In Defense of "Soft" Remedies (Sometimes): Enforcing Principled Remedies to Systemic Social Rights Claims in Canada

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In assessing the effectiveness of enforcement mechanism for social rights we must first ask ourselves what it is we are trying to achieve with social rights claims and assess enforcement options against the goals and purposes of the rights claiming in question. I fear that we often do the opposite. We design the claims around the remedies and enforcement mechanisms most familiar to courts rather than around the problems being addressed and the goals our constituencies seek to achieve. So we may get effective enforcement, but the fundamental rights violation may remain unchallenged.

We must also remember that many social rights claims are not of the traditional form of citizen v. state. Enforcement approaches must reflect the diversity of actors involved both as claimants and respondents in the modern state, the wide range of remedies that may be sought and the diverse legislative, policy or adjudicative contexts in which social rights claims may be advanced. Claimants may be individuals or groups or combinations of the two, respondents may be private actors, non-governmental actors or multiple levels of government, from local to national. All of these actors are likely bound together in webs of contractual delegation and jurisdictional overlap. And the context of social rights claims may range from a single decision made by an individual administrator in relation to a particular benefit under a single statute, to a systemic challenge involving various levels of governments in concert with private and non-governmental actors administering a complex system of programs and policies which, in the end, have denied the claimants their social rights.

These emerging challenges of pragmatic and purposeful design of remedial and enforcement mechanisms were highlighted for us in Canada when a large network of groups and individuals dealing with homelessness came together in the last year to plan a constitutional challenge to the failure of governments in Canada to address widespread homelessness. UN human rights bodies and the UN Special Rapporteur on the Right to Adequate Housing have made it clear that homelessness is an urgent and widespread violation of human rights in Canada and that provincial, federal and territorial governments should urgently adopt a national strategy to address it as such. Why, we asked, have we never really asked domestic courts to say the same thing, so that this recommendation would become an enforceable remedy?

There have been numerous challenges advanced related to **components** of the right to adequate housing in Canada, from under-inclusive security of tenure protections[1], to rental qualifications that

[1] *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, (1993), 119 N.S.R. (2d) 91.

disqualify low income tenants,[2] through to inadequate welfare rates for particular groups[3], and excessive utilities costs for low income households[4]. More recently bylaws were struck down which prohibited homeless people from erecting temporary shelters in parks.[5] In all of these challenges the right to adequate housing under international human rights law was relied upon to encourage courts to interpret existing statutes or constitutional rights in a manner which would advance the right to housing. What was striking, however, when we looked back over 25 years of litigation under our *Canadian Charter of Rights and Freedoms*, was that at no time had anyone actually taken forward a claim that would seek, as a remedy, a coherent response to the problem of homelessness. This means that the right to adequate housing has never really been claimed as a substantive right – only as a backdrop to other types of more instrumental claims.

Why had we never demanded as a remedy a coherent and concerted effort of the sort recommended by UN bodies? I think part of the problem was that we had come to think in terms of the types of remedies courts are used to enforcing rather than those which would really address the problems we were trying to solve. Perhaps it is seems a grandiose plan to ask that homelessness be challenged and remedied in a single court case, but in Canada, the problem is eminently solvable, the violations are not justified by resource constraints. So the question begged to be asked: why not claim the right to an effective remedy to homelessness? Claiming the right to housing as the right to sleep under a box in a park just did not seem appropriate in the context of Canada's abundant resources.

So we decided that in this case, we would take a different approach. Instead of starting with the specific pieces of legislation or provisions, or lack thereof, that we might challenge to seek more traditional, statute-based remedies, we should figure out what kind of remedy would actually solve the problem, and then justify to the court why it should order this remedy. After months of preparation, the claim will be filed in court on May 18, 2010.

