

**SOCIAL RIGHTS IN CONSTITUTIONAL COURTS:
STRATEGIES OF ARTICULATION AND STRATEGIES OF ENFORCEMENT¹**

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Part I: Social Rights and Their Critics

Social rights are often treated as second-class rights.² Critics of social rights condemn them to this inferior status because they are generally thought to require alleviation of hard shortages, expenditure of large amounts from the state budget and commitments to very demanding collective claims.³ And, according to the critics, allowing courts to decide cases involving social rights requires a policy-making role for courts that generally goes beyond what

¹ I would like to thank the Institute for Law and Public Policy, Moscow, and the Russian Constitutional Court for the stimulating conference on social rights in October 2007 at which I first presented these ideas in draft form and at which I learned from the various judges and scholars who were present about other cases that have worked their way into this paper. Valery Zorkin, the president of the Russian Constitutional Court, encouraged me to work on this topic in the first place with his enthusiastic reception of my more theoretical treatment of the relationship between social rights and court competencies. Daniel Brinks provided me with additional examples, and shared his book manuscript on this topic, written with Varun Gauri, while it was still in press. As always, Serguei Oushakine provided both moral support and encouragement for this specific project – and much else.

² See, e.g., ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 91-95 (1974) (limiting the proper use of the term "rights" to those that can be enforced in certain ways limited to civil and political rights); L.W. SUMNER, THE MORAL FOUNDATION OF RIGHTS 123-28 (1987) (explaining that social rights lack a determinate quality necessary for the definition of a right); Maurice Cranston, Human Rights, Real and Supposed, in POLITICAL THEORY AND THE RIGHTS OF MAN 43, 49-53 (D. D. Raphael ed., 1967) (arguing that, to count as a right, a claim must be predictable, of paramount importance, and universal in character).

³ See, e.g., Joel Bakan, What's Wrong with Social Rights?, in SOCIAL JUSTICE AND THE CONSTITUTION: PERSPECTIVES ON A SOCIAL UNION FOR CANADA 85-86 (Joel Bakan & David Schneiderman eds., 1992); D. M. Davis, The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except As Directive Principles, 8 S. AFR. J. HUM. RTS. 475, 478 (1992); Antonio Carlos Pereira-Menault, Against Positive Rights, 22 Val. U. L. Rev. 359, 370 (1988); Cass Sunstein, Against Positive Rights, E. EUR. CONST. REV., Winter 1993, at 35.

courts either can or should do.⁴ Nonetheless, many constitutions around the world contain economic, social and cultural rights. Caught between the critics and the need to enforce constitutional protections, how can constitutional courts overcome the problems attributed to social rights to find a robust way to make these rights real in the everyday life of citizens? This paper examines the various strategies courts have actually used to interpret the social rights that they find in their constitutions.

What are social rights? Social rights are customarily defined as those rights that bear on the material well-being of a population and that provide for this population minimum guarantees of the basic elements of a decent life. In this paper, I will focus on the rights that most affect people who are at the very bottom of the society and that appear in many constitutions around the world.⁵ These are a) a right to subsistence income (a social minimum), b) a right to housing, c) a right to health care and d) a right to education.⁶ In a recent study of 165 written constitutions, for example, 116 made reference to a right to education and 73 to a right to health care.⁷ Virtually all of the post-communist constitutions include a right to a subsistence minimum.⁸ While a right to housing is in fewer constitutions, it has a substantial transnational jurisprudence of its own.

Why should we focus on the rights particularly relevant to the very poor? If we take *any* claim to rights seriously, we will see that the very poor cannot exercise many other basic civil and political rights without having some initial guarantee to the sorts of protections covered by

⁴ See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857, 887-93 (2001) (arguing that due to the costs associated with social rights, judicial enforcement ultimately requires courts to make budgetary and policy decisions more properly within the domain of the legislature).

⁵ For purposes of this article, I will leave aside labor rights because they have their own international treaties, international monitoring bodies, national laws and often special national courts. In addition, active trade unions, themselves protected by rights of individuals to organize and rights of trade unions to exist, are often very active players in the political process ensuring that labor rights receive recognition. Labor rights have a long tradition of enforcement by courts, though this may be weakening in the age of globalization. Still, legal enforceability is not generally the issue with labor rights; political will may be. Given their history, labor rights may be the only social rights routinely given first-class treatment among critics of other social rights.

⁶ There are other rights that often make this short list – the right to food security and to clean water, in particular. But surprisingly few constitutions contain such rights, so I will not discuss them here.

⁷ VARUN GAURI AND DANIEL BRINKS, *COURTING SOCIAL JUSTICE 1* (Cambridge UP, 2008).

⁸ Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 *LAW & CONTEMP. PROB.* 223 at note 39 (2002).

social rights. At the extreme, the goods guaranteed by social rights may be necessary to defend the right to life itself. Without a minimum income, shelter, health care and education, a person may literally not be able to survive. Or, if a person manages to do so, life may be too cramped and difficult to allow the person any dignity. As a result, basic “first generation” civil rights – including the right to life and liberty, to due process and to the protection of contract and property rights – may be impossible to realize and retain without guarantees of a basic social minimum.⁹ Even “second generation” political rights to participate in self-governance are affected by the lack of a social minimum. For example, we know from empirical studies that poor people are very much less likely to be involved in voting and other forms of political engagement important in democratic societies.¹⁰ Because they are preoccupied with survival, the very poor rarely take advantage of basic rights to free speech or freedom of assembly or the right to participate in choosing one’s own government through the right to vote in a constitutional and democratic society. And while they may have the same right to seek redress in courts as others in the society, such a right may not mean much if the person does not have the resources to bring the case or adequate counsel when they do.

Enforcing social rights, then, is not just an isolated matter affecting those rights alone. The enforcement of basic civil and political rights also requires that courts ensure that all segments of the population have the capacity to vindicate their social rights. That means that courts must find a way for the relevant populations to claim a minimum income, as well as a minimum of housing, health care and education. The civil and political rights that all agree are important and legally enforceable cannot themselves be made real in the lives of ordinary people without the practical guarantee of at least some level of material support.

But very poor people are often so desperate that they are preoccupied primarily with their own survival. As a result, just getting their cases heard before a court may be a large part of the

⁹ The view that there are three “generations” of rights – civil rights, political rights and social rights – is often attributed to T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS, AND OTHER ESSAYS* (1950). While Marshall does not use the language of “generations,” he does provide a historical argument for why the guarantee of civil rights to liberty, life, due process and the protection of contract and property rights precedes the guarantee of political rights that allow citizens to participate in their own self-governance. Both, in Marshall’s view, precede the demand for and realization of social rights, which can only arise in a democratic society once inclusiveness is guaranteed through political participation.

¹⁰ For reviews of this evidence, see AMY GUTTMAN, *LIBERAL EQUALITY* (Cambridge University Press, 1980), particularly Chapter 7. See also Desmond King and Jeremy Waldron, *Citizenship, Social Citizenship and the Defense of Welfare Provision*, 18 *BRIT. J. POL. SCI.* 415-443 (1988).

enforcement problem because a lack of material resources will often mean that the person so affected will find it difficult to approach a court for redress. I will take up below the issue of access to courts as part of the analysis on the way to examining what courts actually do with these claims.

Even though there social rights have been the subject of widely ratified treaties and have been routinely included in many of the world's constitutions, they remain a subject of hot political debate, especially when the role of court enforcement is raised. Why are social rights controversial, especially when enforced by courts? The arguments against social rights and their judicial recognition fall into several camps:

1. Shortages. Many social rights cannot be realized because there are shortages of the underlying benefit – e.g. money, housing, health care, education. As a result, critics argue, if a petitioner comes to a court asking for his/her social rights to be vindicated, there may be none of the benefit left because others have taken all that is available. Courts cannot bring into being more of scarce goods by themselves. Therefore, critics say, it is better for courts not to start addressing these problems at all.¹¹

But shortages, as important work by development economists studying famine have indicated,¹² are not just natural. They are often themselves the product of political and social arrangements. They can be altered and even eliminated by a proper focus on political peace, equitable production, non-discrimination and fair distribution. And these topics are well within the usual competencies of courts.

