HARVARD INTERNATIONAL LAW JOURNAL

PRINT RESPONSE: APRIL 2012

Online Volume 53

A Response to David Landau

Responding to David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012).

Mark Tushnet*

David Landau's article, *The Reality of Social Rights Enforcement*,[1] is an important contribution to a growing literature on the judicial role in enforcing social and economic rights. He joins others in noting that debate has ended over whether constitutions should include such rights and whether, if included, those rights should be judicially enforceable.[2] Not "whether," but "how" is the question now on the table among serious scholars and judges.

* William Nelson Cromwell Professor of Law at Harvard Law School.

[1] David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189 (2012).

[2] The United States is an exception for two perhaps related reasons. First, the U.S. Constitution is an old one, written before the political and ideological developments that fueled the inclusion of social and economic rights (and, now, cultural and environmental rights) in more recently written ones. Its text provides fewer resources for developing

Landau's article presents the "how" question in a new light. Drawing together numerous strands in the literature, he helpfully identifies four remedial forms—individual actions primarily seeking individual-level affirmative relief,[3] negative injunctions, weak-form review, and structural injunctions—and assesses their likely effects on the distribution of the material goods that social and economic rights are designed to secure.[4] Proponents of such rights seek them primarily to ensure that the least advantaged in society live in material conditions consistent with basic human dignity.

As Landau observes, effective implementation of social and economic rights for the least advantaged faces formidable obstacles.[5] Many of the world's poorest nations have severely limited internal economic resources.[6] Political obstacles are substantial even when resources are available or could be made available through tax increases. Those already advantaged typically have a favored position in national politics, allowing them to block redistributive initiatives (whether from the legislature or from the courts). The least advantaged may be quite numerous, but they face resource constraints in mobilizing politically or in litigation. The prospects for achieving substantial improvements in the material conditions of the least advantaged through political or judicial action are inevitably small.[7]

One might think that judicial resources should be husbanded for use in the most favorable conditions for enforcing social and economic rights. Yet, as Landau persuasively argues, individual actions are likely to provide social and economic rights

---

constitutional arguments for judicially enforceable social and economic rights. "Fewer," though, does not mean "none," and Cass Sunstein has suggested that only Richard Nixon's narrow victory over Hubert Humphrey in 1968 prevented the Supreme Court from crafting a substantial jurisprudence of social and economic rights. CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 149–72 (2004). Second, the general weakness of the social democratic tradition in the United States, which is both political and ideological, has meant that advocacy of judicially enforceable social and economic rights has been limited.

[3] I assume that individual damage actions would have characteristics similar to those Landau associated with individual-level affirmative relief.

[4] Landau, *supra* note 1, at 201.

[5] *See generally* Landau, *supra* note 1.

[6] For that reason, typical formulations of social and economic rights refer to their *progressive realization within available resources*.

[7] I note that fairly strict market-oriented policies might be the best ones to achieve the progressive realization of social and economic rights, at least on the level of political and economic theory. Advocates for social and economic rights usually reject that theoretical case. Notably, even that case might commend some judicial intervention in support of market-oriented policies—of the sort typically associated in the United States with Lochner v. New York, 198 U.S. 45 (1905).

primarily for those in the middle classes, not for the least advantaged.[8] The reason is that those in the middle classes are more likely than the least advantaged to have the ability to mobilize the legal system in an individual action. They have the requisite knowledge and have access to legal assistance to bring these actions. In short, they have a better "support structure" for securing rights, to use political scientist Charles Epp's term.[9] Landau acknowledges that nongovernmental organizations and similar agencies, some associated with the state itself, can provide education about legal rights and legal assistance to the least advantaged.[10] However, the resources devoted to such efforts are unlikely to overcome the structural advantages the middle classes have in individual actions.

Negative injunctions have a limited impact as well. They can protect against the erosion of existing conditions. Negative injunctions can sometimes freeze the status quo to benefit the least advantaged, as in cases where the homeless and internally displaced persons have taken over unoccupied property as their homes. But, again structurally, the status quo is almost by definition unfavorable to the least advantaged.

