CHAPTER 49

SOCIO-ECONOMIC RIGHTS

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I. Introduction

Social and economic rights cannot be examined in isolation from other forms of rights claims. They form an integral part of the vocabulary of rights. The fact that they are sometimes termed 'second generation' rights affords luminous support for this argument and, at the same time, it points to differences to first-generation rights. While these differences will be canvassed, it will be argued that their existence and justification are inextricably linked to the first generation of human rights, being civil and political rights.

Briefly stated, the nature of first-generation rights was heavily influenced by the French and the American Revolutions which left an indelible imprint upon their nature and scope. Revolutionaries in both countries proclaimed that human rights, which they proclaimed, were sourced in the values of civilization. These rights were claimed in the name of all free men (and later women) and were not to be limited by geographical considerations. The first generation of rights were conceived negatively, being 'freedoms from' as opposed to imposing positive 'entitlements upon'.[1] This generation of rights included freedom of opinion, conscience and religion, freedom of expression, of the press, of movement, the right to due process of law and hence protection against arbitrary detention or arrest, and the right to property.

It is apparent from a careful examination of this generation of rights that not all of these rights can be simply reduced to the exercise of state power and so fall neatly into the category

[1] Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty* (2002).

of negative rights. As an illustration, the right of every citizen to participate in a free election or the right to a fair trial imposes positive obligations upon the state to devote sufficient resources to guarantee a free election or to ensure the establishment of independent courts in which the free trial can be conducted. The attempt to divide the negative from the positive must wait until later in the chapter.

Let us turn to the second generation of rights. Briefly stated, the conventional wisdom is that they were sourced in the development of twentieth-century struggles and institutions. Their historical pedigree goes back much further. In the eighteenth century in Bavaria and Prussia, the state was viewed as an 'agent of social happiness' responsible for caring for the needy and for the provision of work for those who lacked the means and opportunities to support themselves. Similarly, the French Constitution of 1793 included the obligation on the state to provide public assistance for the needy.[2]

In the nineteenth century, Bismarck introduced social legislation which covered income-related insurance in cases of unemployment, accident, and illness, as well as pension and compensation schemes and a residual category of welfare. Not surprisingly, the Weimar Constitution of 1919 recognized the importance of these rights, including labour rights. In 1919, the establishment of the International Labour Organization triggered an attempt to establish certain international labour standards, and a second generation of human rights was introduced into the legal discourse, characterized by an express obligation upon a state to intervene rather than merely abstain from encroaching onto the private domain of the citizen. Rights to decent working conditions, to social security could not be attained without positive obligations being imposed upon the state. These second-generation rights constituted claims upon the state to fulfil obligations rather than to refrain from acting which lay at the heart of the prevailing wisdom about negative freedoms. Apart from Germany, the Mexican Constitution of 1917 included social rights in the text as did the Soviet Constitution of 1936, Part 7 of which contained a comprehensive list of socio-economic rights including the right to work, the right to health care, education, and housing. The Irish Constitution of 1937 also recognized these rights but in a far weaker form, being contained in directive principles of state policy designed to guide the government in its choice of policy and the judiciary in its interpretation of all rights.

But it was after the Second World War that a number of countries adopted or amended their constitutions to include social and economic rights.[3] The development of a human rights jurisprudence which was initially powered by the United Nations gave great impetus to the expansion of these rights in national and international texts.[4] The wider recognition of social and economic rights was coupled to the idea that these rights were part of the concept of citizenship. T.H. Marshall in an influential book suggested that social rights included.

> the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society. The institutions most closely connected with it are the educational system and the social services.[5]

[2] Gunter Frankenberg, 'Why Care? The Trouble with Social Rights' (1996) 17 Cardozo Law Review 1365, 1373.

[3] Lorraine Weinrib, 'The Post War Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006). On economic rights, see further Chapter 50.

[4] Mary Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Humand Rights* (2000).

[5] T.H. Marshall, *Citizenship and Social Class* (1964), 72.

As much writers such as Marshall saw these rights as critical in tempering the social consequences of unbridled capitalism and further that these rights had appeared in pre-war constitutions, a conceptual divide between these rights and traditional civil and political rights appeared always to be present.

Quincy Wright sought already in 1947 to distinguish between the two generations of rights when he wrote:

> Individual rights are in the main correlative to negative duties of the State and social rights are in the main correlative to positive duties of the State. Individual rights require that the State abstain from interference with the free exercise of the individual of his capacities, while social rights require that the State interfere with many things the individual would like to do....[6]

In summary, the initial drive for negative human rights can be sourced in the revolutions of France and America, whereas the initial drive for social and economic rights in the socialist struggles of the first two decades of the twentieth century, and later the period after the Second World War which saw a further development of second-generation and the emergence of third-generation rights. In 1948, the Universal Declaration of Human Rights recognized both civil and political rights as well as economic and social rights.[7]

By 1966, the Commission on Human Rights, itself spawned from the 1948 Universal Declaration of Human Rights, had developed two covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights (ICESCR), the latter of which came into force on 3 January 1976. Initially, the ICESCR lacked a complaints mechanism but by 1987 the UN Committee on Economic, Social and Cultural Rights had begun to develop a jurisprudence through its general comments and state specific reports.

