


2008

# Using Constitutional Adjudication to Remedy Socio-Economic Injustice: Comparative Lessons From South Africa

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## Recommended Citation

13 UCLA J. of Int'l Law and Foreign Affairs 369 (2008)

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# USING CONSTITUTIONAL ADJUDICATION TO REMEDY SOCIO-ECONOMIC INJUSTICE:

## COMPARATIVE LESSON FROM SOUTH AFRICA

*Eric C. Christiansen\**

*This article seeks to explore the effectiveness of constitutional protection and court adjudication of social welfare rights as tools to address and remedy social injustice and economic inequality. The focus of this examination will be on South Africa and its post-apartheid Constitution that enumerates rights and protections intended to remedy the economic injustices of the country's past. This article argues that the model of adjudicating social rights in South Africa is exportable to other countries, while clarifying the reasonable expectations and potential contributions of such adjudication toward the achievement of socio-economic justice. Part I ad-*

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*addresses two questions: first, why look to constitutional social welfare rights as a new solution when they have long existed?; second, why look to South Africa for guidance? Part II examines South Africa's relevant post-apartheid jurisprudence, focusing on the novel concept of "differentiated incorporation," the exportable process by which South Africa defended its adjudication against claims of the non-justiciability of socio-economic rights. Finally, Part III addresses the question of whether South African social rights provisions have served their goals.*

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**INTRODUCTION**

Advocates and scholars have long queried whether constitutional protection of socio-economic rights can advance the cause of social justice. Does inclusion of social welfare rights<sup>1</sup> in the text of a constitution assist a country in addressing the challenges of poverty and economic injustice? Can judicial enforcement of rights to housing, healthcare, education, and other welfare necessities advance substantive socio-economic equality in the manner that traditional rights adjudication has advanced the related goal of civil and political equality?<sup>2</sup> The purpose of this article is to explore whether constitutional protection and court adjudication of social welfare rights are viable tools to address social injustice and remedy persistent economic inequality.

In examining these issues, the first decade of adjudication of socio-economic rights by the Constitutional Court of South Africa provides unique and remarkable comparative law insights. South Africa's post-apartheid Constitution includes among its enumerated rights a host of protections in-

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<sup>1</sup> There is no fixed list of those rights properly defined as "socio-economic" rights. For purposes of this article, those rights include the set of rights in the South African Constitution that are traditionally and consistently identified as socio-economic rights by commentators, have been so identified by the South African Constitutional Court, or have as their evident purpose the improvement of an individual's social welfare: housing, healthcare, and education, among others. Similarly, I use the adjectives "social," "social welfare" and "socio-economic" to describe the same rights; I have avoided terms such as "red" rights, "second-generation" rights, and "positive" rights as less helpful descriptors for the same rights. The arguments presented in this article are not dependent on a particular collection of rights.

<sup>2</sup> By using the term "substantive socio-economic equality" (and related terms, such as "economic equality," "socio-economic injustice," or "substantive equality"), I am not referring to an imaginary, utopian perfect parity of means. Rather, I mean only to identify the aspiration of a country to relative equality on socio-economic terms, such that participation in society is unhindered by such factors. I presume that, at a minimum, inclusion of enforceable socio-economic rights presupposes a constitutional requirement for governmental action to address structural factors, both public and private, that contribute to endemic poverty. However, achievement of "equality" in this sense must call for more than mere equality of economic opportunity. Social rights go beyond merely negative rights; they require more than only the removal of formal, state-sponsored barriers to participation in economic life and its benefits.

tended to remedy the economic injustices of the past. The Court has dealt effectively with claims of the non-justiciability of social rights through a process of "differentiated incorporation," and has addressed specific social rights, most notably, housing and healthcare, in multiple cases. South Africa's affirmative jurisprudence of socio-economic rights enforceability is a novel and important contribution to the struggle against poverty—and an invaluable experiment into the courts' capacity to advance social justice.

But is the South African approach a model other nations can follow, and is it successful enough that other countries should adopt it? As this article discusses, the approach is adaptable to local conditions and thus potentially exportable to other nations, but the actual advancement of social welfare has been incomplete and irregular. The South African Constitutional Court has enforced socio-economic rights infrequently and in a less expansive manner than civil and political rights. There are reasonable justifications for this and historical analogies caution against immodest expectations, but there are also genuine reasons for disappointment. What does the slow pace of socio-economic advancement tell us about the value of constitutional protection of such rights in South Africa and elsewhere? This article will use the specific South African experience to evaluate the general capacity of constitutionally-enforced social welfare rights to advance socio-economic equality.

Part I addresses two preliminary questions: why examine constitutional social welfare rights as a potentially new solution when they have existed for many generations; and, why look primarily to South Africa for guidance? Part II summarizes and evaluates South Africa's relevant post-apartheid jurisprudence, focusing upon the novel concept of differentiated incorporation, the exportable process by which South Africa countered claims against the justiciability of socio-economic rights.<sup>3</sup> Finally, Part III applies the lessons of the preceding Parts to the question of whether the South African social rights provisions have served their goals. This assessment clarifies the reasonable expectations and potential contributions of constitutional social welfare rights in service of a nation's goal of remedying socio-economic injustice.

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<sup>3</sup> Background elements of this article are examined in greater detail in two prior works by the author: Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007) [hereinafter Christiansen, *Adjudicating Non-Justiciable Rights*] (introducing "differentiated incorporation"); and Eric C. Christiansen, *Exporting South Africa's Social Rights Jurisprudence*, 5 LOY. U. CHI. INT'L L. REV. 29, 41-43 (2007) [hereinafter Christiansen, *Exporting Social Rights*] (advocating the possibility of adoption by other countries).

## I. PROTECTING SOCIAL WELFARE RIGHTS IN SOUTH AFRICA: TWO PRELIMINARY QUESTIONS

In order to assess whether the South African social rights jurisprudence offers an effective transnational tool to advance social justice, it is first necessary to examine two questions: (1) why examine social welfare rights as a potentially new solution to the historic problem of socio-economic inequality?; and (2) why look primarily to South Africa for guidance? The answers to those questions are closely interrelated.

### A. *Why is Constitutional Protection of Social Welfare Rights a New Solution?*

Social welfare rights are included in the text of most national constitutions and their inclusion is not a recent phenomenon.<sup>4</sup> They appeared in Western European constitutions following World War II, in Eastern European Constitutions after the fall of the Berlin Wall, and in post-colonial constitutions in the years between and after those events.<sup>5</sup> But social welfare rights are infrequently enforced by courts. Indeed, constitutional law scholars have largely contended that social rights are non-justiciable.<sup>6</sup> Enforcement of such rights by courts, they have asserted, is either impossible or undesirable because of democratic legitimacy issues and judicial competency issues.<sup>7</sup>

The claimed legitimacy issues are related to the classic counter-

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<sup>4</sup> See Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. OF COMP. ECON. 103, 103-119 (2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=407260](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=407260) (surveying the inclusion of constitutional commitments to social rights in 68 countries); Eric C. Christiansen, *Survey of Socio-economic Rights in National Constitutions: Healthcare, Education, Social Security, Housing, Food and Water* (Dec. 2005) (unpublished manuscript, on file with author) [hereinafter Christiansen, *Survey of Socio-economic Rights*]; Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527-28 (1992); see also Wojciech Sadurski, *Post-communist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 LAW & CONTEMP. PROBS. 223 (2002).

<sup>5</sup> See HENRY J. STEINER, PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW POLITICS MORALS* 263-358 (3d ed. 2008).

<sup>6</sup> See Cécile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263, 264 (1998); Etienne Mureinik, *Beyond a Charter of Luxuries: Economic Rights in the Constitution*, 8 S. AFR. J. HUM. RTS. 464, 465 (1992); Dennis M. Davis, *The Case Against Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles*, 8 S. AFR. J. HUM. RTS. 475, 476-78 (1992); Mark Tushnet, *Social Welfare and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1895-96 (2003-2004).

<sup>7</sup> See Fabre, *supra* note 6, at 280.

majoritarian difficulty of judicial review.<sup>8</sup> How can decisions of an unelected branch of government overturn popular will as formulated by a democratically-elected legislative body? In the context of social rights adjudication, the traditional concerns about judicial review are exacerbated by the inherent policy-based and financial nature of the decisions the courts would have to make. A judgment that placed a positive duty upon or required significant funding from the state, rather than merely a cessation of government activity, intrudes upon more non-judicial concerns than just the single issue before the court. This is the basis for the flawed but common description of socio-economic rights as “positive” rights in contrast to merely “negative” civil and political rights.<sup>9</sup> Social rights are “positive” because they require affirmative actions and additional expenditures by the state, such as establishing and funding schools and providing teachers and materials for universal primary education. In contrast, “negative” rights merely prohibit certain government actions, such as state-sponsored discrimination in public schools. Only the latter sphere of “negative” rights are typically viewed as appropriate for a court to enforce.

Judicial competency issues focus on problems related to the viability of courts as fora and the appropriateness of adjudication as a means for determining social welfare entitlements. These alleged failings include procedural limitations, especially concerns about the suitability of any particular plaintiff to represent the general class of affected persons; informational problems, including the absence of the specialized, unbiased fact-finding available in a legislative setting; and remedy-related difficulties, particularly where the limited range of judicial remedies would be inadequate or politically inappropriate.<sup>10</sup>

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<sup>8</sup> The classic formulation of judicial review's counter-majoritarian difficulty is in ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2nd ed. 1986). The theory has also been expressly applied to socio-economic rights. See, e.g., Reynaud N. Daniels & Jason Brickhill, *The Counter-Majoritarian Difficulty and the South African Constitutional Court*, 25 PENN ST. INT'L L. REV. 371 (2006).

<sup>9</sup> This distinction has been largely, and correctly, rejected. See Fabre, *supra* note 6, at 270-75; STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1999); CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT NOW MORE THAN EVER* (2004); see also Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 48-71 (1992) (rejecting the negative-positive distinction because the general notion of rights connotes positive and negative duties equally).

<sup>10</sup> This organization draws upon Christiansen, *Adjudicating Non-Justiciable Rights*, *supra* note 3, at 349-53.

