

REFLECTIONS ON JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

At the present time a consensus has emerged on two points involving the constitutional status of social and economic rights, the so-called “second generation” rights.¹ First, such rights are properly included in modern constitutions, and second, they are enforceable to the same extent as first-generation rights to political participation, free expression, equality, and the like. After explaining the current status of social and economic rights in modern constitutions, these reflections identify two important matters that continue to arise: the forms of enforcement and remedies are appropriate for second-generation rights, and some continuing concerns about effective enforcement. Important recent scholarship develops new concepts to supplement older ones, and the new vocabulary is likely to be quite helpful as scholars consider the directions the law takes in different jurisdictions.

Classical liberal constitutions did not include protection for social and economic rights, which were placed on the agenda of constitution-makers in the late nineteenth century with the rise of socialist parties in Europe and the response by the Roman Catholic Church, whose social teachings, first articulated by Pope Leo XIII in the 1891 encyclical “*Rerum Novarum*”, were taken up by the church’s political allies. The Irish Constitution of 1937, strongly influenced by those social teachings, enumerated social and economic rights in a section labeled “Directive Principles of Social Policy,” which included a statement that such principles were exclusively in the domain of the nation’s parliament and were not to be enforced by the courts. The Indian Constitution adopted in 1949 contained a similar section, with a similar limitation. We can describe these constitutions as early social democratic constitutions.

Constitutions adopted more recently tend to include second-generation rights, without distinguishing them from classical liberal rights. The

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¹ These comments draw heavily on David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L. J., forthcoming 2012. I also benefited from comments on a draft of this Essay by Vicki Jackson.

South African Constitution of 1996, for example, simply enumerated second-generation rights and placed the government under a duty to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of the rights. These developments have influenced constitutional interpretation elsewhere. Notably, the Indian Supreme Court has inferred from the judicially enforceable right to life and to human dignity the power to enforce second-generation rights as essential to the preservation of human life and dignity.²

II. THE REJECTION OF GENERAL OBJECTIONS TO JUDICIAL ENFORCEMENT OF SECOND- GENERATION RIGHTS

The apparent consensus on judicial enforcement of second-generation rights has entailed the widespread rejection of several objections to such enforcement that were common before the consensus emerged. The objections rested on principles of separation of powers, expense, and ineffectiveness.

The separation of powers objection, most forcefully articulated in Irish decisions, focused on the programmatic nature of second-generation rights. In one version, the argument was that the term “rights” could not fairly be applied to the interests at stake when these “rights” were discussed. A right, the argument went, required someone or some entity under a corresponding duty, but duties could arise only in connection with relatively well-defined interests. Social and economic “rights” lacked the specificity needed to generate correlative duties. Legislatures could of course pursue programmes that advanced interests in housing and food and the like, but courts could not develop a jurisprudence of rights implicating those interests. A related objection, or perhaps simply a rephrasing of that objection, was that implementing programs to protect these interests necessarily required a high degree of discretion in the implementer, a much larger degree of discretion than courts enforcing rights could possibly have.

Once courts began to try to enforce second-generation rights, these generalized separation of powers objections turned out to be less forceful than it seemed at first. The objections assumed that first-generation rights were categorically different from second-generation ones, for otherwise separation of powers would have blocked the enforcement of first-generation rights, a result no one thought correct. Yet, no such categorical distinction exists. The right to vote is an obvious first-generation right, but the government must provide the facilities for voting, and one can without much difficulty generate substantial

² The Irish High Court has resisted these influences, although it made some tentative steps in the direction of enforcing second-generation rights by reading some of them into narrow provisions such as an enforceable guarantee of a right to education.

arguments that protecting the right to vote requires that the government devote significant resources toward making it possible for people who have the franchise to exercise their right to vote – by making polling places accessible, for example. Rights to fair process in criminal proceedings are first-generation, and they too require government action, most notably in the provision of counsel for defendants who cannot afford to pay for representation on their own. There are of course differences between the rights the government must provide in criminal proceedings and second-generation rights, but the distinctions are not the sharp ones the separation of powers objection requires.³

In addition, as we will see, courts devised ways of moving from broad statements of the interests at stake to more precisely specified ones, with the effect of allowing them to treat the more precise specifications as “rights” fitting into the traditional category where rights entailed duties. Experience with the enforcement of first-generation rights showed as well that that enforcement also involved a substantial amount of judicial discretion, not only in implementation but even at the rights-specification stage. The emerging consensus was that these experiences showed that separation of powers principles could not support a sharp distinction between first and second-generation rights.