Further, important developments took place within national constitutional law. In 1954 in *Brown v Board of Education*,[8] the US Supreme Court, in one of its most publicized and controversial decisions when delivered struck down the concept of separate but equal and thus paved the way for non-discriminatory access to education. In 1972, the German Federal Constitutional Court held that the right to a free choice of occupation obliged universities to demonstrate that they had effectively deployed all available resources to maximize the number of university places available to students.[9] During the 1970s, the Indian Supreme Court began to develop a range of social rights, from the right to life read together with a directive principles of state policy which were contained in the Indian Constitution,[10] its judgment in *Sunil Batra v Delhi Administration*.[11]

A third generation of human rights emerged during this period. Karel Vasak stated in his inaugural lecture to the tenth study session of the International Institute of Human Rights in July 1979 that this third generation of human rights:

> are new in the aspirations they express, are new from the point of view of human rights in that they seek to infuse the human dimension into areas where it is all too often being missing, having been left to the State or States... [t]hey are new in that they may both be invoked

[6] Wright, cited in Stephen Marks, 'Emerging Human Rights: A New Generation for the 1980s' (1981) 33 *Rutgers Law Review* 435, 439.
[7] GA Res 217A (III) UN DOC A/810 at 71 (1948).
[8] 347 US 483 (1954).
[9] *Numerus Clausus I* case (1972) 33 BVerfGE 303.
[10] See eg *Sunil Batra v Delhi Administration* 1978 SC 1675.
[11] 1978 SC 1675.

> against the State and demanded of it; but above all (herein lies their essential characteristic) they can be realised only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community.[12]

For Vasak, the first generation of human rights corresponded to the principle of 'liberty', the second generation to equality and the third to some form of humanity or fraternity.

In summary, most national constitutions, which were drafted after the Second World War, guaranteed a range of social rights, the key provisions being a right to housing, medical care, education, employment, and nutrition, all of which were in addition to the protection of first-generation rights, traditionally considered to be negative rights.[13]

Unlike first-generation rights, social rights were considered to be controversial and, even more so when courts were granted the power to render them enforceable. It is here that the key argument against the legal nature and hence the recognition of social rights are to be found. Two key arguments are raised against the enforceability of second generation rights: it is argued that courts lack the capacity to translate a general claim to social welfare rights into the equivalent of an enforceable first-generation right. Secondly, judicial enforcement of social rights is considered to constitute a major intrusion into the function and scope of a democratically elected legislature. In particular, the enforcement of social and economic rights holds significant implications for the government budget. Therefore, in adjudicating upon disputes based on these rights, the judiciary plays an extensive and indeed undemocratic role in major distributional questions which on should be left to democratically elected arms of state. To express it differently, because independent courts are not required to respond to transient democratic pressures, their judgments can interfere with the citizens' ability to employ a democratic election to achieve particular goals.[14]

This chapter has two primary objectives: to interrogate these objections to social and economic rights and, secondly, to examine the extent to which these objections have given rise to different forms of judicial and constitutional responses to social and economic rights in comparative national jurisdictions.

II. The Essential Objections to Socio and Economic Rights

The essence of the main objection is that a reliance on positive constitutional rights is ultimately misguided. Social rights cannot be adequately enforced by the judiciary because of the indeterminacy of their guarantees.[15] Take, for example, a litigant who claims that she has not received adequate government support. It is contended that a court would not be able to determine a sufficiently clear standard in order to decide whether the individual was sufficiently impoverished to qualify to so invoke this right.[16] But, even if the litigant was considered to qualify under a judicially conceived standard, the court would confront a further difficulty of crafting an order, namely whether to direct that the litigant be paid a certain sum of money or that specific services should be provided, and further, whether the remedy should be enforced nationally or be restricted geographically. Cross continues his critique thus:

[12] Marks (n 6), 441.
[13] Thomas Grey, 'Traditional Review, Legal Pragmatism' (2003) 38 *Wake Forest Law Review* 473.
[14] Alexander Bickel, *The Least Dangerous Branch: Supreme Court at the Bar of Politics* (1962).
[15] Frank Cross, 'The Error of Positive Rights' (2001) 48 *UCLA Law Review* 857.
[16] Ibid.