Underlying these arguments against justiciability was an even more insurmountable issue: social rights had never been adjudicated in an affirmative and systematic way by a national court.<sup>11</sup> Historically, the most persuasive argument against comprehensive social rights adjudication was its radical novelty. The numerous justifications for opposition to judicial enforcement were routinely proposed without a single significant counterexample as evidence to refute them.<sup>12</sup> Since there was no viable example of adjudication, critics were able to argue that adoption of such inherently unenforceable rights would warp the constitutional separation of powers, weaken respect for the rule of law, bankrupt the nation, or lead to some other disaster.<sup>13</sup> Of course, such arguments ignored the harm caused to nations, their people, their government's legitimacy, and the rule of law by unaddressed socio-economic injustice.

As a consequence, individual nations traditionally resolve the debate about constitutional socio-economic rights through one of only three constitutional options:<sup>14</sup> 1) exclusion from the constitutional text (rejecting such rights altogether on the basis of non-justiciability arguments);<sup>15</sup> 2) inclusion as a special category of unenforceable rights (typically in countries with little or no genuine judicial review);<sup>16</sup> or 3) inclusion as mere "directive principles" for policy-making (including such rights only as judicially unenforceable policy statements).<sup>17</sup> Even where such rights have been expressly included in constitutional text, these rights have been enforced to a very

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<sup>11</sup> STEINER, *supra* note 5, at 313-58 (considering arguments for and against adjudication of economic and social rights and looking at differences in how such rights are enforced in India, South Africa, the United States, and in European countries).

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

<sup>13</sup> See, e.g., Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS? POST-COMMUNIST APPLICATION 225 (András Sajó ed., 1996).

<sup>14</sup> Christiansen, *Survey of Socio-economic Rights*, *supra* note 4. See also Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1897 (2003-2004) (presenting three different ways of recognizing socio-economic rights by "enumerating them but making them nonjusticiable, making them justiciable but allowing the courts to find a constitutional violation only if the legislature has quite dramatically departed from what the constitution requires, and by making them enforceable to the same degree that traditional civil liberties and civil rights are").

<sup>15</sup> See, e.g., Sunstein, *supra* note 13, at 225.

<sup>16</sup> See Tushnet, *supra* note 14, at 1898-1902.

<sup>17</sup> See, e.g., INDIA CONST. pt. IV, 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.").



limited degree.<sup>18</sup> Hence, constitutional enforcement of social rights is a new tool to combat social injustice because it is a tool that has previously been unavailable to courts or available but unused.

South Africa's post-apartheid Constitution introduced a fourth approach to the problem of constitutional recognition of socio-economic rights. South Africa, evidently more concerned with the need to address the radical inequality of the apartheid period than about theoretical harms to the rule of law, adopted extensive social welfare provisions in its Constitution, determined that these rights are enforceable by courts, and adjudicated claims based on the Constitution's social welfare rights. It is only as a consequence of this South African constitutional adjudication that the long-missing counter-example is now available to refute the dire predictions of social rights opponents. South Africa, alone among modern constitutional democracies, has used the tool of constitutional social rights in a manner that permits evaluation of the capacity of courts to advance socio-economic justice through such adjudication.

### B. *Why South Africa?*

South Africa is uniquely situated to provide insight and permit assessment of the possibility of courts advancing social justice. Social welfare provisions were enumerated in the 1994 Interim Constitution and expanded

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<sup>18</sup> For example, in the United States, although social welfare rights are enshrined in many state constitutions, they are not generally enforced. See Sarah Ramsey & Daan Braveman, "Let Them Starve": Government's Obligation to Children in Poverty, 68 TEMP. L. REV. 1607, 1628 (1995) (discussing the state courts' reliance on highly deferential federal standards in interpreting distinctive state constitutional welfare clauses); Helen Hershkoff, *Rights and Freedoms under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631, 640 (1997) (finding that although the New York courts will occasionally review questions of exclusion, it takes a "hands-off approach to questions of adequacy, on the view that these involve choices best left to the electoral process"). Similarly, the Irish Constitution enumerates a list of social welfare rights, but exempts them from judicial enforcement. IR. CONST., 1937, art. 45, § 1 ("The principles of social policy set forth in this Article are intended for the general guidance.... The application of those principles . . . shall not be cognisable by any Court under any of the provisions of this Constitution."). The Indian Constitution includes a list of social welfare rights under the heading "Directive Principles of State Policy," but also makes those rights judicially unenforceable. See INDIA CONST. pt. IV, art. 37. However, India is a rare case where the Supreme Court has made some advances in terms of socio-economic rights, even though they are not explicitly enforceable rights under the Indian Constitution. See, e.g., *Olga Tellis v. Bombay Mun. Corp.*, (1985) 2 S.C.R. Supl. 51 (holding that the right to life and liberty included the directive principle right to livelihood and thereby requiring that pavement dwellers be provided with alternative accommodation before eviction).

in the 1997 Constitution.<sup>19</sup> In the *In Re: Certification* case and other early cases, the Court directly addressed traditional non-justiciability arguments and ruled that social rights were enforceable.<sup>20</sup> Since it began hearing cases in 1995,<sup>21</sup> the courts of South Africa have heard—and affirmatively ruled on—numerous challenges to laws and governmental policies and actions that allegedly violated the social welfare provisions of the Constitution.

South Africa is the first nation that has adjudicated a sufficient number of cases to evidence a comprehensive jurisprudence. The judiciary has used traditional court procedures within the structure of its regular judicial system to enforce socio-economic rights through readily recognizable processes. The current South African jurisprudence is a direct refutation of the traditional claims of dire consequences from judicial enforcement of socio-economic protections. Indeed, the Court has been criticized far more for the excessive restraint it has shown than for judicial over-reaching.<sup>22</sup> Of course,

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<sup>19</sup> Conflict between the ruling white minority government and the ANC resulted in a two-stage constitutional drafting process with a newly-formed Constitutional Court enforcing the parties' negotiated agreement. The first stage involved drafting a preliminary Constitution (the 1994 Interim Constitution), holding fully democratic elections and setting up a new Parliament that would choose a new president. The second stage gave the task of crafting the final constitution (the 1997 Constitution) to the newly elected Parliament and Senate in their role as the Constitutional Assembly. Two safeguards linked the two stages of the process: a set of thirty-four inviolable constitutional principles (known as the Thirty-four Principles) established by the initial negotiating parties to constrict the subsequent, final constitution and a constitutional court appointed under the Interim Constitution with the task of certifying that the final Constitution did not violate any of the Thirty-four Principles. ALLISTER SPARKS, *TOMORROW IS ANOTHER COUNTRY: THE INSIDE STORY OF SOUTH AFRICA'S ROAD TO CHANGE* 129 (1995); PATTI WALDMEIR, *ANATOMY OF A MIRACLE 194-95* (1997); Albie Sachs, *South Africa's Unconstitutional Constitution: The Transition From Power To Lawful Power*, 41 ST. LOUIS U. L.J. 1249, 1255 (1997); Jeremy Sarkin, *Innovations in the Interim and 1996 South African Constitutions*, 60 THE REV. 57 (June 1998).

<sup>20</sup> Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) paras. 1-19, 76-78 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/3626.PDF> [hereinafter *In re: Certification of the South African Constitution*]. This and all Constitutional Court decisions are available at the official website of the Constitutional Court, <http://www.constitutionalcourt.org.za>.

<sup>21</sup> The first case heard by the Court was on February 15, 1995. State v. T Makwanyane and M Mchunu 1995 (6) BCLR 665 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2353.PDF> (declaring the death penalty to be inconsistent with the Constitution)

<sup>22</sup> For criticism of the South African Constitutional Court's socio-economic rights jurisprudence, see David Bilchitz, *Towards a Reasonable Approach to the Minimum Core: Laying the Foundations for Future Socioeconomic Rights Jurisprudence*, 19 S. AFR. J. HUM. RTS. 1

active enforcement of rights is different from successful judicial advancement of social justice, but it is certainly a threshold requirement.

### 1. Enumeration of Rights to Social Welfare

As with everything in the South African Constitution-making process, inclusion of social welfare rights must be understood in historical context: generally, the end of apartheid, and, specifically, the constitutional negotiations in the early 1990s between the African National Congress ("ANC") and the white-minority ruling government.

The impetus, if not necessity, to include social welfare rights in South Africa's first democratic constitution was a result of the role socio-economic oppression played within the larger context of apartheid's system of political and social subjugation.<sup>23</sup> As ANC negotiator Kader Asmal stated in the debates about the constitutional text, "[t]he struggle for liberation in South Africa . . . has always been a struggle for freedom from hunger, poverty, landlessness, and homelessness. Our Bill of Rights must reflect . . . the multidimensional and all-encompassing nature of the struggle for liberation."<sup>24</sup>

Starting with the Freedom Charter, the original anti-apartheid manifesto crafted in 1955, social welfare was inextricably linked to the goal of post-apartheid liberation.<sup>25</sup> The early constitutional proposals and public state-

(2003) (criticizing the jurisprudential foundations of the Constitutional Court in socio-economic rights cases); Theunis Roux, *Understanding Grootboom - A Response to Cass R. Sunstein*, 12 CONST. F. 41 (2002) (arguing that Grootboom does not adequately explain the extent to which the government must prioritize the needs of the poor and finding that the Court's remedy was deficient); Dennis Davis, *Socio-Economic Rights in South Africa: The Record After Ten Years*, 2 N.Z. J. OF PUB. & INT'L L. 47 (2004) (the author, a Cape High Court judge, disapproving of the Court's judgments for excessive deference to government). *But see* Mark S. Kende, *The South African Constitutional Court's Construction of Socio-economic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617, 624 (2004) (finding many of the criticisms of the Court to be unwarranted).

<sup>23</sup> Apartheid dictated a policy of separation with only the pretense of equality, theoretically guided by the development needs of the "inferior races" but in fact effecting a tremendous socio-economic advantage to whites. *See* FRANK WELSH, *A HISTORY OF SOUTH AFRICA* 414-99 (2000).

<sup>24</sup> Republic of South Africa, *DEBATES OF THE CONSTITUTIONAL ASSEMBLY*: 24 January to 20 February 1995, at 122-23 (1994-96).