2. Budgets. Providing social rights generally requires expenditures – often very large expenditures – of state funds. Many commentators believe that courts should not commit large segments of the state's budget to particular purposes because that is a proper role for a democratically elected legislature, not for court judgment.¹³ These commentators also believe

¹¹ This leads to the necessary under-enforcement of social rights, something that critics worry will weaken respect for the constitution as a whole. Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 *PUB. ADMIN.* 169, 198 (Spring/Summer 1993).

¹² JEAN DRÈZE, AMARTYA SEN AND ATHAR HUSSAIN (EDS.), *THE POLITICAL ECONOMY OF HUNGER*. Oxford: Clarendon Press, 1994.

¹³ PATRICK MONAHAN, *POLITICS AND THE CONSTITUTION: THE CHARTER, FEDERALISM AND THE SUPREME COURT OF CANADA* 126 (1987).

that courts are not in a position to allocate money for particular purposes because they cannot see the whole state budget at once to make necessary trade-offs between competing but legitimate uses of state funds.¹⁴

But all rights at some level require state allocation of funds for their realization. A robustly enforced right to private property requires that the state create and maintain both police forces and armies.¹⁵ A right to vote requires that the state create polling places, ways of counting votes, and institutions for monitoring elections. The right to a fair trial requires state institutions to maintain courts, counsel for indigent defendants and transparent procedures – to say nothing of the prisons to house those convicted of committing crimes. All of these require money from the state treasury, and yet that is not an argument against having elections, fair courts, criminal law and private property. If a right is important enough, then a decent state has to do what is necessary to ensure its realization.

Of course, the realization of social rights may be more expensive than the realization of civil and political rights, but this is not an argument against doing what the state can manage at any given moment. The international standard, built into the International Covenant on Economic, Social and Cultural Rights (ICESCR), requires that states “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means. . .”¹⁶ For signatories to the ICESCR, the realization of social rights requires their “progressive realization” within “available resources.” Not having the resources to provide material support for the poor at the highest level is not an excuse for failing to provide what a state can at any given time.

3. Collective rights and structural solutions. Critics of the judicial enforcement of social rights note that courts are particularly good at deciding cases where a single aggrieved petitioner can make a claim that affects only him/her. But where a case brings up a structural problem – a housing shortage or a weak health care system – then effective remedies may go

¹⁴ Cass Sunstein, *Against Positive Rights: Why Social and Economic Rights Don't Belong in the Constitutions of Post-Communist Europe*. 2 EAST EUR. CONST. REV. 1 (1993).

¹⁵ STEPHEN HOLMES AND CASS SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES*. New York: WW Norton, 2000.

¹⁶ Art. 2(1), International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR], available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

beyond what the court might be able to order. Individual cases may simply be a sign of a larger issue beyond the capacity of courts to redress in single instances. A court can fashion an individual remedy, adding *just the petitioner* to those who have the resource (e.g. providing the particular petitioner with a pension, an apartment, health care, or education). But this does not address the larger problem, which may have roots in social and political conditions that courts cannot reach. As critics say, courts will only be able to chip away at the margins of the problem and end up providing social rights only on a piecemeal basis.

Whether a court can fashion a remedy to deal with structural issues depends on the rules of procedure in a particular court and the way that a state is obliged to comply with court decisions. Constitutional cases in a system of abstract review do not – sometimes even *cannot* – handle individual cases one at a time; they must deal with structural questions because laws are subject only to facial challenges without particular facts before the courts. Class action or other such collective complaints may also facilitate dealing with structural issues. But even in the absence of these sorts of procedures, a court judgment – even a court judgment binding only with respect to a single petitioner – will generally place an obligation on the state to treat like cases alike. The decision in one case, generalized across many “like” cases, starts to look like a structural remedy. It just isn’t true that most courts are limited narrowly to handling one complaint at a time in a way that prevents courts from arriving at a structural solution to a problem. Of course, structural solutions will raise issues of shortages and budgets again, but that too – as I have argued – is not beyond the capacity of most states to address, at least in part.

Critics of court enforcement of social rights are persistent, even though in my view most of the critiques are misguided. But the criticisms have not warded off the practice. Out in the world beyond these critiques, social rights appear in many different sources of law. The International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force in 1976, and currently has 149 states parties. The ICESCR is a compendium of social rights with a reporting mechanism that attempts to push states and their policies toward the provision of these rights. In addition, many national constitutions, including most of the recently drafted constitutions, include a wide array of social rights. Social rights often exist in statutes that specify how constitutional rights are to be enforced. Statutes on topics like welfare policy, state pensions, health care policy, or educational policy can create new sub-constitutional social

rights. And, as we will see, social rights also are created by the case law of high courts – interpreting international, constitutional or statutory law.

In considering social rights, then, we are faced with a paradox. Critics say that social rights can be only aspirational, that there can be no effective or democratically justifiable mechanisms for the enforcement of social rights through courts. And yet, social rights appear in many authoritative sources of law. In these laws, courts are called upon to interpret and make real social rights. Fortunately for those who are eager to see the judicial recognition of social rights, social rights only fail to work in theory. They are more effective in practice.

Despite the obstacles and general skepticism about the ability of courts to enforce social rights, courts in many countries are finding ways to do so, not least because the law entrusts them with this responsibility. But courts vary greatly in the judicial methods they use when they interpret and enforce social rights. In the rest of this article, we will examine the different strategies that courts have used to elaborate social rights in constitutional jurisprudence. Despite the persistence of the critics of social rights, many courts in the world have nonetheless found ways to press states toward the realization of these rights.

Part II: Getting Social Rights Cases to Courts

Before a court can rule on a case involving social rights, however, a case first has to come before it. Social rights cases often present logistical difficulties because the very poor may have no income to hire a lawyer, no home address from which to file a case, no education to read the laws that they might use to their advantage and such ill health that they cannot make the claim on their own. For all of these reasons, a case may never begin.

In addition to the practical difficulties, there are also legal ones as well. Those who have no income, housing, education or health care must complain about the *absence* of something, rather than the theft, misuse, or damage to something that the claimant already has as a matter of right. Cases arguing from *absence* are logically harder to make because one must first argue that one *should* have the missing thing before one can make a claim about its absence. Because social rights are often framed quite generally, particularly in constitutional texts, it is not often clear who may claim the right, or whether the right can be claimed individually at all.

To ensure that difficult cases get to court in a proper posture for the social right to be vindicated, a number of jurisdictions have increased access to the courts, often precisely to encourage disadvantaged parts of the population to use the courts to make their social rights claims. Perhaps India has gone farther than any other country to encourage judicial enforcement of social rights. *Public interest litigation* was started officially in the 1980s, when a group of public interest lawyers and activists working on behalf of the poor began approaching a sympathetic Supreme Court of India with new sorts of petitions.¹⁷ The Supreme Court agreed to take cases filed by public interest lawyers on behalf of poor people without requiring that the poor themselves appear before the court. In addition, the Court decided to take these cases before they had wound their way through the slow and balky Indian judiciary. The new expedited procedures made it possible for the claims to be heard in time for judicial resolution to still make a difference to desperate people. This opened up social rights litigation in an unprecedented way. That said, the campaign had its limits because the Supreme Court did not have a good way of resolving contested issues of fact if cases came to the appellate court first, and many social rights cases required factual proof of the deprivation of a right against counter-evidence.¹⁸ But much good has come of the public interest litigation campaign, even if it has not solved India's persistent problems of poverty by itself.