> What if the federal budgets were strapped and a court order would necessitate higher taxes or that money be taken from other programmes such as defence and environmental protection? Would alternative uses of the money be relevant? Could the court consider the possibility that the plaintiff bore some responsibility for his impoverished status? What if he had gambled away a considerable sum of money? What if he had lost his job due to misfeasance?[17]

Once a court has determined that the government's priorities are unconstitutional, for example because it should implement a social welfare right before embarking upon further additions to national defence or national infrastructure, such as roads or telecommunications, a court would have displaced the legislature's judgment about how social policy should be ranked and accordingly would supplant the role of this democratically elected arm of the state.

In a more pragmatically based attack on social rights, Cass Sunstein contends that in transitional countries, which have moved from a planned to a market economy, social and economic rights would conflict with the objective of creating a relatively unregulated free market in which the market produces the key distributional outcomes rather than state regulation or indeed court adjudication.[18] In other words, the inclusion of social and economic rights in the constitution would interfere with a flexibility which the transitional country would require to develop an economy which best meets the expectations of that country's citizens.

Expressed differently, these criticisms constitute what Amartya Sen has described as comprising both an institutionalization and feasibility critique.[19] The institutionalization critique suggests that if social and economic rights are to be considered rights they must be institutionalized; if not they cannot be described as rights. If they are institutionalized, then courts are given powers which they are not capable of implementing, given the nature of the competing distributional demands posed by such claims. The feasibility critique suggests it may not be feasible to arrange for the realization of economic and social rights, whereas traditional, political, and civil rights are not difficult to implement, in that, at core, they require governments essentially to leave citizens alone. Social and economic rights impose significant economic burdens on countries, many of which cannot be reasonably called upon to fund a meaningful application of these rights.

A variation of the criticism of the inclusion of socio and economic rights in any constitutional instrument turns on an argument of under-enforcement. The core of the argument can be described as follows: if X has a right to A, then a court must be able to enforce the right, upon the demand of X to her entitlement to A. If a court is unable to enforce this right on demand, as it would a right to assembly or freedom of speech, then a social or economic right cannot be considered to be a legal right. In other words, a court may not be able to act as a primary enforcer of such a right but, at best, may engage in secondary enforcement, by insisting that a rational procedure be adopted in the allocation of material benefits to prevent an arbitrary denial thereof. On its own, therefore, it is argued that this cannot be considered to be an enforcement of a right on demand from the claimant. Accordingly, so the argument runs, social and economic rights should not be considered to fall within the scope of legal rights.[20]

[17] Ibid 913.
[18] Cass Sunstein, *Free Markets and Social Justice* (1997).
[19] Amartya Sen, 'Elements of the Theory of Human Rights' (2004) 32 *Philosophy and Public Affairs* 315.
[20] This argument has recently been developed by Ronald Dworkin in *Justice for Hedgehogs* (2010). See in this connection Lawrence Sager, 'On Material Rights, Underenforcement and the Adjudication Thesis' (2010) *Boston University Law Review* 579.

III. A Response to the Critics

Critical to the distinction between civil and political rights which are described as negative rights and social and economic rights which are said to be positive rights, is the argument that a positive right is a claim to something such as a share of material goods or for as positive programmes as encapsulated in the right to a clean environment. A negative right is a right for something not to be done to a person or some particular form of conduct to be withheld.[21] But as has been observed already, it is not that easy to distinguish between negative and positive rights on this basis alone. Some negative rights involve material consequences. The right to be tried in an independent court, with the assistance of legal counsel, may not be considered to be a positive right but it imposes clear material obligations upon the state to set up a judicial system whereby judges are paid and courts are adequately equipped with juries and court officials and in significant cases, defence counsel are paid by the state. A similar argument could be made with regard to political rights such as the right to vote and the right to participate in elections which have to be organized and consequently paid for by the state.

The argument that A only has a right if she can enforce it on demand and, if not, that the under-enforcement of the right must lead to the conclusion that there is no legal right, cannot simply be confined to so-called positive rights. If A has a right to free speech and B has an obligation to respect that right, it may well lead to the conclusion that B has to limit her exercise of the same right. Alternatively, the right to free speech may well conflict with another's right to privacy. Take the concept of the public disclosure tort which applies where a disclosure would be highly offensive to a reasonable person and could not be considered to be of legitimate public concern. The Secondary Statement of Torts suggests the following:

> In determining what is a matter of a legitimate public interest, account must be taken of the customs and conventions of the community.... The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake.[22]

It appears that, even with a negative right, it may be that an inquiry has to engage in the importance of the interest from which the right is sourced.[23] This discovery of the interest becomes the basis of the test in order to decide whether A possesses a right. It assumes that if A's right was recognized, as a result of which some interest of B could be seriously harmed, it may then be that we can conclude that A's right is insufficiently important to justify an erosion of B's interest or cannot justify holding a third party under a duty to perform in order for A's right to be recognized.