The expense-based objection fell after reflection on how enforcing first-generation rights was costly too, and under the weight of judicial creativity in devising remedies that made the costs of enforcing second-generation rights comparable to those of enforcing first-generation rights. From the outset it was clear of course that enforcing first-generation rights was costly. At the most basic level, providing courts and the ordinary enforcement apparatus requires government expenditures.⁴

Perhaps opponents of the emerging consensus would argue that these costs are low relative to the costs of enforcing second-generation rights. That overlooks the point that exercising constitutionally protected first-generation rights imposes costs on society at large, and those costs can be large. Demonstrations, for example, increase the risk of disorder, as does speech critical of government policy, yet no one contends that the expenses associated with demonstrations and critical speech imply the inappropriateness of judicial enforcement of rights to free expression. The difference between the costs associated with enforcing first-generation rights and second-generation rights is not that the former are small and the latter large, but that the former are generally invisible because they are diffused across the society as a whole without

³ I note that in my view the obvious response, that the government is subjecting someone to its own processes in criminal proceedings but is not doing anything when second-generation rights are denied, is mistaken, for reasons I develop in detail in MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008). But, developing the argument here would distract from my primary points.

⁴ The usual citation for this point is STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999).

figuring openly in government budgets, while the latter are immediately visible in budget statements. And, as I will note below, courts developed ways of enforcing second-generation rights that reduced the immediate, and immediately visible, costs of enforcement, responsive to formulations like the “within available resources” qualification in the South African Constitution.

Finally, experience also showed that one could not say categorically that efforts to enforce second-generation rights were ineffective, or less effective than efforts to enforce first-generation rights. Again, creativity in devising remedies meant that the most one could say was that some enforcements efforts were ineffective, not that all efforts were inevitable so. And, again, experience with enforcing first-generation rights showed that effective enforcement of such rights was never guaranteed either.

Taken together, these observations about separation of powers, expense, and effectiveness have persuaded most constitutionalists that a sharp distinction between the constitutional status and enforceability of first- and second-generation rights cannot be sustained.

III. THE FORMS OF JUDICIAL ENFORCEMENT OF SECOND-GENERATION RIGHTS

With the basic question about enforcing second-generation rights settled, today’s questions involve the *forms* in which enforcement occurs. David Landau provides a useful classification.

A. DIRECT INDIVIDUAL ACTIONS

These lawsuits fit comfortably into the traditional format of individual litigation. An individual plaintiff claims that the government has failed to guarantee him or her social welfare rights and seeks an order directing that the government do so. The order has no implications for other cases, other than whatever precedential effects the legal system attaches to such decisions.

One prominent early case from South Africa, the *Soobramoney* case, rejected a direct individual action in which the plaintiff claimed that his constitutionally guaranteed right to medical care (and life) was violated when the government refused to provide him with access to a potentially life-saving organ transplant, on the ground that his condition was so severe that he was ineligible for a transplant according to the criteria the government had developed. The Constitutional Court acknowledged the force of *Soobramoney*’s claim, but rejected it because granting him the transplant meant, in effect, that he would jump the established queue and thereby completely disrupt a rationally defensible system for allocating the limited number of organ transplants

the government made available pursuant to the “within available resources” standard.

While well-known around the world, the *Soobramoney* decision is actually not representative of how courts have treated individual actions to enforce social welfare rights. Brazil and Colombia provide the starkest contrast. Courts in both nations have entertained and granted relief in individual actions raising claims to medical care. The form of the actions is straightforward. Medical care is provided through a national system. One feature of the system is the provision of drugs. The national medical agencies have compiled lists of drugs that in their judgment are effective in treating illnesses. But those lists are not comprehensive. They are sometimes out of date, and they often list one relatively cheap drug to treat an illness and omit other more expensive drugs that might do so equally effectively. Individuals file legal actions claiming that they would benefit from taking a life-saving (or pain-reducing) drug not on the national list of drugs, and that denying them access to those drugs violates their right to medical care. Courts routinely enter orders directing the medical agencies to make the drugs available to the plaintiffs. These decisions are highly case-specific, turning on the plaintiff’s precise medical condition and the value of the drug sought compared to those already available. Plaintiffs may win as often as they do because they can almost always frame their cases in quite sympathetic terms, searching for some medical benefit that would, they think, be helpful, were the government to provide it. But, these successes create difficulties for developing a rational system of allocating medical resources, as the *Soobramoney* Court understood.

