

IF I SHOULD FALL BEHIND. AN EXAMINATION OF CONSTITUTIONAL GUARANTEES OF SOCIO-ECONOMIC RIGHTS

Róisín Aine Costello

ABSTRACT

In assessing contemporary debate on socio-economic rights the growth of global capitalist market economics, as well as a rejection (certainly in the United States) of the traditional welfare model has heralded a general disenchantment with the conventional wisdom that socio-economic matters should be left to the legislature and are beyond the purview of the judiciary. In addition there is a growing opinion that ensuring adequate protection for core civil and political rights may tangentially require securing socio-economic rights as well, for example, the provision of minimum levels of education, health and social support. This paper will seek to examine the development of constitutional guarantees that protect socio-economic rights in Canada, the United States, India and South Africa and compare the efficacy that these guarantees have yielded.

KEYWORDS: SOCIO-ECONOMIC – CONSTITUTIONAL LAW – JUSTICIABILITY – RIGHTS – ACTIVISM.

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1. Introduction

The mixed reception that socio-economic rights receive in both political and legal circles can be broadly attributed to issues of resource allocation and justiciability. However, it may well be that the most basic problem with socio-economic rights is that the normative language which they invoke has become tainted by association with the hollow rhetoric of Communism in the twentieth century and subsequent American fears of wealth redistribution²- an association which has proved nearly impossible to dislodge.³ In the face of such challenges to and doubts surrounding their legitimacy it is remarkable that socio-economic rights enjoy not simply lingering⁴ but in some areas staunch support.⁵

In addressing why socio-economic rights retain such support a number of factors appear to be in play. To begin with it should be noted that the jurisdictions considered in this paper have all signed (though the US and South Africa have not ratified), the UN Covenant on Economic, Social and Cultural Rights though the ability of such international agreements to bind countries definitively to their obligations is less certain than national constitutional guarantees.

The growth of capitalism as well as the rejection of the traditional welfare models has

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² K. Schepple, 'A Realpolitik Defense of Social Rights' (2004) 82(7) University of Texas Law Review 1921-1961. See also, Philip C. Aka, "Analyzing U.S. Commitment To Socio-economic Rights" (2006) 39 Akron Law Review 417, 420.

³ Nicholas Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 South African Journal of Human Rights 449 at 451.

⁴ U.N. Econ. & Soc. Council [ECOSOC], Sub-Commission on Prevention of Discrimination and Prot. of Minorities, Final Report: The Realization of Economic, Social and Cultural Rights, 128, 184, U.N. Doc. E/CN.4/Sub.2/1992/16 (July 3, 1992) (prepared by Danilo Turk)

⁵ K. Schepple, 'A Realpolitik Defense of Social Rights' (2004) 82(7) University of Texas Law Review 1921-1961.

heralded a general disenchantment with the notion that socio-economic matters should be left to the legislature and are beyond the purview of the judiciary.⁶ There is a growing opinion that ensuring adequate protection for core civil and political rights may tangentially require securing socio-economic rights such as the provision of minimum levels of education, health and social support.⁷ In the decision of *Hartz IV*,⁸ the German Constitutional Court recognised that an adequate level of social welfare was required to ensure respect for the core constitutional right of the individual to be treated with dignity.⁹ Elsewhere the English courts have suggested that any government action that drives individuals to a state of destitution may violate Article 3 of the ECHR.¹⁰

The arguments in support of socio-economic rights, as well of those which seek to detract from their credibility are beyond the remit of this paper but it is worth noting, in passing, that jurisdictions such as Sweden that are renown for the strongest and most established socio-economic rights guarantees in fact encounter very little litigation, The guarantees seemingly act as a provider of minimum standards from which strong public welfare policy is built.¹¹ This paper will seek to examine the development of constitutional guarantees that protect socio-economic rights in Canada, the United States, India and South Africa and compare the efficacy that these guarantees have yielded.

2. Canada

Although Canada has an exemplary record in the protection of primary or “first generation” rights, socio-economic rights have received mixed support under the country’s Charter of Rights and Freedoms.¹² The Charter, despite being primarily concerned with the protection of civil and political rights, contains two protections for socio-economic rights. Specifically,

⁶ Albie Sachs “Social And Economic Rights: Can They Be Made More Justiciable?”(2000) 53 SMU Law Review) at 1383-85, D.M. Davis “The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles” (8 South African Journal on Human Rights (1992) 473 at 475. Maurice Cranston, “*What are Human Rights*” (Basic Books, 1963) at 66,

⁷ Jonathan Berger “Litigating For Social Justice In Post-Apartheid S.A.: A Focus On Health And Education” Varun Gauri and Daniel M Banks eds “*Courting Social Justice; Judicial Enforcement of Social and Economic Rights in the Developing World*” (Cambridge University Press, 2006) 43

⁸ Hartz IV BVerfG, 1 BvL 1/09 vom 9.2.2010, Absatz-Nr. (1 - 220),

⁹ BVerfG, 1 BvL 1/09 vom 9.2.2010, Absatz-Nr. (1-220), <http://www.bverfg.de/entscheidungen/lis20100209_1bvl000109.html> accessed 30 October 2013

¹⁰ *R v Secretary of State for Social Security, ex parte Joint Council for the Welfare of Immigrants* [1997] 1 WLR 275, 292-93.