The *amparo* action is available in Spain and most Latin American countries, though the specifics of this action vary from country to country. Broadly speaking, an *amparo* action permits groups or classes of individuals to seek rapid injunctive relief from courts for claims regarding rights of general public interest. The *amparo* originates as a writ petition, allowing the petitioner to ask either for quick restitution where a right has been violated or for the prevention of an imminent threat to a constitutional right or guarantee.¹⁹ In many places where the *amparo* action exists – for example in Mexico, Brazil, Bolivia, and Venezuela – it permits the vindication of collective rights already recognized in law, including social rights.

¹⁷ P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT'L. L. 561 (1985). UPENDRA BAXI, *COURAGE, CRAFT AND CONTENTION: THE INDIAN SUPREME COURT IN THE EIGHTIES* (1985).

¹⁸ Marc Galanter and Jayanth Krishnan, "Bread for the Poor": Access to Justice and the Rights of the Needy in India, 55 HASTINGS L.J. 789 (2004).

¹⁹ Enrique Gonzalez Mac Dowell, *Juridical Action for the Protection of Collective Rights and Its Legal Impact: A Case Study*, 30 J.L. MED. & ETHICS 644 (2002).

In Colombia, the equivalent to the *amparo* is the *tutela*, and it permits anyone in the country to approach any judge at any time to ask that his/her rights be protected. This petition does not have to be in writing or formulated with the assistance of a lawyer, which makes judicial assistance much more accessible to the poor. Social rights are included among the rights that anyone can ask to be protected. The number of *tutela* actions confirms the significance of this institution. Instituted in 1991, the number of *tutela* actions rose from 182 in 1992 to 784 in 2002, to 1,340 in 2000.²⁰

In Hungary, anyone can approach the Constitutional Court through an *actio popularis* petition, in which the constitutionality of a law may be challenged through abstract review. This has, in fact, been the primary way in which social rights issues have been litigated in Hungary. The Constitutional Court decisions in 1995 that struck down cuts in social benefit plans mandated under the IMF austerity program are just the most dramatic example of Constitutional Court rulings that preserve constitutional social rights in the face of legislative challenge.²¹ This *actio popularis* procedure has the limitation that only laws – and not simple actions of state – can be challenged in this way. But this limitation is ameliorated by Hungary somewhat by the fact that abstract challenges can be brought not only to rights-infringing legislation but also to the *absence* of laws that the constitution requires the parliament to adopt. Because of the flexibility of this procedure, the abstract constitutional challenge is an effective way of enforcing social rights because social policy legislation can be reviewed, revised and even required in this way.

The Colombian Constitutional Court also has a procedure like the *action popularis* in Hungary, the “public action of unconstitutionality.”²² Through this procedure, anyone in Colombia can challenge the constitutionality of any law and some government decrees. As in Hungary, citizens can directly petition the court without having a concrete grievance to allege and without the assistance of a lawyer.

Many courts have procedural mechanisms that enable social rights claims to come before courts and the courts are then obligated to hear such cases. Not only does domestic law often

²⁰ Justice Manuel Jose Cepeda-Espinosa, *Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court*. 3 WASH. U. GLOBAL STUD. L. REV. 529 (2004).

²¹ Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*. 82 U. TEX. L. REV. 1921-1961 (2004).

²² Maria Paula Saffon, *Can Constitutional Courts be Counterhegemonic Powers vis-a-vis Neoliberalism? The Case of the Colombian Constitutional Court*. 5 SEATTLE J. SOC. JUST. 533, 542 (2007).

provide ways for social rights cases to come before courts, but also many international instruments of law *require* countries to have mechanisms for ensuring the realization of social rights. Countries that are states parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) must report on their progress in realizing social rights to the Committee for Economic, Social and Cultural Rights (CESCR). In its General Comment on Art. 2.1 of the ICESCR,²³ the CESCR indicated that judicial remedies should be available, where possible, for the violation of social rights in national courts. The treaty standard contained in the treaty that states should demonstrate a “progressive realization” of rights

thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.²⁴

In a parallel development, the Human Rights Council adopted an Optional Protocol to the ICESCR in June 2008, which would permit the CESCR itself to hear cases from individuals and issue judgments against participating governments.²⁵ This resolution has been forwarded to the General Assembly of the United Nations for action in fall 2008.

From this review, it is clear that an increasing number of national courts and international bodies are attempting to find judicial mechanisms through which social rights claims can be made. While social rights may be criticized in theory, the drive to enforce them in practice is strengthening in many parts of the world. Many countries and many courts have found ways for courts to hear social rights cases.

²³ The General Comment is available at [http://www.unhcr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+3.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+3.En?OpenDocument).

²⁴ See Para. 9. at id.

²⁵ On 18 June 2008, the Human Rights Council adopted the First Optional Protocol to the ICESCR that will permit individual complaints against the signatory countries through this UN body. The protocol has been sent to the General Assembly for its approval before it can be opened for state ratification. The text of the resolution adopted by the Human Rights Council and the draft wording of the First Optional Protocol can be found at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_8_2.pdf. The General Assembly is slated to take up the issue in October 2008.

Now that we have seen *how* courts can get these cases, what do courts then do with them?

III. Methods of Enforcing Social Rights in National Courts

The language of most constitutional texts is generally broad and vague, specifying neither who may claim the right or how such claims are to be framed. As a result, courts in different jurisdictions have come up with different ways of understanding what a social right requires and different strategies for enforcing these understandings. In this section, we will consider the variety of different techniques that courts have used, starting with those techniques that are most like the conventional methods for enforcing civil and political rights and moving toward techniques that could only be used in the context of social rights specifically.

A. Social Rights as Prohibitions on State Action

Courts can use the fact that a social right exists in a national constitution to prevent people who already have the basic elements of that right from losing their existing protections. Courts can do this by blocking the state action that would take away the provision for the social right. In many ways, this is what courts often do when they enforce civil and political rights; they prevent public and sometimes private actors from taking steps that would deprive the right-holder of the ability to exercise the right. Courts prevent governments from suppressing free speech or taking private property without compensation. They prevent governments from engaging in illegal preventive detention or preventing people from freely associating. In such cases, courts are quite used to invoking a right – free speech, the right to property, the right to liberty or the right to association – as a reason for forbidding the state to engage in some particular action.

Courts often do the same with social rights. They prevent a government from taking away housing a person already has. They prevent a government from reducing the educational benefits a person can already claim. They prevent a government from cutting subsistence benefits that the poor can already access. We might think of this as a court enforcing the *negative part of a positive right*, because the court says that the state may *not* take a particular

action (the usual posture for enforcement of negative right) in order to protect a benefit already in existence (the individual's positive enjoyment of a right already achieved). In these cases, the enforcement of social rights works just like the enforcement of many civil and political rights. Some examples may help to illustrate how this strategy works.

In *Olga Tellis v. Bombay Municipal Corporation*, the Indian Supreme Court held that the right to life and personal liberty required that pavement dwellers be provided with alternative accommodation before they could be evicted from their sidewalk shelters. The Court argued that the right to life and liberty included the right to livelihood, outlined in Article 39 as a directive principle.²⁶ The state did not have a first-order duty to provide either housing or livelihood in this case, because the pavement dwellers had already found a way to survive. But once the state was positively responsible for removing what they had, social rights came to life and the state could be blocked from depriving the pavement dwellers of their existing benefits. One could understand this decision as making the positive requirement of direct provision of a social right contingent on some prior rights-violating action of the state.

In its landmark "certification" judgment reviewing the consistency of the final constitution with the draft principles that had preceded it, the South African Constitutional Court noted that "At the very minimum, socio-economic rights can be negatively protected from improper invasion."²⁷ And in fact, the Court went on to give more tangible meaning to this idea in particular judgments. For example, in *Jaftha v Schoeman*,²⁸ the Court took on a case in which the state was threatening to evict poor people who lived in marginal housing without providing them with an alternative. Their houses were being seized to pay off a private debt. The Court held unanimously that "at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1) [the constitutional right to housing]."²⁹ As a result, the Court held that there had to be judicial

²⁶ [1985] 2 S.C.R. Supl. 51. Directive principles in the Indian Constitution are goals toward which the state must work. Many of the social rights provisions are contained among the directive principles, which were originally intended not to be judicially enforceable. Through decisions like *Olga Tellis*, however, courts have started enforcing the social rights, at least in this negative way.

