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Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law

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ASPIRATIONAL PRINCIPLES OR ENFORCEABLE RIGHTS?

THE FUTURE FOR SOCIO-ECONOMIC RIGHTS IN NATIONAL LAW

ELLEN WILES*

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INTRODUCTION

The issue of legal enforceability has been the primary obstacle impeding the development of socio-economic rights since their inception in the Universal Declaration of Human Rights ("UDHR").¹ Civil and political rights, which have not met with the same resistance, have almost universally been promoted to an enforceable status in national law. Yet it may be, as many commentators have recently suggested, that problems with enforcing socio-economic rights have been overstated,² and have even been used to mask ideological misgivings.³ Such suggestions are supported by an increasing body of case law emerging from a number of jurisdictions, which has arguably put the issue of legal enforceability "beyond question."⁴ Without legal enforceability, it is widely believed that socio-economic rights will remain ineffectual as legal entities.⁵ This paper will therefore address the major issues of principle and practicality involved. I will propose that if socio-economic rights became legally enforceable, this would provide a vital counterbalance to the elevated position of civil and political

1. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948).

2. See U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, *Final Report: The Realization of Economic, Social and Cultural Rights*, ¶¶ 128, 184, U.N. Doc. E/CN.4/Sub.2/1992/16 (July 3, 1992) (*prepared by Danilo Turk*) (asserting the legal enforceability socio-economic rights and arguing that "purely legal issues involved, in particular . . . justiciability," have been given "disproportionate attention").

3. See PAUL HUNT, RECLAIMING SOCIAL RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 53-54 (1996) (arguing that the "different treatment" of rights might be the result of "ideological differences" rather than "differences between the rights themselves").

4. POLLY VIZARD, THE CONTRIBUTIONS OF PROFESSOR AMARTYA SEN IN THE FIELD OF HUMAN RIGHTS 24 (2005).

5. See Michael K. Addo, *Justiciability Re-examined*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT 93, 104 (Ralph Beddard & Dilys M. Hill eds., 1992) (remarking that justiciability is likely "essential to the attainment of all human rights," otherwise states have "little incentive to comply with the full terms of treaty provisions"); see also Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in DECONSTRUCTION AND THE POSSIBILITY OF JUSTICE 3, 6 (Drucilla Cornell et al. eds., 1992) (observing that "[t]he word 'enforceability' reminds us that there is no such thing as law . . . that doesn't imply . . . in the analytic structure of its concept, the possibility of being 'enforced'").

rights, particularly in the context of an increasing wealth gap associated with free market capitalism. However, I will also highlight important practical matters to be addressed if enforceable socio-economic rights are to be viable in practice, and outline some appropriate mechanisms.

I. INTERNATIONAL CONTEXT

The current position of socio-economic rights on the constitutional world map is marginal: they have only explicitly been made legally enforceable in the constitutions of a scattering of states.⁶ The South African Constitution is undoubtedly the most noteworthy, as it includes a full range of rights in this category including rights to adequate housing, sufficient food and water, access to health care, social security and education.⁷ Moreover, a significant body of case law has emerged from the South African Constitutional Court defining the scope of these rights.⁸ Elsewhere, socio-economic rights are either constitutionally incorporated in weaker forms such as “the right to receive indispensable subsistence and care”⁹ or as “directive principles,”¹⁰ or they are omitted entirely. In countries with monist

6. FIN. CONST. §§ 6, 7, 9, 10, 12-19, 22, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2000) [hereinafter FIN. CONST.]; GUY. CONST. arts. 14-40, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1988); HUNG. CONST. arts. 60, 66, 70/B-70/F, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 1995); NAMIB. CONST. arts. 19-20, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2003); PORT. CONST. arts. 58-79, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rudieger Wolfrum & Rainer Grote eds., 2005); SLOVK. CONST. arts. 35-45, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2001); S. AFR. CONST. 1996 §§ 21-31, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2004) [hereinafter S. AFR. CONST. 1996].

7. S. AFR. CONST. 1996, *supra* note 6, §§ 26-29.

8. See Richard Goldstone, *A South African Perspective on Social and Economic Rights*, 13 No. 2 Hum. Rts. Brief 4, 5-7 (2006) (analyzing case law of the South Africa Constitutional Court that relates to shaping social and economic rights).

9. FIN. CONST. *supra* note 6, § 19; see also JAPAN CONST. 1947, art. 25, para. 1, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Rudieger Wolfrum & Rainer Grote eds., 2005) (protecting the right to “a wholesome and cultured living”).

10. See, e.g., INDIA CONST. arts. 38, 39, 41-48A, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2005); IR. CONST. art. 45,

systems, such as Holland and Finland, they are incorporated automatically into national law in the form of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"),¹¹ but case law here is slim.

The reason for this general lack of national engagement stems in part from the historical treatment of socio-economic rights in international law. They initially comprised equal elements of the UDHR along with civil and political rights, and were defined as "indivisible and interdependent" in the Vienna Declaration.¹² However, these two categories of rights were categorized and divided into two separate international covenants—the ICESCR and the International Covenant on Civil and Political Rights ("ICCPR")¹³—at the time of the Cold War, largely as a result of political and ideological differences between the Soviet bloc and the United States.¹⁴ The Covenants set out their respective rights in different terms: whereas in the ICCPR the rights are subjects of immediate obligation,¹⁵ in the ICESCR they are to be achieved by the more intangible notion of "progressive realization."¹⁶ The two categories of rights were also given divergent levels of support for

reprinted in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2004).

11. See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

12. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc A/CONF.157/23 (July 12, 1993).

13. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 172 [hereinafter ICCPR].

14. See Irish Human Rights Commission, *Making Economic, Social and Cultural Rights Effective: An IHRC Discussion Document*, 11 (2005), available at http://www.ihrc.ie/_fileupload/banners/DRAFTDOC.pdf (noting that the Soviet Bloc "argued that economic and social rights and equality are antecedent to civil and political freedoms," whereas the United States asserted "that economic and social rights . . . are oppositional to civic freedom"); Philip Alston, *Economic and Social Rights*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 137, 152 (Louis Henkin & John Lawrence Hargrove eds., 1994) (claiming that "the ideological struggles between communism and capitalism" marked a change from "what was a rational and balanced debate [on human rights] into a struggle that encouraged the taking of extreme positions and prevented objective consideration of the key issues raised by the concept of economic and social rights").

15. ICCPR, *supra* note 13, arts. 1-5, 40, 44, 48-50, 999 U.N.T.S. at 173-74, 181, 184-85.

16. ICESCR, *supra* note 11, arts. 2, 13, 14, 22, 993 U.N.T.S. at 5, 8-10.

monitoring state compliance: whereas the ICCPR was allocated the treaty-based Human Rights Committee comprised of an independent body of experts,¹⁷ no mechanism was set up for the ICESCR until the formation of the Committee on Economic, Social and Cultural Rights (“CESCR”) in 1986, which is obliged to operate under the direction of the politically constituted United Nations Economic and Social Council.¹⁸ Additionally, regional courts such as the Inter-American Court of Human Rights and the European Court of Human Rights have been set up to adjudicate disputes over civil and political rights, whereas the CESCR remains the only mechanism available for socio-economic rights claims, and is able to deal with a only minute fraction of cases, meeting in any event with little political cooperation. The position of socio-economic rights within national jurisdictions has tended to reflect these attitudes of negativity or ambivalence about enforcement on the international level, which persist despite the United Nations’ efforts to realign approaches to the two covenants.¹⁹

Although the mood of legal scholarship is changing on the matter of socio-economic rights, commentators who remain skeptical about the enforceability of socio-economic rights put forward a range of reasons for their views, spanning from points of principle, concerning the need for and legitimacy of constitutionalization and judicial enforcement, to points of practice, relating to the institutional competence of the judiciary in this area.²⁰

17. See ICCPR, *supra* note 13, arts. 28-45, 999 U.N.T.S. at 179-84.

18. See U.N. High Comm’r for Hum. Rts., *Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights*, ¶ 6 available at <http://www.ohchr.org/english/about/publications/docs/fs16.htm#6> (last visited Sept. 10, 2006).