¹¹ ECOSOC, “*Concluding Observations of the Committee on Economic, Social and Cultural Rights (ECOSOC 7-9)*”, 12, U.N. Doc.E/C.12/1995/5 (1995).

¹² Martha Jackman and Bruce Porter “Justiciability of Social and Economic Rights in Canada” in M Langford (eds). “*Socio-Economic Rights Jurisprudence: Emerging Trends in Comparative International Law*” (Cambridge University Press, 2008) 2, 12.

they include the guarantee of equality in section 15¹³ and the rights to life and security of the person in section 7.¹⁴ However, enforcement of the socio-economic rights that are implied under these guarantees has been largely dependent on the distinction between whether the rights are actually positive or negative in nature.¹⁵ Brodsky and Day have noted the possibility that once negative rights which are socio-economic in nature become recognised, the possibility of an extension of recognition to those rights which are positive in nature may follow. On the matter they state 'once we recognize the extent to which it has already been accepted that positive government obligations flow from Charter rights, the resistance to such obligations in the economic sphere should abate.'¹⁶

An examination of socio-economic rights in Canada must begin with *Irwin Toy*,¹⁷ a case in which the Canadian Court rejected attempts by corporate interests to ground their claims within the scope of Section 7 by determining that private property rights had been intentionally excluded from the scope of the Charter.¹⁸

In 2003, for the first time since the *Irwin Toy* case the court considered socio-economic rights in the *Gosselin*¹⁹ case. The case involved a challenge to purportedly inadequate levels of social assistance benefits in Quebec.²⁰ In a notable and strident dissenting judgment (L'Heureux-Dubé J concurring), Justice Arbour J ruled that section 7 (the right to security of the person) placed positive obligations on governments to provide those in need with social assistance which is adequate to cover their basic necessities.²¹ However the majority left the possibility of adopting a novel interpretation of the right to security of the person in future cases, but in this case found insufficient evidence to support such a finding, per McLachlin CJ: 'Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living

¹³ Canadian Charter of Rights and Freedoms, S.15 <<http://www.efc.ca/pages/law/charter/charter.text.html>,> accessed 10 November 2013

¹⁴ Canadian Charter of Rights and Freedoms S.7 <<http://www.efc.ca/pages/law/charter/charter.text.html>,> accessed 10 November 2012, See also, Bruce Porter "Expectations of Equality" *Supreme Court Law Review* Vol 33 (2006) pp22 at 3

¹⁵ Canadian Charter of Rights and Freedoms <<http://www.efc.ca/pages/law/charter/charter.text.html>,> accessed 10 November 2012,

See also Martha Jackman "Charter Remedies for Socio-economic Rights Violations: Sleeping Under a Box" in Kent Roach (eds) *"Taking Remedies Seriously"* (Montreal, Les Editions Yvon Blais, 2010)

¹⁶ Gwen Brodsky and Shelagh Day "Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty" (2002) 14 *Canadian Journal of Women and Law* 185 at 207

¹⁷ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927.

¹⁸ *Ibid.* pp. 1003-4.

¹⁹ *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429

²⁰ *Gosselin v. Quebec (Attorney General)*, [2002] 4 SCR 429 at para 82

²¹ *Ibid.*,

standards. I conclude that they do not.²²

Such decisions suggest that the Court could, in select circumstances, vindicate substantive equality rights obligations, notwithstanding criticism over excessive judicial activism.²³ Yet despite this seemingly progressive attitude the court has consistently neglected to address whether, in the absence of an under-inclusive program or benefits scheme, the Charter may impose a positive obligation on the government to provide for the needs of disadvantaged groups.²⁴

In reality initial optimism over the potential of the Charter to vindicate positive socio-economic rights has proved to be premature. However, the outlook following the court's decision in *Auton v British Columbia*²⁵ has arguably become more hostile to potential progress in the area. *Auton* involved a situation in which parents of autistic children sought to require the State, (under section 15) to provide their children with specific forms of treatment.²⁶ The Supreme Court held that section 15 was used only in cases in which the State had acted in a discriminatory manner²⁷ and would not be implicated where the State failed (as in the case at issue) to positively provide a specific service.²⁸ Commentators on *Auton* have noted the decision displays 'worrying signs that the McLachlin Court may in fact wish to increase the divide between expectations and the Court's approach by closing the door on a positive rights approach to section 15 that was quite explicitly left open in

²² *Ibid*, at para 84

²³ Porter, 'Expectations of Equality', pp. 36-38; B. Porter, 'Beyond *Andrews*: Substantive Equality and Positive Obligations after *Eldridge* and *Vriend*', *Constitutional Forum*, Vol. 9 (1998), pp. 71-82; M. Jackman, "'Giving Real Effect to Equality": *Eldridge v. B.C. (A.G.)* and *Vriend v. Alberta*', *Review of Constitutional Studies*, Vol. 4 (1998) pp. 352-371. See also, L. Weinrib, 'The Canadian Charter's Transformative Aspirations', in J.E. Magnet et al. (eds.), *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Toronto: LexisNexis Butterworths, 2003), pp. 17-37. M. Jackman, 'Charter Equality at Twenty: Reflections of a Card-Carrying Member of the Court Party', *Policy Options* 27(1) (2005), 72-77.

