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Lessons Learned from South Africa's Constitutional Court: Towards a Third Way of Judicial Enforcement of Socio-Economic Rights

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LESSONS LEARNED FROM THE SOUTH AFRICAN CONSTITUTIONAL COURT: TOWARD A THIRD WAY OF JUDICIAL ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

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INTRODUCTION

The question of whether constitutionally recognized socio-economic rights[1] are judicially enforceable remains a hotly debated issue throughout the world as the number of socio-economic guarantees appearing in national constitutions continues to grow. Much of this debate, however, is conducted on a purely theoretical level since judicial precedent speaking to the issue is remarkably thin. This lack of judicial precedent has made it difficult to predict how judicial enforcement might actually work in practice.

Recently, however, South Africa's Constitutional Court has decided a number of significant cases that provide important insight into the judicial enforceability of socio-economic rights. The South African constitutional system, as an "administrative law model of socio-economic rights,"[2] presents a "novel and highly promising approach to judicial protection of socio-economic rights."[3] This is because the approach "answers a number of questions about the proper relationship among socio-economic rights, constitutional law, and democratic deliberation."[4] In particular, the Court's approach "promote[s] a certain kind of deliberation, not [] preempting it, as a result of directing political attention to interests that would otherwise be disregarded in ordinary political

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1. "Socio-economic rights" are those rights concerned with protecting the basic necessities of life, such as health care and housing.

2. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 234 (2001).

3. *Id.* at 236.

4. *Id.* at 233.

life."[5] The insights provided by the South African system contribute greatly to bridging the gap between theory and practice.

This note builds upon Professor Cass Sunstein's observations that the structure of the South African Constitution, coupled with the important decisions of the Constitutional Court in *Government of the Republic of South Africa and Others v. Grootboom and Others*[6] (hereinafter *Grootboom*) and *Minister of Health and Others v. Treatment Action Campaign and Others*[7] (hereinafter *TAC*), offers a workable solution to the problem of the judicial enforceability of constitutionalized socio-economic rights.[8] The South African system provides a rejoinder to those who claim that enforceability of socio-economic rights gives the judiciary far too much power (and that it is ultimately unworkable) by presenting an example of a system that offers a vast improvement over other existing schemes aimed at the enforcement of constitutional socio-economic rights.

Part I contrasts the South African system with other constitutional systems by briefly examining the constitutional structure of the United States, which provides for no explicit socio-economic rights, and that of Hungary, which explicitly provides for a large number of such rights. The analysis examines some of the more common criticisms received by both systems. Part II briefly outlines the South African constitutional arrangement and then moves into a description of the key elements of the *Grootboom* and *TAC* cases. Part III analyzes how the Court, by means of the constitutional system described in Part II, has navigated between the difficulties presented by the two options that are contrasted in Part I. The section demonstrates how the Court has created a "third way" of judicial enforceability of socio-economic rights that, due to the presence of self-imposed limits, promises a solution that is both sensible and workable.

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5. *Id.* at 235.

6. South Africa. v. Grootboom, 2000 (11) BCLR 1169 (CC) [hereinafter *Grootboom*].

7. Minister of Health v. Treatment Action Campaign, 2002 (10) BCLR 1033 (CC) [hereinafter *TAC*].

8. *See* SUNSTEIN, *supra* note 2.

I. SOCIO-ECONOMIC RIGHTS IN THE UNITED STATES AND HUNGARY CONSTITUTIONS

This section briefly examines two approaches to the judicial enforcement of socio-economic rights that reflect two extremes in the current thinking on the subject. One approach provides for no judicial enforcement of such rights at all, while the other provides for judicial enforcement of a number of socio-economic rights, without limitation. In order to facilitate this examination, I consider the Constitution of the United States as an example of the former approach and the Constitution of Hungary as an example of the latter.[9] These approaches provide a recognizable contrast to the South African system.

A. The American Approach

The United States Constitution provides for no socio-economic rights explicitly in its text, such as the right to welfare or health care. While some scholars have suggested that it is possible to find socio-economic rights in the U.S. Constitution using particular interpretations of the text,[10] the Supreme Court has consistently rejected such notions.[11] The

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9. Note that the United States and Hungary are offered here only as *examples* of opposing approaches to socio-economic rights provided in a national constitution. There are a number of countries that have taken similar approaches to either the U.S. or Hungary. For countries taking positions similar to the US approach, consider the United Kingdom. *S, see generally* Elizabeth Palmer, *Resource Allocation, Welfare Rights—Mapping the Boundaries of Judicial Control in Public Administrative Law*, 20 OXFORD J. LEGAL STUD. 63 (2000). For countries taking positions similar to Hungary, consider a number of other Eastern European nations, including Poland. *S, see generally* Wiktor Osiatynski, *Social and Economic Rights in a New Constitution for Poland, in* WESTERN RIGHTS? POST COMMUNIST-APPLICATION 242 (András Sajó, ed., 1996). South Africa's system is an innovative system that departs from the apparent conventional wisdom, as exemplified by the above countries, that socio-economic rights must be constitutionalized generally without specified limitation, or not at all.

10. *See, e.g.*, Erwin Chemerinsky, *Making the Right Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525, 536 (1993); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979); Frank I. Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1964-65); William J. Rich, *Taking "Privileges and Immunities" Seriously: A Call to Expand the Constitutional Canon*, 87 MINN. L. REV. 153 (2002).

11. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *see also* Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L.

U.S. Constitution instead operates on the assumption that the rights included there are "negative" rights requiring only that the government *restrain* itself from interference with the rights of an individual. Negative rights are distinguished from socio-economic rights in that socio-economic rights obligate the government to take "positive" action.

Constitutional scholars have noted a number of problems with the United States' approach. First, the approach relies on a tenuous distinction between "positive" and "negative" rights. As many have noted, the protection of "negative" rights, which include civil and political rights such as the right to vote and the right to privacy, requires positive government action just as socio-economic rights do.[12] The right to vote, for example, requires the government to act positively to prevent interference with the voting process by nongovernmental actors.[13] In addition, interpretations of negative rights by the courts have resulted in the forcing of governments to expend public funds, such as requiring governments to provide for legal aid services in order to achieve the right to a fair trial.[14]

Other scholars have suggested that the United States' approach of excluding socio-economic rights reflects an outdated approach to constitutionalism.[15] The U.S. Constitution has been in continuous force since 1789 with very few textual changes, and it certainly did not anticipate the industrialization of the nation and subsequent calls for greater "positive" obligations on the State. Constitutional law in America has been uniquely slow to acknowledge the changes in economic and social circumstances since the late 18th century, in sharp contrast to more recent constitutional developments in Europe and elsewhere.[16]

REV. 137, 150 (2003) ("The United States Supreme Court has rejected socio-economic rights claims in cases with varying facts and legal grounding.").