That leaves weak-form review and structural injunctions as candidates for remedial forms to enforce social and economic rights for the least advantaged. Drawing on a study of Colombian jurisprudence (broadly understood) in cases involving internally displaced populations, Landau argues that structural injunctions have been more successful in Columbia than weak-form relief has been in South Africa.[11]

Landau's article advances our understanding of the remedial issues he discusses. But, I believe that there are some empirical and conceptual matters that require additional exploration. On the border between the empirical and conceptual is the Colombian experience itself. Conceptually, the distinction between weak-form and structural relief needs clarification. In what follows I argue, first, that the Colombian experience is more ambiguous than Landau represents, and second, that the ambiguity arises from difficulties in identifying metrics for determining when an intervention is successful and for defining the time-frame within which success should be measured.

---

[8] Landau, *supra* note 1*,* at 202–29.

[9] CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE ch. 3 (1998).

[10] *See* Landau, *supra* note 1, at 227.

[11] I think it important to note that, precisely formulated, the claim is not that structural injunctions are free from the middle-class tilt associated with individual actions and negative injunctions. As Landau observes, the Colombian mortgage restructuring litigation was structural in form, benefiting the middle classes far more than the least advantaged. Rather, the claim is either (a) that the degree of "tilt" associated with structural injunctions is smaller than that associated with the other remedial forms (that is, the ratio of idle-class to least-advantaged successes is greater with structural injunctions), or (b) that structural injunctions are successful above some threshold that individual actions and negative injunctions do not reach. *See id.* at 216–17.

I. EVALUATING THE COLOMBIAN EXPERIENCE

Landau argues that the Colombian displaced persons litigation has been reasonably successful.[12] One of the co-authors of the study on which he relies has offered what I think is a more tempered assessment.[13] With respect to material conditions, Rodriguez-Gavarito writes:

> The latest figures show that the situation has changed little: although access to education and health care has dramatically improved, benefitting nearly 80% of IDPs [internally displaced people], conditions with regards to all other [social and economic rights] continue to be unsatisfactory. To illustrate, 98% of IDPs live in poverty, only 5.5% have adequate housing, and only 0.2% of displaced families received the legally mandated emergency humanitarian assistance in the months immediately following their forced displacement. Moreover, forced displacement continues at exorbitant levels: 280,000 people were uprooted in 2010. . . .[14]

Rodriguez-Gavarito argues that the displaced persons litigation had a number of beneficial effects,[15] but an apples-to-apples comparison between Colombia and South Africa with respect to the actual improvement of material conditions suggests a more qualified assessment than Landau provides.

The conceptual difficulties with assessments like Landau's are temporal and causal. One temporal difficulty in assessing remedial outcomes is clear: we need some metric to determine how long we should wait before evaluating a remedy's success. Regardless of the form used, judicial orders dealing with social and economic rights will not transform material conditions upon their announcement. In this, they differ from individual actions. A litigant who wins a case seeking access to a specific

---

[12] Landau, *supra* note 1, at 223–29.

[13] César Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89 TEX. L. REV. 1669, 1686–88 (2011).

[14] *Id.* at 1687.

[15] These include an "unlocking effect" in "shak[ing] up state bureaucracies in charge of attending to the displaced population," a "coordination effect" in bringing several bureaucracies to focus on a single problem in a coordinated way, a "policy effect" in increasing the resources available to the target population, a "participatory effect" in enhancing the capacity of the target population to take part in the policy-making process directly and through NGO representatives, and a "reframing effect" in relocating the issues associated with displaced persons from the conceptual domain of "war's effect" to the domain of human rights. *Id.* at 1683–88.

medication will get that medication relatively quickly. But, material benefits in social and economic rights litigation will take time to reach their targets, even where the litigation is completely successful on its own terms. In my view, arguably the most successful litigation of this type was that involving the Delhi bus system.[16] There, litigants claimed that the pollution emitted by the city's buses violated their constitutional rights to life and health.[17] The relief they secured was an acceleration of the city's ongoing program to replace gasoline-powered buses with ones powered by natural gas. But, of course, the new buses were not put on the streets within days of the decision.