What we will be asking for is what many may worry is too "soft" a remedy. We will ask the Court to order the federal and provincial governments to design, in collaboration and in meaningful consultation with stakeholders, an effective strategy to implement the right to adequate housing, precisely as has been recommended by the CESCR and the Special Rapporteur . This means that the strategy must include complaints procedures, meaningful accountability mechanism, timetables and benchmarks for the elimination of homelessness and a central role for civil society, Indigenous communities and affected groups in developing, implementing and monitoring the strategy. The homeless individuals and

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[2] *Kearney v. Bramalea Ltd* (1998), 34 CHRR D/1 (Ont. Bd. Inq.), upheld in *Shelter Corporation v. Ontario Human Rights Commission* (2001), 143 OAC 54 (Ont. Sup. Ct.); *Whittom v. Québec (Commission des droits de la personne)* (1997), 29 CHRR D/1 (Que. CA)

[3] *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429, 2002 SCC 84

[4] *Boulter v. Nova Scotia Power Incorporated*, 2009 NSCA 17

[5] *Victoria (City) v. Adams,* 2009 BCCA 563; 2008 BCSC 1363

groups are not, at this point, asking for the direct provision of housing nor are they asking for compensation. They are litigating for one thing only – a strategy to end homelessness and implement the right to adequate housing in Canada.

Many claimants, of course, are not in a position to forego individual remedies in this way. In other legal contexts, it would be advisable to demand compensatory damages and individual remedies. I would not suggest that this kind of strategic litigation aimed at systemic solutions should replace or substitute for the vast array of individual claims to particular benefits, challenges to evictions or to discriminatory policies that are critical to housing rights advocacy in Canada and elsewhere. As noted above, it is critical to elucidate on a case by case basis the purpose of the claiming of rights, and design remedy and enforcement around that purpose.

In order to distinguish the approach we are taking in this case from others, and for the purposes of exploring the challenges of social rights remedies and enforcement, I will invoke a simplified dichotomy between social rights claims that operate within the framework of existing entitlements systems and the more transformative claims which address what Amartya Sen called, in his early work, "entitlement system failures." Sen developed that term to explain how starvation and famine occurs when there is no real scarcity of food – through the complex interaction of a wide range of entitlements - to work, wages, social security, land etc which, if not properly co-ordinated around the broader rights based entitlement to food, can end up leaving some groups and communities starving.[6]

The first category of claims, what I am calling "entitlement based claims", would be framed largely within existing statutory or programmatic obligations. Existing entitlement systems are challenged for flaws or failures largely in their own terms, on the basis of accepted principles of fairness, consistency and sometimes adequacy. Claims would address unfair procedures or exclusions, discrimination, corrupt administration, unreasonable exercise of discretion and may involve positive remedies by extending the entitlement to previously excluded groups.

Systemic or transformative social rights claims, by contrast, like our homelessness challenge, seek to remedy broader entitlements system failures that extend beyond a single statute or program, and likely involve complex interactions among social program entitlements, private sector regulation, tax systems, income support, budgetary allocations, zoning and other policies. In these case, we start with the social

[66] The concept of entitlement system failures is particularly useful in the Canadian context, where homelessness and hunger are clearly related to a complex entitlement system failure rather than to a scarcity of housing or resources or land through which to provide it. The problem in Canada is fairly simple: adequate housing is not properly implemented as a right, so there is no institutional mechanism through with the rights violations, the entitlement system failures leading to homelessness and hunger, might be addressed. So even as our economy booms, more and more people become homeless – with no place to go for an effective remedy.

rights violation itself and frame the remedial framework around the right itself – around the process needed to realize the right - rather than defining the remedy in terms of an existing statutory or entitlement framework.

The dichotomy is only useful, of course, because it is over-simplified. We could also describe the two types of claims as the two dimensions of social rights claims. We cannot ignore the transformative potential of entitlement claims operating largely within an existing statute or program. Interpreting and applying existing entitlements in a manner that is consistent with social rights allows us to infuse broader systemic issues into the consideration of case by case entitlement challenges in a way which can become transformative. The success of equality rights litigation on issues of same-sex partnerships in Canada is a case in point. Rights claims by gays and lesbians were largely framed around existing entitlements – arguing for equal access to the benefits conferred on spousal relationships, from pensions through to the right to civil marriage. Yet the transformative potential of such claims was significant. Being included in existing entitlements systems redefined concepts of family, spousal relationships and marriage. Challenging discriminatory exclusions, even within existing entitlement frameworks, may be transformative because it challenges systemic patterns of marginalization and discrimination.