In form, these actions are almost exact duplicates of some actions seeking to enforce classical liberal rights, for example, an action claiming that the government unconstitutionally denied someone a right to vote, remedied by an order directing that the government make the vote available to that person. They do raise questions about the expense associated with second-generation rights. The *Soobramoney* case might be understood as not relying solely on how granting individual-level relief would disrupt government planning for medical care but also on the sheer expense of organ transplants. From the perspective of the one judge deciding an “access to drugs” case in Brazil or Colombia, the expense might seem trivial. Yet, of course, in the aggregate the expense of all the individual actions might be quite substantial, a point to which I return below.

B. NEGATIVE INJUNCTIONS

These too resemble actions to enforce classical liberal rights. An example from the liberal domain: A government denies access to a Hyde Park-like Speakers’ Corner, someone who wishes to make a speech claims that the denial violates his or her right to free expression, and the court issue an injunction barring the government from excluding the person from the facility. Right

to housing cases provide the best examples of the use of negative injunctions to enforce second-generation rights. Often those without adequate housing occupy vacant buildings as “squatters.” Either on its own or acting on behalf of the buildings’ owners, the government seeks to evict the squatters. They seek a negative injunction barring the government from doing so.

There is nothing particularly unusual about negative injunctions as a remedial form. They do not generally lead to increases in government budgets. But, of course, to benefit from a negative injunction a plaintiff must already have something that the government is trying to take away- the occupied property in the right-to-housing cases, for example.⁵ Negative injunctions can keep the government from making things worse. But, the aspiration of second-generation rights is to improve conditions, and negative injunctions cannot do so.

C. STRUCTURAL OR POSITIVE INJUNCTIONS

One commonly noted difficulty with direct individual actions is that the problems individuals face often flow from systemic failings of public agencies. So, for example, in the “right to drugs” cases, the problem might be that the national medical care agency has done a bad job of identifying the most cost-effective drugs to treatment specific conditions. Or, a government may be failing to provide access to food that it has on hand because its mechanism for distributing the food is corrupted, either in the ordinary sense or in the sense used by computer programmers to describe badly designed systems. Direct individual actions do almost nothing directly to address these systemic failings.⁶

Courts in the United States pioneered in the use of structural injunctions, in which courts prescribed rules for government bureaucracies.⁷ Implementing those rules, the courts believed, would eliminate the constitutional violations at the foundation of the lawsuits. So, for example, the conditions in a prison might be so below standard as to amount to “cruel and unusual punishment.” A structural injunction would direct the prison administrators to upgrade the prison to meet minimal standards, and the injunction could go into a great deal of detail, for example about the amount of sleeping space each prisoner should have, the number of hours prisoners should have available for exercise, and much more.

⁵ An important qualification is that what the plaintiffs have might already have been provided by the government. Cases challenging reductions in public pensions are of this sort. A negative injunction does not increase the government’s budget outlays, but it does prevent the government from reducing its budgetary obligations in the ways prohibited by the negative injunction.

⁶ They may have indirect effects, as bureaucracies respond to the costs courts are imposing on them by adjusting their own operations.

⁷ Abram Chayes, *The Role of the Judge in Public Law Litigation*, HARV. L. REV. 89 (1976): 1281-316, is the classical article identifying the characteristics of structural injunctions.

Structural injunctions have been quite controversial in the United States. The U.S. Congress enacted a statute purporting to limit the power of federal courts to issue such injunctions against those in charge of prisons, for example. Structural injunctions are criticized because they lead to quite close judicial oversight of bureaucracies' operations, a task for which, it is said, judges lack appropriate training. And, if judges seek to supplement their own capacities by drawing on experts or by delegating their authority to officials the judges supervise (sometimes known as "special masters"), those actions dilute the specifically judicial component to the supervision and so reduce the apparent legitimacy of the intervention. Finally, some structural injunctions are quite costly, which raises in concrete form the cost-based objections of protecting second-generation rights.

D. NEW REMEDIAL FORMS

Observers have remarked upon the emergence of new remedial forms as courts have taken on the task of enforcing second-generation rights.⁸ Drawing on a term imported into comparative constitutional law from an important contribution to Canadian constitutional scholarship by Peter Hogg and Alison Bushell, we can call these new forms "dialogic" remedies. So far they come in two variants.

