

SECOND INTERNATIONAL WORKSHOP ON THE JUSTICIABILITY OF SOCIO-ECONOMIC RIGHTS

**Bogotá, Colombia
May 15-16, 2010**

**Co-Sponsored by the
Facultad de Derecho, Universidad de Los Andes,
Bogotá, Colombia**

**and the Program on Human Rights and the Global Economy,
Northeastern University School of Law, Boston, Massachusetts, US**

Rapporteur: Sukti Dhital

About the Workshop

The Second Workshop on Justiciability of Socio-Economic Rights was hosted by Professor Helena Alviar García of the Facultad de Derecho, Universidad de Los Andes, Bogotá, Colombia, from May 15 to 16, 2010. Program participants included two judges from two continents and over 15 human rights advocates, practitioners, and academics from all over the world. A sampling of questions addressed during the workshop included legislative deference and separation of powers in adjudication of socio-economic rights; comparative analysis of access to justice and remedies in various jurisdictions; legitimacy of courts when enforcing social and economic rights; and the horizontal application of socio-economic rights.

The topic of justiciability of social and economic rights raises complicated questions in law, and the workshop provided a space for practitioners and scholars to discuss and reflect upon the potential of and obstacles to advocating for those rights. As discussed in last year's conference, considerable challenges exist in the adjudication and ultimate implementation of economic and social rights, including the right to health, education, food, and housing.

The workshop began with a riveting and enlightening discussion by Justice Manuel Cepeda, recently retired President of the Constitutional Court of Colombia, who reflected on the judicial enforcement of social and economic rights from a Colombian perspective based on the experience of his court.

The first panel, "Comparative Claiming" was led by Iain Byrne of INTERIGHTS. Participants engaged in a comparative discussion of the practices, structures, and cultures of the legal and political systems within their respective jurisdictions and considered how access to justice affects mobilization and enforcement of SER. The group examined issues of standing, access to counsel, constitutional literacy, and availability of legal aid systems.

During the second panel, "Comparative Case Studies of Litigation and Mobilization Around SER—the Politics of SER," led by Colm O'Conneide of University College of London, participants reflected on social and economic rights campaigns in which they had been involved

or which they studied. Participants considered the legal and political realities and the effect of such forces on the campaigns' success. Participants also discussed the role of grass roots movements, the media, and the gap between progressive court decisions and subsequent implementation of such decisions.

The third session, "Comparative Reasonableness and Comparative Proportionality" was led by Sandra Liebenberg of the University of Stellenbosch, South Africa. Participants examined the concepts of "reasonableness" and "proportionality," and discussed whether courts use the concept consistently when addressing separation of powers concern. The group also considered the impact of administrative law and reasonableness review in adjudication of socio-economic rights, and whether progressive advocates have an articulated interest in establishing reasonableness over proportionality when litigating such rights.

The discussion continued in the next session, "Comparative Remedies," led by Danie Brand of the University of Pretoria, South Africa. Participants reflected on creative remedies imposed by courts in socio-economic rights cases, including remedies that address obstacles presented by resource allocation constraints.

In the final session, "Comparative Horizontally" convened by Karl Klare of Northeastern University School of Law, participants reflected on whether constitutional norms do and/or should bind private parties within their respective countries and the tensions and benefits that arise with horizontal application. The group considered two hypothetical problems, focusing on whether all private law should be subject to constitutional control.

The workshop concluded with a discussion about future collaboration and next steps led by Lucy Williams, Northeastern University School of Law, convener of the workshop.

Themes

Problems and themes discussed in the sessions included:

- The need for a revised, critical understanding of separation of powers; the danger that courts too easily rely on resource-constraints and the principle of judicial deference, resulting in abdication of judicial responsibility for the enforcement of social and economic rights
- The important role of mechanisms of access to justice (such as the Colombian *tutela*) in the success of SER campaigns, and the mutually reinforcing impacts of SER enforcement and court legitimacy;
- The need for new litigation strategies for enforcing social and economic rights, and particularly the importance of creative thinking about remedies;
- The role of political and legal culture in SER enforcement;

- The doctrinal chaos and inconsistency in judicial application of reasonableness and proportionality tests;
- The tensions and benefits that arise from horizontal application of SER.