<sup>25</sup> On socio-economic topics, the Freedom Charter declared:

Education shall be free, compulsory, universal and equal for all children . . . .  
All people shall have the right to . . . be decently housed, and to bring up their families in comfort and security . . . [N]o-one shall go hungry; [and] Free medical care and hospitalisation shall be provided for all, with special care for moth-

ments reflected the interrelated nature of political equality and social welfare. By the time the formal negotiations began regarding the provisions of the post-apartheid constitution, the goal to include socio-economic rights was a consistent ANC position.<sup>26</sup> Opposition to the inclusion of social welfare rights in the formal constitutional drafting process came from the apartheid government represented by the National Party. For the National Party, inclusion of social welfare rights threatened the system of white and Afrikaner socio-economic privilege that existed under apartheid.<sup>27</sup>

Because of the strength of the ruling government's bargaining position, only very limited social welfare rights, such as basic education and minimum welfare for children, were included in the 1994 Interim Constitution.<sup>28</sup>

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ers and young children . . .

Freedom Charter, Congress of the People, June 26, 1955, African National Congress Historical Document Archive, <http://www.anc.org.za/ancdocs/history/charter.html> (last visited Jan. 27, 2009).

<sup>26</sup> In 1992, the ANC produced *Ready to Govern*, which identified the ANC's clear intention to include affirmative provisions related to socio-economic rights:

The Bill of Rights will affirm the right of all persons to have access to basic educational, health and welfare services. It will establish principles and mechanisms to ensure that there is an enforceable and expanding minimum floor of entitlements for all, in the areas of education, health and welfare. It will commit the courts to take into account the need to reduce malnutrition, unemployment and homelessness when making any decisions . . . . Special agencies linked to Parliament and the courts should be set up so as to ensure that national, regional and local authorities apply appropriate shares of their budgets to achieving these rights, taking into account the problems of limited resources and affordability.

African National Congress, *Ready to Govern: ANC policy guidelines for a democratic South Africa* adopted at the National Conference (1992), <http://www.anc.org.za/ancdocs/history/readyto.html> (last visited Jan. 18, 2009).

<sup>27</sup> See WELSH, *supra* note 23, at 463-99 (describing how the system of apartheid preserved socio-economic privilege for white South Africans, especially Afrikaners); see also LOURENS DU PLESSIS & HUGH CORDER, UNDERSTANDING SOUTH AFRICA'S TRANSITIONAL BILL OF RIGHTS 32 (1994) (stating that the ruling white minority party feared dramatic change in the economic status quo).

<sup>28</sup> S. AFR. (INTERIM) CONST. 1993, ch.3:

§ 32 Education

Every person shall have the right-

- (a) to basic education and to equal access to educational institutions;
- (b) to instruction in the language of his or her choice where this is reasonably practicable; and
- (c) to establish, where practicable, educational institutions based on a common culture, language or religion, provided that there shall be no discrimination on the ground of race.

However, when the ANC achieved political dominance through the popular elections in April 1994, its representatives in the Constitutional Assembly were able to include a panoply of social welfare protections in the draft of the final Constitution. The final Constitution,<sup>29</sup> passed by the requisite majority of the Assembly and signed by President Nelson Mandela on December 10, 1996, included extensive socio-economic rights.<sup>30</sup> The Constitution

§ 30 Children

(1) Every child shall have the right-

(a) to a name and nationality as from birth;

(b) to parental care;

(c) to security, basic nutrition and basic health and social services;

(d) not to be subject to neglect or abuse; and

(e) not to be subject to exploitative labour practices nor to be required or permitted to perform work which is hazardous or harmful to his or her education, health or well-being.

(2) Every child who is in detention shall, in addition to the rights which he or she has in terms of section 25, have the right to be detained under conditions and to be treated in a manner that takes account of his or her age.

(3) For the purpose of this section a child shall mean a person under the age of 18 years and in all matters concerning such child his or her best interest shall be paramount.

<sup>29</sup> At the time of the constitutional drafting process in South Africa the two versions of the constitution were known at the Interim Constitution (the constitution that ended the party-based negotiations, ended apartheid, and allowed democratic elections in South Africa in 1994) and the Final Constitution (based on and subject to limits in the Interim Constitution but formally drafted by the Constitutional Assembly in the two years following the April 1994 elections). See *In re: Certification of the South African Constitution*, *supra* note 20, paras. 1-21.

<sup>30</sup> S. AFR. CONST. 1996, ch. 2. The core social rights included in the South African Bill of Rights include:

§ 26 Housing

(1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

§ 27 Health care, food, water and social security

(1) Everyone has the right to have access to—

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.

§ 29 Education

eventually went into effect on February 4, 1997.<sup>31</sup>

However, before the final Constitution could come into force, all of its provisions had to be certified by the Constitutional Court as compliant with the 1993 negotiated agreements.<sup>32</sup> Inclusion of social rights was contested during this process. Opponents argued that such rights were inherently non-justiciable, were not “universally recognized fundamental rights” (as required by the negotiated agreement), and that inclusion of such rights violated the constitutionally-mandated separation of powers.<sup>33</sup> All of these arguments were rejected in the 1996 Constitutional Court decision *In Re:*

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(1) Everyone has the right—

- (a) to a basic education, including adult basic education; and
- (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

Additional socio-economic rights can be found in the South African Constitution in ch. 2, § 23 (labor relations), § 25 (property rights and land reform), § 28 (children’s rights to, *inter alia*, “basic nutrition, shelter, basic health care services and social services”), § 35 (detainee’s rights to, *inter alia*, “adequate accommodation, nutrition, reading material and medical treatment”).

<sup>31</sup> See Const. Ct. of S. Afr., *The Constitution: The Certification Process*,

<http://www.constitutionalcourt.org.za/site/theconstitution/thecertificationprocess.htm> (last visited May 15, 2009); *In re: Certification of the South African Constitution*, *supra* note 20, at paras. 6-14.

<sup>32</sup> The proposed final Constitution had to be certified by the Court to ensure that none of its provisions conflicted with the Thirty-four Principles in the Interim Constitution. See S. AFR. (Interim) CONST. 1993, sched. 4. The initial review by the Constitutional Court found that “we ultimately come to the conclusion that the [proposed text] cannot be certified as it stands because there are several respects in which there has been non-compliance with the [Thirty-four Principles],” but also noted that, “in general and in respect of the overwhelming majority of its provisions, the [Constitutional Assembly] has attained [its] goal.” *In re Certification of the South African Constitution*, *supra* note 20, at para. 31. Certification of the subsequently amended text was granted by the full court in *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the amended text of the Const. of the Rep. of S. Afr.* 1996, 1997 (2) SA 97 (CC), at para. 205 (S. Afr.).

<sup>33</sup> The opposition groups included the South African Institute for Race Relations (an organization supporting ‘economic liberalism’), the Free Market Foundation, and the Gauteng Association of Chambers of Commerce and Industry. See *In re: Certification of the South African Constitution*, *supra* note 20, at paras. 76-78; Sandra Liebenberg, *South Africa’s Evolving Jurisprudence on Socio-Economic Rights: An Effective Tool in Challenging Poverty?*, 6 L. DEMOCRACY & DEV. 159, 160 n.11 (2002), available at <http://www.communitylawcentre.org.za/Socio-Economic-Rights/research-project/2002-vol-6-law-democracy-and-development/liebenberg-12-march.pdf/>. For a report of some of the Court’s discussion of the certification question as it relates to socio-economic rights, see THE POST-APARTHEID CONSTITUTIONS: PERSPECTIVES ON SOUTH AFRICA’S BASIC LAW 408-09 (Penelope Andrews & Stephen Ellmann eds., 2001).

*Certification of the South African Constitution*.<sup>34</sup> As a result, the core social welfare rights of access to adequate housing, healthcare, food, water, social security, and education were expressly included in the final, certified text of the South African Constitution.<sup>35</sup>

The right of access to adequate housing presents the typical textual formulation of such rights; the declaration of the right is accompanied by textual limitations related to “available resources” and “progressive realization.” Section 26 provides that: “(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.”<sup>36</sup>

The issue of inclusion was settled affirmatively in the final proposed text of the Constitution and in the *In Re Certification* decision, and the issue of justiciability was addressed in the Court's earliest cases. What remained for the Court was to craft a coherent jurisprudence of social welfare rights in actual cases.

## 2. Social Rights Case Law

The Court has addressed the Constitution's social rights provisions in numerous cases, but the core of its substantive jurisprudence has typically been identified from three fundamental cases: *Soobramoney*, *Grootboom*, and *Treatment Action Campaign (“TAC”)*.<sup>37</sup> These initial cases established how the Court will evaluate constitutional claims under socio-economic rights, with more recent cases expanding and clarifying the full capacity of courts as remedial bodies in the area of socio-economic injustice.<sup>38</sup>

In *Soobramoney*, the Constitutional Court faced a challenge to an estab-

<sup>34</sup> *In re: Certification of the South African Constitution*, *supra* note 20, at paras. 77-78.

<sup>35</sup> *Id.*

<sup>36</sup> S. AFR. CONST. 1996, ch. 2, § 26.

<sup>37</sup> These core cases are discussed *infra*. Other important cases include *President of the Republic of South Africa & Others v. Modderklip Boerdery (Pty) Ltd & Others* 2004 CCT 20/04 (right to housing); *Minister of Pub. Works & Others v. Kyalami Ridge Envtl. Ass'n & Others* 2001 (3) SA 1151 (CC) (S. Afr.) (right to housing, right to property, rights of ownership), available at <http://www.saflii.org/za/cases/ZACC/2001/19.pdf>; and *Khosa & Others v. Minister of Soc. Dev. & Others* 2004 (6) SA 505 (CC) (S. Afr.) (right of access to social security), available at <http://www.constitutionalcourt.org.za/Archimages/1344.PDF>.