1. Dialogue between Courts, Legislatures and Executive Officials

Perhaps the most widely noted case enforcing second-generation rights is the *Grootboom* case. There the South African Constitutional Court reviewed the constitutionality of the government's program to provide housing for those in need. Mrs. Grootboom represented a group of squatters who the government evicted. Rather than challenging the evictions, Mrs. Grootboom challenged the government's overall program for providing housing to the needy. The government did have such a program, but the Court held that it was unconstitutionally defective because it did not contain a specific provision aimed at providing housing for those, such as Mrs. Grootboom, in desperate need. The Court ordered the government to develop a plan for providing housing to that group. This order was at least implicitly dialogic because it left open the possibility that the lawyers representing Mrs. Grootboom could return to court to challenge the government's plan as inadequate, and the court would have to determine whether the plan was constitutionally adequate.

This kind of dialogic remedy can be structured in many ways. The government could be required to develop a plan, whereupon plaintiffs could decide whether to challenge the plan. This structure places the burden of going

⁸ For my earlier observations about these new remedial forms, see TUSHNET, *supra* note 3.

forward in the dialogue on the plaintiffs who, for reasons I will discuss, may lack the resources to carry that burden. Otherwise, the government could be required to develop a plan and present it to the court for approval, relieving the plaintiffs of the burden of going forward (but probably still imposing on them some burden of presenting arguments about the plan's possible inadequacy). On reviewing a plan, the court might find some portions constitutionally adequate, others inadequate, and direct furthering planning even as the adequate components are implemented. Repeated stages of the dialogue might produce an overall remedial scheme that closely resembles a structural injunction, but with greater participation by the parties in the development of the remedy's details than can occur in structural litigation.

2. Dialogue between Executive Officials and Plaintiffs

The South African Constitutional Court has pioneered in developing another intriguing remedial possibility. The case again involved squatters. This time they were occupying a building that everyone agreed was unfit for human habitation because it lacked adequate drinking water and was quite vulnerable to fire. The city sought to evict the squatters, not in the service of some property owner's interest in the building, but to protect the squatters themselves against these real risks. The Constitutional Court held that before going forward with the evictions, the city had to engage in a discussion with the residents about whether they could develop some method of providing water and fire protection without evicting the residents.⁹ The "engagement" resulted in an agreement by the city to leave the residents in place and provide them with water and emergency fire services.

Not all dialogues between plaintiffs and executive officials will generate real progress on the ground. The government- or the plaintiffs- might be recalcitrant. In the Johannesburg case, the government had ready access to water that it could make available to the residents, as it had in connection with other occupied buildings. In other settings the cost of eliminating the life-threatening conditions, or of providing some minimum second-generation rights, might be excessive. All said, though a remedial mechanism that promotes dialogue and negotiation rather than confrontation holds out some promise of actual accomplishment, in some settings perhaps a greater promise than structural or other forms of relief.

Experience has shown that judicial enforcement of second-generation rights is possible, though how much enforcement there will be, and how effective it is, will of course depend strongly on particular circumstances. But,

⁹ *Occupiers of 51 Olivia Road v. City of Johannesburg*, 2008 (5) BCLR 475 (CC) (S. Afr.). Brian Ray, *Engagement's Possibilities and Limits as a Socioeconomic Rights Remedy*, 10 WASH. U. GLOBAL STUD. L. REV. 2 (2010): 399-425, provides a good analysis of the case and subsequent ones.

with the principled objections to judicial enforcement having been rejected, and the possibility of effective relief demonstrated, judges and scholars should turn to some continuing concerns.

IV. PROBLEMS FOR THE FUTURE

I have already mentioned some of the difficulties already encountered in enforcing second generation rights. For each, and for others not yet described, there may be some response, but others may face insurmountable difficulties. In the latter group may be negative injunctions which can do no more than prevent an inadequate status quo from degenerating.

Madhav Khosla generalizes from the negative injunction cases to identify two types of social and economic rights, which he calls “conditional” and “systemic.”¹⁰ Conditional rights are, as the label suggests, conditioned on some sort of government action in setting the status quo: creating a housing program in the *Grootboom* case, or defining the contours of an eviction system in the squatter cases. The limitations of negative injunctions are bound up, on this account, with the fact that the rights being enforced are conditional; Or, perhaps better, the very fact that the injunctive remedy has only limited effect shows that the right is only a conditional one. Structural injunctions are appropriate for, and again perhaps define the contours of, systemic social welfare rights. Khosla’s analysis is quite provocative and will surely influence future discussions of these issues.