But that still leaves alive the most popular objection, that social and economic rights give rise to claims to scarce goods which can never be respected in every case on the grounds of the scarcity of public resources which are required to recognize these rights in substance. The question which arises is whether in order to be classified as a legal right, a social or economic right invariably will require a defined amount of money to be provided by the state in order for the right to be vindicated. The response to this difficulty is that social and economic rights do not invariably impose so stringent a demand on the state to fulfil the obligation to fund each socio and economic right in an unqualified fashion.[24]

[21] Charles Fried, *Right and Wrong* (1978).
[22] American Law Institute (2nd), *Torts* (1977), para 6520.
[23] Joseph Raz, *The Morality of Freedom* (1986).
[24] Cecile Fabre, 'Constituting Social Rights' (1998) 6 *Journal of Political Philosophy* 263, 279.

Lawrence Sager provides a good example of the more limited scope of a socio and economic right which still stands to be classified as a right. Take the right to adequate medical care as being a constitutional entrenched right. The court in dealing with the implementation of this right would have to engage in serious questions regarding strategy, responsibility, social coordination, and prioritization.[25] A court would have to answer a strategic question namely; should it ensure that the medicine be given to any person who is in need thereof or should it ensure that certain of the scarce resources go to prevention of disease. How should the government ensure the implementation of the right? Should it ensure that every claimant is provided with money or should it implement a national health scheme? The court would have to consider who would be responsible for the implementation of the right. Would it impose the obligation on national or local government? What role would have to be played by employers and by insurance whether public or private? An even more difficult question would turn on the prioritization to be given to the right to health care as opposed, for example, to other constitutionally entrenched rights, such as those to housing or to education. How would a court, without a full grasp of the budgetary implications, engage in trade-offs between these various rights?

In seeking to answer these difficult questions without jettisoning the promise of the implementation of social and economic rights as envisaged in a constitutional text, a judiciary may eschew the role of a primary enforcer of these rights and develop a role as the secondary enforcer by ensuring that fair procedures are adapted both in the allocation and the withholding of any benefits envisaged as a result of the inclusion of these rights in a constitutional text. It accomplishes this role by ensuring that a plausible justification is provided in the event that the state allocates or withholds benefits selectively.[26]

In this way the judiciary enforces social and economic rights in a manner which is compatible with the choices made by a democratically elected legislature and executive. It can ensure that government is not only reminded of its duties, pursuant to express constitutional guarantees, but that it implements policies which give as much respect as possible to those social and economic rights which are constitutionality enshrined. The court's role, instead of directly implementing the rights, is rather to inform the government on how the latter must fulfil its duty by assuming the role of a partner in a dialogic relationship with the legislature and the executive.

To the argument that judges do not have the necessary skills to examine the national budget or the distributional implications of social and welfare policies, the answer is that judges can examine the evidence placed before their court by independent experts and then, on the basis of a forensic evaluation thereof, develop a jurisprudence of justification as opposed to policy conceptualization. There is now a growing body of national and international jurisprudence which is illustrative of legal choices that courts have made in order to give content to social and economic rights, thereby supporting a rebuttal of the critics. It is to these various approaches to social and economic rights that I now turn.

IV. Enforcement: The Scope for Relief

Throughout the previous examination of the justification for social and economic rights, there is either an express or implied view that social and economic rights are not susceptible to a strong form of review.[27] A traditional conception of a strong form of review is exemplified in

[25] Sager (n 20), 583. [26] Ibid 580.

[27] Mark Tushnet, *Weak Courts, Strong Rights. Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2008).

the approach of the US Supreme Court in *Cooper v Erin* that the federal courts are 'supreme in the exposition of the law of the Constitution' and that accordingly the duties imposed by the legislature and indeed the executive must be followed in the interpretation to the provision as given by the court.[28] With strong forms review, the decision of a court is final. Accordingly, the tension between this form of judicial review of a constitutional text and the decisions of a democratically elected government are exacerbated. As Tushnet has written:

> The people have little recourse when the courts interpret the Constitution reasonably but, in the reasonable alternative view of the majority mistakenly. We can amend the Constitution or wait for judges to retire or die and replace them with judges who hold the better view of what the Constitution means.[29]

By contrast, weak forms of judicial review seek to engage constructively with the tension between rights and democracy or, expressed differently, with the counter-majoritarian dilemma. Underpinning the concept of weak review is the idea that rights, which are contained in a constitution, are best conceived as a means to facilitate dialogue between the three arms of the state. Within the context of socio-economic rights, this model envisages a constitutional dialogue between the judiciary, legislature, and executive as well, arguably, as powerful private actors, which requires all of the latter to give serious and reasoned consideration to the claims of those litigants who lack access to basic economic and social resources. In addition, engagement should ensure a transparent justification for the implementation of a particular right or the failure to achieve its realization.

