Dynamic regulatory constitutionalism

Richard Stacey
Hauser Global Fellows Forum
8 October 2013

Introduction
Socio-economic rights have been formally recognised in international law since at least the Second World War. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise rights to food, shelter and health, for example, and regional treaties and treaties covering specific subjects like the treatment of children and education enshrine a range of socio-economic rights.

While the UDHR is a General Assembly declaration that has no binding legal force, the ICESCR, like its counterpart the International Covenant on Civil and Political Rights, is a treaty that imposes binding legal obligations on its member states. The apprehension that socio-economic rights are somehow different to civil and political rights, and raise considerations of cost, justiciability and enforcement that are different to civil and political rights, was a factor in the divergence of socio-economic rights and civil and political rights into two separate treaties.

Perhaps the most significant point of distinction between civil and political rights and socio-economic rights is that while the former are ‘negative’ rights that establish only limits to state action and protect core individual interests from infringement, socio-economic rights are ‘positive’ rights that impose obligations of action on a state. A right to food, or to health care, requires a government to actively provide these things, or at least establish the conditions under which people have access to them. The same distinction supports the claim that socio-economic rights are not justiciable before courts, because courts have neither institutional competence to make decisions about how resources should be allocated, nor democratic legitimacy to instruct the elected branches of government as to how to act, positively, to fulfil socio-economic rights.

These debates about differences between civil and political and socio-economic rights were reflected on the domestic level, as countries undergoing transitions from politically unjust regimes, with a legacy of social injustice, considered whether to entrench socio-economic rights in new constitutions.

Today, the debate about whether socio-economic rights have a place alongside civil and political rights in constitutions is largely over. The question about whether socio-economic rights
are different from civil and political rights because they impose positive obligations has more-or-less ended with the recognition that all rights require some positive action. The question of whether socio-economic rights are justiciable has been emphatically answered by their adjudication and enforcement in courts all over the world.

The debate about socio-economic rights, in other words, has moved on from the dichotomies and concerns that motivated the misleading but pervasive distinction between ‘first generation’ and ‘second generation’ rights. If there is a ‘second generation’ of anything, it is in the resurgence of scholarship on socio-economic rights over the last few years, as decades of experience operating constitutional systems incorporating socio-economic rights poses new challenges and asks new questions about socio-economic rights. This scholarship addresses questions of what the socio-economic rights embedded in constitutions actually mean, and how courts can enforce, and have enforced, those rights while respecting the boundaries of judicial authority and competence. This scholarship, moreover, has been integral to domestic socio-economic rights litigation, driving and shaping rights claims and engaging directly with the jurisprudence of the courts.

I want to engage with this second generation of socio-economic rights scholarship, and assess its capacity to address a particular problem that arises frequently in socio-economic rights claims: that of the recalcitrant administrative state. Even if we accept that all rights require some positive action on the part of the state, and that litigation can vindicate rights and hold government accountable for its failure to act to protect or fulfil rights – civil and political and socio-economic rights alike – there are numerous cases where governments fail to act to protect or fulfil socio-economic rights. These cases are particularly distressing where a country has made a constitutional commitment to some vision of social justice, embedded socio-economic rights in a constitution as tools for the pursuit of that vision, and enacted legislation and regulatory rules guiding (and requiring) the administrative state in taking positive steps towards its realisation. These instance of administrative recalcitrance are breaches of the rule of law, in the sense that officials do not act in congruence with previously declared rules, as much as they are infringements of socio-economic rights.

The simple question, then, is what this second generation of socio-economic rights scholarship can tell us about how to overcome this problem. My view is: not enough. In this research project I want, first, to examine this scholarship, assess how it frames responses to
administrative recalcitrance, or fails to do so. Second, I want to set out my own view of how the rule of law and socio-economic rights (or social justice more broadly) intersect to articulate a role for the courts, in partnership with legislators, administrators and civil society, in realising socio-economic rights. I think of this partnership as a dynamic regulatory constitutionalism, in which courts are not the only or even the authoritative interpreters of socio-economic rights, and in which administrators themselves must internalise the values and normative principles that underlie the regulatory rules under which they act. The court’s role in this is to ensure normative congruence between the normative foundations of a regulatory system for, say, the realisation of a right to water or health care, and the administrative efforts that are made in pursuit of those objectives.

The idea of dynamic regulatory constitutionalism is thus meant to offer a more concrete guideline to the limits of the judicial role in the adjudication and enforcement of socio-economic rights.

The second generation of socio-economic rights scholarship
There are a handful of models of adjudication that emerge from the second generation of socio-economic rights scholarship. It is with a brief summary of these that I begin.

