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* Judge O'Regan is a member of South Africa's Constitutional Court

Social Rights

Towards A Principled, Pragmatic Judicial Role

by Prof. Craig Scott

It is important to allow a national jurisprudence on socio-economic rights to develop with full vigour. The courts have particular qualities that they can bring to the enforcement of socio-economic rights. In particular, they have the potential to combine reflective, principled reasoning with the ability to test and enrich a legal principle in light of concrete facts in a specific context. We should think of courts as being well-suited to listen to and respond to narratives that are linked to questions of principle. The 1996 Constitution has given a meta-democratic mandate to the judiciary to interpret and enforce socio-economic rights. This places a large responsibility on our courts, especially the Constitutional Court.

Institutional dialogue

However, we should be cautious not to create the perception that rights are the domain of the courts alone. The misplaced assumption that the judiciary is the only institution responsible for giving content to rights exacerbates the fears and concerns that judges have about social rights. We need a constitutional ethos to permeate all government decision-making. Our understanding of rights will be impoverished if other state institutions adopt the view that they will only do something if the courts order them to do so. A dialogue should in fact take place between the courts and legislatures. Following Amy Gutmann, I advocate thinking of rights interpretation and enforcement in terms of a co-operative enterprise in which the judiciary and the legislatures share "a unity of moral labour" (Amy Gutmann, "The Rule of Rights or the Right to Rule?" in J. Roland Pennock and John W. Chapman, eds., *Justification: Nomos XXVIII* New York: NYU Press, 1986, 15 at 166). In South Africa, the institutional dialogue is potentially far richer because of the presence of the state institutions specifically charged with supporting constitutional democracy, particularly the South African Human Rights Commission (SAHRC) and the Commission for Gender Equality (CGE). The proposed Canadian Alternative Social Charter provides an example of how this dialogue and co-operation between various institutions in interpreting and enforcing social rights can occur. Another axis of institutional dialogue is between the domestic Courts and international human rights bodies.

Three modes of co-operation

Three modes of potential institutional co-operation can be identified:

1. *Subsidiary interaction*: This form of interaction involves one institution showing deference to one or more of another institution's functions, either on a systematic basis or on a contextually-determined basis. Deference can occur across a range of matters and can vary in degree. One notion that is central to subsidiary interaction is the notion of waiting for another institution to "speak first" on a normative issue. For example, in a case where a complete or near-complete lack of regulation is alleged to result in a constitutional violation, a court may consider it desirable and useful to adjourn proceedings in order to allow the legislature to

take the first step in enacting legislation before the court is prepared to be fully seized of the matter. Depending on the urgency of the situation and the kind of suffering at stake, such adjournment could well be accompanied with some provisional injunctive relief. It is generally desirable that the legislature should, in the first instance, give content and definition to the more far-reaching obligations attached to rights and thereby provide a baseline from which a dialogue on sufficiency can begin with the courts. The rider to this mode of co-operation is that it applies provided there is (or has been) no unreasonable delay on the part of the legislature in dealing with the particular issue. At a certain point, courts must move out of a subsidiary mode and shoulder a residual burden of responsibility to measure state inaction against constitutional principles without the benefit of an existing regulatory framework.

2. Supererogatory interaction: This form of interaction is premised on an understanding by institutions that there is no ceiling involved in the protection of human rights - only floors. For example, Parliament should not limit its implementation of rights to the interpretations given by the courts as it is institutionally suited to go further than the courts. A second example is the interaction between the State's domestic legal system and international human rights bodies. The standards set at an international level should not be seen as imposing a cap on how far domestic courts can (indeed, must) go. A good example is the judgment in *S v Makwanyane & another* 1995 (6) BCLR 665 (CC) in which the Constitutional Court avoided the more limited interpretation of the right to life under international law in deciding the case. Absent a specific commitment by a State to abolish the death penalty through ratification of the Second Optional Protocol of the International Covenant on Civil and Political Rights, international law does not currently appear to prohibit the death penalty absolutely. Yet, this international legal state of affairs did not prevent the Court from interpreting the South African legal system to have evolved to the point where the right to life includes such a prohibition. A third example of possible supererogatory interaction is between independent Human Rights Commissions and Parliament. A key aspect of the mandate of Human Rights Commissions should be to challenge Parliament to achieve higher levels of rights' protection, including by suggesting detailed means by which to do so.

3. Co-ordinate interaction: This form of interaction involves two or more institutions co-ordinating (with varying degrees of explicitness) across institutional boundaries. This can occur in relation to normative mandates that overlap not just in substance, but also in function. An example of this type of interaction is the potential relationship of co-operation between the Human Rights Commission and the courts. Thus the courts can draw on a set of standards developed and studies conducted by the Commission as aids to deciding cases. The Commission can seek to give more detailed content to general or tentative statements of principle emanating from the courts.