12. *See* Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOYOLA OF LA L. REV. 1207, 1214 (1992).

13. *Id.*

14. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

15. *See, e.g.*, Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311, 318-21 (1989); *see also* Mary Ann Glendon, *Rights in Twentieth Century Constitutions*, 59 U. CHI. L. REV. 519, 525-26 (1992).

16. Casper, *supra* note 15, at 311, 318-321 (noting that even 18th and 19th century European conceptions of the state allowed for greater positive duties than does the U.S. Constitution).

B. The Hungarian Approach

Hungary's Constitution, in contrast to the U.S. Constitution, specifically provides for a large number of socio-economic rights. For example, the Hungarian Constitution specifies a right to "an income that corresponds to the amount and quality of work [citizens] carry out,"[17] and a right to a "healthy environment."[18] Hungary's system illustrates an approach that represents, at least textually, a "rights on demand" system. It operates under the assumption that socio-economic rights are, and should be, enforceable by courts.[19]

Hungary's approach has been criticized by a number of scholars who maintain that the constitutionalization of socio-economic rights is untenable. Such criticism is targeted not only at Hungary's specific system, but at the project of including socio-economic rights in constitutions in general. One oft-repeated criticism is that courts lack the institutional capacity required to adequately enforce socio-economic rights.[20] This argument says, in its most basic form, that courts simply are not up to the task of determining what types of policies are needed to deal with a particular socio-economic problem. Legislatures, not courts, the argument goes, should deal with these types of issues: "Courts lack the tools of a bureaucracy. They cannot create government programs. They do not have a systematic overview of government policy."[21] This is particularly true in a system such as Hungary's, where the lack of limitations on the rights listed in the Constitution makes it very difficult for courts to actually enforce them.[22]

This argument is supported by reference to a "polycentricity" problem that arises in the enforcement of socio-economic rights, as noted by Lon Fuller.[23] The thrust of this problem is that every change in policy has a

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17. HUNG. CONST. art. 70B, sec.§ (3).

18. *Id.* art. 18.

19. *See Id.* art. 70K ("Claims arising from infringement on fundamental rights, and objections to the decisions of public authorities regarding the fulfillment of duties, may be brought before a court of law.").

20. *See, e.g.*, Cass R. Sunstein, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1175 (1999); *see also* Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1598 (2000).

21. SUNSTEIN, *supra* note 2, at 1131, 1175.

22. *See* Antonio Carlos Pereria-Menaut, *Against Positive Rights*, 22 VAL. U. L. REV. 359 (1988).

23. Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

number of unforeseen consequences that go along with it. A change in the price of aluminum, for example, may change the demand for steel or plastic.[24] The fact that this occurs illustrates the institutional limits of the adjudicative power of the courts, because "polycentric" problems can only be addressed through simultaneous resolution of multiple issues. Since many of those issues are not placed before the courts in any one case, it is difficult for courts to engage all of the issues at once, as a legislature might be able to do. The "polycentric" problem raised by the attempted enforcement of socio-economic rights is a valid criticism, given the complexity of the underlying issues undergirding claims brought on the basis of such rights. Courts are simply not equipped to deal with all of the issues involved.[25]

Another criticism raised against the Hungary type approach points to a relative absence of manageable standards determining the content of socio-economic rights. Frank Cross, for instance, argues that positive rights are by their nature indeterminate, as opposed to negative rights.[26] The reason for this, he explains, is that positive rights are "consequentialist, requiring the judiciary to create a program that achieves a given result."[27] This is in contrast to negative rights, which "simply regulate particular actions or conduct."[28] The consequentialist nature of positive rights would be a problem even assuming a "neutral" judiciary, and certainly a major problem with the "far more likely" scenario of ideologically motivated judges enforcing their policy preference.[29] With no manageable standards from which to base their decisions, conservative and liberal judges alike will dictate policy outcomes based on what policies they think are best, which in turn may not be the policies that best help the intended beneficiaries of the positive rights sought.[30]

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24. *Id.* at 394.

25. Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 24 (1992) ("The resistance to constitutionally entrenched social rights on grounds of institutional competence is often summarized in the view that social rights...involv[e] complex, polycentric, and defuse interests in collective goods.").

26. Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 901-02 (2001).

27. *Id.* at 901.

28. *Id.*

29. *Id.* at 906-07.

30. *Id.* at 920-921.

Such indeterminacy of positive rights may also lead simply to judicial non-enforcement. Wiktor Osiatynski cites a number of positive rights found in the Hungarian Constitution, including the fundamental right of children to "the care of their family,"[31] that constitute indeterminate, unenforceable rights.[32] Rights such as the right to "care" seem not to be rights at all, he argues, because of the vague and ill-defined nature of their terms.[33] Given this supposed impossibility of enforcement of socio-economic rights, many "will remain forever a matter of moral norms and social customs rather than the law."[34]

A third criticism is that by giving the court the ability to enforce socio-economic rights, it distorts the separation of powers between the judiciary, legislature, and executive.[35] The ability to enforce socio-economic rights gives the judiciary, the argument goes, "the power of the purse," a power normally granted exclusively to the legislature.[36] Giving such power to the judiciary "constitute[s] a serious setback for the forces of democracy and the sovereignty of the people,"[37] because the judiciary is less representative and accountable to the people than is the legislature.[38]

A final criticism[39] is that a system of enforceable socio-economic rights can cripple a government by requiring vast expenditures of

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31. HUNG. CONST. art. 67, §1.

32. Osiatynski, *supra* note 9, at 242.

33. *Id.* at 370.

34. *Id.*

35. *See* David Beatty, *The Last Generation: When Rights Lose Their Meaning*, *in* HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE 350 (David M. Beatty ed., 1994) (arguing that the ability to enforce socio-economic rights would give the judiciary "the power of the purse," a power normally exclusively afforded the legislature).

36. *Id.* at 350.