1. Institutional reform litigation (IRL)
A precursor to the second generation of socio-economic rights scholarship is institutional reform litigation, which emerged as a strategy for ensuring positive government action where necessary to protect civil and political rights or ensure compliance with ordinary legislation. Efforts towards school desegregation in the wake of Brown v Board of Education and uphold the Civil Rights Act with, for example, school bussing programmes eventually being mandated by courts to ensure the desegregation of schools with all deliberate speed.

Institutional reform litigation is a response to systemic or structural conditions that give rise to infringements of rights. In some cases, it is not enough simply to redress an individual rights violation, because the conditions under which rights violations occur will continue to occur until those conditions change. Institutional reform litigation, or IRL, seeks court orders that compel structural changes: the products of IRL, therefore, are quite often detailed court orders, or structural injunctions, that set out precisely and in voluminous detail the steps that government or
officials must take in changing the conditions under which rights are violated. In many of these cases, the court that grants a structural injunction will maintain jurisdiction over the matter and require the parties to report back to it to monitor the extent of compliance with its order. In other cases a court will exercise supervisory jurisdiction to see to it that rights violations end, without first issuing a structural injunction instructing government officials exactly how to about ending rights violations.

IRL installs courts as managers of administrative functions. They become enmeshed in the activities of the administrative officials whose conduct infringed rights to begin with, and whose compliance with a court order will, ideally, end rights violations. The fulfilment of socio-economic rights is arguably well suited to this kind of managerial judicial approach, since socio-economic rights require positive action to be fulfilled, and perhaps more so than civil and political rights. What better institution to monitor, supervise or even design programmes for the positive fulfilment of socio-economic rights than the courts that authoritatively interpret those rights?

2. The minimum core content of socio-economic rights
The ICESCR provides that state parties have an obligation to take steps, subject to the availability of resources, to achieve the progressive realisation of the socio-economic rights. In its General Comment no. 3 in 1990, the Committee on Economic, Social and Cultural Rights (the UN body charged with monitoring the implementation of the ICESCR) explained that even aside from these qualifications of progressive realisation and limited resources, state parties have on obligation to ensure that a ‘minimum core content’ of each of the rights in the ICESCR is fulfilled.

In the South African Constitution, the rights to housing, food, water, health care and social assistance are phrased in a similar fashion to the ICESCR. This might suggest that the various elements of the state in South African have an obligation to provide a minimum core content, despite limited resources and despite the obligation to realise rights progressively. However, the South African Constitutional Court has largely rejected this approach. It has done so, first, on a reading of the Constitution itself: the rights to housing, water, and so on, must be read together with the obligation the state bears to take reasonable steps, within available resources, to progressively realise each right. There is no free-standing right to claim a certain amount of
water, health care, or a house of a particular minimum character from the state, ‘on demand’. Rather, the content of each of the socio-economic rights in the Constitution – i.e. what the right entitles people to – cannot be determined without reference to what it would be reasonable for the state to provide, within its available resources, in a broader effort to progressively realise each right. This reasoning has been criticised on the basis that it is impossible to assess the reasonableness of state conduct in the fulfilment of a right without some free-standing conception of the right’s content. The conclusion of these criticisms is that the courts should do more to articulate the content of rights on the basis of which the reasonableness of government action is to be assessed.

The Court’s second ground for rejecting the minimum core approach is that a minimum core strips regulatory flexibility from a state engaged in trying to meet a wide range of socio-economic demands in changing circumstances. Holding the state to rigid rules of socio-economic provision does not take into account inter-individual variation, variations between different communities, or the competing demands on a state’s resources over time, that may affect the level at which access to socio-economic resources should be guaranteed by the state.

This argument, it has been contended, misses distinctions between minimal conception of socio-economic provision necessary to ensure mere survival and a maximal conception conducive to human flourishing, on the one hand, and between standards of socio-economic provision and means to achieve those standards. Flexibility of the standards of socio-economic provision is only relevant above the basic floor necessary for mere survival, the objection continues. The Court is wrong to reject the minimum core idea on the basis of its inflexibility. Similarly, adherence to a minimum core content of socio-economic rights does not undermine a state’s ability to react creatively and with flexibility to changing circumstances as it attempts to achieve the minimum core. A lack of flexibility is rather the result of a court taking a managerial role in demanding that the state act in a very particular way in attempting to provide a minimum core.

3. The administrative law model of socio-economic rights enforcement
In answer to the claims that the South African Constitutional Court must, logically, be relying on some conception of the minimum core when it assesses government’s steps to progressively realise rights has been countered with the ‘administrative law model’ of rights enforcement and
an emphasis on the role that reasonableness plays in setting standards rather than rigid rules for state conduct. These approaches describe courts as engaging in a different kind of review, not in prescribing how the state should act or enforcing quantifiable minima of social provision, but in reviewing the state’s conduct against the same kinds of standards of reasonableness that administrative action is usually reviewed. Court will adopt a deferential stance to the state’s action as long as it falls within a realm of ‘legitimate diversity’ established by the concept of reasonableness.

