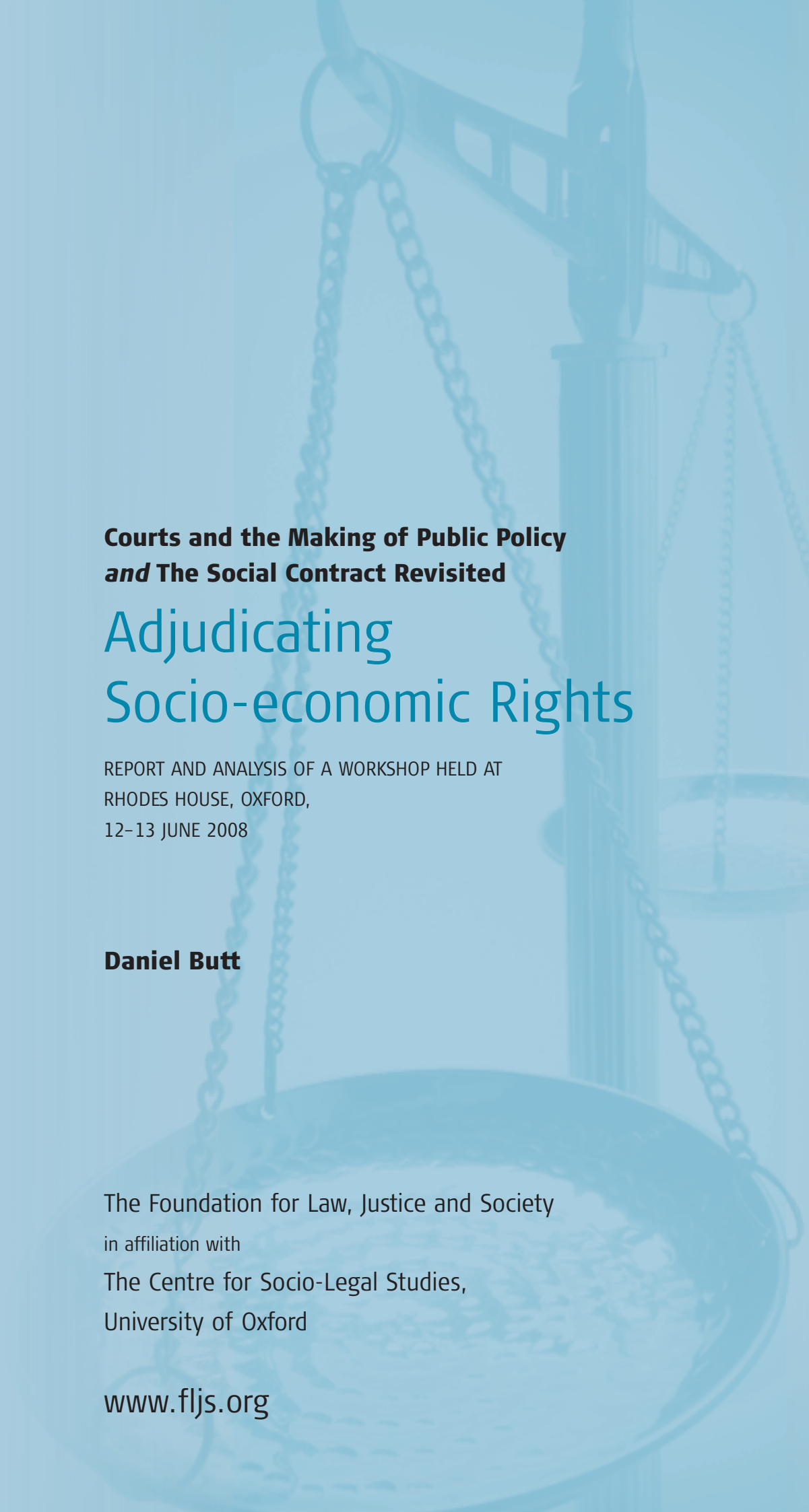

Courts and the Making of Public Policy
***and* The Social Contract Revisited**

Adjudicating Socio-economic Rights

REPORT AND ANALYSIS OF A WORKSHOP HELD AT
RHODES HOUSE, OXFORD,
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Introduction

Opening remarks: Denis Galligan, Professor of Socio-Legal Studies, University of Oxford

Professor Galligan began his introductory remarks by noting that the aim of the workshop was to bring together two Foundation programmes, *The Social Contract Revisited* and *Courts and the Making of Public Policy*, by looking at socio-economic rights as dealt with by the courts in several jurisdictions, and linking this examination to the social contract. The idea of the social contact is often invoked, but what precisely is it? We may identify three broad answers to this question. Historically, it has been seen as a device focusing on the relationship between people and sovereign. Its purpose has been regarded as employing some sense of popular consent in order both to place limits on and provide a basis for the legitimacy of sovereign power. By making reference to the bond between people and government, the social contract is a way of explaining and justifying political structures.

More recently, the social contract has been seen as a device for identifying the moral principles that ought to govern relations both amongst the members of society, and between the members of the society and their government. There is more emphasis placed here on the positive moral principles that ought to govern the political arena. The third approach, labelled the living social contract, is less normative: it looks to what is the case in practice and then identifies the implicit social contract. It is primarily descriptive, looking to a given society to identify what are the contractual principles in play. This is done by analysing the constitution, the laws, practices, and conventions on which legal and political institutions are based. The strength of this approach is that it provides an internal basis for criticizing practices which diverge from the stated principles; such a critique can then lead to adjustments of the contract.

As legal and political institutions, courts can readily be placed within the framework of the social contract. They make decisions concerning justice, be it retributive, distributive, or restitutive in nature, and make reference to the rights and duties of citizens and of government. Their decisions are primarily aimed at dispute resolution, but are also likely to be taken as setting general standards within society. We might then ask how courts should behave in light of the normative principles of the social contract, or question what contractual principles are implicit in a society, and ask whether the courts live up to them.

Historically, the courts were not considered to be particularly important for the social contract in early constitutional and political theory, which did not attribute to them a major social or political role. The idea that courts merely declare the law was common in England and articulated by the founders of the American constitution, and is still strong in some continental jurisdictions. French revolutionary ideas barely mention courts; in fact, over-powerful courts were one cause of the French Revolution. More recently, however, courts have found themselves centre stage in the political process. One may readily think of examples: the US Supreme Court; the European Court of Justice; the European Court of Human Rights (ECtHR); the courts of the new democracies of Eastern Europe; even increasingly the judicial system of the United Kingdom. In countries like Australia where there is no formal bill of rights, courts are finding ways of increasing their authority.

Why this has happened is a complex issue, but some pointers as to the explanation include the human rights movement; the prevalence of international standards that are binding on national courts; distrust and weakness of the political process as in Eastern Europe; and judicial self-confidence, as shown by, for example, British judges claiming final

authority over the constitution. This is well-illustrated in relation to socio-economic rights. Here courts have the chance to contribute to the terms of the social contract. What role they have in this regard is largely dependent on the social and political conditions within which they operate, which vary from one state to another.

A number of questions arise when we consider the nature of socio-economic rights. What are they? Are they different from other rights? What role should the courts have in relation to socio-economic rights: should they be involved? If so, what approach should they take? Is their job to draw out existing principles, or is it to set new ones? How far should courts go? How do we achieve a balance between courts and other political institutions?

A key issue here concerns the basis on which courts claim authority or legitimacy in deciding issues of socio-economic rights. We might suggest four variables for consideration: authority; competence or capacity; effectiveness and appropriateness; and enforcement. The issue of authority is usually linked to democratic legitimacy; in fact, more to legitimacy than democracy. The other factors also go to the question of legitimacy, but it does seem clear that the courts lack democratic legitimacy, at least in a straightforward sense. This point is important, but not necessarily decisive. Courts are not wholly divorced from democratic factors; at the same time, legislative and executive bodies are not wholly democratic. There is more to democratic legitimacy than the mode of appointment; influences on daily practice and procedures for affecting actions also count. Focusing on issues of competence or capacity, we ask whether judges are good at dealing with the issues that arise in socio-economic rights cases. This involves consideration of their institutional capacity, their access to information and expert knowledge; their capacity to balance policies, deal with complex issues, and so forth. Even if courts meet the conditions of the two above tests, there is still the question of whether their intervention is effective and/or appropriate. Given that courts do not control resources, can they manage the consequences of their rulings and oversee follow-up action? As to appropriateness, it may still be better to leave the decision to some other body. Courts should respect the overall policy framework set by government; major changes initiated by courts may not be appropriate. Finally, we might think of the issue of enforcement. This is perhaps an element of effectiveness but is worth emphasizing: can courts enforce their judgments? This may be a significant variable, since one might reasonably hold that rights without remedies are useless.

SESSION ONE:

Wealthier Democracies and the Challenge of Socio-Economic Rights

Geraldine Van Bueren, Barrister and Professor, International Human Rights Law, Queen Mary, University of London

'A Social Contract for the Twenty-First Century: Socio-Economic Rights and Wealthier Democracies'

Professor Van Bueren began by remarking that international human rights law correctly regards the move from governmental acceptance of obligations on the international level to domestic incorporation of said obligations as desirable, important, and often inevitable. However, this has not occurred in a number of Western states with regard to socio-economic rights despite the increasing number of democratic jurisdictions in Europe, Latin America, Africa, and Asia where courts conceptualize socio-economic rights as essential to the underpinning of democracy.

The last twenty-five years have seen extraordinary progress in socio-economic jurisprudence on the international, regional and national level.

