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Making social rights conditional: Lessons from India

Madhav Khosla*

Recent years have witnessed important advancements in the discussion on social rights. The South African experience with social rights has revealed how such rights can be protected without providing for an individualized remedy. Comparative constitutional lawyers now debate the promise of the South African approach, and the possibility of weak-form judicial review in social rights cases. This article considers the Indian experience with social rights, and explains how it exhibits a new form of social rights adjudication. This is the adjudication of a conditional social right; an approach that displays a rare private law model of public law adjudication. This article studies the nature and significance of this heretofore ignored adjudicatory approach, and contrasts it with, what is termed as, the systemic social rights approach. The conditional social rights thesis has important implications for the present debate on social rights adjudication, and presents an account of the Indian Supreme Court that is truer than those we presently encounter.

1. Introduction

A core puzzle lies at the heart of social rights adjudication. While normative debates consider what it means to have a social right, courts may ultimately understand rights very differently. Their conceptualization of a social right often contrasts sharply with the theoretical framework within which constitutional lawyers presently operate. And yet there is some logic to how courts function; there is some method to their madness. This Article substantiates this claim and presents a new form of social rights adjudication.

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The distinction between civil-political rights and social rights is often recast as one between negative and positive rights. Conventional wisdom teaches us that the former merely limit state action whereas the latter entail affirmative state action; the former require the state to refrain while the latter ask it to act.¹ The intuitive appeal of this distinction has contributed to its enormous popularity, thereby privileging civil-political rights over social rights. Although Frank Michelman brought attention to social rights three decades ago,² only recently have they received due attention.

The debate on social rights is multifaceted, and one need hardly rehearse its central themes. It ranges from whether the vagueness of such rights renders their realization impossible³ to intricate analyses of institutional design, which may even require us to explore a new form of separation of powers.⁴ For our purpose, it is sufficient to recognize that defenders of social rights have sought to revisit the traditional distinction between civil-political rights and social rights.⁵ For political theorists, developing new ways to understand this distinction is of much moment: it is crucial for making the argument that social rights can be legitimately constitutionalized in democratic societies. For constitutional lawyers, this task is equally significant: it lends support to the claim that social rights can be effectively enforced through sustainable and meaningful remedies.

Needless to say, there are numerous ways in which this project may be undertaken. Cécile Fabre, for instance, preserves what she calls the *duty distinction* between positive and negative rights: “some rights are negative in that they only impose negative duties of non-interference while other rights are positive in that they only impose duties to help and to resources.”⁶ Despite accepting this distinction, Fabre is able to posit a compelling case for social rights by illustrating the difference between civil-political rights and social rights on the one hand, and negative and positive rights on the other. By recognizing the negative/positive distinction but demonstrating that some civil-political

¹ See CHARLES FRIED, *RIGHT AND WRONG* 110 (1978) (on the distinction between negative and positive rights).

² See Frank I. Michelman, *The Supreme Court, 1968 Term – Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973). For a recent critique of Michelman’s work and an alternate argument in favor of social rights, see Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008).

³ See AMARTYA SEN, *THE IDEA OF JUSTICE* 379–385 (2009); Pablo Gilabert, *The Feasibility of Basic Socioeconomic Human Rights: A Conceptual Exploration*, 59 PHIL. Q. 659 (2009). Vagueness is often mistakenly associated with social rights when in fact it is a feature of law. See Timothy A. O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 6 (1999) (“Not every law need be vague, but legal systems necessarily have vague laws. So we can go so far as to say that vagueness is an essential feature of law. . . . We can put the claim even more strongly: we cannot conceive of a community regulated with precise laws. *Law is necessarily vague.*”).

⁴ See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 721–724 (2000) (positing the possibility of a “distributive justice branch”).

⁵ And, fittingly, those who oppose the constitutionalization of social rights seek to preserve this putative distinction. See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001).

⁶ CÉCILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION: GOVERNMENT AND THE DECENT LIFE* 41 (2000).

rights are negative while others are positive,⁷ Fabre can challenge this distinction's relevance for the social rights debate.⁸

An alternate approach is adopted by Stephen Holmes and Cass Sunstein who focus on the costs incurred for making rights meaningful. Since all rights require costs for their enforcement, Holmes and Sunstein are able to collapse the distinction between negative and positive rights. They thereby reject the conceptualization of civil-political rights and social rights as negative and positive by presenting all rights as positive.⁹ Unlike Fabre, Holmes and Sunstein do not offer an elaborate justification for why democratic societies ought to constitutionalize such rights but nonetheless present an innovative strategy for moving beyond the negative/positive dichotomy.

Sandra Fredman's recent work *Human Rights Transformed* provides yet another way. Fredman offers a powerful defense of social rights by moving our focus from rights to duties. Like Fabre, Fredman argues that civil-political rights can be positive, but for a very different reason. For Fredman, "all rights can be seen to give rise to a range of duties, including both duties of restraint and positive duties."¹⁰ In other words, every right can be viewed as imposing both positive as well as negative obligations.¹¹ Debating the legitimacy of social rights through the prism of rights rather than duties is, Fredman demonstrates, a product of intellectual confusion.

In this Article, I shall be concerned less with relative persuasiveness of each of these approaches than with the realization that all three lead to a similar conclusion: if civil-political rights can be legitimately protected, there is little normative basis on which we can exclude social rights. Because theories of constitutionalizing social rights uniformly aim to arrive at this conclusion they consider social rights to be, what I shall term, *systemic rights*. Under this approach, the nature of the right is not conditional upon state action. Once a right is constitutionalized, state action will often determine whether the right has been violated and the sort of remedy that courts may be able to provide. The traditional conception of a systemic social right focuses on the "minimum core" standard, which ensures an individualized remedy. An alternate approach, initiated by the South African Constitutional Court, adopts a reasonableness standard that is less common to rights-based adjudication. The South African approach will be considered more fully below. For now, it will suffice to note that both these forms of adjudication – the individualized remedial "minimum core" form and the non-individualized remedial "reasonableness" form – are forms of systemic social rights adjudication. One either has a right to a certain minimum

⁷ As Fabre notes, "the civil right to be tried by a jury and with the assistance of a counsel is not a negative right, since it demands that a whole state apparatus be established...." *Id.* at 44.

⁸ *Id.* at 65.

⁹ STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 35-48 (1999).

¹⁰ SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 65 (2008).

¹¹ *Id.* at 69 ("...[I]t is impossible to distinguish between rights on the basis of whether they give rise to positive duties or duties of restraint. Far more useful is to consider each right as giving rise to a cluster of obligations, some of which require the State to abstain from interfering, and others which entail positive action and resource allocation.").

socio-economic standard, or to state action that undertakes reasonable measures to achieve that standard.

Neither of these are guaranteed, however, by what I shall term the *conditional social rights* approach. This is an approach which, I shall argue, has been adopted by the Indian Supreme Court, and exhibits a rare private law model of public law adjudication. Rather than focusing on the inherent nature of measures undertaken by the state, the conditional social rights approach focuses on their implementation. No judicial review is conducted on the former question, making the right *conditional* upon state action. Unfortunately, constitutional lawyers, both in India and elsewhere, have failed to notice the distinctive fashion in which the Indian judiciary had made social rights justiciable. An inquiry into this unique approach informs our views on the varied ways in which justiciability operates. Such an inquiry also provides an account of the Indian Supreme Court that is truer to its practices than those we presently encounter.

The conditional social rights thesis shall receive the explication it requires in the forthcoming sections. Section 2 serves as a background. It evaluates the popular narrative on the Indian Supreme Court's adjudication of social rights and identifies its many limitations. Section 3 introduces the distinction between systemic and conditional social rights by examining cases on the rights to livelihood and education. These cases reveal the atypical private law nature of the conditional social rights model. Differences between the two adjudicatory approaches are brought into sharper focus in Section 4 when we consider cases involving the right to health. Such cases allow us to make a further observation: several social rights claims in India are better understood as constitutional tort actions. Section 5 considers the significance of making social rights conditional. It suggests that the emerging global approach towards studying social rights – which focuses on the relative structuring of rights and remedies – cannot adequately grasp the complexity of the conditional social rights model. It then assesses the potential value of the conditional social rights approach and explores how it impacts constitutional practice. The conditional social rights model alerts us to a form of social rights adjudication that has heretofore been ignored. Despite not enforcing any systemic right, this model could serve an important expressive role in poor and poorly governed countries like India.

2. Unanswered questions

We think 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 and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.

