

# INSPIRE 03 LITIGATION AND ECONOMIC, SOCIAL, AND CULTURAL RIGHTS (ESCR)



In this final note of the *Decoding Injustice* Inspire module, we analyze how taking legal action can deepen democracy by ensuring transparency for governments' decisions. Activists and change-makers will learn what is effective public interest litigation, and how to use it to advance the realization of social and economic rights.

## Key Questions

What is public interest litigation and how can it help realize economic, social and cultural rights (ESCR)?

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How can a case be built for ESCR litigation?

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How can we ensure effective remedies and court oversight for ESCR?

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How can OPERA be applied to ESCR litigation?

## INSPIRE 03

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### Introduction

Public interest litigation involves the use of the law, legal processes and legal fora to advance the rights of marginalized communities. It can play an important role in inspiring change. The detailed evidence that is presented in court proceedings can promote transparency in policy-making, while courts can order that specific steps be taken to remedy a particular harm facing a community or communities. That said, ESCR litigation often elicits challenging evidentiary questions that make it difficult to successfully build a case.

In this note, we look at how activists can engage in public interest litigation, and discuss how it can complement other advocacy aimed at securing people's rights. We outline some of the unique aspects of litigation for economic, social and cultural rights and the benefits of courts as an accountability mechanism, while acknowledging some pitfalls. We also outline how to successfully build a case for ESCR litigation. In addition, we discuss how to design effective remedies, and highlight cases where courts have ordered innovative remedies to enforce ESCR and the important role that evidence plays in this regard. In doing so, we draw on methods shared in the **Interrogate** and **Illuminate** Modules and explore how these can be used to strengthen the evidence you put together for your case.

### What Is Public Interest Litigation And How Can It Inspire Action On ESCR?

Public interest litigation involves the use of the law, legal processes and legal fora to advance the rights of marginalized communities. It can play an important role in holding States accountable for violations of ESC rights. However, the law, as the saying goes, can be a blunt instrument. To be effective, public interest litigation should be:

- grounded in the concerns of the particular community whose interests or fundamental rights are at stake;
- involve a collaborative process between lawyers and the community they serve that is grounded in a bottom-up approach (usually referred to as “community lawyering”);
- be paired with other effective strategies for accountability such as research, evidence-gathering, community mobilization and empowerment (such as protests, workshops or door-to-door campaigns), civil society coalition-building, and other forms of advocacy.

When used effectively, litigation can bear tangible results. For example, a court order can require a particular government department to take specific steps to give effect to the right that has been violated. On other occasions, a court may not grant an order that requires a direct fulfillment of the rights

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This document is organized according to an innovative method for collecting, analyzing and presenting evidence around three steps:



#### INTERROGATE

Map the problem in depth using OPERA to identify indicators and benchmarks.



#### ILLUMINATE

Spotlight the underlying issues by collecting, analyzing and visualizing data.



#### INSPIRE

Take action to build power and hold decision-makers accountable.

that have been violated. Instead, it may require the relevant government department to “meaningfully engage” with the affected community to resolve the underlying problem. This broader requirement for engagement or consultation can still be beneficial for the realization of ESCR. By requiring the State to engage with citizens, it creates a consultative and cooperative process, deepening democracy and thereby accountability for human rights violations.

In addition, the process of evaluating and critiquing the State’s attempts to realize ESCR and the detailed evidence that is presented in court proceedings can promote transparency in policy decisions. This, too, can deepen democracy via a dialogic notion of the separation of powers of the three arms of the State: the government, the legislature and the judiciary. The separation of powers refers to the idea that each arm of the State has a specific role to fulfill in a democracy, with parliament having the power to pass laws, the executive implementing the law and courts interpreting the law. All three hold each other accountable through checks and balances.

However, ESCR litigation is not a silver bullet, or a solution to every case of violation of human rights. Pitfalls and shortcomings include:

- the time it takes to complete rounds of litigation and obtain a tangible outcome;
- the prohibitive cost of litigation and the fact that the communities that require redress are typically poorly resourced;
- the challenges related to the implementation of court orders and remedies (which will be discussed further below).

