

# Vindicating Socio-Economic Rights

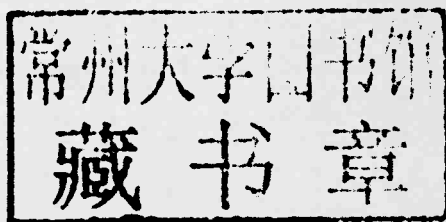
International Standards and Comparative Experiences

Paul O'Connell

# Vindicating Socio-Economic Rights

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Comparative Experiences

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# Vindicating Socio-Economic Rights

Notwithstanding the widespread and persistent affirmation of the indivisibility and equal worth of all human rights, socio-economic rights continue to be treated as the 'Cinderella' of the human rights corpus. At a domestic level this has resulted in little appetite for the explicit recognition and judicial enforcement of such rights in constitutional democracies. The primary reason for this is the prevalent apprehension that the judicial enforcement of socio-economic rights is fundamentally at variance with the doctrine of the separation of powers.

This study, drawing on comparative experiences in a number of jurisdictions which have addressed (in some cases more explicitly than others) the issue of socio-economic rights, seeks to counter this argument by showing that courts can play a substantial role in the vindication of socio-economic rights, while still respecting the relative institutional prerogatives of the elected branches of government. Drawing lessons from experiences in South Africa, India, Canada and Ireland, this study seeks to articulate a 'model adjudicative framework' for the protection of socio-economic rights. In this context the overarching concern is to find some role for the courts in vindicating socio-economic rights, while also recognising the importance of the separation of powers and the primary role that the elected branches of government must play in protecting and vindicating such rights. The text incorporates discussion of the likely impact and significance of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, and looks at the implications of the *Mazibuko* decision for the development of South Africa's socio-economic rights jurisprudence.

**Paul O'Connell** is a Lecturer in Law at the University of Leicester. He has published widely on socio-economic rights, and the impact of globalisation on human rights.

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To Cliona Hannon and all the staff (past and present) at the Trinity Access Programmes, for all they do to make education a right, not a privilege.

# Preface

Over the last three or four years, in the context of the great financial crisis which began in late 2008,<sup>1</sup> socio-economic rights have gained a degree of prominence and urgency, as their systematic denial is implemented through numerous austerity programmes. This book, however, was written (or at least begun) at a time when derivatives, credit default swaps and myriad other products of financial alchemy, appeared to be fuelling a never-ending economic boom that, we were told, would gradually 'lift all boats'. However, even in the middle of plenty, opposition to socio-economic rights was well entrenched. Indeed, the impetus for this study was the trenchant rejection of judicial enforcement of socio-economic rights by the Supreme Court in so-called 'Celtic Tiger' Ireland. In 2001 the Irish Supreme Court held, in effect, that the separation of powers erected a near impenetrable barrier, precluding Irish courts from enforcing socio-economic rights. This study, then, was born of dissatisfaction with the Irish Supreme Court's reasoning, and represents an attempt to answer the question: how can courts play a meaningful role in the vindication of socio-economic rights, while at the same time respecting the separation of powers?

To answer this question I have sought guidance from both the normative standards established at the international level, and, more importantly, from the practical experiences of a number of jurisdictions. In terms of the comparative study undertaken here, it is by no means exhaustive. However, as is explained in Chapter 1, the jurisdictions studied here are pertinent. The lesson that can be drawn from these experiences, in South Africa, India, Canada and Ireland, is that if courts are to play a meaningful role in the vindication of socio-economic rights, then we need to break from static, zero-sum conceptions of the separation of powers. Instead, we need to recognise that all branches of government have a role to play in the protection of all rights, and that in any society with pretensions to democracy it is essential that each branch of government plays its respective role.