*Francis Coralie Mullin v. Union Territory of Delhi*¹²

Before we consider the conditional social rights approach, it will be essential to engage with the widely held perception that the Indian Supreme Court regards social rights as

¹² AIR 1981 SC 746 at 753.

justiciable.¹³ This perception is articulated in, and encouraged by, the work of many writers¹⁴ and judicial opinions like *Francis Coralie Mullin*. But *Francis Coralie Mullin* never dealt with a social right. It focused on the rights of a person detained under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act 1974, and is what one may consider a classic civil liberties case. The Indian Supreme Court's jurisprudence is replete such cases: the justiciable nature of social rights is passionately expressed but there is little effort to expand on their nature or to elaborate upon the scope of review that will be conducted.¹⁵

These questions remain unanswered by academic lawyers. For the most part, the scholarship that takes note of social rights adjudication in India examines it only in passing. The primary focus is on "public interest litigation." In the early 1980s, the Indian Supreme Court relaxed the rules on standing; persons who had suffered no legal injury could approach the court on behalf of others.¹⁶ Public interest litigation was accompanied by additional procedural innovations. For instance, letters to judges were treated as petitions, commissioners were judicially appointed to verify facts, and so on.¹⁷ These procedural developments took place almost alongside an important substantive one: the "right to life" in Article 21 of the Constitution was interpreted to include several socio-economic guarantees.¹⁸

Since its inception, public interest litigation has invited an outpouring of literature.¹⁹ An important link has been drawn between this form of litigation and social rights by demonstrating that social rights violations (under Article 21) are often challenged through public interest petitions. Thus Craig and Deshpande, in a sem-

¹³ See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 246 n.81 (2004) ("The Indian Supreme Court... has developed the world's most comprehensive body of judgments dealing with social welfare rights as protected by the unqualified "right to life" enshrined in the Indian Constitution.").

¹⁴ See, e.g., Arun Kumar Thiruvengadam, *The Social Rights Jurisprudence of the Supreme Court of India from a Comparative Perspective*, in *HUMAN RIGHTS, CRIMINAL JUSTICE AND CONSTITUTIONAL EMPOWERMENT* 264-309 (K. Chockalingam and C. Raj Kumar eds., 2007); Jayna Kothari, *Social Rights Litigation in India: Developments of the Last Decade*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 171-192 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007); Shylashri Shankar & Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India*, in *COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD* 146-182 (Varun Gauri & Daniel M. Brinks eds., 2008); SHYLASHRI SHANKAR, *SCALING JUSTICE: INDIA'S SUPREME COURT, ANTI-TERROR LAWS, AND SOCIAL RIGHTS* 129-166 (2009). Each of these contributions suggest that the Indian Supreme Court enforces a systemic model of social rights (though, surprisingly, none elaborates upon whether the systemic approach allegedly adopted takes the reasonableness form or the minimum core form).

¹⁵ Further, as *Francis Coralie Mullin* reveals, social rights analyses are often performed in cases where such rights are not at issue.

¹⁶ See *S.P. Gupta v. Union of India*, A.I.R. 1982 SC 149; *Bandhua Mukti Morcha v. Union of India*, A.I.R. 1984 SC 802.

¹⁷ See Ashok H. Desai & S. Muralidhar, *Public Interest Litigation: Potential and Problems*, in *SUPREME BUT NOT INFALLIBLE* 159, 162-167 (B.N. Kirpal et. al. eds., 2000) (describing various procedural innovations undertaken).

¹⁸ INDIAN CONST. art. 21 reads as follows: "Protection of life and personal liberty – No person shall be deprived of his life or personal liberty except according to procedure established by law."

¹⁹ See, e.g. Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in *JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER* 289-315 (Rajeev Dhavan et. al.

inal essay two decades ago, observed how the dilution of standing requirements had helped to link Parts III and IV of the Indian Constitution.²⁰ By and large, the former include civil-political rights (“Fundamental Rights”) whose judicial enforcement is guaranteed, while the latter consist of socio-economic goals (“Directive Principles of State Policy”) whose judicial enforcement is expressly barred.²¹ Recent literature has drawn on India’s experience with public interest litigation and its associated innovations to inform the debate on social rights adjudication.²² But since scholars have concentrated on procedural innovations rather than the substantive rights whose adjudication they often facilitate, there remains, several decades on, limited clarity on the precise manner in which social rights are justiciable in India.

Some recent contributions specifically address this issue. Unfortunately they merely confirm, albeit with greater clarity, the doctrinal truth that some form of social rights adjudication is prevalent.²³ There have been few attempts to explore how social rights are conceptualized by the Indian judiciary. Other contributions have performed empirical analyses and examined, for instance, the nature of issues and rates of success witnessed in social rights cases.²⁴ Regrettably, such research has not filled the void.

Consider, for example, a recent essay in which Shankar and Mehta empirically analyze the rights to health and education.²⁵ Let us evaluate their argument on the right to health, wherein they shed light on the issues that arise in litigation,²⁶ the involvement of non-governmental organizations,²⁷ and so on. While a doctrinal analysis may be unnecessary for an assessment of such questions, it would be helpful in order to fully appreciate some of their broader findings. For instance, they note that “against

eds., 1985); P. P. Craig & S. L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. LEGAL STUD. 356 (1989); S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 195-248 (2nd ed. 2002); Upendra Baxi, *Judicial Discourse: Dialectics of the Face and the Mask*, 35 J. INDIAN L. INST. 1 (1993); P.N. Bhagwati, *Judicial Activism and Public Interest Litigation*, 23 COLUM. J. TRANSNAT’L L. 561 (1985); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 AM. J. COMP. L. 495 (1989.); G. L. PEIRIS, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 Int’l & Comp. L.Q. 66 (1991); Rajeev Dhavan, *Law as Struggle: Public Interest Law in India*, 36 J. INDIAN L. INST. 203 (1994); Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL L. 293 (2007); Arun K. Thiruvengadam, *In Pursuit of “The Common Illumination of our House”: Trans-Judicial Influence and the Origins of PIL Jurisprudence in South Asia*, 2 J. INDIAN L. INST. 67 (2008).

²⁰ Craig and Deshpande, *supra* note 19, at 365-366.

²¹ See INDIAN CONST. art 37. On directive principles and their relationship to fundamental rights, see generally GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 50-83 (1966); Upendra Baxi, “The Little Done, The Vast Undone” – Some Reflections on Reading Granville Austin’s *The Indian Constitution*, 9 J. INDIAN L. INST. 323, 344-363 (1967); P.K. Tripathi, *Directive Principles of State Policy: The Lawyer’s Approach to them Hitherto, Parochial, Injurious and Unconstitutional*, in SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION 291-322 (1972); Bertus de Villiers, *Directive Principles of State Policy and Fundamental Rights: The Indian Experience*, 8 S. AFR. J. ON HUM. RTS. 29 (1992).

²² See, e.g., FREDMAN, *supra* note 10, at 124-149.

²³ See, e.g., Thiruvengadam, *supra* note 14; Kothari, *supra* note 14.

²⁴ See, e.g., Shankar & Mehta, *supra* note 14; SHANKAR, *supra* note 14.

²⁵ Shankar & Mehta, *supra* note 14.

²⁶ *Id.* at 153.

²⁷ *Id.* at 153.

the state, individuals won 73 per cent of the time, doing so overwhelmingly in medical reimbursement and HIV cases, and less so in medical negligence cases, and had only a 50 percent chance of winning in public health cases.”²⁸ These findings are problematic because the authors do not demonstrate any correspondence between the litigant and the outcome of the case. That is to say, the varying success rates may simply represent the differing factual content of the cases at hand; the authors do not show how *same* claims by different litigants result in *different* remedies. As they do not establish any homogeneity of inputs, their attempt at highlighting a heterogeneity of outputs may reveal little.

Further, while the authors identify their focus to be on “cases in the higher courts where the judges or litigants explicitly used the right to health. . . to justify their arguments,”²⁹ many cases considered do not meet this standard; they do not involve the contestation of any social right let alone the right to health. An appropriate example is *Jacob Mathew*,³⁰ which explored the standard for medical negligence under the Indian Penal Code 1860. This case did not contain *any reference* to the Constitution or the “right to health,” but is nonetheless included in Shankar and Mehta’s analysis.³¹

Finally, even comparative constitutional law scholars, studying social rights, have not seriously attended to the Indian position.³² The ensuing analysis aims to remedy this lack of attention.³³ The South African experiment has catalyzed a

²⁸ *Id.* at 154.

²⁹ *Id.* at 151.

³⁰ *Jacob Mathew v. State of Punjab*, A.I.R. 2005 SC 3180.

