

Workshop on the Justiciability of Socio-Economic Rights

Northeastern University School of Law
March 19-21, 2009

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About the Workshop

The Workshop on the Justiciability of Socio-Economic Rights was held at Northeastern University School of Law from March 19 to 21, 2009. Program participants included three judges from three continents, and over 20 human rights advocates, practitioners, adjudicators, and academics from all over the world. Some of the questions addressed during the three-day workshop included how democratic societies treat economic and social rights; how to balance collective and individual rights; what the best way is to advance an egalitarian agenda; and how to implement these rights.

The workshop was convened as part of the Program on Human Rights and the Global Economy (PHRGE) at Northeastern University School of Law. Through programs like the workshop, PHRGE aims to have an impact on implementation of economic and social rights and expand thinking about human rights around the world.

The topic of economic and social rights enforcement raises some of the most cutting edge and complicated questions in law, and the workshop provided a space for practitioners and scholars to reflect collectively about the obstacles to advancing those rights. As one scholar from Japan commented, "Often there is an unfair or difficult choice between freedom, life and survival." Progressive court decisions do not necessarily translate into tangible policy changes on the ground and implementation of economic and social rights, including rights to health care, housing, and education, often present significant challenges.

The workshop began with a public program, in which Justice Manuel Cepeda of the Constitutional Court of Colombia, Justice Margot Botsford of the Massachusetts Supreme Judicial Court, and Judge Dennis Davis of the High Court of South Africa reflected on judicial enforcement of economic and social rights in their countries. Constitutional and comparative law scholar Daniela Caruso of Boston University School of Law contributed to the panel; Frank Michelman of Harvard Law School led the discussion and Lucy Williams of Northeastern University School of Law chaired and convened the session. The rest of the sessions were closed to the public to allow for a more open discussion among participants.

The first session, "Judicial Enforcement of Economic and Social Rights and Democratic Theory," was led by Danie Brand of University of Pretoria, South Africa. Participants considered whether the adjudication of socio-economic rights runs counter to democracy because such litigation may infringe on the legislature's power to distribute resources. Other topics included whether economic and social rights should be embedded in constitutions, and whether people can operate as full citizens and engage fully in the practice of democracy without economic and social rights.

In the second session, participants considered “The Impact of Economic and Social Rights on the Ground—How Are Things Working,” as well as “Economic and Social Rights and National Economic Development.” The panel was led by Helena Alviar of Universidad de los Andes in Bogota, Colombia. Participants discussed the costs and benefits of structuring redistributive policies around social and economic rights and the impact of judicial decisions on social policy. The group considered the lessons learned and gains made through economic and social rights adjudication, and reflected on the relationship between economic development and social policy.

The third session, “The Law of Economic and Social Rights – Litigation, Substantive Doctrine & the Role of International Norms in National Courts,” was led by Christian Courtis of the UN Office of the High Commission for Human Rights. The group considered the relationship between the individual and collective aspects of socio-economic rights, the impact of administrative law and reasonableness review in adjudication of socio-economic rights, and the impact at the grassroots level of judicial enforcement.

The discussion regarding the law of economic and social rights continued in the next session, “Standards of Review and Remedies.” The discussion was led by Sandy Liebenberg of the University of Stellenbosch, South Africa. Participants considered how legal culture bears on judicial perception of the proper role of the courts in enforcing economic and social rights; the advantages and disadvantages of reasonableness review and the viability of other models of review including minimum core obligations; the obstacles presented by resource constraints in socio-economic rights litigation; and effective remedial mechanisms for judicial enforcement of socio-economic rights.

In the final session, “Social & Economic Rights, Non-Governmental Actors & ‘Private’ Law,” convened by Karl Klare of Northeastern University School of Law, participants reviewed the state of play of social and economic rights in their jurisdictions and considered the horizontal application of social and economic rights in different countries around the world. The group considered two hypothetical problems and discussed the horizontal application of rights, focusing on whether all private law should be subject to constitutional control, who should make decisions about horizontal applications of rights, and whether the horizontal applications of rights have a political tendency.

The workshop concluded with a discussion led by Karl Klare and Lucy Williams about future collaboration and next steps.

Themes

Through these sessions, several themes emerged:

- The compatibility of democracy and economic and social rights adjudication, including the need for a more sophisticated understanding of separation of powers, in which judicial intervention on questions of economic and social rights

- and resource allocation is not considered improper interference with the legislature;
- The impact on the ground of economic and social rights adjudication, in particular the effect of litigation on redistribution of resources, civil society, and development, and the potential pitfalls of rights-based advocacy;
 - Litigation strategies for enforcing economic and social rights, individual vs. collective rights, the role of administrative law, and international norms;
 - Judicial perceptions of economic and social rights adjudication, approaches to defining rights, and creating remedies;
 - Constitutional rights and private parties: considering the tensions that arise and the potential benefits of horizontal application.