## What Is Unique About ESCR Litigation?

ESCR litigation presents several challenges for human rights activists and practitioners. First, it has been argued that because ESCR litigation requires courts to make decisions that have budgetary implications—that is to say, financial impacts—this makes it different from “ordinary” human rights litigation, which usually does not require the State to reconsider its budgetary allocations. However, ESCR advocates have pointed out that, for several reasons, this perception is false.

Second, there is a concern that decisions involving ESCR require judges to engage in a balancing exercise in which they have to make trade-offs. Should the government spend more on public healthcare, or on access to higher education? Because of this, the argument goes, decisions involving ESCR are inherently technical and involve complex economic and political considerations that courts have neither the expertise nor the legitimacy to adjudicate upon.

Third, ESCR often involves whole communities whose rights have been violated, as opposed to an individual or small group. For instance, ESCR litigation might relate to an entire community’s right to access water as opposed to the sometimes more straightforward question of protecting an individual’s

right to freedom of expression. This poses a dilemma for courts, because they must provide remedies that are collective in nature as opposed to those targeted at an individual.

## Building A Case For ESCR Litigation

ESCR litigation often elicits challenging evidentiary questions for lawyers, communities and judges. First, how can it be established whether or not a right has been violated, and can it be demonstrated whether the State’s government has failed to meet a duty to fulfill the right in question? It will be necessary to find an appropriate metric to determine whether there has been a violation. It may also be necessary to determine whether or not sufficient resources have been allocated to a particular policy or plan. Second, there is the challenge of designing effective remedies. Third, there is the question of whether or not court oversight is required to monitor implementation of the remedy, and if so, to what degree.

### ESTABLISHING A DEPRIVATION AND DETERMINING STATE RESPONSIBILITY

Whether there has been a deprivation of a right is the first thing that must be established. This raises evidentiary as well as legal questions. When it comes to determining the scope of a right, courts may rely on the purpose or objective of ESCR. For example, in the case of *Mahlangu and Another v Minister of Labour and Others*, the Constitutional Court of South Africa determined the scope of the right to social security based on the remedial purpose that the right serves: namely to ensure human dignity, promote substantive equality and ameliorate the system of racialized and gendered poverty inherited from the colonial and apartheid era.

Establishing a deprivation also involves showing who was affected and how. Depending on the context, different methods can be useful. For instance, primary data such as interviews, focus groups or community surveys could demonstrate to a court what the lived experiences of a community are and whether the services they receive are adequate to fulfill their needs. When using methods such as these, it is important to adhere to the human-rights based approach to collecting primary data outlined in [Illuminate Note 2 - Collecting Primary Data](#).

Supplementing primary data with secondary data—such as socio-economic and administrative statistics from the State, if it is reliable—can strengthen a case. These could either be in the form of a census or statistical surveys containing demographic information that is disaggregated on the basis of race, gender, socio-economic status and so on. Data from the [World Bank](#) and [World Health Organization](#), UN agencies such as the [United Nations Development Program](#), and regional bodies and their agencies such as organs of the African Union or European Union, may also be useful. Courts may also rely on data arising from expert judgments or assessments.

The central principles that underpin human rights, such as ensuring human dignity and the guarantee of equality and non-discrimination, are also relevant in establishing a

deprivation. Disaggregated data can demonstrate disparities in the enjoyment of rights along different characteristics such as race, gender or socio-economic status; if there has been a disproportionate impact on certain groups, a particular law or policy may be seen to be discriminatory and consequently unlawful. Reports by independent human rights observers who have documented the human rights violations faced by a specific demographic can also be useful.

Context is also important. A court may consider the historical subordination or oppression that a particular group or community has faced and whether modern policies are a contemporary manifestation of a legacy of discrimination. The lived experiences of the affected individuals and how they interact with the particular law or policy also bear consideration. These could be presented to a court by conducting interviews or community surveys that show how a particular law or policy is failing to meet that community's needs, as well as highlighting gaps in the legal and policy framework. In addition, sociological studies on how certain groups such as women or LGBT groups are affected by particular types of policies may demonstrate how that policy affects specific demographics.