³¹ Shankar & Mehta, *supra* note 14, at 156. There is another minor issue that ought to be pointed out. Shankar and Mehta note that in the 1992 decision *C.E.S.C. Limited v. Subhash Chandra Bose*, AIR 1992 SC 573, Justice Ramaswamy recognized the constitutional right to health in a minority opinion, but “the majority opinion, however, held that in the absence of legislation, one could not talk of a right to health.” Shankar & Mehta, *supra* note 14, at 150. They proceed to observe that by 1997, “the minority ruling had become settled law” and the right to health was recognized as a key ingredient of the right to life. *Id.* This analysis is doubly wrong. First, the constitutional right to health was recognized well before 1992 (let alone 1997). See, e.g., *Rakesh Chandra Narayan v. State of Bihar*, A.I.R. 1989 SC 348. Secondly, their analysis mistakes the majority view in *C.E.S.C. Limited*. In *C.E.S.C. Limited*, the Supreme Court considered the meaning of “supervision” in Section 2(9) of the Employees’ State Insurance Act 1948. In particular, it examined the relationship of a principal employer and an immediate employer to an employee. The majority opinion mentioned neither the word “health” nor Article 21 and concentrates solely on the interpretation of Section 2(9). It did not involve any analysis of fundamental rights under the Indian Constitution. This of course begs the question as to why Justice Ramaswamy’s minority opinion referred to the right to health. The Employees’ State Insurance Act 1948 requires *inter alia* employers and employees to contribute, in different proportions, towards a fund that can assist in the medical expenses of employees (*i.e.*, it creates a form of social security). Justice Ramaswamy chose to refer to the constitutional right to health because, considering the statute’s objective, he believed that the right provided guidance on its interpretation. The majority chose, on the other hand, to interpret this provision without any reference to the Constitution. It is clear that the majority and minority opinions disagree on what interpretive technique to adopt, but it is incorrect to suggest that they disagree on the nature of the right to health under the Indian Constitution.

³² See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008). To my count, Tushnet refers to India at four places in his book. *Id.* at 237, 238, 241, and 247. These references are in passing and no Indian case is cited.

³³ This enterprise does not attempt a comprehensive analysis of every social right being adjudicated in India. The right to shelter and livelihood, the right to education, and the right to health have been considered.

global debate on the possibility of constitutionalizing such rights.³⁴ It has urged us to move beyond simply asking whether such rights ought to be justiciable, and consider the different forms of review that courts could adopt.³⁵ The Indian judiciary has performed some form of social rights adjudication for three decades and its experience holds valuable lessons. We shall see how it requires us to introduce a distinction between the adjudication of a *systemic social right* and a *conditional social right*.

3. Conditional social rights

A useful starting point for clarifying the distinction between a systemic social right and a conditional social right is the celebrated Indian case *Olga Tellis*,³⁶ which dealt with the rights of slum and pavement dwellers – homeless persons residing on public property. The petitioners argued that they could not be evicted unless the state provided them with alternate accommodation. The right to life in Article 21 would, they contended, be meaningless without “protection of the means by which alone life can be lived.”³⁷ The petitioners had migrated from various cities and villages to Bombay in search of employment, and had no option but to take shelter in slums or on pavements. Their eviction would deprive them of their livelihood and employment. In addition to Article 21, the petitioners relied on Article 19(1)(e) which guarantees persons the right to reside in any part of the country.³⁸ Further, certain sections of the Bombay Municipal Corporation Act 1888, which authorized the removal of obstructions on public spaces without notice, were challenged as unconstitutional. The state, on the other hand, argued that the Constitution granted no right to dwell on public spaces. Municipal authorities had an obligation to maintain public spaces, pavements, and streets, and the impugned statutory provisions merely allowed them to fulfill this obligation. It also emphasized that while measures had been undertaken to provide for employment and housing for the poor, major financial constraints limited state efforts.

The central question in *Olga Tellis* involved the scope of Article 21. Drawing on a range of directive principles for interpretive guidance, the Court found that the right

³⁴ For a detailed account of the South African experience, see Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007). See also Marius Pieterse, *Possibilities and Pitfalls in the Domestic Enforcement of Social Rights: Contemplating the South African Experience*, 26 HUM. RTS. Q. 882 (2004); Dennis M. Davis, *Socioeconomic rights: Do they deliver the goods?*, 6 INT'L J. CONST. L. (I·CON) 687 (2008).

³⁵ See TUSHNET, *supra* note 32; Rosalind Dixon, *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*, 5 INT'L J. CONST. L. (I·CON) 391 (2007). See also Kim Lane Scheppele, *A Realpolitik Defence of Social Rights*, 82 TEX. L. REV. 1921, 1933–1935 (2004); Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351 (2008).

³⁶ *Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C. 545.

³⁷ *Id.* at 556.

³⁸ *Id.*

to life would include the right to livelihood.³⁹ If such a right was not recognized then, the Court argued, “the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation.”⁴⁰ In addition to highlighting the importance of this right, the Court drew attention to the problems of poverty and challenges that squatters face. The right to livelihood was not, however, absolute. No person, it was held, “has the right to make use of a public property for private use. . . [and] it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon.”⁴¹

The next question involved Section 314 of the Bombay Municipal Corporation Act that allowed a Commissioner to remove encroachments without notice. This provision, it was held, ought to be interpreted to enable the Commissioner to dispense with the notice requirement in exceptional circumstances, though ordinarily, because all persons have a right to be heard, notice should be served. Even though persons may have no right to reside on public spaces, the serving of notice could, for instance, allow persons to reply and demonstrate that no encroachment had in fact taken place.⁴² Most importantly, however, notice should be served because “the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him.”⁴³ In other words, it would give the squatter sufficient time to find alternate accommodation. Since notice had not been served in this case, the Court held that no eviction should take place till the end of the monsoon season. While it recommended that the state provide housing to the pavement dwellers, this was not “a condition precedent to the removal of the encroachments.”⁴⁴

Although *Olga Tellis* recognizes a right to livelihood, there is no elaboration on the content of this right. Moreover, the real issue in *Olga Tellis* is whether there is a right to shelter. The case arose because squatters and pavement dwellers were being evicted, and Court considered, first, whether such eviction would be legal, and secondly, if alternate accommodation would have to be provided. *Olga Tellis* provides for *no individualized* right to shelter, as well as no right that the state take *reasonable measures* to provide for shelter. The focus is on ensuring that a proper procedure for eviction is followed.

Yet the Court did require the state to provide housing for one set of petitioners before their eviction. In 1976, the state had taken a decision to allot certain vacant land for slum dwellers. In pursuance of this decision, a census was conducted to

³⁹ One of the techniques routinely employed by the Court in social rights cases is to read the Constitution as a whole. This technique finds relevance in another important instance: the formulation of the basic structure doctrine. See SUDHIR KRISHNASWAMY, *DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE* 178-183 (2009). On reading constitutional provisions as part of a whole, see generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

⁴⁰ *Olga Tellis*, *supra* note 36, at 572.

⁴¹ *Id.* at 579.

⁴² *Id.* at 582.

⁴³ *Id.* at 584.

⁴⁴ *Id.* at 586.

populate a list of slum dwellers in Bombay, and a significant percentage were given identity cards. The Court held that these slum dwellers, who had been part of the census and given identity cards, must be provided with alternate accommodation before being evicted. The distinct remedy granted to this particular set of slum dwellers illustrates, with considerable clarity, the difference between the systemic and conditional social rights approaches. The only persons to whom the Court provided shelter were those who had been promised the same under a state scheme; persons who were entitled to shelter under a government policy. The Court's remedy did not flow from a systemic right to shelter, but rather from the state's failure to follow through on its decision to allot land for slum dwellers. Thus, the slum dwellers who were not covered by the scheme was not provided any remedy. In terms of the substantive right being litigated, this approach mirrors a private law contractual model of adjudication.

The *Olga Tellis* approach may appear to bring to mind the familiar distinction between respecting, protecting, and fulfilling social rights. Is the conditional rights approach a form of respecting social rights? The duty involved in such instances is, as Shue famously put it, "a duty simply not to take actions that deprive others of a means that, but for one's own harmful actions, would have satisfied their subsistence rights or enabled them to satisfy their own subsistence rights...."⁴⁵ *Olga Tellis*, and the conditional rights approach, would have been a form of respecting social rights if the Court had granted alternate housing to only those persons already dwelling on the pavement; in other words, if the Court had focused on whether the rights of certain persons were being realized but for the state's interference. However, in *Olga Tellis*, the Court's focus was not on how a person's right would have been satisfied if the state had not acted. The right to alternate accommodation in the case emerged from the particulars of a state policy, not from occupancy of the pavement. If the Court's approach was focused on respecting social rights, then it would have concentrated on the state's duty to *avoid depriving*.⁴⁶

A similar issue arose a decade later in *Ahmedabad Municipal Corporation*.⁴⁷ Several persons occupied a street upon which they had constructed temporary huts, and in time the number of residents increased. As in *Olga Tellis*, the Court held that there was no right to use public property for private purposes. It then considered whether the squatters were entitled to alternate accommodation before their eviction. Following *Olga Tellis*, it referred to schemes which had already been initiated by the Municipal Corporation, observing that it lacked the power to direct the state to devise a scheme with a particular budgetary allocation. Ultimately, the Court held that petitioners who were originally squatting on the land, and had resided for a considerable period of time, should be given the opportunity to benefit from the existing schemes. However, the Court allowed such petitioners to only apply for the schemes, and held that if they

⁴⁵ HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 55 (2nd ed. 1996).