This report discusses each session in turn, highlighting the questions raised and the issues addressed by workshop participants, as well as the themes that emerged.

Session I: Democracy, Separation of Powers, and Economic and Social Rights

A key question addressed at the workshop was whether economic and social rights should be considered differently from other rights because they have budgetary implications. Critics argue that the legislature controls the budget, and the judiciary should not be allowed to intervene in the allocation of resources. Critics often suggest that it is problematic for the judiciary to interfere with the budget because the separation of powers doctrine mandates that elected officials in the legislature make decisions about the budget, not judges. These critics contend that adjudication of economic and social rights infringes on the power of the legislature and therefore runs counter to democracy.

Conference participants pointed to a number of problems with this “democratic objection.” First, participants emphasized that all rights have budgetary implications. Every election costs millions of dollars, and civil rights, such as the right to a fair trial, involve resource allocation. Yet, budgetary considerations do not factor into civil and political advocacy, and they should not present obstacles to social and economic rights litigation. One participant asserted that courts prioritize upper middle class rights, which may be why property rights are given priority over a right to food or shelter.

Second, only a very limited and rudimentary idea of separation of powers would block judges from adjudicating economic and social rights. Since the founding of the United States, no one has defended such a strict notion of separation of powers; rather, the idea of checks and balances replaced it. Branches have to interfere, at least partially, with the work of other branches on a regular basis.

Moreover, workshop participants emphasized that the “democratic objection” was based on a simplistic understanding of constitutions and democracy. Although the U.S. constitution or other constitutions do not refer explicitly to economic and social rights, this does not mean that the rights are not embedded in the constitution. In addition, in the U.S., it is important to look to state constitutions, which often contain positive rights not

explicitly included in the federal constitution, although federal standards tend to influence state court judges' thinking about these rights.

Participants underscored the importance of reminding people of a more sophisticated view of democracy and of separation of powers. As one participant observed, when people look at freedom of expression, they take a nuanced approach, based on a deliberative version of democracy. Yet in the economic and social rights context, people automatically revert to a simplistic view of democracy. It is important not to play into that view, and also not to take for granted that separation of powers means what critics of social and economic rights adjudication say it means. Rather, it is necessary to fight for a different view of the constitution. And, perhaps most important, advocates should try to persuade citizenries to write social and economic rights into their constitutions, as well as to convince reluctant judges to adjudicate and enforce economic and social rights.

Participants noted that adjudication of social and economic rights actually helps advance, not undercut, democracy, and considered different arguments that could be made to support this view and to encourage others to adopt it as well. As one professor commented: "Without basic education, what hope is there of effective participation? Are not these interests the rock bottom of democratic participation? If you take representation reinforcement seriously, social and economic rights, including health and education, are necessary." Another participant asked the group to consider: "Why isn't it built into the concept of democracy that people require food and other basic needs so that judges can say, when enforcing or deepening social and economic rights, that they are carrying out a democratic program." One participant observed, however, that this discussion raised a circularity problem: "To have a process that works well, in which people can participate as equals, people need good benefits; but to obtain benefits which are responsive to people's needs a participatory process is required."

The group reflected on how adjudicating social and economic rights can affect the capacity of impoverished people to act politically. As one participant noted, there is consensus in development economics circles that some form of participation is essential to creating policies that have lasting effect. Participants also emphasized that it is critical to recognize how social and economic rights litigation can reinforce or limit political participation. By adjudicating social and economic rights claims, courts can reinforce and strengthen the political capacity of impoverished people. In an idealistic sense, litigation of these claims is a form of political action. On the other hand, as one participant flagged: "There is potentially a tension between courts giving strong definitions to rights and remedies and civil society groups focusing on defining their own needs, and the best methods of meeting these needs. Our conception of democracy should include both a strong judicial role and a strong civil society role."

The case of *Minister of Health v. Treatment Action Campaign 2002*, (10) BCLR 1033 (CC) (S.Afr.), which addressed the availability of anti-retroviral drugs in South Africa, presents a good example of how litigation can reinforce political action campaigns. South African President Thabo Mbeki's policy was to deny the existence of HIV, and Treatment Action Campaign waged a media war against him. By the time the case reached the Constitutional Court, the campaign had won the media war. While the case

was before the Constitutional Court, the campaign managed to force the government to concede that it would provide services.

The group disagreed about the impact of the *Government of the Republic of South Africa v. Grootboom* 2000, (11) BCLR 1169 (CC) (S. Afr.). In *Grootboom*, the South African Constitutional Court called upon the government to ensure the right of access to adequate housing, but Irene Grootboom, who brought the suit, died without the South African government providing her with a home. One participant contended that litigation simply displaced politics, and significant intellectual effort was poured into the litigation without much concrete gain. Another participant, however, disputed this negative assessment of *Grootboom*, arguing that courts are vital to poor people even when there is no social movement to back them and emphasizing *Grootboom*'s positive social impact, and impact on South Africa's legal jurisprudence. Some participants viewed *Grootboom* as an example of the incremental effects of court-initiated policy changes; as one participant commented: "Judges are not going to give you everything you want right away – the building blocks are important."