²⁴ *Vriend v. Alberta*, [1998] 1 SCR 493 at para. 64; see generally Porter, 'Reclaiming Expectations' supra at 16, pp. 180-5. For a discussion of substantive equality and positive obligations in Canadian and other jurisprudence, see S. Fredman, 'Providing Equality: Substantive Equality and the Positive Duty to Provide', *South African Journal on Human Rights*, Vol. 21 (2005), pp. 163-190; G. Brodsky & S. Day, 'Beyond the Social and Economic Rights Debate: Substantive Equality Speaks to Poverty', *Canadian Journal of Women and the Law*, (2002) Vol. 14. 185-220.

²⁵ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78 at 1. It is interesting to note the similarities in the circumstances of this case and the Irish case of *Sinnott v Minister for Education* 2 I.R. [2001] 547 and to compare the judgements in the two cases.

²⁶ *Ibid*.

²⁷ *Ibid*, at para 3

²⁸ [2004] 3 S.C.R. 657, 2004 SCC 78 at 1.

Eldridge and Vriend.²⁹

Porter has further criticised the Court for reverting to ‘the kind of non-discrimination analysis that had been rejected during the drafting of section 15’,³⁰ which represents a ‘betrayal of the expectations of equality seekers that the right to equality ought to mean something to those who have unique and significant needs.’³¹ While such remarks are somewhat dramatic it can be argued that the court in *Auton* drew a line in the sand, thus fundamentally limiting the potential of the Charter to provide protection for socio-economic rights.

Significant, also, in the Canadian context, is the decision of the Supreme Court in *Chaoulli*.³² In earlier cases the Supreme Court had left open the possibility that section 7 might be interpreted to provide for the protection of positive rights,³³ a potential which it seemed to preclude with its decisions in *Gosselin* by framing section 7 as a largely negative guarantee of individual autonomy.³⁴ *Gosselin* concerned the right to minimum social assistance that was derived from the right to life and the court drew a distinction between corporate commercial economic rights and economic rights which are fundamental to health and human survival. In *Chaoulli* the Court extended this idea of individual autonomy and inviolability in finding a provincial ban on insurance for the provision of private health care to be in breach of the rights protected in both the provincial and federal Charter and seemingly affirming that positive rights would not benefit from enforcement.

The decision in *Chaoulli* proved highly controversial and to many critics, this represented an unacceptable privileging of the neo-liberal ideology by the judiciary further limiting the potential for the enumeration of socio-economic guarantees under the Charter.³⁵ More recently in *Victoria (City) v Adams*,³⁶ relying on *Chaoulli* the defendants argued that the injunction to remove their temporary dwellings violated their right to shelter under section

²⁹ Porter supra at note 11.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Chaoulli v. Quebec (Attorney General)* [2005] 1 S.C.R. 791, 2005 SCC 35.

³³ *Ibid.*

³⁴ *Gosselin v AG of Quebec* 2002 SCC 84 at 310 per Arbour J it might be noted that the statute in Quebec lessened the amount those under 30 were provided with in response to a recession. .

³⁴ David Langwallner “Separation Of Powers, Judicial Deference And The Failure To Protect The Rights Of Individuals” in Oran Doyle and Eoin Carolan eds “*The Irish Constitution: Governance And Values*” (Thomas Round Hall 2008) 256 at page 264. A guarantee of the rights of the person is also evident in the Irish constitutional law under the underutilised Art 40.3 (*Ibid.*)

³⁵ Porter supra at note 11, the Court had, in effect, “recognised a right to health, but only for those who could afford it”.

³⁶ *Victoria (City) v Adams*, 2008 BCSC 1363 [2008] B.C.W.L.D. 7817.

7 of the Charter in circumstances where no alternative shelter was available. The case involved an injunction which was sought by the City of Victoria authorising the bulldozing of a “tent city” which had been created by a number of homeless individuals in a public park in contravention of a municipal bylaw which prohibited the erection of temporary structures overnight in public spaces. Ross J stated that the rights of the homeless population outstripped the accommodation provided by the City and that the “negative right” of the claimants to provide their own shelter in the absence of the provision of any by the City was in accordance with their right to life under section 7 and that the individuals should and could not be removed.³⁷

As we can see through case law, the Canadian experience with regards socio-economic rights has favoured an interpretative approach that limits the potential enumeration of socio-economic rights claims under the Charter to negative guarantees. Despite this the Canadian approach remains significantly more tolerant of rights that explore the boundary between primary and secondary rights. Canada does however remain (despite such limitations) far more willing to identify and enforce socio-economic rights guarantees than its nearest neighbour.

3. The United States

The United States Constitution provides no recognition for socio-economic rights and to date there has been no judicial move to imply any such rights. Indeed, much of the contemporary debate surrounding judicial activism and the recognition of implied rights draws heavily on American commentary, thus making it difficult to foresee a situation in which the Supreme Court would find any textual provision that implied such rights. However staunch academic opposition to socio-economic rights does not mean that the American people necessarily oppose their enforcement. Sunstein has observed that ‘most Americans favour a right to education, a right to be free from monopoly, a right to social security; and in many polls, most Americans favour a right to a job and a right to health care.’³⁸

In the aftermath of Hurricane Katrina there were calls³⁹ for the US to honour its commitments to socio-economic rights under the UNDHR⁴⁰ if they could not be found in the constitution and, per Henkin, ‘if we cannot bring ourselves to declare socio-economic

³⁷ It is worth noting the juxtaposition of this judgement with that of the South African case of *Grootboom* which shall be discussed at a later stage in this paper.

