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## ARTICLES

### CONSTITUTIONAL ROPES OF SAND OR JUSTICIABLE GUARANTEES? SOCIAL RIGHTS IN A NEW SOUTH AFRICAN CONSTITUTION

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This article originally took the form of a position paper prepared for the Executive and Constitutional Committees of the African National Congress (July 23, 1990). While we have attempted to refine our arguments and, in doing so, have changed a considerable portion of the text, the basic arguments have not changed.

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## INTRODUCTION

Recent historic developments in South Africa signal the potential establishment of a constitutional democracy upon the ashes of apartheid. The African National Congress has released a draft Bill of Rights calling for the constitutional entrenchment of fundamental human rights<sup>1</sup> and has entered into negotiations with the ruling National Party government in an effort to effect a fundamental transformation in the structure of the South African government.<sup>2</sup> The purpose of this Article is to bring to international attention and defend the African National Congress's decision to attempt to include certain social rights in a new South African constitution.<sup>3</sup> We hope to engender international academ-

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<sup>1</sup> See *A Bill of Rights for a Democratic South Africa—Working Draft for Consultation*, 7 S. AFR. J. HUM. RTS. 110, 110-23 (1991) [hereinafter *ANC Working Draft*] (noting that the released draft is not a final document and, by the time of this Article, will have been subjected to scrutiny and some revision through a series of conferences and workshops); see also Nicolas Haysom, *Democracy, Constitutionalism and the ANC's Bill of Rights for a New South Africa*, 7 S. AFR. J. HUM. RTS. 102, 102-09 (1991) (outlining some of the provisions of the draft Bill of Rights); Albie Sachs, *From the Violable to the Inviolable: A Soft-Nosed Reply to Hard-Nosed Criticism*, 7 S. AFR. J. HUM. RTS. 98, 98-101 (1991) (responding to various criticisms of the draft Bill of Rights).

For further insight into the reasoning behind this document, see ALBIE SACHS, *PROTECTING HUMAN RIGHTS IN A NEW SOUTH AFRICA* (1990); Kader Asmal, *Constitutional Courts—A Comparative Survey*, 24 COMP. INT'L L.J. S. AFR. 315 (1991). Both Sachs and Asmal are members of the ANC Constitutional Committee.

<sup>2</sup> On February 2, 1990, South African President F.W. de Klerk committed the government to a process of constitutional reform involving all South Africans regardless of race. See *Excerpts from Address by de Klerk on Change*, N.Y. TIMES, Feb. 3, 1990, § 1, at 6. As of mid-September, 1992, these constitutional negotiations had been suspended as a result of action initiated by the ANC and allied parties to force the incumbent National Party government of de Klerk to cease alleged involvement in brutal and massive violence that has plagued various black communities and to provide adequate police protection against such violence. In addition, the ANC continues to push for a commitment to a constitutional Constituent Assembly as both a precondition to and an outcome of any return to the suspended multi-party negotiations. See *The World*, HUM. RTS. TRIB., Summer 1992, at 15, 17.

<sup>3</sup> Social rights refer, at a minimum, to rights to adequate nutrition, housing, health, and education. See *infra* text accompanying notes 16-21.

ic and political debate concerning the limits and possibilities of entrenching social rights in a new South African constitutional order,<sup>4</sup> as well as to offer thoughts that might be of broader relevance to other societies adopting or renewing their constitutions. The goal is to demonstrate why social rights, or a select range of these rights which best reflect the fundamental needs, aspirations, and historical experiences of the majority of South Africans, should and can receive constitutional entrenchment, including protection through judicial review.

Five preliminary points must be stressed. First, reference to judicial protection of constitutional guarantees does not imply that the courts' traditional structures, composition, procedures, and methodologies should be left intact. This Article argues that some creative restructuring of the methodology and procedures of the judiciary is necessary.<sup>5</sup> One of the risks associated with the entrenchment of constitutional guarantees is that these guarantees are subject to a process of interpretation by an elite body of individuals who are in a position to impose their political and ideological world-views on South African society through interpretive acts of understanding.<sup>6</sup> One might have good reason to be

<sup>4</sup> Recent indications suggest that the question of the justiciability of social rights is a live and still-undecided question:

South Africa is experiencing an intensification of the debate on the protection of fundamental rights. Although it seems as if the major political actors agree in principle that a justiciable bill of rights be included in a new constitution, differences of opinion on the substance of such a bill of rights are apparent. One issue that still has to be agreed upon, is the way in which social, economic and cultural rights can be protected in a future bill of rights. . . . The justiciability of socio-economic rights, or so-called second generation rights, is the subject of wide-ranging discussion . . . .

Bertus de Villiers, *Directive Principles of State Policy and Fundamental Rights: The Indian Experience*, 8 S. AFR. J. HUM. RTS. 29, 29 (1992).

<sup>5</sup> See, e.g., Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 714-16 (1990) (arguing that the adjudicative process as traditionally conceived is antithetical to progressive constitutionalism because adjudication is corrective and authoritarian, persistently requires a show of positive authority to prove the truth of propositions, and is inclined to maintain a status quo legal ordering rather than exploring interpretive possibilities and redistributive solutions). For this reason, we advocate a methodology of constitutional adjudication that attempts to ensure that the judiciary is a receptive site for the telling of human stories of oppression.

<sup>6</sup> This does not amount to a claim that judges intentionally favor one social group over another, or that judges are unconstrained by their professional roles or by the legal texts that they apply. It is, however, a recognition that the meaning of a legal text is generally underdetermined by its own contents, and that "[no] set of legal institutions or prescriptions exists apart from the narratives that locate it and give it

wary of entrusting the interpretation of a new, socially progressive constitution to a South African judiciary that historically has practiced and tolerated racism in its courtrooms.<sup>7</sup> It is imperative

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meaning." Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983); see also Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1893-911 (1987) (expanding upon the interpretive approach to legal scholarship proposed by Cover). These narratives are found in the various normative systems of society, and foremost in the normative universe of the legal profession and the judiciary. See Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 814-53 (1988) (analyzing the influence of socially patterned practices upon behavior in the legal world).

This is particularly evident in the constitutional field in which vague standards are applied to complex fact situations. See Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272-73 (1990) (noting the Supreme Court's continued loyalty to the conception that affirmative obligations do not attach to enforceable constitutional rights); West, *supra* note 5, at 641-42 (noting the effect of recent appointments of conservative judges to the United States Supreme Court). The normative world of the judiciary as a profession has tended to reflect the homogeneous, conservative backgrounds of its members, who in western societies have been almost exclusively financially privileged straight-acting white males. See RICHARD A. POSNER, *SEX AND REASON* 1 (1992) (arguing that "judges know next to nothing about [sex] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much . . . screened out of the judiciary" and that this leads to uninformed decisions regarding sexual privacy); Patrick Macklem, *Of Texts and Democratic Narratives*, 41 U. TORONTO L.J. 114, 131-32 (1990) (describing the theme that the judiciary is antidemocratic and inimical to citizen participation); Joel Bakan, *Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)*, 70 CAN. BAR REV. 307, 318-23 (1991) (listing the factors that contribute to the elitism of the judiciary); see also J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 25-31 (3d ed. 1985) (providing numerical breakdown of the socioeconomic backgrounds of senior British judiciary); Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 663-67 (1985) (noting that judicial decisionmaking is inevitably affected by the individual's interest and experience); Andrew Petter, *The Politics of the Charter*, 8 SUP. CT. L. REV. 473, 479-502 (1986) (demonstrating that due to the nature of the judicial system, the Canadian Charter of Rights and Freedoms has failed to advance the interests of disadvantaged Canadians); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799, 948 (1979) (discussing how judges' homophobia affects their understanding of the constitutional protection of sexual privacy).

<sup>7</sup> See DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: SOUTH AFRICAN LAW IN THE PERSPECTIVE OF LEGAL PHILOSOPHY* 49-51 (1991) (discussing the response to apartheid of the South African judiciary); L.J. Boulle, *Constitutional Law in South Africa 1976-1986*, in *LAW UNDER STRESS: SOUTH AFRICAN LAW IN THE 1980S* 55, 65 (T.W. Bennet ed., 1988); Hugh Corder & Dennis Davis, *The Constitutional Guidelines of the African National Congress: A Preliminary Assessment*, 106 S. AFR. L.J. 633, 642 (1989) (noting that "the South African judiciary over the past eighty years of segregationist and apartheid rule has inspired little confidence as a protector of basic rights"); M.G. Cowling, *Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss*, 3 S. AFR. J. HUM. RTS. 177, 177 (1987) (stating that

that the process by which meaning is given to general constitutional language be open to the multiplicity of divergent voices and views that comprise South African society and that the composition and methodology of the South African judiciary be sensitive to the fact that judicial review is susceptible to ideological capture.<sup>8</sup>

Second, we are not claiming that judicial protection of individual social and economic rights is the optimal or only way to achieve social justice.<sup>9</sup> As with other constitutionalized rights, it is fruitless

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“the present legal system is perceived by the majority of South Africans, and the international community in general, as being patently unjust”); John Dugard, *The Quest for a Liberal Democracy in South Africa*, in *LAW UNDER STRESS*, *supra*, at 237, 254-55 (noting that the suitability of the South African judiciary has been challenged on the grounds that all its judges are white); John Dugard, *The Jurisprudential Foundations of the Apartheid Legal Order*, 18 *PHIL. F.* 115, 122 (1986-87); A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 *N.Y.U. L. REV.* 479, 514-21 (1990) (presenting extended examples of racist bias on the part of the South African judiciary); Raymond Suttner, *The Ideological Role of the Judiciary in South Africa*, in *LAW AND JUSTICE IN SOUTH AFRICA* 81, 83 (John Hund ed., 1988) (noting “that the judiciary does play a part—ideologically and through repression—in the social struggles over and within the South African state”). See generally JOHN DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* (1978) (presenting the factors that combined to create an “apartheid jurisprudence”).

For an excellent discussion of the implications of the ideological make-up of the South African judiciary for the best form of court structure for enforcing any new Bill of Rights, see Donald Nicolson, *Ideology and the South African Judicial Process—Lessons from the Past*, 8 *S. AFR. J. HUM. RTS.* 50 (1992).

<sup>8</sup> The danger of an inaccessible process is not simply that the complaints of the excluded will be ignored but that those with privileged access to the ear of the courts will inevitably set the agenda for elaborating the normative concerns to be addressed by constitutional rights and for developing the doctrinal content of those rights. See Petter, *supra* note 6, at 486 (“The institutional barrier created by money not only denies the disadvantaged access to our courts; in doing so it serves to shape the rights themselves.”).

<sup>9</sup> A great deal has been written in the United States about the appropriateness of traditional adjudicative procedures and institutions for implementing social change. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244-72 (1962) (noting that the school segregation cases demonstrate that neither the courts alone nor the federal government alone can find and enforce workable solutions); DONALD L. HOROWITZ, *THE COURT AND SOCIAL POLICY* 4 (1977) (“Judicial activity has extended to welfare administration, prison administration, and mental hospital administration, to education policy and employment policy, to road building and bridge building, to automotive safety standards, and to natural resource management.”); MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* at xi, 75-122, 147-74 (1982) (describing the role of the courts in educational policymaking and providing an empirical analysis of holdings in New York and Chicago); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281, 1298 (1976) (“The centerpiece of the emerging public law model is the decree [which] seeks to adjust future behavior, not to compensate for past wrong.”); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural*

and even dangerous to look to the courts for the first and last word on any matter concerning the vindication of fundamental societal values.<sup>10</sup> Although the judiciary can spur societal reform, the realization of gains in the area of social justice, as South Africans are well aware, is more often than not the result of years of grassroots organizing by individuals and social movements committed to social and economic justice.<sup>11</sup> Invariably, the law reflects the outcome of struggles in economic, social and political arenas. Constitutional adjudication or litigation under a new constitution should not be viewed as the only site where South African aspirations for social justice vie for realization.

Despite the fact that constitutional adjudication is but one path available for the realization of social justice, a background assumption to our arguments is that it is as unfounded to place one's faith entirely in the realm of constitutional politics as it is to place it

*Change in Public Institutions*, 65 VA. L. REV. 43, 44 (1979) ("Courts have become the principal forum for the pursuit of structural reform by many groups most disaffected with the delivery of governmental services."); Gerald E. Frug, *Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 715 (1978) ("The most dramatic examples of this exercise of judicial power have occurred in the fields of corrections and care of the mentally ill and mentally retarded, fields in which a substantial portion of current budgets are now mandated not by legislative choice but by orders of lower federal courts."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 363-65 (1978) (discussing adjudication as a form of social ordering); Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1288-302 (describing the use of litigation to effect change in large and complex public institutions); Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 661-68 (1988) (presenting an overview of the general division of decisionmaking responsibility between the political organs and the courts).

<sup>10</sup> See generally Paul Brest, *The Thirty-First Cleveland-Marshall Fund Lecture: Constitutional Citizenship*, 34 CLEV. ST. L. REV. 175 (1986) (discussing the exclusion of viewpoints and the impoverishment of political discourse resulting from continuing constitutional debate in the courts).

<sup>11</sup> See Hugh Corder, *Crowbars and Cobwebs: Executive Autocracy and the Law in South Africa*, 5 S. AFR. J. HUM. RTS. 1, 25 (1989) ("[L]awyers must not confine their activities to the legal sphere, for there can be no legal form which achieves justice in a system whose social relations are built on injustice. The law, although a potential facilitator, has no magical transformative quality as such."). For a particularly apt illustration of this point in the South African context, see Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699, 719-38 (describing how the villagers of Driefontein challenged the government's plan to remove them from their homes, with a focus on how a lawyer and an organizer worked with the community to support this effort). See generally TONY PROSSER, TEST CASES FOR THE POOR: LEGAL TECHNIQUES IN THE POLITICS OF SOCIAL WELFARE 83 (1983) (stating that "in the field of social welfare the courts alone are most unlikely to be a useful vehicle for achieving social change").

entirely in the realm of constitutional adjudication.<sup>12</sup> It is possible, perhaps crucial, to see constitutional adjudication as one locus of struggle in a broader constitutional politics without succumbing to a view that equates constitutional adjudication with court-led reform. In our opinion, progressive critiques of constitutional adjudication have been overstated.<sup>13</sup> This view is supported by recent legal scholarship illuminating the strategic and symbolic importance of selective reliance on constitutional rights as part of broader political and social efforts.<sup>14</sup> According to this line of legal thought, even losses in the courtrooms can produce long-term victories.<sup>15</sup>

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<sup>12</sup> See Cass R. Sunstein, *What Judge Bork Should Have Said*, 23 CONN. L. REV. 205, 221 (1991) (advocating constitutional politics over constitutional adjudication in areas such as homelessness, malnutrition, and poverty).

<sup>13</sup> This is not to claim that they do not contain important insights. See, e.g., Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1572-81 (1984) (describing the way that existing legal thought both emerges from and helps to maintain the alienated character of the current social situation); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-94 (1984) (developing four related critiques of rights as discussed in contemporary American legal circles).

<sup>14</sup> See MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* 289-311 (1990); Amy Bartholomew & Alan Hunt, *What's Wrong With Rights?*, 9 LAW & INEQ. J. 1, 49-58 (1990); Joel F. Handler, "Constructing the Political Spectacle": *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899, 958-74 (1990); Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 J.L. & SOC'Y 309, 317-25 (1990); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 589, 593-98 (1986); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 553 (1986); Lucie E. White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861, 873-77 (1990).

In particular, there is also a body of work collectively referred to as critical race theory's counter-critique of the rights critique. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 323-30 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 406 (1987) [hereinafter Williams, *Alchemical Notes*]; Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Color*, 5 LAW & INEQ. J. 103, 103 (1987); see also Kimberlé W. Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1369-87 (1988) (expanding CLS to address the role of racism in society).

<sup>15</sup> See Schneider, *supra* note 14, at 592-93. In addition, Hunt provides an evocative example of how a legal loss can herald a victory for a social movement. "In current struggles over wife abuse, all those cases in which judges impose derisory sanctions are contexts which drive the movement forward because they provide instances of a



Third, "social rights" refer to those rights that protect the necessities of life or that provide for the foundations of an adequate quality of life.<sup>16</sup> The necessities of life encompass at a minimum rights to adequate nutrition,<sup>17</sup> housing,<sup>18</sup> health,<sup>19</sup> and education.<sup>20</sup> All of these rights provide foundations upon which human development can occur and human freedom can flourish.<sup>21</sup> In

dying discourse in which women 'deserve' chastisement by their husbands." Hunt, *supra* note 14, at 320.

<sup>16</sup> See *ANC Working Draft, supra* note 1, at 116-17, (Art. 10, "Social, Educational, Economic and Welfare Rights"). Article 10.3 requires the state to "establish standards and procedures whereby all men, women and children are guaranteed by law a progressively expanding floor of enforceable minimum rights, with special attention to nutrition, shelter, health care, education and income." *Id.*

<sup>17</sup> See *ANC Working Draft, supra* note 1, at 117 (Art. 10.7) ("In order to guarantee the right of freedom from hunger, the State shall ensure the introduction of minimum standards of nutrition throughout the country, with special emphasis on pre-school and school funding.").

<sup>18</sup> The ANC's Bill of Rights would require the State to:

dismantle . . . single-sex hostels and other forms of accommodation associated with [apartheid's] migrant labor system[,] to embark upon and encourage an extensive programme of house-building[, to] take steps to ensure that energy, access to clean water and appropriate sewage and waste disposal are available to every home, and to cease eviction . . . without [an] order of . . . court which shall have regard to the availability of alternative accommodation.

See *ANC Working Draft, supra* note 1, at 117 (Art. 10.8-10).

<sup>19</sup> See *ANC Working Draft, supra* note 1, at 118 (Art. 10.12) (requiring the state to "establish a comprehensive national health service . . . to provide hygiene education, preventative medicine and health care delivery to all").

<sup>20</sup> See *ANC Working Draft, supra* note 1, at 117 (second Art. 10.10) (requiring the state to ensure the existence of "free and compulsory primary education for all, . . . progressive expansion of access [to] secondary education, . . . progressive increase in access to pre-school institutions and institutes of vocational training and of higher learning, . . . [and] increasingly extensive [adult-education] facilities").

For an extended analysis of education in the South Africa context, see Johann van der Westhuizen, *A Post-Apartheid Educational System: Constitutional Provisions*, 21 COLUM. HUM. RTS. L. REV. 111, 135-37 (1989).

<sup>21</sup> It should be noted that the view that social rights are inalienable has been endorsed, at times, by the executive branch of the United States. In 1944, President Franklin Roosevelt, for example, called for a "second Bill of Rights," which would recognize among other things, rights to work, minimum income, health, education, and medical care. See 90 CONG. REC. 55-57 (1944) (statement of Franklin D. Roosevelt); see also Bert Lockwood, *Toward the Economic Brown: Economic Rights in the United States and the Possible Contribution of International Human Rights Law*, in *WORLD JUSTICE?: U.S. COURTS AND INTERNATIONAL HUMAN RIGHTS* 149, 152-59 (Mark Gibney ed., 1991) (sketching strategies for enhancing the protection of economic rights within the United States by reference to international human rights norms).

More recently, see the major 1977 statement on "Human Rights Policy" by the Carter Administration's Secretary of State, Cyrus Vance:

addition, such basic social rights should be conceptualized in terms of an entitlement both to be equal as humans and to be equal as members of society.<sup>22</sup>

A considerable number of other candidates for inclusion as social rights lie outside the immediate scope of this paper. Those in question are akin to the social rights reflected in the United Nations' International Covenant on Economic, Social and Cultural Rights.<sup>23</sup> In particular, rights related to income, notably the rights to adequately remunerated work and to social income security,<sup>24</sup> are both conceptually and practically critical to the realization of the

Let me define what we mean by "human rights." . . . [T]here is the right to the fulfillment of such vital needs as food, shelter, health care, and education. We recognize that the fulfillment of this right will depend, in part, upon the stage of a nation's economic development. But we also know that this right can be violated by a Government's action or inaction—for example, through corrupt official processes which divert resources to an elite at the expense of the needy, or through indifference to the plight of the poor.

Cyrus R. Vance, Human Rights Policy (Apr. 30, 1977) (transcript available in the Office of Media Services, Bureau of Public Affairs, Dept. of State), *quoted in* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 5 (1980).

There is an extensive literature that views these rights as part and parcel of universal human entitlement. See ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS (1982); FRANK R. SCOTT, *Expanding Concepts of Human Rights*, in ESSAYS ON THE CONSTITUTION: ASPECTS OF CANADIAN LAW AND POLITICS 353 (1977); CARL WELLMAN, A THEORY OF RIGHTS: PERSONS UNDER LAWS, INSTITUTIONS, AND MORALS (1985); Canadian Mental Health Ass'n, *Economic Policy and Well-Being*, in THE OTHER MACDONALD REPORT 80 (Daniel Drache & Duncan Cameron eds., 1985); Martha H. Good, *Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights*, 6 HUM. RTS. Q. 335 (1984); Susan M. Okin, *Liberty and Welfare: Some Issues in Human Rights Theory*, in HUMAN RIGHTS: NOMOS XXIII 230 (J. Roland Pennock & John W. Chapman eds., 1981); Gregory Vlastos, *Justice and Equality*, in THEORIES OF RIGHTS 41 (Jeremy Waldron ed., 1984).

<sup>22</sup> There are various treatments of what might be called citizenship theory, which seeks to ground entitlements and obligations in the values of societal participation, inclusion, and belonging in the wider community. In the context of social rights, see DAVID HARRIS, JUSTIFYING STATE WELFARE 50-61 (1987); RUTH LISTER, THE EXCLUSIVE SOCIETY: CITIZENSHIP AND THE POOR 62-66 (1990); Handler, *supra* note 14, at 966-67 (noting that "citizenship is about membership, the rights and obligations of those who are involved in the community"). See generally RALF DAHRENDORF, THE MODERN SOCIAL CONFLICT: AN ESSAY ON THE POLITICS OF LIBERTY, at ix (1988) (providing "an essay concerning the modern social conflict and the politics of liberty"); KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION, at ix (1989) (providing "an extended essay on the past and potential contributions of American law, especially constitutional law, to the definition of our national community").

<sup>23</sup> Adopted Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

<sup>24</sup> See *ANC Working Draft*, *supra* note 1, at 118 (Art. 10.13-15).

values underpinning the rights to nutrition, housing, health, and education. South Africans also should consider entrenching those rights that fall under the general rubric of freedom of association, including the right to join a trade union of one's choice, the right to bargain collectively, and the right to strike, as well as rights relating to workplace conditions, worker participation, skills-upgrade training, and transitional adjustment programs upon losing one's job.<sup>25</sup> Concerns of gender equality also must not be overlooked in the constitutional reform process.<sup>26</sup>

Traditional economic rights, such as freedom of contract, commercial rights, or classically conceived rights to private property are not part of our definition of social rights. Constitutionally entrenched economic rights often work to frustrate the establishment of conditions that social rights seek to advance.<sup>27</sup> It is true

<sup>25</sup> See *ANC Working Draft*, *supra* note 1, at 114-15, 118 (Arts. 6 & 10.13) (providing for workers' rights, including the right to form and join trade unions, the right to organize and bargain collectively, the right to strike and picket, and the right to work, including the right to technical and vocational training).

<sup>26</sup> See *ANC Working Draft*, *supra* note 1, at 115-16 (Art. 7) (providing that "men and women shall enjoy equal rights in all areas of public and private life," that "discrimination on the grounds of gender, single parenthood, legitimacy of birth or sexual orientation is prohibited," that "positive action shall be undertaken to overcome the disabilities and disadvantages suffered on account of past gender discrimination," that there shall be legal remedies for "sexual harassment, abuse and violence," and that "educational institutions, the media, and other social institutions shall be under a duty to discourage sexual and other types of stereotyping"); see also SACHS, *supra* note 1, app. 2 (reprinting "The ANC's Constitutional Guidelines for a democratic South Africa—proposed amendments after seminar on gender").

<sup>27</sup> The most notorious examples can be found in early twentieth century decisions of the United States Supreme Court placing a substantive gloss on the due process protection of the Fifth and Fourteenth Amendments to the Constitution. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (invalidating minimum wage legislation for women and children) (1923); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hours legislation for bakers); see also Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 882 (1987) (giving an overview of the *Lochner* era and warning against a constitutional interpretation that validates government's neutrality towards social ills); Ada Verloren van Themaat, *Property Rights, Workers' Rights and Economic Regulation—Constitutional Protection for Property Rights in the United States of America and the Federal Republic of Germany: Possible Lessons for South Africa*, 23 COMP. INT'L L. S. AFR. 53, 56-61 (1990) (performing comparative analysis).

Article 11 of the ANC Working Draft recognizes a right to acquire, own, or dispose of property, but Article 11.5 permits the state to take steps to overcome the effects of past discrimination in relation to enjoyment of property rights. See *ANC Working Draft*, *supra* note 1, at 118-19 (Art. 11). Compensation is required in the event of expropriation, although the state is authorized to control, use, or acquire property in accordance with "the general interest." *Id.* at 119 (Art. 11.11).

The question of property rights in South Africa goes beyond the issue of state "intervention" in the market economy and raises the problem of what should be done

that property rights can be conceptualized in a way that integrates them into a constitutional scheme which seeks to remedy economic and social disadvantage.<sup>28</sup> This might be accomplished by subordinating standard possessory accounts of property to an account that accepts the legitimacy of government's redistributive functions.<sup>29</sup> We question the inclusion of traditional property rights on the basis of pragmatic concerns such as the need to attract foreign investment or to stimulate economic growth. Such concerns are no doubt well-grounded, yet, in our view, they do not outweigh the detrimental effect upon already disempowered South Africans occasioned by an entrenchment of traditional property rights and the attendant constitutionalization of existing structures of economic inequality.<sup>30</sup>

Although our general conclusions are relevant to rights that seek to protect cultural interests, we also do not examine the merits and demerits of enshrining cultural rights relating to language and other community institutions in a new South African constitution.<sup>31</sup>

with respect to land seized in colonial dispossessions and evictions mandated by the apartheid regime. See Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 13, 33-36 (1989) (advocating an affirmative action policy in property takings as a means of breaking up racially oriented monopolies and cartels).

<sup>28</sup> See, e.g., Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964) ("It is time to see that the 'privilege' or 'gratuity' concept, as applied to wealth dispensed by government, is not much different from the absolute right of ownership that private capital once invoked to justify arbitrary power over employees and the public.").

<sup>29</sup> See Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1112 (1981). See generally C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (arguing that collective control of property rights furthers important aspects of individual liberty); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987) (arguing that the distributive conception of property rights should be used to interpret constitutional property rights).

<sup>30</sup> For a detailed study of the functioning of property as right and metaphor in American constitutional law, see JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM* (1990); see also Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 30 ALBERTA L. REV. (forthcoming 1992); Jennifer Nedelsky, *Law, Boundaries and the Bounded Self*, 30 REPRESENTATIONS 162 (1990) (advocating the rejection of boundary as the metaphor for the relationship between the collective and the individual); cf. *ANC Working Draft*, *supra* note 1, at 118-19 (Art. 11) (recognizing private property rights, but with significant limitations).

<sup>31</sup> See Sachs, *supra* note 27, at 26-30 (exploring the possibility of constitutional protection for linguistic groups and ethnically based cultural associations). The ANC Working Draft prohibits discrimination based on language, protects the right to form and join social and cultural bodies, protects freedom of conscience and religion, and requires the state to act positively to further the development of the Sindebele,

Moreover, many of our arguments would also be relevant to the so-called third generation rights to the environment and to development.<sup>32</sup> However, independent arguments relating to the importance of the values underlying cultural and third generation rights are necessary to support their inclusion in a constitutional bill of rights. This Article is relevant to the issue of cultural and third generation rights only in so far as social rights, like cultural and third generation rights, serve as triggers for the scrutiny of state obligations to protect and promote collective goods.<sup>33</sup>

Fourth, in our view, much of the debate surrounding the entrenchment of social rights stems from an improper conflation of

Sepedi, Sesotho, Siswati, Setswana, Afrikaans, English, Tsonga (Shangaan), Venda, Xhosa, and Zulu languages, and to promote respect for all the languages spoken in South Africa. See *ANC Working Draft*, *supra* note 1, at 110, 113-15 (Arts. 1 & 5).

<sup>32</sup> See generally Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982) (asking whether the recognition of the rights to development, to peace, to communicate, to be different, to a healthy environment, to the benefit from the common heritage of human kind, and to humanitarian assistance, as part of international law, might devalue and obfuscate existing rights); Jan Glazewski, *The Environment, Human Rights and a New South African Constitution*, 7 S. AFR. J. HUM. RTS. 167 (1991) (presenting an analysis of environmental issues and the constitution in the South African context); Jeremy Waldron, *Can Communal Goods be Human Rights?*, 27 ARCHIVES EUROPEAN SOC'Y 296 (1987) (arguing that "public goods" may be expressed in terms of individual human rights, while "communal goods," though important, should not be regarded as the subject matter of individual rights).

<sup>33</sup> Rights to one's linguistic heritage or to a healthy environment are usually understood in terms of the need to achieve certain goods that can only be enjoyed communally. In these situations, individual rights function more as rights of enforcement, forcing governments to live up to obligations owed to many individuals.

Such rights may also be understood partially in terms of individual rights to individualized goods or interests. Often this presupposes an existing collective good of a kind the enjoyment of which can be individualized and to which access has been wrongly denied (e.g., an existing minority education facility); if such a good is not yet in existence, recognizing an individual right can initiate, by a process of generalization, the creation of a collective good in order to replicate the provision of a related good (e.g., the provision of minority language tutorial instruction to one student) for all those entitled. For an interesting exchange among legal philosophers on the complicated question of rights in and to collective goods, see generally Leslie Green, *Two Views of Collective Rights*, 4 CAN. J. L. & JURIS. 315 (1991) (contending that collective goods mitigate the individualism and egoism latent in rights, but that collective agents do not so mitigate); Joseph Raz, *Right-Based Moralities*, in *THE MORALITY OF FREEDOM* 193, 208 (Joseph Raz ed., 1988) (stating that collective rights exist when human interest justifies imposing a duty upon some individuals, the interests in question are individual interests in a public good, and no single interest of any one group member is sufficient to justify imposing a duty upon another person); Denise Réaume, *Individuals, Groups, and Rights to Public Goods*, 38 U. TORONTO L.J. 1 (1988) (arguing that certain participatory goods, such as minority language rights, can give rise to claims of group rights); Waldron, *supra* note 32.

two distinct issues. The first is whether South Africa should move toward a constitutional democracy with a written bill of rights enforceable by the judiciary against the state. The second assumes the merits of establishing a constitutional democracy and seeks to determine the type of rights that deserve the mantle of constitutional guarantee. Many concerns expressed in relation to the entrenchment of social rights are in fact deeper concerns about the establishment of a constitutional democracy, misdirected toward the subsidiary issue of whether to entrench social rights. We assume that South Africa is already generally committed to the entrenchment of civil and political rights;<sup>34</sup> as a result, we do not address the merits and demerits of establishing a constitutional democracy in the wake of apartheid.<sup>35</sup> Our task is much more modest, namely, to argue for the inclusion of social rights in light of an apparently pre-existing commitment to a constitutional democracy. In our view, to exclude social rights from a constitution that

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<sup>34</sup> See Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 770 (1991) ("It can be taken for granted that the South African constitution for post-apartheid South Africa will almost certainly contain a bill of rights."). See generally *ANC Working Draft*, *supra* note 1, at 110-14 (Arts. 1-5).

<sup>35</sup> For the view that a South African constitution ought to provide for independent judicial review, see SOUTH AFRICAN LAW REFORM COMM'N, GROUP AND HUMAN RIGHTS (Working Paper No. 25, Project No. 58, 1989); M.M. Corbett, *Human Rights: The Road Ahead*, 96 S. AFR. L.J. 192, 201 (1979); David Dyzenhaus, *Democracy, Rights, and the Law*, 7 S. AFR. J. HUM. RTS. 24, 42 (1991); Higginbotham, *supra* note 7, at 563; Sachs, *supra* note 27, at 19; C.G. Weeramantry, *The Constitutional Reconstruction of South Africa: Some Essential Safeguards*, 3 LESOTHO L.J. 1, 15 (1987). For an extended discussion of Working Paper 25 of the 1989 Law Reform Commission Report, see John Dugard, *A Bill of Rights for South Africa?*, 23 CORNELL INT'L L.J. 441, 448-65 (1990).

For the view that such a constitution ought to contain social as well as civil and political rights, see Lynn Berat, *A New South Africa?: Prospects for an Africanist Bill of Rights and a Transformed Judiciary*, 13 LOY. L.A. INT'L & COMP. L.J. 467, 480 (1991); D.M. Davis, *Legality and Struggle: Towards a View of a Bill of Rights for South Africa*, in A BILL OF RIGHTS FOR SOUTH AFRICA 169 (Johann van der Westhuizen & Henning Viljoen eds., 1988); Albie Sachs, *Towards a Bill of Rights in a Democratic South Africa*, 6 S. AFR. J. HUM. RTS. 1, 15 (1990); Charles Villa-Vicencio, *Whither South Africa?: Constitutionalism and Law-Making*, 40 EMORY L.J. 141, 157 (1991). For the view that only civil and political rights ought to be entrenched, see D.H.M. Brooks, *Albie Sachs on Human Rights in South Africa*, 6 S. AFR. J. HUM. RTS. 25, 33 (1990); Cowling, *supra* note 7, at 177; J.M. Didcott, *Practical Workings of a Bill of Rights*, in A BILL OF RIGHTS FOR SOUTH AFRICA, *supra*, at 52.

For the view that useful lessons can be learned from the Namibian experience, see generally Eric C. Bjornlund, *The Devil's Work?: Judicial Review Under a Bill of Rights in South Africa and Namibia*, 26 STAN. J. INT'L L. 391 (1990); John Hatchard & Peter Slinn, *Namibia: The Constitutional Path to Freedom*, 17 COMMONWEALTH L. BULL. 644 (1991).

protects civil and political rights would be to throw "ropes of sand" to the poor and disempowered in South African society.<sup>36</sup>

Finally, the Article is written from a position of solidarity with the struggle of South Africans and of the ANC, but it is also written from a distance. Writing as outsiders, our feel for the current South African context is necessarily underdeveloped. We seek to offer a perspective on the justiciability of social rights that has sufficiently general analytic relevance to be adaptable to particular societies and situations. This perspective may therefore be of use to South Africans and the ANC in their deliberations about their country's future.

The remainder of this Article is aimed at supporting our belief that concerns about the legitimacy of judicial review do not outweigh the desirability of entrenching social rights in a new South African constitution, and that the judiciary is not institutionally incompetent to deal with the adjudication and interpretation of social rights. Part I outlines two types of arguments against the constitutional justiciability of social rights. The first claims that it is illegitimate to enshrine social rights in a constitution and for the judiciary to be given the power to interpret and enforce social rights. The second claims that courts are not institutionally competent to address matters pertaining to social rights. In Part II, we address the legitimacy dimension and contend that the exclusion of justiciable social rights from a South African constitution would threaten the realization of social justice in South Africa because of law's constitutive influence on society's and individuals' self-understandings. In Part III, we scrutinize and find wanting claims of institutional incompetence, notably claims which deny the capability of courts to impose positive obligations on governments and claims which allege that social rights are too imprecise for adjudication.

Part IV discusses the "interdependence" of civil and political rights with social rights and argues that such interdependence helps

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<sup>36</sup> The metaphor is borrowed from Indian constitutional jurisprudence. In *People's Union for Democratic Rights v. India*, [1983] 1 S.C.R. 456, the Indian Supreme Court, per Justice Bhagwati, held that, because economic necessity vitiates choice, the payment of less than the minimum wage is "forced labour," and thus prohibited by the Indian Constitution. The court concluded that any other interpretation would render the guarantee a "mere rope of sand." *Id.* at 487; see also *Bandhua Mukti Morcha v. India*, [1984] 2 S.C.R. 67, 103 (holding that "[i]t is the fundamental right of every one in this country . . . to live with human dignity, free from exploitation"); *infra* text accompanying notes 401-08.

to challenge further claims that judicial bodies can neither legitimately nor competently scrutinize social rights as a matter of constitutional review. This Part addresses the drafting history, textual provisions, and interpretive development of various instruments of international law, namely, the Universal Declaration of Human Rights of 1948,<sup>37</sup> the International Covenant on Civil and Political Rights (ICCPR)<sup>38</sup> and its (First) Optional Protocol,<sup>39</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>40</sup> the European Convention on Human Rights (ECHR),<sup>41</sup> the European Social Charter,<sup>42</sup> the American Declaration of the Rights and Duties of Man,<sup>43</sup> and the American Convention on Human Rights.<sup>44</sup> Part V then shifts from international law to comparative constitutional law and invokes emergent jurisprudence of the Supreme Court of India, which is infused with the principle of interdependence, to tell a story of the rhetorical possibilities of constitutionalized social rights. The Indian experience is instructive because it provides nascent factual support for our contention that the judiciary both can and should seek to protect social rights. Finally, in Part VI, we offer some concrete textual and institutional strategies to minimize the antidemocratic potential of judicial review.

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<sup>37</sup> G.A. Res. 217A (III), U.N. Doc. A/777, at 71 (1948) [hereinafter UDHR], reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 1, U.N. Doc. ST/HR/1/Rev. 2 (1983).

<sup>38</sup> Adopted Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

<sup>39</sup> Adopted Dec. 19, 1966, 999 U.N.T.S. 302 (entered into force Mar. 23, 1976) [hereinafter ICCPR, Optional Protocol].

<sup>40</sup> See ICESCR, *supra* note 23.

<sup>41</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; see also COUNCIL OF EUROPE, CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS 1, 44 (1991) (final version of the Convention as amended).

<sup>42</sup> Oct. 18, 1961, Europ. T.S. No. 35 [hereinafter ESC] (entered into force Feb. 26, 1965); see also Protocol Amending the European Social Charter, *opened for signature* Oct. 18, 1961, Europ. T.S. No. 142 (entered into force Oct. 21, 1991).

<sup>43</sup> *Handbook of Existing Rules Pertaining to Human Rights in the InterAmerican System*, OAS Doc. OEA/Ser.L./V/II.60 Doc. 28 (1983) 21 [hereinafter American Declaration], reprinted in 1 HUMAN RIGHTS: THE INTER-AMERICAN SYSTEM, pt. 1, ch. IV, at i (Thomas Buergenthal & Robert E. Norris eds., 1982) [hereinafter BUERGENTHAL & NORRIS].

<sup>44</sup> American Convention on Human Rights: Pact of San Jose, Costa Rica, Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978) [hereinafter American Convention].



## I. TWO DIMENSIONS OF JUSTICIABILITY

By the term "justiciability" we mean, in broad outline, the extent to which a matter is suitable for judicial determination.<sup>45</sup> For the purposes at hand, this refers to the ability to judicially determine whether or not a person's right has been violated or whether the state has failed to meet a constitutionally recognized obligation to respect, protect, or fulfill a person's right.<sup>46</sup> "Justiciability" is a deceptive term because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time.<sup>47</sup> Justiciability is a contingent and fluid notion dependent on various assumptions concerning the role of the judiciary in a given place at a given time as well as on its changing character and evolving capability.<sup>48</sup>

Debates over the justiciability of a particular subject matter occur in the long shadow of the basic democratic principle that the will of the majority ought to prevail in the fashioning of law and policy. This principle underpins a standard doctrine of separation of powers manifested in democratic governance: the legislature makes the law, the executive implements the law, and the judiciary applies and enforces the law.<sup>49</sup> In the words of Philip Kurland, "[s]eparation of powers . . . encompasses the notion that there are fundamental differences in governmental functions—frequently but not universally denoted as legislative, executive, and judicial—which

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<sup>45</sup> Galligan defines "non-justiciable" as "unsuited for adjudication." D.J. GALLIGAN, *DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION* 241 (1990). Given our view that it is important to conceive of justiciability as contingent, we deliberately use the word "suitable" rather than "suited". Also, by referring to the "extent" of justiciability, we hope to suggest that justiciability is not a concept that lends itself to "either-or" categorization. We thus prefer to adopt a more fluid understanding of "justiciability," the contingency of which is comprised of both the character of the courts as institutions and of the judges as persons in their societal context.

<sup>46</sup> See *infra* notes 244-52 and accompanying text for a more detailed description of these three levels of obligation.

<sup>47</sup> See, e.g., Chayes, *supra* note 9 (describing the evolution of the judicial role with the growth in public law litigation).

<sup>48</sup> See *supra* text accompanying note 5 (noting that we do not assume as given any traditional understanding of courts as institutions).

<sup>49</sup> See, e.g., David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 521 (1988) (suggesting that legislatures should be freer than courts to embark on paternalistic courses since they are subject to popular will).

must be maintained as separate and distinct, each sovereign in its own area, none to operate in the realm assigned to another."<sup>50</sup>

The enactment of a constitutional bill of rights to be interpreted and enforced by the judiciary represents a fundamental restraint on this understanding of democracy.<sup>51</sup> Certain matters are hived off from majority rule and placed within the exclusive interpretive province of the judiciary. Traditional separation of powers principles require that in performing the interpretive function, the judiciary is not to intrude on the governmental function assigned to other branches of government. Many of the arguments opposing the inclusion of social rights in a written constitution<sup>52</sup> enforceable by the judiciary are arguments that assert that their inclusion would lead to an unacceptable blending of judicial with legislative power.

In many jurisdictions, both international and national, a sharp distinction is often drawn, implicitly or explicitly, between civil and political matters and economic and social matters, with the former enjoying justiciable status, increasingly as constitutional rights, and the latter viewed merely as involving potentially legitimate legislative aspirations or policy goals, sometimes, but just as often not, constitutionally recognized.<sup>53</sup> As will be seen in Part IV, a stark example of this distinction lies in the decision to split the 1948 Universal Declaration of Human Rights into two binding treaties.<sup>54</sup>

<sup>50</sup> Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 593 (1986).

<sup>51</sup> This is not to suggest that scholars have not attempted to reconcile judicial review with democratic values. Classic efforts include JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 2 (1980); JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980). For a critique, see Richard Parker, *The Past of Constitutional Law—And Its Future*, 42 OHIO ST. L.J. 223, 223 (1981) (arguing that Ely's and Choper's theories have underlying assumptions that are implausible in light of recent experience). See generally MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988) (presenting and critiquing comprehensive normative theories of constitutional law).

<sup>52</sup> It should be recognized that questions of justiciability also present themselves in the absence of a written bill of rights. Even where the judiciary is not constitutionally authorized to test expressions of majority will against a bill of rights, debates can occur over justiciability focusing on the limits and possibilities of adjudication as a vehicle for the resolution of disputes. See Fuller, *supra* note 9, at 354.