⁴⁶ *See id.* at 52-53.

⁴⁷ *Ahmedabad Municipal Corporation v. Nawab Khan*, (1997) 11 S.C.C. 121.

were ineligible, they could be ejected after due notice. Other persons who had become encroachers either during the pendency of the petition or “by way of purchase” from the original squatters were not entitled, the Court held, to any remedy.⁴⁸ These different remedies indicate that the Court attached significance to the period of possession and the consequent vesting of a kind of property right, and the nature of government schemes in operation. Yet again, this approach to the social right to shelter is conditional upon state action.

In the conditional social rights model, the court strives hard to emphasize the importance of socio-economic guarantees. But once we move beyond the rhetoric, we notice that the court does not protect any systemic social right, be it weak or strong. *Olga Tellis* and *Ahmedabad Municipal Corporation* provided a distinct set of remedies for different petitioners, and the factual circumstances on which the remedy turned is helpful in distinguishing between systemic and conditional social rights. Had the Court adopted the minimum core approach or the reasonableness approach, it would have inquired into whether each person had access to housing or whether a reasonable numbers of persons had access to housing, respectively. The conditional social rights model is further exhibited by two important cases in which the Supreme Court recognized a right to education: *Mohini Jain*⁴⁹ and *Unni Krishnan*.⁵⁰ In these cases, however, the employment of this model is less easy to discern.

Mohini Jain arose because private medical colleges in the State of Karnataka began charging a “capitation fee” under a government notification. Under this scheme, money served as a consideration for admission; higher tuition was charged from students “who do not possess merit.”⁵¹ The Supreme Court considered the constitutionality of distinguishing between meritorious and non-meritorious students. While the case did involve an equality-based challenge, the Court also examined whether Article 21 would include a *right to education*, and if the impugned scheme violated such a right. Observing the importance of the directive principles, the Court held that the “right to education flows directly from the right to life.”⁵² Without being educated, it would be impossible, it noted, for any individual to live a life with dignity. But what does the “right to education” imply? For the Court, this meant that the state was obliged to “provide educational facilities at all levels to its citizens.”⁵³ This obligation could be discharged either through state-owned or state-recognized educational institutions:

When the State Government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions – whether state-owned or state-recognized – in recognition of their “right to education” under the Constitution. Charging capitation fee in consideration

⁴⁸ *Id.* at 143.

⁴⁹ *Mohini Jain v. State of Karnataka*, (1992) 3 S.C.C. 666.

⁵⁰ *Unni Krishnan v. State of A. P.*, (1993) 1 S.C.C. 645.

⁵¹ *Mohini Jain*, *supra* note 49, at 675.

⁵² *Id.* at 679.

⁵³ *Id.* at 680.

of admission to education institutions is a patent denial of a citizen's right to education under the Constitution.⁵⁴

The decision in *Mohini Jain* was referred to a larger bench of the Supreme Court and these issues were reconsidered in *Unni Krishnan*. In *Unni Krishnan*, the Court confirmed that Article 21 includes the right to education. Placing much textual emphasis on the directive principles, the Court was sensitive to the specific guidelines outlined in two provisions. The first was Article 45 which provided that “the State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.”⁵⁵ The second, Article 41, specified that the state “shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education....”⁵⁶ In light of these provisions, the Court found the scope of the right to education articulated in *Mohini Jain* too broad. The right provided for a right to free education for children till the age of fourteen years. Beyond that age, the state's obligation to provide for free education would be subject to its financial constraints.⁵⁷

At first blush, *Mohini Jain* and *Unni Krishnan* appear to articulate a systemic social right. Both simply differ on the depth of the right: the former case requires the state to provide free education at all levels whereas the latter limits the obligation to children below the age of fourteen years. In fact, *Unni Krishnan* may be read to recognize a systemic social right to education for children below the age of fourteen years, and a conditional social right to education for children above this age. This reading is attractive and persuasive but cannot be sustained.

Both cases dealt with the “capitation fee” scheme.⁵⁸ The Court's conclusion in both cases – that “capitation fee” violates the right to education – survives their disagreement. So what could the *Unni Krishnan* Court mean by asserting that the state must provide free education to children below the age of fourteen years?

The *Unni Krishnan* Court observed that the state's obligation need not be fulfilled only through public schools. It could also be satisfied by schools receiving assistance by non-governmental organizations that are willing to impart free education.⁵⁹ The Court then considered an affidavit filed by the state describing the measures it had undertaken to provide for education from grade I to VIII. The affidavit elaborated on the state's keenness in imparting free education, and highlighted that all State governments had abolished tuition fee in public schools. The Court did not ask the state to initiate any program to ensure that *every* child is educated; it did not even adopt a reasonableness standard and ask the state to build schools. In fact, it acknowledged

⁵⁴ *Id.* at 682.

⁵⁵ INDIAN CONST. art. 45.

⁵⁶ INDIAN CONST. art. 41.

⁵⁷ The Indian Constitution has now been amended and the right to education has been explicitly included in Part III. See INDIAN CONST. art. 21A. See generally Vijayashri Sripati & Arun K. Thiruvengadam, *India: Constitutional amendment making the right to education a Fundamental Right*, 2 INT'L J. CONST. L. (I-CON) 148 (2004).

⁵⁸ *Unni Krishnan* also addressed other issues like whether Article 19(1)(g) of the Constitution guaranteed a right to establish an educational institution.

⁵⁹ *Unni Krishnan*, *supra* note 50, at 735.

the state's limited resources and asked it to ensure that "while allocating the available resources, due regard should be had to the wise words of the Founding Fathers in Articles 45 and 46."⁶⁰

This indicates that all *Unni Krishnan* required from the state is that it *cannot charge* for education for children below the age of fourteen years; the imparting of education till this age must be *free*. The decision implies that *when* education is imparted it must be free, but does not require that the state *must* in fact provide education to all children. It is only this interpretation of the decision that can attempt to reconcile the fact situation which related to tuition fee, and the correspondence between the right and the remedy. Moreover, this conclusion cannot be escaped once we notice that the Court reviewed neither the number of children being educated nor the number of schools established. The Court confirmed its use of the conditional social rights model by elaborating on the state's obligation for children above the age of fourteen years. The obligation merely prevented the state from refusing to provide education within the limits of its economic capacity, and such limits would be determined by the state.⁶¹ It is precisely this conditional social rights model that is also adopted in *Mohini Jain*, where the Court's concern was that "educational institutions must function to the best advantage of their citizens."⁶² The emphasis was not on the creation of institutions.

An important feature of the conditional social rights model is that the court does not ask the state to build, for instance, more housing for the poor or more schools for children. In and of itself, this need not suggest much. It could simply represent the adoption of a weak remedial model in which the court declares that a right has been violated but recognizes that it can only provide a limited remedy. However, *Mohini Jain* and *Unni Krishnan* cannot be understood as cases simply involves a weak-form reasonableness mode of review because of the following reason: in these cases, the existence of insufficient schools was *not* considered a violation of the right to education; just as in the earlier cases, inadequate housing was not considered a violation of the right to shelter. The existence of a violation is *conditional* upon state action. A violation can only occur when the state undertakes an obligation but does not fulfill it. Thus the violation will only occur when a scheme has been initiated but is not being appropriately implemented; for instance, if schools had been established but were charging fees from children. If the model of review adopted was not a conditional rights approach, then the court would also review the number of schools that have been established and the number of children being education – either to examine whether every child is being educated (individualized remedial minimum core approach) or to evaluate if a reasonable number of children are being educated (weak-form reasonableness approach). This form of inquiry is not conducted in such cases, confirming the conditional rights approach. This feature of the conditional social rights model is made clearer by cases involving the right to health.

⁶⁰ *Id.* at 737.

⁶¹ *Id.* at 737.

⁶² *Mohini Jain*, *supra* note 49, at 680.

4. Constitutional tort actions and the right to health

In cases involving the rights to shelter and education, the existence of a right is contingent upon state action. If the state has initiated a housing policy that is being ignored, the court will enforce it; if the state has established schools, then the court will require them to impart free education. But there is no systemic right to either housing or education. This conditional social rights approach is also witnessed in cases involving the right to health. But these cases form a more complex category than those explored in the previous part; often the court does not enforce a social right in any sense whatsoever. Though the approach is conditional, the claim being adjudicated bears greater similarity to a *tort* rather than a *social right*.