So I am not suggesting that we ought in any way to eschew claims that operate within the framework of existing entitlements systems. There is no question that it is easier to convince courts to engage with existing entitlements rather than with unfulfilled rights in the abstract, and that the remedies are much easier enforced when there is some "thing" which is being denied and which can be ordered provided. In those cases, there is no need to require legislatures to pass new laws or design new institutions and therefore much less of a challenge in relation to ongoing monitoring or enforcement of judgments. Courts in Canada have adopted the remedy of "reading in" excluded groups or benefits in existing legislative schemes. The remedies have been both immediate and far-reaching. The case of *Sparks v. Dartmouth/Halifax County Regional Housing Authority*[7] in which security of tenure protections in place for private market tenants were extended to 10,000 public housing is a case in point. The governing legislation and the institutional mechanisms for hearings for termination of tenancy were already in place, and it was simply a matter of extending protections to excluded groups. There were no problems with enforcement of the judgment in that case, despite its positive dimensions and resource implications. The world changed overnight for 10,000 public housing tenants. Responsible advocacy would never pass up remedies of this sort simply because of their simplicity!

The same has generally held true of negatively oriented remedies in which restrictions on existing entitlements or procedural barriers have been successfully challenged, and courts have struck them down or declared them to be of no force or effect. An early decision of the Supreme Court of Canada in relation to restrictions on access to abortions in *Morgenthaler* [8] had an immediate effect of ensuring

[7] *Sparks v. Dartmouth/Halifax County Regional Housing Authority*, (1993), 119 N.S.R. (2d) 91.

[8] *R. v. Morgentaler*, [1988] 1 S.C.R. 30

dramatically improved access to safe abortions for women. The *Adams* decision referred to above, striking down components of a by-law prohibiting homeless people from erecting temporary shelters public parks had immediate effect – and it was the remedy the claimants sought.

What has not been assured by these decisions, however, is a commitment to institutional transformation to ensure access to abortion services for women in every region of the country, or to ensure access to adequate housing rather than a cardboard shelter. While the longer term goals have been advanced by claims framed around existing entitlement systems, they have not been specifically identified as remedies to be enforced. If we were to always design our claims around the ease of judicial intervention and enforceability of remedies, the most serious systemic violations of social rights may remain unchallenged.

Moving Beyond Existing Entitlement Systems to Address Systemic Violations

The judicial preference for overseeing, adjusting or correcting flaws in existing entitlement systems rather than adjudicating allegations of broader systemic failures has been formulated in a common refrain by Canadian courts. Our courts have suggested that there is no constitutional right to welfare or healthcare or even, some have suggested, to human rights protections. Once a system has been put in place to provide these, however, the courts assure us, that system must conform with the Constitution. Courts have given no coherent justification for the idea that constitutional rights should be subservient to decisions of whether or not to institute statutory entitlements to fulfill them. And in fact, the Supreme Court has recognized that the Canadian Charter applies to governments' *failures* to act within their authority as to their *actions*. So this refrain is not only contrary to the fundamental framework of Canada's international human rights obligations, it is also fundamentally at odds with accepted principles of constitutional supremacy.

Tying constitutional review to existing statutory schemes is one way for Canadian courts to reassure themselves that they need not deal with the more challenging aspects of remedies and enforcement that may arise with transformative rights claims. However, it is an approach with itself leads to incoherence and contradictions at the level of remedy and enforcement, and it is here that we can start to deconstruct the paradigm.

In the area of welfare entitlements, one court decided to remedy discrimination between two categories of welfare recipients by lowering the benefits of single mothers to the level of single fathers or "equalizing down" to equal levels of gross inadequacy.[9] The Supreme Court properly identified this remedial approach as "equality with a vengeance".[10] In the historic *Vriend*[11] case, in which the majority

[9] *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (N.S.C.A.)