<sup>53</sup> See E.W. Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights*, 9 NETH. Y.B. INT'L L. 69, 92-93 (1978) (having the judiciary "declare that a government is lagging behind in creating the conditions under which a social right could be enjoyed" would raise "utterly political questions").

<sup>54</sup> See *infra* notes 294-95 and accompanying text.

One treaty, the ICCPR,<sup>55</sup> deals with so-called "civil and political rights" that may be subjected to determinations of compliance by a quasi-judicial body on the basis of individual complaints, and the other, the ICESCR,<sup>56</sup> addresses so-called "economic, social and cultural rights." Rights in the latter covenant were originally designed to be scrutinized at a high level of abstraction from individual situations, with evaluation of the collective performance of states unaided by individual complaints of violation. The distinction between civil and political matters and economic and social matters has enjoyed a resurgence in official United States human rights diplomacy in the 1980s. The separation is reflected in the adamant refusal of the United States to view social and economic rights as human rights, let alone as justiciable, in negotiations surrounding new human rights treaties and on votes on United Nations resolutions.<sup>57</sup>

The distinction between social and economic matters and civil and political matters also finds expression in domestic debates over the proper interpretation of entrenched constitutional guarantees that, on their face, refer only to civil and political matters. In the United States, for example, it is often said that social and economic matters may well constitute potentially legitimate aspirations or policy goals of government, but should not or cannot be characterized as constitutional entitlements. Many of the reasons offered in support of this view do not speak to the broader question of whether to entrench social rights in a new constitution; instead, they refer more specifically to the interpretation of textually pre-existing civil and political rights, and claim that it would be improper for the judiciary to arrogate to itself a review function with respect to social rights relying on a constitution that, on its face, only entrenches civil and political rights.<sup>58</sup>

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<sup>55</sup> See *supra* note 38.

<sup>56</sup> See *supra* note 23.

<sup>57</sup> See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 365 (1990) [hereinafter Alston, *New Strategy*] (reviewing the history of proposals for the United States to ratify the ICESCR); Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 333-34 (1987) [hereinafter Alston, *Out of the Abyss*] (discussing the challenges faced by this Committee in developing an effective and acceptable supervisory process).

<sup>58</sup> This vision is very much alive in judicial thinking. In *Jackson v. Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984), for example, Judge Posner stated that "the Constitution is a charter of negative rather than positive liberties." See also *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S.

In this context, the doctrine of separation of powers suggests that the judiciary simply interpret and apply the law, including the constitution, and not take on an overtly legislative function. However, some of the reasons advocating a limited judicial role in the interpretation of civil and political rights in an existing constitution are relevant to the question of whether to entrench social rights in a new constitution. Such reasons transcend their particular interpretive context and challenge in general the justiciability of interests underlying social rights.

Judges work more or less explicitly with constellations of considerations to determine whether, and how far, they *should* act and, whether, and how far they *can* act. More specifically, arguments against the inclusion of social rights in a written bill of rights correspond to two dimensions of justiciability: the *legitimacy* dimension and the *institutional competence* dimension.<sup>59</sup> For

189, 194 (1989) (holding that the State of Wisconsin is under no affirmative constitutional duty to protect a child from a brutally abusive father); Bandes, *supra* note 6, at 2317; Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VANDERBILT L. REV. 409, 411 (1990); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 39 (1989).

For arguments in favor of expanding equal protection doctrine to include social and economic matters, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 664 (while equal protection can protect welfare entitlements, it is an "inappropriate task" for courts to rule on the adequacy or level of provision of a social right); see also Olga Popov, *Towards a Theory of Underclass Review*, 43 STAN. L. REV. 1095, 1098 (1991) (proposing that laws creating or perpetuating an underclass should be subject to strict scrutiny); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1065-66 (1977) (suggesting that "despite its difficulties, a doctrine will ultimately emerge that recognizes under the fifth and fourteenth amendments constitutional rights to decent levels of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, employment and education").

For criticism of Michelman's thesis, see Susan F. Appleton, *Professor Michelman's Quest for a Constitutional Welfare Right*, 1979 WASH. U. L.Q. 715, 722-24; Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 695 (stating that a welfare rights theory would require "political decisionmaking by the judiciary"); see also Antonio C. Pereira-Menault, *Against Positive Rights*, 22 VALPARAISO L. REV. 359, 360 (1988) (arguing that positive rights belong more to the realm of the state than to the realm of the constitution); cf. Sunstein, *supra* note 12, at 206-07 (expressing ambivalence about "social reform through the judiciary" for "pragmatic reasons").

<sup>59</sup> This terminology appears in Martha Jackman, *The Protection of Welfare Rights Under the Charter*, 20 OTTAWA L. REV. 257, 330-37 (1988) (discussing the institutional legitimacy and competence of the judiciary); see also THOMAS A. CROMWELL, LOCUS STANDI: A COMMENTARY ON THE LAW OF STANDING IN CANADA 6 (1986) (distinguishing legitimacy from adequacy when deciding whether to use the courts); GALLIGAN,

analytical convenience, the legitimacy dimension refers to the nature, or character, of social rights and asks whether it would be legitimate to confer constitutional status on social rights in light of their subject matter. The institutional competence dimension of justiciability looks more to the nature, or character, of the judiciary, and addresses whether the judiciary possesses the institutional capacity and competence to adjudicate social rights.<sup>60</sup>

The legitimacy dimension of justiciability can be further refined by reference to a distinction between "conservative" and "progressive" visions of social justice.<sup>61</sup> A conservative vision of social justice views the constitutionalization of social rights as illegitimate because such rights entail the redistribution of wealth and state intervention in market economies.<sup>62</sup> According to this view, a constitution ought to guard against state intervention and subject state initiatives that seek to institutionalize the values underpinning social rights to constitutional scrutiny.<sup>63</sup> The kind of rights that

*supra* note 45, at 241-51 (distinguishing between policy reasons and whether a matter is analytically suited for resolution by adjudicative procedures); MINOW, *supra* note 14, at 356-62 (discussing legitimacy and competence); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 67 (2d ed. 1988) (justiciability relates to concerns about judicial competence and separation of powers); Jamie Cassels, *Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?*, 37 *AM. J. COMP. L.* 495, 509-17 (1989) (examining questions of legitimacy and adequacy in the judicial function); Gerald Gunther, *Some Reflections on the Judicial Role: Distinctions, Roots and Prospects*, 1979 *WASH. U. L.Q.* 817, 818 (linking legitimacy to the question of which rights are recognized and protected and competence to the question of remedies); Ghislain Otis, *La Charte et la modification des programmes gouvernementaux: l'exemple de l'injonction structurelle en droit américain*, 36 *MCGILL L.J.* 1349, 1357-60 (1991) (discussing the judicial role in terms of legitimacy and efficacy); Craig Scott, *The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, 27 *OSGOODE HALL L.J.* 769, 839-40 (1989) (dividing justiciability into the value, or normative, component and the expertise, or empirical, component).

<sup>60</sup> Cf. Jackman, *supra* note 59, at 331-32 ("The content of social rights generates concerns at the level of institutional competence; the character of social rights at the level of institutional legitimacy.").

<sup>61</sup> For a similar approach, see TUSHNET, *supra* note 51, at 1-17; Patrick Macklem, *Constitutional Ideologies*, 20 *OTTAWA L. REV.* 117, 120 (1988); Milton C. Regan, Jr., *Community and Justice in Constitutional Theory*, 1985 *WIS. L. REV.* 1073, 1074; West, *supra* note 5, at 717.

<sup>62</sup> See RICHARD EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 307-12 (1985); 1 FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 112-15 (1975). See generally West, *supra* note 5, at 672 (describing conservative constitutional thought concerning the legitimacy of market outcomes and existing distributions of wealth).

<sup>63</sup> For a recent economic analysis specifically directed to the issue of positive social rights, see Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitu-*

ought to be constitutionalized are those that create and protect a zone of individual freedom from state intervention, not rights which place positive obligations on the state.<sup>64</sup>

A progressive vision of social justice, on the other hand, does not take issue with the legitimacy of the values underpinning social rights, but may well have concerns about the legitimacy of empowering the judiciary to overrule the popular will as expressed through legislative activity.<sup>65</sup> This may simply be a particular version of the general argument from majoritarian democracy which opposes not simply the constitutional entrenchment of social rights but the entrenchment of any rights at all. Proponents of this view prefer to see battles won through majoritarian politics<sup>66</sup> and energy devoted

*tional Conditions*, 75 CORNELL L. REV. 1185 (1990). While arguing for aggressive indirect protection of social rights interests through the unconstitutional conditions doctrine, she nonetheless argues that while constitutional rights must operate in a market economy to remove state-imposed barriers, they do not require the removal of "background" economic impediments which "necessarily" exist in a market economy. *See id.* at 1219.

<sup>64</sup> For a judicial articulation of this view, see *Coppage v. Kansas*, where it was held that:

[i]ncluded in the right of personal liberty and the right of private property—partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is substantial impairment of liberty in the long-established constitutional sense.

236 U.S. 1, 14 (1915); *see also* *Lochner v. New York*, 198 U.S. 45, 64 (1905) (noting that, absent genuine health concerns, "the freedom of master and employé to contract with each other . . . cannot be prohibited or interfered with").

For classic defenses of this ideological perspective, see MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 34-36 (1962); HAYEK, *supra* note 62, at 55-56; FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 119-21 (1960). For recent academic calls for the return to versions of the *Lochner* era in the United States, see EPSTEIN, *supra* note 62, at 7-18; BERNARD H. SEIGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 324 (1980) (arguing that government should bear the burden of persuading the judiciary that legislation that interferes with property rights serves important governmental objectives, that the means are substantially related to those objectives, and that less drastic means could not be used to achieve a similar result).

<sup>65</sup> *See, e.g.*, Penuell M. Maduna, *Judicial Review and Protection of Human Rights Under a New Constitutional Order in South Africa*, 21 COLUM. HUM. RTS. L. REV. 73, 76-81 (1989) (voicing similar concerns in the South African context). *See generally* TUSHNET, *supra* note 51, at 70 (discussing the jurisprudence of democracy); Anthony Chase, *The Left on Rights: An Introduction*, 62 TEX. L. REV. 1541, 1541 (1984) (discussing the relationship between rights on the one hand and capitalism and socialism on the other).

<sup>66</sup> *See, e.g.*, MICHAEL MANDEL, *THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA* 41-48 (1989) (discussing arguments minimizing the

to reform of that process as well as to the attainment of substantive outcomes through that process. Thus, for the "progressive", it is not the "social" content, but the "constitutionalized" content of the subject-matter in question that speaks against justiciability. Buttressing this view are somewhat different democratic concerns about the lack of an appropriately representative judiciary. Judges are traditionally almost exclusively male, white and wealthy, and their decisionmaking perspective is bound to be heavily structured by their background.<sup>67</sup> On this view, there would be little, if anything, different about social rights from other kinds of constitutional rights that would prevent courts from interpreting those rights regressively.

In contrast to its legitimacy dimension, the institutional competence dimension of justiciability refers not to whether it is legitimate for a particular matter to be made the subject of judicial review, but rather to whether a particular matter is capable of being made the subject of such review. Constitutional jurisprudence and scholarship tend to adopt the view that the judiciary is an institution that, by virtue of its nature, does not possess the capability to adequately engage in the relatively complex task of delineating the contours of social rights.<sup>68</sup> Opponents argue for the exclusion of

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unrepresentative nature of judicial review).

<sup>67</sup> See *supra* note 6.

<sup>68</sup> There is a strong body of U.S. scholarship arguing that the judiciary is ill-equipped for activism and its quasi-policymaking demands. See HOWARD I. KALODNER & JAMES J. FISHMAN, *THE LIMITS OF JUSTICE* (1978); Kenneth C. Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 942 (1980); Fuller, *supra* note 9, at 393-405; Horowitz, *supra* note 9, at 1307; Arthur S. Miller & Jerome A. Barron, *The Supreme Court, the Adversary System and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 VA. L. REV. 1187, 1190-91 (1975); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966) (discussing the delicate balance judges must strike between making political rulings and deferring to political bodies); see also Paul Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law*, 40 U. TORONTO L.J. 117 (1990) (discussing institutional competence in the context of employment and constitutional rights).

These arguments focus their criticism on the ability of the courts to find and receive proper information upon which to base their decisions, and upon the ability of the courts to monitor, administer, and implement the changes. However, as Professor Komesar points out, such criticisms in many respects can also be leveled at the legislative branch, particularly where the interests in question are those of powerless, systemically under-represented groups. See Komesar, *supra* note 9, at 697-99; see also REBELL & BLOCK, *supra* note 9, at xi (stating that in the area of educational policymaking, the courts have a unique and important role).

While U.S. jurisprudence has on the whole found little textual support in the Constitution for positive government obligations, judges have nonetheless taken an

constitutional review of social rights by the judiciary either because of deficiencies in skill, education, training, or procedure, or because the adjudication of social rights touches on the complex intersection of issues involving institutional design, policy choice, and contested political aspirations.

The resistance to constitutionally entrenched social rights on grounds of institutional competence is often summarized in the view that social rights are said to be positive rights and therefore requiring governmental action; resource-intensive and therefore expensive to protect; progressive and therefore requiring time to realize; vague in terms of the obligations they mandate; and involving complex, polycentric, and diffuse interests in collective goods. Civil and political liberties, on the other hand, are said to be, paradigmatically, negative rights that are: cost-free; immediately satisfiable; precise in the obligations they generate; and comprehensible because they involve discrete clashes of identifiable individual interests. These characterizations, even when acknowledged to be overdrawn,<sup>69</sup> support the view that civil and political liberties both are and ought to be seen as involving justiciable matters.<sup>70</sup> Many of these characterizations do not go simply to concerns of institutional competence of the judiciary but also to legitimacy concerns, with conclusions relating to the lack of institutional competence circling back to reinforce impressions that a judicial role would be illegitimate.<sup>71</sup>

The two dimensions of justiciability interact with one another to create a powerful web of resistance to the proposition that social rights ought to be included in judicial constitutional discourse. On the one hand, an alleged lack of institutional expertise reinforces

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activist role at the remedial level in implementing constitutionally mandated desegregation, prison reform, and electoral district reform. See Robert E. Easton, *The Dual Role of the Structural Injunction*, 99 YALE L.J. 1983, 1983-85 (1990); Robert A. Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Action*, 99 YALE L.J. 231, 231 (1990).

<sup>69</sup> Even detractors of the justiciability of social rights note that these distinctions are overdrawn, leading some to contemplate drawing more fluid lines between justiciable and non-justiciable rights. See, e.g., Vierdag, *supra* note 53, at 82 (arguing that financial support on the part of the state, taken alone, is not the most appropriate key to distinguishing between social and civil rights).

<sup>70</sup> See Scott, *supra* note 59, at 833 (noting that alignment of "justiciable" with "civil and political rights" and "non-justiciable" with "economic, social and cultural rights" submerges and obscures a whole series of other distinctions).

<sup>71</sup> See MINOW, *supra* note 14, at 356-62 (concluding that judicial competence reinforces perceptions of judicial legitimacy).



the view that it would be illegitimate for the courts to delve into constitutional adjudication of social rights. For example, the perceived imprecision or indeterminacy of social rights that could be said to render courts incapable of making meaningful determinations also underscores for many that social rights adjudication would involve the pervasive exercise of judicial choice and creativity. Awareness of this fact then provokes misgivings about the legitimacy of according such an authoritative decisionmaking role on such open-ended issues to unelected persons who are drawn from a narrow band of the social and ideological spectrum. On the other hand, the ideologically driven sense of illegitimacy provides a dispositional readiness for the judiciary and other legal actors to marginalize arguments geared toward the expansion and transformation of the courts' capabilities to render the judiciary a more appropriate institution for dealing with such matters. In particular, to the extent that capacity flows from experience, as we shall contend it does, a sense of illegitimacy directly impairs competence because it drains courts of the needed courage to take the first steps. Furthermore, not only do the two dimensions interact in the above-described way but also "[i]t is in practice difficult to keep apart the two senses of non-justiciability, since the same situations may involve elements of both, and the reasons given by the courts for not intervening do not always make clear the distinction."<sup>72</sup>

We are proceeding from the premise that a significant majority of South Africans are not resistant to the establishment of a constitutional democracy. A glance at the ANC's Working Draft,<sup>73</sup> the Freedom Charter,<sup>74</sup> and the ANC's Constitutional Guidelines<sup>75</sup> makes it clear that the ANC, which in our understanding is

<sup>72</sup> GALLIGAN, *supra* note 45, at 241 (discussing matters of national security).

<sup>73</sup> See *ANC Working Draft*, *supra* note 1, at 116-18 (Art. 10).

<sup>74</sup> Freedom Charter, June 26, 1955 (adopted at Kliptown, Transvaal), *reprinted in* M. HAMALENGWA ET AL., *THE INTERNATIONAL LAW OF HUMAN RIGHTS IN AFRICA: BASIC DOCUMENTS AND ANNOTATED BIBLIOGRAPHY* 99 (1988). The Freedom Charter provides for the recognition, *inter alia*, of economic, social and language rights. See *id.* at 99-103.

<sup>75</sup> The ANC's Constitutional Guidelines call for *inter alia* guarantees of freedom of association, expression, thought, worship, and the press, as well as rights to work, education, and social security. See AFRICAN NATIONAL CONGRESS, *CONSTITUTIONAL GUIDELINES FOR A DEMOCRATIC SOUTH AFRICA*, *reprinted in* 5 S. AFR. J. HUM. RTS. 129, 131 (1989). For commentary, see SACHS, *supra* note 1, at 197; Corder & Davis, *supra* note 7, at 639-44; Dugard, *supra* note 35, at 452 (unclear whether the Guidelines indicate support for "the principle of judicial review as a necessary component of a bill of rights"); see also Winston P. Nagan, *Law and Post-Apartheid South Africa*, 12 *FORDHAM INT'L L.J.* 399, 427-33 (1989) (discussing the Bill of Rights

the organization commanding the greatest following among South Africans, is not ideologically opposed to the values underpinning rights to nutrition, housing, health, and education. By implication, it can be concluded that many South Africans view such values to be as critical to the realization of social justice as the values underpinning more traditional constitutional freedoms, such as a person's right to speak freely, to be free from arbitrary detention, to be presumed innocent, and to have their privacy respected. Given these premises, the two hurdles South Africans face in deciding whether to constitutionalize social rights in a new South African constitution relate to progressive concerns about the legitimacy of entrusting the judiciary with the task of overseeing democratic initiatives enacted in the name of social justice, and concerns about the institutional competence of the judiciary even if it were accepted that entrenching such rights would be desirable in principle. The next two Parts address these concerns in turn.

## II. THE LEGITIMACY OF SOCIAL RIGHTS

The constitutionalization of social rights raises concerns of legitimacy from at least two ideological perspectives. A conservative vision of the proper content of a bill of rights would view the inclusion of social rights as antithetical to the purpose of constitutional guarantees. Social rights generate positive obligations on the state to ameliorate certain social and economic conditions in society, whereas a conservative vision of social justice entails a constitutional imagination that views such state intervention in market ordering as illegitimate. Constitutional rights ought to guard against, not compel, such state intervention. A progressive vision of social justice, on the other hand, would not quarrel with the interests underlying social rights. Ensuring equal access to adequate nutrition, housing, health, and education to all is viewed as a fundamental responsibility of the state from a progressive perspective. Where a progressive vision of social justice may have cause for concern, however, is with the constitutionalization of those interests and the attendant transfer of power to an unelected body to ensure that the state lives up to its social obligations.<sup>76</sup> It

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generally, as well as limitations on free expression and economic matters); Johan D. van der Vyver, *Comments on the Constitutional Guidelines of the African National Congress*, 5 S. AFR. J. HUM. RTS. 133, 152 (1989) ("[The ANC's] Guidelines entail no more than tentative suggestions as the basis for reflection and which [sic] have been put forward to stimulate participation . . .").

<sup>76</sup> It must be acknowledged that more radical critiques would call into question

is this latter aspect of the legitimacy of social rights to which this Part is addressed.

The dangers associated with judicial review and with engaging in progressive struggles for social justice through the medium of institutionalized legal rights discourse should not be underestimated.<sup>77</sup> However, these dangers exist not so much in relation to the question of whether to constitutionalize the values underpinning social rights but more broadly in relation to the more fundamental question of the appropriateness of establishing a constitutional democracy. If South Africa takes the historic step of moving toward a modern constitutional democracy and entrenching certain constitutional rights against the state, it will be confronted with the tension between democracy and judicial review endemic to all systems of government that vest power to pass judgment on laws in the judiciary. If South Africa were to constitutionalize civil and political rights but decide to treat social rights as non-justiciable, however, it would create another kind of danger, namely that the values underpinning social rights would be devalued as a result of selective constitutionalization. A constitutional discourse could emerge that implicitly views the values protected by social rights to be illegitimate aspirations of modern governance.

More specifically, legal discourse about the nature of rights has a constitutive effect on political discourse at large.<sup>78</sup> As expressed

the values reflected by social rights by noting that they can serve legitimating functions for a cooptive, and non-transformative, liberal welfarism. See *infra* note 100 and accompanying text for a brief discussion of the regressive potential of social rights.

<sup>77</sup> See Girardeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 2000-03 (1990); West, *supra* note 5, at 713-721. See generally Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (reviewing the controversy surrounding the legitimacy of judicial oversight of the legislature in a democracy and concluding that no objective criteria to assess theories of judicial review exist).

<sup>78</sup> As E.P. Thompson eloquently puts it in reflecting upon his scholarship:

I found that law did not keep politely to a "level" but was at every bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.

by Pierre Bourdieu, "[t]he discovery of injustice as such depends upon the feeling that one has rights."<sup>79</sup> If there is no forum that is socially recognized as authoritative and in which individuals or communities of people similarly disadvantaged can make submissions about the profound barriers they face in attempting to lead meaningful lives, those difficulties will increasingly be deemed irrelevant, and the underlying values that social rights are designed to protect will diminish in meaning and importance. Constitutional jurisprudence forms one of the most authoritative moral and political discourses in contemporary society.<sup>80</sup> The exclusion of one set of interests from the list of protected rights is in effect a vast legal judgment lending universality and authority to those interests that enjoy constitutional protection. Denying an individual or group the ability to make constitutional claims against the state with respect to nutrition, housing, health, and education excludes those interests from a process of reasoned interchange and discussion, and forecloses a useful forum for the recognition and redressing of injustices. The exclusion of social rights from such a discourse is bound to affect the breadth and depth of such a discourse, with the effect that the parameters of debate and dialogue will be unnecessarily curtailed.

In many contemporary societies, access to rights discourse is a necessary precondition to access to equality of attention. As Patricia Williams points out, an appeal to legal rights implies "a respect which places one within the referential range of self and others, which elevates one's status from human body to social being."<sup>81</sup> Whereas the constitutionalization of social rights would be a recognition of the fact that adequate nutrition, housing, health, and education are critical components of social existence, the exclusion of social rights from a South African constitution necessarily would result in the suppression of certain societal

E.P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 96 (1978); see also Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984) (noting that many Critical writers would claim that law "is omnipresent in the very marrow of society—that lawmaking and law-interpreting institutions have been among the primary sources of the pictures of order and disorder").

<sup>79</sup> Bourdieu, *supra* note 6, at 833.

<sup>80</sup> See Brest, *supra* note 10, at 178 ("In our society, most significant issues of public morality are, or once were, or eventually will be, constitutional issues.").

<sup>81</sup> Williams, *Alchemical Notes*, *supra* note 14, at 416; see also Minow, *supra* note 6, at 1893-94 (stating that legal rights influence "the pattern of existing and future relationships").

voices.<sup>82</sup> Perhaps the strongest reason for including a certain number of economic and social rights is that by constitutionalizing half of the human rights equation, South Africans would be constitutionalizing only part of what it is to be a full person. A constitution containing only civil and political rights projects an image of truncated humanity. Symbolically, but still brutally, it excludes those segments of society for whom autonomy means little without the necessities of life.

Similar concerns exist not only at the level of constitutional entrenchment, but also at the level of constitutional interpretation. Courts do not simply discover the inherent meaning of a right that has somehow been settled by the mere inclusion of words in a constitutional document. Rather, they respond to arguments over the kinds of worlds in which we want to live and the types of social beings we want to become. Judges bring their systems of values to bear on creating or determining concrete meanings of rights, until better or simply different arguments are made in the future. Legal meaning is not found or discovered through or by adjudication; it is created in the context of particular fact situations that demand legal resolution. The meaning of constitutional guarantees will always be underdetermined by their wording; reference must always be had, explicitly or implicitly, to more general normative understandings of the society in which a legal decision-maker operates.<sup>83</sup> But society-wide understandings are neither sufficiently shared nor sufficiently specific to resolve concrete disputes concerning fundamental values. As a result, recourse is invariably had to narrower "interpretive communities" whose conventions and whose members' reciprocal interactions serve as reference points for the generation of interpretive meaning.<sup>84</sup>

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<sup>82</sup> As Martha Jackman points out:

The observation also bears repeating that there is a significant difference between the judicial intervention called for by the rich and by the poor: "where the wealthy invariably want the courts to strike down actions the other branches have taken, the disadvantaged often ask the courts to take actions the other branches have decided not to take."

Jackman, *supra* note 59, at 336 (quoting HOROWITZ, *supra* note 9, at 11 n.41).

<sup>83</sup> As James White writes, "[l]egal argument is an organized and systematic process of conversation by which our words get and change their meaning." JAMES B. WHITE, *WHEN WORDS LOSE THEIR MEANING* 268 (1984); see Bourdieu, *supra* note 6, at 805; Cover, *supra* note 6, at 4; Minow, *supra* note 6, at 1866-67; James B. White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 688-96 (1985).

<sup>84</sup> See generally STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY*

In simple cases, "outside" references to communities of understanding may appear to engender a straightforward "plain meaning" of the law or an uncontroversial interpretation of the facts. In more complex cases, however, particularly where vague constitutional laws are applied to complicated fact situations, the appropriate interpretive community is itself open to choice and different judges will engage in sometimes wide-ranging appeals to authoritative meaning-giving sources. However, whether the source appealed to is the intent of the constitutional framers,<sup>85</sup> a philosophical theory of fundamental rights,<sup>86</sup> an understanding of conventional morality,<sup>87</sup> or a complex theory of the appropriate scope of judicial review,<sup>88</sup> no such source, "alone or in combination, can provide an acceptable basis for legal decisionmaking."<sup>89</sup> Through their involvement—and ethical engagement<sup>90</sup>—in the interpretive process, judges individually and courts as collectives

OF INTERPRETIVE COMMUNITIES 1 (1980) (addressing the question whether "the reader or the text [is] the source of meaning").

<sup>85</sup> See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 111 (1977); Edwin Meese, *The Attorney General's View of the Supreme Court: Toward a Jurisprudence of Original Intention*, 45 PUB. ADMIN. 701, 703-04 (1985). For commentary on "originalism," see generally Earl Maltz, *Some New Thoughts on an Old Problem—The Role of the Intent of the Framers in Constitutional Theory*, 63 B.U. L. REV. 811 (1983) (reexamining the role of intentionalism in constitutional discourse); Pierre Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283, 286 (1985) (presenting "a series of attacks on intentionalism"); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation be Justified?*, 73 CAL. L. REV. 1422 (1985) (discussing the problems associated with originalist interpretation).

<sup>86</sup> See, e.g., TRIBE, *supra* note 59, at 769-1435 (describing a theory of preferred rights in constitutional adjudication); David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 5-6 (1980) ("We must philosophically conceive and explicate the conflicting rights of children, parents, and society as a matter of general moral and constitutional principle.").

<sup>87</sup> See, e.g., Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 341 (1987) (discussing the relationship between "the standards of judicial lawmaking and the dominant, conventional morality"); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 224-25 (1973) (discussing the problems associated with collapsing the distinction between principle and policy).

<sup>88</sup> See, e.g., ELY, *supra* note 51, at 181 (arguing that judicial review "can appropriately concern itself only with questions of participation, and not with the substantive merits of the political choice under attack"). *But see* Parker, *supra* note 51, at 223 (critiquing the constitutional theories of John Hart Ely and Jessie Choper).

<sup>89</sup> Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 870 (1988).

<sup>90</sup> See Scott, *supra* note 59, at 835 n.221 ("Judicial interpretations of vaguely worded rights need to be seen as practical ethical choices made in light of the judges' engagement with the social context.").

help to make and remake, constitute and reconstitute legal relations among individuals, groups and the state,<sup>91</sup> and participate in a constitutional discourse that is critical to the self-definition of society and its members.

However, it is because of this fluid and open-ended conception of constitutional rights discourse that one must be aware of the dangers of the process being controlled and the meaning coopted against the interests of the more vulnerable members of society.<sup>92</sup> The constitutionalization of social rights is not only legitimate in terms of the values and interests that these rights seek to protect but also because their exclusion from a bill of civil and political rights would give the judiciary freer rein to thwart the realization of a progressive vision of social justice. Armed with a bill of rights that only enshrines civil and political rights, courts would have more of an opportunity to frustrate progressive reform initiatives in the name of classical civil liberties.

At one level, this is simply the risk that any society takes in deciding to establish a constitutional democracy with an entrenched bill of rights. Having made the decision to advocate the establishment of a bill of rights, however, a new South Africa would have accepted that the benefits of constitutional review outweigh the risk of an unelected judiciary frustrating social reform. The adoption of a bill of rights that included social as well as civil and political rights would lessen the risk of a reactionary judiciary even further; by contrast, the exclusion of social rights would increase the potential for judicial frustration of social reform efforts, especially if rights to private property remain integral to the document. If social rights were excluded, redistributive efforts could not be as easily characterized as following from a constitutional mandate but, conversely, could be characterized as interfering with classical civil and political rights. With the inclusion of social rights, such redistributive laws would be viewed as representing a balance

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<sup>91</sup> In the words of Martha Minow, constitutional rights are grounded "in the processes of communication and meaning-making, rather than in abstract and enduring foundations." Minow, *supra* note 6, at 1862; see also Macklem, *supra* note 6, at 131 (stating that judicial decisionmaking occurs in an "ever-shifting web" of active interpretation of legal, political, social, and economic data).

<sup>92</sup> See Spann, *supra* note 77, at 1982-83 (arguing that the United States Supreme Court is ineffective in protecting the interests of disempowered minorities because its system of tenure and appointments offers no checks on the tendency of judges to subconsciously inform their decisions with majority values, and ensures that only judges holding mainstream values are likely to be appointed).

between conflicting interests which find constitutional expression. Thus, the danger associated with the entrenchment of social rights, as opposed to the danger of establishing a constitutional bill of rights, is that the judiciary would fail to perform its assigned function.

A recent example from Canada illustrates the issues discussed above. In *Wilson v. Medical Services*,<sup>93</sup> regulations introduced by the province of British Columbia limited and directed the influx of new doctors into the province. Given a huge increase in government expenditures on physician services and an extraordinarily high rate of doctors per capita, British Columbia refused to provide the billing number required by new doctors to practice medicine unless it could be shown that a doctor was filling "a demonstrated [medical or community] need."<sup>94</sup> The province also issued billing numbers that were restricted to certain regions suffering a shortage of doctors. The regulations, challenged as an infringement of the right to liberty as guaranteed by the Canadian Charter of Rights and Freedoms, were ruled unconstitutional by the British Columbia Court of Appeal.<sup>95</sup>

Whether or not one agrees with the result reached in *Wilson*, it is clear that the case would have taken on a different argumentative form and structure had there been an explicit constitutional right to health.<sup>96</sup> The province would have been able to assert that its regulations were aimed at protecting or fulfilling the constitutional right to health of British Columbia residents, especially those in regions facing a shortage of doctors. The judiciary would have been faced with an inquiry fundamentally different than that presented by *Wilson*. The government would have been able to claim that its regulations were not only permitted by the constitution but were in fact mandated by the constitutional right to health and its concomitant duties on the state. The regulations would have been more easily characterized as a balance between two conflicting constitutional rights.

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<sup>93</sup> 53 D.L.R.4th 171 (B.C. Ct. App. 1988), *leave to appeal denied*, [1988] 2 S.C.R. viii; see Weiler, *supra* note 68, at 119-21 (commentary on *Wilson* as part of a broader genre of Charter cases).

<sup>94</sup> *Wilson*, 53 D.L.R.4th at 178.

<sup>95</sup> See *id.* at 195.

<sup>96</sup> Canada's health care system is statutory. See Canada Health Act, ch. 6, 1984 S.C. 273 (Can.). Whether § 7 of the Canadian Charter, which affirms the rights to life, liberty and security of the person, protects aspects of Canada's health care system from legislative erosion has yet to be determined.



It is true that entrenching social rights does not ensure that such state initiatives would pass constitutional muster. The risk that initiatives of this sort would be declared unconstitutional stems from vesting the power of judicial review in the judiciary. Excluding social rights from the catalogue of rights the judiciary is empowered to protect, however, exacerbates this risk. Conversely, had the regulations been challenged as being an insufficient response to the regional shortage of doctors and thus an infringement of a constitutionally guaranteed right to health, the major risk associated with a reactionary judiciary would be that it would refuse to exercise its authority and find ways to avoid the issue.

That this is the primary risk does not mean that it is the only risk. All legal texts possess regressive potential. The entrenchment of social rights provides a boost to certain kinds of arguments aimed at combatting disadvantage, but entrenchment alone does not ensure that such arguments will prevail. If rights are guaranteed to all,<sup>97</sup> more advantaged members of society will attempt to have constitutional guarantees interpreted consistently with their interests and world views, aided by the financial resources that the disadvantaged lack.<sup>98</sup> For this reason, as we will suggest in Part VI, it is desirable to set an interpretive framework for adjudication, through a clause, or series of clauses, that establishes that social rights must be approached from the perspective of remedying disadvantage and not that of reinforcing advantage.<sup>99</sup> In the

<sup>97</sup> See Bakan, *supra* note 6, at 310-15 (discussing the problems of underinclusiveness and overinclusiveness created by the conceptualization and phrasing of rights in terms of universal beneficiaries).

<sup>98</sup> Joel Bakan has suggested examples in this vein, in the context of the current debate in Canada over whether and how to constitutionalize a "social charter":

1. under a right to housing, rent control laws could be challenged on the basis that they reduce housing stock,
2. under a right to employment, union security clauses could be challenged, and
3. under a right to an adequate standard of living, taxation necessary to fund social programs could be challenged.

GWEN BRODSKY, SOCIAL CHARTER ISSUES AFTER BEAUDOIN-DOBBIE 20 (1992).

<sup>99</sup> See *id.* at 24-34 (reprinting of the Draft Alternative Social Charter proposed by a large number of equality-seeking and anti-poverty groups in Canada). In several clauses, the various social rights proposed are tied into an underlying purpose, namely "the fundamental value of alleviating and eliminating social and economic disadvantage." *Id.* at 29 (§§ 2 & 5). The umbrella phrase introducing the various rights refers to them as falling within the "human rights of all members of Canadian society, and, in particular, members of its most vulnerable and disadvantaged groups." *Id.* (§ 1). For good measure, a further clause suggests that "[g]overnments have obligations to improve the conditions of life of children and youth and to take

presence of such a clause or clauses, it becomes more likely that a judiciary, recalcitrant about reform efforts, may avoid deciding the issue on the basis of social rights claims, but would be discouraged from reinforcing existing relations and structures of advantage. Even then, however, a focus on disadvantage and vulnerability can slip into protectionist paternalism that risks treating civil liberties as trade-offs for the satisfaction of social need claimed as right.<sup>100</sup>

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positive measures to ameliorate the historical and social disadvantage of groups facing discrimination." *Id.* (§ 4).

<sup>100</sup> An excellent example of this can be found in the *jurisprudence constante* of the Committee of Independent Experts under the European Social Charter with respect to Article 8(1). See ESC, *supra* note 42, art. 8(1), Europ. T.S. No. 35 at 7 ("With a view to ensuring the right of employed women to protection, the Contracting Parties undertake . . . to provide either by paid leave, by adequate social security benefits or by benefits from public funds for women to take leave before and after childbirth up to a total of at least 12 weeks.").

This would seem on its face to be a progressive provision with no obvious opening for regressive interpretation. Indeed, the Committee has called upon governments to account for the inadequacy of the level of benefits provided on a number of occasions. See, e.g., COUNCIL OF EUROPE, CASE LAW ON THE EUROPEAN SOCIAL CHARTER 87-88 (1982) (summarizing the results of the first four cycles of state reporting to the Committee on the question of the adequacy of financial entitlement under Article 8(1)). The Committee found that the United Kingdom's level of benefits for income maintenance during leave were inadequate, recalling language from an earlier report according to which "it is essential that the mother should not suffer prejudice in the form of a substantial reduction in her income, implying a kind of sanction on maternity, for this would constitute a socially harmful instance of discrimination." COMMITTEE OF INDEPENDENT EXPERTS ON THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS XII-1, 1988-89, at 151 (1992) [hereinafter CIE, CONCLUSIONS XII-1]; see also *id.* at 246-52 (Fabricius, dissenting) (setting out the case law to date on the level of benefits and arguing that the Committee should not have found a violation, but rather should have postponed its decision in light of the need to clarify that case law).

The above appears to show not only a capability for a supervisory body to make determinations with respect to positive social rights, but also suggests that these interpretations ought to be generally welcome. However, the second prong of Article 8(1) deals with the length of the leave. It is on this point that the Committee seems to venerate motherhood more than a woman's own determination of what is good for her as a mother.

Beginning in 1984, the Committee opined that Article 8(1) had a dual purpose when read in light of national law and other international treaties. The Committee stated that the provisions "were designed both to grant working women increased personal protection in the case of maternity and to reflect a general interest in public health—i.e. the health of the mother and child." COMMITTEE OF INDEPENDENT EXPERTS ON THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS VIII, 1980-81, at 123 (1984) (emphasis added) [hereinafter CIE, CONCLUSIONS VIII].

The Committee observed that the first purpose of Article 8(1) would point towards the duty of employers and government in tandem to make 12 weeks remunerated leave available if women choose to take the leave for part or all of that period. But the second purpose cut against allowing women complete "freedom of

Once again, it is desirable to enhance the progressive potential of such rights through a second kind of clause that warns against interpretations that subordinate free agency to social benefits provision.<sup>101</sup>

In the absence of entrenched social rights, it would be unwise to expect that values left unconstitutionalized (and thus not reinforced by the continuing processes of constitutional interpretation) could hold their own in wider political discourse. They will be marginalized and categorized as second-class arguments and those most dependent on them for basic survival and for integration into society at large will become or remain second-class citizens. Institutionalized norms enshrine certain kinds of people as the norm and tend to engender a consciousness that "treat[s] classifications of difference as inherent and natural while debasing those defined as different."<sup>102</sup> When we make rights arguments, we are competing for a place on the constitutional landscape. If arguments concerning fundamental social values are not available because the rights that are labels for those values are not entrenched, then other values will come to dominate the broader public discourse. As Barry Glassner has stated, "we view ourselves in part through the eyes of others, and when others see us in a certain way, at least for long enough or sufficiently powerfully, their views are sure to have some effect."<sup>103</sup> A failure to entrench social rights is an act of institutional normatization that amounts to a powerful viewing of members of society by society itself. A constitutional vision that includes only traditional civil liberties within its interpretive horizon fails to recognize the realities of life for certain members of society

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choice," and required a compromise interpretation of the 12-week rule. The result was that the Committee found that Article 8(1) "*obliged the woman concerned and the employer to observe within this total period [of 12 weeks], a minimum period of cessation of work, which had to be taken after birth and which it was reasonable to fix at six weeks.*" *Id.* (emphasis added).

In subsequent reports, the Committee has found states in violation of Article 8(1) even if the level of benefits is adequate and 12 or more weeks of leave is provided at the request of the woman in question. See CIE, CONCLUSIONS XII-1, *supra*, at 150-52; *id.* at 253-54 (Stegard, dissenting).

<sup>101</sup> Ironically, with respect to the discussion *supra* note 100, the European Social Charter has the makings of such a clause in another article. See ESC, *supra* note 42, art. 13(2), Europ. T.S. No. 35 at 10 ("[T]he Contracting Parties undertake . . . to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights.").

<sup>102</sup> MINOW, *supra* note 14, at 111.

<sup>103</sup> Barry Glassner, *Labeling Theory*, in THE SOCIOLOGY OF DEVIANCE 71 (Michael Rosenberg et al. eds., 1982).

who cannot see themselves in the constitutional mirror. Instead, they will see the constitutional construction and legitimation of a legal self for whom social rights are either unimportant or taken for granted.<sup>104</sup> With the passage of time and absent important countervailing factors, this normative vision will help to confirm the very reality that it posits.<sup>105</sup>

Perhaps the most insidious quality of poverty is the tendency of advantaged members of society to become blind to its effects.<sup>106</sup> The modern state tends to paint the regulatory future with a broad legislative brush.<sup>107</sup> To the extent that the state can and does

<sup>104</sup> In one human rights context, that of international law, it has been argued that rights correspond to various philosophical anthropologies or understandings of the nature of humans. See JACK DONNELLY, *THE CONCEPT OF HUMAN RIGHTS* 27-44 (1985); see also Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309, 331-32 (1984) (discussing the structure of rights in the Universal Declaration of Human Rights); Scott, *supra* note 59, at 803-09 (discussing the Universal Declaration's ideal of the free person).

<sup>105</sup> Joel Handler has advanced similar ideas in his study of statutory welfare rights in the United States. He notes that welfare programs "define values and confirm status; they are expressive and symbolic. The distinction between the deserving and undeserving poor is a moral issue that affirms the values of the dominant society by stigmatizing the outcasts." Handler, *supra* note 14, at 926.

Handler makes the point clearly with respect to the bureaucratic decisions as to whom should receive help and on what conditions: through the selection process itself, "dominant values are affirmed by those included as well as by those excluded." *Id.* at 929. The histories recounted by Handler of how the welfare system had close to free rein to label and marginalize the poor according to moral and structural dictates could have taken different paths if there had been constitutional norms permitting persons to conceive of and argue about their situation in non-degrading terms. See *id.* at 926-31.

Cordoning off the "private" from government action is regulation no less than is active government intervention:

Within a sphere cordoned off as "private," removed from state intervention, family members remain individuals who have or who lack rights to appeal to the state. . . . It would be false to say that family relations were unregulated: they *were* regulated by the government's grant of financial, physical, and social privileges to the male head of household and refusal to hear any objections of other family members.

MINOW, *supra* note 14, at 279.

<sup>106</sup> See DANILO TÜRK, U.N. COMM'N ON HUMAN RIGHTS, PRELIMINARY REPORT ON THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS at 14, U.N. Doc. E/CN.4/Sub.2/1989/19 (1989) ("The problem with poverty seems to be that people other than the poor get used to it and that the very notion of poverty conveys a certain idea of passivity.").