Opening Remarks

Justice Manuel Cepeda of the Constitutional Court of Columbia addressed the justiciability of SER through the lens of the Colombian perspective. Describing the Court as engaging in “prudent activism,” Justice Cepeda provided detailed background on the development of the Constitutional Court and its rising legitimacy through interpretation of SER as fundamental rights and its issuance of structural decisions and remedies.

In particular, Justice Cepeda discussed the critical role of the *tutela* system in expanding protection of SER, the doctrine of an “unconstitutional state of affairs” (obliging government either to remedy SER violations or acknowledge that it is regressing from constitutional mandates), and the doctrine of “connectivity” (linking certain rights to constitutionally fundamental rights). Indeed, through the doctrine of connectivity, social and economic rights such as the right to health care were viewed as linked to the right to “minimum level of sustenance,” a direct corollary of the right to human dignity.

When reflecting upon separation of powers concerns, Justice Cepeda noted that his court embraced the notion that the realization of rights is not solely the job of the legislature. Indeed in a case concerning remedies available with respect to an unfinished public sanitation project, the Court held that where the legislature fails to act, another branch of government may issue a directive to address serious gaps in rights-enforcement. When the substance or “basic nucleus” of an individual right is at risk, a court may not abdicate its constitutional responsibility in the face of legislative inaction.

Justice Cepeda also reflected upon the unique remedies issued by the court in SER cases. These include retaining jurisdiction, time-sensitive deadlines on implementation of orders, and engagement of non-governmental entities in the remedial process.

Session I: Comparative Claiming

Participants engaged in a comparative discussion of the practices, structures, and cultures of the legal and political systems within their respective jurisdictions. The discussion involved an overview of the structural and procedural challenges that impede access to justice, including issues of standing, access to courts, the limitations of legal aid systems, and constitutional literacy.

Participants emphasized the critical role of standing in adjudication of social and economic rights, with states such as India providing expansive access to the courts through Public Interest Litigation (PIL). Indeed the PIL system, through its informal justice process of relaxed standing requirements, continuing mandamus, and lower evidentiary burdens, legitimated action by the

Indian Supreme Court and established a bridge between marginalized members of society and the judiciary. In contrast, other jurisdictions such as the United States maintain much narrower criteria of standing; this approach poses considerable structural challenges that impede access to courts. When discussing the role of culture in claiming social and economic rights, participants reflected on substantial protections for social and economic benefits in states such as the UK and Sweden, even though SER are generally not viewed as fundamental rights.

Participants discussed the need for increased constitutional literacy, with a participant from Colombia noting the lack of awareness of certain rights, including right to free primary education. Another participant commented on the discrepancies and challenges in accessing justice within a jurisdiction. For example, in England, 70% of challenges to denial of housing claims arose from London, an area representing 10% of the country's population. Discrepancies of this kind underscore the need for increased literacy and awareness on social and economic rights.

A participant stressed the dilemma of the incompatibility of globalization, particularly as it affects the developing countries, with robust judicial enforcement of social and economic rights. Participants also discussed courts' increasing hesitancy, due in part to a fear of being characterized as "illegitimate," to expand social and economic rights. Participants from South Africa, UK, and Ireland reflected on the increasing deference to the legislature in issues concerning social and economic rights. In the UK, for example, in *Cambridge Health*, where the Health Authority denied a bone-marrow treatment, the court refused to intervene because the matter involved questions of resource allocation that the court considered outside judicial purview. Irish courts maintain a rigid, formalistic view of separation of powers. In *TD v Minister for Education*, [2001] 4 IR 545, the Supreme Court went so far as to hold that the Constitution does not protect social and economic rights since doing so would necessarily infringe on the power and duties of other branches of government. The view was that even where the Constitution explicitly confers a right, the courts should only enforce such rights in the most extreme of cases through mandatory orders.