V. Weak Rights/Weak Review

In turn, there are different forms of weak review which can give rise to different and not always predictable results. The experiences of South Africa and Germany are illustrative. The inclusion of socio-economic rights into the Constitution of the Republic of South Africa 1996 represented one of the boldest moves taken by a young democracy towards the transformation of its legal system. As President Mandela said, in reflecting upon the societal structure inherited by his government:

> A simple vote without food, shelter and health care is to use first generation rights as a smoke screen to obscure the deep underlying forces which deem human rights people. It has created an appearance of equality and justice, while by implication socio-economic inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom.[30]

Early in the development of its socio-economic rights jurisprudence, the Constitutional Court in *Government of the Republic to South Africa v Grootboom and others*[31] developed a reasonableness model of review which was sourced in administrative law. The Court refused to define social and economic rights in terms of its content and scope. Instead, it insisted that any programme developed by government to implement a constitutional obligation imposed upon the state in respect of a particular socio-economic right was required to commence with

[28] 358 US 1, 18 (1958).

[29] Tushnet (n 27), 22.

[30] Cited by Sandra Liebenberg, *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010), 9.

[31] 2001 (1) SA 46 (CC).

addressing the conditions of the poorest of the poor. A programme that did not so commence was unconstitutional. In this way, the Court looked at the reasonableness of the programme but eschewed the development of a substantive interpretation of the right in question. In other words, the rights was not to be given a minimum core, by which standard each rights claim would be assessed.

This approach has recently been developed by the Constitutional Court in *Mazibuko and others v City of Johannesburg*.[32] In this case the Court was required to examine the constitutionality of the City of Johannesburg's free basic water policy of 25 litres per person per day and to determine whether this was sufficient to meet the basic needs of the residents who had brought the application.

In refusing to make a determination as to the amount of water which would meet the right enshrined in the Constitution, that everyone has the right to have access to sufficient food and water, the Court set out its approach thus:

> it is institutionally inappropriate for a court to determine precisely what the achievement of any particular socio and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and the executive, the institutions of government best place to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to socio-economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic and popular choice.[33]

The Court noted that national government had introduced regulations which stipulated that the basic water supply constituted 25 litres per person per day or six kilolitres per household monthly. The City's free basic water policy was based on this regulation and it could not be said that it was unreasonable for the City not to have supplied more water to the applicants. The Court also noted that the free water policy which had been attacked by the applicants' expert witnesses, as being insufficient to sustain a dignified existence, had continually been reconsidered by the City which investigated ways to ensure that the poorest inhabitants gained access not only to more water but to other services such electricity, sanitation, and refuse removal. The Court noted that the City:

> has continued to review its policy regularly and undertaken sophisticated research to seek to ensure that it meets the needs of the poor within the City. It cannot therefore be said that the policy adopted by the City where inflexible. . . .[34]

In this case, a weak version of constitutional review failed the applicants who left the courtroom empty handed. Contrast this judgment to a decision of the German Federal Constitutional Court. This case was concerned with social assistance benefits and particularly unemployment benefits. The question which vexed the Court was whether the amount of a standard unemployment benefit in securing the livelihood of adults and children under the age of 14 in the period between 21 January 2005 and 30 June 2005 was compatible with the provisions of the German Basic Law. The Federal Constitutional Court did not have the benefit of an express socio-economic right which covered the question, such was the case with the South African Constitution. Instead, it worked with the fundamental right to human dignity as set

[32] [2007] BCLR 239 (CC). On the dynamic between constitutionalism and impoverishment, see Chapter 6.
[33] Ibid para 61.
[34] Ibid para 97.

out in Article 1 of the Basic Law, read together with the principle of a social state as enshrined in Article 20 thereof.

The Court found that these two provisions, read together, ensured that every needy person was entitled to the material conditions which were indispensable for his or her physical existence and for a minimum participation in social and cultural political life. The Court engaged in a careful analysis of the statistical model which the legislature had applied and found that the computational benefits which were produced by the model were incompatible with the right to dignity which the Basic Law enjoined was the right to be enjoyed by each citizen. Accordingly, the Court ordered that the legislature was required to initiate a fresh procedure to ascertain the benefits necessary for securing a subsistence minimum that was congruent with the enshrined right to dignity and which was realistic and took account of actual need.[35]

In the South African case, an expressly formulated socio-economic right was subjected to a weak form of review which meant that the Court was not prepared to determine the exact amount of water which was required to be provided by the state in order that the applicants constitutional right could be vindicated. In the German case, the Court worked with implied rights and like its South African counterpart did not determine the exact amount of social assistance benefits which flowed from such implied rights but insisted that the mechanism employed by the legislature did not pass constitutional muster. Accordingly a fresh procedure was needed to ascertain the constitutional benefits which were to be enjoined by the citizens.