<sup>107</sup> This requires attention to the extreme marginalization of the poor from both legislative and regulatory law-makers. "[M]anagerial formalism [within a bureaucratic welfare culture] requires low-income citizens to secure extremely explicit legislative rules and remedies. . . . [But] the poor face unusual and large difficulties in organizing and financing political action." Rand E. Rosenblatt, *Social Duties and the*

individualize rules through regulations and discretionary decisions, it is essential that there be a responsive way to oversee the largely unseen and unchecked activities of the executive bureaucracy, which has considerable autonomy in implementing or thwarting broadly worded policies of the legislature.<sup>108</sup>

Thus, the legislative function requires mechanisms for monitoring how its policies actually affect people and correspond to its own commitments. In the context of the European Social Charter, David Harris has argued persuasively that there are limits to how well any supervisory body, no matter how democratic, diligent, or expert, can determine whether policies and laws respect human rights without having the benefit of real-life detail that individual petitions provide.<sup>109</sup> Such petitions have the effect of drawing attention to personal circumstances that reveal failures and problems unknown to or avoided by those responsible for drafting legislation. Such failures and problems may not have been predicted by, or may remain hidden from the view of, legislators or bureaucrats who live a more privileged life than those claiming the benefit of constitutionally entrenched social rights, and who are not institutionally required to listen to individual stories to produce a bridge between life experiences.<sup>110</sup> This applies whether the body is the government, a legislative committee, or an international monitoring body such as the European Social Charter's Committee of Independent Experts.<sup>111</sup>

*Problem of Rights in the American Welfare State*, in *THE POLITICS OF LAW* 90, 102 (David Kairys ed., 2d ed. 1990).

<sup>108</sup> See generally Jerry Frug, *Administrative Democracy*, 40 U. TORONTO L.J. 559, 563-73 (1990) (arguing that democratic procedures should be incorporated into governmental bureaucracy); Handler, *supra* note 14, at 943 (stating that "[t]he bureaucracy of welfare plays an active role in shaping the operational characteristics of welfare policy").

<sup>109</sup> See DAVID HARRIS, *THE EUROPEAN SOCIAL CHARTER* 217-19 (1984).

<sup>110</sup> It is worth noting Frank Michelman's view that judges actually "enjoy a *situational advantage* over the people at large in listening for voices from the margins." Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1537 (1988) (emphasis added). This suggests another way in which institutional competence and legitimacy interact. At least potentially, courts or court-like bodies are institutionally well-placed to listen for stories of suffering, to act to remedy the situations according to their specific requirements, and to prompt a broader social dialogue about the implications of these stories for politics and policy. For discussion and appraisal of other writings which emphasize the importance of perspective for the methodology of judging, see Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1719-26 (1990).

<sup>111</sup> To date, the Committee of Independent Experts measures states' fulfillment of obligations under the Charter solely on the basis of the states' periodic reports to

Court cases in conjunction with media publicity generated by a free press keep the plight and pain of marginalized members of the community on the political agenda.<sup>112</sup> A court provides a forum for relating debates over fundamental values to individual concrete cases. It is an opportunity to have personal narratives heard and rights put in living context in a way that is virtually impossible for modern legislatures. In general terms, rights litigation is important for its demonstrative effect on society at large by the way in which it engenders awareness over how broader societal ideals are being played out in the context of real lives.

Arguably, social rights can be treated as equally important as civil and political rights and still have their constitutional protection and promotion left exclusively to state legislatures.<sup>113</sup> One could point to other constitutions, such as that of India, that follow the bifurcated approach to justiciability of the International Covenants by placing classical rights and liberties in a section of the constitution that is expressly justiciable while placing social rights in a section that is expressly non-justiciable and meant only to indicate unenforceable constitutional duties of the government.<sup>114</sup> De-

the Committee. It does not have the benefit of individual petitions that could shed light on the actual operation of the laws and policies being evaluated. See ESC, *supra* note 42, arts. 21-24, Europ. T.S. No. 35 at 14-15.

<sup>112</sup> Patricia Williams describes the sense of empowerment that rights bring to those whose concerns have otherwise traditionally been ignored. "It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no-power. The concept of rights, both positive and negative, is the marker of our citizenship, our participatoriness, our relation to others." Williams, *Alchemical Notes*, *supra* note 14, at 431.

On the importance of individualized petition procedures to participatory democracy see Anita Hodgkiss, Note, *Petitioning and the Empowerment Theory of Practice*, 96 YALE L.J. 569, 584 (1987).

<sup>113</sup> See Didcott, *supra* note 35, at 59 (stating the inclusion of social rights "belongs [in] a political programme . . . not a bill of rights").

<sup>114</sup> In India, the classical rights and liberties are expressed in the Fundamental Rights section of its constitution, while social rights are expressed in the Directive Principles of State Policy section. See *infra* text accompanying notes 395-97. Ireland and Spain have similar bifurcated constitutions. Compare IR. CONST. arts. 40-44 (setting out fundamental, justiciable rights) with *id.* art. 45 (setting out nonjusticiable social rights); compare CONSTITUCIÓN chap. II, arts. 14-29 (Spain) (outlining the justiciable basic rights and liberties) with *id.* chap. III (outlining nonjusticiable social and economic guidelines that the state must observe). The correspondence between directive principles of state policy and social rights is not total; all of these constitutions have concessions within the justiciable fundamental rights sections to social rights including those with positive obligations attaching. See de Villiers, *supra* note 4, at 31, 34; Brian Walsh, *Existence and Meaning of Fundamental Rights in Ireland*, 1 HUM. RTS. L.J. 171, 173-81 (1980); *infra* note 385 and accompanying text.

spite the best of intentions, this approach serves to marginalize the centrality of social rights, the values they seek to vindicate, and, most significantly, the persons whose chance to be human and whose place in society is most dependent on these rights.

One reason for this is that just discussed, namely that an individualized petition or complaints procedure offers a kind of scrutiny and protection that the pure political process and policymaking cannot. In the words of Philip Alston, "a complaints procedure brings concrete and tangible issues into relief" and makes "real problems confronting individuals and groups come alive."<sup>115</sup> Although we do not agree with the dated philosophical view that something can only be a human right if judicially enforceable, one must acknowledge that judicial review has practical importance for the enforcement of constitutional rights, and thereby confers legitimacy on the values and interests that social rights seek to protect.

A second reason, directly related to the first and also discussed earlier,<sup>116</sup> is that rendering social rights justiciable will provide greater weight to their underlying values in policymaking and political discourse generally. If social rights are phrased merely as directive principles of state policy or as state responsibilities or obligations, a political discourse may emerge that avoids notions of individual need and entitlement and instead remains at the level of generalized policy considerations.<sup>117</sup> Such generalized attention

<sup>115</sup> Philip Alston, *No Right to Complain About Being Poor: The Need for an Optional Protocol to the UN Covenant*, in *THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS (ESSAYS IN HONOUR OF TORSEL OPSAHL)* 79, 91-92 (Asbjorn Eide & Jan Helgensen eds., 1991).

<sup>116</sup> See *supra* text accompanying notes 78-84, 102-05.

<sup>117</sup> We should not be understood as claiming that there is anything inherent about this tendency; the chances of marginalization almost certainly varies from society to society, and era to era. Indeed, it is likely that the chance of marginalization of values is contingent upon an array of factors, including: the extent to which popular understandings link judicial protection with "real" rights; the relative degree of activism of the judiciary in interpreting and enforcing those constitutional rights that are within its province; the role and status of the judiciary in the democratic culture of a particular society; the ideological disposition of the mainstream of the judiciary; the force of tradition and consensus supporting those values that do not have constitutional protection; and the relative influence of market forces. The evaluation of these kinds of factors in the context of South Africa is one which we are not well placed to undertake. Given the widespread and deeply-felt aspirations in South Africa for a constitutional democracy that involves judicial protection of human rights, however, there will be an inexorable tendency for the values underlying justiciable rights to be enhanced and those not made justiciable to be viewed as being less fundamental and unworthy of equal protection.

risks treating individuals as abstract, passive units of policy and not as active agents suffering hardship with legitimate claims of constitutional right. If expressly phrased as rights, even if non-justiciable, individual circumstances would command greater attention in politics and policymaking as long as political institutions are structured or simply function in such a way that takes constitutional commitments seriously. However, in a world increasingly committed to judicial protection of human rights, excluding social rights from the ambit of justiciability will tend to

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The marginalizing tendency of selective constitutionalization has been evident in a number of different contexts. One example is India, which will be discussed in considerable detail in Part IV, *infra*. In the Indian context, one assessment has been made that "[t]he non-justiciability of the directive principles has led to a situation where their unenforceability has been overemphasized to such an extent that the political and electoral checks originally envisaged have not fully met the promise." K.P. KRISHNA SHETTY, *FUNDAMENTAL RIGHTS AND SOCIO-ECONOMIC JUSTICE IN THE INDIAN CONSTITUTION* 76 (1969), *quoted in de Villiers, supra* note 4, at 38 n.62. De Villiers adds by way of comment: "Due to a more activist approach of the Supreme Court lately, this criticism by Shetty has at least partially been addressed." *Id.*

Another example is the European Social Charter, which has enjoyed a very low profile compared to the European Convention on Human Rights, although the two are meant to comprise two halves of a whole. Personal interviews conducted by one of the authors with several officials within the Council of Europe suggest that the Charter's status and the importance of the values it deals with were detrimentally affected by falling within the jurisdiction of the Council of Europe's Social Affairs Directorate. It has only begun to be taken seriously since its transfer to the jurisdiction of the Human Rights Directorate. Even so, the "social partners" (employers' and employees' organizations) have made it clear that they will not invest time in a process in which they have no serious role and, in particular, in which there is no petition procedure similar to that under the European Convention on Human Rights. *See* Interview with Pierre-Henri Imbert, Assistant Director of Human Rights, Council of Europe, in Strasbourg, Fr. (May 27, 1992); *see also* D.J. Harris, *A Fresh Impetus for the European Social Charter*, 41 INT'L & COMP. L.Q. 659, 659 (1992) (stating that the factors preventing the Charter from "realising its full potential" result from a "lack of political will").

As to the relative status of the ICCPR and the ICESCR, it has been generally acknowledged that the ICESCR has been the "poor cousin" of the pair by not having the opportunity to receive complaints or call states to account in concrete cases. *See* Alston, *Out of the Abyss, supra* note 57, at 341-42, 355-62; Scott, *supra* note 59, at 820-21.

Finally, observers north of the Canada-U.S. border will be forgiven for speculating that the constitutional rights discourse in the United States has both helped create and reinforce a political culture that values the negative freedom of its members in a manner entirely out of proportion to the marginalization of huge sectors of the population. The values of "natural" freedom, individual responsibility for one's successes and one's plight, and distrust of government are not independent features of American political culture. Rather, we would contend, they are intimately influenced by the historical and current constitutive effects of constitutional rights discourse. *See* Gabel, *supra* note 13, at 1572-81.



have a negative effect on those rights and ultimately on the people that depend on them.

As noted in Part I, debates over the justiciability of social rights occur against the backdrop of an express or implied separation of powers, and often such separation is trumpeted as a reason unto itself for not rendering social rights constitutionally justiciable.<sup>118</sup> To confer on the judiciary the power and responsibility of ensuring that the legislative branch lives up to certain social standards is to intrude on the exclusive realm of the legislature and thereby to interfere with the separation of powers necessary to modern democratic governance. To a certain extent the constitutionalization of social rights does upset traditional conceptions of a separation of powers and the idea that each branch of the state possesses a distinct function which should not be invaded by the action of another branch.<sup>119</sup> Yet many question the ability to delineate in the abstract the boundaries of the judicial and legislative spheres.<sup>120</sup> In place of an abstract theory of a separation of powers between the judiciary and the legislature that seeks to determine a priori the appropriate reach of each institution, the constitutionalization of social rights entails to a certain extent a context-specific approach to the delineation of the boundary of judicial and legislative action.

In the words of Martha Minow, “[t]he legal regulation of separation of powers requires a continuing process of mutual action and interaction.”<sup>121</sup> She adds that context, as opposed to a priori definition, ought to be the means by which separation of powers occurs:

The historical moment, the substantive issue at stake, the responsiveness of other branches to that issue, and their abilities to reassert their roles in the balance of power are more central than a remote theory of the distinct functions of each branch. ... Evaluation of the legitimacy of judicial conduct depends largely on the responsiveness of the other branches. Questions of the separation of powers concern not so much whether one branch has invaded the prerogatives of another as whether the branches

<sup>118</sup> See *supra* text accompanying notes 49-52.

<sup>119</sup> See Shapiro, *supra* note 49, at 551-58.

<sup>120</sup> See, e.g., MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 150 (1989) (“I am very sceptical about the possibility of drawing an abstract line to determine how far judicial review can legitimately go.”).

<sup>121</sup> MINOW, *supra* note 14, at 361.

all remain able to participate in the process of mutually defining their boundaries.<sup>122</sup>

The inclusion of social rights in a South African constitution would require rethinking the relationships that would otherwise exist between the executive, legislature, and judiciary. Interpreting constitutional guarantees as requiring positive governmental action, and invoking the constitution to prod the state into better protecting the necessities of life for members of society, would involve some blending of the judicial and legislative functions. The limits of the judicial power in part would be determined by the responsiveness of the judicial, executive, and legislative branches to each other's constitutional stances, and the spheres of each source of governmental authority would be shaped and reshaped by context-specific disputes.

Ideally, the relationship between the judiciary and the other two branches of government would be cooperative as opposed to antagonistic, interactive as opposed to separate. This is not to deny that, in practice, the relationship will often be shaped by spirited, even bitter, resistance to what one branch perceives as overly intrusive incursions by another. Limits on the spheres of authority of each would emerge from the relationships that they jointly construct through the dialogic encounter, whether cooperative or conflictual, engendered by a judicial role that explicitly blends the legislative with the judicial.<sup>123</sup>

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<sup>122</sup> *Id.* at 361-62; see also Kurland, *supra* note 50, at 605 (discussing how the executive and legislative branches have shaped their roles through confrontation); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 438-44 (1987) (discussing the contemporary emphasis on the checks and balances conception of government).

<sup>123</sup> Some argue that traditional separation of powers doctrine falsely assumes that the judicial role can be characterized as a non-legislative function. Kurland, for example, states that:

[T]o resort to the idea that there is a tripartite division of powers, legislative, executive, and judicial, each term self-defining, is to deal with phantasms. If we take the basic arguments usually asserted that it is for the legislature to make the rules governing conduct, for the executive to enforce those rules, and for the judiciary to apply those rules in the resolution of justiciable contests, it soon becomes apparent that it is necessary to government that sometimes the executive and sometimes the judiciary has to create rules, that sometimes the legislature and sometimes the judiciary has to enforce rules, and sometimes the legislature and sometimes the executive has to resolve controversies over the rules.

Kurland, *supra* note 50, at 603.

### III. SOCIAL RIGHTS AND INSTITUTIONAL COMPETENCE

Scholars have also argued that social rights should be treated as nonjusticiable not only because of concerns about the legitimacy of entrenching social rights in a constitution, including fears of upsetting the separation of powers that ought to exist between the various branches of government, but also because the courts are perceived as institutionally incompetent institutions to entrust with their delineation and enforcement.<sup>124</sup> One position is that social rights are radically different than their classical civil and political counterparts, and as a result, the judiciary is an institution that does not possess the capability to engage properly in the relatively complex task of delineating their scope and content. Arguments of this type can and have been made without taking any position on the legitimacy of entrenching social rights in constitutional form. Instead, they tend to focus on the capacity or capability of the judiciary to adjudicate matters involving the assertion of social rights. In this Part, we review and criticize two types of arguments that assert institutional incompetence on behalf of the judiciary in relation to the adjudication of social rights.

The first type of argument is that courts are inappropriate institutions for adjudicating social rights because social rights impose positive obligations on the state which require government to act rather than refrain from acting. The concern with the supposed positive nature of social rights is not simply a legitimacy concern that the courts will usurp the power of the legislature to initiate social change through law and determine the terms on which such initiation takes place. There is also a concern that their perceived positive nature entails the expenditure of state resources and that courts are ill-positioned to make the kind of complex fiscal decisions necessary to create and implement the structures necessary to realize social rights.<sup>125</sup> Moreover, states can only act

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<sup>124</sup> Arguments of this sort are canvassed in Brooks, *supra* note 35, at 33; Asbjorn Eide, *Realization of Social and Economic Rights: The Minimum Threshold Approach*, 43 INT'L COMM'N JURISTS REV. 40 (1989); Dugard, *supra* note 35, at 461-63; Jackman, *supra* note 59, at 330 (discussing the differences between classical and social rights and the implications for the role of the judiciary); C. Michael MacMillan, *Social Versus Political Rights*, 19 CAN. J. POL. SCI. 283, 300 (1986) (placing the onus on the state to protect the exercise of social rights); Pereira-Menault, *supra* note 58, at 377-82 (discussing the difficulties that courts face when enforcing positive rights).

<sup>125</sup> For example, in rejecting the idea of including social and economic rights in a new South African Bill of Rights, Justice Didcott of South Africa stated:

incrementally if they wish to realize the values that underpin positive social rights. Such rights cannot, it is thought, be delineated in terms of immediate obligations on states. Thus, the rubric "positive" stands as an umbrella category for concerns about the institutional inability of courts to make determinations that are costly, are complex, and require time to achieve. By contrast, classical rights are seen as negative rights requiring that a state refrain from interfering with a pre-defined zone of individual liberty. Courts are seen as able to more easily demarcate the limits of negative liberty through drawing the boundaries of individual and collective freedom when the message directed to governments concerns the legitimate exercise of state power.

The second type of institutional competence argument raised against the justiciability of social rights is that social rights suffer from a high degree of imprecision.<sup>126</sup> The obligation of a state to provide nutritious food to hungry people, for example, seems hopelessly vague and indeterminate. Courts, it is said, would be unable to translate such an abstract aspiration into enforceable orders in specific cases. Civil and political rights, by contrast, are thought to have a higher degree of precision. Critics espousing this view see courts as useful institutions only with respect to the delineation and enforcement of civil and political rights and incompetent with respect to social rights.

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A bill of rights is not a political manifesto, a political programme. Primarily, it is a protective device. It is a shield, in other words, rather than a sword. It can state, effectively and quite easily, what may not be done. It cannot stipulate, with equal ease or effectiveness, what shall be done. The reason is not only that the courts, its enforcers, lack the expertise and the infrastructure to get into the business of legislation or administration. It is also, and more tellingly, that they cannot raise the money.

Didcott, *supra* note 35, at 58.

<sup>126</sup> Asbjorn Eide, Director of the Norwegian Institute of Human Rights, comments that:

A number of economic rights have been shown to be enforceable in the context of domestic law provided only that their component parts are formulated in a sufficiently precise and detailed manner.

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The economic, social and cultural rights are broadly recognized, but the corresponding obligations are not. They are largely formulated as broad obligations of result rather than specific obligations of conduct. This has its strengths and its weaknesses. Its strength is that it allows for flexibility, making it possible for states to comply with their obligations in ways which correspond to their particular situation. The weakness is that the obligations—and neglect of them—are very difficult to pinpoint.

Eide, *supra* note 124, at 41.

Although the argument about imprecision is, in theory, independent of whether or not the right is felt to be negative or positive, this probably concedes too much, at least in respect of the strongest critics of social rights, who have difficulty conceptualizing social rights as being anything but positive. Thus, the imprecision argument is often bound up in the overall claim that social rights are positive. For instance, a lack of precision may be thought to inhere in the very nature of social rights because violations of social rights are not amenable to immediate rectification, unlike civil and political rights that, it is thought, simply require the state to stop its interference. The very clarity of the obligations is tied to immediacy, with immediacy in turn being associated with negative rights and a remedy that takes the form of "no longer do what you have just done." The obligation of immediate noninterference seems more precise because the suspect act itself defines the zone of immediate prohibition carved out by the right. Thus, courts do not have to look into what the government should do, but need only use as their reference point what government has clearly and observably already done.

Even if critics were to accept that the clarity of an obligation of noninterference adhering to a negative civil or political right only results from a value-laden inquiry into the prior question of whether the interference has in fact gone too far, the content or scope of civil and political rights is viewed as more bounded and determinate than those about social rights. The allegedly more specific quality of civil and political rights often presupposes, implicitly or explicitly, a greater degree of social consensus about their worth and content as compared to the supposedly more ideologically contentious social rights. Social rights are seen as more controversial and therefore more indeterminate, thereby seriously complicating the judicial task.

These two types of arguments are seen by many to provide strong justification for excluding social rights from constitutional discourse. Both types of arguments are seriously flawed.

#### A. *Institutional Competence, Justiciability and the Negative Rights-Positive Rights Distinction*

The distinction between positive and negative rights has powerful currency in arguments concerning the justiciability of social rights.<sup>127</sup> Positive rights are typically imagined as requiring

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<sup>127</sup> The debate about negative and positive legal rights, conceived in terms of

state intervention to correct for inequalities of wealth caused by market freedom, whereas negative rights are imagined as checking the growth of bureaucratic and governmental intervention into cherished areas of individual freedom.<sup>128</sup> Proponents of limited government thus view positive rights as antithetical to a free and democratic society and argue that it is illegitimate for a constitution to attempt to secure their realization.<sup>129</sup> This section does not address the way in which the distinction between positive and negative rights informs arguments concerning conservative visions of social justice; as stated previously, the discussion assumes that South Africans will not reject the constitutional entrenchment of social rights on ideological grounds.<sup>130</sup>

Parenthetically, however, invoking the distinction between positive and negative rights in support of the view that social rights are illegitimate instruments in a constitutional context involves a serious oversimplification. At a conceptual level, any attempt to determine whether something is a positive right, and therefore requires state action, or a negative right, which requires state inaction, rests upon one's initial vantage point. Without reference to a normative, baseline understanding of the proper role of the state and to a conception of human freedom, the distinction between positive and negative rights is completely uninformative.<sup>131</sup> In North America, judges have tended to take traditional

obligations of inaction and action, is related to, but not strictly aligned with, competing conceptions of freedom. The classic articulation of the difference between positive and negative freedom is found in ISIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 121-72 (1969). For two equally seminal critiques, see C.B. MACPHERSON, *Berlin's Division of Liberty*, in *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 95, 95-119 (1973); CHARLES TAYLOR, *What's Wrong with Negative Liberty?*, in *2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 211, 211-29 (1985). For a positive account of freedom as "the capacity for autonomy," see Raz, *supra* note 33, at 425.

<sup>128</sup> See Jackman, *supra* note 59, at 331.

<sup>129</sup> The distinction between positive and negative rights has been of considerable practical significance in the United States. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) (rejecting that state officials violated the Constitution when they failed to protect a child from imminent danger, since the government normally has no positive duties to protect citizens from private harm); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (upholding a negative right to have an abortion free of state interference, but rejecting the right to state-funded abortions, even if necessary to save a woman's life).

<sup>130</sup> See *supra* text accompanying notes 73-75.

<sup>131</sup> See Daniel A. Farber, *Playing the Baseline: Civil Rights, Environmental Law and Statutory Interpretation*, 91 COLUM. L. REV. 676, 678 (1991) (book review); Peter L. Strauss, *Review Essay: Sunstein, Statutes, and the Common Law—Reconciling Markets, the*

common law private entitlements as the essential components of a largely unarticulated normative baseline.<sup>132</sup> What goes unsaid in the invocation of such a baseline is the fact that property and the right to contract require extensive positive state action to be effective legal institutions, and can in fact be seen as the state structure upon which modern industrial society emerged.<sup>133</sup>

As discussed in the introduction to this Part, the distinction between positive and negative rights also informs arguments that accept the legitimacy of legislative intervention to secure social justice for disadvantaged groups but that take the position that courts are not competent institutions to delineate the nature and extent of government obligations that accompany social rights.<sup>134</sup> However, reliance on the distinction between positive and negative rights to support arguments based on the institutional competence of the judiciary to adjudicate social rights is equally suspect. The negative-positive divide does not neatly distinguish sets of rights. Moreover, the fact that a right can entail a positive obligation does not mean that the judiciary is incapable of having something constructive to say about the scope and remedial requirements of that right. As a matter of practice, traditional civil and political rights have been found to entail positive rights at both the constitutional and international levels, either because of the explicit

*Communal Impulse, and the Mammoth State*, 89 MICH. L. REV. 907, 909 (1991) (book review); Sunstein, *supra* note 27, at 903, 918-19; see also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864 (1986) (examining how Judge Posner's view of the role of the state affects his view of positive and negative rights); Anna T. Majewicz, Note, *Baseline Analysis: Broadening the Judicial Perspective*, 65 ST. JOHN'S L. REV. 495, 508 (1991) (stating that the baseline of analysis greatly affects one's analysis of a problem); *supra* text accompanying note 83.

<sup>132</sup> See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901-02 (1992) ("[A]s it would be required to do if it sought to restrain [the plaintiff] in a common law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses [intended] . . .").

<sup>133</sup> See Bandes, *supra* note 6, at 2325 (arguing that even in the case of negative liberty, "[government's] actions . . . [are] based on value choices about whose freedom it will protect and whose it will obstruct"); Jack M. Beerbaum & Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 946 (1989); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1297 (1982) (discussing the controversy created by the "liberty of contract" at the turn of the century); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 467, 487 (1988) (book review); Sunstein, *supra* note 27, at 889. See generally MACPHERSON, *supra* note 127, at 98 (describing the philosophical tenets of negative liberty).

<sup>134</sup> See, e.g., *Pereira-Menault*, *supra* note 58, at 377-82 (noting the difficulty of judicial enforcement of positive rights and the danger of politicization of such enforcement).

wording of the text or as a necessary implication of the right. The judiciary has demonstrated that it is prepared and able to require positive state action in the context of traditional civil and political rights. Many examples could be given, but the following discussion gives a flavor.

### 1. Due Process and Procedural Fairness

Unreasonable delays in the case of an accused person awaiting trial have resulted in courts ordering that proceedings be stayed, placing incentives on the state to increase the capacity of the judicial system by building new courts and hiring extra judges and staff. In *R. v. Askov*,<sup>135</sup> for example, a delay of up to two years between the date of committal for trial and the trial itself was held to be in violation of an accused's right to be tried within a reasonable time, as guaranteed by the Canadian Charter of Rights and Freedoms. Noting systemic problems in the judicial system under challenge, the Supreme Court of Canada was conscious that its decision would have fiscal implications for the administration of justice:

This conclusion should not be taken as a direction to build an expensive courthouse at a time of fiscal restraint. Rather, it is a recognition that this situation is unacceptable and can no longer be tolerated. Surely an imaginative solution could be found that would rectify the problem.<sup>136</sup>

Nevertheless, the court did go on to suggest several ways in which costs could be minimized, such as adapting government buildings or portable structures to serve as courthouses. Moreover, it stated that if such temporary measures proved "unworkable," some other solution would be required.<sup>137</sup>

The European Court of Human Rights has drawn the link between unreasonable delay and judicial services even more clearly in several cases dealing with Article 6(1) of the European Convention, and has been willing to do so in the context of private law proceedings.<sup>138</sup> The court has distinguished between temporary

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<sup>135</sup> [1990] 2 S.C.R. 1199, 1203-07, 1247 (Can.).

<sup>136</sup> *Id.* at 1241.

<sup>137</sup> *Id.* at 1243.

<sup>138</sup> To some extent, the unreasonable delay cases about to be discussed, as well as the civil legal aid case discussed later in this subsection, operate on the assumption that one of the most basic functions of the state is to provide courts and access to them in order to resolve disputes over what Article 6(1) refers to as "civil rights and



backlogs<sup>139</sup> and "organisationally in-built" backlogs.<sup>140</sup>

In the leading case of *Zimmermann v. Switzerland*,<sup>141</sup> the applicants appealed an administrative decision related to airport air and noise pollution to the Swiss Federal Court. Three and a half years later their appeal was dismissed. Switzerland pleaded before the European Court that the delay experienced by the applicants was defensible because the Federal Court was experiencing an excessive work load and had dealt with more urgent cases first. The European Court found that creating priority categories would only suffice as a provisional expedient in cases where the backlog is temporary. A "temporary backlog of business does not involve liability on the part of the Contracting States provided that they take, with the requisite promptness, remedial action to deal with an exceptional situation"<sup>142</sup> of temporary delay. It is only when the backlog can be called temporary that states can raise a defense to otherwise unreasonable delay, and, even then, the state has a positive duty to take "remedial action" to ensure that the situation remains only temporary. Nevertheless, states have a positive duty to organize their legal system in a way that allows the judiciary to meet their European Convention duties with respect to the administration of justice. Thus, "if a state of affairs of this kind is prolonged and becomes a matter of structural organisation, such [provisional] methods are no longer sufficient and the State will not be able to postpone further the adoption of effective measures."<sup>143</sup> As this passage implies, under the European Convention, states are subject to a duty to organize the provision of the collective good of judicial services so as to facilitate expeditious

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obligations." ECHR, *supra* note 41, art. 6(1), 213 U.N.T.S. at 228. Shoring up this baseline assumption is the early landmark case of *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) (1975). The narrow issue was whether censorship of a prisoner's correspondence with his lawyer violated Article 6(1). The court found that even though no proceedings were pending, the guarantees of Article 6(1) were not limited to the procedural rights triggered only by existing legal proceedings. It laid down the much broader principle that Article 6(1), to be effective, presupposes a right to submit a civil claim to a judge. *See id.* at 17. Applying this principle could involve the court in direct evaluation of the existence and sufficiency of judicial services. As will be seen in the upcoming discussion, the unreasonable delay cases and the civil legal aid cases involve elements of just such an evaluation.

<sup>139</sup> *See Zimmermann v. Switzerland*, 66 Eur. Ct. H.R. (ser. A) at 12-13 (1983).

<sup>140</sup> *Union Alimentaria Sanders S.A. v. Spain*, 157 Eur. Ct. H.R. (ser. A) at 16 (1989).

<sup>141</sup> 66 Eur. Ct. H.R. (ser. A) at 12 (1983).

<sup>142</sup> *Zimmermann*, 66 Eur. Ct. H.R. (ser. A) at 12.

<sup>143</sup> *Id.* at 12-13.

handling of civil suits. Where delays are allowed to become unreasonable and systemic, the state is under a potentially far-ranging duty to structurally reorganize its delivery of judicial services.<sup>144</sup>

The extension of rights of procedural fairness to persons and subject matters in the administrative law area has increased the costs of administrative tribunals enormously. In *Goldberg v. Kelly*, the United States Supreme Court held that a certain degree of due process is required before the termination of welfare benefits, even if such procedure led to increased costs.<sup>145</sup> In the landmark Canadian case of *Re Singh*,<sup>146</sup> the Canadian Supreme Court applied such rights to immigration hearings, holding that "[n]o doubt considerable time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice, but [that] such an argument misses the point of . . . constitutional entrenchment of the principles."<sup>147</sup> Similarly, the European Court of Human Rights extended procedural protections with respect to "civil rights" to statutory rights in the social welfare context, with serious implications for the administrative hearing process in all of Europe.<sup>148</sup>

Guarantees of a right to counsel, traditionally imagined as a classical civil and political right, have resulted in court orders that

<sup>144</sup> Such a broad obligation is implicit in many decisions of the European Court of Human Rights. See, e.g., *Martins Moreira v. Portugal*, 143 Eur. Ct. H.R. (ser. A) at 21 (1988) (where an orthopedic exam was required in a car accident case, Portugal was found in violation of Article 6(1) as a result of an inefficient medical services system that delayed the scheduling of an exam and the trial); *Guincho v. Portugal*, 81 Eur. Ct. H.R. (ser. A) at 17 (1984) (despite the difficulties caused by a recent transition to democracy, a delay caused by the state's failure to act in the face of a seemingly permanent increase in the volume of litigation breached Article 6(1)); *Union Alimentaria Sanders S.A.*, 157 Eur. Ct. H.R. (ser. A) at 15 (where the legal backlog was a foreseeable result of increased migration to Catalonia and had become entrenched, measures sufficient to meet temporary backlogs were both insufficient and a violation of Article 6(1)). For a pre-*Zimmerman* case, see *Buchholz v. Federal Republic of Germany*, 42 Eur. Ct. H.R. (ser. A) at 16 (1981) (considering a delay-causing increase in litigation due to an economic recession to be temporary).

<sup>145</sup> 397 U.S. 254, 266 (1970) ("[T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweigh the State's competing concern to prevent any increase in its fiscal and administrative burdens.").

<sup>146</sup> [1985] 1 S.C.R. 177.

<sup>147</sup> *Id.* at 218-19.

<sup>148</sup> See *Deumeland v. Germany*, 100 Eur. Ct. H.R. (ser. A) at 25 (1986); *Feldebrugge v. The Netherlands*, 99 Eur. Ct. H.R. (ser. A) at 13-14 (1986); A.W. Bradley, *Social Security and the Right to a Fair Hearing: The Strasbourg Perspective*, 1987 PUB. L. 3, 4.

entail state expenditures. The Sixth Amendment of the United States Constitution, which guarantees that accused persons "shall enjoy the right . . . to have the assistance of counsel,"<sup>149</sup> has been held not only to prevent the state from interfering with the ability of an accused to obtain counsel, but also to require the state to provide indigent defendants with legal assistance.<sup>150</sup> Under the European Convention on Human Rights, and other international instruments, the right to free legal aid in criminal cases is expressly recognized for those who cannot afford it.<sup>151</sup>

The European Court has made clear that this right is not to be construed narrowly.<sup>152</sup> In one case, a lawyer was appointed to represent the applicant on appeal to the Italian Court of Cassation. Despite the lawyer's failure to act, the court allowed the appeal to proceed. Italy argued that the initial appointment met its obligations and that, in such a straightforward case, the "interests of justice"<sup>153</sup> did not require the appointment of counsel. In the face of such lassitude, the European Court responded that

the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective; this is particularly so of the rights of the defence in view of the

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<sup>149</sup> U.S. CONST. amend. VI.

<sup>150</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1962) (holding that an indigent defendant in a criminal trial has a fundamental right to counsel).

<sup>151</sup> See ECHR, *supra* note 41, art. 6(3)(c), 213 U.N.T.S. at 228 ("Everyone charged with a criminal offence [has the right to] legal assistance, to be given . . . free when the interests of justice so require."); see also ICCPR, *supra* note 38, art. 14(3)(d), 999 U.N.T.S. at 177 (providing that in criminal proceedings "everyone shall be entitled . . . to have legal assistance assigned to him . . . without payment. . . if he does not have sufficient means to pay for it"); American Convention, *supra* note 44, art. 8(2)(e), 1144 U.N.T.S. at 147 ("Every person accused of a criminal offense has the right to be . . . assisted by counsel provided by the State, paid or not . . .").

It is interesting to note that international instruments also expressly entrench a positive right to "the free assistance of an interpreter if he cannot understand or speak the language used in court." ECHR, *supra* note 41, art. 6(3)(e), 213 U.N.T.S. at 228; see *Öztürk v. Federal Republic of Germany*, 73 Eur. Ct. H.R. (ser. A) at 16-17 (1984) (holding that one charged with a criminal offense is entitled to the free assistance of an interpreter); see also ICCPR, *supra* note 38, art. 14(3)(f), 999 U.N.T.S. at 177 (providing for "the free assistance of an interpreter"); American Convention, *supra* note 44, art. 8(2)(a), 1144 U.N.T.S. at 147 (guaranteeing "assist[ance] without charge by a translator or interpreter").

<sup>152</sup> See *Artico v. Italy*, 37 Eur. Ct. H.R. (ser. A) at 15 (1980) (noting that a restrictive interpretation of Article 6(3)(c) would lead to unreasonable results incompatible with the purposes of the right and the Convention).

<sup>153</sup> ECHR, *supra* note 41, art. 6(3)(c), 213 U.N.T.S. at 228.

prominent place held in a democratic society by the right to a fair trial, from which they derive.<sup>154</sup>

The court went on to dismiss Italy's argument that actual prejudice had to be shown by the applicant, "finding it sufficient to show that a qualified lawyer could plausibly have been of assistance in the circumstances."<sup>155</sup> If Italy was in any doubt that noninterference was insufficient for this Convention right, the court underlined that "compliance with the Convention called for positive action."<sup>156</sup>

Whereas the right to free legal assistance is expressly set forth in the European Convention for criminal matters, no mention is made of a similar right with respect to civil suits. This has not prevented the European Court from ruling that such free legal assistance can be read into Article 6(1) of the Convention on a contextual basis. The court has held, for example, that where matters are too complex to expect a person to represent herself or himself, legal aid must be provided, even in a civil case.<sup>157</sup> In *Airey*, a woman of modest means could not obtain legal aid to cover the high costs of an application to the Irish High Court for judicial separation from a physically abusive husband and was thereby unable to bring the action.<sup>158</sup> Although Irish law allowed *Airey* to represent herself, thereby providing formal access to the courts, such access would have been of little value to her because of, inter alia, the complexity of the proceedings and of the substantive points of law.<sup>159</sup> The court noted that hindrance from exercising a right *in fact* can breach the European Convention as much as any formal legal impediment and emphasized that "fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State."<sup>160</sup>

It is important to note that *Airey* did not decide that Article 6(1) implies a right to legal aid in all cases. Rather, the absence of legal

<sup>154</sup> *Artico*, 37 Eur. Ct. H.R. (ser. A) at 16.

<sup>155</sup> *Id.* at 17-18.

<sup>156</sup> *Id.* at 18.

<sup>157</sup> See *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 15-16 (1979); see also Patrick Thornberry, *Poverty, Litigation and Fundamental Rights—A European Perspective*, 29 INT'L & COMP. L.Q. 250, 250-58 (1980) (commenting on *Airey*); *infra* text accompanying notes 335-36 (discussing how the European Court related this case to the protection of rights that fall within social and economic subject matter).

<sup>158</sup> In view of the context of wife abuse, it is worth noting that the Court also found that this amounted to a breach of the ECHR Article 8 right to family life. See *Airey*, 32 Eur. Ct. H.R. (ser. A) at 17.

<sup>159</sup> *Id.* at 12-13.

<sup>160</sup> *Id.* at 14.

aid could trigger a violation of the right to effective access in which case a state has a choice of means to render access effective. The court suggested one means might be the simplification of procedure.<sup>161</sup> However, the thrust of the decision was that legal aid would often be necessary where legal representation was required, either by law or due to a case's complexity.<sup>162</sup>

## 2. Life, Liberty, and Security of the Person

In the area of the right to life, security of the person, and the right not to be detained, there is a significant body of international precedent for holding states to a standard of due diligence to prevent, investigate, and prosecute crimes against persons on a state's territory.<sup>163</sup> This duty has evolved in many international tribunal and court decisions dealing with the area known as state responsibility for the protection of aliens on a state's territory.<sup>164</sup> The basic component of the duty to prevent crime is the requirement to provide policing commensurate with a state's knowledge of the circumstances. While the due diligence standard allows for adjustments to be made according to the availability of state resources, lack of resources is not an automatically dispositive defense. On the contrary, the duty to protect is so important that states are required to give a certain priority of resources to police and related means of protection such as the court system.<sup>165</sup>

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<sup>161</sup> See *id.* at 12-13. This does not mean that the Court, in a given case, would not be competent to point to what is required to make access effective. In such a way, a person might have a right to legal aid on a concrete set of facts.

<sup>162</sup> It is interesting to note that Ireland responded to the individual remedy provided by the Court by establishing a legal aid system, overseen by an independent legal aid board. See EUROPEAN COURT OF HUMAN RIGHTS, SURVEY OF ACTIVITIES: 1959-1990, at 44 (1991). This response is of considerable significance as an illustration of the remedial process, whereby a decision in an individual case dealing with a positive right can be generalized into a scheme with the features of a collective good, within which the contextual determinations of need and entitlement can be made.

<sup>163</sup> See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 518-32 (4th ed. 1990).

<sup>164</sup> For an extended discussion of international law as it relates to injuries to the persons and property of aliens on state territory, see *id.* at 518-52; see also Dinah Shelton, *Private Violence, Public Wrongs, and the Responsibility of States*, 13 FORDHAM INT'L L.J. 1, 3-26 (1989-90) (delineating the evolution in international law from simple restraints on the exercise of state power to the more generalized obligation of ensuring respect for human rights).

<sup>165</sup> See BROWNLIE, *supra* note 163, at 452-55.

Positive duties in the area of crime prevention, investigation, and prosecution have now made their way into the international law of human rights such that it can be said that there is a positive duty on states in international law to protect not only aliens, but also one's own nationals. A pathbreaking case in this area was handed down two years ago by the Inter-American Court of Human Rights in a case against Honduras under the American Convention on Human Rights involving the phenomenon of disappearances.<sup>166</sup> Basing itself in part on textual language,<sup>167</sup> and in part on the general principles that have emerged from the law of state responsibility for the protection of aliens,<sup>168</sup> the court held that states' duties under the Convention are not simply negative duties that state agents abstain from violating rights.<sup>169</sup> Rather, states also have extensive positive duties with respect to all human rights guaranteed by the Convention, including those related to liberty, humane treatment, and life at stake in the case at hand.<sup>170</sup> The

<sup>166</sup> See *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., OAS/ser.L./V./III 19, doc. 13 (1988), *reprinted in* 28 I.L.M. 291.

<sup>167</sup> Notably, the general obligation in the American Convention refers to the duty of states "to respect . . . and to ensure" all the rights set out in the rest of the Convention. American Convention, *supra* note 44, art. 1(1), 1144 U.N.T.S. at 145 (emphasis added).

<sup>168</sup> The court in *Velásquez* succinctly stated the applicable general principles that place positive obligations on states:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

*Velásquez Rodríguez Case*, Inter-Am. Ct. H.R., OAS/ser.L./V./III 19, doc. 13, ¶ 172, *reprinted in* 28 I.L.M. at 326.

<sup>169</sup> The court linked the Article 1(1) duty "to respect" human rights to the "concept of the restriction of the exercise of state power." *Id.* ¶ 165, *reprinted in* 28 I.L.M. at 324 (quoting The Word "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86/ser. A/No. 6, ¶ 21 (May 6, 1986), *reprinted in* 5 BUERGENTHAL & NORRIS, *supra* note 43, pt. 3, ch. 25, at 1).