Direct individual actions present a somewhat different picture. As noted earlier, they can interfere with rational planning and do not directly generate reforms of bureaucratic structures whose routine operation is sometimes the real cause of violations of second-generation rights. Yet, precisely because these actions in the aggregate can make it difficult for bureaucrats to operate, direct individual actions can induce the bureaucrats to reform. In Brazil, for example, the cumulative pressure of the direct individual actions has led ministries of health to devote significant resources to reformulating the lists of drugs that they make available through the public health system. The incentive comes not from some threat the judiciary makes about itself reformulating the lists but from the ordinary bureaucratic interest in making it easier for bureaucrats to make day-to-day decisions. Beyond that there is the possibility of judicial intervention to enforce their decrees through contempt sanctions imposed on recalcitrant bureaucrats. That has happened on an occasion in Brazil, but whether judges will have the fortitude to impose sanctions so as to induce changes in bureaucratic behavior is open to question.

¹⁰ Madhav Khosla, *Making Social Rights Conditional: Lessons from India*, INTL J. CONSTITUTIONAL LAW, forthcoming 2012.

Scholars sometimes question the effectiveness of structural injunctions and the new remedial forms. Here the key case is, perhaps ironically, the *Grootboom* case itself. The South African government did develop a housing program that included special provisions for those in desperate need, but neither Mrs. Grootboom nor any other members of the group she represented ever got housing as a result of that program. The relief, that is, may have benefited some of those in desperate need, but not the litigants themselves. Similar results have occurred in similar cases involving street dwellers, internal migrants, and the homeless. The obvious reason for the difficulties here is that the problems are so severe that almost nothing is likely to provide much help. Translated into legal terms, the “within available resources” qualification explicitly or implicitly placed on guarantees of second-generation rights justices—as a matter of law—quite limited efforts, because the available resources are quite small relative to the size of the problem.

One should not generalize these difficulties into a universal statement that structural injunctions and the newer forms of relief can never be adequate. The counter-example to the *Grootboom* case is the New Delhi bus case in which a judicial order directing the conversion of buses in New Delhi to natural gas operation, based on a right to health in a heavily polluted urban environment was completely successful. What scholars need to examine now are the *conditions* under which remedies of whatever sort can succeed for fail. We are only at the beginning of the exploration of that issue.

A final concern may be the most troubling. Examined as a whole, the cases in which courts have done something significant in enforcing second-generation rights tend to be cases that primarily benefit not the poorest in a nation but those who are relatively well-off, the middle classes rather than the poor. This is of course clearest in the “right to health” cases involving the provision of specific drugs through individual direct actions. Statistics are hard to come by, but it seems clear enough that the primary beneficiaries of these actions are in the middle classes. The reason is clear enough as well: To bring such an action a person has to have a lawyer available to him or her, and in general, the middle classes have substantially greater access to lawyers than the poorer people. But the problem arises in connection with other forms of relief too. Effectively implementing a structural injunction, for example, requires that the plaintiffs be in a position to monitor what the government is doing in response to the injunction, and monitoring is made substantially easier when lawyers do it. Most people can effectively engage with government officials only if they have some assistance, and again, lawyers provide that assistance. Of course NGOs can provide assistance, by making lawyers and other resources useful in litigation over second-generation rights available to poor people. But, equally obviously, NGOs are underfunded, available only spottily, and in general cannot be expected to be available widely enough so as to offset the middle-class bias of the remedial forms taken as a whole.

The US political scientist Charles Epp has provided a systematic explanation for these outcomes. Examining what he calls efforts at rights revolutions in a number of countries, including India, Epp concludes that such revolutions succeed only when they are accompanied by what he calls a “support structure,” a set of institutions that supply those seeking constitutional rights with regular access to lawyers, funds to keep litigation going, and favorable publicity.¹¹ Support structures include NGOs, but, intriguingly, Epp finds that some governments provide the necessary resources, even when the lawyers are attacking government policies. Nonetheless, sustaining a support structure is difficult, and national variations will matter a great deal.

V. CONCLUSION

Future scholarship on the judicial enforcement of second-generation rights will, I think, focus on several issues. First, and probably most pressing for those who hope for substantial effective judicial enforcement of social and economic rights is, how can support structures be created and sustained? Second, are there systematic ways to ensure that direct individual actions will somehow transform the bureaucracies responsible for administering second-generation rights? We know that such actions can induce bureaucracies to respond, but we need to think about whether they can force the bureaucracies to change not simply respond, and change not merely their policies but the routines that lead them to neglect second-generation rights. And, if the direct individual actions cannot do that in any systematic ways, are there methods by which other remedies could be piggy-backed on the direct individual actions to achieve those goals.

Perhaps the most important conclusion I draw from these reflections is a much simpler one. The issues scholars in the field need to consider are substantially different from the ones that have preoccupied scholarship on the judicial enforcement of second-generation rights for the past decades. A new scholarly agenda is on the table, which is something that scholars should welcome.

¹¹ CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

