The Judicial Enforcement of Socio-Economic Rights in Comparative Perspective

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Abstract

The judicial enforcement of socio-economic rights raises several questions about the legitimacy of the judicial function. Judicial legitimacy, in the words of James Gibson and Gregory Caldeira, “means that people accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions.” The traditional view has been that the enforcement of socio-economic rights are decisions inappropriate for courts to be making because they exceed the capacity of courts, compel governments to take actions not authorized by the people’s representatives, and redistribute resources to pay for them. Whether courts can perform these tasks competently and give meaning to social welfare rights without undermining the principles of separation of powers and representative democracy will have consequences on the legitimacy of the judicial function.

This paper examines how courts and quasi-judicial institutions, such as human rights commissions, at the international, regional, and national levels of governance have given meaning to the socio-economic rights that are entrenched in various treaties, charters, and constitutions for which they are responsible. My aim is twofold: 1) to compare the approaches to these rights employed by courts and other institutions at the international, regional, and national levels of governance, and 2) to contribute to the debate over the legitimacy of judicial action in this area of law. Special emphasis is devoted to the trend toward the increased reliance on “weak form judicial review” by courts and more forceful recommendations by regional human rights commissions to protect social welfare rights, what I call convergence toward hybrid approaches employing hard law and soft law measures.

Introduction

The judicial enforcement of socio-economic rights raises several questions about the role of courts in democratic societies and the legitimacy of the judicial function. Judicial legitimacy, in the words of James Gibson and Gregory Caldeira (2003), “means that people accept judicial decisions, even those they bitterly oppose, because they view courts as appropriate institutions for making such decisions.” The traditional view has been that the enforcement of socio-economic rights, such as the rights to housing, health care, nutrition, education, gainful employment, welfare, and social security, are decisions beyond the capacity of courts. Whether courts can perform certain tasks competently, in this case the fashioning of legal remedies necessary to implement socio-economic rights, certainly has consequences on judicial legitimacy and the ability of courts to get their decisions accepted and implemented.

There are some other obvious objections to the judicial enforcement of socio-economic rights that raise questions of judicial legitimacy. Unlike the judicial capacity objection, which questions whether courts can perform certain tasks, the separation of powers and representative democracy objections question whether courts should even be

2 The term “socio-economic rights” is being used as an abbreviated form of “social and economic rights.” The catalog of rights under the heading socio-economic rights, though not universally agreed, is generally understood to include the so-called “second-generation rights” that place positive duties on government to provide the necessities of life. For the purposes of this paper, I shall be focusing on the rights to housing, health care, nutrition, education, gainful employment, a clean environment, welfare, and social security.
making these decisions. These objections allege that courts violate separation of powers and undermine basic notions of representative democracy when their rulings to enforce socio-economic rights compel governments to adopt policies and redistribute resources to pay for them. Most would agree that decisions about the use of government resources are matters of public policy better left to the people’s representatives in their elective institutions. There is, however, less agreement about what to do when governments fail to act and citizen rights-bearers appeal to courts for help in holding their governments to the constitution’s commitment to welfare rights.

Despite these longstanding objections, increasing numbers of jurists and scholars are taking the view that courts also risk their legitimacy when they rule these rights non-justiciable or refuse to hold governments accountable for failing to deliver on all their constitutional commitments.³ Legitimacy is risked, they argue, when socio-economic rights appear alongside longstanding commitments to political and civil rights in the nation’s fundamental law, and only the latter are protected. Justice Arthur Chaskalson, former President of the Constitutional Court of South Africa, described the dilemma in the following way:

One needs to be sensitive to the role of government in a democratic society. Policies are in the first instance matters for the government and not the courts. The court has said it will be sensitive to this—but on the other hand, the socio-economic rights are rights under the Constitution, and government policy must be developed within a framework required by the Constitution. If government doesn’t do so, then the court is under a duty to say so.⁴

Some jurists and scholars go even further than Justice Chaskalson. They argue that courts must do more than merely say that governments are not meeting their obligations. Courts must resort to the same legal remedies—mandamus, injunction, supervisory jurisdiction, and so forth—used to enforce political and civil rights to enforce social welfare rights. The assumption is, of course, that fundamental political and civil rights and socio-economic rights are interdependent, that is, the fulfillment of socio-economic rights is a necessary precondition for equal access to the basic liberties. Unless the rights protecting the necessities of life are recognized and enforced, people will not have an equal right to the basic liberties. In essence, courts that respect, protect, and fulfill only political and civil rights risk legitimacy by being perceived as institutions that condone inequality or at least unequal access to basic political and civil rights.⁵

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³ Cass Sunstein is one legal scholar who apparently has changed his mind on the subject. In 1996 he argued against the inclusion of socio-economic rights in the constitutions of nations of Eastern Europe making the transition to democratic rule (“Against Positive Rights,” in Andras Sajo, ed., Western Rights?: Post-Communist Application (Kluwer, 1996)), and in 2001 he wrote favorably of the South African Constitutional Court’s decision in the Grootboom case, discussed infra, which gave meaning to the “right of access to adequate housing” in the South African Constitution (Designing Democracy: What Constitutions Do (Oxford University Press, 2001)).