<sup>170</sup> The Court interpreted the Article 1(1) duty "to ensure" human rights to generate extensive positive duties on the state to regulate private relations in society that may violate the interests safeguarded by human rights:

This obligation implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for

court concluded that the evidence was sufficient to find that Velásquez Rodríguez' disappearance "was carried out by agents who acted under cover of public authority."<sup>171</sup> However, the court went on to state explicitly that, even if the direct involvement of Honduran state agents had not been proven, Honduras would still have had no defense given its positive obligations and "the failure of the State apparatus to act."<sup>172</sup> Thus, it would not have been fatal to the victim's case that the death squads could not be linked directly to the government: in either circumstance, Honduras was in violation of the Convention for its failure to investigate the disappearance.<sup>173</sup>

Another example from international human rights law is important as a statement of principle that positive duties of prevention or protection relate to human rights generally, and are not limited to situations of flagrant oppression such as those that existed in Honduras. The case of *Plattform "Arzte Für Das Leben" v. Austria*<sup>174</sup> revolved around two incidents during the course of an anti-abortion demonstration organized in Stadl-Paura by the applicant organization at which demonstrators were pelted with eggs and clumps of grass by pro-choice counter-demonstrators. One incident occurred at the location where the traditional socialist march normally took place every year; the Plattform had managed to get its demonstration license first. The demonstration was disrupted on both occasions by the counter-demonstrators despite the presence at each event of a large contingent of police.

damages resulting from the violation.

....

The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and ensure the victim adequate compensation.

This duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the safeguard of human rights and ensure that any violations are considered and treated as illegal acts . . . .

Velásquez Rodríguez Case, Inter-Am. Ct. H.R., OAS/ser.L./V./III 19, doc. 13, ¶¶ 166, 174, 175, reprinted in 28 I.L.M. at 324-25.

<sup>171</sup> *Id.* ¶ 182, reprinted in 28 I.L.M. at 327. Based on the evidence and the use of evidentiary presumptions, the court was able to conclude that Velásquez Rodríguez had been kidnapped, tortured, and murdered by state agents.

<sup>172</sup> See *id.* ¶ 182, reprinted in 28 I.L.M. at 327.

<sup>173</sup> See *id.* ¶¶ 177-81, 188, reprinted in 28 I.L.M. at 326-27.

<sup>174</sup> 139 Eur. Ct. H.R. (ser. A) (1988).

The applicants initially alleged a violation of their rights to publicly manifest their beliefs,<sup>175</sup> to freedom of expression and opinion<sup>176</sup> and to freedom of assembly.<sup>177</sup> But the European Court of Human Rights addressed the relatively narrow question of whether the applicants had an "arguable case" on the merits, such that their right to an effective remedy under Article 13 of the Convention would have been denied by the absence of adequate recourse in the Austrian legal system against the police for their failure to protect them. The court cast the issue as one of freedom of assembly and rejected Austria's contention that Article 11 only creates negative duties:

[Although] [t]he Court does not have to develop a general theory of the positive obligations which may flow from the Convention, . . . effective freedom of peaceful assembly cannot . . . be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11. Like Article 8, Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be.<sup>178</sup>

After analyzing the efforts made by the police, the court went on to find that the police and authorities had in fact not failed to take reasonable and appropriate measures.<sup>179</sup> In doing so, they made clear that their scrutiny would not be so strict as to substitute their opinion for that of the police, but would assess the failure to prevent the clash in terms of "measures . . . taken and not . . . results to be achieved."<sup>180</sup>

A final example drawn from Germany is instructive. There, the constitutional guarantee of a right to life has been interpreted to go beyond requiring the State to investigate and prosecute crime, by requiring the State to enact legislation making certain action criminal. In the Federal Republic of Germany, for example, the German Constitutional Court has interpreted the right to life enshrined in the Basic Law to protect fetuses, and required the State to make abortion a crime in certain circumstances. In the Court's view, the Basic Law "forbids not only . . . direct state attacks

<sup>175</sup> See ECHR, *supra* note 41, art. 9(1), 213 U.N.T.S. at 230.

<sup>176</sup> See *id.*, art. 10, 213 U.N.T.S. at 230.

<sup>177</sup> See *id.*, art. 11, 213 U.N.T.S. at 232.

<sup>178</sup> *Plattform*, 139 Eur. Ct. H.R. (ser. A) at 12.

<sup>179</sup> *Id.* at 13.

<sup>180</sup> *Id.* at 12.



on the life developing itself but also requires the state . . . [to] preserve it even against illegal attacks by others."<sup>181</sup> Regardless of one's views on whether or not a right to life ought to extend to the constitutional protection of a fetus, the German experience is instructive in that it illustrates that there are no inherent barriers related to competence preventing a judiciary from requiring a state to pass laws that conform to constitutional standards.<sup>182</sup> It also illustrates that competence is as much about willingness to take an interpretive step as it is about judicial capacity in the abstract.

### 3. The Rights to Privacy and Family Life

As has already been made clear from examples discussed above, the European Court of Human Rights has explicitly stated that it will not shy away from interpretations of rights that entail positive duties on states. This willingness to forge a positive rights jurisprudence is perhaps most apparent in relation to "the right to respect for . . . private and family life."<sup>183</sup> One area of concern relates to the legal and social disabilities created by a child's "illegitimate" status in a given domestic legal system. In the case of *Marckx v. Belgium*, for example, the court held that Article 8's requirement of respect for family life was violated by the absence of a domestic legal regime that allowed a child born of an unmarried woman to be considered that mother's child for all legal purposes without recourse to special procedures by either mother or child after birth.<sup>184</sup> The court clearly adopted as its working baseline the

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<sup>181</sup> Judgment of Feb. 25, 1975, BVerfG, 39 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1, translated in John D. Garby & Robert E. Jones, *West German Abortion Decisions: A Contrast to Roe v. Wade*, 9 J. MARSHALL J. PRAC. & PROC. 551, 641 (1976) (including prefatory and explanatory remarks). For commentary, see Currie, *supra* note 131, at 867-72 (reviewing the German Constitutional Court's reasoning behind its abortion stance); Donald P. Kommers, *Abortion and Constitution: United States and West Germany*, 25 AM. J. COMP. L. 255, 264-76 (1977) (examining the reasoning in support of the opposing doctrinal stances of the German and American courts regarding abortion). The German Constitutional Court has also held that the "right to life" requires state action to protect the individual from "adverse physical or economic conditions," including the freedom to broadcast and the right to choose a place of training. See Currie, *supra* note 131, at 870-71.

<sup>182</sup> See *supra* text accompanying notes 83-101.

<sup>183</sup> ECHR, *supra* note 41, art. 8(1), 213 U.N.T.S. at 230 ("Everyone has the right to respect for his private and family life, his home and his correspondence.").

<sup>184</sup> See *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 15 (1979) ("As envisaged by Article 8, respect for family life implies . . . the existence in domestic law of legal safeguards that render possible . . . the child's integration in his family."); see also

fact that states do enact laws dealing with family status and thus are responsible for failing to create the proper legal relationship between an illegitimate child and her or his mother:

[I]n addition to [the] primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.

This means, amongst other things, that when the State determines in its domestic legal system the régime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. . . . [R]espect for family life implies in particular . . . the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family.<sup>185</sup>

Perhaps the most important part of the decision for present purposes was the court's dictum concerning an illegitimate child's inheritance rights. The court found that a law precluding an illegitimate child from inheriting property from her or his unmarried mother violates Article 14's nondiscrimination guarantee.<sup>186</sup>

Matters of intestate succession—and of disposition—between near relatives prove to be intimately connected with family life. Family life does not include only social, moral or cultural relations, for example in the sphere of children's education; it also comprises interests of a material kind, as is shown by, amongst other things, the obligations in respect of maintenance . . . in the domestic legal systems of the majority of the Contracting States . . . .<sup>187</sup>

The court went on to find that Article 8 was not itself violated since an entitlement to some share in relatives' estates was not "indispensable in the pursuit of a normal family life,"<sup>188</sup> but nevertheless

Johnston v. Ireland, 112 Eur. Ct. H.R. (ser. A) at 25-26 (1986) (applying the *Marckx* interpretation of Article 8).

<sup>185</sup> *Marckx*, 31 Eur. Ct. H.R. (ser. A) at 15.

<sup>186</sup> Article 14 is not a free-standing equality guarantee; discrimination must be shown regarding a subject within the scope of another Convention right. Thus the court must first determine whether a situation potentially could constitute a violation of another right before moving on to Article 14. See J.G. MERRILLS, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS* 152-57 (1988). With respect to the question of the mother's and daughter's basic legal status addressed in *Marckx*, the court decided that the absence of appropriate legal protection constituted a violation of Article 8 and also found discrimination on the basis of illegitimacy, a violation of Article 14. See *Marckx*, 31 Eur. Ct. H.R. (ser. A) at 18-20.

<sup>187</sup> *Id.* at 23-24.

<sup>188</sup> *Id.* at 24.

found that underlying Article 8 interests were sufficiently engaged to trigger the application of the Article 14 nondiscrimination provision, which was then found to have been breached.<sup>189</sup> Most relevant for our purposes, however, is the acknowledgement by the court that positive rights to material assistance, such as that represented by maintenance laws, might be found in the future to exist in Article 8, and at minimum would appear to play a threshold role in triggering the application of Article 14.<sup>190</sup>

Another case showing that positive rights can be "found" on a contextual basis within the European Convention is the case of *X & Y v. The Netherlands*, in which the court held that there had been a violation of the right to privacy because Dutch law failed to provide for criminal prosecution of a person who had committed sexual assault against a mentally handicapped girl; the law neither allowed her to press charges on her own nor provided for any guardian to do so on her behalf.<sup>191</sup> In addition to declaring a breach of the Convention due to the absence of a criminal legal sanction, the court ordered compensation to the victim as "just satisfaction" under Article 50 of the European Convention.<sup>192</sup> The court did not go so far as to order the Netherlands to pass amending legislation,<sup>193</sup> but it implicitly put the government on notice that failure to do so would result in a finding of future violations in similar circumstances.<sup>194</sup>

The final example relates to a series of three recent cases dealing with legal recognition of gender in the case of post-operative transsexuals. In two cases coming from the United Kingdom,<sup>195</sup> applicants argued that British law did not go far

<sup>189</sup> See *id.* at 24-27. For a very recent application of *Marckx's* finding of a violation of Article 14 in conjunction with Article 8 regarding inheritance rights, see *Vermeire v. Belgium*, 214 Eur. Ct. H.R. (ser. A) (1991) at 9 (holding that the facts before it were so close to *Marckx* that the results would apply equally to the succession at issue); *infra* text accompanying notes 237-40.

<sup>190</sup> See *infra* text accompanying notes 233-40.

<sup>191</sup> See *X & Y v. The Netherlands*, 91 Eur. Ct. H.R. (ser. A) at 11-14 (1985) (finding a violation of the victim's Article 8 rights under the Convention).

<sup>192</sup> *Id.* at 16.

<sup>193</sup> In this international judicial context, it seems clear that the court *could not* issue such an order, at least given the court's interpretation of Article 50 and "just satisfaction" to date. See CHRISTINE D. GRAY, *JUDICIAL REMEDIES IN INTERNATIONAL LAW* 153-60 (1987).

<sup>194</sup> The Netherlands, in fact, responded to the case by filling the gap in its criminal code so as to authorize the legal representative of a mentally disabled person to file a complaint. See EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 162, at 46.

<sup>195</sup> See *Cossey v. United Kingdom*, 184 Eur. Ct. H.R. (ser. A) at 7-8 (1990)

enough in recognizing their true gender identity and that Britain had an obligation to, inter alia, rectify their birth certificates to reflect their true identity at birth to which their physiology now corresponded due to surgical transformation. In *Rees*, the court stated in general terms that states could be required to act: “[t]he Court has already held on a number of occasions that, although the essential object of Article 8 is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective respect for private life . . . .”<sup>196</sup>

Due to the controversy surrounding the issue both in terms of social mores and scientific understanding of transsexuality, and also since “there would have to be detailed legislation”<sup>197</sup> to address the degree of disclosure of the rectification to third parties, the court held in both *Rees* and *Cossey* that “the positive obligations arising from Article 8 cannot be held to extend that far.”<sup>198</sup> In each case, however, the court hinted strongly that its interpretation would not remain static even though complex issues and positive action would be involved.<sup>199</sup>

A year and a half later, the court handed down a judgment finding a violation of Article 8 in the case of similar claims to legal and social recognition of a post-operative male-to-female transsexual.<sup>200</sup> The majority claimed to have distinguished *Rees* and *Cossey*, and not to have overruled them, on the basis of the fact that the violation of privacy interests was more serious in France than in the United Kingdom.<sup>201</sup> At least one dissenting judge felt the majority was being less than candid and that the judgment was open to the

(involving a post-operative male-to-female transsexual); *Rees v. United Kingdom*, 106 Eur. Ct. H.R. (ser. A) at 8-9 (1986) (involving a post-operative female-to-male transsexual). In addition to rectification of the original birth certificate, *Cossey* also sought recognition of a right to marry a male. See 184 Eur. Ct. H.R. (ser. A) at 11-12.

<sup>196</sup> See *Rees*, 106 Eur. Ct. H.R. (ser. A) at 14; see also *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 14 (applying *Rees* and explaining that any differences between the cases were not material).

<sup>197</sup> *Rees*, 106 Eur. Ct. H.R. (ser. A) at 18.

<sup>198</sup> *Id.*; see also *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 15-16.

<sup>199</sup> “The Convention has always to be interpreted and applied in the light of current circumstances . . . . The need for appropriate legal measures should therefore be kept under review having regard particularly to scientific and societal developments.” *Rees*, 106 Eur. Ct. H.R. (ser. A) at 19; see also *Cossey*, 184 Eur. Ct. H.R. (ser. A) at 17 (reiterating the observations made in *Rees*).

<sup>200</sup> See *B. v. France*, 232 Eur. Ct. H.R. (ser. A) at 25 (1992).

<sup>201</sup> French law required the use of a “neutral” first name and preserved a greater number of documents indicating one’s unrectified gender. See *id.* at 22-24.

interpretation that *Rees* and *Cossey* had been overruled.<sup>202</sup> No longer able to prod parties to the treaty by hinting that they would find a violation sometime in the future, the court pushed the dialogue to another level by declining to offer its own view about the way in which France would have to respond to the finding of a breach.<sup>203</sup> It is clear, however, that the extent to which a complex, positive right was involved was hardly any less than had been the case in the United Kingdom cases.<sup>204</sup>

#### 4. Prisoners' Rights

Courts in the United States have long found there to be positive obligations on authorities for the conditions in prisons and other state institutions, such as those for the mentally insane. Courts have ordered that prisons be built to relieve overcrowding and that committees be established to carry out programs of institutional reform laid down by the courts.<sup>205</sup> Prison officials have been found to have engaged in cruel and unusual punishment, contrary to the Eighth Amendment, after demonstrating "deliberate indifference" to a prisoner's medical needs.<sup>206</sup> The constitutional

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<sup>202</sup> See *id.* at 30 (Matscher, J., dissenting) (arguing that the Court's judgment departed from the conclusions reached in *Rees* and *Cossey*).

<sup>203</sup> See *id.* at 25 ("The respondent State has several means to choose from for remedying this state of affairs. It is not the Court's function to indicate which is the most appropriate." (citation omitted)). Of course, less than two years before, it had not been the court's "appropriate function" to find a violation. One gets a strong sense that the dialogue is not over.

On the notion of "putting the government to means," see Craig Scott, *Social Values Projected and Protected: A Brief Appraisal of the Federal and Ontario Government Proposals*, in CONSTITUTIONAL COMMENTARIES: AN ASSESSMENT OF THE 1991 FEDERAL PROPOSALS 81, 90-91 (Douglas Brown et al. eds., 1992).

<sup>204</sup> Indeed, the implications for government action in France might well be more far-reaching if the views of the French Judge Pettiti in dissent are taken into account:

There is another aspect of considerable importance. For states like France whose civil status law is highly precise and compulsory, a consequence of rectification is that there is no obstacle to the marriage of a transsexual with a person of the same sex as his original sex. There is also the problem of adoption . . . . The whole of the civil law and inheritance law could be thrown into confusion.

*B. v. France*, 232 Eur. Ct. H.R. (ser. A) at 35-36 (Pettiti, J., dissenting) (provisional translation).

<sup>205</sup> See generally Frug, *supra* note 9, at 718-30 (reviewing the nature and impact of several court orders mandating massive changes in prisons, juvenile detention centers, and facilities for the mentally ill).

<sup>206</sup> See *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) (recognizing "the government's obligation to provide medical care for those who it is punishing by incar-

right to access to courts has been interpreted as requiring prison officials to furnish prisoners with the tools necessary to research legal claims.<sup>207</sup> To name but a few positive initiatives, courts have ordered an increase in custodial personnel,<sup>208</sup> the construction of a prison hospital,<sup>209</sup> and the provision of vocational training.<sup>210</sup>

Arguably a common theme in these kinds of cases is an unspoken acceptance of the provision of custodial institutions as a legitimate baseline function of the state.<sup>211</sup> The right in question is defined in less controversial terms, as an incremental entitlement to an adequate prison regime that provides sufficient health care and living space. Defining the right in this way masks the fact that positive state action is required to maintain the baseline from which the right seeks incremental improvement. A right to an adequate prison regime presupposes a more basic obligation on the state to provide prisons. While not being required to involve themselves in the design or establishment of an entire custodial system, the courts have been willing to engage in the complex and difficult task of evaluating existing systems. Court orders in these kinds of custodial cases amount to implicit or even explicit directives to improve the situation, failing which the court may have no choice but to order the release of the person from state custody or at least declare continued detention unlawful.<sup>212</sup>

ceration"). Additionally, courts have found prison officials liable for assaults on prisoners by third parties, since the prisoners have no way to protect themselves from this private harm. *See, e.g., Moore v. Winebrenner*, 927 F.2d 1312, 1315 (4th Cir. 1991) (holding that prison guards are liable for prisoner assault if they are "deliberately indifferent" to the victim's safety); William H. Danne, Jr., Annotation, *Prison Conditions Amounting to Cruel and Unusual Punishment*, 51 A.L.R.3d 111, 156-59 (1978) (finding "little disagreement" among courts that an "aggravated denial of protection" of prisoners may constitute cruel and unusual punishment); *id.* at 77-80 (Supp. 1991).

<sup>207</sup> *See Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that prison authorities must provide "adequate law libraries or adequate assistance from persons trained in the law").

<sup>208</sup> *See, e.g., Pugh v. Locke*, 406 F. Supp. 318, 335 (M.D. Ala. 1976) (specifying minimum custodial staffing levels for several state prisons), *aff'd and remanded sub nom.*, *Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977).

<sup>209</sup> *See Hamilton v. Landrieu*, 351 F. Supp. 549, 550 (E.D. La. 1972).

<sup>210</sup> *See Nadeau v. Helgemoe*, 423 F. Supp. 1250, 1269-71 (D.N.H. 1976). *But see Garza v. Miller*, 688 F.2d 480, 485 (7th Cir. 1982), *cert. denied*, 459 U.S. 1150 (1983) (holding that "there is no constitutional mandate to provide educational, rehabilitative, or vocational programs, in the absence of conditions that rise to a violation of the Eighth Amendment").

<sup>211</sup> This can be conceptualized in terms of the rights to personal security of members of society and the corresponding duty of the state to protect that personal security. *See supra* text accompanying notes 163-82.

<sup>212</sup> *See Newman v. Graddick*, 740 F.2d 1513, 1521 (11th Cir. 1984) (recognizing

## 5. Equality Rights

Finally, mention must be made of equality rights. Where a group of persons is being discriminated against with respect to certain statutory benefits or goods, such as pensions or housing, a violation of the right to equality is often expressed in negative terms: the state must refrain from discriminatory action. In these cases, however, the violation in question is a failure to provide equal benefits and amounts to a breach of a positive obligation. Bedeviling questions of remedies exist in this area since the government might respond to the finding by "equalizing down," i.e. lowering benefits to match those of the persons discriminated against,<sup>213</sup>

the ability of the courts to order the release of prisoners to end their unconstitutional confinement); *see also* Bouamar v. Belgium, 129 Eur. Ct. H.R. (ser. A) at 9-11 (involving a series of judicial orders placing a juvenile in a remand prison on nine separate occasions). Bouamar claimed that he had been deprived of his liberty in breach of Article 5(1) of the ECHR; the government argued that the placements in a remand prison came within an "educational supervision" exception. *See id.* at 19-21. Article 5(1) guarantees that:

Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

....

(d) *the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority . . . .*

ECHR, *supra* note 41, art. 5(1), 213 U.N.T.S. at 226 (emphasis added).

Because this baseline state function was actually written into the human rights document, the court first noted that the detentions were in conformity with the Convention to the extent that they were lawful according to Belgian domestic law. *See Bouamar*, 129 Eur. Ct. H.R. (ser. A) at 20-21. However, Article 5(1) jurisprudence also requires that detentions not be arbitrary. The *Bouamar* placements were arbitrary because they were not followed by educational supervision in an appropriate setting. *See id.* at 22. Indeed, Belgium did not have any custodial institutions that would count as fulfilling the "purpose of educational supervision." *See id.* at 22. By finding Article 5(1) breached, the implicit result was that absent such positive government action to make good on its baseline functions, Bouamar's detention was in violation of his negative right to be free from state detention.

<sup>213</sup> Great Britain has responded this way at least once after a finding by the European Court of Human Rights. The court found United Kingdom immigration rules that prevented women residents in Britain from having their husbands join them, in situations in which the wives of male residents would be able to join them, discriminatory. *See Abdulaziz v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 33-39 (1985). In response, rather than dropping the restriction on husbands joining wives, the United Kingdom extended the restriction to wives joining husbands. *See Andrew Byrnes, Recent Cases: Abdulaziz et al. v. U.K.*, 60 AUSTL. L.J. 182, 185 (1986); Rebecca Cook, *The International Right to Nondiscrimination on the Basis of Sex: A Bibliography*, 14 YALE J. INT'L L. 161, 178-179 (1989).

rather than "equalizing up," i.e. increasing the benefits of the victims of discrimination.<sup>214</sup> In light of this fact, there are strong arguments supporting the view that the judiciary ought to signal to the legislature the direction that conforms to the underlying purposes of constitutional norms.<sup>215</sup> Equality rights, for all practical purposes, involve positive duties in circumstances where governments wish to respond in good faith or where the judiciary extends the benefits in question to the class of persons discriminated against by virtue of the initial exclusion.

A recent case in Canada illustrates the above claims. At the first level of appeal, in *Schachter v. Canada*,<sup>216</sup> the Federal Court of Appeal of Canada upheld a trial award extending the benefits of underinclusive legislation to those unconstitutionally excluded. At issue was the constitutionality of unemployment insurance legislation that provided adoptive parents but not natural parents with unemployment benefits to care for a new child.<sup>217</sup> The trial judge held that the provision of benefits infringed the right not to be discriminated against on the basis of parental status. As a remedy,

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<sup>214</sup> The constitutionality of this response depends on the extent to which equality guarantees are interpreted as formal in nature or as honoring some commitment to "substantive equality" dimensions. Equality norms can be said to be substantive if benefits available in the private sphere are used as a reference point to effectively interpret poverty itself as a prohibited ground of discrimination, or if existing social benefits are taken as a baseline in determining whether a state has violated the guarantee of equal benefit or protection of the law. In either kind of case, a kind of ratchet effect is created. See Helena Orton, *Section 15, Benefits Programs and Other Benefits at Law: The Interpretation of Section 15 of the Charter since Andrews*, 19 MAN. L.J. 288, 298-302 (1990).

<sup>215</sup> See Nitya Duclos & Kent Roach, *Constitutional Remedies as "Constitutional Hints": A Comment on R. v. Schachter*, 36 MCGILL L.J. 1 (1991); see also Evan H. Caminker, *A Norm-Based Remedial Model for Underinclusive Statutes*, 95 YALE L.J. 1185, 1204 (1986) (arguing that a court can further help actualize constitutional norms by recommending a preferable remedy).

<sup>216</sup> [1990] 2 F.C. 129 (Ct. App.); see also Richard Gold, *From Right to Remedy: Putting Equality to Work*, 14 QUEEN'S L.J. 213, 235-41 (1989) (discussing the choice of remedy after a finding of discrimination in the provision of beneficial programs). But see *Bregman v. Attorney-General of Canada*, 57 O.R.2d 409, 410-11 (Ct. App. 1986) (Can.) (holding that the constitution gave no authorization to create a new class of beneficiaries), *leave to appeal refused*, [1987] 1 S.C.R. vi; *Re Phillips*, 27 D.L.R.4th 156, 159 (N.S. 1986) (Can.) (same holding). For extensive commentary on *Schachter*, see Duclos & Roach, *supra* note 215, at 29-34.

<sup>217</sup> The Unemployment Insurance Act provided that one adoptive parent of either sex could obtain benefits under the Act; biological parents had no equivalent provisions, although expectant mothers were entitled to parental leave benefits. Biological fathers, however, could qualify for parental leave benefits similar to adoptive parents only if the mother had died or could not care for the child. See *Schachter*, [1990] 2 F.C. at 135.



the judge ordered the extension of benefits to natural parents until such time as Parliament chose to amend the legislation while still respecting the need to provide an equal level of benefits as between adoptive and biological parents. Citing a number of cases where judicial orders in the name of constitutional guarantees resulted in the appropriation of public funds,<sup>218</sup> the court of appeal endorsed the remedy and, in the process, advanced the bold proposition that the submission that the judiciary "must respect Parliament's constitutional authority over the public purse . . . is not supported by the jurisprudence."<sup>219</sup>

On further appeal, the Supreme Court of Canada reversed the court of appeal's disposition.<sup>220</sup> However, its judgment contains dicta suggesting a constructive interbranch dialogue as a means by which the judiciary can usefully engage the definition and enforcement of a positive rights. The court affirmed the power of the judiciary in appropriate cases to extend the reach of an underinclusive statute to include a class of persons that the statute unconstitutionally excludes. After setting out criteria for deciding when to read into a benefits conferring law instead of suspending an order of invalidity,<sup>221</sup> the court decided that in this case reading in was not appropriate, finding as well that suspensive invalidation was no

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<sup>218</sup> See *Marchand v. Simcoe County Board of Education*, 29 D.L.R.4th 596, 613-18 (Ont. High Ct. 1986) (holding that the right to French language educational facilities requires public funds); *R. v. Rowbotham*, 25 O.A.C. 321, 365-71 (1988) (Can.) (holding that accused has a constitutional right to be provided with counsel at the expense of the state if he or she lacks the means to employ counsel).

<sup>219</sup> *Schachter*, [1990] 2 F.C. at 151.

<sup>220</sup> See *Canada v. Schachter*, No. 21889, slip op. at 47 (Can. July 9, 1992) ("Without a mandate based on a clear legislative objective, it would be imprudent for [this court] to take the course of reading the excluded group into the legislation.").

<sup>221</sup> See *id.* at 44-45 (stating that cases of "benefit conferring schemes" will lend themselves to remedies of reading down, reading in, or suspensive invalidation, that is, striking down the law but suspending the operation of the judicial order until a specified date so as to give the legislature time to visit the issue, rather than immediate invalidation, as such schemes will rarely have an unconstitutional purpose).

In the United States, the Supreme Court has held that "extension, rather than nullification, is the proper course" for remedying federal benefits statutes which violate equal protection due to their underinclusiveness. *Califano v. Westcott*, 443 U.S. 76, 89 (1979); see also *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring in result) (stating that extension rather than nullification is the better choice in remedying some underinclusive statutes). But see *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 818 (1989) (refusing to cure an unconstitutional tax scheme by broadening the class of those taxed); *Moses Lake Homes v. Grant County*, 365 U.S. 744, 752 (1961) (holding that courts must nullify an unconstitutional tax because it is beyond the judicial power to extend a tax).

longer appropriate because the legislation had in fact already been changed (lowering the benefit period to ten from fifteen years).<sup>222</sup>

Two of the criteria that the court set out were the relative degree of imprecision involved and the relative government expenditure that would be triggered in any "reading in" exercise, each used as surrogate considerations for whether the legislature can be interpreted to have intended the discriminatory exclusion.<sup>223</sup> The foregoing may suggest little in the way of support for this Article's judicial competence thesis. However, the court's view of its competence must be read in light of the fact that it was not working with a constitutional text that explicitly mandated the court to test its institutional capacities. Keeping in mind the baseline provided by the existing Canadian Charter, it is significant that the court saw precision and cost implications as matters of degree, tied as much to background considerations of legitimacy as to inherent limits on the judicial function:

It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures. . . . In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy, it is to what degree they can appropriately do so. A remedy which entails an intrusion so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.<sup>224</sup>

The court made it clear that the statutory benefit in this case was not also a constitutionally entrenched positive right.<sup>225</sup> Other

<sup>222</sup> See *Schachter*, No. 21889, slip op. at 48-49 (noting that Parliament's amendment followed commencement of the litigation and differed from the change that "reading in" would have imposed).

<sup>223</sup> On the facts of *Schachter* itself, the court did not invoke imprecision as a concern, but did invoke budgetary implications as secondary support for a primary conclusion that reading in would not be appropriate due to the lack of any "clear legislative purpose" that would allow the court to reasonably find that the legislature intended to include the excluded beneficiaries. See *id.* at 47-48. ("[T]he ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions such as these.")

<sup>224</sup> *Id.* at 30 (citing Andrée Lajoie, *De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux*, 36 MCGILL L.J. 1338, 1344-45 (1991)).

<sup>225</sup> *Schachter*, No. 21889, slip op. at 45-46. "The benefit with which we are concerned here is a monetary benefit for parents . . . not one which Parliament is constitutionally obligated to provide to the included group or the excluded group." *Id.* at 45.

reasons given by the court suggest a preparedness to accept that an equality guarantee's positive dimension may be actively embraced and a willingness on occasion to fashion a "reading in" remedy. More specifically, the court acknowledged that equality rights can have positive rights dimensions: "[T]he equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s.15 as providing positive rights."<sup>226</sup> In so doing, the judgment suggests an approach that would occasionally grant quasi, or at least conditional, constitutional status to social benefits. The court stated that extending under-inclusive statutes not only may serve statutory purposes but also may be "sometimes required in order to respect the purposes of the Charter."<sup>227</sup> Giving the example of a law providing social benefits to single mothers challenged by a man, the court argued that striking down the legal provisions so as to nullify benefits would amount to "equality with a vengeance."<sup>228</sup> "While s.15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances."<sup>229</sup>

Thus, *Schachter* suggests the beginning of a creative jurisprudence which would eschew either/or dispositions of issues and would insert the courts into a dialogue with the executive and legislature by making remedial determinations based on an evaluation of the "deeper social purposes of the Charter."<sup>230</sup> This would not be a world of *either* courts *or* legislatures, nor a world of *either* constitutional norm *or* statutory norm. Rather, this would be a world of interaction in which questions of disadvantage and statutory social entitlement could be quasi-constitutionalized in a way that fosters interbranch dialogue. The legislature must affirmatively depart from the judicial remedy of statutory extension in the full knowledge that the court has made clear that underlying values of the Charter encourage ratcheting up rather than ratcheting down.

*Schachter* suggests another level of preparedness to engage positive constitutional rights. The court stated that constitutional

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 18.

<sup>228</sup> *Id.* at 19 (quoting a phrase of the Women's Legal Education Action Fund, an intervenor organization). The court's working assumption, that such a law would be discriminatory, is a controversial question in itself.

<sup>229</sup> *Id.* (disapproving of *Phillips* which had previously been denied review).

<sup>230</sup> *Id.* at 18.

provision of benefits to single mothers "may" not be required, although it proceeded to say that they are "at least" encouraged. Given the fact that the court has appealed to "deeper social purposes" of the Charter and found them to include remedying disadvantage, in future cases the court can appeal to those same purposes in interpreting substantive constitutional rights beyond rights guaranteeing relative equality. Later in the judgment, for example, the court in dicta referred to the right to life, liberty, and security of the person as a hybrid positive and negative right.<sup>231</sup>

Other rights [besides s.15] will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s.7 as a positive right in some circumstances.<sup>232</sup>

Far from counting against the institutional competence thesis, *Schachter* suggests that institutional competence is first and foremost subservient to and conditioned by a commitment to the fundamental values that underlie constitutional rights.<sup>233</sup> Courts create their own competence. The courage to be creative depends on a conviction that the values at stake are legitimate concerns for the judiciary. When the desirability of recognizing such values

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<sup>231</sup> See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7 ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.").

<sup>232</sup> *Canada v. Schachter*, No. 21889, slip op. at 45 (Can. July 9, 1992).

<sup>233</sup> The Canadian Supreme Court decided that corporations could not plead § 7. See *Irwin Toy v. Quebec*, [1989] 1 S.C.R. 927, 1003-04. In doing so, however, the court made clear that it was excluding claims by corporations with their attendant commercial content, but not equating such "economic" claims with those claims likely to be invoked by more disadvantaged groups. The court refrained from stating whether, within § 7's "security of the person" provision, "economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights." *Id.*

Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous.

*Id.* at 1003.

nonetheless conflicts with perceived institutional inadequacies, the judiciary need not absolve itself of the issue. Instead, it is free to provide an interpretation and a remedy as best as it can do in the circumstances, and hope to provoke a cooperative and constructive dialogue with other organs of government and the citizenry at large.

Two cases from Belgium provide further insight into interbranch dialogue in the equality rights context. In *Marckx*, after finding discrimination in inheritance law, the European Court of Human Rights stated that its "judgment [was] essentially declaratory and leaves to the State the choice of means" and could not itself "annul or repeal" the discriminatory legal provisions.<sup>234</sup> In addition, the court decided not to give the decision retroactive effect, thus "dispens[ing] the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgement."<sup>235</sup> In response to the judgment, Belgium took some eight years to amend a number of legal provisions relating to affiliation and inheritance.<sup>236</sup> In that new law, Belgium chose not to make the new equality of inheritance rules retroactive to the time of the European Court judgment and instead made them applicable only from March 1987 onwards.

In 1981, Astrid Vermeire, an illegitimate child according to the Belgian law that was found in *Marckx* to be in violation of Article 14 of the Convention, brought an action in Belgian courts to claim an inheritance from her grandparents.<sup>237</sup> Although the grandmother had died before the *Marckx* judgment was issued, the grandfather had died afterward. With respect to the grandfather's estate, which had gone to Vermeire's 'legitimate' brother and sister, both the Belgian legislature and the Belgian courts adopted the view that the old discriminatory law continued to apply. The following passage from the Brussels Court of Appeal shows the negative-positive distinction in majestic flight:

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<sup>234</sup> *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) at 25 (1979); see also *supra* notes 200-04 (discussing *B. v. France*, where the European Court of Human Rights also put the government to means, with little or no guidance on what those measures should be).

<sup>235</sup> *Marckx*, 31 Eur. Ct. H.R. (ser. A) at 25-26. The court gave as its reasons the "principle of legal certainty" and the fact that many countries in Europe had regarded treating "illegitimate" children worse than "legitimate" children as "permissible and normal." *Id.*

<sup>236</sup> See EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 162, at 44.

<sup>237</sup> See *Vermeire v. Belgium*, 214 Eur. Ct. H.R. (ser. A) (1991).

[I]n so far as Article 8 entails negative obligations prohibiting arbitrary interference by the State in the private or family life of persons residing within its territory, it lays down a rule which is sufficiently precise and comprehensive and is directly applicable [in Belgian law by Belgian courts], but this is not the case in so far as Article 8 imposes a positive obligation on the Belgian State to create a legal status in conformity with the principles stated in the said provision of the Convention; . . . given that on this point the Belgian State has various means to choose from for fulfilling this obligation, the provision is no longer sufficiently precise and comprehensive and must be interpreted as an obligation to act, responsibility for which is on the legislature, not the judiciary.<sup>238</sup>

The government pressed this argument before the European Court, explaining that the legislature had taken so long to draft and pass a new law because it preferred “an overall and systematic revision” rather than “partial, fragmentary alterations.”<sup>239</sup> Belgium thereby played up the “choice of means” granted to it in *Marckx* and then, with an interesting rhetorical twist, stated that it had “pondered long” over the question of the date from which to give effect to the new statute and, in the end, decided against retrospective effect out of “concern for the legal certainty”—exactly the rationale the European Court had used in order to avoid giving retrospective effect to *Marckx* eight years before. The Belgian argument was designed to persuade the court that putting the government to means meant that the court must defer to the means chosen, and could not later return to evaluate those means in light of the result achieved, or not achieved. Any dialogue was to be brief and end with the government’s reply.

The court disagreed and substituted for the opinion of government its own view as to whether such positive action, in the form of the thoroughgoing legislative revision occasioned by the judgment, precluded an immediate obligation on the state to remedy discrimination:

An overall revision of the legislation, with the aim of carrying out a thoroughgoing and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, was not necessary at all as an essential preliminary to compliance with the Convention as interpreted by the Court in the *Marckx* case.

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<sup>238</sup> *Id.* at 4. The Belgian Court of Cassation “concurred substantially with [these] reasons.” *Id.*

<sup>239</sup> *Id.* at 9.

The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed . . . .<sup>240</sup>

The European Court found, in essence, that the basic discrimination regarding inheritance should have been treated with priority and the law changed immediately. In the process, it not only showed itself willing to assume the competence to draw lines as to what is necessary and when, but also made known that it will continue the conversation if the state is not listening.

Although many classical rights are often imagined in all but exclusively negative terms, the above survey suggests that there is nothing inherent in classical civil and political rights that limits them to negative rights. It also suggests that rights imagined as having significant positive dimensions need not involve the judiciary in an illegitimate or even unfamiliar role. The enforcement of what are traditionally imagined as negative rights often belies the image and involves the imposition of positive obligations upon a state.<sup>241</sup> Courts have not shied away from the generation of positive duties in the context of the adjudication of civil and political rights when they are convinced that the fundamental values at stake demand it.<sup>242</sup> To speak of civil and political rights as negative rights against the state oversimplifies the nature of protection that they provide. Courts and agencies charged with interpreting constitutional guarantees have demonstrated in the civil and political rights context that they are quite capable of judging whether positive duties on the state have been met. Competence in this regard is a matter of will and experience. The same applies to judging whether a state has lived up to its duties with respect to the positive dimensions of social rights. As demonstrated by judicial experience in the context of civil and political rights, the fact that rights involve the imposition of positive duties on the state has not acted as a barrier to judging and seeking to ensure compliance.<sup>243</sup>

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<sup>240</sup> *Id.*

<sup>241</sup> See Bandes, *supra* note 6, at 2278-85; Currie, *supra* note 131, at 886-87; Gerhardt, *supra* note 58, at 438-40.

<sup>242</sup> In enforcing the Equal Protection Clause of the Bill of Rights, federal judges have had resort to judicially imposed taxation in the face of intransigent legislatures. See *Missouri v. Jenkins*, 495 U.S. 33, 35-36 (1990) (judges may order local governments to levy taxes in order to remedy constitutional violations).

<sup>243</sup> The examples from international human rights law should not only be read illustratively, but also in light of the situational disadvantages that characterize this

B. *Institutional Competence, Justiciability, and the Lack of Precision of Social Rights*

The second type of argument often brought to bear against the constitutionalization of social rights is that, unlike traditional constitutional rights against the state, social rights often suffer from a painful lack of precision with respect to the nature and extent of obligations that attach to the state party. Moreover, social rights are perceived as imprecise because the circumstances that constitute violations of social rights cannot be rectified immediately. The key to making obligations attendant upon the constitutionalization of social rights clearer and more precise is to have experience with actual, real-life situations that call upon courts to move from the abstract to the concrete and develop the meaning and scope of social rights with some degree of precision.<sup>244</sup> Just as it would be a mistake to assume that in the 1800s courts in the United States had extensive knowledge of what "equal protection" of the law entailed, so too would it be a mistake to assume judicial precision in relation to enforceable obligations that might flow from a right, such as the right to education, too early in the constitutional history of that right.<sup>245</sup> The specific shape and contour of a right is the result of years of repeated applications of practical reasoning to facts at hand. The lack of precision associated with many social rights should not be held up as a justification for their nonentrenchment. On the contrary, nonentrenchment is to a very large extent

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area of law, including judicial resources and factfinding capabilities that are much more limited than those found in most domestic systems. In addition, the overarching fact that international courts work within a unique set of normative baselines results not only in democratic legislative sovereignty but also in state sovereignty mediating all decisionmaking and creating certain pressures for restraint. Finally, given the diversity of legal systems and cultural viewpoints represented on an international bench, such as the European Court (whatever stock one puts in the idea of a "united" Europe), there is constantly at work a "lowest common denominator" dynamic in collective judicial decisionmaking at the international level.

<sup>244</sup> Eide proposes an outline of a minimal-threshold approach to immediate implementation of international social and economic rights that uses country-specific indicators measuring nutrition, infant mortality, disease frequency, life expectancy, income, and unemployment, as well as indicators relating to adequate food consumption. See Eide, *supra* note 124, at 47.

<sup>245</sup> "Municipal courts have been able to give effect in a wide range of situations to concepts such as 'due process' or 'equal protection.' In many such cases the courts have adopted the attitude that while they may be unable to define the term precisely, 'they know an abuse when they see it.'" Philip Alston, *International Law and the Human Right to Food*, in *THE RIGHT TO FOOD* 9, 57 (Philip Alston & Katarina Tomaševski eds., 1984).



the reason for the lack of precision. Historical, ideological, and philosophical exclusions of social rights from adjudicative experience have resulted in a failure to accumulate experience that would render the imprecision of social rights less and less true as time goes on.

Moreover, the fact that social rights suffer from a lack of precision should not be overstated. Over the past decade, the United Nations has invested considerable energy in developing the idea of a multilayered obligations structure that may potentially be generated for any right, whether it be a civil liberty or a social right. Initial attention has been focused on the right to food.<sup>246</sup> Attention is now shifting to the realization of economic, social, and cultural rights more generally.<sup>247</sup> The structure of obligations being developed within the United Nations, following the ideas of Henry Shue,<sup>248</sup> is threefold: the duty to respect; the duty to protect; and the duty to fulfill. Each layer will be briefly addressed to demonstrate that social rights suffer from less imprecision than their critics claim.<sup>249</sup>

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<sup>246</sup> See Asbjorn Eide, *Report on the Right to Adequate Food as a Human Right*, U.N. ESCOR, Comm'n Hum. Rts., 39th Sess., Agenda Item 11, at 2, U.N. Doc. E/CN.4/Sub. 2/1987/23 (1987).

<sup>247</sup> See TÜRK, *supra* note 106, at 5; Danilo Türk, *Progress Report on the Realization of Social, Economic and Cultural Rights*, U.N. ESCOR, Comm'n Hum. Rts., 42d Sess., Agenda Item 7, at 4, U.N. Doc. E/CN.4/Sub.2/1990/19 (1990). Although these studies within the United Nations system are bringing increased precision and clarity to social rights obligations, they have also been concerned to demonstrate that social rights do not need to be judicially enforceable in order to be considered as rights. The reports tend to leave discussion of implementation mechanisms aside and focus instead on normative exposition. For a similar view, see G.J.H. van Hoof, *The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views*, in THE RIGHT TO FOOD, *supra* note 245, at 97; see also Symposium, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 121, 123 (1987) (finding that human rights and fundamental freedoms are indivisible and interdependent, and that equal attention and urgent considerations should be given to the implementation, promotion, and protection of both civil and political and economic, social, and cultural rights).