<sup>38</sup> *Occupiers of 51 Olivia Road Berea Twp. and 197 Main St. Johannesburg v. City of Johannesburg & Others* 2008 (3) SA 208 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/11581.02.08.PDF> [hereinafter *Berea Township*].

lished hospital policy prioritizing access to dialysis treatments.<sup>39</sup> A terminally ill patient excluded by the policy from life-sustaining treatment sued under Section 27, the right of access to healthcare, and other provisions. The Court affirmed the judicial enforceability of social rights but held that neither the right of access to healthcare nor the right to emergency medical treatment required the Court to overturn the otherwise reasonable medical decisions of doctors and administrators faced with limited financial resources.<sup>40</sup>

The *Grootboom* case addressed the right to housing for squatters in an informal settlement outside Capetown.<sup>41</sup> Ms. Irene Grootboom, along with 510 children and 389 other adults, made a claim under Section 26, the right of access to adequate housing, and Section 28, the rights of children, seeking provision of adequate housing for adults and children pending permanent accommodation.<sup>42</sup> The Court concluded that governmental housing programs violated the Constitution by failing to develop and implement a “comprehensive and coordinated programme” to advance a constitutional right; particularly programs that failed to address the housing needs of people “with no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations.”<sup>43</sup> The order issued by the Court required the government to remedy the program's failings, and assigned the Human Rights Commission, an independent national body, to monitor and report on the status of the changes.<sup>44</sup>

In the *TAC* case, the Court declared unconstitutional a government program that restricted distribution of medication that dramatically decreased the likelihood of mother-to-child transmission of Human Immunodeficiency Virus (“HIV”).<sup>45</sup> The Court ordered the government to “implement within its available resources a comprehensive and coordinated programme” to ad-

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<sup>39</sup> *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/1617.PDF> [hereinafter *Soobramoney*].

<sup>40</sup> *Id.* at para. 36.

<sup>41</sup> *Gov't of the Republic of S. Afr. v. Grootboom & Others*, 2001 (1) SA 46 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2798.PDF> [hereinafter *Grootboom*].

<sup>42</sup> *Id.* at paras. 7-13.

<sup>43</sup> *Id.* at para. 99.

<sup>44</sup> *Id.* at paras. 97-99.

<sup>45</sup> *Minister of Health v. Treatment Action Campaign & Others* (No. 2), 2002 (5) SA 721 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2378.PDF> [hereinafter *TAC*].



dress HIV transmission issues.<sup>46</sup> It also ruled that the government must: devise a program that includes reasonable measures for counseling and testing pregnant women for HIV, immediately remove the restrictions that prevented the medication from being distributed widely, and “permit and facilitate” the use of such medication for the purpose of reducing the transmission of HIV.<sup>47</sup>

In addition to these core judgments, the Constitutional Court very recently decided *Occupiers of 51 Olivia Road Berea Township v. City of Johannesburg*, a case that may have even more practical effect.<sup>48</sup> The plaintiffs sought to halt otherwise legal government evictions of people residing in unsafe buildings in Johannesburg. The Court held that the comprehensive program requirement announced in *Grootboom* and *TAC* must include a meaningful process of engagement with the affected community.<sup>49</sup> *Berea Township* further limited the government's capacity to evict legal and illegal residents unless a “good faith” negotiation and consultation process had occurred and allowance had been made for the homelessness that could result from the action.<sup>50</sup>

In general, these and other social rights cases<sup>51</sup> affirm that, although the “obligations imposed on the state . . . are dependent upon the resources available for such purposes,”<sup>52</sup> the Court will require creation of a broad policy-based program with particular attention paid to those who are most vul-

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<sup>46</sup> *Id.* at para. 135.

<sup>47</sup> *Id.* at para. 135.

<sup>48</sup> *Occupiers of 51 Olivia Road Berea Township and 197 Main Street Johannesburg v. City of Johannesburg & Others* (No. CCT 24/07) (2008) ZACC 1 (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/11581.02.08.PDF> [hereinafter *Berea Township*].

<sup>49</sup> *Id.* at para. 16

<sup>50</sup> *Id.* at paras. 20-22.

<sup>51</sup> See, e.g., *Jaftha v. Schoeman* 2004 (2) SA 140 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/Archimages/2336.PDF> (concluding a lack of judicial oversight for a debt-related forced home sale was an unconstitutional violation of Section 26); *Khosa v. Minister of Soc. Dev.* 2004 (6) SA 505 (CC) (S. Afr.) (finding that denial of social welfare benefits to non-citizen permanent residents was unreasonable and violated the rights to both equality and social security), available at <http://www.constitutionalcourt.org.za/Archimages/1344.PDF>. For a summary discussion of the most judgments (including lower court judgments) related to socio-economic rights, see The Socio-Economic Rights Project of the Community Law Centre's Case Reviews, <http://www.communitylawcentre.org.za/Projects/Socio-Economic-Rights/case-reviews-1/south-african-cases>.

<sup>52</sup> *Soobramoney*, *supra* note 39, at para. 11 (Ngcobo dissent).

nerable.<sup>53</sup> The Court will also require implementation that includes “all reasonable steps necessary to initiate and sustain” a successful program to advance the asserted right,<sup>54</sup> including “meaningful engagement” with those whose social welfare rights are most impacted.<sup>55</sup>

### 3. Court-Imposed Limits

However, this portrayal of the Court’s jurisprudence tells only one part of the story. In addition to the relatively affirmative elements of the jurisprudence described above, there are also a host of self-imposed limits in the Court’s rulings. The most obvious examples are the Court’s avoidance of individual remedies, its unwillingness to recognize unqualified textual rights, and its rejection of a “minimum core” standard for social welfare entitlements.

The Court has granted an individual remedy in just a single, rather atypical case,<sup>56</sup> and has otherwise refrained from issuing orders directly benefiting the parties bringing claims. In the *Njongi* case, the Court addressed indefensible bureaucratic action against Ms. Deliwe Muriel Njongi, a destitute disabled woman who lost her only source of income when the Department of Welfare for the Eastern Cape denied continuation of her disability grant, apparently at random and without notice.<sup>57</sup> In its ruling, the Court rejected the Department’s statute of limitations defense because the state’s decision to claim the defense failed to take into account Ms. Njongi’s poverty and other circumstances.<sup>58</sup> *Njongi* is an exceptional case, however, as is evident in the Court’s use of particularly strong language to describe the state action as “grossly insulting,” “absurd,” and “devoid of all humanity.”<sup>59</sup>

Far more typical of the Court’s remedies is *Grootboom*, where the Court declared the Western Cape’s housing program unconstitutional but issued an order that brought no immediate or direct relief to Irene Grootboom or the other plaintiffs.<sup>60</sup> Typically, the Court has focused on dissatisfaction with

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<sup>53</sup> *Grootboom*, *supra* note 41, at para. 67.

<sup>54</sup> *Grootboom*, *supra* note 41, at para. 67.

<sup>55</sup> *Berea Township*, *supra* note 48, at para. 18.

<sup>56</sup> *Njongi v. Member of the Executive Council, Department of Welfare, Eastern Cape*, (No. CCT 37/07) (2008) ZACC 4 (S. Afr.), available at [www.constitutionalcourt.org.za/Archimages/11953.PDF](http://www.constitutionalcourt.org.za/Archimages/11953.PDF) [hereinafter *Njongi*].

<sup>57</sup> *Id.* at para. 3-27.

<sup>58</sup> *Id.* at para. 80-92.

<sup>59</sup> *Id.* at para. 85-90.

<sup>60</sup> See *Grootboom*, *supra* note 41, at para. 99. See Kameshni Pillay, *Implementing Grootboom: Supervision Needed*, 3 ESR REV. 11 (2002), available at <http://www.escri>

governmental programs or governmental action; placing the burden upon the government to improve its programs, generally without reference to the parties who advanced the claims to the Court. The Court's remedial orders essentially tell the government to do better, rather than ensuring any immediate improvement for the complainant.

Additionally, the Court has ignored the textual distinctiveness of the unlimited rights in the Constitution; rights without an internal limitations clause related to "progressive realization" and "available resources."<sup>61</sup> For example, the Court has treated the unqualified textual rights to minimal social services for children as if they granted no greater protections than other social welfare provisions.<sup>62</sup> Similarly, despite the use of ensured minimum social welfare entitlements in international law, the Court has rejected the adoption of such "minimum core" standards.<sup>63</sup>

These judicially-imposed limits have been the basis for some of the strong criticism of the Court's jurisprudence.<sup>64</sup> The result is that even without clear constitutional guidance, the Court at present has chosen a somewhat cautious middle position for its jurisprudence, encompassing legislative deference, a reasonableness standard, and rejection of any form of unrestricted enforcement. While such jurisprudence is far more defensible against the arguments of those opposed to social rights enforcement, it is notably less satisfying to those who expected enforcement of social welfare

net.org/usr\_doc/Kameshni\_Pillay\_-\_Implementing\_Grootboom.doc; see also Lucie White, *African Lawyers Harness Human Rights to Face Down Global Poverty*, 60 ME. L. REV. 165, 170-71 (2008) (describing Ms. Grootboom's post-trial frustration).

<sup>61</sup> The internal limitations clause (so-called to distinguish it from the Chapter 36 Limitations Clause, which applies to all rights in the Bill of Rights) is present in nearly all of the social welfare rights in the Constitution. For example, in the provisions regarding housing, it states: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." S. AFR. CONST. 1996, ch. 2, § 26(2).

<sup>62</sup> *Grootboom*, *supra* note 41, at para. 74.

<sup>63</sup> Minimum core analysis, used by the United Nations International Committee on Economic, Social, and Cultural Rights ("ICESCR"), in its non-binding general comments and concluding observations on nation reports under the ICESCR, attempts to "ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" by state parties to the ICESCR. U.N. Off. of the High Comm'r for Hum. Rts., Comm. on Econ., Soc., and Cultural Rights, General Comment 3: The Nature of States Parties Obligations, § 10, U.N. Doc. E/1991/23 (Dec. 14, 1990). See Sandra Liebenberg, *The Interpretation of Socio-Economic Rights*, in 2 CONSTITUTIONAL LAW OF SOUTH AFRICA §33.2(a), n.3 at 33-3, §33.5(e) at 33-22 (Matthew Chaskalson et al. eds., 2d ed. 2004) (providing a discussion about the Court's rejection of minimum core obligations analysis and a review of the critiques of that position).

<sup>64</sup> These self-imposed limits are also evidence of the process of differentiated incorporation as discussed in Part II, *infra*. See Davis, *supra* note 22.

rights to dramatically advance social justice in post-apartheid South Africa.