This paper examines how courts and quasi-judicial institutions, such as human rights commissions, at the international, regional, and national levels of governance have given meaning to the socio-economic rights that are entrenched in various treaties, charters, and constitutions for which they are responsible. My aim is twofold: 1) to compare the approaches to these rights employed by courts and other institutions at the international, regional, and national levels of governance, and 2) to contribute to the debate over the legitimacy of judicial action in this area of law.

Debate over the Nature of Social Welfare Rights

Whether socio-economic rights are “rights” deserving the same concern and regard as civil and political rights has been debated for over 60 years. There was controversy from the beginning over the decision to include social welfare rights in the United Nations Declaration of Human Rights (1948). The debate over the nature of these rights continued in 1966, when the UN set out to create a listing of fundamental rights, and the result was two separate covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The ICESCR was drafted and approved by the United Nations General Assembly in 1966 and entered into force in 1976. Today there are 158 countries that have ratified the treaty. The ICESCR provides that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation…with a view to achieving progressively the full realization of the rights recognized in the present Covenant.\(^6\)

The ICESCR recognizes, \textit{inter alia}, the rights to work, to form and join trade unions, to social security, to an adequate standard of living, to the enjoyment of the highest attainable standard of health, and to an education. In acceding to the treaty, states agreed to submit periodic reports to the United Nations Economic and Social Council on how they give effect to the provisions of the Covenant. In 1985 the Economic and Social Council established the Committee on Economic, Social and Cultural Rights, consisting of a panel of experts, to devote more time and energy on the monitoring of state efforts to meet their obligations under the ICESCR.

Article 4 of the ICESCR provides that “[w]ith regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.” In short, the signatory nations have agreed to obligations in international law that create positive duties with respect to fulfilling socio-economic rights. In addition, the Committee on Economic, Social and Cultural Rights has taken the view that the “progressive realization” of these rights includes access to judicial remedies.\(^7\) To meet these obligations, many countries have incorporated socio-economic rights in their

\(^{6}\) ICESCR, Article 2 (1).
national constitutions and signaled to courts that these rights are justiciable. The constitutionalization of these rights, as I shall describe below, has been an important step in the process leading to increased judicial recognition and enforcement of socio-economic rights at the national level.

In many constitutional democracies around the globe today, the judiciary has assumed or acquired the role of guardian of the constitutional order. At the heart of any constitutional order is the idea that public power is being exercised legitimately. In a constitutional democracy committed to the principle rule of law, there is no more proper exercise of judicial power than the exercise of judicial power to ensure the legitimacy of government action. Legitimate government action means that government is operating within the boundaries set by law. One way in which these boundaries are maintained is through judicial review. When government acts in ways that are proscribed by the constitution or against entrenched constitutional rights, the judiciary is expected to exercise its power of judicial review. Judicial review of governmental action that interferes with the fundamental rights to vote and to form political associations, freedom of speech, freedom of conscience, and so forth has been the norm for sometime. But more recently, jurists and scholars alike have called for judicial review of government inaction with regard to socio-economic rights.

Assume for a moment that a country has decided that alleged violations of socio-economic rights are suitable for judicial review at the domestic level. Just what kind of judicial review is appropriate for government failure to deliver on the constitutional promise of fulfilling these rights is an important part of the debate over judicial legitimacy. Should courts use “strong-form judicial review,” that is, all the legal remedies courts have employed through the years to protect individuals from the unlawful encroachment upon their political and civil rights, including mandamus, injunction, supervisory jurisdiction, and damages, or should courts pursue less aggressive judicial responses, what some call “weak-form judicial review”? Proponents of “strong-form judicial review” argue that since constitutions embody the core values of society, the constitutional commitments to social welfare rights that appear alongside fundamental political and civil rights deserve the same treatment. Proponents of “weak-form judicial review,” such as Mark Tushnet, argue that since social welfare rights are different, courts may use different approaches:

[T]he conventional wisdom about the inability of courts to enforce social welfare rights…arose at a time when the only options for constitutional courts seemed to be passive or strong-form review. A new form of judicial review has arisen in the past few decades, and its invention might alter our judgments about judicial capacity… The new form of judicial review comes in several variants, but in

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7 CESC, “General Comment 3 on The Nature of States parties obligations (Art. 2, par. 1),” December 14, 1990.
8 See Fons Coomans, ed. Justiciability of Economic and Social Rights: Experiences from Domestic Systems (Intersentia, 2006).
each a judicial determination of what the constitution requires is explicitly not conclusive on other political actors, who can respond to the court’s decision through ordinary politics.10

The examples of “weak-form judicial review” that Tushnet describes are: 1) Section 33 of the Canadian Charter of Rights, the notwithstanding clause; 2) Section 4 of Britain’s Human Rights Act (1998), which allows courts to make a “declaration of incompatibility” when a provision of primary legislation breaches a fundamental right; 3) Section 27 of the New Zealand Bill of Rights, which gives courts the power to review legislation in light of provisions in the Bill of Rights, but makes no provision for judicial remedy even in the case of clear rights’ violation; and 4) the use of a reasonableness test by the South African Constitutional Court to give meaning to Section 23 of the Constitution, which guarantees “access to adequate housing” and imposes on the government the duty to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.” These and other approaches to judicial review of socio-economic rights will be discussed more fully in a section that follows called Overview of Approaches to Protecting Social Welfare Rights.