<sup>248</sup> See SHUE, *supra* note 21, at 38-40.

<sup>249</sup> Although this structure of obligations addresses claims of imprecision, the structure is equally useful in debunking the claim that purely "negative" rights exist. All rights, whether commonly imagined as positive or negative, generate a range of obligations, some of which are negative (duties to respect) and some of which are positive (duties to protect and fulfill). See *id.* at 39-40.

### 1. The Primary Obligation to Respect Social Rights

The primary obligation to respect social rights requires that states refrain from infringing a social right directly, a duty traditionally associated with many classical rights such as the right to free expression. For example, under a duty to respect the right to food, a state would be prohibited from interfering with the normal means of food procurement for members of vulnerable groups. Therefore, a state should not take away the land of a subsistence farmer without providing any replacement in kind or a stream of monetary entitlement for lost food and productive capability. Similarly, the right to housing would be violated if the government destroyed homes or evicted squatters without providing alternative and comparable housing.

The obligation to respect social rights bears some resemblance to property rights, especially in the housing context, despite several significant differences. The obligation is not dependent on an extant characterization of "property" at law; prior formal ownership by squatters, for example, is not a necessary precondition for judicial protection. Also, the violation is a function of the economic circumstances of the victim. A person who has one of two or more homes expropriated, for instance, is not being denied the right to housing. That person would only be able to appeal to a right to property which may or may not be recognized by the constitution. Similarly, a landowner who has a farm expropriated for redistribution cannot appeal to the right to food if he or she was not dependent on that land for food and had sufficient means to purchase food on the market.

### 2. The Secondary Obligation to Protect Social Rights

The secondary obligation to protect social rights corresponds to many of the examples given earlier. The state is under a positive duty to prevent a right from being infringed by private actors.<sup>250</sup>

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<sup>250</sup> The United States Supreme Court has rejected the idea that states have any general obligation to protect citizens from private harm. *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195-96 (1989). However, the Court has recognized this positive obligation in limited settings, such as prisons and mental hospitals:

The rationale for this [exception] is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e. g., food, clothing, shelter, medical care, and

The failure of the South African government to provide sufficient police resources or make a serious effort to prevent recent violence throughout South Africa, for example, would be a violation of rights to life and security of victims and potential victims. One commentator, G.J.H. van Hoof, gives another example which could have widespread application in South Africa as well as around the world:

[T]he obligation to respect and protect the right to adequate housing, as laid down in Article 11 of the [ICESCR], would in my view be violated, if the government's policy, even in the least developed countries, allowed the hovels of poor people to be torn down and replaced by luxury housing which the original inhabitants could not afford and without providing them with access to alternative housing on reasonable terms.<sup>251</sup>

### 3. The Tertiary Obligation to Fulfill Social Rights

The tertiary obligation to fulfill social rights is the level of obligation traditionally thought to be the exclusive terrain of social rights but, as the previous section indicated, it has many counterparts in the field of civil and political rights. The tertiary obligation to fulfill social rights translates into state duties to provide food, housing, health, and education (or a monetary entitlement sufficient to secure access thereto) to those in society without the means to provide for themselves.<sup>252</sup>

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reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*Id.* at 200; see also *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) (holding that involuntarily committed mental patients must constitutionally be entitled to safe conditions of confinement); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (holding that a state must provide medical treatment for those injured in prison); *Moore v. Winebrenner*, 927 F.2d 1312, 1315 (4th Cir. 1991) (holding that prison guards are liable for an assault by one prisoner against another if the prison guards are "deliberately indifferent" to the victim's safety), *cert. denied*, 112 S. Ct. 97 (1991).

<sup>251</sup> Van Hoof, *supra* note 247, at 107; see *infra* text accompanying notes 409-14 (describing a case brought by Bombay's sidewalk dwellers that bears a striking resemblance to Van Hoof's example).

<sup>252</sup> Our conception of a social right does not mandate universal entitlement at the level of the obligation to fulfill, according to which government would be obliged to provide benefits to all free of charge. The government may decide that the best way of protecting everyone's rights is to provide universal health care, for example. However, that would be a choice of *means* that would not be mandated by the right. Such a decision could also be made, of course, by society at large as a matter of constitutional choice.

The above structure of obligations that accompanies social rights makes it clear that social rights can be understood with a greater degree of specificity and precision than their critics are willing to acknowledge. The implications of primary obligations to respect social rights are relatively straightforward and precise. Imprecision increases the more one moves toward tertiary obligations to fulfill social rights. Yet this is also the case with civil rights, which can be hopelessly imprecise in the context of determining what a state must do to fulfill civil and political rights. In effect, when critics claim that, unlike civil and political rights, social rights suffer from a lack of precision and therefore ought to be imagined as nonjusticiable, they are comparing apples and oranges.<sup>253</sup> That is, they are comparing civil and political rights at the relatively precise first level of obligations with social rights at the relatively imprecise third level of obligations, with second level obligations playing an ambivalent role in between. Critics of the justiciability of social rights often claim a high degree of precision in relation to civil and political rights by referring to the relatively specific primary obligations to respect civil rights that accompany their entrenchment, and argue that the relative lack of precision that accompanies tertiary obligations to fulfill social rights ought to render social rights nonjusticiable. The foregoing brief survey suggests that social rights have relatively precise first and second level obligations, just as civil and political rights have imprecise third level obligations. The

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For those with the ability to obtain goods and services covered by social rights (that is, education, health, food), the duties to respect and protect those rights (that is, not directly or indirectly deprive, or permit others to deprive, them of the means to independently obtain adequate education, health and food) are the state's duties. Thus, the state could tax a person up to, but not past, the point at which they could preserve their own basic social rights. If a universal system of education or health care existed, then it is obviously easier for the court to determine that the rights to respect and protection have been accorded; judicial inquiry would then be able to focus on whether the system is in fact functioning universally and whether the level of entitlement provided meets the constitutional standard of adequacy.

Under our conception, even if the state taxes a family to the point that it cannot afford a private school, as long as there are state schools available to all, then the right to education of the family members has not been violated. *But see* *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that a law which requires the use of public schools violates the rights of property, contract, privacy and association). For those without the means, the duties to respect and protect would be insufficient, and the duty to fulfill would govern: the state would have to provide schools or the means of access to private schools. As a result, the rights of all are universally met, even if the duty incumbent on the state varies in relation to the social circumstances of the persons in question.

<sup>253</sup> For this claim, see Eide, *supra* note 246, at 24.

imprecision that accompanies third level obligations to fulfill civil and political rights is not imagined as a reason for their nonentrenchment, and adjudicative bodies have felt capable of rendering third level obligations to fulfill civil and political rights more precise. The relative lack of precision that accompanies third level obligations to fulfill social rights equally should not, therefore, stand as a reason for treating social rights as nonjusticiable. Moreover, courts are very capable of overseeing obligations at the first two levels of the duty to respect and the duty to protect.

Additionally, one must not attach too great a degree of imprecision to the obligation to fulfill social rights. Nor should the fact that social rights are directed to circumstances that cannot be immediately rectified stand as a reason for their nonentrenchment. Immediate action can be taken with respect to violations of social rights even at the level of a duty to fulfill. A body of principles, known as the Limburg Principles,<sup>254</sup> has been promulgated by a group of the world's leading experts in the field of the legal protection of social rights. The developing practice of the new Committee on Economic, Social and Cultural Rights demonstrates that there can be clear, near-absolute, core entitlements to the provision of the basic subsistence needs of the most vulnerable in all states party to the ICESCR. With respect to the most vulnerable, the obligation to fulfill is immediate in nature and is not dependent on scarcity of resources, except perhaps in the most impoverished of countries where even total redistribution of wealth might not meet everyone's needs.<sup>255</sup> In effect, a priority of attention is mandated for people who would not be able to meet the most basic of health, nutrition and housing needs without direct government assistance. People who would die or suffer serious consequences for their health if no assistance were immediately forthcoming fit in this category. Courts are capable of determining the adequacy of fulfillment at this most basic level, with the aid of evidence and the testimony of experts.<sup>256</sup>

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<sup>254</sup> *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*, U.N. ESCOR, Comm'n on Hum. Rts., 43d Sess., Annex, Agenda Items 8 & 18, at 1, U.N. Doc. E/CN.4/1987/17 (1987) [hereinafter *Limburg Principles*].

<sup>255</sup> In such a case, evolving duties on the international community as a whole would complement the state's duties. See General Comment No. 1, in *Report on the Third Session*, U.N. ESCOR, Comm'n on Economic, Social and Cultural Rights, 3d Sess., Supp. No. 4, Annex 3, at 87, 89, U.N. Doc. E/1989/22, E/C.12/1989/5 (1989) [hereinafter *Report on the Third Session*].

<sup>256</sup> For the sources of expertise on the most basic and core level of social rights

A recent example from Canada demonstrates judicial capabilities as to a core level of entitlement. The Federal Court Trial Division held that a provincial government cannot deduct from current welfare checks amounts that it may have overpaid in error on previous welfare checks. Such deductions would bring the recipient below the level at which he or she could hope to make ends meet.<sup>257</sup> The person who brought the case was a chronic epileptic who relied wholly on the welfare system for support. Although the court was relying on a liberal interpretation of an administrative agreement between the federal and provincial governments, the judges were unanimous in their belief that they were both justified in and capable of determining a level of benefits below which a decrease in benefits could not be tolerated.

Beyond this area of core entitlement, which helps to lend precision to social rights phrased in terms of obligations of result, social rights at the third level of entitlement can also be rendered more precise by interpreting them as including an affirmative duty to progressively achieve the full realization of rights that go beyond basic subsistence.<sup>258</sup> Article 2(1) of the ICESCR, for example, provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.<sup>259</sup>

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within development economics scholarship and international organizations, as well as one economist's attempt to draw together international law and economics in the area of social rights, see Frances Stewart, *Basic Needs Strategies, Human Rights, and the Right to Development*, 11 HUM. RTS. Q. 347, 373 (1989).

<sup>257</sup> See *Finlay v. Minister of Fin. of Can.*, 57 D.L.R.4th 211, 227, 229 (Fed. Ct. Trial Div. 1989), *aff'd*, [1990] 2 F.C. 790 (Fed. Ct. App.). The Court of Appeal held that the province was not providing basic necessities adding that "it must not be blithely supposed that it is necessarily in the public interest to bleed those who live at or below the poverty line as a purgative for social health, even if the bleeding is only at a little at a time and only once a month." [1990] 2 F.C. at 816.

<sup>258</sup> For a discussion of the division in international legal doctrine between obligations of conduct and obligations of result, a distinction that revolves around the degree of precision with which a duty is framed and the corresponding degree of freedom a state enjoys to achieve a certain result, see Eide, *supra* note 246, at 24.

<sup>259</sup> ICESCR, *supra* note 23, art. 2(1), 993 U.N.T.S. at 5.

Circumstances that contribute to the violation of a social right take time to rectify and can be addressed by a duty to adopt measures that partially, but progressively, go to ameliorating the situation. Although ultimately constructing schools or inoculating all children, for example, may take time, a duty to begin the process of reaching that ultimate goal itself is immediate.<sup>260</sup> While decision-makers should leave a margin of discretion to the government in choosing the means and schedule for ultimately fulfilling these rights,<sup>261</sup> their fulfillment cannot be postponed indefinitely. Much in the same way that courts and tribunals are able in international matters to determine whether a state is acting with due diligence,<sup>262</sup> there will be obvious cases where a court could say that the obligation to take steps has not been satisfied.<sup>263</sup>

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<sup>260</sup> See *Limburg Principles*, *supra* note 254, ¶ 16, at 2 ("All state parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant."). The Committee on Economic, Social and Cultural Rights recently stated that steps must be "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant." General Comment No. 3, in *Report on the Fifth Session*, U.N. ESCOR, Comm'n on Economic, Social and Cultural Rights, 5th Sess., Supp. No. 3, Annex 3, at 83, U.N. Doc. E/1991/23, E/C.12/1990/8 (1990) [hereinafter *Report on the Fifth Session*].

<sup>261</sup> See *Limburg Principles*, *supra* note 254, ¶ 71, at 8 ("In determining what amounts to a failure to comply, it must be borne in mind that the Covenant affords to a State party a margin of discretion in selecting the means for carrying out its objects, and that factors beyond its reasonable control may adversely affect its capacity to implement particular rights.").

<sup>262</sup> See *supra* text accompanying notes 163-80.

<sup>263</sup> Amartya Sen has described how such a duty to fulfill can be made justiciable:

A *metaright* to something x can be defined as the right to have *policies* p(x) that genuinely pursue the objective of making the right to x realisable. As an example, consider the following "Directive Principle of State Policy" inserted in the Constitution of India when it was adopted in 1950:

"The state shall, in particular, direct its policy toward securing . . . that the citizens, men and women equally, have the right to an adequate means of livelihood:"

....

There are, of course, ambiguities as to ways of checking whether the measures taken by the government amount to a policy p(x) aimed at securing a certain right x. . . . But such ambiguities of specification are not unusual in dealing with rights in general. . . . Indeed, sometimes it is patently clear that the policies are *not* thus directed.

. . . There is . . . no difficulty in conceiving of the same right being made institutional and concrete, permitting any individual to sue the government for not pursuing, with the required amount of urgency, a policy that is genuinely aimed at achieving the right to adequate means.

Amartya Sen, *The Right Not to Be Hungry*, in *THE RIGHT TO FOOD*, *supra* note 245, at 69-71.

The duty to take steps required in the International Covenant on Economic, Social and Cultural Rights is not limited to a duty to act by all appropriate means. The required steps are cumulative in nature, and must be designed "to achiev[e] progressively the full realization of [those] rights."<sup>264</sup> This element of progressive realization has implications for the degree of precision that can be achieved by the constitutional entrenchment of a social right as well as for judicial review of the entrenched rights. The Committee on Economic, Social and Cultural Rights has indicated that the concept of progressive realization does not simply refer to the fact that fulfillment of a right must be pursued as expeditiously and effectively as possible. It also creates a kind of ratchet effect in that lowering the fulfillment level of a right is presumptively prohibited once that level has been achieved.<sup>265</sup> Existing levels of provision can thereby be used as a baseline, adding further precision to the judicial task.

Levels of provision of social goods existing in statutory form at the time of constitutionalization can themselves be specifically worded and entrenched in the constitution as minimum constitutional, as opposed to statutory, standards. For example, debate is currently occurring in Canada over whether to constitutionalize the elements of universality, accessibility and portability of the existing health care system so as to render those elements constitutionally sacrosanct.<sup>266</sup> Were this to occur, a so-called positive right would in effect be recognized as a negative right, at least in the sense that specified components of the social state (as opposed to the 'state of nature') become the baseline for constitutional analysis. Social rights constitutionalized in this way would operate in much the

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<sup>264</sup> ICESCR, *supra* note 23, art. 2(1), 993 U.N.T.S. at 5.

<sup>265</sup> See Heikki Karapuu & Allan Rosas, *Economic, Social and Cultural Rights in Finland, in INTERNATIONAL HUMAN RIGHTS NORMS IN DOMESTIC LAW: FINNISH AND POLISH PERSPECTIVES* 195, 208-09 (Allan Rosas ed., 1990) (discussing prohibitions against "going back" in a Finnish domestic constitutional context). *Compare Report on the Fifth Session, supra* note 260, at 85 ("[A]ny deliberately retrogressive measures . . . would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.") with *Limburg Principles, supra* note 254, ¶ 72, at 8 ("A State party will be in violation of the Covenant, *inter alia*, if: . . . it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or does so due to a lack of available resources or *force majeure* . . .").

<sup>266</sup> See generally MINISTRY OF INTERGOVERNMENTAL AFFAIRS, GOVERNMENT OF ONTARIO, A CANADIAN SOCIAL CHARTER: MAKING OUR SHARED VALUES STRONGER 17-18 (1991) (outlining various opinions for entrenching fundamental principles).



same way that the system of private property and contract rights functions as a constitutional baseline in the United States.<sup>267</sup>

On the other hand, where a state is required to progressively achieve the realization of a benefit not initially enjoyed by all at the time of constitutional entrenchment, the baseline or point of reference against which state action would be assessed by the judiciary would be a moving one. Such would be the case where the entrenched right is a right to the progressive achievement of a certain social good, such as universal medicare. Unlike the previous example, the baseline by which state action would be judged would not be levels of entitlements actually in existence at the time of entrenchment, but rather a shifting baseline that conforms to judicial assessments of the adequacy of steps taken to realize the ideal articulated in the guarantee.<sup>268</sup> Even where such an ideal is expressed in general terms, a corresponding duty to take steps would have the effect of lending precision to the guarantee, in that steps taken would form the baseline against which subsequent state action would be assessed, to the extent that it is not in dispute that full realization of the right has yet to be achieved.<sup>269</sup>

In either of these two situations, the judiciary is provided with many more precise reference points to work with than critics of social rights tend to acknowledge. A shifting baseline need not mean a total prohibition on downward movement or change, but could involve placing a burden of justification on government to show, for instance, why backsliding is fiscally necessary and why existing benefits may be more generous than captured by the term "full realization" of rights. Whatever the justificatory burdens and criteria, a *sine qua non* for permitting justified downward movement could be that individuals not find themselves lacking core minimum entitlements as a result of such change.

Other obligations on the state could combine with a duty to take steps to provide even further precision to social rights. Beginning

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<sup>267</sup> At the level of individual entitlement, where people have yet to receive a benefit to which they are constitutionally entitled, positive state action would be required. A constitutional challenge to an attempt to take away existing statutory entitlements, however, looks very much like the assertion of a classical negative right. Cf. Reich, *supra* note 28, at 739-46 (describing removal of social benefits as a government activity bounded by constitutional protections).

<sup>268</sup> See Sen, *supra* note 263, at 70-71, and quote reprinted therein.

<sup>269</sup> Cumulative stages of achievement would thus provide the type of baseline to which the *Report on the Fifth Session* and the *Limburg Principles* implicitly refer. See *Report on the Fifth Session*, *supra* note 260, at 85; *Limburg Principles*, *supra* note 254, ¶ 72, at 8.

with United Nations studies on the right to food, process-oriented obligations of conduct, for example, have been posited at the third level of obligation; these duties involve gathering the necessary information and obtaining the necessary input from those most in need as the necessary foundation for fulfilling the social rights in question.<sup>270</sup> Failure to engage in this process and to assume process and participation-oriented duties raises a presumption that the state is not meeting its constitutional duty to fulfill the right in question.

The following summary of recommendations of the United Nations's Special Rapporteur on the Right to Food, Asbjorn Eide, gives some indication of what shape these obligations of conduct could take in the context of social rights.<sup>271</sup> In Eide's view, states ought to: (1) establish a nation-wide system of identifying local needs and opportunities for achieving food security (defined to mean enough and adequate food in terms of nutrition and cultural acceptability, viable patterns of procurement of food, and a sustainable food resource base); (2) draw up plans for national food security, focusing on household and community food security; (3) as part of such identification of need and within such a national plan, identify as a matter of priority the needs of groups which have the greatest difficulty in achieving food security, and set specific objectives for achieving sustainable access to adequate food for these groups; (4) ensure popular participation in periodically assessing and analyzing local needs and opportunities, and facilitate contributions by the least privileged groups into the action plans that follow from such assessment and analysis; (5) determine the areas in which international assistance is required and detail the requirements; and (6) ensure that an adequate monitoring system for the right to food is developed and put into action.<sup>272</sup> These recommendations suggest that even the most generally worded social right can be conceptualized so as to generate quite precise obligations of conduct rather than simply act as a general obligation of result.

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<sup>270</sup> For an emphasis on popular participation and public discussion in the context of taking steps to fulfill social rights as well as in relation to obligations to report to the Committee on Social, Economic and Cultural Rights on steps taken, see *Limburg Principles*, *supra* note 254, ¶¶ 11, 76, at 2, 9.

<sup>271</sup> See Eide, *supra* note 246, at 56-57.

<sup>272</sup> See *id.*

Given the current unwillingness, at least at a general level, of international human rights law and the new Committee on Economic, Social, and Cultural Rights to make judgments about the preferred approach of states for achieving required substantive results, formulating obligations of conduct can ensure that a state will be under an amalgam of procedural duties that, if met, create further pressure to take social rights seriously. In the words of the Committee on Social, Economic, and Cultural Rights, "it would be incorrect to assume that reporting is essentially only a procedural matter designed solely to satisfy each State party's formal obligation to report to the appropriate international monitoring body."<sup>273</sup> In its elaboration of the objectives that the reporting function is designed to achieve, the Committee has in essence indicated that states are under an immediate obligation to place an individual-rights focus on all social and economic policymaking, specifically to know who is in need and to target their need as a matter of priority.<sup>274</sup>

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<sup>273</sup> *Report on the Third Session, supra* note 255, ¶ 1.

<sup>274</sup> Extracts from the Committee's description of the second and third objectives of the reporting function serve to illustrate this claim:

A *second objective* is to ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. From the Committee's experience to date, it is clear that the fulfillment of this objective cannot be achieved only by the preparation of aggregate national statistics or estimates, but also requires that special attention be given to any worse-off regions or areas and to any specific groups or subgroups which appear to be particularly vulnerable or disadvantaged. Thus, the essential first step towards promoting the realization of economic, social and cultural rights is diagnosis and knowledge of the existing situation. . . .

While monitoring is designed to give a detailed overview of the existing situation, the principal value of such an overview is to provide the basis for the elaboration of clearly stated and carefully targeted policies, including the establishment of priorities which reflect the provisions of the Covenant. Therefore, a *third objective* of the reporting process is to enable the Government to demonstrate that such principled policymaking has in fact been undertaken.

*Report on the Third Session, supra* note 255, ¶¶ 3-4.

The fusion of procedural and substantive obligations has subsequently become even more complete with the revision of reporting guidelines that states are to use when preparing their reports. The requirement to gather and act on disaggregated information and to be sensitive to individual circumstances, or at the very least to the situation of presumptively vulnerable groups, is now painstakingly reflected in twenty closely-typed pages of questions that states are to use as "guidelines." See Revised Guidelines, in *Report on the Fifth Session, supra* note 260, Annex 4, at 88-110.

In summary, social rights suffer from less conceptual imprecision than their critics are willing to acknowledge. There are a multiplicity of ways to render social rights more precise. While it is true that social rights preponderantly speak to circumstances that take time to remedy, this should not stand as a reason for their nonentrenchment. Some deprivations can be rectified immediately. Other deprivations can be addressed in a progressive way through the interpretive evolution of a duty to take steps to eliminate conditions that constitute violations of social rights.<sup>275</sup>

Moreover, precision is a function of the repeated invocation and application of social rights by the judiciary. Any lack of precision in practice is in part due to the fact that they are not yet treated as justiciable in many jurisdictions, and should, therefore, not stand as a reason for their nonentrenchment. That being said, it is true that the constitutionalization of social rights will place the judiciary in a new and unfamiliar environment. Social rights require the judiciary to explicitly adopt a promotional and creative stance in their interpretive endeavors. However, judicial competence in this area, as in others, is a function of experience and effort, and does not lie in the inherent nature of the institution. In the words of Mauro Cappelletti, "[s]ooner or later, [judges] have to accept the realities of a changed conception of the law and of a new role of the state of which, after all, they are a 'branch.'"<sup>276</sup>

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<sup>275</sup> Philip Alston has given an example of the type of steps which might be taken:

The starting point for a program to implement economic and social rights is to ascertain, as precisely as possible, the nature of the existing situation with respect to each right, so as to identify more clearly the problems that need to be addressed and provide a basis for principled policymaking. Thus, to take the case of the right to food, an immediate and feasible step that the United States could take would be to adopt legislation requiring the various levels of government to collaborate periodically on a detailed survey of the nutritional status of the American people, with particular emphasis on the situation of the most vulnerable and disadvantaged groups and regions. Such a survey could then constitute the basis for carefully targeted legislative, administrative and practical measures aimed at enhancing realization of the right.

Alston, *New Strategy*, *supra* note 57, at 379-80.

<sup>276</sup> CAPPELLETTI, *supra* note 120, at 15.

#### IV. THE INTERDEPENDENCE OF HUMAN RIGHTS AND INTERNATIONAL LAW

Thus far we have been advocating the inclusion of social rights in a new South African constitution, with the assumption that South Africa is already committed to the principle of at least enshrining classical civil and political rights in constitutional form. If South Africa decides to include social rights in its new constitution, it would be assuming a leading role in the international human rights movement by eclipsing the debate that has cast positive and negative freedom as theatrical rivals rather than supporting actors. Such a decision would also lead the way in the modern world by resurrecting a fundamental principle of international human rights law: the interdependence of human rights. By the principle of interdependence, we refer to the fact that the interests underlying civil, political, and social rights are indivisible and interconnected. Neither category of human rights is more important than the other. Moreover, neither category can be seriously respected without simultaneously respecting the other. They ought to be viewed as "two wheels of a chariot,"<sup>277</sup> each indispensable to the other and both necessary for there to be any forward movement toward the realization of a progressive vision of social justice.

It is trite but true that many traditional civil liberties are illusory to those living in poverty. Satisfying human needs for nutrition, housing, health, and education is a fundamental precondition of contemporary citizenship. The ability to participate in decisions that affect one's life is in no small measure conditional not only on the existence of civil and political rights but also on material circumstance. Likewise, the constituent elements of social rights also ought to include reconceived values normally associated with classical civil and political rights. Social rights are not meant simply to entrench bureaucratic structures of the modern welfare state so that beneficiaries continue to be treated as passive recipients of state largesse. Instead, social rights ought to include rights to

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<sup>277</sup> *Minerva Mill Ltd. v. India*, 1980 A.I.R. (S.C.) 1789, 1806 (India) (Chandrachud, C.J.) (discussing the relationship between the justiciable Fundamental Rights in Part III of the Indian Constitution and the Directive Principles of State Policy in Part IV). If only to emphasize the highly rhetorical nature of the notion of interdependence, it is worth noting that in this case the Supreme Court of India invoked the evocative chariot metaphor in order to strike down a nationalization law (enacted pursuant to a newly constitutionalized Directive Principle) as a violation of a Fundamental Right. *See id.*

participate in the design, implementation, critique, and revision of measures that seek to improve material and social circumstances.<sup>278</sup> As such, social rights are aimed at the material and political empowerment of the worst off in society.<sup>279</sup>

In Part II, we addressed the legitimacy of entrenching social rights alongside more classically imagined civil liberties in terms of the negative constitutive effect on social and political discourse and conceptions of identity and status. To constitutionalize half the human rights equation<sup>280</sup> would entrench a certain vision of the human and social self, while marginalizing those who do not fit that norm. The notion of interdependence may be seen as a shorthand principle for these claims.<sup>281</sup>

In this Part, we seek to illuminate aspects of the interdependence of social rights through an examination of a number of different instruments of international human rights law. Interdependence is relevant in two ways, in each instance in terms of what could be called a "doctrine of advocacy." First, interdependence is a doctrine that advocates pulling rights together. That is, it tells us to engage, wherever useful and possible, in an integrated consideration of rights.<sup>282</sup> This includes making a social rights

<sup>278</sup> For a similar view, see White, *supra* note 14, at 865, 872, 873, 877.

<sup>279</sup> For an extended treatment of the concept of interdependence, concentrating on importing the interests underlying social rights into interpretations of civil and political rights, see Scott, *supra* note 59, at 786-90.

<sup>280</sup> See *supra* text accompanying note 82.

<sup>281</sup> "The term *interdependence* attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation." Scott, *supra* note 59, at 786. Interdependence may also be seen as a way of advocating within human rights discourse "a full conception of human freedom and a full and integrated conception of the self." *Id.* at 804. Furthermore, "interdependence" could also be seen as a way of rejecting a related series of fundamental oppositions or dichotomies that can serve to privilege certain conceptions of the self, and to reinforce marginalization. See Janet Mosher, *The Harms of Dichotomy: Access to Welfare Benefits as a Case in Point*, 9 CAN. J. FAMILY L. 97, 97-104, 113-16 (1991) (analyzing selected dichotomies, including "dependence/independence," as they relate to statutory social rights law and policy in Canada).

<sup>282</sup> See Scott, *supra* note 59, at 779-86, for an attempt to fashion two "analytical meanings" of interdependence. In a relationship of *organic interdependence*, one right forms a part of another right and may therefore be incorporated into that latter right (for example, the right to nutrition as part of the right to life). In a relationship of *related interdependence*, rights are equally important and complementary, yet separate, such that the question is not whether one right is part of another but, rather, whether one right applies to another (for example, the right to a fair hearing applying to a pension benefit).

The concept of interdependence is not limited to the relationship between social, civil, and political rights, although that is historically the axis of concern and almost

claim before a court on the basis of a document generally imagined to be about civil and political rights.<sup>283</sup> Second, interdependence advocates the importance of a right or a given set of rights, imbuing that claim of worth with a further implicit claim that its importance is in part a function of its relation to other rights. Used in this way, interdependence refers to a right's status within an overall system of valuation and protection. It is a way of stating that a right should be given due attention, or protection, through appropriate mechanisms and procedures. To the extent possible, the right in question should be accorded the same status and form of protection provided to other valued rights. For our purposes, interdependence suggests the protection of social rights through more justiciable petition procedures.

In international human rights law, the first aspect of advocacy has had little effect on practice. There are relatively few instances of integrated considerations of social, civil, and political rights.<sup>284</sup> Even fewer cases have actually acknowledged the concept of interdependence.<sup>285</sup> It is the second, more general and even polemical use of interdependence which has begun to make some headway into the practice of international human rights law. Developments in the last five years in the United Nations Covenant system, the Council of Europe system and the Inter-American

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certainly still provides the context in which the concept is the most useful. But, as a general matter, interdependence connotes primarily the inextricable quality of all rights, including, for example, freedom of expression and freedom of assembly and association. See *Plattform Ärzte Für Das Leben v. Austria*, 139 Eur. Ct. H.R. (ser. A) at 12 (1988) (noting that a state's failure to provide protection for those wishing to assemble freely could "deter associations or other groups . . . from openly expressing their opinions"); *Young, James & Webster v. United Kingdom*, 44 Eur. Ct. H.R. (ser. A) at 23-24 (1981) (noting that the "protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11").

<sup>283</sup> Recall the discussion of *Schachter* and *Irwin Toys* and the possible "importation" of social rights into the right to "security of the person." See *supra* text accompanying notes 226-33.

<sup>284</sup> By integrated consideration, we include side-by-side consideration of such rights in the same case. See *Yanomami*, Resolution No. 12/85, Case No. 7615 (1985) (Brazil), reprinted in INTER-AMERICAN COMM'N ON HUMAN RIGHTS & INTER-AMERICAN COURT OF HUMAN RIGHTS, INTER-AMERICAN YEARBOOK OF HUMAN RIGHTS: 1985, at 264, 278 (1987) (finding that the Brazilian government violated both the personal security and health rights of the Yanomami Indians) [hereinafter 1985 INTER-AM. YEARBOOK].

<sup>285</sup> The authors know of only three. See *infra* text accompanying notes 301-10 (trilogy of cases interpreting Article 26 of the ICCPR).

system have begun either to draw attention to the need for greater petition-linked justiciability or have actually begun to forge such justiciability.

A. *The International Bill of Rights: The Universal Declaration and the International Covenants*

The principle of the interdependence of human rights underlies the cornerstone of contemporary international human rights law, the Universal Declaration of Human Rights of 1948.<sup>286</sup> The Universal Declaration of Human Rights represents an idealistic global recognition of human rights espoused by societies that claimed membership in the United Nations at the time the document was drafted.<sup>287</sup> The Declaration recognizes rights to social security and those "economic, social and cultural rights indispensable" to human "dignity and the free development of . . . personality."<sup>288</sup> Civil and political rights and social rights co-exist side by side in this document, which has been so often been invoked around the world in struggles for freedom and equality. The inclusion of social rights in a South African constitution would resurrect and vindicate the original, if inchoate, promise of the text and intention of many of the drafters of the Universal Declaration of Human Rights.<sup>289</sup>

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<sup>286</sup> See *supra* note 37. As a recommendation of the United Nations General Assembly, the Declaration is traditionally conceived to have no independent legal status, and is rather a document of a political and moral nature. Many have argued that the Declaration indirectly obligates states, either as an authoritative interpretation of the United Nations Charter's generally-worded human rights provisions or as evidence of customary international law. See BROWNLIE, *supra* note 163, at 570-71 (discussing past usage of the Declaration by international institutions); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 22, 28-30 (B.G. Ramcharan ed., 1979) (discussing widespread use and influence of the Declaration).

It should perhaps be noted that South Africa refused to endorse the Declaration. See Dugard, *supra* note 35, at 446.

<sup>287</sup> See Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309, 309 (1984) (describing human rights conceptions incorporated into the Declaration); Scott, *supra* note 59, at 791 (documenting the history of the Declaration).

<sup>288</sup> UDHR, *supra* note 37, art. 22, at 75. Article 22 serves as an "umbrella article" for the articles immediately following it. See Humphrey, *supra* note 286, at 28.

<sup>289</sup> See Morsink, *supra* note 287, at 334 (noting that the framers "went consciously beyond the earlier declarations and were proud of it").



Despite its initial prominence in the Universal Declaration of Human Rights, the principle of the interdependence of human rights was immediately submerged by an international debate over what legally-binding treaties could be parented by the Declaration. The primary source of controversy was whether to include some kind of quasi-judicial supervisory machinery to oversee states' obligations and, if so, whether all Declaration rights could be subject to such machinery. The debate was explicitly over justiciability, with the proponents of dividing the Declaration into two Covenants arguing that social rights were non-justiciable and therefore could not be included in a unified document, if that document was to go beyond the purely normative statement of the Declaration.

The primary stumbling block for continuing to adhere to the Declaration's vision of an integrated body of human rights was not, therefore, fueled by a conservative vision of the limits of state intervention or by the view that social rights are somehow inferior to, or of a lesser order than, classical rights and liberties. Rather, social rights were not viewed as justiciable because courts, or court-like bodies, were not thought to be competent bodies to deal with them. It is also true that the debates do reveal some clear ideological resistance by several states' delegates to the very idea of social rights as "rights."<sup>290</sup> Yet even these states acceded to the consensus position that the two categories of rights were in fact philosophically inseparable and in principle equally legitimate subjects of external review of states' conduct.<sup>291</sup> The General Assembly resolution that called for the drafting of two separate treaties<sup>292</sup> did so only after quoting an earlier General Assembly resolution which had called for one treaty in terms that had explicitly accepted the principle of the interdependence of human rights.<sup>293</sup>

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<sup>290</sup> See Scott, *supra* note 59, at 797-98 (discussing views of Canada and the United States). The U.S. representative at the time was Eleanor Roosevelt, the widow of President Roosevelt, who had promulgated a vision of a second Bill of Rights that included social rights. See 90 CONG. REC. 57 (1944) (statement of Franklin D. Roosevelt).

For a persuasive view that the sub-text, as opposed to the rhetoric, of the entire debate was an ideological East-West split on the merits of laissez-faire economic policy, see Farrokh Jhabvala, *On Human Rights and the Socio-Economic Context*, 31 NETH. INT'L L. REV. 149, 159 (1984).

<sup>291</sup> See Scott, *supra* note 59, at 800.

<sup>292</sup> See *Preparing of Two Draft International Covenants on Human Rights*, G.A. Res. 543, U.N. GAOR, 6th Sess., 375th mtg. at 8, U.N. Doc. A/2119 (1952) [hereinafter *Draft Covenants*].

<sup>293</sup> The following two preambular clauses were borrowed from the earlier

Thus, despite pronounced emphasis on the equal claim to legitimacy of social rights through the principle of interdependence, the United Nations General Assembly decided to split the Declaration's catalogue of rights into the ICCPR<sup>294</sup> and the ICESCR.<sup>295</sup> To underscore the fact that the principle of interdependence was in fact affirmed rather than rejected, the preamble of the ICCPR makes direct reference to the principle of interdependence:

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights . . . .<sup>296</sup>

The corresponding preambular paragraph in the ICESCR reverses the order of the relationship of the two sets of rights.<sup>297</sup> The wording of these documents clearly conveys the message that pragmatic considerations concerning the judiciary's competence to adjudicate social rights prevented states from incorporating social and political rights in a single covenant.

Procedures established to address alleged violations of the two Covenants further pushed the Declaration's enthusiastic embrace of the principle of interdependence to the margins of international human rights law. The ICCPR provided for the creation of a quasi-judicial organ, the Human Rights Committee. This Committee is empowered under a protocol to the treaty, the Optional Protocol,<sup>298</sup> to deal with individual claims (petitions) of violations of

resolution:

*Whereas* the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent;

*Whereas* when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man.

*Draft International Covenant on Human Rights and Measure of Implementation: Future Work of the Commission on Human Rights*, G.A. Res. 421E., U.N. GAOR, 5th sess., 317th mtg. at 43, U.N. Doc. A/1775 (1950), at pmb. ¶¶ 3 & 4, *reprinted in Draft Covenants*, *supra* note 292, at pmb. ¶ 2.

<sup>294</sup> See ICCPR, *supra* note 38.

<sup>295</sup> See ICESCR, *supra* note 23.

<sup>296</sup> ICCPR, *supra* note 38, pmb. para. 2, 999 U.N.T.S. at 173.

<sup>297</sup> See ICESCR, *supra* note 23, pmb. para. 2, 993 U.N.T.S. at 5; *see also* Scott, *supra* note 59, at 809-11 (noting that the two preambular paragraphs serve as the textual interpretive basis for mediating the unity and distinctiveness of the two Covenants).

<sup>298</sup> See ICCPR, Optional Protocol, *supra* note 39, pmb. para. 1 & arts. 1-5, 999

rights enshrined in the Covenant.<sup>299</sup> The exercise of such jurisdiction requires states to accept explicitly the individual petition procedure. The ICESCR, by contrast, provided no equivalent right of individual petition and limited its monitoring mechanism to a state report procedure.<sup>300</sup>

The Human Rights Committee, in two related cases arising out of the Netherlands, has helped to draw attention, at least implicitly, to the principle of interdependence. In both cases, the petitioners invoked the principle of interdependence as one justification for interpreting the generally worded right to equality in Article 26 of the ICCPR<sup>301</sup> to include the right to non-discrimination with respect to social welfare benefits. In *Broeks v. The Netherlands*<sup>302</sup> and *Zwaan-de Vries v. The Netherlands*,<sup>303</sup> two unemployed female

U.N.T.S at 302.

<sup>299</sup> See DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 150-51 (1991). The decisions of the Committee are termed "views" under the Optional Protocol and are technically non-binding.

<sup>300</sup> See ICESCR, *supra* note 23, art. 16, 993 U.N.T.S. at 9; see also Philip Alston & Gerald Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 170 (1987) (noting that no provision for effective remedy was proposed during the drafting of ICESCR). See generally Alston, *Out of the Abyss*, *supra* note 57, at 332 (outlining the challenges that the Committee will face in monitoring states' compliance to the ICESCR); Philip Alston & Bruno Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603, 604 (1988) (noting that constructive dialogue during the Committee's deliberations reduced the level of politicization and therefore raised the stature of the Committee closer to the level of its ICCPR counterpart, the Human Rights Committee); Philip Alston & Bruno Simma, *First Session of the UN Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747, 749, 755 (1987) (claiming that the newly established U.N. Committee is not fully depoliticized); Bruno Simma, *The Implementation of the International Covenant on Economic, Social and Cultural Rights*, in *THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS* 75-81 (Franz Matscher ed., 1991) (analyzing the reporting system, the sole implementation machinery of the Covenant).

<sup>301</sup> Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

ICCPR, *supra* note 38, art. 26, 999 U.N.T.S. at 179.

<sup>302</sup> U.N. Doc. CCPR/C/OP/2/172/1984, U.N. Sales No. E.89 XIV.1 (1987), reprinted in 2 UNITED NATIONS, *SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL: SEVENTEENTH TO THIRTY-SECOND SESSIONS* 196, 201 (1990) [hereinafter *SELECTED DECISIONS*].

<sup>303</sup> U.N. Doc. CCPR/C/OP/2/182/1984 (1987), reprinted in 2 *SELECTED*

workers had unemployment benefits terminated pursuant to the Dutch Unemployment Benefits Act, which provided that benefits could not be awarded to married women who were neither "breadwinners" nor permanently separated from their spouses. The Act did not contain a similar exclusion for married men. The major issue facing the Committee was whether to interpret Article 26 as prohibiting discriminatory treatment with respect to social benefits, especially given the existence of Article 2(2) in the ICESCR guaranteeing the right to non-discrimination in the provision of benefits guaranteed by that Covenant.<sup>304</sup> The claim of the government was largely based on the fact that an interpretation of Article 26 of the ICCPR to provide non-discrimination protection for social benefits would create an overlap with Article 2(2) of the ICESCR as it operated in conjunction with Article 9 of the ICESCR.<sup>305</sup> In the government's view, the Human Rights Committee should use a principle of minimizing overlap as an interpretive presumption. Related to this was the argument that if Article 2(2) and Article 9 in tandem are not justiciable under the ICESCR (in the sense of subject to the same kind of petition procedure as available under the ICCPR), they should not be rendered justiciable by means of an interpretation which imports them into Article 26 of the ICCPR.

In both cases, the Committee held that discrimination is prohibited by the ICCPR, thereby declining to endorse a principle of non-overlap that would have had the Committee interpret Article 26 on the basis of a proposition that might be expressed as "what is there (in the ICESCR) explicitly cannot be here (in the ICCPR) implicitly." Instead, in refusing to accord dispositive importance to the presence of Article 2(2) of the ICESCR, thereby enabling it to

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DECISIONS, *supra* note 302, at 209, 213; *see also* Danning v. The Netherlands, U.N. Doc. CCPR/C/OP/2/180/1984 (1987), *reprinted in* 2 SELECTED DECISIONS, *supra* note 302, at 205 (dismissing a marital status discrimination claim by a disabled man and holding that by choosing not to enter into marriage, the applicant had not assumed the full extent of the duties incumbent on married couples, and thus was not entitled to receive the full benefits provided by Netherlands law for married couples).