## II. EXPORTING THE SOUTH AFRICAN SOCIAL RIGHTS MODEL

An obvious pre-condition for constitutional enforcement of social welfare rights was a judicial response to the varied and dominant non-justiciability arguments. The arguments that constitutional protection of socio-economic rights would be harmful to a nation had to be confronted, assessed, and addressed. Because of the unique approach of the South African Constitutional Court, South Africa not only justified its own affirmative jurisprudence but it also created a model for other nations wishing to judicially enforce social rights. Because of South Africa, an additional viable option is available for such nations other than exclusion of such rights, unenforceable inclusion, or inclusion as mere directive principles.<sup>65</sup> South Africa offers a fourth alternative: inclusion with enforceability through differentiated incorporation.

### A. *The Question of Exportability*

The South African social rights jurisprudence can be offered up as a model for other countries to adopt or emulate only if it is “exportable,” that is, if it is capable of application outside the particular milieu of South Africa. This is an important issue because the inclusion of socio-economic protections in the Constitution was a result of the unique history of South Africa. For most South Africans, an end to apartheid required an end to the radical economic disparity of the past; political equality was both an end in itself and a means to equality of access, advantage, and opportunity.<sup>66</sup> To the extent the radical socio-economic inequality of apartheid resulted in inclusion of enumerated social rights in the final South African Constitution, it could be argued that such rights cannot be effectively exported to countries with a different history.

It is true that historical need and popular expectations applied substantial pressure on the drafters of the Constitution. However, that is the nature of constitutional drafting processes generally, not just in South Africa. There is no reason to assume similar pressures for improved socio-economic

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<sup>65</sup> See discussion *supra* this article, at 5, text accompanying n. 14-17.

<sup>66</sup> 3 DEBATES OF THE CONSTITUTIONAL ASSEMBLY, Rep. of S. Afr., 122-23 (1996) (ANC member Kader Asmal said, “The struggle for liberation in South Africa was not only a struggle for the right to vote, to move, to marry, or to love. It has always been a struggle for freedom from hunger, poverty, landlessness, and homelessness.”); *Soobramoney*, *supra* note 39, at para. 8.

conditions will not be, or have not been, frequent motivations for political change through constitutional processes in many countries. But there is every reason to believe that constitutional drafting procedures which result in enumerated and ostensibly enforceable social rights are motivated by very similar popular, political, or moral concerns.<sup>67</sup> Similar constitutional commitments may grow out of distinctive histories.

As described in detail below, the unique but adaptable manner in which the South African Constitutional Court's social rights jurisprudence accommodated classic non-justiciability arguments gives rise to an exportable model of social rights enforcement.

### *B. Differentiated Incorporation*

In order to craft its socio-economic rights jurisprudence, the South African Constitutional Court needed to determine how a judicial body could best interpret and enforce such rights. This assessment required the Court to confront the long-standing arguments against the justiciability of socio-economic rights. The Court implicitly and explicitly evaluated the various theoretical arguments against social rights adjudication, disregarded the concerns that were inapt under its unique Constitution and history, and then crafted a jurisprudence that accounted for and incorporated the surviving criticisms in its enforcement.<sup>68</sup>

This model is "differentiated incorporation" because it differentiates between valid and invalid critiques of social rights adjudication and then incorporates the legitimate concerns into a jurisprudence that differs from political rights jurisprudence only as necessary to accommodate the surviving concerns. The result is an exportable model for social rights adjudication: a country-specific jurisprudence that accommodates valid justiciability concerns through domestically-appropriate processes.<sup>69</sup> Each step of this process must be tailored to the particular country by its courts. While a similar collection of theoretical opposing arguments will generally be considered at the start of the differentiation stage, there will inevitably be concerns or emphases unique to the adopting country, derivative of its particular history or legal culture. The judiciary must examine each non-justiciability argument in relation to its own constitutional text and culture. Issues that will

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<sup>67</sup> Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473, 1478 (2008).

<sup>68</sup> The concept of differentiated incorporation was first presented by the author in another article; see Christiansen, *Adjudicating Non-Justiciable Rights*, *supra* note 3, at 377-84.

<sup>69</sup> Christiansen, *Exporting Social Rights*, *supra* note 3, at 41-43.

impact this analysis include the constitution's text (especially the claimed social rights provisions), the approach to rights adjudication generally, separation of power issues, federalism issues (where applicable), legal culture, the capability and credibility of the judiciary, procedural issues that impact the courts' capacity to solicit information, and the breadth and flexibility of the courts' remedial powers.

This discussion of a foreign nation's adoption of differentiated incorporation focuses on the South African model for determination of an appropriate jurisprudence, rather than on South African textual rights and case law. The model is exportable because the courts of other nations can explicitly follow the process implicit in the South African Constitutional Court's approach. A different court interpreting a new constitution or a newly-amended constitution that includes social welfare rights as enforceable provisions can evaluate the range of historical arguments against adjudication of socio-economic rights, discard those arguments that are invalid or inapt in that country's particular constitutional culture and then craft a social rights jurisprudence that expressly addresses the remaining, legitimate concerns.<sup>70</sup>

### III. CONSTITUTIONAL RIGHTS ENFORCEMENT AS A TOOL FOR SOCIAL JUSTICE

While the process of differentiated incorporation may allow courts to enforce socio-economic rights in a useful and appropriate manner, it does not speak to the capacity of such adjudication to rectify social injustice. Have the South African courts contributed to positive social change? A review of changing socio-economic conditions in South Africa highlights the need to ask a nuanced question about judicial contributions, thus ensuring expectations are modest and consistent with the role of judges. The South African experience will then help identify reasonable expectations of courts generally when they adjudicate social welfare rights. The result is an initial list of ways in which constitutional adjudication may be used to advance social justice.

#### A. *The Constitutional Meaning of Persistent Socio-economic Inequality*

Any evaluation of the aptitude of South African courts to advance social justice must account for the current socio-economic situation in the country. South Africa remains troubled by substantial poverty and inadequate social welfare protection. Inclusion of constitutional rights related to housing,

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<sup>70</sup> See *id.*

healthcare, education, and other social necessities has not resulted in a nation that satisfies all of its citizens' social welfare needs. The disparity between protecting socio-economic rights and adequately providing social welfare must be explored. Is the gulf between the Constitution's promise and the people's needs remedied or lessened by the enforcement of enumerated social welfare rights?

### 1. The Necessity of Assessment

Why is it necessary to closely evaluate the capacity of constitutional rights enforcement to advance social justice? Is it not enough that it might work? In the absence of other new and promising solutions to the problem of persistent economic inequality, should advocates not pursue all reasonable means? Although there is some merit to that argument, two relevant pieces of conventional wisdom seem self-evidently true and argue for a careful analysis. First, court enforcement of social welfare rights cannot be sufficient alone to accomplish substantial realization of a socially just society. Second, prioritizing adjudication to the detriment of political action and popular organizing works against the ultimate goal of social transformation. These insights counsel for a cautious, or at least, informed, approach to a judicially-focused strategy for social change.

#### a. Institutional insufficiency

The first point of conventional wisdom highlights the institutional weaknesses of the judiciary. At a practical level the courts need the bureaucracy of the state to implement any significant change. At a theoretical level, a court's role as interpreter of the laws cannot possibly include sufficient power to effectuate significant social change in the absence of, or in opposition to, the other branches of government.<sup>71</sup> Nearly all rights-based court orders are effectuated through the political branches; purely pragmatic reasons require such a system. Establishing effective bureaucratic responses requires specialized knowledge of systems of delivery, related and impacted services, and local conditions. It also requires a capacity to effectively and promptly investigate relevant issues and resolve newly arising challenges. The nuanced approach necessary to successfully address social welfare and craft systems to meet such needs exceeds the capability of judges.<sup>72</sup>

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<sup>71</sup> Obviously, few social welfare issues are likely to reach the courts where the other branches are in agreement with the courts' opinion. Presumably, those concerns would be addressed by legislation or policies that serve those concerns.

<sup>72</sup> It should not be surprising that this concern about competency mirrors one of the justicia-

Moreover, judicial rulings and the limited array of court remedies are an inefficient way to address governmental disinterest or opposition to social welfare concerns. Courts do not have the tools to force an obdurate government to comply with their will in a constitutional democracy; only the electorate possesses such power. In addition, changing public opinion in order to apply pressure to governments is also not a strength of courts.<sup>73</sup> This is true even in the context of South Africa, which possesses a separation of powers scheme that strongly empowers the judiciary in relation to the other branches.<sup>74</sup>

b. Prioritizing strategies for social change

Litigation is a resource- and labor-intensive undertaking and its capacity for social transformation is weakest when the court acts at odds with popular opinion.<sup>75</sup> Furthermore, litigation does not occur spontaneously nor do courts act of their own volition. Necessarily, if courts enforce social welfare rights, they do so in response to claims brought by extra-judicial parties.<sup>76</sup>

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bility concerns that survived the differentiated incorporation process. Differentiated incorporation highlights the legitimate limits on the judicial role as much as it discards the illegitimate ones. See *supra* this article, at Part II.B.

<sup>73</sup> GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (Univ. of Chicago Press 1991) (arguing that judicial capacity for social change is limited). See generally *LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE* (David A. Schultz ed., Peter Lang 1998) [hereinafter *LEVERAGING THE LAW*] (discussing a variety of critical responses to the Hollow Hope thesis). See also Thomas R. Marshall, *American Public Opinion and the Rehnquist Court*, 89 *JUDICATURE* 177 (2005) (using surveys to demonstrate a general convergence of public opinion and Supreme Court rulings).

<sup>74</sup> Eric C. Christiansen, *Essay: An Appropriately Activist Court: South African Constitutional Court Rights Jurisprudence, 1995-2001*, 30-34 (unpublished manuscript, on file with the author) [hereinafter *An Appropriately Activist Court*]. And, there is reason to believe these institutional weaknesses are appropriate. If courts had the capacity to remedy a problem as enormous and important as social welfare without the other branches of government, this would be juristocracy in an immediate and indefensible way.

<sup>75</sup> ROSENBERG, *supra* note 73.