In societies where many are without adequate income, food, health care, housing, nutrition, and education, the values most threatened by government inaction are personal autonomy, human dignity, and equality. These values are key elements in most views of the contemporary democratic state. In Justice as Fairness: A Restatement, John Rawls wrote:

[I]n a society well ordered by the principles of justice as fairness, citizens are equal at the highest level and in the most fundamental respects. Equality is present at the highest level in that citizens recognize and view one another as equals. Their being what they are—citizens—includes their being related as equals; and their being related as equals is part both of what they are and of what they are recognized as being by others.... This equal relation at the highest level favors, when life-prospects are involved, a social minimum based on an idea of reciprocity over one that only covers the human needs essential to a decent human life. Here we see how the appropriate concept of a social minimum depends on the content of the public political culture, which in turn depends on how political society itself is conceived by its political conception of justice.11

Rawls placed on democratic governments the positive duty to respect, protect and fulfill socio-economic rights as part of the social contract with its citizens. His conception of justice includes a “social minimum” which is greater than merely providing for “the human needs essential to a decent human life.” Rawls is not alone in arguing that social welfare rights are ultimately concerned with what it means to be human.

Amartya Sen has argued that human rights are in fact about social and economic well being, and not just individual freedom.\textsuperscript{12} Charles Taylor has shown that “the system of positive rights rests on a set of deep-rooted moral beliefs concerning the human person and the dignity and liberty that we must accord that person.”\textsuperscript{13} Cecile Fabre brings these ideas together in her book \textit{Social Rights under the Constitution: Government and the Decent Life} (2000). She begins by showing that the moral purpose of liberal-democratic societies is to allow individuals to lead meaningful lives--“X has social rights to resources against the state and other parties by virtue of the moral value of X leading a decent life”\textsuperscript{14}—and then argues that if one must struggle for the basic necessities of life, then freedom to pursue the good life as one sees fit is impossible.

Some of the leading political philosophers of our time (Rawls, Sen, and Taylor) have shown that people’s needs must be met as a matter of right—morality requires it, equality requires it, justice requires it, and, as I will show, commitments made in international law and in national constitutions require it. Once international, regional, and national law require governments to safeguard socio-economic rights and once socio-economic rights are understood to be just as important to leading meaningful lives as the right to liberty, the right to be free from torture and inhumane treatment, the right to free expression, free movement and so on, courts will find it increasingly difficult to ignore them. The issue today is not whether courts should review government action on behalf of social welfare rights, but how.

\textbf{Entrenching Social Welfare Commitments in International and Domestic Law}

In 1985 the United Nation’s Economic and Social Council established the Committee on Economic, Social and Cultural Rights. The committee consists of 18 independent experts and its purpose is to assist the Council in carrying out its responsibilities relating to implementation of the ICESCR. The decision in 1985 to establish this institution signaled a new desire at the international level to take socio-economic rights more seriously.

The renewed international commitment to socio-economic rights soon found concrete expression in the “Limburg Principles on the Implementation of the International Covenant of Economic, Social and Cultural Rights.” In 1986 a group of distinguished experts in international law, convened by the International Commission of Jurists, met at the University of Limburg (Maastricht, The Netherlands) to consider the nature and scope of socio-economic rights and the work of the newly constituted Committee on Economic, Social and Cultural Rights. The participants agreed to 103 principles which they believe reflected the emerging state of international law relevant to socio-economic rights. The third principle, for example, expresses the new

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understanding of the interdependency of first and second-generation rights: “As human
rights and fundamental freedoms are indivisible and interdependent, equal attention and
urgent consideration should be given to the implementation, promotion and protection of
both civil and political, and economic, social and cultural rights.” Numbers 16 through
34 include the “interpretative principles” used to give meaning to the key provisions in
the ICESCR, such as the obligations “to take steps…by all appropriate means…to
achieve progressively the full realization of the rights…to the maximum of its available
resources.” The aim of the Limburg Principles was to clarify the states parties’
obligations under the treaty.

On occasion of the tenth anniversary of the Limburg Principles, another group of
international law experts met in Maastricht to clarify appropriate responses and remedies
to violations of the ICESCR. The 32 guidelines that were agreed upon at this meeting
became known as the “Maastricht Guidelines on Violations of Economic, Social and
Cultural Rights” (1997). The steady progress made at the international level since the
introduction of the Limburg Principles on the understanding of the nature of socio-
economic rights can be seen in Guideline 4:

It is now undisputed that all human rights are indivisible, interdependent,
interrelated and of equal importance for human dignity. Therefore, states are as
responsible for violations of economic, social and cultural rights as they are for
violations of civil and political rights.