Generally speaking, it would be best to place as many different sources of data before the court as possible—including primary, secondary and contextual data—especially where they supplement each other. A court is more likely to be persuaded when primary data (based on the perceptions of the community) is supported by secondary data from the State or data from independent sources such as UN missions, or reports of independent human rights organizations or bodies. In addition, depending on the jurisdiction, a court may be more willing to take notice of the historical subordination of a particular group in society and whether current policies are an extension of a legacy of discrimination.

The second thing to establish is whether the State is responsible for the violation. The overarching question here is whether the State acted reasonably in fulfilling its obligations, and various factors need to be examined.

First, an inquiry into the quality of the services provided by the State is needed. As outlined **in the second note in the Interrogate Module**, States have an obligation to ensure that a minimal essential level of each right has been provided, especially to those who belong to the most marginalized groups in society. This may pose evidentiary challenges, since a benchmark would be needed to determine whether, for example, the quantity of water or quality of sanitation services provided are consistent with the State's human rights obligations.

In addition, this step would involve an assessment of the resources that the State has allocated to fulfill the right in question. This is because States have an obligation to ensure the "progressive realization" of ESCR within their "maximum available resources." This poses particular challenges for both lawyers and communities, because they are not usually well versed in the

analysis of government budgets. That said, basic techniques for analyzing budgetary and economic data can help to determine whether it can afford the measure in question, and also whether the government has instead chosen to prioritize issues that are not related to human rights. Besides determining whether the government has allocated sufficient resources to fulfill its ESCR obligations, it is also necessary to interrogate whether it has allocated resources in a way that perpetuates or entrenches inequalities on prohibited grounds such as race, gender, or sexual orientation. This would almost always be inconsistent with the State's human rights obligations. This could be demonstrated by disaggregated data that shows disparities between groups, or by sociological studies or independent reports that highlight the structural discrimination against a particular group. Using the tools outlined in previous modules, such as analyzing whether legal and policy processes are participatory, transparent and accountable, would also be beneficial.

## DESIGNING REMEDIES

Traditional legal remedies such as monetary compensation are often inappropriate or insufficient in the context of ESCR. Instead, innovative remedies may be required. In determining what would be an effective or appropriate remedy, one should consider what would resolve the underlying violation. For instance, in the case of the right of access to housing, merely instructing the government to construct homes for the affected community without the input of community members or some form of court oversight would probably be ill-advised. Nevertheless, what would be an appropriate remedy could vary widely depending on the context, and should be determined on a case by case basis.

The first remedy that courts are likely to utilize is a declaration of whether an individual's or community's rights have been infringed. While this does not provide a community with what they are lacking, it at least offers a public acknowledgement that the state has failed to fulfill its obligations in respect of ESCR.

Another frequently utilized remedy is a mechanism for the government to engage directly with the affected community to develop an agreed way forward, coupled with court oversight. The Constitutional Court of South Africa has referred to this as the principle of "meaningful engagement," which broadly speaking aligns with the dictates of international human rights law, and which directs States to always undertake a participatory approach when fulfilling human rights obligations. It speaks to the obvious though often not implemented principle that any State-led intervention will usually be futile if it is not aligned with the lived experiences of the affected community.

Generally speaking, however, the more detailed the information provided to the judges is during the course of public interest litigation, the more targeted and specific the remedy will be, and thus more likely it is to be able to address the needs of the affected community. This underscores the importance of providing detailed evidence.

## ENSURING IMPLEMENTATION AND OVERSIGHT

A particularly challenging issue in ESCR litigation is whether a court needs to oversee the implementation of a court order. If so, to what degree and how? How this challenge is resolved can vary widely from jurisdiction to jurisdiction. Because of concerns over separation of powers, courts are generally cautious about being seen to be too intrusive and taking over the functions of the government.