²⁷ In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC), para. 78.

²⁸ *Jaftha v Schoeman*, 2005 (2) SA 140 (CC).

²⁹ *Id.* para. 34.

oversight of the seizure and sale process to ensure that this right was protected.³⁰ Thus, without requiring that the state affirmatively provide housing for these specific petitioners under the Constitution, the Court at least required the state not to deprive people of the housing they already had without a hearing.

Another South African case, *President of the Republic of South Africa v. Modderklip Boerdery (Pts) Ltd.*,³¹ came to the Supreme Court of Appeal on the issue of whether the property rights of a landowner whose farm had been unlawfully occupied took precedence over the housing rights of a group of 40,000 people who would otherwise be rendered homeless if the eviction order the farmer obtained was carried out. The court ruled that the state had violated *both* the property rights of the farmer and the right to housing of the occupiers, and ordered the state to make alternative land available to the occupiers. In the meantime, the court permitted the occupiers to stay on the farmer's land and required the state to pay "constitutional damages" to the farmer for this use of his land. The Constitutional Court upheld this judgment.³² While part of this judgment reveals that the South African courts will block state action (in this case, the eviction) if it would result in the removal of the means for realizing their rights that persons already have, the other part (the order to provide alternative land) falls into another category that we will see later, judgments of courts that require states to undertake social rights programs.

Though the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not overtly include social rights, the European Court of Human Rights (ECtHR) has nonetheless found ways to enforce some social rights through their decisions by requiring clear procedures to be followed in cases where access to the provisions for social rights may be removed. In *Feldbrugge v. The Netherlands*,³³ the ECtHR used Article 6(1) of the European Convention, the right to a fair hearing, to examine the procedure for the termination of health-care benefits under the Netherlands' social security system. Mrs. Feldbrugge argued that she had been denied the right to a fair trial because she was unable to appeal a decision by the state's

³⁰ Id. paras. 52-55.

³¹ 2005 (8) BCLR 786 (CC).

³² Case CCT20/04, decided 13 May 2005, available at <http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/20081012150849/SIRSI/0/520/J-CCT20-04> .

³³ 8 Eur. Ct. H.R. 425 H.R.R. 425 (1986).

medical expert that she was fit to return to work. The Court found the existing appeals procedure violated Article 6(1) because it allowed for review of eligibility determinations under only limited circumstances, which had not included Mrs. Feldbrugge. In finding this violation, the Court placed limits on how the state could take away benefits that a person already had. Later, this sort of procedural protection was extended to social welfare benefits.³⁴

Though environmental cases are a bit beyond our remit in this article, the way that the Constitutional Court of Hungary handled its major environmental case also follows this pattern of enforcing the negative part of a positive right. The constitutional right to a healthy environment in the Hungarian Constitution was interpreted as requiring, at a minimum, that the state not permit the environment to get worse, unless such a situation was required in order to ensure other constitutionally protected rights or values.³⁵ Here too, the Court found that the state did not have an affirmative obligation to improve the environment as a first-order matter, but the state was required to prevent the existing state of the environment from getting worse.

In some of these cases, national courts have ordered not only public authorities to stop actions that might infringe already realized social rights, but they have also taken on private actors whose actions would affect others' constitutionally protected benefits. In short, the "horizontal application"³⁶ of constitutional principles occasionally applies even in the area of social rights. We already saw this in the South African *Modderklip* case in which the private farmer was required to keep the 40,000 occupiers on his property until the state found them another place to go. Even though the farmer was paid damages for this, he was still required to accommodate the realization of others' social rights.

³⁴ *Salesi v. Italy*, Case of 26/2/1993, Ser. A. no. 257-E.

³⁵ Decision 28/1994: On Environmental Protection (AB) translated in LÁSZLÓ SÓLYOM AND GEORG BRUNNER, *CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT*. (Ann Arbor: University of Michigan Press, 2000)

³⁶ Horizontal application of a constitutional principle occurs when a court finds that the constitutional right in question can be claimed not only against state actors but also against private actors through private law. See Hannes Rosler, *Harmonizing the German Civil Code of the Nineteenth Century with a Modern Constitution - The Luth Revolution 50 Years Ago in Comparative Perspective*, 23 *TUL. EUR. & CIV. L.F.* 1 (2008). Among the countries that accept the application of some constitutional principles in private law are Belgium, Costa Rica, Estonia, Greece, Japan, Malta, Namibia, the Netherlands, Romania and Spain. Stephen Ellman, *A Constitutional Confluence: American "State Action" Law and the Application of South Africa's Socioeconomic Rights Guarantees to Private Actors*, 45 *N.Y.L. Sch. L. Rev.* 21, at n. 52 (2001)

Germany has also moved toward the recognition of horizontal application of social rights. The Federal Constitutional Court has a textual basis for this in the case of property rights, which under the German Basic Law have a social dimension: “Property imposes duties. Its use should also serve the social weal.”³⁷ This gives the Court the possibility of balancing property rights against other rights without always assuming that property dominates. In considering whether a tenant may be protected from eviction, for example, the Federal Constitutional Court tied the protection of property to one of the most fundamental rights in the German constitutional order: the right to the development of personality.³⁸ The Court held that people have property rights in their rented apartments precisely because apartments are so connected to core personality interests. And these rights in rental properties strengthen their claims in disputes with landlords. As the Court noted in one particularly important case:

The dwelling place [or apartment] is, for everyone, the middle-point of his private existence. The individual depends on the use [of the apartment] for satisfying elementary needs of life as well as securing freedom and the development of his personality. The majority of the population, however, cannot resort to property ownership in order to cover its housing needs; rather it is forced to be a tenant of living space. Under these conditions, the tenant's right of possession fulfills functions that ordinarily accrue to tangible property.³⁹

In India, private employers have been held to obligations created by the directive principles in the Indian Constitution in another example of horizontal application in the area of social rights. The High Court of Mumbai, in *MX v. ZY*,⁴⁰ held that an employer is not allowed to condemn HIV-positive people to “certain economic death” by firing them from their jobs only

³⁷ German Basic Law, Art 14.2 .

³⁸ While this case illustrates the situation in which courts enforce social rights by requiring another party to refrain from taking away the good in question, it also illustrates the fact that the Federal Constitutional Court in Germany very rarely uses social rights directly, except to bolster their interpretation of other protected rights.

³⁹ 89 BVerfGE at 6 (1993). See Quint *supra* note ___ at 323 for the translation of this quotation and a discussion of this line of cases.

⁴⁰ *MX v. ZY*, A.I.R. 1997 Bonn. 406.

because of their HIV status. In the particular case, the court required the employer to reinstate the employee and pay him lost wages.

In each of these cases, the vindication of social rights does not require first-order positive action by the state or private actors to ensure that rights are realized. The mandatory consideration of the rights of the poor is only triggered when a state or private actor wants to take the benefit away. In this sort of case, the courts require that the social rights holder (the poor person) be allowed to continue on in his or her existing condition and courts will block action that would make conditions worse by infringing on already realized social rights. As a result, in these cases, the obligation of either the state or (in some situations) the private actors to take the poor into account is visible only if a previously secured right is threatened by new action.

B. Social Rights as Interpretive Guides to Other Constitutional Provisions

Courts can use the existence of social rights in a national constitution to help them understand other constitutional provisions beyond those directly implicating social rights. Instead of using social rights provisions by themselves to generate constitutional claims, courts sometimes use the social rights provisions of constitutions to give meaning to other constitutional rights and structures. Because the realization of social rights is often crucial for being able to exercise other civil and political rights, courts might “read in” to the civil and political rights social implications.