The Maastricht Guidelines explain how failure to meet the specific state
obligations “to respect, protect, and fulfill” socio-economic rights constitutes a violation
of such rights. Violations can occur through the direct action of states (Guideline 14) or
through the omission or failure of states to take necessary measures stemming from treaty
obligations (Guideline 15). As for remedy, Guideline 22 indicates that individuals and
groups “should have access to effective judicial or other appropriate remedies at both the
national and international levels.” Thus, the Maastricht Guidelines for the first time
indicated that states parties to the ICESCR have an obligation to provide effective
judicial and other remedies for victims of violations of treaty rights.

The emergence of the doctrine of minimum core also has fortified the
enforcement efforts of human rights organizations. This doctrine, developed by the
Committee on Economic, Social and Cultural Rights, requires states to satisfy minimum
levels of socio-economic rights for everyone, regardless of the availability of resources or
any other factors or difficulties. In its General Comment 3, the Committee explained
this new obligation:

On the basis of the extensive experience gained by the Committee, as well as by
the body that preceded it, over a period of more than a decade of examining States
parties’ reports, the Committee is of the view that a minimum core obligation to

15 Sandra Fredman, Human Rights Transformed: Positive Rights and Positive Duties (Oxford University
Press, 2008), pp. 84-86.
16 General Comments are the authoritative interpretations by the Committee on Economic, Social and
Cultural Rights on what the ICESCR means. Since 1989 the Committee has issued 15 General Comments.
ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party…. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’etre*.

As I will demonstrate later, the emergence of the doctrine of minimum core emboldened regional human rights commissions to demand that specific remedial steps be taken by governments to satisfy treaty obligations.

Socio-economic rights also received a boost when supranational institutions, such as the European Court of Human Rights, the European Court of Justice, the Inter-American Court on Human Rights, and the African Commission on Human and Peoples’ Rights/African Court on Human and Peoples’ Rights, started to breathe new life into the regional human rights treaties for which they are responsible. Perhaps even more significant were the developments in the so-called ‘third wave democracies,’ including the emerging democracies in Eastern Europe and the former Soviet Union, in post-colonial Africa, in Latin America, and in Southeast Asia, which established new constitutions with both political and civil rights and social welfare rights. The political developments in these countries have brought questions about the status of socio-economic rights to the forefront of discussions on constitutionalism and the role of courts in society.

1. Regional Charters

**Europe.** The European Social Charter is the economic and social counterpart of the European Convention on Human Rights. It entered into force in 1965. Part I of the European Social Charter contains a list of objectives which contracting states must accept as the aim of their policy, and Part II contains the obligations the states consider themselves bound. Like the ICESCR, its international equivalent, the European Social Charter requires states to submit periodic reports to the Secretary-General of the Council of Europe which are then considered by the Committee of Independent Experts. There is no individual petition procedure and the recommendations prepared by the Committee of Independent Experts are non-binding. Over the last decade there have been several proposals for improving the effectiveness of this treaty, including an amending protocol providing for a system of collective complaints, but these changes have not entered into force.

Most commentators agree that the European Social Charter has not realized its full potential as a treaty designed to advance and protect social welfare rights in Europe. Nevertheless, the inclusion of socio-economic rights in the Charter of Fundamental Rights (CFR) suggests that socio-economic rights may be stepping out of the shadows of

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the civil and political rights in the European Convention on Human Rights. Signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on December 7, 2000, the CFR sets out in a single text a wide range of rights including human rights, civil and political rights, and social welfare rights. On December 12, 2007, an amended version of the CFR was made legally binding on all EU countries except Poland and the United Kingdom. Even though the CFR was part of the Treaty of Lisbon and the now stalled effort to establish a Constitutional Treaty for the EU, it remains in force today.

**Americas.** The American Convention on Human Rights, which entered into force in 1978, affirmed the signatory states’ intention to create a “system of personal liberty and social justice” for the hemisphere. The preamble declares the states’ commitment to the belief that “free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.” The American Convention explicitly protects both first and second-generation rights. Chapter II includes a listing of the fundamental civil and political rights (rights to life, humane treatment, personal liberty, etc.). Social, economic, and cultural rights are provided for in Article 26, which reads:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

The Inter-American Commission on Human Rights (Washington, D.C.) and the Inter-American Court of Human Rights (San Jose, Costa Rica) are the institutions designed to monitor the commitments made by the signatories to the Convention. Article 42 obliges the states parties to send to the Commission reports on the progress made in meeting the Charter’s standards. Though individuals and non-governmental organizations may petition the Commission with complaints of rights violation (Articles 44-46), Article 61 restricts the jurisdiction of the Court to states parties and the Commission. Aggrieved individuals and NGOs do not have the right to submit cases to the Court.