<sup>304</sup> *See* ICESCR, *supra* note 23, art. 2(2), 993 U.N.T.S. at 5 ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

<sup>305</sup> *See* ICESCR, *supra* note 23, art. 9, 993 U.N.T.S. at 7 ("The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.").

become justiciable in concrete cases by way of Article 26 of the ICCPR, the Committee noted an "interrelated drafting history" of the two Covenants, but explicitly stated that it was restricting its analysis to the wording of Article 26.<sup>306</sup> The petitioner, Broeks, however, had expressly argued that the human rights in the two Covenants were interdependent. These arguments were set out in detail in the Committee's decision and the Committee did little to distance itself from this proposition.<sup>307</sup>

Even if the Committee did not openly embrace the interdependence concept to bolster its reasoning, the results in these cases illustrate the interdependence of social rights with civil and political rights.<sup>308</sup> They also illustrate that civil and political rights can be and have been interpreted to cover matters associated with social rights protection, albeit in a way that provides only limited, indirect protection.<sup>309</sup> Although these have been the only cases in which interdependence has openly played a role in argument, several other cases have raised issues of overlap between the ICESCR and the ICCPR, with the result of one decision being hostile to the principle of interdependence.<sup>310</sup>

<sup>306</sup> See Scott, *supra* note 59, at 856-57.

<sup>307</sup> See *id.* at 858-59 (considering the significance of the style of judgment in this case for the Committee's view on the question of interdependence).

<sup>308</sup> See *id.* at 855-59 (relating to the question of how far these cases can be said to endorse, or leave open, interpretive borrowing from the ICESCR by the ICCPR based on the principle of interdependence).

<sup>309</sup> In subsequent cases, the Committee has not backed away from applying Article 26 to social rights legislation, always emphasizing the indirect, procedural nature of the protection accorded to social rights. It has, however, declined to interpret Article 26 in a way that would in effect read substantive social rights into it. See *Report of the Human Rights Committee*, U.N. GAOR, Supp. No. 40, ¶¶ 647-50, U.N. Doc. A/44/40 (1990) (comment by the Committee on its own jurisprudence).

<sup>310</sup> One of us has previously extensively reviewed a case which decided whether the freedom of association guarantee of Article 22(1) of the ICCPR should be interpreted to include the right to strike, which is found explicitly in Article 8(1)(d) of the ICESCR. See Scott, *supra* note 59, at 869-74. While interdependence was not explicitly discussed, the principle of no-overlap was argued by the Canadian government and, in effect, endorsed by the Committee majority who refused to read the right to strike into Article 22(1) of the ICCPR. See *J.B. v. Canada*, Communication No. 118/1982 (1986), reprinted in 2 SELECTED DECISIONS, *supra* note 302, at 34 (refusing to read the right to strike into Article 22(1) of the ICCPR). But see Scott, *supra* note 59, at 869-74 (arguing that the freedom of association guarantee of Article 22(1) of the ICCPR should be interpreted to include the right to strike found explicitly in Article 8(1)(d) of the ICESCR).

Due process guarantees for social benefits, under Article 14(1) of the ICCPR, are also the subject of such interpretations. See *Y.L. v. Canada*, Communication No. 112/1981, reprinted in 2 SELECTED DECISIONS, *supra* note 302, at 28 (dealing with the

After years of ineffectual monitoring of the ICESCR by a Working Group of the United Nations Economic and Social Council, the Council created a parallel expert committee under the ICESCR to oversee the implementation of that treaty.<sup>311</sup> In its first years of operation, the new Committee has shown a strong interest in receiving information from states on the kinds of judicial protection provided for the rights in the Covenant.<sup>312</sup> The Committee has also made it clear that its central function is to clarify the core obligations of states that flow from the rights in the Covenant, a function, albeit incremental, that will make many of the rights more manageable for courts in the future.<sup>313</sup>

A major part of this project of norm clarification involves articulating specific procedural obligations (or obligations of conduct) owed by states with respect to their general reporting obligation under the Covenant.<sup>314</sup> The Committee's work also involves elaborating the substantive normative content of rights found in the Covenant. Its first step has been to issue a General Comment<sup>315</sup> on Article 2(1) of the ICESCR, which, as described

interaction between social benefits and due process rights); *see also* Scott, *supra* note 59, at 860-69 (discussing how the case avoids the issue of due process and leaves it open for future decision); *id.* at 876 (discussing how the Committee has interpreted the right to life in Article 6(1) of the ICCPR to "require[] . . . that States adopt positive measures . . . [e.g.,] to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics"). The Committee has not, to the authors' knowledge, yet been presented with an individual communication seeking to test this general, interdependence-infused principle in a concrete case. *Cf.* *Lubicon Lake Band v. Canada*, Communication No. 167/1984, *reprinted in* 11 HUMAN RIGHTS L.J. 305 (1990); Dominic McGoldrick, *Canadian Indians, Cultural Rights and the Human Rights Committee*, 40 INT'L & COMP. L.Q. 658, 661, 664-67 (1991) (arguing that the decision in *Lubicon Lake Band* displayed a willingness to interpret Article 27's minority linguistic, cultural, and religious rights in an interdependence-sensitive fashion that included importing considerable social and economic content into Article 27).

<sup>311</sup> *See* E.S.C. Res. 17, U.N. ESCOR, 1st Sess., Supp. No. 1, at 15, U.N. Doc. E/1985/85 (1985) (designating an 18-member committee to oversee the ICESCR).

<sup>312</sup> This interest has been evident since the second session of the Committee in 1988 and is reflected in the revised reporting guidelines the Committee agreed on during its fifth session. These guidelines give detailed guidance to states on points that the Committee requires to be addressed in state reports on compliance with the Covenant. Six separate points touch upon judicial protection of social rights. *See* Revised Guidelines, *in Report on the Fifth Session*, *supra* note 260, Annex 4, at 89; *see also* General Comment No. 3, *in Report on the Fifth Session*, *supra* note 260, at 84 ("[T]he Committee would wish to receive information as to the extent to which these rights are considered to be justiciable . . .").

<sup>313</sup> *See* Alston, *Out of the Abyss*, *supra* note 57, at 351-55.

<sup>314</sup> *See supra* text accompanying notes 270-74.

<sup>315</sup> *Report on the Fifth Session*, *supra* note 260, ¶¶ 1-14.

previously,<sup>316</sup> imposes a duty on states to take steps to progressively realize all the social rights listed in the Covenant. Of particular interest is the Committee's development of the concept of "minimum core obligation":

[T]he Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.<sup>317</sup>

In response to the claim that a core obligation would involve prohibitive financial costs, the Committee is of the view that a state making such a claim "must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."<sup>318</sup> Consistent with its focus on the need in state reports for indicators and disaggregated data that take seriously the special priority of attention of disadvantaged and vulnerable groups such as women,<sup>319</sup> the Committee is careful to state that process-oriented obligations of conduct are absolute.<sup>320</sup>

As stated, unlike the Human Rights Committee under the ICCPR, the Committee on Economic, Social and Cultural Rights is limited to supervision of state reports. However, there are signs of

<sup>316</sup> See *supra* notes 260-65 and accompanying text.

<sup>317</sup> *Report on the Fifth Session, supra* note 260, ¶ 10; see also *Limburg Principles, supra* note 254, ¶ 25, at 3 (describing states' obligation "to ensure respect for minimum subsistence rights for all," regardless of the level of economic development).

<sup>318</sup> *Report on the Fifth Session, supra* note 260, ¶ 10. The Committee adds that "even in times of severe resource constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes." *Id.* ¶ 12.

<sup>319</sup> See *supra* note 255 and accompanying text. For a list of eleven "especially vulnerable or disadvantaged groups" (in addition to women) with respect to the right to adequate food, see Revised Guidelines, in *Report on the Fifth Session, supra* note 260, Annex 4, at 100; see also Simma, *supra* note 300, 84-85 (remarking that "[o]ne could go so far as saying that concern for the particularly vulnerable and disadvantaged members of society lies at the heart of the Committee's entire 'philosophy.'").

<sup>320</sup> See *Report on the Fifth Session, supra* note 260, ¶ 11. ("[T]he obligations to monitor the extent of the realization, or more especially of the non-realization, of economic, social and cultural rights, and to devise strategies and programmes for their promotion, are not in any way eliminated as a result of resource constraints.").

an embryonic willingness and ability to indicate whether or not a state is in compliance with its obligations under the Covenant.<sup>321</sup> As the Committee struggles with its own procedures and the normative content of Covenant rights, it has not been unknown for individual Committee members to indicate that in their view a right has not been respected.<sup>322</sup>

As early as the second session, there was an elliptical indication that the Committee as a whole considered Zaire not to have complied with the Covenant, including Article 13's obligation to provide free primary education.<sup>323</sup> This observation was offered at the final stage of the evaluation of a state report known as "concluding observations" which are now, in the practice of the Committee, presented by one Committee member on behalf of the Committee as a whole.<sup>324</sup> In its fifth session, the Committee indicated unambiguously, for the first time, that a State, the Dominican Republic, had violated Article 11 of the Covenant.<sup>325</sup> In the words of the Committee:

The information that had reached members of the Committee concerning the massive expulsion of nearly 15,000 families in the course of the last five years, the deplorable conditions in which the families had to live, and the conditions in which the expulsions had taken place were deemed sufficiently serious for it to be considered that the guarantees in article 11 of the Covenant had not been respected.<sup>326</sup>

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<sup>321</sup> See *Limburg Principles*, *supra* note 254, ¶ 72, at 8 (outlining the potential range of violations that the Committee could find).

<sup>322</sup> See Alston, *supra* note 115, at 89.

<sup>323</sup> "It was recalled, in this connection, that the members of the Committee had expressed particular concern with regard to certain issues related to the implementation of the Covenant in Zaire such as the problem of Zairian refugees, the question of equality between men and women, the enjoyment of trade-union rights and the abolition of free primary education." *Report on the Second Session*, U.N. ESCOR, 2d Sess., Supp. No. 4, Agenda Item 3, ¶ 303, U.N. Doc. E/1988/14; E/C.12/1988/4 (1988); see also Alston, *supra* note 115, at 89 (discussing the development by the Committee of "other techniques by which it might better contribute to an understanding of the normative content of the various rights").

<sup>324</sup> See Simma, *supra* note 300, at 83.

<sup>325</sup> See ICESCR, *supra* note 23, art. 11, 993 U.N.T.S. at 5 ("The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing . . .").

<sup>326</sup> Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant, in *Report on the Fifth Session*, *supra* note 260, ¶ 249.



This "concluding observation" reveals the importance of receiving information from actors in addition to governments themselves and it illustrates how such information can be determinative in measuring states' performance of their obligations. This is not to suggest that an ad hoc and indirect consideration of individual circumstances is adequate. Significantly, the Committee has begun discussions on the possibility of encouraging states to draft an Optional Protocol for the ICESCR that would allow for a right of individual petition similar to that which exists for the ICCPR.<sup>327</sup> At its sixth session in 1991, the Committee began to address ways to render some or all of the rights in the Covenant justiciable at the international level.<sup>328</sup> This complements the Committee's consistent concern to learn about justiciability within states' domestic systems, a concern which has culminated in the Committee setting out a non-exhaustive list of rights found in the Covenant which "would seem to be capable" of being immediately justiciable.<sup>329</sup> In its discussion

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<sup>327</sup> See Review of Methods of Work of the Committee, in *Report on the Fifth Session*, *supra* note 260, ¶ 285; see also U.N. ESCOR, 4th Sess., 3d mtg. at 10, U.N. Doc. E/C.12/1990/SR.3 (1990) (discussing the possibility of providing for a petition system). For more detail on the way in which an Optional Protocol came to be discussed within the Committee, see Alston, *supra* note 115, at 91-93; Simma, *supra* note 300, at 90.

<sup>328</sup> See *Report on the Sixth Session*, U.N. ESCOR, Comm'n on Economic, Social and Cultural Rights, 6th Sess., ¶ 360, U.N. Doc. E/1992/23, E/C.12/1991/4 (1992). A discussion note prepared by committee member Philip Alston on an optional protocol to the ICESCR resonates with some of the key themes of this article and received the following response:

The members of the committee . . . supported the drafting of an optional protocol since that would enhance the practical implementation of the Covenant as well as the dialogue with States parties and would make it possible to focus the attention of public opinion to a greater extent on economic, social and cultural rights. The Covenant would no longer be considered as a "poor relation" of the human rights instruments. Members stressed that the doctrine of interdependence and indivisibility of human rights should form the basis of any work done by the Committee on drawing up such a draft.

*Id.* ¶ 362; see also U.N. ESCOR, 6th Sess., 1st mtg. at 61, U.N. Doc. E/C.12/1991/Sr.1 (1992).

<sup>329</sup> *Report on the Fifth Session*, *supra* note 260, ¶ 5. Included in the Committee's list are Articles 3 (gender equality with respect to all rights in the Covenant), 7(a)(i) (equal pay for equal work, inter alia), 8 (various trade-union rights, including the right to strike), 10(3) (special measures of protection and assistance for all children and young persons, namely protection from economic and social exploitation including, inter alia, legislation establishing age limits below which child labour is to be prohibited), 13(2)(a) (compulsory and free primary education), 13(3) and (4) (parental liberty rights with respect to education of children in private schools and religious and moral education), and 15(3) (freedom of scientific research and creative activity).

of justiciable rights, the Committee highlights the unequivocal justiciability of Article 2(2)'s right to non-discrimination with respect to the rights found in the Covenant.<sup>330</sup>

### B. *The Council of Europe Experience*

The fracturing of civil and political rights from social and economic rights also finds expression in two documents governing the European community. The European Convention on Human Rights<sup>331</sup> and the European Social Charter<sup>332</sup> were adopted by the Council of Europe, which was established by western European states to promote European political unity.<sup>333</sup> The European Convention on Human Rights in many ways mirrors the ICCPR, guaranteeing a number of civil and political rights and establishing a European Court of Human Rights for purposes of interpretation and enforcement. The Social Charter, by contrast, is akin to the ICESCR. It contains a number of social rights, including rights to the protection of health, social security, social and medical assistance, and social welfare services. Supervision has been based on a reporting system, which, as will shortly be seen, has been able to develop an extensive and relatively detailed case law even in the absence of the concrete focus that an individual petition procedure would supply.

The European Court has relied forcefully, if still only implicitly, on the principle of the interdependence of human rights in its reasoning in *Airey*, the case discussed above<sup>334</sup> that dealt with the positive duty of Ireland to provide free civil legal aid to a woman petitioning for judicial separation:

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Two points can immediately be seen from this non-exhaustive list. First, the rights in the Covenant are not limited to rights traditionally imagined as positive. Second, rights with significant positive obligations are seen by the Committee as immediately justiciable. See *Limburg Principles*, *supra* note 254, ¶ 8, at 1 (discussing progressive versus immediate justiciability).

<sup>330</sup> This has, of course, been confirmed in recent jurisprudence under Article 26 of the ICCPR, as was discussed above. See *supra* notes 301-10 and accompanying text.

<sup>331</sup> ECHR, *supra* note 41. See generally P. VAN DIJK & G.J.H. VAN HOOFF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1984) (discussing the European Convention on Human Rights).

<sup>332</sup> ESC, *supra* note 42. See generally HARRIS, *supra* note 109 (discussing the Charter at length).

<sup>333</sup> See generally F. Tennfjord, *The European Social Charter: An Instrument of Social Collaboration in Europe*, [1961] 9 EUR. Y.B. 71 (Council of Europe) (discussing the drafting of the ESC).

<sup>334</sup> See *supra* notes 157-62 and accompanying text.

The Court is aware that the further realisation of social and economic rights is largely dependent on the situation—notably financial—reigning in the State in question. On the other hand, the Convention must be interpreted in the light of present-day conditions . . . and it is designed to safeguard the individual in a real and practical way as regards those areas with which it deals. . . Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. . . . [T]he mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.<sup>335</sup>

In so holding, the court made explicit what in our view is implicit in the nature of the relationship between civil and political rights and social rights: namely, that each category is indispensable to the realization of the other. However, this case is notorious among international human rights lawyers who follow European Court jurisprudence in that it has been as scrupulously absent (even by way of general citation) from subsequent case law as it was shining in its promise of an adventurous new jurisprudence.<sup>336</sup> For instance, the court has failed to rely on the “*Airey* principle” in two cases in which it would have bolstered the reasoning and strengthened the hand of the majority. Both cases, mentioned earlier, dealt with Article 6(1)’s due process protections for social benefits.<sup>337</sup> Indeed, the majority in these two cases seemed intent on avoiding basing (or being perceived as basing) the decision on the importance of procedural protections for these kinds of social rights.<sup>338</sup>

Two recent freedom of expression cases also seem to reflect a working principle diametrically contrary to that advanced in *Airey*.<sup>339</sup> In each case, teachers were dismissed from their jobs on

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<sup>335</sup> *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 14-15 (1979).

<sup>336</sup> If there is any doubt about the potential radical implications of this passage, despite the more modest result on the facts, one need only note the eloquent but somewhat alarmed response from one of the dissenting judges: “The war on poverty cannot be won through broad interpretation of the Convention . . . .” *Airey*, 32 Eur. Ct. H.R. (ser. A) at 26 (Vilhjalmsson, J., dissenting).

<sup>337</sup> See *Deumeland v. Germany*, 100 Eur. Ct. H.R. (ser. A) at 21-30 (1986); *Feldbrugge v. The Netherlands*, 99 Eur. Ct. H.R. (ser. A) at 11-18 (1986); *supra* text accompanying note 148.

<sup>338</sup> See Scott, *supra* note 59, at 861-62 & n.331.

<sup>339</sup> See *Kosiek v. Germany*, 105 Eur. Ct. H.R. (ser. A) at 18-21 (1986); *Glasesnapp v. Germany*, 104 Eur. Ct. H.R. (ser. A) at 22-27 (1986).

the basis of the German authorities' evaluation that they were not loyal to the Basic Law and its principles of a free democracy; one was linked with the extreme left,<sup>340</sup> and the other with the extreme right.<sup>341</sup> They each claimed a breach of their right to free expression under Article 10 of the Convention, but the court found either that freedom of expression was not at issue or that it was not sufficiently affected to have been breached.<sup>342</sup> In any case, the court cast the issue as one of equal access to public service employment and held that such a right was deliberately omitted during the drafting of the Convention, as compared to its express inclusion in the Universal Declaration and the ICCPR.<sup>343</sup> As the court stated in *Glasenapp v. Germany*, "[t]his is not therefore a chance omission from the European instruments; as the Preamble to the Convention states, they are designed to ensure the collective enforcement of 'certain' of the rights stated in the Universal Declaration."<sup>344</sup>

Such compartmentalization does not walk on the same landscape as *Airey*. It is not simply that the court failed to take account of either applicant's employment interests, nor that it did not consider that freedom of expression should be jealously protected. It is more that the court was so ready to interpret the omission of what could be viewed as a kind of social right as having covered the field to the extent that freedom of expression was not viewed as implicated at all. Each applicant (particularly *Glasenapp*) essentially had to trade off a civil liberty for a job in his or her chosen profession of teaching. Whatever substantive analysis may have justified limiting freedom of expression, such analysis was avoided and the implicit message of the case might well be described as "shut up and work."<sup>345</sup>

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<sup>340</sup> See *Glasenapp*, 104 Eur. Ct. H.R. (ser. A) at 11-13 (1986) (*Glasenapp* vocally supported the German Communist Party's (KPD) policy of setting up an "international people's kindergarten" in her city).

<sup>341</sup> See *Kosiek*, 105 Eur. Ct. H.R. at 11-13 (*Kosiek* belonged to the neo-fascist NPD, which advocated "extreme nationalism and a racist ideology").

<sup>342</sup> The judgments are not entirely clear on this point.

<sup>343</sup> See *Glasenapp*, 104 Eur. Ct. H.R. (ser. A) at 27 ("[A]ccess to the civil service lies at the heart of the issue submitted to the Court. . . . That being so, there has been no interference with the exercise of the right protected under paragraph 1 of Article 10.")

<sup>344</sup> *Id.* at 25.

<sup>345</sup> Added to this collective forgetting of *Airey* must be a reminder that the only court decisions to have actively considered the relationship between the Convention and the Charter, a trilogy of pre-*Airey* trade union cases, resulted in the court using as one basis for its decision the fact that the European Social Charter itself does not provide the protection claimed under the Convention by the applicants. This is all

Compared to the limited inspiration coming from the European Court, the bodies of the European Social Charter have been slowly and practically building the case for the justiciability of social rights. Supervision of the Social Charter is implemented through a cumbersome review process.<sup>346</sup> Furthermore, the body actually

the more significant given the fact that in these cases interdependence-sensitive, detailed and creative arguments were presented to the court, including arguments that first used the notion of related and organic rights relationships. See *Schmidt v. Sweden*, 21 Eur. Ct. H.R. (ser. A) at 15 (1976); *Swedish Engine Drivers' Union v. Sweden*, 20 Eur. Ct. H.R. (ser. A) at 15 (1976); *National Union of Belgian Police v. Belgium*, 19 Eur. Ct. H.R. (ser. A) at 18 (1975).

Much like the later *J.B. v. Canada*, Communication No. 118/1982, reprinted in 2 SELECTED DECISIONS, *supra* note 302, at 35, under the ICCPR, these cases all involved applications by trade unions or members to have various rights related to collective bargaining recognized as falling within Article 11(1) of the European Convention. Most of the rights in question were found in some form in Articles 5 and 6 of the European Social Charter. In *Swedish Engine and Belgian Police*, the court relied in part on the fact that, as phrased in the European Social Charter, the claimed rights (to be consulted and to have a collective agreement concluded with the union) were phrased with such "prudence" that they did not count as "real" rights, and therefore could not be implied into the Convention even if the court had been willing to do so. See *Swedish Engine* at 15; *Belgian Police* at 18. In *Schmidt*, on the claim that post-strike retroactivity of benefits should be read into Article 11(1), the court noted that "[s]uch a right, which is enunciated neither in Article 11(1) nor even in the Social Charter . . . is not indispensable . . ." *Schmidt* at 15. At least with respect to certain rights found in the Social Charter, we have the makings of an interpretive Catch-22: one cannot borrow a right that is *not* in the Social Charter, and one cannot borrow a right that is in the Social Charter (at least to the extent it is not "real").

In any case, the basic result is that the Charter is used as a kind of interpretive foil which places a ceiling on what can be read into the Convention. Thus, the Charter covers the field, so to speak, notwithstanding the Charter's own statement in Article 32 that "[t]he provisions of this Charter shall not prejudice the provisions of . . . any . . . multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected." ESC, *supra* note 42, art. 32, Europ. T.S. No. 35 at 18 (emphasis added). Article 32 must be reconciled with the following passage in the Appendix to the Charter relating to Part III: "It is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof." ESC, *supra* note 42, app., Europ. T.S. No. 35 at 27.

<sup>346</sup> This involves a complicated system of reporting by, and committee evaluation of, member states. These states are required to submit reports on their compliance with those terms of the Social Charter that they have agreed to follow. A report based on these reports is prepared by the Committee of Independent Experts (CIE) and then submitted to the Governmental Social Committee of the Council of Europe. On the basis of these conclusions, the Governmental Committee drafts a report which in turn is submitted to the Committee of Ministers which, together with the Parliamentary Assembly, decides whether "recommendations" to member states in question are appropriate. See ESC, *supra* note 42, arts. 21-29, Europ. T.S. No. 35 at 14-17.

creating most of the jurisprudence, the Committee of Independent Experts (CIE), sits on the lowest rung of a process that, in technical legal terms, can only result in non-binding recommendations.<sup>347</sup>

Despite the weak nature of the Charter's control machinery, the CIE has been able to establish a dialogue with social policy-makers in governments. Over a period of twenty years it has been able to generate a wealth of conclusions that demonstrate the possibility of assessing with considerable precision whether or not a state has lived up to its international obligations in the social rights field.<sup>348</sup> In its 1992 report, the CIE found violations of the Charter by all seven states examined.<sup>349</sup> Some examples from the case law will illustrate.<sup>350</sup>

One area of *jurisprudence constante* involves the Committee's interpretation of Article 13(1), dealing with the right to social and medical assistance for those in need,<sup>351</sup> as creating a positive obligation on the state.<sup>352</sup> The main element of this case law is the Committee's determination that social assistance must be a claimable right in domestic law:

[I]t is compulsory for those states accepting the article to accord assistance to necessitous persons as of right; the Contracting Parties are no longer merely empowered to grant assistance as they

<sup>347</sup> See generally HARRIS, *supra* note 109, at 222-34 (outlining the procedure and impact of CIE recommendations). For the details of a new reporting system under Article 21 which would require states to report each year to the Committee on all of the "hard-core" Charter provisions (those which all states must accept), and on a quarter of the other articles, which represents a procedural change from the former practice of requiring a full report every two years, see COMMITTEE ON THE EUROPEAN SOCIAL CHARTER, REPORT SETTING OUT A PROPOSAL FOR A CHANGE IN THE REPORTING SYSTEM PROVIDED FOR IN ARTICLE 21 OF THE EUROPEAN SOCIAL CHARTER, Charte/Rel (92)19 (May 27, 1992).

<sup>348</sup> To date, the Council of Europe has published three annotated article-by-article digests of the jurisprudence of the Charter. Although the digests report on all of the Charter organs, most entries come from CIE reports. See COUNCIL OF EUROPE, *supra* note 100; COUNCIL OF EUROPE, CASE LAW ON THE EUROPEAN SOCIAL CHARTER (Supp. 1986); COUNCIL OF EUROPE, CASE LAW ON THE EUROPEAN SOCIAL CHARTER (Supp. No. 2 1987).

<sup>349</sup> The "score" was: Denmark (non-compliance with respect to 5 provisions; unable to say due to inadequate or inappropriate information with respect to 2 provisions); Greece (15; 19); Iceland (6; 3); the Netherlands (11; 5); Norway (3; 6); Sweden (5; 5); United Kingdom (12; 3). See CIE, CONCLUSIONS XII-1, *supra* note 100, at 257, 268-69, 286, 295-96, 309, 320, 331-32.

<sup>350</sup> See also *supra* note 100 (discussing the controversial case law surrounding Article 8(1) on maternity leave benefits).

<sup>351</sup> See ESC, *supra* note 42, art. 13, Europ. T.S. No. 35 at 10.

<sup>352</sup> See COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS X-1, at 115 (1987) [hereinafter CIE, CONCLUSIONS X-1].

think fit; they are under an obligation, which they may be called on in court to honour.<sup>353</sup>

Several countries have applied this basic principle on a number of occasions,<sup>354</sup> and many have required a right of appeal as well.<sup>355</sup> Although the Committee does press governments on adequacy of benefits under Article 13(1), it appears to have made a strategic decision to concentrate its efforts on requiring states to make the level of benefits subject to domestic judicial evaluation, presumably so as to make case-by-case evaluations of need systematic and to harness local knowledge and the greater institutional resources of domestic legal systems.<sup>356</sup>

A second area involving the level of protection is that dealing with compulsory education, as guaranteed by Article 7(3) of the Social Charter. For example, the Committee criticized an Irish order which permitted children to do up to thirty-five hours a week of light, non-industrial work during holidays. The Committee held the restrictions on children's work to be "insufficient" and criticized Ireland for its failure to provide a list of permitted and prohibited types of work.<sup>357</sup>

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<sup>353</sup> COMMITTEE OF INDEPENDENT EXPERTS ON THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS I, at 64 (1969-70) [hereinafter CIE, CONCLUSIONS I]. The Committee ties the Charter requirement that there be a court-enforceable domestic legal right to a view that the Charter involved an "attempt . . . to break away from the old idea of assistance, which was bound up with the dispensing of charity." *Id.*

<sup>354</sup> See, e.g., CIE, CONCLUSIONS X-1, *supra* note 352, at 115 (it was not enough that in Greek law social assistance constituted a state obligation; such obligation had to be enforceable as of individual right); see also COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS VII, at 75-76 (1981) [hereinafter CIE, CONCLUSIONS VII] (despite an "innovatory" reorganization and decentralization of activities in the Italian health sector which "seems likely to result in better protection of the rights to social and medical assistance," such substantive protection was not enough without "a genuine subjective right to social assistance").

<sup>355</sup> See COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS XI-2, at 119-21 (1991) [hereinafter CIE, CONCLUSIONS XI-2] (Italy and Spain); CIE, CONCLUSIONS XII-1, *supra* note 100, at 188, 192 (Greece and United Kingdom).

<sup>356</sup> See CIE, CONCLUSIONS XII-1, *supra* note 100, at 190-92 (indicating that the United Kingdom's benefits scheme was deficient because it was overly discretionary); see also CIE, CONCLUSIONS X-1, *supra* note 352, at 121 (finding Spain in violation of the requirement to provide assistance as of right and "express[ing] concern" at the underinclusiveness of the social assistance laws).

<sup>357</sup> See COMMITTEE OF INDEPENDENT EXPERTS OF THE EUROPEAN SOCIAL CHARTER, CONCLUSIONS IX-2, at 52-53 (1986) [hereinafter CIE, CONCLUSIONS IX-2]; see also CIE, CONCLUSIONS XI-2, *supra* note 355, at 84-85 (criticizing Italy for noncompliance with this provision of the charter); CIE, CONCLUSIONS XII-1, *supra* note 100, at 135-36 (finding that the Netherlands violated Article 7(3) for allowing 15 year olds to work

A third significant area of case law that shows a much more confident level of inquiry concerns the right guaranteed by Article 4(1) "to a remuneration [sufficient for] a decent standard of living." In this area the Committee has established a "decency threshold" by which to judge the situation of different groups in the wage economy, placing considerable emphasis on the situation of vulnerable sectors of society. The Committee has stated that the lowest wage actually paid in an economic sector or occupation cannot fall below 68% of the national average wage, with social benefits and taxation factored in.<sup>358</sup> This allows "member states to meet the criteria of [Article 4(1)] by using [fiscal and social transfer] policies in those cases where wages alone were not sufficient."<sup>359</sup> For example, one recent Committee report found that the United Kingdom was in violation of this "68% rule." It concluded that at least 25% of all workers, and at least 50% of all female workers, earned less than the "decency threshold."<sup>360</sup>

A final example involves Article 19(6), which the Committee has used to take a particular interest in the housing situation of foreign workers.<sup>361</sup> It has interpreted the provision to oblige the state to take special measures to assist foreign workers in finding accommodation for their families, unless conditions on the housing market render this unnecessary. It has persisted with this interpretation despite the insistence of governments that their specific housing obligations vis-à-vis foreign workers require them only to treat foreign workers no worse (or better) than their own nationals.<sup>362</sup>

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forty hours per week during holidays and to deliver newspapers after 6 a.m. on school days and reasoning that "the main purpose of holidays is to let young people rest after a year of study in order to derive greater benefit from the next year's course".

<sup>358</sup> See COUNCIL OF EUROPE, *supra* note 100, at 29-30 (describing how the Committee moved away from very open-ended country-specific evaluations and came to adopt studies of poverty by the Council of Europe and the OECD as the foundation of its work). Apart from tax and social benefits entering in as a regular part of the equation, the Committee gives itself some latitude to raise or lower the percentage somewhat based upon whether there is a general trend towards "excessive widening of income distribution," on the one hand, or "an effort on the part of the government of a country to ensure sustained progress in the social field for workers," on the other hand. *Id.*

<sup>359</sup> CIE, CONCLUSIONS XII-1, *supra* note 100, at 93.

<sup>360</sup> *Id.* at 92.

<sup>361</sup> See ESC, *supra* note 42, art. 19(6), Europ. T.S. No. 35 at 13 ("[T]he Contracting parties undertake . . . to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory.").

<sup>362</sup> These governments assert that a separate subsection of art. 19 exhaustively sets out their obligations in this matter. See *id.* art. 19(4)(c), Europ. T.S. No. 35 at 13 (requiring states to secure for foreign workers "treatment not less favourable than



On this reading, if the state has no housing program at all, foreign workers would not be receiving "less favourable" "treatment" than nationals. The Committee's interpretation seems to recognize the special vulnerability of foreign workers in contemporary Europe by requiring the state to provide active assistance in bringing families together. By insisting on housing as crucial to the reunification of families, the Committee has also demonstrated on many occasions that it is prepared to find that states have not done enough.<sup>363</sup>

For two decades, governments and legal scholars have discussed whether more individualized protection mechanisms within the Council of Europe system for social rights are necessary. Proposals have alternated between adding a social rights protocol to the European Convention on Human Rights and enhancing the machinery of the European Social Charter through a protocol to that treaty.<sup>364</sup> Recently, the movement towards justiciability for

that of their own nationals in respect of . . . accommodation[s]"). For a summary view of the mutual resistance of governments and the Committee to each other's interpretations, see COUNCIL OF EUROPE, *supra* note 100, at 163-68.

<sup>363</sup> See, e.g., CIE, CONCLUSIONS VII, *supra* note 354, at 105 (stating that the Swedish housing shortage, particularly of multiple-family dwellings, hindered foreign workers' ability to find accommodations, necessitating that "practical measures be taken with a view to remedying the situation").

<sup>364</sup> See Alston, *supra* note 115, at 82 (surveying the proposals of various commentators on the topic of improved protection mechanisms in the social rights arena); F.G. Jacobs, *The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights*, 3 HUM. RTS. REV. 166 (1978) (discussing the appropriateness of incorporating a social rights protocol into the Convention).

However, there have been other kinds of proposals. An Austrian proposal in 1990 suggested the enactment of an entirely new treaty on economic, social, and cultural rights that would provide for individual claims but which would subject such claims to a conciliation procedure instead of judicial or quasi-judicial scrutiny. See Klaus Berchtold, *Council of Europe Activities in the Field of Economic, Social and Cultural Rights*, in THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS, *supra* note 300, at 355.

Others have proposed that the system of supervision currently in place in the Social Charter be replaced, or complemented, with rights of petition and the establishment of a European Court of Social Rights. For example, the European Parliament asserted:

Verification of . . . [compliance with] the Social Charter should no longer be based only on the periodical submission by governments of all-embracing national reports. A system of petitions and complaints must be devised, possibly with ultimate rulings to be given under an authority similar to that of the European Court of Human Rights.

*Resolution 967 on Renewal of the Council of Europe's Social Charter*, EUR. PARL. ASS. TEXTS ADOPTED 43d Sess. 2 (June 28, 1991); see also *Recommendation 839 on the Revision of the European Social Charter*, EUR. PARL. ASS. TEXTS ADOPTED 30th Sess. 2 (Sept. 28, 1978) (advocating individual petitions to the Committee of Independent

social rights has proceeded rapidly. First, the Council of Europe adopted and opened for ratification an additional Protocol to the European Social Charter. The Protocol, by amending Article 24 of the Charter, explicitly endorsed the current practice of the CIE. The amendments included the addition of a new subsection:

With regard to the reports referred to in Article 21, the Committee of Independent Experts shall assess from a legal standpoint the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned.<sup>365</sup>

This amendment represents a critical acknowledgement. Put simply, if the Charter now accepts that "compliance" can be assessed by the Committee of Independent Experts, some assessments could just as easily be initiated by an individual petition. As David Harris, a current member of the CIE, has argued, even the present findings of violations are "juridically no different from any such finding as might result from the operation of a system of petitions [and have] presented no inherent difficulties."<sup>366</sup>

Indeed, developments have not stopped with this amendment. The institutional competence that has gradually built up through the Committee's experience interpreting the Charter has proven sufficiently impressive for the Council of Europe to have decided to forge ahead with a complaints procedure. The same conference that adopted the new Protocol recommended that a draft Protocol providing for a system of collective complaints be opened for signature soon. Additionally, the conference advocated that work continue on how to improve the effectiveness of the Charter's supervisory machinery.<sup>367</sup>

Experts and the establishment of a Court of Social Rights); David Harris & Teun Jaspers, *The System of Supervision of the European Social Charter—Problems and Options for the Future*, in *THE FUTURE OF EUROPEAN SOCIAL POLICY* 11, at 30-36 (Lammy Betten ed., 1989) (advocating the introduction of a right of petition into the Charter system of enforcement); C. Villars, *Social Security Standards in the Council of Europe: The ILO Influence*, 118 INT'L LAB. REV. 343, 353 (1979) (supporting the concept of a European Social Court); Comment, *Social Charter: The State of Play*, 209 EUR. IND. REL. REV. 22 (1991).

<sup>365</sup> Protocol Amending the European Social Charter, Oct. 21, 1991, art. 2, Europ. T.S. No. 142 at 4 [hereinafter Protocol] (amending ESC, *supra* note 42, art. 24, Europ. T.S. No. 35 at 15) (emphasis added).

<sup>366</sup> HARRIS, *supra* note 109, at 269. Harris is a recently added member of the Committee of Independent Experts and a leading proponent of a petition procedure.

<sup>367</sup> See Recommendations (a) and (c), *Final Resolution of the Conference*, Council of Europe Ministerial Conference on the European Social Charter, Turin, 21-22 October, 1991.

In the most general terms, a draft Additional Protocol Providing for a System of Collective Complaints<sup>368</sup> provides for organizations—not individual persons—to submit complaints. Thus this treaty will deal with collective complaints.<sup>369</sup> The CIE, as the “adjudicative” body, will accept complaints in writing and solicit information from the parties. It will have the option of calling a hearing into the matter but such a procedure is not mandatory. The CIE will produce a report regarding each complaint. This reply will be sent directly to the Committee of Ministers who must vote by two-thirds majority on a recommendation to the state in question if the CIE has found that the Charter has not been “satisfactorily applied.”<sup>370</sup> The Draft Protocol also contains a provision which links the recommendation to the report procedure under Article 21 by mandating that states report to the CIE on what measures they have taken to conform to the recommendation. In this way, some

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<sup>368</sup> All documents with respect to the Additional Protocol are classified as “Confidential” and thus are unavailable to the public. However, the authors have spoken to government and Council of Europe officials about the contents of the Protocol, including the tentative numbers assigned to its various provisions. They are confident, as are we, the editors, that the following is an accurate description of the Draft Protocol in the form it was sent to the Committee of Ministers from the Charter Relations Committee on May 20, 1992. We expect that the new Protocol to be open for signature in late 1992.

<sup>369</sup> Significantly, potential organizations are not limited to the international trade union or employers organizations which have traditionally been the “social partners” of governments within the Charter’s structure. See ESC, *supra* note 42, art. 27(2), Europ. T.S. No. 35 at 16 (stating that members of international trade unions and employers’ organizations may constitute a limited number of the Governmental Social Committee’s Sub-Committee).

Under certain conditions both international and national non-governmental organizations (“NGOs”) can bring complaints. International NGOs must have consultative status *and* be placed on a special list decided by a two thirds majority of the Governmental Committee following application. Criteria for being on the list will not, apparently, appear in the Protocol itself but observers indicate that the Committee of Ministers will be asked to promulgate rules of procedure and criteria, among which will be the requirement that the international NGO illustrate, through detailed documentation, that it has access to authoritative sources of information; will be able to carry out reliable verifications; and will have the capacity to put together reliable complaint files. See *id.*

<sup>370</sup> The precise legal status of the CIE’s “conclusions” in the draft Protocol on whether the Charter has been satisfactorily applied remains a matter of textual ambiguity as this Article goes to press. This ambiguity should be compared to the wording of the Amending Protocol of October 1991 which emphasized the “legal” function of the CIE in “assess[ing] . . . compliance” under the report procedure. See Protocol, *supra* note 365, art. 2, Europ. T.S. No. 142 at 4. The legal status of these conclusions may determine the degree of deference afforded to CIE pronouncements by domestic courts. In turn, a substantial amount of deference may translate into domestic remedies for aggrieved individuals.

symbiosis, including a structured follow-up procedure that is novel even to domestic law, may develop between the complaints cases and the CIE's over-all treatment of a state report.

Sustenance for this symbiosis will be found, it seems, in the Protocol's *travaux préparatoires* (preparatory work) which likely will reflect an understanding that a "collective" complaint refers not just to the character of the complainant but also to the nature of the situation described. The situation which is the subject of the complaint must involve a question of the compatibility of a law or practice with the Charter at a general level. According to this Draft Protocol, organizations will not be permitted to submit complaints seeking specific conclusions regarding individual cases. If successful, this approach will not prevent the CIE from hearing illustrative evidence of individual situations, and situations of particular societal groups, in order to judge compliance in terms of how a law is actually working. Without evidence culled from individual situations, the complaints procedure could easily degenerate into the kind of overly abstract dialogue that currently plagues report procedures. Stories of individual suffering woven into a broader narrative about the general impact of a law or practice, especially when used by sophisticated nongovernmental organizations ("NGOs"), could actually be an improvement over a purely individual petition procedure because it may be more likely to produce complaints focusing on systemic or otherwise widespread violations. Exclusion of individual situations should thus be limited to precluding the Committee's specification of individual remedies. Even this limitation would, however, have its costs. It would complicate the attempts of social action organizations to generate a broader politics out of the cases being heard before the Committee. A case without a name and a face will have some trouble capturing the imagination of the media and society at large. Caveats aside, the Draft Protocol is nothing short of a landmark, one which sends the unequivocal message that general claims of the nonjusticiability of social rights are deficient and that the legitimacy of the values underpinning social rights permit the exploration of uncharted terrain.<sup>371</sup>

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<sup>371</sup> For references that suggest that the principle of interdependence may have played a role in helping to muster the institutional and interstate will of the Council of Europe to move so quickly after such a long period of relative procrastination, see Xavier Dijon, *La Convention européenne et les droits de l'homme le plus démunis*, 107 JOURNAL DES TRIBUNAUX 716 (1988); P.H. Imbert, *Droits des Pauvres, Pauvre(s) Droit(s)?*

### C. *The Inter-American System*

The American Declaration of the Rights and Duties of Man was adopted by the member states of the Organization of American States in 1948, prior to the Universal Declaration.<sup>372</sup> Like the Universal Declaration, the American Declaration guarantees not only civil and political but also social and economic rights, the latter including such rights as health care, food, clothing, housing, and education, as well as the more general right to life. The Inter-American Commission on Human Rights, an organ established by the OAS Charter, is granted a general mandate to both promote and protect human rights as well as broad powers to determine its own structure, procedures and jurisdiction.<sup>373</sup>

One function that the Commission assumed early on in its existence was that of conducting investigations and compiling special country reports as well as including commentary on the human rights situations of particular countries in the Commission's annual report to the OAS General Assembly. Perhaps not surprisingly in the context of Latin America, the Commission has paid a considerable amount of attention to social rights in its country reports.<sup>374</sup> While not often specific in its recommendations, it has been willing to conduct an analysis which condemns in general terms the lack of protection accorded to such rights, and links violations to the economic structure of the country in question.<sup>375</sup>

*Réflexions sur les droits économiques, sociaux et culturels*, 1989 REVUE DU DROIT PUBLIC ET DE LA SCIENCE, POLITIQUE EN FRANCE ET À ÉTRANGER 739, 748-50; J.M. Verdier, *Les droits économiques et sociaux: r elance au Conseil de l'Europe?*, 4 DROIT SOCIAL 415, 418 para. 22 (1992). Imbert is the Assistant Director for Human Rights in the Council of Europe and closely involved with the Social Charter. He undoubtedly had a hand in preparing a recent informational book that emphasizes the indivisibility of human rights on the first page. See COUNCIL OF EUROPE, THE EUROPEAN SOCIAL CHARTER: ORIGIN, OPERATION AND RESULTS 1 (1991).