Although litigation can, in some instances, galvanize people to action and help achieve political results, participants emphasized that litigation is not always effective. The two South African cases highlight the difficulty of assessing the impact of litigation. *Treatment Action Campaign* was accompanied by widespread mobilization and the case ensured that a benefit was obtained; in contrast, in *Grootboom*, a far more fundamental change occurred in the state's approach to the law, even though the individual rights of the plaintiff were not actually enforced.

Some other pitfalls of economic and social rights litigation include courts' tendencies to individualize and depoliticize claims, limiting the capacity of people to participate and achieve their rights. Courts often focus on individual rights, consider issues in very technical terms, and talk about capacity or incapacity to address rights – all of which can disempower civil society and social movements. But participants noted that courts can fight against this tendency by emphasizing the particular situation of impoverished people and by forcing the government to confront the situation. For example, courts can require that the government engage with people before evicting them; they can also require that the government meet and negotiate with plaintiffs after recognizing certain rights.

Participants generally agreed that "important systemic change is rarely achieved in a single court decision. It is more often the result of a more sustained effort to convince the courts to adopt a more inclusive and transformative human rights framework, which may only be achieved after a number of apparent losses in court." Participants also flagged the importance of social movements and civil society in implementing and promoting economic and social rights. Because many people cannot access the courts, the judiciary does not hold the solution for everyone, and people have to look for alternative ways of obtaining informal justice.

One participant raised the question of whether courts, in giving strong definitions to rights and remedies, can actually undermine civil society, such that civil society groups

are not as focused on addressing their own needs. The group considered whether it is possible to conceive of a strong judicial role, as well as a strong civil society role, and reflected on whether there are instances in which courts should hold back from defining social and economic rights so that civil society groups can come up with their own definitions. One participant noted, however, that “democracy isn’t everything there is in the world that’s good and valuable Democracy is good but justice is also good, and justice and democracy are not necessarily congruent, although they overlap.”

Participants also discussed the relevance of history and context to adjudicating and advancing social and economic rights. In Japan, for example, the constitution was written after World War II and the drafters were strongly influenced by President Franklin Roosevelt and the New Dealers, who emphasized the importance of freedom from fear and want. As a result, the Japanese constitution includes a full range of civil and social rights. The Cold War, however, led many countries like the United States to set aside the notion of economic and social rights and to focus solely on civil and political rights in the name of democracy. During this period, social and economic rights were associated with socialism and communism; as a result, politicians in the U.S. and other countries distanced themselves from those rights, prioritizing instead civil and political rights.

Participants observed that courts’ willingness to adjudicate social and economic rights can shift over time, depending on the political and economic context. In India for example, the Supreme Court was extremely progressive for a number of years. Courts came up with creative ways of ensuring that remedies were enforced, even though economic and social rights were not justiciable under the Indian constitution. In recent years, however, courts have become more deferential to the executive and more reluctant to intervene in questions that raise policy concerns. In addition, courts in India are now more focused on the rights of the middle class than the lower classes.

The recent international economic downturn also led participants in both the public panel and the closed sessions to consider whether courts will be more circumspect with regard to social and economic rights, given states’ lack of resources in the recession.

Session II: The Impact of Economic and Social Rights on the Ground

The Right to Health

The discussion started with the premise that health care rationing is inevitable, and it is therefore a question of what principles should guide rationing, how rationing will be done, and who will decide how resources are distributed. Implicit rationing occurs all the time, for example, when insurance companies deny certain experimental or expensive drugs or limit the types of treatment available to patients. But, a heightened degree of justification, transparency, and explicit rationing is necessary to advance a right to health care.

The group considered decisions by the Colombian Constitutional Court addressing health care. The court in Colombia has attempted to render rationing more transparent and

explicit, finding that denials of coverage without explanation and justification violate the right to health. The court has found a right to health care enforceable where it is inextricably connected to a fundamental right, such as a right to life or dignity, and where the lives of children, people with disabilities, and pregnant women are at stake. The court adjudicates an overwhelming number of *tutela* claims – claims to protect basic constitutional rights – each year, and has asserted repeatedly that reimbursement procedures and benefit plans must be restructured.