**Africa.** The African Charter on Human and Peoples’ Rights was adopted in 1981 by the Organization of African Unity (now known as the African Union) and came into force in 1986. Like the American Convention on Human Rights after which it was

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modeled, the African Charter includes basic human rights, civil and political rights, and social welfare rights and permits both state and individual complaints to be brought to the commission, known as the African Commission on Human and Peoples’ Rights. Under Articles 47, 55, and 56 of the Charter, the Commission hears complaints alleging violations of any rights recognized in the Charter and the standing requirements for bringing a case are broad. Individuals as well as non-governmental organizations with observer status in the Commission can bring cases against states. But unlike the American Convention, individuals and NGOs will have the right to submit cases to the newly established African Court on Human and Peoples’ Rights.23

The protection activities of the African Commission consist mainly in a reporting and monitoring procedure.24 Article 62 requires that “[e]ach state party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter.” By relying on the Commission, critics charge that the Charter’s enforcement mechanism is inherently weak. Just what approach the African Court will take with regard to socio-economic rights remains to be seen.


The regional intergovernmental organizations in Europe, the Americas, and Africa have played a vital role in spreading the norms of international human rights law to their member states. While scholars of international law have generally focused on the diffusion and reception of human rights norms, just what makes that process work is not always fully explained. With regard to the diffusion and reception of the norms and obligations under the ICESCR, the acculturation theory derived from sociology best explains how and why countries incorporated international commitments to socio-economic rights into domestic law. Acculturation theory emphasizes the microprocesses that influence state actors. States tend to act, the theory holds, in accordance with expectations and roles that have been internalized. Actors conform because of the “social psychological costs of nonconformity…and social-psychological benefits of conforming to group norms and expectations.”25 Policy actors at the national level conform to roles and purposes that originate at the international and are transmitted at the regional level in part because the member states of these regional intergovernmental organizations serve as their reference group and define desirable and appropriate policies.

22 The Constitutive Act of the African Union (May 2001) came into force after Algeria acceded to the treaty, making it the thirty-sixth state to do so.
23 The African Court was established in 1998 by a protocol, 12 years after the entry into force of the African Charter. The protocol entered into force on January 1, 2004, once 15 member states had ratified it. In January 2006, judges of the new court were selected. No cases have been heard yet.
As a consequence, explicit references to social welfare rights began to appear in many modern constitutions. Some placed positive duties on the state to act and were expressed in the form “the State shall provide x,” but did not explicitly make citizens rights-bearers. The provision in Poland’s Constitution (1997) dealing with housing (Article 75) is a good example:

Public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen.

Others were framed in terms of individual rights, such as “citizens shall have the right to x,” and made citizens rights-bearers with bases for claims against government inaction. The provisions in Bulgaria’s Constitution (1991) dealing with health care (Article 52) and the Hungarian Constitution (1990) dealing with social security are fairly typical:

Citizens shall have the right to medical insurance guaranteeing them affordable medical care, and to free medical care in accordance with conditions and procedures established by law.

Citizens of the Republic of Hungary have the right to social security; they are entitled to the support required to live in old age, and in the case of sickness, disability, being widowed or orphaned and in the case of unemployment through no fault of their own.

Social welfare rights are sometimes described in considerable detail. For example, Article 48 of the Belarus Constitution (1996) provides:

Citizens of the Republic of Belarus shall be entitled to housing. This right shall be safeguarded by the development of state and private housing and assistance for citizens in the acquisition of housing. The State and local self-government shall grant housing free of charge or at available prices in accordance with the law to citizens who are in need of social protection. No one may be deprived of housing arbitrarily.

At other times the rights are established with little detail as in “Everyone has the right to a home.”\textsuperscript{26} And while some rights are qualified by the availability of resources\textsuperscript{27} or include reservations such as “everyone has the right to have access to x,” others appear in the text to be unqualified substantive rights.

\textsuperscript{26} Russian Constitution (1993), Article 40.
\textsuperscript{27} South African Constitution (1996), Chapter 2, Section 26 (2): “The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.” The same provision appeared in Section 27 (2) with regard to access to health care, food, water, and social security.
The nature of the constitutional commitment being made in these national constitutions is often signaled by the text of the provisions themselves. In some countries the constitutional provisions are general directives to the government or legislature to take care that the basic necessities of life be realized. In these instances, the commitments are more like development goals or mere aspiration than judicially enforceable rights. Article 45 of Ireland’s Constitution is a good example: “The principles of social policy set forth in this article are intended for the general guidance of Parliament. The application of those principles in the making of laws shall be the care of Parliament exclusively, and shall not be cognizable by any Court under any of the provisions of this Constitution.” In other instances, where the provisions are expressed in the form of rights, the implication is that aggrieved individuals and groups may seek redress from alleged violations of these rights in domestic courts.

Overview of Approaches to Protecting Social Welfare Rights

Socio-economic rights may be protected by “soft law,” “hard law” or a combination of both. “Soft law” and “hard law” used to distinguish the approaches employed by quasi-judicial institutions, such as human rights commissions, and courts. Soft law is generally the term used to describe the commission approaches, which includes state reporting, expert monitoring by members of the commission, and non-binding recommendations for implementation. The recommendations for implementation are considered “soft law” because they are more like guidelines than orders and there are no mechanisms to ensure compliance. In contrast, hard law is generally the term used to describe the remedial orders traditionally available to courts, such as mandamus, injunction, and supervisory jurisdiction, which compel government to act in ways fulfill social welfare rights.