Session 2: Comparative Case Studies of Litigation and Mobilization Around SER—the Politics of SER

The discussion began with reflections on the South African courts' purported embrace of "democratization" in adjudication of SER cases. Citing separation of powers concerns, courts insist that judicial deference is crucial to the democratic process. However as one scholar noted, judicial abdication of constitutional responsibility is "profoundly undemocratic." Comments on the role of legal culture were provided, with the South African Constitution often described as an open forum for political engagement, when in fact such engagement is highly constrained by judicial attitudes of deference.

Another scholar emphasized the need for research on public mindset of enforcement of social and economic rights when assessing if litigation is viable. Discussions centered on the importance of framing a case to the public and engaging with judicial consciousness. Participants noted the influence of public mindset on judicial analysis and reasoning, with op-ed pieces and judicial colloquia viewed as effective advocacy tools.

Conference participants shared litigation strategies that have proven successful within their respective jurisdictions, including the critical role of working with the press, coordinated campaign efforts, the need for grass roots leadership of SER movements, and the increasing relevance of judicial colloquia as a tool for educating judges on progressive issues. Participants from India provided a case study of current litigation efforts concerning access to reproductive health care. They discussed as factors contributing to the success of the campaign reliance on binding international law, coordinated efforts with grass roots movements, relationships with the media, and trainings and colloquia to raise awareness of reproductive rights as constitutional rights.

Regarding Ireland, participants discussed the Supreme Court's denial of "adjudicative space" for social and economic rights and its increasing resistance to enforcing positive obligations upon the State. A SER campaign that has gained marginal success concerns the right to free primary education, a right expressly enumerated in the Constitution. The Supreme Court in *Ryan v Attorney General* recognized education as encompassing the teaching and training of children to make the "best possible use" of their "inherent and potential capacities." [1965] IR 294 at p. 350. Building upon this expansive notion in *O'Donoghue v Minister for Health*, the Court held that the right to education extended to the needs of severely disabled children and guaranteed *all* children to make the most of their inherent capacities, regardless of how "limited capacities may be." [1996] 2 IR 20 at p. 62. In so doing, the Court rejected the State's argument that severely disabled children were "uneducable." But in more recent cases, the Court has narrowed the State's obligation as evidenced by *Sinnott v Minister for Education*, in which the Court held that the guarantee of free primary education only extends to children up to the age of eighteen and not to all citizens regardless of age, even when appropriate education services had not been provided. [2001] 2 IR 241. As a scholar noted, "the Irish Supreme Court sent out a clear message through the cases like *Sinnott*: the Irish Constitution was a charter of negative liberties, and socio-economic rights, although laudable aspirations, were not a matter for the courts, but, rather, should be left to the elected branches of government."

A case study concerning protection for internally displaced persons (IDPs) with disabilities in Colombia illuminated the complexities of litigating SER cases. Panelists discussed the lack of a coordinated social movement. The decision to go forward with litigation was based on seeing litigation as a means of raising awareness on the issue. The judgment ordered the government to build a program specific to IDPs with disabilities, with collection of statistical data on IDP social, health, and economic conditions specified as a core component of the program. Participants spoke candidly about the challenges of implementation; there has been little or no movement to implement the decision, which was rendered more than a year ago. As an advocate noted, the difficulties of litigating SER cases concern how to effectively "measure expectations."

Session 3: Comparative Reasonableness & Proportionality

The discussion centered on standards that courts use in reviewing legislative and executive action that limits or improperly implements SER. Participants reflected on whether "reasonableness review" and "proportionality tests" have any constraining purchase.

The group discussed the case of *Mazibuko and Others v. City of Johannesburg*, in which the Constitutional Court held to be reasonable a municipal policy limiting free water per month to 6 kilolitres per accountholder. (CCT 39/09) [2009] ZACC 28. Participants argued that the Constitutional Court abdicated its responsibility under the reasonableness-review standard by failing to give any independent significance to or guidance regarding the right of access to sufficient water in terms of section 27(1)(b) of the Constitution, relying on the lack of institutional competence and legitimacy of courts. Comparisons were drawn to the Constitutional Court's decision in *Khosa v. Minister of Social Development, Mahlaule v. Minister of Social Development* 2004 (6) BCLR (CC). In *Khosa*, the Court rejected a "rational basis" interpretation of reasonableness in holding that legal permanent residents were eligible for social assistance grants, finding that reasonableness review under the South African Constitution warranted a higher standard. However, in *Mazibuko*, participants argued that the Court adopted a highly deferential approach, and under a purported guise of reasonableness, failed to engage with issues of adequate levels of water usage, cross subsidization, infrastructure challenges related to apartheid, and policies ensuring that the "worst offenders" were paying the government for their water usage.