While I am satisfied that experience shows, and I hope that it becomes clear throughout this study also, that courts can play a meaningful role in the

1 On which, see John Bellamy Foster and Harry Magdoff, *The Great Financial Crisis* (New York: Monthly Review Press, 2009).

protection of socio-economic rights, the unfortunate reality is that current political and economic conditions do not promise much for socio-economic rights. This study, it is hoped, provides a coherent and defensible alternative to the canard that the separation of powers simply precludes judicial enforcement of socio-economic rights, by providing a positive account of an alternative conception of the separation of powers that allows for such judicial enforcement. However, the real battle for those concerned with the protection of socio-economic rights, as discussed in Chapter 8, is in challenging the political and economic orthodoxies that now prevail on a global scale, and are fundamentally inimical to the protection of socio-economic rights.<sup>2</sup>

This study has been a long time in the making, as a consequence of which I have incurred innumerable intellectual and personal debts. In the first instance I would like to thank Gerry Whyte for initially piquing my interest in the subject of socio-economic rights, while I was an undergraduate at Trinity College, Dublin. I would also like to thank Oran Doyle for nurturing that interest while supervising my final-year dissertation. My Ph.D. supervisor, Gerard Quinn, deepened and broadened my understanding of the intricacies of the subject and provided excellent guidance and support throughout the course of my studies. Over time various other people kindly read and commented on one or more of the chapters, including: Danie Brand, Cosmo Graham, Sandy Liebenberg, Aoife Nolan, Colm O'Conneide, Andreas Rahmatian and Margot Young. I would like to express my thanks to them all. Shivaun Quinlivan read all of the chapters, and provided helpful and insightful comments on each, for which I am most grateful. Needless to say I also owe a great thanks to my parents, family and friends for all of their support and encouragement throughout the researching and writing of this book. Finally, words are a paltry currency through which to express my thanks to my wife Geraldine, but as they are all I have at my disposal here, I wish to express my deepest and profoundest thanks to her for all of the support, help and love she has given me over the years – *'buti na meron ka*.

2 See Paul O'Connell, 'The Death of Socio-Economic Rights' (2011) 74 *Modern Law Review* 532.

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Doucet-Bourdeau v. Nova Scotia (Minister of Education) [2003] 3 SCR 3  
Egan v. Canada [1995] 2 SCR 513  
Eldridge v. British Columbia [1997] 3 SCR 624  
Fernandes v. Manitoba (Director of Social Services) (1992) 93 DLR (4th) 402  
Gosselin v. Quebec (Attorney General) [2002] 4 SCR 429  
Haig v. Canada [1993] 2 SCR 995  
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New Brunswick (Minister of Health and Community Services) v. G. (J.) [1999] 3 SCR 46  
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Victoria (City) v. Adams [2009] BCCA 563  
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## Indian

- ADM Jabalapur v. Shiv. Kant Shukla [1976] INSC 129 (28 April 1976)  
Ahmadabad Municipal Corporation v. Nawab Khan [1996] INSC 1300 (11 October 1996)  
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Almitra H. Patel v. Union of India [2000] INSC 54 (15 February 2000)  
BALCO Employees Union v. Union of India [2001] INSC 646 (10 December 2001)

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- Francis Coralie Mullin v. The Administrator, Union Territory of Delhi [1981] INSC 12 (13 January 1981)
- Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225
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- Municipal Council, Ratlam v. Shri Vardichand [1980] INSC 138 (29 July 1980)
- Narmada Bachao Andolan v. Union of India [2000] INSC 518 (18 October 2000)
- National Textile Workers' Union v. PR Ramkrishnan [1982] INSC 94 (10 December 1982)
- N. D. Jayal v. Union of India (2004) 9 SCC 362
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- P. A. Inamdar v. State of Maharashtra [2005] INSC 413 (12 August 2005)
- Paschim Banga Khet v. State of West Bengal [1996] INSC 659 (6 May 1996)
- People's Union for Civil Liberties v. Union of India Writ Petition (Civil) No. 196/2001 (23 July 2001) Unreported
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- State of Punjab v. Ram Lubhaya Bagga [1998] INSC 131 (26 February 1998)
- TMA Pai Foundation v. State of Karnataka [2002] INSC 455 (31 October 2002)
- Union of India v. Bhanudas Krishna Gawde [1977] INSC 29 (25 January 1977)
- Unni Krishnan v. State of Andhra Pradesh [1993] INSC 60 (4 February 1993)