Emerging in the jurisprudence on social welfare rights is what may be thought of as a “hybrid approach,” that is, one combining aspects of hard and soft law approaches. An example of the hybrid approach employed by courts includes those instances when courts declare a rights violation (hard law) but instead of ordering government to take some specific action, they made recommendations on how the right can be fulfilled and then gave the government an opportunity to act (soft law). An example of the hybrid approach employed by quasi-judicial institutions, such as the regional human rights commissions, includes those instances when human rights commissions report that a state’s “minimum core” obligations have not been met (soft law) and then indicate how they must be satisfied (hard law). What moves a commission’s “minimum core” recommendation from “soft law” to hybrid is the political pressure and threat of litigation that the clarification brings to bear on the government. Since 1990 and the introduction of the concept of minimum core, clarifying rights and obligations by this approach has allowed the various human rights commissions to back up their declarations with “recommendations with bite.”

Approaches to protecting social welfare rights may be thought of as falling along a spectrum ranging from soft law to hard law (See Figure 1). The soft law-commission approaches consist of state reporting, commission monitoring, and commission recommendations for implementation. The hard law-judicial approaches consist of variations of strong-form and weak-forms of judicial review. Under strong-form judicial review, courts not only recognize or declare the importance of socio-economic rights, but use a variety of binding legal remedies to implement the rights. The judicial remedies characteristic of strong-form judicial review of socio-economic rights include mandamus, injunction and supervisory jurisdiction. Under weak-form judicial review, courts find socio-economic rights claims justiciable, but only provide recommendations for implementation. As in strong-form judicial review, courts declare socio-economic rights justiciable and recognize that these rights do in fact impose positive obligations on government to promote and implement them, but what characterizes the “weak form” is that the courts’ orders fall far short of legal mandates for effective action by government. Instead, courts may direct government “to take reasonable steps” toward the “progressive realization” of these rights.

**Figure 1. Approaches to the Protection of Social Welfare Rights**

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<th>Commission Approaches</th>
<th>Judicial Approaches</th>
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<td>Soft Law</td>
<td>Hybrid</td>
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<td>-State Reporting</td>
<td>-Strong-form Judicial Review:</td>
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<td>-Commission Monitoring</td>
<td>-Injunction</td>
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<td>-Non-binding recommendations</td>
<td>-Mandamus</td>
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<td>-Supervisory jurisdiction</td>
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<td>-Damages/Reparations</td>
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As I shall demonstrate in the next section, the trend is toward the “hybrid approaches,” or convergence toward the center of the figure above. When national courts are asked to enforce social welfare rights, they tend to rely more on weak-form than strong-form judicial review. Evidence of the same trend can be seen in the approach used by some regional human rights commissions. Introduction of the “minimum core” doctrine has given human rights commissions a better tool to fulfill their missions and has emboldened them to make more specific and demanding recommendations for the implementation of these rights.
Developments in the Law Protecting Social Welfare Rights

Reported in this part of the paper are a few examples of this emerging trend toward more hybrid approaches.

1. Regional Human Rights Commissions


In the first case, SERAC brought a complaint on behalf of the Ogoni people, a minority living in the oil-rich Niger Delta region of Nigeria, to the African Commission. Ogoni lands and waters had been polluted by the Nigerian National Petroleum Company, the state oil company and majority shareholder in a consortium with Shell Petroleum Development Corporation. As a result of the government’s link with oil exploration and production in the region, complainants allege that Nigeria had violated several provisions in the African Charter, including the right to enjoy the best attainable state of physical and mental health, the right to a general satisfactory environment favorable to the peoples’ development, and the right to freely dispose of their wealth and natural resources.

The Commission found Nigeria in violation of several Charter rights, and issued the following ‘communication’:

[The Commission] Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by: stopping all attacks on Ogoni communities…; conducting an investigation into the human rights violations described above…; ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations; ensuring that appropriate environmental and social impact assessments are prepared for any future oil development…; and providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.\(^{32}\)

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\(^{32}\) Id.
This was not the usual, non-binding recommendation issued by a human rights commission subsequent to an investigation. The Commission in this case directed the state to take specific action (stop attacking the Ogoni community, clean up the damaged areas, etc.) and provide reparations to the victims of the rights violations.

The African Commission issued an equally forceful decision in a case called *Purohit and Moore v. Gambia* (2003). Applicants alleged that Gambia was violating Article 16 (the right to enjoy the best attainable state of physical and mental health) and 18(4) (the right of the disabled to special measures of protection) of the Charter on Human and Peoples’ Rights in its treatment of the mentally ill. The Commission found that Gambia failed to satisfy its obligations under these provisions, and ruled that mental health patients should be accorded special treatment to enable them to attain and sustain their optimum level of independence and performance. The Commission’s “communication” to Gambia read in relevant part:

> [States Parties are obliged] to take concrete and targeted steps, while taking full advantage of their available resources, to ensure that the right to health is fully realized in all its aspects without discrimination of any kind.

These actions, in the words of one observer, “mark a renewed commitment by the Commission to the implementation of economic, social, and cultural rights.”