<sup>372</sup> See American Declaration, *supra* note 43, reprinted in BUERGENTHAL & NORRIS, *supra* note 43, pt. 1, ch. IV, at 1.

<sup>373</sup> See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 48 [hereinafter OAS Charter], amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607.

<sup>374</sup> The Commission hangs its jurisdictional hat on an amalgam of the rights in the American Declaration, *supra* note 43, ch. I, arts. XI-XVI, reprinted in BUERGENTHAL & NORRIS, *supra* note 43, pt. 1, ch. IV, at 3-4, on the very general Article 26 in the American Convention, *supra* note 44, art. 26, 1144 U.N.T.S. at 152; and on the OAS Charter generally, *supra* note 373, art. 32, 2 U.S.T. at 2399, 119 U.N.T.S. at 60-62.

<sup>375</sup> See, e.g., *Report on the Situation of Human Rights in El Salvador*, Inter-Am. C.H.R., OEA/ser. L/V/II. 46, doc. 23 rev. 1, at 162-67 (November 1978), reprinted in THOMAS BUERGENTHAL, ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 154, 157 (3d rev. ed. 1990). These reports do not languish in

Of considerable interest with respect to the principle of interdependence is the following statement of the framework the Commission claims to utilize:

When examining the situation of human rights in various countries, the Commission has had to establish the organic relationship between the violation of the rights to physical safety on the one hand, and the neglect of economic and social rights and suppression of political participation, on the other. That relationship, as has been shown, is in large measure one of cause and effect. In other words, neglect of social and economic rights, especially when political participation has been suppressed, produces the kind of polarization that then leads to acts of terrorism by and against the government.

....

The essence of the legal obligation incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the 'rights of survival' and 'basic needs' is a natural consequence of the right to personal security.<sup>376</sup>

By interpreting the Declaration to be incorporated into the general human rights provision of the Charter of the Organization of American States, the Inter-American Commission on Human Rights has empowered itself to hear individual petitions and render recommendations to individual states on the basis of the Declaration. In the *Yanomami* case,<sup>377</sup> a petition against the Government of Brazil was presented by several human rights groups, alleging violations of the rights of the Yanomami Indians. Thousands of Yanomami Indians had been forced to abandon their homeland after a plan, approved by the Brazilian government, to exploit the natural resources of the Amazon region was implemented. The plan led to the construction of a highway which cut through the Yanomami's territory and to the discovery of rich mineral deposits in the area. It was alleged that the massive penetration of outsiders, from prospectors to mining companies, had devastating consequences for the Yanomami Indians, including the disintegration of

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complete obscurity. See *id.* at 157, 165 (responses of criticized governments).

<sup>376</sup> Annual Report (1979-1980), Inter-Am. C.H.R., OEA/Ser. L/V/II.50, doc.13 rev. 1, at 2 (1980), reprinted in BUERGENTHAL, *supra* note 375, at 167.

<sup>377</sup> Resolution No. 12/85, Case No. 7615 (1985) (Brazil), reprinted in 1985 INTER-AM. YEARBOOK, *supra* note 284, at 264.

traditional social structures, the introduction of prostitution, and the spread of epidemics and disease.

The Commission held, *inter alia*, that the failure of the Brazilian Government to take "timely and effective measures" on behalf of the Yanomami Indians resulted in violations of their rights to life, liberty and personal security, rights to residence and movement, and rights to the preservation of health and well-being as guaranteed by the American Declaration of the Rights and Duties of Man.<sup>378</sup> It further recommended that the government continue to take "preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases."<sup>379</sup> Despite the fact that the Commission only has the power to issue recommendations, the *Yanomami* case illustrates the fact that social rights can be adjudicated by quasi-judicial bodies. By viewing the American Declaration of the Rights and Duties of Man as containing non-enforceable secondary duties to protect and tertiary duties to fulfill certain social rights, the Commission in effect recommended that the government take steps to ensure the well-being of the Yanomami people.

While the above case is one example of the American Declaration having been interpreted as involving justiciable social rights in addition to civil and political rights, the Declaration is still considered second in importance to the American Convention on Human Rights. In part, the lower status of the Declaration is due to the fact that, unlike the American Convention, it is not a treaty. As well as being a treaty, the American Convention also has particular procedures and control machinery, notably the possibility of cases reaching the Inter-American Court of Human Rights.<sup>380</sup> Like the United Nations' instruments and the experience of the Council of Europe, the American Convention does not expressly permit individualized judicial or quasi-judicial scrutiny of alleged social rights violations.

However, the Inter-American Court has addressed, at an abstract level, the extent to which social rights could be subjected to quasi-judicial or judicial review, and whether an instrument providing for such review should be a separate convention. It did so in response to a request to give its opinion on what was then a draft protocol to the American Convention dealing with social rights.<sup>381</sup> On both

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<sup>378</sup> See *id.* at 276.

<sup>379</sup> *Id.* at 278.

<sup>380</sup> See American Convention, *supra* note 44, arts. 52-53, 1144 U.N.T.S. at 157-61.

<sup>381</sup> See *Observations of the Inter-American Court of Human Rights on the Draft*

issues the court tied its reasoning to the principle of interdependence. Its approach to the justiciability of social rights relied on a relatively fluid conception of justiciability, one that does not embrace a sharp distinction between civil and political, and social and economic rights, and that acknowledges that the boundaries of justiciability are fluid ones. In admitting that justiciability is a moving target, the court advocated looking, *inter alia*, to the experience under the European Social Charter. Furthermore, it advocated that the instrument be a protocol rather than a separate convention in order that changes in the justiciable status of rights over time could be accommodated within a single unified framework. In sum, the court appealed to the interdependence principle to emphasize both the importance of social rights and the urgency of securing more effective protection for them,<sup>382</sup> as well as to support their view that the Protocol should be seen as part of the basic civil and political rights convention and not set apart in the manner of the Covenants.<sup>383</sup>

The instrument that was eventually adopted was, following the court's recommendation, a Protocol to the Convention, the preamble of which contains a formulation of the interdependence principle.<sup>384</sup> Despite the hints by the court that there are a number of rights which it would have considered justiciable, only two provisions in the entire Protocol are incorporated by reference into the American Convention's complaints procedures by Article

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*Additional Protocol to the American Convention on Human Rights*, in INTER-AMERICAN COMM'N ON HUMAN RIGHTS & INTER-AMERICAN COURT OF HUMAN RIGHTS, INTER-AMERICAN YEARBOOK OF HUMAN RIGHTS: 1986, at 440 (1988). The court's "observations" represent not only the highest level consideration of the issues discussed in this article, but also the court has been the only judicial body to have faced the questions so directly.

<sup>382</sup> "In this regard, the Court fully shares the conviction that those are authentic fundamental human rights. As the Universal Declaration of Human Rights states, the people have determined 'to promote social progress and better standards of life in a larger freedom . . . because since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.'" *Id.* at 442 (citing *Declaration of Teheran*, International Conference on Human Rights, U.N. Doc. A/CONF.32/41 (1968)); see also *id.* at 448 (tying the enjoyment of all human rights to effective democracy).

<sup>383</sup> One of the reasons for the court's determination was "the essential unity, interdependence and mutual conditioning of all human rights." *Id.* at 444.

<sup>384</sup> See *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Nov. 14, 1988, 28 I.L.M. 161 (1989) (recognizing the "close relationship that exists between economic, social and cultural rights and civil and political rights") [hereinafter *Additional Protocol*].



19(6) of the Protocol. Those are the right of workers to organize trade unions (Article 8(a)) and the right to education (Article 13).<sup>385</sup>

Even though petitionable claims are limited, Article 19(7) of the Protocol still leaves considerable room for interpretive development by the Inter-American Commission of Human Rights. The Commission "may formulate such observations and recommendations as it deems pertinent concerning the status of the economic, social and cultural rights established in the present Protocol in all or some of the States parties."<sup>386</sup> Still, the Inter-American Protocol, while a beginning, does not seriously challenge traditional conceptions of justiciability and, in light of the draft European Social Charter Protocol, the Inter-American organs may feel compelled eventually to revisit their own Protocol.

The above examples are not offered to romanticize the international law experience. The principle of interdependence has been marginalized from international jurisprudence ever since the decision was made to split the Universal Declaration into two Covenants. International legal discourse continues to draw a distinction between civil and political rights, and social rights. Such a distinction discriminates against the poor since they are the ones who most need respect for economic and social rights in order to breathe life into liberty.<sup>387</sup>

<sup>385</sup> Article 13 includes a whole series of positive rights, some phrased in ways which suggest more or less immediate duties to fulfill, e.g., Article 13(3)(a) on primary education, and some of which are much more programmatically worded, e.g., Article 13(3)(d) on basic education. *See id.* at 165. However, Article 19(6) conditions claims with the requirement that the right in question be "violated by action directly attributable to a State Party" which seems to characterize the right in negative terms. *Id.* at 168.

<sup>386</sup> Additional Protocol, *supra* note 384, art. 19(7), 28 I.L.M. at 168.

<sup>387</sup> *See* Jackman, *supra* note 59, at 335-37 (discussing how the distinction between rights categories discriminates against the poor).

An eloquent and forceful statement of this perspective was advanced at the 1987 session of the United Nations Commission on Human Rights by the leader of International Movement ATD Fourth World, a nongovernmental organization known for its work with the poorest of the poor and for its philosophy of empowerment:

[T]he situation of families living in extreme poverty shows that the lack of economic, social and cultural rights compromises the civil and political rights which are considered *a priori* as the easiest to guarantee. Their situation forces us to make a closer study of the question of the indivisibility of human rights. . . .

. . . How does it happen that human rights to which, in principle, all human beings are entitled, become in reality rights that cannot be exercised without a minimum of means?

While current international jurisprudence or supervisory procedures cannot be viewed as anything even approaching a place of refuge for the poor and underprivileged, this is in part because the original principles underlying the Universal Declaration of Human Rights have been ignored. The principle of the interdependence of human rights is at the core of the Universal Declaration of Human Rights, and cannot be ignored by any state interested in questions of constitutional design. If South Africa were to constitutionalize social rights alongside classical civil and political rights, it not only would be resurrecting the principle of interdependence, but it would also be acting in accordance with the original vision of the Universal Declaration of Human Rights. Such a constitution might also actively embrace a methodology of "looking to the bottom"<sup>388</sup> in order to fill social rights with the emphatic insight of context.<sup>389</sup> For the glimmerings of such a methodology, we turn now to the Indian story.

#### V. THE INTERDEPENDENCE OF HUMAN RIGHTS AND THE INDIAN EXPERIENCE

The interdependence of human rights finds recognition, implicitly and explicitly, in the jurisprudence of the Supreme Court of India surrounding public interest litigation and the Indian Constitution. The illustration of India is instructive since it illustrates that judicial competence is a function of effort and will.

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. . . The [UN] Commission on Human Rights should have access to the experience of the most underprivileged populations, not only because this is standard democratic procedure but also because the most poverty-stricken experience situations and draw conclusions that are beyond the conception of persons in a different situation.

Joseph Wresinski, *Extreme Poverty: A Human Rights Challenge of Our Time*, U.N. ESCOR, Human Rts. Comm'n, 43d Sess., Agenda Item 8, at 4, U.N. Doc. E/CN.4/1987/NGO/2 (1987).

<sup>388</sup> Matsuda, *supra* note 14, at 323.

<sup>389</sup> Many authors have argued for a methodology of creating human rights meaning from the standpoint of historically oppressed groups. See, e.g., Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies*, 13 INDIAN INT'L CENTRE Q. 185-86 (1986) (discussing how classical human rights "ignore the entire problematic of human needs"); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, in JUDGES AND THE JUDICIAL POWER: ESSAYS IN HONOUR OF JUSTICE V.R. KRISHNA IYER 289, 291-305 (Rajeev Dhavan et al. eds., 1985) (describing the emergence of social action litigation in Indian jurisprudence); White, *supra* note 11, *passim* (drawing on radical education theory). This argument has also been made as an interpretive methodology in the international human rights context. See Scott, *supra* note 59, at 789 (drawing on liberation theology).

The Indian experience may also be useful for South Africa given that each country is characterized by an economically-privileged minority and oppressive poverty for the vast majority of the populace. It is also relevant in that India's constitutionalization of the functions of a social state grew out of a struggle against colonial domination and a more socialist philosophy which that struggle engendered.<sup>390</sup> Beyond these very general considerations, Indian case law is of interest because it demonstrates an embryonic judicial willingness and capacity to address aspects of social rights in a way that challenges many received notions of the judicial role.<sup>391</sup>

"Public interest litigation" in India has been described by former Chief Justice Bhagwati as "a strategy evolved by the Supreme Court of India with a view to securing observance of the law by the State and its agencies and reaching social justice to the large masses of underprivileged persons in the country."<sup>392</sup> Originally, public interest litigation referred to what has now come to be known as epistolary jurisdiction, a jurisdiction forged by the court's interpretation of Article 32 of the Indian Constitution, according to which traditional rules of procedure are waived or modified as regards claimed violations of the rights of the poor or other socially oppressed groups. It is now possible to move the court with a simple letter which can be sent not only by affected individuals but by public interest groups or other citizens on their behalf.<sup>393</sup> The term "public interest litigation" in India has now come to refer more generally to the substantive body of constitutional human

<sup>390</sup> See de Villiers, *supra* note 4, at 30 (stating that the "directive principles of state policy and fundamental rights in the Constitution originated during the struggle against British rule").

<sup>391</sup> See *id.* at 32-33 (illustrating that human rights directives can no longer be ignored by the courts).

<sup>392</sup> P.N. Bhagwati, *Public Interest Litigation*, 2 COMMONWEALTH LAW. 61, 61 (1986). In *Bihar Legal Support Soc'y v. Chief Justice of India*, [1987] 1 S.C.R. 295, 297, the Indian Supreme Court stated that the poor are entitled to "preferential consideration." See generally S.K. AGRAWALA, PUBLIC INTEREST LITIGATION IN INDIA: A CRITIQUE (1985) (criticizing the history and future of public interest litigation in India); G.L. Peiris, *Public Interest Litigation in the Indian Subcontinent: Current Dimensions*, 40 INT'L & COMP. L.Q. 66, 66 (1991) (stating that public interest litigation represents a "bold but controversial response to the perceived implications of social inequality and economic deprivation").

<sup>393</sup> For a discussion of this procedural innovation, see Cassels, *supra* note 59, at 499; P.P. Craig & S.L. Deshpande, *Rights, Autonomy and Process: Public Interest Litigation in India*, 9 OXFORD J. LEGAL STUD. 356, 361 (1989); Peiris, *supra* note 392, at 67-68.

rights law that has emerged as a result of the court's jurisprudential initiatives.<sup>394</sup>

The most significant aspect of Indian public interest litigation is the manner in which the Directive Principles of State Policy in Part IV of the Constitution have been creatively relied upon by the court in the process by which meaning has been given to entrenched constitutional guarantees. For our purposes, entrenched constitutional guarantees are referred to in the Indian Constitution as Fundamental Rights, and roughly correspond to the civil and political rights set out in the ICCPR. By contrast, the Directive Principles are roughly akin to those cultural, economic and social rights listed in the ICESCR.<sup>395</sup> By Article 37 of the Constitution, the Directive Principles are expressly non-enforceable in court.<sup>396</sup> The court has shown a marked tendency, however, to take the principle of the interdependence of human rights seriously and to interpret entrenched constitutional guarantees in light of the Directive Principles.<sup>397</sup> It should be noted from the outset that the Indian illustration is still one step removed in terms of the issues of legitimacy and competence from what would be the case

<sup>394</sup> It should be noted that the Indian judiciary has not always been associated with this approach and had previously been known for remaining true to its elite and propertied origins by vigorously resisting legislative initiatives in the areas of land reform and other redistributive measures through the right to property. The development of a radical rhetoric by the court can be understood as at least in part a conscious attempt to retrieve lost legitimacy and relevance. See Cassels, *supra* note 59, at 510-11 ("The new judicial activism may . . . be understood as part of the courts' effort to retrieve a degree of legitimacy. . . ."); see also UPENDRA BAXI, *THE INDIAN SUPREME COURT AND POLITICS* 188 (1980) (discussing how "well-considered moves on the part of the Court will add to a source of legitimation").

<sup>395</sup> See de Villiers, *supra* note 4, at 34 (stating that the Fundamental Rights/Directive Principles division does not correspond exactly to the civil and political rights/economic, social and cultural rights division).

<sup>396</sup> INDIAN CONST. art. 37 ("The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.").

<sup>397</sup> De Villiers divides his study into three chronological stages of jurisprudence concerning the relationship between the two parts of the constitution. "Initially fundamental rights were 'sacrosanct' and sovereign to directive principles. Later, the courts stressed the interpretative harmony and nexus, and for the past decade they have tended to uphold legislation which, even though it may limit fundamental rights, furthers the ideals of the directive principles." de Villiers, *supra* note 4, at 40. Whatever the merits of this chronological classification, our focus is better described in terms of a fourth "stage," in which not only are directive principles used as a shield against certain challenges based on fundamental rights, but also used in sword-like fashion to infuse the interpretations of those fundamental rights.

if South Africa gave a meta-democratic, constitutional mandate to the judiciary to involve themselves in social rights adjudication. The Supreme Court of India's embryonic jurisprudence has been, to a significant degree, fashioned against the constitutional grain of India's constitution. The mediating variables of the bifurcated structure of the Indian Constitution and the presence of Article 37 need not be present in a new South African constitution.

A number of cases illustrate the borrowing process between the two parts of the Indian Constitution and provide examples of how social rights can be susceptible to judicial determination. Perhaps the best known cases are those interpreting the right to life in Article 21 of the Indian Constitution so as to protect a spectrum of social rights found in the Directive Principles of State Policy. In *Frances Mullin v. Union Territory of Delhi*,<sup>398</sup> a British national detained on smuggling charges was allowed only restricted access to a lawyer and members of his family. A right to counsel is not listed as a Fundamental Right in the Constitution, yet the court found that the right to life includes a right to consultations with friends, family, and legal counsel.

From this unlikely beginning, the court laid down wide-ranging principles on the meaning of the right to life. The court asserted that the right to life was the "ark of all other rights" and therefore had to be interpreted in an expansive manner to prevent it from becoming "atrophied or fossilized."<sup>399</sup> In the court's view:

[T]he right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. . . . Every act which offends against or impairs human dignity would constitute deprivation *pro tanto* of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights.<sup>400</sup>

In *Bandhua Mukti Morcha v. India*,<sup>401</sup> the court took its first step toward integrating the above principles with the Directives of State Policy. A letter from a social action group<sup>402</sup> moved the

<sup>398</sup> [1981] 2 S.C.R. 516 (India).

<sup>399</sup> *Id.* at 528.

<sup>400</sup> *Id.* at 529.

<sup>401</sup> [1984] 2 S.C.R. 67 (India).

<sup>402</sup> The letter was from the Bonded Labour Liberation Front. See Note, *Judicial*

court to consider the working conditions of quarry workers. The petitioners alleged that the lack of enforcement of certain social welfare and labor statutes by various levels of government violated the constitutional right to life. Justice Bhagwati first paid close attention to the lived experience of bonded laborers, stating that “[t]hey are non-beings, exiles of civilization, living a life worse than that of animals . . . . Not having any choice, they are driven by poverty and hunger into a life of bondage[,] a dark bottomless pit from which, in a cruel exploitative society, they cannot hope to be rescued.”<sup>403</sup> Citing the expansive definition of the right to life provided in *Frances Mullin*, he then found that the right to live with human dignity “derives its life breath from the Directive Principles,”<sup>404</sup> particularly, the right to protection of workers’ health and strength, just and humane conditions of work, the provision of facilities for workers’ children to develop and be educated in a healthy and dignified manner, and maternity relief for female workers. In so doing, the Justice embraced the principle of the interdependence of human rights without, however, mentioning that principle by name.

The court also took some tentative steps toward delineating how such a broad interpretation of the right to life could be enforced by the judiciary:

Since the Direc[t]ive Principles . . . are not enforceable in a court of law, it may not be possible to compel the State . . . to make provision by statutory enactment or executive fiat for ensuring [that] these basic essentials [are not threatened] but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21 . . . .<sup>405</sup>

The court took some care not to appear to be enforcing the Directive Principles directly. Its requirement that the state live up to its legislative commitments is an illustration of the minimal role

*Application of the Rule of Law: Bandhua Mukti Morcha (Bonded Labour Liberation Front) v. Union of India and Others*, 36 INT’L COMM’N OF JURISTS REV. 69, 69 (1986) (discussing the contents of the letter sent to the court).

<sup>403</sup> *Bandhua Mukti Morcha*, [1984] 2 S.C.R. at 91.

<sup>404</sup> *Id.* at 103.

<sup>405</sup> *Id.*

that the courts can play in adjudicating social rights, one which would not stray far from traditional principles of the rule of law. In such cases, constitutional social rights would serve as judicial triggers for overseeing the implementation and enforcement of statutes, rather than as vehicles by which legislation is held unconstitutional. Such an approach would permit the judiciary to claim with some justification that it is not usurping legislative authority but simply holding government to its own statutory promises. In the court's view, this approach stresses cooperation over adversarialism, and gives the government the opportunity "to examine whether the poor and the down-trodden are getting their social and economic entitlements."<sup>406</sup>

Some might respond to the judgment in *Bandhua Mukti Morcha* by claiming that a lot of rhetorical effort was expended to arrive at the obvious conclusion that statutes ought to be enforced. This underestimates the value of a constitutional confirmation of the views expressed by Justice Bhagwati concerning the nature and scope of the right to life and the methodology adopted by the court in seeking to give voice to the concerns of the underprivileged. Moreover, the order given by the court should not be underestimated. The distinction between a statute's nonenforcement and a statute's nonexistence can be a slim one indeed, especially from the perspective of those who require assistance. Ordering the enforcement of a statute is very much akin to ordering legislative or executive action; in both cases, the judiciary is making the substantive judgment that individuals need assistance. In the former case, the judiciary is able to shield itself from a charge of illegitimacy by claiming that it is giving effect to legislative commitments, and from a charge of incompetence by using these legislated standards, however general the wording, as its baseline.<sup>407</sup> Such an order nonetheless carries with it an implicit judgment that the government should be doing more to secure conditions of social justice.<sup>408</sup>

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<sup>406</sup> *Id.* at 102.

<sup>407</sup> This is not to say that such a position will silence critics.

India being a welfare state, legislation already exists on most matters . . . . If the Court starts enforcing all such legislation under the sp[e]cious plea that non-enforcement is violative of article 21, perhaps no state activity can be spared from the purview of the Supreme Court as a [public interest litigation] matter. Its logical extension could mean the taking over of the total administration of the country from the executive by the Court.

AGRAWALA, *supra* note 392, at 37.

<sup>408</sup> See Craig & Deshpande, *supra* note 393, at 368 (linking *Bandhua Mukti Morcha*

The right to life was given an even richer content by the court in the recent case of *Olga Tellis v. Bombay Municipal Corp.*<sup>409</sup> *Olga Tellis* dealt with a claim on behalf of certain Bombay sidewalk dwellers that their right to life would be violated if they were evicted from their rudimentary shelters without being provided an alternative site by the state.<sup>410</sup> The petitioners claim was not that a right to shelter could be read into the right to life.<sup>411</sup> Instead, it was argued, and accepted by the court, that the petitioners had "chosen" a pavement or a slum near their place of work to avoid the time and prohibitive cost of commuting, and that eviction would deprive them of their right to livelihood and their right to work as protected by the Directive Principles:

If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.<sup>412</sup>

According to Article 21, deprivation of the right to life can be justified if procedural due process was provided to the street dwellers. In *Olga Tellis*, the ultimate issue was whether the city authorities of Bombay had respected the sidewalk dwellers' right to be heard prior to the eviction decision, particularly in light of the fact that notice had not been given.<sup>413</sup> The court held that the

to the recent writings of Joseph Raz on the relationship between autonomy and collective goods). Also of importance in the case is its broad conception of procedure in interpreting Article 32 to allow public interest standing to groups or persons not directly affected by alleged violations, and the appointment of two commissions of inquiry to assist the court in investigating the facts and suggesting remedial solutions. See *Bandhua Mukti Morcha*, [1984] 2 S.C.R. at 101-12; see also INDIAN CONST. art. 32(1) ("The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred . . . is guaranteed.").

<sup>409</sup> [1985] 2 Supp. S.C.R. 51 (India). *Olga Tellis* is also commonly known as *The Bombay Pavement Dwellers Case*.

<sup>410</sup> See *id.* at 52.

<sup>411</sup> No right to shelter appears among the Directive Principles.

<sup>412</sup> *Olga Tellis*, [1985] 2 Supp. S.C.R. at 80-81; see also *id.* at 73 ("The right to live and the right to work are integrated and inter-dependant and, therefore, if a person is deprived of his job as a result of his eviction from a slum or a pavement, his very right to life is put in jeopardy.").

<sup>413</sup> See *Olga Tellis*, [1985] 2 Supp. S.C.R. at 94 (requiring that notice be given to



proceedings before the court itself retroactively satisfied all that was required by way of the right to be heard and that the city could proceed with the evictions.<sup>414</sup>

Despite drawing a distinction between the duty to respect and the duty to promote a social right and claiming that the right to a livelihood and the right to work do not involve affirmative obligations on the state to attend to the shelter needs of the sidewalk colonies, Chief Justice Chandrachud fashioned a remedy replete with positive duties on the Government. It ranged from the provision of alternative and equally close sites to programmatic duties to begin or implement certain non-statutory programs.<sup>415</sup> Never expressed as a consent order, the court's decision nevertheless seems to have been intended to elicit assurances from the Government to address broader and systemic aspects of the shelter crisis. *Olga Tellis* is an illustration of how the judiciary can attempt to engender political dialogue over issues that otherwise might remain hidden from sustained legislative and general political scrutiny.<sup>416</sup>

satisfy justice); see also *id.* at 91 (quoting *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970)).

<sup>414</sup> See *id.* at 94.

<sup>415</sup> The court hinted that the state was under a constitutional duty to promote the right to a livelihood and the right to work. Under the guise of divining what the city commissioner would or should have decided "had he granted a hearing to them and heard what we did," the court passed an order "which . . . he would or should have passed." *Id.* at 94-95. The actual order appeared to contain only one formally binding condition: the evictions should not take place until after the end of the current monsoon season. See *id.* at 94. Such a condition can be seen as simply another aspect of the primary duty to respect the right to a livelihood and the right to work. However, by adding the words "and, thereafter, only in accordance with this judgment," the court also seemed to treat a long passage in the opinion as a separate hortatory order containing elements of a tertiary duty on the state to promote those rights:

[T]he assurances given by the State Government in its pleadings . . . must be made good. Stated briefly, [1] pavement dwellers . . . should be given, though not as a condition precedent to their removal, alternate pitches . . . ; [2] slums which have been in existence for . . . twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites or accommodation will be provided to them; [3] the 'Low Income Scheme Shelter Programme' . . . will be pursued earnestly; and, [4] the 'Slum Upgradation Programme (SUP)' under which basic amenities are to be given to slum dwellers will be implemented without delay.

*Id.* at 98.

<sup>416</sup> For a concrete illustration of the linkages between social rights litigation and social change in another context of homelessness, see Robert M. Hayes, *Homelessness & the Legal Profession*, 35 *LOY. L. REV.* 1 (1989). Hayes discusses the value of

G.L. Peiris has noted that the court acts pragmatically in relation to its own institutional limitations when "provid[ing] definitive solutions to . . . broad policy problems in such areas" as are covered by social rights.<sup>417</sup> The court has emphasized a co-operative dialogue between the judiciary and the executive and legislative branches, as opposed to the standard separation of powers conception based on watertight jurisdictional functions.<sup>418</sup> In his view,

[t]he courts have chosen . . . to . . . [collaborate] with other organs of government rather than to pursue a benevolent policy in isolation. The intricacies of public interest litigation have necessitated the forging of a refreshingly novel apparatus directed towards fruitful co-operation among legislature, executive and judiciary in pursuit of social justice.

One of the by-products of the interlocking mechanisms which have evolved in response to the urgent need for a concerted and co-ordinated approach to problems of daunting complexity is the instrumentality of directions issued by the courts to the executive branch of government. These directions, encompassing a wide spectrum of nuances and gradations, range from sparse indication of tentative guidelines to elaborate formulations. The degree of particularity has tended to depend on the nature of the subject matter and the extent to which settled conclusions could be arrived at suitably by the courts on their own responsibility.<sup>419</sup>

litigation around Article 17 of the New York State Constitution which provides: "The aid, care and support for the needy are public concerns and shall be provided by the state." *Id.* at 2 (quoting N.Y. CONST. art. XVII, cl. 1). In Hayes' words, "the biggest victory is not these terrible institutions called shelters, but . . . the push that resulted in the City of New York to spend [sic] hundreds of millions of capital tax dollars to rebuild abandoned buildings for permanent housing . . . [which would] become an infrastructure for a new neighbourhood for a community." *Id.* at 9.

<sup>417</sup> Peiris, *supra* note 392, at 81.

<sup>418</sup> See MINOW, *supra* note 14, at 158-59. In commenting on the preoccupation of the legal process school of constitutional adjudication with separation of powers and overly rigid notions of "competence," Minow observes:

It is a world concerned more with distinctions than with connections, a world using bounded spheres as the components of conceptual order . . . . And it is a world that view[s] as relatively unimportant issues of marginality, degradation, and exclusion on the basis of group membership.

*Id.* at 159.

<sup>419</sup> Peiris, *supra* note 392, at 81-82. Peiris points to cases in which the court has immersed itself in an exceptional degree of administrative detail on matters of shelter, clothing, nutrition, and health. See *Baxi v. Uttar Pradesh*, 1987 A.I.R. (S.C.) 191; *Narain v. Bihar*, 1986 S.C.C. 576. Both Indian cases involved situations of confinement by the government, in a mental hospital and in a foster care home for children, respectively.

*Azad Rickshaw Pullers Union v. Punjab*,<sup>420</sup> exemplifies this cooperative approach to court orders and is also indicative of the workability of a constitutional duty to take steps to promote social rights. The State of Punjab had passed a statute which created a licensing scheme for drivers of cycle-rickshaws that was intended to eliminate the "exploitation of rickshaw pullers by . . . middlemen."<sup>421</sup> The statutory scheme provided financial assistance that would allow rickshaw drivers to buy their own rickshaws but its provisions proved inadequate and some rickshaw pullers complained that they were unable to free themselves from the rickshaw middlemen.<sup>422</sup> They challenged the constitutionality of the Act, asking the court to strike down the statute.<sup>423</sup> It is unclear from the judgment upon which Fundamental Right the petitioner rickshaw drivers relied.<sup>424</sup> The remarkable aspect of the case is

As part of an argument that United States' caselaw is not precedent for wide-ranging positive rights, Currie distinguishes similar cases of imposing positive duties upon the government in the United States in prisons, mental hospitals, and similar confinement contexts as being legitimate because of the prior deprivation of liberty by government which incapacitates the petitioners from attending to their basic needs. See Currie, *supra* note 131, at 873-74, 886-87. This position was recently adopted by the United States Supreme Court in *DeShaney v. Winnebago County Dept. of Social Servs.* in which the Court observed:

The rationale for [the imposition of positive duties on the government] is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

*DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 200 (1989).

<sup>420</sup> [1981] 1 S.C.R. 366.

<sup>421</sup> Punjab Cycle Rickshaws (Regulations of Rickshaws) Act, No. 41 (1975) (Punjab), quoted in *Azad Rickshaw Pullers*, [1981] 1 S.C.R. at 368.

<sup>422</sup> Exactly what the gaps were is not clear from the judgment. Justice Krishna Iyer tells us only that "[s]ome hitch somewhere prevented several desperate rickshaw-drivers getting the benefit, which drove them to this Court." *Id.* at 368. This may imply that these individuals were caught by a ban in the statute on licensing for non-owner rickshaw drivers. See *id.* at 368, 371.

<sup>423</sup> The court may have suspected that the petitioning rickshaw pullers were mere fronts for middlemen:

The challenge in these writ petitions compel us to remind ourselves that under our constitutional system courts are havens of refuge for the toiler, not the exploiter, for the weaker claimant of social justice, not the strong pretender who seeks to sustain the *status quo ante* by judicial writ in the name of fundamental right.

*Id.* at 367.

<sup>424</sup> For instance, it could have been brought as an equal protection claim. See

the way in which the court refashioned the remedial issue from the request to strike down a law in violation of a constitutional guarantee, to an expansion, and indeed re-drafting, of a statute. In doing so it brought under the statute's rubric those whose exclusion would violate the state's positive social rights obligations alluded to in Article 38 of the Directive Principles,<sup>425</sup> and enlisted all parties in the case in this new cooperative venture.

Justice Krishna Iyer described this unorthodox re-working of the case in the following terms:

No higher duty or more solemn responsibility rests upon this court than to uphold every State measure that translates into living law the preambular promise of social justice reiterated in Article 38 of the Constitution. We might have been called upon to examine from this angle of constitutionalised humanism, the vires of the . . . Act . . . . But negative bans, without supportive schemes, can be a remedy aggravating the malady. . . . [Therefore, j]udicial engineering towards this goal is better social justice than dehumanised adjudication on the vires of legislation.<sup>426</sup>

The court issued a court-mediated negotiated order, which included detailed directives as to time schedules, amounts and procedures for securing and repaying loans, none of which appeared in the legislation or regulations.

The judgment also extended beyond a re-writing of the Act so as to allow the Act to meet its immediate purpose of financially supporting the drivers' acquisition of and licensing of rickshaws. The Municipal Commissioner was obligated to work out a group property and life insurance scheme in consultation with the drivers' unions. Also, specific mention was made of the occupational health problems associated with rickshaw driving (notably tuberculosis) and the State was ordered either "progressively" or "by stages" to replace rickshaw pulling with mechanized cycles and to consider any projects that seek to replace pulling with motor scooters.<sup>427</sup> Finally, until the scheme was implemented, non-owner rickshaw pullers would be allowed to continue to operate. In sum, the court

INDIAN CONST. art. 14.

<sup>425</sup> *Id.* art. 38 ("The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.").

<sup>426</sup> *Azad Rickshaw Pullers*, [1981] 1 S.C.R. at 367-68.

<sup>427</sup> *See id.* at 371.

envisaged an interactive relationship among the branches of government to produce the most effective system of justice.<sup>428</sup>

A final point to note about this aggressive cooperative paradigm is that the court has, at least partially, a vision of cooperation that is not confined to official give-and-take between the branches of government. The remedy in *Azad Rickshaw Pullers* involved all counsel as well as the rickshaw pullers' unions.<sup>429</sup> Similarly, at the stage of investigating alleged rights violations, *Bandhua Mukti Morcha* involved commissions of inquiry drawn from civil society, with the court also ordering that the government cooperate with social action groups in ensuring the implementation of various Acts and the detailed orders of the court related to those Acts.<sup>430</sup> In other cases, independent monitoring committees have also been used to monitor court orders.<sup>431</sup>

Moreover, the cooperation paradigm, while emphasizing the statutory expression the government has given to the Directive Principles of State Policy, has not precluded the court from crossing over the line with respect to affirmative obligations alluded to in the

<sup>428</sup> A rhetorical flourish brought the judgment to a close, capturing the nature of the court's vision of the interactive relationship between it and the other branches:

The State by exercising its legislative power alone, could not produce justice until this formula was hammered out. The Court with its process of justice alone could not produce a viable project. But now, justice and power have come together and, hopefully, we have fulfilled the words of Blaise Pascal;

"Justice without power is inefficient; power without justice is tyranny. Justice and power must, therefore, be brought together, so that whatever is just may be powerful, and whatever is powerful may be just."

*Id.*

<sup>429</sup> The court noted collaborative remedial efforts:

Court and counsel agreed on this constructive approach and strove through several adjournments, to mould a scheme of acquisition of cycle rickshaws by licensed rickshaw pullers without financial hurdles, suretyship problems and, more than all, that heartless enemy, at the implementational level of all progressive projects best left unmentioned. Several adjournments, several formulae and several modifications resulted in reaching a hopefully workable proposal.

*See id.*

<sup>430</sup> *See Bandhua Mukti Morcha v. Union of India*, [1984] 2 S.C.R. 67, 146 (ordering the government to take assistance from non-political social action groups for implementing provisions in contention).

<sup>431</sup> *See, e.g., Sheela Barse v. Union of India*, [1986] 3 S.C.R. 443, 448-49 (directing a committee to oversee compliance with provisions in prison manuals), discussed in Peiris, *supra* note 392, at 83 (stating that such committees must be strengthened by enforcement machinery); *see also Cassels, supra* note 59, at 506 (establishing a committee to monitor a power plant).

right to life cases and from interpreting positive obligations into Fundamental Rights in the absence of a statutory framework. In one case, the court went beyond giving content to statutes already in force by ordering the executive to bring child protection legislation into operation which was on the statute books but not yet brought into force.<sup>432</sup> In several pollution cases, notably one involving pollution of the river Ganges by tanneries, the court invoked Directive Principle 51-A(g)<sup>433</sup> to direct public schools to teach environmental awareness one hour per week and the central government to produce and distribute free school texts on the environment.<sup>434</sup>

The court has also read Directive Principle 39(d) mandating equal pay for equal work as forming part of Fundamental Right 14's guarantee of equality.<sup>435</sup> Similarly, in *Hussainara Khatoon v. Home Secretary*, the court interpreted the Article 21 due process right to include Directive Principle 39A's obligation on the government to provide free legal aid for the poor and "strongly recommend[ed] to the Government . . . that a comprehensive legal service programme [be] introduced in the country."<sup>436</sup> Without ordering the state to

<sup>432</sup> See *Sheela Barse*, [1986] 3 S.C.R. at 448 (stating that particular care should be taken to observe child prisoners living in unacceptable conditions). Peiris notes that the court made this order on the basis of compelling practical need despite acknowledging that "[o]rordinarily it is a matter for the state government to decide when a particular statute should be brought into force." Peiris, *supra* note 392, at 73. In another case, the court admonished a lower court judge for abandoning his legitimate judicial role when he ordered the government to initiate legislation on the practice of "ragging" incoming university students. See *Himachal Pradesh v. Parent of a Student of a Medical College, Simla*, [1985] 3 S.C.R. 676, 682-84 (noting that the Supreme Court cannot assume a supervisory role over the lawmaking activities of the executive and the legislature).

<sup>433</sup> INDIAN CONST. art. 51-A (Directive Principle directing the state to educate the public about pollution).

<sup>434</sup> See *M.C. Mehta III v. India*, [1988] 1 S.C.R. 471, 491 ("Children should be taught about the need for maintaining cleanliness . . . of the streets in which they live."). In *Mehta*, the court also made several other orders of a highly positive nature. See *Cassels*, *supra* note 59, at 506 n.54 (observing that the court in *Mehta* also ordered the public authorities to complete proposed work on sewage treatment in a timely fashion and to refuse new licenses without proof of adequate waste management facilities). However the constitutional basis for the orders was blurred by the existence of an under-enforced statutory framework, as well as common law nuisance authority. See *Craig & Deshapande*, *supra* note 393, at 369-70 (stating that it is not clear from the Supreme Court's reasoning which rights of the petitioner were affected).

<sup>435</sup> See *Randhir Singh v. Union of India*, [1982] 3 S.C.R. 298, 304 (stating that directive principles must be read into the Fundamental Rights as a matter of interpretation).

<sup>436</sup> *Hussainara Khatoon v. Home Secretary*, [1979] 3 S.C.R. 532, 542 (India).

go about providing the collective good of a legal aid system, the court did order the government to provide a lawyer at its own cost within six weeks.<sup>437</sup> An interesting feature of *Hussainara Khatoon* is that the court also read the right to a speedy trial into Fundamental Right 21's "reasonable, fair and just" procedure<sup>438</sup> and then, borrowing from United States case law, imbued it with wide-ranging positive obligations.<sup>439</sup>

A final chapter in this narrative involves another instance of the statutory compliance paradigm. In *People's Union for Democratic Rights v. India*,<sup>440</sup> at issue was private parties' non-compliance

Directive Principle 39(a) had been added in a 1977 constitutional amendment two years prior. See INDIAN CONST. art. 39(a). The relatively recent vintage of the decision to put legal aid into the constitution as an unenforceable state duty did not prevent the court from seeing it as part of the petitioner's enforceable fundamental right.

<sup>437</sup> See *Hussainara Khatoon*, [1979] 3 S.C.R. at 541. It should be noted that this order reflects the way in which respecting one's social rights (including the right to legal aid) often requires the provision of a collective good, usually through legislative action. Yet, in an individual case, a court can focus on an individual remedy and thereby avoid ordering the legislature and executive to provide for all. If generalized, the necessary implication of the individual remedy is some collective goods scheme, but the court can defer to other branches of government to generate an appropriate solution. See, e.g., *supra* note 162 (individual order led to establishment of legal aid system) & text accompanying note 194 (individual order led to legislative creation of new cause of action). One middle ground position would be for the court to allow class actions and to adopt streamlined procedures to allow new plaintiffs to sue on the precedent. See Scott, *supra* note 59, at 836-37 (describing how an individual child benefits remedy might be translated by the political process into a generalized statutory response).

<sup>438</sup> *Hussainara Khatoon*, [1979] 3 S.C.R. at 542.

<sup>439</sup> See *id.* at 543. The court stated that:

The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability . . . . It is also the constitutional obligation of this Court . . . to enforce the fundamental right of the accused to speedy trial by issuing the necessary directions to the State which may include taking of positive action, such as augmenting and strengthening the investigative machinery, setting up new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.

*Id.* The court appeared to draw sustenance in its interpretation from an observation that the United States judiciary had viewed certain constitutional rights as entailing positive duties in the area of prison conditions. See *id.* ("We find that in fact the courts in the United States have adopted this dynamic and constructive [sic] role so far as the prison reform is concerned by utilising the activist magnitude of the Eighth Amendment."). For a discussion of positive obligations regarding prisoners' rights found by courts in the United States, see *supra* text accompanying notes 205-10.