The group considered the normative standards and benchmarks generated by the European Committee on Social Rights, which assesses whether states are complying with their economic and social rights obligations and which has a collective complaint mechanism. Although not binding, the Committee's pronouncements have had the effect of setting threshold standards for certain countries. For example, NGOs in France have based their advocacy and the remedies they sought on the Committee's findings. In Norway, the Constitutional Court has used the Committee's standards in its jurisprudence. But not all countries are as open to the Committee's guidance. Other countries, like the UK and Ireland, have repeatedly ignored the Committee's findings, because the Committee is not a court and its adjudication of complaints and national monitoring is not considered important.

Economic and Social Rights Adjudication

In considering the impact of economic and social rights litigation, participants agreed that lawyers and academics alike must not be too romantic about what courts can achieve. As an academic from the U.K. flagged, the Western European welfare systems, which were based on social redistribution, extensive social security, and labor rights, also involved a deliberate policy of de-legalizing the system. In fact, the most successful welfare systems ejected legal controls. And, the re-judicialization of the system has been triggered by neoliberal policies and accompanied by the roll back of the welfare states by activist courts.

Participants also raised reasons to be wary of over-emphasizing the impact of social and economic rights adjudication. In general, social and economic rights adjudication will rarely transform the social trajectory of a state – it won't transform a state with a neoliberal policy into a welfare state like Sweden. The Indian Supreme Court, for example, recognized a right to food and appointed monitors to ensure compliance with the right, but even after the decision, there was only a 30 percent compliance rate.

In the U.S., it has been difficult to enforce social and economic rights through litigation. One successful example of litigation is the state court case of *Jiggetts v. Grinker*, 528 N.Y.S.2d 462 (N.Y. Sup. Ct. 1988), in which Barbara Jiggetts challenged the state allowances for shelter, and the lower court held that the allowance provided was, in fact, inadequate. The court held that the legislature had the duty to enact meaningful statutes to aid the needy. On appeal, the New York Court of Appeals, the state's highest court, held that the state Department of Social Services had a duty to establish shelter allowances that were reasonably related to the cost of housing in New York.

Other social and economic rights litigation in the U.S. has, however, been less successful. Many states adopted laws after the restructuring of the welfare system in 1996 denying welfare benefits to children born on welfare. Although there was a successful case in Nebraska, enforcing the rights of disabled women, most challenges to this policy were unsuccessful. The courts concluded that the states had no obligation to provide any particular benefits to children; states had power to spend welfare benefits however they chose.

Yet, despite the losses in these individual cases in the U.S., the litigation kept the issue alive politically and helped garner media attention. Still, looking back, advocates questioned whether the litigation was the best strategy – should advocates have tried harder to mobilize international attention? Should the plaintiffs have been more active in the litigation? Would a strategy other than litigation, such as trying to pass a constitutional amendment, have been more effective?

At least one participant asserted that even if cases are not successful, litigating social and economic rights claims is useful. Particularly in places like Latin America and Africa, the process can create a space for discussion and transparency that can be very useful. Without pressure from advocates and lawsuits, progress would not be made. Economic and social rights litigation raises awareness about housing, education, health care and other issues, and frames them as rights, which can be very powerful.

In addition, participants emphasized litigation's capacity to mobilize allies across a range of sectors. Participants emphasized the need for collective action – such as class action law suits – to enforce social and economic rights, and expressed concern that individual litigation would distort the system and undermine the well-being of the collective. For example in *O'Rourke vs. Mayor Etc. of the London Borough of Camden*, [1997] UKHL 24, a person ejected from a homeless shelter in London argued that the UK had breached both a statutory duty and the European Convention of Human Rights by subjecting him to inhuman and degrading treatment and allowing him to be homeless. He lost the case, both in the House of Lords and in Strasbourg, and the courts ruled that homelessness did not constitute inhuman and degrading treatment, creating bad precedent. But the plaintiff in *O'Rourke* had assaulted someone – a more sympathetic plaintiff or a different set of facts might have resulted in a more positive outcome and better precedent.

Furthermore, litigation can unfairly privilege those who have access to the courts. In Brazil, for example, middle class plaintiffs with access to good lawyers have brought suits which then result in the distortion of health care budgets and have a negative impact on poor people, who were not able to litigate their rights. As one judge noted, in cases brought by individuals, the weaker, less organized the litigant, the greater the importance of the remedy. Although it is important to encourage litigation, without a strong remedy, the decision will not have any impact.

Keeping in mind the importance of background and context, participants agreed that economic and social rights adjudication can, at a minimum, make systems fairer and more just; it can bridge the gap between rhetoric and reality, and serve as a useful method of attacking the executive for failure to deliver on certain promises and obligations.

One practitioner took issue with the group's approach to assessing the impact of economic and social rights litigation at this nascent stage, arguing that there is discrimination embedded in the assessment of the impact of litigation. Groups that advocate for civil and political rights are never asked to justify their decisions to litigate or challenge violations of civil and political rights as human rights. Accordingly, economic and social rights advocates should not have to justify challenging violations as human rights either. This participant argued that the paradigm needs to shift so that positive rights, such as welfare, enjoy the same status as negative rights, and advocates for social and economic rights should refrain from considering whether a moratorium should be placed on certain kinds of cases.