<sup>76</sup> Standing to bring claims is very broad in South Africa but disputes may not be initiated by a judge *sua sponte*. *An Appropriately Activist Court*, *supra* note 74, at 8-10. S. Afr. Const. 1996, ch. 2, sec. 38:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are -

- a. anyone acting in their own interest;
- b. anyone acting on behalf of another person who cannot act in their own



As a consequence, social justice advocates and affected individuals must weigh the various mechanisms for seeking the desired change. In a world of limited time and resources, that evaluation must ask whether an investment in impact litigation and judicial remedies is worth the loss of time and energy which might otherwise be devoted to non-adjudicatory strategies. Seeking judicial enforcement requires resources, and those resources would perhaps be more beneficially invested in popular education, democratic pressure, cause-based organizing, or other methods of activism for changes to law and policy.<sup>77</sup>

Litigation has a particularly strong potential to detract from popular movements for social change where the courts do not grant direct relief to the plaintiff. In South Africa, even if an individual plaintiff prevails, their needs are not directly served by going to court and are only indirectly and imperfectly served by the typical remedy: an order to a government entity to reform an inadequate social welfare program. With less direct motivation for plaintiffs, there is a greater likelihood that claims will be brought by public interest groups, which might otherwise be engaged in popular organizing to encourage government action.

Additionally, judicial action is relatively insecure; it is subject to legislative revision, constitutional amendment, and executive inaction. Change through judicial fiat without popular support may be fleeting, ineffective, or merely symbolic. Even successful plaintiffs may have been better served by a broad-based political strategy that prioritized prompt action for social change. Because courts cannot inaugurate a just society on their own and there are opportunity costs associated with any litigation strategy, assessment of the potential transformative capacity of constitutional social rights adjudication is critical.

## 2. Assessment: Has Social Welfare Improved in South Africa?

South Africa possesses enumerated social welfare rights, previously considered unadvisable, and viable, affirmative judicial enforcement of social rights, previously considered impossible. But does the South African

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name;

c. anyone acting as a member of, or in the interest of, a group or class of persons;

d. anyone acting in the public interest; and

e. an association acting in the interest of its members.

<sup>77</sup> There is a great deal of literature about the relative merits and interrelationship between legal and non-legal avenues for change. See, e.g., LEVERAGING THE LAW, *supra* note 73.

model advance social justice? Is life better for those South Africans who experienced wide-ranging, government-sponsored socio-economic injustice during the apartheid regime? If constitutional adjudication can help address socio-economic inequality, a nation with enforceable provisions should evidence improved social welfare conditions. Presumably, if social welfare has not improved for the people such rights were meant to protect, there would be little impetus for other nations to adopt a system of constitutional protections. If improvement has happened (or if an otherwise inevitable worsening of socio-economic conditions has been inhibited), then it is necessary to ask a follow-up question: what role did enumerated social rights play in that advancement? Hence, any viable assessment of social welfare adjudication should allow, first, evaluation of post-apartheid socio-economic developments and second, evaluation of whether constitutional provisions contributed to the improvements.

Assessing the success of the Court's jurisprudence on both levels is challenging but clearly necessary. One gauge of social welfare developments generally is overall improvement in the substantive areas enumerated in South African social rights provisions, such as housing, education, and healthcare, since the enactment of the Constitution.<sup>78</sup> Initially, one should examine the satisfaction of core socio-economic requirements, especially for the poorest South Africans. This inquiry is consistent with the values of the post-apartheid Constitution and with the focus of the rights protected in the South African Bill of Rights. Satisfaction of minimum subsistence needs for very poor persons also represents a particular concern of the Constitutional Court.<sup>79</sup>

Unfortunately, it is challenging to answer even this relatively straightforward inquiry. In attempting to find reliable socio-economic data, the normal difficulties—especially when researching conditions among persons at or below the poverty line—are dramatically compounded by the un-

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<sup>78</sup> Only a few social rights were included in the Interim Constitution; most socio-economic rights were added into the Final Constitution. See *supra* notes 27, 29; S. AFR. (Interim) CONST. 1993, ch. 3; S. AFR. CONST. 1996, ch. 2.

<sup>79</sup> *Grootboom*, *supra* note 41, at para. 44:

A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.

reliability, and occasionally the outright falsity, of apartheid-era statistics.<sup>80</sup> Nevertheless, some helpful statistics are available and relatively trustworthy.

*Housing:* Between the end of apartheid and August 2007, the South African government spent approximately 44 billion Rand (US \$ 5.7 billion) on services related to housing, including construction of 2.4 million new houses.<sup>81</sup> By 2006, 9.6% of households were receiving government housing subsidies.<sup>82</sup> Furthermore, by the end of the 2006-07 fiscal year, 93% of the land restitution claims (arising from apartheid-era displacement policies) had been settled, with applicants returned to their land or receiving compensation for it.<sup>83</sup>

*Access to basic services:* Significant progress has been made with regard to water, sanitation, and electricity access. Household water access increased from 59% to 86% between 1994 and 2007; sanitation service availability improved from 50% to 71% in the same time period. Electrification of 3.5 million homes occurred since apartheid ended and the government recently initiated a free electricity allotment for poor South Africans.<sup>84</sup>

*Education:* As of 2006, attendance rates for students aged 7-15 were 97.7%.<sup>85</sup> Overcrowding in schools and the number of inadequate facilities have both decreased significantly since the end of apartheid.<sup>86</sup> Additionally,

<sup>80</sup> See Jeremy Seekings, *Poverty and Inequality after Apartheid* (Centre for Social Science Research, University of Cape Town, Working Paper No. 200, 2007), available at <http://www.sarpn.org.za/documents/d0003024/index.php> (stating that the apartheid state never collected data on poverty among African people); Daniel F. Neff, *Subjective Well-Being, Poverty and Ethnicity in South Africa: Insights from an Exploratory Analysis*, 80 SOC. INDICATORS RESEARCH 313 (2006) (stating that during apartheid rule, official statistics did not cover the whole of South Africa). Even the South African government has lamented this difficulty. See *Toward 10 Years of Freedom: Progress in the First Decade, Challenges in the Second 2* (2004), available at <http://www.gcis.gov.za/docs/publications/10tab.pdf>.

<sup>81</sup> SOUTH AFRICA YEARBOOK 2007/08, at vi (Delien Burger, ed., 2007), available at [www.gcis.gov.za/docs/publications/yearbook/index.html](http://www.gcis.gov.za/docs/publications/yearbook/index.html).

<sup>82</sup> Statistics South Africa, General Household Survey, Statistical Release P0318, at iii-vi (July 2006), available at [www.statssa.gov.za/publications/P0318/P0318July2006.pdf](http://www.statssa.gov.za/publications/P0318/P0318July2006.pdf). [hereinafter 2007 General Household Survey]. Statistics South Africa was created in 1999 by the South African parliament in order to "advance the planning, production, analysis, documentation, storage, dissemination and use of official and other statistics . . ." Statistics Act, No. 6 of 1999, G 19957, s. 2 (Apr. 21, 1999).

<sup>83</sup> SOUTH AFRICA YEARBOOK 2008/08, *supra* note 81, at vi.

<sup>84</sup> *Id.* at vii.

<sup>85</sup> 2007 General Household Survey, *supra* note 82, at iii-vi.

<sup>86</sup> SOUTH AFRICA YEARBOOK 2007/08, *supra* note 81, at vii ("Progress between 1996 and 2006 include the following: the number of overcrowded schools dropped from 51% to 24%; the number of schools with electricity increased from 11,174 to 20,713; schools without access to

reported literacy rates have improved since the end of apartheid: up by 1.2% for adults (to 82.4%) and up by 5.4% for children (to 93.9%).<sup>87</sup>

*Health:* Between the end of apartheid and mid-2007, eleven new hospitals and 1,600 clinics had either been built or upgraded, according to government reports.<sup>88</sup> Moreover, healthcare is now free for children under six years of age, people with disabilities, pregnant women, and new mothers.<sup>89</sup> Satisfaction with healthcare services is also high; nearly 85% satisfaction for public healthcare services and just over 95% for private providers.<sup>90</sup>

But such relatively good news must be viewed in the context of the remaining statistics about social welfare in South Africa. Even with the improvements above, the South African government's 2007 *General Household Survey* shows that many people in South Africa still live in poverty and disadvantage: 14.5% of households live in informal structures; 10-12% of persons aged 20 years and above still have no formal education;<sup>91</sup> only 13.7% of the population is covered by a formal medical aid scheme;<sup>92</sup> and the unemployment rate was 28.6% in 2006.<sup>93</sup> Statistics from sources outside South Africa also tend to show extreme poverty.<sup>94</sup>

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water decreased from 8,823 to 3,152 in 2006; and schools without toilets decreased from 3,265 to 1,532.”)

<sup>87</sup> BRETT MOORE, ET AL., SOUTH AFRICA 8 (a globalization and education report), available at [http://globalizationandeducation.ed.uiuc.edu/Students%20Projects/GSEB/2007/SOUTH\\_AFRICA.pdf](http://globalizationandeducation.ed.uiuc.edu/Students%20Projects/GSEB/2007/SOUTH_AFRICA.pdf).

<sup>88</sup> SOUTH AFRICA YEARBOOK 2007/08, *supra* note 81, at vii.

<sup>89</sup> *Id.*

<sup>90</sup> 2007 General Household Survey, *supra* note 82, at iv.

<sup>91</sup> *Id.*

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

<sup>93</sup> *Id.* at xx. ACCORD CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK: SOUTH AFRICA, <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html> (last visited July 7, 2008) (unemployment rate in 2008 is 21.7%); World Bank, Country Brief-South Africa (March 2008),

<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/SOUTHAFRICAEXTN/0,menuPK:368086~pagePK:141132~piPK:141107~theSitePK:368057,00.html> (last visited July 7, 2008) (noting a 28.4% unemployment rate).

<sup>94</sup> More than 43% of South Africans live below a poverty line of R 3,000 (U.S \$440) per year. AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REPORT 2008: STATE OF THE WORLD'S HUMAN RIGHTS 272, <http://www.amnesty.org/en/library/asset/POL10/001/2008/en/9a3b2fec-2c0d-11dd-b0b9-f7948efb10d4/pol100012008eng.pdf> (last visited July 7, 2008). Fifty percent of the population lives in developing country conditions, compared with 13% of the population that lives in “first world” conditions. Additionally, over one-third of the children in South Africa suffer from chronic malnutrition. World Bank, Country Brief-South Africa, *supra* note 93.