Given the reluctance of many in the Anglo-American world to countenance an incorporation of socio-economic rights into justiciable Bills of Rights, Van Bueren explored an approach complementary to that of classical international human rights law, thereby offering a more evolutionary historical basis for socio-economic rights than the more common political approach. She suggested that drawing upon social contract theory may prove more fruitful than maintaining, for example, that the United Kingdom is party to socio-economic rights treaties and so should incorporate them into domestic law. Enabling these rights to be domestically justiciable is an essential component of the social contract, but courts have to respond to the challenge by moving beyond traditional approaches of judicial resolution and adopting successful approaches drawn from other legal cultures, particularly from those of the democratic South.

For three centuries, from the seventeenth until the nineteenth century, the terms of the social contract included only civil and political rights. It is the inclusion of international human rights law that transforms social contract theory into a theory of universal application. The impact of international human rights law is that it transforms the social contract approach by recognizing that in incorporating socio-economic rights, the social contract can assist in overcoming some of the justifiable objections of disadvantaged groups to a social contract. This occurs through the involvement of civil society in the drafting of international, regional, and national bills of rights; a process that was previously exclusively the domain of states. Thus, international human rights law can assist in translating moral and social demands into legal entitlements and moves socio-economic rights from the field of political discretion to a transparent and accountable process. The social contract has been recast, such that even apparently negative civil and political rights place positive obligations on states to uphold socio-economic rights, which are themselves largely positive in nature. The last twenty-five years have seen extraordinary progress in socio-economic jurisprudence on the international, regional and national level.

Thinking about the international social contract has evolved over the years. A treaty is an international

contract between states, and the founding treaty of the League of Nations was focused solely on states and governments. The emphasis has, however, changed from the League of Nations to the United Nations, and in sharp contrast the UN Charter begins with the proclamation, 'We the Peoples', advancing the Charter beyond the exclusive bilateral relationships of states and towards the obligations and entitlements of peoples in general. There is, however, a fundamental distinction between an international social promise and an international social contract, and it is not only in the UN Charter Preamble that people emerge as parties to the international social contract. The UN Charter recognizes the importance of the democratic participation of civil society and non-governmental organizations (NGOs) and the necessity of human rights protection. The two international Covenants, the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966, together form the terms of the new international social contract. It is clear that economic and social entitlement is part of this new contract, because the Preamble to the UN Charter calls for the employment of international machinery for the promotion of the economic and social advancement of all peoples, and all members pledge themselves to take joint and separate action in cooperation.

Van Bueren went on to discuss the application of socio-economic rights to wealthier democracies, such as the United Kingdom. Although it may seem a leap to argue that the evolution of the social contract requires justiciable socio-economic rights, if it is accepted that socio-economic rights are part of the new social contract and that international human rights law is holistic and indivisible, then the same appropriate tools are required to enforce the socio-economic provisions of the social contract as the right to life, liberty, and property. In the United Kingdom this would require the enactment of a Socio-Economic Rights Act. Van Bueren stressed that she was not maintaining that the combating of poverty ought to be conducted exclusively through the courts, but rather that the courts are able to act as a constitutional safety net when other mechanisms have failed specific groups in the community.

Socio-economic rights jurisprudence opens up the courts to a more participatory form of justice, consistent with deliberative democracy and Habermas's call for a renewed democratization of public institutions and spaces. The evolution of the narrow social contract into the universal twenty-first century social contract through the incorporation of international human rights law is a facet of globalization with a human face. The theory had its classical roots in North America and Europe, and has been expanded and improved both within Europe, and by Africa, Asia, and Latin America. Van Bueren suggested that it is bitterly ironic that the constitutional settlement of the United Kingdom and the Constitution of the United States, which in the seventeenth and eighteenth centuries were symbolic of the most progressive systems of government and law, have now fallen behind.

Response: **Dr Daniel Butt, Oriel College**

Dr Butt's response asked whether the social contract was indeed the best prism through which to view socio-economic rights. He drew upon cosmopolitan political theory in order to argue that an alternative form of justification was available for justiciable socio-economic rights. Rather than maintaining that such rights emerged specifically as a result of a certain form of socialization, he suggested that at least basic human rights should be viewed as non-relational in character. This is to say that rather than resting upon positivist codification, or upon the historically contingent development of particular societies, such rights are best seen as *natural* rights, possessed by all moral persons and placing duties on others regardless of their social relation. Butt suggested that this theoretical grounding was potentially of great significance when it came to thinking about questions of international justice.

For further discussion, see the concluding section of this report.

Professor Wojciech Sadurski, Professor of Legal Theory, European Institute, Florence
'Constitutional Socio-Economic Rights: Lessons from Central Europe'

Professor Sadurski began by claiming that the idea of legally protecting socio-economic rights has never been seriously challenged in central and Eastern Europe (CEE) following the fall of Communism, for a number of interrelated reasons. These include the rise of inequality and of huge social zones of poverty, the relative weakness of laissez-faire political parties, a widespread sense of entitlement to state protection inherited from the state-socialist period, and the gravitating pull of European Union social policy. But this is not to say that the catalogue, the meaning, and the forms of legal protection of such rights has been self-evident. The 'whys' and 'hows' of the constitutionalization of socio-economic rights have been subject to intense debate, reflected in the constitutional drafting and jurisprudence of constitutional courts in the region. This last important wave of constitution making and of the emergence of constitutional courts, then, provides a recent and not yet fully settled laboratory for analyzing constitutionalism.

Viewing social rights through the lens of constitutions is worthwhile for three reasons. First, there is an obvious sense in which the entrenchment of social rights in constitutions is significant to their protection from majoritarian legislators and from inconstant public opinion. Second, constitutionalization of social rights has a powerful symbolic significance: constitutions are not only legal documents, but also perform a declaratory function, stating intentions, aspirations, and goals. Third, the very fact that there is no clear correlation between the scope of social policy and the status of social rights in the constitution raises interesting questions for constitutional theory, in terms of the judicial enforcement of social rights. While the dominant view in contemporary legal literature may be to see socio-economic rights as equivalent to civil rights in terms of their justiciability, no legal reality in Western Europe takes this equivalence seriously. The range of experience in CEE allows for a reconsideration of the relation between social rights and social policy.

It was a given that socio-economic rights would be included in CEE constitutions. The key questions were what the specific catalogues of these rights would be, and what status these rights would be given. Three rights are present in all the catalogues, though with local variation: the right to social security, the right to health care, and the right to education. In addition, rights relating to work (such as to proper working conditions and to choice of profession) are frequently listed. Less frequently listed rights include rights to the protection of the family, to training for the disabled, to protection of culture, and to a good environment. Notably, a right to adequate housing is rarely articulated.

Overall, it can be concluded that the degree of diversity between CEE constitutions is not great, and that they are relatively generous in relation to other constitutions found elsewhere in the world. However, the question of the status of social rights, compared to classical liberal rights, is perhaps more important than that of the catalogue. Three main approaches can be identified in this regard. The first model makes no distinction at all between social rights and any other rights, examples being Bulgaria, Hungary, Romania, and all three Baltic States. The second model, displayed in the Czech Republic and Slovakia, makes a sharp distinction by specifying that certain rights, including social rights, can only be claimed within the limits of laws enacted to implement these rights. Under a third, hybrid model, as in Albania, Poland, and Slovenia, some social rights may be asserted subject to limitations specified by law, while others are left outside the general limiting clause, and thus may be seen as fully enforceable rights.

Given that CEE constitutions generally ignore the distinction in status between classical liberty rights and at least some social rights, the constitutional courts have faced an unenviable task of line-drawing. This has occurred in two opposite directions at the same time: asserting the difference in status between social and

other rights even if there is no such difference in the constitutional text; and reducing the gap between those covered by and those free of a limiting clause.

The latter move, for example, has taken place in Poland, where the court has found that although rights covered by the limiting clause cannot be the grounds for individual claimants, they can be the basis of constitutional review of legislation by the Constitutional Court. The Hungarian example is illustrative of the former approach. Although the Hungarian constitution does not differentiate between any of its contained rights in terms of status, the Court has interpreted social rights in such a way as to translate them into targets for the state to pursue. Rather than seeing such rights as programmatic and non-justiciable, courts have been quite active in reviewing, and at times invalidating statutes under the standards of socio-economic rights, even when their competence to do so is debatable. When having a choice, courts have generally preferred to make reference to general constitutional clauses referring to concepts such as 'social justice' or 'equality' rather than invoking specific welfare rights, suggesting that the courts themselves feel that they are on shaky grounds when telling governments or legislatures what, to whom, and how much, should be paid or supplied to citizens as a result of their socio-economic rights.

Sadurski concluded by asking what general lessons can be derived from these recent developments in CEE. The arguments in favour of social rights are obvious: if we believe that social rights are important, and if we believe that the importance of a right or rights means they should be entrenched against the passions of the day, then we should constitutionalize them. However, one should not assume that those opposed to such a project are also opposed to the social project which seeks to further the goals which socio-economic rights seek to protect, such as the alleviation of poverty.

We might identify three significant objections to constitutionalization. First, elevating social rights to constitutional rank brings judges into the domain of economic policymaking, in which they lack competence, knowledge and legitimacy, and disempowers parliaments and executives in a way contrary to democratic principles. Second, one might argue that constitutionalization may promote attitudes of welfare dependency and become a counter-incentive to self-reliance and individual initiative. Third, a 'contamination' argument has been made, whereby one risks 'contaminating' the entire charter of rights by under-enforcement in one particular category. Sadurski denied that there was convincing arguments for the second and third objections: it is not clear why constitutional social rights would promote welfare dependency any more than statutory rights; and the contamination argument probably underestimates the intelligence of constitutional judges and their ability to apply different standards of scrutiny to different categories of constitutional provision. However, he maintained that the first argument cannot be dispensed with so easily.