Participants considered the effect of the global economic crisis, and one participant suggested that "the economic crisis may present a paradigm shifting moment, in which economic rights receive greater recognition, although they may be narrowed or minimized as a result of the lack of resources." Another noted that "one positive outcome of the economic crisis is that neoliberal economists are in crisis and have lost their theoretical standing to challenge rights-based decisions." The fact that the flaws of neoliberal policies have been exposed may, in fact, help advance social and economic rights, since economists' arguments against the implementation of social and economic rights may no longer be persuasive.

Even in a depressed economy, participants posited, there is a certain minimum floor below which rights must not go and litigation can work to enforce those rights. For example, while France spent more of its gross domestic product on housing than any country in the world, it still had a significant homeless population because it did not identify those with the greatest need in allocating subsidized housing. The European Commission on Social Rights, under its collective complaint procedure, determined that France's failure to establish a system of prioritization violated the European Charter. Housing rights advocates subsequently used this decision in bringing complaints in French courts, and the decision has also been used in policy and budget discussions about the right to housing in France. Even before the decision was issued, France enacted a justiciable right to housing. The group considered whether the European Commission's collective complaint procedure presented a useful model that could be exported.

Session III: Litigation Strategies: Individual vs. Collective Rights; First Generation Rights, Administrative Law, and Reasonableness Review; and the Role of International Norms in National Courts

Participants considered a range of issues raised in developing litigation strategies, including how to frame economic and social rights – whether they should be considered individual or collective rights; the extent to which traditional/first generation bills of rights or administrative/statutory law and reasonableness review can be used to adjudicate socio-economic rights; and the role of international norms in national courts.

Economic and social rights have both individual and collective components. As one participant explained, a right to housing or education consists of both an individual entitlement to access housing or schools and a collective arrangement such as a school, health care or social security system.

The group reflected on how to prioritize spending and budgetary concerns and considered what it means when rights are partially individual in nature and partially collective. In *Soooramoney v. Minister of Health (Kwazulu-Natal) 1998*, (1) SA 765 (CC) (S. Afr.), for example, the South African Constitutional Court accepted the rationing of health care services and resources, and found that a hospital's refusal to provide renal dialysis treatment to the complainant did not violate South Africa's Bill of Rights or the state's obligations regarding health care, because those obligations were considered to be resource dependent, and that it would have been too expensive to pay for his treatment.

Participants compared this tension between individual and collective rights to the conflict between torture and the rights of the broader community to security. In considering civil liberties claims, academics and advocates are not concerned with social cost and do not engage in a cost-benefit analysis, whereas when considering economic and social rights they do. As one participant noted, when enforcing the rights of an individual, it is always possible to find ways in which that decision will encroach on other individuals or other groups. Even with the case of *Brown v. Board of Education*, 347 U.S. 483 (1954), there were certainly people affected who did not want to be forced to integrate their schools or associate with others. There were also real budgetary implications to the decision, but these issues were not considered obstacles to the advocacy effort.

The group also considered how to define economic and social rights and looked at whether advocates should draw upon 1st generation rights to create a minimum core analysis. For example, one participant raised the question of whether the concept of inhuman and degrading treatment can help courts establish minimum standards for economic and social rights. In some instances, courts have been open to interpreting the right to life and the right to be free from inhuman treatment broadly to encompass a right to shelter or welfare or health. For example, asylum seekers who applied for welfare benefits in the UK successfully argued that destitution can be considered cruel and degrading treatment. But in most cases, courts have been reluctant to expand the scope of rights. In addition, attempts to use arguments based on the equality principle have often failed.

Participants analyzed whether administrative law, statutory frameworks, and the concept of reasonableness might provide a more effective basis for advocating for economic and social rights. In many countries, judges have adopted an administrative law approach, because they are comfortable with the model. Courts have always been charged with reviewing administrative agencies and determining whether certain actions are reasonable. As a result, at least one participant posited that it might be possible to formulate an administrative law approach and concept of reasonableness that could accomplish the same end result as economic and social rights litigation.

Some noted, however, that attempts to use administrative law have only presented limited success as administrative lawyers are hesitant to transform a general duty to provide housing into an individual duty and courts are reluctant to push statutory frameworks too far. One participant explained that in the mid-1990s administrative law in the UK was effectively operating as a constitutional rights mechanism, but when the UK incorporated the European Convention on Human Rights, judges became more cautious about using administrative law outside of the civil and political rights context.