19. See ECOSOC, Comm. on Econ., Soc. and Cultural Rts., *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, ¶¶ 4-12, U.N. Doc. E/C.12/2000/13 (2000) (observing that both the 1986 Limburg Principles and the 1997 Maastricht Guidelines stress the importance of standards of equivalence in the enforcement of civil and political, as well as economic, social and cultural rights).

20. See Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 15 (1992).

II. CONCEPTUAL BARRIERS TO THE ENFORCEABILITY OF SOCIO-ECONOMIC RIGHTS

A. ADEQUACY OF EXISTING LAW

The challenge to the necessity for enforceable socio-economic rights must be addressed at the outset. As core socio-economic issues such as nutrition, education, health, housing, income and social security are already covered by welfare state provision and by regular law in developed countries, it is suggested that the entrenchment of new enforceable rights is unnecessary, and would in fact be detrimental, because it eats into valuable public resources and creates an extra workload for an already-overstretched judiciary.²¹ It is notable that countries with the strongest “socio-economic rights” such as Sweden actually have very little litigation, and just have strong welfare systems. Indeed, it is clearly advisable to minimize litigation as far as possible by having the optimum social policies in place through legislation. However, this does not invalidate the need for legally enforceable mechanisms to protect those systems. For instance, in Sweden, the government has been introducing cutbacks in the welfare system, and as a result the courts have recently begun to take a more assertive role in adjudicating matters such as housing.²²

Some commentators argue that regular common law is sufficient to deal with such changes in the administrative system, and maintain the fundamental standards that underpin socio-economic rights.²³ However, similar arguments were put forward in relation to civil and political rights in the United Kingdom before they were incorporated into domestic law by the Human Rights Act 1998,²⁴ and yet the value

21. See *id.* at 3-4, 9-10, 15, 20, 24-25 (observing that social rights require government action and lack judicial competence).

22. See ECOSOC, Comm. on Econ., Soc. and Cultural Rts., *Concluding Observations of the Committee on Economic, Social and Cultural Rights, Sweden*, ¶¶ 7-9, 12, U.N. Doc. E/C.12/1995/5 (1995).

23. Jeffrey Jowell goes so far as to argue that almost all South African cases on socio-economic rights could be applied in UK law under common law administrative jurisprudence. Jeffrey Jowell QC, *Administrative Justice and the New Constitutionalism in the United Kingdom*, in *REALISING ADMINISTRATIVE JUSTICE* 78, 80, 92 (Hugh Corder & Linda van der Vijver eds., 2002).

24. See Human Rights Act, 1998, c. 42, pt. I, arts. 2-12 (Eng.).

of having an entrenched set of enforceable rights to act as a safeguard against breach of these standards has been subsequently widely affirmed. Without socio-economic rights, the degree of judicial “creativity” employed to achieve a just result on what are clearly socio-economic rights matters has at times bordered on the absurd; the United Kingdom’s *JCWI* case²⁵ is a clear example. In the 1990s, the Conservative government decided to remove welfare state support for asylum seekers who applied late.²⁶ In order to condemn this legislation, and without the ability to resort to fundamental socio-economic rights, the Court of Appeal sought to find a common law right against destitution and resurrected a case from 1803: *Inhabitants of Eastbourne*,²⁷ which concerned a rather incongruous situation where the claimants were ordered to feed a starving family whose father was not a native of England.²⁸ Lord Ellenborough used such phrases as “laws of humanity” in justifying the decision.²⁹ Such creativity of interpretation, though, is not always possible, and does not represent a reliable approach.

Socio-economic rights can also be indirectly incorporated via the interpretation of civil and political rights. For instance, the right against “inhuman and degrading treatment” encompassed in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms³⁰ can be invoked in relation to inadequate living conditions in cases involving homeless or disadvantaged persons. However, this too involves stretching the right to its conceptual limit, and in U.K. courts has been interpreted as having an extremely high threshold.³¹ Other broadly-defined constitutional

25. *R v. Secretary of State for Social Security ex parte Joint Council for the Welfare of Immigrants (JCWI)*, [1997] 1 W.L.R. 275, 283-84.

26. *Id.* at 283.

27. *R v. Inhabitants of Eastbourne*, (1803) 4 East. 103, 107.

28. *JCWI*, [1997] 1 W.L.R. at 292 (reciting the facts of *Eastbourne*).

29. *Id.* Another passage from *Eastbourne* that Lord Ellenborough cited in his opinion reads “[a]s to there being no obligation for maintaining poor foreigners before the statutes ascertaining the different methods of acquiring settlements, the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving.” *Id.* (citing *Eastbourne*, 4 East at 107).

30. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

31. See, *R v. Secretary of State for the Home Department*, [2005] 3 W.L.R. 1014 (H.L.) (adjudicating asylum seekers’ claim that the Secretary of State violated their “right not to be subjected to inhuman or degrading treatment”

rights can also be interpreted with the effect of indirectly incorporating socio-economic rights, such as the “right to human dignity and freedom” which forms a part of Israel’s Basic Law,³² and was recently adjudicated upon by the Israeli High Court in relation to an appeal against welfare cuts.³³ The court rejected the appeal, and although the Chief Justice stated that “[o]ur ruling is not designed to prevent any future petitions on citizens’ rights to dignified human subsistence” and recognized “the constitutional right to live in dignity,”³⁴ it is clear that such broadly-phrased rights are not satisfactory legal bases for distinct socio-economic issues such as the receipt of benefits. Such omissions, then, seem to point clearly to the need for reform; as Van Bueren has optimistically expressed, “economic, social and cultural rights represent the next constitutional dynamic.”³⁵

B. JUDICIAL POLICY-MAKING?

It is argued, however, that elevating socio-economic rights to a status of legal enforceability would threaten traditional notions of democracy and the separation of powers.³⁶ Socio-economic issues are

guaranteed by Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms). Lord Bingham of Cornhill states that

[a]s in all article 3 cases . . . in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3 [unless] . . . a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.

Id. at 1018.

32. Basic Law: Human Dignity and Liberty, 1992, S.H. 1391 (Isr.).

33. HCJ 366/03, 888/03 Mehuyavut and Association for Civil Rights v. Ministry of Finance and the National Insurance Institute [2005] (Isr.), *available at* <http://elyon1.court.gov.il/files/03/660/003/a39/03003660.a39.pdf>.

34. Yuval Yoaz, *Court: State Must Ensure Dignified Subsistence*, Dec. 13, 2005, <http://www.haaretz.com/hasen/objects/pages/PrintArticleEn.jhtml?itemNo=657013>

35. Geraldine Van Bueren, *Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act*, 2002 PUB. L. 456, 457.

36. See David M. Beatty, *The Last Generation: When Rights Lose Their Meaning*, in HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 321, 326 (David M. Beatty ed., 1994) (recognizing the concern some have regarding the upholding of the separation of powers in the context of cases involving socio-economic rights).

considered to constitute the core of political policy: the realm of elected representatives rather than an unelected judiciary.³⁷ Some commentators worry about the radical nature of the “new and unprecedented responsibilities” for judges that would be created by this encroachment into the legislative sphere.³⁸ The communitarian critique comes to a similar conclusion, but for different reasons; arguing that constitutional adjudication on socio-economic issues will ultimately have a negative impact on the development of social justice, on the basis that the judicial approach to change is inherently reactionary, and it is only the political sphere that enables radical debates that catalyze more progressive social policies.³⁹ Both of these attitudes indicate a distrust of the judiciary as an institution and the process of constitutional review in general.⁴⁰ It is important to note, however, that the arguments of judicial policy-making and judicial conservatism also apply to civil and political rights issues. A clear example of this is the case of *Brown v. Board of Education*, which was responsible for condemning the policy of segregation of blacks in the American educational system—a radical and progressive judgment.⁴¹ It is now widely accepted that judicial review of such policies is a valuable mechanism for intervention where policies are threatening human rights standards.