Further, we need some metric to measure success. Landau uses what could be termed "improvement in material conditions" as his metric.[18] But, improvement comes in degrees, and we need some standard for determining when an improvement is "enough" to count as a success. Landau treats the improvements in conditions of displaced persons along some dimensions—health and education—as "enough," even though improvements along other dimensions appear to have been small. Consider again the Delhi bus litigation, a fully implemented structural injunction. The air quality in Delhi probably improved somewhat as a result of the court's order, but it is unlikely that the order made the city's air crystal-pure. Is the improvement in air quality "enough?" The *Grootboom* case,[19] which Landau (with others) characterizes as a failure of weak-form review,[20] produced some acceleration in the provision of housing for those in desperate need—the remedy's target—even though Mrs. Grootboom and those she represented in the litigation never obtained replacement housing. Why was the acceleration not "enough?"

I do not mean to suggest that the time-frame and the metric for evaluating success can be chosen in some quasi-scientific way. The choice will inevitably involve judgment. My own is that the differences between outcomes under structural injunctions and under weak-form review are relatively small.[21] Landau offers two

---

[16] For a discussion of the litigation, see Lavanya Rajamani, *Public Interest Environmental Litigation in India: Exploring Issues of Access, Participation, Equity, Effectiveness and Sustainability*, 19 J. ENVTL. L. 292, 298–301 (2007).

[17] This formulation condenses a rather complex legal argument within the Indian constitutional framework, but the condensed version is sufficient for present purposes. I note as well that the litigation was treated as one involving social and economic rights, although it might also be characterized as involving environmental rights understood in a specific way.

[18] *See* Landau, *supra* note 1, at 239–41.

[19] Government of the Republic of South Africa and Others v. Grootboom and Others 2000 (11) BCLR 1169 (CC).

[20] Landau, *supra* note 1, at 196–98.

[21] By "relatively," I mean something suggested by a comment I once heard Charles Sabel make about what I regard as his version of weak-form review, destabilization rights: It is a miracle that anything happens at all. For the concept, see Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

Colombian case studies of structural injunctions and compares the (relative) success of the Colombian displaced persons litigation with the (relative) failure of the Colombian health care litigation.[22] He accounts for the differences by pointing to the different political contexts in which the decisions were located. I think this is more promising than a comparison between weak-form and structural relief. That is, I suspect that the variables that account for most of the variation in outcomes between South Africa and Colombia are political rather than the difference in the forms of relief.

That observation introduces my comments on some causal aspects of Landau's argument.[23] I begin with an observation about terminology. I find the distinction between weak-form and structural relief thinner than Landau seems to find it.[24] Indeed, in my own work I used U.S. structural litigation to illustrate one type of weak-form relief.[25] The difference between those forms on the one hand and individual actions and negative injunctions on the other is reasonably clear. Relief in individual actions and negative injunctions occurs almost immediately after a court issues a final order in the plaintiff's favor: medication is distributed to the winning litigant; evictions are halted. In contrast, relief in weak-form and structural injunctions occurs over a more extended period.

I take the difference between weak-form and structural injunctions to be that the latter are substantially more detailed and prescriptive than the former. The *Grootboom* remedy said to the government, "Come up with a plan to ensure that those in desperate need receive housing relatively quickly." That is a weak-form remedy. Had the order been, "Come up with a plan to build [a specified number of] housing units in the next fiscal year for those in desperate need," it would have been more like a structural injunction. Even more so had the order been, "Build those units next

---

Sabel and Simon draw the term from Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 600 (1983).

[22] Landau, *supra* note 1, at 216–37.

[23] I merely note a terminological point. I introduced the term "weak-form review" to identify an institutional "genus" in which courts and legislatures interacted over constitutional questions within a relatively compressed time frame, and within that genus I identified a number of "species," including the Canadian notwithstanding clause and the kinds of relief with which Landau is concerned. Even were Landau's evaluation of weak-form *relief*'s failures in securing social and economic rights correct, that would not necessarily undermine the normative case for other species of weak-form review (although I agree that it would cast some inquisitive light on that case).

[24] *See* Landau, *supra* note 1, at 201.

[25] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 254–56 (2008). The argument is that weak-form structural relief might be transformed into strong-form structural relief, which of course presupposes that there *is* something properly described as weak-form structural relief. *Id.*

year."[26] The extended time-frame for compliance distinguishes these remedies from individual actions and negative injunctions; the degree of generality or specificity distinguishes between weak-form and structural remedies.