37. *Id.*

38. *Id.*

39. The criticisms listed here are not intended as an exhaustive list of all possible criticisms, but rather they include the most important general concerns about enforcement indicated by the current scholarly debate. Other criticisms not mentioned here include: the likelihood of public resistance to increased welfare payments and the consequent political difficulty of judicial enforcement, *see* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2341 (1990) (noting that court orders requiring monetary outlays "would then be faced with the undeniably difficult task of obtaining funding from the legislature to implement this duty and of obtaining executive enforcement of its order"); the problem of making socio-economic rights dependent on litigating in court, which may be too difficult and expensive for the very people the rights are meant to help the most; *see* Cross, *supra* note 26, at 862; and the observation that conservatives generally dominate the judiciary and court adjudication of these issues should therefore not be normatively attractive to those on the Left; *see* Cross, *supra* note 26, at 863.

government funds.[40] There are simply not enough resources available, especially in relatively poor nations like Hungary and South Africa, to enforce a right to "the highest possible level of physical and mental health," as the Hungarian Constitution does for everyone living within its territory.[41] Also, if there is only a limited amount of resources to go around, the enforcement of socio-economic rights predetermines a significant part of the state budget, thereby constraining political options in the elected branches.[42]

In general, the criticisms highlighted above can be thought of as falling into two broad categories. The first two criticisms, regarding institutional competence and manageability standards, ask whether courts *can* act to enforce constitutional socio-economic rights, while the latter two, concerning the separation of powers and the implications of enforcement for the distribution of a state's financial resources, asks whether courts *should* act to enforce these rights.[43] Both sets of criticisms overlap and the possible responses to them should therefore be related as well. The South African response provides such a method, for it presents a means of enforcement that addresses these criticisms through a unified approach, or a "third way." It does so by incorporating provisions for socio-economic rights directly into the text of its Constitution, unlike the American Constitution, while overcoming some of the problems inherent in the "unlimited" approach exemplified by the Hungarian Constitution.

II. THE SOUTH AFRICAN CONSTITUTIONAL SYSTEM AND THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

South Africa has a long history of internal ills, compounded by its bleak experience with apartheid and its current battles with AIDS and poverty.[44] When South Africa's chief legislative body, the South African Congress, began work on a new South African Constitution, it did so with this history in mind, and in so doing set out to develop an instru-

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40. *See* Osiatynski, *supra* note 9, at 262.

41. HUNG. CONST. art. 70D, §1.

42. *Id.*

43. *See* PAUL HUNT, RECLAIMING SOCIAL RIGHTS: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 25 (1996).

44. *See* Suzanne Daley, *At Inauguration, Mbeki Calls for Rebirth of South Africa*, N.Y. TIMES, June 17, 1999, at A3.

ment that would deal with these problems. The decision to utilize such a correctional approach as a motivational compass can be thought of as a "pre-commitment strategy."[45] This strategy dictates that constitutional design should "work against those aspects of a country's culture and traditions that will predictably produce harm through that country's ordinary politics."[46] The Constitution's Preamble suggests such an objective by making an indirect reference to the South African people's continued struggle to rise above apartheid.[47]

Adopted in 1996, the final text of the Constitution guarantees both civil and political rights, such as the right to privacy[48] and the right to freedom of religion,[49] as well as a number of provisions that set forth socio-economic guarantees. These guarantees pertain to housing,[50] health care,[51] and children's rights,[52] among several others.[53] In addition to guaranteeing the right to have *access* to these goods, including food, water, and social security,[54] the Constitution also requires the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of th[ese] right[s]."[55] The courts were given the ability to "grant appropriate relief" to anyone alleging that their rights had been infringed upon or threatened.[56] For those who support the placing of socio-economic rights in a constitutional document, the South African Constitution was a success.[57]

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45. SUNSTEIN, *supra* note 2, at 226.
46. *Id.*
47. The first lines of the Preamble read:

> We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity.

S. AFR. CONST., Preamble.
48. S. AFR. CONST. ch. 1, § 14.
49. *Id.* ch. 1, § 15.
50. *Id.* ch. 1, § 26.
51. *Id.* ch. 1, § 27.
52. *See id.* ch. II, § 28.
53. *See, e.g., id.* ch. II, § 29.
54. *See* S. AFR. CONST. ch. II, § § 26(1), 27(1).
55. *Id.* ch. II, §§ 26(2), 27(2) (The operative language is substantively the same in both sections).
56. *See id.* ch. II, § 38.
57. *See* Scott, *supra* note 25.

In the same year that the new Constitution was adopted, the Constitutional Court touched upon the question, in a certification decision, of whether the newly constitutionalized socio-economic rights would be enforceable.[58] Faced with the argument that these socio-economic rights were not justiciable, and therefore not enforceable by the courts, the Court responded "we are of the view that these rights are, at least to some extent, justiciable.... At the very minimum, socio-economic rights can be negatively protected from improper invasion."[59] Nonetheless, the question of how the enforcement of socio-economic guarantees would actually work in practice remained unanswered until June of 2000, when the Constitutional Court announced its ruling in *Grootboom*. In that decision, the Court held, for the first time, that section 26 of the Constitution, ensuring the "right of access to adequate housing," required the legislature to take further action to address pressing housing concerns.[60] In holding as it did, the Court set forth a framework by which the judicial enforcement of socio-economic rights could function in a substantially different way from the two systems outlined in Part I.

The plaintiffs in *Grootboom* were 510 children and 390 adults who, as a result of intolerable conditions in their previous squatter settlement, had illegally occupied vacant private land. After occupying the land, the plaintiffs subsequently found themselves evicted and left homeless.[61] Many of the plaintiffs had applied for subsidized low-cost housing from the municipal government, but when it became clear that the government had no response forthcoming, they were left with no choice but to occupy the privately held land.[62] Following the eviction proceedings, the plaintiffs returned to their previous settlement only to find that it was now occupied by others,[63] forcing the plaintiffs to build temporary housing that consisted mostly of plastic sheeting.[64] The court-appointed attorney for the plaintiffs demanded that the municipal government meet

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58. *See* In re Certification of the Constitution of the Republic of South Africa, 1996 (10) BCLR 1253 (CC). The justicibilityjusticiability of the socio-economic rights in the South African Constitution was finally crystallized in Soobramoney v. Minister of Health, KwaZulu-Natal 1997 (12) BCLR 1696 (CC), discussed *infra*, Part III (C).

59. *See id.* ¶ 78.

60. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶¶ 93-96.

61. *See id.*

62. *Id.* ¶ 8.

63. *Id.* ¶ 9.

64. *Id.* ¶ 11.

its constitutional obligations by providing temporary accommodation to the plaintiffs,[65] but the plaintiffs charged that the municipality's subsequent response was inadequate.[66] The plaintiffs then brought suit against the government, claiming that their right to housing under Section 26(2), and their children's right to shelter under Section 28(1)(c) had been violated by the government's inaction.[67] After a decision in the High Court favoring the plaintiffs on both claims, the government brought an appeal to the Constitutional Court.[68]

The appeal gave the Court an opportunity to specify how the courts should enforce the socio-economic rights guaranteed in the Constitution, while respecting the limitations requiring the state only to "(a) [] take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realization of the[se] rights."[69] The Court noted that enforcement, admittedly a difficult proposition, was something that must happen on a case-by-case basis.[70] To this end, it is necessary, the Court continued, to examine the rights embodied in the Constitution both in terms of the textual setting of the rights and in their social and historical context.[71] For example, the state's obligation to provide for access to adequate housing "may differ from province to province, from city to city, from rural to urban areas and from person to person."[72] In terms of "reasonableness," a state housing program must be "balanced and flexible and make appropriate provision for attention to housing crises and to short, medium, and long term needs" and it must not exclude "a significant segment of society."[73] Additionally, measures must "respond to the needs of the most desperate," and "cannot leave out of account the degree and extent of the denial of the right they endeavor to realise."[74]

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65. *Id.*
66. *Grootboom,* 2000 (11) BCLR 1169 (CC) ¶11, n.10.
67. *Id.* ¶ 13.
68. *Id.*
69. *Id.* ¶ 21.
70. *Id.* ¶ 20.
71. *Id.* ¶ 22.
72. *Grootboom,* 2000 (11) BCLR 1169 (CC) ¶ 37.
73. *Id.* ¶ 43.
74. *Id.* ¶ 44.