An alternative policy-based argument against judicial adjudication of socio-economic rights is that, as rights claims are decided on a

37. See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1063-65, 1082, 1105-07 (1981); see also Michael Mandel, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* 39, 51 (rev. ed. 1994) (observing that “[n]obody could seriously argue that courts are as representative as legislatures” when dealing with socio-economic rights).

38. David M. Beatty, *supra* note 36, at 325.

39. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 648-51 (1990) (concluding that constitutional socio-economic rights are not “judicially heard” and thus remain silent and suggesting a “reorientation of progressive constitutionalism to the legislative arena would bring progressive constitutionalism into line . . . with progressive politics”).

40. See Scott & Macklem, *supra* note 20, at 8, 43 (suggesting that in regards to the enforceability of socio-economic rights, some critics find that courts are “institutionally incompetent institutions to entrust with their delineation and enforcement”).

41. 347 U.S. 483, 495 (1954) (holding that separate schools for black and white children were “inherently unequal” and deprived the children of their equal protection rights).

case-by-case basis, the political result of their enforceability will be a piecemeal and short-term approach to social policy. This was the basis for the defense case made on behalf of the Thatcher government when criticized by the United Nations for having inadequate socio-economic rights standards. In defense they protested that although spending on social areas such as welfare was being curbed in the short term, this formed a part of their strategy to improve economic growth in the longer term, which would ultimately create the necessary resources.⁴² This raises interesting questions relating to the notion of progressive realization. However, again, if a commission existed with the role of producing impact assessment studies relating to policy measures, then judges would be enabled to take wider and more long-term policy considerations into account when coming to balanced decisions on such matters.⁴³

Indeed, rights-based policy making could in fact have an ameliorative effect on the process of policy development, by increasing the precision of diagnosing problems and prescribing future developments. Focusing on the effects of policies on individuals is an efficient mode of policy evaluation, and would lead to greater streamlining and rationality.⁴⁴ Legal rights would also have the effect of improving the accountability of government, and create a consequent incentive to improve transparency.⁴⁵

42. See, e.g., Larry Elliott & David Brindle, *The Election: Unequal 'Not Unfair' in Tory Equation*, THE GUARDIAN, Apr. 28, 1997, at 13 (discussing Margaret Thatcher's belief that the poor will benefit from "trickle-down" economics).

43. The "piecemeal policy" argument is also put forward by some communitarians, who feel that social policy should be decided in a holistic way by the democratically elected government; it tends to blur with the boundaries of the protest against any form of judicial review as a matter of principle. Again, it is important to recognize that civil and political rights also have an impact on policy, and that socio-economic rights tend in fact to be less individualistically-oriented than civil and political rights.

44. See Martin Loughlin, *Rights, Democracy, and Law*, in SCEPTICAL ESSAYS ON HUMAN RIGHTS 41, 49 (Tom Campbell et al. eds., 2001) (discussing how the theory of liberal republicanism argues that rights are "capable of strengthening social bonds").

45. See Irish Human Rights Commission, *supra* note 14, at 60 (emphasizing that the Vienna Declaration requires judicial enforcement of socio-economic rights).

C. POSITIVE VS. NEGATIVE RIGHTS

The key difference between the elevation of socio-economic rights and civil and political rights to a status of enforceability, in terms of potential intrusion into political policy, is alleged to be that of “positive” and “negative” effects. Socio-economic rights are “positive rights,” requiring the state to expend resources to provide a remedy, whereas civil and political rights are “negative rights,” which simply require the state to refrain from unjust interference with individual liberty. The “positive rights” criticism tends to align with a conservative ideological view, suspicious of perceived steps towards increased state intervention that would interfere with the operation of the free market by authorizing redistribution of wealth.⁴⁶ The preference for negative rights alone derives from principles of natural law,⁴⁷ in particular the Kantian view of negative liberty based on autonomy. From this perspective, the poverty that an individual may experience as the result of the operation of a free market is not to be construed as a limitation of individual liberty, as the outcomes of markets are an unintended consequence of decisions of individuals to buy and sell.⁴⁸ This goes some way to explaining the double

46. See KEITH JOSEPH & JONATHAN SUMPTION, *EQUALITY* 47–49 (1979) (suggesting that “poverty is not unfreedom” because the individual can still make decisions about the use of their available resources). But see FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 86 (1960) (proposing that “it is the essence of the demand for equality before the law that people should be treated alike in spite of the fact that they are different”).

47. See MATTHEW C. R. CRAVEN, *THE INTERNATIONAL COVENANT OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT* 10–11 (1995) (claiming that there is a widespread, but mistaken, belief that human rights are founded on principles of natural law and that positive rights do not fit into this conception). Craven notes that this belief may be at least a partial cause of modern skepticism of socio-economic rights. *Id.*

48. The American liberal approach has influenced the approach of prominent rights theorists, such as Dworkin, who have tended to ignore socio-economic rights and to concentrate on values of individual liberty. See Clifford Orwin & James R. Stoner, Jr., *Neoconstitutionalism? Rawls, Dworkin, and Nozick*, in *CONFRONTING THE CONSTITUTION: THE CHALLENGE TO LOCKE, MONTESQUIEU, JEFFERSON, AND THE FEDERALISTS FROM UTILITARIANISM, HISTORICISM, MARXISM, FREUDIANISM, PRAGMATISM, EXISTENTIALISM* 437, 454 (Allan Bloom ed., 1990) (emphasizing that Dworkin defines rights as individual rights). Even Rawls, who endorses redistribution of wealth, rejects the idea of fundamental social rights. *Id.* at 439 (reinforcing Rawls’ view that “fair equality of opportunity cannot be compromised for the sake of increasing social wealth”).

standard of the U.S. Supreme Court, which has openly acknowledged that socio-economic rights receive scant judicial scrutiny in relation to civil and political rights,⁴⁹ a position that undoubtedly reflects the libertarian orientation of the country's socio-political outlook.⁵⁰ Today the United States refuses to acknowledge socio-economic rights, not only as being legally enforceable, but as constituting human rights at all.⁵¹

Even those who are not ideologically opposed to the principle of state intervention in the form of public expenditure may query the merits of giving responsibility to an unelected judiciary to determine that expenditure through positive rights litigation. But the presumption that socio-economic rights as positive rights is questionable. Firstly, the enforcement of civil and political rights also requires resource expenditure, and as such, these rights are equally positive.⁵² For instance, the right to a fair trial can only be attained by the maintenance of an expensive court system. The case of *Airey v. Ireland*,⁵³ highlights this point, as it suggests that the right

49. See HENRY J. ABRAHAM & BARBARA A. PERRY, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 11, 17 (8th ed. 2003) (referencing the notion of a "double standard" and crediting the idea of "preferred freedoms" to Justice Stone when he specifically enunciated the "double standard" as an activist doctrine (citing the famous "Footnote Four" in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938))).