<sup>440</sup> [1983] 1 S.C.R. 456 (India).

with minimum wage legislation. The court interpreted Article 23's banning of forced labor to include the positive duty on both private persons and the state not only to avoid but also to alleviate the compulsion of economic circumstances. Of immediate interest is the way in which the court generated this interpretation. Beyond having recourse to the interpretive spirit mandated by the Directive Principles taken collectively, the court also explicitly invoked the interdependence principle as it appears in international human rights discourse and, in particular, in a document considered to contain an authoritative, post-Universal Declaration revisiting of the fundamental normative foundations of the United Nations' human rights system, the United Nations Proclamation of Teheran of 1968.<sup>441</sup>

The court defined the expression "forced labour" in Article 23 in a way heavily imbued with the organic interdependence of the Indian Constitution's values:

Any factor which deprives a person of a choice of alternatives and compels him to adopt one particular course of action may properly be regarded as "force" and if labour or service is compelled as a result of such "force", it would be [sic] "forced labour". Where a person is suffering from hunger or starvation, . . . he would have no choice but to accept any work that comes him [sic] way, even if the remuneration offered to him is less than the minimum wage. . . . And in doing so he would be acting not as a free agent with a choice between alternatives but under the compulsion of economic circumstances and the labour or service provided by him would be clearly "forced labour." There is no reason why the word "forced" should be read in a narrow and restricted manner so as to be confined only to physical or legal "force".<sup>442</sup>

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<sup>441</sup> In this light, the court stated:

There is indeed a close relationship between civil and political rights on the one hand and economic, social and cultural rights on the other and this relationship is so obvious that [the Teheran Proclamation] declared. . . : "Since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible."

*People's Union for Democratic Rights*, [1983] 1 S.C.R. at 468-69 (quoting *Declaration of Teheran*, *supra* note 382, at 19).

<sup>442</sup> *People's Union for Democratic Rights*, [1983] 1 S.C.R. at 491-92.



The court took the opportunity not only to enforce the minimum wages laws but also to suggest the inclusion of a protective clause in future government contracts which would prohibit the payment of wages through the particular system it had found suspect.<sup>443</sup>

The above narrative suggests a potential role for a creative and sensitive judiciary with respect to social rights. The Indian experience shakes the traditional orthodoxy of a doctrine of separation of powers as a necessary and determinate constraint on the justiciability of social rights. It suggests instead the existence of radical contingency over where those lines of separation can or should be drawn<sup>444</sup> and reveals that there are more imaginative and varied possibilities for constitutional design than the mere entrenchment of classical civil and political rights.

With respect to the legitimacy of social rights the Indian interpretive odyssey captures the insights of the principle of the interdependence of human rights. The Indian Supreme Court has grounded the legitimacy of its interpretive interventions on a conception of human rights as being interconnected and on a more integrated, holistic and inclusive vision of freedom and community membership. Legitimacy is viewed by the court as involving both the vindication of substantive values<sup>445</sup> and a methodology that attempts to interpret rights from the perspective of the socially disadvantaged. Democracy is seen less as a countervailing value to the judicial function than as being vindicated by it. This vision of

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<sup>443</sup> See *id.* at 494. This system involved payment through intermediaries known as "jamadars" who skimmed off over 10% of the wage as a commission before passing it on to the workers.

<sup>444</sup> As Cassels summarizes his study of the Indian judicial experiment:

There can be little doubt that the Indian courts have penetrated policy formulation and administrative operations to a much greater extent—or at least in a more open fashion—than Western court-watchers are used to seeing. . . . However, the doctrine of separation of powers, while suggesting good reasons why . . . lines must be drawn (judicial non-accountability, institutional competence, etc.), does not of itself indicate precisely where they should be placed. . . . Whenever a court is called upon to scrutinize an official decision or operation it is immediately and inevitably engaged in both policy analysis and the political exercise of determining its own jurisdiction. Principles of standing, justiciability and judicial deference do not remove so much as disguise this dimension. Where the lines may be drawn is as much a matter of institutional capacity, practical politics and popular support as of constitutional theory.

Cassels, *supra* note 59, at 513-14.

<sup>445</sup> Cf. CAPPELLETTI, *supra* note 120, at 150-52 n.3 (advocating a "value-protecting approach" to judicial review in contrast to the process theory of John Hart Ely).

the judicial role is related instrumentally to a prior conviction that both a more positive, fuller conception of freedom and a more inclusive sense of community are fundamental to any vision of a good society.

With respect to the institutional competence dimension of justiciability, the Indian experience unsettles convictions that the traditional account of separation of powers describes necessary attributes of the constitutional universe. While the judicial imagination of public interest litigation as a cooperative process is notable for its hopefulness, the Indian experience reveals an open-ended conception of the relationship amongst the branches of government that emphasizes pragmatic interaction and contextual determinations of the boundaries of judicial action. A matter of substantial constitutional policy need not be the exclusive province of one branch or another of government, but can involve a "continuing interplay"<sup>446</sup> or conversation amongst the branches. In short, the Indian experience suggests that it may be appropriate to allow the judiciary to advocate certain solutions in order to prod the other branches into general debates and concrete responses that in the long run are more democratically legitimate and effective.

Some final comments putting the above account into perspective are in order. The Indian jurisprudential tale has been deliberately narrated with an eye to its difference from standard Western accounts of constitutionalism, although the selection of cases from the European and Canadian legal systems suggests that value-oriented and dialogical constitutional judging has a wider applicability. The purpose has been to illuminate the "possible" within existing law. We acknowledge that such jurisprudence seems to "exist in almost metaphysical isolation from social reality."<sup>447</sup> The empirical data on the concrete and more generalized symbolic effects of public interest litigation is limited, and what data exists is, not surprisingly, contradictory.<sup>448</sup> Such empirical analysis is

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<sup>446</sup> MINOW, *supra* note 14, at 372.

<sup>447</sup> Cassels, *supra* note 59, at 515 ("It is hardly surprising . . . that while public interest litigation may have secured a better life for some individuals, it has not ended bonded labor nor found homes for the Bombay pavement dwellers."); see also S.P. Sathe, *Constitutional Law*, in 22 ANN. SURV. INDIAN L. 359, 398 (1986) ("[T]he decisions of courts remain confined to the parties who fight the litigation. The government and the public sector organizations continue to flout them and the poor men have unfortunately no resources for going to the court again and again."). One might be forgiven for pointing to this as a likely scenario for constitutional dialogue in a real world of oppression and domination.

<sup>448</sup> See Cassels, *supra* note 59, at 517 ("The experience of both the social activists

indeed desirable, but in the end will still have to be filtered through theory-dependent prisms of value related to what efforts count as worthwhile and what risks are worth taking.<sup>449</sup>

In our view, the rhetorical struggle is worth engaging in all fora, including the courts, but we are under no illusions that the gains from this strategy will be immediate or large, let alone measurable. In any society, structures and relationships of oppression and domination will exist regardless of idealistic commitment. A plurality of modes and fora of constitutional inquiry is desirable to ensure that the exercise of power, public or private, occurs in conformity with basic ideals. As a result, constitutional design matters. Close attention must be paid to textual and institutional structures to enhance the democratic potential of rights-based constitutional politics. With this in mind, in the final Part we offer a number of suggestions relating to constitutional design.

## VI. THE CONSTITUTIONAL ENTRENCHMENT OF SOCIAL RIGHTS

### A. *Layers of Protection*

What follows is an outline of a variety of different ways in which social rights and the values that underpin them can find expression in a constitutional document, generated in light of the previous analysis of international human rights law and the Indian experience. At a very minimum, courts can be given the responsibility for "indirect protection" of social rights. That is, without resorting to the explicit entrenchment of social rights, the values underpinning

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and the beneficiaries of [public interest litigation] is no doubt a contradictory one.").

<sup>449</sup> In this respect, we can do no better than reproduce the closing words of Jamie Cassels where he contrasts two equally (progressively) critical "reads" on Indian public interest litigation, one which sees this process and case law serving legitimization functions for a supremely unjust social order and the other which emphasizes the potential to rhetorically exploit the hypocrisy of that order:

By exploiting the limited autonomy of law [from the immediate requirements of the political and economic elite], the courts become an arena of social struggle wherein the stakes may be largely ideological and only incrementally material. In this view, the function of social activism is to "expose the false rhetoric of the State, exploit its contradictions . . . , and realign its social base along class lines rather than traditional factions." The crucial question remains whether this ideological function will serve to expose and alter pathological social arrangements, or simply paper over the abyss which separates formal legal promises from Indian social reality.

*Id.* at 518-19 (footnote omitted) (quoting Rajeep Dhavan, *Managing Legal Activism: Reflections on India's Legal Aid Programme*, 15 *ANGLO-AM. L. REV.* 281, 292 (1986)).

social rights can be indirectly protected by the constitutionalization of more traditional rights against the state. For example, a constitution can acknowledge the importance of values underpinning social rights yet permit the state to infringe those interests if infringements correspond to norms of procedural justice.<sup>450</sup> In Canada, for example, “[e]veryone has the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>451</sup> Thus even if a South African constitution were to permit state infringement of a right to education, for example, it could nonetheless provide for protection to ensure that infringements conform, at a minimum, to notions of procedural fairness and justice. Similarly, equality rights could be drafted so as to require the state to adhere to principles of equality in relation to the provision and deprivation of social services. The minimum form of protecting values underpinning social rights, in other words, is to permit the legislature to pass laws that infringe those values, but require that such laws accord procedural protection to affected individuals and respect notions of relative equality.

If it is decided not to protect interests underlying social rights beyond providing indirect protection, it would be important to enact a savings clause as a shield against interpretations of rights that would prevent redistribution programs or affirmative action programs by government. For example:

Nothing in this Bill of Rights shall detract from the power of the legislature or government to engage in or promote affirmative action programs, programs for the redistribution of wealth, and programs designed to fulfill the social rights of all South Africans.

How the interpretation of generally worded rights like “due process,” “liberty,” or “equal protection” could result in social welfare laws being struck down by the courts is of concern.<sup>452</sup> It may be sufficient to insert a savings clause which explicitly says that

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<sup>450</sup> See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 263-64 (1970) (discussing the potential to terminate government benefits with a pre-termination evidentiary hearing); *In re Webb*, 22 O.R.2d 257, 266 (Ont. Ct. App.) (1978) (holding that the Ontario Housing Corporation treated a tenant “fairly” before terminating her lease, and thus satisfied the procedural protection afforded to recipients of welfare benefits).

<sup>451</sup> CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

<sup>452</sup> See *supra* note 27 and accompanying text.

nothing in the constitution shall be interpreted as implying classical rights to freedom of contract and private property.

To deepen the constitutional commitment to the values underpinning social rights, the constitution could expressly give the courts power to enforce existing statutes that the state has enacted in the field of specified social rights, whether or not there is provision for such enforcement in the statute itself. In this way, the court's role would be tied to the legislature's own commitments and the judiciary could hold the legislature to those commitments.<sup>453</sup> It would be desirable, in tandem with seeing social rights in terms of *locus standi*, to provide for an interpretive clause calling for judicial interpretation of legislative and regulatory initiatives consistent with the constitutional commitment to social rights protection. Such an interpretive clause would facilitate the establishment of an inter-branch dialogue over the appropriate boundaries of legislative, executive and judicial action. Jurisprudence from the Indian Supreme Court outlined earlier represents a fledgling illustration of this form of social rights recognition.<sup>454</sup>

At a higher level of judicial involvement, the constitution can provide for express constitutional protection of social rights. Within this level, a spectrum of possibilities exists. The weakest version of express recognition and protection of social rights conforms to the primary obligation to respect social rights as set out in the United Nations structure of obligations discussed earlier.<sup>455</sup> That is, the constitution could expressly provide that the state is not entitled to directly interfere with specified social rights. Even the duty not to take away limited existing means could have the potential to increase enjoyment of social rights if courts were to order and supervise alternative provision under their remedial capacity. A stronger version of express constitutional protection of social rights conforms to the secondary obligation to protect social rights in relationships in which the state is not directly involved. A duty to protect social rights would place an obligation on the state to ensure that private actors do not infringe social rights.

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<sup>453</sup> A phenomenon of regulatory gutting has been identified in the United States in the 1980s, whereby legislation is undermined by administrative action, thus avoiding amendment by the legislature. See generally Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985) (discussing the increased role of administrative action accompanied by a decreasing level of legislative amendments in the area of deregulation).

<sup>454</sup> See *supra* text accompanying notes 390-449.

<sup>455</sup> See *supra* note 21 and accompanying text.

The strongest version of express protection of social rights would be to require the state to fulfill social rights. In this regard, the constitution could require the fulfillment of a core set of immediate entitlements and impose a duty on the state to take steps to fulfill other aspects of social rights.<sup>456</sup> Core minimum entitlements could be expressed in relatively open-ended terms to leave room for judicial responsiveness to individual circumstances and for the development of flexible substantive and remedial case law.<sup>457</sup> The duty to take steps could be expressed in terms of collective goods to be realized progressively. Courts could thereby be vested with the role of prodding other branches of government in the event of unreasonable failures to act or in cases of inadequate action. The judiciary would be charged with the responsibility of enforcing a constantly-expanding level of provision or baseline. Finally, it would be desirable to entrench process and participation-oriented duties to provide, for instance, for a periodic public forum to scrutinize and turn a constitutional spotlight on governmental efforts to date. Such a forum could be structured so as to permit individuals and groups to present arguments on the adequacy or inadequacy of the progress of reform and to highlight places where individuals have been falling through cracks in the system.

### B. *Strategies to Maximize the Democratic Potential of Judicial Review*

It is our view that the constitutionalization of social rights is one essential component to the realization of social justice for South Africans. Arguments based on a perceived lack of institutional competence on the part of the judiciary should not prevent the entrenchment of social rights. Furthermore, the exclusion of social rights from a new South African constitution on the basis that it is illegitimate for courts to engage in substantive review of democratic decisions would result in the devaluation of the values underpinning

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<sup>456</sup> Cf. Sachs, *supra* note 27, at 25-26 (listing array of options including: constitutional silence with respect to social rights; a constitutional framework of socio-economic development; provisions permitting legislation to advance a progressive agenda; interpretive presumptions sympathetic to a progressive agenda; and providing general civil and political constitutional guarantees with interpretive room for the advancement of values associated with social rights).

<sup>457</sup> See *supra* text accompanying notes 252-57 (noting that individual remedies can serve to spark generalized legislative solutions).

social rights and would work to establish a constitutional discourse limited in imaginative possibility.

The dangers attendant upon the entrenchment of social rights in a new South African constitution, and indeed upon the entrenchment of any constitutional rights against the state enforceable by a non-elected institution, cannot be ignored. Inherent in the recognition of a third branch of government responsible for ensuring that legislative and governmental action conforms to constitutional standards is the possibility that judicial power can be exercised in a way that threatens central features of democratic governance.<sup>458</sup> Vesting a judiciary with the power to strike down laws passed (or to require that laws be passed) by democratic institutions takes power out of the hands of the many and places power in the hands of the few. Constitutional scholars for years have endeavored to provide justifications for judicial review of democratic institutions.<sup>459</sup> Some have argued that judicial review ought to be exercised so as to further democratic values and that democracy should not be equated with simple majoritarianism.<sup>460</sup> Instead, the democratic impulse includes a respect for the views and interests of minorities who are not adequately represented in the

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<sup>458</sup> There are several aspects to this threat. For further discussion of the view that judicial review is a "counter-majoritarian force," which by its nature requires justification in a system of government deriving its legitimacy from the consent of the governed, see BICKEL, *supra* note 9, at 16-23. The accusation of counter-majoritarianism is often coupled with an argument that the judiciary expresses an elitist professional perspective. See, e.g., PHILLIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 204 (1970) ("[T]he Court is not a democratic institution, either in makeup or in function. This should be seen for what it is, even at the cost of that grossest of contemporary epithets, 'elitist.'"); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 966 (1978) ("[The insulation of judges] makes judges particularly susceptible to the views of a specific, relatively small, elite group of the society."). Finally, relying upon the judiciary to resolve fundamental moral issues in national politics can arguably lead to an impoverishment of legislative discourse and political debate. See, e.g., Brest, *supra* note 10, at 181-82 ("If the judges exercise a monopoly over constitutional decisionmaking, then other citizens and their representatives are excluded in what are among the polity's most fundamental decisions.").

<sup>459</sup> See *supra* notes 45-75 and accompanying text.

<sup>460</sup> See, e.g., CHOPER, *supra* note 51, at 6-7 (stating that the judicial limitation on majoritarian power is not contrary to, but is the essence of, democracy); ELY, *supra* note 51, at 73-104 (discussing a need for intervention when the political process is undeserving of trust and arguing that the judiciary is in the best position to assess objectively when a democratic malfunction has occurred); see also Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 16-17 (1986) (noting that the republican tradition points away from the counter-majoritarian difficulty as the true focus of democratic concern).

democratic process. For these theorists, a constitutional bill of rights is necessary to ensure that the majority treats underrepresented minorities with the equal concern and respect that they deserve.<sup>461</sup> This Article is not designed to provide justifications for the establishment of a constitutional democracy in South Africa. Its task is much more modest, and is premised upon the acceptance of the need for constitutional protection of minority interests through judicial review. If South Africans are committed to at least entrenching civil and political rights in a new constitution, in our view it is essential that such a constitution also protect social rights from state interference, lack of protection and failures to fulfill.

The dangers associated with judicial review, however, which are not restricted to the entrenchment of social rights but which also accompany the entrenchment of civil and political rights, are numerous. First, law operates in a technical and specialized language. It is a site of politics that is open only to those capable of mastering its codes, or who have the economic power to purchase persuasive spokespersons.<sup>462</sup> Because of the expensive nature of litigation, access to the courts is easily dominated by those interests which stand to gain by the continuation of the status quo of South African society.<sup>463</sup> Those who are disadvantaged and disempowered in contemporary society cannot afford to launch expensive and time-consuming litigation strategies, which will tie up already scarce resources. Second, even the most progressive constitutional language cannot wholly constrain future interpretive activity by the judiciary. Constitutional guarantees, by their nature, are vague and indeterminate. In the process of giving meaning to constitutional guarantees in the context of concrete cases, judges may be guided by non-threatening and traditional ideological understandings about relations between individuals, groups, and the state, and may tend to reproduce rather than transform the status quo.<sup>464</sup> The fear

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<sup>461</sup> See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 133 (1977) ("The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.").

<sup>462</sup> See Bourdieu, *supra* note 6, at 821-26 (analyzing the relative power and motivations of the different kinds of juridical capital); Petter, *supra* note 6, at 486-90 (addressing the institutional barrier created by money, and its resulting impact on rights and freedoms).

<sup>463</sup> See Petter, *supra* note 6, at 488-90 (analyzing the impact of lawyers' and judges' beliefs and backgrounds on the process of judicial interpretation of the Canadian Charter of Rights and Freedoms).

<sup>464</sup> See *supra* text accompanying notes 66-68 (concerning the relationship between



is that rights discourse and meanings generated by the judiciary will be captured by powerful, non-disadvantaged actors.<sup>465</sup> Third, judicial review creates the possibility that the legitimacy of democratic institutions will be challenged. Important matters of state and citizen will ultimately be decided not in institutions that provide individuals with democratic voice and participation, but rather in the cold halls of an institution far removed from the pulse of the nation.<sup>466</sup> If democratic institutions require the judicial stamp of approval, democracy cannot claim to be the voice of the people.

In light of South Africa's pre-existing commitment to the establishment of some form of constitutional democracy, the constitutionalization of social rights helps to reduce some of the dangers associated with the judicial enterprise. Such a bill of rights will provide a text for future judicial interpretation predicated upon equal recognition and respect in constitutional discourse for the values underpinning social rights. South Africans ought also to consider other strategies in order both to obviate the dangers of the constitutionalization of rights and to enhance the positive qualities of using the courts as fora for vindicating fundamental societal values. The following sets out some strategies for consideration.

### 1. Constituent Assembly

A precondition for the entrenchment of constitutional rights may be to convene a Constituent Assembly, with representation of all interests and groups in society and with the participation of vulnerable and relatively powerless groups being actively encouraged and financially supported by the state. Such an Assembly would ensure that the values in the constitution reflect the aspirations of the people and not just those of the elite. In the words of Albie Sachs, "the people affected by the Bill must be involved in the

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ideology and adjudication).

<sup>465</sup> See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-124 (1974) (explaining why repeat players, comprised mostly of governmental entities, large businesses and insurance companies, will triumph more often in adjudications); Petter, *supra* note 6, at 487 (predicting that greater exposure to, and frequency in courts of, business claims in relations to freedom of expression will cause judges to favor corporate interests over those of consumers, employees, and other less-well represented segments of society).

<sup>466</sup> See generally Brest, *supra* note 10 (discussing society's over-reliance on the Supreme Court for determining our most important public moral issues, and the false assumption that only the Court is authorized and capable of deciding constitutional questions).

process of its formulation, so that they see it as their own, as something they have struggled for and will defend, even if in a particular case its immediate application is inconvenient to many of them."<sup>467</sup> The Assembly should operate in a series of sessions, so that its members can consult with their constituencies between sessions, and so that common ground can be more likely reached. This process will also enable the drafting of proposals which seek to capture the evolving sense of the Assembly and bring to bear some expertise as to the best formulations and how the various values should be interrelated. A Constituent Assembly is a crucial starting point if constitutional discourse is to serve its community-building function.

## 2. Legislative Override

South Africa may wish to consider the enactment of a provision which permits legislatures to override rights contained in the constitution. In Canada, for example, legislatures are entitled to declare that statutes shall operate notwithstanding the fact that they may infringe on certain constitutional guarantees.<sup>468</sup> Taken to its extreme, a legislative override negates the very reason behind constitutional guarantees. However, a legislative override can be restricted to certain guarantees,<sup>469</sup> or require certain additional procedural steps that a legislature must take before it is entitled to override constitutional guarantees. The override in the Canadian Charter of Rights and Freedoms, for example, is insufficiently demanding as it allows omnibus overrides (i.e. inserting override clauses in one piece of legislation that applies to a whole group of other statutes). It was not drafted, nor has it been interpreted, in

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<sup>467</sup> Sachs, *supra* note 27, at 16.

<sup>468</sup> See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

<sup>469</sup> Some rights might be made "non-derogable," following the model of some international human rights treaties. See, e.g., ICCPR, *supra* note 38, art. 4(2) at 174 (exempting from derogation, inter alia, freedom from torture, recognition as a "person", and freedom of thought, conscience and religion); ECHR, *supra* note 41, art. 15(2) at 232; American Convention, *supra* note 44, art. 27(2) at 152 (exempting from derogation inter alia, right to life, right to humane treatment, freedom from slavery, rights of the family, right to a name, and rights of the child).

such a way as to fully exploit the rich potential for institutional dialogue between the courts and the legislature.<sup>470</sup>

At a minimum, it would seem desirable to require the government to pass separate amending acts to override specified rights, or sections in a statute, with a requirement for a higher degree of publicity than mere publication in the parliamentary journal (e.g., notifying the population through the press of the government's intention to override). Another option would be to require periodic renewal of the override. Limited provision for legislative override of this sort permits the reassertion of the democratic will in the face of judicial intransigence or serious error, while ensuring that such an action occurs in the context of public knowledge and potential debate.<sup>471</sup>

### 3. Limitations Clauses

Thought should be given to clearly worded limitations clauses, either tailored to specific rights or applying generally to all rights, that convey to the public at large the notion that most rights are not absolute (except perhaps those that are non-derogable) and that rights sometimes must be considered in relation to other important values. The constitution should be clearly structured in such a way that people comprehend both that certain encroachments upon rights can be legitimate, and that a right cannot be considered violated until carefully circumscribed justificatory arguments are analyzed.<sup>472</sup>

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<sup>470</sup> See generally Lorraine E. Weinrib, *Learning to Live With the Override*, 35 MCGILL L.J. 541 (1990) (discussing override clauses, and the role these clauses do and could play in an interbranch institutional dialogue).

<sup>471</sup> The ANC Draft Bill of Rights has what might be seen as a very soft notwithstanding clause, which may be more likely to foster dialogue than § 33 of the Canadian Charter, which has a conversation-cutting quality to it. In Article 16 of the draft, it is made clear that *all* rights in the bill, including the Article 10 social rights, are justiciable. See *ANC Working Draft*, *supra* note 1, at 122-23 (Art. 16(1)-(5)); see also *id.* (Art. 16(7)-(14)) (stating the supervisory role envisaged for a Human Rights Commission and an Ombudsman).

The Draft Bill of Rights goes on to say that "Parliament shall have a special responsibility for ensuring that the basic social, educational, economic and welfare rights set out in this Bill of Rights are respected." *Id.* (Art. 16(6)). There are some dangers in this formulation. The main danger is that "special" may be interpreted to mean "exclusive" rather than "primary," which is not what we understand to be the intention behind the draft. See Sachs, *supra* note 1, at 198-200. A broader concern is that this soft version of an override clause only applies to the Article 10 rights.

<sup>472</sup> See *ANC Working Draft*, *supra* note 1, at 122 (Art. 15(2)).

#### 4. Amendment Procedure

The means by which a constitution is amended is intimately related to the threat to democracy posed by an activist judiciary. The more complex and difficult an amending procedure, the more difficult it is to overturn judicial interpretations of constitutional provisions.<sup>473</sup> A balance is required so that the amending formula is not so flexible as to transform it into an open-ended legislative override, but not so inflexible as to make it impossible to put constitutional law on a new course.<sup>474</sup>

#### 5. Standing and Intervenor Rights

The extent to which participation is open to persons and groups not intimately connected to the dispute is also critical to the ability to avoid some dangers associated with judicial review, notably the problem of polycentricity.<sup>475</sup> As the account of Indian constitutional jurisprudence indicates,<sup>476</sup> liberal standing and intervention rules permit a greater degree of participation in debates concerning the potential interpretation of constitutional guarantees.<sup>477</sup> A new South African constitution should permit relaxed standing and intervention rules, so that the judiciary may hear as many divergent views as possible in order to minimize the risks of exclusion.

Related to such concerns regarding hearing different perspectives on polycentric issues is the desirability of organizing the judicial system so as to permit public interest actions to proceed as class actions.<sup>478</sup> Often a social right will, in effect, involve individ-

<sup>473</sup> See Michael G. Calantvano, Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and the Constitutional Change*, 75 CAL. L. REV. 1473, 1510-11 (1987) (noting that making constitutions difficult to change deprives popular majorities and legislatures of the power to overturn judicial decisions).

<sup>474</sup> See Corbett *supra* note 35, at 198 (stating that "it is essential that the court maintains a fine balance between . . . the need to protect constitutional rights and liberties . . . and the danger of a too great interference in the affairs of the executive and legislative branches. . ."). But see Calantvano, *supra* note 473, at 1510-11 ("The federal and state constitutions contain many safeguards against tyranny of the majority. These provisions would provide little protection for minorities if they could be repealed readily by a popular majority.").

<sup>475</sup> See Fuller, *supra* note 9, at 394.

<sup>476</sup> See *supra* notes 36 & 117 and accompanying text.

<sup>477</sup> For a classic discussion of broad standing rules as part of the public law judicial paradigm, see Chayes, *supra* note 9, at 1288-1302; see also CAPPELLETTI, *supra* note 120, at 272-308 (discussing the problem of standing in relation to diffuse individual interests).

<sup>478</sup> For a discussion of public interest actions in the context of statutory social

ual claims of right to collective goods (such as a hospital and its related human and physical infrastructure) which are either lacking or inadequate due to government inaction, or which have been discontinued as a result of government action. It is all too common for administrative authorities in the statutory social rights context to require each individual complainant to establish a separate case, even if there are many in a similar position, particularly in cases involving the state's failure to provide a benefit or its discontinuation of an existing benefit.<sup>479</sup> A similar result could be achieved through a process of generalizing an individual case through a judicial remedy. Such an approach, however, loses certain advantages of class actions, which include the empowerment of the claimant through association with others in similar straits, and the ability to situate the individual case as part of a larger narrative of systemic deprivation.<sup>480</sup>

## 6. Legal Aid

Another way to minimize the exclusion of disadvantaged individuals and groups from expensive constitutional litigation is to provide state-financed legal assistance. Current legal assistance programs in South Africa face serious underfunding problems.<sup>481</sup> In 1987, eighty percent of all criminal defendants were unrepresent-

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rights, see CAPPELLETTI, *supra* note 120, at 27 (“[I]f . . . a social benefit is discontinued, such governmental action may be detrimental to large communities of people and can be effectively attacked only by means of class, collective, test, or ‘public interest’ litigation.”).

<sup>479</sup> See, e.g., White, *supra* note 14, at 869 (noting that individuals challenging the New York City welfare system had a right to a hearing, but they had relatively “little political muscle to back up their [common] demands”). Another method of vindicating social rights exists through *qui tam* actions, in which a penalty for the omission or commission of an act, established in one action, brought also on behalf of the state, becomes recoverable by a plaintiff in a civil action, with a portion going to any plaintiff bringing suit, and a portion to the state.

<sup>480</sup> See Gilbert Marcus & Dennis Davis, *Judicial Review Under an ANC Government*, 7 S. AFR. J. HUM. RTS. 93, 98 (1991) (“The collective nature of the ANC’s draft Bill makes it essential that there be express provision for public interest actions as well as class actions. . . .”; see also Schneider, *supra* note 14, at 649 (discussing empowerment through class action in relation to the women’s rights movement).

<sup>481</sup> See Albertine R. van Buuren, Note, *Insufficient Legal Representation for the Indigent Defendant in the Criminal Courts of South Africa*, 17 BROOK. J. INT’L L. 381, 395 (1991); see also Lynn Berat, *Legal Aid and the Indigent Accused in South Africa: A Proposal for Reform*, 18 GA. J. INT’L & COMP. L. 239, 273-77 (1988) (stating that inefficient expenditure of funds by the Legal Aid Board, low publicity of legal aid programs, rigid application procedures, and low income ceilings all serve as barriers to the procurement of adequate legal assistance in South Africa).

ed before the courts.<sup>482</sup> To promote effective public interest litigation regarding entrenched social rights, those whose interests are most at stake in the interpretation of such rights must be provided with the means of ensuring that their voices are heard. State assistance should not be restricted to individuals primarily affected by the litigation in question, but should also extend to interest groups to permit them to develop national litigation strategies.

### 7. Lay Advocacy and Language

We have mentioned the dangers of law as a privileged discourse and of rights being defined by a potentially exclusionary language.<sup>483</sup> To avoid such dangers, legal assistance programs should be permitted to fund lay advocates. Such advocates might be more likely to come from the same community as the victim and to have experienced similar disadvantages, and might therefore be better suited than many lawyers to argue a victim's case.<sup>484</sup> Whether funded by the state or not, South Africans should consider a presumption operating in favor of leave for lay advocacy, which is but an extension of the right of any individual to plead his or her own case without a lawyer.

The court system should further be open to hearing cases expressed in language and styles not necessarily tied to traditional legal rights argumentation. Rights language and legal argumentation should not be considered so sacrosanct as to oust other ways of describing injustice.<sup>485</sup> The benefits of lay advocacy and forms of argumentation could be considerable. Lay advocacy, likely to merge arguments about law and fact, would prompt appellate courts to be more attuned to the actual experiences of those individuals whose

<sup>482</sup> See N.C. STEYTLER, *THE UNDEFENDED ACCUSED ON TRIAL* at vii (1988).

<sup>483</sup> See *supra* notes 77-82 and accompanying text.

<sup>484</sup> See Gerald P. López, *Lay Lawyering*, 32 UCLA L. REV. 1 (1984) (linking lay lawyering to the telling of stories of exclusion and victimization, with the lay lawyers drawing on both their own experience and on "stock stories" that have general resonance for those faced with the problems of the particular claimants); see also Steven Wexler, *Practicing Law for Poor People*, 79 YALE L.J. 1049, 1051 (1970) (discussing the need for lawyers to understand the difference between representing poor and rich clients); White, *supra* note 11, at 765-66 (discussing the dangers of lawyers speaking for those for whom they are acting).

<sup>485</sup> See Plaintiffs' Opening Address in *Uukw v. British Columbia* (May 11, 1987), in [1988] 1 C.N.L.R. 14, 56-57 (noting that traditional forms of narrative are more natural for First Nations than legal discourse).

cases they must decide, despite the need for considerable deference to findings at trial.

### 8. Informal Petitions and a Proactive Court Support Staff

Another way to make courts more accessible is to relax, or at least modify, some rules of procedure that may exclude people. For example, ten years ago the Supreme Court of India began accepting and acting on informal written communications from people who felt that injustices were being perpetrated on them, but who lacked the education to put their claims in constitutional discourse or lacked the resources to hire a lawyer to perform the task.<sup>486</sup> Rather than ignoring such communications, the court has established a committee to wade through such communications, extract those which seem most serious, and initiate follow-up inquiries to potentially bring the claim into the system.<sup>487</sup> South Africa should consider some kind of innovation requiring a more hands-on, inquisitorial role for the courts. The adversarial processes of the common law world are not necessarily the best in situations of inequality among litigants.

### 9. Court-Appointed Commissions of Inquiry and Expert Advisors

If the judiciary is granted the right to act on third-party petitions to address situations of extreme oppression and immediate and obvious danger, it should also be permitted and prepared to require that, as a rule, the petitioner demonstrate the consent and indeed the involvement of those whose rights are at issue.<sup>488</sup> It may be that a commission should be appointed by the court which could proactively investigate at arm's length on behalf of those who are the subjects of the claim. Another, perhaps preferable, option would be for such a commission to enjoy a permanent status and mandate to assume a proactive human rights role. Such a permanent commission would develop "expertise" in investigating claims and trust among citizens; the court would be free to call upon the

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<sup>486</sup> See, e.g., *Bandhua Mukti Morcha v. Union*, [1984] 2 S.C.R. 67, 157 (Pathak, J., concurring in the judgment) (discussing the growing practice of submitting a simple letter of complaint which the court treats as a petition under Article 32).

<sup>487</sup> See *id.* at 111.

<sup>488</sup> See White, *supra* note 11, at 767-68 (describing how a lawyer's efforts to help South African villagers frame their oppression in legal terms resulted in a community's coalescence); cf. MINOW, *supra* note 14, at 306 (advocating practical steps to enable courts effectively to guard children's interests).

commission to exercise this role. It would be unwise to make such a commission the exclusive gatekeeper of the courts due to the danger of bureaucratic appropriation of people's claims.<sup>489</sup>

Again drawing on the Indian innovations, South Africa might consider giving the courts the power and the administrative budget to appoint commissions of inquiry to gather facts and report to the court, both as a follow-up to potentially meritorious informal communications and in response to cases before them in which the court is not satisfied with the quality of the information presented. South Africa might also consider granting the courts power to appoint advisors when the court believes the parties' experts and its own expertise are not up to the task at hand.

### 10. Judicial Appointments

Intimately related to many of the possibilities suggested above is the question of who becomes a judge and who selects judges.<sup>490</sup> First, if constitutional interpretation is an exercise in world-making, its judicial participants ought to be selected by individuals and groups representing all aspects of South African society: citizens and politicians, women and men, non-lawyers and lawyers, blacks and non-blacks, solicitors and barristers.<sup>491</sup> Second, those doing

<sup>489</sup> See *ANC Working Draft*, *supra* note 1, at 123 (Art. 16(7)-(8)) (calling for the establishment of a Human Rights Commission to investigate patterns of violation of constitutional guarantees, to receive complaints and to institute court proceedings).

<sup>490</sup> This general question relates to the more particular question of whether South Africa should create a new constitutional court or reform the existing judiciary. This is a critical issue given the ideological underpinnings of the current South African judiciary:

Simply reforming the present judiciary would mean that it would take years before the interpreters [sic] of a Bill of Rights was in the hands of a racially heterogeneous bench, let alone one representative of women and the subordinate classes. This is where a separate constitutional court has advantages. It would allow greater democratisation of the appointment process. Without changing the system for ordinary judicial appointments and without giving professional politicians any greater a role, one could consider giving a role in the appointment of the constitutional court to individuals and organizations more intimately connected with human rights issues, such as trade unions, the Black Sash, Nicro.

Donald Nicolson, *Ideology and the South African Judicial Process—Lessons from the Past*, 8 S. AFR. J. HUM. RTS. 50, 72-73 (1992). The ANC Draft appears to have left the issue somewhat open. See *ANC Working Draft*, *supra* note 1, at 121 (Art. 14(7)) (stating that "the judiciary shall be transformed in such a way as to consist of men and women drawn from all sectors of South African society").

<sup>491</sup> See D.D. Mokgatle, *The Exclusion of Blacks From the South African Judicial System*, 3 S. AFR. J. HUM. RTS. 44, 46 (1987) (noting that although a black man was appointed



the selecting should be required to avoid the cult of expertise and to select worthy individuals from a wide pool of qualified applicants.<sup>492</sup> At minimum, the pool of applicants should not be restricted to members of the corporate bar but rather should draw from practitioners and legal academics with a range of interests, expertise and outlooks; those involved in family law, legal aid work, criminal law, and constitutional advocacy, to name but a few areas, should play at least as great a role on the bench as traditional appointees. Ideally, constitutional interpretation should not be the exclusive domain of the legal elite. Serious consideration ought to be given to whether nonlawyers, such as social workers, poets, and activists from the non-governmental organization sector, ought to serve as members of the judiciary.

What is certain is that creativity is required in restructuring the judiciary. By way of example, a modest effort in Ontario, Canada has begun to change the face of the judiciary with regard to the appointment of judges.<sup>493</sup> Lawyers interested in a position must apply in writing to a committee, comprised mainly of non-lawyers.<sup>494</sup> This system has increased the diversity of backgrounds

to the Natal Supreme Court in 1987, "it is widely recognized that there is a serious need to appoint blacks to the bench in order to maintain (restore?) confidence in the South African judiciary").

In the words of Nelson Mandela during one of his trials:

The White man makes all the laws, he drags us before his courts and accuses us, and he sits in judgement over us.

It is fit and proper to raise the question sharply, what is this rigid colour-bar in the administration of justice? Why is it that in this courtroom I face a White magistrate, confronted by a White prosecutor, and escorted into the dock by a White orderly? Can anyone honestly and seriously suggest that in this type of atmosphere the scales of justice are evenly balanced?

Why is it that no African in the history of this country has ever had the honour of being tried by his own kith and kin, by his own flesh and blood?

NELSON MANDELA, *NO EASY WALK TO FREEDOM* 127 (1965); see also Higginbotham, *supra* note 7, at 510-11 (discussing the judicial discrimination and harassment faced by Nelson Mandela as a practicing attorney in 1956).

<sup>492</sup> See Mokgatle, *supra* note 491, at 45.

<sup>493</sup> See Peter H. Russell & Jacob S. Ziegel, *Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees*, 41 U. TORONTO L.J. 4, 32 (1991) (noting that "specially constituted appointments Committees in Quebec and Ontario . . . have the responsibility not only of weeding out bad candidates but also of advising the provincial or territorial minister on the best candidates for the provincial or territorial courts").

<sup>494</sup> See *id.* at 30.

among lawyers recently appointed to the bench, and has virtually eliminated the role of political patronage.<sup>495</sup>

### 11. Parliamentary References

In Germany, it is possible for a member of the opposition in Parliament to refer a constitutional question (usually involving the constitutionality of draft legislation) to the constitutional courts;<sup>496</sup> forms of constitutional pre-view also exist in other European constitutions. In Canada, such a right of reference is the exclusive preserve of the executive.<sup>497</sup> South Africa might wish to consider a similar system for Parliament, which would enhance the dialogue between the courts and elected representatives, and encourage scrutiny of government laws or policy in terms of constitutional rights. The fact that such a process can lead to abstract litigation, that is, legislation that is challenged without the benefit of a concrete case, can be obviated to an extent by liberal intervenor rules allowing the courts to evaluate the constitutional question based on representative concrete cases presented by the intervenors.

### 12. Remedies

A South African constitution should grant the judiciary broad remedial powers when faced with an unconstitutional law. A broad remedial power will permit the judiciary to fashion remedies with the participation of those affected by the outcome. For example, a court ought to be able to delegate a degree of responsibility for determining the appropriate remedy to affected individuals and groups; this will permit democratic participation in the fashioning of remedies and offset some of the concerns associated with judicial power. In other contexts, a court may find it more appropriate to simply declare a violation of a right for enumerated reasons, leaving it up to the government (at least initially, as the court can retain jurisdiction to review the government's measures) to fashion the best means of achieving a result. This approach also respects democratic participation by elected representatives and has the

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<sup>495</sup> See *id.* at 20.

<sup>496</sup> See L.W.H. Ackermann, *Constitutional Protection of Human Rights: Judicial Review*, 21 COLUM. HUM. RTS. L. REV. 59, 69 (1989).

<sup>497</sup> See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 177-83 (2d ed. 1985).

added benefit of generating cooperative dialogue which will enhance the community-building function of rights litigation.

### 13. Interpretive Clauses

As discussed in Part II, textual rights do not come with perspective attached. Given the purpose of social rights in fighting poverty and related disadvantage, it is desirable to adopt certain interpretive clauses that expressly embrace a methodology of looking and listening to those at the margins of society and responding to suffering and remedying disadvantage.<sup>498</sup> It must also be made clear that the bill of rights is not to be interpreted in a way that deprives or limits a person's other rights and freedoms in the name of, or as a condition of, ensuring her or his social rights. Consideration could also be given to a clause which makes clear that judicial interpretations in the area of positive social rights may not be invoked by government as a ceiling for their independent responsibility to constantly expand and enhance the fulfillment of those rights.

### CONCLUSION

This Article has advocated the inclusion of justiciable social rights in a new South African Constitution. In our view, social rights are an indispensable tool for the realization of social justice in South Africa. Arguments against their non-justiciability based on the judiciary's lack of institutional competence overlook the fact that competence is a function of experience. Moreover, such arguments underestimate the particular institutional advantages of courts as an important forum for telling the stories of those whose humanity and place in the community are marginalized. More fundamentally, charges of judicial competence are based on an overly rigid assumption that governmental functions must be compartmentalized. Such assumptions obscure the fact that constitutional discourse is capable of stimulating a valuable dialogue in the community at large and, more particularly, among the various branches of government. Jurisprudence under international human rights instruments and the Constitution of India illustrates that the

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<sup>498</sup> See *supra* note 99 and accompanying text (discussing clauses from the Canadian Draft Alternative Social Charter).

judiciary can successfully adopt a promotional role in protecting the interests underlying social rights.

Arguments against the justiciability of social rights based on the lack of legitimacy associated with judicial review of democratic decisionmaking stress the dangers of arming the judiciary with dispositive power. Having decided to move toward a constitutional democracy with judicial review of legislative decisions, however, it would be more dangerous for South Africa to vest the judiciary with the authority to enforce only civil and political rights. Selective constitutionalization overlooks the constitutive dimension of constitutional discourse. The absence of social rights from a new South African constitution would risk the development of a constitutional discourse that would marginalize the values underpinning social rights, and implicitly, but nonetheless powerfully, deem those values to be illegitimate aspirations of modern governance. Nonetheless, the institution of the judiciary and the processes of judicial review as currently organized and conceived fit uncomfortably with the imaginative and progressive role they would be called upon to play under a constitution that contains social rights. For that reason, we have outlined several institutional and textual strategies which will help maximize the democratic potential of constitutional law in a post-apartheid South Africa.