Of course, it might be the case that any efforts by the state to fulfil socio-economic rights that fall below the level objectively necessary for mere survival – leaving aside for a moment the question of whether there is an objective minimum or whether it depends on the context of each case – will be unreasonable precisely for that reason. In other words, the administrative law model that turns on reasonableness may end up requiring the state to ensure access to the same basic level of socio-economic resources, but it does so without any of the disadvantages that a conception of the minimum core content of rights brings with it.

4. The catalytic court
Each of the approaches to socio-economic rights enforcement set out so far corresponds to a particular archetype of judicial review. A typology of five different forms of review can be set out. Managerial review and peremptory review involve courts assuming a hierarchical position vis-à-vis the elected branches of government, and telling it both when its approach is wrong and supervising or directing the adoption of a different approach. Deferential review aligns with the administrative law model, to the extent that a court will leave the state to go about the business of achieving rights as long as it does so within the boundaries of reasonableness. Conversational and experimental review involve a greater involvement by the courts in the state’s attempts to protect rights and ensure socio-economic provision. Conversational review aims to generate dialogue between the courts and other branches of government, eliciting more substantial consideration from these branches on questions of whether their actions uphold rights or not. Some work has been done, in this regard, on the view of courts as participants in a multi-branch dialogue committed ultimately to the proper interpretation and methods of enforcing socio-economic (and other) rights.
Experimental review, finally, engages courts in more than just dialogue with the elected braches. Experimental courts try to understand the root of rights infringements and failures of social justice by engaging with administrators, officials and civil society. The objective is not only to determine why rights are being violated by to engage all interested and responsible parties in the articulation of remedies.

While different courts may generally follow one or two of these typologies, the ‘catalytic’ court picks and chooses between them all in order to manufacture the most productive interaction with all parties concerned. The objective of these interactions is to ensure deliberative approaches to problems of social and economic need and to reflect the values on which rights to socio-economic resources rest, rather than to set out quantifiable bundles of entitlements and goods that the state is obliged to supply or ensure access to. The court is a catalyst not only because it generates exchanges between various political, legal and social actors, by engaging in one or more of the typologies of review, but also because it lowers the amount of ‘political energy’ needed to get these exchanges going in the first place.

The contributions of positive law
Each of these bodies of work proposes a way to conceive of courts as guardians of rights or socio-economic rights. While there are intersections between them, each is largely distinct and tensions exist between them: the catalytic court model, for example, rejects the idea of the minimum core, although it remains open to courts taking a managerial role. The minimum core approach rejects the administrative law model’s reliance on reasonableness alone, but the latter model might well arrive at a situation that would not disappoint proponents of the minimum core.

To the extent that these models are in tension, they compete for dominance as the theory that should define the role of courts in the adjudication and enforcement of socio-economic rights. My objective is not to choose between them, but to see how much help they can offer in the face of a recalcitrant administrative state.

My view is that all of these models are flawed in at least two respects. First, they pay insufficient attention to the role of legislation. This is of particular concern in the cases that I want to investigate, where the state is in breach of its obligations in terms of positive legislation, and not just against the standards or minima contained in a set of socio-economic rights. It is
difficult to conceive of how courts can act as catalysts, as partners in conversation with the
elected branches, or even as an authoritative interpreter of rights, without considering the place
of legislation, as a primary instrument of government action.

The second flaw is that whatever approach to judicial conduct is taken, the bodies of work
say very little about what the forms or limits of judicial review are. The suggestion that courts
should, as catalysts, engender deliberative problem solving or participate in dialogue and
conversation with other actors does not actually set any limits to judicial action. Do managerial
courts have any limits? Should courts set the minimum core for rights, or merely enforce them
against the state if they are set by law or policy? What should courts do if the steps the state takes
in trying to progressively realise socio-economic rights are unreasonable?

In addressing the first of these problems, and articulating a more central role for positive law
and for legislation, I end up describing limits to judicial action in the enforcement of socio-
economic rights. By expanding the ideas of judicial dialogue (or conversation) and judicial
experimentalism to include a theory of legislation, I introduce more directly into this scholarship
a focus on the regulatory nature of constitutional law and socio-economic rights. Tying ideas of
dynamic and dialogic courts to the regulatory enterprises of the state offers more certain and
defined limits to judicial action in the enforcement of socio-economic rights. I briefly describe
the elements of this dynamic regulatory constitutionalism.