Although progress has been made, it has undeniably been limited in scope. Available and reliable data show an increase in available housing, medical clinics, and school enrollment, but many people are still living with unmet social welfare needs. The stark socio-economic legacy of apartheid will haunt South Africa for many more decades.

However, while examination of socio-economic statistics may answer the question of whether socio-economic conditions have improved, it cannot resolve the more focused question regarding the role courts have played in the improvement. The concern of this article is an even more elusive component of the overall assessment of success: to understand the contribution of the Constitution and the Court's jurisprudence to the advancement of social justice. Have the constitutional protections and court enforcement supported positive socio-economic change?

### 3. Assessment: Contributions from Constitutional Protections?

In the absence of any improvement, it could be reasonably asserted that the Court has failed in its appointed task.<sup>95</sup> But where, as is the case in South Africa, there is some improvement, how can one evaluate the role of constitutional social welfare rights? It is impossible to compare the real South Africa with a hypothetical post-apartheid country without constitutional social welfare rights. Any quantitative or otherwise precise determination is undeniably out of the question, as it would be if one were assessing contributions to changes associated with civil and political rights.<sup>96</sup> To proceed, one must consider carefully the kinds of change courts are capable of and the limited scope of their powers. The effects of the South African judgments can then be considered as a specific example of the general capabilities of courts.<sup>97</sup>

What is the appropriate approach to such an analysis? First, one must

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<sup>95</sup> We are spared the even more challenging task of assessing if the constitutional provisions only mitigated otherwise worse conditions by the evidence presented *supra* in Part III.A.2.

<sup>96</sup> Of course, some intriguing attempts have been made at quantitative studies to demonstrate social welfare commitments, but they cannot isolate causes. *See, e.g.*, Ben-Bassat & Dahan, *supra* note 4 (surveying the inclusion of constitutional commitments to social rights in 68 countries).

<sup>97</sup> This is not to assert that evaluation of the social benefit of individual judgments is not possible. Although beyond the scope of this article, an assessment of the pragmatic consequences of *Grootboom* or *TAC* would at least reveal whether the South African judiciary needs to reassess its individual rulings, and to question whether the courts should take on a more participatory post-judgment role. The most obvious, and clearly constitutionally permissible, option would be the use of supervisory orders in connection with its judgments.

adjust expectations: courts cannot inaugurate a socially just society on their own. Expectations should therefore be modest in scope. This is particularly true at the earliest stage in the development of social rights adjudication. Institutional reserve that might be thought of as excessive in later eras is more justified in the first decade of adjudication and in the absence of comparable models. It is reasonable to expect only limited contributions from courts, not full-scale change.

Second, expectations must be appropriate in kind as well. One must identify the forms of judicial contribution that are realistic in light of courts' structural and institutional limits. Indeed, the kind of change courts can facilitate will be different from the change typically expected of popular movements; they will follow adjudication's strengths and reflect the unique nature of the judicial role. In the same way that differentiated incorporation showed the courts defining their capacity to address social welfare cases in a manner consistent with their limited capabilities, the observer must evaluate the contributions of courts with similarly realistic expectations.

Once observers adjust expectations in light of these insights, they are better equipped to identify judicial contributions to socio-economic change. Notably, a great deal of criticism may still be—and in the South African situation probably should be—leveled at the political branches for an inadequate response to poverty.<sup>98</sup> But this portion of this article questions the effectiveness of constitutional rights and the jurisprudence of the South African Constitutional Court as tools for combating social injustice. If one examines the South African case law looking specifically for the desired, modest social welfare improvements permitted within institutional strictures, what has the Court accomplished? If it is possible to identify any positive contributions made by the South African courts, one must then ask if other nations' courts could make similar advances. If so, the result of such an inquiry would be one set of potential judicial contributions to the struggle for social justice that could foreseeably be improved upon and expanded over time.

### *B. The Contributions of Constitutional Courts*

The causes of social change are difficult to assess, whether in the realm of civil and political rights or substantive socio-economic equality. This is as true of the contributions from civil society as it is of those from courts and

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<sup>98</sup> See, e.g., BBC News, *ANC Seeks to Calm War of Words*, British Broadcasting Corp., Nov. 11, 2004, available at <http://news.bbc.co.uk/2/hi/africa/4054273.stm> (last visited July 28, 2008).

constitutions. Even the most determined statisticians could not definitively apportion credit or blame to one actor or feature among the many factors that influence social welfare. In light of this, one must ask several basic questions regarding the courts' behavior in order to evaluate their actions in the area of socio-economic rights: do they refrain from harm to the nation's financial stability or rule of law (the long-standing concern of all social rights adjudication)?;<sup>99</sup> do they use their particular institutional strengths to advance social welfare?; and, do they support other elements of the struggle for social justice? Court action to advance social justice that complies with these criteria is most easily supported as appropriate and useful judicial involvement.

### 1. Evident Contributions of the South African Court

Ultimately, in what must be an incomplete assessment, it is reasonable to conclude that the South African Court has achieved clear success in one area, modest successes in other areas, and additional indeterminate positive effects.

At the very least, the Court's jurisprudence has been clearly successful on a symbolic level. By hearing claims and evaluating government actions against the backdrop of constitutional social welfare protections, the Court reinforces the South African vision of substantive equality. As the Court has said, "The fact that poverty and homelessness still plague many South Africans is a painful reminder of the chasm that still needs to be bridged before the constitutional ideal to establish a society based on social justice and improved quality of life for all citizens is fully achieved."<sup>100</sup> By reiterating the constitutional pre-commitments, the Court reminds South Africans of their promises to create "a society based on democratic values, social justice and fundamental human rights" and to "improve the quality of life of all citizens"—promises not yet kept by their elected officials.<sup>101</sup>

Modest success has been evident in the Court's judgments in the specific substantive social welfare disputes brought before it. In multiple cases, the Court has identified when the government has failed constitutional requirements: inadequate programs and procedures related to housing, as in *Grootboom* and *Berea Township*; healthcare, as in *TAC*; and general social welfare

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<sup>99</sup> See Sunstein, *supra* note 13; see also Christiansen, *Adjudicating Non-Justiciable Rights*, *supra* note 3, at 342-53.

<sup>100</sup> *President of Republic of S. Afr. v. Modderklip Boerdery (Pty) Ltd*, (8) BCLR 786 (CC), 36 (S. Afr. 2005), available at <http://www.constitutionalcourt.org.za/Archimages/3493.PDF>.

<sup>101</sup> S. AFR. CONST. 1996, pmb1.

services, as in *Njongi*. These judgments can be considered successful because the Court has held the government accountable for the quality of its response to persistent economic inequality; but it is only a partial success. Official responses to *Grootboom* and *TAC* asserted a willingness to comply with the Court's orders but implementation has been inconsistent and incomplete.<sup>102</sup> Some direct and effective changes have been made, such as increased distribution of Nevirapine following *TAC*, and evictions prevented as a result of the order in *Berea Township*, but other change has been inexcusably slow.<sup>103</sup> However, where there are post-judgment failings, the fault lies primarily with the government rather than the Court. Nevertheless, in evaluating the use of judicial remedies to effectuate positive social change, one must conclude that the overall effectiveness has been only moderate.<sup>104</sup>

The unknowable element of the success determination is the impact the threat of judicial review has had in promoting social welfare legislation at a national and provincial level. Hopefully, the combination of enumerated social rights with potential enforceability by an active judiciary has effectively reinforced the government's earliest commitments to social transformation. Certainly, the potential for enforcement supports the advocacy of civil society organizations, activists, and community members. This is particularly the case following the Court's ruling in *Berea Township*. The interpretation of the Constitution which requires government officials to participate in "meaningful engagement" with affected communities, and the potential for judicial orders to enforce that requirement should significantly empower affected persons and community organizers.<sup>105</sup> This supports the further realization of social justice without direct involvement by the courts and, very beneficially, coordinates cause lawyering and broader popular involvement.

Thus the conclusion at the current stage is that thirteen years after the South African Constitutional Court began hearing cases under the post-

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<sup>102</sup> Siri Gloppen, *Social Rights Litigation as Transformation: A South African Perspective* 16-17 (Chr. Michelsen Institute, Working Paper 2005: 3), available at <http://www.cmi.no/publications/2005/wp/wp2005-3.pdf>.

<sup>103</sup> See, e.g., Davis, *supra* note 22, at 56 ("A right asserted successfully by litigants who then wait in vain for any tangible benefit to flow from the costly process of litigation soon becomes an illusory right—hardly the sort of right so essential to the long-term success of the constitutional project launched but a decade ago!").

<sup>104</sup> Notably, compliance with the *TAC* decision was significantly better than *Grootboom*. It is unclear why that is. It may be partially the result of Court action as the *TAC* ruling is more direct and specific in its final orders.

<sup>105</sup> *Berea Township*, *supra* note 48, at paras. 9-23.



apartheid Constitution, there is reasonable evidence of initial success on the Court's part at openly reaffirming the nation's commitment to transformation, actively identifying specific areas of governmental failings, and passively pressuring the government to advance the social justice goals of the constitutional text. These accomplishments, though limited, highlight potential capacities of other courts to achieve similar progress through socio-economic rights adjudication.

## 2. Potential Contributions from Other Courts

In light of the preceding insights, what initial conclusions can be made about the ways in which constitutional enforcement of social rights can advance social justice? The core question is whether or not constitutional protection of social welfare rights and constitutional courts' enforcement of those rights can help remedy persistent economic inequality? If one looks to South Africa, for now the answer is a qualified yes. South Africa evidences that courts can adjudicate social rights without destroying the rule of law or the fiscal security of the country. Within institutional constraints and despite judicial caution, the Court has advanced the socially transformative commitments of the South African Constitution. Moreover, the exportable process of differentiated incorporation allows other countries to design a similarly viable jurisprudence for their own constitutional milieu.

