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Economic and social rights force us to pressure a return to the state

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Constitutional entrenchment is only part of the battle for recognition of economic and social rights, as many South African cases have made clear.

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In 2014, five-year old South African Michael Komape fell through a broken toilet—a rudimentary pit outfitted by his school—and drowned. His case was taken up by "SECTION27", a social justice organization in South Africa, which campaigns for constitutional rights to dignity, equality, education, health care, social assistance, food and water (the latter rights are entrenched in the Constitution's section 27). Pursuing both a #JusticeForMichael political campaign and litigation, SECTION27 won its argument about government liability, but failed in securing a remedy for Michael's traumatized family. The

court issued an order requiring the government to develop a plan to fix sanitation in the Limpopo province's schools within three months. As advocate Mark Heywood has written, the limits of this remedy for Michael's family provoked outrage and an appeal has just been heard.

The Komape case is emblematic of the complex interaction that can occur when economic and social rights are part of an express constitutional undertaking. South Africa's Constitution is the poster child for this kind of commitment, but all governments, everywhere, can be said to have these duties, from both the perspective of human rights and of constitutional theory. And indeed, the case itself points to three persistent challenges that accompany these duties—first, of the place of litigation amongst broader human rights campaigns; second, of the tensions between complex and individual remedies in even successful economic and social rights cases; and third, of hoary assessments of the overall impact of campaigned-for rights and duties under conditions of government dysfunction and extreme economic and social inequality.

The advocates of #JusticeForMichael lead a broad campaign that was parallel to, consistent with, but not dependent on, the litigation.

Economic and social rights, increasingly central to human rights strategies, have always had legal-constitutional dimensions. While such rights are often tied to the material promises of the Universal Declaration of Human Rights of 1948, their links with constitutional law go back further. It was 1917 when economic and social rights received their first inscription in a constitutional text (of Mexico), and since the end of the Cold War, such rights have surged into the world's basic laws. Some economic and social rights, such as the rights to education, health care, and social security, are now standard for the majority of the world's constitutions. As my recent edited collection, *The Future of Economic and Social Rights* demonstrates, other rights, such as the right to housing, water, or most recently a healthy environment, have been increasingly formulated by constitutional drafters, political coalitions, social movements and litigants. The US constitution is an obdurate outlier from recent trends. Nonetheless, as Michael Rebell and Malcolm Langford in the same collection make clear, the politics of economic and social rights remains vibrant at the state constitutional level of the US, especially around educational guarantees. This politics is also present, if even more contested, at the federal level, visible in various US-based advocacy campaigns around rights to health care, education, and housing.

The choice between structural remedies and individual responses is not an either/or one: courts can issue both proactive and systemic suggestions, as well as reactive and individual compensation.

But constitutional entrenchment is only part of the battle for recognition of economic and social rights. As a long line of South African cases make clear, and as evidence from India, Colombia, Brazil and other jurisdictions confirm, hard questions arise whenever such commitments are "legalized". First comes the concern that lawyers—and litigation—might

take over a human rights campaign, and co-opt or crowd out social movements and broader democratic action. This concern is longstanding, and seasoned campaigners are often alert to it. For example, the advocates of #JusticeForMichael lead a broad campaign that was parallel to, consistent with, but not dependent on, the litigation. While it utilized the publicity afforded by the case (and often brought legal arguments to maximize such effects), the campaign itself was never hostage to a court win. South Africa of course has a particularly developed history of public interest law—and the setting for a perfect storm, in Jason Brickhill's words—to support strategic litigation. But it would be wrong to think that South Africa is the only jurisdiction where law and politics meet, oftentimes, in court.

The need to work with—and reform—recalcitrant, dysfunctional or corrupt governments is hardly new to human rights advocacy.

Secondly, in any enforcement context—of entrenched rights or recognized duties or both—there is a concern with remedies. After longstanding US experience, complex, systemic, structural orders—the kinds of orders that could desegregate a school or reform a prison—were thought to provide the nearest approximation of remedy. This type of structural reform litigation has influenced campaigns for human rights in other domestic, regional and international settings. Yet the Komape case shows how the systemic orders in South African jurisprudence—the demand of a government plan of action, a declared change to government programmes, or an alteration of the background privileges conferred by property rights—can come at a cost. Indeed, it confirms that the choice between structural remedies and individual responses is not an either/or one: as Kent Roach's recent work shows, courts can respond in "two tracks" and issue both proactive and systemic suggestions (with timelines or suspended orders), as well as reactive, and individual compensation.

Thirdly, economic and social rights rely on a theory of government responsibility for human rights (which UN principles that address corporate responsibility confirm). But as well as responsibility, they also rely on a theory of government ability. This reliance is misplaced, however, when a long legacy of under-resourced, absent, and dysfunctional government has brought about the very rights-infringement in question. One can hardly find a government untouched by this criticism. Yet the need to work with—and reform—recalcitrant, dysfunctional or corrupt governments is hardly new to human rights advocacy. The campaign to fix school toilets in Limpopo province is, in many ways, the current challenge of government and governance in microcosm: layers of governmental action and responsibilities between various overlapping authorities, and finding the pressure points to force action and accountability at each.

One might argue that concentrating our attention on government duties is a lost game. In our world of globalized power (and capital), neoliberal market fundamentalism, state capture, gross material inequalities, and an ever more worrying return to nationalism and nativism, it is tempting to depart from the nation-state unit of analysis. Tempting, but

counterproductive. Just as giving due respect to economic and social rights has unsettled our understanding of international human rights law, it has challenged previous understandings of constitutional rights, as primarily negative in form (i.e., as protecting spaces that the government could not invade) and as primarily counter-majoritarian (i.e., as giving voice to minorities and others unrepresented by majoritarian democratic institutions).

Our vision of the state need not be so diminished. Economic and social rights force us to pressure a return to the state, at least in part, and articulate the duties of government within a rights vision.

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