³⁸ Cass Sunstein, “The Second Bill Of Rights: The Last Great Speech Of Franklin Delano Roosevelt And America’s Unfinished Pursuit Of Freedom” (Basic Books, 2006) 26

³⁹ Philip C. Aka “Analyzing Us Commitment To Socioeconomic Rights” 39 Akron Law Review (2006) 417 At 420

⁴⁰ Article 22 “The Universal Declaration of Human Rights”

guarantees rights, we can well legislate them as entitlements.’⁴¹

The struggle for the recognition of human rights in America has not always been so rhetorical a battle. In President Theodore Roosevelt’s 1944 state of the union address he boldly outlined his “Second Bill Of Rights,” stating the American Constitution guaranteed the means sufficient for survival⁴². The Americans were also entitled to ‘economic security, social security, moral security’⁴³

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence.... In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.⁴⁴

Roosevelt listed the rights to be guaranteed as including the rights to a useful and remunerative job and to earn enough money, to provide adequate food and clothing and recreation. There is also the right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad. There is also the fundamental right of every family to have a right to a decent home.⁴⁵ Fifteen months after delivering his speech Roosevelt was dead and though his wife continued to campaign⁴⁶ the dream of judicially recognised and enforceable socio-economic rights in the U.S. died with its creator.⁴⁷ Although his vision is thought by some to have played a major role in the Universal Declaration of Human rights, which was finalised in 1948 under the leadership of Eleanor Roosevelt and publicly endorsed by American officials at the time.

⁴¹ Louis Henkin, “The Universal Declaration And The U.S. Constitution” 31 *Ps: Pol. Sci. & Politics* (Sept. 1998) 512 at 515.

⁴² President Franklin D. Roosevelt, State Of The Union Address (Jan. 11, 1944) Volume 13 “The Public Papers And Addresses Of Franklin D. Roosevelt” at 32-42 (Samuel I. Rosenman Ed., Harper & Bros. 1950).

⁴³ *Ibid*, at 33.

⁴⁴ *Ibid* at 1.

⁴⁵ *Ibid* at 41.

⁴⁶ Cass R Sunstein and Randy E Barnett “Constitutive Commitments And Roosevelt’s Second Bill Of Rights: A Dialogue” 53 *Drake L Rev* 205 2004-2005 at page 209.

⁴⁷ Sunstein, *ibid* at page 2. Additionally it is worth considering the similarities between the current socio-economic climate in the United States and that which existed in Roosevelt’s time <<http://online.wsj.com/article/SB123897612802791281.html>>, accessed 8 November 2012 and the attendant possibility that there may be a resurgence in support for socio-economic rights, a trend which may be beginning to be evidenced with initiatives such as “Obamacare”, The Patient Protection and Affordable Care Act (PPACA).

4. India

The Indian Constitution was intended at its inception to be a transformative document, with a commitment to 'protecting and enhancing national unity and integrity; establishing the institutions and spirit of democracy; and fostering a social revolution to better the lot of the mass of Indians.'⁴⁸The Constitution thus places much of its emphasis on guarantees of civil and political rights, augmented by the Principles of State Policy and in doing so, it is quite similar to the Irish approach, distinguishes between fundamental rights that are protected from incursions by the state and non-enforceable directive principles.⁴⁹

Initially the judiciary in India favoured the distinction between fundamental rights and state policies. In the 1970s however this altered as the courts began to take the view that the rights and directives should be harmonised and began to incorporate rights to health, food, education and shelter rights pursuant to life and liberty in Articles 14 and 21.⁵⁰ This development resulted in a transformation in social economic rights as the result of judgements from the higher courts in India, like basic education, health, food, shelter, speedy trial and equal wages into enforceable socio-economic rights.⁵¹

The judgements in these cases, emphasised the purpose of this new initiative, that being the strengthening of the protection of socio-economic rights in India for the benefit of those poor and excluded classes in need of such guarantees.⁵² In doing so the Supreme Court embraced an expansive interpretation of the meaning of the right to life under Article 21 of the Constitution, which included 'the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing one-self in diverse forms'⁵³

In the case of *Paschim Banga Khet Samity v State of West Bengal*⁵⁴ the Indian Supreme Court interpreted the right to life as by extension securing the right to emergency medical

⁴⁸ G. Austin, "Working a Democratic Constitution: The Indian Experience" (New Delhi: Oxford University Press, 1999) 6 these various commitments encompass what Austin refers to as the 'seamless web' of Indian constitutionalism.

⁴⁹ Shylashri Shankar and Pratap Bhanu Mehta "Courts and Socioeconomic rights in India" in Varun Gauri and Daniel M Banks eds "*Courting Social Justice; Judicial Enforcement of Social and Economic Rights in the Developing World*" (Cambridge University Press, 2006) 146-148.

⁵⁰ *Ibid*, at 149.

⁵¹ S.P. Sathe "Judicial Activism In India"(Oxford University Press, Delhi 2002) .