50. It is important to note that the United States has not always stood against socio-economic rights. President Roosevelt directly endorsed the view that they should be inalienable and advocated an "Economic Bill of Rights" in his State of the Union Address. Franklin D. Roosevelt, State of the Union Address, Jan. 11, 1944, in 90 CONG. REC. 55, 57 (1944). But this position was conclusively rejected by the conservative Reagan government in the 1980s. See, e.g., Ronald Reagan, State of the Union Address (January 27, 1987), reprinted in *PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES*, 56, 58–59 (United States Government Printing Office, 1989) (encouraging the abolishment of federal welfare programs and suggesting more local projects).

51. See, e.g., Phillip Alston, *Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 348–49 (1987) (observing U.S. opposition to the creation of the Committee on Economic, Social and Cultural Rights).

52. See, e.g., CHARLES FRIED, *RIGHT AND WRONG* 113 (1978) (suggesting that "[h]onoring negative rights is costly"); HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 37 (1980) (arguing that all rights impose both negative and positive duties).

53. See *Airey v. Ireland*, Eur. H.R. Rep. 305, 315 (1979) (finding in a judicial separation proceeding that "the possibility to appear in person before the High Court does not provide the applicant with an effective right of access" when it is

to a fair trial goes so far as to constitute a right to legal aid funding.⁵⁴ The assertion that socio-economic rights matters tend to require a *more* resource-intensive state response is questionable, and is dependent on the individual case.

Secondly, judicial review of a socio-economic right does not necessarily involve the determination of a particular level of resources to be spent by the state or the exact way they are to be spent; a judgment can simply consist of pointing out where a violation has occurred, and instructing that it should be remedied in which ever way the public authority deems most appropriate, or simply that an appropriate inquiry should be instigated. For example, in the Venezuelan case *Cruz del Valle Bermudez v. Ministry of Health and Social Action*,⁵⁵ the Supreme Court considered whether those with HIV/AIDS had the right to receive the necessary medicines without charge and, identifying a positive duty of prevention at the core of the right to health, it ordered the Ministry to conduct an effective study into the minimum needs of those with HIV/AIDS to be presented for consideration in the government's next budget.⁵⁶

Thirdly, even where expenditure is clearly required for remedial action, judges are, in practice, very sensitive to their constitutional role within the state and are not keen to authorize large amounts of money to be spent unless it is absolutely necessary, well aware that resources are not limitless. The South African case *Soooramoney v. Minister of Health, Kwazulu-Natal* is a clear example of this.⁵⁷ Fears

difficult for the plaintiff to coherently present her case without the aid of counsel).

54. *Id.* at 314–16 (holding that although the Convention for the Protection of Human Rights and Fundamental Freedoms does not explicitly provide for a right to free legal assistance in civil cases, in some circumstances Article 6.1 may require the states to provide free legal assistance when such assistance proves indispensable for securing an effective access to court).

55. See Joint United Nations Programme on HIV/AIDS, *Courting Rights: Case Studies in Litigating the Human Rights of People Living with HIV*, 66, UNAIDS/06.01E (March 2006) (citing *Bermudez et al. v. Ministerio de Sanidad y Asistencia Social*, Supreme Court of Justice of Venezuela, Case No. 15.789, Decision No. 916 (1999)) (discussing the court's declaration that the right to life was a "positive right" and found that every Venezuelan was at least entitled to necessary HIV medication because of that right).

56. *Id.* at 64, 66.

57. 1998 (1) SA 765 (CC) at 771,776 (S. Afr.) (finding that the state was not required to provide dialysis to every patient; rather the judgment of medical

that legal enforceability of positive socio-economic rights will suddenly open the floodgates and swamp the state with resource demands appear to be unfounded. In evaluating the situation in South Africa, Sandra Liebenberg has emphasized that maintaining a constitutional dialogue between the judiciary and legislature is an important means of achieving the right balance between judicial intervention and legislative and executive direction of policy.⁵⁸

D. POVERTY AND JUST DEMOCRACY

To label socio-economic rights as positive rights detracts from the fundamental nature of their content; in essence, they consist of rights to a provision of resources necessary in order to live a minimally decent life within society. Amartya Sen views them in terms of basic "human well-being," conceived in terms of how a person can "function," through "activities (like eating or reading or seeing), or states of existence or being, e.g., being well-nourished, being free from malaria, not being ashamed by the poverty of one's clothing or shoes."⁵⁹ To have autonomy and to be able to exercise choice, human beings need to be able to function in these basic ways, and socio-economic rights can therefore be considered "component[s] of a commitment to individual freedom,"⁶⁰ as means of *enabling* civil and political rights to exist. For example, without being literate there is not much use for the right to freedom of speech, and without housing there is not much use for a right to privacy. From this perspective, the decision to make only civil and political rights legally enforceable appears illogical.⁶¹

authorities and available resources should dictate what obligations the state must fulfill).

58. See Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?*, 6 L., DEMOCRACY & DEV. 159, 189 (2002) (discussing how the court's comprehensive plan for implementation of socio-economic rights will help direct and execute and legislation and policies).

59. Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 THE J. PHIL. 169, 197–98 (1985).

60. See DAVID FELDMAN, *CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES* 113 (2d ed., 2002).

61. See also K.D. Ewing, *Constitutional Reform and Human Rights: Unfinished Business?*, 5 THE EDINBURG L. REV. 297, 323 (2001) (suggesting "[t]here is a need to underpin the reform project with the constitutional protection of social rights . . . [t]his is necessary not only to give life to those human rights

Data has revealed a strong link between poverty and access to a broad range of human rights.⁶² Consequently, there is a political argument of democratic principle in favor of socio-economic rights: that they are important means to achieve a *just* form of democracy, because they are instruments designed to help minority groups and the most disadvantaged members of society improve their situation through affirmative action, thereby redressing the “tyranny of the majority” that results from a democracy without such safeguards.⁶³

E. HUMAN EXISTENCE AS SOCIAL EXISTENCE

Philosophically, too, it is argued in favor of socio-economic rights that, as we are inherently “social beings,”⁶⁴ socio-economic rights better reflect our experience of human existence than the individualistically-centered civil and political rights.⁶⁵ Therefore, to render only civil and political rights legally enforceable, in fact represents a structural imbalance in our *conception* of rights. Socio-economic rights are by definition more socially oriented; they add a participatory, duty-based element to the idea of human rights, and reflect a concern for the welfare of the community, and as such are aligned to a notion of citizenship that is much sought after in today’s political environment.⁶⁶ Feminist rights theory takes a similar view of structural imbalance, proposing that civil and political rights have been disproportionately prioritized by patriarchal political and legal

which have already been entrenched, but also to respect the indivisibility of human rights generally; to restore balance to . . . constitutional protection”).

62. See U.N. DEVELOPMENT PROGRAMME [UNDP], HUMAN DEVELOPMENT REPORT 2005: INTERNATIONAL COOPERATION AT A CROSSROADS: AID, TRADE AND SECURITY IN AN UNEQUAL WORLD 54, 57, 227–29, *available at* <http://hdr.undp.org/reports/global/2005> (showing that poverty interferes with “substantive freedoms”).

63. See JOHN STUART MILL, ON LIBERTY 4 (Elizabeth Rapaport ed., Hackett Publishing Co., Inc. 1978) (1859) (recommending that “there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose . . . its own ideas and practices as rules of conduct”).

64. Van Bueren, *supra* note 35, at 456.

65. See JACK DONNELLY, THE CONCEPT OF HUMAN RIGHTS 27–44 (Preston King ed., 1985) (suggesting that rights correspond to various philosophical anthropologies or understandings of the nature of humans).