In *Mazibuko*, the Court adopted an approach which can be classified as an interpretation of a socio-economic right which results in the creation of a weak right and, in this case, coupled it to a weak remedy. By contrast, the German Federal Constitutional Court may not have introduced a strong right by way of its working with the fundamental right to human dignity, which it read together with a principle of a social state. However, it granted the applicants a strong remedy, in that the legislature was required to initiate new procedures which in turn would give rise to the benefits fresh computation of; the clear implication being that an improved system of benefits had to be produced by government.

But courts, even within the national state, are not always consistent. A further example of a weak right/strong remedy approach is to be found in the judgment of the same South African Constitutional Court in *Occupiers of 51 Olivia Road v City of Johannesburg*.[36] In this case, the City of Johannesburg sought to evict some 300 people from six properties which were located in the inner city. The City justified these evictions in terms of a so-called 'regeneration strategy' for the inner city of Johannesburg, one important characteristic of which was the identification, clearance, and redevelopment of 'bad buildings' which had been occupied by approximately 70,000 people within the inner city.

The question for decision turned on whether the City by evicting the residents, had violated their right to access to adequate housing in terms of section 26 of the South African Constitution in that it had sought these evictions without any programme which was designed to rehouse those who had been evicted. When the matter reached the Constitutional Court, it noted that the City would have been aware not only of the possibility but the probability that those evicted would have become homeless as a result of the decision of the City to so evict them. Accordingly, those involved in the management of the City ought, at the very least, to have engaged meaningfully with the residents before a process of eviction was implemented. The Court developed a concept of engagement; that is 'a two-way process' in which the City

[35] German Federal Constitutional Court, 9 February 2010: 1 BvL 1/09.
[36] 2008 (5) BCLR 475 (CC).

and those who were about to become homeless would talk to each other meaningfully in order to achieve certain objectives. These objectives included a determination of the consequences of the eviction, whether the City could assist in alleviating these consequences, whether it was possible to render the buildings concerned relatively safe and conducive to the health of the residents for an interim period, and ultimately whether the City had any obligation to the occupiers within the context of the facts of the case. Although the Court agreed that the right to housing, in terms of section 26, did not constitute a complete obstacle to the removal of residents from unhealthy and unsafe buildings, it found that there was, within the scope of the provision, an obligation placed upon the City to engage with the affected people, who would be rendered homeless after the eviction.

The order of the Court was designed not only to ensure engagement between the City and the applicants but also to retain jurisdiction over the dispute, in that both the City and the applicants were ordered to file further affidavits reporting on the result of their engagement. In this case, the engagement appeared to have been successful because the Court was later informed that an agreement of settlement had been entered into between the City and the applicant occupiers. In this case, while the Court worked with a weak right given its interpretation of section 26, it provided a relatively strong remedy which contained significant opportunity for legal relief between impoverished applicants.

VI. Stronger Forms of Right and Relief

Columbia provides a rich source of research for the implications of a stronger form of review. For example, in 2008, the Constitutional Court of Columbia handed down a decision that ordered the state to dramatically restructure the countries health system.[37]

The background to this case is illustrative of the Court's jurisprudence. In 1993 the Columbia health-care system was reformed. Law 100 altered the government subsidies from a supply to demand system and used public and private insurers as surrogates to purchase health care for insured patients, the object being directed toward the improvement of efficiency. A two-tier system of medical benefits was established: one for those formally employed or earning more than twice the minimum wage and a second being a subsidized regime which included approximately one half of the benefits which were available in the contributory regime. Literally tens of thousands of petitions (tutelas) were presented to the courts relating to the constitutional right to health and the concomitant breach of that right by Law 100.

In its 2008 decision, the Court collected 22 tutelas which were selected to illustrate the problems endemic to the health system. The Court reiterated that the constitutional right to health is enforceable in favour of plaintiffs who are unable to afford health care when the right to health, if not protected immediately, would result in the violation of fundamental rights, being the right to life. Further, in a case which involves people in particularly vulnerable circumstances, such as children, pregnant women, or the elderly, and where the provision of the particular health service in question fell within, what the court considered to be, the minimum core content of the right to health, the right would be enforced in favour of the plaintiffs.

In terms of this interpretation of the right to health, the Court has ordered the provision of a wide range of goods and services, including antiretrovirals, cancer medication, and even the

[37] Corte Constitutional de Columbia (2008) Sala Segunda de Revisión, Sentencia T-760, 31 July 2008, Magistrado Ponente: Manuel José Capeda.

financing of treatment of patients abroad, when the appropriate medical treatment was unavailable in Colombia.