Whether or not a court should oversee the remedy should be determined primarily by what kind of order would best remedy the ESCR violation. A [study conducted by CESR](#) revealed several key factors that determined whether or not courts around the world were more likely to oversee a remedy in decisions involving ESCR. First, courts were generally more likely to order oversight in cases where the government had a history of being unable or unwilling to improve the violation. Second, courts were more likely to order long-term monitoring and oversight when litigants could provide evidence pointing to a detailed history of government failures and obstruction in implementing courts' decisions. Third, in cases where the obstruction was based on incompetence or corruption, statements from government actors were referred to by courts when making their decision. Lastly, information about the severity and urgency of the situation also encouraged courts to engage in oversight.

In the next section, we will look at a few judgments from different jurisdictions where courts adopted innovative and detailed remedies for ESCR violations. The common thread is that where litigants are able to provide detailed evidence regarding the nature and extent of the violation, courts are more likely to order both innovative and detailed remedies.

### Examples of Innovative Remedies Granted by Courts

#### MWELASE V DIRECTOR-GENERAL, DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM

In this case, the Constitutional Court of South Africa endorsed the use of a "special master" as a remedy for the systemic violation of the land rights of thousands of labor tenants. According to the [Legal Information Institute](#), "A special master is appointed by a court to carry out some sort of action on its behalf." The concept of a special master derives from American law and had never before been used as a remedy by a South African court. In what follows we will explore the context of the case, and why this was an innovative remedy for ESCR violations.

In order to address the colonial and apartheid legacy of land dispossession, the new dispensation in democratic South Africa enacted a suite of legislation to address the precarious land rights of poor Black South Africans. The Land Reform (Labour Tenants) Act, one such piece of legislation, was to provide redress to Black workers who had previously worked on land owned by white farmers in exchange for their right to reside there. In terms of the Act, labor tenants could lodge a

claim for restitution of land they had resided on. The Act was enacted in 1996 and provided a cut-off date of 31 December 2001, by which time all land claims had to be lodged with the Department of Land Reform. There were thousands of labor tenants who had lodged their claims before the cut-off date, but their claims were never processed.

In the *Mwelase* case, the legal question was whether it was competent for a court to order that a special master be appointed as a novel remedy to ensure that the Department of Land Reform fulfilled its constitutional obligations. In finding that such a remedy was appropriate, the Constitutional Court was influenced by several factors. First, it endorsed the "dialogic" notion of the separation of powers, which means that there is not a strict separation between the three arms of government, but rather that there should be a push and pull of checks and balances where the three hold each other accountable. The court used this principle to find that all three branches of government must be committed to the Constitution's vision of justice, dignity and equality, and cooperate to this end. Second, the court stressed the vulnerability of the class of individuals before it and the importance of crafting a "just, effective and equitable remedy." It noted that the case concerned an "extreme rights infringement" and the department's recalcitrance had triggered a "constitutional near-emergency." Third, the court pointed out that such a remedy could only be granted when the evidence before the court supported it.

The *Mwelase* case is a notable example of using an innovative remedy to address a systemic violation of ESCR affecting a class of individuals, and ensure that the relevant State department fulfilled its ESCR obligations. This was more effective than the usual "structural interdict" remedy, which requires a State department to report back regularly to the court. The court's endorsement of a dialogic notion of the separation of powers means that courts play a stronger role in ensuring that ESCR guarantees are enforced, even if this means the court is entering into terrain that touches on budgetary decisions. The court's innovative remedy was one that was suited to protecting the rights of a class of individuals, as distinct from a remedy that would vindicate the rights of an individual. Importantly, the court stressed that it was able to provide such a remedy because of the kind of evidence put before it by the litigants. This highlights, yet again, the connection between placing strong evidence before a court or tribunal and obtaining an effective, specific and targeted remedy.

#### MENDOZA BEATRIZ SILVA ET AL VS. STATE OF ARGENTINA ET AL

This case was instituted by a group of residents of Buenos Aires who argued that their right to life and right to a healthy environment had been violated as a result of the continued pollution of the Matanza/Riachuelo basin and the stoppage of contamination activities. The residents sought damages and compensation from the national government of Argentina, the province of Buenos Aires, the city of Buenos Aires and 44 companies. The Supreme Court of Argentina ruled in favor of the residents and ordered the national government, the province and the city to take measures to improve the residents' quality of life, remedy the environmental damage and prevent future damage.