Response: **Dr Cristina Parau, Research Fellow, Centre for Socio-Legal Studies, Oxford**

Dr Parau began her critique by questioning the importance of viewing social rights through a constitutional prism. The fact that constitutions have importance does not necessarily mean that the constitutionalization of social rights is important, even if one seeks the furtherance of the values which social rights seek to protect. Since the constitution does not create the surplus out of which social rights can be paid for, constitutionalizing social rights is unlikely to affect the actuality of social rights. If there is already a pre-existing surplus of wealth large enough to be redistributed in the universal way declared by social rights, then constitutionalizing social rights may matter, because the conditions are already in place that would make these rights enforceable. But the constitution is unable to alter the absence of these preconditions.

Parau also expressed scepticism as to the symbolic value of socio-economic rights. A probable motive of the constitution drafters of CEE was the mollification of public opinion, lest the public turn against the draft constitution and vote it down.

Such strategic uses entail betrayal and invite public cynicism. Would it really be positive for the public to believe that they possess an enforceable right to decent housing, only to find out that this is not so? If there really is a common European culture of social justice, that culture itself can be counted upon to support social spending, within reason, without justiciable social rights – democratically elected assemblies should be enough.

Why have constitutional courts felt obliged to differentiate between socio-economic rights and other classical liberal rights, even when such distinctions are not made in constitutional texts? A possible answer might relate to scarcity. If a right to scarce goods is to be enforceable at the same level as a liberal right, this implies that there is no scarcity of resources. But because of the fundamental law of economics – that resources are limited but demand for them is unlimited – there must always be an insurmountable problem with social rights for any constitution or court. Everybody in the end is compelled by necessity to limit social rights in a way that does not apply to liberal rights. It is therefore not surprising that the constitutional courts of CEE have uniformly reached the conclusion not to grant individuals a demand right in the manner of traditional liberal rights.

Parau identified the 'governing with judges' argument as the strongest argument against the constituionalization of social rights. She was, however, less sanguine as to the empirical evidence which had emerged in CEE, suggesting that the only clear idea that emerges is the necessity for constitutional courts everywhere to be bound by economic reality regardless of what it says in their various constitutions.

There is no guarantee that a balance will be reached between entrenching social rights and respecting the constitutional mandate and democratic responsibility of the legislature. Could it be just a question of time before the constitutional courts overstep their proper boundaries? The courts may have restrained their activism until now only because CEE countries have so small a surplus of resources. CEE countries cannot afford all these rights on demand; therefore, the only feasible thing is to 'interpret' them as less than rights on demand. But what will happen when the surplus does become available? On whose terms will the surplus be used? If the only sensible thing to do with these rights is to alter them to the point where individuals cannot have their demands enforced, then what is the point in putting them in the constitution in the first place? If the only sensible interpretation of these constitutional rights is to make them under-enforceable then they are like deadwood cluttering the constitution.

SESSION TWO:

The Protection of Economic and Social Rights in Europe and Latin America and the Role of the Courts

Professor Matthew Diller (Professor of Law, Fordham University) introduced the paper, entitled **'The Inter-American Court and the Role of National Courts in Protecting Socio-Economic Rights'**, by **Monica Feria Tinta** (Advocate and Recipient of 2007 Gruber Justice Prize, Peru), who was unable to attend the workshop.

Professor Diller identified a fourth sense, further to Professor Galligan's initial threefold typology, in which the approach of the Inter-American Court could be viewed within the terms of the social contract. This approach sees the social contract as a call for social transformation, and seeks to use the law as a mechanism to bring about social change. Feria Tinta's paper considers the role of both the Inter-American Commission and the Inter-American Court on Human Rights in relation to the American Convention on Human Rights, which is considered national law in the constitutions of most Latin American countries. The Inter-American Court has developed a jurisprudence of socio-economic rights by interpreting the 'right to life' contained in the Convention in such a way as to encompass the notion of the 'right to a dignified existence' and the 'right to a decent life'. These notions were first articulated in relation to the rights of children, in a case concerning Guatemalan street children (*Villagrán-Morales y Otros v. Guatemala*).

Diller observed that, insofar as there is a distinction to be made between classical liberal rights to non-interference and positive rights to entitlements, it is children who have the most obvious claims in relation to the latter: they clearly need positive support rather than just a set of negative rights. The Court has taken the reference to children in Article 19 of the American Convention as encompassing several aspects, including the right to receive the highest level of priority from states, the right to education, the right to health, and the right to housing. The Court has further extended its account of socio-economic rights when considering cases involving indigenous peoples, such as in *Yakye Axa v. Paraguay*, which concerned indigenous peoples who had been pushed off their land and ended up living in complete destitution, which the court found to be a violation of the right to a life of dignity. The right to a dignified existence has been taken to incorporate a right to self-development; to flourish as a human being, not merely a right to subsistence. Dignity here has what Feria Tinta calls a 'spiritual dimension', referring also to the right to have one's identity respected.

The Inter-American Commission has focused on procedural rather than substantive rights, in connection with the obligation on states to remove economic obstacles to access to courts, the components of due process in administrative and judicial proceedings concerning social rights, and the effective judicial protection of individual and collective rights. This focus on procedure is critically important to ensure substantive rights are fulfilled in practice. The Commission has demanded reforms and changes in nation states, so that the legal system can be used to enforce norms as articulated by the Inter-American Court.

Diller noted that the language of the courts in this area, and the expansiveness of the notions which they have articulated in their very recent decisions, is fairly incredible from a North American or Western European perspective. The extent of the intervention of the Court and Commission raises a host of interesting questions, not least on account of their status as regional, rather than national or global

institutions. This regional character is significant when we come to consider the democratic legitimacy of the judicial action in question.

On Gardner's criteria, it seems clear that the Inter-American Court is illegitimate, and in fact stands as an extreme example of what courts should not do.

Response: **Daniel Slifkin, Cravath Swaine & Moore**
Daniel Slifkin began his response by noting that, as a practising lawyer, he was dubious as to whether the vision in the paper would be fulfilled, or even tolerated. The paper articulated an expansive vision of the Inter-American Court's function, whereby new substantive rights were coupled with new processes in such a way as to present the Court as a potential vehicle for massive social change throughout Latin America. Slifkin recalled that, in an earlier session of the programme on *Courts and the Making of Public Policy*, Professor John Gardner had put forward a very narrow view of the role of the courts, describing criteria which had to be met in order for the courts' actions to be legitimate, and derived a set of principles as to how courts should behave.

Gardner pointed to a series of structural obstacles to courts acting as if they were truly legislators or constitutional bodies in their own right, in terms, for example, of the courts' need to react to cases which others bring before them and prescribe specific remedies, the binding character of precedent and legal reasoning, and the difficulty of engaging in programmatic reform. In his earlier response to Gardner, Slifkin had accepted that the critique possessed normative force, but had called into question to what extent it was descriptively powerful. Gardner's criteria call into question the legitimacy of any constitutional courts, and indeed of the Supreme Court of the United States, which often takes decisions which do not fall within Gardner's terms, *Brown v. Topeka Board of Education* being one obvious potential example.

But in the real world, these courts are generally seen as legitimate. On Gardner's criteria, it seems clear that the Inter-American Court is illegitimate, and in fact stands as an extreme example of what courts should not do. The Inter-American Court raises a series of questions as to how far courts can legitimately and effectively act in a legislative fashion in order to bring about redistributive policies.

First, the structure of the Inter-American Court is such that member states are obliged to amend their own legal systems to conform with the Court's decisions. However, it seems unlikely that twenty signatories will implement such legislation each time the Court hands down a ruling. In the Guatemalan street children case, the Court held that the conditions for a dignified life must be maintained. This is an extremely broad and vague standard, which does not tell a prospective legislator what to do. In relation to the rights of children, the Court is issuing advisory opinions even when there is not a case before it. As such, it makes decisions in a context divorced from the instance that needs remedy, issuing hard to implement prescriptions. Even when more specific remedies are stated, they include a large number of hard to implement value choices. The remedy given in the *Yakye Axa* case held that the state was obliged to supply drinking water, provide regular medical care, provide sufficient food, restore latrines and other biological services, and endow the local school with sufficient resources. This is an entire legislative programme, which covers a huge range of different policy areas with no specific account of what it is that ought to be done. It represents a principled decision as to what the right to a dignified life means, which is now directly applicable to the twenty signatories to the Convention. Each of these countries is already dealing with these issues, in their own way and in their own time, and it seems unlikely that they will disregard their own programmes to adopt that of the Court.

Slifkin expressed doubts as to whether this was what courts could or should be doing. How is the remedy to be fashioned in these cases? What does it mean, for example to provide food of sufficient quality and

variety? What level of sanitation is necessary? How is this to be monitored? Is there some body to put this into effect? To what extent is this usurping decisions already made by different processes from a distance?

Slifkin concluded with three thoughts as to why the programme outlined in Feria Tinta's paper went too far. First, the inclusion of constitutional rights in the South African constitution drew a great deal of strength from the fact that the constitution was recently established, had popular consent, and was part of a newly founded and interrelated structure. This is very different from what is happening in Latin America, where the bulk of the socio-economic rights programme is judge-made. Second, Chief Justice Langa had pointed out that South Africa faces major problems, owing to its history of massive socio-economic inequalities. The specific cases of grave hardship faced by, for example, the street children of Guatemala or the indigenous cases of Paraguay are relatively easy, in that the sense in which they call for immediate remedy is so overwhelming. But beyond these straightforward cases, it is much more difficult to say how limited amounts of resources should be distributed between competing groups. Third, Langa pointed out that there is a principle of moderation when it comes to interference in the political process, in terms of whether what the government was doing was reasonable or not reasonable. In American jurisprudence, there is an extremely complicated set of principles as to how one assesses governmental decision making. This kind of moderation does not seem to be present in the Latin American cases. For this reason, it is not clear that this type of intervention is likely to work, and it is not clear that the Inter-American Court is legitimate.