The general conclusion, required by the limited role of courts and the uncertain interaction of popular processes and adjudication, is that court enforcement can support social change within institutional constraints. Thus, while constitutionally-based social welfare rights and judicial enforcement of them cannot independently create social change, such rights can supplement other legal and non-legal approaches to the advancement of social justice. Specifically, enforceable constitutional rights provide at least four general classes of assistance: 1) remedying evident rights violations; 2) influencing government action through the threat of judicial enforcement; 3) supporting non-adjudicatory processes; and 4) reinforcing constitutional values for social transformation.

### a. Remedying rights violations

At a minimal level, a court can adjudicate and remedy obvious violations of enumerated social welfare rights. Such judgments place the adjudicating court on its most secure footing vis-à-vis separation of powers arguments. In cases where the right is enumerated and intended to be enforced, and where the violation of that right is obvious and within the court's juris-

diction, the court can act with the least fear of criticism. Obviousness of a violation can result from the clear textual language of the right or from evidence of a gross or inexcusable violation of a right. The former occurs whenever a court engages in negative enforcement, requiring removal of a governmental obstacle to enjoyment of a right.<sup>106</sup> The latter was evident in South Africa in the Constitutional Court's response to the state's arbitrary denial of Ms. Njongi's disability benefits.<sup>107</sup>

Although such rulings may occur only in limited circumstances, their capacity to impact social welfare is not always so limited. The *TAC* holding related to the narrow issue of the availability of Nevirapine to halt mother-to-child HIV transmission is an example of this.<sup>108</sup> The Constitutional Court's order resulted in a significant expansion of testing and counseling related to HIV transmission, but it also identified minimum standards that presumably apply in many related healthcare circumstances.<sup>109</sup> Furthermore, the court's order highlighted an additional risk of inadequate governmental action: the judicial response may require the state to take greater action than the country's constitution would otherwise require, or would otherwise leave to the discretion of the executive or legislature. Even a holding affecting only a single person (as in *Njongi*<sup>110</sup>) can force the government to rethink and reformulate its response to a diverse set of social welfare needs.

b. Threatening unfavorable judicial attention

Regardless of the eventual outcome, court involvement can be assumed to be disfavored by the political branches. Even generally popular government practices will have unflattering attention drawn to them by at least one side in the proceedings. Moreover, a courtroom loss for a governmental social welfare program, or in response to state inaction, is a significant blow to the executive and legislative branches. It is a public rebuke and negative evaluation of the non-judicial actor. As mentioned above, judicial remedies may circumvent measures that the legislature or executive did or would have otherwise chosen. As a consequence, the passive threat of court involvement motivates government actors to legislate proactively and appropriately.

This threat also encourages government attention to previous judicial

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<sup>106</sup> See, e.g., *Soobramoney*, *supra* note 39, at para. 34 (state must “desist from preventing or impairing the right of access to adequate housing”).

<sup>107</sup> *Njongi*, *supra* note 56.

<sup>108</sup> *TAC*, *supra* note 45, at para. 135.

<sup>109</sup> *Id.*

<sup>110</sup> *Njongi*, *supra* note 56.

rulings. To the extent litigation losses are disfavored, prior rulings will inform government decision-making. Previous decisions can influence both the likelihood and the content of social welfare legislation and policies. For example, *Soobramoney* announced the Court's expectation that legislation consider "those whose needs are most urgent" in order to satisfy constitutional social welfare obligations.<sup>111</sup> Ideally, the state will account for this requirement in the formulation of future social welfare policies; not just in relation to the particular issues under adjudication in the original case, housing and child welfare, but more broadly. The South African Constitutional Court's reiteration of that requirement in *Berea Township* highlights for government policy makers and legislators that there should be evident consideration of the needs of very poor persons in all social welfare legislation and related government action.<sup>112</sup>

c. Supporting non-adjudicatory remedies

Perhaps one of the most important things an adjudicating court can do is provide support for non-adjudicatory processes. While acknowledging the inability of judicial action to fully remedy endemic social injustice, courts can nonetheless empower popular movements, non-governmental organizations, and activists with their rulings. Furthermore, holdings that support the role of civil society decrease concerns about judicial legitimacy and capacity by encouraging decision-making by competent stake-holders outside the judicial process.

The South African example of *Berea Township* is an exceptionally promising instance of this. By calling for a process of "meaningful engagement" with affected members of the relevant community,<sup>113</sup> the Court's holding encourages community involvement. Moreover, because the Court defined meaningful engagement as an element of the reasonableness requirement first announced in *Soobramoney*,<sup>114</sup> the Court has indirectly called for engagement whenever government action directly impacts social welfare. By announcing this standard, the Court both empowered community groups and disentangled itself from many potential disputes by returning them to the political realm.

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<sup>111</sup> *Soobramoney*, *supra* note 39, at para. 44.

<sup>112</sup> *Berea Township*, *supra* note 48, para. 20.

<sup>113</sup> The meaningful engagement requirement is discussed in *Berea Township*, *supra* note 48, paras. 9-23.

<sup>114</sup> *Soobramoney*, *supra* note 39, at paras. 39-44.

d. Reinforcing the founding generation's constitutional values

The final contribution that can be made by adjudication of enumerated social welfare rights is to remind the polity and its leaders about their extant constitutional commitments. Such reminders strengthen the role of the constitution in a society and accentuate the interrelatedness of traditional civil rights and social welfare rights. Any court can reinforce constitutional values. This is a task that looks nearly identical for socio-economic rights and for civil and political rights: in interpreting the enumerated constitutional provisions, a court reminds the country of past commitments to a different present.

In South Africa, the Court has frequently used the context of social rights cases to reiterate the fundamentally transformative nature of the South African Constitution and the incomplete status of that transformation in the area of social welfare. As Chief Justice Chaskalson said in the first substantive social welfare case to come before the Court,

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions in great poverty . . . . These conditions already existed when the Constitution was adopted and a commitment to address them, and transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.<sup>115</sup>

Of course, these four different potential contributions often interrelate and are distinguished purely for analytical purposes. For example, the validation a court gives to civil society organizations allows those groups to popularly redefine what constitutes an obvious violation of an express right, which a court need not hesitate to enforce. Similarly, reinforcement of the transformational values of the Constitution further legitimates civil society groups seeking to advance those goals and gives them additional tools when interacting with governmental officials.

All of these contributions share three important characteristics: they do no harm to the financial basis of the nation or support for the rule of law (because of differentiated incorporation and the initial modesty of courts); they work within institutional limits and rely on institutional strengths, especially when they advocate for the socially transformative values of the Constitution; and they support non-judicial solutions to socio-economic problems by empowering civil society and supporting popular claims for socio-economic justice.

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<sup>115</sup> *Id.* at para. 8.

### *C. Socio-economic Rights and Judicial Activism*

As a final note, it must be admitted that the potential impact of courts in the area of social welfare sounds unlike the role traditionally ascribed to the judiciary. Is this not too much authority for courts? Novel forms of adjudication, expanded substantive authority at the expense of the executive and legislature, and judgments involving policy-making and finances raise the specter of "judicial activism." The social welfare adjudication discussed in this article very actively engages with, and advocates for, the values placed in the Constitution by its founding, or amending generation.

However, even if one assumes that the term has meaning other than as an easy political epithet, what has been occurring in the South African Court is not judicial activism. It is a more significant role for the courts, but not one inconsistent with a generally-accepted understanding of judicial review. It is judicial enforcement of express constitutional values, enumerated in the official text by the constituent authoring body with an expectation of realization.<sup>116</sup> Such adjudication is something relatively novel; and "novel" itself is often reflexively disparaged by some critics; especially when applied to the role of the judiciary. Nevertheless, an evolved understanding of courts' capacity to advance social justice through enforcement of socio-economic rights has the ability to shift our understanding of the courts' capabilities and the role constitutional courts play in advancing constitutional values. Moreover, it may significantly alter what citizens expect of their state and influence their general assumptions regarding the state's capacity to address social welfare.

### CONCLUSION

The frequency of inclusion of socio-economic rights in modern constitutions is evidence of the increasing popularity of foundational pre-commitments to social welfare. Nevertheless, few countries' courts have enforced such rights and only the Republic of South Africa has crafted a comprehensive, affirmative approach to enumerated social welfare rights. The novelty of its jurisprudence is reflected in the modesty of the South African

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<sup>116</sup> Notably, I am generally resisting making claims about social welfare protections arising from unenumerated rights. But much of the discussion of the potential for court-supported social change could apply to enforcement of unenumerated rights reflective of other express constitutional rights, for example, the recognition of a socio-economic minimum core as a pre-condition for realization of civil and political rights. Obviously, such a usage needs jurisprudential justification (that it is called for by the relevant constitution) even if the court follows the adjudicatory viability argument suggested in this article.

Constitutional Court's early judgments.<sup>117</sup>

The Court's willingness to adjudicate social rights nevertheless presents a dramatic challenge to the traditional opposition to judicial enforcement of constitutional social welfare rights. There is a revolutionary and instructive element to the Court's work in this area. Through the process of differentiated incorporation, the Court evaluated the range of historical arguments against adjudication of socio-economic rights, disregarded those arguments that were invalid or inapt in its particular constitutional setting, and then crafted a social rights jurisprudence that expressly addressed the remaining, legitimate concerns. The result is an exportable model for social rights adjudication: a country-specific jurisprudence that disregards concerns invalid in the importing country but accommodates valid justiciability concerns through domestically-appropriate processes.

But even if adoption is possible for other countries with enumerated social rights, is it productive of improved social welfare? This article concludes that when one appropriately evaluates the circumscribed capabilities of courts, there remain significant possible contributions. Specifically, enforced constitutional rights can provide at least four classes of assistance: 1) remedying glaring rights violations, 2) influencing government action through the threat of judicial enforcement, 3) supporting extra-judicial social welfare action, and 4) reinforcing constitutional values for social transformation. If one can temper expectations in light of the appropriate role for a judiciary and forgive some of the excessive caution by the South African pioneers in this area of jurisprudence, there is good reason to believe that courts and constitutions can contribute to the advancement of social justice and may increasingly do so.

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<sup>117</sup> The South African Constitutional Court has only been hearing cases since 1995. Hist. of the Const. Ct. of S. Afr.,

<http://www.constitutionalcourt.org.za/site/thecourt/history.htm#gather>. Its first social rights case, *Soobramoney*, was heard in 1998. See *Soobramoney*, *supra* note 39.