The court established an action plan requiring the government agency responsible for the Matanza/Riachuelo basin, ACUMAR, to fulfill specific measures, including: producing and disseminating public information, controlling industrial pollution, cleaning up waste dumps, expanding water supply, sewer and drainage works, developing an emergency sanitation plan, and adopting an international measurement system to assess compliance with the plan's goals. In order to ensure adequate enforcement, the court delegated the enforcement process to a federal court, Juzgado Federal de Primera Instancia de Quilmes, to monitor enforcement of the decision. The court also created a working group formed by Argentina's Ombudsman and the NGOs involved in the case as non-litigant parties, seeking to strengthen and enable citizen participation in monitoring enforcement of the decision. This created a system of enforcement monitoring, and tried to address the difficulties that often prevent effective enforcement of obligations imposed on public agencies, by ordering coordinated interjurisdictional compliance and setting up a creative alternative model of court intervention.

### STC 4360-2018, SUPREME COURT OF COLOMBIA

The applicants in this case were 25 young people in Colombia who argued that the deforestation of the country's Amazon region and the resulting greenhouse emissions violated their rights to life, health, a healthy environment (particularly the corresponding obligation to sustain the environment for the benefit of future generations), and access to food and water. The case was brought against the President of Colombia, the Ministry of Agriculture, the Ministry of the Environment and several local municipalities in the Amazon. The Supreme Court of Colombia found that the Colombian authorities had failed in respect of their duty to take effective measures to address the deforestation of the Amazon, both in terms of their domestic obligations under Colombian law and their international obligations in terms of the [Paris Climate Accords](#).

The court therefore ordered the relevant authorities—with the participation of the plaintiffs, affected communities and the general public—to formulate a series of action plans, including an intergenerational pact, to combat deforestation, greenhouse gas emissions and climate change with respect to the Colombian Amazon. In terms of enforcement, the court made several concrete orders: the development of an Intergenerational Pact for the Life of the Colombian Amazon; the creation of short, medium and long-term plans to reduce deforestation to net zero; and the alignment of land management plans with deforestation targets within four or five months.

This is an illustrative case of using an innovative remedy to address a collective violation, which is often the challenge with ESCR. The resulting court order is a combination of a consultative remedy (such as the meaningful engagement approach discussed earlier) with concrete and targeted steps to address underlying violations. Much like the cases *Mwelase* and *Silva*, it highlights the importance of the evidence placed before a court in how it reaches its decision and how it crafts a suitable

remedy. In this case, it is notable that the court relied heavily on the most up-to-date scientific findings on climate change, and these were placed before it by the litigants.

## **How Can Opera Enhance Remedies and Court Oversight?**

Using the OPERA Framework can help to enhance the evidentiary material placed before a court by identifying targets and indicators. It can also assist in the process of gathering information to track progress on the implementation of court orders. These steps can improve both the precision of court orders and monitoring that follows.

In 2015, CESR collaborated with the [Legal Resources Centre \(LRC\)](#) in South Africa on [Madzodzo and Others v Minister of Basic Education and Others](#), a case related to the right to basic education of learners at schools in the rural Eastern Cape. Essentially, the *Madzodzo* case was about whether school-related furniture, such as desks and chairs, are a component of the right to basic education in the South African Constitution. In 2012, the LRC had brought litigation against the Department of Basic Education in the High Court to compel the department to complete a full audit of furniture needs across the province, develop a comprehensive plan to address the shortage of school furniture, and deliver furniture to all schools by June 2013. The case was initially settled, but the department failed to comply with the agreement. The LRC then took the department to court and successfully obtained a court order in February 2014. Importantly, the High Court judgment confirmed that access to school-related furniture is a component of the right to basic education, and that this is enforceable in a court of law. The department was ordered to deliver sufficient desks and chairs to all Eastern Cape schools by 31 May 2014. This order was not complied with either. Many schools in the province still did not have enough furniture, and students were obliged to squeeze together at shared desks, balance on broken furniture, or sit on the floor.