In contrast, other participants pointed to decisions by courts in Canada, South Africa, and other countries in which courts turned to administrative law and reasonableness review to enforce people's social and economic rights. For example, the Canadian Supreme Court in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, held that administrative decision-makers were unreasonable in denying an undocumented immigrant and her four Canadian born children a "humanitarian and compassionate considerations" exception, and turned to international human rights principles, including the Convention on the Rights of the Child to determine whether the decision-makers had acted reasonably. Similarly, in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, the Supreme Court of Canada found that the failure to provide a reasonable accommodation – sign language interpreters – to deaf people in health care settings was unconstitutional. In *Grootboom*, the South African Constitutional Court considered whether authorities had taken reasonable legislative and other measures to achieve the right to have access to adequate housing under the Constitution, concluded that the state had not, and directed the state to develop a comprehensive and coordinated program.

The Optional Protocol to the International Covenant on Economic Social and Cultural Rights, adopted by the General Assembly on December 10, 2008, also incorporates a type of reasonableness review. Specifically, Article 8(4) looks at the reasonableness of a state's actions in adopting a range of policies to implement rights. The standard was taken from the South African *Grootboom* case.

Participants generally agreed that international treaties and covenants can provide domestic courts with useful guidance in interpreting and defining social and economic rights. For example, in *Vishaka v. State of Rajasthan*, (1997) A.I.R. 1997 S.C. 3011, the Indian Supreme Court considered the rape of a social worker in light of article 21 of the Constitution, which guarantees a right to life, and article 14, which guarantees a right to equality, and used India's obligations under the Convention on the Elimination of Discrimination Against Women to give the rights meaning. The court held that that these rights guaranteed women protection against sexual harassment in the work place.

One participant raised the issue of whether there are certain instances in which looking to international obligations, such as those set forth in the WTO or other treaties, to interpret domestic provisions would lead to a restriction of rights. Another countered that as long as courts look to fundamental rights, such as those set forth in the UN conventions, there would not be a conflict of interest. Another participant contended, however, that there is no normative consensus about the fundamental content of rights and therefore turning to international norms could in fact prove problematic in certain instances.

Session IV: Courts, Legal Culture, Standard of Review, and Remedies

Traditional legal culture is often skeptical of enforcing social and economic rights. These rights are generally seen as outside the pale – not suitable for being processed through legal systems, because they involve courts in areas where they lack competency. Judges in liberal states assume that they can adjudicate property or contract rights but when cases appear to involve redistribution, judges become skittish. Courts often feel the need to apologize if they enter into the world of positive obligations.

As a result of courts' wariness about adjudicating economic and social rights, advocates often believe they must use different language to frame arguments so that judges can feel more confident deciding their claims. In *R (on the application of Limbuela) v. Secretary of State for the Home Department*, (2006) 1 A.C. 396, for example, counsel for the asylum seekers who were applying for welfare support spent an enormous amount of time attempting to reassure the judges that the UK was taking a negative action in preventing asylum seekers from obtaining benefits. Counsel for government argued, in contrast, that the asylum seekers were looking to obtain a benefit and the court was being asked to rule on a positive obligation. In response, the UK House of Lords asserted that it was a question of semantics whether the provision of benefits was considered a negative or positive obligation.

Similarly, in *Victoria (City) v. Adams*, [2008] B.C.J. No. 1935, 2008 BCSC 1363, homeless people in parks wanted to create plastic shelters, while municipal regulations prohibited structures of any kind in the park. Advocates asked the court to strike down the regulation, rather than asking for resource allocation, and the British Columbia Supreme Court did so, holding that the regulation deprived homeless people of life, liberty and security of the person. In *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791, the claimant challenged the waitlist for hip replacement surgery and the Supreme Court of Canada held that the prohibition on private medical and health insurance deprived residents of access to health care services. Rather than asking the court to revamp the public health care system, advocates chose to defer to the judicial preference for negative rights remedies. The outcome intruded on government prerogatives, but the judicial culture considered it less intrusive than telling the government to fix the health care system. Similarly in *Eldridge*, the claimants argued that the government was being under-inclusive in discriminating against deaf people, rather than asserting that the government had a positive obligation to provide sign language interpreters.

In some instances, civil law systems appear to be more open to enforcing social and economic rights through judicial mechanisms and more willing to award remedies in individual cases than common law systems. But participants argued that common law systems can accommodate social and economic rights adjudication as well, although it may take some amount of creativity. It is the job of advocates and academics to change the legal culture in jurisdictions in which courts are more cautious, and less willing to enforce economic and social rights.

Participants noted that advocates often try to stretch civil and political rights, such as equality and property, to include concepts found in economic and social rights, but such

approaches are often difficult. In addition, although reasonableness review is a familiar concept for more traditional jurists, the administrative law notion of reasonableness can lead courts to defer to agencies, without addressing whether a minimum core of rights is being upheld.