As Landau notes, structural injunctions are rare outside the United States.[27] I believe that the U.S. experience indicates that structural injunctions typically begin as weak-form injunctions with little detail, and Landau's account of the Colombian displaced persons litigation suggest that the same might be true there. If so, the contrast he draws between the two remedial forms[28] may be overdrawn, or may reflect temporal rather than analytical differences.

The specificity that transforms weak-form remedies into structural injunctions occurs for two reasons.[29] Political resistance leads to judicial frustration as the courts observe what they regard as foot-dragging. Judicial frustration leads to increasing specificity, again to make monitoring compliance easier. In addition, courts observe how their decrees are being implemented and learn about particular strategies that work as well as those that work less well. As experience accumulates, more detailed decrees become possible.

II. THE CASE FOR WEAK-FORM REMEDIES

With the preceding observations in hand, I can restate, in summary form, the case for weak-form remedies in cases involving social and economic rights. For present purposes, the case begins by noting that individual actions generate bureaucratic resistance; structural injunctions generate political resistance. Weak-form remedies try to draft—or, to use a term Landau does, cajole[30]—the bureaucracies and political actors into supporting policies that they would not have adopted on their own.

Bureaucracies resist individual actions because the litigation injects substantial irrationality into bureaucratic functioning. The right-to-medication cases are exemplary. Health-care bureaucrats have to allocate limited resources for medications. They do so by developing lists of medications for which the health-care system will pay. Where things are going reasonably well, the lists are based on relatively professional evaluations of costs and benefits. A judge deciding an individual case may have no idea of why the litigant has been denied a medication that would indeed be life-saving in the case at hand. Directing that the specific medication be made

---

[26] An alternative description of the difference is that observers (and courts) can determine relatively easily whether the government is complying with a structural injunction against it, whereas determining whether there is a violation of a weak-form remedy is more difficult.

[27] *See* Landau, *supra* note 1, at 203, 235.

[28] *See id.* at 199–201.

[29] For my prior discussion of this point, see TUSHNET, *supra* note 25, at 254–56.

[30] Landau, *supra* note 1, at 224.

available disrupts the cost-benefit based ordering of the list the bureaucracy has developed. The bureaucracy can deal with one disruption, but not all the disruptions resulting from large numbers of individual actions.[31]

Of course, things may not always be going reasonably well. The bureaucracy may be too slow moving, for example, updating its lists infrequently or responding too slowly to developments in medical practice. Or, the bureaucracy may have become corrupted, either in the ordinary financial sense or in the sense used by information-technology specialists to describe a system that is no longer functioning according to its initial principles. A bureaucracy corrupted in the latter sense would be trying but failing to perform rational cost-benefit calculations to devise its list of medications. The remedy for those problems ought to be a structural injunction directed at the bureaucracy's operating procedures, rather than individual actions directed at its decisions about particular medications.

Structural injunctions, though, generate political resistance. I think it important to stress that the resistance does not necessarily come from a concern that such injunctions will consume too many resources, although that may play some role. As Landau shows, in the aggregate, individual actions can be quite expensive.[32] Another source of resistance is that structural injunctions deal only with one sector—the litigation's target—whereas politicians are responsible for many sectors. A structural injunction about health care may "work" to improve the health-care bureaucracy's provision of health care, but implementing the injunction may consume resources that politicians would prefer to devote to housing policy, and from the point of view of social and economic rights, health does not have obvious priority over housing.

The case for weak-form remedies keeps these difficulties in mind. With a bit of overstatement, it could be said that weak-form remedies are designed to turn bureaucratic and political resistance around, to draft the bureaucracies and the politicians into supporting a court-devised policy. So, for example, a weak-form remedy aims to improve a bureaucracy's operation *on its own terms*. That is, by ensuring that the bureaucracy operates according to policies that are rational within the bureaucracy's own framework.[33] Landau's example of Acción Social suggests how politicians can be drafted into the courts' service as well.[34] A politician can create a bureaucracy to do what the court requires or assign the task to an existing agency and

---

[31] I note, though, that even individual litigation can indirectly affect the bureaucracy by forcing it to restructure its list, simply to reduce the harassment it experiences from the courts.