The Federal Constitutional Court of Germany has used this approach in the interpretation of rights that might not at first glance seem to be social rights. While the German Basic Law proclaims that Germany is a “social state” in Article 20 for the national government and in Article 28 for the Länder, the Constitutional Court does not usually enforce social rights in isolation from a consideration of their impact on the realization of other rights.⁴¹ As a result, it has used the protection of social rights as a baseline for understanding what other basic rights require. So, for example, the Court has held in a long line of cases that the constitutional protection of the right to property includes protection for social benefits like old-age pensions,

⁴¹ Peter Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 305 (1999).

health benefits, and unemployment compensation.⁴² These decisions prevent the state from cutting benefits beyond a certain point.⁴³ In addition, the Court has interpreted the constitutionally explicit right of parents to create private schools (Article 7.4) in a way that requires the federal government to provide financial support for these schools if their economic existence is threatened.⁴⁴

Social rights even have an effect in the interpretation of the German Basic Law beyond the rights clauses. The fiscal federalism cases of the Federal Constitutional Court have recognized the spillover effects of the social rights provisions. For example, the Federal Constitutional Court has recognized that Articles 106 and 107, which require redistribution of national tax payments to the Länder (states), do so precisely on the grounds that the Länder are the governments that pay social benefits.⁴⁵ As a result, they need the resources to be able to do so equally across the country. In addition, the Federal Constitutional Court struck down a federal tax law as unconstitutional because it would have permitted the state to take taxes from an individual to the point where that person would be left without enough money for life's basic necessities. According to the Court, the tax system had to leave enough money to the taxpayer in the end so that the taxpayer could provide for his/her own "existence-minimum."⁴⁶ The Russian Constitutional Court has done the same, requiring that the state ascertain through an *ex ante* hearing that an individual has enough money to live on and provide for basic social needs before taxes can be taken from a person's bank account.⁴⁷

This interpretive strategy – using the social rights to understand other constitutional provisions – has also been used in Hungarian constitutional law. The Hungarian Constitutional

⁴² For example, 53 BVerfGE 257 (1980); 72 BVerfGE 9 (1986).

⁴³ For a discussion of these cases, see Peter Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303-326 (1999).

⁴⁴ 75 BVerfGE 40 (1987). For a discussion of this case, see Quint, *supra* note ___ at 306.

⁴⁵ See Clifford Larsen, *Financial Federalism with an Accent*, 40 S. TEX. L. REV. 737 (1999); Clifford Larsen, *States Federal, Financial, Sovereign and Social. A Critical Inquiry into an Alternative to American Financial Federalism*, 47 AM. J. COMP. L. 429 (1999).

⁴⁶ 87 BVerfGE 153 (1992). See Quint *supra* note ___ at 323-324 for a discussion of these tax cases implicating a social minimum.

⁴⁷ Case # 17-12-96-20P: In the case *Concerning Verification of the Constitutionality of Points 2 and 3 of the First part of Article 11 of the Russian Federation of 24 June 1993 "On the Federal Bodies of the Tax Police."* Translated in 36(1) STATUTES AND DECISIONS 19-27 (Jan-Feb 2000).

Court's set of 1995 decisions striking down sharp cutbacks in social benefits as a result of an IMF austerity program also used social rights to understand other constitutional clauses. In particular the "rule of law" clause, which the Court previously indicated had guaranteed a right to legal security, was found to have been violated when the radical austerity program cut social benefits rapidly without giving people a chance to adjust. While the Court conspicuously avoided indicating precisely what the social rights provisions of the Constitution guaranteed under the circumstances, the Court used constitutional social rights to understand what legal security required.⁴⁸

In each of these cases we have examined in this section, courts did not base their decisions primarily on a direct interpretation of the social rights provisions of the constitution. Instead, courts took note of the social rights provisions to understand the meaning of other provisions, including other rights, federalism, the state taxing power, and the rule of law. Because these courts avoided having to indicate a direct meaning of social rights, the decisions gave both the government and later judgments of the courts the possibility of adjusting just what social rights demanded of the state. That said, social rights were not left unprotected, but were instead built into a wide variety of constitutional considerations.

C. Social Rights as State Goals

Courts can decide that social rights provide goals that the state must attempt to achieve. In such cases, the court often sets standards for determining when a state has made a reasonable effort to achieve the social right in question. In these sorts of social rights cases, courts often direct a state to institute or bolster a program through which a particular social right may be given concrete realization. This sort of decision may (but does not have to) reject the particular petitioner's claim to acquire the conditions that would enable realization of a social right in favor of the collective claim.

⁴⁸ 43/1995 AB hat. "On Social Security Benefits." Pp. 322-332 in LÁSZLÓ SÓLYOM AND GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT. (Ann Arbor: University of Michigan Press, 2000). For a discussion of this case and the others in the series, see Kim Lane Scheppele, *A Réalpolitik Defense of Social Rights*. 82 U. TEX. L. REV. 1921-1961 (2004).

To push states toward setting the conditions within which social rights may be realized, courts can give meaning to the social rights provisions in their constitutions by enforcing the standard used by the International Covenant on Economic, Social and Cultural Rights (ICESCR). This standard requires a state to adopt policies “to the maximum of its available resources, with a view to achieving progressively the full realization of the rights.”⁴⁹ Sometimes the language of ICESCR is directly borrowed over into the domestic constitution itself.⁵⁰ In these cases, the court does not necessarily give the petitioner the direct benefit that he/she is seeking, but uses the petitioner’s case to assess whether the government has an aggressive-enough program in place to make the realization of the right as full and fast as possible. Often, using this approach, courts determine a social benefit is not a subjective right individually claimable by an individual, but instead a constitutionally mandated state objective that requires the state to take action that will affect that individual’s ability to realize the right.

For example, the South African Constitutional Court, in *Government of Republic of South Africa v Irene Grootboom and Others*,⁵¹ decided a case involving a group of 900 petitioners (including 510 children) who had been forcibly evicted from their squatter settlement and whose possessions and houses had been burned. Despite the dramatic facts of the case, the Court denied the petitioners’ direct requests for housing⁵² and for the protection of their children,⁵³ but held that the state had an obligation to devise a reasonable program of measures that would make actual access to housing by people like the petitioners likely in the shortest possible time. The Court acknowledged that “a wide range of possible measures could be adopted by the State ... [that] would meet the requirement of reasonableness.”⁵⁴ Nevertheless, while praising much about the current housing policies of the government, the Court held that the current system

⁴⁹ Art. 2.1, ICESCR.

⁵⁰ This is true of the South African Constitution, which incorporates internal limitations clauses in the various social rights provisions that tracks the language of the ICESCR. For example, see *infra* at notes ___ __.

⁵¹ *Government of Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC).

⁵² S Afr. Const. 1996, ch. 2, Section 26, “everyone has the right to have access to adequate housing” and “the state must take reasonable legislative and other measures, within its available resource, to achieve the progressive realisation of this right”

⁵³ S Afr. Const. 1996, ch. 2, Section 28, “every child has the right to ... basic nutrition, shelter, basic health care services and social services”

⁵⁴ *Government of Republic of South Africa v Grootboom*, 2001 (1) SA 46 (CC), para. 41.

unreasonably neglected to consider and address those in the most serious need of housing. The current set of measures adopted by the government "fell short of constitutional compliance" because the state failed to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing."⁵⁵ The Court issued a declaratory order requiring that the state put a more effective housing program in place and assigned the Human Rights Commission, an independent national body, to monitor and report on the status of the changes.⁵⁶

In another case that illustrates the ability of courts to order the government to make progress on a social problem at the root of the lack of realization of social rights, the Supreme Court of Venezuela considered the right to health care in conjunction with the right to life when it was asked to consider whether those with HIV/AIDS had the right to receive the necessary medicines without charge.⁵⁷ Identifying a positive duty of prevention at the core of the right to health, the Court ordered the Ministry of Health to conduct an effective study into the minimum needs of those with HIV/AIDS and then to present its results with regard to the cost of such programs in the government's next budget. In short, the Court required the state to evaluate and then provide the requisite funding for making progress on the provision of medication.