In 2008, the Constitutional Court was confronted with a number of cases where there were restrictions on access to medical care that flowed from an inappropriate transfer of administrative costs on to patients and a failure to provide effective access to medical care, for example, not catering for the transportation needs of patients.

The Court went even further and examined the nature of the benefit plans which were inherent in the applicable legislation. The Court directed the National Commission for Health Regulation immediately and, thereafter on an annual basis, to update the benefits which were to be provided, pursuant to a subsidized scheme. It also ordered the appropriate executive agencies to unify the multiplicity of plans which had been introduced throughout the country, pursuant to the adoption of the relevant legislation, initially for children, later for adults and in a latter case, taking into account of financial sustainability as well as the epidemiological profile of the population.

In a further development, the Court ordered the government to adopt deliberate measures progressively to realize universal medical coverage by 2010, together with various compliance deadlines which have taken place between 2008 and 2009.

As Yamin and Parra-Vera note, the approach of the Colombian Court has been to implement the right to health within a framework set out by the United Nations Committee on Economic Social and Cultural Rights.[38] However, the Court has gone on to specify the multiple obligations which have to be carried by the state, pursuant to the constitutional right to health, further declaring that the state was responsible for adopting the deliberate measures to achieve the progressive realization of the right to health and further that the state is required to adopt a transparent approach and provide access to information in respect of its health coverage.

The Court heard another case in October 2009 in which it set out definitive guidelines for the provision of an abortion service.[39] In this case, the Court held that a women, who sought a legal therapeutic abortion from a health-care provider as a result of serious fetal malformation that made it unviable, had a right to choose freely whether she would have an abortion or continue the pregnancy without coercion, duress, or any type of manipulation. It confirmed that abortion services should be available throughout the country and called upon the Ministries of Education and Social Protection to implement a plan within three months of the decision, to promote the sexual and reproductive rights of women, which must include information about the grounds of which abortion was legal in the country. The Court also listed the services that are prohibited with regard to provision of abortion.

The effect of a strong remedy is illustrated by the far-reaching nature of this decision. For this reason, it is useful to look at the detail of the order which included the following obligations imposed by the court upon a range of state authorities.

- To hold medical meetings, or auditors' meetings to review or approve the request, which result in unjustified waiting periods to perform the abortion.
- To establish additional requirements, such as demanding forensic medical reports, judicial orders, health examination not practised timely, authorization by family members, legal consultants, auditors, or a multiple number of doctors.

[38] Alicia Ely Yamin and Oscar Para Vera, 'How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court' (2009) 6 *PLoS Medicino* 147.

[39] The decision of the Columbian Constitutional Court T-388/2009.

- To submit collective conscientious objections, which result in institutional and unfounded claims of conscientious objection.
- To subscribe to agreements—individuals or collective—to deny abortion services.
- To use forms or template disclaimers which results in hospitals not having among their personnel, doctors willing to perform abortions.
- To discredit patient evaluations drafted by psychologists, whose status as health professionals has been recognized by legislation.
- To be reluctant in complying with all the rules in the cases in which abortion services are not available at the health centre where the patient requested the abortion.
- Not to have any available abortion services within the network of public health-care providers at the departmental, district, and municipal level.

The relatively strong right/strong remedy approach adopted by the Columbian Constitutional Court may arguably be explained in terms of a more interventionist civil law culture. But while legal culture manifestly influences jurisprudence, it is an argument that need not detain us because there are illustrations of a similar approach adopted by courts which function in common law jurisdictions.

Take, for example, the Indian Supreme Court, whose jurisprudence has briefly been mentioned and which court system was inherited from the British colonial power. India has a written constitution which provides for fundamental rights for its citizens. However, it did not include, as justiciable rights, any of the social and economic rights with which we have been engaged in this chapter. In Part IV of the Indian Constitution there is provision for directive principles of state policy which are required to be followed by the state when it develops its social and economic policies. Thus, Article 38 requires the state to secure a social order for the promotion of the welfare of the people, in which justice—social, economic, and political—shall inform all institutions of national life. Similarly, Article 39 provides that the state shall direct its policy towards securing that 'the citizens—men and women equally—have the right to adequate means of livelihood'.

These provisions are not couched as rights but rather as principles which should guide the state in the formulation and implementation of its policy but without giving a litigant the ability to demand that any of these principles be enforced as of right by way of a judicial order. The courts, however, have made creative use of these directive principles of state policy, reading them together with some fundamental rights. Thus, in *Olga Tellis and others v Bombay Municipal Corporation and other*,[40] the applicants were living on Bombay pavements or slums in the vicinity of their workplace. They were then forcibly evicted and their dwellings demolished by the municipality. They challenged their eviction on the basis that it violated their constitutional rights; in particular the right to life which was enshrined in Article 21. The Court held that the right to livelihood was to treated as being part of the constitutional right to life and hence, by depriving a person of his or her means of livelihood, this action would effectively deprive the person of his right to life. On this basis, therefore, the Court thus placed an obligation upon the Bombay Municipality to provide shelter for the applicants.