1. The rule of law and the role of legislation
I have mentioned how in places where the state bears obligations in terms of law or regulations
to take action in pursuit of socio-economic rights, the failure to do so, or the failure to uphold
commitments to rights, amounts to a breach of the rule of law. I do so by relying particularly on
the idea that the essence of the rule of law is the requirement that government officials act only
as previously declared rules say that they will. Legislation sets out the rules under which
government must act, and is thus an important element of the rule of law. It is not only a tool by
which the legislature tells the public how the government’s officials will act, but also a
mechanisms of intra-government communication through which the legislature tells officials
how they must act.

In constitutional systems that entrench socio-economic rights, legislation or regulations often
define more closely a programme of government action to fulfil those rights. Socio-economic
rights are not only aspirational goals, but also a manifesto for government action, and legislation draws down aspirational goals into policy. In some ways it does not make sense to talk about the rule of law until there are previously declared rules to which government officials’ conduct can be compared. Official conduct can be compared against rights themselves, but this raises the difficult question that existing literature leaves unresolved: what is the free-standing content of socio-economic rights? Where legislation or regulations have been enacted, however, in order to give life to the more abstractly phrased right – and this legislation may describe a tangible or quantifiable content for rights in specific contexts – it is against this positive law that official conduct must be scrutinised.

2. Links between legislation and socio-economic rights
Courts that are not charged with the enforcement of socio-economic rights are quite often required to determine whether legislation is consistent with rights. This is a core function of constitutional review. There is no reason that courts in constitutional systems that entrench socio-economic rights should not be empowered to assess the consistency of legislation setting programmes for the advancement of socio-economic rights against the core values of those rights.

The idea that legislation can be inconsistent with socio-economic rights raises the possibility that administrative recalcitrance may be explained as a failure of the legislature to communicate the normative foundations of a regulatory framework for, say, water provision or social assistance, to government officials. If we are to hold government officials to their promises, and hope to advance commitments to social justice in doing so, it has to be the case that the rules under which officials act are themselves closely connected to the normative foundations of our commitments to social justice. A statutory or regulatory system for socio-economic provision, and the specific rules for government conduct that it establishes, must be in harmony with commitments to justice if the enforcement of those laws is to achieve justice. I think of this as the requirement of regulatory harmony.

Legal systems that are characterised by regulatory harmony, I argue, are more likely to benefit from the judicial enforcement of legislation and regulations. One of the first contours of the judicial role in the enforcement of socio-economic rights, then, is the determination of
whether the rules of official conduct are in harmony with, or rationally connected to, the commitments to social justice expressed as socio-economic rights.

3. Institutional unity
The empirical challenge to the idea of regulatory harmony comes from cases of administrative recalcitrance even in the face of statutory or regulatory programmes for the pursuit of socio-economic rights characterised by regulatory harmony. I explain these cases as a breakdown in communication between legislators and officials, in the sense that despite a set of laws that connects rule for official conduct to the normative foundations of socio-economic rights, the officials themselves responsible for operating the regulatory system must internalise the normative foundations of the rules if their actions are to advance them. Regulatory harmony at the abstract lever, in other words, must be matched by a shared understanding among all the institutional sites of a regulatory system as to how the normative foundations of the regulatory system infuse the rules under which each official acts. A lack of institutional unity as to these connections between norms and rules can undermine the regulatory harmony that otherwise exists.

4. The dynamic, regulatory role of the court
These two ideas – regulatory harmony and institutional unity – form the kernel of an idea about what courts should do to uphold socio-economic rights. Succinctly, courts should do no more than police the boundaries of regulatory harmony and institutional unity.

In doing so, however, courts should focus on leading actors involved in the formulation and implementation of regulatory and statutory schemes for the advancement of rights to the understanding of how the normative foundations embedded in rights infuse and inflect the rules under which they act, or that should be established for action. The court’s role in this regard cannot be to simply substitute its own judgments for the actions of the elected branches, for at least two reasons.

First, courts cannot hope to substitute their judgments for those of administrators and regulators in massive and comprehensive schemes for, say the control of water pollution or the disbursement of social assistance grants. There just aren’t enough courts.
Second, and more importantly, if the source of ongoing rights violations, in the form of failures to implement laws in ways uphold the normative foundations of the laws, then failures will continue to occur as long as the officials concerned do not appreciate the connections between norms and rules. The court’s job here is to guide officials to an understanding of how the normative values expressed as socio-economic rights stand as a guide to their actions in implementing rules. It is by engaging with officials, legislators, society, and policymakers, in an effort to work out where the breakdown in communication has occurred and why, and in seeking to repair that breakdown by leading official towards a fuller understanding of the relevant rules and norms, that the enforcement of legislation may begin to advance socio-economic rights. This process of dynamic regulatory constitutionalism holds promise as a model for the judicial enforcement of socio-economic rights.

Selective bibliography


Young, Katherine G: Constituting Economic and Social Rights (Oxford University Press, Oxford 2012).