66. See HUNT, *supra* note 3, at 183 (proposing that social rights are necessary for “marginalised individuals and groups” to “enjoy full and effective citizenship”).

systems because their purpose is to afford protection for men in public life, and that socio-economic rights which affect life in the private sphere, the world of women, have been neglected.⁶⁷

Constitutional entrenchment of rights sends a strong, expressive message to citizens. As Scott and Macklem observe:

A failure to entrench social rights is an act of institutional normatization that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognize the realities of life for certain members of society who cannot see themselves in the constitutional mirror. Instead, they will see the constitutional construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted.⁶⁸

F. CONCEPTUAL CLARITY AND LEGAL CERTAINTY

Despite these points of principle, legally enforceable socio-economic rights are denounced on the basis of the principle of legal certainty; it is argued that they are, by nature, open-ended and indeterminate, and that there is a lack of conceptual clarity about them.⁶⁹ Which treatments, for instance, should be included in the right to an adequate minimum standard of health care? How are judges to decide when such rights have been violated? This may initially appear to be a matter of concern, particularly in view of the differentiation in poverty thresholds that exist between states and between regions, and the variability of conceptions of what constitutes an adequate standard of living, which would seem to

67. See Christine Chinkin & Shelley Wright, *The Hunger Trap: Women, Food, and Self-Determination*, 14 MICH. J. INT'L L. 262, 301 (1993) (claiming that the "male-oriented" focus deprives women and children of their own needs).

68. Scott & Macklem, *supra* note 20, at 35–36. Social theorists such as Pierre Bourdieu and Patricia Williams have emphasized the importance of the existence and content of rights in social discourse. See *id.* at 27–28 (noting Bourdieu's and Williams' suggestions that discussion of rights is needed to achieve equality).

69. See Michael J. Dennis & David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There Be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, 98 AM. J. INT'L L. 462, 464, 473 (2004) (suggesting that many States ignore socio-economic rights because they are "imprecise [and] unenforceable").

exacerbate these difficulties.⁷⁰ However, this argument has been substantially rebutted institutionally, in scholarship, and in practice. Specifically, the CESCR has issued a series of General Comments that support the capacity of many socio-economic rights for interpretation,⁷¹ and it has adopted a twin-track approach of identifying a “minimum core” standard (required for all states), and requiring “maximization” (whereby a state must take all reasonable steps to realize the standard set of rights). In national law there have been varied responses to this approach. Countries such as Brazil and Venezuela have adopted a minimum core approach,⁷² whereas South Africa has taken a reasonable steps approach,⁷³ neither of which seem to have posed insurmountable conceptual difficulties for the judiciary. Many legal theorists have supported the capability of socio-economic rights to constitute viable legal entities,⁷⁴ and case

70. See generally, Comparative Research Programme on Poverty [CROP], LAW, POWER & POVERTY, (AsbjørnKjønstad & John Veit Wilson eds., 1997) available at <http://www.crop.org/publications/files/cpubl/LAP97book.pdf>.

71. See ECOSOC, Comm. on Econ., Soc. & Cultural Rts., *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 12: The Right to Adequate Food*, ¶ 19, 6 U.N. Doc E/C.12/1999/5 (May 12, 1999) giving examples where a right to adequate food would have been violated, including: “repeal or suspension of legislation necessary for the continued enjoyment of the right to food; denial of access to food to particular individuals or groups, whether the discrimination is based on legislation or is pro-active; [and] the prevention of access to humanitarian food aid in internal conflicts or other emergency situations”).

72. See BRAZ. CONST. art. 6-11, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2006); VENEZ. CONST. arts. 75–111, *reprinted in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2000).

73. See S. AFR. CONST. 1996 *supra* note 6, § 27 (requiring the state, with regard to health care, food, water and social security, to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”).

74. See CRAVEN, *supra* note 47, at 151–52 (finding that legislation may be “indispensable” for the enforcement of rights and national judicial solutions should be emphasized); see also HUNT, *supra* note 3, at 204–05 (suggesting that lawyers should become more involved in ensuring that socio-economic rights are enforced); Alston, *supra* note 51, at 379–80 (encouraging states to make a “political commitment” in their domestic policy to execute the obligations set forth in the Covenant on Economic, Social and Cultural Rights); Audrey R. Chapman, *A “Violations Approach” for Monitoring the International Covenant on Economic, Social and Cultural Rights*, 18 HUM. RTS. Q. 23, 39–40 (1996) (proposing that a “complaints procedure would render issues concrete and tangible” and would give rights more “political salience”); Frank I. Michelman, *Welfare Rights in a*

law is being developed in South Africa and elsewhere to demonstrate the application of coherent socio-economic rights in domestic practice.

A key example is *Soobramoney*, which involved the interpretation of the right to health care services provided by the state.⁷⁵ The South African Constitutional Court held that the right did *not* hold the state under a duty to provide the claimant, a diabetic sufferer, with kidney dialysis.⁷⁶ His kidneys had failed, and his condition was diagnosed as irreversible, yet he was denied dialysis by the local hospital on the basis of a prioritization policy based on limited resources.⁷⁷ The court held that the right could not be interpreted to mean that the treatment of terminal illnesses had to be prioritized over other forms of medical care needed by other citizens, such as preventative treatment.⁷⁸ Furthermore, the right to state health care had to be interpreted in context of availability of health services generally; if treatment was provided to Mr. Soobramoney, it would have to be provided to all others in his position, which would constitute an impossible expansion of the dialysis program.⁷⁹ The court emphasized that the responsibility of fixing the health care budget and deciding priorities lay with political organizations and medical authorities, and that the court would be slow to interfere with such decisions if they were

Constitutional Democracy, 1979 WASH. U. L.Q. 659, 659 (1979) (reasoning that a constitutional right to socio-economic rights exists in the U.S.); Scott & Macklem, *supra* note 20, at 147–48 (disagreeing with notions that social rights are unenforceable because of lack of judicial skill); Richard L. Siegel, *Socioeconomic Human Rights: Past and Future*, 7 HUM. RTS. Q. 255, 266–67 (1985) (foreseeing an increase in social right enforceability by States); Van Bueren, *supra* note 35, at 461–62 (claiming that enough jurisprudence exists to make socio-economic rights justiciable).

75. *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.).

76. *See id.* at 778 (holding that the state did not violate its constitutional duty when it failed to provide terminal patients with dialysis).

77. *Id.* at 769–70 (reporting the hospital's policy of admitting only patients who could be cured within a short period—which the appellant could not—or those with chronic renal failure eligible for a transplant—which the appellant was not because of a prior heart condition—or those who required emergency medical treatment—a category into which the appellant's condition did not fall).

78. *Id.* at 777 (reasoning that the state must balance its resources to provide care for all those it serves).

79. *Id.* at 775–76 (suggesting that the current use of the dialysis machines is the most efficient because an increase in usage would drain state resources).

rational and “taken in good faith.”⁸⁰ In summary, the court interpreted the right as pertaining to emergency and primary health care only, leaving a wide scope to the state, and the court came to this interpretation in a rational, informed manner.

Again, it is important to remember that similar criticisms of conceptual clarity were leveled at civil and political rights before their jurisprudential development through practice and scholarship.⁸¹ Even now, the scope of rights, such as freedom of speech, are far from being set in stone, and are constantly being re-evaluated. A lack of volume of precedent case law in global terms is no reason to denounce the principle that enforceable rights should exist. Enacting legislation to give concrete effect to constitutional rights is a vital way to provide greater clarification on their meaning and content.⁸²

III. PRACTICAL ISSUES WITH ENFORCEMENT

A. COMPLEXITY OF ADJUDICATION AND SOCIAL IMPACT

Another, related argument is made against the practicability of legal enforcement: that cases involving socio-economic rights are too complex for judges to analyze adequately, as the social and economic issues they raise tend to be embedded in a complex web of causes and effects.⁸³ Consequently, there is a danger that a judicial decision that effected a change in public policy or in the distribution of resource expenditure could upset the balance in ways that a court

80. *Id.* at 776.