The effectiveness of administrative law in adjudicating social and economic rights depends in part on the type of scrutiny the courts apply. Reasonableness review can either involve weak or strict scrutiny. In *Soooramoney*, the South African Constitutional Court applied a low threshold of rationality review. The court looked at whether the state's budgetary decisions were rational and concluded quickly that they were, without considering the human rights implications of the budgetary decisions. In *Grootboom* and *Treatment Action Campaign*, the court's reasonableness review was more thoughtful. Specifically, the court tried to articulate a set of criteria and looked at whether those measures were reasonable in relation to the right. The court explained that a reasonable program had to be implemented and that adequate budgetary resources had to be allocated to the program.

Participants observed, however, that the effectiveness of administrative law analysis, unlike a traditional rights analysis, is limited in terms of defining rights; reasonableness review allows courts to side step defining the scope of economic and social rights. Even in *Grootboom* and *Treatment Action Campaign*, the court did not spend time defining the right. There was almost no discussion of what the right to housing or health means. This is in stark contrast to the European Commission on Human Rights which has deliberately worked to give meaning to the right to housing and other rights. Developing the meaning of rights needs to be the focus of courts in the future.

Resource considerations are often at the forefront of judges' minds. In *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, the Supreme Court of Canada considered whether reduced welfare benefits for people under 30 who do not participate in training or employment programs violated the right to equality, the government's obligation to provide social assistance, and the right to life, liberty, and security, and concluded that it did not. The court determined that the adequacy of the social service measures the government provided were beyond judicial review. It reached this decision, in part, because imposing a duty to provide equal welfare benefits would have had an unknown, possibly huge, budgetary impact.

Courts can avoid such budgetary issues by instructing the legislature to allocate reasonable resources to achieve a prescribed end. For example in *Tutela 704*, Corte Constitucional, T-760/08 (31 July 2008), the Colombia Constitutional Court addressed the failure of the state to transfer earmarked funds to indigenous communities, found that the state had an obligation to guarantee the rights of the communities, and directed the community, regional, and national government to distribute the resources necessary to ensure the effective realization of the indigenous community's rights.

One creative approach taken by courts in fashioning remedies involves requesting inputs from the community, the government, NGOs, academic experts, and the private sector to identify the most effective solution and to ensure compliance. In *Mendoza v. National*

Government, M 1569 XL Originario (2001), for example, the Supreme Court in Argentina called for a series of public hearings to develop a remedy and established some general guidelines, which it ordered the authorities to follow in safeguarding the right.

The Colombian Constitutional Court took a similar creative approach in adjudicating *Tutela 025*, Corte Constitucional, T-025/04 (22 Jan. 2004). The court declared that the abysmal living conditions of internally displaced people (IDPs) were unconstitutional and directed the legislature to allocate all necessary resources to ensure that IDPs had a minimum standard of basic resources, services, and protections. In order to ensure compliance, the court convened a hearing with the cabinet ministers of health, housing, and the interior, as well as with NGOs advocating for IDP rights, thereby establishing a dialogue between the government and those entitled to rights. The court ordered the government to develop result indicators, which IDP advocates participated in designing, and demanded that the government submit periodic results reflecting compliance with these indicators.

Although some members of the group were very optimistic about the results this type of dialogue could produce, others questioned whether participatory decision-making was actually an effective method of creating remedies. Participants agreed that although advocates and academics spent a great deal of time thinking about and framing rights, not enough time is spent on fashioning and proposing remedies. As one participant noted: “At the end of the day, the remedy is the content of the right.” Participants considered whether conferences and workshops might help change the mindset of judges in traditional jurisdictions. Participants also noted the need to change the legal culture and perspectives more broadly, using fellowships, seminars, professional conferences, and blogs to increase the dialogue around human rights and adjudication of social and economic rights, in particular.

Session V: Horizontal Application of Rights: Non-Governmental Actors and Private Law

Workshop participants discussed the horizontal application of rights in each of their respective countries and the issues that arise in applying constitutional rights to private actors. The group considered two hypothetical problems that revealed the tension involved when two private parties’ rights are at issue.

In most countries identified by participants, other than the U.S., the U.K., and Japan, at least some rights are horizontally applicable. In the U.S., constitutional rights, other than the prohibition on slavery and the right to travel, do not apply to private parties. The Alien Tort Claims Act can be used to sue a company directly for human rights violations. The Human Rights Act in the UK only applies to public bodies, but what constitutes a public body is often the subject of debate, since companies can arguably take on public roles. In Japan, fundamental rights do not apply to private actors.