Another participant argued that reasonableness review in early South African decisions had a transformative effect. In *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC), for example, the Court held in the context of reasonableness review that legislative action impinging on SER must at a minimum provide short-term relief for those in desperate need. This doctrine has been side-stepped by the Court in more recent decisions. The group debated whether the "doctrine of subsidiarity," a principle that limits direct constitutional attack of legislation when a legislative scheme provides statutory remedies, contravened the principle that injured parties should have proportional, urgent responses. All workshop participants agreed that progressives have a stake in highlighting inconsistencies and ambiguities in application of reasonableness review when litigating SER cases, with one scholar commenting that reasonableness is a "malleable concept that can serve progressive and conservative movements."

The group went on to discuss whether reasonableness and proportionality were simply verbal formulations with no restraining components. One scholar described the political positioning of the courts through increasing deference to legislatures as the "new corruption of SER." As in earlier sessions, the group discussed the need to develop a new idea of separation of powers, challenging the notion that legislatures are uniquely situated to "give effect" to social and economic rights. One scholar noted that there is "no difference between proportionality and reasonableness, as everything depends on the degree of scrutiny and degree of deference, and the most relevant component is how closely the judge will scrutinize the legislation or policy."

Another practitioner discussed proportionality and reasonableness in terms of the UK Human Rights Act. Similar to other jurisdictions, the pull of "deference" is significant. The most influential of concern remains resource allocation. The group discussed an HIV case involving a Ugandan national deported on account of his status. The judge held that Article 3 of the Human Rights Act does not guarantee "health tourism" and relied on budgetary constraints when affirming the deportation order. As one advocate noted, "proportionality can be distinguished from reasonableness; however, it is up to the judges to invoke this distinction and, in the end, it

comes down to a resource allocation issue.” Another participant reiterated the importance of the degree of judicial scrutiny and believed that the Human Rights Act has transformative potential.

Session 4: Comparative Remedies

In this session, participants reflected on creative remedies imposed in SER cases within their respective jurisdictions. The session began with an overview of the unique remedies available in the Indian context, which include constitutional torts, interim orders for structural decisions, appointments of commissions, and issuance of directives. The directives, developed generally with input from NGO’s and advocates, are binding guidelines that supplement legislative framework and provide legal entitlements. As one participant argued, “remedies create rights, as they provide substance to the right at issue.”

Participants also reflected upon the legal structures available in Argentina, which has a procedure similar to the *tutela* system in Colombia that enables constitutional claims to be brought before any court. Discussion centered on decisions by the Argentine courts to open up available remedies, most recently a case concerning the overcrowding of prisons. In this opinion, the court held that although prison conditions are a matter of public policy and fall within the ambit of the political branch, the judiciary maintains adjudicative power when circumstances affect constitutional values.

Within the South African context, participants discussed *Khosa*, where the Court “read-in” or inserted language (specifically the words “permanent residents”) into a statute, thereby expanding eligibility of social welfare benefits. In the US, the New York courts, while not ordering the legislature to appropriate funds, ordered the state to pay shelter-benefits to welfare recipients threatened with eviction. *Barbara Jiggits v. William J. Grinker, Commissioner of the New York City Department of Social Services*, 528 N.Y.S. 2d 462 (NY 1988). As one scholar noted, “what is the difference between ordering relief and ordering an appropriation? Is any formulation of the difference coherent?” In comparing these decisions to cases in which courts invoke deference, the group discussed the inherent tension between the need for creative remedies and the strictures of judicial deference.