Early cases on the right to health saw the Indian Supreme Court struggling to identify its precise role. The Court would assert the constitutional status of the right to health but do little more. In *Vincent Panikurlangara*,⁶³ for instance, a public interest petition brought to light the distribution and sale of unsafe drugs throughout India. The petitioner appealed to Article 21 of the Constitution, and sought, *inter alia*, the withdrawal of 7000 fixed dose combinations from the market. The Union government responded by highlighting legal regulations in place and the Drugs Controller of India's constant efforts at advising State authorities to stop the manufacture and distribution of harmful drugs. The Court travelled considerable distance to emphasize the importance of public health and its place within the Indian Constitution.⁶⁴ Yet it did not examine whether the petitioner's claim would constitute a violation of the right to health. It refused to review the matter, observing its incapacity to frame the nation's drug policy:

Having regard to the magnitude, complexity and technical nature of the enquiry involved in the matter and keeping in view the far-reaching implications of the total ban of certain medicines for which the petitioner has prayed, we must at the outset clearly indicate that a judicial proceeding of the nature initiated is not an appropriate one for determination of such matters.⁶⁵

This approach seems to articulate Lon L. Fuller's classic claim that courts lack the institutional ability to adjudicate polycentric issues.⁶⁶ *Vincent Panikurlangara* demonstrates how the conditional social rights approach is conceptually distinct from the non-justiciability approach. Had the Court adopted the former approach, it would have, at the very least, investigated the legal regulations in operation.

The problematic nature of Fuller's exposition has been demonstrated,⁶⁷ and quite fittingly *Vincent Panikurlangara*'s non-justiciability approach was short-lived. In *Rakesh Chandra Narayan*,⁶⁸ a case that soon followed, the Supreme Court adopted a

⁶³ *Vincent Panikurlangara v. Union of India*, (1987) 2 SCC 165.

⁶⁴ *Id.* at 173-174.

⁶⁵ *Id.* at 173.

⁶⁶ Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 393-405 (1978).

⁶⁷ See Owen M. Fiss, *The Forms of Justice*, 93 HARV. L. REV. 1, 39-44 (1979); Jeff A. King, *The Pervasiveness of Polycentricity*, PUB. L. 101 (2008).

⁶⁸ *Rakesh Chandra Narayan v. State of Bihar*, A.I.R. 1989 SC 348.

much stronger form of judicial review. A letter written to the Chief Justice of India brought to light conditions in a hospital for the mentally challenged in the State of Bihar. The letter was admitted as a public interest litigation petition, and the Court ordered the Chief Judicial Magistrate of Ranchi to investigate the matter. The Magistrate's report painted a disturbing picture: the hospital was under-staffed, water shortage was acute, the toilets were not in working condition, lights and fans needed repairing, there was no supply of sheets and pillows, doctors were unavailable and hardly visited the hospital, medicines were not stocked, and the like. The Report suggested that the hospital was, in the Court's words, "a shade worse than Oliver Twist's Orphanage. . . a medieval torture-house."⁶⁹

Upon considering the report the Court had, in an earlier interim order, directed the State to improve matters. However, despite the issuance of directions, there had been no change. The Court concluded that the State of Bihar had failed in its obligation "to perform its duties by running the hospital in a perfect standard and serving the patients in an appropriate way."⁷⁰ Consequently, it constituted a "Committee of Management. . . to look after all aspects of the institution."⁷¹ It developed guidelines on how committee members would be appointed, the nature of their tasks and responsibilities, and instructed the Committee to provide updates on its progress.

In *Rakesh Chandra Narayan*, there was no scrutiny of the state's efforts to construct hospitals or its budgetary allocation towards healthcare. All the decision suggests is that once the state decides to spend a certain amount on healthcare or build a particular hospital, it has a constitutional duty to fulfill that obligation. A distinction must therefore be recognized: the difficulty in *Rakesh Chandra Narayan* was not that the state had built only few hospitals for the mentally challenged, but that it did not maintain those it chose to build. Yet again this exhibits the conditional social rights model. If an individualized remedial minimum core model had been adopted by the Court, then it would have inquired into whether every mentally challenged person had access to requisite medical care. Alternatively, if a reasonableness approach had been chosen, the Court would have looked into whether a reasonable number of mentally challenged persons had this access. None of these inquiries were undertaken in this case, revealing a departure from the systemic social rights model of adjudication to which we are accustomed.

Rakesh Chandra Narayan is also striking for its strong remedial approach. In addition to providing instructions on administering the hospital, the Court instituted a committee to perform the task. However, this remedy was not adopted at the first instance. Initially, interim orders addressed conditions in the hospital, and it was only after such instructions were repeatedly ignored that the task was taken outside the state's direct control. *Rakesh Chandra Narayan* indicates that where courts provide a strong remedy that is ineffective their capacity to have judgments enforced may be called into question, leading them to respond by further strengthening the remedy.

⁶⁹ *Id.* at 351.

⁷⁰ *Id.* at 354.

⁷¹ *Id.* at 355.

The strong remedial approach involved the judicial supervision of bureaucratic management practices; a case seemingly more relevant for scholars of separation of powers rather than social rights. The nature of judicial supervision tells us something about the political climate in which the conditional social rights model is likely to operate. It may be difficult for poor countries to provide for a systemic social right. But such countries are often not simply poor but also poorly governed. As a consequence, the conditional social rights model involves courts being far more proactive in responding to legislative and executive inertia. In this narrow respect, the conditional social rights model contains a more intense form of judicial review than the systemic social rights one.

Importantly, we must pay greater attention to the right being enforced in *Rakesh Chandra Narayan*. The right – that there should be some baseline maintenance standard for hospitals – is uncontroversial; it is likely to be guaranteed in most democratic societies, irrespective of whether they constitutionalize social rights. Typically such cases arise when the executive fails to perform a statutory duty under a health-related legislation. But *Rakesh Chandra Narayan* was a petition under Article 32 of the Indian Constitution and involved the violation of a fundamental right.⁷² Yet, although it was litigated as a “right to health” case, the factual circumstances do not relate to our standard conception of a social right. The facts resemble an instance of negligence, and the case is better described as a tort action against the state. Such cases may constitute a category of cases within the conditional right to health cases. They echo the conditionality approach but do not involve social rights and are more accurately understood as *constitutional tort actions*.

This point may be borne out by considering the case of *Consumer Education & Research Centre*.⁷³ In *Consumer Education*, a public interest petition outlined health hazards faced by workers in asbestos industries. After examining the dangers of exposure of asbestos, the Supreme Court held that that employers had a constitutional responsibility to provide for safe working conditions.⁷⁴ Article 21, read with Articles 39(e), 41, and 43, was interpreted to include “protection of the health and strength of the worker” and guarantee the right to health and medical care.⁷⁵

Once again the Court adopted a strong remedial approach. The first remedy provided immediate and individualized relief: employers must pay compensation to the tune of one *lakh* rupees to employees who had suffered because of exposure to asbestos. Under the Employees’ State Insurance Act and the Workmen’s Compensation Act, workmen were entitled to compensation for death or injury only during their employment. Since diseases caused by exposure to asbestos often manifest themselves after retirement, the Court found these statutory provisions inadequate. Incorporating rules issued

⁷² See INDIAN CONST. art. 32.

⁷³ *Consumer Education & Research Centre v. Union of India*, (1995) 3 S.C.C. 42.

⁷⁴ Justice Ramaswamy went so far as to hold that “in an appropriate case, the court would give appropriate directions to the employer, be it the State or its undertaking or private employer to make the right to life meaningful....” *Id.* at 72.

⁷⁵ *Id.* at 70.

by the International Labour Organization (ILO), the Court declared them binding on “all industries.”⁷⁶ The State of Gujarat was asked to examine whether the petitioners’ health condition had been appropriately diagnosed, so that compensation could duly follow. The second remedy focused on creating long-term institutional frameworks that could provide for safe working conditions. For instance, the Court directed all industries “to maintain and keep maintaining the health record of every worker up to a minimum period of 40 years from the beginning of the employment or 15 years after retirement or cessation of the employment whichever is later.”⁷⁷ Certainly the right to work in a safe environment is not ordinarily considered a constituent of the right to health. Further, this case too confirms the conditional social rights thesis because the primary motivating factor for the Court’s remedy was the inadequate statutory framework in operation. As per the Court’s reasoning, if the law aimed at addressing health hazards during employment, then they must be sufficiently addressed.

The circumstances that result in the individualized remedy of compensation being granted are clearly brought by *Paschim Banga Khet Mazdoor Samity*.⁷⁸ In *Paschim Banga*, the petitioner fell from a train and sustained serious head injuries. He was taken from one government hospital to another in Calcutta, where at each instance he was refused treatment. Finally, he received treatment at a private hospital and incurred certain medical expenses. He approached the Supreme Court alleging that his inability to receive treatment at a government hospital violated his right to life under Article 21. While the petition was pending before the Court, the government constituted a commission to inquire into the incident. The Commission identified a range of administrative failures at several hospitals that led to the petitioner being refused treatment.

The Court was clear in outlining the nature of the duty under Article 21. Doctors working in government hospitals must provide medical treatment, and the “[f]ailure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment results in violation of his right to life guaranteed under Article 21.”⁷⁹ The Court proceeded to award compensation to the petitioner (of an amount in excess of what had been spent receiving treatment at a private hospital). It then considered various recommendations made by the Commission. Though the government had accepted these recommendations, the Court gave further directions. For instance, it ordered the creation of a centralized communication system so that if a bed is unavailable in a one hospital the patient could be promptly directed to another with vacancies, and so on.⁸⁰

In analyzing *Paschim Banga*, we should distinguish between two possible situations. In the first the petitioner approaches several government hospitals but is unable to receive treatment because, while each hospital is functioning perfectly, none of them

⁷⁶ *Id.* at 73.