In regard to the Section 26 housing claim, the Court determined that "[t]he housing situation is desperate"[75] and that the government's program, while laudable for its medium and long-term objectives, "leaves out of account the immediate amelioration of the circumstances of those in crisis."[76] The right of access to adequate housing requires more than just "bricks and mortar"—it requires land, services, and a dwelling.[77] Because of the program's failure to provide these goods "for those in desperate need," the Court declared that the government failed to meet its obligations under Section 26 of the Constitution.[78]

Turning to the Section 28 claim regarding the rights of children, the Court noted that a "rights on demand" interpretation of Section 28 would produce an "anomalous result," allowing persons with children to use their offspring as "stepping stones" to receive housing while shutting out those without children, regardless of the severity of their circumstances.[79] The correct interpretation of Section 28, the Court explained, is not that it provides "housing on demand" for children and parents, but that it imposes a primary obligation on the parents or family to provide for Section 28 goods, "and only alternatively on the state," such as in cases of orphaned children who no longer have families to provide for them.[80] The Court added that this does not relieve the state of its obligations to children who do have families. Such children still retain the right to access that is embedded in other provisions.[81]

The Constitutional Court, substituting the High Court's order with its own,[82] thus declared that the state's housing program fell short of its constitutional obligation and was not reasonable.[83] In its holding, the government was required to "devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing." Although the Court had thereby imposed a judicially enforced obligation on the legislature,

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75. *Id.* ¶ 59.
76. *Id.* ¶ 64.
77. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 35.
78. *Id.* ¶ 66.
79. *Id.* ¶ 71.
80. *Id.* ¶ 77.
81. *Id.* ¶ 78.
82. The High Court's order had included an order that, under Section 28 of the South African Constitution, the applicant children were to be "provided with shelter," which the Constitutional Court saw as an order for "housing on demand." *See id.* ¶ 70.
83. *See Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 99.

it qualified its decision by clarifying that "the precise allocation [of the national housing budget] is for national government to decide,"[84] and gave the state general leeway in the development of a housing program that would fall within the Court's guidelines.

In the recent *TAC* case, the Court continued and amended the *Grootboom* framework of the justiciability of socio-economic rights.[85] The *TAC* holding focuses further the role of the courts in the constitutional system. In *TAC*, the Court makes it clear that the socio-economic rights in the Constitution do not create a free-standing "minimum core" of rights (an issue left somewhat vague in *Grootboom*), while demonstrating that the Court's use of reasonableness standards apply to existing government programs as well as to government inaction of the sort in *Grootboom*.[86]

TAC, like *Grootboom*, involved a government appeal from the High Court's interpretation of a socio-economic rights provision in the Constitution that was unfavorable to the government.[87] Unlike *Grootboom*, however, where the applicants brought suit because of government inaction, the applicants in *TAC* took issue with an ambitious legislative program devised to deal with mother-to-child HIV transmission.[88] The government program provided for a limited distribution of Nevirapine, an HIV inhibitor.[89] The applicants argued that the limited distribution of Nevirapine, confined to only two sites in each province rather than being made generally available,[90] violated constitutionally mandated access to health care services,[91] children's rights to basic nutrition and health care,[92] and the government's obligation to take "reasonable" measures "within its available resources" to achieve the "progressive realization of each of these rights."[93] Thus, the Court considered whether measures adopted by the government to provide access to health care services for

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84. *Id.* ¶ 66.
85. *See TAC*, 2002 (10) BCLR 1033 (CC) ¶¶ 34-39; *Id.* ¶ 25.
86. *See TAC*, 2002 (10) BCLR 1033 (CC) at ¶¶ 34-39; *Id.* ¶ 25.
87. *See id.* ¶ 2.
88. *See Grootboom*, 2000 (11) BCLR 1169 (CC); *see also TAC*, 2002 (10) BCLR 1033 (CC).
89. *TAC*, 2002 (10) BCLR 1033 (CC); *Id.* ¶ 4.
90. *Id.* ¶ 10.
91. S. AFR. CONST. § 27(1).
92. *Id.* § 28(1).
93. *Id.* § 27(2).

HIV-positive mothers and their newborns fell short of its obligation under Sections 27 (right to health care) and 28 (rights of children).[94]

The government's justification for the unavailability of Nevirapine at non-research hospitals, where facilities existed only for testing and counseling, included: (1) a concern that Nevirapine would not be effective,[95] (2) that the administration of Nevirapine would lead to future resistance to the drug in later years,[96] (3) that the drug might be unsafe,[97] and (4) concerns over government budget constraints.[98] The Court dismissed each of these concerns one by one, concluding that the government's policy failed to address the urgent needs of mothers and newborn children who did not have access to the research hospitals.[99] The Court also noted that there was a comprehensive policy for testing and counseling of HIV-positive pregnant women, but that the policy was not implemented uniformly.[100] Given that HIV/AIDS is "the greatest threat to public health in [South Africa],"[101] the government's policy of restricting the use of Nevirapine to research sites, and its lack of provision for the extension of testing and counseling facilities throughout the public health sector was not "reasonable."[102] To that end, the Court required the government to devise and implement a new "comprehensive and coordinated programme" to provide access to health services for pregnant women and their children.[103]

The South African constitutional system has taken seriously the need to enforce socio-economic rights. At the same time, it has set a number of limits, appearing both in the text and in the interpretations of that text, that help to define and restrict the power of the judiciary in relation to the other branches of government. The next Part examines why this system may well be the best devised thus far to ensure a sensible system of judicial enforcement of constitutional socio-economic rights.

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94. *See id.TAC* ¶ 3 (The applicants in the High Court were members of civil society concerned with the medical treatment of HIV-positive mothers and the prevention of the transmission of HIV to the children through breastfeeding).

95. *TAC*, 2002 (10) BCLR 1033 (CC); *Id.* ¶ 51.

96. *Id.* ¶ 52.

97. *Id.* ¶ 53.

98. *Id.* ¶ 54.

99. *Id.* ¶ 67.

100. *TAC*, 2002 (10) BCLR 1033 ¶ 90.

101. *Id.* ¶ 93.