Though the Inter-American Commission on Human Rights has generally neglected social welfare rights and focused more on the political and civil rights in the Convention, its action in a case called *Dilcia Yean and Violeta Bosica v. Dominican Republic* (2001) resembles the “renewed commitment” by the African Commission. Petitions were two girls born in the Dominican Republic to mothers who immigrated from Haiti. They complained that state authorities had denied the right to an education by denying them the birth certificates necessary to prove that they were citizens of the Dominican Republic. The Commission declared that the government had violated Article 19 of the American Convention by not extending the right to an education to Dominican children of Haitian descent and in its communication directed the government to change the policy which denied full citizenship rights, including the right to an education, to children born to immigrant mothers.

2. Regional Human Rights Courts

In *Plan de Sanchez v. Guatemala* (2004), the Inter-American Court of Human Rights (IACtHR) employed a hybrid soft law-hard law approach in resolving petitioners’

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claim resulting from Plan de Sanchez massacre. In 1982, during Guatemala’s Civil War, 268 individuals, mostly members of the Maya indigenous people who had lived in Plan de Sanchez, were killed by the Guatemalan Army and paramilitary forces. Survivors of the massacre filed a complaint with the Inter-American Commission on Human Rights which referred the case to the IACtHR. Complainants alleged violations of several articles of the American Convention and sought the return to their ancestral home. In 2004, the IACtHR declared that the government had been responsible for the massacre and the scorched earth policy that forced survivors from the area and ordered reparations. In addition to monetary compensation for both survivors and next-of-kin, the Court ordered the state to implement a housing program, improve the village’s infrastructure, including roads, water supply and sewage systems, and built schools and health care facilities. Understanding that it would take time to rebuild the village, the Court gave the state five years to complete the tasks. Timetables for compliance and supervisory jurisdiction (the court also mandated periodic progress reports) are two elements of the “hybrid judicial approach” when it comes to enforcing socio-economic rights. As will be shown below, other varieties of so-called weak form judicial review have been employed by national courts in an effort to enforce state commitments to provide social welfare rights.

As for the other regional human rights courts, the European Court of Human Rights and the newly established African Court of Human and People’s Rights, the former has had little interest in social welfare rights and the latter has yet to hear a case.

3. National Courts

Two cases decided by the Hungarian Constitutional Court show the general trend away from strong-form judicial review toward weak-form review in cases dealing with social welfare rights. The Constitutional Court’s decision in the Benefits Case (1995), nullifying the government’s proposed welfare policy as violating the right to social security, provoked a crisis that damaged the court’s reputation and taught the Court to be more cautious in this area of law. In the Housing Case (2000), the Court handed down a more hesitant decision.

The fall of communism led to important changes in the Hungarian Constitution. The new, post-communist constitutional order can be traced to the 1989 and 1990 revisions. The new Constitution included both political and civil rights and several social and economic rights that reflected Hungary’s tradition of social justice.

The constitutional provision guaranteeing the citizens of Hungary the right to social security (Article 73E) was invoked in a challenge to the nation’s new social welfare statute (the Economic Stabilization Act). The statute was part of a package of reforms passed by the legislature that were designed to speed the transition to a market economy. In the Hungarian Benefits Case (1995), the Constitutional Court decided that

37 Decision 43/1995 (VI. 30) AB (Constitutional Court of Hungary).
the proposed welfare cutback was unconstitutional because it gave no guarantee of basic subsistence to the poor:

As the Economic Stabilisation Act ordained the implementation of the withdrawal or transformation of already acquired rights with respect to the family allowance virtually with immediate effect, this gave rise to an unconstitutional situation. In view of this, the Constitutional Court rendered its Decision on the unconstitutionality of the [Act].

The decision led to a constitutional crisis in Hungary.38 The government challenged the legitimacy of the court and accused it of overstepping its legal boundaries. The government’s major complaint was with the Constitutional Court’s ruling that “[t]he right of the State to change [social welfare benefits] is not unlimited.” No doubt anticipating this complaint, Justice Zlinszky’s concurring opinion explained his understanding of the Court’s responsibility for socio-economic rights:

The Constitutional Court does not wish to tie the hands of the legislature in the search for the appropriate solutions, but in a form more express than that incorporated in the Decision, the Court must call [to] the attention of the legislature that it can expect the agreement and cooperation of society, which is the necessary precondition of the success of the reforms, only if it chooses and requires restrictive solutions which meet the moral perceptions and sense of social justice of society.

In 2000 the Hungarian Constitutional Court was asked whether the same constitutional right to social security (Article 70E) at issue in the Benefits Case included an implied right to housing. This time, a more chastened Court found that the constitutional right to social security requires the state to guarantee “minimum sustenance,” but this does not include a right to have a place of residence.” The constitutional commitment to social security, the Court reasoned, includes only the establishment and maintenance of institutions providing social security insurance and social services. Therefore, the petition seeking a declaratory judgment of the legislature’s duty to provide a place of residence was rejected.39

The South African Constitutional Court has been the pioneer in developing weak-form judicial review approaches to the social welfare rights entrenched in its Constitution. The Constitution (1996) imposes an affirmative duty on the government to move forward on socio-economic rights. The decision to include socio-economic rights in the Bill of Rights was the result of considerable debate during the multi-party negotiations that produced the post-apartheid settlement.40 In making the important

decision to constitutionalize socio-economic rights, South Africa has given the Constitutional Court considerable power to determine how these rights are to be enforced.