## **Irish**

- Abbey Films v. Attorney General [1981] IR 158
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- In Re Article 26 and the Health (Amendment) (No. 2) Bill, 2004 [2005] 1 IR 105
- In Re Article 26 and the Regulation of Information (Services Outside the State for Termination of Pregnancies) Bill 1995 [1995] 1 IR 1
- In Re Haughey [1971] IR 217
- Macauley v. Minister for Posts and Telegraphs [1966] IR 345
- Magee v. Farrell [2009] IESC 60
- McD v. Minister for Education [2008] IEHC 265
- McGee v. Attorney General [1974] IR 284

Melling v. Ó Mathghamhna [1962] IR 1  
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Murtagh Properties v. Cleary [1972] IR 330  
OA v. Minister for Justice [2007] 1 ILRM 58  
O'Brien v. Wicklow UDC, unreported High Court judgment of 10 June 1994  
O'C v. Minister for Education [2007] IEHC 170  
O'Carolan v. Minister for Education [2005] IEHC 296  
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O'Keefe v. Hickey [2009] 2 IR 302  
O'Reilly v. Limerick Corporation [1989] ILRM 181  
O'T v. B [1998] 2 IR 321  
Ryan v. Attorney General [1965] IR 294  
Sinnott v. Minister for Education [2001] 2 IR 545  
TD v. Minister for Education [2001] 4 IR 259  
The People (DPP) v. Healy [1990] 2 IR 73  
The State (C) v. Frawley [1976] IR 365  
The State (Ryan) v. Lennon [1935] IR 170

## **South African**

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B v. Minister of Correctional Services 1997 (6) BCLR 789 (CC)  
Ex parte Chairperson of the Constitutional Assembly In re Certification of the  
Constitution of the Republic of South Africa 1996 1996 (10) BCLR 1253 (CC)  
Fose v. Minister of Safety and Security 1997 (7) BCLR 851 (CC)  
Government of the Republic of South Africa v. Grootboom 2000 (11) BCLR 257  
(CC)  
Khosa v. Minister of Social Development 2004 (6) BCLR 569 (CC)  
Mazibuko v. City of Johannesburg [2009] ZACC 28 (8 October 2009)  
Minister of Health v. Treatment Action Campaign (TAC) 2002 (10) BCLR 1075  
(CC)  
Nokotyana v. Ekurhuleni Metropolitan Municipality [2009] ZACC 33 (19 November  
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Sibiya v. Director of Public Prosecutions (Sibiya 1) 2005 (8) BCLR 812 (CC)  
Soobramoney v. Minister for Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC)

## **United Nations Human Rights Committee**

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Gueye et al v. France, Communication No. 196/1985 (03/04/1989)  
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# 1 Introduction

While the rhetoric of international human rights law maintains that all human rights are indivisible, interdependent, interrelated and consequently deserving of equal respect,<sup>1</sup> the reality is that socio-economic rights have traditionally been viewed and treated as 'the Cinderella of the international human rights corpus',<sup>2</sup> honoured more in 'the breach than the observance'.<sup>3</sup> This second-class status has, among other things, had 'a negative impact on the possibilities to claim effective implementation of these rights, both at the international and domestic level'.<sup>4</sup> And notwithstanding a degree of optimism generated in recent years by an emergent international, regional and domestic jurisprudence dealing with socio-economic rights,<sup>5</sup> a combination of global political developments,<sup>6</sup>

- 1 Articulated most famously in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (UN Doc. A/CONF.157/23), which stated, at para. 5, that: 'All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'. See also Manfred Nowak, 'Indivisibility of Human Rights' in Smith and van den Anker (eds.), *The Essentials of Human Rights* (New York: Hodder Arnold, 2005) 178.
- 2 Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press, 2008) at p. 2.
- 3 David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford: Oxford University Press, 2007) at p. 2.
- 4 Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Constitutional Context' in Coomans (ed.), *Justiciability of Economic and Social Rights* (Antwerp: Intersentia, 2006) 1 at p. 2.
- 5 Such optimism is exemplified by Langford's claim that 'It is arguable that one debate has been resolved, namely whether economic, social and cultural rights can be denied the status of human rights on the basis that they are not judicially enforceable' (Malcolm Langford, 'The Justiciability of Social Rights' in Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge: Cambridge University Press, 2008) 3 at p. 4).
- 6 See David Beetham, 'What Future for Economic and Social Rights?' in Beetham (ed.), *Politics and Human Rights* (Oxford: Blackwell, 1995) 41 at p. 43; and Paul O'Connell, 'On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights' (2007) 7(3) *Human Rights Law Review* 483.