102. *Id.* ¶ 95.

103. *Id.* ¶ 135.

III. SOUTH AFRICA'S JUDICIAL SYSTEM FOR THE ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS

The Constitutional Court of South Africa has developed a sensible and feasible framework for the judicial enforcement of socio-economic rights that may serve to help South Africa rise out of its apartheid past. While this is certainly a bright achievement for South Africa itself, this framework may also provide a workable model for the rest of the world. By establishing a number of important constraints on the scope of the judiciary's enforcement powers that are derived from the text and judicial interpretations of the Constitution, the South African system navigates a "third way" between the opposing models discussed in Part I. These constraints arise out of a limitation on the number of socio-economic rights enumerated in the Constitution and the generalized nature of those rights, the requirements set forth in the text of the Constitution that the legislature need only "progressively" pursue "reasonable" policies, and the Court's own acknowledgement of its limitations combined with its pragmatic of reasonableness standards. These limitations, considered in turn below, have helped to construct a workable system for the enforcement of socio-economic rights that not only answers the practical questions of how courts *can* enforce these rights, but also addresses the more theoretical concern over whether courts *should* enforce these rights.

A. Limited Number of Enumerated Rights and Lack of Specificity

A limitation in the number of rights enumerated in the Constitution provides an inherent limit on the Court's power to enforce socio-economic rights. Additionally, those that are enumerated are far less specific than those contained in the constitutions of several Eastern European nations, especially that of Hungary. Unlike Hungary's Constitution, which provides "a truly dazzling array of social and economic rights"[104] including "leisure" and a "healthy environment," the South African Constitution lists only a few. Also, the level of specification

104. Cass R. Sunstein, *Against Positive Rights*, *in* WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996).

found in the Hungarian Constitution[105] is much higher than that found in the more generalized language of the South African Constitution, leaving the definition of rights such as the right to "sufficient food" and "adequate housing" rather loose.

A number of commentators have advocated for the inclusion of many highly detailed rights in a constitution as an appropriate response to the imprecision of social rights.[106] The problem with this approach, however, is that it leads to an enforcement scheme that binds the hands of future legislators regardless of whether the policy actually makes sense in a given time and place. The unworkability of a particular constitutionally-mandated program may very well lead to the legislature taking no action at all despite the express constitutional language to do so. In such cases, the courts would likely be reluctant to actually enforce such rights, knowing that their decisions could not and would not actually be followed.[107]

South Africa's system is different in this regard because it sets forth generally defined rights, such as "access to adequate health care," that ultimately allow the legislature a wider berth in which to work unencumbered by judicial interference. The flexibility in the Constitution also gives the courts the ability to develop the kind of flexible system highlighted in this Note. Generally defined rights have allowed the Court to largely overcome the "manageable standards" concern, mentioned in Part I above, by allowing the legislature room, within certain limits, to specify the manner in which these general obligations can be developed into manageable policies. As the Court noted in *TAC*, "[t]he government has always respected and executed orders of this Court," and one main reason for this probably lies in the fact that the Court has never required the government to perform a task that it cannot possibly accomplish.

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105. *See* A MAYGAR KÖZTÁRSASÁG ALKOTMÁNYA (MKA) [Hung. Constitution] art. 70B (stating that there is a right to an income "that corresponds to the amount and quality of the work they carry out").

106. *See, e.g.*, HUNT, *supra* note 43.

107. *See* SUNSTEIN, *supra* note 2, at 229-30.

B. The Distinction Between "Access" to Rights and the Rights Themselves

The language setting forth the socio-economic rights enumerated in the South African Constitution consists of two main components: first, that "everyone has the right to have access to" the specified right; and second, that "the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of" the right or rights. The characterization of socio-economic rights as "rights of access," rather than general rights in and of themselves,[108] such as the "right to employment," contrasts with the sort of "rights on demand" constitution exemplified by the Hungarian Constitution.[109] Framing the right to socio-economic goods as a right to "access" rather than to the right itself is an additional way of delineating the outer boundaries of the role of the courts in the area of socio-economic rights enforcement. In other words, the Court is free to enforce all listed socio-economic rights but it is not free to provide unlimited "rights on demand" without regard to the actual circumstances of the individual(s) seeking relief.

Some may argue that providing for socio-economic rights by means of a qualified "access" standard makes them lesser rights in comparison to rights not similarly qualified.[110] However, this suggestion has less force when one considers that framing the rights as "access" rights actually assists the realization of such rights by placing the relative needs of individuals in context. In the *Grootboom* housing scenario, for example, this meant that the appropriate response of the Court in regard to those most unable to help themselves was to require the State, within certain limits, to provide material goods including land, dwellings, and services. This approach acknowledges that for the poorest citizens, *legal* access to the underlying good by itself is not true access, since their socio-economic position forecloses *actual* access to such goods in the marketplace. In regard to those who *can* afford their own housing, the

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108. *See Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 35.

109. For example, the South African Constitution includes a "right to freedom of religion." S. AFR. CONST. § 15(1). The South African Constitution also includes the right "to form a political party." *Id.* § 19(1).

110. Sandra Liebenberg, *South Africa's Evolving Jurisprudence on Socio-Economic Rights* (2002), *at* http://www.communitylawcentre.org.za/ser/research.php.

appropriate response is not "rights on demand" but rather a requirement that the state "unlock[] the system" and provide access to housing stock. In this way, the "right of access" acknowledges that individuals and civil society share some obligation with the State in ensuring that citizens' socio-economic needs are met.

C. The "Within Available Resources" Provision

The first of three provisions attached to the enforceability of the "qualified" rights in the Constitution is the "within available resources" provision. This provision ensures that courts take budgetary limitations seriously, and that they enforce socio-economic rights only with the relevant political and economic realities in mind. In *Soobramoney v. Minister of Health*, [111] a case decided three years prior to *Grootboom*, the Court demonstrated its willingness to take the "within available resources" provision seriously. The case also illustrates the manner in which the provision helps to constrain the courts.