Through a collaboration with CESR, the LRC used the OPERA Framework to see if it could lead to any improvements in the ongoing litigation. A rigorous analysis of the documents submitted in the case using OPERA revealed a number of alarming facts:

- In relation to outcomes, it uncovered that at least a fifth of schools would continue to face furniture shortages in the short to medium term;
- In relation to policy efforts, it became clear that the procurement processes that the department had deployed were riddled with irregularities;
- In relation to resources, approximately R290 million (approximately 19.3 million USD) was allocated to school furniture in the Eastern Cape between 2013 and 2015. However, it was difficult to determine how much of this money was actually spent and if so, what it was spent on;
- In relation to assessment, it was revealed that the department was offering very short-term solutions instead of

tackling the root causes of the furniture shortage. In this regard, CESR and LRC's report noted that "The almost total lack of attention to furniture in the [department's] strategic planning raises questions about how seriously it is committed to this issue [and] reflective of entrenched weaknesses in the department's leadership."

Using OPERA prompted CESR and LRC to rethink what kind of data they needed to gather to identify the root causes of the chronic furniture shortage, and persuade a court to make a more specific remedy. The LRC was able to obtain a far more detailed court order, by agreement with the department, in February 2016. Notably the order included the following:

- The furniture task team had to prepare a consolidated list with details about the furniture needs of all public schools in the Eastern Cape by May 2016;
- This list had to be verified by August 2016 and the Minister had to ensure that those schools needing furniture received age and grade appropriate furniture by 1 April 2017;
- The Minister was ordered to report to the court every 90 days, providing updated data about current shortages, describing steps taken to procure furniture, including budget allocated and orders placed, and supplying evidence of deliveries made and a timetable for deliveries scheduled.

Throughout the agreement period, the LRC met regularly with the task team and made recommendations on carrying out their mandated tasks. This included providing comments and

feedback on the proposed data collection methods for verifying furniture needs, based on tools CESR and LRC developed and piloted in consultation with schools. In addition, it suggested improvements in information management, such as recording school furniture stock electronically in SA-SAMS (the South African Schools Administration and Management System), and identifying the repair of damaged furniture (which was seen to be extensive in CESR's school visits) as a cost-effective alternative to procuring new furniture, and proposing draft text for a school furniture policy.

The project demonstrated several benefits of using OPERA in ESCR litigation. First, it gave the LRC and CESR a system for categorizing, systematizing and, importantly, identifying gaps in the information that had been submitted. This helped them to determine where to prioritize their energy when engaging with education departments. To this end, they focused on exploring ways to improve information management systems for recording furniture stock. Second, the use of OPERA improved the level of specificity in subsequent judgments and helped the court to be more assertive in interrogating the State's budgetary decisions. By requiring that the implementation reports include information about budget allocations, the new order set out significantly more detailed obligations than previous ones, in terms of remedial actions to be taken. Third, the project emphasized the importance of data as a tool in measuring implementation. Fourth, the project highlighted the tension between the more adversarial approach of litigation and the need for collaboration in monitoring implementation.

# CONCLUDING THOUGHTS

**As we have seen in the cases above, successful ESCR litigation is built on analysis that examines the reasonableness of policy decisions through a rights-based lens and on information that illuminates the extent to which governments have prioritized ESCR in accordance with their human rights obligations, or failed to do so.**

Despite the many challenges involved, public interest litigation, when it is used effectively, can be an important mechanism for holding governments accountable for their ESCR obligations, and bear tangible fruits in the realization of those rights. The case studies above are good examples of how litigation can deepen democracy by ensuring transparency for governments' decisions—including budgetary decisions. In addition, when a court vindicates ESCR, it can facilitate effective and cooperative engagement among the different arms of government, thereby strengthening the rule of law and participatory democracy.

As these case studies show, when lawyers and communities are able to provide the right quality of evidence and data before a court, the results can be groundbreaking. A community lawyering approach that centers the needs of communities that have experienced ESCR violations, coupled with detailed evidence, are essential in the pursuit of innovative, collective and context-sensitive remedies that can address large scale and systemic violations of ESCR.