Professor Polonca Končar, President of the European Committee of Social Rights and Professor of Labour Law, University of Ljubljana, Slovenia
'The Role of the Courts in Defining the Social Contract: a Case Study of Socio-Economic Rights'

Professor Končar's paper was concerned with the role of international legal instruments in enforcing socio-economic rights, with particular regard to the European Social Charter and its supervisory machinery. The Charter is a complement to the European Convention on Human Rights, and is the only international legal instrument at the European level which guarantees a comparatively wide and comprehensive set of social and economic rights. Effective monitoring is key if international human rights agreements are to be implemented effectively at a national level. Supervision of the Charter's implementation in domestic systems is based on two different procedures: the regular procedure, based on periodic written national reports by contracting parties; and the collective complaints procedure, which allows certain national and international organizations to lodge complaints. Within this supervisory mechanism, the ECSR is the body which assesses putative violations of the Charter by contracting parties. Though not a judicial body in a strict sense, it is obliged to interpret the clauses of the Charter in order to assess the compliance of contracting parties, and so employs essentially juridical procedures.

The reporting procedure is based on regular written reports by member states. There is a statutory role for civil society in the reporting process, since reports are forwarded to national employers' associations and trade unions, and to NGOs with consultative status with the Council of Europe, who can comment on the reports. The European Committee of Social Rights (ECSR) procedure is in principle carried out on the basis of written reports, though it can choose to hold meetings with representatives of contracting parties. A follow-up procedure then begins, which, when a violation of the Charter has been found, aims to bring the national situation into compliance with the Charter.

The collective complaints procedure was adopted by the 1995 Additional Protocol to augment the reporting process. Complaints must be collective in substance as well as in the procedural sense. They involve the general situation in a given country, and can only be lodged by certain collective entities, including employers' groups, trade unions, and certain NGOs. When the ECSR upholds a complaint, the government in question is obliged to present, within the

reporting system, information on the measures taken to bring the situation into conformity with the Charter.

Končar then turned to the question of the direct applicability of the Charter. The implementation of an international treaty on the national level in principle depends on whether a state has a monist or dualist system. In monist countries, such as France, Poland, and Turkey, a ratified treaty becomes a part of the internal legal order and its provisions can, as a rule, be invoked directly by citizens before a court. In countries with a dualist system, such as Germany, Italy, and the United Kingdom, international treaties become effective in the domestic system through either statutory ad hoc incorporation or automatic standing incorporation. Although one might assume that Charter rights would be more often directly invoked before national courts in monist countries than in dualist countries, this does not appear to be the case; possibly, in part, due to low general awareness of the existence of the Charter.

Response: **Dr Amir Paz-Fuchs, Programme Director, 'The Social Contract Revisited', FLJS**

Dr Paz-Fuchs began by focusing on Professor Končar's opening assertion – one that typically does not receive sufficient scrutiny in discussions of socio-economic rights – that the significance of internationally recognized human rights from a legal perspective depends on their effective implementation at a national level. Paz-Fuchs noted that the Committee's work is not limited to identifying violations of the Charter.

Of the two procedures discussed in the paper, the collective complaints procedure is particularly interesting. Though only established a decade ago, it has given rise to over thirty complaints – an impressive number, given the limited degree of ratifications of the procedure and stringent conditions for standing. Both the reporting and the collective complaints procedures have a follow-up stage that aims to bring the state into compliance with the Charter. This is of theoretical importance when we remember that one of the commonly articulated objections to the justiciability of socio-economic rights focuses on the inability of courts to track the progress of their judgments. The example of the Committee shows that there are ways of addressing this problem, and so the question of the extent to which these follow-up procedures have really worked in practice is of great significance.

In similar vein, one might note that the Committee deals directly with matters that many have maintained, over the last fifty years, have no place in judicial fora, as per Dr Parau's earlier comments. Paz-Fuchs sought to make two claims stemming from Končar's paper. The first concerned the readiness of the Committee to examine real world social contexts to determine whether contracting parties were in violation of their Charter commitments. He suggested that the Committee is more comfortable dealing with the legal conformity of state legislation with Charter mandates than with economic policies or social structures that, on close inspection, are found to be in violation of Charter rights. Some support for this assertion may be found in Končar's claim that the basic role of the ECSR is to assess conformity of national legislation with the Charter.

Secondly, Paz-Fuchs argued that the courts are more likely to find *ex post* violations that lead to demands for compensation that *ex ante* charges for a change in policy. In relation to his first claim, Paz-Fuchs noted that in a majority of cases where the Committee found a violation of Charter rights on the merits, it did so by inspecting legal texts. The Committee does not shy away completely from considering the real world situation in particular contexts, in relation to child labour in Portugal, and substandard housing for Roma families in Greece, for example. But it may be the case that the particular facts of these unusual cases allowed the Committee to adopt a more interventionist stance on policy, as they were essentially dealing with pressing emergencies.

Paz-Fuchs sought support for his second argument by looking at the practice of the ECtHR. Although socio-economic rights are outside the purview of the Court, a wide array of human rights cases have a distinct socio-economic element to them. Looking at the Court's case law, a curious

phenomenon is revealed. The Court is relatively receptive to arguments that socio-economic rights have been violated after the violation has occurred, when the issues at stake are whether compensation or investigation are required. It is much less sympathetic to forward-looking arguments that will have an immediate effect on future socio-economic policy. If this hypothesis is true, it should be of particular interest to bodies such as the ECtHR.

At the heart of the *ex ante–ex post* distinction lies a reluctance on the part of judicial bodies to intervene too severely in matters of socio-economic policy that have serious financial implications. The problem is that this is precisely the argument that is often made against the justiciability of socio-economic rights due to the courts' lack of expertise and fears of a breakdown of the separation of powers.

SESSION THREE:

Lessons Learnt from Courts in Africa and Asia

Paul Hunt, Professor, Department of Law, University of Essex and UN Special Rapporteur on the right to the highest attainable standard of health and **Rajat Khosla**, Senior Research Officer, University of Essex

'The Role of Courts in the Implementation of Economic, Social, and Cultural Rights: a Right to Health Case Study'

Professor Hunt presented this jointly written paper, concerning the right to the highest attainable standard of health. The paper opens with the observation that there has been a tendency to construe the social contract very narrowly, such that it incorporates civil and political elements, but neglects social elements such as economic security, education, and access to a responsive health system. This truncated conception of the social contract has influenced contemporary accounts of human rights. States have tended to favour civil and political rights and to neglect economic, social, and cultural rights. However, the focus of contemporary human rights has broadened in recent years. Since the 1990s, the international community has devoted more attention to economic, social, and cultural rights, including rights to education, food, and shelter, as well as to the highest attainable standard of physical and mental health. At both national and international levels, courts and tribunals have been increasingly willing to adjudicate cases on economic, social, and cultural rights.

Hunt proposed to focus on judicial accountability, with particular attention on the right to the highest attainable standard of health. Whilst the limitations of judicial processes are well known, Hunt argued that recent cases demonstrated that it is possible for courts to clarify the meaning of the right to health and health-related rights, and also secure better health-related services for individuals and communities.

According to international human rights law, the right to the highest attainable standard of health is subject to progressive realization and resource availability. The South African Constitution recognizes the right of access to health care services, and holds that the state is required to take reasonable measures, within its available resources, to achieve the progressive realization of this human right. Thus, in *Minister of Health v. Treatment Action Campaign* the Constitutional Court ordered the government to devise and implement, within its available resources, a programme to ensure access to an antiretroviral drug used to prevent mother-to-child transmission of HIV. The remedy that this right provides is therefore limited, as was seen in *Soobramoney v. Minister of Health KwaZulu-Natal*, where the Court held that a patient with chronic renal failure did not have his right to emergency medical treatment violated when refused dialysis treatment at a state-run hospital, since the hospital had, due to resource scarcity, adopted a policy where only patients with chronic renal failure who were eligible for kidney transplants were admitted. Since the Court held that the hospital's policy was reasonable in the light of the resources available and fairly applied, there was no violation of the Bill of Rights.

The point relating to fair application is significant here. The right to health gives rise to some obligations with immediate effect, such as the obligation to provide equal treatment for men and women. Elsewhere, some courts have held that the right to health gives rise to other immediate obligations that are subject neither to progressive realization nor to resource availability. Thus, for example, in *Paschim Banga Khet Mazdoor Samity v. State of West Bengal*, the Indian Supreme Court considered the case of a man denied emergency treatment for head trauma, on account of a lack of available provision. The Court held that the state had a duty to ensure that emergency medical facilities were available, and so required the government to ensure that immediate stabilizing treatment was available in primary health centres, and also to

increase the number of treatment facilities and create a centralized communication system between state hospitals. The Court maintained that although this would require significant expenditure, the state could not avoid its constitutional obligation on account of financial constraints.

The Indian case throws up a further element of the right to health: the requirement that health facilities, goods, and services be available, accessible, acceptable, and of good quality. Recent cases show the importance of this requirement, whilst also demonstrating that its practical application varies in different jurisdictions, depending upon, for example, resource availability. Examples include cases in Argentina, concerning the availability of a vaccine for Argentine haemorrhagic fever; in Romania, concerning coercive sterilization; and in Bangladesh, concerning the quality of imported skimmed milk powder containing radioactive material.