81. See, e.g., K.D. Ewing, *The Unbalanced Constitution*, in *SCEPTICAL ESSAYS ON HUMAN RIGHTS*, *supra* note 44, at 103, 107-08 (criticizing the Human Rights Act of 1998 as troublesome to enforce because “the rights themselves are vague and open-ended” and arguing that the Act will create a “new hierarchy of rights”).

82. See Irish Human Rights Commission, *Observations on the Disability Bill 2004*, 32-34 (Nov. 15, 2004), available at http://www.ihrc.ie/_fileupload/publications/Disability_Bill_2004_Obs.doc (emphasizing that state legislative action specifying a statute of limitations, as well as requiring public hearings when assessing complaints, can improve enforcement and justiciability of the Disability Bill of 2004).

83. See Scott & Macklem, *supra* note 20, at 23-24 (discussing a popular view in constitutional scholarship that judges lack the skills, education, or training to adjudicate socio-economic cases given the complexity of the conflicting interests involved, often including questions of institutional design, policy choice, and politics).

might not expect, as its decision on one area of social policy could have an impact on another. This potentially problematizes the legitimacy of judicial intervention, and suggests that socio-economic rights cases could therefore overstep the proper boundaries of judicial review.

This argument is questionable. Firstly, there are certain aspects of socio-economic rights that cannot be said to present such complex problems for the courts; issues such as arbitrary eviction from one's home seem ideally suited to judicial determination. Second in any event, it seems unjustified to accuse judges of an inability to cope with complexity, when they are trained directly to be able to analyze and evaluate many different types of legal cases involving an extensive amount of complex evidence, of which corporate tax fraud cases are just one example. If judges are provided with adequate information on the factors involved in a socio-economic rights case, there is no reason why they should not be more than competent to adjudicate such a case. An example of the judicial capability to assess core levels of welfare entitlement is the Canadian case *Finlay v. Minister of Finance of Canada*, where the court decided that the state cannot deduct from welfare checks amounts that it may have overpaid in error on previous welfare checks, as this would bring the recipient below the level of minimum need.⁸⁴ The judges unanimously agreed that they were capable of determining the scope of this need and the level of benefits needed to maintain it, despite the fact that they were relying on a liberal interpretation of an agreement between federal and provincial governments in order to do so.

However, it should be acknowledged that there are highly complex social conditions surrounding certain socio-economic rights claims that need to be clearly understood by judges in order for comprehensive analysis to be possible. Therefore it is important that mechanisms be put in place to give judges access to the relevant information. I would emphasize the value of establishing a mechanism such as a commission of experts on socio-economic rights, with the role of assimilating statistics and information and

84. (1990) 71 D.L.R. (4th) 422, 443 (concluding that it cannot be within the state's best interest to "bleed those who live at or below the poverty line"); see also Scott & Macklem, *supra* note 20, at 78.

producing evaluation reports on the standards in their particular country or region, as well as impact assessment reports to anticipate the effects of potential policy changes.⁸⁵ Additionally, the development of a comprehensive set of methodologies for judges to employ in analyzing the evidence would be another way to address the complexity problem.

B. REMEDIES AND IMPLEMENTATION

The notion of providing remedies for socio-economic rights, however, is considered to be problematic, as it is seen as involving social changes that are not capable of immediate implementation, and therefore, in practice, they cannot be treated as enforceable law. Indeed, it is substantially due to this concern that socio-economic rights were framed as achievable via progressive realization in the ICESCR. The CESCR, however, has emphasized that many socio-economic rights *are* instantly realizable, and has listed a series of such rights in its third General Comment.⁸⁶ It is true nevertheless, that an appropriate remedy for others may be less straightforward, and the process of implementation more time-consuming than for civil and political rights. For instance, if a decision is made that education provided through the current curriculum is inadequate, what would a remedy by progressive realization actually mean in lawyers' speak? And how are the courts to assess whether, and with what effectiveness, the government has remedied the situation effectively in response? These problems are real, but surmountable if certain mechanisms are put in place. For instance, methodological changes to courts' procedure-setting remedies, such as the setting of

85. See Irish Human Rights Commission, *supra* note 14, at 82 (describing the United Kingdom's newly created Joint Committee on Human Rights' duties to analyze and advise on human rights issues, using its power to make reports to both Houses, examine testifying witnesses, and require the written submission of evidence).

86. See ECOSOC, Comm. on Econ., Soc. & Cultural Rts., *General Comment No. 3: The Nature of States Parties Obligations*, ¶ 5, U.N. Doc. E/C.12/1990/8 (Dec. 14, 1990) (categorizing a series of provisions in the International Covenant on Economic, Social, and Cultural Rights as "self executing": Article 3 (equal rights for men and women), Article 7(a)(i) (equal pay for equal work), Article 8 (right to form trade unions and strike), Article 10 (3) (right of children to special protection), Article 13(2)(a) (free, compulsory primary education), Article 13(3) (liberty to choose a non-public school), Article 13(4) (liberty to establish schools), and Article 15(3) (freedom for scientific research and creative activity)).

more structural remedies for certain types of case, including time limits for the realization of goals corresponding to the requisite standard, could enable the realization of the right to be monitored and achieved much more easily. Although the role of supervising compliance over a period of time appears to be beyond the scope of the role of national courts, setting up a commission mechanism to monitor compliance would counter the proposed difficulty of post-judgment supervision and assessment of progress towards realization.⁸⁷

C. ACCESS TO JUSTICE

Another potential practical problem is that of access to justice. It is argued that, as has been a tendency with civil and political rights, cases are brought only by the most articulate, assertive, and wealthy individuals; the most disadvantaged, poor, and marginalized do not have the knowledge, ability, or resources to be able to voice their claims, and cases are decided without taking their potentially competing needs into account.⁸⁸ This is an important issue to consider, particularly as socio-economic rights are primarily conceived as a means to assist the least well-off in society. It is quite foreseeable that an assertive person could use the right to health care, for instance, to litigate their right to the latest advance in expensive medical technology to treat their particular heart complaint under the public health system, whilst hundreds of poorer sufferers experience ever-longer waiting lists for regular treatments without being aware or capable of bringing a case to court. The disadvantaged might be further compromised by a reduction in the overall amount of resources as a result of the judicial decision. This would be antithetical to the objective of improving social justice through socio-economic rights, and it raises utilitarian concerns about the

87. See discussion *infra* Part XIV (examining the South African Constitutional Court's difficulties in cooperating with the South African Human Rights Commission in implementing various orders).

88. See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 119-121 (1974) (concluding that wealthy parties have strategic advantages over their lower-income opponents in legal battles due to their ability to retain quality legal and investigative services, in addition to the further advantage of passivity and overload of institutional facilities).

welfare of the majority population in the context of rights litigation. In response to this, it is important to remember that *Soobramoney* represents a precedent to demonstrate that judges are sensitive to these issues and are not timorous about drawing the line at unreasonable rights claims to ensure an adequate minimum standard of health care applies to all.

