The catalyst for reframing federal corruption policy lies in a recent policy paper of the Obama administration. In 2010 the administration publicly announced its position that ''corruption is a violation of basic human rights.''[9] The paper was both underpublicized, and undertheorized; it did little to promote or defend this novel assertion. But when subjected to a rigorous philosophical defense, this executive statement of foreign policy can begin to fill the void that the judicial branch's *Kiobel* decision has created.

Meanwhile, a broad public debate on anti-bribery policy may be sparked by a now-pending FCPA enforcement action: Wal-Mart, perhaps the most infamous U.S.-based multinational corporation, is under investigation for systematically paying bribes across the developing world, inducing violations of various long-recognized rights. With the convergence of these forces, now is the time to radically reconceptualize corporate bribery as an issue of human rights.

The New Economic and Social Rights

By Katharine G. Young[*]

In the last two decades, economic and social rights have experienced a notable repositioning in international law. No longer a proxy for the ideological standoffs of the Cold War, such rights are now embraced as a fundamental part of the international human rights agenda, as well as in international food security, health, and development regimes. Soon the Optional Protocol to the ICESCR will itself create a new role for international enforcement, when the United Nations Committee on Economic, Social and Cultural Rights becomes authorized to consider complaints.[1] At this moment of repositioning, domestic constitutional systems help us to understand a vital change in the form that such rights take—a change I term *the new economic and social rights*.

This trend, I argue, has three main characteristics. Firstly, the new economic and social rights are linked to the new wave of constitutionalism. Combining the rights tradition of U.S. constitutionalism with the non-court centric features of German and other models, the new constitutions bind state actors in a variety of ways. Secondly, the new economic and social rights have accompanied new models of the enforcement of positive obligations. Despite the longstanding ''justiciability'' objection of the West—the concern that judicial involvement in economic and social rights is naïve at best and anti-democratic at worst—comparative evidence of new models of adjudication, dispute resolution, and civil society coordination demonstrates unexpected enhancements to democracy. Thirdly, and of course relatedly, the new economic and social rights are led from the Global South. States, legal institutions, and social movements from Africa, Asia, and Latin America have initiated new understandings of the legal validity of such rights. Through transnational networks, these understandings have reignited legal and political debates in Europe and North America, where austerity measures provide a greater impetus than new constitutional design.

Much links the new conception of economic and social rights with the old. The new economic and social rights repeat the call for the indivisibility of human rights, and their

[9] White House, National Security Strategy (2010), http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

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[1] Optional Protocol to the International Covenant of Economic, Social and Cultural Rights, G.A. Res. 63/117, UN Doc. A/RES/63/117 (Dec. 10, 2008) (due to enter into force May 5, 2013) (Argentina, Bolivia, Bosnia and Herzegovina, Ecuador, El Salvador, Mongolia, Portugal, Slovakia, Spain, and Uruguay).

existential and moral equivalence with values of dignity and human flourishing. They continue to advance positive and negative obligations on states, in duties to respect, protect, and fulfill. They maintain their potential, if presently marginal, influence on counterpart regimes in international trade, investment, armed conflict, and environmental law. Yet their new forms shift our understandings of these subject areas. The new economic and social rights can be understood, not as minimum bundles of commodities or entitlements, but rather as focal points for value-based deliberative problem-solving.[2]

Nowhere is this more clear than in the context of enforcement, where the recognition of economic and social rights has long stalled. The arguments usually take on a no-win cast in the domestic, court-centric context: because courts are counter-majoritarian, enforcement of economic and social rights will usurp the more democratic contests over distributive concerns. And because courts lack the power of the sword and the purse, the inevitable failures of enforcement will lead to an abdication of the judicial role, risking the debasement of all fundamental rights.

Yet developments occurring across the world require us to revisit what we know about these arguments. Unlike U.S. judges, at least at the federal level, courts around the world have been developing, often in dialogue with one another,[3] a jurisprudence on economic and social rights that is becoming as analytically sophisticated as more traditional constitutional jurisprudence such as free speech or privacy. The starting point of this development is that many constitutions entrenched after World War II—a significant proportion of present-day examples— contain a number of economic and social rights. These are recognized as ''directive principles of state policy,'' ''institutional guarantees'' implicitly protected by rights to life or equality, or stand-alone fundamental and enforceable law.[4] They are subject to progressive realization clauses, or to other forms of limitation. In many cases, such rights are directly drafted from the economic and social rights of the Universal Declaration of Human Rights. From this starting point, the rule-of-law projects, legal transplants, transnational judicial dialogue, and geopolitical shifts that have occurred since the 1990s, and which have contributed to the dynamic mutual relevance of international and comparative law, have accelerated their litigation.