States also face duties to respect, protect, and fulfill the right to the highest attainable standard of health. The respect element requires the state to grant equal access to health services to all persons, including prisoners, minorities, asylum seekers, and illegal immigrants. States also face duties to take measures that prevent third parties, such as private companies, from interfering with the right to the highest attainable standard of care; a relevant recent case concerning the treatment of the Ogoni community in Nigeria, whereby the African Commission on Human and Peoples' Rights held that the Nigerian government's failure adequately to regulate and monitor an oil consortium had resulted in the violation of human rights to health and a clean environment. Finally, the duty to fulfill requires states to adopt appropriate legislative, administrative, budgetary, judicial, and other measures towards the full realization of the right to health.

The key to all these cases is accountability. Independent, effective, and accessible mechanisms of accountability are essential if a state is not to hide behind excuses couched in terms of progressive realization and scarcity of resources. When supported by appropriate legislation, courts are able to ensure that the interests of the poor and disadvantaged are given due weight. The courts are not a panacea: they are limited, for example, in terms of their ability to ensure that authorities comply with their rulings, but can ensure one form of accountability in the promotion and protection of health-related rights.

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The deepening jurisprudence of economic, social, and cultural rights demonstrates that the boundaries of the social contract can be pushed beyond the civil and political, to incorporate the social element. Different elements of the right to health will provoke different approaches from those seeking to promote health care. Rights to medical care, for example, are more susceptible to individual rights claims, whereas the right to an effective public health system is more susceptible to collectivist and communitarian approaches. Traditional human rights approaches, focusing on bringing court cases, letter writing campaigns and so forth must be augmented by a policy-based approach, which demands the development of new skills and tools, such as budgetary analysis, indicators, benchmarks, and impact assessments. Recent years have seen significant progress in the health and human rights community in developing these methodologies.

Response: **Professor Peter Carver, Associate Professor, University of Alberta**

Professor Carver's response looked at a different case study, that of Canada. He sought to ask whether

adjudication through the courts was a reliable instrument for advancing a certain framework of socio-economic rights in relation to health care. Though a Westminster system, Canada adopted a Bill of Rights in 1982.

This raises two senses in which we might consider the Canadian social contract. The first is constitutional, and relates to the passage of the Bill of Rights. A deal was struck that held that the Charter of Rights would concern itself with traditional first generation rights, rather than socio-economic rights. The trade-off was that the Bill would also not include protection for the right to property; the danger here being that the inclusion of such a right would mean Canada might be prone to Lochner era type restrictions.

The second relates to health care specifically. If one were to ask an average Canadian what the social contract was in Canada, they would likely respond that part of the contract is the public health care system, where there is public insurance for all hospital and physician services. The Canadian system is unique amongst developing countries in being a single-tier system, where parallel payment for private health care is not allowed. As a result, everyone has access to the same health care, regardless of wealth. This single-tier system is well-supported in Canadian political culture, and has been explicitly defended by reference to egalitarian social values.

Four years ago, the Supreme Court of Canada heard two cases over two days which raised the closest arguments to a right to health care under the Canadian Constitution. The first case was brought under the equality rights provision of the Charter, and was based on allegations of discrimination in relation to mental disability, specifically in connection with an expensive therapeutic response for autism. The Supreme Court denied that the non-provision of this therapeutic response was discriminatory. The Court was concerned that a positive ruling could open the floodgates, and give rise to extensive conflict between different groups as to their health care entitlements. The second case was brought by a patient and physician against the prohibition on private insurance. The Court decided in favour of the plaintiffs, and struck down the prohibition of private health insurance. Carver argued that this decision went against the Canadian social contract. It was akin to recognizing a right to property – a market-based right to purchase health care services. It also questioned the second element of the social contract, in relation to the single-tier health care system.

What might one learn from these cases? The cases were not decided under the right to the highest attainable standard of health. Had such a right been in play, different decisions might have been reached. It is perhaps problematic to ask courts to apply civil and political rights to social and economic rights issues. Nonetheless, the cases do suggest some problems with using the courts to seek to uphold socio-economic rights to health care. Courts are responsive to the cases brought before them. In court cases, there will always be a winner and a loser. Court cases are gambles for plaintiffs. They respond to the individual cases, persons, and stories before them, and have difficulties in addressing system-wide concerns. This was apparent in both the cases in question.

Jayna Kothari, Advocate, High Court of Karnataka, Bangalore, India
'The Role of the Courts in Enforcing Socio-economic Rights: the Indian Experience'

Jayna Kothari's paper concerned the role of litigation as a strategy to enforce the social rights laid down in the Indian Constitution. She suggested that Indian Supreme Court jurisprudence from the early nineties onwards is particularly instructive, since it provides support for the contention that the judiciary both can and should seek to protect social rights. The last decade has been particularly interesting in this regard, as new socio-economic rights, such as the right to food, have been articulated by the Supreme Court, with innovative remedies for enforcement. Kothari sought to argue that litigation is still an important strategy for making social rights enforceable in India. Enforceability is the key, in that litigation only succeeds effectively when it finds popular support and political will.

The Indian Constitution does not include social rights as justiciable fundamental rights, but as directive principles of state policy. However, the Indian courts have pioneered the worldwide movement for enforcing social rights as extensions of justiciable fundamental rights in response to litigation. Thus, Article 21 of the Indian Constitution, regarding the right to life, has become a repository of socio-economic rights. The Court has interpreted the Directive Principles and Fundamental Rights of the Constitution as being in harmony, not conflict, and as together constituting a commitment to social revolution. The Supreme Court has thus expanded the guarantee of the right to life to include rights such as the right to a clean environment, food, clean working conditions, the right to emergency medical treatment, the right to free legal aid, and the right to release from bonded labour. The result is that social rights have become de facto justiciable and enforceable. The Supreme Court has evolved unorthodox remedies intended to initiate positive action on the part of the state and its authorities. Court orders may be declaratory, noting a rights violation but leaving it to the state to devise a remedy; mandatory, requiring specific actions to be taken; or supervisory, requiring the relevant agency to report back within a set time-frame. For the actual social rights situation to improve as a result, the judgments must be complied with by the relevant authorities, and whether this takes place depends upon the character of the prevailing political culture.

Kothari outlined two particular areas of recent case law, involving the 'right to food' and the 'right to health'. In the former case, the Supreme Court has issued a series of orders directing the proper implementation of a range of schemes, including, amongst others, the distribution of food grain and other basic commodities at subsidized prices, food-based assistance to destitute households, and the provision of cooked midday meals to children in all government schools. Notably, the right to food is not expressly derived from a socio-economic right, but from the cardinal civil and political right to life. This means that it is not formulated as a progressive duty, to be rolled out subject to the availability of resources, but instead requires immediate fulfillment. Implementation of the Court's orders has, however, been patchy. The highest levels of compliance have been in relation to the school midday meal scheme, where the orders have been backed up by campaigns throughout the country. Other programmes have a far poorer implementation record. The Court has also read a right to life to incorporate a right to health and to the provision of state health care, claiming that the state 'cannot avoid this primary responsibility on the ground of financial constraints'. It obligates all state governments and the Union of India to provide a 'time-bound plan' for provision of life saving medical facilities in state-run hospitals, and has begun to award compensation for failure to so provide.

The Indian courts have changed their procedures considerably, in order to make the courts accessible to those seeking protection of fundamental rights. As well as informalizing its procedures, the Supreme Court has used the mechanism of appointing commissioners to investigate the facts and to overview implementation of orders. These changes, Kothari suggested, transform the adversarial procedure into one that is essentially cooperative. Attorney Generals and other officials appearing for the government in public interest litigation cases view their roles in this light and seek to take a constructive role in proceedings, rather than polarizing the debate by defending their position regardless of the circumstances. It is clear from some of the successful public interest litigations that a court-centred approach to human rights development and implementation is not sufficient. The Court's continuing involvement in relation to the right to food, for example, is both a response to and a catalyst for a well-organized, grass-roots activist campaign of fact-finding, compliance monitoring, and strategic litigation.

Response: **Professor Sandra Fredman, Professor of Law and Fellow of Exeter College, Oxford**
Fredman began her response by observing that Kothari's paper spoke to a standard criticism of judicial involvement in policymaking, which holds that the courts are unsuited to such a function on account of their adversarial nature. The Indian

experience suggests that this is not necessarily fixed; judicial proceedings can be adapted in creative ways to make them better suited to dealing with socio-economic rights. Nonetheless, the actions of the Indian Court have been controversial. While some hold that it has opened up the possibility of inclusive decision making, others maintain that it has betrayed the interests of the disadvantaged. Has it, in fact, paralyzed or energized the political process? The courts are often accused, by the likes of Jeremy Waldron, of subverting democracy, but could they in fact be catalysts for its advancement? Fredman suggested three yardsticks which might be employed to assess courts' impact on the democratic process: enhancing accountability, facilitating deliberation, and promoting equality in the democratic process.

The usefulness of accountability is that courts are not necessarily required actually to take decisions themselves, but to call upon the government to justify its actions. There is a culture of justification in South Africa where the state cannot simply claim that it does not have the money to fulfill socio-economic rights, but has to justify its priorities in the light of its human rights obligations. Accountability takes us as far as transparency, but should the courts go further and assess the justifications given by the state? For this, we need to make sure that the court can facilitate democratic participation. Fredman drew upon Jurgen Habermas's distinction between interest bargaining and value or deliberative bargaining. If we see the democratic process as entirely based on interest bargaining, then those who have power in society, be it political or economic, will necessarily triumph. We move to a value-oriented and deliberative discussion when parties enter into the process willing to be persuaded, and seeking to persuade others. Courts are potentially good fora for value bargaining since they do not necessarily work to the advantage of those who have the most power in society, as the cooperative process in India demonstrates.