However, it is also desirable to address this potential problem actively, with mechanisms to ensure that access is assured for the disadvantaged. The Indian judiciary has been very active and creative in finding ways to ensure that the poorest citizens are able to bring claims through public interest litigation (“PIL”), which has involved several measures to increase access. Firstly, the judiciary has expanded the semantics of *locus standi* to give standing to those without traditional aspects of a real interest—such as property— but who have suffered from a “wrong against a community interest.”⁸⁹ PIL has been initiated by individuals on behalf of other individuals and groups, as well as by academic journalists and social action organizations.⁹⁰ Secondly, the judiciary has allowed procedural flexibility: actions have been commenced not only by formal petition but by letters, and there are even reports of an action by postcard.⁹¹ Judges have been known to directly invite actions; one judge converted a newspaper letter into a PIL writ.⁹² The court will often waive fees or award other forms of assistance, and frequently appoints commissions of enquiry to collect facts and relieve the burden on applicants.⁹³ It has also sought to increase the impact of its decisions by treating some individual actions as class actions in

89. *Maharaj Singh v. State of Uttar Pradesh*, [1976] 1 S.C.R. 1072, 1083 (India).

90. See Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495, 499 (1989) (quoting *Mumbai Kangar Sabha, Bombay v. M/S Abdulbhai Faizullahbhai*, [1976] 3 S.C.R. 591, 597 (India)) (“Test litigations, pro bono publico and like broadened forms of legal proceeding are in keeping with the current accent on justice to the common man. . . . Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with the individualization of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker.”).

91. *Id.* at 499.

92. *Id.*

93. *Id.* at 500.

appropriate cases, and issuing orders binding on the entire class.⁹⁴ Such measures have been contested by defendants as violating traditional canons of procedure.⁹⁵ But the Chief Justice has responded that the constitution-makers deliberately did not lay down particular forms of proceeding for enforcement of fundamental rights, and he highlighted a "need to forge new tools . . . for the purpose of making fundamental rights meaningful for the large masses."⁹⁶ I would concur that a proactive approach to implementing such measures is crucial to realize the benefit of socio-economic rights for those who are most in need of them.

IV. SUCCESSES, PROBLEMS, AND LESSONS

A. A COMPROMISE? RIGHTS AS "DIRECTIVE PRINCIPLES"

The Indian Supreme Court has clearly made considerable advances in the realm of socio-economic rights, despite the fact that the Indian Constitution incorporates them solely as "directive principles" rather than as explicitly enforceable rights.⁹⁷ This represents a compromise approach to enforceability that can be taken by states, behind which lies the implication that "justiciability" is a fluid notion, and that legal enforcement is not the only way human rights standards can be set and attained. The response to this strategy in India has been a unique degree of judicial activism by creatively interpreting the directive principles in order to bring them to life as meaningful rights. For instance, in the renowned case of *Olga Tellis v. Bombay Municipal Corporation*,⁹⁸ the Indian Supreme Court held right to life and personal liberty⁹⁹ required that pavement dwellers be

94. *Id.* (citing *M.C. Mehta v Union of India*, [1987] 4 S.C.C. 463) (adjudicating an issue regarding pollution of the River Ganga in which the court published notices in newspapers inviting witnesses to appear before the court and defend their practice of dumping untreated waste into the river).

95. *Id.*

96. *Id.* at 500-01 (citing *Bandhua Mukti Morcha v. Union of India*, [1984] 2 S.C.R. 67, 71, 73 (1983)) (ruling on a dispute concerning bonded labor and the lack of enforcement of abolition law).

97. INDIA CONST. arts. 36-51 (declaring that though no court may enforce the provisions, it is the role of the state to apply them when creating legislation).

98. [1985] 2 S.C.R. Supl. 51.

99. *Id.* at 81, 83 (discussing Article 21 of the Indian Constitution, which confers the rights to life and livelihood).

provided with alternative accommodation before eviction, on the basis that the right to life and liberty included the right to livelihood, outlined in Article 39 as a directive principle.¹⁰⁰

Such intentions to remedy social inequality are commendable. But it has to be acknowledged that this approach puts fundamental notions of legal certainty and the separation of powers in jeopardy. In principle, it is hard to justify the treatment of deliberately non-binding directions about rights as legal obligations directly enforceable in court, as their status is thereby determinable by the whim of the judiciary currently in place, which may pick and choose which policies they attack. In practice, consequently, it is hard for potential claimants and their lawyers to predict with any certainty the outcome of a case, which is dependent on judicial activism. The judiciary have now admitted, however, the potential dangers of this, and have acknowledged that the 1980s cases, decided in a wave of “initial enthusiasm,”¹⁰¹ represented a high water mark, which has now been reversed by more cautious case law.¹⁰² But in any event, it seems evident that explicit legal enforceability is needed in order for socio-economic rights to have legitimacy, credibility, and consistency as human rights in the long term, as an operative part of the legal system.

B. PRACTICABILITY IN POOR COUNTRIES

However, there are reasons why poorer countries such as India may feel unable to entrench socio-economic rights as directly enforceable which are not as pertinent elsewhere; extra difficulties

100. *Id.* at 80 (discussing Article 39(a) of the Indian Constitution, which requires the state to “direct its policy towards securing . . . the right to an adequate means of livelihood”); *see also* INDIA CONST. art. 39(b) (requiring “the ownership and control of material resources of the community are distributed as best to subserve the common good”); *id.* art. 39(c) (holding that the state must secure “the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment”).

101. G. L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT’L & COMP. L.Q. 66, 84 (1991).

102. *See id.* at 85-86 (citing *Himachal Pradesh v. A Parent of a Student of Medical College, Simla* (Medical College), [1985] 3 S.C.R. 676, 677 (India)) (holding that the court cannot mandate the executive or any member of the legislature to initiate legislation because the Constitution does not designate that role to the court).

present themselves in attempting to judicially adjudicate on socio-economic rights where even minimum core standards are hard for the state to achieve. Cases such as *Olga Tellis*¹⁰³ will inevitably constitute somewhat symbolic gestures in India, as they cannot effect the depth of social and economic change necessary to ameliorate the poverty besetting much of the country. However, rather than discount the principle of socio-economic rights on this basis, I would emphasize that this situation highlights the importance, emphasized at the beginning of this article, that socio-economic rights should be supported not just by judicial adjudication, but by broader social welfare policies and economic development strategies, so that all states are focused on achieving the minimum core in every possible way.

C. THE STRUCTURAL BALANCE OF HUMAN RIGHTS

In both poor and wealthy countries, even those with highly developed welfare infrastructures, the omission of enforceable socio-economic rights from national bills of rights arguably creates a structural imbalance which has a direct impact on rights-based case law. This is illustrated by the Canadian case *Wilson v. Medical Services Commission of British Columbia*.¹⁰⁴ Although Canada is widely seen as having developed an exemplary civil and political rights jurisprudence, socio-economic rights do not feature in its Charter of Rights and Freedoms.¹⁰⁵ *Wilson* involved a challenge to new regulations implemented by the province of British Columbia that restricted the authorization of new doctors from practicing unless there was a demonstrable medical or community need in the area.¹⁰⁶ The regulations had been introduced in light of an unequal

103. [1985] 2 S.C.R. Supl. at 80 (holding that the constitutional right to life and liberty include the right to a livelihood).

104. [1988] 53 D.L.R. (4th) 171. See Scott & Macklem, *supra* note 20, at 32; Paul C. Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law*, 40 U. TORONTO L.J. 117, 119-21 (arguing that a Canadian Constitutional right to health would have altered the outcome of the litigation, and that *Wilson* is part of an array of Canadian Charter of Rights and Freedoms cases in which the lack of a constitutional directive has allowed the Court of Appeals to dispose of substantive claims in a "cavalier manner").

105. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, ch. 11, §§ 1-15 sched. B (U.K.).