⁷⁷ *Id.* at 73.

⁷⁸ *Paschim Banga Khet Mazdoor Samity v. State of W. B.*, (1996) 4 S.C.C. 37.

⁷⁹ *Id.* at 44.

⁸⁰ *Id.* at 48.

have any availability. The alternate scenario is one where the petitioner approaches several government hospitals but is unable to receive treatment because of administrative failures on behalf of hospital authorities. For instance, informing the petitioner that the hospital does not have the requisite facilities for treatment when in fact it does. It is the second scenario that was witnessed in *Paschim Banga*. These two scenarios articulate the distinction between systemic and conditional social rights. Like in *Rakesh Chandra Narayan*, the Court focused on the state's inability to effectively run hospitals rather than on the creation of new hospitals.

Consumer Education and *Paschim Banga* involve constitutional tort claims primarily because of the nature of the violation being asserted – the presence of unsafe working conditions and negligence by hospital authorities. In addition, there needs to be greater engagement with the significance of the awarding of an individualized remedy in the form of damages. Within Indian legal scholarship, there has been no effort to understand such cases as involving tort actions, and no theory of constitutional torts has been developed around this cluster of case law.

These cases need to be contrasted with those such as *Rudul Shah* in which the Indian Supreme Court awarded compensation for illegal detention and held that the “right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield.”⁸¹ Cases like *Rudul Shah* involve very different claims to those we have examined, and greater study will be required to ascertain which identifying principles can distinguish these cases.⁸² Finally, although compensation is awarded in cases like *Consumer Education* and *Paschim Banga*, these cases indicate that the awarding of monetary damages will be a discretionary remedy. In other words, it is not clear whether the Supreme Court recognizes a *right to compensation* for, as Birks points out, “[i]f the court regards its order as strongly discretionary, its content cannot reflect an interior right.”⁸³ There is no elaboration however of which goals will govern how remedies will vary in terms of their intrusiveness. Discretionary remedies are of course common in public law adjudication.⁸⁴ Indeed, they are often adopted by the Indian judiciary in important constitutional cases.⁸⁵

5. The significance of making social rights conditional

5.1. Beyond the rights-remedies paradigm

In what way does the conditional social rights thesis require us to reorient the ongoing debate on social rights? The South African Constitutional Court has shown us how social rights can be protected without performing traditional standards of rights-based

⁸¹ *Rudul Shah v. State of Bihar*, (1983) 4 S.C.C. 141 at 148.

⁸² Such a discussion may be usefully informed by the nature of constitutional tort actions in the United States. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See also *Monroe v. Pape*, 365 U.S. 167 (1961).

⁸³ Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD. 1, 16 (2000).

⁸⁴ See generally The Rt. Hon. Sir Thomas Bingham, *Should Public Law Remedies be Discretionary?*, PUB. L. 64 (1991).

⁸⁵ See, e.g., *Rameshwar Prasad v. Union of India*, (2006) 2 S.C.C. 1 at 130–131.

review. Two cases, *Grootboom*⁸⁶ and *Treatment Action Campaign*,⁸⁷ help illustrate the novelty of the South African approach.

In *Grootboom*, the Constitutional Court considered the scope of the right to housing under Section 26 of the South African Constitution.⁸⁸ After a series of events, the respondents, without alternate options, occupied a sports field where they lived under plastic sheets. This form of housing was unsustainable, and they eventually alleged a violation of their constitutional rights. Examining Article 11.1 of the International Covenant on Economic, Social and Cultural Rights and the “minimum core” standard in international law,⁸⁹ the Constitutional Court observed an important difference between Article 11.1 and Section 26: while the former contained a right to adequate housing, the latter provided for a right of access to adequate housing. Moreover, Article 2.1 of the Covenant required states to take appropriate steps whereas Section 26 required the state to take reasonable measures.⁹⁰ These textual distinctions coupled with the fear that the “minimum core” approach would require the judiciary to address issues beyond its competence led to a rejection of this approach.⁹¹ Instead, the question to be asked was merely whether the state had undertaken reasonable measures; measures that were “capable of facilitating the realization of the right.”⁹² This reasonableness standard would entail considerable judicial deference:

A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognize that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.⁹³

The Court explicitly rejected an individualized form of relief; no *person* was entitled to housing under the Constitution.⁹⁴ The reasonableness standard simply required measures that would “ensure that a significant number of desperate people in need are afforded relief, though not all of them need receive it immediately.”⁹⁵ The remedial approach employed was weak. The respondents were granted only declaratory relief and no timeline was framed for implementing the requisite measures.

A largely similar approach was followed in *Treatment Action Campaign*. Here the Constitutional Court evaluated whether the state could limit access to Nevirapine, a drug used to prevent mother-to-child transmission of HIV. Access to the drug had been limited

⁸⁶ *Government of the Republic of South Africa v. Grootboom*, 2000 (11) B.C.L.R. 1169.

⁸⁷ *Minister of Health v. Treatment Action Campaign*, 2002 (10) B.C.L.R. 1033.

⁸⁸ See S. AFR. CONST. § 26. the respondents also relied upon S. AFR. CONST. § 28(1)(c).

⁸⁹ See U.N. Econ. & Soc. Council [ECOSOC], Comm. on Econ., Soc. & Cultural Rights, *Report on the Fifth Session, Supp. No. 3, Annex III, ¶ 10*, U.N. Doc. E/1991/23 (1991). See generally Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008).

⁹⁰ *Grootboom*, *supra* note 86, at para 28.

⁹¹ *Id.* at para 32-33.

⁹² *Id.* at para 41.

⁹³ *Id.* at para 41.

⁹⁴ *Id.* at para 95.

⁹⁵ *Id.* at para 68.

to certain research and training sites. At all other public hospitals and clinics, Nevirapine could not be administered. It was important, the state argued, to provide counseling to mothers during the administration of the drug and there were financial constraints in this regard. Counseling was crucial because HIV could be transmitted through breastfeeding, thereby counteracting the effect of the drug. Moreover, the state contended that it was uncertain about the drug's safety; wide availability could only be ensured after the drug's performance at the limited sites had been evaluated.

Following *Grootboom*, the Court rejected the “minimum core” approach as it would be “impossible to give everyone access even to a ‘core’ service immediately.”⁹⁶ It only inquired whether the state had undertaken reasonable measures to fulfill its constitutional duty.⁹⁷ Evaluating scientific data, the Court concluded that Nevirapine could be partially effective even if breastfeeding were to take place and found that safety was “no more than a hypothetical issue.”⁹⁸ While further research was important, the Court considered it unreasonable and in violation of Section 27(2) of the Constitution to limit access to the drug.⁹⁹

Constitutional lawyers have rightly observed the uniqueness of the South African approach.¹⁰⁰ Sunstein, for instance, celebrates its novelty by terming it as an “administrative law model of socioeconomic rights.”¹⁰¹ The right, he notes, “involved the creation of a system of a certain kind rather than the creation of fully individual protections.”¹⁰² Tushnet draws on the approach to put forth the possibility of weak-form judicial review in social rights cases. Regarding the choice between strong-form social rights review and no recognition of such rights whatsoever as false, Tushnet offers a third way: rights can be considered strong without the presence of strong enforcement mechanisms.¹⁰³ Weak-form review may take place through the *Grootboom* and *Treatment Action Campaign* approach wherein no person is entitled to individualized relief.

The important question is how to structure the relationship between rights and remedies. Tushnet expresses skepticism about the stability of the South African approach. For instance, coupling weak remedies with strong rights may lead to remedies becoming stronger, which in turn may result in strong rights becoming weak.¹⁰⁴ The best model of weak-form review, Tushnet concludes, may be one that recognizes social rights as declaratory but non-justiciable “because it at least allows for the permanent

⁹⁶ *Treatment Action Campaign*, *supra* note 87, at para 35.

⁹⁷ *Id.* at para 38-39.

⁹⁸ *Id.* at para 60.

⁹⁹ *Id.* at para 81.

¹⁰⁰ Though popular, the reasonableness standard has not invited universal praise. For a powerful critique, see DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* 141-149 (2007).

¹⁰¹ Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, in *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 231 (2001) [hereinafter Sunstein SA].

¹⁰² *Id.* at 234. See also CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 209-229 (2004) [hereinafter SUNSTEIN FDR].

¹⁰³ TUSHNET, *supra* note 32, at 227-264.