## 2 *Vindicating socio-economic rights*

and continued hostility to the protection of such rights by domestic courts, has insured that socio-economic rights very much retain this second-class status.<sup>7</sup> The arguments against socio-economic rights are something of a hodgepodge, spanning arguments grounded in abstract moral philosophy to more focused, practical arguments about the competence of courts to adequately address cases involving the assertion of such rights, with a lot of blurring of the lines in between.<sup>8</sup> Over the last number of years these arguments have found favour in Ireland and other jurisdictions, and have emerged as a veritable orthodoxy in constitutional jurisprudence,<sup>9</sup> and it is the ultimate object of this study to critically engage with this incipient orthodoxy.

As will become clear in the pages and chapters that follow, the ultimate concern with the protection of socio-economic rights is the fear that providing constitutional protection for such rights will result in undermining the separation of powers by transferring too much authority to the courts, at the expense of elected branches of government. What this study aims to do is show, through a comparative survey of a number of jurisdictions which have grappled with the issue of socio-economic rights, that it is possible for the courts to play a meaningful role in the protection, realisation and vindication of such rights, without undermining the separation of powers. Through an assessment of the experience of other jurisdictions, noting both best practice and potential pitfalls, the ultimate aim will be to articulate a model, or ideal, framework for courts in general to play a role in vindicating socio-economic rights. The rest of this introductory chapter clarifies the terms of the debate, specifying the focus of the study, the main arguments to be addressed and addressing some issues of comparative methodology, before the subsequent chapters embark in earnest on the comparative exercise.

### 1.1 Socio-economic rights

A preliminary point which needs to be addressed, and which will be dealt with here, is what exactly is the subject matter of this study? The seemingly self-evident answer to this question may very well be intuitively obvious, but we nonetheless profit significantly from taking the time to spell out precisely what this study is about, to avoid, or at least reduce, confusion. To begin with, then,

7 As Barak-Erez and Gross note, 'despite the renewed consensus regarding the interdependence of rights, the debates over the similarities and differences between the two sets of rights, and the frequent relegation of social rights to second-class status, persist' (Daphne Barak-Erez and Aeyal Gross, 'Introduction: Do We Need Social Rights' in Barak-Erez and Gross (eds.), *Exploring Social Rights* (Oxford: Hart Publishing, 2007) 1 at p. 6).

8 See Herman Schwartz, 'Do Economic and Social Rights Belong in a Constitution?' (1995) 10 *American University Journal of International Law and Policy* 1233 at pp. 1234–1235.

9 See the Irish Supreme Court judgments in *Sinnott v. Minister for Education* [2001] 2 IR 545 and *TD v. Minister for Education* [2001] 4 IR 259, in particular the judgments of Hardiman J.; and Gerard Hogan, 'Directive Principles, Socio-Economic Rights and the Constitution' (2001) 36 *Irish Jurist* (n.s.) 174.

the focus of this study is the constitutional protection of socio-economic rights (or to put it slightly differently: the focus of this study is the separation-of-powers argument against the constitutionalisation of socio-economic rights). Now, this preliminary clarification requires the further explanation of the following three sub-matters: (i) what are 'socio-economic rights', or at least what is the understanding of the term as it is used here?; (ii) why the focus on constitutional, as opposed to legislative, protection of such rights?; and (iii) why the insistence on the judiciary playing a part in the enforcement and vindication of such rights? Each of these issues will now be addressed in turn, so that we can then move onto the substantive enterprise with the terms of reference, as it were, clarified.