In ordering governments to take positive action, courts generally recognize the material limits under which states operate either on their own initiative or because the constitutions they are interpreting explicitly require it. As a result, if the state has a plan in place to ensure that as many as possible – within the limits of the state budget – have access to scarce benefits protected by social rights, then courts generally permit the government to engage in rationing or other limitation on free access to the benefit, as long as the limitation is not discriminatory.

⁵⁵ Id. para. 99.

⁵⁶ This seems not to have produced much for the community that brought the initial claim, though it has strengthened the resolve of the South African courts to prevent the evictions in the first place. Jonathan Berger, *Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education*. Pp. 38-99 in VARUN GAURI AND DANIEL M. BRINKS (EDS.) *COURTING JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* (Cambridge UP, 2008) at 81.

⁵⁷ *Bermudez et al. v. Ministerio de Sanidad y Asistencia Social, Supreme Court of Justice of Venezuela*, Case No. 15.789, Decision No. 916 (1999).

For example, the South African Constitutional Court, in *Thiagraj Soobramoney v Minister of Health, KwaZulu-Natal*,⁵⁸ examined the case of a desperately poor and sick man who claimed the right to emergency medical treatment. His kidneys were failing, but he was not able to receive a transplant because his medical condition was too precarious. Given the expense of dialysis, the state had decided to limit treatment only to those who were approved and waiting for kidney transplants. The question before the Court was whether lifetime dialysis without a prospect for transplant was covered either by the specific constitutional right to emergency medical care,⁵⁹ or by the general constitutional right to life. The Court examined the system that the government had in place for determining who should receive treatment and examined the state budget to see whether it could in fact provide further funds for the healthcare system. But perhaps most crucially, the Court relied on the Constitution's internal limitations clause, "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [the right]."⁶⁰ Finding that government had a reasonable system in place for rationing the use of scarce dialysis machines, the Court held the petitioner did not qualify for treatment under the government's rationing scheme for reasons having to do with his overall medical state rather than for any constitutionally impermissible reason. His claim was denied. Sadly enough, he died three days after the Court's ruling. Obviously, this man did not get what he petitioned for, but the Court used the case to evaluate the general program that the state had in effect.

When constitutions provide "directive principles" outlining state goals in the area of social rights, courts may examine whether the state has made progress toward these goals directly in constitutional litigation.⁶¹ The Irish Constitution was the first to include directive principles, followed later by the Indian Constitution.⁶² The Spanish Constitution includes

⁵⁸ 1998 (1) SA 765 (CC).

⁵⁹ "[N]o one may be refused emergency medical treatment." S Afr. Const. 1996, ch. 2, §27(3)

⁶⁰ S Afr. Const. 1996, ch. 2, §27(2).

⁶¹ Many East European constitutions include extensive lists of social rights and constitutional drafters beat back efforts to list these as "merely" directive principles. Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 LAW & CONTEMP. PROB. 223, 230-236 (2002).

⁶² PARAMJIT JASWAL, *DIRECTIVE PRINCIPLES JURISPRUDENCE AND SOCIO-ECONOMIC JUSTICE IN INDIA* (1996).

"Guiding Principles of Economic and Social Policy."⁶³ While the Irish and Indian constitutions indicate on the face of their texts that directive principles are not directly enforceable as subjective rights in court,⁶⁴ courts following these directive principles have nonetheless required at a minimum that their states to undertake general programs aimed at ensuring that the directive principles of constitutions are acknowledged by state policy and even on occasion have created enforceable individual rights.⁶⁵

In Indian constitutional litigation, both directive principles and individual rights have been given enforceable meaning by the Supreme Court, raising questions about which takes priority where they conflict. In *Minerva Mills Ltd. v. Union of India*,⁶⁶ the Supreme Court of India held that the constitution requires a balance between fundamental rights and directive principles, both of which are crucial:

To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and Directive Principles is an essential feature of the basic structure of the Constitution.⁶⁷

But the decision did not resolve the question which took precedence over the other.

⁶³ Spanish Constitution, arts. 39-52.

⁶⁴ Art 45, § 1 of the Irish Constitution provides: "The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas [the Irish Parliament]. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution." Ireland Const art 45, § 1

Art 37 of the Indian Constitution provides: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the country and it shall be the duty of the State to apply these principles in making laws." India Const. art 37 (1949).

⁶⁵ In the Irish case, see *Ryan v. Attorney General* [1965] I.R. 294 (Ir.) (holding that certain unenumerated rights could be derived from the directive principles and that such rights could be justiciable) and *T.D. v. Minister for Educ.*, [2001] 4 I.R. 259 (Ir. S.C.). (holding that the lower court violated the separation of powers by ordering the government to create an educational program and arguing instead that the role of the courts was limited to pointing out the unconstitutionality of a situation and relying on the government to correct the omission).

⁶⁶ A.I.R. 1980 S.C. 1789.

⁶⁷ *Id.* at 1806.

The Indian case law sometimes gives surprisingly strong meanings to the both individual rights and directive principles in the same case. For example, the Indian Supreme Court in *Gaurav Jain v. Union of India*⁶⁸ ordered the Indian state to provide for the “empowerment” of disadvantaged classes of people so that they could realize their social rights. This case involved the integration of former prostitutes and their children into Indian society. The Court went well beyond the resolution in the particular case to require that the state undertake a program of job training for former prostitutes so that these women could earn livelihoods in other ways.

The Indian Supreme Court considered the right to health care in *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*.⁶⁹ The case involved a man who fell from a train and suffered serious head trauma. Despite being taken to six state-run hospitals, he could not receive treatment for his injuries because there was not enough bed space in the hospitals and because there was a general lack of trauma facilities. Did the lack of adequate medical facilities for emergency treatment constitute a denial of his fundamental right to life? The Court found that it is the primary duty of a welfare state to ensure that medical facilities are adequate and available to provide treatment, and so the Court required the state to ensure that primary health centers are equipped to provide immediate stabilizing treatment for serious injuries and emergencies. In addition, the Court ordered the state to increase the number of specialist and regional clinics around the country available to treat serious injuries, and to create a centralized communication system among state hospitals so that patients could be transported immediately to the facilities where space is available. The Court recognized that substantial expenditure was needed to ensure that medical facilities were adequate. However, it held that a state could not avoid this constitutional obligation on account of financial constraints. The Court also awarded the injured man monetary damages to be paid by the state. This case stands not only for the proposition that a court can order a state to create a state program to meet general goals, but the wide sweep of the remedy in this case shows how courts can take on both individual remedy and structural changes as part of their remit.

Judicial recognition that the state has an obligation to make progress toward the realization of social rights does not always result in a concrete benefit for the individual bringing

⁶⁸ *Gaurav Jain v. Union of India*, A.I.R. 1997 S.C. 3021.

⁶⁹ *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, (1996) 3 S.C.J. 25.

the case. When a court takes this approach, individuals cannot rely on social rights to make personal (subjective) claims. That said, the court may nonetheless require that states take general actions to realize social rights. For example, in a case at the Berlin (Land) Constitutional Court, a man argued that after mandatory deduction of child support payments from his paycheck, he was therefore unable to pay his rent.⁷⁰ He claimed a right to housing under the Land constitution. The Court held that the "right to living space" did not give right to an individually claimable right, but was instead a directive to the state to work toward providing enough housing so that all could realize the right.

State provision for the realization of social rights does not necessarily require that all who might claim the right get the benefit at the state's behest, even when provision for the social right exists. Despite the constitutional provision that "guarantee[d] the principles of free and equitable State public education," the Argentine Supreme Court permitted the government to charge fees for education. The Court reasoned that the word "equitable" allowed the state to charge tuition fees to those who could afford them, as long as there was still a guarantee to open and free access to the schools for those who could not afford it.⁷¹

As these cases reveal, courts with a wide range of specific constitutional provisions will find that they have the capacity to order the government to create or fund a particular social program that will aid in the realization of social rights. Sometimes courts do this because the constitution gives them the clear standard for doing so (e.g. progressive realization or directive principles); other times courts do this because they recognize that the capacity to realize social rights makes little sense doled out one by one. Sometimes individual petitioners win and sometimes they lose in these structural decisions.