¹⁰⁴ *Id.* at 254.

articulation of the view that social and economic rights should be strong.”¹⁰⁵ Tushnet’s key insight is that we can disaggregate rights and remedies, and others too have begun to explore different forms of weak-form review.¹⁰⁶

The difference between strong-form and weak-form judicial review, and the structuring of rights and remedies, raises deep questions. It also has, no doubt, profound implications for the debate on judicial review.¹⁰⁷ The South African approach is appropriately understood through the rights-remedies paradigm since a central feature of cases like *Grootboom* and *Treatment Action Campaign* is that no person is guaranteed individualized relief. It is this feature that motivates Tushnet’s project, and urges us to seriously explore the potential of weak-form judicial review.

But this paradigm cannot allow us to fully grasp the Indian experience. The Supreme Court of India’s adjudication of social rights requires us to move beyond the rights-remedies paradigm because although the South African approach is novel it remains a model that involves the adjudication of a systemic social right. On the other hand, the Indian approach is far weaker: there is no systemic right, only a conditional one. This conditional approach does not guarantee any standard –minimum core or reasonableness – for any social right.

The inadequacy of the rights-remedies paradigm becomes clearer when we acknowledge that the conditional rights approach is stronger in some respects. First, in many cases an individualized remedy is granted. Further, these cases are different from civil liberties cases. The nature of adjudication being formed is a private law model of public law adjudication.¹⁰⁸ As Chayes once noted, the interdependence of the right and the remedy is an important feature of civil law adjudication.¹⁰⁹ Moreover, some cases involve constitutional tort actions even though they are litigated as social rights claims. In the case of constitutional torts, it is especially difficult to disaggregate the relationship between rights and remedies.¹¹⁰ Consequently Tushnet’s suggestion is unlikely to be successful in such cases. Secondly, Tushnet indicates that the ineffectiveness of remedies may lead to the right becoming weaker.¹¹¹ But the conditional social rights model does not confirm this supposition. Cases such as *Rakesh Chandra Narayan* and *Consumer Education* demonstrate that when a strong remedial model is ineffective, courts make the remedy even stronger (and more innovative through strategies such as compensation). They show how a court’s sense of its own power and legitimacy may

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., Dixon, *supra* note 35.

¹⁰⁷ See generally Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L. J.* 1346, 1353-1359 (2006) (elaborating upon the different forms of judicial review and limiting the argument against judicial review to strong-form judicial review).

¹⁰⁸ I make the “private law” claim at several points in this article but I aim to do so narrowly. I refer to the conditional form of the substantive right being litigated but do not, of course, ignore important public law features of social rights litigation in India such as the non-bipolar party structure, role of judges, and the like.

¹⁰⁹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1282-1283 (1976).

¹¹⁰ See James J. Park, *The Constitutional Tort Action as Individualized Remedy*, 38 *HARV. C.R.-C.L. L. REV.* 393, 419-440 (2003).

¹¹¹ TUSHNET, *supra* note 32, at 254-256.

come to be at stake in such instances. Further, framing claims as conditional social rights claims could re-describe the interests at stake and lead courts to take these cases more seriously than they may have otherwise done. Thirdly, as we have observed, because the conditional social rights model is likely to operate in poorly governed nations, courts are far more responsive to inertia than they are in the systemic social rights model. Thus judicial supervision of bureaucratic practices is often witnessed.

This suggests that, contrary to Tushnet's supposition, the key question isn't really how to structure the relationship between rights and remedies. Using the *rights* language has allowed the Indian judiciary to develop remedies in underdeveloped areas of law, most notably tort law. Through its approach, the court is able to modulate the remedy according to the conditionalities in play. The primary issue appears to be whether there is a forum available for the modulation of remedies. We thus find that while Tushnet's thesis is significant, his typology may be incomplete in important ways. Accommodating the Indian experience with conditional social rights requires us to revise the present debate on the forms of judicial review in social rights adjudication.

5.2. The expressive function of conditional social rights

If the conditional social rights thesis is accurate, the significance of the Supreme Court's rhetoric must be explained. This rhetoric is partially responsible for the familiar tale of Indian constitutional practice. The story suggests that while the Indian Constitution draws a distinction between civil-political and socio-economic guarantees in the form of enforceable Fundamental Rights and unenforceable Directive Principles of State Policy, the Supreme Court has ignored this distinction; it adjudicates social rights through the "right to life" in Article 21 of the Constitution.¹¹² While it is indeed true that cases are litigated and judgments pronounced on the basis of a social right, I have argued that no systemic right is enforced and many cases are better understood as involving private law claims. The claim of some commentators has been more nuanced. In their classic essay, Craig and Deshpande identified two ways in which a relationship had been forged between Parts III and IV.¹¹³ First, Article 21 in Part III was interpreted to include socio-economic guarantees in Part IV. Secondly, the relaxation of *locus standi* meant that the judiciary could be approached on behalf of disadvantaged groups. That is to say, the "relative deprivation in terms of the social and economic benefits contained in Part IV provides the best justification for according standing to a member of the public who will vindicate the public interest."¹¹⁴ Both these insights are accurate. But we are now able to see that they do not present a

¹¹² Robinson's assertion adequately sums up the story: "Although the Constitution did not on its face give the Supreme Court a mandate to enforce social and economic rights like those in the Directive Principles, the Court gradually interpreted this to be its role." Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, 8 WASH. U. GLOBAL STUD. L. REV. 1, 41 (2009).

¹¹³ Craig & Deshpande, *supra* note 19, at 355-356.

¹¹⁴ *Id.* at 366.

complete picture of social rights adjudication in India two decades on. These decades have revealed greater complexity in the relationship between Parts III and IV of the Constitution.

Does the Supreme Court's recognition, then, of a "right to health" or a "right to education" having any meaning? Although there is no systemic social right being protected, this recognition does perform an expressive role. The law has the potential to play a crucial part in changing social meanings.¹¹⁵ It has an influence that is exogenous to the liability it imposes. But what social meaning does the recognition of social rights carry?

To answer this question we must notice one consistent theme in the Supreme Court's jurisprudence: it is posited that the violation of a social right results in the violation of a civil-political right. Civil-political rights cannot, the Court invariably notes, be realized without the realization of socio-economic ones.¹¹⁶ In *Olga Tellis*, for example, the Court stated that the right to life must include the right to livelihood "because no person can live without the means of living, that is, the means of livelihood."¹¹⁷ In *Ram Lubhaya Bagga*, the Court held that the right to health must form part of the right to life since health "is the nucleus of all activities of life" and without it "everything crumbles."¹¹⁸ The right to education was recognized in *Mohini Jain* as the "fundamental rights guaranteed under Part III of the Constitution. . . cannot be appreciated and fully enjoyed unless a citizen is educated."¹¹⁹

The significance of this interpretive technique can be appreciated by considering Lawrence Lessig's detailed account of how social meanings are constructed.¹²⁰ Two particular techniques are important for our analysis. In the first technique, "tying", we find that "the social meaning architect attempts to transform the social meaning of one act by tying it to, or associating it with, another social meaning that conforms to the meaning that the architect wishes the managed act to have."¹²¹ So, for example, when persons with a certain social capital endorse Gap trousers, a part of that capital gets associated with the trousers and there is a change in the social meaning of wearing the trousers.¹²² As Nozick observes, "the symbolic connection of an action to a situation enables the action to be expressive of some attitude, belief, value, emotion, or whatever."¹²³

¹¹⁵ Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043 (1996) ("A large point of law may be to shift social norms and social meaning.").

¹¹⁶ This recognition of the interdependence of rights can lead to some confusion regarding prioritization. In this context, Griffin's insight is important: "Welfare rights are indeed prior to liberty rights in the sense that they are the necessary condition for liberty rights' being of value to us; but this does not show that they are prior in the sense that they must be realized first." JAMES GRIFFIN, *ON HUMAN RIGHTS* 305 n.4 (2008).

¹¹⁷ *Olga Tellis*, *supra* note 36, at 572.

¹¹⁸ *Ram Lubhaya Bagga*, *infra* note 137, at 122.

¹¹⁹ *Mohini Jain*, *supra* note 49, at 680.

¹²⁰ Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995).

¹²¹ *Id.* at 1009 (internal citations omitted).

¹²² *Id.*

¹²³ ROBERT NOZICK, *THE NATURE OF RATIONALITY* 28 (1993).