[10] *Schachter v. Canada*, [1992] 2 S.C.R. 679

[11] *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

of the Supreme Court of Canada ordered a remedy of "reading into" provincial human rights legislation the omitted prohibited ground of 'sexual orientation', one Justice dissented from the majority's remedy in favour of a declaratory remedy that would allow the legislature to choose "no human rights Act over one that includes sexual orientation as a prohibited ground of discrimination".[12] Without a recognition of an over-arching obligation to ensure the existence of systems and legislation to protect rights, the right to equality unravels into a right to have no human rights protections at all. Clearly a more coherent approach to the issue of substantive obligations and remedies is needed - one that infuses the issue of remedy with values that move beyond the four corners of a particular statutory entitlement, toward the goal of substantive enjoyment of rights.

Louise Arbour has suggested that not only courts in Canada but also advocates have shown some "timidity" in making substantive social rights claims under the *Canadian Charter of Rights and Freedoms*.[13] One of the reasons for timidity among advocates, of course, is the fear that courts will reject claims for more substantive remedies. We would rather win small than lose big. But there is also a fear among advocates that "soft" or what I would call "principled" remedies rather than "hard and fast entitlement orders leave too much up in the air, too much wiggle room for governments to be adequately enforced. There is no question that this is a risk that must be addressed in the specific design of remedies such as the one we are seeking in our homelessness challenge. But there are also important benefits to the softer, principled remedies, in comparison to the clearer entitlement claims, that we should not ignore.

Remedies that simply order entitlements in the simplest and most enforceable manner do not tend to address the need for ongoing decision-making by non-judicial actors that are themselves based on human rights values. They situate the human rights values in the judicial review function, and make clear orders to decision-makers about what must be provided. The advantage of clarity and enforceability however, has the disadvantage of removing the need for ongoing rights based decision-making from the remedial order. An alternative approach is to have the court affirm the "principles" the "values" around which entitlement systems must be designed and reformulated. That kind of remedial order incorporates social rights review directly into the apparatus of decision-making. Rather than itself deciding what entitlement should be provided in each context, the court provides guidance as to how these decisions are to be made in compliance with social rights. This approach may be more transformative in the longer term. And it is more efficient in the short term because it provides to the court more of an oversight role in terms of human rights values rather than requiring judicial involvement in detailed entitlement allocations.

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[12] *Ibid*, at para. 196, per Major, J. (dissenting in part).

[13] L. Arbour, '"Freedom From Want" – From Charity to Entitlement', LaFontaine-Baldwin Lecture, Quebec City (2005), p. 7.

The well-known decision *of Eldridge v. British Columbia* [14] provides a good example of these two alternative approaches to remedy and enforcement under the *Canadian Charter*. In that case, the issue was whether a failure to provide interpretation services for the deaf in hospitals and health services violated the right to equality in healthcare. The applicants, on advice from their lawyers, framed the challenge as an allegation of a discriminatory legislative omission or under-inclusion. They argued that interpreter services should have been explicitly included as a health service in the legislation governing public healthcare insurance and hospital services. Had the court decided the case in the manner in which it was framed by the applicants, the remedy would have been a simple matter of reading into the legislation the omitted entitlement, and the case would have been closed.

However, the Supreme Court of Canada chose to frame the violation differently, and came up with a different somewhat "softer" remedy. The Court found that there was nothing in the relevant legislation which prevented hospitals or healthcare providers from providing interpreter services. Further, the Court was not convinced that explicit legislative entitlements for interpretation as a component of healthcare was the best way in which such services should be provided. The services had previously been provided by a non-profit service operating outside of the healthcare delivery system. So rather than finding a violation of rights in the absence of a specific entitlement in the legislation, or remedying the violation by ordering the entitlement within the existing statutory framework, the Supreme Court turned its attention to *the quality of the decision-making*. It found that it was the decision-making by the delegated decision-makers that was at fault rather than the statutory framework. The right to equality required that decision-makers exercise their discretion consistently with the value of full and equal access to healthcare for the deaf. Although hospital are non-governmental actors and generally exempt from *Charter* obligations, the Court found that the hospitals had been delegated a governmental role and hence must exercise decision-making authority consistently with the *Charter* right to equality for people with disabilities.