The South African Constitutional Court has delivered several prominent decisions dealing with the socio-economic rights. The first, Soobramoney v. Minister of Health (KwaZulu-Natal) (1997), was a case involving the right to access to health care. Soobramoney, a chronically ill patient in need of renal dialysis, sued the Minister of Health for failing to provide access to this expensive health care technology and treatment. The Constitutional Court dismissed the claim reasoning that the applicant failed to establish that the State was in breach of its obligations under section 26 of the Constitution. In its decision the Constitutional Court explained the constitutional meaning of “progressive realization of the right”:

The term “progressive realization” shows that it was contemplated that the right could not be realized immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realization means that the state must take steps to achieve this goal.

The Constitutional Court ruled that the right to access to health care services does not mean the right to expensive specialist health care services which the government cannot afford.

In Republic of South Africa v. Grootboom and Others (2000), the Constitutional Court issues its decision in a case involving the issue of housing. Grootboom and others brought suit claiming that the State’s housing policy failed to make reasonable provision within available resources for people in the Cape Metropolitan Council area. The Constitutional Court agreed, finding that the State had not acted reasonably in meeting its constitutional obligation to provide access to adequate housing. The positive duty, the Court ruled, “includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.”

In another case involving the right of access to health care services, Minister of Health and Others v. Treatment Action Campaign and Others (2002), the Constitutional Court elaborated on several controversial issues involving judicial protection of socio-economic rights. Treatment Action Campaign brought suit against the Minister of Health alleging that the government had acted unreasonably in refusing to make the anti-retroviral drug Nevirapine available in the public health sector to prevent mother-to-child transmission of HIV. In a unanimous judgment the Constitutional Court ruled that Sections 27(1) and (2) of the Constitution required the government to devise and


41 1997 (12) BCLR 1696 (CC).
42 2000 (11) BCLR 1169 (CC).
43 2002 (10) BCLR 1033 (CC).
44 Chapter 2, Section 27 (1) Everyone has the right to have access to-- a) health care services, including reproductive health care;... (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.
implement within its available resources a comprehensive program to realize progressively the rights of pregnant women and their newborn children to have access to Nevirapine.

In this decision, the Constitutional Court considered and disposed of several of the controversial issues. First, there was the issue of justiciability:

The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are. The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.

With the question of justiciability out of the way, the Court then examined whether the state had taken “reasonable measures” to meet its constitutional obligation to provide access to health care:

In the present case this Court has the duty to determine whether the measures taken in respect of the prevention of mother-to-child transmission of HIV are reasonable. We know that throughout the country health services are overextended….We are also conscious of the daunting problems confronting government as a result of the pandemic….Nonetheless…[t]he rigidity of government’s approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of Nevirapine to the research and training sites, the policy as a whole will have to be reviewed.

In finding that the state had not acted reasonably within its available resources, the Constitutional Court turned to the difficult questions of relief and enforcement:

We … reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of mandamus and the exercise of supervisory jurisdiction.

Government is ordered without delay to: (a) Remove the restrictions that prevent Nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics… (b) Permit and facilitate the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated….
South Africa’s approach to the judicial protection of social welfare rights has attracted considerable attention. Its use of a “reasonableness standard” to determine the state’s obligation to meet the basic needs of its citizens, conceiving reasonableness in terms of available resources and government priorities, is one that constitutional courts in other countries are beginning to use.

Conclusions

For some scholars, the argument that judicial enforcement of socio-economic rights is needed to affirm a society’s commitment to human dignity, substantive equality, and social justice is enough to allay concerns about judicial capacity and judicial legitimacy. But for others, the problems in fashioning a remedy and the concerns that courts may be overstepping the boundaries of separation of powers, still need to be addressed. Recent developments by constitutional courts at the national level and human rights courts at the regional level suggest how courts might actually begin to realize socio-economic rights without undermining judicial legitimacy. Weak-form judicial review—where governmental decisions affecting socio-economic rights are examined and if the government’s obligations have not been met, courts declare a rights violation, but leave remedy and implementation to the government—emerged in response to the concerns about the legitimacy and capacity of judicial action in this area of law.

This study of the protection of socio-economic rights suggests one possible conclusion. Though the general approaches by courts and human rights commissions at the regional and national levels are different in kind (soft law-commission approaches versus hard law-judicial approaches), there has been convergence toward approaches exhibiting characteristics of both (that is, the hybrid approaches) when it comes to the enforcement of social welfare rights. The interest of courts in developing approaches that are sensitive to concerns about the legitimacy of the actions they take help to explain the rise of weak-form judicial review in the enforcement of social welfare rights. Weak-form judicial review may be less effective in producing immediate results, but national and regional courts seem to understand that in the long run their legitimacy is enhanced by their willingness to work with democratic governments to meet the commitments they have made to fulfill socio-economic rights.