If the court is actually to promote democratic equality in society, it needs to go beyond simply hearing the cases before it, and find ways of ensuring that all groups in society have a say in the democratic process. The Indian Court has openly and expressly said that its aim is to be part of a social transformation on the part of the oppressed and marginalized. Adjudication emerges as a social conversation, not as a cultivated discourse solely by and for the educated classes but between a multitude of diverse voices. This decentres the judicial role, presenting litigation not as a transfer of hierarchical power from the legislature to the court, but as a trigger for democratic interaction between governmental actors and different social and political groups, with the court acting as a catalyst. Groups without a voice in the political process are able to enter into this conversation and shape its outcome.

Fredman concluded her remarks by looking at the role of social groups in setting litigation agenda. In considering public interest litigation, we move away from the idea of litigation as a dispute between two sides each representing their own interest. In the light of the Indian experience, we might ask who the public is, and whether the public litigant represents its interest (if, indeed, we can meaningfully speak of a single public interest). The role of the Indian Court has become more contentious as the public interest process has spread beyond its original rationale. Whereas such litigation was initially articulated in terms of the poor and disadvantaged, it is now accessible to anyone claiming to represent the public interest. The issue of who is initiating the legislation is key if we are to see the process as one which energizes the democratic process. Since the mid 1990s, many more middle-class groups have pursued public interest litigation. The Court needs to be increasingly vigilant that it is still adhering to it original rationale of giving a voice to the disadvantaged. We should not expect too much of the ability of the courts to promote socio-economic rights on their own as a result of public interest litigation. We should see the courts not as an instrument for social revolution, taking on legislative power, nor as succeeding where government has failed, but as catalysts for democracy in the three senses outlined above.

SESSION FOUR

Socio-Economic Rights from Theory to Practice: A View from the Bench to the Bar

Richard Clary, Head of Litigation, Cravath, Swaine & Moore, New York

'The "Homeless Families with Children" Litigation as a Case Study of the Issues That Arise When a Court Defines and Enforces Socio-Economic Rights (the Right to Shelter)'

Richard Clary's paper was based upon his experience as co-counsel for the plaintiffs in the 'Homeless Families with Children' litigation in New York. Clary observed that in the United States, the debate over socio-economic rights frequently spills into the arena of adversarial litigation. Accordingly, courts (both federal and state) have played a key role both in defining socio-economic rights and in enforcing the government's obligations to provide those rights. While many key judicial pronouncements are well known, what is less well known are the long-term oversight and enforcement issues that have followed from those declarations of rights. Clary took as his case study the 'Homeless Families with Children' litigation, formally known as *McCain v. Bloomberg*, which has been pending in the New York state courts for twenty-five years. At issue is the legal obligation of New York City to provide shelter to families who are too poor to afford housing and have nowhere else to live. This case serves as a useful case study of how courts go about defining and enforcing elements of the social contract, and the political/governance issues that then arise. Clary highlighted five aspects of the debate on the social contract and the role of the courts: (1) declaring the right at issue, and the source of that right; (2) defining the scope of the right; (3) enforcing the right; (4) critiques of judicial oversight; and (5) defining when the court should end its role.

The *McCain* litigation was filed in 1983 by the Legal Aid Society on behalf of a class of homeless families with children, to address the availability and quality of short-term shelter and services and the need for long-term relief. The first issue was to find the source for a substantive right to shelter. The existing federal and state programmes were viewed by the City agencies administering them as benefits, not legal entitlements; which largely afforded the executive discretion as to what type of shelter, if any, should be provided. The court, however, found the source for the right to shelter in a provision of the New York State Constitution, which had been added in 1938 following the Great Depression, for the express purpose of establishing public assistance for the needy as a positive duty and not just a matter of executive or legislative grace. The court did not view itself as creating a right to shelter; rather it was simply recognizing and enforcing an existing right duly established through the constitutional process.

The next critical step was for the court to define the scope of the right. In the face of inaction by the legislative and executive branches, the court was faced with a series of very concrete and troubling fact patterns that required prompt judicial relief, and so was forced to set specific guidelines in order to establish the scope of the substantive right to shelter. Clary outlined three examples of questions the court faced: who is entitled to shelter? What are the minimum standards for public shelter? What are the procedural rules governing the application process?

The third issue faced by the court has been that of enforcement. The *McCain* litigation has been highly contentious. Over ninety different court orders are currently in place, mostly concerning the provision of adequate shelter to eligible families. Yet progress in improving the shelter system has been very slow, and indeed some City officials have been held in contempt of court for their failure to execute the court's

orders. This raises the question of the legitimate role of the courts in enforcing social rights, particularly in areas requiring substantial systemic reform and oversight (and public expense) where the executive has been unwilling or unable voluntarily to assume the lead in that reform effort. Courts are often accused of overstepping their bounds, particularly in cases where social rights are expressed in highly generalized terms that are far from self-executing. This can be expressed as a philosophical debate as to whether judges should simply apply the law, rather than effectively making it themselves, or it can take the form of a more particular critique of judicial oversight in particular contexts.

Long-running judicial oversight can prevent the responsible executive from taking ownership of the system for delivery of the social right.

Clary referred specifically to four categories of objections to the court's role. The first involves claims that the court has gone beyond its expertise and that such decisions should be left to trained professionals. The second holds that long-running judicial oversight stifles the creativity of the professional administrators in one of two ways: either by distracting administrators by taking up their time with courtroom activities; and/or by discouraging their creativity by leaving them open to the fear of being second-guessed in a public courtroom. The third criticism is that long-running judicial oversight can prevent the responsible executive from taking ownership of the system for delivery of the social right. Finally, it is asked whether the court is 'interfering' with the proper functioning of elected officials who are accountable for their actions to the electorate, in relation, for example, to budget-balancing. Clary expressed considerable doubt as to the relevance of these objections to the *McCain* litigation specifically.

Clary concluded by considering one final question currently being litigated: when is the outcome 'good enough' that ongoing judicial oversight should end? This is an issue over which there is currently considerable debate at a federal level. Clary suggested that in the *McCain* case, the proper test would hold that the executive must demonstrate that it is ready, willing, and able to run the shelter system fairly, in compliance with the applicable legal standards, and that no core judicial decree is necessary to protect homeless families with children. There cannot be a requirement of perfection, since mistakes requiring individual legal redress will inevitably be made in individual cases, but that is not the same as judicial oversight through class-wide reform litigation. Proof of systemic errors that could be corrected but for the defendants' refusal to do so reasonably puts in doubt all three prongs of 'ready, willing, and able'. Ultimately it is for the court to decide when its ongoing role is finished.

Response: **Professor Matthew Diller, Professor of Law, Fordham University**

Professor Diller began his response by describing the homeless family litigation case as a 'poster child for judicial usurpation'. There was no clear right involved in the case, there was no clear link between right and remedy, and the litigation had involved twenty-five years of judicial oversight with no beginning, middle, or end. He suggested that the case should have been moved to trial by the defendants fifteen years ago.

The source of the right in the case is the New York State Constitution. In the United States, it is not unusual for state constitutions to contain a wide array of positive rights. They were typically written in the Progressive or New Deal eras, and so have a clear context of social transformation. As such, they were intended as substantive provisions, but this is not how they have always been interpreted. Traditions of interpretation of the federal constitution have contaminated the interpretation of state constitutions so that the courts have sometimes been disinclined to affirm the positive rights contained therein. They have generally been more

willing to intervene in emergency contexts, and especially in cases which shock the conscience, than when it is not clear that the need for their involvement is so pressing and immediate.

The kind of case described by Clary, where there is a solvable crisis in relation to which the state is refusing to act, and where the courts have therefore intervened, is not, however, unusual. In considering such cases, it is important not to undersell the expertise of the judiciary. In the New York case, the presiding judge is recognized to be the predominant expert on the policy case in question. Having been on the case for twenty-five years, and having presided over a range of different rotating defendants, it is clear that no one knows the subject matter better; this, again, is not uncommon in cases with similar structures. The real issue here, then, is not one of competency but of legitimacy.

Diller proceeded to make a number of observations relating to the legitimacy issue. First, it might be seen as significant that the court in question is a state and not a federal court. State courts have broader powers than federal courts, as common law courts with law-making powers. It is also the case that state constitutions are less fixed than the federal constitution, and so easier to amend. Second, this is not a case where there is a direct conflict between the legislative and judicial branches, since in this case the legislature never really did step in. Third, the defendants in the case have never really pushed for resolution, but have agreed to a large number of court orders. Fourth, the judge in this case is far from radical, and has done everything possible to avoid using judicial power.

It is, therefore, an over-simplification to maintain that courts intervening in social policy in such contexts is illegitimate. In situations where other political braches fail to act, it may be that the courts are effectively forced to respond. Cases of this kind give the disempowered a seat at the table, and ensure that their interests are taken into account when decisions are made. This is not to say that the policy that results from such judicial interventions will necessarily be ideal. Certainly, one potential problem concerns a skewing of priorities. When one hundred million dollars is spent on a shelter system, it is reasonable to ask whether this is the best way for the money to be spent in order to improve the provision and quality of housing.

Dr Daniel Smilov, Programme Director at the Centre for Liberal Strategies, University of Sofia
'The Constitutional Politics of Socio-Economic Rights: Proceduralism "Writ Large"'

Dr Smilov's paper sought to examine the constitutional protection of socio-economic rights in relation to the political process. How should constitutional courts approach claims of socio-economic rights? Should they defer to politically elected bodies? If not, what kind of arguments should judges employ in their reasoning? He suggested that socio-economic rights are best understood as a form of political rights, which prevent certain groups of the population from being marginalized and socially excluded. Socio-economic rights are part of the constitutional infrastructure of liberal democracy, which is designed to ensure that each citizen is granted equal respect by the state, or 'equal part' and 'equal stake' in the communal enterprise. Just as the right to vote is essential for ensuring equality of participation, so are socio-economic rights, which prevent certain groups from being reduced to 'second class' citizenship.