This was a "softer" remedy, more difficult to enforce than an immediate legislative change to healthcare entitlements. The Court gave the government time to choose among the "myriad" of options the best way to provide interpreter services. The government sought and received an extension of time from the Court to consult with affected communities. There was some skepticism within the disability rights community and legal communities as to whether the claimants would actually get the remedy to which they were entitled. In the end, however, interviews with those involved with the claim suggest that the consultative participatory process put in place by the softer remedy and enforcement were considered beneficial.[15] The development of interpreter services through the enforcement of the order gave a previously excluded group a new voice in program design. Rather than creating a new category of required healthcare service, the remedy ended up creating a new program.

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[14] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624

[15] Interview of Andrea L. Zwack, Counsel for Appellants in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, by Azin Samani (15 March 2010).

More importantly, the principle affirmed by the Supreme Court's decision in *Eldridge* was potentially more transformative than an immediately enforced order to include interpreter services in healthcare delivery. The softer remedy affirmed that human rights principles must be paramount in all decision-making, and put in place a new decision-making process based on these principles. Moreover, the court had ruled that even private actors, when they are exercising decision-making authority that has an impact on the enjoyment of constitutional rights which are otherwise the responsibilities of governments to fulfill, must exercise their authority consistently with obligations of governments under the *Charter of Rights*. It is not a difficult stretch, in light of subsequent jurisprudence in the *Baker* case on the obligation to exercise delegated decision-making in a manner consistent with international human rights values, to suggest that social rights values should inform all delegated decision-making. This requirement applies to a wide range of decision-makers, from private sector actors contracted by governments to deliver services, through to the highest levels of governments exercising discretionary authority in relation to budgetary allocations.

An interesting example of the sometimes unforeseen benefits of 'principles' affirmed in judgments rather than only "entitlements" is found in the case of *Newfoundland (Treasury Board) v. N.A.P.E.* – a case in which the claim was actually rejected by the Court and no remedy ordered. In that case the Newfoundland and Labrador Association of Public and Private Employees challenged a decision to revoke a retroactive pay equity award of $24 million for workers in underpaid areas of women-dominated employment. The government argued that the measure was necessary at a time of severe fiscal restraint, when budget cuts were being made in all areas of spending. The claimants, on the other hand, argued that the roll-back constituted sex discrimination which could not be justified on budgetary grounds. The Supreme Court of Canada agreed that revoking the pay equity award constituted discrimination against women. However, it found that the measure was justified in the circumstances of cut-backs to hospital beds, lay-offs and reduced social welfare programs.

While the N.A.P.E. decision was seen by many as a severe set-back to women's equality rights, it is interesting to note that the principles enunciated in the decision nevertheless played an important part in the claimants securing the entitlement claimed through political rather than legal means. Two years after the Supreme Court issued its judgment, with oil revenues starting to flow into Newfoundland, a widespread lobbying campaign by women and labour groups was successful in convincing the government to make the retroactive payment of $24 million that had been denied as a remedy by the Supreme Court of Canada. The campaign relied heavily the decision of the Court that the non-payment of the award had constituted discrimination.[16] In this sense, even in finding against the claimants, the Court had established the basis for a principle that empowered the group affected to eventually win the entitlement they sought. A framework was suggested for the assessment of reasonableness in budgetary allocations which subsequently allowed constituencies to lobby for fairness in budgetary allocations relative to available resources and competing social rights obligations.

[16] Letter from Shiela H. Greene, Counsel for Appellants in *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 (29 March 2010).

From Constitutional Remedial "Dialogue" to Rights Based "Conversation"

There has been much discussion in the Canadian context of a constitutional "dialogue" between courts and legislatures. More positive experiences of enforcement of social rights remedies, however, suggest that the notion of a two-way conversation is misconceived. Because of the unusual history of ESC rights being, in many instances, rights without complaints procedures, the importance of the claimant's voice and those of stakeholders has too often been ignored. This is as true in the area of enforcement as in that of interpretation of the content of the rights themselves . An important advantage of principled or "softer" enforcement mechanisms such as the one in *Eldridge,* therefore, over specifically mandated entitlement orders is that they tend to be more effective in bringing the claimant group into the enforcement process, in the design and implementation of the remedies.