The second technique, “ambiguation”, is slightly different. Here “the architect tries to give the particular act, the meaning of which is to be regulated, a second meaning as well, one that acts to undermine the negative effects of the first.”¹²⁴ Lessig’s example helps to clarify the technique: Jews were forced to wear yellow stars by the Nazis and this gave the wearing of yellow stars a certain social meaning. The technique of ambiguation was at work when persons other than Jews, such as Danes, began to wear yellow stars and thereby created an ambiguity about what it meant to wear a yellow star.¹²⁵ Of course this technique, as Lessig recognizes, shares an important relationship with the former technique since their “action also *tied* the Danes to the Jews: now Danes were seen as supportive of the Jews.”¹²⁶

The Court’s interpretive approach bears close resemblance to both these techniques. By tying civil-political rights to social rights, the Court tries to give legitimacy to the view socio-economic guarantees should be considered *rights*. The Indian Constitution reflects the conventional understanding of rights and it is only recently that we are beginning to witness a change on this front. Social rights are increasingly being considered rights that can be legitimately and effectively guaranteed. The South African Constitution reflects this change.¹²⁷ In other words, it is a new phenomenon to view the absence of socio-economic goods as constituting violations of *rights*. It is thus hardly surprising that, *pace* Tushnet’s observation,¹²⁸ Part IV of the Indian Constitution does not speak in the language of non-justiciable social *rights*; it speaks of non-justiciable socio-economic *goals*.¹²⁹

Through the technique of tying the Court attempts to change the social meaning of socio-economic guarantees. Neither does the judiciary enforce any systemic social right nor does it ignore the directive principles. Instead, it continually reminds the state of its obligations. This interpretive approach also adopts the ambiguation technique since there are now two ways to understand the state’s indifference towards the directive principles. On the one hand, it could be argued that the state has resource constraints and its decisions reflect policy choices which it can legitimately make; on the other hand, one may infer that the state *does not take civil-political rights seriously*.

The Supreme Court’s rhetoric seeks to move beyond the directive principles framework, not by making such guarantees enforceable but through reminding the state that ignoring these principles results in the violation of a *right*. Previously, such violations had little social-meaning; the Court’s jurisprudence reflects an effort to alter that. Through tying and ambiguation, the Court passes an important judgment about the

¹²⁴ Lessig, *supra* note 120, at 1010.

¹²⁵ *Id.* at 1010-1011.

¹²⁶ *Id.* at 1011.

¹²⁷ After all, as Dworkin once observed, law is “our most structured and revealing social institution.” RONALD DWORKIN, *LAW’S EMPIRE* 11 (1986).

¹²⁸ TUSHNET, *supra* note 32, at 238 n.30 (observing that the Indian Constitution incorporates social rights in the form of non-justiciable rights).

¹²⁹ See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-100 (1977) (on the difference between right and goals).

importance of social rights.¹³⁰ But it also passes a judgment about the state's performance, thereby attempting to construct a role for the state. Currently, the Indian state is not perceived as one that provides social services. As Mehta observes, "there is little in the citizens' experience of the Indian state that leads them to believe that the state will be a credible provider of social services. . . because the state has not in the past been an effective provider of health and education, the voters at large do not hold it to account on that score."¹³¹ As social meanings associated with social rights change, there will emerge an increasing cost of non-performance. Appreciating this expressive role allows us to better understand the relationship that the Court has forged between fundamental rights and directives principles under the Indian Constitution.

It is worth pausing to recognize that there may be more to this tale. My argument presumes that the judiciary's primary audience is the state. Of course, the expressive role is also important for citizens, but insofar as courts speak to citizens there may be a further phenomenological factor that requires exploring. Perhaps, in addition to playing an expressive role, the Supreme Court's rhetoric and reasoning shame the Indian state. They illustrate struggles about the relative power of institutions, and their complex claims to democratic legitimacy.

5.3. Impacting constitutional practice

The conditional social rights thesis requires us to move beyond the rights-remedies paradigm, and reveals how courts can work towards changing social meanings. But making social rights conditional also has other important consequences for constitutional practice.

In the Indian context, one such consequence is that petitioners can approach the Supreme Court as the court of first instance under Article 32 of the Constitution. Article 32 is central to India's constitutional scheme and the provision makes the Court, as Charles Epp has noted, perhaps the most accessible supreme court in the world.¹³² It is herein that the relationship between public interest litigation and social rights adjudication emerges; persons can approach the Court directly for failures on behalf of the state even though they themselves have suffered no violation of a legal right. Public interest litigation in India is distinct from representative standing witnessed in other jurisdictions. In India, the petitioner is typically not required to establish any relationship between herself and the person whose right has been violated. A generation ago, Cunningham rightly termed this extraordinarily diluted standing requirement as "citizen standing" since a petitioner "sues not as a representative of others but in his own right as a member of the citizenry to whom a public duty is owed."¹³³ Allowing petitioners to directly approach the Supreme Court gives the matter immediate attention, makes it

¹³⁰ See Sunstein, *supra* note 115, at 2034 (observing that the "law might attempt to express a judgment about the underlying activity in a way as to alter social norms.").

¹³¹ PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY* 138 (2003).

¹³² CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND THE SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 81 (1998).

¹³³ Clark D. Cunningham, *Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience*, 29 J. INDIAN L. INST. 494, 501 (1987).

subject to public scrutiny, and this often facilitates the supervisory role that we observe the judiciary undertaking.

Secondly, granting rights constitutional status prioritizes them over statutory rights with which they could conflict. This point is brought out by *Parmanand Katara*,¹³⁴ which dealt with problems in medico-legal cases. It was often witnessed that in such cases, when a person was injured as a result of an act that could attract criminal liability, doctors were reluctant to deliver treatment until the police arrived and assessed the situation. The Court held that because the right to health was guaranteed by the Constitution, no legal provision or regulation of any kind could interfere with this right.¹³⁵ Thus, doctors in a position to give treatment must do so.¹³⁶ As it happened, the state confirmed that doctors were not legally required to delay treatment, and no provision in any legislation mandated that they wait for the police before commencing treatment.

Another correlated consequence is that health-related state policies are often challenged as violating a social right. In *State of Punjab v. Ram Lubhaya Bagga*,¹³⁷ for example, the Court considered whether state employees could claim reimbursement for expenses incurred in a private hospital. Under a previous policy, employees were entitled to full reimbursement for treatment in certain private hospitals whereas under a new policy a rate for reimbursement was fixed. This change in policy was challenged as violating the right to health. The Court upheld the new policy as Article 21 would be violated only if the state contended that it had “no obligation to provide medical facility.”¹³⁸

Notice that the Supreme Court’s reasoning seeks to prevent a *reductio ad absurdum* of the conditional social rights thesis. The thesis holds that social rights cases involve the regulation rather than initiation of state action. But the Court will not allow the argument to reach its logical extreme: when the state undertakes *no* program at all, the judiciary could step in. This should not be confused with the South African systemic rights approach. Rather than being a matter of degree, this is a difference of kind. Both approaches are conceptually distinct: the former simply involves assessing the *existence* of state action while the latter necessitates an inquiry into the *nature* of the action. Moreover, *Ram Lubhaya Bagga* ensures that the judiciary does not establish a perverse set of incentives. Extending the conditional social rights thesis to its logical extreme may lead the state to conclude that it is less likely to win cases if it initiates social service programs and therefore encourage it to do nothing at all.

6. Conclusion

The past decade has witnessed important advancements in the debate on social rights. The South African Constitutional Court has demonstrated that how such rights can

¹³⁴ *Parmanand Katara v. Union of India*, (1989) 4 S.C.C. 286.

¹³⁵ *Id.* at 293.

¹³⁶ *Id.* at 293.

¹³⁷ (1998) 4 S.C.C. 117.

¹³⁸ *Id.* at 130.

be made justiciable without providing for an individualized remedy. Comparative constitutional lawyers now debate the nature of weak-form judicial review; a form of review that was, prior to the South African experience, insufficiently considered in the discussion on social rights.

The Indian experience calls on us to be sensitive to another key distinction, one between systemic and conditional social rights. While it is widely believed that the Indian Supreme Court adjudicates social rights, a study of Indian constitutional practice reveals that the Supreme Court does not typically enforce any systemic social right. The existence of a right is conditional upon the nature of state action undertaken, thereby exhibiting a private law model of public law adjudication. Moreover, in several cases the Court does not enforce our traditional conception of a social right; the claim involved is more appropriately described as a constitutional tort action.

This thesis holds important implications for our understanding of social rights adjudication. It is difficult to appreciate the complexity of the conditional social rights model through the rights-remedies paradigm that comparative constitutional scholars currently embrace. The South African approach, Sunstein suggests, has enormous promise for it requires priority-setting on reasonable grounds but ultimately defers to the state on how priorities should be outlined and structured.¹³⁹ In a strange way, the Indian conditional social rights approach does the opposite: it requires no priority-setting but once priorities are set it plays an important role in their structuring and implementation.

While the conditional social rights approach involves, by definition, a weaker form of judicial review than the systemic social rights approach, in certain respects the intensity of review undertaken is greater. And although the quasi-chimerical nature of social rights adjudication in India has been uncovered, such an approach can play a vital expressive role. It can help to change social meanings about certain guarantees, and push the state towards delivering social services. This rare if disappointing form of social rights adjudication requires far greater study. Ultimately many of us are likely to prefer systemic social rights over conditional ones, but the distinction is one we cannot afford to ignore.

¹³⁹ Sunstein SA, *supra* note 101, at 236; SUNSTEIN FDR, *supra* note 102, at 211-212.