⁵² M. Galanter and J. Krishnan, "Bread for the Poor : Access to Justice and the Rights of the Needy in India" (2004) 55 *Hastings Law Journal* 789 , 795. See also, Paul O'Connell "The Death of Socio-Economic Rights" *Modern Law Review* (2011) 546.

⁵³ Constitution of India, Art 21. (IND)

⁵⁴ 1996 4 SCC 37.

care and noted that essential obligations such as those in question could not be avoided by pleading financial constraints.⁵⁵ The facts of case where that the plaintiff had been taken into a succession of health care facilities and was repeatedly refused treatment due to lack of the facility's technical capacity or lack of beds and finally was left with no alternative but to seek to be admitted into a private hospital where he was treated at a great expense. The Court ordered the plaintiff to be compensated for a breach of his rights but also directed the government to provide facilities in the form of additional hospitals and ambulances where required.⁵⁶

Particularly significant was the line of authority in which a right to free primary education was recognised by the Court leading to a constitutional amendment to allow for the explicit recognition of the right in the Indian Constitution. Beginning with the case of *Unikrishnan v State of AP*⁵⁷ the Indian Supreme Court noted that the right to education should be treated as fundamental even if it was not present in the constitution.⁵⁸ This case led to a line of precedent which, forty five years after independence, the Indian court used to establish the recognition of education as a fundamental right for children between the ages of six and fourteen.⁵⁹

It was shortly after this enumerative zenith of the Supreme Court that the Indian Government began to embrace neo-liberalism⁶⁰ signalling a shift in the attitudes of the Supreme Court to a more restricted view of constitutional rights expounded in the U.S. and other Western constitutional democracies. As Bhushan notes, the pattern of judgments in more recent years has been one of

Liberal and expansive pronouncements on socio-economic rights under Article 21...[not] matched by a determination to implement those rights. Since the liberalization of the Indian economy, even the court's rhetoric on socio-economic

⁵⁵ *Paschim Banag Khet Samity v State of West Bengal* 4 SCC 37 (1996) .

⁵⁶ *Ibid.*

⁵⁷ *Unikrishnan v State of AP* 1 SCC 645 (1993).

⁵⁸ *Ibid.*

⁵⁹ Shylashri Shankar and Pratap Bhanu Metha "Courts and Socioeconomic rights in India" 146 p 163 in Varun Gauri and Daniel M Banks (eds) *"Courting Social Justice; Judicial Enforcement of Social and Economic Rights in the Developing World"* (Cambridge University Press, 2006).

⁶⁰ The neo-liberal worldview has been repeatedly characterised as hostile to the recognition and protection of socio-economic rights See, R. Nozick, "Anarchy, State and Utopia" (Oxford: Blackwell, 1974) 238; and M. Rothbard, "The Ethics of Liberty" (New York: New York University Press, 2003) 100. As Pieterse argues 'It is . . . clear that the idea of constitutionally entrenched social rights goes contrary to several tenets of neo-liberalism' see n 5 above 14. See also "Negative Rights v Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in Emerging Neo-Liberal Economic Orders"(2000) 22(4), *Human Rights Quarterly* 1060 , 1071.

rights has been weakening. Very often the court has itself ordered the violation of those rights, and in the process [violated] the principles of natural justice... seriously calls into question the commitment of the Indian courts to the rights of the poor and the constitutional imperative of creating an egalitarian socialist republic.⁶¹

The stark assessment of Bhushan that the courts have failed in guaranteeing progress through socio-economic rights is borne out somewhat by a number of preceding Supreme Court judgements that had seriously undermined the earlier 'Public Interest Law revolution.' In the case of *T.M.A. Pai Foundation v State of Karnataka*,⁶² the Supreme Court considered a challenge to the quota system under which fifty per cent of places in third level institutions were reserved for members of specific castes or other disadvantaged groups, and were subsidised by other students paying higher tuition fees. The Court held that the right to establish and operate educational institutions was inherent in Articles 19(1)(g) and 26 of the Constitution,⁶³ and that by extension private third level institutions should be entitled to autonomy bordering on unfettered freedom in determining the admissions policy of their institution, including the fees to be charged.⁶⁴ Such reasoning stands in stark contrast to the sentiments articulated by the courts in earlier decisions and have subsequently been reinforced by cases displaying similar reasoning. In the *Narmada Valley*⁶⁵ and *Tehri Valley* cases,⁶⁶ the Supreme Court disregarded the right to shelter of multiple thousands in deference to development programs.

While such developments may seem ominous as to the future of justiciable socio-economic rights in India, arguably, there remains strong support for their recognition in the Private International Law System.⁶⁷ Indeed it is worth noting that the behaviour of the Indian courts is perhaps one of the few examples of successful judicial activism.⁶⁸

5. South Africa

⁶¹ Bhushan, 'Misplaced Priorities and Class Bias in the Judiciary' (2009) 44(14) Economic & Political Weekly 32, 37.

⁶² *T.M.A. Pai Foundation v State of Karnataka* 1994 SCC (2) 195 1993 SCALE (4) 368.

⁶³ Const. of India Articles 19(1)(g) and Article 26.

⁶⁴ *Ibid.*

⁶⁵ *Narmada Bachao Andolan v Union of India* [2000] INSC 518

⁶⁶ *N.D. Jayal v Union of India* (2004) 9 SCC 362.