[32] *See* Landau, *supra* note 1, at 212.

[33] An order to update the list of medications for which the system will pay is rational within the bureaucracy's framework, for example.

[34] *See* Landau, *supra* note 1, at 227–28.

then claim credit for whatever successes accrue.[35] More abstractly, dialogic remedies give politicians some "buy-in" on the policies they are called upon to implement. The politicians might not have gone down the road the courts laid out, but by engaging in dialogue with the courts, those politicians who did might have become committed to those policies, at least to some extent.

Another advantage of weak-form remedies has been emphasized by Sabel and his colleagues: their iterative nature.[36] That is, the dialogue takes the form of a tentative decision to implement a specific policy followed by a period in which the successes and failures of that policy can be observed, followed in turn by the next stage of judicial re-evaluation and transformation of the initial policy. That transformation could amount to mere tweaking, but it could be more substantial—for example, substituting something quite new for a large, but failed, component of the initial remedy. Iteration of this sort allows courts to learn what works and what does not, and learning matters in areas of complex social policy. A court can be reasonably confident in ordering that the government give demonstrators a permit for a protest against the government's housing policy, for instance.[37] A court, upon its first encounter with a case challenging the government's overall housing policy as inadequate to deal with those in desperate need, would be unlikely to be able to write a sensible and workable detailed structural injunction. It simply would not know enough about the issue: what types of building materials should be used, how quickly different types of shelter can be built, and the like. Weak-form injunctions enable learning by the courts, while embedding the courts' general policies within the implementing bureaucracies. Here too, Landau's Colombian case study seems to me consistent with the case for weak-form remedies rather than a challenge to that case.[38]

III. CONCLUSION

To summarize, the distinction between weak-form and structural injunctions may not be as sharp as Landau suggests. The successes of structural injunctions that he describes do not seem to me dramatically different from the failures he ascribes to weak-form injunctions: both types of remedies can sometimes achieve something but rarely can achieve a great deal, and politics rather than remedial form seems to me likely to explain why. Further, to my eyes, the Colombian displaced persons case study

---

[35] And, perhaps equally important, politicians can disclaim failures as the result of policies forced on them by the courts.

[36] *See, e.g.*, Sabel & Simon, *supra* note 21, at 1081.

[37] Even here learning can occur, especially as courts accumulate experience about the kinds of problems actually associated with demonstrations rather than those merely predicted to occur. For a brief discussion, which someone ought to develop, see TUSHNET, *supra* note 25, at 67–69.

[38] *See* Landau, *supra* note 1, at 240–47.

seems to examine a weak-form remedy in its early stages, with a bit of evolution thereafter, rather than a full-fledged structural injunction.

My comments may seem merely terminological. Landau describes as a structural injunction something that I would describe as a weak-form remedy. Terminological clarification is important for scholars, but there might be implications beyond terminology. Landau's argument may have two audiences in the policy community: lawyers seeking judicial enforcement of social and economic rights and judges dealing with such cases. Again, the U.S. experience indicates that lawyers seek decrees with as much specificity as possible. The motivation at the very least, is to ease the task of monitoring compliance. The more specific, the easier it is to determine whether the decree is being carried out. But, of course, the lawyers will accept whatever decree they can get out of the courts. The judicial audience might take Landau's argument as the basis for concluding that the judges ought to skip the weak-form stage and move directly to the structural injunction. Doing so, though, might lose some of the buy-in and learning advantages of weak-form remedies that I have described. And, notably, my previous discussions of weak-form remedies have not ruled out in principle the possibility that weak-form remedies might sometimes be a way station to stronger ones. To that extent, the distinction between weak-form and structural injunctions becomes even thinner.

As I have noted, Landau says that the Colombian structural injunctions cajoled policy-makers into action. "Cajole" is a word in a family of words about conversation and, yes, dialogue. As I read it, Landau's article is an elaboration rather than a critique of the case for weak-form remedies. However read, though, it is an important contribution to scholarship on the judicial enforcement of social and economic rights.