106. *Wilson*, 53 D.L.R. at 172 (describing the details of the Medical Service Act

distribution of doctors in certain areas, as well as an increase in cost of physician services, and a large number of doctors per capita.¹⁰⁷ They were ruled unconstitutional on the basis of a right to liberty under the Charter. However, had a right to health existed, the outcome may have been very differently decided, since the health needs of disadvantaged members of society with compromised access to a doctor would have had to be weighed into the balance.¹⁰⁸ In such cases, then, where individual freedoms are implicated but where fundamental social standards have also been breached, it is a real practical concern that there is no legal counter-balance to civil and political rights arguments without the existence of legally enforceable socio-economic rights.

D. SOUTH AFRICA'S EXPERIENCE

South Africa, provides an example of explicit constitutional protection of legally enforceable socio-economic rights that cannot be ignored. In contrast to critics' suggestions, it is clear that the judiciary has not treated enforceability as a panacea for finding socio-economic rights violations; the *Soobramoney* case¹⁰⁹ indicates that judges are responsible in respecting the boundaries of their role, and are even accused of being over-cautious. An example of positive application of socio-economic rights is the *Grootboom* case, in which a group of applicants, comprised of 390 adults and 510 children, was evicted from a squatter camp in which they had been living in extremely poor conditions.¹¹⁰ Many had applied for housing, but had

Regulations, which divided the province into thirty four practitioner areas, requiring applicants to apply for a practitioner number individually for each particular area, and directed commissions to consider these applications based on the area's need for the type of medical services provided by the applicant).

107. *Id.* at 197 (summarizing the government's position that the legislation had "legitimate and important purposes: a) cost control; and b) control over the allocation of physicians' services within the province").

108. *See id.* at 198 (holding that the act "is so manifestly unfair," with respect to its effects on the appellant doctors, "as to violate the principles of fundamental justice"); *see also* Scott & Macklem, *supra* note 20, at 32 (arguing that a constitutional right to health care would have enabled the government to argue that the bill was constitutionally required, thus altering the outcome of the litigation).

109. *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

110. *Gov't of the Republic of S. Afr. v Grootboom & Others* 2001 (1) SA 46 (CC) at 53 (S. Afr.) (describing the applicants' living conditions as "appalling" and "intolerable").

been on a waiting list for as long as seven years.¹¹¹ The applicants launched an urgent application for adequate and sufficient basic temporary shelter for the group under Section 26 of the Constitution, which provides that everyone has the right to have access to adequate housing.¹¹² The respondents were ordered by the court to make a local building available, free of charge, as temporary accommodation pending a further hearing.¹¹³

Of course, progress in socio-economic rights jurisprudence in South Africa has not been flawless; indeed, there have been implementation problems in that very case that highlight the pitfalls that have been encountered. It emerged recently that the position of the legally successful complainants has not in fact changed on the ground, five years after the judgment.¹¹⁴ The key problems, it transpires, were with the nature of the order handed down by the Constitutional Court, and the monitoring mechanisms in place. The High Court had made a settlement order, which was only implemented to a limited extent; some services—such as taps—were provided to the community, but the parts of the order requiring continuous involvement—like maintenance and the provision of services such as refuse collection and drainage—were not fulfilled. The Constitutional Court had then made a general order, declaring that the state was obliged “to devise and implement within its available resources a comprehensive and co-ordinated programme progressively to realise the right of access to adequate housing.”¹¹⁵ But this was a weaker order in that it was merely declaratory and did not compel the state to take steps to ensure compliance, or contain any time frames within which the state had to act. The Constitutional Court did not play any role in supervising or overseeing the implementation of the various orders, but indicated that the South

111. *Id.* at 55.

112. *Id.* at 57 (summarizing the applicants' claims that section 26(2) of the South African Constitution provides a basic right to adequate housing, and in addition, imposes "an obligation upon the state to take reasonable legislative and other measures to ensure the realization of this right").

113. *Id.*

114. See Rosalind Dixon, *Creating Dialogue About Socio-Economic Rights: Strong v. Weak-Form Judicial Review Revisited*, (Center for Human Rights and Global Justice, Working Paper No. 3, 2006) 2 (citing Bonny Schoonakker, *Treated With Contempt*, SUNDAY TIMES, Mar. 21, 2004, at 15).

115. *Grootboom*, 2001 (1) SA at 87.

African Human Rights Commission had agreed to monitor and report on the authorities' compliance with the obligations. However, the Commission was not required to report back to the Court,¹¹⁶ and consequently the chain of communication, accountability, and impetus for positive action was broken.

These difficulties, however, are not intractable, and indeed it is evident that lessons are being learned. More recent cases in South Africa, such as *President of The Republic of South Africa v. Modderklip Boerdery* in 2005,¹¹⁷ have had different outcomes, featuring an increased use of structural remedies by the Constitutional Court. Indeed, it is natural for initial teething problems to arise in a radically new area of jurisdiction without national precedent, and for a process of responsive adaptation of the system to occur.

CONCLUSION

In conclusion, then, it is suggested that socio-economic rights can and should be made legally enforceable, with several qualifications. They *can* be made legally enforceable in practice, but on the condition that certain mechanisms are put in place to ensure that their enforcement is effective. Firstly, a commission, ombudsman, or similar monitoring body is needed to produce relevant reports, statistics, and impact assessment studies, and to monitor progress in implementation. This could involve a forum process for assessing the evolving notion of what constitutes minimum basic need within the distinct national context as the basis for determining the scope of the rights and setting benchmarks, which could potentially connect to an international forum for comparative discussions. Secondly, there should be development of specific methodologies for the judiciary to analyze these rights, including the formulation of structural remedies, which should be connected to the output of a commission. This could even extend to the establishment of specialized tribunals to

116. *Id.* at 86 (indicating that section 184(1)(c) of the South African constitution placed the responsibility of monitoring the state's compliance with the court's order on the Human Rights Commission).

117. *President of the Republic of S. Afr. v Modderklip Boerdery (Pty.) Ltd.* 2005 (5) SA 3 (CC) at 27 (ordering the state to pay compensatory damages for its occupation of petitioner's land).

adjudicate on socio-economic matters. Thirdly, measures should be taken to ensure and ameliorate access to justice for disadvantaged groups, such as class actions, potentially including a role for the commission in communicating with such groups. Finally, judicial means of protection as a whole should work in conjunction with administrative systems of protection to develop socio-economic rights in an optimal way, and to maintain the separation of powers.

Socio-economic rights *should* be made legally enforceable in principle, as they are rights that protect the necessities of life and provide for the foundations of an adequate quality of life¹¹⁸ and the conditions for the pursuit of human dignity and equal opportunities.¹¹⁹ As they are rights concerning the welfare of disadvantaged members of society, they reflect the social aspect of our existence as citizens and members of a common humanity, representing an important counterpart to civil and political rights. As a form of protection for individual citizens and a form of accountability for government, they can act as an anchor for a just democratic society, assisting and complementing legislative policy development on socio-economic issues.

There appears, then, to be a strong case for the widespread incorporation of legally enforceable socio-economic rights in national legal systems. But the truth is that without an imminent need for regime change—as experienced by South Africa following the collapse of apartheid—national governments are reluctant to commit themselves to measures which appear to entrench more concrete guarantees of social welfare than they would like—a tendency which is exacerbated by the pressure of multinational corporations to maintain free market conditions. It is unclear whether the new orientation of scholarship in favor of socio-economic rights will be able to counter these opposing forces. However, I would conclude by reinforcing that unless rights are made legally enforceable, rather than remaining merely aspirational, they cannot truly be considered to constitute law at all, and will remain a pipe dream for those who need them most.

118. See Scott & Macklem, *supra* note 20, at 9.

119. See FELDMAN, *supra* note 60, at 113.