⁶⁷ S. J. Cassels "Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?" (1989) 37 American Journal of Comparative Law 495

⁶⁸ Shylashri Shankar and Pratap Bhanu Metha "Courts and Socioeconomic rights in India" 146 p177 in Varun Gauri and Daniel M Banks eds "*Courting Social Justice; Judicial Enforcement of Social and Economic Rights in the Developing World*" (Cambridge University Press, 2006).

The new South African Constitution at its adoption was lauded as a progressive document that would create the basis for wholesale social change. This is noted as having been the inspiration behind the constitution of Namibia which was among the first of the African nations to enact a constitution containing a Bill of Rights. Similarly to the Constitution of South Africa the Namibian Constitutional guarantees are largely, but not exclusively, derived from the 1948 Universal Declaration of Human Rights and guarantees both first generation (traditional civil and political) rights as well as socio- economic (second and third generation rights) are contained in the Namibian Constitution.⁶⁹ Socio-economic rights promised significant potential for improving the lives of the country's worst off and advancing a progressive agenda but their limits have been obvious as judges have struggled to give effect to competing claims for limited resources and have failed to deal with the effects of political pressure in relation to the appropriate role of the judges in dictating public policy.⁷⁰ At the same time, the constitutional protection of the aims of equality and social progress through the socio-economic rights guarantees gave an indication of the right as guaranteeing something beyond abstract equality and affecting real change.⁷¹

Despite the revolutionary promise of the Constitution the first decision of the Constitutional Court in *Soobramoney*⁷² was hardly radical and led to the concern that it might 'foreshadow a downgrading of the status of socio-economic rights.'⁷³ Craig Scott and Phillip Alston argued, in contrast, that such remarks were indicative of 'too quick a judgement' and rather the appropriate way to understand the *Soobramoney* case was in the context of the Court's first faltering step into the uncertain terrain of socio-economic

⁶⁹ The Namibian Constitution <<http://www.orusovo.com/namcon>> accessed 27 September 2014, was adopted in February 1990 a month prior to Namibia's independence from apartheid South Africa and was drafted by an elected constituent assembly and drew heavily on the UN Covenant on Civil and Political Rights as well as making several guarantees not enumerated in that document. For a discussion of the Constitution's guarantees see Jill Cottrell "The Constitution of Namibia: An Overview" (1991) 35(1) *Journal of African Law* 56; John Cantius Mubangizi "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" 2 *African Journal of Legal Studies* 1 (2006) 8.

⁷⁰ Jonathan Berger "Litigating for Social Justice in Post-Apartheid S.A.: A focus on health and education" in Varun Gauri and Daniel M Banks (eds) "*Courting Social Justice; Judicial Enforcement of Social and Economic Rights in the Developing World*" (Cambridge University Press, 2006) 38.

⁷¹ K Klare "Legal Culture And Transformative Constitutionalism" (1998) 14 *South African Journal on Human Rights* 147 and Christopher Mbazira "Litigating Socio-Economic Rights in South Africa; A Choice Between Corrective And Distributive Justice", <http://www.pulp.up.ac.za/pdf/2009_07/2009_07.pdf> accessed 1 November 2012).

⁷² *Soobramoney v Minister of Health (Kwazulu-Natal)* (CCT32/97) [1997] ZACC 17.

⁷³ Craig Scott and Phillip Alston "Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and Grootboom's Promise" (2000) 16 *South African Journal of Human Rights* 206 at 250.

rights jurisprudence, and not the limiting the horizons of future jurisprudence. As it has transpired, the Court's subsequent jurisprudence was significantly more progressive as evidenced in *Minister of Health v Treatment Action Campaign*⁷⁴ in which the Court ordered the state to make antiretroviral drugs available to all pregnant women and in *Khosa v Minister of Social Development*⁷⁵ where the Court found a provision of the South African Social Welfare code which excluded non-South Africans from receiving certain benefits unconstitutional. The focal triptych of cases which will be examined in the South African context are *Government of Republic of South Africa v. Irene Grootboom, et al*,⁷⁶ *Soobramoney v Minister for Health*⁷⁷ and *Minister for Health v Treatment Action Campaign*.⁷⁸

Grootboom addressed the right to housing of several hundred squatters who were living with no running water, electricity, sewage or refuse services on vacant land that had been specifically zoned for low-income housing.⁷⁹ The local government deemed them to be trespassers and bulldozed the area. The plaintiffs successfully challenged this as a failure to comply with their right to housing under the constitution. Much of the Court's reasoning in the case focused on the need to vindicate socio-economic rights in order to facilitate the exercise of civil and political rights.⁸⁰

The Court however qualified the right by establishing a reasonableness test, explaining 'The measures must establish a coherent public housing programme directed towards the progressive realization of the right of access to adequate housing within the state's available means'⁸¹ meaning the government had 'an obligation to move as expeditiously

⁷⁴ *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16;

⁷⁵ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11.

⁷⁶ *Grootboom* was first time court found government to be in breach of socio-economic rights guarantees, the second case to come before the court first case being *Soobramoney v Minister For Health KwaZulu Natal* 1998(1) SA 765 (CC), D. J. Brand, "Constitutional Reform - The South African Experience", (2002) 33 Columbia Law Review 1, 10 () "Canadian law influenced the new Bill of Rights, in particular its limitation clause and the purposive interpretation that courts must use when applying the Bill of Rights." Brand also explains that the German governmental structure influenced the parliamentary system adopted in South Africa.