D. Direct Judicial Provision of Goods that Realize Social Rights

Courts may order direct provision of the goods that would allow social rights to be realized and may provide them either individually to the petitioner or collectively to the affected class. This is obviously the remedy that most critics fear, and courts use it surprisingly rarely

⁷⁰ 4 LVerfGE 62 (1996).

⁷¹ CSJN, 24/5/1999, "Estado Nacional (Ministerio de Cultura y Educacion de la Nacion) formula observacion estatutos U.N.C. -art. 34 ley 24.521-" (U.N.C.), L.L. (1999-E-65, 20-21) (Arg.).

given the opportunities to do so. But courts in particular parts of the world, particularly in Latin America, have been resorted to direct provision decisions with increasing frequency to ensure that social rights guaranteed in their constitutions have some reality on the ground. As with the other techniques we have examined, courts may do this in a variety of ways.

Courts may hesitate to order provision of the goods necessary for realizing a social right directly, and so develops an indirect analysis. In such cases, a court first finds that the vindication of a fundamental right (not a social right) requires that the goods be provided. In such cases, the courts then directly order that individual petitioners receive the scarce benefit that is the subject of a social right on the grounds that the social right is necessary to protect a more fundamental right. But it is the violation of the fundamental right, rather than the social right directly, that gives the court warrant to do so.

The Colombian Constitutional Court has done this most explicitly, by elaborating doctrine of *conexity*.⁷² This doctrine permits the Court vindicate a social right in cases where the social right is connected to a fundamental right. When the failure to attain a social right blocks the attainment of a fundamental right, the Court then treats the social right as if it were part of the fundamental right. This enables a stronger judicial response than would be the case if the case involving the social right were just heard on its own. Throughout the 1990s, the Colombian Constitutional Court heard challenges under *tutela* jurisdiction from petitioners who had been denied free access to either medical procedures or drugs under the new partially privatized national health care system.⁷³ The Court often ordered the state to provide the treatment or drugs at public expense in cases where the medical condition substantially affected the petitioner's fundamental rights to life, physical integrity or human dignity and the person could not afford to pay for the treatment. By 1999, fully 30% of all *tutela* petitions to the Court dealt with denial of medical service questions.⁷⁴ Through this mechanism, the Court decided on a case-by-case

⁷² Maria Paula Saffon, Can Constitutional Courts be Counterhegemonic Powers vis-a-vis Neoliberalism? The Case of the Colombian Constitutional Court. 5 SEATTLE J. SOC. JUST. 533, 545 (2007).

⁷³ For a discussion of these cases see, Maria Paula Saffon, Can Constitutional Courts be Counterhegemonic Powers vis-a-vis Neoliberalism? The Case of the Colombian Constitutional Court. 5 Seattle J. Soc. Just. 533 (2007).

⁷⁴ For examples of the health care cases of the Colombian Constitutional Court, see CORTE CONSTITUCIONAL, S. T-1239/01. S. C-1498/00; S. C-408/94. S. C-177/98; S. C-146/98; S. C-112/98; S. C-054/98; S. C-596/97; S. C-590/97; S. C-410/97; S.C-665/96; S. C-663/96; S. C-370/96; S. C-173/96; S. C-111/96; S. C-003/96; S. C-584/95; S. C-577/95; S. C-461/95; S. C-376/95; S. C-255/95; S. C-221/95; S. C-168/95; S. C-126/95; S. C-030/95; S. C-027/95; S. C-529/94; S. C-512/94; S. C-497A/94; S. C-476/94; S. C-475/94; S. C-410/94; S. C-409/94; S. C-387/94.

basis who would get medical care otherwise denied.⁷⁵ The Court, by the way, had previously upheld as constitutional the partial privatization of the health care system that then resulted in these denials; then the Court intervened often to ensure that the system as it actually functioned did not deprive anyone of their fundamental rights.

Sometimes the warrant to order the direct provision for social rights is attached to a fundamental right through the interpretive aid of a directive principle. In *Akhil Bharatiya Soshit Karamchhari Sangh v. Union of India*,⁷⁶ the Supreme Court of India held that the judiciary should use the directive principles of the Indian Constitution as a code of interpretation to help the judges determine the substance of fundamental rights. The fundamental rights were effectively to be construed in light of the directive principles, and "whenever and wherever possible," the former were to be read into the latter. In these cases, not only did the individual claiming the right receive some remedy, but also the state was ordered to take measures to prevent the further infringement of rights.

As a result of this doctrine, the Indian Supreme Court has included provision for economic and social rights in its understanding of the meaning of the "right to life" in the Indian constitution.⁷⁷ In *Bandhua Mukti Morcha v. Union of India*, the Court found that protection of health and opportunities for healthy development are among "the minimum requirements which must exist in order to enable a person to live with human dignity."⁷⁸ In *Francis Coralie Mullin v. Union Territory of Delhi*, the Court found that "the right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head."⁷⁹ And in a case where a man was denied emergency medical treatment and died as he was being moved to another hospital, the Indian Supreme Court held that Article 21 of the Constitution casts an obligation onto the state to take

⁷⁵ These cases were sometimes brought against private providers who failed to include particular conditions in their coverage. The Court could order the private service to provide the health care, allowing the private health care provided to apply for reimbursement through a general state fund for social solidarity programs.

⁷⁶ (1981) 1 S.C.C. 246, A.I.R. 1981 S.C. 298.

⁷⁷ *Samatha v. State of Andhra Pradesh*, A.I.R. 1997 S.C. 3297.

⁷⁸ *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 S.C. 802.

⁷⁹ *Francis Coralie Mullin v. Union Territory of Delhi*, A.I.R. 1981 S.C. 746, 753.

every measure to preserve life.⁸⁰ The Court found that it was essential to the preservation of life that doctors provide medical services to individuals in need.

In another decision that, at least in concurring opinions, ordered direct provision for social rights because of their connection with fundamental rights, the Argentine Supreme Court required the Argentine government to provide drugs for the treatment of all HIV-positive and AIDS patients in the country, under its understanding of the right to health care in the Argentine Constitution.⁸¹ The decision came at a time when the International Monetary Fund had required a strict austerity budget for Argentina in the wake of the country's economic collapse, and it might be interpreted as a sign of protest against the austerity measures. Two concurring justices, Justices Boggiano and Moline O'Connor, argued that the right to health was an important part of the fundamental right to life, and therefore had to be protected as part of the protection of fundamental rights (like the Colombian *conexity* doctrine).

Sometimes courts order the direct provision of a social benefit to an individual solely on the grounds that the benefit is protected directly by a social rights provision in the Constitution without going through the fundamental rights analysis first. The Argentine courts have been leaders in this regard. For example, a decision of the Argentine Supreme Court ordered that the government provide expensive medication for a four-year-old child whose trade-union-sponsored insurance company had gone bankrupt. The court made this order directly on the ground of the constitutional right to health care.⁸² A lower court in Argentina ordered the government to provide safe drinking water for a village inhabited by indigenous peoples.⁸³

⁸⁰ Parmanand Katara v. Union of India, A.I.R. 1989 S.C. 2039.

⁸¹ *Asociacion Benghalensis y otros c/ Ministerio de Salud y Accion Social*, CSJN, 1/6/2000, *Estado Nacional s/ amparo ley 16.986*, L.L. (2000-A-986, 13) (Arg.).

⁸² CSJN, 24/10/2000, "Campodonico de Beviaqua, Ana Carina c/ Ministerio de Salud y Accion Social - Secretaria de Programas de Salud y Banco de Drogas Neoplasicas," L.L. (2000-C-823) (Arg.). For a discussion of this case, see Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*. 22 AM. U. INT'L L. REV. 101 (2006).