### 1.1.1 Defining socio-economic rights

As to the first point, there is significant diversity in the ways in which different commentators refer to the rights which are the subject of this study. Commentators refer, variously, to: social rights, welfare rights, economic, social and cultural rights and, somewhat misleadingly, positive rights.<sup>10</sup> There is little or no explicit basis for choosing one nomenclature over the others, and preference tends to be conditioned by either geographical or disciplinary background; with US commentators generally preferring the term welfare rights,<sup>11</sup> British commentators, and social philosophers in general, preferring social rights,<sup>12</sup> and those most au fait with international human rights law opting for the more expansive economic, social and cultural rights.<sup>13</sup> They all refer to the same thing(s), namely 'rights to the meeting of needs, amongst which the most important are the right to a minimum income, the right to housing, the right to health care, and the right to education',<sup>14</sup> but do so in different ways. And while very little turns on the differing terminologies, I will,

10 Antonio Carlos Pereira-Menaut, 'Against Positive Rights' (1988) 22 *Valparaíso University Law Review* 359. I say 'somewhat misleadingly' because, as will become clear in section 1.2. of this chapter, the emergent consensus is that all rights have both positive and negative elements, and thus seeking to classify socio-economic rights alone as positive, is something of a misnomer.

11 See Amy Wax, 'Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes and the Political Economy of Welfare Reform' (2000) 63 *Law and Contemporary Problems* 257; and Frank Michelman, 'Welfare Rights in a Constitutional Democracy' (1979) *Washington University Law Quarterly* 659.

12 See Cécile Fabre, *Social Rights Under the Constitution* (Oxford: Oxford University Press, 2000); and T. H. Marshall and Tom Bottomore, *Citizenship and Social Class* (London: Pluto, 1992).

13 This rather all-encompassing way of referring to socio-economic rights derives, perhaps unsurprisingly, from the primary international treaty for the protection of such rights: the International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966. See Asbjorn Eide and Allan Rosas, 'Economic, Social and Cultural Rights: A Universal Challenge' in Eide, Krause and Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (2nd edn, The Hague: Martinus Nijhoff, 2001) 3.

14 Fabre (n. 12) at p. 3.

for the sake of completeness, explain why the term socio-economic rights is preferred here.

On a very base level, one of the reasons for preferring the term socio-economic rights to the other terms on offer is to make clear that cultural rights, although immensely important in their own right, are not the concern of this study. At a higher level, the term socio-economic rights is preferred here because it 'reflects the inextricable link between the economic and social policy fields' and the law,<sup>15</sup> and therefore brings to the fore the relevance of socio-economic rights to the social and economic status of rights claimants, and the implications that the assertion of such rights has for power relations within societies. Furthermore, the term is understood, both by the myself and others, to have myriad, context-sensitive, dimensions to it. As Ellie Palmer notes:

Thus, in human rights discourse it is a normative construct that conveys the idea that within a framework of fundamental human rights values, the repositories of collective power have corresponding moral obligations to protect the social and economic welfare of individuals in their jurisdictions. Secondly, it connotes a set of legal rights, for example rights enshrined in treaties such as the ICESCR . . . which impose corresponding legal obligations on states for their realisation. Thirdly, the term socio-economic rights may be used to connote legally enforceable individual entitlements . . . to public welfare provision.<sup>16</sup>

It is because it captures these different dimensions of the rights under consideration, and because it more readily signals the implications which these rights have for social and economic policy, that the term socio-economic rights is preferred here.

As understood here, socio-economic rights are those rights which are concerned 'with the material bases of human well being and include the rights to shelter, to a job under decent working conditions and to subsistence'.<sup>17</sup> More expansively they are 'those human rights that aim to secure for all members of a particular society a basic quality of life in terms of food, water, shelter, education, health care and housing'.<sup>18</sup> Regardless of how one catalogues such rights, they are concerned with the substance of human life, with the very basics necessary for human well-being. Such 'substantive or material' rights serve two important functions,<sup>19</sup> as Keith Ewing puts it:

15 Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act* (Oxford: Hart Publishing, 2007) at p. 8.

16 *Ibid.* at p. 9.

17 Mark Tushnet, 'Civil Rights and Social Rights: The Future of the Reconstruction Amendments' (1992) 25 *Loyola of Los Angeles Law Review* 1207 at p. 1207.

18 Gerhard Erasmus, 'Socio-economic Rights and Their Implementation: The Impact of Domestic and International Instruments' (2004) 32 *International Journal of Legal Information* 243 at p. 243.

19 K. D. Ewing, 'Social Rights and Constitutional Law' (1999) *Public Law* 104 at p. 105.