⁷⁷ (CCT32/97) [1997] ZACC 17.

⁷⁸ (CCT9/02) [2002] ZACC 16.

⁷⁹ 2000 (11) BCLR 1169 (CC) 2000 SACLX LEXIS 126.

⁸⁰ De Vos "Starving people may find it difficult to exercise their freedom of speech." Pierre de Vos, "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" 67 South African Journal of Human Rights. (1997) 71 at 73.

⁸¹ Everyone has the right to have access to adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right." South African. Constitution Chapter 2, Section 26, <<http://www.gov.za/constitution/1996/96cons2.htm#26>,> accessed 9 November 2012.

and effectively as possible toward that goal'.⁸² The Court thus concluded that the government's policy of building low income housing whilst simultaneously depriving those such as the plaintiff of their right to the same was unconstitutional though it noted 'the precise allocation is for the national government to decide in the first instance'⁸³ and required the government to comply but deferred to the government as to the means that ought to be used to achieve this end.⁸⁴

Grootboom succinctly illustrates the approach of the South African courts in cases involving socio-economic rights the existence of rights in the constitution shall not necessarily indicate that every individual is entitled to assistance on demand. The consideration will thus be whether the overall policy is reasonable or not.⁸⁵ Cass Sunstein has remarked that in this respect the approach in *Grootboom's* is one of an administrative law model of socio-economic rights.⁸⁶

In *Soobramoney v. Minister of Health*,⁸⁷ the Court held that a hospital had not violated the right of the plaintiff (who was dying) to health care by refusing to provide him with renal dialysis⁸⁸ and upheld the policy of the hospital in choosing to allocate a scarce resource to those individuals who were not terminally ill. In *Minister of Health v. Treatment Action Campaign*, the Court relied on the right to health care to require the government to provide Nevirapine, which sought to prevent transmission of HIV/AIDS, to pregnant women.⁸⁹ In light of the gravity of the AIDS crisis in the region as well as the troubling absence of strong government action in the area⁹⁰ this ruling was undoubtedly one of the strongest issued by the court.⁹¹

⁸² *Ibid*, at 71.

⁸³ *Grootboom* at 96-97.

⁸⁴ *Ibid*, at 166. In this way it could be argued to be similar to the Irish approach.

⁸⁵ *Grootboom* at 96-97.

⁸⁶ Sunstein, *supra* at note 34, at 234. It is worth noting that the plaintiff in *Grootboom* died in 2008 without her right to proper accommodation having been vindicated since judgment had been given.

⁸⁷ 1997 (12) BCLR 1696 (CC), 1997 SACLR LEXIS 41.

⁸⁸ *Ibid*.

⁸⁹ 2002 (10) BCLR 1033 (CC), 2002 SACLR LEXIS 26.

⁹⁰ Though there had been previous litigation on the area in the case of *VanBiljon v Minister for Correctional Services* 1997 (4) SA 441 (C) 17 April 1997 held that prisoners had to be supplied with ARVs while in prison for as "long as this medication is prescribed for them on medical grounds

⁹¹ The extent of the positive obligation recognized in *Grootboom* was limited by the requirement that the government produce a reasonable plan to address the problem of emergency housing faced by the applicants ... In the *TAC* case, however, the High Court took the next step, holding that in the context of MTCT [mother to child transmission] of HIV, the provision of Nevirapine, one particular drug, is now a constitutional obligation. Heinz Klug, "Five Years On: How Relevant is the Constitution to the New South Africa?" (2002), 26 VT. L. Rev. 803, 807-08.

In both *Soobramoney* and *Treatment Action*, the Court stated it would defer to reasonable social and economic policies expounded by the government but emphasised that such deference was not to be read as an abdication of the court's role in the enforcement of socio-economic rights. This retrenchment of the reasonableness approach laid down in *Grootboom* was emphasised in the court's rejection in *Treatment Action* of "minimum core" requirements⁹² in relation to socio-economic rights. Such an approach would essentially create an individual right to demand a social benefit from the government that is incompatible with the test previously established.⁹³ Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable, the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them while a purposive reading of sections 26 and 27 does not lead to any other conclusion.

Throughout this period the Government of South Africa, as in India, adopted the policy prescriptions of neo-liberalism, a development commentators feared would lead to conflicts with the commitment to transformative re-distribution and egalitarianism that is embodied in the Constitution.⁹⁴ Such tensions came to the fore in the case of *Mazibuko*⁹⁵ in relation to the government's support for the commodification of water services⁹⁶ which seemed to signal a departure from the jurisprudence of socio-economic rights in this jurisdiction. The Constitutional Court, per O'Regan J, found against the applicants on all grounds. In an approach which is notable for its use of a particularly formalistic and narrow application of the reasonableness standard O'Regan J held 'the city is not under a constitutional obligation to provide any particular amount of free water to citizens per month. It is under a duty to take reasonable measures progressively to realise the achievement of the right'.⁹⁷

⁹² For an explanation of the minimum core see David Bilchitz "Giving Socio-Economic Rights Teeth" *The Minimum Core and its Importance* (2002) 119 *South African Law Journal*, 484

⁹³ *TAC*, 2002 (10) BCLR 1033 (CC) at T 26, 32, 34-35. at 9134-35.