This point is evident in the leading Supreme Court of Canada case on longer term judicial monitoring of remedial enforcement, *Doucet-Boudreau v. Nova Scotia*[17] This is the case in which the Supreme Court of Canada considered the common law principle of *functus officio* in a challenge by governments to a remedy provided in a *Charter* challenge based on the *Charter* right to publicly funded minority French language education outside of Quebec, where numbers warrant. The trial judge in that case ordered what we are calling a "soft" remedy, requiring the governments to use their "best efforts" to develop secondary school facilities and programs by particular dates in a number of different districts. The judge broke with normal judicial practice in Canada by retaining jurisdiction to hear reports on the progress made. While such an approach in other countries would be considered the obvious approach to take in a case such as this, in Canada it was considered more controversial. In its decision, a majority of the Supreme Court moved helpfully affirmed the primacy of the notion of effective and responsive constitutional remedies. The Court found that a court may play a role in supervising the implementation of remedies, including holding further hearings into the implementation of the order, as long as the decision itself is not altered on the basis of subsequent hearings.

A minority of the Supreme Court of Canada, however, found that the order exceeded the appropriate role of courts by breaching the separation of powers principle and by acting after exhausting its jurisdiction in breach the *functus officio* doctrine. The minority held that the Court engaged in essentially political activity by attempting to hold the government's "feet to the fire", noting that "the trial judge may have sought to exert political or public pressure on the executive".[18] What the minority missed, of course, it was not the judge who exerted the political pressure but the claimants. The claimant communities relied on the Reporting sessions back to court as democratic accountability mechanisms . Such mechanisms are entirely appropriate to ensure the timely implementation of fundamental rights as clarified by the court's decision. The sessions enabled them to move a cumbersome process along

[17] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R

[18] Ibid, at para 131 per *Per* Major, Binnie, LeBel and Deschamps JJ. (dissenting)

more expeditiously and to get the ear of government officials which would otherwise have been impossible.

Effective principled based remedies and enforcement require ongoing accountability mechanisms that give power to the groups whose rights were violated or ignored. Legislative accountability to courts is not, in the end, to the courts as administrators of entitlements, but rather to the courts as interpreters of fundamental human rights. In the Canadian context, it is important to maintain the clarity of that distinction if we are to convince a reluctant judiciary to enter into the sphere of social rights adjudication.

Democratic Accountability and Effective Enforcement

In *Doucet-Boudreau* the ongoing accountability for enforcement was assured by way of scheduled reporting sessions to the court. An alternative remedy, fashioned in a different institutional setting, might have required reporting sessions to some other body that could provide effective oversight. Unfortunately, in Canada, reporting to courts is still a more effective form of public accountability than reporting to our human rights commissions or even to parliamentary committees . Eventually, we must build better institutional mechanisms for accountability on which courts could rely in fashioning effective remedial orders.

In our challenge to homelessness, we are asking the court to order the government to develop, in consultation with claimant communities, effective accountability mechanisms through which progress against set goals and timetables for the elimination of homelessness and the implementation of the right to adequate housing can be assessed. We will also ask the court to retain jurisdiction. If extra-judicial accountability mechanisms fail, then we must be ensured that the court may step in and receive reports on the implementation of its order. Courts may not always be the best or most convenient place for ongoing monitoring to occur, but if governments cannot come up with anything that works, courts must be there to play that role.

The enforcement of human rights through rights-based processes of accountability, expanding the two way "dialogue" between courts and legislatures into a broader conversation engaging rights claimants themselves, is critical to effective enforcement of systemic claims. Social rights accountability requires a much broader and more diverse participation, on both the claimant and respondent sides, than the traditional model suggests. Often there will be diverse communities who are stakeholders in a remedial order as well as a range of governmental and non-governmental actors . It is up to the courts to frame enforcement orders such that all of the relevant actors are engaged in an ongoing, rights-based process of accountability to substantive rights.

Giving a voice to diverse communities of rights-holders, and understanding obligations from governments to delegated decision makers and private actors, is critical to effective enforcement of systemic challenges to "entitlement system failures." Social rights violations are usually the results of failures of democratic accountability and inclusiveness, and social rights remedies must be enforced in a manner that will bring about new forms of democratic participation and accountability. If social rights

remedies are to actually bring about the enjoyment of social rights, the remedies will have to be based on the ongoing application of human rights principles, and on the empowerment of marginalized communities to be involved in that process.