⁸³ *Camara de Apelaciones en lo Civil de Neuquen , Sala II, 19/5/1997, "Menores Comunidad Paynemil s/ accion de amparo" (Comunidad Paynemil)*, Expte. No. (311-CA-1997) (Arg.), discussed in Etchichury, *id.*

Similar reasoning was used by a different lower court in Argentina to affirm the government's positive obligation to provide vaccinations for children.⁸⁴

The Brazilian courts also have been very active in ordering the direct provision for social rights to particular individuals. While in many ways, this is an anomaly generated by the complexity of the Brazilian health care system, it has now become routine for patients who are denied access to medication within their private or public health plans to sue the state for provision of the medication. The analysis conducted by Hoffman and Bentes sampled 7,400 such lawsuits that got to the higher courts, leaving out many, many more that were resolved at lower levels.⁸⁵ Fully 85% of those cases were brought by individuals against the state, claiming direct provision of care or medication, and in 82% of these cases, the plaintiffs were successful in gaining the benefit they sought.⁸⁶ While the legal bases of their arguments varied somewhat, with some petitioners claiming the constitutional right to health care and others claiming the constitutional right to life and others making more specific claims under concrete statutes. The most common argument that courts used was based on the right to life, read together with the right to health care.⁸⁷ Brazilian courts have balked ordering some particularly expensive treatments, as in the case of four children with Gaucher disease whose treatment would have cost \$1 million per year.⁸⁸ Through the combined effects of these thousands of case the "judiciary is, increasingly, an intermediary in the provision of basic health . . . services."⁸⁹ Not surprisingly, the state is starting to push back by threatening legislation to curb the litigation or by delaying its response to successful cases.⁹⁰

⁸⁴ Camara Nacional de Apelaciones en lo Contencioso Administrativo Federal, Sala IV, 2/6/1998, "Viceconte, Maria Cecilia c/ Estado Nacional -Ministerio de Salud y Accion Social-s/ amparo ley 16.986, (Arg), discussed in Etchichury, *id.*

⁸⁵ Florian F. Hoffman and Fernando R.N.M. Bentes, "Accountability for Social and Economic Rights in Brazil." Pp. 100-145 in Vauri and Brinks (eds), *supra* note ___ at 116. They indicate that 2,800 individual actions claiming access to medication were brought in the lower courts between January and July 2006 alone. *Id.* at 123.

⁸⁶ *Id.* at 117-119.

⁸⁷ *Id.* at 120.

⁸⁸ *Id.* at 123.

⁸⁹ *Id.* at 134.

⁹⁰ *Id.* at 138-140.

While some courts provide benefits on a case-by-case basis, other courts order the direct provision of a benefit to the entire affected class. For example, the South African Constitutional Court, in *Minister of Health v Treatment Action Campaign*,⁹¹ considered whether the drug Nevirapine must be made available to HIV-positive pregnant women. Tests had shown that the drug dramatically reduced the likelihood of mother-to-child transmission of HIV. The drug manufacturer had agreed to provide the drug for free for five years to all South African women who needed it, but the state had limited the use of the drug to pilot-testing sites only. The Court ordered the ban on the use of the drug outside the test sites lifted and ordered the government to give access to the drug to all pregnant women in the country. Significantly, however, since the drug was provided for free by the manufacturer, this was the rare social rights case involving no added expense for the government and only the removal of a barrier of access to the medication. Seen this way, the case may have more in common with the cases we saw in the first section, where courts enforce the negative part of a positive right, requiring the government to stop taking an action that prevented the realization of rights.

As we have seen in this section, even the cases that could be classified as examples of direct provision for social rights often use one or more of the methods we already examined in previous sections for tempering the effects of their decisions and limiting them to the most serious cases. By enforcing the negative part of a positive right or attaching social rights to other fundamental rights or directive principles, courts tend to avoid ordering the government to directly provide for a huge new mass of claimants all at once.

Even so, very few legal systems feature courts that directly order the provision of a concrete benefit directly under a social rights claims. This is the nightmare scenario for critics of the judicial enforcement of social rights, but the fact is that such remedies are very rarely ordered when one looks internationally. In some legal systems – Colombia, Argentina and Brazil in particular – the provision of benefits comes so often through court decisions that this has become the way to push recalcitrant bureaucracies into providing what they probably should have provided in the first place. But these cases are the exceptions not the rule. Courts mostly find other ways to honor the rights without bankrupting the governments.

⁹¹ (No. 2) 2002 (5) SA 721 (CC).

IV. It Doesn't Work in Theory, but It Actually Works in Practice

Despite the efforts of the critics to discourage social rights, new constitutions have included them, even beyond the post-communist world where they might be expected. Moreover, where social rights have appeared in constitutions, courts generally find ways to give positive meaning to them. While it is hard to tell just whether the poor are really made better off by these judgments,⁹² it is certainly the case that the governments in countries where social rights have been made real by courts have not gone bankrupt on account of the court decisions. For all of the huffing and puffing against social rights in the literature, no court seems to have blown the house of state down by taking social rights seriously.

Why do courts make the social rights decisions that they do? From our review of social rights cases, several factors seem to make a difference.

First, courts enforce the law. If the constitution contains social rights, courts will attempt to enforce them. This may sound rather simple-minded, but in fact, the text matters. Countries without direct social rights provisions in their constitutions will tend not to have courts enforcing social rights even though giving meaning to social rights may enhance other rights or be good social policy. Courts work with the laws they have. This doesn't explain *how* courts understand social rights, but instead helps us to understand *whether* they attempt the exercise or not.

Second, courts tend to read social rights in the same way that they read civil and political rights, at least on a first pass. Many courts enforce the negative part of a positive right – or (in other words) they first prevent the state from taking actions that infringe the right. If that is not enough to guarantee the right, then courts tend to read social rights provisions in the context of the whole constitutions that they are called upon to interpret. As a result, courts find that the lack of provisions guaranteed by social rights is particularly serious when it starts to infringe fundamental rights or show a failure of the state to attempt to abide by the state goals that the constitution provides. This suggests that courts may try to find ways to enforce social rights in

⁹² The Varun and Brinks volume does attempt to see what happened as a result of social rights enforcement in South Africa, Brazil, India, Nigeria and Indonesia, and generally concludes that courts are more likely to be effective when they order already left-leaning governments to comply with social rights and where the interaction between court decisions and government policy is more dialogic than command-and-control-like. VARUN AND BRINKS, *supra* note ____ at 320-334.

particularly serious cases, which is a way of responding to the worry that too vigorous an understanding of social rights will put too many liens on state policy and on state budgets. Reading social rights together with other constitutional provisions allows courts to pick out only the most egregious cases for social rights enforcement. This is a self-limiting strategy.

Finally, courts have shown themselves to be responsible with state budgets. Courts have turned away cases where the realization of the right is simply too expensive in individual cases for the state to be able to cover it. (See, for example, the South African dialysis case and the Brazilian cases involving Gaucher disease.) In cases where the state cannot immediately provide the benefits that social rights demand for a large number of claimants, courts have tended to take the longer view, requiring the development of state policy over the longer haul. (See, for example, the *Grootboom* case in South Africa and the case of the man who fell from the train in India.) These varying solutions show that courts recognize that the realization of social rights requires material provision and that the right in question has to be adjusted to that reality. Courts have backed off in situations where the expenditures were just too big for a state to handle, but they have also been very eager to get involved where modest amounts of state resources will make a big difference. Judges seem well aware of the demands that their judgments place on states and they attempt to provide room for the state to adjust its policies to the various material limitations that it has.

But bearing judicial responsibility for the enforcement of the laws means that courts must do something about social rights where they exist. From our review, we can see that courts have eagerly reached out to embrace the enforcement of social rights while always knowing that they rely on state compliance to make their decisions real. As a result, courts have tried to find ways to push the state to secure social rights without requiring the impossible. More research is necessary to know whether courts succeed, but from our review of the decisions, we can see that what isn't supposed to work in theory actually does seem to work in practice.