Under the South African Constitution, rights are horizontally applicable and even insurance contracts are subject to constitutional review. In Argentina, private parties are

bound by fundamental rights and the body of constitutional private law is growing. Colombia also recognizes fundamental rights between private parties and rights in the constitution apply to students in private schools, as well as to people trying to obtain commercial loans. In Canada, the nature of the activity determines whether private actors may be subject to the charter. The Indian Constitution includes rights which have direct horizontal effect, such as the prohibitions on untouchability and forced labor. Other rights can also have an indirect horizontal effect where, for example, a private corporation can be considered the state. In Ireland, constitutional tort actions are considered horizontally applicable. The European Court of Human Rights has sanctioned states for failing to protect their residents against abuses of rights by third parties. In addition, certain types of European Union regulations have full horizontal effect.

In the first hypothetical the group considered, the fictional Constitution entrenched the rights to food, life, the pursuit of happiness and well-being, and in the case of children, the right to be protected from maltreatment and neglect. The rights under the constitution had full horizontal application, and any person whose rights were infringed had standing to seek relief in the courts. P, a poor single parent with two children, subsisted on corn, which S typically sold for 10 cents per pound, until the country entered into a free-trade agreement, corn was suddenly exported in large quantities, and S started selling corn at double the price per pound. As a result, P could no longer afford to purchase corn, and she and her children became malnourished and sick. P sued S for infringing her constitutional rights, seeking damages and a decree ordering S to reduce her sale price of corn to P.

The group considered whether it would be inappropriate to impose a positive responsibility to provide food at a low cost on S. One participant noted that if the question were framed as the seller denying food, it could be considered a negative rights case, instead of a positive rights case. Another participant asserted that the hypothetical should be seen as a freedom of contract case, not a positive duties case.

Participants considered whether it would be preferable for P to proceed against S or to proceed against the government, since many people would probably be in her situation, and the state has an obligation to provide food stamps or some other form of basic subsistence. Some participants argued that it was unfair for P to have to hold the state responsible for poverty, since the state would likely give preference to international trade, and P might not have the money or time to launch a systemic case against the state. Moreover, the store could reasonably provide her with food at the old price. Others argued, however, that the group needed to consider the rights of the seller as well. As one participant noted, when the rights of two private parties are at stake, it is hard for courts to balance those rights and reach a decision.

Another, paraphrasing a South African scholar, concluded that “every social practice in someway relies on a legal rule that can in certain circumstances be subject to constitutional review,” and all common law rules should therefore be subject to the constitution.

The second hypothetical involved the construction of a new schoolhouse in Sweden by a Latvian firm which was able to make the lowest bid because the workers earned far less than their Swedish colleagues. A Swedish union asked the Latvian company to sign a collective bargaining agreement and abide by its wage levels, and the Latvian company declined. The union picketed and halted delivery of all supplies and materials. The company needed Swedish electrical workers but they refused to enter the job site, in solidarity with the Swedish union. Work on the schoolhouse shut down, and the Latvian company was in danger of losing its contract. The Latvian company sued the union, seeking a court decree that the union's blockade of work on the schoolhouse violated European Community law, specifically an article guaranteeing free movement of services among states; an article prohibiting discrimination on the basis of nationality; and an article giving direct horizontal effect to these rights. The union argued that another article protected the right to strike, and the blockade was validly undertaken under Swedish law with the legitimate public purpose of protecting workers' living and work conditions, and as a result, the articles invoked by the Latvian company should not be given full horizontal effect.

In this hypothetical, the horizontal application of rights helped Latvian workers, but undercut the Swedish union. Workshop participants were asked to consider whether a strike by the union was subject to the European treaty and whether it should be. One participant argued that labor unions should not be immunized from constitutional norms, but another noted that the right to strike would have brought Latvian workers a fair wage.

Given how fundamental freedom of movement is to the EU, one participant argued that it would be necessary to uphold the treaty as a superior norm, and the court should therefore find the union's actions in violation of the treaty. Another queried whether in the short run there would be an advantage to upholding the right to strike despite the problems it created. Participants grappled with whether there should be a hierarchy of rights, and how that hierarchy would play out when looking at the horizontal application of rights. Several participants agreed that no one should be immunized from the horizontal application of rights.

Key Points and Conclusions

This first Workshop yielded the following key points and conclusions:

- Economic and social rights adjudication can help promote a robust democracy by ensuring the protection of minimum core rights, such as education, health, and housing, and thereby enabling greater participation in political processes;
- It is important for advocates to work with communities in bringing lawsuits – grassroots participation can ensure that the rights being litigated and remedies crafted are responsive to community needs; political momentum can spur courts to enforce rights;

- Although administrative law may be helpful to advancing social and economic rights in the short term, courts should be pushed in the direction of a traditional rights analysis – administrative law analysis is limited in terms of defining rights;
- Courts need to develop the meaning of economic and social rights so that governments have a framework for taking steps to promote those rights and advocates need to spend time crafting remedies to ensure that rights are adequately monitored and enforced;
- Advocates must dedicate time and energy to changing the legal culture and to educating courts in order to advance economic and social rights.

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

Participants

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