Another participant provided a detailed review of the recent, landmark decision issued by the German Constitutional Court, *Hartz IV*, concerning the adequacy of computation of social assistance payments. In *Hartz IV*, the court held that the German legislature had failed to adequately and transparently justify the methods of calculation and levels of payment under the *Hartz IV* social assistance legislation. Noting the fundamental constitutional guarantee of a subsistence minimum to maintain human dignity, the Court ordered the legislature to enact new provisions consistent with this right by 31 December 2010, subject to judicial oversight. As the scholar noted, in Germany “separation of power is subordinate to an overriding dignity provision” and “social welfare is a core component of providing dignity.” The discussion recognized the principles central to German society, namely that the society is based on law and the State assumes responsibility for a certain level of dignity.

In contrast, in South Africa as one scholar noted, “courts see their roles as simply resolving disputes,” and they often fail to maintain an “ongoing view of engagement with the social process.” Participants suggested a new model of separation of power, one that somewhat de-privileges legislation and comprehends the importance of the guarantee of minimum social rights to human self-realization and therefore to meaningful democratic participation.

Session 5: Comparative Horizontality

This session focused on the horizontal application of social and economic rights and problems that arise in imposing constitutional obligations on private actors. Participants considered two hypothetical problems designed to reveal conceptual difficulties involved in the idea of horizontal application. A spirited debate emerged on the question of whether progressive courts and advocates seeking social justice wrongly privilege the prestige of human and constitutional rights while overlooking or marginalizing the importance of change at the level of private law, so-called.

The participants briefly reviewed the extent of horizontal application in their jurisdictions. Horizontal application is weakest in the U.S. and the U.K. In the U.S., only the prohibition of slavery operates horizontally. In the U.K., the Human Rights Act obligates only public bodies. However, considerable debate exists as to what constitutes a public body, since certain companies take on public roles.

The Bill of Rights applies horizontally under the South African Constitution. For example, the terms of insurance contracts between private parties have been subject to constitutional review. In India, habeas corpus applies to all parties, and there are numerous examples of private parties being held to constitutional obligation, including cases involving child labor/trafficking and sexual harassment. In Colombia, the Constitution binds private actors, and horizontal application is widespread through the concept of “direct action.” This applies to private pension and health systems, as well as to students’ rights cases involving private schools.

When reflecting upon the South African court’s decision to invalidate an exculpation clause after a finding of gross medical negligence at a private hospital, one scholar noted that the court failed to give any reason as to why freedom of contract is accorded constitutional protection above an individual’s right to health care. In contrast, in *President of the Republic of South Africa v. Modderklip Boerdery* 2005 (8) BCLR 786 (CC) (S. Afr.), the Court balanced constitutional property rights with other constitutional values, holding that a landowner may not evict the over 40,000 squatters on its property, but that the State was obliged to pay the landowner the equivalent of fair rental value as constitutional damages until a meaningful relocation program was initiated. As a scholar noted, in so doing the Court recognized that “private property is no longer absolute, and is infused by competing constitutional concerns.”

The first hypothetical concerned whether health-care providers and poverty lawyers have a right of entry to a private farm in order to cater to the needs of migrant agricultural workers residing on the property. Rather than declaring that constitutional rights to health and/or access to justice trump private property, the court in the case upon which the hypothetical was based opted to redefine “private property ownership” so that it does not comprehend the right to exclude health

and legal workers attempting to access poor migrants. In that particular case, the strategic goal was to avoid review by the US Supreme Court (which the progressive, local court perceived likely to be unsympathetic to the concerns of poor migrant workers). The conceptual issue with which the participants grappled is whether there is anything distinctive about human rights discourse (other than its prestige) that makes it a more suitable medium than private law for effecting social change.