⁹⁴ D.Schneiderman, "*Constitutionalizing Economic Globalization*" (Cambridge: Cambridge University Press, 2007) at 2, 18.

⁹⁵ *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28.

⁹⁶ The plaintiffs in this case challenged the decision of Johannesburg water Ltd to install pre-paid water meters in the Phiri Township. Their two contentions were that the installation of the pre-paid water meters was unlawful and that the Free Basic Water Policy company's policy that provided 6 kiloliters of water per month for free was in breach of Section 27 of the Constitution as it provided an insufficient amount of water. The applicants succeeded in both the High Court and the Supreme Court of Appeal, with the court of final appeal holding that each individual should be provided with 42 litres of water per person, per day by the City.

⁹⁷ (CCT 39/09) [2009] ZACC 28 43.

6. Conclusion

Tushnet has outlined elsewhere the three ways in which socio-economic rights can be recognised, namely, by enumeration in the constitution but with the caveat they are non-justiciable, by deeming them justiciable but allowing courts to find a violation only where the legislature dramatically departs from constitutional requirements and by making them enforceable to the same extent as other rights.⁹⁸ Tushnet contends that the approach adopted should be that socio-economic rights are non-justiciable because were they to be enforced this could lead to harsh outcomes, political opposition and ultimately non-compliance.

Among the jurisdictions examined in this paper, only South Africa conforms to this latter category by making an explicit constitutional provision for justiciable socio-economic rights.⁹⁹ The constitution of India conforms with the first approach to recognition outlined by Tushnet in which socio-economic rights are guaranteed in the forms of 'Directive Principles of States Policy' but are not enforceable¹⁰⁰ while in Canada the courts have recognised socio-economic rights that are enforceable in circumstances where the rights involved are negative in nature with the result that jurisprudence of socio-economic rights in that jurisdiction remains slightly unsettled.

In considering the actual enforcement of socio-economic rights, South Africa takes the lead due to the judicial mechanisms in place to deal with claims of breaches and subsequent enforcement.¹⁰¹ However, a pattern of enforcement may be more easily distinguished in that jurisdiction due to the sheer volume of decided socio-economic rights cases. The explicit guarantee of such rights means that judgements are not hedged in prevaricate language which recognises a right but refuses to attribute to it a socio-economic character such as the right to adequate social security as seen in the Canadian case of *Gosselin*.¹⁰²

⁹⁸ M Tushnet 2004 symposium "Constitutional Courts in the field of Power and Politics: Social Welfare Rights and the forms of Judicial Review" (1985) 82 Texas Law Review (94).

⁹⁹ It could be argued that Ghana comes in as a poor and somewhat reluctant second, see John C. Mubangizi "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" African Journal of Legal Studies 2(1) (2006) at page 15.

¹⁰⁰ Though they have *become* enforceable through judicial interpretation and activism.

¹⁰¹ Shylashri Shankar and Pratap Bhanu Metha, 'Courts and Socioeconomic rights in India' 146, p71 in Varun Gauri and Daniel M Banks eds "Courting Social Justice; Judicial Enforcement of Social and Economic Rights in the Developing World" (Cambridge University Press, 2006)

¹⁰² It is interesting to note that even if other African nations in which constitutional recognition has been given to socio-economic rights the enforcement measures that exist to ensure that such rights are in fact carried out are minimally successful. For example both the Namibian Ombudsman and the Ghanaian Commission on Human Rights and Administrative Justice who deal with complaints relating to socio-economic rights, have no judicial powers in the case of the Namibian Ombudsman while the Ghanaian Commission on Human Rights and Administrative Justice officials possess only quasi-judicial powers that

O'Connell has noted a pattern of diminishing recognition for socio-economic rights in all three citing *Chaouilli* in Canada, *Mazibuko* in South Africa and *T.M.A. Pai* in India as indications of an imminent decline in support for meaningful socio-economic rights adjudication.¹⁰³ While these cases may indeed be less than sweeping in their endorsement of socio-economic rights and undoubtedly represent a more conservative view than cases such as *Irwin* and *Treatment Action Campaign* it is ventured that the claim that they sound the last toll for justiciable socio-economic rights is somewhat an alarmist view. Rather it can be argued that they illustrate the attempts of the neo-liberal ideals of global capitalism and human rights to reach a mutually acceptable compromise that seeks to resolve the inherent tension that accompanies rights that have long-term economic and political implications. On this view the challenge for the enforcement of socio-economic rights in the future may not be whether or not they are justiciable but rather whether they can be protected against the distortions, (not only denials and violations) which result from such tensions and compromises.¹⁰⁴ In India, as in other jurisdictions, socio-economic rights threaten to be recast as market friendly, procedural guarantees, rather than substantive material entitlements.¹⁰⁵

lack full judicial force John C. Mubangizi "The Constitutional Protection of Socio-Economic Rights in Selected African Countries: A Comparative Evaluation" (2006) 2(1) African Journal of Legal Studies 18, 19.

¹⁰³ P. O'Connell, 'The Death of Socio-economic Rights' 4 *Modern Law Review* (2011) 74

¹⁰⁴ K. Tomasevski, 'Unasked Questions about Economic, Social and Cultural Right from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson' (2005) 27 *Human Rights Quarterly* 709 at 710.

¹⁰⁵ *Ibid.*