rights talk (Rodríguez Garavito and Santos 2005), which since the 1990s in particular has become a prominent feature of politics in all parts of the world – is how this phenomenon travels across countries and cultures. Attention is focused on understanding the conditions and limitations of "legal transplants" and the processes of "vernacularization" or "interlegality" whereby global norms are appropriated and transformed by local actors in different social and political contexts (Rodríguez Garavito and Santos 2005).

But HRBAs are not just the free flow of rights talk but the conscious attempt to generate rights talk in places where it is absent or weak. From the perspective of human rights talk as a human rights based approach to (or a strategy for) development, the role of transnational activism, and the link between global and local activists, have become particularly interesting. A growing volume of scholarly literature is beginning to uncover and clarify the ways in which transnational activists engage in "rights talk" with local actors around the globe, exchanging ideas, rhetorical 'tools' and advocacy strategies, joining forces in campaigns and around litigation efforts (Goodale and Merry 2007; Risse-Kappen, Ropp, and Sikkink 1999; Sikkink 2011; Tarrow 2012).

A significant challenge in this form of HRBA is the misfit between human rights norms and socially rooted practices in many developing countries. When human rights are discussed in HRBAs, they are typically conceived in one of two ways: as fundamental moral rights, drawing on the natural rights tradition; or as universal legal immunities and entitlements, drawing on the

model of subjective rights established in positive law. Both of these standard accounts struggle with the fact of normative divergence on the ground; in other words, there are questions about whether these accounts of human rights, while generating enormous passion and rhetorical power for many (particularly in urbanized and Westernized environments), are sufficiently and widely understood in the world so as to form the basis for "an international bill of rights," as many have hoped. Another way of putting this question is to ask whether human rights are intersubjectively rooted in shared social practices. This plays out on the ground when human rights advocates and donors using HRBAs struggle with whether to tolerate practices in, using Rawls' terms, decent but hierarchical societies. Many of these practices, particularly those involving non-democratic forms of political legitimacy and traditional personal law, seem legitimate in the eyes of many of their own citizens, and even more so when "foreigners" and national elites are seen to be imposing controlling forms of law. Describing the challenges of the HRBA in Malawi, Banik (2010: 142, and quoting (Ribohn 2002): 176) notes that "it is common to hear villagers – and even highly educated Malawians – argue that maintaining traditional culture if of paramount consideration, even if this means overriding universalistic human rights considerations . . . 'the emphasis on traditional culture and its consequences may be seen as a reaction against the transnational policies embraced by the government.'"

Overall, rights talk and rights consciousness is a long-term driver of societal change. But further work is needed on the circumstances under which consciously designed rights talk in HRBAs directly contributes to this change, and the circumstances under which it is ineffectual or, indeed, generates a backlash.

Constitutionally Based Legal Mobilization

Constitutionally based legal mobilization for social and economic rights takes different forms, but the most typical, which will be the focus here, is litigation before domestic courts.[8] Court cases on social and economic rights have increased in frequency and scope in many parts of the world over the last two decades, including in developing countries (Langford 2008a). It has become the focus of considerable attention – both from activists and scholars – as an avenue for bringing social and economic rights to bear in national politics. In a situation where many countries have adopted rights-rich constitutions and strengthened their judiciaries – and where democratic institutions are often weak or unresponsive to the needs of the poor – social rights litigation represents an alternative "decentralized" means for holding decisions-makers at different levels to account for their constitutional rights obligations as they set priorities and distribute resources in legislation, policies and administrative decisions.

When considering the pros and cons of litigation on social and economic rights, it is important to bear in mind that this is a diverse phenomenon, both in substance and form. Some countries and courts designate a broader range of social and economic rights as justiciable. The agents and form of litigation also varies. Individuals and group engage in litigation to improve their own individual situation and address specific needs – but social and economic rights litigation is also a strategy pursued by actors and organizations on behalf of others, usually disadvantaged groups in society, as a means to achieve structural change.[9] Social rights claims may be (and are) made by all social classes; but, again, we focus here on litigation in the form of

[8] Mobilization based on social and economic rights enshrined in national constitutions may also be focused on quasi-legal bodies such as ombudsmen, human rights commissions, or administrative bodies. But it can also target and be used by political and electoral institutions, such as political parties. It should also be noted that constitutional litigation for social and economic rights may also be based on obligations to international legal norms.

[9] Social transformation understood as significant social change altering structured inequalities and power-relations in societies in ways that reduce the weight of morally irrelevant circumstances such as socio-economic status

claims against privileged actors, made by the poor or those speaking on their behalf to protect their crucial human interests.