More recently, in *Peoples Union for Civil Liberties v Union of India and others*[41] the Supreme Court was faced with various interim orders which had been passed, from time to time, directing governmental authorities to see that food was provided to aged, infirmed, disabled,

[40] 1985 (3) SCC 545.
[41] 2004 (12) SCC 108.

destitute men who were in danger of starvation, pregnant and lactating women, and destitute children. This class had insufficient funds to live free of malnutrition.

The Court framed the dispute by way of the following question:

> Article 21 of the Constitution of India protects for every citizen a right to live with human dignity. Would the very existence of life of those families which are below poverty line not come under danger for want of appropriate schemes and implementation thereof, to provide requisite aid to such families?

The Court then ordered that nutritious food had to be provided for those undernourished or malnourished applicants and further directed that an integrated child development scheme be implemented through various government centres, first to supply nutritious food and supplements to children, adolescent girls, and pregnant and lactating women under a scheme which so provided for 300 days in a year.

In this case the Court, operating broadly within a common law tradition inherited from the United Kingdom, and adjudicating within the context of a Constitution which had no express judiciable social and economic rights, interpreted various provisions of its Constitution to create amongst other rights, a basic right to housing and the right to food. A strong right/strong remedy was developed from reading the implications of the constitutional text.

VII. Conclusion

Conceptually, it is possible that social and economic rights can be considered to be strong rights whenever a court enforces these rights without deferring to a legislative process and whenever there is a conclusion that government has failed its constitutional obligations imposed by the specific social or economic right. Colombia and India, on occasion, have performed in this manner. But as the South African experience illustrates, courts may be reluctant to interpret social and economic right in order to bring about the result in which no substantial deference to a legislative judgment can be offered by the court; hence the reasonableness test adopted by the South African Constitution Court. But even in this kind of case, the court may offer a plausible reason for developing a weak right:

> Moreover, what the right requires will vary over time and context. Fixing a quantified content might, in a rigid and counter-productive manner, prevent an analysis of context. The concept of reasonableness places context at the centre of the enquiry and permits an assessment of context to determine whether a government programme is indeed reasonable.[42]

The Court suggests in this dictum that adherence to a weak right may afford greater possibility for progressive development in the longer term than might be the case with a strong right that is interpreted, for example, so as to impose a fixed obligation upon the state to provide 50 litres of water a day to each applicant. In all of these cases, courts have recognized that, while civil and political rights are valuable in that they are predicated on the premise that individual citizens should have control over their lives as autonomous, sentient beings possessed of a protected sphere of dignity, the absence of substantive conditions to permit the vindication of these rights, renders these rights somewhat illusory. Where social and economic right are included in a constitution, either by way of express rights or by way of directive principles of state policy, courts have sought, by means of differing approaches, to recognize that these rights are morally valuable in providing a basis

[42] *Mazibuko* (n 32), para 60.

for individuals to have some form of acceptable control over their lives, as Mr Mandela understood, when he reflected upon the social and economic structure inherited from apartheid. If the residents of a country are hungry, ill, thirsty, or cold and living under a constant threat of poverty, it is extremely difficult to see how they could decide on any meaningful conception of a good life for themselves and further, to what extent the first generation of rights would have significant meaning for them, living as they do in parlous conditions. Arguably, the existence of these rights justifies a move away from a narrow conception of individual right-holders so central to first-generation rights. Ultimately socio-economic rights promote a sense of community, and thus are claimed by groups of impoverished and marginalized people who seek to preserve a sense of dignified community. In turn, this compels a different vision of rights, one which is not based exclusively upon an individual rights bearer.

It does, however, appear that the conceptual obstacles posed in the way of social and economic rights have far less intellectual traction than does the enforceability question, which it cannot be denied means that, generally speaking, adjudicating upon a dispute based on a negative right involves a process of adjudication which is different from that involving a dispute predicated on a social and economic right. But, this must be qualified. Decisions based on negative rights are not necessarily immunized from considerations relating to the public allocation of resources. Further, judges may not be able—given their technical competence, the limitations created by a lack of evidence, and their inability to deal with the polycentric implications of a decision based upon the interpretation of social or economic rights—to enforce the latter as they may the right to fair trial or the right to assembly.

However, when courts have compelled the legislature or the executive to justify a policy choice in terms of an articulated conception the meaning of a social and economic right, a process of deliberation flows therefrom which cannot be discounted. It leads to more accountable government, it provides a voice for litigants who would otherwise be silenced, and, in a number of cases, as described in this chapter, this results in the provision of a basic minimum of goods and services to those who otherwise would have been left out in the proverbial cold.

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