BOOK REVIEWS


Courting Social Justice, edited by Varun Gauri and Daniel Brinks, is a great contribution to the growing scholarship on the comparative adjudication of socio-economic rights. It offers an empirical analysis of the role of courts in implementing health and education rights in five countries: South Africa (chapter 2, by Jonathan Berger), Brazil (chapter 3, by Florian Hoffmann and Fernando Bentes), India (chapter 4, by Shylashri Shankar and Pratap Mehta), Nigeria (chapter 5, by Chidi Odinkalu), and Indonesia (chapter 6, by Bivitri Susanti). It also provides an analysis of the horizontal application of socio-economic rights obligations to private entities (chapter 7, by Helen Hershkoff).

At first glance, the latter chapter might seem to be a bit out of place, but it makes an important input on private sector obligations that is particularly relevant to health and education rights (private health clinics, private health insurance and private schools etc). The book is written in an accessible, but academically rigorous, style and should appeal to most scholars and practitioners interested in the subject.

The editors explain that the five countries included were chosen so as to include common law countries with records of aggressive, and limited, socio-economic rights litigation; as well as civil law countries with aggressive, and incipient, litigation. The common law countries described as having aggressive socio-economic rights litigation are South Africa and India, while the common law country with limited litigation is Nigeria. The civil law country with strong socio-economic rights litigation is Brazil, while the civil law country with incipient litigation is Indonesia. These countries provide interesting case studies. However, recent judgments from both India and South Africa suggest that the courts in these countries have either retreated from, or have never really pursued, aggressive implementation of socio-economic rights – certainly when compared with the aggressive enforcement of socio-economic rights by many Latin American courts. Indeed, one criticism of the book is that, by comparing along the weak/strong axis across both common and civil law systems, the book has muddied an important direct comparison between common and civil law systems per se. Nevertheless, the very detailed common and civil law case studies provide an extremely useful baseline for further comparative analysis.

In the introductory chapter, Gauri and Brinks set out their theoretical framework for the analysis of courts and socio-economic rights. Exploring the nexus between formal rights and legalisation, they define the ‘legalisation of policy’ as the product of a four-stage process: 1) legal mobilisation; 2) the judicial decision; 3) the bureaucratic, political or private-party response; and 4) follow-up litigation. The authors of the five country chapters have done a
commendable job in tracing the course of this legalisation process in each country. In particular, there is an impressive focus on the impact of judicial decisions (whether direct or indirect), which is an aspect of litigation often ignored by legal scholars.

However, although legal mobilisation is mentioned by some of the country authors, the book does not focus on this aspect of the legalisation life-cycle, which is a pity because it means that there is no analysis of the strategic usefulness (or not) of socio-economic rights litigation to civil society organisations, social movements etc. Nor does the book deal with the effects of legal mobilisation per se, ie the role of legal mobilisation notwithstanding judicial decisions, as introduced by McCann. Related to this, the editors do not seem to appropriately analyse litigation as merely one of multiple, concurrent, strategies utilised by social actors to fulfil their socio-economic rights. They ask: ‘Why do [people] choose courts, rather than other avenues for fulfilling their rights?’ whereas, in most contexts, the choice of litigation or other avenues is not a zero-sum gain. Indeed, while introducing the legal mobilisation theme, the book clearly focuses much more comprehensively on the supply side (courts) than the demand side (society) of the legalisation equation. This is not to suggest that the book’s central analysis is compromised by its supply-side focus – in fact, the book’s conclusion clarifies that mobilisation is incidental to, rather than a cause of, the receptiveness of courts. Nevertheless, scholars who are specifically interested in demand-side determinants might be somewhat disappointed.

In terms of the supply-side frame, for Gauri and Brinks – like Epp – the most important feature determining the level of judicialisation is not the existence of a formal socio-economic right. Yet, whereas Epp finds demand – as expressed by the degree of civil society organisation – to be essential to spark a rights revolution, Gauri and Brinks see the primacy of supply: noting that receptive courts are a prerequisite to the presence of active public interest litigation. In other words, for the editors, the supply side largely determines the demand side. Crucially, they conclude that ‘[w]here courts are not receptive, even a well-developed civil society will take its claims elsewhere; where the courts are an attractive demand mechanism, civil society will develop the structures needed to support litigation’.

This acknowledgment in the concluding chapter seems at least partially to refocus the central research frame (or to throw out a challenge for future research) more directly on the composition, behaviour, and evolution of courts themselves – and, specifically, strong courts. And/or to directly compare strong courts in common and civil law countries to see if any conclusions can be drawn about the receptiveness of such courts to enforcing socio-economic rights, and the impact of such enforcement. If further research is undertaken, Costa Rica might be a valuable case study – a civil law country without

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1 M McCann Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization (1994).
strong civil society organisation or legal defence, but with a very activist Constitutional Court. Another possible civil law case study is Colombia, with a fractured society and polity but a strong Constitutional Court. It might be interesting to compare the impact of the judicial enforcement of socio-economic rights in these countries with that in India and South Africa.

Overall, this book’s main contribution is in providing very well-researched and rich case studies of the socio-economic rights jurisprudence from the five countries examined. In addition, the introductory and concluding chapters draw out many of the essential fault lines in the enforcement of socio-economic rights, including the inevitable balancing act between the judiciary and the executive. If there is a weakness, it is that the comparative analysis seems somewhat inconclusive, and I could not shake the feeling that there were more pertinent comparisons to be made. For me, little was gained by including the weak court case studies (Nigeria and Indonesia) and I suspect it would have been more beneficial to include additional strong court examples, using different frames of comparison. But perhaps this frame had to be explored in order to refine the lens for further analysis.

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