The fact that courts, and constitutional courts in particular, can interpret and enforce socio-economic rights as legal rights does not mean that judges are always best placed to determine the scope and character of these rights. Courts can help to redress particular weaknesses of the political process, but they cannot be a complete substitute for political bodies in matters related to socio-economic entitlements. Therefore, there is a need for a theory of adjudication which advises courts to be partners of the political bodies of power in a dialogue intended to create an inclusive and representative liberal democracy. Smilov claimed his approach was close to John Hart Ely's 'proceduralist' theory of adjudication, whereby courts are seen as bodies capable of remedying some of the

failures of the formal democratic process, but sought to widen Ely's narrow focus in order to address dangers of marginalization and exclusion, which cannot be addressed by strengthening voting rights and fighting discrimination and segregation, but may require socio-economic rights.

He argued that the concrete implementation and enforcement of rights depends on specific state policies, labelled 'policies of justice'. Who has the right to take decisions on 'policies of justice': is it the legislature or the constitutional court? In general, should judges be allowed to review a particular 'policy of justice' adopted by the legislature? If we turn to the most well-known defender of the distinction Ronald Dworkin, we have to follow the dictum that matters of policy are to be generally deferred to the legislature. This may not apply, however, to a special kind of policy: a policy about justice. The character of this policy would determine quite dramatically the scope, extent, and enforcement of rights. It is not at all clear why courts should be denied powers of review of policies of justice, if their main goal is the defence and interpretation of rights. If constitutional courts are banned from adjudicating on 'matters of policy of justice', this would affect both negative and socio-economic rights and would limit substantially the scope of constitutional review. In systems with constitutional review, such as those of the Eastern European countries, such an outcome would be unacceptable.

Smilov sought to sketch an adjudicative theory for such cases, drawing a distinction between 'legislative' policies of justice (appropriate for political bodies) and 'constitutional' policies of justice (designed for constitutional courts). He listed various factors of the democratic political process, which judges should take into account if they are to provide efficient remedies to democratic failures: the degree of separation of powers in the system; the length of the domination of a single party or a cohesive coalition of parties over the government and the legislature; the intensity of the competition between different political actors; the degree of openness of the political system to citizens and civil society organizations; the long-term significance of the particular question in the dispute; the practices of cooperation and consensual decision making which are not regulated by rigid rules; and the political preferences of the majority of the court. As on Ely's theory, the goal of the judges is to move beyond the formal electoral democratic process, and to defend the idea that liberal democracy is more than just counting of votes. On the 'proceduralist theory writ large' judges are entitled to improve democracy through interventions on behalf of excluded and marginalized members of society, interventions which go well beyond the strengthening of voting rights. On this approach, socio-economic rights could be useful tools for constitutional courts, preventing the marginalization and social exclusion of specific groups, whose interests are not properly taken care of by the political process.

Courts have, however, used such rights quite sparingly. Smilov suggested that political systems in the region had neglected socio-economic issues, and asked whether the courts should send a strong signal to the political parties that the democratic process has become too obsessed with symbolic-cultural issues and systematically neglects deeper social problems. Should they become activist to the point of recklessness (by systematically invalidating major budget laws and reform acts) just to focus attention on the seriousness of the problem? Few would advocate this strategy of judicial extremism, but probably many would agree that constitutional courts will do a service to liberal democracy in Eastern Europe, if they manage to enter into a meaningful dialogue with the political bodies of power on social and economic policies, and if they stress the interests of groups in danger of marginalization and social exclusion due to persistent problems like poverty, lack of adequate housing, and poor education. From a normative point of view, they should try to read correctly the specific failures of the democratic processes in their jurisdiction, and provide well-tailored remedies, which improve democracy, rather than substitute it with some form of juristocracy.

Response: **Kirsty McLean, University of the Witwatersrand, Johannesburg**

McLean began by identifying the key issue in

the paper concerning the way in which political developments impact on the interpretation of socio-economic rights. An important aspect of this defines socio-economic rights as a subsidiary of civil and political rights, in order to prevent the subordination and marginalization of certain groups. Smilov uses a distinction between matters of principle and of policy to determine the appropriate forum for discussing socio-economic rights. Socio-economic rights are described as a matter of policy, and so should be left to the executive or legislature, unless they conflict with an existing policy of justice. In South Africa, when faced with competing policies of justice, the courts have maintained that they take their lead from the policy of justice espoused in the Constitution. As such, they maintain that their policy interventions are legitimate, since they are simply interpreting the Constitution. Smilov claims judges should only decide matters of policy when they have an express mandate to do so, or when normal democratic processes have failed. One question this raises is when it is indeed the case that normal democratic processes have failed. Would this include cases where courts disagree with a given policy as failing to give effect to the Constitution, or where natural justice has not been complied with?

The Hungarian judgment discussed by Smilov is remarkable. The Hungarian Court has blocked certain welfare reforms, and entered into the field of macroeconomic policy. This is in stark contrast to the line taken in South Africa, where the courts have taken an incremental approach in relation to reforming the existing system. McLean suggested that Smilov's discussion raised three questions on the role of courts in addressing failures of democracy. First, are socio-economic rights best understood as arising from civil and political rights? McLean suggested in this regard that there is a sense in which regarding socio-economic rights as second generation rights undermines their status. Second, if we see socio-economic rights as secondary to civil and political rights, does that modify our understanding of the social contract? Third, to what extent is Smilov's model transplantable to other countries? McLean expressed doubt as to whether the current jurisprudence of the South African court is best seen as either correcting deficiencies or as seeking to protect democracy. Rather, one should see the role of the courts as redirecting the South African government to a more constitutionally appropriate interpretation and implementation of socio-economic rights. In doing so, it engages in a dialogue with the executive and the judiciary as to the meaning of the social contract.

Discussion and Comment

The workshop was designed to bring together two FLJS programmes, on *The Social Contract Revisited* and *Courts and the Making of Public Policy*, by considering the specific issue of judicial action in relation to socio-economic rights. There are obvious linkages between the ideas of socio-economic rights, judicial policymaking, and the social contract. Most obviously, of course, as was made very clear throughout the workshop, courts are deeply involved in policymaking in many diverse jurisdictions throughout the world in relation to socio-economic rights: striking down majoritarian legislation which is deemed to violate said rights; scrutinizing and censuring executives and other governmental bodies which fail to act in a manner consonant with their rights-based mandates; and, in some cases, taking an active and prescriptive role in policymaking by proposing specific remedies to ensure that socio-economic rights are upheld.

It was suggested that we might look to the idea of the social contract to specify the content and status of these rights. As the workshop made clear, there are a number of different ways of understanding this social contract, and thus of understanding the nature of socio-economic rights which stem from the contract. We might see it as an actual agreement between extant citizens, as seen, perhaps, most obviously in the present day in South Africa. Viewed as an account of the fair terms of cooperation of members of a given society, it can be seen as a feature of a given political culture, based on empirical observation of those existing practices and understandings as to the nature of shared societal

rights and obligations which we find even in the absence of explicit agreement amongst citizens. Alternatively, it can be prescriptive rather than descriptive in force, and make reference to ideas of impartiality and fair agreement under conditions of uncertainty to ascertain what should, hypothetically, be agreed amongst citizens.

It seems that courts risk their legitimacy if they act upon an account of socio-economic rights which depends upon deeply contested accounts of distributive justice.

The character of our justification of socio-economic rights is of great importance, since it makes a crucial difference to the character of legitimate judicial intervention. This can be seen clearly both in Chief Justice Langa's keynote address, and in Professor Van Bueren's discussion of the international social contract. If the contract which grounds the right is understood as descriptive, then there is an actuality, of either explicit agreement or implicit understanding, to which judges must refer in articulating and enforcing socio-economic rights. If the account of the social contract to which we refer is prescriptive and hypothetical, however, then judges will need to make recourse to some form of theoretical reasoning in order to ascertain the catalogue of rights. It might be noted here that this is not necessarily to say that it is judges themselves who need to undertake the theoretical reasoning in question. It might also be noted that we need not maintain that either approach gives an exclusive explanation of the grounding of different socio-economic rights. We might, for example, hold that rights claims are justified both by reference to positive legislation, such as international human rights treaties or particular state or regional constitutions, and by ideas of fair reciprocity, understood by reference to hypothetical contractual agreement. Or we might argue that particular socio-economic rights are more or less demanding in different jurisdictions according to the extent and manner in which they are enshrined in positive law, whilst maintaining that there are universally held rights to certain minimum levels of provision which obtain regardless of their legal codification.

Much of the discussion of the workshop assumed that individuals the world over do indeed possess socio-economic rights. For some, these are best seen as rights to a certain minimal level of well-being, and so refer to the basics of a decent human existence: food, shelter, basic health care, sanitation, and so on. For others, they are potentially rather more demanding: an obvious example being Professor Hunt's discussion of the right to the highest possible standard of health care.

The more expansive one's understanding of the requirements of socio-economic rights, the more important it is that one provides a justification for their grounding. It may be that we are reaching a point in international society where there is broad agreement that individuals do possess certain minimal socio-economic rights; and there was broad support throughout the workshop for instances where courts have acted in a context of pressing emergency to make sure that these minimal rights are indeed fulfilled. It is important to note, however, that the very existence of socio-economic rights beyond this point is controversial. Many people would argue that the rights contained in international treaties, for example, are largely aspirational in nature, and do not confer entitlements upon individuals which can be claimed against governments in conditions of scarcity.