Soobramoney was brought by a forty-one year-old unemployed man suffering through the irreversible final stages of chronic renal failure.[112] Regular treatments of renal dialysis, which requires a dialysis machine and a total of six hours of care per treatment, could have prolonged his life,[113] but a state hospital refused treatment on the grounds that the treatment could be given on a limited basis only, due to its high cost and the limited availability of supplies at the hospital.[114] The man sued the hospital, claiming that the hospital's refusal of treatment violated the constitutional guarantee of his "right to life"[115] and his right not to be refused "emergency medical treatment."[116]

The Court, taking note of the negative wording of section 27(3)[117] and the fact that the applicant's injury was "an ongoing state of affairs" rather than an "emergency,"[118] emphasized the necessity of limits on the enforcement of the kind of socio-economic rights raised in the case,

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111. Soobramoney v. Minister of Health, 1997 (12) BCLR 1696 (CC).
112. *Id* ¶ 1.
113. *Id.*
114. *Id.*
115. *Id.*; S. AFR. CONST. § 11.
116. *Soobramoney*, 1997 (12) BCLR 1696 (CC); S. AFR. CONST. § 27(3).
117. *See* S. AFR. CONST. § 27(3).
118. *Soobramoney*, 1997 (12) BCLR 1696 (CC) ¶ 21.

specifically the "right not to be refused emergency medical treatment." In this case, "an unqualified obligation to meet [the] needs" indicated in Section 27 would "not presently be capable of being fulfilled," given the "lack of resources and the significant demands on [those resources]."[119] The Court explained that because South Africa is a relatively poor nation with a Constitution recognizing a number of other socio-economic rights, "[t]here will be times when [managing limited resources] requires [the State] to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."[120] This opinion suggests that when the state argues that it cannot pursue a certain socio-economic policy due to financial constraints, the Court is required to give such an argument due consideration.

The "within available resources" provision also helps to ensure that the socio-economic rights in the Constitution do not become a form of "rights on demand" that are handed out with no regard to budgetary circumstances. This is in contrast to the system in Hungary where there is no comparable financial limitation on the enforcement of socio-economic rights. The lack of such a provision in Hungary has led to the Hungarian courts' reluctance to enforce the socio-economic rights in their constitution, since forcing the government to supply something it simply cannot provide is seen to be largely meaningless.

The "within available resources" provision has the added effect of helping realize South Africa's national commitment to assist the neediest members of its society. Enforcing rights such as health care and housing require substantial financial outlays, and a "rights on demand" system would, if enforced, quickly drain the nation's treasury. By limiting the ability of the courts to divert the nation's scarce resources, it helps ensure that there will be enough resources available for the poorest citizens.

An objection to the inclusion of a financial limitation is that it might allow the legislature to determine the extent of its own obligations set forth in the constitution by simply adopting a smaller budget. This is a serious concern that has yet to be directly addressed by the South African Constitutional Court. At this point, it appears the Court would be reluctant to interfere with a legislative move to lower tariffs, for

119. *Id.* ¶ 11.
120. *Id.* ¶ 31.

example, that would ultimately result in a smaller governmental budget within which to work. However, basic separation of powers doctrine suggests that it is appropriate to restrain the judiciary from commanding tax increases, for instance, or to block policies that result in lowering government cash inflows. This seems especially true when considering the alternative, which would allow the judiciary to determine the "reasonableness" of a tax decrease or tariff cut rather than the "reasonableness" of an existing government program—something perhaps not impossible to do, but likely more difficult. In any case, the *TAC* Court recognized that the judiciary's role is not in "rearranging budgets," though it may make orders that have budgetary implications.[121] While some may be concerned that the government may use the available resources provision to define the scope of its own obligations, such discretion is likely a necessary component in a system that respects the relative authorities of each branch and properly limits the role of the judiciary.

D. The "Progressive Realization" Provision

Sections 26, 27, and 28 require the government to achieve the "progressive realisation [sic]" of the rights spelled out in those sections.[122] As the *Grootboom* Court explained, "[t]he term 'progressive realization' shows that it was contemplated that the right could not be realised immediately."[123] In other words, the provision allows the government to take some time in implementing proposals. Quoting the United Nations Committee on Economic, Social, and Cultural Rights (CESCR), the Court noted that progressive realization provision is "'a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights.'"[124] By adopting for the South African Constitution

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121. *See TAC*, 2002 (10) BCLR 1033 (CC) ¶ 38.

122. As the *Grootboom* court notes, this term was borrowed from international law, specifically from Article 2(1) of the Covenant on Economic, Social, and Cultural Rights. The Court used the committee's analysis to guide its reasoning in the *Grootboom*. *See Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 45.

123. *Id.*

124. *Id.*

the CESCR's requirement[125] that its progressive realization provision "'be read in the light of the overall objective, indeed the raison d'etre, of the [International Covenant on Economic, Social and Cultural Rights]'" and that "'any deliberately retrogressive measures . . . 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,'" the Court in *Grootboom* recognized the need to allow the legislature the necessary time required to design adequate socio-economic programs.[126]

This contextual approach, allowing the government to enact even facially retroactive measures if it means better future compliance with the Constitution, is far better than an immediate "rights on demand" system. Such systems fail to consider inherent difficulties of such an approach, including the necessity for legislative fact-finding and appropriate policy-shaping—actions that take substantial time to perform adequately. Without the "progressive realization" provision, South Africa would likely be left with a legislature forced to quickly enact legislation in order to adhere to judicial mandate, leading to hastily developed programs that suffer from lack of foresight regarding long-term consequences, poor wording, and other unforeseen problems. The provision allows the legislature to consider socio-economic remedies in greater detail and encourages, in turn, the enactment of better legislation. For advocates of the enactment of real, meaningful, and workable socio-economic policies, this balance is critical.

E. The "Reasonableness" Provision

Perhaps the most important limit, used in conjunction with the other limits discussed above, is the judiciary's use of "reasonableness" standards. One might think that the introduction of such a vague term into a constitution is a recipe for disaster, since it can easily lead to judicial overreach. While such a concern may never be eliminated entirely as long as judicial review exists, the way in which the South African Constitutional Court has interpreted "reasonableness" is hopeful. In

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125. *See id.* ("Although the committee's analysis is intended to explain the scope of states parties' obligations under the Covenant, it is also helpful in plumbing the meaning of 'progressive realisation [sic]' in the context of our Constitution.").

126. *Id.*

particular, the *Grootboom* and *TAC* cases shed some light on the manner in which reasonableness standards may be used in a way that does not compete with the legislature's policymaking authority. These cases also shed light on the analogous nature of other types of reasonableness standards that are employed by courts on a regular basis.

In order to give content to what "reasonable" policies are, the court looks to the problems at hand "in their social, economic and historical context" as well as the context of the bill of rights as a whole.[127] For that reason, the *Grootboom* Court undertook an inquiry into the applicants' housing problems, and the *TAC* Court looked into the problems of HIV/AIDS in South Africa. By bringing this kind of focus to the inquiry, the Court is better able to determine on whom to place the burden of providing the socio-economic good in question—civil society, the individual herself or, if necessary, the State.

This interpretation of the "reasonableness" provision allows the legislature to maintain its wide policy-setting jurisdiction. The *TAC* Court recognized, and many constitutional scholars agree,[128] that courts are institutionally limited when it comes to the "wide-ranging factual and political enquiries" inherent in policy-making.[129] Heeding this insight, the role of the courts is simply to make suggestions for possible policy alternatives that in general only constrain the government's options within a certain range, rather than directing any one particular outcome. By limiting itself to this function, the Constitutional Court in South Africa has in large measure overcome the criticisms of "polycentricity" and institutional competence discussed in Part I of this Note.