Typologizing these developments, according to the stances of judicial review deployed, and the more or less interventionist remedies awarded,[5] helps us understand how such rights can deliver material change in their more deliberative, less concrete, form. To give brief substance to this typology, let me give an example. A city attempts to evict occupiers from a public building, citing health and safety concerns. The eviction would render them homeless. The occupiers make a claim about their constitutional right to have access to housing. How might a court respond? Should it dictate what type of housing should be in place, rejecting the attempts of the city to evict and even creating greater obligations to improve the living conditions? With such a *managerial* orientation, should it prescribe that construction materials be fireproof, or that there be a clear proximity to clean water? Should it manage these reforms, by issuing timelines and supervising their compliance? Alternatively, should a court reject the claim, citing institutional constraints on judicial powers, or appropriate deference

[2] I unpack this claim in detail in KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012).

[3] MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008).

[4] *See, e.g.*, S. AFR. CONST. 1996 §§ 26–29; COLOM. CONST., ch 2; GHANA CONST., 1992, ch. 6: INDIA CONST. art. 21, Part IV; GERMAN BASIC LAW, art 1, 19–20.

[5] For diagrams of this typology, see YOUNG, *supra* note 2, esp. at 194.

to the greater information and resource assessments available to the city? By acting *deferentially*, a court is acting according to a relatively traditional application of the separation of powers. Or, as another alternative, should it attempt to signal its disapproval by issuing a declaration of unconstitutionality, but give no further remedy, leaving it to voters to register their preferences in the next election? This *conversational* stance allows representative democracy to take its course while exacting a dialogical pressure on the separation of powers.

The factual spine of this example did come before the South African Constitutional Court—and it indeed found that the right to housing had been infringed by the city of Johannesburg.[6] Yet rather than pursuing the managerial, deferential, or conversational approaches mentioned above, the court instituted an assessment of the reasonableness of the city's eviction decision, and designed a new remedy, in terms I describe as *experimentalist*. The court's remedy of ''meaningful engagement'' required the parties to negotiate an appropriate solution. The resulting negotiations unearthed some interesting features of the parties' claims: the occupiers were greatly concerned with how their relocation would take place, as well as the new rental terms of temporary accommodation. This deliberative stance recalls the literature on new governance that emphasizes the disentrenchment of public institutional power by litigation.[7]

Why courts might act according to these different modes of review and remedy is grounded in a complex mix of constitutional design, standing rules, substantive or procedural interpretations of rights, remedial options, common- or civil-law inherited traditions, and constitutional culture. In Colombia, for example, the Colombian Constitutional Court has drawn on a constitutional commitment to a ''social state-rule of law'' to order a radical transformation of the health care system.[8] In managing the pressure of hundreds of thousands of individual *tutela* health rights claims, the court has gathered information, prepared large-scale public hearings, dictated policy and managed resources, in order to deliver on a substantive, core right to health which borrows from international law.[9] In India, the Supreme Court has acted more experimentally, such as by appointing court masters to liaise with right-to-food campaigners to mobilize across schools and other public institutions in different Indian states. And in the United Kingdom, the pressure of the ''declaration of incompatibility'' processes of the Human Rights Act 1998 (UK) (and its implementation of the European Convention on Human Rights) has effected some parliamentary-led change to housing reforms.[10]

The ''success'' of these developments is hard to measure. Often, a courtroom ''win'' for economic and social rights can result in a long-term loss as backlash ensues. And a ''loss'' can prove to be a remarkably effective mobilizing tool against maldistributions in food, health, housing, education, or social security. The often disheartening results of the realist measure of how human rights ''make a difference''—which might point to, for example, a middle-class bias in economic and social rights litigation—may be reversed by a more interpretative measure of changes in the political discourse of rights, legal consciousness, and social relations. As economic and social rights become more institutionalized in international law, comparative experiments in their constitutional forms are more relevant than ever.

[6] Occupiers of 51 Olivia Road v. City of Johannesburg, 2008 (3) SA 208 (CC) (S. Afr.).

[7] Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

[8] T-760/08 (July 31, 2008) (CC) (Colom.)

[9] Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes of the Right to Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 801 (2013).

[10] These examples are all dealt with in greater detail in YOUNG, *supra* note 2, ch 7.