The level, scope and form of HRBA litigation depends on four factors: a) organized and individual legal assistance, and the accessibility of courts; b) the receptiveness of courts, which in turn depends on patterns of judicial recruitment and retention, legal traditions, judicial strategies; c) the anticipated responses of the targets of litigation to court rulings; and d) the capacity for litigant follow up. There is substantial variation across these dimensions in different countries. Some, such as Colombia and Costa Rica, have very low thresholds for individuals to present social right claims. Others, such as India and South Africa, have higher thresholds for individual claims, but have broad standing provisions that make it relatively easy to bring public interest litigation claims. Some countries have organized civil society groups that can bring HRBA legal claims (e.g., the United States, India), others have publicly supported legal institutions that can perform this task (e.g., Brazil), and others have neither.

From the perspective of democracy, social rights litigation is promising, but also presents challenges conceptually as well as in practice. Litigation is inclusive and (at its best) enables a broad set of actors to participate in public deliberation on social policies. It encourages relevant information to be presented in a structured manner. By providing an alternative arena for social contestation, litigation may enable or magnify voices that are marginalized in the political process (or conversely, it may provide an extra arena for the dominant voice). Inclusiveness and increased opportunities for participation, transparency and accountability are all 'democratic goods' (Fredman 2008). On the other hand, social rights litigation also brings to a head the democratic dilemma of justifying the authority of non-elected judges in overruling democratic priority setting and preference aggregation.

We will not go into the counter-majoritarian dilemma in any depth here. Suffice it to say that the process of judging social and economic rights have lead judges in different countries to develop new and creative forms of jurisprudence that seek to overcome this problem. Typically, this involves more dialogical forms of judgments, where the courts, rather than determining the material outcome of the case in detail, engage in a dialogue with political authorities.

To give some examples: The South African Constitutional Court, in the well known *Grootboom* case, ordered the government to develop a housing policy that also provided for people in desperate need, but left to the government authorities themselves to decide how this could best be done. The Constitutional Court of Colombia, in a 2004 judgment regarding displaced people (T-025), declared an "unconstitutional state of affairs" and ordered the government to engage in a deliberative process with stakeholders and come back with policies and plans attending to various rights of this vulnerable groups (Rodríguez Garavito 2010). In a similar (but much more politicized) 2008 judgment (T-760) the Constitutional Court ordered a participatory process for health system reform. The Supreme Court of Argentina in 2008 ordered a number of municipalities to join forces, engage in a dialogue with affected groups, and establish a structure to clean up the polluted Matanza-Riachuelo river basin, and report back on progress within regular intervals. These examples show how courts – particularly in cases concerning significant structural change – have sought to bring rights to bear on politics in ways that set general (but binding) parameters for politics, rather than ordering a specific policy.

While these judgments have excited legal and political theorists, and drawn much acclaim, critics have argued that litigants get little back for their efforts other than a seat at the table in a (sometimes fruitless or protracted) dialogue. Others respond that providing a seat at the table or privileged access to decision-makers is the most valuable aspect of litigation strategies.

Particularly when litigation is part of a broader social mobilization process, social movements or NGOs may use the process itself ("the shadow of litigation") as leverage in a bargaining process with political authorities or commercial companies – sometimes settling cases out of court, and sometimes "winning even when losing" (McCann 2006). More generally, any consideration of the potential of social and economic rights litigation to bring about social change should see litigation as part of a broader mobilization process. Not only may the litigation process strengthen social mobilization in different ways – by providing visibility, structure and a focal point for mobilization efforts – out of court mobilization also increases possibilities for winning in court and, even more important, the chances of getting a favorable judgment implemented.

Implementation, though, is often the Achilles heel of legally based strategies (Shankar and Mehta 2008). Critics have expressed doubts regarding the potential of litigation to bring about significant social change (Baxi 1988; Hirschl 2004; Rosenberg 1991). It is argued that the 'haves' are most likely to come out ahead in court, and that, even cases that do succeed in court are unlikely to lead to significant change unless they are supported by strong social actors, who are able to follow up on implementation and make the judgment bear on policy. It is also argued that human rights based mobilization is constraining political contestation within a liberal framework, and diverting the attention and resources of social movements away from other, potentially more productive strategies. This should be taken seriously. On the other hand, it is important to consider what the alternatives to legal mobilization are in different societies. Much of the criticism of (and support for) litigation as a transformative strategy is also primarily based on normative arguments, and rest on relatively weak empirical grounds, typically from the US (McCann 2006). Studies of social rights litigation in developing countries include (Abramovich

and Courtis 2002; Gargarella, Domingo, and Roux 2006; Langford 2008a). This literature does, however to a limited extent investigate the impact of the litigation.