Nevertheless, the use of reasonableness standards may worry those concerned over the judiciary's competence to even touch upon areas that require specialized knowledge.[130] However, the tools the Constitutional Court has at its disposal to determine reasonableness are not out of line

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127. *See id.* ¶ 43.

128. *See, e.g.*, Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1990 (2001) ("[Positive] rights come wrapped with questions of judgment, strategy, and responsibility that seem well beyond the reach of courts in a democracy.").

129. *See TAC*, 2002 (10) BCLR 1033 (CC) ¶ 37.

130. *See, e.g.*, Aharon Barak, *Forward: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 33 (2002) ("[A] judge should beware evaluating complex polycentric questions of economic or social policy that require specialized expertise and knowledge and that may rely on assumptions concerning issues with which he or she is unfamiliar.").

with those employed by other courts at different times and in other contexts. As Professor Sunstein has noted, the Court has constructed an "administrative model" of socio-economic rights, a model used by a number of courts to determine the reasonableness of bureaucratic implementation of legislative enactments. Additionally, taking some examples from the United States, court decisions in areas as diverse as racial discrimination,[131] obscenity,[132] and shareholder rights,[133] all delve into areas requiring specialized knowledge of social and economic data.

By not interfering with the legislature's broad control over program specifics, the court refrains from going into details which it has no competence to consider. Just as courts do all of the time, it needs only to look at the available data brought to it to determine reasonableness. Fact-finding will be done by the parties to the case—meaning that the government is able to make its case using available data that the court is not required to generate.

Still, there may be some concern that even if the Court's result in *Grootboom* is acceptable, the way in which the *TAC* Court used the "reasonableness" standard crossed the line into judicial overreach by prescribing a particular policy outcome (requiring that the government make Nevirapine available nationwide) to the legislative branch, instead of simply requiring the government to come up with any reasonable plan that would combat the underlying problem. By doing so, the *TAC* decision may have shifted the Court's promising approach in *Grootboom* to a stronger, and more problematic, form of judicial review.[134] There are, however, at least two responses to such an argument that may serve to ease such concerns.[135]

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131. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483 (1954).

132. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973) (establishing a definition of obscenity requiring the court to inquire into whether alleged obscene material has "serious literary, artistic, political, or scientific value").

133. *See, e.g.*, Shlensky v. S. Parkway Bldg. Corp., 166 N.E.2d 793 (Ill. 1960) (holding corporate directors liable for damages suffered by the corporation for various transactions because the directors did not establish the "fairness" of the challenged transactions).

134. One scholar recently noted the possibility that the South African constitutional system, which he considers an example of "weak-form judicial review," might escalate into "strong-form judicial review" as a result of *TAC*. He also notes, however, that there is reason to believe such an escalation will not occur due to the unusual facts surrounding the case. *See* Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 825-828 (2003).

135. In large part, the response here is also suggested by another scholar (after the High Court's decision in *TAC* but before the final Constitutional Court decision). *See* Heinz Klug,

The first response is that *TAC* can and should be read narrowly. This is so for several reasons. First of all, the Court was faced with a unique and very sympathetic set of facts in *TAC*. The case involved a particularly innocent group of injured parties (newborns),[136] and it involved the deadly AIDS disease, which is the "'most important challenge facing South Africa'" today.[137] Undoubtedly, the plaintiffs in *Grootboom* were also sympathetic. However, in *TAC*, as opposed to *Grootboom*, the government's arguments were very weak. The government's positions regarding the efficacy and safety of Nevirapine, as well as its alleged inability to provide wide distribution of the drug to all regions of the nation, were sharply undermined by the scientific evidence brought to its attention, the minimal cost of the drug,[138] and the fact that the government had already distributed the drug to several other sites. Also, though it was not mentioned by the *TAC* Court directly, the intense negative public reaction to South African President Mbeki's dogged skepticism toward the causal link between HIV and AIDS may have helped the Court feel more comfortable with the result it reached in *TAC*.[139] All of these factors indicate that the Court found it appropriate to delve into specific policy matters more deeply than it usually would due to the uniqueness of the factual situation surrounding the case.

Secondly, given that the government had already adopted a policy of limited distribution of Nevirapine to test sites, the Court's mandate for a policy of wider Nevirapine distribution can be seen as simply an extension of an already existing government policy. Indeed, the Court framed its action as one of getting the non-participating regions in the nation to follow the participating ones.[140] This can be seen as fulfilling a basic principle enunciated in *Grootboom*: "[a] programme that excludes a significant segment of society cannot be said to be reason-

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Five Years On: How Relevant is the Constitution to the New South Africa?, 26 VT. L. REV. 803, 816-818 (2002); *see also* Tushnet, *supra* note 134.

136. *TAC*, 2002 (10) BCLR 1033 (CC) ¶ 72. ("In evaluating government's policy, regard must be had to the fact that this case is concerned with newborn babies whose lives might be saved by the administration of Nevirapine . . . .").

137. *Id.* ¶ 1 (quoting a South African Department of Health publication).

138. The cost of the Nevirapine itself was not a factor, as the manufacturer had offered the drug to the respondents for a period of five years. *See id.* ¶ 48.

139. *See* Suzanne Daley, *AIDS in South Africa, A President Misapprehends a Killer*, N.Y. TIMES, May 14, 2000, at D4; *see also What to Make of Thabo Mbeki?*, N.Y. TIMES, June 27, 2001, at A22.

140. *TAC*, 2002 (10) BCLR 1033 (CC) ¶ 132.

able."[141] Additionally, the political situation in *TAC* contrasts sharply with that in *Grootboom*, where no government policy had yet been devised to deal with housing problems in the short-term. This fact led the Court to refrain from requiring the legislature to follow a policy created solely by the Court itself.

TAC signified that *some* involvement by the courts in policy matters, and perhaps more so when given a narrow set of facts such as those in *TAC*, may be appropriate to give efficacy to listed socio-economic rights. The case also suggests that increased policy direction by the Court will occur only where the legislature has indeed acted, but has acted in a such a manner so as to treat similarly situated citizens differently from region to region. That the Court waited to make this point clear in the "easier" *TAC* case ("easier" due to the unique circumstances mentioned above) is not insignificant. The Court was able to accomplish the dual purpose of demonstrating that the socio-economic guarantees of the Constitution are to be taken seriously, even in the context of more "traditional" rights, while simultaneously suggesting that in harder cases where the legislature has not yet acted, the Court will be less willing to fix specific policy directives on the government. Where the line should be drawn determining how much judicial involvement is necessary in a particular case is something that the Constitutional Court will continue to develop, and should be closely followed by socio-economic rights critics and supporters alike.