Creative remedies

Institutional dialogue operates with particular appropriateness at the level of remedies. When a healthy interaction exists between the courts and other institutions, there is scope for the courts to make decisions and for other institutions to formulate or propose remedies. However, there is probably a limit to how far the courts will (or should) go in this regard without feeling that their function is being undermined.

It is important to develop novel and creative remedies for dealing with violations of socio-economic rights. Through utilising declarations of non-compliance or "problematic compliance", the courts can put the State to terms to remedy the defects. In this way, the courts can deal pragmatically, yet creatively, with perceived problems of polycentric decision-making.

The following are some of the remedies which may be considered in the context of socio-economic rights:

- declaring a violation coupled with putting the legislature or executive to terms to correct the defect: in so doing, the court makes clear the normative *result* that must be achieved, but does not specify the *means* to achieve it ("putting to means");
- ordering a time-delayed provisional remedy with a duty on the State to report back with proposed measures before final argument on remedies proceeds;
- ordering a structured, participatory process to recommend final remedies (taking seriously the solutions proposed by affected groups, including by involving local communities and representative organisations in the process);
- ordering the promulgation or enactment of a regulatory regime in which measures are actually specified as being necessary to solve a defined and concrete problem; or
- ordering a government committee of inquiry to report on the situation prior to litigation, perhaps with a list of questions framed by the court as the focus of the inquiry.

The appropriateness of such remedies, alone or in combination, will depend on a range of contextual factors and on the constant exercise of judgment in relation to the most effective mode of interaction on the issue.

'Diagonality'

There is an obvious overlap between the State's duty to protect socio-economic rights and 'horizontality' (constitutional obligations placed directly on non-state actors). However, there is an important category of cases in which the most effective process would require a joinder of private and state parties in order to facilitate a legal analysis of how to allocate constitutional obligations as between private entities and the State. I have coined the phrase, 'diagonality' for the situation where human rights obligations are *prima facie* shared by both public and private actors. This conceptualisation has considerable potential for promoting a more holistic analysis of human rights violations that are located within a field of overlapping state and non-state power structures.

In South Africa, the situations that would seem ripe for 'diagonality' analysis may be as numerous as the combination of 'vertical' cases (where only the state need be sued) and 'horizontal' cases (where only specific private actor need be sued). There are examples of fact situations drawn from outside South Africa which would benefit from the 'diagonality' approach. In Britain, the government's recent Social Exclusion Report notes that there are many poor housing estates throughout the UK where "[l]ocal shops ... often charge 60 per cent more than supermarkets" in adjoining areas and, "[y]et, tenants are often trapped with no cars" (Peter Hetherington, "Blair pledges help for the jobless" *The Guardian Weekly*, Sept. 27, 1998, p. 10). One could conceive of a justified horizontal claim against shop-keepers if there is evidence of opportunistic price-gouging. Equally,

one can conceive of a claim against the State for increased social assistance for food. Yet, a case which looked at potential joint responsibility in the context as a whole might lead a court to:

- a. order the State to put an efficient and adequate public transportation system in place to and from various key parts of estates; and
- b. order an independent review of profit margins at similar small off-estate shops.

After this second order, the case would be reconvened to look at price levels once enough time has passed to see what effect transportation has had on freeing up market pressures to force down prices and to see how effective the combined transportation and price adjustment have been in improving access to adequate food by groups that may have a greater need to shop locally on the estate (e.g. disabled and elderly persons).

Interpretative Approaches

I conclude with a synopsis of some interpretative approaches I would advocate. Institutions such as the executive should treat the interpretations of rights by the courts as floors not ceilings. The notion of binding precedent in the context of human rights interpretation should also be adapted. Courts need to be open to new and different interpretations of rights in the future as fresh information and research comes to light, and as new understandings evolve. Overly technical and formalistic interpretations should be avoided.

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A Response To Craig Scott

A South Africa Perspective

by Bongani Majola

One of the envisaged effects of our new Constitution is the transformation of South African society to a democratic society characterised by freedom and equality. The transformative nature of our Bill of Rights, which is based on human dignity, equality and freedom, is central if we are to shift ground and free ourselves from the vestiges of apartheid. Our Bill of Rights is unique in the manner in which it seeks to bring about the transformation of South African society, not only in terms of their civil and political entitlements, but also in terms of social and economic entitlements. While many constitutions place emphasis only on civil and political rights, ours goes a step further and attempts to transform the social and economic dimensions of our lives through the entrenchment of social and economic rights.

The problems of enforcement

The problem of the enforcement of socio-economic rights, which are generously spelt out in international human rights instruments and in the constitutions of some countries, is a vexed one. While there is a clear international understanding that one of the keys to the alleviation of poverty and suffering is the realisation of socio-economic rights, there is still no agreement on effective ways of bringing about the realisation of these rights. There is even less agreement regarding the