In one sense, judicial intervention to uphold rights claims seems most compelling when there is general acceptance of the validity of the right in question: when the content of the right in question is specified in positive law, for example, and/or when there is consensus as to the justice of the distributive claim which the right asserts. (One might refer, in both these regards, to the strong support, both constitutional and cultural, for egalitarian social transformation in contemporary South Africa.) It seems that courts risk their legitimacy if they act

upon an account of socio-economic rights which depends upon deeply contested accounts of distributive justice. One might, for example, follow Jeremy Waldron in maintaining that although such rights do rightly protect individuals from majoritarian decision making which neglects their interests, the catalogue of rights should itself be decided by the demos rather than by unelected judges.

On the other hand, however, we should be careful not to neglect the vital interests which are at stake in relation even to rights claims which some hold to be above the threshold of minimal provision. Professor Hunt made the point that every year, around 500,000 women die of largely preventable health problems related to pregnancy and child birth. The fact of the matter appears to be that many people either do not accept that distributive justice requires a redistribution of resources to remedy this situation, do not believe that it is possible to remedy this situation, or lack the political will to do so. One might plausibly maintain that, in such situations, courts operate in a constant context of emergency, since issues of life and death are in fact in play whenever different distributive policies are proposed. Viewed from such a perspective, the democratic legitimacy of judicial action is of only instrumental importance; the primary question which needs to be answered is whether judicial intervention leads to better or worse outcomes.

There appears, then, to be a potential conflict between the goal of furthering democratic government and the goal of respecting socio-economic rights. Such a possibility is not surprising – there is a clear sense in which entrenched rights constrain democracies, by narrowing the policy space within which the demos can act. However, a number of participants sought to argue that a commitment to a judicial role in the enforcement of socio-economic rights need not necessarily lead to such a conflict, but that courts could rather energize and invigorate the democratic process. This goes beyond Ely's claim that courts may legitimately act to uphold representation-reinforcing rights, by seeing judicial bodies as surrogate fora for democratic participation. In responding, for example, to public interest litigation, courts engage with civil society actors, who deliberately pursue judicial strategies to seek to effect policy change. This suggests that the traditional understanding of the institutional separation of powers, which sees an active judiciary as acting against the wishes of executives and parliamentary majorities, may be outdated. In many jurisdictions, it was observed that judicial action takes place with the connivance and sometimes positive support of other political actors in the legislature and executive. Multiple participants stressed that courts are unlikely to be able effectively to uphold socio-economic rights on their own; that litigation must be linked to and rooted in social activism.

There are potentially conflicting perspectives one might adopt in relation to such observations. From an optimistic perspective, one might argue that courts are able to bring something distinctive to the political process in terms of their structure and format. As Professor Fredman stressed, courts' reasoning is based on the power of argument, not interest bargaining. They can thus play a role within a vision of deliberative democracy, whereby different parties do not aim to further their own interests by majoritarian voting, but where all participants seek to express their views in terms of public reasons accessible to all and couched in terms of the common good. However, it remains an open question whether this is what happens in practice. An alternative perspective suggests that the involvement of interest groups and other political actors suggests not a principled deliberative democracy but a pluralist society, where the courts simply provide an institutional context for political struggle and conflict. Viewed from this angle, the question of judicial involvement in social policy may not actually be that important – all that is happening is that the courts are reflecting background political forces, which would impact on society in some other way in the absence of the courts. Alternatively, one might actually see the courts not as catalysts but as impediments to social activism and democratic debate. It was observed that, in the United States, the academic literature on public interest litigation is very negative, telling a story whereby lawyers set the agenda, and where an elite bar takes on the mantle of the poor and dispossessed.

This literature sees the adoption of a public interest litigation agenda as very risky, since a reliance on litigation can displace social activism. In one memorable turn of phrase, it was suggested that litigation is 'like fly-paper that attracts and captures social activists'.

How are we to assess these conflicting interpretations of the effects of public interest litigation on social activism? There is a deep analytical problem here, which recurs whenever one tries to assess the effects of judicial decision making. The problem relates to the nature of counterfactual reasoning: in any given case, there is no certain way of telling what would have happened in the absence of judicial intervention. A number of participants noted in discussion that there is a paucity of empirical data which can be used to assess the effectiveness of judicial intervention in Asia, Africa, South America, and Eastern Europe. This could be remedied to some extent by further empirical research, but data will always have to be interpreted, and there is simply no fact of the matter as to what would have happened had judges not chosen to act in a given case.

A theme that emerged throughout the course of the workshop was the degree of difference there is between different judicial contexts. Courts possess a wide range of institutional features: constitutional courts, for example, sometimes effectively operate as quasi-legislative bodies, as if third chambers of the legislature. They also operate in distinct social and political contexts: one might contrast, for example, the rather different levels of popular support for the judiciary in South Africa and in Latin America. As such, it may be that the best way to assess their efficacy is to rely on the judgement of experienced observers of particular regions, rather than by seeking to build comparative models and draw wide-ranging conclusions. This being the case, it might be noted that the participants whose papers consisted of case studies of judicial interventions in various different non-Western contexts were broadly positive regarding the role the courts had played, in at least a substantial number of cases.

Another striking feature of the workshop concerned the issue of the competence of the courts. It is commonplace in the Anglo-American tradition to question whether judicial bodies are well placed to make good decisions on public policy matters. In previous workshops, some participants have compared courts unfavourably to other political bodies in terms, for example, of their respective abilities to gather and process empirical information. Such critiques were notably absent in this workshop, and there were striking instances of courts possessing considerable expertise in particular policy fields, an obvious example being the judge who has presided over the New York housing case for the last twenty-five years. It was suggested that constraints on the competence of the courts may well have been overstated in the North American literature on the subject in particular, and the Courts programme intends to focus on this issue in a future workshop. This is a potentially rewarding area for study, since it does seem possible that lessons learnt from one jurisdiction may be applicable to others, insofar as the competence of judicial bodies is at least in part a function of their institutional structure and resources.

To argue that courts are competent, however, is not necessarily to maintain that they are effective. The crucial issue here is the extent to which they manage to formulate and implement effective remedies. Although multiple participants reported positively on the effects of judicial intervention in a number of cases, and although a creative range of different remedies in different jurisdictions was observed, there was general agreement that more study needs to be undertaken in this specific area. It is one thing to examine quite how a particular ruling is followed up, but discussion in the workshop underlined the extent of disagreement that exists as to the overall effect of a focus on socio-economic rights in different jurisdictions, as seen by the exchange between Professor Sadurski and Dr Parau as to the 'aspirational' role that courts can serve even when they are unable to enforce rights, and to claims that this can lead to a 'contamination' of rights which has overall negative effects. Some participants suggested that courts may be more effective in relation to certain kinds of rights claims – when assessing whether a given individual had suffered a violation

of her rights, for example, as opposed to ruling as to whether there was a general lack of provision.

One issue on which no consensus was reached, even amongst those who were very much supportive of the judiciary seeking to promote socio-economic rights, concerns the character, and subsequent appropriateness, of judicial remedies. Should the courts be handing down detailed policy prescriptions, or should their aim be merely to identify rights violations and leave the question of the most appropriate remedy to other political institutions? It was suggested, for example, that recent Indian decisions have been viewed from a South African perspective with a mixture of admiration and horror. The decisions are seen as particularly robust and not unclear, but they are seen as being very prescriptive. In South Africa, by contrast, once a judgment has been made the case tends to be referred back to the legislature to work out the detail of the remedy. It is striking that judicial interventions have been criticized from both sides on this issue. Courts which do hand down detailed prescriptions are accused of acting outside their field of competence and having distorting effects on government budgets, whereas those that do not are criticized for failing to explain how the problems they identify can be remedied.

The workshop certainly witnessed lively disagreement as to the proper role of the courts in the public policy process. But it does seem fair to conclude that a number of participants expressed considerable surprise, and, for some, a degree of optimism, at the extent to which the socio-economic rights agenda has progressed outside of North America and Western Europe. In a range of different jurisdictions, courts are holding governments to account for their failings in relation to social policy.

There are, of course, a number of reasons why the socio-economic rights agenda has not been furthered in the same way in the West. It might be that different understandings of the social contract have been key in establishing social welfare programmes in developed states through regular democratic politics, and it might even be argued that judicial intervention to ensure minimal levels of welfare is a second-best approach, which should only be pursued if regular democratic procedures fail. But insofar as we are thinking about persons' most vital interests, which fundamentally affect whether they are able to life their lives in conditions of basic decency, then the most important question is simply whether or not these interests are best served by the intervention of the courts. The question is extremely difficult to answer in a broad sense, but the workshop did demonstrate that there are particular instances – in South Africa, in India, in New York City, and elsewhere – where the courts do seem to have intervened with success.

Should the courts be handing down detailed policy prescriptions, or should their aim be merely to identify rights violations?

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Courts and the Making of Public Policy

In the last fifty years, courts have emerged as key participants in the public policymaking process, exercising discretion to make decisions which have far-reaching consequences in terms of the distribution of benefits and burdens within society. The *Courts and the Making of Public Policy* programme seeks to provide a critical assessment of the role of courts in policymaking from both empirical and theoretical perspectives, assessing their level of influence and scrutinizing the efficacy and the legitimacy of their involvement. The programme considers a range of issues within this context, including the relationship between courts, legislatures, and executives; how judicial policymaking fits within a democratic society; what training and qualifications judges have for policy decisions; and how suitable the judicial forum is for handling the information that is needed for informed policy choices.

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