The second hypothetical, based on an Indian case, involved a cooperative housing scheme that reserved membership based on affiliation with a minority religion. In the real case, the court declined to apply equality and freedom of conscience rights horizontally; accordingly, the by-law provision in the housing scheme was not held to constitutional strictures. The irony with which the participants grappled is that ordinarily progressives tend to favor horizontal application, yet in this situation a principled case could be made against it. As one participant queried, “what do we want to achieve with horizontality?” Participants also explored whether a just resolution, perhaps a superior resolution, could be obtained by working within the medium of private law. Participants debated generally whether the human rights community does not imprudently promote a hierarchy of rights-discourses (e.g., the notion that constitutional or fundamental rights are inherently more important or potent or social-justice oriented than private-law entitlements, or whether, to the contrary, it all depends on the substance). This in turn led to general discussion about the problem of rights-essentialism in our advocacy.

Comments and Future Projects

Following an enriching discussion, participants shared their perspectives on future collaboration and projects and reflected on the structure & style of the workshop. Below is a list of suggestions that emerged from this conversation:

- Invite more participants from South Asia, Africa, South America, and Eastern and Western Europe (particularly the Scandinavian countries and new democracies).
- Expand discussion to include role of NGO’s and grass roots movements in SER enforcement.
- Increase database of cases to reflect full range of the emerging jurisprudence; employ students to assist in this endeavor.
- Connect database with ESCR.net to better disseminate information.
- Assist in translation of SER decisions or case summaries from important, non-anglophone jurisdictions (e.g., Colombia).
- Organize a colloquium with judges.
- Produce a book based on the participants’ work; the book is to be a critical, not merely descriptive, study.

- Include discussion on Alternative Dispute Resolution in various jurisdictions.
- Priority agreed upon by all – maintain the small, informal, non-hierarchical, and collaborative atmosphere of workshop.

Key points and Conclusions

The Second Workshop yielded the following key points and conclusions:

- Enforcement of economic and social rights can enrich democracy and greater inclusion of marginalized members of society through protection of minimum core rights, such as health, education, shelter, and food;
- Advocates and scholars need to push for a new conception of separation of powers in which the non-representative, non-majoritarian nature of adjudication is tempered by an understanding that SER enforcement can enrich democracy by empowering individuals and groups to participate meaningfully in political and social processes;
- Advocates must engage with grass roots movements, the media, judicial consciousness and public mindset when bringing lawsuits – all of these affect the success of SER campaigns and are important in insuring that remedies are responsive to community needs;
- Constitutional literacy at the grass roots is imperative to the success of SER campaigns; advocates must dedicate time and energy to educate courts and civil society on social and economic rights to open up access to courts and change the legal culture.

Participants in the group plan to continue to address these issues at future workshops.

Participants

- Helena Alviar García, Director and Professor of the Doctorate and Master's in Law Program, Universidad de los Andes and Professor in the Undergraduate Law Program
- Danie Brand, Senior Lecturer, Department of Public Law, University of Pretoria, South Africa
- Ian Byrne, Senior Lawyer, INTERIGHTS
- Natalia Ángel Cabo, Director, Program of Action for Equality and Social Inclusion, Universidad de los Andes
- Esteban Hoyos-Ceballos, Assistant Professor of law, Eafit University Law School JSD Candidate, Cornell Law School.

- Honorable Manuel José Cepeda, former President of the Constitutional Court, and Justice Constitutional Court
- Honorable Dennis M. Davis, Judge of the High Court of South Africa for the Western Cape Division, Cape Town
- Sukti Dhital, Legal Consultant, Human Rights Law Network
- Leonardo Filippini, Professor of Law, University of Palermo, Argentina
- Colin Gonsalves, Senior Advocate, Founder Director of Human Rights Law Network
- Karl Klare, Professor of Law, Northeastern University School of Law
- Sandra Liebenberg, H.F. Oppenheimer chair in Human Rights Law, Law Faculty of the University of Stellenbosch
- Gustavo Morales, Assistant Judge, Colombian Constitutional Court
- Colm O’Cinneide, Senior Lecturer in Law, Faculty of Laws, University College of London
- Paul O’Connell, Lecturer in Law, University of Leicester
- Pablo Rueda, former Columbian Constitutional Court assistant, doctoral student at UCLA.
- Namita Wahi, SJD student, Harvard Law School
- Lucy Williams, Professor of Law, Northeastern University School of Law