In short, the Court's approach has worked because it demonstrates the manner in which the judiciary can enforce "positive" rights while constraining itself to a contextual examination of process. The question is not, as the Hungarian Constitution suggests, whether the courts believe that "leisure" has been accomplished or that people are receiving "equal pay for equal work." Rather, the proper inquiry should be whether the government's policies allow for the realization of rights. If the applicant is very poor, then "access" may mean that government needs to do more than simply "unlock the system" by actually providing socio-economic goods by a process that is reasonable. With this approach, it is easy to imagine that if an applicant came to the Constitutional Court in possession of the personal resources needed to obtain housing, but

141. *Grootboom*, 2000 (11) BCLR 1169 (CC) ¶ 43.

lacking the will to use those resources to do so, the Court would require that she use self-help rather than relying on the State.

F. The "Minimum Core" Argument Rejected

The determination of whether a given policy is "reasonable" does not depend on whether there is a "minimum core" obligation required of the legislature. The Court explicitly rejected such an approach in *Grootboom* and *TAC*. In so doing, the Court placed a further constraint on the judiciary's role in the South African system of socio-economic rights.

The minimum core model, presented by two amicus briefs in *TAC*, and noted in *Grootboom*, was developed by the CESCR.[142] Though not easy to define, the minimum core model requires that the state guarantee "at least the minimum decencies of life consistent with human dignity."[143] The argument in regard to the South African Constitution was that Section 27(1), providing for "access" to health care, established a right independent of the limitations in 27(2). The Court rejected this approach.[144] Both the *Grootboom* and *TAC* Courts noted that while particular cases may use a minimum core analysis of a particular government service in order to determine whether government policies are "reasonable," "the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them."[145]

One major problem with the minimum core approach is that it does not take into account the particular contexts present in each country. A "most pressing need" at a given time and place might be a whole host of things under the minimum core model, rather than one or two things that require particular and immediate attention on the part of government. As the *TAC* opinion noted, "[i]t is impossible to give everyone access even to a 'core' service immediately"[146] due to financial limitations.

Additionally, the establishment of a minimum core standard would require the government to devise policies that provide all citizens with

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142. *See TAC*, 2002 (10) BLCR 1033 (CC) ¶ 26.
143. *Id.* ¶ 28.
144. *Id.* ¶ 39.
145. *Id.* ¶ 34.
146. *Id.* ¶ 35.

socio-economic goods, regardless of social and economic circumstance. As the Court noted in *TAC*, when the government limits the supply of Nevirapine to its test sites, "it is the poor outside the catchment areas of these sites who will suffer."[147] It is not those who can already pay for the product who will be hit the hardest. The Court recognized that *everyone* is entitled to the socio-economic rights granted in the Constitution, but it was aware that the distribution of scarce state resources needs to be limited to those who cannot otherwise afford the goods. In this manner, requiring *access* to socio-economic rights, rather than absolute provision of the rights themselves is, as the Court noted, actually a more progressive policy than a minimum core approach that requires the state to provide limited resources to *everyone* regardless of economic circumstances.

Finally, the minimum core approach forces courts to take on the role of policy-maker rather than concentrating on processes. As mentioned above, the Court has recognized that it is "not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards . . . should be."[148] The crux of the Court's observation is that priority-setting should be done by legislatures rather than the courts, allowing the "restrained and focused" role of the courts to be that of "requir[ing] the State to take measures to meet its constitutional obligations and subject[ing] the reasonableness of these measures to evaluation."[149] Doing so helps the "judicial, legislative and executive functions achieve appropriate constitutional balance."[150]

The South African system as it stands is more flexible and workable than it would be if it included a minimum core of rights.[151] For

147. *Id.* ¶ 70.

148. *TAC*, 2002 (10) BCLR 1033 (CC) ¶ 37.

149. *Id.* ¶ 38.

150. *Id.*

151. The *TAC* Court's explicit rejection of the "minimum core" approach nevertheless has its critics. *See, e.g.*, David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socio-Economic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1, 26 (2003) (arguing that the *TAC* court's approach was "overly cautious"). The minimum core approach, however, is not the only way to have a "principled strong commitment to eradicating . . . terrible living conditions as soon as possible" and the only "means of specifying priorities." *Id.* at 15. The Court's approach after *Grootboom* and *TAC* forces the government to adhere to the constitutional directive of eradicating the legacy of apartheid, by directing the legislature's attention to problems it may otherwise have ignored. This helps spur action by the

advocates of socio-economic rights, this system should be normatively attractive because it can actually work. Though it may initially seem more attractive to have a highly specified system of socio-economic rights (as in Hungary), those rights have yet to be actually implemented.[152] Allowing some flexibility in the system helps to ensure that the other branches of government actually and appropriately meet the constitutional goal of State assistance to all citizens.

CONCLUSION

South Africa's constitutional system suggests that there is a third way between providing no socio-economic rights at all, on the one hand, and "rights on demand," on the other. This third way emphasizes the importance of having the judiciary work with the legislature and executive to come to the best practical solutions for reaching the aspirational goals enumerated in the Constitution's preamble. To best reach that end pragmatically, the structure of the constitution, as interpreted by the Constitutional Court, places limits on the sphere of judicial enforceability of the socio-economic rights provided for in the text. Those limits include the enumeration of only a few generally defined socio-economic rights, a distinction between qualified and unqualified rights, the realization that the state's resources are limited, the allowance for the state to take the necessary time required to devise effective policy, and giving the legislature freedom to pursue a wide range of policy options in order to solve the nation's social problems, as long as the policy is "reasonable." These limits are sensitive to the concern that legislatures, and not courts, are more institutionally competent to devise and implement particular policies enforcing socio-economic guarantees

The insights gained from an examination of the system of socio-economic rights enforcement constructed by the South African constitu-

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government by letting it know where its constitutional priorities should lie. And, for the many reasons highlighted in this Note, it does so in a way that squarely addresses the strong criticisms of judicial enforcement of socio-economic rights outlined in Part I.

152. *See* Beatty, *supra* note 35, at 347-48 ("[N]o court has ever stood up to the other two, elected branches of government and told them that the actual amounts or levels of financial or cultural support they have provided are inadequate as a matter of constitutional law. . . . [W]henever claimants have asked a court to second guess the amount of money a Government has decided to spend on particular social or cultural programmes, they have, without exception, gone away empty-handed.").

tional system should not be understated. As one scholar recently put it, "perhaps it is time for Americans to learn from the South African Constitutional Court's excellent work."[153] South Africa's constitutional system is still a work in progress, but its early promise suggests that at the very least observers should keep a close eye on the future developments of South Africa's "third way" of socio-economic rights enforcement.

153. Mark S. Kende, *The Fifth Anniversary of the South African Constitutional Court: In Defense of Judicial Pragmatism*, 26 VT. L. REV. 753, 767 (2002).