An ambitious attempt to analyze the impact of social rights litigation is *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Gauri and Brinks 2008), a comparative study of litigation on health and education in Brazil, India, Indonesia, Nigeria, and South Africa. This study seeks to estimate the number of persons who directly and indirectly benefit from judicial decisions, both within each country and comparatively and draws attention to the importance of systemic enforcement of social rights, arguing that enforcement resulting in policy change—if implemented—can easily outweigh the impact of thousands of individual cases where courts enforce individual rights but without generalizing the remedy.[10] It concludes that, on balance, the direct and indirect effects of social rights litigation are modest, but positive. Social goods are redistributed to people who need them, and the poor are at least as likely to benefit as the better-off. The privileged are not seen to monopolize the issues or capture state revenues through litigation. But while those who use the courts and benefit from their judgments are, in general, not the elites (who need not rely on public services), they are also not the most vulnerable and excluded. While Gauri and Brinks do not find that court decisions (so far) have had demonstrable macroeconomic consequences, they raise concerns that there might be a political backlash against judicialization of politics, if costs mount.

Another set of studies appear in a volume that focuses more narrowly on health litigation in Argentina, Brazil, Colombia, Costa Rica, India and South Africa (Yamin and Gloppen 2011).

[10] One example is the famous judgment on vehicle pollution in Delhi, where Indian Supreme Court demanded a shift toward cleaner fuel in the public transport system, significantly affecting hundreds of thousands of people, and advancing their right to live in a healthy environment.

Litigation on health rights (and related rights to water, food, a healthy environment) constitutes a large and rapidly rising share of social rights litigation, particularly in Latin America. *Litigating Health Rights* examines how litigation takes different forms depending on the legal and socio-political context, and how it plays out and influences health policies differently depending of the nature of the health system. In some cases litigation seems to contribute towards better functioning heath systems and more equality between patients; in other contexts the effect appears to be the opposite. Litigation influences health policy in ways that not only affect the distribution of resources among individual patients and social groups, but also the relative emphasis placed on different forms of services. For example, litigation in some contexts seems to increase spending on expensive drugs vis-à-vis for example preventive care. It may thus – depending on the baseline of services in society and what is litigated for – result in less (or more) efficient and fair use of health care resources.

Summarizing, constitutional litigation on social and economic rights can play an important progressive role and advance the situation for marginalized and stigmatized groups (such as people living with HIV-AIDS, prisoners, indigenous and displaced people). Strategic litigation can also force governments to prioritize basic services of crucial importance to poor people (food, water, sanitation, health services, education) – not least in countries with significant state capacity, but that are marked by wide inequalities and where the poor often have a weak voice vis-à-vis political decision-makers.[11] Litigation can also contribute towards solving complex collective action problems that political bodies cannot (or at least do not) handle

[11] The larger picture shows that many of the countries that have been at the forefront with regard to social rights litigation are middle-income countries marked by huge inequalities (such as Colombia, Brazil and South Africa, which are among the most unequal countries in the world). More generally, countries with significant state capacity- including a reasonably well-functioning judiciary - but where large sections of the population are socially marginalised and the ruling elite is perceived as unresponsive - seem to provide particularly fertile grounds for social rights litigation.

adequately, such as pollution problems transcending jurisdictional boundaries or involving multiple public and private actors. It thus merits closer examination as a potential (partial) solution to fundamental democratic challenges.

We do, however, also know that litigation does not always provide an institutionalized voice for the poor. Under some conditions it is prone to elite (or at least middle-class) capture – particularly where litigation is a strategy pursued by individuals or groups for individual gain, and relying on their own resources. Further work is needed on what enables a pro-poor/developmental outcome at the different stages of the litigation process. With regard to the mobilization phase (articulation of legal claims) we need better to understand:

- how litigation interacts with other mobilization strategies – when it demobilizes and depoliticizes – and when it does the opposite; and
- why we see mobilization on certain issues and in certain contexts and not in others, and what role professional legal support organizations and activists play in (different types of) rights mobilization processes.

With regard to the courts' handling of social rights claims we need better to understand:

- what makes certain courts more prone to take up these types of cases and to deal with them in a way that is conducive to social transformation; and
- the contexts under which social rights jurisprudence generates political backlash.

With regard to the implementation phase we need:

- better methodologies – and more systematic empirical data – for evaluating the impact of social rights litigation.

Conclusion

Rights-based approaches to development have increased in popularity in recent years. While they vary widely, their potential, as well as the modes of political change they have a chance of engendering, can be analyzed on the basis of the institutional mechanisms they speak through. We find four such mechanisms: global compliance, policies and programming, rights talk, and legal mobilization. The most convincing accounts available to date involve the theory and evidence of treaties and legal strategies. These accounts suggest that, under certain circumstances, human rights based strategies can make a difference. Rights talk is consequential in the long term, but little evidence is available on the short-term consequences of consciously designed rights talk strategies. Policies and programming regarding HRBAs typically encompass a broad array of neighboring development strategies, so much so that it can be said to be mainstream practice in development organizations. But further work needs to be done to disaggregate the impact of these various approaches to HRBA policies and programming.

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